Unqualified Interests, Definitive Definitions: *Washington v. Glucksberg* and the Definition of Life

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Introduction

"*My* life, *my* death, *my* control."[1] More than ten years ago, the Supreme Court found that Washington state had an "unqualified interest" in preserving the life of its citizens.[2] Balancing the state's interests against an individual's right to suicide, or, further, an individual's right to physician-assisted suicide, the Court found that the state's interests were "unquestionably important and legitimate" and "at least reasonably related" to the statute in question.[3] But in making this decision, and applying a rational basis review, the Supreme Court neglected to consider what should have been a key question: what is life and when does it end?

The Supreme Court in *Cruzan v. Director, Missouri Department of Health* held that it was proper to "simply assert an unqualified interest in the preservation of human life."[4] In *Washington v. Glucksberg*, the Court further adopted Washington's assertion that "all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law."[5] By refusing to specify when life ends, however, the Court assumed its eventual conclusion: it is impossible for an

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1. Daniel Bergner, *Death in the Family*, N.Y. TIMES MAG., Dec. 2, 2007, *available at* http://www.nytimes.com/2007/12/02/magazine/02suicide-t.html?scp=3&sq=.

2. Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

3. *Id.* at 735.

4. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990).

5. *Glucksberg*, 521 U.S. at 729.

individual liberty to overcome an unqualified interest in preserving an undefined term.

At some point, the state's interest in a person's life must end, due to the simple fact that that person is no longer "alive." By conclusively defining this ending point, the Court can provide a standard against which the state's interest can be properly balanced against an individual's liberty. An examination of biology, medicine, and currently established legal standards of death suggest that the end of a person's life and, consequently, the state's interest in preserving that life, should be defined as "whole brain death." Ultimately, a bright-line definition may help individuals have greater control over their own autonomy and set the end point of what is inevitably a sliding scale of a state's interest.

This note will examine how the *Glucksberg* Court assumed its eventual conclusion and why defining the end of life as whole brain death can help remedy that error. Part I examines how the history of physician-assisted suicide cases culminated in (1) the rational basis review of the Washington law; (2) the unqualified interest in the preservation of life, and; (3) why these two assertions suffer from inherent flaws. Part II examines scientific and legal definitions of death and discusses why whole brain death is the appropriate designation for the end of life. Part III provides a hypothetical examining how using whole brain death to define the end of life would affect the Court's analysis of the state's interest in preserving life with regard to physician-assisted suicide. This section concludes by discussing a few of the questions with regard to physician-assisted suicide that this definition would be as yet unable to resolve.

I. The History of Physician-Assisted Suicide Cases

Three cases outline the development of the Court's adoption of the state's unqualified interest in life. First, *In re Quinlan*, a New Jersey Supreme Court case, examined the right of a family member to refuse treatment on behalf of a daughter in a persistent vegetative state.[6] Second, *Cruzan*, a Supreme Court case, examined whether a state could set a high evidentiary bar to prove intent of a persistent vegetative person to withdraw treatment.[7] Finally, *Glucksberg*, the most recent Supreme Court case, examined whether an individual has a right to physician-assisted suicide.[8] Examining how each of these three cases shaped and created the state's

6. *In re* Quinlan, 355 A.2d 647, 671 (N.J. 1976).

7. *Cruzan*, 497 U.S. at 265.

8. *Glucksberg*, 521 U.S. at 705–06.

unqualified interest in life underscores the concerns and ideals courts have grappled with to arrive at the law's current position.

A. *In re Quinlan*: Where It Began

In 1976, Karen Ann Quinlan, a twenty-two-year-old coma victim, unknowingly became the center of the burgeoning right-to-die debate.[9] The crux of the case centered on her father's wish to be appointed his daughter's guardian.[10] However, Mr. Quinlan made it clear that, if granted guardianship, he intended to remove his daughter from life support.[11]

The court's discussion was grounded on a theoretical constitutional right to privacy.[12] While not explicitly mentioned in the United States Constitution, a right to privacy had been recognized in "many aspects of personal decision[s]."[13] The court found that "no external compelling interest of the State could compel Karen to endure the unendurable,"[14] and, consequently, that the "termination of treatment pursuant to the right of privacy is . . . lawful."[15]

Although *Quinlan* concerned whether a person in a permanent vegetative state or his or her guardian could refuse medical treatment, the case is widely regarded as the "seminal discussion" addressing an individual's right to die.[16] The *Quinlan* court discussed the state's interest in the preservation of life at length.[17] Most pertinent to this discussion, the court acknowledged "that the State's interest *contra* weakens and the individual's right to privacy grows as . . . the prognosis dims."[18] Additionally, the court noted, "[u]ltimately there comes a point at which the individual's rights overcome the State interest."[19]

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9. *Quinlan*, 355 A.2d at 651.

10. *Id.*

11. *Id.*

12. *Id.* at 662–63.

13. *Id.* at 663 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

14. *Quinlan*, 355 A.2d at 663.

15. *Id.* at 670.

16. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 270 (1990); *see also* PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. AND BIOMED. AND BEHAV. RESEARCH, DEFINING DEATH: A REPORT ON THE MEDICAL LEGAL AND ETHICAL ISSUES OF THE DETERMINATION OF DEATH 40, 61 n.8 (1981) [hereinafter PRESIDENT'S COMM'N], *available at* http://www.bioethics.gov/reports/past_commissions/defining_death.pdf. Karen Quinlan and her physical state are used as examples throughout this discussion.

17. *Quinlan*, 355 A.2d at 663–64.

18. *Id.* at 664.

19. *Id.*

B. *Cruzan v. Director, Missouri Department of Health*: An "Unqualified" Interest?

Fourteen years later, the Supreme Court was presented with a similar situation.[20] The parents of Nancy Beth Cruzan, an incompetent on artificial feeding and hydration, petitioned the Court to remove her life support.[21] The Court denied the parents' petition, on the ground that the parents could not show by heightened evidentiary standards that such action would be approved of by their daughter.[22]

Invoking the Fourteenth Amendment, the Fourth Amendment, and prior decisions, the Court concluded that a person does have a liberty interest to refuse medical treatment under the Due Process Clause.[23] The Court refused to find, contrary to *Quinlan*, that such a right of refusal exists under a "generalized constitutional right of privacy."[24] The Court noted that such a right is not absolute, but must be weighed against the state's interest.[25] Although the Court noted that "[t]he choice between life and death is a deeply personal decision,"[26] it found that a "State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life."[27] The Court's analysis concluded that Missouri's "clear and convincing evidence" standard of proof was a proper standard.[28] This standard was proper both because the "interests at stake . . . were more [than] substantial,"[29] and it allocated "the risk of an erroneous decision" to the moving party—the parents, in this case.[30]

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20. *Cruzan*, 491 U.S. at 261.

21. *Id.* at 265.

22. *Id.* at 281. The standard adopted by the Missouri Supreme Court was "clear and convincing" evidence. *Id.* at 282.

23. *Id.* at 278. Two cases relied upon for this implied liberty of refusing medical treatment included a case in which the Petitioner refused a small pox vaccine, *Jacobson v. Massachusetts*, 197 U.S. 11, 24–30 (1905), and one in which Petitioner refused the administration of antipsychotic medication. Washington v. Harper, 494 U.S. 210, 221–22 (1990).

24. *Cruzan,* 497 U.S. at 279 n.7.

25. *Id.* at 278. The *Cruzan* Court acknowledged that "Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest." *Id.* Justice Brennan further clarified that the Missouri Supreme Court found that only the state's interest in the preservation of life was important. *Id.* at 314 (Brennan, J., dissenting).

