

The Supreme Court and the Meaning of Life: A Legal and Philosophical Primer on the Right to Die

by John Hasnas

I. Introduction

On October 15, 2003, Judge George W. Greer of the Sixth Circuit Court for Pinellas County, Florida ordered the removal of the feeding tube sustaining the life of Theresa Schiavo, a woman in a persistent vegetative state since 1990, pursuant to her right to refuse unwanted medical treatment. On October 21, 2003, the Florida legislature passed and Governor Jeb Bush signed a statute known as Terri's law that empowered the Governor to order that Theresa Schiavo's feeding tube be re-inserted. The Governor issued the order and the tube was re-inserted. Thus, thirteen years after the Supreme Court first (implicitly) recognized the existence of a Constitutional right to die, the nature and scope of this right remain controversial.

[Full account of the Schiavo case. Highlights: In a persistent vegetative state since 1990 due to brain damage caused by a heart stoppage that resulted from a potassium imbalance. Sustained by a feeding tube for nutrition and hydration. In May of 1998, her husband, Michael Schiavo petitioned the circuit court for Pinellas County to have her feeding tube removed. Terri's parents, Robert and Mary Schindler, opposed the removal of the feeding tube. On Feb. 11, 2000, Judge George W. Greer ruled that Terri Schiavo would have chosen to have her feeding tube removed. Terri's parents appealed the decision to the Court of Appeal of Florida, Second District which affirmed the trial court's decision on January 24, 2001. *In re Schiavo*, 780 So. 2d 176 (Fla. App. 2001). On April 18, 2001, the Florida Supreme Court refused to review the case. *Schindler v.*

Schiavo, 789 So. 2d 348 (Fla. 2001). On April 20, 2001, the Federal District Court for the middle district of Florida granted the Schindlers a stay until April 23, 2001, to exhaust all their possible appeals. On April 23, 2001, Justice Anthony M. Kennedy of the United State Supreme Court refused to stay the case for a review by that Court. On April 24, 2001, pursuant to a court order, Terri Schiavo's feeding tube was removed. On April 26, 2001, again pursuant to a court order, the tube was re-inserted in response to an emergency motion for relief filed by the Schindlers citing new evidence, including a claim that Michael Schiavo perjured himself when testifying to Terri's aversion to remaining on life support. Following mediation, examination of Terri by five additional doctors, testimony concerning the possibility of new medical treatments, and the dismissal of a federal lawsuit, the feeding tube was removed again on October 15, 2003 and again reinserted pursuant to Terri's law on October 21, 2003. On May 6, 2004, the Circuit Court of Clearwater County held that Terri's Law was unconstitutional. Currently on appeal to Florida's Supreme Court. Include outcome when announced.]

Does Terri Schiavo have a Constitutional right to die? If so, what specifically does this right consist in? When can it be exercised and when, if ever, can the state legitimately assert an interest sufficient to override it? How can such a right be asserted by incompetent patients and what are its implications in the context of other bioethical controversies such abortion or other maternal-fetal conflicts? The purpose of this article is to answer these questions. In Part I, I trace the historical development of the right to die from its common law origins into Constitutional doctrine in order to identify the precise nature of the right and to delimit its range of application. In Part II, I explore the potentially compelling state interests that can override the right. After

identifying all such interests, I focus on the interest in the preservation of life to show that there is currently no settled judicial interpretation of this interest. Rather, the various courts that have ruled on the matter as well as the Justices of the Supreme Court itself have given distinct and incompatible definitions of the nature of this interest. In Part III, I argue that for the right to die to be a meaningful normative entity, the state interest in the preservation of life must be interpreted as a protection for a life of subjective value to the person living it. Finally, in Part IV, I trace the implications of this analysis for cases concerning irreversibly incompetent patients like Terri Schiavo.

II. The Nature of the Right to Die

The genesis of the right to die is conventionally traced back to *Schoendorf v. Society of New York Hospital*,¹ in which Benjamin Cardozo declared that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.” This grandiose-sounding articulation of what is called the right to bodily integrity was really little more than the recognition of the traditional common law protection of one’s person; something Cardozo made clear in the immediately following clause by stating: “and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.”

[The section traces the evolution of the legal right to die from the common law protection against battery through the right to informed consent to the corresponding right to informed refusal of life-sustaining medical treatment recognized in cases such as *Superintendent of Belchertown State*

¹211 N.Y. 125, 105 N.E. 92 (1914).

School v. Saikewicz,² *Satz v. Perlmutter*³, and *In re Conroy*⁴. It also traces the Constitutionalization of the right from *In re Quinlan*⁵, which located it in the penumbral right to privacy recognized in *Griswold v. Connecticut*⁶ and *Roe v. Wade*,⁷ to *Cruzan v. Director, Missouri Department of Health*,⁸ which identifies it as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. The section then examines *Cruzan*, *Vaco v. Quill*,⁹ and *Washington v. Glucksberg*¹⁰ to show that the currently recognized Constitutional right is limited to a right to refuse unwanted life-sustaining medical treatment rather than a more general right to terminate one's life.]

Thus, in *Vaco v. Quill*,¹¹ the Court stated that “our assumption of a right to refuse treatment was grounded not . . . on the proposition that patients have a general and abstract ‘right to hasten death,’ but on well-established, traditional rights to bodily integrity and freedom from unwanted

²370 N.E. 2d 417 (1977).

³362 So. 2d 160 (Fla. Dist. Ct. App. 1978).

⁴486 A.2d 1209 (1985).

⁵355 A.2d 647 (N.J. 1976).

⁶381 U.S. 479 (1965).

⁷410 U.S. 113 (1973).

⁸497 U.S. 261 (1990).

⁹521 U.S. 793 (1997).

¹⁰521 U.S. 703 (1997).

¹¹521 U.S. 793 (1997).

touching.”¹² The Court was equally explicit in *Washington v. Glucksberg*¹³ where it stated that

although Cruzan is often described as a “right to die” case, we were, in fact, more precise: We assumed that the Constitution granted competent persons a “constitutionally protected right to refuse lifesaving hydration and nutrition.”

....

The right assumed in Cruzan . . . was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions.¹⁴

By construing the right narrowly, the Court rejected the broader formulation that would give individuals control over the manner of their death. This broad formulation had been famously urged in an *amicus* brief in *Vacco* and *Glucksberg* filed by six of the nation’s leading political and moral philosophers, the “Philosophers’ Brief.”¹⁵ That brief argued that past Supreme Court decisions such as *Planned Parenthood v. Casey*,¹⁶ implied that “[e]ach individual has a right to make the ‘most intimate and personal choices central to personal dignity and autonomy.’”¹⁷ Adding the premise that “[a] person’s interest in following his own convictions at the end of life is so central a part of the more general right to make ‘intimate and personal choices’ for himself that a failure to protect that particular interest would undermine the general right altogether,”¹⁸ the

¹²*Id.* at 807.

¹³521 U.S. 703 (1997).

¹⁴*Id.* at 722-25.

¹⁵The philosophers were Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson.

¹⁶505 U.S. 833 (1992).

¹⁷The Philosophers’ Brief at ??.

¹⁸The Philosophers’ Brief at ??.

brief concluded that the general right necessarily “encompasses the right to exercise some control over the time and manner of one's death.”¹⁹

In rejecting this argument, the Court essentially accused the philosophers of mistaking a necessary condition for the recognition of a fundamental right for a sufficient condition. The Court described the interests of individuals that qualify for protection as fundamental rights under the Due Process Clause as those that are *both* “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed,’”²⁰ and “‘deeply rooted in this Nation’s history and tradition.’”²¹ Thus, although *Casey* may indeed imply that citizens have a fundamental Constitutional right to make *some* important intimate and personal decisions for themselves, i.e., those that have long been recognized in American culture and law, it does not imply that citizens have a fundamental right to make *all* such decisions for themselves. As the Court expressed it, “[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.”²² Therefore, even if the philosophers are correct that an individual’s interest in controlling the manner of his or her death is a crucially important intimate personal decision, this would show only that it was a candidate for Due Process Clause protection, not that it was necessarily entitled to such protection. Decisions about when and how one will die may be just as intimate and

¹⁹The Philosophers’ Brief at ??.

²⁰*Glucksberg*, 521 U.S. at 721.

²¹*Id.*

²²*Id.* at 727-28.

personal as decisions about whether to accept or reject medical treatment, but the Court found only the right to make the latter decision to be deeply rooted in American history and tradition.

In limiting the right to die to the right to refuse life-sustaining medical treatment, the Court also rejected broader conceptions of the right advocated by Justices Breyer and Stevens. Justice Breyer thought that the nation’s history and tradition supported the existence of a right to die with dignity in which “would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined.”²³ Breyer’s conception of the right was somewhat narrower than that advocated by the philosophers, consisting in control over the manner, but not necessarily the time of one’s death, and then only to the extent necessary to avoid dying in severe physical pain.²⁴ Nonetheless, it went beyond merely the right to refuse medical treatment to include a right to at least certain kinds of palliative care that would ease the process of dying.

Justice Stevens, too, advocated a broader conception of the right to die. Insisting “that the source of Nancy Cruzan’s right to refuse treatment was not just a common-law rule,”²⁵ Stevens argued that

this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law. This freedom embraces not merely a person’s right to refuse a particular kind of unwanted treatment, but also her interest in dignity, and in

²³Washington v. Glucksberg; Vacco v. Quill, 521 U.S. 702, 790 (1997) (Breyer, J., concurring).

²⁴*Id.* at 792 (“[I]n my view, the avoidance of severe physical pain (connected with death) would have to constitute an essential part of any successful claim . . .”).

²⁵Washington v. Glucksberg; Vacco v. Quill, 521 U.S. 702, 743 (1997) (Stevens, J., concurring).

determining the character of the memories that will survive long after her death.²⁶

He thus concluded that “[w]hatever the outer limits of the concept may be, it definitely includes protection for matters ‘central to personal dignity and autonomy.’”²⁷ Although this grounding would seem to support a conception of the right to die that is even broader than that advocated by the philosophers, the right Stevens actually advanced was considerably less so. Stevens argued only for a right for those in the end stages of a terminal illness to control how they died. He advocated a right to die that provided “individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death [with] a constitutionally protected interest . . . in deciding how, rather than whether, a critical threshold shall be crossed.” Thus, Stevens’ right to avoid “intolerable pain and the indignity of living one’s final days incapacitated and in agony”²⁸ was, like Breyer’s, considerably less extensive than that advocated by the philosophers. Nevertheless, in characterizing the right at issue as the right to refuse life-sustaining medical treatment, the Court rejected even Breyer’s and Steven’s more modest formulations.

[I plan a bit more discussion of the nature of the right that clarifies what constitutes medical treatment, and shows that it includes artificial nutrition and hydration.]

We see from this analysis that the Supreme Court has recognized the existence of a

²⁶*Id.*

²⁷*Id.* at 744.

²⁸*Id.*

Constitutional right to refuse unwanted medical treatment that is at least coextensive with and probably a bit broader than the corresponding common law right. This means that for all intents and purposes, we may speak exclusively in terms of the Constitutional right. For, the Constitutionalized version of the common law right not only provides all the protection of the common law right and more, it provides it in a considerably strengthened form. Thus, where the common law right could be overridden by legislative measures, its Constitutionalized version may not be. Direct state action in the form of statutes or actions by public officials that would formerly have supplanted the common law right is now barred by the Due Process Clause. Further, because under current Constitutional interpretation the enforcement of state or federal court judgments authorizing private actions that restrict rights is considered state action,²⁹ private legal actions that would infringe on the right would likewise be barred. And where the common law right could fall before sufficiently important countervailing state interests, the Constitutionalized right can stand before all but narrowly-tailored, compelling state interests.³⁰ Thus, the Supreme Court's right to die jurisprudence has essentially produced a somewhat more extensive and significantly strengthened version of the traditional common law right to bodily integrity.

III. The Nature of the State Interests

[This section reviews the state of the law on the state interests that could potentially override an individual's exercise of his or her right to die. Its purpose is to focus attention upon and set up the arguments concerning the interest in the preservation of life presented in Part IV. It begins by identifying the four countervailing state interests that were traditionally recognized as sufficient to

²⁹Footnote to the principle of *Shelley v. Kramer*.

³⁰Footnote stating the standard for strict scrutiny for fundamental rights.

override the common law right to refuse medical treatment: the preservation of life, the prevention of suicide, the protection of innocent third parties, and the maintenance of the ethical integrity of the medical profession. Leaving aside the interest in the preservation of life temporarily, I review the treatment that courts have given the other three interests.

