

2004

## The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die

Michael P. Allen  
allen@law.stetson.edu

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### Recommended Citation

Allen, Michael P. "The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die." *American University Law Review* 53, no.5 (June 2004): 971-1020.

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# The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die

## **Abstract**

In the past fifteen years, the United States Supreme Court has decided three cases in which it tentatively began to explore what the United States Constitution has to say about issues that are popularly described as the "right to die." In this article, I suggest that the current state of constitutional analysis does not provide for an effective mechanism for securing an individual's "right to die," at least not without undervaluing a state's interest in the preservation of human life should a state choose to take such a position. In the article, I suggest that it is possible to adopt a means of balancing the competing interests of the individual and of the state in such a way as to do service to both of them. I propose that the Court adopt a balancing standard modeled generally on, but by no means identical to, the current constitutional mechanism under which infringements on a woman's right to have an abortion during the period prior to fetal viability are judged. In other words, I propose the adoption of an undue burden standard similar to that articulated in *Casey*. In the article I explain why the current state of affairs is deficient. Thereafter, I explore the undue burden standard I propose, explaining how it would address the deficiencies in current law as well as cure many of the problems identified with the *Casey* standard itself. Finally, I apply the standard to several scenarios. I ultimately conclude that adopting the standard I propose is justified despite the risks associated with it. I also conclude, however, that those risks do not warrant the maintenance of the standard in other areas, including with respect to abortion.

## **Keywords**

Constitution, right to die, right to refuse medical treatment, fundamental rights, jurisprudence, undue burden standard

## ARTICLES

# THE CONSTITUTION AT THE THRESHOLD OF LIFE AND DEATH: A SUGGESTED APPROACH TO ACCOMMODATE AN INTEREST IN LIFE AND A RIGHT TO DIE

MICHAEL P. ALLEN\*

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\* Associate Professor of Law, *Stetson University College of Law*, B.A., 1989 *University of Rochester*; J.D., 1992, *Columbia University School of Law*. I wish to thank Debbie Allen, Bruce Jacob, Tom Marks, and Becky Morgan for comments on earlier versions of this Article. Also, I owe a debt of thanks to the staff of the Stetson Faculty Support Office, in particular Sharon Gisclair, for technological assistance above and beyond the call of duty.

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## INTRODUCTION

In the past fifteen years, the United States Supreme Court has decided three cases in which it tentatively began to explore what, if anything, the United States Constitution has to do with an individual's choice concerning the time and manner of one's death.<sup>1</sup> In common parlance, the Court has begun to address the so-called "right to die."<sup>2</sup> These decisions have not ended public debate about or policy developments in the states concerning the right to die. Indeed, the Court intentionally sought to avoid restricting policy debates too quickly by treading cautiously in its right to die decisions.<sup>3</sup> Thus, we have been in a period of continued innovation

1. See *Vacco v. Quill*, 521 U.S. 793 (1997) (reversing the decision of the Second Circuit Court of Appeals that New York State's ban on physician-assisted suicide was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (reversing the decision of the Ninth Circuit Court of Appeals that Washington State's ban on physician-assisted suicide was unconstitutional under the Due Process Clause of the Fourteenth Amendment); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990) (affirming the decision of the Missouri Supreme Court that it was permissible under the United States Constitution to require clear and convincing evidence of an incompetent person's intent to refuse medical treatment).

2. Definitional issues are important in the debate concerning a person's right to control the manner of her death. See, e.g., *Glucksberg*, 521 U.S. at 789-90 (Breyer, J., concurring) (discussing the importance of defining the right that is at issue in any given case); 1 ALAN MEISEL, *THE RIGHT TO DIE* § 1.1 (2d ed. John Wiley & Sons, Inc. 1995) (discussing the definitional issues surrounding the popular and legal connotations of the phrase "right to die"); Rebecca C. Morgan et al., *The Issue of Personal Choice: The Competent Incurable Patient and the Right to Commit Suicide*, 57 MO. L. REV. 1, 17 n.109 (1992) (discussing use of "right to die" as a "term of art"). I most often use the phrase "right to die" in its broadest possible sense, referring to the wide array of factual settings dealing with the end-of-life. Such situations include physician-assisted suicide, decisions by competent adults to decline or remove life-sustaining treatment, and choices made on behalf of children or incompetent adults concerning such matters. See generally Michael P. Allen, *Life, Death, and Advocacy: Rules of Procedure in the Contested End-of-Life Case*, 34 STETSON L. REV. (forthcoming 2004) (on file with the American University Law Review) (describing in detail the range of potential end-of-life situations); Thomas A. Eaton & Edward J. Larson, *Experimenting with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253 (1991); Cass R. Sunstein, *The Right to Die*, 106 YALE L. J. 1123, 1126-27 (1997).

3. See, e.g., *Glucksberg*, 521 U.S. at 735 ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and

and experimentation concerning the right to die and its regulation through the democratic process in its various forms.<sup>4</sup>

There is much to be said for experimentation in the states concerning an issue such as the right to die. After all, one of the apparent advantages of a federal system such as the one enshrined in our Constitution is the ability of states to observe and learn from the actions of their sister states when addressing a common social problem.<sup>5</sup> The danger is that, in being faithful to the “laboratory” metaphor<sup>6</sup> of Justices Brandeis and O’Connor, some state experiments may produce monsters instead of miracles. In other words, some states could, by intention, inadvertence, or even chance, infringe upon the individual rights of the people. The challenge for the Court becomes crafting a mechanism by which the valuable democratic experimentation can continue while the rights of the people remain secure.

The starting point for this Article is that the current state of affairs does not provide an effective mechanism for securing an individual’s right to die, at least not without undervaluing a state’s interest in the preservation of human life. Even though a state is not compelled to do so, its decision to stand in support of life should not be easily rejected.<sup>7</sup> But how does one correctly engage in the delicate balancing necessary to protect and preserve both of these interests? It is this question that I seek to explore. While I advocate a broader right to die at the conclusion of the Article, in order to work through the question I have identified, I will focus principally on one type of

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practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”); *Cruzan*, 497 U.S. at 292 (O’Connor, J., concurring) (noting that the Court’s decision allowed the law concerning an incompetent person’s right to refuse life-sustaining medical treatment to be “entrusted to the ‘laboratory’ of the States . . . in the first instance”) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

4. See generally MEISEL, *supra* note 2, § 1.7 (cataloguing legislative and judicial developments concerning end-of-life matters).

5. Of course, this point is not always taken as an affirmatively positive aspect of federalism. See, e.g., Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 12-18 (2002) (discussing some criticisms of allowing states to experiment, collecting literature on the topic, and ultimately rejecting the criticism). This Article will not debate the merits of state experimentation within the broader federal union. Instead, it accepts that the Court believes that benefits of such experimentation exist. See, e.g., *supra* note 1 (citing cases in which the Supreme Court advocates state experimentation in the formulation of “right to die” policies).

6. *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting) (arguing that the federal government must allow states to remold economic and regulative practices in order to meet changing social and economic needs because the states serve as small laboratories for the experimentation of bold new social and economic policies).

7. See *infra* Part I.B (discussing the legitimacy of a state’s interest in the preservation and protection of human life).

situation implicating the right: a person's right to refuse life-sustaining medical treatment even when such refusal will lead to the person's death.<sup>8</sup>

To be clear, this Article is not about whether the right to refuse treatment should be entitled to constitutional protection.<sup>9</sup> That topic has been well-mined.<sup>10</sup> Instead, this Article proceeds largely on the assumption that the right to refuse treatment is protected by the Due Process Clause.<sup>11</sup> Moreover, this Article assumes that it is a "fundamental right" as that term is used in constitutional jurisprudence. As discussed below, the Supreme Court's current

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8. For most of my discussion, I do not distinguish between the refusal of treatment *by* a competent adult and the refusal of such treatment *on behalf of* an incompetent adult. By combining these situations I do not mean to imply that they present the same issues. In fact, the differences between these two situations are quite important. For example, in the latter situation we must face how it is that an incompetent person can be said to be exercising a right to refuse treatment when, by definition, she is not competent to act. See *Cruzan*, 497 U.S. at 279-80 (recognizing and discussing this issue). Near the end of this Article I address how the proposal I advocate might lead to different results in these two situations. See *infra* Part III (articulating the different outcomes of an undue burden analysis of Terri's Law compared to an analysis of a hypothetical state law allowing a limited right to refuse medical treatment when the patient has a "living will"). For purposes of articulating my generic proposal, however, there is no need to treat the situations differently.

9. Nor does this Article address the profound moral, ethical, and religious aspects of the general debate concerning whether an individual has the right—apart from whatever the Constitution has to say on the subject—to determine the time and manner of one's death. Many others have addressed this likely eternal debate. See, e.g., RONALD M. DWORIN, *LIFE'S DOMINION* (Alfred A. Knopf 1993); Brian C. Kalt, *Death, Ethics, and the State*, 23 HARV. J.L. & PUB. POL'Y 487 (2000); DAVID ORENTLICHER, *MATTERS OF LIFE AND DEATH* (2001); RAYMOND WHITING, *A NATURAL RIGHT TO DIE: TWENTY-THREE CENTURIES OF DEBATE* (2002).

10. See, e.g., NORMAN L. CANTOR, *LEGAL FRONTIERS OF DEATH AND DYING* (1987); PETER J. RIGA, *RIGHT TO DIE OR RIGHT TO LIVE* (1981); MELVIN I. UROFSKY, *LETTING GO: DEATH, DYING, AND THE LAW* (1993); Norman L. Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973); Eaton & Larson, *supra* note 2; Michael R. Flick, *The Due Process of Dying*, 79 CAL. L. REV. 89 (1991); Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857 (1992); Yale Kamisar, *When Is There a Constitutional "Right to Die"?* *When Is There No Constitutional "Right to Live"?*, 25 GA. L. REV. 1203 (1991); Susan R. Martyn & Henry J. Bourguignon, *Coming to Terms with Death: The Cruzan Case*, 42 HASTINGS L.J. 817 (1991); Thomas Wm. Mayo, *Constitutionalizing the "Right to Die"*, 49 MD. L. REV. 103 (1990); Stewart G. Pollock, *Life and Death Decisions: Who Makes Them and By What Standards?*, 41 RUTGERS L. REV. 505 (1989); John A. Robertson, *Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139 (1991); Vincent J. Samar, *Is the Right to Die Dead?*, 50 DEPAUL L. REV. 221 (2000); Mark Strasser, *Incompetents and the Right to Die: In Search of Consistent Meaningful Standards*, 83 KY. L.J. 733 (1995); Brian C. Goebel, Comment, *Who Decides If There Is "Triumph in the Ultimate Agony?" Constitutional Theory and the Emerging Right to Die with Dignity*, 37 WM. & MARY L. REV. 827 (1996).

11. While I make this assumption, I discuss the right further below. See *infra* Part I.A (discussing the Court's ruling that the Due Process Clause encompasses the liberty interest inherent in the freedom to refuse life-sustaining medical treatment).

fundamental rights jurisprudence<sup>12</sup> makes it likely that either the individual's right to refuse treatment or the state's interest in preserving life would consistently lose were a court to engage in traditional balancing of a state interest that could be "compelling" against a right deemed "fundamental."<sup>13</sup> At its core, this Article is about a limited alternative to this almost binary, zero-sum approach to constitutional balancing in this area in which, for all practical purposes, either the state interest (if it is found to be compelling) or the individual right (if it is found to be fundamental) will always prevail.<sup>14</sup>

The Court should adopt a balancing standard modeled generally on, but in no means identical to, the current constitutional mechanism under which infringements on a woman's right to have an abortion in the period prior to fetal viability are judged: the "undue burden" standard of the operative opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>15</sup> As I would reformulate the standard, a court should strike down any government regulation that (a) has the effect of creating a substantial obstacle to an individual's exercise of one's right to refuse medical treatment<sup>16</sup> or (b) has the primary purpose of creating an obstacle (whether substantial or otherwise) in the exercise of the right instead of advancing the state's interest in the protection and preservation of life.<sup>17</sup> This Article is devoted principally to explaining the standard I propose and exploring its applications in several situations in which a state infringes upon an individual's right to refuse medical treatment in one way or another.

Before turning to that enterprise, however, it is fair to ask "why now?" In other words, why is it important that scholarly attention should focus on balancing the competing interests of the state and the individual *today*? After all, has not the experimentation the

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12. See *infra* Part I.C (articulating the Court's distinction between fundamental rights and other rights and the standard of review appropriate for both cases).

13. See *infra* Part I.C (describing the traditional constitutional fundamental rights jurisprudence).

14. I explain this approach below and why it is particularly troubling in the right to die context. See *infra* Part I.C (insisting that the right to life is different from other fundamental rights and, therefore, must be subject to a test other than strict scrutiny).

15. 505 U.S. 833 (1992). By "operative opinion," I refer to the joint opinion of Justices O'Connor, Kennedy, and Souter.

16. See *infra* Part II.B (describing the operation of the effects prong of the undue burden standard I propose).

17. See *infra* Part II.C (describing the operation of the purpose prong of the undue burden standard I propose). If the primary motivation for state action is *not* protecting life, then the legislation should be struck down. This "purpose" prong also deters government actions motivated purely by a desire to restrict these rights.

Supreme Court hoped for been working? The fact is that in the years since the Supreme Court decided *Cruzan*<sup>18</sup> and took its first tentative steps in this area, the right has not been as secure as one would think. Both the Court's equivocal stance on the right's constitutional pedigree and a mobilization of forces on the political front are threats to the individual's right to refuse life-sustaining medical treatment.

A recent example widely reported in the national media forcefully demonstrates this point. In February 1990, twenty-seven year-old Terri Schiavo suffered a cardiac arrest causing her brain to be deprived of oxygen for over ten minutes.<sup>19</sup> As a result, Ms. Schiavo entered a "persistent vegetative state."<sup>20</sup> After Ms. Schiavo had existed in this state for nearly eight years, her husband sought a court order directing the cessation of the artificial nutrition and hydration sustaining his wife.<sup>21</sup> Ms. Schiavo's parents opposed the request and thus began a protracted legal battle over Ms. Schiavo's fate.<sup>22</sup>

Given her physical condition and the discord in her family, Terri Schiavo's case could only be considered a tragedy. For present purposes, however, what is particularly important is what happened *after* a judicial decision concerning Mr. Schiavo's request had been rendered. Over ten years after Mr. Schiavo made his request, it was finally judicially determined that, if she were competent, Terri Schiavo would not have intended to continue receiving artificial nutrition and hydration.<sup>23</sup> Accordingly, a Florida state court directed that such life-sustaining measures be discontinued.<sup>24</sup> The court's order was carried out on October 15, 2003.<sup>25</sup>

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18. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

19. *In re Guardianship of Schiavo*, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001).

20. *Id.* In a "persistent vegetative state" a person's body is able to support basic life functions such as temperature, circulation, and respiration without artificial means. However, the person lacks the higher brain functions necessary for self-awareness and thought. See *Cruzan*, 497 U.S. at 266 n.1 (discussing the accepted definition of "persistent vegetative state"); *Mack v. Mack*, 618 A.2d 744, 746 (Md. 1993) ("The distinguishing feature of a patient in a persistent vegetative state is wakefulness without awareness.").

21. *In re Guardianship of Schiavo*, 780 So. 2d at 178.

22. *Id.* I have described elsewhere the lawsuits concerning Terri Schiavo in greater detail. See Allen, *supra* note 2.

23. *In re Guardianship of Schiavo*, 851 So. 2d 182, 187 (Fla. Dist. Ct. App. 2003). Ms. Schiavo did not have a written advance directive, or so-called "living will." *In re Guardianship of Schiavo*, 780 So. 2d at 180. Therefore, the court proceeded to determine her intent based on evidence of her wishes gleaned from conversations with family and friends. See *id.* at 179-80. Such a procedure is in accord with Florida statutory law. See, e.g., FLA. STAT. ch. 765.401 (2004) (mandating the statutory scheme under which health care decisions may be made on behalf of an incompetent person).