26. *Id.* at 281 (majority opinion).

27. *Id.* at 282.

28. *Id.*

29. *Id.* at 283.

30. *Id.*

Cruzan presents several interesting points. First, the Court found that an individual had a liberty interest in refusing medical treatment.[31] Second, the Court appears to have applied a heightened level of scrutiny to this decision.[32] Third, part of the direct support the Court provides for its conclusion of an "unqualified interest in preserving human life" is a reluctance to judge the "quality" of a human life.[33] Indirectly, the Court places great emphasis on the irreversible nature of the decision to remove life support,[34] which likely influenced its reluctance to define quality of life. But the ultimate holding rested on deciding the appropriate level of evidentiary persuasion regarding intent to permit removal of life sustaining treatment, and not a direct examination of whether an individual had the fundamental right to refuse such treatment. The Court's language regarding an unqualified interest in the preservation of life was somewhat tangential. As Justice Brennan noted in his dissent,

> [M]issouri has no such power to disfavor a choice by Nancy Cruzan to avoid medical treatment, because Missouri has no legitimate interest in providing Nancy with treatment until it is established that this represents her choice. Just as a State may not override Nancy's choice directly, it may not do so indirectly through the imposition of a procedural rule.[35]

If the Court's true concern was to avoid making quality of life judgments, then not even the procedure the Court takes in deciding a case should be influenced by a state's unqualified interest in preserving life.

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31. *Id.* at 278.

32. *Id.* at 282. The "substantial" interest language indicates this heightened level of scrutiny. Under heightened scrutiny, a statute only violates a liberty if the "incidental restrictions on . . . freedoms are greater than necessary to further a substantial governmental interest." San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 537 (1987). Heightened scrutiny has been reframed in other cases with slightly different language, usually in the context of gender discrimination. *See* Craig v. Boren, 429 U.S. 190 (1970) (requiring that the government interest be important); United States v. Virginia, 518 U.S. 515, 524 (1996) (requiring an "exceedingly persuasive justification" for that government action). The other two standards of scrutiny are strict scrutiny and rational basis scrutiny. Under strict scrutiny, afforded to fundamental rights, a statute must be narrowly tailored to meet a compelling state interest. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). Under the lowest level of scrutiny, and by far the most common level applied, the statute is upheld if it bears a "reasonable relation to a legitimate state interest." *Id.* at 722.

33. *Cruzan*, 497 U.S. at 281. Justice Scalia, in his concurring opinion, spent much time on how neither the Constitution nor the nine Justices themselves know when a life has become "worthless." *Id.* at 293 (Scalia, J., concurring).

34. *Id.* at 283–84 (majority opinion).

35. *Id.* at 317 (Brennan, J., dissenting).

Missouri had already acknowledged that life-sustaining treatment could be refused; the court only specified that this refusal must be proven by clear and convincing evidence.[36] Because preponderance of the evidence is the standard of proof for a "run-of-the-mine [sic] civil dispute"[37] and end of life is "self evident[ly]"[38] a more serious issue, this clear and convincing evidence requirement was only an incidental restriction on an individual's freedom to refuse life-sustaining treatment. As a result, the Court did not have to define the state's interest in preservation of life all that concretely—or even at all—to find either a substantial interest in avoiding erroneous decisions through a heightened standard of proof.

The limitations of the *Cruzan* reasoning with regard to physician-assisted suicide are readily apparent. This case concerned only an evidentiary standard, not any individual right to make a decision concerning the merits of life or death.[39] Furthermore, because Nancy Cruzan was in a vegetative state, she was not making the decision herself.[40] Finally, the decision here involved the refusal of life-sustaining treatment, a right long acknowledged by the Court.[41] This is quite different from the proactive administration of substances designed to end life, as physician-assisted suicide does. As a result of these factual differences, the *Cruzan* reasoning, while certainly influential, should not be controlling in situations where an individual is making for him- or herself the life or death decision of physician-assisted suicide. As discussed below, these factual differences were essentially ignored in *Washington v. Glucksberg*.

C. *Washington v. Glucksberg*: Where We Are Now, and Where It Went Wrong

Washington v. Glucksberg concerned a statute which imposed criminal liability on anyone who knowingly or intentionally aided another person to commit or attempt suicide.[42] Four doctors, who "occasionally

36. *Id.* at 283 (majority opinion).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 267.

41. *Id.* at 281.

42. Washington v. Glucksberg, 521 U.S. 702, 706 (1997). Another case, *Vacco v. Quill*, 521 U.S. 793 (1997), was decided the same day. *Vacco* concerned a New York statute that provided criminal prosecution for aiding a suicide. *Id.* at 796. While the Court similarly found that this statute did not violate the Fourteenth Amendment, *Vacco*, 521 U.S. at 797, *Glucksberg* remains the benchmark for physician-assisted suicide litigation. Therefore, discussion here will be limited to a discussion of *Glucksberg*.

treat[ed] terminally ill, suffering patients," filed suit as a *prima facie* challenge.[43]

The Court framed the question as a constitutional challenge to the "liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide."[44] Based upon this narrow framing of the issue, the Court found, throughout history, that Anglo-Americans have considered it criminal to commit—or to assist—suicide.[45] The Court declined to find a fundamental right to an assisted suicide because of the copious history demonstrating societal disapproval of suicide itself.[46] Affording the individual's interest in suicide only rational basis scrutiny,[47] the Court balanced this interest against the state's many interests.[48] These interests included protection of the preservation of life;[49] "protecting the integrity and ethics of the medical profession;"[50] "protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes;"[51] and, protecting against the "slippery slope" from suicide to involuntary euthanasia.[52] In finding that all interests are "unquestionably important and legitimate," the Court held the law was rationally related to the state's interests and that the Washington law was proper.[53]

The three areas of the *Glucksberg* decision that are most pertinent to this note are as follows: the framing by the Court of the individual interest at stake;[54] the subsequently determined rational basis review;[55] and, the "unqualified interest in the preservation of human life."[56] By examining

43. *Glucksberg,* 521 U.S. at 707.

44. *Id.* at 708.

45. *Id.* at 710–16.

46. *Id.* at 728.

47. *Id.* at 728 n.21.

48. *Id.* at 734; *see also id.* at 728 n.20.

49. *Id.* at 728.

50. *Id.* at 731.

51. *Id.*

52. *Id* at 732; *see also id.* at 733 n.23. Six state interests were addressed by the Ninth Circuit: "(1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses." *Id.* at 728 n.20 (citing Compassion in Dying v. Washington, 79 F.3d 790, 816–32 (1996)).

53. *Glucksberg*, 521 U.S. at 735.

54. *Id.* at 722.

55. *Id.* at 728.

56. *Id.*

the type of interest the Court found and the type of interest that the Court perhaps should have found, a proper level of scrutiny can be assumed. Once a definition of "life" is established, this sets the stage for a new individual's right versus state's interest balance. The need for a concrete definition of life becomes readily apparent by examining how the Court arrived at its "unqualified interest in the preservation of human life" language and why this designation is not only fallacious, but shows how the Court avoided its obligation to adequately balance the state's interest against the individual right.

1. Reformulating the Individual "Right to Die"

The Court carefully set up its Due Process analysis under the guise that "substantive-due-process cases [require] a 'careful description' of the asserted fundamental liberty interest."[57] Under this rubric, the Court rejected the Ninth Circuit's framing of "'whether there is a liberty interest in determining the time and manner of one's death,' or, in other words, 'is there a right to die?'"[58] Similarly, the Court rejected Glucksberg's framing of the liberty interest as "'the right to choose a humane, dignified death' [or] 'the liberty to shape death.'"[59] Because the Washington statute specified "aiding another person to attempt suicide,"[60] the Court framed the liberty interest as whether there is "a right to commit suicide which itself includes a right to assistance in doing so."[61] By framing the question so narrowly and, by specifically using the word "suicide,"[62] the Court was able to avoid finding a fundamental interest.[63]

57. *Id.* at 721.

