Paper 2 Bio-Medical Ethics
PHI 325 - Dr. Harris

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Insufficient Methodology: *Washington v. Glucksberg* and the Traditions Test

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Physician-assisted suicide (PAS) is a practice that long predates modern society, and one that is once again gaining legal recognition as the public considers it a means for preserving personal dignity in death. However, American federal law continues to criminalize PAS, as established by *Washington v. Glucksberg*. This paper argues that the *Glucksberg* ruling approached a modern issue, enabled by modern medicine, with a methodology that is insufficient. Through an evaluation of ancient tradition of government-facilitated euthanasia, the selective nature of Rehnquist's Anglo-American traditions test, and the role of living constitutionalism in protecting the rights and liberties the Constitution guarantees, this paper argues that the traditions test is not only an insufficient methodology, but that it defeats the reasoning the Constitution was designed to enable. With support from the Philosophers' Brief, it argues that living constitutionalism is an essential methodology for continuing to address modern issues of personal liberty.

INTRODUCTION

Death is an inevitable process that societies throughout history have attempted to rationalize, control, and dignify, leading to the continuous evolution of the philosophy, culture, and technology surrounding it.

Ancient governments embraced euthanasia, with Ancient Greece utilizing it as a useful political practice for protecting the dying and preserving the rights of others in their society. A 2025 article from the University of Athens explores this history: "Essentially, euthanasia was proposed primarily for social reasons, as the death of a citizen that was bringing harm to the city was justifiable for the well-being of the remaining population, which would otherwise be deprived of such well-being, as well as for the relief it would bring to said individuals." [1] The tradition of governments allowing private citizens to choose their manner of death, or embrace it at a time where the process remains dignified, is not unique to Greece.

The same article found that the tradition persisted across most empires of that time: "During Roman times, euthanasia was embraced by many philosophers, particularly the Stoics, who often chose to end their lives by suicide, especially in old age. In Marseilles and Kos, there was a specialized center that provided a poisonous drink, similar to hemlock, to terminally ill people willing to end their suffering peacefully, with the permission of the city senate."[2]

It's become evident that in societies past, the utilization of technology– in many cases chemical– to ease the psychological and physical pain of the dying was not only common, but a decision of the government. In Greece, the government facilitated it, in Seneca, the government was required to approve of it, and in Rome, it was allowed so that individuals could follow their own philosophical beliefs. So then, euthanasia holds a tradition beginning in ancient times of being a government-approved process that allows individuals to exercise their personal freedoms while protecting the dignity of themselves and the society to which they belong.

While these cases are not representative of American history, they do call into question whether American courts hold an obligation to protect the same rights that the ancients clearly valued. Through the First Amendment, the Bill of Rights grants anyone in America the right to practice any religion they choose, and through the Ninth Amendment, the right to not have their free exercise of this practice infringed upon.[3] Then, how can the American government aim to prevent individuals from choosing their manner of dying, when choice in death is long-associated with personal and intimate philosophical leanings?

This paper argues that Chief Justice Rehnquist's majority opinion in *Washington v. Glucksberg*– that physician-assisted suicide is not "deeply rooted in this Nation's history and traditions"[4]– is constitutionally self-defeating on three grounds. First, the historical record that Rehnquist invokes does not support his conclusion, as a tradition of government-facilitated PAS predates the Anglo-American traditions he selectively references by centuries. Second, historical record was never the appropriate methodology for this question. The Constitution is a living document that demands forward reasoning to address novel challenges, not reasoning that is backward from historical practice. Third, modern medicine

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[1] A. Spinthouraki et al., "Historical Review of Euthanasia. From Ancient Times until before Modern Times," *Maedica - A Journal of Clinical Medicine* 20, no. 1 (2025): 118, https://doi.org/10.26574/maedica.2025.20.1.117.
[2] Spinthouraki et al., "Historical Review of Euthanasia. From Ancient Times until before Modern Times," 118.
[3] "The Bill of Rights: A Transcription," National Archives, November 4, 2015, https://www.archives.gov/founding-docs/bill-of-rights-transcript.
[4] "Washington v. Glucksberg, 521 U.S. 703 (1997)," Justia Law, accessed April 17, 2026, https://supreme.justia.com/cases/federal/us/521/703/.

has created a liberty interest by presenting an option for eliminating patient suffering more efficiently than ever before, one that no prior legal tradition is equipped to govern. Applying a traditions test to a novel issue prevents true societal development, and circumvents moral reasoning. Living constitutionalism to protect the right to self-determination is the only methodology that PAS can be addressed with.

