DEATH AFTER *DOBBS*

KATHY L. CERMINARA

ABSTRACT

Courts have recognized that decisions about medical care near the end of life enjoy both common-law and constitutional protections since the 1970s, when patients, their families, and the medical establishment invited legal input into those intensely private discussions. In *Cruzan v. Director, Missouri Department of Health*, the U.S. Supreme Court famously "strongly assumed" that substantive due process protected decisions to withhold or withdraw such treatment as arising from a fundamental liberty interest. Beginning on June 24, 2022, however, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization,* prompted concern over whether federal constitutional substantive due process protection for end-of-life decision-making would disappear.

Barring total annihilation of substantive due process, federal constitutional protection of end-of-life medical decisional liberty will, at a minimum, continue to exist to the same extent it does now. The *Dobbs* dissent noted that the Court had not overruled a line of substantive due process cases involving personal decisions other than abortion, thus preserving arguments that the federal Constitution protects end-of-life medical decisional liberty *writ* large as a fundamental right. Even applying the test of *Dobbs*, the Court's "strong assumption" remains valid after *Dobbs*, so decisions to reject life-sustaining treatment will continue to enjoy the same, if not more, constitutional protection they enjoyed before *Dobbs*. Some advance directives face greater scrutiny, however, and it seems clear that medical aid in dying will continue to rely on state law as a source in that instance.

INTRODUCTION

As a matter of both medical ethics and law, it was unfortunate that the U.S. Supreme Court in *Cruzan v. Missouri, Department of Health*,[1] failed to loudly proclaim the existence of a fundamental liberty interest in end-of-life medical decision-making. Courts have recognized that decisions about medical care near the end of life enjoy both common-law and constitutional protections since the 1970s, when patients, their families, and the medical establishment invited legal input into those intensely private discussions. Seemingly in that spirit, the *Cruzan* majority "effectively enshrined personal autonomy in a medical setting as a constitutionally protected interest,"[2] but its failure to issue a clear, strong statement recognizing the fundamental nature of the liberty to exercise autonomy near the end of life has raised questions in these days of cramped constitutional interpretation.[3] Bioethics scholar Zita Lazzarini, for example, expressed such

[1] 497 U.S. 261 (1990).
[2] Kathy L. Cerminara, *Cruzan's Legacy in Autonomy*, 73 SMU L. REV. 27, 27 (2020).
[3] Because this symposium focuses on *Dobbs*, and because *Dobbs* relates only to substantive due process, this Article will not analyze other potential state and federal constitutional protections that could assure liberty in end-of-life decision-making. *See, e.g.,* right to travel arguments in Vermont and Oregon (?) and section of The Right to Die about state and federal constitutional sources.

concerns[4] soon after the decision in *Dobbs v. Jackson Women's Health Organization*,[5] in which the Court utilized what the Massachusetts Supreme Court recently termed a "narrow" approach to recognizing fundamental rights.[6]

Future development of the law of end-of-life decision-making indeed will be affected negatively if the Court eliminates the doctrine of substantive due process, but end-of-life liberty is in far better shape than the right to choose an abortion. Physicians, other health care providers, patients, and their loved ones will continue to be able to honor patient autonomy with respect to withholding and withdrawal of life-sustaining treatment based upon a number of legal arguments. Due to a gap in the common-law foundation of such autonomy, however and because the Court refrained from explicitly recognizing a federal constitutional right in *Cruzan,* it would be helpful if state constitutions and statutes shored up the right to refuse life-sustaining treatment in the wake of *Dobbs*. Asserted rights to choose medical aid in dying absolutely require such action.

In the short run, assuming no such drastic and destructive development immediately in federal constitutional law, the federal Constitution protects end-of- life autonomy after *Dobbs* at least to the same extent it did previously. Expanded protection of end-of-life medical decisional liberty broadly defined[7] is possible if the Court applies the view of fundamental rights it adopted in *Windsor*[8] and *Obergefell.*[9] More likely, the Court will continue to use the test it used to determine whether a fundamental Constitutional right existed in *Dobbs* and referenced in *Cruzan*. There, of course, the Court refrained from holding that the right existed, but the Court later "described itself as having `assumed, and *strongly* suggested' the right's existence in *Cruzan*."[10] Withholding and withdrawal of life-sustaining treatment easily meets that test, while the Court has ruled that medical aid in dying fails that test.