58. *Id.* at 722 (citing Compassion in Dying v. Washington, 79 F.3d 790, 799, 801 (1996)).

59. *Id.* (citations omitted).

60. *Id.* at 723 (citing WASH. REV. CODE § 9A.36.060(1) (1994)).

61. *Id.*

62. The word "suicide" carries with it the weight of years of morality, religion and culture. *See id.* at 716; *see also* Mark D. Frederick, *Physician Assisted Suicide: A Personal Right?*, 21 S.U. L. REV. 59 (1994); Kam C. Wong, *Whose Life Is It Anyway?*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 233, 233 n.4 (2006). As an aside, the Bible, a source of many Americans' religious beliefs, does not strictly condemn suicide. The immorality of suicide stems from a middle-age proclamation by the Catholic Church; from that time, suicide was seen as "a crime against man and God." Frederick, *supra* at 64.

63. *Glucksberg*, 521 U.S. at 728. A fundamental interest is one that is "objectively 'deeply rooted in this Nation's history and tradition.'" *Id.* at 720–21 (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1977). Another formulation requires the right to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 721 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). A final formulation requires the right to be so implicit that "neither liberty nor justice would exist if they were sacrificed." *Id.* (citing Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

This careful construction of the individual interest did not escape the notice of the concurring Justices. Justice O'Connor (and subsequently Justice Ginsberg)[64] focused her concurring opinion on the possibility that a different construction might result in a finding of a liberty interest.[65] Justice Stevens acknowledged that there was still "room for further debate about the limits that the Constitution places on the power of the States to punish the practice [of giving aid in dying],"[66] and that such a challenge might be better framed in an "as applied" challenge.[67] Justice Stevens also suggested that in some situations, there may be a stronger liberty interest than the Court found generally.[68] Justice Souter explained that a more proper analysis might have been accomplished by examining whether there was a "liberty interest in bodily integrity,"[69] and he relied on numerous examples where such a liberty interest has been found.[70] Justice Breyer, disagreeing with the Court's formulation of the liberty interest, would have used a formulation which included a "right to die with dignity."[71] From the concurring opinions, it appears that there was support for finding that a properly formulated "right to die" or "right to bodily integrity"[72] would be found as a liberty interest.

2. "Right to Die" as a Liberty Interest

Support for the "right to die" as a liberty interest can also be found by comparing it to the rights affirmed in abortion jurisprudence. The obvious parallels between end of life and beginning of life provide only a starting point.[73] References to *Planned Parenthood of Southeastern Pennsylvania*

64. *See id.* at 789 (Ginsberg, J., concurring).

65. *See id.* at 736–38 (O'Connor, J., concurring).

66. *Id.* at 738 (Stevens, J., concurring).

67. *Id.* at 739.

68. *Id.* at 745.

69. *Id.* at 777.

70. *Id.* at 777–78.

71. *Id.* at 790 (Breyer, J., concurring).

72. For ease of discussion, the right in question here will be called a "right to die."

73. For a discussion about how abortion and physician-assisted suicide are legally related, see Carrie Pailet, Comment, *Abortion and Physician Assisted Suicide: Is There a Constitutional Right to Both?*, 8 LOY. J. PUB. INT. L. 45, 64 (2006) (discussing how "both procedures . . . rel[y] on the same legal argument, that to prohibit either choice is a violation of an unspecified, constitutionally protected, liberty interest that one may make decisions affecting one's own body free from legal interference").

For a discussion about why abortion and physician-assisted suicide are dissimilar, see Marc Spindelman, Are the Similarities between a Woman's Right to Choose an Abortion and the Alleged Right to Assisted Suicide Really Compelling?, 29 U. Mich. J.L. Reform 775, 815–32 (1996) (discussing how there is a distinct difference between personhood in the two cases; that

v. Casey[74] as well as *Roe v. Wade*[75] figured prominently in every Justices' opinion in *Glucksberg*.[76] The language of *Casey,* in reaffirming "the essential holding of *Roe* v. *Wade*,"[77] provides ample room for a right to die. *Casey* held that the Due Process Clause protected many of the rights and liberties "involv[ed in] the most intimate and personal choices a person may make in a lifetime,"[78] and that "[a]t 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."[79] A right to die fits well within the "defining one's own concept of existence" language used in *Casey*.[80] Therefore, it is consistent that the rights accorded to abortion should be extended to physician-assisted suicide.

Although *Roe v. Wade* defined abortion as a fundamental right,[81] over time it has become less clear if the right is "fundamental" or merely a "liberty interest."[82] Beginning with *Webster v. Reproductive Health Services*, the Court proposed that abortion need not be defined as a fundamental right but could be construed as a "liberty interest protected by the Due Process Clause."[83] Although this definition was startling at the time, the language in *Casey* continued this move away from defining abortion as a fundamental right, choosing instead to state the following language: "liberty, or an aspect of bodily integrity, or an exercise in personal autonomy."[84] In the most recent abortion decision, *Gonzales v. Carhart*, the term "fundamental" is used only once, in Justice Ginsberg's

abortion is being redefined as a sex-equality right; and that socially, abortion is seemingly more acceptable than physician-assisted suicide).

74. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

75. Roe v. Wade, 410 U.S. 113 (1973).

76. *See, e.g., Glucksberg*, 521 U.S. at 726–35. Again, by defining the question of the right as narrowly as the Court did, the Court mitigated the parallels between these areas of jurisprudence.

77. *Casey*, 505 U.S. at 846.

78. *Id.* at 851.

79. *Id.*

80. *Id.*

81. *See* Roe v. Wade, 410 U.S. 113, 154–56 (1973).

82. Spindelman, *supra* note 73, at 786 (stating that "[t]he Supreme Court no longer considers the right to abortion to be a 'fundamental,' 'very fundamental,' or 'limited fundamental' right . . . [which] provides an important lesson where the right to assisted suicide is concerned . . . [that] the most that could be said of any right to assisted suicide is that it is a Fourteenth Amendment 'liberty interest.'").

83. Webster v. Reprod. Health Servs., 492 U.S. 490, 520 (1989).

84. Spindelman, *supra* note 73, at 785 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992)).

dissenting opinion.[85] The Court in *Carhart* echoes the language of *Casey*: the government may not impose an undue burden, defined as a regulation of which the "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion."[86] By lumping liberty interests and fundamental rights into one category,[87] the *Glucksberg* Court further muddles the line between the two.

The obvious similarities between abortion and right to die jurisprudence make the individual rights accorded in abortion cases an appropriate standard for right to die cases. Because it seems that abortion is no longer a "fundamental" right, the appropriate status is that of "liberty interest." Therefore, a happy medium could be reached by also according an individual's right to die a "liberty interest" status. Indeed, five of the Justices on the *Glucksberg* Court seemed prepared to eschew the Court's formulation of the individual right, and seemed similarly prepared to define the right (albeit not in the same terms) as a liberty interest.

It is not clear from the Court's jurisprudence if a fundamental right and a liberty interest accord the same protection. A number of commentators have noticed that the Court appears to be using the term liberty interest as opposed to a fundamental right and are not quite sure what to make of that.[88] As Professor Sunstein noted, "It is unclear whether the identification of a 'liberty interest' has the same consequence [as a fundamental right]."[89] It is possible that the term "liberty" is merely being used to "more closely tie Due Process jurisprudence to the text of the Constitution," and, therefore, the distinction between the two terms has no merit.[90] However, in *Cruzan,* the Court used the term "liberty interest" and referred to the state's interests as "substantial."[91] For argument's sake, this

85. Gonzales v. Carhart, 127 S. Ct. 1610, 1647 (2007) (Ginsberg, J., dissenting).

86. *Id.* at 1626–27 (majority opinion).

87. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997). The Court also acknowledged fundamental and liberty interests in contexts other than an individual's right to die: Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (abortion); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–279 (1990) (right to refuse unwanted lifesaving medical treatment); Rochin v. California, 342 U.S. 165 (1952) (right to bodily integrity); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to have children); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to direct the education and upbringing of one's children); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (same); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to marital privacy and use of contraception). *Id.* at 720.

88. *See* Michael P. Allen, *The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die*, 53 AM. U.L. REV. 971, 986 n.64 (2004); Cass R. Sunstein, *Essay: The Right to Die*, 106 YALE L.J. 1123, 1131 n.30 (1997).

89. Sunstein, *supra* note 88, at 1131 n.30.

90. Allen, *supra* note 88, at 986 n.64.

91. *Cruzan*, 497 U.S. at 278, 283.

note conservatively assumes that a "liberty interest" does not merit strict scrutiny as a fundamental interest, but rather deserves something higher than a rational basis review. For simplicity's sake, this note will adopt the language set forth by the Court in *San Francisco Arts & Athletics v. United States Olympic Committee* that a statute cannot stand if the "incidental restrictions on . . . freedoms are greater than necessary to further a substantial government interest."[92] Accordingly, this assumption further includes that the liberty interest of the right to die is afforded heightened scrutiny.

3. The State's Interest: An "Unqualified Interest" in Preserving What?

The *Glucksberg* Court set forth four state interests: protecting the preservation of life;[93] "protecting the integrity and ethics of the medical profession;"[94] "protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes, and;"[95] protecting against the "slippery slope" from suicide to involuntary euthanasia.[96] Commentators have argued that the state's interest in the preservation of life is arguably the most important of the state's interests when compared to a right to die.[97] Because each of the above interests embody many nuanced issues that are themselves deserving of individual review, this note's discussion is limited to the state's interest in preserving life.

The Court in *Cruzan* held that to avoid "quality of life judgments" it was proper to "simply assert an unqualified interest in the preservation of human life."[98] In addition to appropriating verbatim *Cruzan*'s "unqualified interest" standard,[99] the *Glucksberg* Court also adopted Washington's assertion that "all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law."[100]

92. San Francisco Arts & Athetics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 537 (1987).

93. Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

94. *Id.* at 731.

95. *Id.*

96. *Id.* at 732; *see also id.* at 733 n.23.

97. Allen, *supra* note 88, at 987; *see also* Matthew P. Previn, Note, *Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life*, 84 GEO. L. J. 589 (1996); Eryn R. Ace, Note, *Krishner v. Mciver: Avoiding the Dangers of Assisted Suicide*, 32 AKRON L. REV. 723 (1999).

98. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990).

99. *Glucksberg*, 521 U.S. at 728 (citing *Cruzan*, 497 U.S. at 282).

100. *Id.* at 729.

Difficulties arise from this use of the "unqualified interest" language.[101] Although the *Glucksberg* Court endeavored to support its assertion of an unqualified interest in the preservation of life, the Court's analysis suffered from three serious flaws. First, the *Glucksberg* Court applied the *Cruzan* language to a completely different context. The Washington statute at issue in *Glucksberg* was not an evidentiary measure that protected access to a right, as it was in *Cruzan*, but a direct affront to an individual's ability to decide when and how they wanted to die. Second, although the *Glucksberg* Court cited existing state policies such as homicide law to support this blanket contention, the Court selectively chose to ignore state policies that leaned the other way. Third, and most importantly, in declining to define "life," the Court created an insurmountable standard. An unqualified interest in an undefined term could embody almost anything.

The *Glucksberg* Court appropriated the "unqualified interest" language and the "quality of life" language without support and without a similar context. In *Cruzan*, the Court's biggest fear was making quality of life judgments.[102] But in *Cruzan*, the Court was at one remove: the issue there was the appropriate evidentiary standard for refusing medical treatment, a procedural question. The Court did not have to make a quality of life decision; that decision was left to the individual. The individual simply had to prove their desire to refuse treatment with clear and convincing evidence. In addition, the *Cruzan* Court's statement of an unqualified interest in preserving life was essentially dicta. In *Glucksberg*, the Court simply adopted the language without any explanation and, contrary to *Cruzan*, as a factor key to the central holding.[103] Furthermore, the *Glucksberg* Court adopted the position first elucidated in *Cruzan* that "the States 'may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy.'"[104] That language was presented in the context of why Missouri could impose "heightened evidentiary requirements."[105] Heightened evidentiary requirements lessen a court's responsibility to determine which facts are true; they also make the

101. *See, e.g.*, Allen, *supra* note 88, at 988 (discussing how the unqualified interest makes it difficult to weigh that interest versus an interest in refusing medical treatment); *see also* Suzanne M. Alford, Note, *Is Self-Abortion a Fundamental Right?*, 52 DUKE L.J. 1011, 1028–29 (2003) (discussing how the "unqualified interest" in life recognized by the Court provides support for "proscrib[ing] activities that endanger it, including [physician-assisted suicide]").

102. *Cruzan*, 497 U.S. at 282.

103. *Glucksberg*, 521 U.S. at 728.

104. *Id.* at 729 (citing *Cruzan*, 497 U.S. at 282).

105. *Cruzan*, 497 U.S. at 281.

determination more procedural: are the facts such that they prove the issue clearly and convincingly?[106]

The *Glucksberg* Court provided only selective support for its assertion of an unqualified interest in the preservation of life, by ignoring other areas that show states qualifying their interest in life. The Court cited the existence of homicide laws as the quintessential indicator of the state's interest in preserving life.[107] In addition, the Court cited the state's involuntary commitment provisions for those who attempt to harm themselves for the proposition that the state is interested in keeping people from harming themselves.[108] The Court also noted that prevention of suicide "shores up the notion of limits in human relationships," in that it "reflects the gravity with which we view the decision to take one's own life."[109] The state also has a *parens patriae* interest[110] in making sure that an individual does not make bad choices. While these interests do show that the state does have an interest in preserving life, this interest is not *unqualified* because, as discussed below, there are many ways in which the states, and even the Constitution, qualify an interest in the preservation of life.

Justice Brennan, in his *Cruzan* dissent, points out that if states truly had an unqualified interest in the preservation of life, there would be universal health care laws.[111] This critique remains true today, as evidenced by the fact that only Massachusetts has implemented universal health care.[112]

Justice Stevens, in his *Glucksberg* dissent, specifically noted that the Court has routinely upheld the constitutionality of capital punishment

106. As noted in Justice Brennan's dissent, allowing an "unqualified" interest to inform even the evidentiary standards would entail the State making a quality choice about the type of evidence representing an individual's intent, which is akin to making a quality choice about how the state viewed that individual's life. *Id.* at 316–17 (Brennan, J., dissenting). It seems possible that there may be a logical flaw in the *Cruzan* language, which further compounds the problem of the appropriation in *Glucksberg*.

107. *Glucksberg*, 521 U.S. at 728–29 ("The interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another.") (citing MODEL PENAL CODE § 210.5 cmt. 5 at 100) (1962)).

108. *Id.* at 729 n.22 (citing People v. Kevorkian, 527 N.W.2d 714, 730 (Mich. 1994)).

