

# *Washington v. Glucksberg* and Physician-Assisted Suicide: A Pyrrhic Victory?

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ABSTRACT: This paper will discuss what the Supreme Court has said about whether the Constitution contains a putative “right to die.”

THERE IS LIMITED PUBLIC DISCUSSION explicitly about “euthanasia” in the U.S. today. It is almost entirely a discussion of “physician-assisted suicide” (PAS), a term first used in the early 1980s. It seems to me that PAS has come into use at least partly to avoid the unpleasant connotations of “euthanasia.” Moreover, from the standpoint of right-to-die forces, this term seems preferable to “euthanasia” because it suggests that the doctor only “assists” rather than directly kills the patient, as if this mitigates his responsibility somewhat and perhaps lessens his legal liability, depending on the laws of the relevant jurisdiction.

I will be primarily concerned with claims about the “right to die” or to commit suicide, and not with other important related questions, such as who (in the case of someone who is incompetent) can make the decision about what that patient would have wanted. I will consider this topic under four headings: (1) a description of the broad legal background (substantive due process); (2) a summary of the two major Supreme Court cases: *Cruzan v. Missouri Dept of Health* (1990) and *Washington v. Glucksberg* (1997); (3) a series of more general observations on constitutional law that arise from my discussion of physician-assisted suicide; and (4) brief comments about where we stand today.

## 1. Legal Background

Why is physician-assisted suicide even a federal constitutional issue? Ordinarily, issues like this are left to the States (as part of what was traditionally called “the police powers” of the state, for States are charged to regulate health, safety, welfare, and morals, unless there is something in the U.S.

Constitution that would make something a federal issue. There is obviously nothing explicit in the U.S. Constitution about suicide in any form. What *is* in the U.S. Constitution that might give rise to a legal question regarding State power to regulate end-of-life issues?

There is a long and complicated story that is said to provide an answer to that question. It is centered on the notion of “substantive due process.” The due process clauses of the Fifth Amendment and the Fourteenth Amendment assert that no one shall be deprived of life, liberty, or property without due process of law. That wording implies that *with* due process of law, life, liberty, or property may be taken away. This is the notion of “procedural due process,” which does not ask about the substance of the law (*what* is being taken away, and/or *why*), but simply about *how* this happens, the “processes.”

Yet, for complicated reasons, there developed another conception of due process.<sup>1</sup> It focused on the requirement of due process of *law*, and it involved the question of what a “law” requires. Law is a general rule, as opposed to a particular decree, and so, for example, some jurists thought that simply “taking property from A and giving it to B” was not a real law. In such a case, the issue is not just about the processes by which a law is applied, but about the very substance of the law itself. An enactment that is an “arbitrary decree” – even if it has the form of legislation – is a violation of the requirement of “due process of law.” This is the idea of “substantive due process.”

The major way in which substantive due process was used initially involved the protection of protect property rights. From the 1870s to about 1890, the idea of substantive due process percolated in the opinions of the Supreme Court. From 1890 until 1937, however, it became one of the dominant forces in American constitutional law. During that time substantive due process was often used to strike down a wide variety of economic regulation, including maximum hours laws, minimum wage laws, union-protecting legislation, and price regulation. After a constitutional crisis of sorts, in 1937, the Court abandoned “economic substantive due process.”

But the general idea of substantive due process was never overruled. For example, the Due Process Clause of the Fourteenth Amendment had been used to apply the First Amendment to the States, but in its concerns with free speech and religion the courts take the First Amendment to deal with substantive issues, not with the procedural rights identifiable in other amendments, such as

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<sup>1</sup> For a more extensive discussion of substantive due process, see C. Wolfe, *The Rise of Modern Judicial Review* (New York NY: Rowman and Littlefield, 1994), ch. 6.

the right not to incriminate oneself, the right to a hearing, the right to a lawyer, and so on.

In the 1960s, substantive due process was resuscitated. This occurred first in a dissent by Justice John Marshall Harlan in *Poe v. Ullman*<sup>2</sup> in 1961, which dealt with a largely unenforced Connecticut law against the sale of contraceptives. The Court majority took a route that avoided reaching the merits of the case. When the law came back to the Court in 1965 in the famous *Griswold v. Connecticut* decision,<sup>3</sup> Justice Douglas wrote an opinion that claimed to avoid substantive due process. The very idea was anathema to him, as an old New Dealer. But the concurrences in this case and in other decisions clearly brought substantive due process back to life, but now for quite different purposes that involved not property rights but a new conception of “privacy.”