This Article will illustrate the continued vibrancy of federal constitutional protection for the majority of end-of-life medical decisions after *Dobbs*. First, it will explain why end-of-life medical decision-making rights will survive – although in politically precarious form – if federal substantive due process law ceases to exist. Second, assuming no such drastic and destructive a development in the law, this Article will demonstrate the validity of the Court's earlier assumption and strong suggestion that a fundamental liberty interest in making medical decisions exists. Some advance directives face greater scrutiny, however, and it seems clear that medical aid in dying will continue to rely on state law as a source if the substantive due process test the Court used in *Dobbs* prevails. All in all, however, the law of death[11] after *Dobbs* still mostly assures patient autonomy.

I. END-OF-LIFE DECISIONAL LIBERTY WILL SURVIVE IF SUBSTANTIVE DUE PROCESS BECOMES A DOCTRINE OF THE PAST

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[4] Zita Lazzarini, *The End of Roe v. Wade – States' Power Over Health and Well-Being*, 387 NEW ENG. J. MED. 390 (2022).
[55] 142 S. Ct. 2228 (2022).
[6] *See* Kligler v. Attorney General, 198 N.E.3d 1229, 1251 (Mass. 2022).
[7] Including both withholding and withdrawal of life-sustaining treatment and medical aid in dying.
[8] Windsor cite. Use full name in text.
[9] Obergefell cite. Use full name in text.
[10] *See* Cerminara, *supra* note __ (Cruzan's Legacy) at 27 (*quoting* Washington v. Glucksberg, 521 U.S. 702, 720 (1997)) (emphasis added).
[11] "The law of death" here is intended to encompass the law of withholding and withdrawal of life-sustaining treatment and medical aid in dying. Other related subjects, such as brain death, deserve great attention as well but are beyond the scope of this Article.

The primary concern for all those intent on preserving constitutional freedoms is that *Dobbs* may portend the elimination of substantive due process. Although the majority took pains to assure readers to the contrary,[12] Justice Clarence Thomas, writing in concurrence, pulled no punches in stating that, "[b]ecause any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents."[13] The judicial philosophies and previous writings of other justices suggest that they may concur.[14]

One category of end-of-life medical decisional liberty does not hinge on substantive due process and thus likely would not be affected if substantive due process doctrine is eliminated. Patients who are Jehovah's Witnesses refuse blood transfusions as a matter of faith, asserting First Amendment Free Exercise rights in support of doing so.[15] The Court's current apparent concern for religious freedom suggests that it will be receptive to such arguments, even if the patient's life hangs in the balance, other than perhaps in the cases of pregnant patients.[16] The leading treatise in this area of law, however, notes that courts initially refused to uphold such refusals and only began permitting them refusals of life-sustaining treatment had been upheld in other settings.[17] It is thus possible that the religious freedom cases could be affected by the elimination of substantive due process entirely (or even simply as a basis for end-of-life medical decisional liberty).

More generally, future development of the law of end-of-life decision-making indeed would be affected negatively if the Court eliminates the doctrine of substantive due process. The effect, however, would be primarily to eliminate hopes for full recognition of end-of-life decisional liberty, rather than to eliminate all protection for such liberty. Moreover, should substantive due process become a thing of the past, the Court will have eliminated only one source of legal protection for decisional liberty, not all recognition of fundamental liberty interests in making end-of-life treatment decisions.

A. *The Future of End-of-Life Decisional Liberty Would Be Diminished But Not Destroyed By the Elimination of Substantive Due Process Protection at the Federal Level*

The King in Lewis Carroll's *Alice in Wonderland* advised us to "begin at the beginning,"[18] and so this Article shall, by journeying back to the Supreme Court's initial foray into end-of-life medical decisional liberty. When the Supreme Court assumed the existence of a fundamental liberty interest in end-of-life medical decision-making in *Cruzan*, it missed an opportunity to fully protect such decision-making. "The majority and Justice O'Connor's concurrence spoke of the right as rooted in the common-law doctrine of informed consent."[19] In doing so, as the Court later held in *Washington v. Glucksberg*, it considered the liberty in question to be solely a negative right

[12] Dobbs, 142 S. Ct. at 2280-81.
[13] 142 S. Ct. at 2301-02 (Thomas, J., concurring).
[14] *E.g.,* _____, Gorsuch book?
[15] *See, e.g.,* Wons (Florida Supreme Court). *See generally* Right to Die chapter 2, 2.06[C] (terming such refusals "religious motivation" cases).
[16] See later section on pregnancy and advance directives.
[17] Right to Die chapter 2, 2.06[C].
[18] Need actual cite to Alice in Wonderland. Placeholder = https://www.goodreads.com/quotes/6305-begin-at-the-beginning-the-king-said-very-gravely-and (last accessed March 20, 2023).
[19] Cerminara, *supra* note ___ (Cruzan's Legacy), at 28.