24. *In re Guardianship of Schiavo*, 851 So. 2d at 187. This determination was



After Terri Schiavo's feeding tube had been removed, a startling thing happened. On October 21, 2003, the Florida Legislature passed and Florida Governor Jeb Bush signed "Terri's Law."<sup>26</sup> The Legislature held no hearings concerning this bill which was enacted and signed into law just over twenty-four hours after its introduction.<sup>27</sup> Under Terri's Law, the Governor was given the authority to issue a "one-time stay to prevent the withholding of nutrition and hydration" from a person in Terri's Schiavo's position.<sup>28</sup> Immediately after signing the bill that would become Terri's Law, Governor Bush issued a "stay" pursuant to which Terri Schiavo's feeding tube was reinserted into her body.<sup>29</sup> Thus, the Governor and Legislature essentially used Terri's Law to reverse the judgment of the Florida state courts concerning Ms. Schiavo's right to refuse life-sustaining treatment.<sup>30</sup>

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ultimately affirmed after at least four reported decisions were rendered by an intermediate appellate court. *See id.* at 182 (affirming the guardianship court's decision that Schiavo would choose to discontinue life-sustaining treatment and affirming the denial of the motion for relief from that judgment); *In re Guardianship of Schiavo*, 800 So. 2d 640 (Fla. Dist. Ct. App. 2001) (affirming the trial court's denial of the petition for removal of guardian and the motion to disqualify, but reversing and remanding the trial court's denial of the parents' motion for relief from judgment and the petition for independent medical examination); *In re Guardianship of Schiavo*, 792 So. 2d 551 (Fla. Dist. Ct. App. 2001) (directing the guardianship court to permit Ms. Schiavo's parents to file a motion for relief from judgment based on equitable principles); *In re Guardianship of Schiavo*, 780 So. 2d 176 (Fla. Dist. Ct. App. 2001) (affirming the trial court's decision ordering the removal of life support). In addition, the Florida Supreme Court has declined to review the matter three times. *See Schindler v. Schiavo*, 855 So. 2d 621 (Fla. 2003); *In re Guardianship of Schiavo*, 816 So. 2d 127 (Fla. 2002); *Schindler v. Schiavo*, 789 So. 2d 348 (Fla. 2001).

25. *Woman's Feeding Tube Removed*, CNN, Oct. 16, 2003, at <http://www.cnn.com/2003/LAW/10/15/coma.woman/index.html> (on file with the American University Law Review).

26. FLA. STAT. ch. 744.3215 (2003). For a description of the history of House Bill 35E, see FLORIDA HOUSE OF REPRESENTATIVES, DESCRIPTION OF ACTIVITY FOR HOUSE BILL 35E, at [http://www.myfloridahouse.gov/bills\\_detail.aspx?Id=12713&iSessionSelectedIndex=1&sBillSubjectText=&sBillNumberText=&iSponsorSelectedIndex=0&iBillListSelectedIndex=0&sStatueAmendedText=&iBillTypeSelectedIndex=0&iReferredToSelectedIndex=0&iChamberSelectedIndex=0&iBillSearchListPageIndex=0](http://www.myfloridahouse.gov/bills_detail.aspx?Id=12713&iSessionSelectedIndex=1&sBillSubjectText=&sBillNumberText=&iSponsorSelectedIndex=0&iBillListSelectedIndex=0&sStatueAmendedText=&iBillTypeSelectedIndex=0&iReferredToSelectedIndex=0&iChamberSelectedIndex=0&iBillSearchListPageIndex=0) (Oct. 21, 2003) (on file with the American University Law Review).

27. FLA. STAT. ch. 744.3215 (2003). *See also* Steve Bousquet, *How Terri's Law Came to Pass*, ST. PETERSBURG TIMES, Nov. 2, 2003, at B1.

28. Governor—Feeding Tube Removal Stay, 2003 Fla. Sess. Law Serv. 418 (West). Although Terri's Law was not denominated as a "special bill" relating to one person under Florida law, the prerequisites for actions set out in the law perfectly match Terri Schiavo's conditions, and almost certainly no one else's. *See Terri's Law—Subversion of the Right to Die?*, CONN. L. TRIB., Dec. 8, 2003, at 19 [hereinafter "*Subversion of the Right to Die?*"] ("[Terri's Law] was drawn as narrowly as possible to fit Terri Schiavo's factual circumstances perfectly.").

29. *See* William R. Levesque et al., *Gov. Bush Order Puts Schiavo Back on Fluids*, ST. PETERSBURG TIMES, Oct. 22, 2003, at 1A.

30. In a recent decision, a Florida Circuit Court declared Terri's Law unconstitutional and granted Mr. Schiavo's motion for summary judgment. *Schiavo v. Bush*, No. 03-008212-CI-20, 2004 WL 980028 (Fla. Cir. Ct. May 5, 2004). The

The legislative interference with the judicial process and its impact on an individual's rights provides an even greater impetus for the action I advocate when one considers the political forces that apparently led to Terri's Law.<sup>31</sup> It appears that conservative political forces made concerted efforts to pressure Florida politicians to enact the law, both out of a concern for Ms. Schiavo and as a means to advance their broader political pro-life/anti-abortion agenda.<sup>32</sup> In short, the story of Terri's Law is a veritable "poster child" for why those concerned with the preservation of the right to refuse medical treatment need to consider how best to protect that right today.

Moreover, while the Florida Legislature's attempt through Terri's Law to interfere so directly in a completed judicial proceeding is quite rare, there is no shortage of examples of other interference in end-of-life dramas. For example, there was a widely publicized case in which the Governor of Virginia sought to prevent the removal of artificial nutrition and hydration from a man injured in an accident even though no member of the man's family objected to the removal.<sup>33</sup> There have also been instances in which local prosecutors actively opposed families' requests to terminate life-sustaining

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Supreme Court of Florida has agreed to hear the Governor's appeal of the Circuit Court's decision. *See* *Bush v. Schiavo*, Case No. SC04-925 (Fla. June 16, 2004).

31. Below, I discuss the application of the proposed undue burden test to Terri's Law. *See infra* Part III.A (indicating that an application of the undue burden test to Terri's Law would be successful due to the "purpose" prong of the analysis).

32. There is further discussion below of Terri's Law in which these themes are explored in greater detail and appropriate citations are provided. *See infra* Part III.A (noting that the manner in which Terri's Law was passed and its absence of any legislative history does nothing to refute the presumption that certain political groups motivated the legislature's swift action). Others have commented on the relationship between politics in the *Schiavo* case and the legal status of a right to refuse unwanted medical treatment. *See, e.g.*, Michele Goodwin, Book Review, 14 L. & POL. BOOK REV. 1 (2004) (describing Terri's Law and commenting that "[i]t became clear that end of life decision-making, while seemingly clearly settled law, may still be ambiguous or at least politically contentious in the twenty-first century.") at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Behuniak-Svenson104.htm> (on file with the American University Law Review). In a similar vein, other commentators have discussed the more general potential impact of political forces on end-of-life issues. *See, e.g.*, Judith F. Daar, *Direct Democracy and Bioethical Choices: Voting Life and Death at the Ballot Box*, 28 U. MICH. J.L. REFORM 799 (1995). Other commentators have written generally about the growth of the right to die issue in politics and how those politics are translated into policies. *See* HENRY R. GLICK, *THE RIGHT TO DIE POLICY INNOVATION AND ITS CONSEQUENCES* (1992).

33. *See, e.g.*, Paul Bradley, *Gilmore Appeal Denied; Michele Finn is 'Relieved,' Decries Governor's Actions*, RICH. TIMES DISPATCH, Oct. 3, 1998, at 1A; Paul Bradley, *Tube Pulled that Keeps Finn Alive; Family of Severely Disabled Man Acts as Gilmore Vows to Appeal*, RICH. TIMES DISPATCH, Oct. 2, 1998, at 1A; Holly A. Heyser, *Does Hugh Finn Have a Right to Die?; Astounding Some, Gov. Gilmore Fights Choice of Family to Remove Tube from Comatose Man*, VIRGINIAN-PILOT, Oct. 2, 1998, at 1A. The case eventually reached the Supreme Court of Virginia. *See Gilmore v. Finn*, 527 S.E.2d 426 (Va. 2000).

treatment for children.<sup>34</sup> Finally, there have been interventions of state law enforcement officials to prevent the removal of such treatment.<sup>35</sup> All of these examples of government action have taken place after the Court's decision in *Cruzan*.<sup>36</sup>

What these various actions vividly demonstrate is that there is a danger that the application of political forces may lead to the infringement of an individual's right to refuse medical treatment. For those who support this right, it is tempting to argue that the Court should recognize the right as fundamental and, under traditional fundamental rights jurisprudence, effectively stop all infringements. The problem with such an approach is that to do so would undervalue the state's legitimate interest in preserving life in all forms when a state chooses to adopt a pro-life policy. The policy that must be adopted must balance these two interests so that they may coexist to the fullest extent possible.<sup>37</sup> My "undue burden" proposal will do so over the widest range of situations.

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34. See, e.g., *In re Rosebush*, 491 N.W.2d 633, 635 (Mich. Ct. App. 1992). In *Rosebush*, an eleven-year-old child, Joelle, had been involved in a car accident, and as a result, her brain was deprived of oxygen for a significant period of time. *Id.* at 634. The lack of oxygen "destroyed most, if not all, of Joelle's cerebral functions, and left her in a persistent vegetative state." *Id.* at 634-35. After she had existed in this state for over a year, Joelle's parents decided to remove her from a respirator and other life-sustaining devices. *Id.* at 635. The parents' decision was supported by Joelle's treating physicians, a hospital ethics committee, and the family's Catholic priest. *Id.* Anonymous hospital staff members opposed the decision and contacted the local state attorney. *Id.* Thereafter, the local state attorney successfully sought preliminary injunctive relief preventing the removal of life-sustaining treatment. *Id.* The trial court dissolved the injunction after trial and Joelle died shortly after her respirator was removed. *Id.*

35. See, e.g., *Blouin v. Superior Court*, 356 F.3d 348 (2d Cir. 2004). The case concerned a Section 1983 action against New York State Attorney General Eliot Spitzer for his office's intervention in the efforts to remove life-sustaining treatment from an incompetent adult. *Id.* at 351. The suit failed because the court ruled that the constitutional status of an incompetent person's right to refuse medical treatment was unclear. *Id.* at 360. The *Blouin* case is discussed below in more detail. See *infra* Part I.A (analyzing the *Blouin* case and clarifying that the case was dismissed due to the court's determination that the state actors had qualified immunity under Section 1983).

36. 497 U.S. 261 (1990).

37. It is true that the right to refuse medical treatment has been held to be protected by several state constitutions. See, e.g., *Cruzan v. Harmon*, 760 S.W.2d 408, 417 n.12 (Mo. 1988) (presenting examples of state court recognition of a state constitutional right to refuse medical treatment while declining to recognize this right under the Missouri Constitution), *aff'd sub nom. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990). Such state-based protection is insufficient for the right at issue for two reasons. First, allowing protection to be recognized on a state-by-state basis would create a type of patchwork quilt in which the right would be protected in one state but perhaps not in a neighboring state. Cf. Daar, *supra* note 32, at 853-55 (explaining that inequity would result from protecting rights via the initiative process, because only some states allow such a process). For a right as important as the ability to refuse medical treatment, such inconsistent protection is unacceptable.

A second reason that state constitutional protection is insufficient is that the

Part I of this Article lays out the relevant background principles and working assumptions, focusing on three issues: (1) the current constitutional status of the right to refuse medical treatment and the outlines of the argument for considering that right to be fundamental; (2) the legitimacy of a state's choice to assert an unqualified interest in the preservation of life within the constitutional framework and why that interest should be considered compelling; and (3) an explanation of why the Supreme Court's current fundamental rights jurisprudence is not adequate to allow the individual right and the state interest to coexist in a meaningful way. Part II describes my suggested undue burden standard as a better means to balance the competing interests. I also contrast this suggested standard with the one the Court articulated in *Casey*, addressing along the way some concerns commentators have raised about the *Casey* articulation of the standard. To explore my suggested test, Part III applies it to three situations in which the state's interest in life is pitted against an individual's right to refuse unwanted medical treatment. This experiment emphasizes certain strengths of the standard and exposes some potential weaknesses that become apparent in its application. Finally, Part IV concludes the Article by providing a suggestion of how this standard could apply more broadly to the right to die. However, I also provide a cautionary note about expanding any form of an undue burden

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amendment process for state constitutions is generally easier than that for amending the United States Constitution, making state rights less secure than federal rights. For example, since the Bill of Rights was ratified in 1791, there have been only seventeen amendments to the United States Constitution. This is an average of less than one every decade. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 23 (1998). As of 1996, there had been 5,900 amendments adopted on the state level, or an average of about 120 per state. *Id.* at 24. Moreover, this figure is conservative because it does not take into account amendments to any state's prior constitutions. *Id.* This is important because only nineteen states still have their original constitution in place, and a majority of states had three or more constitutions. *Id.* at 23. Thus, state constitutional protection is not as secure as one might otherwise expect.

Similarly, it is true that the right to refuse medical treatment is generally protected as a common law or statutory right. *See, e.g., Cruzan*, 497 U.S. at 269-77 (cataloguing state case law sources of the right). The difficulty in terms of right-protection here is that a state legislature is always able to amend a statute to eliminate a statutory right or enact legislation to alter the common law right. *See, e.g., McConnell v. Beverly Enters.-Connecticut, Inc.*, 553 A.2d 596, 606-07 (Conn. 1989) (Healy, J., concurring) (discussing, in an end-of-life case, the power of the legislature to alter the common law). Therefore, the common law and statutory rights exist at the pleasure of the legislature and are subject to political pressures. At the end of the day, it is essential that the Federal Constitution provides a safety-net for the right to refuse medical treatment. Other commentators have drawn this same basic conclusion. *See, e.g., Martyn & Bourguignon, supra* note 10, at 850-51 (arguing that a minimum national standard is required in order to protect a right to die).

standard to areas beyond the right to die, including, but not limited to, the subject of abortion from which I drew my inspiration.

I. BACKGROUND PRINCIPLES: THE RIGHT TO REFUSE MEDICAL TREATMENT, THE STATE'S INTEREST IN PRESERVING LIFE, AND FUNDAMENTAL RIGHTS JURISPRUDENCE

In this Part, I set the stage for developing my undue burden balancing mechanism by discussing three broad background principles: the current state of a constitutional right to refuse medical treatment even when doing so would lead to death and a limited defense of why that right should be considered fundamental; a justification of the legitimacy of a state's unqualified interest in the preservation and protection of human life; and, a consideration of current fundamental rights jurisprudence and why its essentially binary nature does not allow for the meaningful coexistence of the individual's right and the state's interest in life. My aim is not to provide a comprehensive discussion of any of these points. Rather, this Part presents a series of descriptions and limited assumptions designed to focus on the task a court faces when balancing the individual's right to refuse medical treatment and the state's interest in the preservation of life.

A. *The Constitutional Right to Refuse Medical Treatment*

As promised earlier, this Article decidedly is not intended to be a defense of the argument that the United States Constitution provides protection for the right to refuse medical treatment.<sup>38</sup> To reach the question I wish to address, I will assume that the right (a) is protected as a matter of Due Process and (b) is one of those "fundamental" rights deserving of the heightened protection of courts.

Given my assumptions, it might seem unnecessary to devote any time to the current constitutional status of the right to refuse medical treatment. However, this discussion is important because the current status is a reflection, at least in part, of the difficulty courts face when trying to balance such an intimately personal matter as the refusal of medical treatment with the preservation of human life.<sup>39</sup> The nature of this balancing exercise in its traditional form would make it difficult for courts to simultaneously accord clear protection to the

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38. See *supra* text accompanying note 9.

39. See *infra* text accompanying notes 87-88 (explaining that the individual's interest in refusing medical treatment and the competing state's interest in preserving life are difficult to balance because of the profound implications of each).

individual right and the state's interests.<sup>40</sup> This difficulty has caused courts to describe the right in equivocal and conditional terms. I hope to show that if the courts adopt the balancing mechanism I suggest, the clarity with which they define the constitutional status and scope of the right will be increased while still allowing for appropriate deference to a state's democratically-determined decision to protect life.

The Supreme Court addressed the constitutional status of the right to refuse unwanted medical treatment in its landmark *Cruzan* decision.<sup>41</sup> After discussing the common law right to be free from unwanted touching, the right of informed consent to medical procedures,<sup>42</sup> and Supreme Court Due Process precedent,<sup>43</sup> the Court described the constitutional status of a right to refuse medical treatment in the following terms:

Although we think the logic of the [Due Process] cases discussed above would embrace such a liberty interest [in refusing life-sustaining medical treatment], the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. 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.<sup>44</sup>

As the quotation makes clear, the majority opinion in *Cruzan* discusses a constitutional right to refuse medical treatment in a conditional sense, only assuming that the right exists.<sup>45</sup> The Court

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40. See *infra* Part I.C (describing a due process analysis as an essentially binary decision in which an individual right is afforded great protection if defined as "fundamental," whereas the state interest benefits if the individual interest is not deemed "fundamental").

41. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990). The case concerned Nancy Cruzan, a young woman in a persistent vegetative state resulting from loss of oxygen to the brain after a car accident. *Id.* at 266. Nancy's parents sought permission to cease providing nutrition and hydration to their daughter. *Id.* at 267-68. A Missouri trial court ruled in the parents' favor. *Id.* at 268. The Missouri Supreme Court reversed that decision, holding that there was insufficient evidence of Nancy's intent concerning the withdrawal of such life-sustaining treatment. *Id.* The United States Supreme Court affirmed the judgment of the Missouri Supreme Court, holding that it was constitutionally permissible, although not required, for a state to require clear and convincing evidence of an incompetent person's wishes concerning the withdrawal of life-sustaining treatment. *Id.* at 286-87. The lawyer for Nancy Cruzan's parents provides an interesting and in-depth perspective on the litigation leading up to and including the landmark Supreme Court decision. See WILLIAM H. COLBY, *LONG GOODBYE: THE DEATHS OF NANCY CRUZAN* (2002).