The privacy at issue was not the old kind of privacy, the kind that involved the government in conducting illegal searches and seizures, breaking into people’s homes to find things, government eavesdropping on people’s conversations in the home or on telephones, and the like. The “new” privacy issue concerned a right to personal autonomy – the right to make important personal decisions for yourself. This new privacy right centered especially on sexual choices, beginning with contraception, both for the married, in *Griswold v. Connecticut* (1965) and for the unmarried, in *Eisenstadt v. Baird* (1972).<sup>4</sup> It was later famously applied to an issue that went well beyond sexual choice, namely, abortion in *Roe v. Wade* (1973)<sup>5</sup>, and then homosexual sodomy in *Lawrence v. Texas* (2003),<sup>6</sup> and to gay marriage in *Obergefell v. Hodges* (2015).<sup>7</sup> Inevitably, it became the foundation for claims to personal autonomy in making decisions about end-of-life issues.

## 2. The Supreme Court Right-to-Die Cases

### *Cruzan v. Director, Missouri Department of Health* (1990)

The first widely known case involving the putative “right to die” was *In Re Quinlan*, a 1976 New Jersey case.<sup>8</sup> Karen Ann Quinlan had taken alcohol

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<sup>2</sup> 367 U.S. 497 (1961), at 522.

<sup>3</sup> 381 U.S. 479 (1965).

<sup>4</sup> 405 U.S. 438 (1972).

<sup>5</sup> 410 U.S. 113 (1973).

<sup>6</sup> 539 U.S. 558 (2003).

<sup>7</sup> 576 U.S. (2015).

<sup>8</sup> 70 N.J. 10, 355 A.2d 647 (NJ 1976).

and drugs while on a severe fast to lose weight, and then stopped breathing for a sustained period of time. After being resuscitated, she was diagnosed as being in what is called a “persistent vegetative state.” Her parents asked her doctors to end artificial nutrition and hydration. The New Jersey Supreme Court ultimately held that her parents’ request was legitimate, basing its decision on the federal privacy right. The *Quinlan* case was followed by various state court cases over the next fourteen years.

The first U.S. Supreme Court case in this area was *Cruzan v. Director, Missouri Dept. of Health* (1990).<sup>9</sup> This case focused on the question of what Nancy Cruzan’s wishes were. Her parents wanted to terminate clinically-provided nutrition and hydration and went to court when medical authorities, fearing possible prosecution, refused to do so. The State of Missouri required “clear and convincing evidence” of a person’s wish to have medical treatment (including food and water) terminated, and Missouri courts held that statements that Nancy had made to a friend did not meet this standard.

The Court opinion of Justice Rehnquist (for Justices White, O’Connor, Scalia, and Kennedy) began with a survey of state cases, beginning with *In Re Quinlan*. It noted that, while *Quinlan* had relied on a federal constitutional privacy right, most state courts dealing with these issues had relied on a common law right to self-determination and informed consent, or, in some cases, on a combination of that common law right with a constitutional privacy right.

The Court noted that State courts (including a later New Jersey case) had rejected various distinctions that had been proposed as relevant, including the extraordinary/ordinary treatment distinction and the distinction between nutrition and hydration versus other medical treatment. Rehnquist’s opinion says that the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from the Court’s prior Due Process decisions. But that point does not end the question, he says, because it is necessary to balance that liberty interest against State interests.

He concedes that the logic of the cases would embrace a liberty interest in rejecting the forced administration of life-sustaining medical treatment, and even of artificially-delivered food and water essential to life. He adds, however: “The dramatic consequences involved in refusal of such treatment would

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<sup>9</sup> 497 U.S. 261 (1990).

inform the inquiry as to whether the deprivation of that interest is constitutionally permissible.” Then he says that “for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse life-saving hydration and nutrition.”<sup>10</sup> That is, the Court will proceed on that assumption without actually holding that there is such a constitutional right as a matter of law.

The rest of case is about whether *incompetent* persons, or their *surrogates*, have such a right, and what standards States may use to determine whether a person has authorized such a decision on their behalf. The Court eventually concludes that a State may apply a clear and convincing evidence standard (as Missouri did) in proceedings where a guardian seeks to discontinue the nutrition and hydration of a person diagnosed to be in a persistent vegetative state.