109. *Id.*

110. *Cruzan*, 497 U.S. at 315 (Brennan, J., dissenting).

111. *Id.* at 314 n.15.

112. Pam Belluck, *Massachusetts Sets Benefits in Universal Health Care Plan*, N.Y. TIMES, Mar. 21, 2007, *available at* http://www.nytimes.com/2007/03/21/us/21mass.html?scp=1&sq=. Three other states are contemplating this measure: California, Illinois and Pennsylvania. Kevin Sack, *States' Widening of Health Care Hits Road Blocks*, N.Y. TIMES, Dec. 25, 2007, *available at* http://www.nytimes.com/2007/12/25/us/25health.html?scp=6&sq=.

statutes.[113] If the state's interest in preserving life were truly unqualified then the state would have an interest in preserving the life of even those who commit capital crimes. In the capital punishment context, the state's interest is not to preserve life, but to take life.[114] To this day, thirty-six states, the United States government, and the United States military have some form of capital punishment statute on their books.[115]

Similarly, the Constitution implies that as long as due process is followed, one may be deprived of life.[116] For example, the Court held in *Gregg v. Georgia* that the Constitution did not *per se* forbid "the sentence of death for the crime of murder."[117] The Framers of the Constitution lived during a time when putting someone to death was a common punishment.[118] It would seem that if the Constitution truly supported the contention that the states had an unqualified interest in the preservation of life, there would be no situation in which someone may be deprived of life, even if due process were followed.

In declining to define "life" and, specifically, when life ends, the Court created an insurmountable standard because, an unqualified interest in an undefined term could embody almost anything. While the word "life" conveys a certain meaning to everyone, that meaning is not universal and can mean a variety of things in a variety of circumstances.[119] For example, in order to be considered "dead" for purposes of "settling estates, closing bank accounts, selling stocks and bonds, and determining insurance and pension benefits[, or] providing evidence in court cases," one needs a death certificate.[120] Filling out a death certificate often involves determining a clear cause of death,[121] which may take time. It is foolish to think that the

113. *Glucksberg*, 521 U.S. at 738 (Stevens, J., concurring) (citing Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976)).

114. Supporters of the state's unqualified interest combat the presence of capital punishment statutes by differentiating between those who have been convicted of a crime and those who have not committed crimes, classified as "innocent life." Previn, *supra* note 97, at 593 n.21. However, merely by drawing that distinction, the state has shown that it does qualify its interest in preserving life. While only protecting innocent life may be a justifiable qualification, it is still a qualification.

115. Death Penalty Information Center, Death Penalty Policy by State, http://www.deathpenaltyinfo.org/article.php?did=121&scid=11 (last visited Sept. 29, 2008).

116. U.S. CONST. amend. V.

117. *Gregg*, 428 U.S. at 176.

118. *Id.* at 177.

119. *See* discussion *infra* Part II.

120. Geoffrey R. Swain, Gloria K. Ward & Paul P. Hartlaub, Editorial, *Death Certificates: Let's Get it Right*, 71 AM. FAMILY PHYSICIAN 652 (2005), *available at* http://www.aafp.org/afp/20050215/editorials.html.

121. *Id.*

state's interest in preserving "life" extends until a death certificate is completed. On the other end, clinical death is defined as "cardiac arrest accompanied by apnea and loss of consciousness" but may be, for a time, reversible.[122] Ostensibly someone in the "reversible" portion of clinical death is still very much alive. Because there is so much wiggle room in adopting an unqualified interest in preserving an undefined term, it is hard to pinpoint the state's exact interest under any circumstances. It is simply impossible to compare an individual right to something that is so fluid.

In summary, the *Glucksberg* Court erred in many ways. First, by narrowly defining the individual right in question to one of suicide, the Court misframed the individual right. Five Justices were prepared to grant the individual right in question a liberty interest status and the connection between physician-assisted suicide jurisprudence and abortion jurisprudence seem to indicate that the rights in question in both areas should be afforded the same liberty interest protection. Second, because of this misframing, the level of scrutiny applied—rational basis review—was erroneous. Liberty interests should be accorded a heightened scrutiny, wherein the restrictions must be necessary to meet a state's substantial interest. Finally, the Court erred in asserting an unqualified interest in the preservation of life. Not only is the state's interest in preserving life qualified,[123] but the lack of a definition for life, and when life ends, makes it impossible to accurately compare the state's interest in preserving life with an individual's liberty interest.

II. Defining the End of "Life"

Simply acknowledging that the Supreme Court has avoided its obligation to seriously balance the state's interest against the individual's interest does little to resolve how the Court may rectify this problem. A definitive point at which the Constitution no longer recognizes life would provide the floor beyond which no state may pursue its interest to preserve life. When such a floor is set, the Court could undertake a reasoned balance of the two competing interests.

To be fair, practically any definition for the end of life, as long as it was logically supportable, would allow for this reasoned balance. The

122. James DuBois, *Non-Heart-Beating Organ Donation: A Defense of the Required Determination of Death*, 27 J.L. MED. & ETHICS 126, 130 (1999).

123. Paul S. Kawai, Comment, *Should the Right to Die Be Protected? Physician Assisted Suicide and Its Potential Effect on Hawai'i*, 19 U. HAW. L. REV. 783, 795 (1997). *But see* Allen, *supra* note 88, at 990–92 (suggesting that a state may have a comprehensive interest in life while taking into account the seemingly paradoxical interest in capital punishment. The author, however, calls this a qualified "comprehensive interest").

choice of one particular bright-line rule necessarily excludes other bright-line rules.[124] The choice of whole brain death is suggested here as a preeminent definition for several reasons: it provides a definitive point in time for death; it has established criteria for determining that point in time; it has precedent and support from both the medical and legal community, and; it is in accordance with a generally accepted concept of death. Other definitions lack at least one of these supporting factors.

A. Definition: Life is the Absence of Death

Certainty is prized in law.[125] This is especially true in situations in which so many legal changes are wrought at the moment when life ceases.[126] The simplest definition contrasts life directly with death, without necessarily defining death.[127] This definition, although conceptually gratifying, is more a "know it when I see it"[128] definition that suffers from two major drawbacks.

First, this definition begs the question: the death of what? In biology, life and death are relative terms. In biology "[c]ells . . . are the fundamental units of life" and provide the answer to the "question of what life is."[129] But whereas a single bacteria, the simplest of all cells, dies when that cell ceases to function,[130] a multi-cellular human being continues to live even if a single cell dies. In a single human being, billions of cells die every hour.[131] Both external and internal forces dictate when a cell dies; for example, a cell has a limited number of times it can divide before it

124. For an example where the Court has previously established a bright-line rule to the exclusion of other rules, see *Reynolds v. Sims*, 377 U.S. 533 (1964). There, the Court adopted the "one person, one vote" standard, to the exclusion of a number of other reasons. *Id.* at 558. This standard was chosen the exclusion of other standards. *See, e.g., id.* at 622–23 (Harlan, J., dissenting) (suggesting that division of votes could have occurred on almost any other ground, such as history or economic interest).

125. Kirsten Rabe Smolensky, *Defining Life from the Perspective of Death: An Introduction to the Forced Symmetry Approach*, 2006 U. CHI. LEGAL. F. 41, 43.

126. *Id.* at 44.

127. Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/life (last visited Sept. 29, 2008). ("1a: the quality that distinguishes a vital and functional being from a dead body . . . c: an organismic state characterized by capacity for metabolism, growth, reaction to stimuli, and reproduction").

128. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Although commonly used to refer to an inherent knowledge of what is what, Justice Stewart did effectively recant the line in *Miller v. California*, 413 U.S. 15, 39–40 (1973) (Brennan, J., dissenting), calling such a standard "vague."