– that is, a right to refuse bodily intrusion, not an expansive right to make end-of-life medical decisions.

Doing so limited the assumed substantive due process right in the same way as the common-law doctrine of informed consent "inadequately protect[s] the fundamental right of individuals as patients to determine for themselves whether they wish medical treatment, and if so what kind of treatment."[20] As the legendary Jay Katz noted, the law of informed consent's "frequently articulated underlying purpose – to promote patients' decisional authority over their medical fate – has been severely compromised from the beginning."[21] Professor Katz made that statement in the context of criticizing the law's purporting to honor patient self-determination while giving physicians the discretion to withhold information during the consent process under certain circumstances.[22] More recently, Alan Meisel similarly has criticized informed consent law's insistent focus on amount and details of information disclosure as its "continued lack of recognition that inadequate disclosure of information to patients by doctors is itself a wrong meriting legal protection," because of the resulting harm to patients' dignitary interests.[23] Similarly, in a paper so recent that it has not yet appeared in print, Valerie Gutmann Koch has argued that the law of informed consent is missing a crucial element, a determination that patients have understood the information provided "to ensure the lofty ethical goals of clinical informed consent."[24] Those, she suggests, are "the ethical goals of ensuring autonomous, voluntary, and informed decision making in medicine." Ethically, the doctrine of informed consent seeks patient decisional autonomy; legally, the Court limited it in a constitutional sense to preventing unauthorized bodily intrusion.

Thus, the *Cruzan* Court's focus on bodily intrusion rather than the true ethical meaning of informed consent distracted the law's traditional and more fundamental protection of self-determination and dignity, represented by the tort of battery. The law of battery traditionally has prohibited unauthorized bodily contact for its own sake, whereas informed consent is generally a negligence cause of action, requiring injury beyond the dignitary. [25] The law of battery affords recovery regardless of whether physical injury occurred from an unauthorized bodily contact, even when the intrusion benefits victims/patients, thus addressing the dignitary harm that occurs when contact is made without consent, contrary to a rejection, or – ideally -- after failing to provide accurate or adequate information.[26] The Court's characterization of its assumed liberty interest as arising out of the law of informed consent rather than the law of battery eliminated (or at least limited) consideration of the dignitary harm associated with administration of life-sustaining treatment when a patient refused or requested withdrawal of it.

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[20] Alan Meisel, *A "Dignitary Tort" as a Bridge Between the Idea of Informed Consent and the Law of Informed Consent*, 16 L. MED. & HEALTH CARE 210, 211 (1988).
[21] Jay Katz, *Informed Consent – a Fairy Tale: The Law's Vision*, 39 U. PITT. L. REV. 137, 139 (1977).
[22] See Katz, (Fairy Tale) at 141-42.
[23] Meisel (Dignitary Tort), *supra* note ___, at 211. Professor Meisel identified other intentional torts such as intentional infliction of distress and invasion of privacy as other common-law sources of dignity protections. Recently, New York's Court of Appeals recognized a cause of action for wrongful living, long resisted by courts nationwide, thus heralding another potential path toward additional tort protections for medical dignitary interests.
[24] Valerie Gutmann Koch, *Reimagining Informed Consent: From Disclosure to Comprehension*, forthcoming (copy on file with the author) (draft at page 1).
[25] The Right to Die chapter 11 & Meisel (Dignitary Tort) at 211-12.
[26] See generally Meisel (Dignitary Tort) at 211-12, and The Right to Die chapter 11.