42. *Cruzan*, 497 U.S. at 269.

43. *Id.* at 278-79.

44. *Id.* at 279.

45. The Court later reiterated the conditional nature of the right but also sent signals strongly suggesting that the right had constitutional dimensions. Washington

further assumes that the right to refuse medical treatment is not restricted to competent adults. Rather, while recognizing that there are difficulties associated with the manner in which that right can be exercised, the Court's opinion accepts, for purposes of the decision, that an incompetent person retains the assumed constitutional right to refuse medical treatment.<sup>46</sup>

The cautious nature of the Supreme Court's language in *Cruzan* has led to a level of uncertainty in the lower courts concerning the existence and scope of any right to refuse treatment that is protected under the Constitution.<sup>47</sup> More troubling, however, is that the Court's equivocation in *Cruzan* has had, and continues to have, substantive implications in the way lower courts address end-of-life issues. Two examples make this point. The first concerns the question of what protection, if any, the Constitution affords to a person's choice to have the assistance of a physician in ending one's life. Two courts have considered this issue and rejected the claim for constitutional protection in ending a life, basing their decision, at least in part, on the conditional and uncertain language in *Cruzan*.<sup>48</sup>

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v. Glucksberg, 521 U.S. 702, 720 (1997) ("We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment."). Moreover, Justice O'Connor in her concurring opinion in *Cruzan* eschewed the conditional tone of the majority opinion. She wrote that "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water." *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring). Some academic commentators have also read *Cruzan* as an indication of where the Court would likely go if pushed. See, e.g., Kadish, *supra* note 10, at 863 (noting that in *Cruzan* the Supreme Court "went a good distance toward lending its authority to a constitutional right to refuse medical treatment").

46. See, e.g., *Cruzan*, 497 U.S. at 280 (addressing the constitutionality of the Missouri evidentiary requirement by which an incompetent person's wishes concerning the withdrawal of medical treatment have to be proven by clear and convincing evidence). See also Robertson, *supra* note 10, at 1148 (noting that "the [*Cruzan*] majority appeared to share the dissent's and petitioner's assumptions about the right of competent persons to refuse treatment and to issue advance directives against treatment when incompetent"). Moreover, Justice O'Connor again spoke with less ambiguity in her concurring by indicating that a state "may well be constitutionally required" to recognize surrogate decision-making for incompetent persons in order "to protect the patient's liberty interest in refusing medical treatment." *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring).

47. See, e.g., *In re Guardianship & Protective Placement of Edna M.F.*, 563 N.W.2d 485, 488 n.4 (Wis. 1997) (noting ambiguity as to the scope of the Supreme Court's holding). Of course, other state courts have considered the outcome in *Cruzan* to be clear in terms of establishing a federal constitutional right to refuse medical treatment. See, e.g., *In re Fiori*, 652 A.2d 1350, 1353 (Pa. Super. Ct. 1995).

48. See *People v. Kevorkian*, 527 N.W.2d 714, 754 (Mich. 1994) (Mallett, J., concurring in part and dissenting in part) (challenging the majority opinion's rejection of a right to assisted suicide because the opinion took the position that "because the *Cruzan* Court merely 'assumed' for the purposes of that case that a person has a constitutional right to refuse life-sustaining treatment such a right may

As we know, the Supreme Court eventually decided that the Constitution does not afford any protection to such a right, at least when that “right” is defined as a general one of all people to have assistance in committing suicide.<sup>49</sup> My goal here is not to argue about whether the Court was correct in its decisions on this point.<sup>50</sup> Rather, I wish to point out that the constitutional decision-making process in the lower courts was affected in at least some respect by the uncertain status of the right that was only assumed to exist in *Cruzan*. Such a distortion in constitutional decision-making in the lower courts should be avoided whenever possible.

A second substantive implication of the Court’s approach in *Cruzan* surfaced in the Second Circuit’s recent decision in *Blouin v. Spitzer*.<sup>51</sup> The underlying events that led to this case concerned Sheila Pouliot, a woman in her early forties who had “suffered profound physical and mental disabilities since infancy.”<sup>52</sup> After chronically suffering from cerebral palsy and a number of other ailments, Ms. Pouliot had lost the ability to eat by 1999 and was “acutely ill and, by all accounts, near death.”<sup>53</sup> Based on her conditions, Ms. Pouliot’s family, her medical team, clergy, and a hospital ethics committee decided that only palliative care would be provided to Ms. Pouliot and, specifically, that the hospital would not administer artificial nutrition, hydration or antibiotics.<sup>54</sup> It thus appeared that Ms. Pouliot would pass quietly away.

At this point, events took an unexpected turn when the New York State Attorney General’s office intervened. Although the precise chain of events is not entirely clear, the Attorney General’s office interceded with the hospital administration, pressuring the hospital to continue to treat Ms. Pouliot.<sup>55</sup> Eventually, the Attorney General

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not exist”); *Quill v. Koppel*, 870 F. Supp. 78, 83 (S.D.N.Y. 1994) (rejecting a right to physician-assisted suicide in part because “the Court stopped short of actually deciding that there is a constitutional right to terminate medical treatment necessary to sustain life, although the Court assumed the existence of such a right for the purpose of going on to other issues in the case”). The district court’s resolution of this case, while not all of its reasoning, was eventually endorsed by the Supreme Court. *Vacco v. Quill*, 521 U.S. 793 (1997).

49. See *Glucksberg*, 521 U.S. at 702 (concluding that assisted suicide was not a right protected by the Due Process Clause); *Quill*, 521 U.S. at 793 (finding that a statute prohibiting assisted suicide did not violate the Equal Protection Clause).

50. I do suggest, however, that the “undue burden” standard I advance should also apply in the assisted suicide area. See *infra* Part IV.

51. 356 F.3d 348 (2d Cir. 2004).

52. *Id.* at 351.

53. *Id.* at 352.

54. *Id.*

55. See *id.* at 353 (noting a factual dispute regarding the authority upon which the Attorney General interceded in Ms. Pouliot’s care).



took more formal action in the court system with the aim of preventing the implementation of the decision to forgo life-sustaining treatment for Ms. Pouliot.<sup>56</sup> The Attorney General's various interventions kept Ms. Pouliot in her near death condition for almost three months after the original decision had been made to cease her treatment.<sup>57</sup> Ms. Pouliot was eventually removed from life-sustaining equipment and allowed to pass away, but only after a judge overruled the State's objections.<sup>58</sup> Before she died, however, Ms. Pouliot was forced to endure "treatment" mandated by the state, the provision of which her own doctors believed to be unethical and "inhumane."<sup>59</sup>

After Ms. Pouliot's death, Alice Blouin, the administrator of Pouliot's estate, brought an action against the New York State Attorney General pursuant to 42 U.S.C. § 1983.<sup>60</sup> The Court of Appeals affirmed the dismissal of Blouin's complaint primarily because it agreed that the state officials were entitled to qualified immunity.<sup>61</sup> A primary reason for upholding this defense was that the federal law concerning the right to refuse medical treatment for an incompetent adult was unclear, or, in Section 1983 vocabulary, not "clearly established."<sup>62</sup> Once again, the *Cruzan* Court's reticence to

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56. *Id.* at 354.

57. *Id.* at 352-56.

58. *Id.* at 355-56.

59. The treatment notes of one of Ms. Pouliot's doctors makes this point vividly:

[Pouliot's] gut cannot accept artificial feedings at this point, and her bowel sounds remain absent, indicating that her gut is not functioning . . . . Sheila is edematous, with total body bloating from hydration in the absence of protein. Hydration alone has resulted in severe protein malnutrition, which is typified by skin, peripheral muscle, and cardiac muscle breakdown. She will die a slow and lingering death from protein malnutrition. From an ethical standpoint, I believe this continued treatment, however well intentioned, is now inhumane and is causing suffering. From a medical standpoint, it is outside of the bounds of what I consider to be medically indicated care.

*Id.* at 355 n.4 (ellipses in original).

60. *Id.* at 356. The statute provides, in relevant part, as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2003).

61. *Blouin*, 356 F.3d at 364. As the court explained, the qualified immunity defense "shields a government official acting in an official capacity from suit for damages under § 1983 unless the official violated clearly established rights of which an objectively reasonable official would have known." *Id.* at 358 (internal quotation marks and citation omitted).

62. *Id.* at 360-61.

clearly state the status of the right to refuse medical treatment continues to have substantive effects.<sup>63</sup>

The preceding discussion was meant to demonstrate, first, that while the Court has been less than crystal clear concerning the constitutional status of the right to refuse life-sustaining treatment, it is likely that the Court would affirm that right if forced squarely to face the issue.<sup>64</sup> As Justice O'Connor noted in her *Cruzan* concurrence, if the Due Process Clause protects anything, it must protect an individual's right to refuse medical treatment.<sup>65</sup> In short, it seems supportable to assume for purposes of this Article that the right is at the core of the liberty protected by the Due Process Clause

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63. One can view the actions of the Florida Legislature in enacting Terri's Law as another instance of a substantive effect of the Court's approach in *Cruzan*. See *infra* text accompanying notes 132-51. It is difficult to believe that the Florida Legislature would have taken the bold step it did if the Supreme Court had firmly identified the right to refuse medical treatment as one that is protected as fundamental under the Due Process Clause. For a more in-depth discussion of Terri's Law with respect to its constitutionality under the undue burden standard, see *infra* Part III.A.

64. There has also been discussion concerning the potential implications of the Court's use in *Cruzan* of the term "liberty interest" as opposed to "right." See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790, 814 n.67 (9th Cir. 1996) (en banc) (distinguishing between a liberty interest and a liberty right), *rev'd sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Morgan et al.*, *supra* note 2, at 22 n.151 (presuming that the Court would subject a liberty interest to a less rigorous test than a right); Sunstein, *supra* note 2, at 1131 n.30 (conceding there is a "technical difference" between the two terms). While a full exploration of this issue is well beyond the confines of this Article, I do not believe that the "liberty interest" vs. "right" issue has a great deal of substantive meaning and relevance. First, Chief Justice Rehnquist seems to use the two terms almost interchangeably. See *Cruzan*, 497 U.S. at 279 (variously describing the refusal of medical treatment as a liberty interest and a right). Second, the use of the term "liberty" appears to be a trend on the Court to more closely tie Due Process jurisprudence to the text of the Constitution. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning a Texas criminal sodomy statute based on the protection of "liberty" as expressed in the Due Process Clause); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (basing the decision concerning abortion rights on "liberty"). Decrying the slippage in terminology, Justice Souter opined that:

Our cases have used various terms to refer to fundamental liberty interests, and at times we have also called such an interest a "right" even before balancing it against the government interest. Precision in terminology, however, favors reserving the label "right" for instances in which the individual's liberty interest actually trumps the government's countervailing interests; only then does the individual have anything legally enforceable as against the State's attempt at regulation.

*Glucksberg*, 521 U.S. at 768 n.10 (Souter, J., concurring) (internal quotation marks and citation omitted). In any event, whatever the ultimate meaning of the use of these terms, for present purposes, the Article will proceed on the basis that there is no substantive difference.

65. *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring). But see *Morgan et al.*, *supra* note 2, at 22 n.151 (inferring from *Cruzan* that the Court likely would not find the right to be fundamental, thus implicitly rejecting the import of Justice O'Connor's concurrence).

and would be found to be so by the Court even given the Court's equivocation on this point.<sup>66</sup>

The second point to be taken from this analysis, however, is that the failure of the Court to make that right clear in *Cruzan* has had and continues to have serious consequences. As discussed below, the binary nature of fundamental rights jurisprudence has led, in part, to the Court's failure to clearly articulate the right to refuse medical treatment.<sup>67</sup> Adoption of the undue burden standard should, at the very least, ameliorate that concern. Before moving on to discuss what it is about fundamental rights analysis that causes the problem, this Article turns to a discussion of the legitimacy of a state interest in the preservation of life. It is the importance of that interest, when combined with the importance of the individual right, that causes the central problem with which this Article concerns.

### B. *The State's Interest in the Preservation of Human Life*

It seems beyond reasonable dispute that a legitimate and, perhaps, primary responsibility of a government is to protect the lives of its citizens.<sup>68</sup> When courts have been forced to consider cases concerning the right to refuse medical treatment, they have almost universally identified the preservation and protection of human life as one of the legitimate state interests weighing against that right.<sup>69</sup>

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66. One could also draw support for this proposition from the often quoted language from *Casey* used to support the joint opinion's reaffirmation of the right of a woman to have an abortion:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.

*Casey*, 505 U.S. at 851. If these words accurately describe why the abortion right is central to "liberty," it is difficult to see how they would not support the right to control one's own body by refusing medical treatment.

67. See *infra* Part I.C.

68. See, e.g., *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 640 n.1 (Mass. 1986) (Lynch, J., dissenting) ("Maintaining the sanctity of life may well be the reason society invests the State with sovereign authority."); *In re Quinlan*, 355 A.2d 647, 652 n.1 (N.J. 1976) (citing the Declaration of Independence and the Constitutions of both the United States and the State of New Jersey for the proposition that the State's interest in life "has an undoubted constitutional foundation"). But see *Samar*, *supra* note 10, at 261-62 (asserting that the protection of individual autonomy is the most important of state interests and that an interest in the preservation of life should be subservient to the goal of increasing autonomy).

69. See, e.g., *McKay v. Bergstedt*, 801 P.2d 617, 622-23 (Nev. 1990) (discussing the state's interest as both fundamental and compelling); *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990) (identifying state interests "in the preservation of life, the protection of innocent third parties, the prevention of suicide, and

The difficulty has not been in recognizing that the protection of life is a valid state goal. Rather, the challenge has been, and continues to be, precisely how to “weigh” that interest against the right to refuse medical treatment. As discussed in the next sub-part, the nature of the traditional fundamental rights jurisprudence makes it difficult to honor, simultaneously, the state interest and the individual right.<sup>70</sup> In this sub-part, the Article seeks to underscore the importance of the state interest in preserving and protecting life, an interest that in constitutional law terminology I would ordinarily deem “compelling.”<sup>71</sup> The Article also addresses potential objections to, or perhaps limitations on, the assertion of the life-protecting rationale.

In terms of the state’s interest in life, this Article argues that *should* a state decide to take an extreme vitalist position,<sup>72</sup> that stance is

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maintenance of ethical integrity of the medical profession”); *Brophy*, 497 N.E.2d at 635-36 (recognizing the state’s broad interest in preserving life); *In re Conroy*, 486 A.2d 1209, 1223 (N.J. 1985) (finding that the right to refuse medical treatment is not absolute and in some cases must give way to countervailing societal interests); *In re Quinlan*, 355 A.2d at 652 n.1 (adding that the state’s interest in the preservation of life has constitutional foundations); *In re Guardianship of Barry*, 445 So. 2d 365, 370 (Fla. Dist. Ct. App. 1984) (acknowledging that the state has an interest in preserving life and that the state must balance that interest with the rights of an individual); *Bartling v. Glendale Adventist Med. Ctr.*, 209 Cal. Rptr. 220, 225 (Cal. Ct. App. 1984) (balancing the state interest in the preservation of life against the right of an individual to refuse intrusions upon bodily integrity).

70. See *infra* Part I.C (outlining the difficulty with a binary either/or standard of review for courts in right to refuse medical treatment cases).

71. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 18.3 (3d ed. 1999) (discussing the use of the two-tier approach in substantive due process cases). As argued in the concluding section of the Article, I do not believe that any undue burden analysis is appropriate in the context of “potential” life or the interest at issue in the subject of abortion. See *infra* Part IV (addressing possible difficulties with an application of the undue burden analysis to end-of-life cases). For now it is sufficient to note that the argument advanced here should not be embraced or discarded because it is “anti-abortion.”