EVALUATION OF THE COURT'S REASONING

Anglo-American Traditions

Rehnquist argues in his majority opinion that the Supreme Court has an obligation to examine the nation's "history, legal traditions, and practices"[5], and that suicide has long been considered a practice against American tradition: "More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[6] Yet, this argument contains within itself a fallacy– it protects Anglo-American tradition– the tradition of white, English-speaking individuals of European descent. It does not include protections for those from different religious, cultural, or ethnic backgrounds, despite the Constitution and the Bill of Rights guaranteeing all people equal protection and freedom under the law.

Yet if one wanted to argue that Anglo-American traditions are the only ones the Supreme Court has a duty to uphold, then rejecting PAS is also a direct rejection of the European history from which this group hails– as discussed in the introduction. One must ask: who is the traditions test designed to protect? If not all Americans, and not the history of Anglo-Americans, then what is it actually seeking to evaluate?

Criminalization is Equivalent to Consensus

The majority opinion also assumes that because something was once heavily criminalized, as suicide was in the colonies, it must also be something that the society itself rejects. Yet, as modern technology has come to existence, so has a shift in social views concerning PAS. From Rehnquist's opinion: "Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses…Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect. Many States, for example, now permit… the withdrawal or refusal of life-sustaining medical treatment."[7]

When presented with the option of embracing a dignified death, sufficient public support exists to bring the question before state and federal courts repeatedly. Moreover, the expression of individual liberty in controlling the time, place, and manner of one's inevitable death is reflective of the same principles that ancient societies used to justify euthanasia, indicating the re-adoption of a sympathetic and rights-focused tradition by a society that is committed to religious freedom.

Interestingly, the reasoning for enabling both euthanasia and PAS are similar in ancient and modern times. Rehnquist addresses this: "On the other hand, in 1994, voters in Oregon enacted, also through ballot initiative, that State's 'Death With Dignity Act,' which legalized physician-assisted suicide for competent, terminally ill adults. Since the Oregon vote, many proposals to legalize assisted-suicide have been and continue to be introduced in the States' legislatures, but none has been enacted."[8]

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[5] Justia Law, "Washington v. Glucksberg, 521 U.S. 702, 710 (1997)."
[6] Justia Law, "Washington v. Glucksberg, 521 U.S. 702, 710 (1997)."
[7] Justia Law, "Washington v. Glucksberg, 521 U.S. 702, 716 (1997)."
[8] Justia Law, "Washington v. Glucksberg, 521 U.S. 702, 717 (1997)."

Rehnquist cannot simultaneously acknowledge shifting public sentiment, the passage of Oregon's "Death With Dignity Act", and the broader evolution of state law, while maintaining that criminalization represents settled moral consensus. Rather, it must be acknowledged that these changes are grounded in the same beliefs that led to an ancient tradition of government-approved euthanasia, and that there is sufficient discourse in American society to necessitate a constitutional argument for or against PAS.

Tradition as Constitutional Intention

To assert that a practice deserves constitutional protection solely because it is traditional– or conversely, that a right may be denied because tradition has not recognized it– misunderstands the nature of the Constitution itself. The Constitution is not a preservation of existing tradition but a framework for protecting individual liberties as society evolves.

Imagine, for a moment, if the traditions test was applied during the Civil War. Slavery was once among the most deeply rooted traditions in American history, embedded for centuries in the "history, legal traditions, and practices" that Rehnquist's test demands. Yet, despite how deeply ingrained it was in American culture, economics, and law, the Thirteenth and Fourteenth Amendments did not defer to that tradition– they repudiated it, demonstrating that the Constitution is designed to reason beyond tradition when tradition fails to protect the rights of the people, even to the point where the document itself undergoes modification.[9]

Societies and cultures are constantly evolving, and just as America evolved to detest slavery, it has for decades been evolving to protect individual dignity at the end-of-life. This argument is not to say that PAS must be accepted. Rather, it is to say that if Rehnquist's traditions test were applied to slavery, our society would be far worse for it, and a methodology that could have preserved slavery cannot be the correct tool for determining the scope of constitutional liberty.

A genuine traditions test applied to the full documented historical record, one that includes centuries of government-sanctioned assisted dying in Greece, Rome, Seneca, and more ancient societies, arrives at the conclusion that PAS has long been part of human society, the opposite of what Rehnquist finds. This indicates that the traditions test is a fractured methodology, and that decisions concerning evolving technologies and rights should instead be rooted in the liberties protected by the Constitution.

PHILOSOPHERS' BRIEF AS CONSTITUTIONAL METHODOLOGY

The Liberty Interest

The Philosophers' Brief was written by six of the most prominent moral and political philosophers of the twentieth century, and delivered directly to the Supreme Court. It sought to address not the social case, but the moral argument for PAS as an expression of the constitutional right to self-determination. Dworin, Nagel, Nozick, Rawls, Scanlon, and Thomson were united in their conviction that "respect for fundamental principles of liberty and justice, as well as for the American constitutional tradition"[10] required that the right to PAS be upheld.