A minority of justices in *Cruzan* would more appropriately have grounded the right to refuse treatment in the right to shield against harm to dignitary interests. Writing in concurrence, Justice Stevens envisioned "a more expansive view of autonomy," recognizing a right to "make decisions regarding one's body and the condition in which one would wish to live."[27] Dissenting Justice Brennan, joined by Justices Blackmun and Marshall, focused on dignitary interests in describing the right at issue as "a right to evaluate the potential benefit of treatment and its possible consequences according to one's own values and to make a personal decision whether to subject oneself to the intrusion."[28]

The *Dobbs* Court's overruling of *Planned Parenthood of Southeastern Pennsylvania v. Casey* may but need not have foreclosed any immediate possibility of recognition that the federal Constitution recognizes a fundamental liberty interest in end-of-life medical decision-making based on more than preventing or ridding oneself of bodily intrusion. Two years after *Cruzan*, after discussing substantive due process cases "respect[ing] the private realm of family life which the state cannot enter," the majority *Casey* wrote the following expansive view of medical decisional liberty:

> Our precedents "have respected the private realm of family life which the state cannot enter." . . . 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 compulsion of the State.[29]

Although the *Dobbs* Court specifically refused to overrule the precedents upon which it had based that conception of decisional liberty (then called the right to privacy),[30] the Court has indicated elsewhere that it is not willing to expand its view in the end-of-life decision-making context. In *Glucksberg*,[31] the only other end-of-life medical decision-making case to reach the Supreme Court, litigants sought to expand upon the vision of end-of-life decisional liberty as expressed in *Casey* in arguing that the state of Washington's statute criminalizing assisted suicide was unconstitutional as applied to competent, terminally ill patients seeking to obtain prescriptions to use in ending their own lives. As noted earlier, the Court refused, holding that the right the *Cruzan* Court had assumed was limited to a right to avoid bodily intrusion. It thus missed an

[27] Cerminara (Cruzan's Legacy), supra note ___, at 28.
[28] Cruzan, 497 U.S. at 309.
[29] 505 U.S. 833, 852 (1990).
[30] Addressing this very point, the Court in *Dobbs* stated: "None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way." Slip opinion at 32.
[31] 521 U.S. 702 (1997).

opportunity to embrace the fundamental interests in self-determination protected by the law of battery and intended to be fostered as a matter of medical ethics.[32]

B. The Extent of the Diminishment

Should the Court eliminate substantive due process as a ground upon which to invalidate any state action, end-of-life liberty is in far better shape than the right to choose an abortion. Physicians, other health care providers, patients, and their loved ones will continue to be able to honor patient autonomy with respect to withholding and withdrawal of life-sustaining treatment. Due to the above-discussed gap in the common-law foundation of such autonomy, however, and because the Court refrained from explicitly recognizing a federal constitutional right in *Cruzan,* it would be helpful if state constitutions and statutes were to shore up the right to refuse life-sustaining treatment in the wake of *Dobbs*. Asserted rights to choose medical aid in dying absolutely require such action.

The discussion above highlights the fact that constitutions – whether federal or state – are not the only laws protecting end-of-life medical decisional liberty. Courts have also found such protection in state constitutions, state statutes, and the common law. The federal Constitution has two distinct advantages over these sources of law. First, unlike the common law, state legislatures cannot change the Constitution by passing statutes. Second, it governs the entire nation rather than only the territory of a single state. Nevertheless, those sources of law other than the federal Constitution provide opportunities for both current protection and further protection in the future.

Several state courts have grounded the right to refuse life-sustaining treatment in their state constitutions. The highest courts of Arizona,[33] California, Florida, Illinois, Indiana, Kentucky, New Jersey, and Washington, for example, have clearly relied on their state constitutions in ruling that patients have rights to refuse life-sustaining treatment. Some of these decisions have related to constitutional rights other than substantive due process, such as the right to privacy.[34] Even with respect to substantive due process, however, state constitutions may provide protection when the federal Constitution does not. Recently, for example, the Massachusetts Supreme Court noted that "we part ways with previously adopted Federal standards if they do not provide the degree of protection required by our State Constitution."[35]

Additionally, although subject to political pressures, state statutes and common law serve as sources of rights to refuse life-sustaining treatment. Beginning in the 1980s, states passed advance directive statutes with legislative findings either situating rights to refuse life-sustaining treatment in constitutional or common law or creating rights themselves. The common law, as discussed previously, guards against, at a minimum, bodily intrusion, and arguably again violations of dignity as protected by other tort claims. State legislatures may, of course, amend the common law and previously passed statutes, so these protections are nowhere near as powerful as federal or state constitutional protections.[36]

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[32] Medical ethicists are not, of course, completely in accord with medical aid in dying. Major medical associations, however, are increasingly re-considering their traditional opposition to the practice. See, e.g., discussion of AMA CEJA proposal over past few years, and also list of medical organizations in support.