Justice O’Connor concurs. But she goes beyond the Court opinion by emphatically stating her belief that food and hydration can be rejected when she says:

Whether or not the techniques used to pass food and water into the patient’s alimentary tract are termed ‘medical treatment,’ it is clear they all involve some degree of intrusion and restraint.... Requiring a competent adult to endure such procedures against her will burdens the patient’s liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual’s deeply personal decision to reject medical treatment, including the artificial delivery of food and water.<sup>11</sup>

For O’Connor, artificial feeding cannot readily be distinguished from other forms of medical treatment.

Scalia says that this is a matter for the States, not for federal courts, and he urges the Court not to enter this area by imposing federal constitutional restrictions on State policy. His opinion notes that the dissents of Justices Brennan (joined by Marshall and Blackmun) and Stevens would adopt principles that involve a constitutionally-protected right to suicide.

So, with Justice O’Connor being the necessary fifth vote in the case, it seemed that there was a Court majority behind an assumed right to decline food and water. This suggests, in turn, that there was already a limited “right to die,”

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<sup>10</sup> 497 U.S. 261 (1990) at 279.

<sup>11</sup> 497 U.S. 261 (1990) at 289.

as a practical matter, by refusing them food and water.

*Washington v. Glucksberg* (1997)

Seven years later, the Court revisited end-of-life issues in *Washington v. Glucksberg*<sup>12</sup> and *Vacco v. Quill*,<sup>13</sup> two cases that today still provide the framework of controlling law regarding physician-assisted suicide. The Court composition had changed somewhat since *Cruzan*, with four new justices: David Souter replaced William Brennan, Clarence Thomas replaced Thurgood Marshall, Ruth Bader Ginsberg replaced Byron White, and Stephen Breyer replaced Harry Blackmun. But this left the ideological balance on the Court roughly the same.

*Glucksberg* focused on a broad challenge, based on the Due Process Clause, to a Washington State law that prohibits the causing or aiding of suicide. *Vacco* dealt with a claim that the Equal Protection Clause was violated by treating refusal of treatment and physician-assisted suicide differently. In this essay I will confine my discussion to *Glucksberg*.

The case arose when physicians in the State of Washington challenged the State law against “caus[ing]” or “aid[ing]” a suicide. The State law specified, it should be noted, that “withholding or withdrawal of life-sustaining treatment” at a patient’s direction “shall not, for any purpose, constitute a suicide.” The physicians claimed that there is a “liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide.”<sup>14</sup> It is important to note that the case involved a broad challenge to the law on its face, not to any particular application of it to a particular case or set of circumstances.

Chief Justice William Rehnquist delivered the Court’s opinion, rejecting the challenge to the law. He began by noting the almost every State, indeed almost every Western democracy, made it a crime to assist a suicide. These laws, he says, are longstanding expressions of the State’s commitment to the protection and preservation of all human life, which have generally been re-

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<sup>12</sup> 521 U.S. 702 (1997).

<sup>13</sup> 521 U.S. 793 (1997).

<sup>14</sup> 521 U.S. 793 (1997) at 708. The District Court agreed with the physicians’ claim, but a three-judge panel for the Ninth Circuit Court of Appeals overruled the District Court. But then the Ninth Circuit, sitting en banc, reversed again, and their decision was appealed to the Supreme Court.

affirmed in recent years.

He begins his due process analysis by noting that the clause guarantees more than fair process, and that the “liberty” that it protects includes more than the absence of physical restraint. It also provides heightened protection against government interference with certain fundamental rights and liberty interests. In this connection he cites Court precedents regarding privacy, and in particular he cites *Cruzan* regarding the right to refuse unwanted lifesaving medical treatment.

He says that the Court’s established method of substantive-due-process analysis has two primary features: (1) the Due Process Clause specially protects those fundamental rights and liberties that are, objectively, “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” (2) In substantive-due-process cases the Court has required a “careful description” of the asserted fundamental liberty interest. He notes that this approach tends to rein in the subjective elements that are necessarily present in due-process judicial review.

Rehnquist then turns to the question in this case: whether the “liberty” that is specially protected by the Due Process Clause includes a right to commit suicide, and whether that asserted right would in turn include a right to assistance in doing so. He asks: “Does this asserted right have any place in our nation’s traditions?” and answers that “we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults.”<sup>15</sup> Then he asks whether the asserted liberty interest is consistent with this Court’s substantive-due-process line of cases, if not with this nation’s history and practice.