129. ESSENTIAL CELL BIOLOGY: AN INTRODUCTION TO THE MOLECULAR BIOLOGY OF THE CELL 1 (Bruce Alberts et al. eds., Garland Publishing, Inc. 1998).

130. *Id.* at 22.

131. *Id.* at 584–85.

stops dividing and dies.[132] This division is regulated by chemical signals in the body which tell a cell when to divide, and when it is no longer needed.[133] Thus, from a cellular perspective of an organism, "life" and "death" may only be defined as a process rather than as a set point in time.[134] Furthermore, *Human Biology* posits that the key difference between humans and other living organisms is the existence of a cultural heritage.[135] Elucidating criteria of death of a human as opposed to bacteria when the dividing line is "culture" presents too many variables to contemplate. Because this definition lacks both a definitive point in time, as well as criteria to determine that point in time, defining life as the absence of death is not helpful.

Second, the miracle of modern medicine allows people to continue living on machinery that, if removed, would result in either starvation or asphyxiation.[136] While medicine is "the science and art [of] dealing with the maintenance of health and the prevention, alleviation, or cure of disease,"[137] it is this ability to maintain health through aiding natural means or through artificial means, which allows human beings to lengthen their own lives.[138] The concept of extending life by artificial means is becoming an issue of great concern.[139] There are now machines that will pump blood and supply oxygen, two functions that can be performed without the body's inherent ability to perform either.[140] Because it is now possible to be "not dead" with the aid of a machine, this adds additional problems to determining the point in time at which one is "dead."

Accepting the general proposition that life is the absence of death, life can be defined based upon the point life ceases, as opposed to searching for an affirmative definition of life. Anything before that point is life, anything after that point is death. Unfortunately, biology, which embraces a process

132. *Id.* at 584.

133. *Id.* at 585.

134. Smolensky, *supra* note 125, at 43.

135. HUMAN BIOLOGY 2 (Sylvia S. Madder ed., McGraw-Hill 7th ed. 2002) (1988).

136. Yen-Yuan Chen, Alfred F. Connors, Jr. & Allan Garland, *Effect of Decisions to Withhold Life Support on Prolonged Survival*, 133 CHEST 1312 (2008).

137. Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/medicine (last visited Sept. 29, 2008).

138. *See* Melissa Fusco, *World Faces Challenge as Technologies Lengthen Life Expectancies, Biologist Says*, STANFORD NEWS SERVICE, March 1, 2006, http://news-service.stanford.edu/news/2006/march1/atulja-030106.html.

139. *See id*; *see also* Previn, *supra* note 97, at 601; Ace, *supra* note 97, at 738 n.85.

140. Chen, *supra* note 136.

approach to life,[141] is ill-suited to this analysis. We must turn to other fields in search of a definition of death.

B. Definition: Death as the Opposite of Viability

One of the most pertinent areas of law defining life, and certainly one most compared to physician-assisted suicide, is the area of abortion.[142] The abortion debate centers predominantly at the point at which a fetus becomes a person and, therefore, subject to the protection of the Constitution.[143] The Court has chosen to identify this transitional point from fetus to person as the point of viability.[144] Viability is commonly held to be the point at which a fetus can survive on his own outside the mother's body.[145] Viability is presumed at twenty-four weeks after conception, although, the rate of survival of babies born before the twenty-fourth week continues to improve with advances in medical science.[146] This suggests that viability as a defining point is becoming increasingly irrelevant because a fetus "can" be kept alive, even if it could not stay alive on its own.[147] Generally speaking, a fetus is unable to stay alive outside the mother's body before five-and-a-half months (approximately twenty-two weeks) even with medical aid because the lungs are not developed enough to function.[148] Therefore, despite being tied to a specific time, the viability standard is losing the preciseness it once had.[149]

Extrapolating viability lessons to end of life determinations is difficult. First, unlike viability's presumption that a fetus can survive at twenty-four weeks, there is no definitive temporal point which marks for

141. Smolensky, *supra* note 125, at 43.

142. *See* Spindelman, *supra* note 73, at 815–21; *see also* Pailet, *supra* note 73.

143. Roe v. Wade, 410 U.S. 113, 160–63 (1973).

144. *Id.* at 163.

145. *See* Webster v. Reprod. Health Servs., 492 US 490, 515–516 (1989) (viability presumed at twenty weeks); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992) (viability presumed when there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and in all fairness be the object of state protection that now overrides the rights of the woman).

146. Clare Dyer, *Experts Clash as Committee Debates Reducing 24 Week Abortion Limit*, 335 BRIT. MED. J. 781, 789 (2007).

147. Richard Lyus, *Abortion Limit Debate: Viability is Probably Irrelevant*, 335 BRIT. MED. J. 945, 953 (2007).

148. LANGMAN'S MEDICAL EMBRYOLOGY 197–200 (T.W. Sadler ed., Lippincott Williams & Wilkins 10th ed. 2006) (1963) (stating that sufficient lung development occurs during months six and seven).

149. For a discussion on alternate means of defining fetal life, see Smolensky, *supra* note 125, at 72 (suggesting that a better identifier of fetal life is "brain birth," the point at which electical activity in the brain begins).

all people the time at which the human body ceases to survive. Second, a particular organ failure does not present the same problems in an elderly person as it does in a fetus. At the end of life, there is no question that organs are developed enough to possess the capacity, if not the ability, to function. Through the aid of medical machines, the actions of almost every major organ group can be replicated.[150] Applying viability to end of life provides neither a definitive end point, nor criteria for determining that end point.

C. Definition: Death as Whole Brain Death–A Workable Solution

There is, however, some hope. Because the medical community is concerned with "the science and art [of] dealing with the maintenance of health and the prevention, alleviation, or cure of disease,"[151] the medical community had to establish a point in time in which a person was declared "dead."[152] The medical community developed a variety of various methodologies by which doctors determined death from the early 1900s through the late twentieth century.[153] Originally considering death to occur at the time of cardio-pulmonary cessation,[154] doctors realized that it was possible to have a heartbeat with no brainwave function and vice versa.[155]

In the 1980s, struggling with the variations of the human body, the medical community called for a universal definition of death that embodied "the loss of integrative unity of the organism as a whole."[156] In 1981, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research ("Commission") proposed the Uniform Determination of Death.[157] The Commission, consisting of doctors, lawyers and ethicists, defined death as occurring when "[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brainstem, is dead. A determination of death

150. Wendy L. Schoen, Note, *Conflict in the Parameters of Defining Life and Death in Missouri Statutes*, 16 AM. J. L. & MED. 555, 556 (1990) (stating that there are machines that can perform the actions of the heart and lungs).

151. Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/medicine (last visited Mar. 6, 2008).

152. Schoen, *supra* note 150, at 567.

153. *Id.* at 566–67.

154. Smolensky, *supra* note 125, at 46.

155. Schoen, *supra* note 150, at 567.

156. Ari Robin Joffe, M.D., *The Neurological Determination of Death: What Does it Really Mean?*, 23 ISSUES L. & MED. 119, 120 (2007).

157. PRESIDENT'S COMM'N, *supra* note 16.

must be made in accordance with accepted medical standards."[158] The entire brain is responsible for the integrated functioning of all the organs and, therefore, a definition that required whole brain death marked the point at which the body could no longer regulate or integrate any of its systems.[159] The Commission especially liked the term "whole brain" because it "clarif[ied] the understanding of death that enjoys near universal acceptance in our society."[160] Overall, the Commission decided that whole brain death was the most appropriate standard[161] because it allowed death to be defined as a single phenomenon[162] for the organism as a whole,[163] was not a radical new development in the medical front,[164] could be uniformly applied,[165] and was adaptable to advances in diagnosis techniques.[166] The Commission's definition amalgamated several disparate definitions used in the United States.[167] These definitions had been promulgated by individual state legislatures, the American Medical Association, and the American Bar Association.[168] The Uniform Determination of Death is now applied in some form in all fifty states.[169] Although suggested for "all jurisdictions of the United States,"[170] federal entities have yet to adopt its framework.[171]

158. *Id.* at 2.