[33] Insert footnote for each state – check case(s) – They are listed in Right to Die section 2.06[B] footnote 138.

[34] *See, e.g., In re* Browning, 568 So. 2d 4 (Fla. 1990) (right to privacy).

[35] Kligler v. Attorney General, 198 N.E.3d 1229, 1251 (Mass. 2022) (determining, in the context of medical aid in dying, that state's substantive due process doctrine protects a broader category of rights than the federal doctrine).

[36] If existing common-law and statutory protections can be diminished or eliminated through votes, however, the democratic process also may contribute to protection of end-of-life medical decisional liberty. Recently, citizens have

One way to protect end-of-life medical decisional liberty would be to amend state constitutions, as legislators and citizens in states that disagree with *Dobbs* have been doing with respect to abortion rights. In November, voters in Michigan amended that state constitution to specifically provide "a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care."[37] So did voters in Vermont[38] and California.[39] Use of a broad term "reproductive freedom," sometimes accompanied by non-exclusive lists of examples, in these constitutional amendments would help ensure that courts refrain from too narrowly defining rights the constitutions grant to their citizens.[40] Such provisions guard against cramped interpretation of more general language through "careful definition" of a right.[41] In states with broader applicable constitutional provisions, or if amendments including broader language are adopted, the role of the courts will be to examine why those constitutions were amended after Dobbs to determine the meaning of the broad language.[42] In Florida, for example, the state supreme court has ruled that the state constitution's right of privacy provides "an explicit textual foundation for those privacy interests inherent in the concept of liberty which may not otherwise be protected by specific constitutional provisions."[43] The court has "found the right involved in a number of cases dealing with personal decisionmaking,"[44] and has ruled that it confers upon citizens a fundamental right to have life-sustaining treatment withdrawn or withheld.[45]

II. THE FUTURE OF END-OF-LIFE MEDICAL DECISIONAL LIBERTY AFTER *DOBBS* AS WRITTEN AND LIMITED

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amended their state constitutions to expand abortion protections, in reaction to *Dobbs*. *See infra* section ____. There is nothing (other than political will) preventing such action with respect to end-of-life decisional liberty as well.

[37] Article I, section 28. http://www.legislature.mi.gov/(S(fvewg2qwu3dbs0tuclajnwa2))/mileg.aspx?page=getObject&objectName=mcl-Article-I-28 (last accessed March 29, 2023).

[38] Chapter I, Article 22: Providing "that an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means." https://legislature.vermont.gov/statutes/constitution-of-the-state-of-vermont/ (last accessed March 20, 2023).

[39] Article I, section 32, also discussing "reproductive freedom." https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CONS§ionNum=SEC.%201.1.&article=I&highlight=true&keyword=reproductive+freedom (last accessed March 20, 2023).

[40] *See infra* section ___ (discussing narrow as opposed to broad phrasings of constitutional rights).

[41] *See* Dobbs, 142 S. Ct. at _____ (discussing formulation of right as a "right to abortion").

[42] General statutory construction: what does "privacy," for example mean? (Ambiguous term rather than clear? But is there an argument that the second sentence limits the first? Not according to the provision's history, but wouldn't get to that if court finds language unambiguous.) The Florida Supreme Court did this in interpreting Florida's right of privacy in an abortion case in 1989. *See In re* T.W., 551 So. 2d 1186 (Fla. 1989). That decision is currently being challenged. *See* Planned Parenthood of Southwest & Central Fla. v. State, 2023 WL 356196 (Fla. January 23, 2023) (accepting jurisdiction). For a contemporaneous account of the deliberations of the commission that recommended adding the right of privacy to the Florida Constitution, *see* Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 Fla. State U. L. Rev. 671 (1978).

[43] Rasmussen v. S. Fla. Blood Serv., 500 So. 2d 533, 536 (Fla. 1987) (footnote omitted).

[44] T.W., 551 So. 2d at 1192.

[45] *In re* Browning, 568 So. 2d 4 (Fla. 1990).