In particular, he raises the question of whether *Planned Parenthood v. Casey* and *Cruzan* reflect a general tradition of “self-sovereignty” that protects “basic and intimate exercises of personal autonomy.”<sup>16</sup> Further, he argues that the right assumed in *Cruzan* was not simply deduced from abstract concepts of personal autonomy but rested on the common-law rule that forced medication was a battery and that the long legal tradition protects the decision to refuse unwanted medical treatment. He takes up the famous “mystery passage” of

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<sup>15</sup> 521 U.S. 793 (1997) at 723.

<sup>16</sup> 521 U.S. 793 (1997) at 724.

*Casey* and argues that the fact that many Due Process rights and liberties are grounded in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected. In fact, history shows that the asserted “right” to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.

Rehnquist then turns to the question whether Washington State's assisted-suicide ban is rationally related to legitimate government interests. He offers a list of five different interests.<sup>17</sup>

- (1) The state has an “unqualified interest in the preservation of human life.”
- (2) “All admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups.” He points out that those who attempt suicide – terminally ill or not – often suffer from depression or other mental disorders.
- (3) The State also has an interest in protecting the integrity and ethics of the medical profession – an interest that had received support from the American Medical Association.
- (4) The State has an interest in protecting vulnerable groups – including the poor, the elderly, and disabled persons – from abuse, neglect, and mistakes. He points out that if physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs. Moreover, the State’s interest here goes beyond protecting the vulnerable from coercion. It extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and “societal indifference.”
- (5) Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. This contention is supported by evidence about the practice of euthanasia in the Netherlands.

Without any need to weigh exactly the relative strengths of these various interests, Rehnquist concludes, they are unquestionably important and legitimate, and Washington State’s ban on assisted suicide is at least reasonably related to their promotion and protection. Thus, Americans – as should be the case in a democratic society – can continue their earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.

On its face, then, *Glucksberg* appears to be a strong rejection of the idea

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<sup>17</sup> 521 U.S. 793 (1997) at 728-35.



that the Due Process Clause protects a constitutional right to physician-assisted suicide, and *Vacco v. Quill* says the same about the Equal Protection Clause. A careful examination of the other five opinions in the case, however, casts some doubt on this reading.

The most important of those other opinions was Justice O'Connor's opinion, both because it was the key fifth vote in the case to make a Court opinion (rather than a plurality opinion) possible and because some of the other concurrences specifically make favorable references to her opinion.

Justice O'Connor says that she joins the Court opinions in *Glucksberg* and *Vacco* because "I agree that there is no generalized right to 'commit suicide.'" She specifically says that there is "[n]o need to reach the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death," for "all agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death."<sup>18</sup>

Of course, the fact that she distinguishes this narrower question and refuses to decide it does not automatically mean that, if she had reached that narrower question, she would have voted to uphold such a right. But her separating out of that question, and noting that it is not decided by the Court opinion, creates a very strong impression that she would decide the narrower question differently. That is, she would hold that a mentally competent person who is experiencing great suffering has a constitutional right to control the circumstances of his or her imminent death, which is to say, has a right to decide whether or not to die, i.e., a right to decide to die.

Justice Stevens's concurrence likewise joins the Court judgment in holding that the Washington statute is not invalid on its face. But, he says, this holding does not foreclose the possibility that some applications of the statute might well be invalid. Although as a general matter the State's interest in the contributions that each person may make to society outweighs the person's interest in ending her life, this interest does not have the same force for a terminally ill patient faced not with the choice of whether to live, but only of how to die. The State's legitimate interest in preventing abuse does not apply

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<sup>18</sup> 521 U.S. 793 (1997) at 736-37.

to an individual who is not victimized by abuse, who is not suffering from depression, and who makes a rational and voluntary decision to seek assistance in dying. Palliative care cannot alleviate all pain and suffering. So, the potential harms are sufficient to support the State's general public policy against assisted suicide, but they will not always outweigh the individual liberty interest of a particular patient. He concludes: "I do not, however, foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge."<sup>19</sup>

Justice Souter concurs only in the judgment. His concurrence is an extensive description and analysis of the history of substantive due process jurisprudence, relying especially on Harlan's dissent in *Poe v. Ullman* and on *Planned Parenthood v. Casey*. It strongly supports a broad judicial power in applying substantive due process. On the particular question of physician-assisted suicide, he likewise leaves open the question of a right to die under some circumstances.