159. *Id.* at 32–37.

160. *Id.* at 36.

161. Other standards contemplated, but eventually rejected by the Commission, included higher brain death, defined as "the psychological functions which make consciousness, thought and feeling possible," and other non-brain related definitions, such as the more traditional cessation of cardio-pulmonary function. *Id.* at 38, 41.

162. *Id.* at 57.

163. *Id.* at 58.

164. *Id.* at 58. Brain death as a form of death had been acknowledged since the 1960s. *See* Smolensky, *supra* note 125, at 47.

165. PRESIDENT'S COMM'N, *supra* note 16, at 60.

166. *Id.* at 61.

167. *Id.* at 61–69.

168. The American Bar Association defined death as "a human body, with irreversible cessation of total brain function, according to usual and customary standards of medical practice, shall be considered dead." *Id.* at 64. The American Medical Association had adopted a form of the "either or" test proposed in the final Uniform Determination of Death, although with extensive provisions that limited liability from state action. *Id.* at 66.

169. Smolensky, *supra* note 125, at 47; *see also id.* at 47 n.24 ("Some states adopted the UDDA [Uniform Determination of Death Act] by statute and others adopted it via case law."). A few states, notably New Jersey and New York, have built in exceptions for religious beliefs. *See id.* at 47–49.

170. PRESIDENT'S COMM'N, *supra* note 16, at 2.

171. *See* David Powner, Michael Hernandez & Terry Rives, *Variability Among Hospital Policies for Determining Brain Death in Adults,* 32 CRIT. CARE MED. 1284, 1284 (2004) (stating that brain death is the standard used for organ donation).

On a practical level, the medical community has developed criteria for determining whole brain death.[172] One such set of criteria requires that:

> (1) The cause of the neurological state must be **known** unequivocally, and must be known to **be irreversible**. (2) There must be no medical or anatomic conditions that could confound the determination . . . . (3) [Whole brain death can only be pronounced at] a core temperature of 97.7 °F (36.5 °C) as hypothermia can inhibit brain function, including the brainstem. (4) [Whole brain death can only be pronounced when t]he systolic blood pressure [is] maintained >90 mm Hg. (5) There must be no evidence of drug intoxication, poisoning or paralysis.[173]

In addition, clinical tests require existence of a coma, absence of brainstem reflexes, and presence of apnea, which is defined as absence of motor response.[174]

In summary, by defining the end of life as the point of whole brain death, many important considerations are addressed. This is a specific point in time at which a person is deemed "dead." In addition, the medical community has an established protocol for establishing when whole brain death has occurred. Whole brain death conforms to both the medical and legal definitions of death used in all fifty states, as well as our social perceptions of "death."[175] Whole brain death is the most certain and

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172. *Id.* at 1285. As suggested in the article, there is no universal standard required of all medical institutions. *Id.* at 1284. Although the American Academy of Neurology published guidelines in 1995, "they are an informal model against which institutional policies" are created. *Id.*

173. Sandra Nathan & David Greer, *Brain Death*, 25 SEMINARS IN ANESTHESIA, PERIOPERATIVE MED. & PAIN 225, 226 (2006).

174. *Id.*

175. Another form of death contemplated but ultimately rejected by the Commission is higher brain death. *See* PRESIDENT'S COMM'N, *supra* note 16, at 38–41. *In Re Quinlan* figured prominently in the President's Commission's analysis of whether higher brain function should be the appropriate measure. *See id.* at 18, 40, 61. However, the Commission noted that someone who was able to breath on their own, much as Karen Quinlan could do, was not the same as a corpse. *Id.* at 40.

Higher brain death results in loss of emotion, consciousness and cognition and occurs more easily than damage to the more resilient brainstem. Anna Schlotzhauer & Bryan Liang, *Definitions and Implications of Death*, 16 HEMATOL. ONCOL. CLIN. N. AM. 1397, 1399 (2002). Proponents of a higher brain death standard argue that this takes into account the "personness" of a person. *Id.* at 1400. But because there is no full definition of "personness," a corresponding definition using higher brain death cannot be established. *Id.* Higher brain death is not as easy to ascertain as whole brain death, and irreversibility can only be established after "3 months to 1 year, when the hemispheres of the higher brain show clear degeneration." *Id.*

As a society, we do not easily accept the possibility that someone may have lost their personness. The infamous Terri Schiavo debacle is a perfect example. Terri's husband and parents battled for control over whether to remove her feeding tube. The nation responded on an

supportable definition of death developed thus far;[176] and it is this definition that the Supreme Court should adopt as marking the end of life.

III. How a Definition of Life Could Change the *Washington v. Glucksberg* Analysis

Physician-assisted suicide jurisprudence would change if the Supreme Court were to adopt whole brain death as the point at which a person's life ends and, therefore, when the state's interest in preserving that life ends. As this note discussed in Part I, there were three areas where the *Glucksberg* Court provided an improperly cursory analysis. These areas are (1) the framing of the individual interest in question, (2) the subsequently determined level of scrutiny, and (3) the poorly defined state's unqualified interest in the preservation of life. By reevaluating the individual's right, affording the right a heightened scrutiny, and reframing the state's interest in preserving life as one that ends at whole brain death, it is possible to arrive at a different outcome.

A. Application in a Constrained Hypothetical

To fully explore this hypothetical reexamination of *Glucksberg*, four assumptions are made. First, the plaintiffs in this hypothetical case are

unprecedented level, all claiming that the removal of the tube was a cruel punishment. *See generally* Mary Coombs, *Schiavo: The Road Not Taken,* 61 U. MIAMI L. REV. 539 (2007). When it was later discovered that she had no functioning brain matter other than her brainstem, people, in hindsight, appeared more willing to accept that her death was "okay." *See id.* at 541 n.8; *see also* Bryan Hilliard, *The Politics of Palliative Care and the Ethical Boundaries of Medicine: Gonzales v. Oregon as a Cautionary Tale,* 35 J.L. MED. & ETHICS 158, 165 (2007) ("The culture of life constitutes a "belief system that starts at conception and ends at Terri Schiavo, with something of a detour around the death penalty.").

176. Even this standard has been subject to much scrutiny, as doctors have since discovered that the integrative unity can be decentralized, allowing for the body to continue "living" even if key organ groups such as the brain or respiratory systems cease to function. Joffe, *supra* note 156, at 121.