In doing so, I discuss a quirk in the evolution of the jurisprudence of the right to die. The four traditional state interests arose in the context of a common law right to bodily integrity. In that context, they were referred to as “countervailing” state interests. To require individuals to accept medical treatment without their consent, these interests merely had to have sufficient utilitarian value to justify curtailing a common law right. However, over the course of time between *Quinlan* and *Cruzan* during which the common law right to refuse life-sustaining medical treatment became Constitutionalized, these four countervailing state interests came to be treated as potentially compelling state interests that could justify curtailing a fundamental Constitutional right. Yet, as far as I can determine, there is no case that explains why the common law countervailing interests can rise to the level of narrowly-tailored, compelling state interests necessary to restrict Constitutional rights. In fact, they almost certainly cannot, as evidenced by the fact that with the exception of the interest in the preservation of life, there are virtually no cases in which an individual’s refusal of life-sustaining medical treatment has been overridden on the basis of one or more of these interests. Given the way the right has been construed, as discussed in Part II, suicide is definitionally excluded from the scope of the right and hence, the state interest in preventing suicide can never conflict with an individual’s exercise of the right. The interest in protecting innocent third parties can almost never meet the narrow-tailoring requirement, and in the absence of some form of coercion applied upon doctors, the interest in

protecting the ethical integrity of the medical profession is never strong enough to force treatment on an unwilling patient. There is reason to believe that in mentioning these interests only to find them inapplicable or inadequate to override the Constitutional right, courts are merely paying lip service to a vestige of the now antiquated common law analysis. Hence, the interests in the prevention of suicide, the protection of innocent third parties, and the protection of the ethical integrity of the medical profession appear to play no substantive role in the analysis of the Constitutionalized right.

I then review more recent additions to the list of potentially compelling state interests such as the interest in encouraging charitable and humane care advanced in *McKay v. Bergstedt*³¹ and the interests in protecting vulnerable groups and avoiding involuntary euthanasia discussed in *Glucksberg*.³² I argue that the interest in encouraging charitable and humane care has a status equivalent to the three traditionally recognized interests just dismissed in that it alone can never be sufficient to override the Constitutional right. The most that this interest can require is that certain types of information be provided to a patient who wishes to exercise his or her right. The interests in protecting vulnerable groups and avoiding involuntary euthanasia present more substantive concerns, but again can usually be circumvented by building procedural safeguards into the mechanism for the exercise of the right. This leaves the interest in the preservation of life.]

[Before addressing the substance of the state interest in the preservation of life, I discuss its

³¹106 Nev. 808, 801 P.2d 617 (1990).

³²*See* 521 U.S. at 731-34.

source. Both the *Quinlan*³³ and *Cruzan* cases suggest that the interest is a Constitutional one. For example the *Quinlan* court declares that the state's interest in the preservation of life "has an undoubted constitutional foundation."³⁴ In support of this contention, however, the court offers only the comment that

The importance of the preservation of life is memorialized in various organic documents. The Declaration of Independence states as self-evident truths "that all men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." This ideal is inherent in the Constitution of the United States.³⁵

The *Cruzan* Court is somewhat more specific in that it asserts that "[i]t cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."³⁶ Neither of these is very promising as a source of either state or federal government power to preserve life. Whether one is talking about the Declaration's right to life that has somehow been written into the Constitution or the Fifth or Fourteenth Amendment's right not to be deprived of life without due process of law, one is talking about a restriction on, not a grant of, state and federal power. Constitutional rights bar the state and federal governments from acting in derogation of individual interests; they do not empower the governments to preserve interests, and especially not against the will of the individuals who interests they are.

The only way either the Declaration of Independence or the Due Process Clause can be read to create a federal or Constitutional interest in the preservation of life is to take the

³³In re *Quinlan*, 355 A.2d 647 (N.J. 1976).

³⁴*Quinlan*, 355 A.2d at 652.

³⁵*Id.* at 653 n.1.

³⁶*Cruzan*, 497 U.S. at 281.

Declaration's claim that the right to life is inalienable seriously.³⁷ Inalienable rights cannot be relinquished by their possessor. If the Constitution empowers the federal government to protect an *inalienable* right to life, then the federal government would be authorized to act to preserve individuals' lives whether or not they wish to continue living. However, such an interpretation of the Due Process Clause or any other Constitutional provision would be at odds not only with the way Constitutional rights are generally interpreted, but with the recognition of the Constitutional right to refuse life-sustaining medical treatment itself.

The source of the state interest in the preservation of life, therefore, must be states' general police power to promote the health, safety, and welfare of their inhabitants. This is made clear in *Cruzan* where, after pointing out that Missouri is relying on "its interest in the protection and preservation of human life, and there can be no gainsaying this interest,"³⁸ the Court supports this contention by recognizing that "[a]s a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime."³⁹ Because most right to die cases concern restrictions imposed by the states, the source of the state interest is usually is not significant. However, should it be the federal government that is acting to preserve life against the wishes of the patient, it could be. In the absence of a federal police power, the federal government would have to find some other basis for interfering with the

³⁷In *Glucksberg*, The Court cites the case of *Martin v. Commonwealth*, 184 Va. 1009, 37 S.E.2d 43, (1946) for the proposition that "The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable," *Glucksberg*, 521 U.S. at 715, so perhaps there is a textual basis for the claim. This, however, is quite a thin reed on which to hang an argument.

³⁸*Id.* at 280.

³⁹*Id.*

individual's choice, something that may not be that easy since the *Lopez*⁴⁰ decision.]

The states, then, have a legitimate interest in the preservation of life under their general police power. But what does this mean? What precisely does the state have an interest in preserving? In other words, legally speaking, what is the meaning of "life"?

At the moment, it may be argued that this question is, at least technically, unsettled. Neither *Cruzan* nor *Glucksberg/Quill* decisions turned on the nature of the state interest in the preservation of life. In *Cruzan*, the Court hypothetically recognized the existence of a Constitutional right to refuse life-sustaining medical treatment⁴¹ as well as the existence of a state interest in the preservation of life.⁴² However, its ruling concerned not whether or when the state interest could override the right, but whether the state could impose a procedural requirement on a surrogate decision-maker's exercise of an incompetent patient's right that required that the "incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence."⁴³ In *Glucksberg/Quill*, the Court similarly recognized the existence of both the right to

⁴⁰United States v. Lopez, 514 U.S. 549 (1995).

⁴¹*Cruzan*, 497 U.S. at 278 ("But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.")

⁴²*Cruzan*, 497 U.S. at 280 ("Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest.")

⁴³*Id.* at 280.

refuse life-sustaining medical treatment⁴⁴ and the state interest in the preservation of life.⁴⁵ The Court held, however, that the fundamental right to refuse life-sustaining medical treatment did not encompass the right to physician-assisted suicide that the plaintiffs were claiming.⁴⁶ Hence, state laws prohibiting the practice need only be rationally related to legitimate state interests to be Constitutional.⁴⁷ In holding the laws under attack were rationally related to state interests not only in the preservation of life, but also in preventing suicide, protecting the integrity of the medical profession, protecting the members of vulnerable groups from abuse, mistakes, neglect and coercion, and avoiding the risk of voluntary and involuntary euthanasia,⁴⁸ the Court was again not required to address the question of whether or when the state interest in the preservation of life could override the fundamental Constitutional right to refuse life-sustaining medical treatment. Nevertheless, although technically *dicta*, the Court did address the nature of the state interest by recognizing the legitimacy of the Missouri Supreme Court's characterization of it in *Cruzan* and in its own characterization of the interest inherent in the Washington statute being challenged in *Glucksberg*. A logical place to begin our inquiry, then, would be with an examination of the Missouri Supreme Court's decision in *Cruzan*.

⁴⁴*Glucksberg*, 521 U.S. at 723.

⁴⁵*Id.* at 728.

⁴⁶*Id.* at 728 (“[O]ur decisions lead us to conclude that the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.”).

⁴⁷*Id.*

⁴⁸*Id.* at 728-35.

In *Cruzan*,⁴⁹ the Missouri Supreme Court directly addressed the nature of the state interest in the preservation of life. That court held that “[t]he state’s interest in life embraces two separate concerns: an interest in the prolongation of the life of the individual patient and an interest in the sanctity of life itself.”⁵⁰ Dividing the interest in the preservation of life between the prolongation of life and the sanctity of life can be meaningful only if what is intended is a division between an empirical and normative definition of life. That is, the concern with the prolongation of life must refer to the maintenance of a living being’s biological existence apart from any question of the value of that existence. The concern with the sanctity of life must refer to the preservation of life’s normative value.⁵¹

That this is what the court had in mind is reflected by its treatment of the two identified concerns. In discussing the interest in prolonging Nancy Cruzan’s life, the court discusses only its biological maintenance, stating “[t]he state’s interest in prolonging life is particularly valid in Nancy’s case. Nancy is not terminally ill. Her death is imminent only if she is denied food and water. Medical evidence shows Nancy will continue a life of relatively normal duration if allowed

⁴⁹*Cruzan v. Harmon* 760 S.W.2d 408 (1988).

⁵⁰*Id.* at 419.

⁵¹Unless the court’s division is understood in this way, its formulation would be entirely question-begging. Taken at face value, the assertion that the interest in the preservation of life consists in the prolongation of life is entirely uninformative in the absence of a definition of what the life that is being prolonged consists in. What is it that should be prolonged? The life of the body? The life of the mind? Sentient life? Similarly, the assertion that the interest in the preservation of life consists in the sanctity of life is equally vacuous in the absence of any definition of what “sanctifies” life, that is, what gives life its value. Is it mere respiration? The ability to interact with one’s environment? Self-awareness? The possession of a soul?

basic sustenance.”⁵² And in discussing the sanctity of life the court discusses what makes life valuable stating “[t]he state’s concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality.”⁵³

Although the court appears to be making a substantive point in this part of its opinion, its discussion is, in fact, pure verbiage. By making the principle that “life is precious and worthy of preservation without regard to its quality” the basis for its definition of the sanctity of life, the court oxymoronically collapses the distinction it has just been at pains to draw. This is because to say that life is valuable regardless of its quality is simply to say that biological life is inherently valuable, which is to say that there is no meaningful distinction between biological life and the sanctity of life. The court must, of course, identify the sanctity of life with biological life for its initial assertion that the state has a legitimate concern with the prolongation of purely biological life to make sense. Thus, despite the apparent distinction the court draws, all it is actually saying is that biological life is valuable in itself.

Although this discussion may seem to be mere logic-chopping, it contains a valuable lesson. In the context of an investigation into the nature of the state interest in the preservation of life, no reference to the sanctity of life can be helpful. The question we are attempting to answer is what makes life worth preserving, that is, what gives life its normative value. Only normatively valuable life can be “sanctified.” Hence, the question under consideration is identical to the question of what the sanctity of life consists in. Any attempt to answer this question that itself refers to the sanctity of life would obviously be question-begging. What gives life its sanctity is

⁵²*Id.*

⁵³*Id.*

precisely what we are trying to determine.

By declaring biological life to be inherently valuable, the Missouri Supreme Court is identifying the state interest in the preservation of life with the interest in prolonging biological life. This is the meaning of the court's assertion that "the state's interest is not in the quality of life, . . . [but] is an unqualified interest in life."⁵⁴ The "unqualified" interest in life is the interest in life without regard to its quality, which can only be an interest in maintaining biological life.

Although this formulation of the state interest is, strictly speaking, not necessary to the United States Supreme Court's decision in either *Cruzan* or *Glucksberg*, Chief Justice Rehnquist, speaking for the majority in both cases, nevertheless endorses it. In reviewing the Missouri Supreme Court's decision in *Cruzan*, Rehnquist states that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."⁵⁵ Rehnquist reiterates this view of the state interest as an interest in the preservation of biological life in *Glucksberg* where he reads it into Washington's assisted-suicide statute, stating

Washington has an "unqualified interest in the preservation of human life." The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. . . . Washington, . . . through its assisted-suicide ban, insists that all persons' lives, from beginning to end, *regardless of physical or mental condition*, are under the full protection of the law."⁵⁶

Thus, Chief Justice Rehnquist has advanced a conception of the state interest in the preservation

⁵⁴*Cruzan*, 760 S.W.2d at 422.

⁵⁵*Cruzan*, 497 U.S. at 281.

⁵⁶*Glucksberg*, 521 U.S. at 728-29 (emphasis added).

of life as an interest in the prolongation of biological life. For Rehnquist, and hence for a majority of the Court, the legal meaning of life is biological life.

Other courts and other members of the Supreme Court have defined the state interest differently. They have advanced other conceptions of the legal meaning of life. Consider, to begin with, the dissenting opinion of Judge Blackmar of the Missouri Supreme Court in *Cruzan*.⁵⁷ Blackmar explicitly considers and rejects the proposition that the state can have a legitimate interest in preserving an individual's biological life regardless of the quality of that life, arguing

[i]t is unrealistic to say that the preservation of life is an absolute, without regard to the quality of life. . . . It is appropriate to consider the quality of life in making decisions about the extraordinary medical treatment. Those who have made decisions about such matters without resort to the courts certainly consider the quality of life, and balance this against the unpleasant consequences to the patient. There is evidence that Nancy may react to pain stimuli. If she has any awareness of her surroundings, her life must be a living hell. She is unable to express herself or to do anything at all to alter her situation. . . . Nor am I impressed with the crypto-philosophers cited in the principal opinion, who declaim about the sanctity of any life without regard to its quality. They dwell in ivory towers.⁵⁸

In decrying the identification of the sanctity of life with purely biological existence, Blackmar is rejecting the notion that biological life is inherently valuable. Biological life is indeed life, but it is not necessarily normatively valuable life. There is some other feature, some degree of quality, that biological life must possess to have value. And because the state interest in the preservation of life must be an interest in preserving a normatively valuable life, it must be an interest in preserving a life that possesses this feature or quality. It cannot be merely an interest in preserving biological life.

