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Death After *Dobbs*

Kathy L. Cerminara
Nova Southeastern University - Shepard Broad College of Law

Author(s) ORCID Identifier:

https://orcid.org/0000-0002-4726-6610

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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 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 *Court emphasized that it 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.*

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I. INTRODUCTION

AS a matter of both medical ethics and law, it was unfortunate that the U.S. Supreme Court, in *Cruzan v. Director, Missouri Department of Health*, failed to loudly proclaim the existence of a fundamental liberty interest in end-of-life medical decision-making.[1] 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 the intensely private discussions about those decisions.[2] Seemingly in that spirit, the *Cruzan* majority "effectively enshrined personal autonomy in a medical setting as a constitutionally protected liberty interest,"[3] 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.[4] Bioethics scholar Zita Lazzarini, for example, expressed such concerns[5] soon after

1. Cruzan by Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–84 (1990).
2. *See id.* at 270.
3. Kathy L. Cerminara, Cruzan's *Legacy in Autonomy*, 73 SMU L. Rev. 27, 27 (2020).
4. 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.*, Complaint at 1, Bluestein v. Scott, No. 2:22-cv-160 (D. Vt. Aug. 25, 2022), ECF No. 1 (alleging Vermont aid-in-dying statute's residency requirement statute violated, *inter alia*, the Federal Privileges and Immunities Clause); Complaint at 2, Gideonse v. Brown, No. 3:21-cv-01568 (D. Or. Oct. 28, 2021), ECF No. 1 (same with respect to Oregon statute's residency requirement); Alan Meisel, Kathy L. Cerminara & Thaddeus M. Pope, The Right to Die § 2.06[C] (3d ed. 2023) [hereinafter The Right to Die] (discussing First Amendment rights); *id.* at § 11.08[A] (discussing state constitutional claims); *id.* at § 11.09[A] (discussing federal constitutional claims). In the aftermath of both *Bluestein* and *Gideonse*, Vermont's and Oregon's legislatures amended their statutes to remove the residency requirements. *See* Livia Albeck-Ripka, *Vermont Removes Residency Requirement for Medically Assisted Deaths*, N.Y. Times (May 2, 2023), https://www.nytimes.com/2023/05/02/us/vermont-assisted-suicide-nonresidents.html [https://perma.cc/LLQ6-V64S]; *Oregon's Landmark Death with Dignity Law Now Extends to Patients Who Come from Other States*, OPB (July 13, 2023, 6:20 PM), https://www.opb.org/article/2023/07/13/oregon-governor-kotek-signs-change-opening-death-with-dignity-act-to-nonresidents [https://perma.cc/745W-LJ25].
5. *See* Zita Lazzarini, *The End of* Roe v. Wade—*States' Power Over Health and Well-Being*, 387 New Eng. J. Med. 390, 391 (2022).

the decision in *Dobbs v. Jackson Women's Health Organization*,[6] in which the Court utilized what the Massachusetts Supreme Court recently termed a "narrow" approach to recognizing fundamental rights.[7]

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 will be helpful if 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.

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,[8] is possible if the Court applies the view of fundamental rights it adopted in *United States v. Windsor*[9] and *Obergefell v. Hodges*.[10] 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*."[11] 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 a politically precarious form—if federal substantive due process law ceases to exist.[12] Second, assuming no such drastic and destructive 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.[13] 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

6. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022).

7. *See* Kligler v. Att'y Gen., 198 N.E.3d 1229, 1251 (Mass. 2022).

8. Both withholding and withdrawal of life-sustaining treatment and medical aid in dying rely in part on the right to medical decisional liberty.

9. United States v. Windsor, 570 U.S. 744 (2013).

10. Obergefell v. Hodges, 576 U.S. 644 (2015).

11. *See* Cerminara, *supra* note 3, at 27 (emphasis added) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

12. *See infra* Part II.

13. *See infra* Part III.

due process test the Court used in *Dobbs* prevails. All in all, however, the law of death after *Dobbs* still mostly assures patient autonomy.[14]

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

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,[15] 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."[16] The judicial philosophies and previous writings of some other Justices suggest that this may occur.[17]

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.[18] 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.[19] The leading treatise in this area of law, however, notes that courts initially refused to uphold such refusals and only began permitting them after refusals of life-sustaining treatment had been upheld in other settings, based on other arguments.[20] It is thus possible that the religious freedom cases could be affected by the elimination of substantive due process entirely, leaving religious freedom as unsteady ground upon which to base 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 recognition of the full range 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,

14. "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.

15. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2280–81 (2022).

16. *Id.* at 2301 (Thomas, J., concurring) (internal citations omitted).

17. *See, e.g.*, NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 157 (2006).

18. *See, e.g.*, Pub. Health Tr. of Dade Cnty. v. Wons, 541 So. 2d 96, 97 (Fla. 1989); *see generally* THE RIGHT TO DIE, *supra* note 4, § 2.06[C] (terming such refusals "religious motivation" cases).

19. *See* THE RIGHT TO DIE, *supra* note 4, § 7.07[A] (discussing limitations on advance directives during pregnancy).

20. *Id.* at § 2.06[C].

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 "[b]egin at the beginning,"[21] 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*,[22] it missed an opportunity to protect such decision-making fully. "The majority and Justice O'Connor's concurrence spoke of the right as rooted in the common-law doctrine of informed consent."[23] In doing so, as the Court later held in *Washington v. Glucksberg*,[24] it considered the liberty in question to be solely a negative right—that is, a right to refuse bodily intrusion, not an expansive right to make end-of-life medical decisions.[25]

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."[26] 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."[27] 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.[28] 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.[29] Similarly, Valerie Gutmann Koch has argued

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21. Lewis Carroll, Alice in Wonderland 182 (1865).
22. Cruzan by Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–84 (1990).
23. Cerminara, *supra* note 3, at 28.
24. Washington v. Glucksberg, 521 U.S. 702, 725 (1997).
25. *Cruzan*, 497 U.S. at 277.
26. 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).
27. Jay Katz, *Informed Consent—A Fairy Tale?: Law's Vision*, 39 U. Pitt. L. Rev. 137, 139 (1977).
28. *See id.* at 141–42.
29. Meisel, *supra* note 26, 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. *Id.* at 212–14. Recently, New York's Appellate Division 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. *See* Lanzetta v. Montefiore Med. Ctr., 210 A.D.3d 535, 536 (N.Y. App. Div. 2022).

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."[30] Those, she suggests, are "the ethical goals of ensuring autonomous, voluntary, and informed decision-making in medicine."[31] 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 detracted from 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.[32] 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.[33] 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 the administration of life-sustaining treatment when a patient refused or requested withdrawal of it.

A minority of Justices in *Cruzan* and *Glucksberg* would more appropriately have grounded the right to refuse treatment in the right to shield against harm to dignitary interests. Writing in concurrence in *Glucksberg*, 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."[34] Dissenting in *Cruzan*, 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."[35]

The *Dobbs* Court's overruling of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[36] may, but need not, have foreclosed any immediate possibility that the Federal Constitution recognizes a fundamental liberty interest in end-of-life medical decision-making based on more

30. Valerie Gutmann Koch, *Reimagining Informed Consent: From Disclosure to Comprehension*, 14 U.C. IRVINE L. REV. (forthcoming) (manuscript at 1).

31. *Id.*

32. *See* THE RIGHT TO DIE, *supra* note 4, § 11.02[A]; Meisel, *supra* note 26, at 211–12.

33. *See generally* Meisel, *supra* note 26, at 211–12; THE RIGHT TO DIE, *supra* note 4, § 11.02[A].

34. Cerminara, *supra* note 3, at 28 (citing Washington v. Glucksberg, 521 U.S. 702, 799 (1997) (Stevens, J., concurring)).

35. Cruzan by Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 309 (1990) (Brennan, J., dissenting).

36. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

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,"[37] the majority in *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.[38]

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),[39] the Court has indicated elsewhere that it is not willing to expand its view in the end-of-life decision-making context.[40] In *Glucksberg*, 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 in accordance with *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.[41] As noted earlier, the Court refused, holding that the right the *Cruzan* Court had assumed was limited to a right to avoid bodily intrusion.[42] It thus missed an opportunity to embrace the fundamental interest in self-determination protected by the law of battery and intended to be fostered as a matter of medical ethics.[43]

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37. *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

38. *Id.* at 851 (emphasis added) (internal citation omitted).

39. 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.

Dobbs, 142 S. Ct. at 2258.

40. *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997).

41. *Id.* at 708.