Justice Ginsberg concurs in the judgments in these cases for "substantially for the reasons stated by Justice O'Connor in her concurring opinion."<sup>20</sup>

Justice Breyer concurs in the judgments in these cases but specifically disagrees with the Court's formulation of that claimed "liberty" interest, that is, a "right to commit suicide with another's assistance." He would use a different formulation, which would use words such as a "right to die with dignity." At its core, he says, lies personal control over the manner of death, professional medical assistance, and the avoidance or unnecessary and severe physical suffering – combined. But he says that this Court need not now decide whether or a not such a right is "fundamental," for in his view the avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful claim and the laws before us do not force a dying person to undergo that kind of pain:

Were the legal circumstances different – for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life – then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue, and the Court might have to revisit its conclusions in these cases.<sup>21</sup>

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<sup>19</sup> 521 U.S. 793 (1997) at 750.

<sup>20</sup> 521 U.S. 793 (1997) at 789.

<sup>21</sup> 521 U.S. 793 (1997) at 791-92.

The bottom line in this case, therefore, is that there are probably five votes for a somewhat narrower formulation of some right to die, under some circumstances.

### 3. Observations on *Glucksberg* and Constitutional Law

In this section I would like (1) to look at three implications of the previous discussion for the future development of “right-to-die” cases; (2) to point out what I think is a distinctive theoretical point about the issue of suicide; and (3) to indicate some implications of my discussion for constitutional law and judicial review more broadly.

Let me begin with three comments on *Glucksberg* and the future development of constitutional law in this area.

First, from the time of *Cruzan* the Supreme Court has been sympathetic to patient self-determination, which seems to be the initial governing principle, the starting point, in this area. It is the first (but not the only) principle governing these issues. In both *Cruzan* and *Glucksberg*, however, Rehnquist hedges, for he refuses to accept self-determination as the complete story. There are various State interests, in light of which the scope of self-determination has to be evaluated. But at the same time, as the *Glucksberg* concurrences make clear, it is possible to downgrade or put to the side these various State interests. This is important if a future Court wishes to distinguish rather than overrule *Glucksberg*. The following are examples of how that might be done.

(1) Does the State have an “unqualified interest in human life”? Yes, but, in some circumstances, this unqualified interest may be outweighed by other interests, e.g., the right of a person to control the circumstances of his or her death.

(2) Is suicide a public health problem (especially in cases involving depression)? This may just require adopting sensible procedures to guard against the expansion of suicide beyond “appropriate” circumstances and to monitor depression and prevent it from distorting decision-making.

(3) How about medical integrity, ethics, and the life-preserving role of the doctor? If doctors assist patients in dying (e.g., in appropriate circumstances, at the behest of patient), they are playing, we can well imagine that it will be said, a praiseworthy and ethically attractive role.

(4) Are we protecting vulnerable groups (the poor, elderly, and disabled)

from abuse or neglect? A proponent might say that we just need to ensure adequate provision of public services and proper procedures to ensure even-handed treatment of different groups.

(5) Can we avoid the slippery slope (e.g., from voluntary to involuntary euthanasia)? The Court could simply decide not to go farther down the slippery slope.

In short, there is simply plenty of “wobble-room” for lawyers to get around the argument of *Glucksberg*.

Second, I think it is likely that some future cases dealing with the application of State anti-PAS laws to particular circumstances will turn on factual questions about the efficacy of palliative (pain-reducing) care, with pro-euthanasia lawyers constructing arguments doubting the efficacy of such care in particular cases, based on journal pieces from pro-euthanasia academics and with the support of amicus briefs, which will receive a warm reception from liberal judges sympathetic to PAS. We have already seen a dynamic of this sort in *Stenberg v. Carhart* (2000),<sup>22</sup> the first partial-birth abortion case, in which a liberal federal district court judge pretty much adopted the arguments of the pro-abortion lawyers on various factual issues, such as whether partial-birth abortions were ever a superior way to preserve maternal health, and ratified somewhat implausible arguments about the indistinguishability of the abortions at issue in that case from the more common form of second trimester D&E abortions. There is plenty of evidence that, when judges confront issues they really care about, they will find a way to resolve them as they want to. As the old saying goes, “where there is a will, there is a way.”

