

VACCO V. QUILL AND THE INALIENABLE RIGHT TO LIFE

But what interest can the state possibly have in requiring the prolongation of a life that is all but ended? . . . What concern prompts the state to interfere with a mentally competent patient's 'right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life,' . . . when the patient seeks to have drugs prescribed to end life during the final stages of a terminal illness? The greatly reduced interest of the state in preserving life compels the answer to these questions: 'None.'¹

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness —That to secure these rights, Governments are instituted among Men . . .²

In the Summer of 1997, the United States Supreme Court rendered its decisions in the companion cases, *Washington v. Glucksberg*³ and *Vacco v. Quill*.⁴ The Court held that a fundamental right to commit suicide does not exist⁵ and state laws prohibiting physician-assisted suicide do not violate the Equal Protection Clause of the Fourteenth Amendment.⁶ The Court concluded that the Washington and New York statutes prohibiting assisted suicide do not infringe the constitutional rights of terminally ill individuals.

This casenote is concerned with the extent to which the Court's analysis and holding in *Vacco* comport with the philosophy that civil government exists to secure inalienable rights,⁷ among which is the right to life. After presenting a summary of the case, this note will review the concept of the inalienable right to life. It will then address the Court's equal protection analysis of the New York statutes in light of the princi-

¹ *Quill v. Vacco*, 80 F.3d 716, 729-30 (2d Cir. 1996) (alteration in original) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (citations omitted).

² DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³ 117 S. Ct. 2258 (1997).

⁴ 117 S. Ct. 2293 (1997).

⁵ *Glucksberg*, 117 S. Ct. at 2275.

⁶ *Vacco*, 117 S. Ct. at 2302.

⁷ Something that is inalienable is something that "cannot be transferred to another." MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 196 (1978). "Things belonging to individuals are by nature inalienable or alienable. Inalienable things are things which belong so essentially to one man that they could not belong to another, as a man's life, body, freedom, honour." GROTIUS, JURISPRUDENCE, quoted in RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 70 (1979).

ple that securing the inalienable right to life is a fundamental role of civil government. This note will conclude by urging continued adherence to this principle that has shaped and instructed American law and government for more than two centuries.

I. BACKGROUND

Glucksberg and *Vacco* drew the Supreme Court into a strenuous public debate over laws that prohibit physician-assisted suicide. The frequent misdeeds of Jack Kevorkian kept the debate alive in the media and everyday conversation.⁸ From 1991 to 1997, advocates and opponents of physician-assisted suicide battled for the hearts, minds, and votes of Washington, California, and Oregon citizens in public initiatives designed to relax existing prohibitions.⁹ In 1996 and 1997, several state legislatures enacted statutes prohibiting assisted suicide.¹⁰ In other states, legislators introduced statutes designed to permit the practice.¹¹ In *Glucksberg* and *Vacco*, advocates of physician-assisted suicide looked to the courts for a decision in their favor.

⁸ Since 1990, Jack Kevorkian has helped more than 130 people kill themselves. In these assisted suicides, Kevorkian usually has maintained, the person wishing to die started the flow of lethal drugs through the use of a "suicide machine" that Kevorkian built. Prosecutors charged Kevorkian four times with assisting suicide, but those cases ended with three acquittals and one mistrial. In September of 1998, Kevorkian himself administered a lethal dose of drugs to Thomas Youk, a 52 year-old accountant. Kevorkian videotaped the killing and prosecutors obtained the tape. Kevorkian was charged with murder, convicted of second-degree murder, and sentenced to 10 to 25 years in prison. Edward Walsh, *Kevorkian Sentenced to Prison; Mich. Judge Tells Doctor "Consider Yourself Stopped"* WASH. POST, April 14, 1999, at A2.

⁹ In 1991, Washington voters defeated ballot Initiative 119, which would have permitted some forms of physician-assisted suicide; in 1992, California voters defeated Proposition 161, a similar measure. In 1994, Oregon voters approved Ballot Measure 16 which legalized certain forms of physician-assisted suicide for competent, terminally ill individuals ("The Oregon Death with Dignity Act," OR REV. STAT. § 127.8 - 127.995 (1995)). Measure 16 was challenged as a violation of equal protection of the laws. In federal district court, the claimed violation was held to exist. Lee v. State of Or., 891 F. Supp. 1429 (D. Or. 1995). The decision, however, was reversed on appeal on the grounds that the only patient still living lacked standing. Lee v. State of Or., 107 F.3d 1382 (9th Cir.), cert. denied, Lee v. Harclerode, 118 S. Ct. 328 (1997). In 1997, the issue was again put before Oregon voters as ballot initiative Measure 51. The initiative, designed to repeal the Death with Dignity Act, failed.