In the short run, assuming no such drastic and destructive development immediately in federal constitutional law, the federal Constitution protects end-of-life medical decisional autonomy after *Dobbs* at least to the same extent it did previously. The *Dobbs* dissent noted that the Court had not overruled a line of substantive due process cases involving personal decisions other than abortion,[46] thus preserving arguments that the federal Constitution protects end-of-life medical decisional liberty *writ* large[47] as a fundamental right.[48] Moreover, the test the Court used to determine whether a fundamental liberty interest existed in *Dobbs* is the same test the Court had used when assuming the right existed in in *Cruzan*. There, the Court assumed correctly that the Constitution guarantees a fundamental liberty interest in choosing withholding or withdrawal of life-sustaining treatment. A few factual settings may represent exceptions to that rule, as illustrated by current state statutory exceptions to advance directive applicability. In contrast, the Court has already ruled that medical aid in dying fails the test it applied in *Dobbs* and identified in *Cruzan*. Absent an unlikely adoption of a more comprehensive test for fundamental rights that it used in Dobbs, no reversal will be forthcoming.[49] State constitutions and statutes must form the basis of rights beyond withholding and withdrawal going forward.

A. *Obergefell and Windsor Provide an Argument for Protection of End-of-Life Medical Decisional Liberty as a Fundamental Right*

In a fantasy world (perhaps Wonderland) in which the composition of the Court were different, defenders of end-of-life medical decisional liberty have a good argument for protection as a fundamental right. As the Court exists at this time, this is unlikely, but courts change, and the following analysis likely will be useful in some state courts interpreting their own constitutions. Indeed, the New York Court of Appeals recently ruled that the appropriate standard to use in

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[46] Majority says:

> Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. *Post*, at 2318 – 2319, 2332, n. 8. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."*Supra*, at 2277 – 2278. We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life.". . . . Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by "appeals to a broader right to autonomy." . . . . It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.

142 S. Ct. at 1280-81.

[47] *I.e.,* both w/w LST and MAID.

[48] Analysis in this Article primarily will be limited to the issue of whether a fundamental right exists such that any regulation would be subjected to strict scrutiny. There also exists the possibility that laws restricting end-of-life medical decisional liberty would be unconstitutional in some cases if rational basis review were applied. *See* Kligler, 198 N.E.3d at 1268-1271 (Wendlandt, J., dissenting) (arguing that Massachusetts criminalization of medical aid in dying could at some point in the future be declared unconstitutional under rational basis review).

[49] Add to that individual justices' views of medical aid in dying. *E.g.,* Justice Gorsuch's, _____________.

determining whether a fundamental right exists for purposes of that state's constitution is the "comprehensive" approach of *Obergefell* rather than the "narrow" approach of *Dobbs*.[50]

Since *Cruzan*, as the New York court noted, the analysis of whether a federal fundamental constitutional right exists has developed along two paths. In *Glucksberg*, as noted earlier,[51] the Court limited the right the *Cruzan* Court assumed to exist, thus refusing to extend the reasoning applied to decisions to withhold or withdraw life-sustaining treatment to find a fundamental right to physician aid in dying.[52] Similar to its rights-naming in *Dobbs*,[53] the Court reached this decision while terming the asserted right as right to "suicide" rather than a right to engage in a form of medical decision-making.[54]

In fact, the Supreme Court has adopted a more inclusive view of autonomy in other personal decision-making cases since *Cruzan* and *Glucksberg*.[55] In *United States v. Windsor*[56] and *Obergefell v. Hodges*,[57] the Court found fundamental federal constitutional rights to make "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[58] In reaching those decisions, the Court relied on *Griswold* and *Eisenstadt*, among other precedent. In *Dobbs*, the majority refused to overrule those previous decisions, stating:

> [T]he dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. *Post*, at 2318 – 2319, 2332, n. 8. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Supra*, at 2277 – 2278. We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life.". . . . Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by "appeals to a broader right to autonomy." . . . . It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.[59]

Such an assurance is problematic on at multiple levels. First, as a matter of logic, as a matter of logic, that distinction mixes the fundamental liberty analysis with the analysis of state interests. As the *Dobbs* dissent pointed out, the state interest in life or potential life is properly addressed after a right is examined to determine whether it is fundamental, not as part of the test for