The Brief is a reframing of the discussion from a debate around suicide and the right to die, to a debate around one's right to make decisions about their "most intimate and personal choices", a direct quote from the court's own ruling five years prior: "Some deny that the patient/plaintiffs have any constitutionally protected liberty interest in hastening their own deaths. But that liberty interest flows

[9] "U.S. Constitution | Constitution Annotated | Congress.Gov | Library of Congress," accessed April 17, 2026, https://constitution.congress.gov/constitution/.
[10] Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, 44, no. 5 (1997): 3.

directly from this Court's previous decisions. It flows from the right of people to make their own decisions about matters 'involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.' Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)."[11] With this, the philosophers argued that PAS is not a debate surrounding a new right, but a question of existing constitutional protection being applied to new circumstances made possible by modern medicine.

This reframe undermines the traditions test, as it shifts the discourse from historical relevance to the protection of the right to self-determination over personal decisions– a right the Court has consistently recognized across circumstances. Rehnquist's methodology is insufficient for evaluating this claim because it asks whether there is historical precedent for this specific practice, rather than addressing the applications of the underlying constitutional principles.

The liberty interest in the Brief identifies PAS as a legal question that could not have existed before the modern technology that makes it possible, meaning it was never an issue of American tradition, because this is a novel circumstance driven by novel innovation. The liberty interest argues that living constitutionalism is the only way to address such issues, as it approaches them uniformly, determining whether a new circumstance protects or infringes upon self-determination, not whether it has been evaluated by a different body in the past. Technology will continue to evolve, and an adherence only to tradition to make decisions about its legality will result in an unadaptable and eventually failed society.

Historical Groundings

The Brief situates itself between Rehnquist's narrow historicism and constitutional principles. The majority opinion analyzes the history of suicide and PAS, and whether it has been legalized, while the Brief asks whether failing to protect PAS would undermine constitutional principles. It finds that individuals must be free to make decisions about matters of personal dignity and conscience without state imposition if the constitution is being followed.

This methodology does not invent a new right, rather, it proposes an argument that the court should have advocated for the protection of personal liberties, regardless of the circumstances. It reasons from established constitutional principles on personal liberty to answering a question that did not exist in previous iterations of American society, as required by living constitutionalism. As the philosophers argue: "Denying that opportunity to terminally ill patients who are in agonizing pain or otherwise doomed to an existence they regard as intolerable could only be justified on the basis of a religious or ethical conviction about the value or meaning of life itself. Our Constitution forbids the government to impose such convictions on its citizens."[12]

This reasoning directly connects to the historical tradition documented in the introduction. Ancient Greek and Roman societies recognized the government's obligation to protect individual dignity in dying because they understood death as a philosophical and personal decision that cannot be legislated. The Brief asserts that tradition is not about specific case studies, but rather about the consistent application of constitutional principles to novel circumstances. The constitutional principle of self-determination at the end-of-life is not a modern invention, it is a reflection of values that long predate the Anglo-American common law on which Rehnquist's traditions test relies.

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[11] Dworkin et al., *Assisted Suicide: The Philosophers' Brief: 4*.
[12] Dworkin et al., *Assisted Suicide: The Philosophers' Brief: 4*.

Bioethical Connections

The Brief's emphasis on individual liberty maps directly onto the bioethical principles. Beauchamp and Childress clearly establish that individuals have a fundamental right to autonomy in healthcare– the right to make decisions about their own bodies and medical care free from external coercion. This principle aligns directly with the constitutional liberty the philosophers argue the Court was obligated to protect.

As Beauchamp and Childress argue: "To respect an autonomous agent is to recognize with due appreciation that person's capacities and perspectives, including his or her right to hold certain views, to make certain choices, and to take certain actions based on personal values and beliefs."[13] Rehnquist's ruling overrides that autonomy interest and instead prioritizes the state's categorical interest in life preservation over an individual's right to self-determine a dignified death.

The Brief argues that this substitution is not simply unconstitutional, but that it is actively harming individuals by forcing them to suffer when terminally ill, or continue to live with debilitating and painful conditions. Here, there exists a connection to the principle of nonmaleficence, which argues that physicians have an obligation to do no harm, which Beauchamp and Childress recognize can be either passive or active: "...more specific prohibitions are found across the literature of biomedical ethics, each grounded in the principle that intentionally or negligently caused harm is a fundamental moral wrong."[14]

By this definition, denying patients PAS creates a state of compelled life, and failing to aid patients in ending their suffering while in this state is an act of maleficence. Morally, it is prioritizing common law trends– socially, politically, and economically-rooted duties– over the well-being of human life, and cannot be defended by the constitutional methodology the Brief proposes. Whether compelling life without guaranteeing its quality meets the threshold of systematic maleficence remains a question that this ruling fails to address, and one that future literature should seek to.