⁵⁷*Cruzan*, 760 S.W.2d at 427-430 (Blackmar, J., dissenting).

⁵⁸*Id.* at 429.

In rejecting majority's claim that biological life is inherently valuable, however, Judge Blackmar is immediately confronted with an extremely difficult question: What is the feature or quality that gives life value? Blackmar himself seems acutely aware of the difficulty of this question. Although he is highly critical of the court's majority for "unnecessarily subject[ing] Nancy and those close to her to continuous torture that no family should be forced to endure,"⁵⁹ beyond that he feels compelled to say that "I am grasping for words which elude me, and so will not say more."⁶⁰ Although certain that Nancy Cruzan's life does not possess whatever feature gives life its value, Blackmar seems unable to identify precisely what that feature is.

In declaring himself at a loss for words, Judge Blackmar is implicitly recognizing the inherent difficulty of identifying the feature or quality that life must possess to be normatively valuable; a difficulty that itself forms at least part of the appeal of the position that rejects all quality of life considerations.⁶¹ Judicial efforts to grapple with this question have unfortunately enhanced its difficulty due to the courts' frequent failure to recognize two important distinctions: the distinction between interpersonal and intrapersonal assessments of quality of life and the distinction between objective and subjective measures of quality of life. It will therefore repay our scrutiny to take a moment to consider each of these distinctions.

The first of these is the distinction between interpersonal and intrapersonal assessments of

⁵⁹*Id.* at 430.

⁶⁰*Id.*

⁶¹Part, but not all. See *infra* text accompanying notes 62-64 discussing how the confusion between interpersonal and intrapersonal quality of life judgments can mistakenly lead courts to reject all quality of life judgments.

quality of life.⁶² Interpersonal assessments of quality of life may be thought of as assessments of an individual's social worth. In assessments of this type, the quality of an individual's life is evaluated for the purpose of ranking that individual's worth relative to others. Such assessments may be made to support utilitarian calculations regarding the amount of resources to expend on the various members of society. The very act of making interpersonal assessments of quality of life implies that some people's lives are worth more than others'. In contrast, intrapersonal assessments of quality of life are noncomparative assessments. Assessments of this type concern "the value or quality of an individual's life *to that individual*, regardless of how society or would-be calculators of social utility evaluate it."⁶³ Such assessments do not imply that anyone's life is worth more than anyone else's.

Interpersonal assessments of quality of life are often viewed with distaste by the courts. Because of the abuses of the Nazi and Jim Crow eras in which governments discounted the value of the lives of members of disfavored groups, many courts are (rightly) suspicious of interpersonal assessments of quality of life. Hence, they are loathe to invest other branches of government with the power to make such judgments or to make such judgments themselves. Accordingly, in the context of the right to die, courts often reject standards that allow decisions to turn on assessments of quality of life on the ground that every person's life is of equal value. A significant part of the appeal of the position that rejects all consideration of the quality of life undoubtedly stems from the belief that such a position is necessary to ensure that all human beings are treated

⁶²See Allen Buchanan & Dan W. Brock, *Deciding for Others: Standards for Decision-Making*, in *ETHICAL ISSUES IN MODERN MEDICINE* 207, 211 (John Arras & Nancy Rhoden eds., 3d ed. 1989).

⁶³*Id.*

as having equal moral worth.⁶⁴ But whereas this may be a good reason to reject standards that permit *interpersonal* assessments of quality of life, it is not a reason for rejecting standards that permit *intrapersonal* assessments. By failing to distinguish between the two types of assessment, courts allow their distaste for the former to cause them to reject the latter as well.⁶⁵

In what follows, we must be careful not to fall into the same trap. There may be a reason why the state interest in the preservation of life should be construed so as to exclude intrapersonal assessment of the quality of life. If there is, however, it is not that doing so is necessary to maintain respect for the equal moral worth of all human beings. Intrapersonal assessment of the quality of life is perfectly consistent with treating every life as equally valuable. As long as the same standard of intrapersonal assessment is applied to everyone, all are treated equally.

The second distinction we should be cognizant of is that between objective and subjective measures of quality of life. Intrapersonal assessments of quality of life may be made along many dimensions. The quality of an individual's life can be measured in terms of the amount of physical pleasure or pain the individual experiences, the number of physical or mental tasks the individual is capable of performing, the extent to which the individual is aware of his or her surroundings or is self-aware, or the extent to which the individual is able to function independently. In each of these cases, quality of life is measured according to an objective standard of value. Life is assigned

⁶⁴See *supra* note 61.

⁶⁵The preeminent example of this may be the Missouri Supreme Court's decision in *Cruzan*, in which it argued that

It is tempting to equate the state's interest in the preservation of life with some measure of quality of life. . . . But the state's interest is not in quality of life. . . . *Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives.* Instead, the state's interest is in life; that interest is unqualified. *Cruzan*, 760 S.W.2d at 420 (emphasis added).

a higher or lower quality in proportion to its possession of more or less of an objectively defined characteristic. This need not be the case, however. Quality of life can also be measured on a subjective basis. That is, the quality of one's life may be determined purely on the basis of how much the individual living the life values it. The subjective measure of the quality of life does not require a common interpersonal standard of value against which the quality of individual lives is measured. The quality of life of an individual's life is simply whatever quality the individual assigns to it. When a subjective measure of the quality of life is employed, there is a common metric only in the sense that *every* individual gets to determine the value of his or her life for himself or herself. Thus, under an objective measure of the quality of life in which cognitive functioning is regarded as valuable, a conscious patient has a higher quality of life, *ceteris paribus*, than one in a persistent vegetative state regardless of either patient's personal values. Under a subjective measure, a patient's life is of higher or lower quality when it possesses more or less of whatever the patient believes gives life it value.

With these distinctions in mind, we can return to Judge Blackmar's quandary. If the state interest in the preservation of life is an interest in preserving not merely biological life, but normatively valuable life, what feature or features give life its value? What is the legally appropriate measure of the quality of life? Blackmar's own comments suggest that he is making an intrapersonal assessment of the quality of life on the basis of an objective measure of quality. In attacking the majority opinion for refusing to consider the quality of Nancy Cruzan's life, Blackmar is clearly not arguing that the court should have considered whether Nancy's life is worth more or less than anyone else's, but that it should have considered the value of her life to her. However, the only factors that he mentions in attempting to make this evaluation concern the

amount of pain and suffering that Nancy Cruzan is experiencing. He evaluates the quality of Nancy's life in terms of the "unpleasant consequences"⁶⁶ of her treatment, noting that "[t]here is evidence that Nancy may react to pain stimuli,"⁶⁷ that "[i]f she has any awareness of her surroundings, her life must be a living hell,"⁶⁸ and that "[s]he is unable to express herself or to do anything at all to alter her situation."⁶⁹ Although he seems uncertain as to what gives life its normative value, he is sure that the court should not be subjecting Nancy to a life of "torture." Whether consciously or not, Blackmar is measuring the quality of Nancy Cruzan's life in terms of her capacity to feel pleasure and pain and experience satisfaction or suffering, an objective standard of value.

Blackmar's position on the quality of life is one that is fairly commonly adopted by the courts. A good illustration of this is provided by the New Jersey Supreme Court case of *In re Conroy*.⁷⁰ *Conroy* involved a petition to remove a nasogastric feeding tube from a patient who, although not in a persistent vegetative state, was incompetent and would die without the tube. In deciding the case, the court explicitly considered the situation in which there was little or no reliable evidence that an incompetent patient would wish to terminate life-sustaining treatment. This situation constitutes a telling test case because if the state interest in the preservation of life is characterized as an interest in the prolongation of biological life (i.e., as an "unqualified" interest

⁶⁶*Cruzan*, 760 S.W.2d at 429 (Blackmar, J., dissenting).

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰98 N.J. 321, 486 A.2d 1209 (1985).

in life), then no petition to withdraw treatment should ever be granted. In deciding that treatment can be withdrawn when it is in the patient's best interest to do so, the court implicitly rejected this characterization of the state interest. Rather, it ruled that it can be in a patient's best interest to have life-sustaining medical treatment withdrawn when

it is clear that the burdens of the patient's continued life with the treatment outweigh the benefits of that life for him. By this we mean that the patient is suffering, and will continue to suffer throughout the expected duration of his life, unavoidable pain, and that the net burdens of his prolonged life (the pain and suffering of his life with the treatment less the amount and duration of pain that the patient would likely experience if the treatment were withdrawn) markedly outweigh any physical pleasure, emotional enjoyment, or intellectual satisfaction that the patient may still be able to derive from life.⁷¹

By authorizing the withdrawal of treatment when the pain of continued life sufficiently outweighs its pleasures, the court adopted an objective measure of the quality of life. In doing so, however, it went out of its way to ensure that its ruling could not be interpreted to permit interpersonal assessments of the quality of life by stating

[a]lthough we are condoning a restricted evaluation of the nature of a patient's life in terms of pain, suffering, and possible enjoyment . . . , we expressly decline to authorize decision-making based on assessments of the personal worth or social utility of another's life, or the value of that life to others. We do not believe that it would be appropriate for a court to designate a person with the authority to determine that someone else's life is not worth living simply because, to that person, the patient's "quality of life" or value to society seems negligible. The mere fact that a patient's functioning is limited or his prognosis dim does not mean that he is not enjoying what remains of his life or that it is in his best interests to die. More wide-ranging powers to make decisions about other people's lives, in our view, would create an intolerable risk for socially isolated and defenseless people suffering from physical or mental handicaps.⁷²

Thus, the *Conroy* court, like Judge Blackmar, would permit the withdrawal of life-sustaining

⁷¹*Conroy*, 98 N.J. at 365, 486 A.2d at 1232.

⁷²*Conroy*, 98 N.J. at 367, 486 A.2d at 1232-33.

treatment on the basis of an intrapersonal assessment of the quality of life where quality is measured objectively in terms of the individual's experience of pleasure and pain. This implies that the state interest in the preservation of life is not an interest in preserving biological life, but an interest in preserving life that is not overly burdened by intractable pain and suffering.

Quality of life need not be measured in terms of pleasure and pain, of course. Other objective standards of value are available and are sometimes employed by the courts. Indeed, the dissenting justice in *Conroy* specifically criticized the majority for measuring quality strictly in terms of pain.⁷³ Justice Handler argued in dissent that “a decision to focus exclusively on pain as the single criterion ignores and devalues other important ideals regarding life and death,”⁷⁴ such as the patient's dependence on others, lack of privacy, and the degree to which the treatment violates the patient's bodily integrity (its invasiveness).⁷⁵ Similarly, in *In re Dinnerstein*,⁷⁶ the court identified the state interest in the preservation of life not with “a mere suspension of the act of dying, but [with] . . . at the very least, a remission of symptoms enabling a return towards a normal, functioning, integrated existence.”⁷⁷ It has even been suggested that the quality of life should be measured in terms of an individual's potential benefits to others. Thus, at one point in his concurrence in *Quill* and *Glucksberg*, Justice Stevens argued that

⁷³*Conroy*, 98 N.J. at 393-96, 486 A.2d at 1247-48 (Handler, J. dissenting in part, concurring in part).

⁷⁴*Id.* at 396, 1248.

⁷⁵*Id.*

⁷⁶*In re Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978).

⁷⁷*Dinnerstein*, 6 Mass. App. Ct. at 472-73, 380 N.E.2d at 138.

[t]he State has an interest in preserving and fostering the benefits that every human being may provide to the community—a community that thrives on the exchange of ideas, expressions of affection, shared memories, and humorous incidents, as well as on the material contributions that its members create and support. The value to others of a person’s life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life.⁷⁸

In each of these cases, quality of life is being measured by an objective standard other than the ratio of pleasure to pain.

Despite the existence of such alternative standards, courts are loathe to employ any objective measure of quality other than the pleasure/pain metric advanced by *Conroy* and Judge Blackmar. To some extent, this may be due to judges’ failure to distinguish between interpersonal and intrapersonal assessments of quality of life and the resulting belief that measuring quality of life in terms of individual’s independence or cognitive functioning would cheapen the lives of the disabled or other vulnerable groups. To some extent, it may be due to judges’ beliefs that they are either ill-equipped to or simply should not be rendering judgments on fundamental questions of moral value. Judgments rendered in terms of pain and the prospects for its relief may strike judges as scientific or capable of empirical measurement and hence, as not implicating fundamental moral issues. Whatever the reason, however, judicial assessments of quality of life are usually rendered in terms of pain and suffering.