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[50] *See* Kligler (although then ruling that applying the comprehensive standard still resulted in a ruling that the state statute criminalizing medical aid in dying was not a fundamental right).
[51] *See supra* section ____.
[52] Glucksberg, ___.
[53] *See* earlier discussion of use of term "right to abortion" rather than anything about choice or decision-making.
[5454] "[T]he majority decided the case by examining whether a federal constitutional `right to suicide' existed." Cerminara, *supra* note ___ (Cruzan's Legacy_, at 28 *citing* Glucksberg at 723.
[55] Kligler pointed this out.
[56] 570 U.S. 744 (2013).
[57] 135 S. Ct. 2584 (2015).
[58] 135 S. Ct. at 2597-98 (*citing* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965)).
[59] 142 S. Ct. at 1280-81.

determining whether a right is fundamental.[60] Moreover, distinguishing the holdings of those previous cases because abortion "terminates life or potential life" also distinguishes any case asserting a fundamental liberty interest in end-of-life medical decisions in favor of withholding and withdrawal of life-sustaining treatment. While some on the Court may disagree,[61] a decision to withhold or withdraw life-sustaining treatment permits an already-present deadly force to end a life rather than terminating life itself.[62] A decision by a terminally ill person to obtain a prescription to use to end their suffering should they decide to do so does not even always result in the termination of a life; all of those patients, whether obtaining that prescription or not, will die by virtue of being terminally ill. The only question is when and how much pain, indignity, and mental distress they (and their families , friends, and caregivers) might suffer before they do so.

Nevertheless, those decisions, providing part of a foundation for a comprehensive, rather than a narrow, vision of fundamental rights, remain good law in the aftermath of *Dobbs*. Applying the test used in *Windsor* and *Obergefell* refocuses the inquiry away from simply rejection of invasions of bodily integrity, and away from "suicide," and toward the decision-making of the patient or their surrogates. Law thus becomes more consistent with the original purposes of common-law protections and with the ethical goal of true shared medical decision-making at crucial points of the care trajectory. Personal, intimate decisions such as how one wants to spend their final days are entitled to fundamental rights protection under that reasoning.

B. *Liberty to Choose Withholding or Withdrawal of Life-Sustaining Treatment Certainly Meets the Fundamental Rights Test the Court Used in* Dobbs

Alternatively, applying the test the *Dobbs* Court used to determine whether a fundamental right exists also results in a conclusion that withholding or withdrawal of life-sustaining treatment is a fundamental right, although the Court has already held that medical aid in dying fails this test. The Court's "strong assumption" that a fundamental right exists remains valid, so decisions to reject life-sustaining treatment continue to enjoy the same constitutional protection they enjoyed before *Dobbs*.

Both the *Cruzan* and the *Dobbs* Courts used a two-part test that the Dobbs Court noted it had "long-asked" in deciding whether an asserted right that is not named in the Constitution is fundamental.[63] First, courts are to ask whether the right is "deeply rooted in [our] history and tradition."[64] Second, they should ask "whether it is essential to our Nation's `scheme of ordered liberty.'"[65] Properly situated in tort law and medical ethics, the right to choose withholding or

[60] See Dobbs, concurrence and dissent slip opinion at 26 (noting that the majority itself had stated that was what it was doing) (Breyer et al., J., dissenting).
[61] Scalia in Glucksberg.
[62] It is here that some may raise objections to withholding or withdrawal of medically supplied nutrition and hydration. Five justices of the Supreme Court have already, however, ruled that medically supplied nutrition and hydration constitutes medical treatment, so any attempt to carve the particular treatment out of the universe of decision-making would require analysis of the *stare decisis* test. Cruzan for the five justices. See Dobbs on what the "*stare decisis test*" is.
[63] Dobbs slip opinion at 11.
[64] Dobbs slip opinion at 11.
[65] Dobbs slip opinion at 11-12.

withdrawal of life-sustaining treatment satisfies both prongs of this test, validating the *Cruzan* Court's assumption that a fundamental right to that effect exists.

When engaging in this inquiry, the Court has cautioned that courts are to be careful in phrasing/naming the rights that are asserted. The *Dobbs* Court, without discussion of the need to do that, termed the right at issue in the case before it a "right to suicide," thus almost guaranteeing that the asserted right would fail the test. In contrast, the dissent speaks of "the right of individuals – yes, including women – to make their own choices and chart their own futures."[66]

[For purposes of this symposium draft, the following is an abstract of what I imagine I will write here. The legal history recounted earlier in this Article, combined with what the *Cruzan* Court said, demonstrates that both of these are met.]