42. *Id.* at 724–30.

43. Medical ethicists are not, of course, completely in accord with medical aid in dying. Major medical associations, however, are increasingly reconsidering their traditional opposition to the practice. *See, e.g.*, James E. Sabin, *Opinion of the Council on Ethical and Judicial Affairs*, Am. Med. Ass'n 244–48 (2019), https://www.ama-assn.org/system/files/2019-08/a19-ceja-reports.pdf [https://perma.cc/S2UR-AUUY]; The Right to Die, *supra* note 4, § 12.04[F] (recounting American Medical Association (AMA) House of Delegates' refusal to affirm its traditional opposition after its Council on Ethical and Judicial Affairs recommended that it do so); *id.* at § 12.04[F] n.154 (listing medical organizations supporting or expressing neutrality regarding medical aid in dying).

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 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.

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 found such protection in state constitutions, state statutes, and the common law.[44] The Federal Constitution has two distinct advantages over these sources of law. First, unlike the common law, state legislatures cannot revise their constitutions 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,[45] California,[46] Florida,[47] Indiana,[48] Kentucky,[49] New Jersey,[50] and Washington,[51] 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.[52] 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, "[W]e part ways with previously adopted Federal standards if they do not provide the degree of protection required by our State Constitution."[53]

Additionally, although subject to political pressures, state statutes and common law serve as sources of rights to refuse life-sustaining treatment.

44. *See infra* notes 45–51.
45. Rasmussen by Mitchell v. Fleming, 741 P.2d 674, 682 (Ariz. 1987).
46. *In re* Wendland, 28 P.3d 151, 159 (Cal. 2001).
47. *In re* Browning, 568 So. 2d 4, 10 (Fla. 1990).
48. *In re* Lawrance, 579 N.E.2d 32, 39 (Ind. 1991).
49. Woods v. Commonwealth, 142 S.W.3d 24, 31–32 (Ky. 2004).
50. *In re* Quinlan, 355 A.2d 647, 663–64 (N.J. 1976).
51. *In re* Colyer, 660 P.2d 738, 742 (Wash. 1983).
52. *See, e.g.*, *Browning*, 568 So. 2d at 10 (focusing on the right to privacy).
53. Kligler v. Att'y Gen., 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).

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.[54] 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.[55] 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.[56]

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 2022, voters in Michigan amended their 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."[57] So did voters in Vermont[58] and California.[59] Use of the broad term "reproductive freedom," sometimes accompanied by nonexclusive lists of examples, in these constitutional amendments would help ensure that courts refrain from too narrowly defining the rights constitutions grant to their citizens. Such provisions guard against cramped interpretation of more general language through careful definition of a right.[60] 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.[61] In Florida, for example, the state

54. *See* The Right to Die, *supra* note 4, § 2.06[D] (explaining the statutory landscape); *id.* at §1.07[A] (enumerating sources of the right).

55. *See supra* Part II.A.

56. 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 amended their state constitutions to expand abortion protections, in reaction to *Dobbs*. *See* Cal. Const. art. I, § 1.1; Mich. Const. art. I, § 28; Vt. Const. ch. I, art. 22. There is nothing (other than political will) preventing such action with respect to end-of-life decisional liberty as well.

57. Mich. Const. art. I, § 28.

58. Vt. Const. ch. I, art. 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").

59. Cal. Const. art. I, § 1.1 (also discussing "reproductive freedom").

60. The Justices in *Dobbs* sparred over rights-naming in precisely this context. Justice Alito repeatedly used the term "right to abortion" throughout the majority opinion, as did various concurring Justices. *Compare, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241–43 (2022) (examples of the majority's formulation of right as a "right to abortion"), *with id.* at 2319 (Breyer, J., dissenting) (explaining that *Roe*, *Casey*, and the precedents upon which they relied were "all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions").