72. As a policy matter, there are many reasons why a state might very well choose to adopt a strong vitalist position. For example, a state could determine that a position strongly in favor of preserving life was necessary to protect vulnerable populations such as the elderly, the handicapped, or the young. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 731-32 (1997) (recognizing the legitimacy of such an interest in the context of laws generally prohibiting physician-assisted suicide). Similarly, the state could make the policy judgment that moving away from the protection of life in any context would lead to the danger of ignoring the value of life in other contexts. In other words, a state might credit the “slippery slope” or “Pandora’s Box” argument. See *id.* at 733 n.23 (indicating concern over the eventual expansion of the right claimed in end-of-life cases). Of course, these assertions are debatable. See, e.g., Martyn & Bourguignon, *supra* note 10, at 842-47 (rejecting slippery slope arguments in this end-of-life subject area). On the other hand, a state might agree with the types of views expressed by Ronald Dworkin, which are more complex and nuanced than can be done justice to here, that the sanctity of life actually is a reason to allow greater individual decision-making at the end-of-life. See DWORKIN, *supra* note 9, at 213-17 (rationalizing that the sanctity of life values human contribution as well as natural contribution and the court’s denial of euthanasia might frustrate the sanctity of life). The point here is not which position is correct.

entitled significant weight in the process of determining whether a constitutional right to refuse medical treatment has been infringed. This Article does not argue that the extreme vitalist position is required of a state or that a court should presume that such a state interest exists. Instead, the proposal set forth below is a means of giving the proper respect or deference to an actual state interest determined through the appropriate democratic process. In other words, to paraphrase Justice Scalia, I proceed on the basis that life really is different.<sup>73</sup>

Of course, as with describing the “right to die” itself, there are definitional hurdles that arise when one discusses the state’s interest in preserving life. One way to define the issue is what I term the “focused interest.” The focused interest looks to the protection of a given individual’s life. Seen in this way, one can easily imagine how a state interest in life would give way to an interest of any individual person to refuse unwanted medical treatment. After all, assuming that the person making the choice is rational and not subject to coercion or duress, it is difficult to see why the state’s interest in that life should trump the individual’s constitutional right. One can see this attitude reflected in court decisions that either hold or suggest in one form or another a point made by one judge in dissent: “The State has an interest in preserving the lives of its citizens. But the State’s interest weakens and the individual’s right to privacy grows as natural death approaches.”<sup>74</sup>

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Rather, it is that there are reasons a state could take an extreme vitalist position. For an interesting, philosophically-oriented discussion concerning a government’s interest in life, see EDWARD W. KEYSERLINGK, *SANCTITY OR QUALITY OF LIFE IN THE CONTEXT OF ETHICS, MEDICINE AND LAW* (Law Reform Commission of Canada 1979), which addresses issues, implications, and assumptions on life-saving treatment decisions for terminally ill patients.

73. See *Wiggins v. Smith*, 539 U.S. 510, 557 (2003) (Scalia J., dissenting) (mocking the “death is different” jurisprudence concerning capital punishment).

74. *Compassion in Dying v. Washington*, 49 F.3d 586, 596 (9th Cir. 1995) (Wright, J., dissenting). The Ninth Circuit, *en banc*, reversed, adopting Judge Wright’s position in his panel dissent, *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996), *rev’d sub nom. Glucksberg*, 521 U.S. at 702 (1997). Other courts and some dissenting judges have accepted the proposition that the state’s interest in life declines as the particular individual’s interest in refusing treatment grows. See, e.g., *Cruzan*, 497 U.S. at 312-13 (Brennan, J., dissenting) (discussing the state’s interest in relation to the severity of the patient’s medical condition); *In re Conroy*, 486 A.2d at 1224 (suggesting the value of life may be reduced rather than enhanced by not allowing an individual free choice and self-determination); *Compassion in Dying*, 79 F.3d at 817, 820 (adding that the strength of the state’s interest is dependent on circumstances including the patient’s wishes and medical condition), *overruled by Glucksberg*, 521 U.S. at 702 (1997); *Quill v. Vacco*, 80 F.3d 716, 729-30 (2d Cir. 1996) (restating that New York’s prohibition on assisted suicide bears a rational relation to a legitimate end), *rev’d*, 521 U.S. 793 (1997).

There is, however, another way to view the matter: the “comprehensive interest” in life. In the comprehensive interest, the state is concerned not only with protecting a given individual’s life but also with the best means to preserve and protect life over society viewed as a whole.<sup>75</sup> It appears that the Supreme Court essentially has accepted that a state may assert the comprehensive interest in life when opposing an individual’s exercise of a constitutional right to refuse medical treatment,<sup>76</sup> but that state courts have overwhelming rejected it.<sup>77</sup> In any event, it is when we define the state’s interest in

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75. It may seem that what I have termed a comprehensive interest in life is simply a utilitarian view. In other words, one might think of it as a view in which the operating principle is that the “good of the many is placed before the good of [the] one.” See Keith D. Kilback, *To Be Human: Selective Reflections on the Sanctity of Life in Rodriguez*, 2 HEALTH L.J. 39, 56 (1994) (criticizing the sanctity of life approach as a justification for protecting the vulnerable under a utilitarian theory). There is academic debate as to whether such a utilitarian view should be adopted at the expense of a focus on individual autonomy. *Id.* at 54-57; Linda R. Hirshman, *Topics in Jurisprudence: The Philosophy of Personal Identity and the Life and Death Cases*, 68 CHL-KENT L. REV. 91, 97-99 (1992) (discounting utilitarian protection of a patient where the patient is unable to feel pain, unable to experience future pleasure, and lacks conscious experience of personhood beyond the body). I am not convinced that the comprehensive view is necessarily utilitarian. For example, consider a situation in which slightly more than half of the citizens in a state would “benefit” from a right to refuse treatment considered individually. In such a situation—perhaps when a majority of the population is elderly—it would not be utilitarian for the state to assert a comprehensive interest in life; yet, I contend that it would still be a valid policy choice for the state to do so. Moreover, for the reasons I describe in the text, that policy choice would still be worthy of enhanced protection even though it was not strictly individualistic or utilitarian. It would have been the state’s policy choice adopted via whatever is the operative political process.

76. See *Cruzan*, 497 U.S. at 282 (“Finally, 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.”). Some commentators have rejected the notion that the state’s assertion of what I have termed the comprehensive interest in life should be viewed in any meaningfully different way than the focused interest. See, e.g., Cantor, *A Patient’s Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 243-45 (1973) (noting the complications with the preservation of life where a competent person resists medical treatment).

77. See, e.g., *In re Guardianship of L.W.*, 482 N.W.2d 60, 74 (Wis. 1992) (reiterating that at a certain point the patient’s liberty in refusing treatment prevails over state interests in preserving life); *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990) (distinguishing the state’s interest in preservation of life where the patient’s condition is not curable); *In re Guardianship of Grant*, 747 P.2d 445, 451 (Wash. 1987) (advancing the argument that where the terminally ill patient’s treatment is significantly intrusive, the patient’s right to refuse treatment prevails over the state’s interest); *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 635 n.28 (Mass. 1986) (noting the state’s interest carries less weight with the incapacitation and suffering of the patient); *In re Conroy*, 486 A.2d at 1223 (expanding the preservation of life interest into related concerns of preserving the life of the patient and preserving the sanctity of all life); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 425-26 (Mass. 1977) (reconciling the state interest in preserving life with the interest of an individual to refuse prolongation where the cost to the patient is great); *In re Quinlan*, 355 A.2d

life comprehensively that problems develop under the traditional constitutional balancing mechanism.

Before moving to a consideration of that mechanism, I will address what some readers might be thinking: Couldn't the state be insincere in asserting the comprehensive version of an interest in the preservation of life? This question actually raises two distinct points. First, the state could be asserting the comprehensive interest in life merely as a pretext to justify its action infringing upon the right at issue. While dealing with such a pretextual situation is not simple, the Article has attempted to craft a balancing mechanism to address this possibility by including in the calculus a consideration of the purposes of the law causing the infringement.<sup>78</sup>

The more difficult type of insincerity occurs in situations in which the state is not using its action as a pretext for accomplishing some other, improper goal, but rather when its profession of a comprehensive interest in life is undermined by other state actions or policies. For example, consider a situation in which a state articulates a comprehensive interest in life but also provides for and carries out capital punishment. Does the imposition of the death penalty mean that a court should—or must—disregard the state's asserted comprehensive interest in the preservation of life? This question is a far more challenging one with which to deal. One would be tempted to use such an apparent inconsistency as a basis to ignore the state's more comprehensive assertion that it is protecting all life. I ultimately conclude, however, that to do so would be inconsistent with a premise upon which the argument is based. That is, in the arena of life and death, a state should have significant leeway to proclaim an interest in life. A corollary to that position is that—within constitutional bounds<sup>79</sup>—a state may take the policy position that all life is valuable *except* the lives of those persons who have committed a particularly heinous crime. A state would be taking

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647, 663-64 (N.J. 1976) (approving a parental request for termination of life support and finding that an individual's rights overcome the state's interest where the patient's prognosis is extremely poor); *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 304-05 (Cal. Ct. App. 1986) (granting patient's request for removal of life support); *In re Guardianship of Barry*, 445 So. 2d 365, 371 (Fla. Dist. Ct. App. 1984) (allowing the parents to exercise the substituted judgment for their minor child). *But see* *Cruzan v. Harmon*, 760 S.W.2d 408, 419-20 (Mo. 1988) (accepting a more comprehensive view of state interest in the preservation of life), *aff'd sub nom.* *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

78. See *infra* Part II.B (discussing the "purpose" prong of my proposed undue burden analysis).

79. I thus leave aside the forceful arguments that the imposition of the death penalty itself is a violation of the constitutional protection against cruel and unusual punishment. See, e.g., U.S. CONST. amend. VIII.

what amounts to a “qualified comprehensive” view in terms of the protection of life. Thus, while acknowledging the inconsistency in a state’s argument that it is in favor of preserving life when that state itself kills, the Article does not suggest that this inconsistency should be a basis to disqualify or lessen that state’s broadly defined interest in preserving life.

Having addressed the individual right and the state interest, the Article turns to a consideration of relevant background principles of constitutional law. Through this section one may appreciate the difficult position in which a court is placed when attempting to balance the two critical interests at stake in end-of-life cases.

*C. Fundamental Rights Jurisprudence and its Inadequacies to Address the Constitutional Right to Refuse Treatment and the State Interest in Life*

It is a familiar part of constitutional law that courts evaluate substantive due process claims using a two-tier standard.<sup>80</sup> If a right is deemed “fundamental,”<sup>81</sup> the Due Process Clause prevents government action infringing upon that right “unless the infringement is narrowly tailored to serve a compelling state

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80. There are commentators who have argued that, as a descriptive matter, the Court may actually employ a standard more akin to a sliding scale in substantive due process cases. See generally Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994) (arguing that the Court has long applied an ad hoc approach in substantive due process cases in which the nature of the infringement of the right makes a substantial difference in an analysis of whether such an infringement is a violation of the Constitution); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 314 (1993) (arguing that the Court gives “the impression” of using a two-tier process when in reality the process is more complex); RÖTUNDA & NOWAK, *supra* note 71, § 18.3, at 225 (3d ed. 1999) (“The Supreme Court has come close to stating that, in fundamental rights cases, it will use a balancing test or an intermediate form of review that would require the government to demonstrate that the restriction on the fundamental right was substantially related to an important interest,” but continues to note that the Court has been “unclear” as to how such a standard would operate). The Court, for its part however, has consistently articulated the basic two-tier standard described in the text as the means of evaluating a substantive due process claim, whether or not it could be considered to have deviated from that standard in certain situations. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (holding that the right to assisted suicide is not a fundamental liberty protected by the Due Process Clause); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (describing the standard for finding fundamental interests and advocating self-restraint in expansion of this area).

81. The Court has used various formulations to define what constitutes a “fundamental” right. For example, in discussing the issue in *Glucksberg*, Chief Justice Rehnquist, writing for the Court, combined several such formulations when he described fundamental rights as those that are “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.” 521 U.S. at 720-21 (internal quotations and citations omitted).



interest.”<sup>82</sup> Under this tier of review—strict scrutiny—the individual right at issue is given a form of heightened protection against infringement because a court requires a stronger justification for government action. Correspondingly, decisions made in the democratic process are more likely to be overturned at this higher level of review precisely because the court engages in a more searching review of the state’s purposes and the means chosen to achieve such purposes.<sup>83</sup>

The other tier of review for substantive due process claims is often termed rationality review. Within this tier, if a right is not deemed fundamental, government action infringing upon that right (if one can still employ the term) will be sustained so long as the action is “rationally related to legitimate government interests.”<sup>84</sup> Acting as a mirror image of the situation under strict scrutiny, an individual right or interest is more at risk of being infringed upon in rationality review because of the deferential nature of a court’s review. A state’s interests, as reflected in political decisions, are correspondingly more likely to be sustained because of that deference.<sup>85</sup>

Thus, one can view traditional substantive due process analysis as being essentially binary in nature. A classification of a right as fundamental will, for all intents and purposes, protect that right from infringement, but it will do so at the cost of trumping a state interest.<sup>86</sup> The binary nature of the process presents courts with a particularly difficult challenge in the context of the right to refuse medical treatment. In this situation, a court must deal with an infringement of an incredibly powerful individual interest, one that Justice O’Connor has indicated is at the heart of due process

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82. *Flores*, 507 U.S. at 302. Other than my brief comments earlier, I leave aside for purposes of this Article whether there is a difference in the standard depending on whether a court characterizes something as a “fundamental right” or a “liberty interest.” See Sunstein, *supra* note 2, at 1131 n.30 (noting the possibility that such difference in terminology could affect the appropriate level of constitutional review); Robertson, *supra* note 10, at 1172-74 (suggesting that by avoiding the fundamental right language and instead using liberty interest terminology, the Court may allow greater deference to state regulation).

83. See, e.g., *Glucksberg*, 521 U.S. at 720 (“By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.”).

84. *Id.* at 728.

85. See, e.g., ROTUNDA & NOWAK, *supra* note 71, §§ 15.4, 18.3 (discussing substantive due process, equal protection, and the various standards of review).

86. It is true as Justice O’Connor has noted in another context that strict scrutiny is not “strict in theory but fatal in fact.” *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)). The reality is, however, that the strict scrutiny standard is designed to, and does, make it exceedingly difficult for a state to justify the infringement of a fundamental right.

protection itself.<sup>87</sup> On the other side of the ledger, however, is a state interest that is also powerful: preserving and protecting life both on an individual and on a society-wide basis.<sup>88</sup> The problem is that the very nature of substantive due process analysis makes it difficult, if not impossible, to simultaneously honor both interests. If the right is honored and deemed “fundamental,” a state may only justify an infringement upon the right if it has a compelling state interest. But if the state’s democratically arrived-at choice to protect life is honored and deemed a compelling interest, the infringement upon the right usually will be allowed under the Constitution.<sup>89</sup> Thus, traditional analysis is unsatisfying in this context because it puts a court to somewhat of an either/or choice: either it protects the individual right to refuse unwanted medical treatment or it protects the government interest in preserving life. This Article addresses this unsatisfying choice by providing an alternative method for analyzing the situation.

One objection to the point articulated about the “unsatisfying” nature of substantive due process analysis in the right to die area is that this concern is applicable to the constitutional adjudication of *all* due process claims. That is, for every individual right and every state interest, a court must make choices leading to one side or the other losing out. Indeed, that is at some level the point of the balancing of right and interest. But this type of criticism is really addressed to the entire notion of two-tier review of substantive due process claims.<sup>90</sup> The Article does not attack the efficacy of the traditional two-tier review as a general matter of constitutional jurisprudence; indeed, an assumption on which the Article proceeds is that such review is usually the appropriate standard principally because it provides a

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87. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 289 (1990) (O’Connor, J., concurring). *See also supra* Part I.A (reviewing the constitutional status of a patient’s right to refuse medical treatment).

88. *See supra* Part I.B (noting the challenge of a state’s interest in preserving life as weighed against the individual’s right to refuse medical treatment).

89. It is also true that in addition to having a compelling interest the government’s action must be narrowly tailored to achieving that interest. *See supra* text accompanying notes 80-82 (observing the complexity of the standard of review for substantive due process claims). This additional requirement, however, does not significantly lessen the point being made. Its addition to the mix only means that the right will be trumped in most but not all cases. The key still remains that finding life to be a compelling interest would greatly reduce the protection of the right across the population.

90. *See, e.g.*, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004) (arguing that judicial interpretation has largely skewed the general scheme of the Constitution); Peter Preiser, *Rediscovering A Coherent Rational for Substantive Due Process*, 87 MARQ. L. REV. 1 (2003) (discussing the anomaly of a two-tier approach and advocating for a detailed analysis of the relationship between the government’s interest and the restriction of liberty).

high degree of protection to fundamental rights.<sup>91</sup> Rather, the Article contends that there is something unique about the situation in which the right to refuse medical treatment is pitted against a state interest in preserving life. Choices about life are fundamentally different in my view than choices about most other things. Here, we are faced with choices about life on both sides of the equation. Thus, the contest of life versus life is, in some sense, *sui generis* and deserves a standard of review that recognizes that fact.<sup>92</sup> In the next part, the Article describes a proposed standard for that purpose.

## II. AN “UNDUE BURDEN” STANDARD AS THE APPROPRIATE MEANS TO BALANCE THE RIGHT TO REFUSE MEDICAL TREATMENT AND THE STATE’S INTEREST IN THE PRESERVATION OF LIFE

The Supreme Court should adopt a standard for balancing the individual right to refuse medical treatment against state action infringing upon that right as follows: a court should strike down any governmental action that (a) has the effect of creating a substantial obstacle to an individual’s exercise of her right to refuse medical treatment or (b) has the primary purpose of creating an obstacle (whether substantial or otherwise) in the exercise of the right instead of advancing the state’s interest in the protection and preservation of life. The proposed standard has its genesis in the joint opinion of Justices O’Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>93</sup> As explained in this Part, this

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91. See *supra* note 80 (suggesting that substantive due process cases involve more than discrete tiers of scrutiny).