Among the Justices of the Supreme Court, there is reason to believe that Justices O’Connor and Breyer subscribe to this position. Each seems willing to allow consideration of a patient’s quality of life as measured in terms of pain and suffering to influence the outcome of a

⁷⁸*Glucksberg*, 521 U.S. at 741 (Stevens, J. dissenting). It should be noted that this does not represent Justice Steven’s ultimate construction of the state interest in the preservation of life. Stevens clearly advocates a subjective measure of the quality of life. See *infra* text accompanying notes X-X.

right to die case. Although O'Connor was part of the majority in both *Cruzan* and *Glucksberg/Quill*, her concurrence in the latter cases provides evidence that she did not adopt Rehnquist's commitment to interpreting the state interest in the preservation of life as one in the prolongation of biological life. Although agreeing with the Court that there is no right to commit suicide, O'Connor appears to regard "the narrower question [of] 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"⁷⁹ as an open one. In concurring on the grounds that "[t]here is no dispute that dying patients . . . can obtain palliative care, even when doing so would hasten their deaths,"⁸⁰ O'Connor suggests that she would not interpret the state interest in the preservation of life as supporting the prolongation of a life of intractable pain and suffering. Justice Breyer, who also concurs in *Glucksberg/Quill*, explicitly agrees with O'Connor on this point, going so far as to indicate that he would reach a different conclusion in cases in which "the law's impact upon *serious and otherwise unavoidable physical pain* (accompanying death) [was] more directly at issue."⁸¹ Hence, neither O'Connor nor Breyer seems willing to recognize a state interest in preserving life regardless of its quality. Both appear to be implying that the state interest in the preservation of life must be limited to an interest in preserving life of at least some minimal quality, where quality of life is measured objectively in terms of physical pain and suffering.

On my reading of the relevant cases, there do not appear to be any members of the Court

⁷⁹*Glucksberg*, 521 U.S. at 736 (O'Connor, J. concurring) (emphasis added).

⁸⁰*Id.* at 737-38.

⁸¹*Glucksberg*, 521 U.S. at 792 (Breyer, J. concurring) (emphasis added).

who would associate the state interest in the preservation of life with the preservation of a life of *objective* quality measured in any terms other than pain and suffering. But, as previously noted,⁸² quality of life need not be measured objectively. Several justices have been willing to measure it subjectively and therefore have construed the state interest in the preservation of life as an interest in preserving a life that is regarded as valuable by the person living it. This appears to be the position taken by Justice Brennan, speaking for Justices Marshall and Blackmun as well, in his dissent in *Cruzan*.⁸³ After recognizing the existence of the state interest in the preservation of life, Brennan flatly rejects the Missouri Supreme Court's characterization of it that was endorsed by Justice Rehnquist's majority opinion. In arguing that "the State has no legitimate general interest in someone's life, *completely abstracted from the interest of the person living that life*, that could outweigh the person's choice to avoid medical treatment,"⁸⁴ Brennan limits the "life" that the state may act to protect to one that serves the interests of the individual concerned. That Brennan is employing a truly subjective measure of life's normative value is made clear later in the opinion when he argues that even the possibility of a medical miracle that would restore the patient's quality of life under any objective measure of quality would not justify state intervention if the patient would not choose to pursue that possibility.⁸⁵

⁸²See *supra* page 22.

⁸³*Cruzan*, 497 U.S. at 301-330 (Brennan, J., dissenting).

⁸⁴*Id.* at 313 (emphasis added).

⁸⁵*Id.* at 321 ("The majority also misconceives the relevance of the possibility of 'advancements in medical science,' by treating it as a reason to force someone to continue medical treatment against his will. The possibility of a medical miracle is indeed part of the calculus, but it is a part of the *patient's* calculus. If current research suggests that some hope for cure or even moderate improvement is possible within the life span projected, this is a factor that should be and

The most forceful advocate of defining life in terms of its subjective value, however, is Justice Stevens. In his dissent in *Cruzan*, Stevens presents an eloquent argument for the proposition that the state interest in the preservation of life is not an interest in preserving biological life, but in preserving a life that is meaningful to the individual living it. He begins by rejecting the Missouri Court's, and hence Justice Rehnquist's, equation of life with biological life as a question-begging effort to define away the very question at issue: what life does the state have a legitimate interest in preserving.

Missouri asserts that its policy is related to a state interest in the protection of life. In my view, however, it is an effort to define life, rather than to protect it, that is the heart of Missouri's policy. Missouri insists, without regard to Nancy Cruzan's own interests, upon equating her life with the biological persistence of her bodily functions.

...
... Nancy Cruzan is obviously "alive" in a physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is "life" as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence. The State's unflagging determination to perpetuate Nancy Cruzan's physical existence is comprehensible only as an effort to define life's meaning, not as an attempt to preserve its sanctity.⁸⁶

He then argues that life cannot properly be identified with mere biological continuance.

Life, particularly human life, is not commonly thought of as a merely physiological condition or function. Its sanctity is often thought to derive from the impossibility of any such reduction. When people speak of life, they often mean to describe the experiences that comprise a person's history, as when it is said that somebody "led a good life." They may also mean to refer to the practical manifestation of the human spirit, a meaning captured by the familiar observation that somebody "added life" to an assembly. If there is a shared thread among the various opinions on this subject, it may be that life is an activity which is at once the matrix for, and an integration of, a person's interests. In any event, absent some theological abstraction, the idea of life

would be accorded significant weight in assessing what the patient himself would choose.").

⁸⁶*Cruzan*, 497 U.S. at 344-345 (Stevens, J., dissenting).

is not conceived separately from the idea of a living person.⁸⁷

From this, Stevens concludes that the life that the state has a interest in preserving is not the life of the body, but the life of the person, or, in Nancy Cruzan’s case, the life “defined by reference to her own interests, so that her life expired when her biological existence ceased serving *any* of her own interests.”⁸⁸ Thus, for Stevens, the state interest in the preservation of life is an interest in preserving a life of subjective value to the individual living it.

Stevens reiterates this position in his concurrence in *Glucksberg/Quill*, where he goes out of his way to indicate that it requires only intrapersonal assessments of quality of life. Again employing a subjective measure of the quality of life, Stevens restates the conclusion he drew in *Cruzan* by defining the state interest in the preservation of life as an interest in the “protection of every individual’s *interest in* remaining alive, which . . . [p]roperly viewed, . . . is not a collective interest that should always outweigh the interests of a person who because of pain, incapacity, or sedation finds her life intolerable, but rather, an aspect of individual freedom.”⁸⁹ He then implicitly criticizes the majority opinion, which rests partly on the ground that Washington’s “assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy,”⁹⁰ for failing to distinguish between interpersonal and intrapersonal assessments of quality of life. Thus, he argues that

[a]llowing the individual, rather than the State, to make judgments “about the

⁸⁷*Id.* at 345-47.

⁸⁸*Id.* at 351.

⁸⁹*Glucksberg*, 521 U.S. at 746 (Stevens, J. concurring) (emphasis added).

⁹⁰*Glucksberg*, 521 U.S. at 732.

‘quality’ of life that a particular individual may enjoy,” does not mean that the lives of terminally ill, disabled people have less value than the lives of those who are healthy. Rather, it gives proper recognition to the individual’s interest in choosing a final chapter that accords with her life story, rather than one that demeans her values and poisons memories of her.⁹¹

Evaluating the quality of the lives of the disabled in terms of their own, rather than society’s or any one else’s values does not cheapen their lives, but treats them in exactly the same way all members of society are entitled to be treated, with respect for their autonomy. Thus, Stevens argues that there can be no objection to legally defining “life” as a life of value to the person living it on the ground that doing so would deny the equal value of all human life.

[This section continues by assimilating the treatment of the state interest in the preservation of life in several significant post-*Quinlan*, pre-*Glucksberg* right to die decisions into one of the three identified perspectives: life = biological life, life = life of objective quality, life = life of subjective quality. It concludes by offering an understanding of what constitutes suicide in terms of these distinctions for later use. Suicide refers to the situation that arises from a great divergence between the objective and subjective quality of life. Thus, suicide consists in the intentional termination of a biological life of objective value by one for whom it possesses little or no subjective value.]

IV. The Proper Construction of the State Interest in the Preservation of Life

Part III demonstrated that there are three distinct legal meanings of “life” as that term is used in the context of the state interest in the preservation of life: biological life, life of objective quality (usually measured in terms of the ratio of pleasure/satisfaction to pain/suffering), and life

⁹¹*Glucksberg*, 521 U.S. at 746-47 (Stevens, J. concurring).

of subjective quality (measured in terms of what the person whose life it is regards as valuable).

Each of these meanings has adherents among the judiciary generally and among the Justices of the Supreme Court in particular. But which is correct? What really is the legal meaning of life?

One way to answer this question would be to address the underlying philosophical issue of what makes life normatively valuable. If we could determine what gives life its moral significance, we would be able to identify the “life” the state should act to preserve. It would be an understatement, however, to say that such an undertaking would be beyond the scope of this article. It undoubtedly would be beyond the scope of my lifetime as well. Fortunately, it is not necessary to determine the philosophical meaning of life to determine the proper legal meaning of “life.” Hence, I will make no effort to address the philosophical issue. Rather, I will advance an argument that applies only in the legal context. Specifically, I will claim that the right to die that has been recognized as a protected liberty interest by the Supreme Court, i.e., the right to refuse life-sustaining medical treatment, can function as a meaningful Constitutional right only if the state interest in the preservation of life is defined as an interest in protecting life of subjective quality. Hence, *for purposes of Constitutional analysis*, the proper *legal* meaning of life is life that is of value to the person living it.

To develop this argument, I must spend some time considering the nature of legal rights in general and the nature of fundamental Constitutional rights in particular. But before beginning this consideration, one possible construction of the state interest in the preservation of life may be dismissed out of hand. On the ground of logic alone, the state cannot have an *exceptionless* interest in the preservation of biological life. This is because to assert that the state possesses an exceptionless interest in the preservation of biological life is simply to deny that the right to refuse

life-sustaining medical treatment exists. The existence of an absolute state interest in prolonging biological life is logically incompatible with the existence of a right that empowers individual citizens to act in ways that shorten their biological lives. No logical space for a right to die remains if the state is empowered to preserve biological life *in all circumstances*. A state interest in the preservation of biological life *without regard to its quality* is consistent with the existence of a right to die only if it varies in intensity in proportion to the *amount* of remaining life. That is, the strength of the state interest must diminish as the life span of the relevant individual shortens until at some point it becomes insufficient to override an individual's decision to forgo life-sustaining medical treatment.

Recognizing this may be of negligible practical significance, however. Despite the all the talk of the state interest in the preservation of life being “unqualified”⁹² or “absolute,”⁹³ no state has actually asserted and no court has recognized the existence of an *exceptionless* interest in the preservation of biological life. In characterizing the state interest in life as unqualified in *Cruzan*, the Missouri Supreme Court (and by implication, the United States Supreme Court), was asserting only that the state interest did not depend on life's quality,⁹⁴ not that it did not depend on life's duration. Indeed, the Missouri court recognized that the strength of the state interest

⁹²See *Cruzan*, 760 S.W.2d at 420; *Cruzan*, 497 U.S. at 281.

⁹³See *Cruzan*, 760 S.W.2d at 429.

⁹⁴As evidenced by its assertion that “some courts find quality of life a convenient focus when justifying the termination of treatment. But the state's interest is not in quality of life. The broad policy statements of the legislature make no such distinction; nor shall we. . . Instead, the state's interest is in life; that interest is unqualified.” *Id.* at 420.

varied with the duration of remaining life,⁹⁵ basing its decision on the fact that “Nancy will continue a life of relatively normal duration if allowed basic sustenance.”⁹⁶ In this respect, even the Missouri Supreme Court, which articulates the strongest version of the state interest in preserving biological life, is in the tradition of *Quinlan*, which placed the relationship between the right to die and the state interest in the preservation of life on a sliding scale, stating “[w]e think that the State’s interest Contra weakens and the individual’s right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual’s rights overcome the State interest.”⁹⁷ For all practical purposes, therefore, the version of the state interest that defines life as biological life should be understood as an interest that varies in intensity in proportion to the duration of the patient’s remaining life. With this in mind, we can now turn our attention to the nature of fundamental Constitutional rights.

A. The Minimum Content of Rights: Dworkin’s Argument

When the Supreme Court recognized a Fourteenth Amendment liberty interest in refusing life-sustaining medical treatment in *Cruzan* and *Glucksberg/Quill*, it transformed the common law

⁹⁵In describing the state’s interest in the preservation of life, the court quotes *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626 (1986) to the effect that [T]he State’s interest in preserving life is very high when “human life [can] be saved where the affliction is curable.” That interest wanes when the underlying affliction is incurable and “would soon cause death regardless of any medical treatment.” The calculus shifts when the issue is not “whether, but when, for how long, and at what cost to the individual that life may be *briefly* extended.” *Brophy*, 497 N.E.2d at 635.

⁹⁶*Cruzan*, 760 S.W.2d at 419.

⁹⁷*Quinlan*, 70 N.J. at 41, 355 A.2d at 664. Despite the sliding scale, the *Quinlan* court’s characterization of the state interest is considerably weaker than the *Cruzan* court’s. In *Quinlan*, the held that the state interest weakens not only in proportion to the duration of life, but also in proportion to the “degree of bodily invasion.” This imports a consideration of the quality of life into the equation that the Missouri court would not permit.

right to bodily integrity into a fundamental Constitutional right. Although the precise contours of such rights remain controversial,⁹⁸ the details of that debate need not concern us. In the present context, it is enough to recognize first, that Constitutional rights are rights against the government, that is, rights to be protected against governmental interference with or failure to provide the activities, goods or services secured by the rights, and second, that *fundamental* Constitutional rights are a special class of “preferred rights,”⁹⁹ that are entitled to protection “from all but the most compellingly justified instances of governmental intrusion.”¹⁰⁰ As the Court itself explains it, the Due Process Clause of the Fourteenth Amendment “provides heightened protection against government interference with certain fundamental rights and liberty interests, . . . which 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.’”¹⁰¹ The essence, then, of a fundamental Constitutional right is that it provides its possessor with a greater amount of protection against governmental interference with his or her activities than an ordinary, non-fundamental Constitutional right.