61. 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, 1191–92 (Fla. 1989). That decision is currently being challenged. *See* Planned Parenthood of Sw. & Cent. Fla. v. State, No. 22-1050, 2023 WL 356196 (Fla. Jan. 23, 2023) (accepting jurisdiction). For a contemporaneous account

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."[62] That court has "found the right involved in a number of cases dealing with personal decisionmaking"[63] and has ruled that it confers upon citizens a fundamental right to have life-sustaining treatment withdrawn or withheld.[64]

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

In the short run, assuming the continued existence of substantive due process as a federal constitutional right, the Federal Constitution will protect end-of-life medical decisional autonomy after *Dobbs*, at least to the same extent it did previously. The *Dobbs* majority expressly emphasized that the Court had not overruled a line of substantive due process cases involving personal decisions other than abortion,[65] thus preserving arguments that the Federal Constitution protects end-of-life medical decisional liberty writ large[66] as a fundamental right.[67] Moreover, the test the Court used in *Dobbs* to determine whether a fundamental liberty interest existed is the same test the Court had used when assuming the right existed in

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. ST. U. L. REV. 671 (1978).

62. Rasmussen v. S. Fla. Blood Serv., Inc., 500 So. 2d 533, 536 (Fla. 1987).

63. *See In re T.W.*, 551 So. 2d at 1192.

64. *In re* Browning, 568 So. 2d 4, 17 (Fla. 1990).

65. The *Dobbs* majority said,

> Finally, the dissent suggests that our decision calls into question *Griswold, Eisenstadt, Lawrence*, and *Obergefell*. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." 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.

Dobbs, 142 S. Ct. at 2280–81 (alteration in original) (internal citations omitted).

66. I.e., including both withholding and withdrawing life-sustaining treatment and medical aid-in-dying.

67. 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 v. Att'y Gen., 198 N.E.3d 1229, 1268–71 (Mass. 2022) (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).

Cruzan.[68] There, the Court assumed, correctly, that the Constitution guarantees a fundamental liberty interest in choosing withholding or withdrawal of life-sustaining treatment.[69] Though, a few factual settings may represent exceptions to that rule, as illustrated by current state statutory exceptions to advance directive applicability.[70] In contrast, the Court has already ruled that medical aid in dying fails the test it applied in *Dobbs* and identified in *Cruzan*.[71] Absent an unlikely adoption of a more comprehensive test for fundamental rights than it used in *Dobbs*, no reversal of those earlier decisions will be forthcoming. 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 would 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 will likely be useful for some state courts interpreting their own constitutions. Indeed, the Massachusetts Supreme Judicial Court recently ruled that the appropriate standard to use in 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*.[72]

Since *Cruzan*, as the Massachusetts court noted, the analysis of whether a federal, fundamental constitutional right exists has developed along two paths.[73] In *Glucksberg*, 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.[74] Similar to its narrow rights naming in *Dobbs*,[75] the Court reached this decision while terming the asserted right as a right to "suicide" rather than a right to engage in a form of medical decision-making.[76]

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68. *See* Cruzan by Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 279 (1990); *see also Dobbs*, 142 S. Ct. at 2260.

69. *See Cruzan*, 497 U.S. at 286.

70. *See generally* The Right to Die, *supra* note 4, § 2.06[D] (explaining the statutory landscape); *id.* at §1.07[A] (enumerating sources of the right).

71. *See* Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

72. *See Kligler*, 198 N.E.3d at 1250–53 (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).

73. *See id.* at 1248–49.

74. *Glucksberg*, 521 U.S. at 705–06.

75. *See supra* note 60 and accompanying text (highlighting various Justices' choices of rights-defining terminology in *Dobbs*).

76. "[T]he majority decided the case by examining whether a federal constitutional 'right to suicide' existed." Cerminara, *supra* note 3, at 28 (citing *Glucksberg*, 521 U.S. at 723).

In fact, the Supreme Court has adopted a more inclusive view of autonomy in other personal decision-making cases since *Cruzan* and *Glucksberg*.[77] In *Windsor* and *Obergefell*, 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."[78] In reaching those decisions, the Court relied on *Griswold* and *Eisenstadt*, among other precedents.[79] In *Dobbs*, as previously noted, the majority refused to overrule those previous decisions:

> [T]he dissent suggests that our decision calls into question *Griswold, Eisenstadt, Lawrence*, and *Obergefell*. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." 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.[80]

Such an assurance is problematic on multiple levels. First, 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 determining whether a right is fundamental.[81] 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.[82] While some Justices on the Court may disagree,[83] a decision to withhold or withdraw life-sustaining treatment permits an already-present, deadly force to end a life rather than terminating life itself.[84] A decision by

77. The Massachusetts Supreme Judicial Court pointed this out in *Kligler*. *See Kliger*, 198 N.E.3d at 1249–51.

78. Obergefell v. Hodges, 576 U.S. 644, 663 (2015) (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) and Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965)); *see also* United States v. Windsor, 570 U.S. 744, 775 (2013).