92. I return in my concluding comments to the question of whether the undue burden standard advocated should be expanded to areas beyond the right to die. See *infra* Part IV (limiting the application of the undue burden test). The undue burden standard should be reserved only for those situations in which, essentially, life and death are pitted against one another. Indeed, I suggest that the standard should not be applicable to the situations in which it is currently used—infringements on the ability to have a pre-viability abortion—because the state interest at issue there is the preservation of *potential* life, an interest that should not be sufficient to warrant a movement away from the traditional means of evaluating infringement on fundamental rights under the Due Process Clause.

93. 505 U.S. 833 (1992). There is some precedent for using a form of undue burden analysis in end-of-life matters. For example, certain state and federal trial courts considering the constitutionality of bans on physician-assisted suicide concluded that the *Casey* undue burden standard was applicable to those challenges. See, e.g., *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459-63 (W.D. Wash. 1994) (analogizing precedent where similar issues of intimate and personal choice and the right to be free from governmental intrusion are present), *rev’d by Washington v. Glucksberg*, 521 U.S. 702 (1997); *Hobbins v. Attorney Gen.*, No. 93-306-178 CZ, 1993 WL 276833, at \*9 (Mich. Cir. Ct. May 20, 1993) (articulating the application of the *Casey* undue burden test where the fundamental right to bodily integrity is at issue), *rev’d by People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994). Ultimately, both these opinions were reversed on the principal ground that there was

Article's articulation of the standard has some significant differences from the one employed in *Casey*.<sup>94</sup> In addition to contrasting these two undue burden standards, the Article will also explain in detail

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no right to physician-assisted suicide. *Glucksberg*, 521 U.S. at 702 (reversing *Compassion in Dying*, 850 F. Supp. at 1454); *Kevorkian*, 527 N.W.2d at 714 (reversing *Hobbins*, 1993 WL 276833). Thus, neither the United States Supreme Court nor the Michigan Supreme Court considered whether the *Casey* undue burden standard should apply to the claims. See also Valerie J. Pacer, Comment, *Salvaging the Undue Burden Standard—Is it a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 328-31 (1995) (arguing that a modified undue burden standard should be applied on a broader basis in constitutional law and using as an example the Supreme Court decision of *Cruzan*).

In addition, at least one court prior to *Casey* used undue burden language in evaluating a right to die claim. In *In re Jobes*, the New Jersey Supreme Court considered the appropriate standards for allowing the withdrawal of life-sustaining medical treatment “from a non-elderly nursing home patient in a persistent vegetative state who, prior to her incompetency, failed to express adequately her attitude toward such [life-sustaining] treatment.” 529 A.2d 434, 436 (N.J. 1987). At one point in its opinion, the court stated that the procedures it had developed “adequately protect patients, without unduly burdening their rights to self-determination and privacy.” *Id.* at 451 (emphasis added). Taken as a whole, however, it does not appear that the court was actually advocating a substantively different constitutional standard by using this particular language. If the court was attempting to adopt a hitherto unused standard, it certainly did so with little analysis. *In re Jobes*, 529 A.2d at 434.

94. 505 U.S. 833 (1992). The joint opinion articulated its undue burden standard as follows:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

*Id.* at 877.

The 1992 Supreme Court opinion in *Casey* drew substantial public and academic comment because, as one writer noted, “[t]he lead opinion is so fractured that, as the maze of concurrences and dissents illustrate, there is something in it for everyone to hate.” Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 80 (1995). I will address certain criticisms of the *Casey* undue burden standard as part of my explanation and defense of my articulation of the standard in this Part of the Article.

It is also true that the Court has employed standards that are similar to an undue burden analysis in other areas of constitutional law. See, e.g., Brownstein, *supra* note 80, at 893-908 (discussing what the author views as undue burden analysis used by the Court in a number of constitutional cases); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1219, 1235-39 (1996) (discussing use of what Professor Dorf considers to be a form of undue burden analysis in evaluating claims of an incidental burden on the exercise of fundamental rights). Whatever the pedigree of undue burden analysis in constitutional law as a whole, it does seem that the use of such a standard specifically with respect to substantive due process claims concerning so-called unenumerated rights, or at least direct burdens on those rights, was largely a creation of the *Casey* joint opinion. See, e.g., *Casey*, 505 U.S. at 965, 987-88 (Rehnquist, C.J., concurring in part and dissenting in part) (raising criticism of the joint opinion because the undue burden standard purportedly did not have a strong pedigree in constitutional jurisprudence).

how the standard advocated would work, discuss the theoretical concepts that support it, and identify and address difficulties one might expect to encounter in applying the standard. I continue this effort in Part III in which the Article further explores the standard by applying it to three examples of government infringements of an individual's right to decline medical treatment.

Before moving on to address these various matters, however, I want to underscore an important feature of the underpinning for the concept of the standard I propose. One reaches the undue burden standard *only after* having concluded that the right at issue is fundamental and the state interest in life is deserving of special consideration. Thus, while it appears to be a form of intermediate scrutiny,<sup>95</sup> and perhaps operates in some respects in a manner similar to intermediate scrutiny, it is different theoretically.<sup>96</sup> The standard is a balancing device that one reaches not by "devaluing" a right as one might say occurs when, for example, gender-based classifications are subjected to intermediate scrutiny under equal protection analysis.<sup>97</sup> Instead, the standard is a means to try to reconcile two extraordinarily important interests in a way that, in the long run, best secures both.<sup>98</sup> Such a situation is difficult to categorize in traditional

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95. See, e.g., *United States v. Virginia*, 518 U.S. 513, 532-33 (1996) (describing intermediate scrutiny with respect to gender classifications). Such classifications can only survive judicial review if they both further "important governmental objectives" and are "substantially related to the achievement of those objectives." *Id.* at 533.

96. Under classically defined equal protection intermediate scrutiny, for the law at issue to be sustained, the government must "demonstrate that the classification has a substantial relationship to an important interest." See ROTUNDA & NOWAK, *supra* note 71, § 15.4 (observing that intermediate level scrutiny requires less than the compelling interest required with strict scrutiny but more than the great deference to the legislature with rational basis review). Some commentators have described the *Casey* undue burden standard as a form of intermediate scrutiny. See, e.g., Jon S. Lerner, Comment, *Protecting Home Schooling through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363, 364 (1995) (exploring the reasoning and application of the undue burden standard to home schooling regulations). Additionally, one commentator advocating a broader use of intermediate scrutiny in constitutional law has suggested that the Court use such scrutiny when judging issues concerning physician-assisted suicide. See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 349-50 (1998) (defining intermediate scrutiny as including gender discrimination and commercial speech and discussing its application to affirmative action). This Article later suggests that physician-assisted suicide claims, as part of the larger "right to die" constellation, should be judged by the undue burden standard. See *infra* Part IV (advancing an undue burden standard and discussing implications).

97. See generally ROTUNDA & NOWAK, *supra* note 71, § 18.20 (providing an overview of scrutiny of gender-based classifications).

98. It is for this reason that my proposed standard should not be expanded beyond the right to die, broadly defined. See *infra* Part IV (acknowledging that adopting an undue burden standard may reduce the protection of a fundamental right). Indeed, I suggest that the similar *Casey* standard should be abandoned because the prerequisite of a uniquely important state interest is absent.

terms, but that is a result of the difficulty inherent in trying to respect both the right to refuse medical treatment and the state interest in the preservation of life.<sup>99</sup>

A. *The Procedure for Applying the Undue Burden Standard*

Having explored the foundation for the undue burden standard, this sub-part discusses the procedural steps by which a court would apply it. The initial burden would fall on the individual to establish, by a preponderance of the evidence, that a given state action infringes upon the individual's right to refuse medical treatment. If there were no infringement, there would be, by definition, no violation of the right.<sup>100</sup>

Assuming that the individual carried her burden of demonstrating an infringement of the right, the law at issue would be presumptively invalid. To sustain the law, the state would have the burden to establish by a preponderance of the evidence that (1) the law did not have the effect of creating a substantial obstacle to the exercise of the right to refuse medical treatment and (2) the primary purpose of the law was the advancement of the state's interest in preserving and protecting life and not merely the creation of an obstacle (whether substantial or otherwise) to the exercise of the right for its own sake. If the state carried its burdens in this regard, the law at issue would be sustained.<sup>101</sup> If it failed in either of the prongs of the analysis, the individual would prevail and the law would be voided as to that person.<sup>102</sup>

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99. My colleague Professor Tom Marks has argued that the *Casey* standard is not truly concerned with balancing but rather more accurately represents merely a definitional exercise in that the manner in which a court defines the burden will dictate the result. Thomas C. Marks, Jr., *Three Ring Circus Six Years Later*, 25 STETSON L. REV. 81, 111-13 (1995). Whether or not Professor Marks is correct about the *Casey* standard, as I have explained in the text, the standard I advocate is applicable only after balancing the state interest and the individual right and concluding that the traditional substantive due process analysis does not allow for both of these valuable commodities to be given the respect they each deserve.

100. See Brownstein, *supra* note 80, at 867 (noting that the "conventional understanding of fundamental rights" jurisprudence includes a determination of "whether the right has been infringed").

101. As a technical matter, the law at issue would still need to pass rationality review. Cf. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (concluding that right to physician-assisted suicide was not a fundamental liberty interest but observing that "[t]he Constitution also requires, however, that [the state law at issue] be rationally related to legitimate government interests."). As a practical matter, if a given law does not fall under the undue burden standard with its consideration of both purpose and, through the effect prong, means, it will not fall under the less stringent rational basis test. See Brownstein, *supra* note 80, at 881 (commenting that the *Casey* standard "subsumes the application of the rational basis standard review to regulations that do not impose undue burdens").

102. Solely to simplify matters for purposes of this Article, I will assume that the

The Article will describe the substantive contours of both the effect and purpose prongs of the analysis below.<sup>103</sup> Before doing so, however, there are additional points that should be made or reiterated that concern the level of protection to be afforded to the individual right to refuse medical treatment. First a reiteration: the adoption of the undue burden analysis suggested does not mean that the right is no longer “fundamental.”<sup>104</sup> Rather, the standard is designed as a means to best balance two competing interests, both of which are deserving of the highest possible degree of protection. It is a compromise standard in the one area in which this fundamental right is pitted against the state’s compelling interest in life.<sup>105</sup> There is

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individual is making only an “as applied” as opposed to a facial challenge to the state law. There has been debate in the courts and the academic literature in the abortion-regulation area as to whether the *Casey* undue burden standard is applicable in a facial challenge or is restricted to those made only on an “as applied basis.” See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790, 798 n.9 (9th Cir. 1996) (en banc), *rev’d sub nom. Washington v. Glucksberg*, 521 U.S. 702, 735 n.24 (1997) (holding that the Washington ban on assisted suicide does not violate the Fourteenth Amendment facially or “as applied” to competent, terminally ill adults); John Christopher Ford, Comment, *The Casey Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443 (1997) (suggesting the overbreadth doctrine is more appropriate to abortion cases than previous tests); Sandra Lynne Tholen & Lisa Baird, Note & Comment, *Con Law Is As Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, 992-95 (1995) (discussing the facial challenge test established in *United States v. Salerno*, 481 U.S. 739 (1987), where a regulation is facially invalid if under “no set of circumstances” would the law be valid). I do not believe that the difference between these types of challenges should be germane to the arguments I advance.

103. See *infra* Parts II.B and II.C (describing further the “effect” and “purpose” prongs of the undue burden standard I propose to infringements on the right to refuse medical treatment).

104. A major criticism of the Court’s decision in *Casey* was that the right to have a pre-viability abortion that had been deemed fundamental in *Roe v. Wade*, 410 U.S. 113 (1973), was essentially rendered non-fundamental through the operation of the undue burden standard. See, e.g., Annette E. Clark, *Abortion and the Pied Piper of Compromise*, 68 N.Y.U. L. REV. 265, 321 n.278 (1993) (implying that the undue burden standard in *Casey* involves less than strict scrutiny analysis and that *Casey* questions the holding in *Roe* that the right to terminate a pregnancy is a fundamental right); C. Elaine Howard, Note, *The Roe’d to Confusion: Planned Parenthood v. Casey*, 30 HOUS. L. REV. 1457, 1488 (1993) (adding that although the *Casey* Court did not overrule *Roe*’s fundamental right to an abortion, the Court did not protect the right from further regulation); Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1154 (1993) (finding that *Casey* rejected the strict scrutiny standard adopted in *Roe* and instead applied the less demanding undue burden test); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 20 n.30 (1993) (questioning whether, after *Casey*, there is a fundamental right to an abortion and observing the difficulty of weighing competing interests without a useful guide); Nadine Strossen & Ronald K.L. Collins, *The Future of an Illusion: Reconstituting Planned Parenthood v. Casey*, 16 CONST. COMMENT. 587, 588 (1999) (flouting the redefinition of the fundamental right and strict scrutiny in *Roe* to the deferential undue burden standard in *Casey*).

105. See *infra* Part IV (discussing how the undue burden standard should be reserved for *only* those cases in which the state interest is the preservation or

no doubt that more instances of infringement of this right will be allowed than under the standard strict scrutiny calculus, assuming that the interest in life was deemed compelling.<sup>106</sup> But simply because this balancing is slightly different than traditional balancing in strict scrutiny does not mean that the right at issue has been devalued. Instead, the standard reflects an attempt to continue to value that right without undervaluing the state interest in life.<sup>107</sup>

Second, and related to the preceding point, the undue burden standard is not a means to *reach* strict scrutiny. It is a balancing mechanism to be used *in place* of traditional strict scrutiny analysis. Some commentators addressing the *Casey* standard have suggested that a court would essentially determine whether there is an undue burden and, if there was, proceed to address whether there was a compelling state interest for the state action and whether the action was narrowly tailored to achieve that interest.<sup>108</sup> Such an approach would not sufficiently address the concerns this Article raises.

To begin with, under this reading of the standard, if one determined that there was an undue burden, the remaining issue would be how to balance properly an interest in preserving life with the right to refuse medical treatment. Thus, the problem of how to best balance the state interest in life and the individual right would not actually be addressed. Rather, it would merely be delayed. Moreover, the addition of this preliminary step in the strict scrutiny analysis would present the danger that infringement on fundamental

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protection of existing human life). This restriction should deal with alarms raised that by adopting the *Casey* undue burden standard to address pre-viability abortion regulations, the Court was endangering all fundamental rights. *See, e.g., Casey*, 505 U.S. at 987-88 (Scalia, J., concurring in part and dissenting in part) (insisting that the joint opinion was wrong in applying the undue burden standard to a law that “directly regulates” a fundamental right). That concern is certainly legitimate. It is precisely the desire to avoid undermining the traditional protection accorded fundamental rights while simultaneously attempting to acknowledge the uniquely important place the protection of life has in our culture that drove me to make the proposal advanced in this Article.

106. *See supra* Part I.C (discussing fundamental rights jurisprudence and its inadequacies in dealing with right to die situations).

107. *See id.* (emphasizing that strict scrutiny involves balancing between the right to die and the state’s interest in protecting life).

108. *See, e.g.,* R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in Casey and Its Progeny*, 29 PEPP. L. REV. 637, 649 n.42 (2002) (discussing how the Court has applied the undue burden standard in other situations, such as the right to marry and the right to travel); Lerner, *supra* note 96, at 368 (defining the undue burden standard as “a threshold inquiry designed to establish whether the rational basis or strict scrutiny standard should be applied to a particular regulation”). *But see* Brownstein, *supra* note 80, at 879 (“Instead of using the ‘undue burden’ test as a threshold inquiry to determine the appropriate standard of review to apply, the *Casey* plurality utilizes the undue burden test itself as an independent standard of review.”).



rights might be allowed without the state ever being put to the test of having a compelling interest for engaging in the infringing conduct in the first place.<sup>109</sup> Under my proposal, one only gets to the undue burden analysis *after* having concluded that there is a sufficiently powerful state interest—the preservation of life—that is in opposition to the fundamental individual right to refuse treatment.

Third, I recognize that it is rare—although not unheard of—to impose a burden that is akin to proving a negative on a party,<sup>110</sup> as I do by requiring the state to demonstrate that its actions do not have the effect of creating a substantial obstacle to the exercise of an individual's right to refuse medical treatment.<sup>111</sup> The burden is allocated in this way to provide a measure of increased protection for the right in a standard that, concededly, provides less protection than strict scrutiny would likely provide. The assignments of burdens of

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109. For example, assume that a given state action claimed to have infringed on a fundamental right occurred for a legitimate, although not compelling reason. Further assume that the effect of that action was to create an obstacle—although not a “substantial” one—to the exercise of the fundamental right at issue. In this case, under the *Casey* standard there would be no undue burden and, therefore, no need to engage in the strict scrutiny calculus, even though there most certainly was an infringement of a fundamental right.