Third, in order to decide *Glucksberg* the way the Court did, Rehnquist had to try to somehow “tame” the “mystery passage” in *Planned Parenthood v. Casey*. This was a matter of common-sense, in fact, since the passage is patently indefensible. Arguing that personhood cannot be maintained unless one has the right to define “one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”<sup>23</sup> is absurd. In principle, it would provide pro-slavery advocates with a solid argument for defining black people as sub-human and therefore fit subjects for chattel slavery. So, Rehnquist argues that the fact that many Due Process rights and liberties are grounded in

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<sup>22</sup> 530 U.S. 914 (2000).

<sup>23</sup> 505 U.S. 833 (1992) at 851.

personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.

One would have hoped that this opinion would have consigned the mystery passage to the dustbins of history. Unfortunately, Justice Kennedy had a chance to rescue his brain-child in later cases. He quotes it specifically in *Lawrence v. Texas*,<sup>24</sup> and in *Obergefell* he wrote: “respondents refer to *Washington v. Glucksberg*..., which called for a ‘careful description’ of fundamental rights. They assert that... the petitioners do not seek to exercise the right to marry but rather a new and non-existent ‘right to same-sex marriage.’ ... *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices.” Yet, while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), “it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.” But Justice Kennedy offers no reason at all why physician-assisted suicide is different. Moreover, he offers citations to two of the concurrences in the judgment (not to the Court opinion) in *Glucksberg* (those by Justice Souter and Justice Breyer). It is not hard to imagine a future court arguing that the mystery passage applies as much to PAS as to other rights.

#### 4. A Theoretical Question About Euthanasia, Law, and Public Policy

I want to pose a question about whether there is an aspect of public debate that is distinctively applicable to euthanasia. Can this issue – especially the fundamental issue of suicide – be decided without reliance on theological grounds?

Interestingly, “theological grounds” would presumably include “secularism.” For purposes of the Free Exercise Clause, liberal secularists have emphatically insisted that “free exercise of religion” means freedom for everyone with respect to religious matters – that is, it extends to free exercise of non-religion or anti-religion as much as to free exercise of religion. If that is true, then “secularism” should consistently be treated as a “religion” for purposes of constitutional issues.

Justice Stevens’s concurrence in *Cruzan* explicitly argues that end-of-life issues are inevitably matters of faith: “Choices about death touch the core of

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<sup>24</sup> 505 U.S. 833 (1992) at 574.

liberty.... [N]ot much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience.”<sup>25</sup> This is a variation of his argument in abortion cases, e.g., *Webster v. Reproductive Health Services* (1989), that laws restricting abortion violate the Establishment Clause, for they reflect a particular religious position.<sup>26</sup>

I think that Justice Stevens is wrong about abortion, for arguments based on reason rather than faith are quite potent. But I think that he is right when he says: “[N]ot much may be said with confidence about death unless it is said from faith.” I would add that this may be even more true of suffering than it is of death.

But Justice Stevens’s argument involves the classic liberal fallacy: since any position on suicide involves questions of faith, it has to be left up to the individual – as if that position were not equally based on a kind of “faith,” i.e., the secular faith, one of whose central beliefs is individual autonomy.<sup>27</sup>

Our problem, politically, is that many Americans – including many centrist or even somewhat conservative Americans – have a notion of “separation of church and state” that creates a decided aversion to bringing religious beliefs explicitly to bear on public issues. They also have an inclination – often a healthy one – to “keep government out of” intensely personal decisions. This combination of factors is likely to make it difficult to resist the drift toward autonomy regarding end-of-life decisions, including suicide by withdrawal of clinically-supplied nutrition and hydration. On the other hand, there may be factors working against autonomy too. Once physician-assisted suicide becomes widely accepted, the strong American bent toward utilitarianism and the secularism-induced sense that suffering is simply meaningless may eventually support a broader acceptance of involuntary euthanasia, e.g., for patients suffering from dementia or from pain that cannot easily be palliated.

## 5. Two General Observations About Constitutional Law and Judicial Review

We should also take note of the way in which the Supreme Court’s right-

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<sup>25</sup> 505 U.S. 833 (1992) at 343.

<sup>26</sup> 492 U. S. 490 (1989) at 566-67.