To appreciate the significance of this, let us begin by considering the amount of protection one receives from a non-fundamental right. What gives an ordinary right against the government

⁹⁸See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 438 (6th ed. 2000) (“The basis upon which the Court declares an aspect of liberty to be a fundamental Constitutional right remains vague today. . . . There has been little agreement on the Court to among scholars concerning the proper basis upon which the Justices should declare a right to be fundamental.”)

⁹⁹Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

¹⁰⁰LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 770 (2d ed. 1988).

¹⁰¹Glucksberg, 521 U.S. at 720-21.

its substance? What is the minimum content that a right against the government must possess for it to be a meaningful entity, or, more informally, what is required for a right against the government to be taken seriously? Ronald Dworkin has supplied an answer to this question that I believe to be correct, and that, with one emendation, can be applied in the context of the right to die.¹⁰² Dworkin argues that for a right against the government to be meaningful, considerations of general social utility alone must be inadequate to authorize the state to override it. For reasons stated below, I would extend the scope of Dworkin's conclusion a bit to state that for such a right to be meaningful, considerations of *either* general social utility *or paternalism* alone must be inadequate to authorize the state to override it. In other words, the essential characteristic of a right against the government is that the state may not abridge it on the basis of either purely utilitarian considerations of what will be beneficial for society as a whole or purely paternalistic considerations of what would be good for the individual concerned. Let us take a moment to examine this argument.

The argument rests on the fundamental premise that even when respect for individual rights is not at issue, a legitimate government must function under basic moral constraints. That is, a proper government is always under the obligation to provide a moral justification for its proposed actions. Dworkin argues that the basic moral constraint on government action is utilitarian; that a morally proper government may act only when its proposed actions would serve the common good. This would mean that the standard justification for government action is that, giving equal consideration to the interests of all members of society, the action is likely to produce

¹⁰²See RONALD DWORKIN, *Taking Rights Seriously*, in *TAKING RIGHTS SERIOUSLY* 184 (1977).

more aggregate good than harm.¹⁰³ Therefore, even when rights are not present, individuals are entitled to be protected against government actions that are not designed to serve the common good.¹⁰⁴

Although Dworkin's characterization of utilitarianism as the basic moral constraint on government action is correct as far as it goes, there is reason to believe that it is too narrow; that government action can be justified on other than utilitarian grounds. Perhaps for actions that affect members of society differentially, those that impose losses on some in order to provide benefits to others, the utilitarian standard provides the appropriate moral floor. But not all government action is of this nature. Government action is often designed to advance the good of the very individuals whose activities it restricts. Laws requiring the use of seat belts or helmets and those prohibiting or restricting the use of narcotics and other intoxicants have this character. Many political and moral philosophers argue that such paternalistic government action is morally justified even if it does not necessarily promote the greatest good for the greatest number. Indeed, in cases concerning an individual's decision refuse life-sustaining treatment, paternalistic considerations rather than utilitarian ones are often the basis for government intervention.

For purposes of this article, therefore, I propose to employ a more expansive version of Dworkin's fundamental premise. While fully agreeing with his contention that even when

¹⁰³*Id.* at 191 ("Of course a responsible government must be ready to justify anything it does, particularly when it limits the liberty of its citizens. But normally it is a sufficient justification, even for an act that limits liberty, that the act is calculated to increase what the philosophers call general utility—that it is calculated to produce more over-all benefit than harm.").

¹⁰⁴It is important to note that Dworkin is not claiming that any government action which does produce more overall good than harm is thereby morally justified, but that only actions which have this feature can be morally justified. His claim is that any proposed government action must be designed to do more good than harm to be in the "moral ballpark."

individual rights are not at stake, government must function under moral constraints, I will consider those constraints satisfied when the government acts for either utilitarian or paternalistic reasons. On my reading, a morally proper government may act not only when its proposed action would serve the common good, but also when it would serve the good of the individuals whose activities are being restricted. Therefore, I will represent the fundamental premise of the argument as asserting that even when rights are not present, individuals are entitled to be protected against governmental actions that are not designed to serve either the common good or the good of the individuals affected.¹⁰⁵

To this initial premise, Dworkin adds what he believes to be the obvious truth that for a right to be a meaningful entity, it must provide its possessors with something they would not otherwise have. Specifically, it must provide them with more protection against governmental interference with their activities than they would have without the right. In making this point, Dworkin is highlighting the difference between treating rights as substantive objects and merely paying lip service to them. No matter how vociferously one may proclaim his or her adherence to rights, if the rights do not provide their holders with any protection that they do not already possess, the rights are not morally significant entities. In Dworkin's words, they are not being taken seriously.¹⁰⁶

These two premises give rise to an immediate implication. If rights must provide

¹⁰⁵Dworkin does not argue for his fundamental premise explicitly since he apparently regards it as a matter of common sense. We may safely follow him in this since government actions that can be justified on neither utilitarian nor paternalistic grounds are precisely those which are designed to be detrimental to society or exploitative and represent the model of tyrannical behavior.

¹⁰⁶DWORKIN, *supra* note 102, at 186.

individuals with more protection than they would ordinarily have and if individuals ordinarily have the amount of protection afforded by the government's obligation to act only for the common good or the particular good of the individual subject to restriction, then it must follow that rights provide individuals with more protection than is afforded them merely by the government's obligation to act only for the common good or the particular good of the individual subject to restriction. In other words, for rights to mean anything at all, they must mean that the government is not justified in interfering with the activities the rights protect *solely* because such interference would be beneficial for society as a whole or for the specific individual affected. Taking rights seriously means that the benefit of society as a whole or the individual himself or herself can never be a sufficient ground for their abridgement.

Dworkin neatly summarizes his argument on this point as follows.

Of course a responsible government must be ready to justify anything it does, particularly when it limits the liberty of its citizens. But normally it is a sufficient justification, even for an act that limits liberty, that the act is calculated to increase what the philosophers call general utility--that it is calculated to produce more over-all benefit than harm. . . . When individual citizens are said to have rights against the Government, however, like the right of free speech, that must mean that this sort of justification is not enough. Otherwise the claim would not argue that individuals have special protection against the law when their rights are in play, and that is just the point of the claim.¹⁰⁷

I would depart from this only to insert the words "or to benefit the individuals subject to the restrictions themselves" into the ellipsis of the quote. Thus, the essential logical feature of a right against the government is that it may not properly be overridden merely to serve either the common or the specific individual's own good. It is precisely this quality of being proof against the force of utilitarian and paternalistic considerations that constitutes the minimum content that

¹⁰⁷R. DWORKIN, *supra* note 102, at 191.

must be present for something to qualify as a meaningful, substantive right.

B. Implications

How can understanding the minimal content of rights against the government help us determine the legal meaning of “life”? To answer this question, let us assume for the moment that individuals possess no right to die; that there is no common law or Constitutional right to refuse life-sustaining medical treatment. What would the effect of this be on those who wish to refuse such treatment?

Dworkin’s argument reminds us that the absence of a right to refuse life-sustaining medical treatment or any other right does not mean that anything goes. It does not give the state *carte blanche* to treat individuals in any way it pleases. In the absence of the right to refuse life-sustaining treatment, the state would not be morally authorized to subject individuals to painful and invasive procedures to extend life for the purpose of maintaining a supply of spare organs for the nomenklatura. Although respecting individual rights is a critically important component of moral action, it does not constitute all or even most of morality. Rights do not embody all of the moral constraints on government action; rather, they impose additional moral constraints on the state beyond those to which it is ordinarily subject. Thus, even in the absence of a right to refuse life-sustaining medical treatment, the state can properly impose such treatment on an unwilling patient only when the doing so conforms to the basic moral constraints on state action, that is, only when doing so can be justified on utilitarian or paternalistic grounds.

Under what conditions, then, can imposing unwanted life-sustaining treatment be justified on utilitarian grounds? Surely when the cost of such treatment is low and the treatment will cure the patient and return him or her to full function, this will be the case. The archetypical example of

this would be giving a blood transfusion to one who does not want it when doing so is necessary to save his or her life during a surgical procedure.¹⁰⁸ In such a case, society receives the benefit of all of the future contributions made by the surviving patient and the patient and his or her loved ones receive the pleasure of the patient's continued existence at the cost of the small expenditure for the treatment plus the dissatisfaction the patient experiences at having his or her autonomy violated; clearly a situation in which the good realized outweighs the harm imposed. And it will just as surely not be the case when the cost of the treatment is high, the treatment is painful and invasive, can extend life only briefly without restoring function, and would cause emotional distress to the patient and/or his or her loved ones.¹⁰⁹ In such situations, society gains almost nothing from the patient's continued existence at the cost of great material expenditure and significant psychic harm to the patient and/or those close to him or her. Generally, then, as the cost of treatment increases, and with it the concomitant diversion of scarce medical resources from other uses, and as the duration of life extension and restoration of function it provides decreases, there comes a point at which the imposition of treatment can no longer be justified on utilitarian grounds. As admittedly difficult as it may be to determine when this point has been reached, it is fairly clear that most of the "right to die" cases involving terminal patients, and especially those in which the patients are irreversibly incompetent, are well beyond it. Forcing someone like Nancy Cruzan to accept life-sustaining medical treatment clearly cannot be justified in terms of its benefit to society as a whole.

¹⁰⁸As illustration, *see* John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576, 279 A.2d 670 (1971).

¹⁰⁹As illustration, *see* Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

The situation is similar with regard to the paternalistic justification for imposing unwanted life-sustaining treatment. Although what constitutes the patient's own "good" will certainly be controversial, when the cost of the treatment to the patient is low and the treatment can cure the patient and restore function, imposing it will almost always be good for the patient. Under such circumstances, a patient will be better off with the treatment than without it, regardless of whether being better off is defined in terms of pleasure, psychic satisfaction, or the ability to realize one's potential or lead a meaningful life. In contrast, no matter how "good" is defined, it will rarely be in a patient's best interests to undergo a painful and invasive treatment whose cost to the patient is high and which can neither cure the patient nor restore function.¹¹⁰ In such cases, treatment can provide little or no gain in pleasure, psychic satisfaction, or ability to realize one's potential or lead a meaningful life. As treatments become more expensive and more physically and psychologically onerous to the patient and provide less additional life and restoration of function, there will come a point at which treatment can no longer be justified on the ground that it is for the patient's own good. And although it may be just as difficult to identify this point as it was in

¹¹⁰This will not be true if the patient's good is identified purely with his or her continued biological existence. In such a case, it can never be in an individual's best interest to die. This will be a difficult identification to maintain, however, since it implies that an individual's good can never be advanced by any action that shortens one's life even slightly for a greater cause, such as saving one's loved ones or, in the case of war, one's fellow soldiers from death. Further, such an extreme definition is unlikely to be supported even by those who are religiously motivated because presumably they believe that it can be in individuals' best interest to lay down their lives for their faith or for god under certain circumstances. Such a definition would be especially odd because it implies that as long as one is biologically alive, one's life is good. Under it, therefore, there could be no paternalistic justification for interfering with any of an individual's self-destructive activities, such as drug abuse or self-mutilation, unless they posed a risk of biological death.

the context of utilitarian considerations,¹¹¹ people like Nancy Cruzan are clearly beyond it.

These considerations imply that even if there were no right to refuse life-sustaining medical treatment, the state would not be empowered to impose such treatment on individuals in all cases. Unless such treatment either increased the aggregate well-being of society or was in the best interests of the patient, the state cannot legitimately override an individual's decision to forego the treatment. Thus, in almost all cases in which the proposed treatment is expensive or onerous to the patient and can only briefly delay death with little restoration of function, the state would act improperly in imposing such treatment on an unwilling patient. In other words, in the absence of a right to refuse life-sustaining medical treatment, individuals are protected against state interference with their personal decisions about whether to accept or refuse life-sustaining medical treatment where the treatment will advance neither the common nor their own good. This represents the baseline level of protection against the state that individuals possess without rights.

This conclusion does not, of course, imply that there are no philosophically viable justifications for imposing life-sustaining medical treatment in all cases; merely that these justifications are not available to the government in a liberal democracy. For example, one could argue, as John Locke does, that the right to life is inalienable because God, as the creator of

¹¹¹An example of a difficult borderline case is provided by Donald Cowart. Cowart, who had suffered second- and third-degree burns over sixty-eight percent of his body, was subjected to months of extremely painful treatment and several surgical procedures despite his continual refusal to authorize the treatments. Cowart survived although he is blind, severely scarred, and has only limited use of his hands and arms and reduced hearing. *See* JUDITH AREEN ET AL., *LAW, SCIENCE AND MEDICINE* 1112-17 (1984). Although Cowart went on to have a happy and successful life, he frequently gives lectures in which he argues that he should have been allowed to refuse the treatment that saved his life. (Get reference to the NY Times article on Cowart for this.)

human life, is the only one empowered to determine when it should end.¹¹² If this were the case, then human beings would never be morally entitled to make decisions to end their lives before that would naturally occur according to God's plan. The state could then justify the imposition of life-sustaining medical treatment in all cases on the ground that it was ensuring that none of its citizens depart from God's plan for them. Such theologically-based justifications for state action, however, are barred to liberal democratic regimes by the doctrine of the separation of church and state, or in case the United States specifically, by the First Amendment. Thus, all explicitly religiously-based arguments for state action are ruled out of consideration by the structural features of American government.