79. *See Obergefell*, 576 U.S. at 663.

80. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2280–81 (2022) (alteration in original) (internal citations omitted).

81. *See id.* at 2323–36 (Breyer, J., dissenting) (noting that the majority itself had stated that was what it was doing).

82. *See id.* at 2331.

83. *See* Cruzan by Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 295–98 (1990) (Scalia, J., concurring) (rejecting the distinction between action and inaction).

84. It is here that some may raise objections to withholding or withdrawal of medically supplied nutrition and hydration. *See* The Right to Die, *supra* note 4, § 6.03[G][3] (noting

a terminally ill person to obtain a prescription to end their suffering, should they decide to do so, does not even always result in the termination of a life; many of those patients pass away without using the prescriptions they have obtained. Finally, 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, away from "suicide," and toward the decision-making of the patient or their surrogates. The law thus becomes more consistent with the original purposes of common law protections and with the ethical goal of truly 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.[85] First, courts are to ask whether the right is "deeply rooted in [our] history and tradition."[86] Second, they should ask "whether it is essential to our Nation's 'scheme of ordered liberty.'"[87] Properly situated in tort law and medical ethics, the right to choose withholding or 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.

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that some argue that withholding or withdrawing medically supplied nutrition and hydration results in death by starvation or dehydration rather than death by operation of a patient's underlying condition). Five Justices of the Supreme Court (based on *Cruzan*, counting Chief Justice Rehnquist and Justices O'Connor, Brennan, Marshall, and Blackmun) have already, however, ruled that medically supplied nutrition and hydration constitutes medical treatment, so any attempt to carve that particular treatment out of the universe of decision-making would require analysis of the *stare decisis* test. *See Dobbs*, 142 S. Ct. at 2280–81 (discussing the *stare decicis* test).

85. *Dobbs*, 142 S. Ct. at 2246.
86. *Id.* (alteration in original) (quoting Timbs v. Indiana, 139 S. Ct. 682, 687 (2019)).
87. *Id.* (quoting *Timbs*, 139 S. Ct. at 687).

When engaging in this inquiry, the Court has cautioned that courts are to be careful in framing the rights that are asserted.[88] The *Dobbs* Court, without explanation, termed the right at issue in the case before it a "right to abortion," thus almost guaranteeing that the asserted right would fail the test.[89] In contrast, the dissent speaks of "the right of individuals—yes, including women—to make their own choices and chart their own futures."[90] These disparate identifications of the rights at stake are reminiscent of the contrasting labels the majority and concurring opinions attached to the right at issue in *Glucksberg*. There, the majority discussed a "right to commit suicide" rather than a right to make medical decisions concerning the timing and manner of one's imminent death.[91] The *Glucksberg* Court's decision to frame the right at stake so narrowly foreclosed a determination that the right at issue in that case satisfied the fundamental rights test it had set forth, which is the same test the Court used in *Dobbs*.

There is a crucial difference, however, between careful definition of a right and "reasoned judgment about which broader principle, *as exemplified in* the concrete privileges and prohibitions embodied in our legal tradition, best fits the particular claim asserted in a particular case."[92] Even the relatively narrow phrasing of the medical decisional right that the Court assumed in *Cruzan* ("a constitutionally protected right to refuse lifesaving hydration and nutrition")[93] speaks in terms of protecting *decision-making* (the broader principle), unlike the terms "right to abortion" and "right to suicide," which do not focus on the decision-making at all. In *Cruzan*, it is clear that what was at stake was medical decisional liberty, especially given that five members of the Court agreed that medically supplied nutrition and hydration is medical treatment.[94]

The Court itself has made a convincing case that the right to decide to authorize withholding or withdrawal of life-sustaining treatment is a fundamental right. As its discussion in *Cruzan* demonstrated,[95] medical decisional liberty to refuse treatment is "deeply rooted in [our] history and tradition"[96] due to its roots deep within the common law.[97] Such liberty is also "essential to our Nation's 'scheme of ordered liberty'"[98] because the liberty to refuse unwanted medical treatment is "one of the basic civil rights of man."[99] The *Cruzan* Court recounted several instances in which