Societal Trends Surrounding PAS

The debate around PAS is not just in theoretical frameworks and federal documents. As societal trends continue to evolve, and the refusal of life-sustaining care becomes increasingly common, many worry that society may advance too far into voluntary euthanasia. As Brock argues, the ethical case for voluntary active euthanasia (VAE), a more patient-driven variation of PAS, rests on individual self-determination. He frames VAE as respecting the wishes of those who have already rejected life-sustaining care. He argues that it is merely an acceleration toward respecting those wishes, for they have already decided to die: "But when a competent patient decides to forgo all further life-sustaining treatment then the patient, either explicitly or implicitly, commonly decides that the best life possible for him or her with treatment is of sufficiently poor quality that it is worse than no further life at all."[15]

He proceeds to present a variety of case studies; patients with cancer, amputations, and slow-growing terminal conditions. They had already decided to stop fighting, that wasn't going to change. However, physicians had– and often used– the power to end their suffering out of respect for their autonomously-made decision, as well as for the dignity of the life they had lived.[16] With this framing,

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[13] Tom L. Beauchamp, "The 'Four Principles' Approach to Health Care Ethics," in *Principles of Health Care Ethics*, 1st ed., ed. Richard E. Ashcroft et al. (Wiley, 2006): 4, https://doi.org/10.1002/9780470510544.ch1.
[14] Beauchamp, "The 'Four Principles' Approach to Health Care Ethics": 5.
[15] Dan W. Brock and B. D. Colen, "Voluntary Active Euthanasia," *The Hastings Center Report* 22, no. 2 (1992): 11.
[16] Brock and Colen, "Voluntary Active Euthanasia."

PAS, VAE, and all other forms of medical aid in dying are not infringements on rights, rather, they are a natural evolution in medical care that is made possible by evolving technologies.

DISCUSSION

Taken together, the evaluation of Rehnquist's majority opinion, the Philosophers' Brief, Beauchamp and Childress's principles of bioethics, and Brock's analysis of public sentiment reveal a consistent pattern: the *Glucksberg* ruling mistakes a selective legislative history for a national tradition and fails to make a ruling that protects constitutional liberties in the face of an evolving society.

Tradition surrounding PAS is rooted in the ancient times, when government-sanctioned euthanasia was performed in Grace, institutionalized in Rome, and legally permissible in Seneca. PAS existed, and was philosophically defended, centuries before Anglo-American common law existed. The deeper American tradition, as reflected in the Bill of Rights and upheld by the same Court's rulings on other cases, is to protect the intimate and personal decisions of individuals from state imposition, regardless of the specific circumstances.

Rehnquist does not engage the full record of PAS. Rather, he narrows tradition to Anglo-American criminalization, a brief period of history that public sentiment no longer supports, but that he regards as moral consensus for supporting criminalization. As the slavery example demonstrates, applying the traditions test narrowly will always produce a result favorable to the seeker– which is precisely why living constitutionalism requires the Court to reason forward from constitutional principle, rather than backward from historical practice.

What is significant is the intention of the Constitution, as argued by the Brief. The Constitution and the Bill of Rights aim to protect the self-determination of individuals in their most intimate and personal decisions, regardless of how a specific issue may have been regarded by a previous society, and regardless of whether it was previously thought possible. A traditions test that ignores this reality does not protect the Constitution, it undermines it.

CONCLUSION

Washington v. Glucksberg presented the Supreme Court with a question that tradition was never equipped to answer, and one that tradition never should have been called upon to determine. Whether a liberty interest enabled by modern medicine is constitutional cannot be decided by a textual interpretation of a document that was written before modern medicine could have been reasonably conceptualized.

Chief Justice Rehnquist attempted to answer the question by reaching backward, selecting an Anglo-American criminalization record that excludes centuries of tradition supporting PAS and treating it as moral consensus. The Philosophers' Brief presents what the Court should have done instead– reasoned forward from the constitutional principle of self-determination to a question that principle was designed to answer. The *Glucksberg* ruling is not reflective of any meaningful policy on PAS, and is instead a clear demonstration of how applying incorrect methodologies and ignoring broader historical contexts can lead to a government that does not support the sentiment of its people. It is a testimony to the importance of living constitutionalism, and grounding national decisions in what most protects the rights guaranteed to the people in the Constitution.

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