We are now in a position to draw some initial conclusions about the nature of the legal right to die. If there were no such right, individuals would still be protected against state efforts to interfere with their decisions to refuse life-sustaining medical treatment unless doing so would advance utilitarian or paternalistic ends. For a Constitutional right to refuse life-sustaining medical treatment to be meaningful, therefore, it must provide individuals with more protection against state interference with their decisions than this. And if *fundamental* Constitutional rights are indeed a class of preferred rights entitled to a special level of protection, then a fundamental Constitutional right to refuse life-sustaining medical treatment must provide individuals with an

¹¹²See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 6 (C.B. MacPherson ed. 1980) (1690).

But though this be a *state of liberty*, yet it is not a *state of licence*: though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, . . . for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure: . . .

even higher level of protection than would an ordinary, non-fundamental Constitutional right.

These conclusions carry immediate implications for the way the state interest in the preservation of life may be interpreted. The state interest in the preservation of life is what authorizes the state to override an individual's exercise of his or her right to refuse life-sustaining medical treatment. If that right is to remain a meaningful entity, the state interest can not be so powerful that it drives the level of protection individuals receive from the right below the baseline level of protection established by the ordinary utilitarian and paternalistic constraints on state action. In fact, the state interest must be weak enough so that the right affords individuals at least some additional protection against state interference with their decision-making autonomy beyond that baseline. And if the right is truly a fundamental Constitutional right, the state interest must be weak enough to afford individuals even more protection than that. Which of the available interpretations of the state interest in the preservation of life can satisfy these logical requirements?

C. Applications

Let us consider first the interpretation of the state interest in the preservation of life in which "life" is defined as biological life. Understood in this way, the state interest is in preserving life without regard to its quality, no matter how quality is defined. To test the effect of this interpretation, we must examine the cases in which medical treatment can extend lives of little or no objective or subjective quality. An interest in the preservation of biological life would, of course, also give the state an interest in preserving lives of quality. But because such cases would be encompassed by the more restrictive interpretation of the state interest as one in preserving quality life, they do not distinguish the interpretation under consideration from others, and

therefore, do not constitute appropriate test cases.

We have already seen that when “life” is defined as biological life, the state interest cannot be construed as an interest in the preservation of biological life *per se*, but must be understood as one that varies in intensity in proportion to the amount of additional life that can be gained through treatment.¹¹³ Because no consideration is given to the quality of life, the state interest is served whenever biological life is *sufficiently* prolonged, regardless of how much pain or how little function is experienced by the patient. Interpreted in this way, the state interest in the preservation of life would *not* override the patient’s right to refuse life-sustaining medical treatment *only* where the treatment could extend life only briefly. But this would render the right entirely meaningless because 1) in the cases in which it would not be overridden, it provides no protection the individual does not already possess, and 2) in all cases in which it could provide protection that the individual does not already possess, it is overridden.

Consider the cases in which the state interest would not override the right, that is, the cases in which treatment could only briefly extend life. In such cases, the right to refuse life-sustaining medical treatment plays no role because the state would be prevented from interfering with the patient’s decision to forgo treatment by the basic moral constraints on government action. Imposing medical treatment on patients with lives of little or no quality who will die shortly anyway clearly cannot be justified on utilitarian grounds. Brief extensions of such lives can never produce sufficient social benefits to offset the material cost of the treatment and the psychic costs to the patients and/or their loved ones who are opposed to it. Nor can overriding such a patient’s refusal of treatment be justified on paternalistic grounds. Forcing a few more days or

¹¹³See *supra* text preceding note 92.

weeks of life on a patient whose existence has little or no objective or subjective quality can never be “good” for the patient, regardless of whether good is defined in terms of the patient’s ability to experience pleasure or psychic satisfaction, realize his or her potential, or lead a meaningful life. Hence, in those cases in which the state interest does not override the right, the right has no significance because the state was already barred from acting by the ordinary moral constraints on government action.

Now consider the cases in which the state interest would override the right. These are the cases in which treatment can extend life for a considerable amount of time regardless of how much pain or how little function the patient experiences; indeed, regardless of whether the patient is irreversibly incompetent. This clearly renders the right to refuse life-sustaining medical treatment meaningless because it drives the level of protection the right affords considerably below the baseline established by the ordinary moral constraints on government action. Under this interpretation of the state interest, the “right” to refuse life-sustaining medical treatment does not even provide the level of protection against state interference that is provided by the requirement that the state refrain from acting unless a utilitarian or paternalistic end would be served.¹¹⁴

¹¹⁴Justice Brennan recognizes that this is the case in his dissent in *Cruzan*, although he does not appear to appreciate the full significance of his observation. Brennan argues that:

[a]lthough the right to be free of unwanted medical intervention, like other constitutionally protected interests, may not be absolute, no state interest could outweigh the rights of an individual in Nancy Cruzan's position. Whatever a State's possible interests in mandating life-support treatment under other circumstances, there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so. Missouri does not claim, nor could it, that society as a whole will be benefited by Nancy's receiving medical treatment. No third party's situation will be improved and no harm to others will be averted. . . . There is simply nothing legitimately within the State's purview to be gained by superseding her decision. *Cruzan*, 497 U.S. at 313-14.

Preserving the lives of mentally-incapacitated or incompetent patients for extended periods of time is almost always an expensive proposition. Preserving the lives of physically-incapacitated patients experiencing considerable pain or suffering can be even more so. Such patients can make little or no material or intellectual contribution to society,¹¹⁵ and their continued existence is often a source of emotional distress to themselves and their loved ones. Preserving biological life of low quality for extended periods is a drain on society's resources for virtually no return.¹¹⁶ It not only cannot be justified on utilitarian grounds, it represents precisely the type of activity that utilitarianism would condemn. Government action to impose years of unwanted life on such

Although Brennan purports to be explaining why no state interest can override Nancy Cruzan's right to refuse life-sustaining medical treatment, what he is really demonstrating is that the state has no legitimate ground for abridging Nancy's liberty whether she has such a right or not. Because none of the basic moral justifications for the exercise of state power apply to Nancy's case, she should not need a right to refuse life-sustaining medical treatment to prevent the state from overriding her decision. Brennan does recognize, however, that if the right to refuse life-sustaining medical treatment does not restrict government action in such cases, it is entirely meaningless. Thus, he notes that "the regulation of constitutionally protected decisions . . . must be predicated on legitimate state concerns *other than* disagreement with the choice the individual has made. . . . Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity." *Id.* at 313 (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) (opinion of Stevens, J.))

¹¹⁵It may be thought that someone like Stephen Hawking would serve as a counter-example to this. He does not, however, because although physically disabled, he does not have a life of low quality. Whether defined objectively in terms of pleasure, satisfaction, cognitive function, or social interaction, or subjectively in terms of Hawking's own conception of what makes life valuable, Hawking's is clearly leading a life of quality. The state would have an interest in preserving a life like his even if "life" were defined to mean a life of objective or subjective quality. Hence, as noted above, he does not constitute an appropriate case for testing the interpretation of the state interest in which "life" is defined as biological life regardless of quality. The physically disabled persons relevant in the present context are those whose lives possess little or no objective or subjective quality. It is extremely unlikely that such individuals will make significant contributions to society.

¹¹⁶Excluding scenarios in which they are being maintained for purposes of organ harvesting.

patients clearly cannot be grounded on the claim that doing so will increase aggregate well-being.

Nor can it be justified on paternalistic grounds. There is no sense in which extending the biological lives of irreversibly incompetent or mentally-incapacitated patients who are suffering can advance the patients' own good. Such patients cannot realize their potential or lead meaningful lives and have little or no ability to experience pleasure or psychic satisfaction. Similarly, imposing years of unwanted suffering on competent, but physically incapacitated patients provides little benefit in terms of the experience of pleasure or psychic satisfaction. It also seems unlikely to aid such patients in realizing their human potential or leading meaningful lives, unless persevering in the face of great suffering is what gives life its meaning. Under any conventional definition of "good," indefinitely extending a life of incapacity and suffering that the individual living it wishes to end would seriously detract from rather than advance the patient's ability to realize it.¹¹⁷

It is important to note that the possibility that a miracle cure might be found that could restore the patient to a high quality of life does not change this analysis. The very fact that it is a "miracle" cure implies that it has such a low probability of occurrence that its positive value will

¹¹⁷As discussed previously, see *supra* note 110, imposing treatment in such cases will be good for the patient only if the patient's good is identified with his or her continued biological existence. In addition to the problems with such a concept of good that has been previously discussed, see *supra* note 110, it is worth noting that identifying the individual's good with continued biological life can serve no purpose in the present context. Whether biological life is inherently valuable is the very question we are examining. To claim that state action is justified on paternalistic grounds because continued biological life is good for the patient is merely to define away the question, not to settle it. Such a definition of the what is good for individuals would render the argument for the interpretation of the state interest presently under consideration entirely circular. To establish the viability of the interpretation of the state interest as one in the preservation of biological life without regard to its quality, its proponents must show that indefinitely extending low quality biological life is good for the patient in some way other than just that he or she is not dead.

be so discounted as to have virtually no effect on the utilitarian or paternalistic calculus. As a purely logical matter, the fact that *it is possible* that continued biological life *could* ultimately be good for society or the individual patient does not imply that continued biological life *is* good for either.

This analysis shows that in the context of a meaningful right to refuse life-sustaining medical treatment, the state interest in the preservation of life cannot be interpreted as an interest in the preservation of biological life without regard to its quality. Under such an interpretation, the putative state interest does not identify a discrete set of situations in which the right may legitimately be overridden; it entirely destroys the right. By overriding the right in every situation in which it can provide individuals with protection against the government that they do not already possess, this interpretation of the state interest reduces the right to an empty shell. Simply put, to interpret the state interest as an interest in the preservation of biological life without regard to its quality is to fail to take the right to refuse life-sustaining medical treatment seriously. Hence, to argue for this interpretation is not to argue for limitations on the right, but that the right itself should not exist.

In the abstract, there is nothing wrong with advocating such a position. It may well be that a proper philosophical analysis will establish that there is no legitimate grounding for a right to refuse life-sustaining medical treatment and that no such right actually exists. This is irrelevant in the current legal context, however, because the Supreme Court has recognized the existence of a fundamental Constitutional right to refuse life-sustaining medical treatment. In this context, an interpretation of the state interest in the preservation of life that completely emasculates this right is untenable.

It is worth noting that this interpretation of the state interest implies more than just that the right to refuse life-sustaining medical treatment does not exist. Because it would drive the level of protection individuals have against state interference with their activities below that afforded by the basic utilitarian and paternalistic constraints on government action, it implies that there exists some other ground upon which the government may abridge the liberty of citizens. That is, it implies that Dworkin and I have construed the conditions under which the government is morally authorized to act too narrowly; that we have overlooked some third justification that empowers the government to preserve biological life even when doing so would promote neither the common nor the individual's own good. But what can this third justification be?

Unless I am missing something, there appears to be only one candidate: the theological one. Only something along the lines of Locke's argument that because God grants life only he can decide when it should end¹¹⁸ could ground government action in the relevant cases. If this is correct, then interpreting the state interest as one in the preservation of biological life without regard to its quality implies that the government is morally authorized to act not only to achieve utilitarian or paternalistic ends, but also to preserve God's handiwork or God's plan for the world.

The courts and Justices of the Supreme Court who interpret the state interest as one in the preservation of purely biological life obviously cannot give voice to this implication, if they are even aware of it. For reasons discussed above,¹¹⁹ religiously-based justifications for government action restricting the liberty of citizens are barred by the Constitutional doctrine requiring the separation of church and state. This may explain why the courts that adopt this interpretation

¹¹⁸See *supra* text accompanying note 112.

¹¹⁹See *supra* text following note 112.

either baldly assert it without defense as though it is an obvious truth or defend it on the spurious ground that it is necessary to avoid invidiously discriminatory interpersonal assessments of the quality of life. The archetypical example of this may be the Missouri Supreme Court's decision in *Cruzan*, which, at different points in its opinion, actually does both. For example, when it first introduces the subject of the state interest, the court appears to be engaging in analysis by dividing the interest into two component parts, "an interest in the prolongation of the life of the individual patient and an interest in the sanctity of life itself."¹²⁰ Yet, rather than explain why mere biological life is morally valuable, the court simply asserts that it is, declaring "[t]he state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality."¹²¹ To the extent that the court provides any grounding for this claim beyond its assumed obviousness, it does so by erroneously conflating intrapersonal and interpersonal assessments of quality of life, asserting that unless considerations of the quality of life are eschewed, "persons with all manner of handicaps might find the state seeking to terminate their lives."¹²² This is mirrored by the United States Supreme Court's decision in *Cruzan*, which simply asserts without explanation that "we think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."¹²³

¹²⁰*Cruzan*, 760 S.W.2d at 419.