88. *See* Washington v. Glucksberg, 521 U.S. 702, 721–22 (1997).
89. *See Dobbs*, 142 S. Ct. at 2242.
90. *Id.* at 2320 (Breyer, J., dissenting).
91. *See Glucksberg*, 521 U.S. at 722–23.
92. *Id.* at 771 n.11 (Souter, J., concurring) (emphasis added).
93. *Id.* at 725 (citing Cruzan by Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 287 (1990)).
94. *See supra* note 84 and accompanying text.
95. *See Cruzan*, 497 U.S. at 269–70.
96. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022) (alteration in original) (quoting Timbs v. Indiana, 139 S. Ct. 682, 686 (2019)).
97. "[N]o right is held more sacred, or is more carefully guarded, by the common law . . . ." *Cruzan*, 497 U.S. at 269.
98. *Dobbs*, 142 S. Ct. at 2246 (quoting *Timbs*, 139 S. Ct. at 686).
99. *Cruzan*, 497 U.S. at 304 (Brennan, J., dissenting) (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)).

it had previously found "substantial" constitutional liberty interests in refusing vaccinations,[100] antipsychotic medications,[101] and other forms of medical treatment.[102] In its words, it agreed that "the logic of the cases discussed above would embrace such a liberty interest."[103] The Court in *Glucksberg*, in explaining that the *Cruzan* Court had "strongly suggested" the existence of a fundamental medical decisional liberty interest, termed the right "traditional"[104] and stated that its assumption of a fundamental right sounding in medical decisional liberty was "entirely consistent with this Nation's history and constitutional traditions."[105]

C. A Brief Look at State Interests

Since *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 a variety of 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 the preservation of life, the state interest in the prevention of suicide, the state interest in the protection of vulnerable third parties, and the state interest in the maintenance of medical ethics.[106] Others, however, varying with the setting, have been asserted at particular points in the past.[107] 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.[108] At the same time, Justice O'Connor reminded us of the importance of the particular facts in each case, opining that such a state interest would have to yield to the wishes of a patient-appointed surrogate decision-maker while, in contrast, perhaps being stronger in cases involving a court-appointed or informally appointed decision-maker.[109]

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.[110]

100. *See id.* at 278 (citing Jacobson v. Massachusetts, 197 U.S. 11, 24–30 (1905)).
101. *See id.* (citing Washington v. Harper, 494 U.S. 210, 221–22 (1990)).
102. *See id.* at 278–79 (citing Vitek v. Jones, 445 U.S. 480, 494 (1980) and Parham v. J.R., 442 U.S. 584, 600 (1979)).
103. *Id.* at 279.
104. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
105. *Id.* at 725.
106. *See* The Right to Die, *supra* note 4, § 5.04[A].
107. *See id.* at § 5.04[F].
108. *See Cruzan*, 497 U.S. at 281–85. 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.
109. *Id.* at 289–92 (O'Connor, J., concurring).
110. *See* The Right to Die, *supra* note 4, § 7.07[A] (listing state statutes).

They do so by purporting to invalidate any advance directive the patient has executed for the period of the patient's pregnancy.[111] "The effect is to deny individuals the exercise of their autonomy, but also to raise the grisly specter of incapacitated patients being reduced to incubators solely for the benefit of their fetuses."[112] 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 person.[113] At least one court, in fact, has ruled that such a statute was unconstitutional to the extent it purported to apply after viability.[114] By overruling *Roe* and *Casey*, *Dobbs* clearly has changed that analysis.

Perhaps the leading cases impacting this issue relate to pregnant patients' abilities to make medical decisions impacting the life or health of fetuses. In *In re A.C.*, for example, the District of Columbia Court of Appeals, *en banc*, considered whether a hospital could perform a caesarean delivery of a terminally ill patient's viable (twenty-six-and-a-half-week) fetus.[115] If there were no caesarean delivery and A.C. died, the fetus likely would have died with her.[116] Earlier, she had chosen a course of palliative treatment in the hope that delivery could be postponed two additional weeks, but she varied in her responses to questions about whether she still wanted to have her baby.[117]