One of the key criticisms against the Uniform Definition of Death is its failure to take into account that "the legal definition of irreversibility [of death] should remain vague" to better reconcile with an "event that can be understood to be the occurrence of death" on a religious level. DuBois, *supra* note 122, at 127, 132; *see also* Smolensky, *supra* note 125, at 47–49 (discussing the religious exceptions to the Uniform Determination of Death adopted by New Jersey and New York which allow death to be defined purely by cardiopulmonary cessation where religion forbids a neurological determination, affording death pronouncement decisions to either the attending physician or hospital). It is this ability which promotes an organism to a person, as distinct from merely an organism of cells. Joffe, *supra* note 156, at 122; *see also* James J. McCartney, *Embryonic Stem Cell Research and Respect for Human Life: Philosophical and Legal Reflections,* 65 ALB. L. REV. 597, 614 (2002) ("[W]hat constitutes being human [being a person] is beyond the competence of science."). In essence, a person is the sum of both their organic body and their capacity for consciousness.

terminally ill, capable patients. Definitions of "terminally ill" and "capable" are most easily drawn from the Oregon Death with Dignity Act.[177] Terminal disease is defined as "a disease that is incurable and 'will, within reasonable medical judgment, produce death within six months.'"[178] A "capable" person has "the ability to make and communicate health care decisions to health care providers, including communication through a person familiar with the patient's manner of communicating if those persons are available."[179] The limitation to terminally ill, capable patients serves a two-fold purpose: it presents a situation in which, similar to the situation in *Glucksberg*, the timeline of the life in question is measurable and of short duration; and, there is no question about the intent or interest of the person in question, as there might be with someone in a persistent vegetative state, which avoids the possibility of "involuntary euthanasia."[180]

The second assumption concerns the individual interest. As discussed above, the individual interest at issue in physician-assisted suicide cases is properly defined as a liberty interest, as suggested by the five concurring Justices in *Glucksberg*. This assumption is further based upon both the legal links between abortion—in light of its dwindling protection—and the fact that other interests, such as bodily integrity and right to refuse medical treatment, are accorded a "liberty interest" status.

The third assumption flows from the second; namely, because the individual right in question is a liberty interest, a heightened scrutiny level should be applied. In order to survive review under this level of scrutiny, the statute in question must be necessary to meet a substantial state interest. The fourth and final assumption provides that life ends at whole brain death.

The first three assumptions establish the individual interest side of the heightened scrutiny balance: a terminally ill, capable patient has a liberty interest in choosing a right to die. How defining life at whole brain death affects the state's interests presented in *Glucksberg* presents a more

177. OR. REV. STAT. §§127.800-.897 (2005). In 1994, Oregon passed, and then re-passed again in 1997 its Death with Dignity Act, becoming the one and only state that allows physician-assisted suicide. *See* Hilliard, *supra* note 175, at 160. Subject to very exacting procedures, a physician in Oregon could prescribe controlled substances to "terminally ill, competent, adult patients." *See id.*

178. Glen R. McMurry, Comment, *An Unconstitutional Death: The Oregon Death with Dignity Act's Prohibition Against Self-Administered Lethal Injunction*, 32 DAYTON L. REV. 441, 443 (2007) (citing OR. REV. STAT. §127.800(12) (2005)).

179. *Id.* (citing OR. REV. STAT. §127.800(3) (2005)).

180. Lawrence Solum, Ronald Dworkin & John Finnis, *The Fifth Annual Fritz B. Burns Lecture: Euthanasia, Morality and the Law*, 30 LOY. L.A. L. Rev. 1465, 1475 (1997).

nuanced examination. In order to survive the heightened scrutiny suggested by the liberty interest at stake, the state interest of preservation of life must now be a substantial, and not merely legitimate, as required in *Glucksberg*.[181]

As soon as an end point to life is definitively determined, this is arguably no longer the overarching and overreaching state's interest as discussed in *Glucksberg*. This statement is contingent upon the underlying assumptions that because the state's interest cannot continue in perpetuity, an individual's right to choose when and how he or she dies at some point outweighs the state's interest.[182]

B. A Definition of Life Relieves Internal Inconsistencies of State's Interests

Critics might suggest that defining the end of life at brain death does little to change the unqualified nature of the state's interest; instead, it merely provides an end point for that interest. In essence, the state can claim a full and unqualified interest until that point at which the individual is "dead." The state's unqualified interest cannot continue in full force in perpetuity, or even up to the point of whole brain death, because to allow the state such unilateral control over an individual's decision to die is incongruous with the whole idea of balancing rights. In both *Cruzan* and *Glucksberg*, the Court made much of the fact that states have laws prohibiting homicide.[183] Yet states have differing levels of punishment for homicides, depending on the circumstances of the death and the intent of the perpetrator.[184] The state's interest in life and death is inevitably on a sliding scale. Therefore, if at some point in time the state's interest in an individual's life ends, then it seems to logically follow that, with regard to physician-assisted suicide, the state's unqualified interest in preserving life lessens as that individual approaches his or her death. In the end, the state's interest depends on the temporal nature of the individual's situation.

Is a prohibition on physician-assisted suicide necessary to a substantial state interest? Prevention of death is necessary if the state's interest in

181. Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

182. The New Jersey Supreme Court assumed as much when it said, "Ultimately there comes a point at which the individual's rights overcome the State interest." *In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976). Although it is important to point out that the New Jersey Supreme Court prefaced their decision on a right to privacy, this idea still holds that the strength of the state's interest lessens as an individual moves closer to death.

183. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 280 (1990); *Glucksberg*, 521 U.S. at 710.

184. *See* MODEL PENAL CODE §§ 210.1–210.4 (1962) (dividing homicide into murder, manslaughter, and negligent homicide).

preserving that life is substantial. In the case of our hypothetical terminally ill, capable patient, this determination rests on an examination of whether the state's interest in preserving the life of someone who is going to die in six months is substantial. Arguably, the state's interest is no longer substantial. Here is a person who is unlikely to contribute to society and who is likely to be in grave amounts of pain for the remainder of his or her days. In addition, an individual's right to die arguably gets stronger the closer that individual comes to death. "Death will be different for each of us."[185] The state's *parens patriae* interest weakens as well, because the right choice for the individual who both knows and understands that he or she is on death's door "is a deeply personal decision of obvious and overwhelming finality."[186] When a person is going to die within six months, the fact that he or she chooses to die a little sooner is not necessarily a bad choice, and not one from which the state need protect the individual. The Court's fear of making a quality of life judgment is a moot point because the Court is not making the decision to end the person's life—the patient is.

C. Moving Away From a Constrained Hypothetical

This analysis shows that for a terminally ill, capable patient, the state's interest in preserving his or her life for six months is not substantial enough to uphold a prohibition on the individual's right to die. Moving away from these very constrained assumptions would change the analysis. For example, how would the analysis change if the prognosis were a year? Two years? Arguably, the state's interest might be substantial enough to outweigh the individual interest. Or, for example, what if the person was in a persistent vegetative state? In that case, someone other than the individual would ostensibly be providing the individual's interest. That individual does not have the same knowledge and understanding that the hypothetical person here does, and the Court's fear of having to make quality of life decisions becomes more real.

These additional hypotheticals show that defining the end of life as whole brain death will not result in an automatic right of all people to physician-assisted suicide, and there are still many questions which remain unanswered. However, affording an individual's right to die a liberty interest status, and examining the state's interest in preserving life when the individual is both capable of making his or her own decisions and six

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

186. *Cruzan*, 497 U.S. at 281.

months away from death, illustrates that it is possible for the individual interest to prevail.

Conclusion

This note has endeavored to explain why the *Glucksberg* Court, in creating an unqualified interest in life, and by refusing to define life, assumed its eventual conclusion that an individual has no right to suicide. After examining the errors of the Court in its framing of the individual right and the subsequently determined level of scrutiny, as well as its misappropriation of the "unqualified interest" language from *Cruzan* and lack of definition of "life," this note attempted to suggest remedies to those errors. Although any definition of life would help, the definition of whole-brain death provided by the Uniform Determination of Death provides a workable solution. Whole brain death is a definitive point in time that is determined by established criteria, supported by the medical and legal communities, and conforms to society's conception of death. By redefining the individual's interest as a liberty interest and creating a definition of life, a more nuanced analysis can be established. The facts of the *Glucksberg* case show that under this more nuanced analysis a different result would be reached; under other circumstances, however, the question still remains open.

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