¹²¹*Id.*

¹²²*Id.* at 420.

¹²³*Cruzan*, 497 U.S. at 281.

The judicial silence regarding the grounding for a state interest in preserving purely biological life may indicate a tacit recognition that the only available ground is the legally off-limits theological one. If this interpretation of the state interest necessarily derives from a religious definition of the meaning of life, it would be better to say nothing about the basis of the interpretation at all. This is certainly what Justice Stevens believes is going on. Finding, in his dissent in *Cruzan*, that the Missouri court's "unflagging determination to perpetuate Nancy Cruzan's physical existence is comprehensible only as an effort to define life's meaning,"¹²⁴ he denounces this effort because

[a]s I have already suggested, it would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State's action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life.¹²⁵

I previously characterized Stevens' argument as an eloquent one.¹²⁶ Indeed, its eloquence may be magnified by the fact that the argument for the position it is directed against cannot be openly articulated in court. In the Constitutional context, it may be that the only argument that can support an interpretation of the state interest in the preservation of life as one in preserving biological life without regard to its quality is one that dare not speak its name. But whether or not this interpretation of the state interest should be rejected on the ground of the need to maintain the separation of church and state, it certainly must be rejected as an interpretation of an interest that can override the right to refuse life-sustaining medical treatment if that right is to mean

¹²⁴*Cruzan*, 497 U.S. at 345.

¹²⁵*Id.* at 350.

¹²⁶See *supra* text following note 85.

anything at all.

Let us now turn our attention to the interpretation of the state interest in the preservation of life in which “life” is defined as a life of objective quality. Although we saw in Part III¹²⁷ that there are many objective standards of value by which the quality of life can be measured, the courts that address the matter usually measure quality of life in terms of the amount of pain and physical suffering the individual is experiencing. This appears to be the standard of quality that Justices O’Connor and Breyer employ as well. Let us begin then by considering this form of objective quality.

Under this interpretation, the “life” that the state has an interest in preserving is life that is not beset by excessive pain and suffering. Although not as strong as the interpretation that defines “life” as biological life, this interpretation nevertheless creates a very powerful version of the state interest because it permits the government to override individual autonomy in all cases other than those in which patients are experiencing uncontrollable physical pain and suffering. To test the effect of this interpretation, we must examine the cases in which medical treatment can extend lives that possess quality only in the sense that they do not involve uncontrollable pain and suffering. Like the interpretation that defined life as biological life, the present interpretation would give the state an interest in preserving lives of even higher quality. But, again like the previous interpretation, such cases would be encompassed by less powerful interpretations of the state interest, and therefore do not constitute proper test cases for the one presently being evaluated. The question we must examine then is whether a state interest in preserving life whose only quality is the absence of pain and suffering is consistent with the existence of a meaningful

¹²⁷See *supra* text accompanying notes 66-81.

right to refuse life-sustaining medical treatment.

The answer to this question is again a clear no. Like the previous interpretation, the current one overrides the right in all cases in which it could provide more protection against the government than individuals already possess from the basic constraints on government action. The analysis of the utilitarian constraint is virtually identical to that of the previous interpretation. As was noted in that context, preserving the lives of mentally-incapacitated or incompetent patients is expensive. Preserving the lives of physically-incapacitated patients can be as well, especially because of the need to control their pain. Once again, the patients we are considering can make little or no contribution to society because, although they are not suffering debilitating levels of pain, their lives, by hypothesis, possess no other quality. Irreversibly incompetent patients who are not able to experience pain and mentally-incapacitated patients who receive treatment to relieve pain clearly can make little contribution to society. Physically-incapacitated patients who have their pain under control can, of course, make significant contributions to society if their lives possess other forms of quality such as a high level of cognitive function, a certain degree of privacy and independence that comes from not being subject to highly invasive medical treatment, or the ability to engage in significant social interaction.¹²⁸ But as noted above, these are not the relevant test cases for the interpretation presently being evaluated. In the present context, we are considering patients whose lives possess none of these qualities; patients, for example, whose treatment to relieve pain requires medications that create high levels of stupor or disassociation. Although there may be little pain and suffering to place on the negative side of the utilitarian calculus in these cases, there is also little that can be placed on the positive side to offset the

¹²⁸Stephen Hawkings can again serve as an illustrative example.

expense of the treatment and the emotional distress the patient and his or her loved ones experience due to the forced treatment. As with the previous interpretation, preserving life whose only value is the absence of pain drains society's resources for almost no return, and cannot be justified on utilitarian grounds.

The analysis of the paternalistic constraint differs from that of the previous interpretation. This is because if the patient's good is defined strictly in terms of the experience of pleasure and pain, then it is possible to justify imposing unwanted life-sustaining treatment upon a patient on paternalistic grounds. To the extent that patients' pain can be reduced sufficiently so that the amount of pleasure they experience even marginally outweighs the amount of pain, it can make sense to say that the treatment is for their own good. Many would not agree that a life whose only positive feature is the experience of slightly more pleasure than pain is truly a good life or that preserving such a life is truly good for the patient. But their disagreement is with the definition of "good," an issue that cannot be addressed here. For those who do define good strictly in terms of pleasure and pain,¹²⁹ imposing life-sustaining medical treatment on an unwilling patient who can experience more pleasure than pain is good for the patient.

There is a sense in which the difference between the analysis of this interpretation and the interpretation that defines life as biological life is highly significant. The availability of a

¹²⁹For example, Jeremy Bentham and John Stuart Mill. *See e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ?? () ("Now, pleasure is in itself a good: nay, even setting aside immunity from pain, the only good: pain is itself an evil; and indeed, without exception, the only evil; or else the words good and evil have no meaning."); JOHN STUART MILL, UTILITARIANISM ?? () (" But these supplementary explanations do not affect the theory of life on which this theory of morality is grounded—namely, that pleasure, and freedom from pain, are the only things desirable as ends; and that all desirable things . . . are desirable either for the pleasure inherent in themselves, or as means to the promotion of pleasure and the prevention of pain.")

paternalistic justification for imposing treatment implies that, unlike the previous interpretation, the current one can be maintained without having to posit a religiously-motivated ground for government action. In the context of the right to refuse life-sustaining medical treatment, however, the difference between the current and previous interpretations is immaterial. Although interpreting the state interest as one in preserving life not beset by excessive pain and suffering may not reduce individuals' protection against the government below that afforded by the basic moral constraints on government action, it nonetheless leaves no room for the right to refuse life-sustaining medical treatment to provide any protection beyond this baseline level. Because the basic moral constraints on government action already prohibit the government from imposing unwanted life-sustaining treatment on those beset by excessive pain and suffering, and because the state interest would override the right in all cases in which the lives of those not beset by excessive pain and suffering can be preserved, this interpretation guarantees that the right affords individuals no protection that they do not already possess. Hence, this interpretation would render the right to refuse life-sustaining medical treatment as much of an empty shell as the previous one; and hence, it, too, is untenable in the face of the Supreme Court's recognition of the right.

This analysis does not imply that the state interest cannot be defined as one in the preservation of life of objective quality in a way that is consistent with the existence of a meaningful right to refuse life-sustaining medical treatment. It merely shows that when quality is measured purely in terms of pleasure and pain, the resulting state interest is not consistent with the right. But, as we saw in Part III, quality of life can also be objectively measured in terms of the level of cognitive and physical functioning individuals possess, how much privacy and

independence they can enjoy, and their potential for social interaction.¹³⁰ When quality of life is measured in terms of function, that is, when a life of quality is defined, for example, as one with a high level of cognitive functioning or as “a normal, functioning, integrated existence,”¹³¹ it is possible to construct an interpretation of the state interest that leaves room for a substantive right to refuse life-sustaining medical treatment.

To see that this is the case, consider the basic utilitarian constraint on government action first. There are some patients beset with potentially fatal medical conditions who, with treatment, can continue to live with a reasonable degree of cognitive and/or physical function. If treated, such patients can continue productive lives that make positive contributions to society’s stock of material goods and engage in the type of social interaction that produces significant psychic satisfaction for both the patients and those with whom they interact. Preserving the lives of such patients who would otherwise refuse medical treatment can be justified on utilitarian grounds. If the state interest in the preservation of life is defined in a way that empowers the state to override individuals’ decision to refuse medical treatment only to preserve lives that possess a higher level of quality than this, there would be room for a substantive, meaningful right to refuse life-sustaining medical treatment to exist.

For example, there is some minimal level of function at which individuals who are not totally disabled and are not beset by excessive pain can lead lives that make a positive net contribution to overall social welfare, even when the costs of their treatment are factored in. This means that the basic moral constraint that bars government from acting unless some utilitarian or

¹³⁰See *supra* text accompanying notes 73-78.

¹³¹*Dinnerstein*, 6 Mass. App. Ct. at 472-73, 380 N.E.2d at 138.

paternalistic end can be served would not prevent the government from imposing unwanted medical treatment on such individuals. If the state interest in the preservation of life is interpreted as an interest in preserving life with a high level of cognitive function or a normal, functioning, integrated existence, then the state interest would not preempt all of the logical space available to the right to refuse life-sustaining medical treatment. The ordinary constraints on government action would protect individuals against the state imposition of unwanted medical treatment whenever they have such a low level of function that no social benefit can be derived from preserving their lives. The right to refuse life-sustaining medical treatment would provide additional protection in that it would bar the state from imposing unwanted treatment on those who function at a high enough level to make a net contribution to society, but do not have a high level of cognitive function or a normal, functioning, integrated existence. The state interest in the preservation of life would then override the right and authorize the state to impose unwanted treatment only on those who do have this high level of functioning or integrated existence.

A similar analysis would apply to the paternalistic constraint. Continuing with our earlier assumption that an individual's good consists in experiencing more pleasure or psychic satisfaction than pain or dissatisfaction, then an interpretation of the state interest as one in the preservation of life with a high level of cognitive function or a normal, functioning, integrated existence would leave room for a meaningful right to refuse life-sustaining medical treatment. The ordinary constraints on government action would protect individuals against the state imposition of unwanted medical treatment on those whose lives give them more pain than pleasure. The right to refuse life-sustaining medical treatment would provide additional protection by barring the state from imposing unwanted treatment on those who experience more pleasure than pain, but do not

have a high level of cognitive function or a normal, functioning, integrated existence. And the state interest would again authorize the state to impose unwanted treatment only on those who function at this level.

From this we learn that when “life” is defined as a life of objective quality and when quality is measured by the possession of a high level of cognitive functioning or an integrated existence, the state interest in the preservation of life is logically compatible with the existence of a substantive right to refuse life-sustaining medical treatment. The question then becomes whether such an interpretation of the state interest is an acceptable one. Is the state interest in the preservation of life properly defined as an interest in preserving the lives of high functioning individuals?

[I plan to insert here a discussion of the practical problems associated with this interpretation of the state interest. The first of these is the sheer difficulty of identifying the level of function at which the interest attaches and applying it to cases. As discussed in Part III, courts are usually reluctant to discuss quality of life matters in any terms other than the amount of pain and suffering the patient experiences. The amount of pain a patient is experiencing seems like something that is capable of scientific, objective measurement and appears to require courts to make no overt moral discriminations. Other standards for measuring intrapersonal quality of life lack these features. A patient’s level of cognitive function or the degree to which he or she has an “integrated” existence are not easily quantified.

Secondly, judges often feel ill-equipped to make and ill-at-ease about making what are essentially meta-ethical assignments of value to human life. Even if there are excellent

philosophical arguments for assigning qualitatively higher value to human beings who are conscious, or self-aware, or can interact with their environment, or can communicate, or can reason, judges are usually not comfortable being the ones to explicitly make or apply such assignments. Not being moral philosophers, they are liable to confuse the position that sees the special value of human life as coming from humans' ability to form concepts and communicate abstractions with one that values intelligent or educated individuals over those who are less so, which once again raises the specter of invidious interpersonal assessments of the quality of life.]

Beyond these practical problems, however, lies a purely theoretical reason for rejecting this interpretation of the state interest. Our analysis showed that an interpretation of the state interest in the preservation of life that defines life as a life of high cognitive function or an integrated existence is not *logically* inconsistent with the existence of a right to refuse life-sustaining medical treatment. Because this interpretation of the state interest leaves room for the right to provide more protection for individuals than they receive from the ordinary moral constraints on government, a substantive Constitutional right to refuse life-sustaining medical treatment that can be overridden to preserve lives of high cognitive function or an integrated existence *could* exist. But it would be a very odd type of right. This is because the state interest invests the state with the power to override autonomous individual decision-making at precisely the point at which individuals become fully capable of autonomous decision-making. In other words, this interpretation of the state interest ensures that the only individuals who can effectively exercise their right to make an autonomous decision to refuse life-sustaining medical treatment are those with limited capacity for autonomous decision-making. The resulting right seems designed

to have as limited a range of application as is conceptually possible.