110. *See, e.g.*, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 11 (1976) (discussing certain provisions of federal legislation that presumed black lung disease in miners was caused by their working conditions and, accordingly, placed the burden on the mine operators to prove that mine work was not the cause); *Chase Manhattan Bank v. O'Connor*, 197 A.2d 706, 709 (N.J. 1964) (declaring that generally, where a party's case rests on proving a negative—such as non-delivery of a document—the burden of proof is on the party alleging the negative). Moreover, the claim that a party is forced to prove a negative is, at some level, misleading because almost all affirmative statements can be reformulated as negative ones. *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *MODERN EVIDENCE DOCTRINE AND PRACTICE* § 3.1, at 177 n.12 (1995) (suggesting that most positive “propositions” can be reworded as negatives); 2 MCCORMICK ON EVIDENCE § 337, at 412 (John W. Strong et al. eds., 5th ed. 1999) [hereinafter MCCORMICK ON EVIDENCE] (clarifying the assignment of the burden of proof when an averment is negative).

111. *See supra* Part II.A. My placement of the burden in this regard is another example of how my proposal differs from the *Casey* standard. In *Casey*, it appears that the burden fell on the challenger to affirmatively demonstrate that there was an undue burden under either the purpose or effect prong of the test. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 990-91 (1992) (Scalia, J., concurring in part and dissenting in part) (collecting examples from joint opinion indicating that the record did not demonstrate that there was an undue burden). The placement of the burden on the challenger in *Casey* has also been the subject of academic criticism. *See, e.g.*, Howard, *supra* note 104, at 1486 (insisting that *Casey* alters the “nature of the right” in the way that it applies the burden of proof); Kolbert & Gans, *supra* note 104, at 1155 (suggesting that the Court in *Casey* created a higher burden of proof for challengers to abortion regulations than *Roe* had originally set forth). There are, however, academic commentators who have argued that the *Casey* Court placed the burden on the government in the undue burden analysis. *See, e.g.*, David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 688-89 (1994) (reviewing the holding in *Casey* and charging that the joint opinion placed the burden of proof on the government, at least with respect to showing that spousal notification would not amount to a substantial obstacle).

production and persuasion are, in many respects, means of implementing more substantive policy goals.<sup>112</sup> Thus, the assignment of the burden I propose reinforces the importance of the individual right at stake, even while the standard as a whole seeks also to protect the state's interest in preserving life.

Having now canvassed the procedure by which the undue burden standard would be applied, this Article will turn in the following two sub-parts to a consideration of the separate prongs of the analysis, those concerning the effect of the government action and the government's purpose for acting. The exploration of the contours of these prongs continues in Part III which applies the proposed standard in three situations and raises a range of issues.

*B. The "Effects" Prong of the Undue Burden Standard*

Under the effects prong of the undue burden analysis, a law that has the effect of creating a substantial obstacle to an individual's exercising the right to refuse medical treatment would be invalid. The effects prong is the principal means under my proposal by which an individual's right to refuse unwanted medical treatment is to be protected.<sup>113</sup> Under the burden structure described above, the state would have the burden to establish that the law at issue did not have the prohibited effect. Recall that the individual has the initial burden to demonstrate that a given law caused an infringement upon the right to refuse medical treatment.<sup>114</sup> Thus, by the time a court is required to consider the effects prong of the analysis it has already been established that there is an "obstacle" to the exercise of the right. The issue will almost certainly turn on whether that obstacle is "substantial." That inquiry will in turn require a court to consider all of the facts and circumstances of that individual case. What is a

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112. See, e.g., MUELLER & KIRKPATRICK, *supra* note 110, § 3.1, at 177 ("First and perhaps most important, burdens are allocated to serve substantive policy, making it easier or harder for plaintiffs to recover or defendants to avoid liability."); cf. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 283 (1990) (commenting that "not only does the standard of proof reflect the importance of a particular adjudication, it also serves as a societal judgment about how the risk of error should be distributed between the litigants") (internal quotations and citations omitted). See also Faigman, *supra* note 111, at 658-60, 665-70 (advocating the use of shifting burdens as part of a theory of constitutional adjudication).

113. As I discuss below, while also protecting the right, the purpose prong additionally serves another important goal. See *infra* Part II.C (explaining that the second goal of the purpose prong is to police state actions).

114. See *supra* Part II.A (describing shifting burdens and asserting that the law is presumptively invalid if the individual has demonstrated an infringement of the right).

“substantial” obstacle in one situation might very well not be deemed “substantial” in another.<sup>115</sup>

Describing the central inquiry under the effects prong raises one of the principal criticisms leveled at the *Casey* standard: It is too amorphous and does not provide judges with sufficient guidance.<sup>116</sup> There is no question that the standard—both as articulated in *Casey* and in this Article—provides judges with discretion and flexibility in determining what constitutes a “substantial” obstacle. But such flexibility is inherent whenever a test is based on a standard instead of a bright-line rule. A full exploration of the rules versus standards debate in terms of judicial decision-making is well beyond the scope of this Article.<sup>117</sup> The key point at present is that a standard allowing courts to consider a variety of facts and circumstances—as is contemplated by the undue burden standard—is important precisely so that a decision-maker can evaluate a claim of undue burden in the context in which it is made. Over time, a body of law will develop that will provide guidance to litigants and later courts, while still allowing a judge to exercise discretion to evaluate a new situation. Moreover, flexibility is needed in this situation in order to help ameliorate the formalistic nature of traditional two-tier substantive due process analysis. Thus, my response to the basic criticism that

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115. See *infra* Part III (exploring this concept further by way of a discussion of how the proposed standard would work in three factual scenarios).

116. See, e.g., *Casey*, 505 U.S. at 965 (Rehnquist, C.J., concurring in part and dissenting in part) (arguing that the undue burden standard will produce numerous “conflicting views”); *id.* at 985-91 (Scalia, J., concurring in part and dissenting in part) (stating that the undue burden standard is amorphous and inconsistently applied); Clark, *supra* note 104, at 326 (explaining that “[a]t present, the undue burden standard appears arbitrary because there is no reasoned basis for the results the joint opinion [in *Casey*] would ascribe to it”); Linton, *supra* note 104, at 69-72 (arguing that the undue burden standard can never be applied evenly); Marks, *supra* note 99, at 113 (questioning whether the joint opinion in *Casey* actually applied a balancing of interests method or simply used a “fact driven definition” to determine whether something is an undue burden); Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2027 (1994) (claiming that in *Casey* “the joint opinion’s failure to provide a systematic methodology by which to apply the standard undermines the standard’s force”).

117. There is a vast amount of literature on the debate both as it pertains to constitutional adjudication as well as more broadly. See, e.g., Michael P. Allen, *In Rem Jurisdiction from Pennoyer to Shaffer to the Anticybersquatting Consumer Protection Act*, 11 GEO. MASON L. REV. 243, 281-84 (2002) (discussing the rules versus standards debate, generally, and arguing for the application of a single standard to determine jurisdiction in cyberspace); Faigman, *supra* note 111, at 646-55 (considering the balancing of these issues in constitutional adjudication); Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 837-49 (1994) (concluding that some balancing is inevitable, and though there are conflicting definitions of what balancing is, the real question is how and when it should be used).

the effects prong of the undue burden standard is “standard-less” is that this feature actually serves the positive purpose of allowing courts to address individual situations to best balance the individual right and the state interest at stake in any given dispute.<sup>118</sup> In short, what others view as a weakness, I perceive as a strength.

C. *The “Purpose” Prong of the Undue Burden Standard*

This Article proposes that a law is invalid under the undue burden standard if the state had the primary purpose of creating an obstacle (whether substantial or otherwise) to the exercise of the right to refuse medical treatment in lieu of actually advancing the state’s interest in the protection and preservation of life. There are two independent goals underlying this prong of the analysis.

First, my impetus for advocating the adoption of the undue burden standard is the unique place that the protection of life should have in the constitutional calculus.<sup>119</sup> If such protection is not, in fact, the primary reason for the state’s action, then any infringement on the right should fail.<sup>120</sup> In other words, without a primary motivation to protect and preserve life, there would be no reason to create the undue burden standard in the first place.

A second goal underlying the purpose prong is generally to police government conduct. Government action taken for the sole or dominant purpose of depriving a person or group of persons of a right is inherently suspect.<sup>121</sup> The purpose prong of the analysis is, in

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118. The joint opinion in *Casey* mounted a related defense of its standard:

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.

*Casey*, 505 U.S. at 849.

119. See *infra* Parts I.B-C (discussing the state’s interest in protecting existing human life and the inadequacies of current fundamental right jurisprudence in balancing between the state’s interest and the right to refuse life sustaining treatment).

120. This assumes that there is no other compelling state interest, narrowly tailored to the problem at hand, that the government could use to justify the action under traditional strict scrutiny analysis.

121. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (articulating the Court’s use of a more probing rational basis review when the objective of a law appears to be to the “desire to harm a politically unpopular group”); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (pointing out that animosity towards a specific group cannot be a legitimate governmental interest); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (clarifying that the state, in creating policies and legislation, “may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary

part, designed to ensure that the government is not acting with such a highly questionable motive.

Two criticisms of the purpose prong of the analysis immediately come to the fore—one specific to the “right to die” area and the other relevant more generally to constitutional analysis. The more general issue is whether it is possible to inquire into the motivation behind any given legislative act, a point about which there has been spirited debate within the Supreme Court.<sup>122</sup> Despite these debates, in a number of contexts the Court has held that a proper constitutional analysis requires at least some consideration of legislative motivations.<sup>123</sup> Moreover, courts are not without means to conduct such an inquiry. To take just a few possibilities, a court can consider the text of the statute, its legislative history, deviations from normal procedures in enacting the legislation, and analysis of the events leading up to the passage of a given piece of legislation.<sup>124</sup>

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or irrational”); *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-36 (1973) (finding that the government’s denial of federal food assistance to households with one or more unrelated members was irrational and that a “bare . . . desire to harm” cannot be a “legitimate” governmental interest). *See also* *Dorf*, *supra* note 94, at 1233-34 (discussing the suspicion inherent when a government acts with the intention of infringing a right).

122. *See, e.g.*, *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 682 n.3 (1981) (Brennan, J., concurring) (analyzing a dormant commerce clause challenge by exploring the actual motivation of the legislature and rejecting the dissent’s claims that such an inquiry is impracticable); *id.* at 702-03 (Rehnquist, J., dissenting) (claiming that consideration of actual legislative purpose is unwarranted and practically impossible); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 186-93 (1980) (Brennan, J., dissenting) (advocating a search for the actual purpose of legislative action under review and criticizing the majority opinion for refusing to conduct such an analysis).

123. The specific situations in which the Court has held legislative purpose to be an important consideration include: (1) evaluating government action under the Religion Clauses of the First Amendment, *see* *Brownstein*, *supra* note 80, at 939-41 (collecting and analyzing cases under the Establishment Clause); (2) setting the outer limits on Congress’s use of the Necessary and Proper Clause, *see* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (suggesting that the Court would strike down a law passed by Congress if it were a mere pretext to act in an area otherwise forbidden by the Constitution); (3) invalidating government actions when the motivation for the laws at issue was a “bare desire to harm” a certain group, *see, e.g.*, cases cited *supra* note 121 (relating to the analysis of legislative motivation, specifically the “bare desire to harm”); and, (4) using dormant commerce clause principles to evaluate state actions to determine whether a given regulation is motivated by economic protectionism, *see* *Brownstein*, *supra* note 80, at 891-92 n.77 (showing that certain state objectives are presumptively valid or at least legitimate, while others are presumptively invalid, by analogizing Dormant Commerce Clause cases). Use of legislative motivation is also supported by thoughtful academic commentary. *E.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 136-70 (1980).

124. *See infra* Part III.A (providing an example of consideration of such information in the context of applying the standard to Terri’s Law).

Finally, the standard is phrased in such a way that the interest in preserving life need only be the *primary* motivation for acting. Thus, evidence that other motivations existed, something likely to occur when dealing with multi-member bodies,<sup>125</sup> would not require invalidation of the law unless those other reasons became, in the aggregate, the primary motivation for the action. The bottom line is that such a general attack on the purpose prong of the analysis is unpersuasive.

The more targeted criticism of the purpose prong concerns whether the standard will actually add anything of substance to the analysis. To understand this possible fault in the standard, one must recall that the joint opinion in *Casey* explained the utility of the purpose prong of its analysis in the following way:

A statute with [the purpose of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion] is invalid because the means chosen by the state to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.<sup>126</sup>

Thus, the use of the purpose prong in *Casey* was to ensure that the government action was not designed as a means to make the exercise of the right more difficult but rather as a means of increasing the woman's contemplation of the decision to abort a non-viable fetus.<sup>127</sup>

The *Casey* incarnation of the standard does not translate well when the right to refuse medical treatment is substituted for the abortion right. As I have set up the equation, the entire reason that the undue burden standard is appropriate is because the state has a powerful interest not simply in making its citizens *think* about life, but in *actually* fostering the preservation of existing life on both individual and community bases.<sup>128</sup> Thus, it would seem that if the goal behind the *Casey* standard were the same goal in the right to refuse medical treatment situation, all state actions would fail because, by my definition, the state is trying to stop citizens seeking death.

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125. See *Kassel*, 450 U.S. at 702-03 (Rehnquist, J., dissenting) (cataloguing perceived problems with searching for legislative intent, including the difficulty of ascribing motivation to a legislative body comprised of more than one member); see also Dorf, *supra* note 94, at 1234 (noting that "the purpose of a law enacted by a multi-member body may be indeterminate").

126. 505 U.S. at 877.

127. See *id.* at 882-95 (deciding that the state may require doctors to inform a woman seeking an abortion about the possible consequences to herself and to the fetus, and that the state may also require a twenty-four hour waiting period, but finding the requirement for spousal consent to be an undue burden).

128. See *supra* Parts I.B-C (analyzing the state's need to protect both the lives and rights of its citizens).

This hypothesized criticism is not troubling, however, because the goal of the purpose prong in the right to die context is more limited, although no less important, than the abortion-focused goal in *Casey*. In *Casey*, the Court worked on the premise that it was improper for a state to attempt to place an obstacle in the path of a woman seeking an abortion.<sup>129</sup> In the context of the right to refuse medical treatment, my premise is that it is legitimate for the state to have the goal of preventing death for any and all of its citizens. However, it is not proper for the state to simply profess that goal while it actually has another primary motivation. Therefore, the purpose prong in the proposed standard is designed to ensure, as much as possible given the difficulty in determining legislative motivation, that the state is actually pursuing its life preservation goal. If the state is pursuing another goal, the reason for judging the state infringement of a fundamental right at a standard less rigorous than strict scrutiny has evaporated. In the end, while the purpose standard I envision likely will have an impact in only a small number of situations, preventing state infringement in those situations is an important check on the abuse of government power.<sup>130</sup> It seeks to ensure that the lessening of protection for a fundamental right that is inherent in the adoption of the standard, is as limited as possible.

This Part set forth the contours of the proposed undue burden standard and the theoretical grounds for it. It also attempted to anticipate certain prominent objections that could be raised to the adoption of this standard to judge infringements on the right to

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129. See *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (equating a state regulation that by “purpose or effect” creates a substantial obstacle for a woman attempting to get an abortion with an undue burden). It is true that a literal reading of the *Casey* standard would suggest that only a purpose to impose a *substantial* obstacle ran afoul of the purpose prong, implicitly allowing the state to have the purpose of imposing a non-substantial obstacle to obtaining an abortion of a non-viable fetus. *Id.* As others have pointed out, however, such a literal reading of *Casey* makes no sense in the context of the joint opinion as a whole. See, e.g., Brownstein, *supra* note 80, at 883-84 n.53 (suggesting a more workable reading of the joint opinion). As Professor Brownstein concludes, “[t]he more plausible interpretation of the joint opinion suggests that any law solely intended to prevent women from obtaining abortions by burdening their choice serves an impermissible purpose.” *Id.*; see also Dorf, *supra* note 94, at 1233-35 (noting the same tension in *Casey* and suggesting that the language was partly sloppy drafting and partly a reflection of an underlying theme in the case concerning the difference between an incidental and direct burden on the exercise of any right). In any event, the purpose prong of the analysis I have crafted does not track the language in *Casey* that has caused this particular type of confusion. See, e.g., *supra* Part II.A (setting forth and analyzing the procedural steps taken to apply the undue burden standard).

130. *But cf.* Brownstein, *supra* note 80, at 884-85 (noting with respect to the *Casey* standard that “[i]n practice, however, it may be difficult to establish that a regulation that does not create a substantial obstacle to obtaining an abortion was adopted for the purpose of interfering with the exercise of this fundamental right”).

refuse medical treatment. The next Part continues the exploration of both the operation of the standard and its potential weaknesses by considering how it would be used to judge three different government infringements of an individual's right to refuse medical treatment.