<sup>27</sup> This is similar to another form of the liberal fallacy: “If there is no good reason to treat people unequally, then they must be treated equally.” But that does not follow at all. What if there is equally no good reason to treat them equally? Doesn’t equal treatment require a reason too?

to-die cases fit in with some broader developments regarding constitutional law and judicial review.<sup>28</sup>

First, the arguments regarding PAS are another good example of what I call the “asymmetry” of modern privacy decisions. In these privacy cases, which deal with central issues of the so-called culture wars, we do not find an open debate between the liberal and the conservative positions on culture war issues. What we usually find, rather, is a debate between the liberal position (personal autonomy regarding controversial issues of personal morality, such as contraception, abortion, sodomy, the definition of marriage, and PAS) and an anti-judicial activism position. The Court conservatives do not argue that the Constitution prohibits abortion or sodomy or same-sex marriage or PAS. They simply argue that the Constitution says nothing about these issues, and therefore they should be left for resolution through the ordinary democratic process. It is true that, occasionally, they are able to sneak in substantive conservative arguments indirectly, usually along lines like these: “Some people have historically believed that marriage is especially about the procreation of the next generation, and therefore is necessarily defined as being between one man and one woman; and there is nothing in the Constitution that precludes states from adopting this view.” But the overall debate is generally not between two definitions of marriage – conservative and liberal – but between a liberal definition of marriage that extends it to same-sex partners and a conservative opposition to having judges getting involved in the issue. This is not a fair fight. It leaves those of us who adhere to more traditional or conservative substantive ideals without straight-forward and unapologetic representation in one of the main venues for discussion of public issues. The same thing is generally true of *Cruzan* and *Glucksberg*, in which only the late Justice Scalia (in *Cruzan*) made anything like an argument that States have a right to prohibit all forms of suicide, including suicide by deprivation of nutrition and hydration. He does so, characteristically, by framing the argument as one of limits on judicial power.

Second, I think there is another kind of asymmetry in contemporary constitutional law worth noting. It regards the positions taken on judicial review. Conservatives, who are generally originalists, for the most part oppose judicial activism on certain principled grounds. It is not the judges’ job to

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<sup>28</sup> I have previously made both the points I make in this section, in “Public Morality and the Modern Supreme Court” in *American Journal of Jurisprudence* 45 (2000): 65, at pp. 88-91.

resolve important social questions; rather, they are simply to apply the law. Liberals, who generally embrace the notion of a living or evolving Constitution, for the most part embrace judicial activism, the idea that judges can and should play a major role – in certain areas associated with liberty and equality, the dominant role – in deciding broad issues of policy for the nation.

Liberals accuse conservatives of engaging in activism, it is true, and I think they are occasionally correct that conservatives have erred in their reading of the Constitution.<sup>29</sup> But I think that even in these cases, conservative justices (mistakenly) think that they are following the law as found in the Constitution rather than making social policy. Moreover, many of the liberal accusations of conservative judicial activism are actually reducible to complaints that conservatives will not engage in the activism that liberals prefer (e.g., regarding abortion, sodomy, same-sex marriage, and PAS).

So, the combination of liberal judicial activism and conservative judicial self-restraint has created a “heads I win, tails you lose” situation. Liberals try to get their way in the legislature, and when they fail there, they go to courts to get them to impose their preferred social policies. Conservatives fight in the legislature, and, if they lose there, there is usually no incentive for them to go to the courts (unless there is a strong textual argument for their position) since conservative justices will generally refuse to engage in conservative activism. So, for example, liberals had some (but very limited) success in expanding abortion rights in some States in the late 1960s, but then turned to the courts and won a huge victory in *Roe v. Wade* in 1973. Conservatives have, since then, made efforts to overturn *Roe* (largely stymied by poor Supreme Court appointments by Republican presidents) that would do no more than turn abortion over to the States again. No conservative justice has ever proposed that laws permitting abortion be struck down, under the equal protection clause, even though such a reading is much more plausible than finding abortion rights in the Constitution (because it is literally a denial of the equal protection of the laws to a particular category of human beings).<sup>30</sup>

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<sup>29</sup> See my “The Rehnquist Court and ‘Conservative Judicial Activism’” in *That Eminent Tribunal: Judicial Supremacy and the Constitution* ed. Wolfe (Princeton NJ: Princeton Univ. Press, 2004).

<sup>30</sup> Whether such a reading is plausible enough to justify judicial review is, however, a serious question. Given my own strict requirements for judicial review, I have argued (like conservative originalists like Scalia) that the Constitution left abortion to the states.