Although the medical treatment decision before it likely would determine life or death for the fetus, the court distinguished it from a decision about abortion, saying that the issue was "not whether A.C. (or any woman) should have a child but, rather, who should decide how that child should be delivered. That decision involves the right of A.C. (or any woman) to accept or forego medical treatment."[118] It ruled that, as with any medical decision, the patient should make the decision if competent to do so, while substituted judgment should be applied to determine what the patient would have wanted to have done if she were incompetent to decide for herself.[119]

Similarly, a decision whether to forego life-sustaining treatment, even if that decision were to implicate the life or health of a fetus, is a decision about the patient's, not the fetus's, life or health. One could imagine a

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111. *See id.*

112. Joan H. Krause, *Pregnancy Advance Directives*, 44 Cardozo L. Rev. 805, 807 (2023) (providing an excellent analysis of statutory advance directive pregnancy restrictions).

113. *See id.*

114. Almerico v. Denney, 532 F. Supp. 3d 993, 1002–04 (D. Idaho 2021) (holding Idaho's invalidation of pregnant persons' advance directives unconstitutional to the extent to purported to apply after viability).

115. *In re* A.C., 573 A.2d 1235, 1237–38 (D.C. 1990) (en banc). *See also* Krause, *supra* note 112, at 846–47 (describing the *In re A.C.* opinion as "[t]he most relevant analysis").

116. *See In re A.C.*, 573 A.2d at 1237–38.

117. *Id.* at 1238–39.

118. *Id.* at 1245 n.9.

119. *Id.* at 1245–51. The leading treatise on end-of-life decision-making has noted that, conversely, "[i]t is a possibility that for many courts, . . . the two issues will be inextricably linked." The Right to Die, *supra* note 4, § 6.04[J][1]. Other cases have addressed this issue from various perspectives. *See* Burton v. State, 49 So. 3d 263, 264–66 (Fla. Dist. Ct. App. 2010); *In re* Doe, 632 N.E.2d 326, 330–31 (Ill. App. Ct. 1994); *In re* Brown, 689 N.E.2d 397, 402–04 (Ill. App. Ct. 1997); *In re* Klein, 538 N.Y.S.2d 274, 275–76 (N.Y. App. Div. 1989).

situation in which a pregnant patient on a ventilator has reached the condition in which her surrogate decision-makers believe that she would have chosen withdrawal of that ventilator support.[120] Before *Dobbs*, this would have been analyzed as a right to refuse life-sustaining treatment balanced against a state interest in the (potential) life of the fetus. Were the law to consider the removal of life-sustaining treatment to be the equivalent of an abortion after *Dobbs*, then the question becomes whether a caesarean delivery must be accomplished before the removal of life-support because the patient does not have a right to choose abortion. And that leads back to *In re A.C.* and the question of coerced pregnancy although the patient is at the end of life.[121]

In sum, *Dobbs* has muddied, but not desiccated, the analytic waters with respect to the enforceability of provisions in advance directive statutes purporting to rob pregnant patients and their surrogates of the ability to choose to forego life-sustaining treatment. Arguments remain, and litigation undoubtedly will develop if states continue to attempt to limit medical decisional liberty in this way.

IV. CONCLUSION

While it was unfortunate that the U.S. Supreme Court in *Cruzan* 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."[122] 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 *Dobbs*.

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,

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120. In Texas, about eight years ago, a hospital maintained ventilator support of a brain-dead pregnant woman because it believed that Texas's advance directive statute prevented removal of LST from a pregnant patient. *See* Munoz v. John Peter Smith Hosp., No. 096-270080-14 (96th Dist. Tex. Jan. 24, 2014). Because the patient was brain-dead, and thus no longer a "patient," the court ordered removal of the ventilator support. *Id.* The law required only that living patients be kept alive and did not apply to bodies that already were dead. That case would come out the same today, but if a pregnant patient were lying in a terminal condition, dependent on a ventilator, the issue would arise again.

121. *See also* Krause, *supra* note 112, at 849 ("In short, the law of medical self-determination may not be strong enough to support challenges to pregnancy restrictions after *Dobbs*."). The situation could become even more complex if the pregnant patient were refusing a blood transfusion as an exercise of First Amendment rights.

122. Cerminara, *supra* note 3, at 27.

and if the Court applies a more expansive 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 the narrow test of *Dobbs* and *Cruzan*. The Court has ruled that medical aid in dying fails that test. Withholding and withdrawal of life-sustaining treatment easily meets that test, however, although some advance directives could be subject to state restrictions.

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