Neither the oddness of this right nor its severely limited range of application bar it from being recognized as a Constitutional right. However, the right to refuse life-sustaining medical treatment that the Supreme Court has recognized is not an ordinary Constitutional right, but a fundamental one. And the right that emerges from the interpretation of the state interest presently under consideration is a very poor candidate for recognition as a *fundamental* Constitutional right.

Recall that fundamental Constitutional rights are a preferred class of Constitutional rights that are entitled to protection “from all but the most compellingly justified instances of governmental intrusion.”¹³² To be a member of this class, a Constitutional right must be “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”¹³³ A right to refuse life-sustaining medical treatment that may be overridden in the vast majority of cases to which it applies and that protects only those with limited capacity to make autonomous decisions hardly seems to satisfy these conditions. And a right with such a limited range of application certainly cannot be the type of right without which neither liberty nor justice would exist. If it is indeed the case that the essence of a fundamental Constitutional right is that it provides its possessor with a greater amount of protection against the government than an ordinary, non-fundamental Constitutional right,¹³⁴ the state interest in the preservation of life cannot be as powerful as the one we are presently considering. The interpretation of the state

¹³² LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 770 (2d ed. 1988).

¹³³ *Glucksberg*, 521 U.S. at 720-21.

¹³⁴ See *supra* text accompanying notes 98-101.

interest as one in preserving life of high cognitive function or an integrated existence produces a right that provides so little protection against government interference that it can just barely qualify as a Constitutional right. Such an enervated right clearly cannot provide the greater level of protection that would be necessary for it to function as the fundamental Constitutional right that the Supreme Court has recognized. Hence, this interpretation, and with it all interpretations of the state interest in the preservation of life that define life as a life of *objective* quality, must be rejected.

Once we appreciate what is required to take rights seriously, what minimal content rights must possess to be meaningful moral entities, this becomes a rather unsurprising conclusion. Because rights must afford individuals more protection than they receive from the ordinary utilitarian and paternalistic constraints on government action, they may not be abridged merely to achieve utilitarian or paternalistic ends. But this means that rights are very powerful things. Taking them seriously greatly restricts the government's ability to achieve otherwise worthwhile ends. An individual's right to life means that we may not kill him or her in order to use his or her organs to save the lives of many others. Thus, rights impose significant moral costs on society.

For a right to refuse life-sustaining medical treatment, much less a fundamental Constitutional right to refuse such treatment, to be taken seriously, it cannot merely be balanced against a state interest in the preservation of life. It must trump that interest in all but the most extraordinary cases. It is simply contradictory to maintain that both a right to refuse life-sustaining medical treatment and a powerful state interest in the preservation of life exist. Each of these is always the negation of the other.

Any interpretation of the state interest that defines life in terms of its objective quality,

however, will necessarily produce a powerful state interest. Such a definition implies that in all cases in which life possesses the relevant objective characteristic, the right to refuse life-sustaining medical treatment may be overridden. Regardless of whether the characteristic is defined as self-awareness, or the ability to communicate, or reason, or to engage in social interaction, or fulfill one's potential, or lead an integrated existence, the overwhelming majority of people possess it. This means that the right will be overridden in the overwhelming majority of cases.¹³⁵ But a right that is almost always overridden cannot qualify as a fundamental right.

It is perfectly reasonable to argue that no right to refuse life-sustaining medical treatment truly exists and that a correct moral analysis will demonstrate that the contention that individuals are entitled to refuse life-sustaining medical treatment in all but a few extraordinary cases is unsustainable. That is a question for another day. In the current legal context in which the Supreme Court has recognized the existence of a fundamental Constitutional right to refuse life-sustaining medical treatment, however, it is not reasonable to argue that there exists a state interest in the preservation of life powerful enough to reduce the right to virtual insignificance.

This analysis implies neither that the right to refuse life-sustaining medical treatment is absolute nor that there is no legitimate state interest in the preservation of life. Defining "life" as life of subjective quality, as one that advances the interests or values of the person living it, produces an interpretation of the state interest that is both compatible with the existence of a fundamental Constitutional right to life and serves a very important moral function.

¹³⁵It also accounts for the previously noted oddity that the right protects only those who are least equipped to exercise it. See *supra* page 62

[In this section, I complete the argument by describing the nature of the state interest when defined in terms of life of subjective quality. In the first place, when defined in this way, the state interest only rarely overrides the right. In the overwhelming majority of cases in which a patient elects to refuse life-sustaining treatment, it is because the life that would be preserved no longer has personal value for him or her. If the state interest is understood as one in preserving life of value to its possessor, it cannot override the right in any of these cases. Thus, this interpretation of the state interest allows for the existence of a robust and significant right to refuse life-sustaining medical treatment.

A right that allows individuals to refuse life-sustaining medical treatment whenever life does not have personal value for them provides them with considerably more protection against the government than is provided by the ordinary moral constraints on government action. In the absence of the right, the government would be empowered to impose life-sustaining treatment upon an individual if preserving his life would either increase overall social welfare or be good for the individual under whatever definition of personal good the society endorses. The right prohibits the state from imposing unwanted treatment on individuals to provide benefits to others or to realize its, Aristotle's, Bentham's, or anyone else's conception of what is good for the patient. Hence, interpreting the state interest as one in preserving life of subjective quality produces a right that provides profound protection for a deeply personal interest; one that it would be quite reasonable to regard as implicit in the concept of ordered liberty. In other words, one that can reasonably qualify as a fundamental Constitutional right.

Although a state interest in preserving life of subjective quality allows for the existence of a strong right, it is far from vacuous. One of the most serious concerns of the courts that have

addressed end of life issues is the risk that individuals who do not truly want to end their lives will be coerced, cajoled, or misled into doing so; that in many cases the exercise of the right to refuse life-sustaining medical treatment will not represent a truly autonomous choice. For example, courts have expressed the concern that patients may elect to refuse life-sustaining treatment even though their lives still have value to them because they are suffering from depression,¹³⁶ have less than a full appreciation of their condition, its potential treatments, or their prospects for recovery,¹³⁷ have been misled or pressured by family members or financial considerations,¹³⁸ or simply feel duty-bound not to be a burden to their loved ones.¹³⁹ The Supreme Court has itself voiced these concerns, recognizing that “[t]hose who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders. . . . [and that] because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients’ needs”,¹⁴⁰ that “vulnerable groups—including the poor, the elderly, and disabled persons . . . [face] the real risk of subtle coercion and undue influence in end-of-life situations,”¹⁴¹ and that such groups might elect to end their lives “to spare their families the substantial financial burden of end-of-life health-care costs.”¹⁴² But these are precisely the situations in which the state interest

¹³⁶Supply references.

¹³⁷Supply references.

¹³⁸Supply references.

¹³⁹Supply references.

¹⁴⁰*Glucksberg*, 521 U.S. at 730-31.

¹⁴¹*Id.* at 731-32.

¹⁴²*Id.* at 732.

would override the right.

The interpretation of the state interest as one in preserving life of subjective quality empowers the state to impose life-sustaining treatment when doing so would preserve a life that is of value to the individual living it. The only situations in which individuals would elect to forego treatment that can preserve a life that they value are those in which they have been deceived, are mistaken, or are being swayed by depression, or financial, emotional or other inappropriate pressures. Hence, this interpretation of the state interest permits the right to be overridden only where its exercise does not represent a true expression of the patient's autonomy. That is, the state interest overrides the right only in cases in which the right not serve its essential purpose. But that is precisely the class of cases in which the right should be overridden.

What this shows is that a fundamental Constitutional right to refuse life-sustaining medical treatment and a state interest in the preservation of life of subjective quality are perfectly complementary. They work together to ensure that the right serves its essential purpose of protecting that degree of personal autonomy that is "implicit in the concept of ordered liberty" at the absolutely minimal cost in lives when this autonomy is not at stake. Under this interpretation, the state interest serves to keep the right within its proper bounds, working something like a shepard to prevent individual exercises of the right from straying too far from their essential justification.

Justice Stevens clearly recognized the complementarity of the right and this interpretation of the state interest. As he explained in *Cruzan*

[i]f Nancy Cruzan's life were defined by reference to her own interests, so that her life expired when her biological existence ceased serving *any* of her own interests, then her constitutionally protected interest in freedom from unwanted treatment would not

come into conflict with her constitutionally protected interest in life. Conversely, if there were *any* evidence that Nancy Cruzan herself defined life to encompass every form of biological persistence by a human being, so that the continuation of treatment would serve Nancy's own liberty, then once again there would be no conflict between life and liberty.¹⁴³

Stevens also recognized that what makes them complementary is that the state interest is designed to enhance rather than undermine the effectiveness of the right.

That interest not only justifies—it commands—maximum protection of every individual's interest in remaining alive, which in turn commands the same protection for decisions about whether to commence or to terminate life-support systems or to administer pain medication that may hasten death. Properly viewed, however, this interest is not a collective interest that should always outweigh the interests of a person who because of pain, incapacity, or sedation finds her life intolerable, but rather, an aspect of individual freedom.¹⁴⁴]

From this we may conclude that the proper construction of the state interest in the preservation of life is as an interest in preserving life of subject value, that is, life that is of value to the person living it.

Part IV: Implications

[I originally planned to use Part IV to trace the implications of my analysis of the right to refuse life-sustaining medical treatment for cases concerning irreversibly incompetent patients. In doing so, I would address the case of Terri Schiavo with which I opened the article. Because doing this adequately will be something of a large undertaking, however, I am now considering turning this part into a separate article.

To explain how the right to refuse life-sustaining medical treatment applies to irreversibly incompetent patients I must first distinguish between the interest and option theories of rights.

¹⁴³*Cruzan*, 497 U.S. at 352.

¹⁴⁴*Glucksberg*, 521 U.S. at 746 (Stevens, J. concurring).

The interest theory views rights as moral entities that protect very important moral interests of any type; the option theory views rights as moral entities that invest individuals with spheres of control within which they may act autonomously.¹⁴⁵ I will then argue that fundamental *legal* rights must be grounded on the option theory, that is, that they must be understood as protections for individual autonomy. This implies that the right to refuse life-sustaining medical treatment invests individuals with ultimate decision-making authority over whether they receive life-sustaining medical treatment or not. Developing this argument is likely to require many pages.

The implication of this argument for irreversibly incompetent patients is as follows. For irreversibly incompetent patients who executed either advanced directives (or other definite expressions of their will regarding the application of life-sustaining medical treatment) or durable powers of attorney (or otherwise invested another with the power to make decisions for them), the right requires that instructions in the advanced directive or of the designed proxy be carried out. In these cases, the patient has made an autonomous decision within the sphere protected by the right that must be honored. However, if the irreversibly incompetent patient has not executed an advanced directive or durable power of attorney or their equivalents, the right to refuse life-sustaining medical treatment does not apply to his or her situation. Earlier expressions of the patient's preferences or other evidence of what the patient *would have* chosen are not equivalent to an exercise of autonomous choice by the patient.¹⁴⁶ Hence, these can never be sufficient to

¹⁴⁵I originally addressed this in John Hasnas, *From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights*, 89 NORTHWESTERN UNIVERSITY LAW REVIEW 900 (1995).

¹⁴⁶See Allen Buchanan & Dan W. Brock, *Deciding for Others: Standards for Decision-Making*, in ETHICAL ISSUES IN MODERN MEDICINE 207, 209 (John Arras & Nancy Rhoden eds., 3d ed. 1989).

invoke an exercise of the patient's right. As a protection of individual autonomy, the right to refuse life-sustaining medical treatment is not transferable. No one can exercise another's autonomy; hence, no one can exercise another's right to refuse life-sustaining medical treatment unless specifically authorized to do so by the individual whose right it is. In the absence of an actual autonomous decision by the patient, the right to refuse life-sustaining medical treatment does not apply to his or her situation, and cannot serve as a ground for withdrawing such treatment.

This does not imply that the patient's preferences or evidence of how he or she would have chosen is irrelevant to the patient's situation. It simply means that it must be considered in a different context. When the patient's right to refuse life-sustaining medical treatment is not implicated, the decision of whether to impose or continue such treatment is determined on the basis of what is in the patient's best interests. How a patient's best interests are determined requires an extensive discussion, but for now it is sufficient to note that, like the state's interest, the patient's interests can be measured on the basis of either an objective or subjective standard of value. In the present context, however, in which the interest is not being offered to override a right, there is not the same objection to evaluating the patient's interests according to an objective standard. In fact, I would argue that the determination of whether to impose or continue treatment on an irreversibly incompetent patient should be based upon an assessment of his or her interests in both an objective and subjective sense. Evidence of the patient's personal preferences and values can then play a role in determining whether the treatment would be in the patient's best interests. For example, continuing artificial nutrition and hydration may be in the best interests of a patient who had a sincere religious belief that only God can decide when life should end, but not

in the best interests of a patient who had a strong aversion to lingering on in a vegetative state when both patients are in an identical medical condition.

More relevantly, however, my analysis of the right to refuse life-sustaining medical treatment implies that cases like Nancy Cruzan's and Terri Schiavo's should not be analyzed in terms of the patient's exercise of this right, as they currently are. An honest recognition that in such cases other people are deciding what is best for the patient rather than exercising one of the patient's fundamental Constitutional rights will ultimately produce more justifiable outcomes in these difficult cases.]