Under these circumstances, there is simply no reason for liberals to oppose judicial activism. If there is a liberal Court majority, judicial activism advances the liberal social agenda. If there is a conservative Court majority, liberals are back to fighting out the social issues in legislatures, and thus no worse off than they would have been if they had a majority of the Court.

This creates a difficult situation for conservative justices: should they “do their job” and reject judicial activism because it is the “right thing to do” – which, frankly, makes them look like “suckers” – or do they say “what’s sauce for the goose has to be sauce for the gander”? Conservative justices have – rightly, in my view – continued to reject judicial activism, for they are following an important moral principle: “do your job – exercise the powers you legitimately have – and don’t abuse your powers.” But, under these circumstances, it might be difficult for many conservatives to work up much indignation were conservative justices to emulate their liberal colleagues.

#### 6. Where Are We Now?

Where does the Court stand now, nineteen years after *Glucksberg*? Over half – five – of the justices on that Court are gone: Rehnquist, Souter, Stevens, O’Connor, and now Scalia.

The four new justices are John Roberts (who replaced William Rehnquist), Sonia Sotomayor (who replaced David Souter), Elena Kagan (who replaced John Paul Stevens), and Samuel Alito (who replaced Sandra O’Connor). This configuration probably represents a net shift to the right (with Alito to the right of O’Connor, although she joined Rehnquist’s Court opinion in *Glucksberg*). But now Justice Scalia is gone, and his replacement may be the swing vote regarding PAS.

As the Court stands, it seems unlikely that four justices would vote to take a case that might narrow *Glucksberg* (unless Justice Kennedy waffles, which can never be ruled out). Neither side really has much of an incentive to do so since the outcome is likely to be an even split. But that will change once the Scalia vacancy is filled.

It seems likely, at this point, that Hillary Clinton will win and will appoint a very liberal justice to replace Justice Scalia. At that point, we could quickly see a Supreme Court opinion that expands the autonomy principle of Justice Kennedy’s mystery passage to include a right to suicide. This might well start with terminal cases involving great pain, and then be extended to include mental as well as physical pain (as *Doe v. Bolton* broadened *Roe v. Wade* by

specifying that “health of the mother” included mental health<sup>31</sup>). It might then be extended even further, moving beyond terminal illness. I base this on general tendencies in contemporary liberal ideology, which are likely to be reflected in Court opinions if there is a solid liberal majority.

But politics is frequently unpredictable, so we will have to wait to see. What is appalling is that the resolution of this extraordinarily important issue turns so much on the views of nine (five, really) unelected and unaccountable justices of the Supreme Court.<sup>32</sup>

## 7. Conclusion

As a small way of honoring one of the great American jurists, I want to leave the last word to Justice Scalia (from his concurrence in *Cruzan*):

I am concerned, from the tenor of today's opinions, that we are poised to confuse that enterprise as successfully as we have confused the enterprise of legislating concerning abortion – requiring it to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term. That would be a great misfortune.

While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide – including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes “worthless,” and the point at which the means necessary to preserve it become “extraordinary” or “inappropriate,” are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory....”<sup>33</sup>

My one quibble with Justice Scalia's formulation is that, when he wrote it, nine people picked at random from the Kansas City telephone directory would have answered those questions *better* than a majority of the Supreme Court. Unfortunately, they – and the rest of us – are unlikely to have the chance to determine this for ourselves, since the Court is likely to intervene and take over

<sup>31</sup> *Doe v. Bolton* 410 U.S. 179 (1971).

<sup>32</sup> I am aware that the Supreme Court justices are not entirely detached from political forces. But they are substantially so, for reasons I have discussed in my *Judicial Activism: Bulwark of Freedom or Precarious Security* (New York NY:Rowman and Littlefield, 1997), pp. 89-92.

<sup>33</sup> *Cruzan by Cruzan v. Director, Missouri Department of Health* 497 U.S. 261, at 293.

the issue. Even more unfortunately, given the power of intellectual elites to shape American opinion (especially the opinions of young people) over time (as the homosexuality issue has amply demonstrated), the difference between Kansas City and the Supreme Court is much smaller than it used to be. But that is a different story, for another occasion.<sup>34</sup>

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<sup>34</sup> I have told some of that story in “The Supreme Court and Changing Social Mores” in *Ourselves and Our Posterity: Essays in Constitutional Originalism*, ed. Bradley C.S. Watson (New York NY: Rowman and Littlefield, 2009).