C. A Brief Look at State Interests

As *Dobbs* focused on the fundamental rights question of substantive due process analysis, this Article will not address state interests that might be balanced against any asserted end-of-life medical decisional liberty interest. As a practical matter, state interests cannot be analyzed in a vacuum. A state might assert any of the variety of state interests when arguing for some restriction on the liberty to make end-of-life medical decisions. Most often, these state interests are one of a near-catechistic list of four: the state interest in preservation of life, the state interest in prevention of suicide, the state interest in protection of vulnerable third parties, the state interest in the maintenance of medical ethics.[67] Others, however, varying with the setting, have been asserted at particular points in the past.[68] When decisions are made by court-appointed guardians or other surrogate decision-makers, for example, the Court in *Cruzan* recognized an interest in assuring that the wishes being expressed were actually the wishes of the patient.[69] At the same time, Justice O'Connor reminded us of the importance of the particular facts in each case, stating that she believed that that state interest would have to yield to the wishes of a patient-appointed surrogate decision-maker as opposed to perhaps being stronger in cases involving a court-appointed or informally appointed decision-maker.[70]

One obvious state interest – one state legislators have already asserted, in fact – is a state interest in potential life when the patient in question is pregnant. In this respect, *Dobbs* could greatly limit pregnant patients' rights. Some state statutes purport to invalidate the wishes of pregnant patients lacking decision-making capacity to refuse life-sustaining treatment.[71] They do so by purporting to invalidate any advance directive the patient has executed for the period of the patient's pregnancy. After *Roe* and *Casey*, it was widely assumed that those state statutes could only be enforced up to fetal viability, and to the extent that they did not impose an undue hardship on the pregnant woman.[72] By overruling *Roe* and *Casey*, Dobbs clearly has changed that analysis.

Yet to address in this sub-section: Almerico v. Denney, 532 F.Supp. 3d 993 (D. Idaho 2021) and an earlier opinion. (Idaho settled.) Also perhaps to discuss, in no particular order):

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[66] *Dobbs* dissenting slip opinion at 7.
[67] *See* The Right to Die, chapter 5.
[68] Also see The Right to Die, chapter 5.
[69] *See* Cruzan regarding C&CE. Note that this probably would differ with the facts of each case, and in fact depending on whether the patient had left a living will or not.
[70] Cruzan concurrence.
[71] See the list of state statutes in The Right to Die section 7.07[A].
[72] See The Right to Die section 7.07[A].

A.C., 573 A.3d 1235 (D.C. 1990) – Although the court in A.C. said that cases in which state interests could overcome patients' expressed wishes would be "extremely rare and highly exceptional," Dobbs as changed the game.

Klein, 538 N.Y.S.2d 274 (App. Div. 1989)

Doe, 632 N.E.2d 326 (Ill App. Ct. 1994)

Fetus Brown, 689 N.E.2d 397 (contra Doe in Illinois?)

Burton v. State, 2010 WK 3168124. See page 6-138.1.

CONCLUSION

While it was unfortunate that the U.S. Supreme Court in *Cruzan v. Missouri, Department of Health* failed to loudly proclaim the existence of a fundamental liberty interest in end-of-life medical decision-making, that case still "effectively enshrined personal autonomy in a medical setting as a constitutionally protected interest." Its failure to issue a clear, strong statement recognizing the fundamental nature of the liberty to exercise autonomy near the end of life has raised questions in these days of cramped constitutional interpretation such as that used in the opinion in *Dobbs v. Jackson Women's Health Organization.*

This Article has demonstrated, however, that end-of-life liberty is in far better shape than the right to choose an abortion. Even a total elimination of the doctrine of substantive due process will leave end-of-life medical decision liberty with both constitutional and common-law protections in many jurisdictions, although it would be helpful if amendments to state constitutions and statutes shore up the right to refuse life-sustaining treatment in the wake of *Dobbs*. Asserted rights to choose medical aid in dying absolutely require such action. If substantive due process doctrine lives on, and if the Court applies an earlier-used, view of fundamental rights that it has not overruled, the Court could still rule that citizens enjoy fundamental liberty to make end-of-life medical decisions. More likely, the Court will continue to use a more narrow test. Withholding and withdrawal of life-sustaining treatment easily meets that test, although some advance directives could be subject to state restrictions. The Court has ruled that medical aid in dying fails that test.

All in all, the law of death after *Dobbs* still mostly assures patient autonomy.