### III. APPLYING THE UNDUE BURDEN STANDARD

Having described the details of, and theoretical underpinnings for, the undue burden standard proposed, the discussion now proceeds to how that standard would apply in practice. The following three situations allow an exploration of both the purpose and effect prongs of the analysis. In addition to demonstrating the standard's application, these examples are also designed to raise some of the more difficult issues in this area. The three examples discussed concern (1) the Florida Legislature's enactment of Terri's Law attempting to reverse a court decision ordering the withdrawal of life-sustaining treatment, (2) a hypothetical state law under which incompetent adults without a "living will" or "advance health care directive" would be precluded from refusing or ceasing life-sustaining medical treatment, and (3) a hypothetical state law that, in addition to the conditions set out for example number two, also precludes recognition of a now incompetent person's wishes as reflected in a "living will" or "advance health care directive."

Three preliminary points are worth making. First, I have assumed for the purpose of each example that the individual has carried the burden to show an infringement of the right to refuse medical treatment. Second, while I have attempted to select examples that raise a variety of issues, they will invariably not cover every conceivable situation. I have not meant to give short shrift to any particular type of question. In the end, the examples should be sufficient to provide a good picture of the standard in operation. Finally, because the proposed standard is designed to allow courts to exercise a fair degree of discretion, readers may reach different conclusions with respect to any given example. Some reasonable variation in outcomes is an inevitable feature of a standard based on discretion. Such variation only becomes a reason to reject a standard when results over time yield no workable rules by which states and individuals can plan their conduct. While I do not believe the standard I propose is, in fact, unworkable, the ultimate conclusion on this point would need to await the results of actual use of the standard over time.



A. *Terri's Law*

As described earlier, the story of Terri Schiavo is a modern day saga having played out in a variety of hospitals and other health care facilities, all levels of the Florida state court system, the federal courts in Florida, and the Florida Legislature and the Governor's office.<sup>131</sup> Terri Schiavo has been in a persistent vegetative state since early 1990.<sup>132</sup> After several years of litigation with many twists and turns, a final court order was in place as of October 15, 2003 ordering the withdrawal of a feeding tube, which was providing Ms. Schiavo with nutrition and hydration.<sup>133</sup> The decision was made in accordance with Florida statutory law. This law essentially provided that if an incompetent adult had not, while competent, provided written instructions concerning the provision of medical treatment, a court could order the withdrawal of life-sustaining medical treatment if it was established by clear and convincing evidence that the person would not have chosen to continue receiving the medical treatment at issue.<sup>134</sup>

Ms. Schiavo's feeding tube was removed pursuant to the court order on October 15, 2003.<sup>135</sup> Thereafter, a coordinated campaign, apparently largely fueled by conservative organizations, pushed the Florida Legislature to take some action.<sup>136</sup> At least in part as a result

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131. See *supra* text accompanying notes 19-30 (describing the procedural history, facts, and circumstances of the *Schiavo* case).

132. *In re Guardianship of Schiavo*, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001).

133. *In re Guardianship of Schiavo*, 851 So. 2d 182, 187 (Fla. Dist. Ct. App. 2003). On October 21, however, the Florida Legislature enacted Terri's Law, authorizing the Governor to stay the trial court's order. See 2003 Fla. Sess. Law Serv. 418 (West).

134. See FLA. STAT. ANN. § 765.401(3) (2004).

135. *Woman's Feeding Tube Removed*, *supra* note 25.

136. See, e.g., *Subversion of the Right to Die?*, *supra* note 28 (observing that Terri's Law was drawn to match only Terri Schiavo's condition); Wes Allison, *New Life for the Right-to-Life Movement*, ST. PETERSBURG TIMES, Oct. 25, 2003, at 1A (noting that pressure from right-to-life and Christian advocates probably greatly influenced Governor Jeb Bush's actions); Dudley Clendinen, "My Father Wasn't There": *Reflecting on the End of Life*, MILWAUKEE J. SENTINEL, Nov. 9, 2003, at 1J (commenting that the political pressure caused by "public prayer vigils, demonstrations, and a global e-mail campaign" dealing with Terri Schiavo's situation is similar to that usually caused by fights over abortion); Abby Goodnough, *Victory in Florida Feeding Tube Case Emboldens the Religious Right*, N.Y. TIMES, Oct. 24, 2003, at A1 (reporting on the role that religious conservatives played in the legislative challenge); Betty Parker, *Political Fallout from Schiavo Vote Unknown*, THE NEWS-PRESS, Oct. 27, 2003, at 1B; Michael Romano, *Separation of Health, State*, MODERN HEALTHCARE, Oct. 27, 2003, at 4 (arguing that legislative energies spent on medical activities could be used more wisely; in effect, healthcare has become politicized). But see Mark Silva, *Governor Acts on Beliefs, Not to Win Political Backing*, ORLANDO SENTINEL, Oct. 22, 2003, at A1 (arguing that at least Governor Bush did not act out of a political motive in connection with Terri's Law). The political pressure most observers recognized in connection with Terri's Law is similar to the connection between anti-abortion advocacy and organized opposition to the withdrawal of life-sustaining medical treatment observed shortly

of this pressure, the Florida Legislature passed a bill on October 21, 2003—now commonly known as Terri's Law—the effect of which was to give Florida Governor Jeb Bush the power to overturn the court's decision concerning Terri Schiavo.<sup>137</sup> Governor Bush immediately exercised his authority under Terri's Law and ordered the reinsertion of Ms. Schiavo's feeding tube.<sup>138</sup>

After Governor Bush issued his "stay," Ms. Schiavo's husband and guardian filed suit seeking a declaration that Terri's Law was unconstitutional under various provisions of the United States and Florida Constitutions.<sup>139</sup> For purposes of this exercise, the focus will only be on a challenge to Terri's Law under the United States Constitution. The theory advanced in the case is that Terri's Law violates Ms. Schiavo's constitutionally protected right to refuse medical treatment.<sup>140</sup> Given the unsettled nature of the right to refuse medical treatment after *Cruzan*,<sup>141</sup> it is difficult to determine exactly what standard a court will use to evaluate the federal

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after *Cruzan*. See Robertson, *supra* note 10, at 1140 n.4 (commenting that some "extreme vitalists" would require protection for prenatal life "regardless of its quality or functional ability," fertilized eggs, embryos, and fetuses).

137. The full text of Terri's Law is as follows:

Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

- (a) That patient has no written advance directive;
- (b) The court has found that patient to be in a persistent vegetative state;
- (c) That patient has had nutrition and hydration withheld; and
- (d) A member of that patient's family has challenged the withholding of nutrition and hydration.

(2) The Governor's authority to issue the stay expires 15 days after the effective date of this act, and the expiration of that authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at anytime. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

(3) Upon the issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.

Section 2. This act shall take effect upon becoming a law.

2003 Fla. Sess. Law Serv. 418 (West).

138. See William R. Levesque et al., *Gov. Bush's Order Puts Schiavo Back on Fluids*, ST. PETERSBURG TIMES, Oct. 22, 2003, at 1A (giving a timeline of the bill's passage and the Governor's order to reinsert the feeding tube).

139. See *Schiavo v. Bush*, No. 03-008212-CI-20, 2004 WL 980028, at \*6-7 (Fla. Cir. Ct. May 5, 2004) (declaring that "Terri's Law" created both an "unconstitutional delegation of legislative power" and an "unconstitutional authority to interfere with right of privacy"). The Supreme Court of Florida has agreed to hear an appeal of the lower court's decision. See *Bush v. Schiavo*, Case No. SC04-925 (Fla. June 16, 2004).

140. *Id.*

141. See *supra* Part I.A (discussing the current state of a constitutional right to refuse medical treatment).

constitutional challenge to Terri's Law, if indeed the courts reach the federal issues at all.<sup>142</sup> For our purposes, however, this Article will explore how a court would evaluate a challenge to Terri's Law under the undue burden standard previously advocated.

An application of the undue burden standard indicates that a challenge to Terri's Law should be successful under the purpose prong of the analysis.<sup>143</sup> One can reach this conclusion by evaluating the events leading up to the law, its legislative history, and its text. First, there is a strong and probably justified perception that the Florida Legislature was prompted to take action purely because of politics.<sup>144</sup> The evidence is fairly clear that a certain political faction pressured Florida legislators to overturn the court decision as part of a larger political agenda.<sup>145</sup> Thus, there is, at a minimum, a suspicion concerning the state's purpose or motivation in enacting the law.

Second, the legislative history of Terri's Law reinforces this suspicion. There were no hearings or public comment of any kind before the legislation was passed.<sup>146</sup> Thus, the legislative history of Terri's Law does nothing to refute the political motivation for the Act and, if anything, only adds to the cloud surrounding the Legislature's action.

Finally, and perhaps most importantly, the text of Terri's Law itself undercuts any suggestion that the Legislature's purpose was the preservation of life. By its terms, the Act applied only to an

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142. The Florida Circuit Court of Pinellas County recently decided that Terri's Law was unconstitutional using a strict scrutiny analysis, but doing so under the Florida Constitution's explicit protection of the right to privacy. Schiavo, 2004 WL 980028, at \*4.

143. Under the purpose prong, a law is invalid if the state had the primary purpose of creating an obstacle (whether substantial or otherwise) in the exercise of the right to refuse medical treatment instead of actually advancing the state's interest in the protection and preservation of life.

144. See *supra* text accompanying note 136 (noting the political pressure that right-to-life and Christian advocates exerted on the Florida Legislature to enact Terri's Law).

145. See Allison, *supra* note 136, at 1A, 8A (indicating that organizations, such as the National Right To Life Committee, regarded Terri's Law as crucial in the larger right to life battle).

146. See FLORIDA HOUSE OF REPRESENTATIVES, DESCRIPTION OF ACTIVITY FOR HOUSE BILL 35E, at [http://www.myfloridahouse.gov/bills\\_detail.aspx?Id=12713&iSessionSelectedIndex=1&sBillSubjectText=&sBillNumberText=&iSponsorSelectedIndex=0&iBillListSelectedIndex=0&sStatueAmendedText=&iBillTypeSelectedIndex=0&iReferredToSelectedIndex=0&iChamberSelectedIndex=0&iBillSearchListPageIndex=0](http://www.myfloridahouse.gov/bills_detail.aspx?Id=12713&iSessionSelectedIndex=1&sBillSubjectText=&sBillNumberText=&iSponsorSelectedIndex=0&iBillListSelectedIndex=0&sStatueAmendedText=&iBillTypeSelectedIndex=0&iReferredToSelectedIndex=0&iChamberSelectedIndex=0&iBillSearchListPageIndex=0) (Oct. 21, 2003) (on file with the American University Law Review) (providing a description of the Florida House of Representatives' Bill Activity for Bill 35E and highlighting its brisk passage through the House and Senate); see also Clendinen, *supra* note 136, at 3J (noting that Terri's Law was passed "after one day of debate").

extraordinarily narrow “class.”<sup>147</sup> In fact, there does not appear to be any person in Florida other than Terri Schiavo who would have met the classification set out in the statute. Even if there had been such people, the Legislature mandated that the Act, although not any stay issued under it, would expire fifteen days after its effective date.<sup>148</sup> In other words, any life-sustaining benefit of Terri’s Law would not last unless Governor Bush exercised his discretion to issue a “stay.” Finally, in passing Terri’s Law, the Legislature did not change Florida law in any other respect. Thus, the Florida law under which the courts operated in the case was never displaced and is still in effect today.<sup>149</sup>

Based on all of these circumstances, it seems fairly clear that the Florida Legislature was not acting in furtherance of a State policy to preserve life. Even if the Legislature was partially motivated to protect and preserve Ms. Schiavo’s life, it is highly unlikely that the state could carry its burden of demonstrating that the preservation of life was its primary purpose in enacting Terri’s Law.<sup>150</sup> The simple fact is that the Legislature chose in this one case to alter the result reached by the courts under the laws the Legislature itself passed, probably under political pressure. As a result, a challenge to Terri’s Law under the undue burden standard would be successful.<sup>151</sup>

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147. See Governor—Feeding Tube Removal Stay, 2003 Fla. Sess. Law Serv. 418 (West) (narrowing the class to patients who are in a persistent vegetative state, who are not receiving nutrition and hydration, whose family has directly challenged the withholding of nutrition and hydration, and who have no written advance directive on what to do in such a situation).

148. *Id.* § 2.

149. See FLA. STAT. ch. 765.101-401 (2003) (allowing the withdrawal of life-sustaining medical treatment when clear and convincing evidence demonstrates that a person would not have wanted such treatment).

150. One might say that even if there is no evidence that the state’s motivation was to protect all life, Florida definitely intended to preserve Ms. Schiavo’s life. While such an argument might be plausible in the abstract based simply on cause and effect, it does not make sense in the context of the facts of the case. At the beginning of this saga, the basis upon which Terri Schiavo’s feeding tube was removed was a statute passed by the Florida Legislature. See *In re Guardianship of Schiavo*, 780 So. 2d 176, 178 (Fla. 2001) (noting that the decision was made pursuant to Chapter 765 of the Florida statutes as well as common law guardianship procedures). So, the Legislature seemed to change the rules concerning Ms. Schiavo well into the game. Such an action again raises a suspicion that there was more going on than met the eye. Moreover, it is odd that the Legislature decided to protect Ms. Schiavo’s life while leaving millions of other Floridians subject to a statutory scheme that did not reflect an extreme vitalist theory. Such an intent would certainly be susceptible to an argument that the Legislature was not even acting rationally. In short, the facts in many ways speak for themselves about the rank political motivations of the Legislature in enacting Terri’s Law. That motivation really had very little to do with life, on either a focused or comprehensive basis.

151. Because a challenge to Terri’s Law would be successful under the purpose prong of the analysis, there would be no need to analyze it in terms of its effects.

*B. Restricting the Ability of an Incompetent Adult, Without a "Living Will" or Similar Device, to Cease or Refuse Medical Treatment*

The example concerning Terri's Law focused attention on the purpose prong of the undue burden standard. The following examples deal with the effects prong of the analysis. They also deal with the incredibly difficult issue of how a competent adult's right to refuse medical treatment is applied to a person who has become incompetent as a result of an accident or a medical condition. There has been much written about this issue, discussing the theoretical underpinning of the "transference" of the right, whether the right should or can logically be said to apply to an incompetent adult, and if the right is to apply to an incompetent adult, how it should be exercised.<sup>152</sup> The purpose of this Article is not to revisit these debates

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152. The issue has been the subject of much discussion in the state courts. *See, e.g., In re L.W.*, 482 N.W.2d 60, 67-77 (Wis. 1992) (holding that an incompetent patient's right to refuse unwanted medical treatment emanates from the rights of self-determination and informed consent); *In re Guardianship of Browning*, 568 So. 2d 4, 9-13 (Fla. 1990) (holding that an incompetent patient's right to refuse unwanted medical treatment is protected by the right of privacy under the Florida Constitution, so long as the wishes were expressed orally or in writing prior to incompetency); *In re Conroy*, 486 A.2d 1209, 1221-37 (N.J. 1985) (allowing for the removal of life-sustaining treatment from an incompetent patient in any of three scenarios: (1) where clear and convincing evidence suggests that the patient would refuse treatment under the circumstances (subjective test); (2) where clear and convincing evidence of the patient's wishes is lacking, but the burden of continued pain outweighs the benefit of continued life (limited objective test); and, (3) where continuing medical treatment would be inhumane (also called a pure objective test)); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 423-32 (Mass. 1977) (finding that the right to refuse medical treatment should transfer to an incompetent patient and that a surrogate decision-maker should make this subjective judgment); *In re Quinlan*, 355 A.2d 647, 662-64 (N.J. 1976) (determining that the right to refuse medical treatment should transfer to an incompetent patient because the right of privacy supercedes the state interest in life). It has also been the subject of intense scrutiny in academic commentary. *See, e.g., James Bopp, Jr. & Daniel Avila, The Sirens' Lure of Invented Consent: A Critique of Autonomy-Based Surrogate Decisionmaking for Legally Incapacitated Older Persons*, 42 HASTINGS L.J. 779, 781 (1991) (supporting the transference of the right to refuse medical treatment to incompetent patients but denouncing surrogate decisionmaking as an erosion of patients' autonomy rights); Susan Adler Channick, *The Myth of Autonomy at the End-of-Life: Questioning the Paradigm of Rights*, 44 VILL. L. REV. 577, 630 (1999) (suggesting that an incompetent person's right to refuse medical treatment should be exercised according to a "consumer welfare" model based on informed consent instead of an autonomy model); Rebecca Dressler, *Relitigating Life and Death*, 51 OHIO ST. L.J. 425, 425 (1990) (concurring with Professor Nancy Rhoden that incompetent persons should be able to refuse medical treatment based on their prior wishes, but opting instead for a more objective standard); Rebecca Dressler, *Life, Death and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law*, 28 ARIZ. L. REV. 373, 374 (1986) (advocating a "present best interests" standard, instead of a simple best interests standard, for incompetent patients who did not express their preference for medical treatment prior to incompetency); Linda C. Fentiman, *Privacy and Personhood Revisited: A New Framework for Substitute Decisionmaking for the Incompetent, Incurably Ill Adult*, 57 GEO. WASH. L. REV. 801, 843 (1989) (recommending a "conversation model" for surrogate decisionmaking); Louise Harmon, *Falling Off the Vine: Legal*

or to advance a substantive argument as to the appropriate resolution of the issue. Rather, this Article will assume that a presently incompetent adult retains the right to refuse medical treatment.<sup>153</sup> The question will then be whether certain infringements on that right amount to a constitutional violation under the undue burden standard.

The particular hypothetical situation considered in this sub-part concerns a state that provides the means for a competent person to accept or decline medical treatment in the event of future incompetency.<sup>154</sup> This hypothetical state, however, has made the policy judgment that if a person has not, while competent, drafted a "living will" or otherwise decided whether to accept or decline medical treatment in the event of future incompetency, then no such means will later become available.<sup>155</sup> In other words, the state has adopted a strong vitalist attitude. It will protect the lives of incompetent people for whom—in the absence of taking the appropriate formal steps while competent—their wishes could only be divined through substituting another's judgment, whether a family

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*Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 40-46 (1990) (tracing the history of substituted judgment and specifically, its application to incompetent patients); Martyn & Bourguignon, *supra* note 10, at 818 (charging that the right to refuse medical treatment should apply to an incompetent adult and should be exercised by close family members, with the role of the state remaining secondary); Pollock, *supra* note 10, at 520 (noting that a best interests test should be applied to persons who never indicated their preference for medical treatment while competent); Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 375 (1988) (supporting the right to refuse medical treatment for incompetent patients but advocating family decision-making and living wills as the preferable method); Robertson, *supra* note 10, at 1140 (contending that the right to refuse medical treatment should apply to an incompetent adult and should be exercised from the standpoint of present incompetency and not the person's prior wishes); Michele Yuen, *Letting Daddy Die: Adopting New Standards for Surrogate Decisionmaking*, 39 UCLA L. REV. 581, 584 (1992) (proposing that the right to refuse medical treatment should be applied to an incompetent adult only under a best interests standard).

153. The Supreme Court has taken at least a tentative position recognizing that an incompetent adult retains whatever protection the Constitution affords to competent adults concerning the refusal of medical treatment. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279-80 (1990).

154. See *infra* note 162 and accompanying text (reaffirming that the various means of dictating future treatment decisions are beyond the scope of this Article).

155. Courts and legislatures have crafted a wide array of standards by which an incompetent person may be removed from life-sustaining medical treatment. A discussion of these mechanisms, including their strengths and weaknesses, is well beyond the scope of this Article. Generally speaking, these standards range from attempting to determine what the incompetent person would have wanted ("substituted judgment") to what is in the "best interests" of the incompetent person, to allowing a surrogate (usually a family member or court) to make the decision on the incompetent person's behalf. See *supra* note 152 and accompanying text (providing a sampling of state rules and scholarly critiques on this topic); see generally MEISEL, *supra* note 2, §§ 7.1-7.46 (describing and critiquing the various approaches the states have taken).

member or a court, for that of the incompetent person. This process is filled with built-in margins of error.<sup>156</sup>

The issue to be addressed here is whether this hypothetical state action would be unconstitutional under the effects prong of the undue burden analysis.<sup>157</sup> Under this prong, a government's action infringing the right to refuse medical treatment is unconstitutional if it has the effect of creating a substantial obstacle to an individual's exercise of this right. As explained below, such a law does not create a substantial burden and therefore would be found constitutional under the undue burden standard.<sup>158</sup>

There is no question that the legislative scheme outlined above would deprive some individuals of their right to refuse medical treatment. Thus, the scheme creates an obstacle and, for some persons, an insurmountable one. But the obstacle is insurmountable only because the person, while competent, did not draft a "living will" or otherwise decide whether to accept or decline medical treatment in the event of incompetency. If a state could not make the extremely pro-vitalist value choice in a situation such as this one, it would seem that the undue burden standard would be nothing more than strict scrutiny in disguise. After all, the state has created mechanisms by which all competent adults can effectively trump the

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156. It appears that no state has taken the position hypothesized in this sub-part. In actuality, there is a wide spectrum of vitalist attitudes among the states, with some closer to this Article's position than others. For example, Missouri is certainly more vitalist in its consideration of medical decisions for incompetent patients than is New Jersey. Compare *Cruzan v. Harmon*, 760 S.W.2d 408, 417-18 (Mo. 1988) (refusing to extend the penumbral right to privacy to the removal of life-sustaining food and water from incompetent patients), with *In re Conroy*, 486 A.2d 1209, 1231-32 (N.J. 1985) (allowing for the removal of life-sustaining treatment from incompetent patients in any of three scenarios). The attraction of the undue burden standard for evaluating actions along this spectrum is that it will allow a wide range of state action and will also provide a backstop of protection if the state adopts too aggressive a vitalist position to comport with the Constitution.

157. This Article does not posit facts from which it would appear that the state would run afoul of the purpose prong of the analysis. In other words, this Article assumes that the state is acting out of a sincere policy favoring the preservation of life. For example, the state may have concluded that the risk of error that is inherent in a substituted judgment or best interests test is, on the whole, too great to risk the loss of lives that could occur if inaccurate decisions are made. Moreover, the state may have concluded that even an increased standard of proof, such as clear and convincing evidence, does not reduce the risk of error sufficiently.

158. The majority opinion in *Cruzan* expressly left open the related issue "whether a [s]tate might be required to defer to the decision of a surrogate if competent and probative evidence established that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for that individual." 497 U.S. at 287 n.12. In her concurring opinion, Justice O'Connor was more forthcoming with her view, writing that "such a duty [to defer to a proxy decision-maker] may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment." *Id.* at 289.

state's default, life-favoring policy. A finding of unconstitutionality under these conditions would be inconsistent, however, with the premise upon which the undue burden standard has been created: the need to provide due respect for *both* the individual right and the state interest in the preservation of life. In sum, the fact that the statutory scheme makes it possible for all competent adults to ensure that their right to refuse medical treatment is protected should they become incompetent means that there is no creation of a "substantial obstacle" to the exercise of the right. This is so even though a person not taking the required steps will be foreclosed from exercising the right.

The perceptive reader will probably identify a significant criticism with this suggestion. In particular, this theory would result in the systematic deprivation of certain groups in the population of the right to refuse medical treatment when rendered incompetent. Such groups would include those that are less able or likely to take advantage of the means the state provides to ensure that the right is preserved: the young, the poor, and the uneducated.<sup>159</sup> This criticism is a serious one and cannot be taken lightly. Ultimately, it is unpersuasive because applying the undue burden standard requires balancing. The unfortunate reality is that there are, and always have been, inequities in our society flowing from age, wealth, and social class. To allow those inequities to tip the scales in the undue burden analysis would lead us back into an undervaluation of the state's interest in life. This standard forces difficult choices in order to ensure an appropriate balance of the state's interest and individual rights. Here, the state left open avenues to protect the right; it hopefully will also have taken steps to publicize those actions. If individuals do not take advantage of those avenues to preserve a right, then the ultimate outcome is that their rights, when those

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159. Others have likewise observed that these groups could be harmed by a policy favoring the use of advance directives and living wills. See Channick, *supra* note 152, at 628 (noting that young people do not generally use advance directives and that advance directives are not always reliable because the underprivileged sometimes intend them to be executed by physicians exercising discretion); Martyn & Bourguignon, *supra* note 10, at 838 (highlighting the young as particularly vulnerable because they rarely express their preference for life-prolonging medical treatment). Cf. Metzger, *supra* note 116, at 2066-67 (making a similar point concerning the application of the undue burden standard to abortion regulations). At least one court has also recognized the possibility that advance directives would discriminate against the underprivileged. *In re Westchester County Med. Ctr.*, 531 N.E.2d 607, 614 (N.Y. 1988) ("Of course, a requirement of a written expression in every case would be unrealistic. Further, it would unfairly penalize those who lack the skills to place their feelings in writing.").



persons are rendered incompetent, will be lost.<sup>160</sup> This is not a favorable policy choice, but it comports with the constitutional safety-net the undue burden standard ensures.

*C. Elimination of the Option of a "Living Will" or  
Similar Advance Directive*

This section builds on the hypothetical considered in the prior subpart. First, assume that a state continues to deny incompetent adults the ability to exercise their right to refuse medical treatment.<sup>161</sup> Further, assume that the state provides no lawful means for a competent adult, while competent, to decide whether to accept or decline medical treatment in the event of future incompetency.<sup>162</sup> Thus, under this scenario a competent person is still able to refuse medical treatment while competent, but there is no mechanism to do so if this person should be rendered incompetent or too ill to act. What is the outcome of an undue burden analysis with respect to this statutory scheme?<sup>163</sup>

This analysis is brief, given what has come before. As discussed above, a statutory scheme that precludes the right to refuse medical treatment after becoming incompetent, but leaves open the means to exercise such a right prior to becoming incompetent, would be considered constitutional under the undue burden analysis because an individual could exercise the right to refuse medical treatment

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160. Professor Robertson reached much the same conclusion, although in less sympathetic terms. In rejecting the basic criticism to a rule requiring written directives outlined above, he wrote:

This criticism is unpersuasive. If the right [to refuse medical treatment] concerns the considered exercise of autonomy, then one simply must exercise it in a considered way. It is not unreasonable to require that the exercise in fact occur and that it be documented in writing or be made explicit in some other manner to provide proof that it was exercised, just as written contracts are required for certain other autonomous decisions. A less restrictive position might lead to erroneous determinations and premature death of incompetent patients who possess interests in treatment. Robertson, *supra* note 10, at 1165-66 (footnote omitted).

161. See *supra* Part III.B (denying the right only if incompetent adults failed to exercise it while competent).

162. There are a number of ways that states commonly provide for competent adults to essentially dictate how treatment decisions can and should be made if the person becomes incompetent. Once again, this Article does not critique the various approaches the states have taken on this issue. See generally MEISEL, *supra* note 2, §§ 10.1-14.10 (discussing different methods such as advance directives, living wills, proxy directives, and surrogate decision-making that states have legislated to allow competent adults make future treatment decisions).

163. Assume again that the state has a valid motivation to preserve and protect life. In other words, assume that the state would be able to carry its burden under the purpose prong of the analysis.

simply by taking certain action while competent.<sup>164</sup> In the current hypothetical, there is no way for an individual to secure the exercise of the right to refuse medical treatment while incompetent. This individual cannot do so through a surrogate after being rendered incompetent. Moreover, nothing the person can do while competent can protect this right. In this situation, the state would have erected a “substantial obstacle” in the path of individuals seeking to exercise their right to refuse medical treatment because there could be no situation in which an incompetent person could exercise that right. Thus, the statutory scheme hypothesized above would be unconstitutional under the undue burden standard.

#### CONCLUSION

This Article proposes that the undue burden standard should be adopted as the means of analyzing whether infringements on the right to refuse medical treatment violate an individual’s constitutional right to due process. Of course, the effect of employing the undue burden standard in place of traditional strict scrutiny is less protective of fundamental rights.<sup>165</sup> Justice Scalia is therefore correct, at least in part, when he asserts that an undue burden standard is a “dangerous” proposition because of the potential loss of protection for rights.<sup>166</sup> It is for this reason that this Article does not advocate the use of that standard in any area of substantive due process beyond those limited cases in which the state asserts as a counterbalance to the fundamental right an interest in the preservation and protection of existing human life. Courts that have done so and commentators who have suggested such an approach are in error because of the risk to the protection of fundamental rights inherent in moving away from strict scrutiny.<sup>167</sup>

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164. See *supra* Part III.B (concluding that such a statutory scheme would not create a substantial obstacle in exercising the right to refuse medical treatment because the patient, while competent, failed to express any treatment preferences).

165. See *supra* Part I.C (noting that under traditional strict scrutiny the fundamental right almost always prevails over the state interest, whereas the undue burden analysis is more accommodating of both interests).

166. *Planned Parenthood v. Casey*, 505 U.S. 833, 965, 988 (1992) (Scalia, J., concurring in part and dissenting in part).

167. At least two courts have used a form of the undue burden standard to evaluate substantive due process claims when the state’s asserted interest was not the preservation of human life. See, e.g., *Herdon v. Tuhey*, 857 S.W.2d 203, 209-10 (Mo. 1993) (using the *Casey* undue burden standard to consider grandparent visitation rights issue); *Griffin v. Strong*, 983 F.2d 1544, 1549 (10th Cir. 1993) (using the *Casey* undue burden standard to consider a dispute concerning First Amendment associational rights issue). Academic commentators have also urged the adoption of the standard with respect to broader areas of substantive due process. See, e.g., Dorf, *supra* note 94, at 1181-82, 1219, 1235-39 (suggesting that an undue burden analysis

This Article has two recommendations beyond its main thesis. First, the undue burden standard should be expanded *only* to address substantive due process claims concerning the broader understanding of the “right to die.”<sup>168</sup> Issues at stake in the broader right to die context, such as those surrounding physician-assisted suicide, have the same features as disputes concerning the right to refuse medical treatment: on one hand there is a state interest in the preservation of life while on the other hand there is an individual liberty interest in, broadly speaking, bodily integrity.<sup>169</sup> Thus, the aforementioned “extraordinary” preconditions to using an undue burden test are present and in this instance justify a move away from strict scrutiny.<sup>170</sup>

The second recommendation is that the undue burden standard adopted in *Casey* should *not* be used to evaluate infringements on the right of a woman to have a pre-viability abortion. Instead, courts should apply strict scrutiny because the essential precondition to move away from such heightened review is absent. *Roe* recognized the fundamental right of privacy that a woman has in the control of her own body, at least during the pre-viability stage of her pregnancy.<sup>171</sup> Under the conditions for proper use of the undue burden standard, the state interest must be the preservation of life. But the interest in the abortion context is the “interest in protecting

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currently is and should remain a standard by which to judge incidental burdens on the exercise of all fundamental rights except those based on what Professor Dorf terms “equality norms”); Lerner, *supra* note 96, at 364 (arguing for adoption of an undue burden standard concerning home schooling of children).

168. See *supra* note 2 (identifying topics covered by the broader definition of the “right to die”).

169. It is true that the Court has held that there is no protected liberty interest in having help in committing suicide. *Washington v. Glucksberg*, 521 U.S. 702, 722-27 (1997). However, as several of the concurring opinions in *Glucksberg* make clear, there are still open issues in this area. See *id.* at 736 (O’Connor, J., concurring) (noting that the question “whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death” was not reached in the decision); *id.* at 741 (Stevens, J., concurring) (noting that the “decision upholding a general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid”).

170. Of course, this assumes that there is a fundamental right involved in the broader right to die areas. For present purposes, this Article assumes so.

171. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating that a woman’s right to terminate her pregnancy is “founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . .”). Today the interest more certainly would be denominated as one of “liberty” and not “privacy.” See *Planned Parenthood v. Casey*, 505 U.S. 833, 951 (noting that the right of privacy is not all-encompassing because the state has a concurrent interest in the preservation of life); cf. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (acknowledging that there is a zone of liberty upon which the state cannot impinge).

the *potentiality* of human life.”<sup>172</sup> Although a full discussion of this issue is beyond the scope of this Article, the interest in *potential* life is not of the same magnitude as the preservation of *existing* life. If for no other reason, the Court has held that a fetus is not a “person” in terms of the Constitutional Due Process protection.<sup>173</sup> This is not to say that the interest in potential life is unimportant. Rather, it simply does not meet the threshold required to move away from strict scrutiny and its strong protection of fundamental rights.<sup>174</sup>

In the final analysis, the proposed solution to balance a state’s interest in the preservation and protection of life and the individual’s fundamental right to refuse medical treatment will probably satisfy few people engaged in the debate. However, this reality is the same for any system of balancing interests and rights in which one “side” is not given a preference.<sup>175</sup> In most situations, I would come down on the side of erring in favor of protecting rights and, thus, support the protection of fundamental rights through strict scrutiny. And, indeed, parts of this proposal continue to have a pro-rights bias.<sup>176</sup> But there is something special when the state is advancing a true interest in the protection of existing life, something that is part of the fundamental reason why we have governments in the first place. In this instance—and only in this instance—should courts employ the undue burden standard previously described. In this way, the proper respect will be shown to the people, both individually and collectively.

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172. *Casey*, 505 U.S. at 871 (quoting *Roe*, 410 U.S. at 162) (emphasis added).

173. *Roe*, 410 U.S. at 158.

174. As an alternative suggestion, if an undue burden standard is still to be used to evaluate infringements on the right to have a pre-viability abortion, this Article’s general outline of the standard better serves the protection of the right and the recognition of the interest. In particular, the burden of proof should shift to the state. *See supra* Part II.A (delineating the procedure for applying the undue burden standard).

175. For example, contrast this Article’s proposal with the almost absolute “preferences” accorded to individual rights in strict scrutiny and state interests in rationality review. *See supra* Part I.C (discussing the binary nature of traditional fundamental rights review, where either the individual right or the state interest gets plenary protection).

176. An example of such a rights-favoring bias is the placement of the burden on the state at certain critical points in the process. *See supra* Part II.A (noting that the burden shifts to the state once the individual has shown by a preponderance of the evidence that the law infringes on the right to refuse medical treatment).