¹⁰ In 1996, Iowa legislators made it a felony to intentionally or knowingly assist another to commit suicide, IOWA CODE ANN. § 707A.1 (West 1997); in 1996, Rhode Island legislators outlawed assisted suicide in that state, R.I. GEN. LAWS § 11-60-1 (1996); Louisiana recently enacted a statutory ban in LA. REV. STAT ANN. § 14:32.12 (West 1997).

¹¹ From 1995 to 1997, measures designed to legalize physician-assisted suicide were introduced in 19 state legislatures. *Glucksberg*, 117 S. Ct. at 2268 n.15 (1997).

II. EXPOSITION

Vacco v. Quill originated with three physicians¹² and three terminally ill patients¹³ challenging two New York statutes¹⁴ that prohibit assisted suicide. The physicians and patients claimed that the statutes violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹⁵

A. Due Process Claim

The *Vacco* plaintiffs argued the existence of a fundamental right to physician assistance in suicide¹⁶ on the basis of the Supreme Court's

¹² The physicians challenging the statute were Timothy E. Quill, Samuel G. Klagsbrun, and Howard A. Grossman. They alleged in their complaint that in the course of their medical practice, they treated terminally ill patients who requested assistance in the voluntary self-termination of life; that under certain circumstances it would be consistent with the standards of these physicians to prescribe medications to such patients which would cause death, since without such medical assistance these patients could not hasten their deaths in a certain and humane manner.

Quill v. Koppell, 870 F. Supp. 78, 79-80 (S.D.N.Y. 1994).

¹³ Jane Doe was dying of thyroid cancer and suffered greatly from the effects of a large cancerous tumor that had wrapped itself around her right carotid artery and invaded her voice box. George Kingsley was dying from AIDS and in the process suffered from blindness and several other illnesses including "toxoplasmosis" which had caused lesions to develop on his brain. William Barth was also dying of AIDS and endured several parasitic infections and extremely burdensome treatment regimes. All three patient plaintiffs desired the aid of a physician in hastening their deaths in a certain and humane way. Brief for Respondents at 5-8, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858).

¹⁴ N.Y. PENAL LAW § 125.15 (McKinney 1987) provides: "A person is guilty of manslaughter in the second degree when . . . (3) He intentionally causes or aids another person to commit suicide. Manslaughter in the second degree is a class C felony"; N.Y. PENAL LAW § 120.30 (McKinney 1987) provides: "A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide. Promoting a suicide attempt is a class E felony."

¹⁵ See *Quill v. Koppell*, 870 F. Supp. at 80.

¹⁶ The plaintiff-respondents argued that "[r]ecognition of a dying patient's liberty, within the doctor-patient relationship, to request . . . a prescription for life-ending medication does not imply . . . any general 'right to die,' or 'right to suicide.'" Brief for Respondents at 3, *Vacco* (No. 95-1858). They then stated, however, that individuals have the liberty, at least in some circumstances, to physician assistance in ending one's life. *Id.* at 29. The argument is not consistent. First, if an individual wants to end his own life, he wants to commit suicide. Suicide is "the act or an instance of intentionally killing oneself." AMERICAN HERITAGE DICTIONARY 1216 (2d college ed. 1985). Second, the claimed right to physician assistance in suicide presupposes the right to commit suicide. As the district court stated,

[T]he primary right claimed is that of the patient--i.e., the right to decide to terminate one's life and to do so by suicide. However, if such a constitutional right resides in the patient, then there would be a

holdings in *Cruzan v. Director, Missouri Department of Health*¹⁷ and *Planned Parenthood v. Casey*.¹⁸ They maintained that the constitutional right of a patient to refuse nutrition and hydration assumed by the Court in *Cruzan*¹⁹ could be understood only "as a recognition of the liberty, at least in some circumstances, to physician assistance in ending one's life."²⁰ The plaintiffs insisted that this liberty was included in those defined by *Casey* as involving "the most intimate personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,"²¹ and therefore "central to the liberty protected by the Fourteenth Amendment."²² According to the plaintiffs, the New York statutes prohibiting assisted suicide infringed the fundamental right to physician assistance in suicide and could not pass a compelling state interest or undue burden test; therefore, they violated substantive Due Process.²³

B. Equal Protection Claim

The Equal Protection claim challenged the simultaneous existence of New York statutes that allow physicians to assist in the withdrawal of life-saving medical treatment²⁴ but prohibit assisted suicide.²⁵ Under these laws, the plaintiffs contended, only some competent, terminally ill patients were allowed to obtain the assistance of a physician when they wanted to kill themselves. Physicians could withhold or withdraw life-saving medical treatment from a patient who was dependent on such care if the patient so requested. The plaintiffs maintained that this con-

corresponding constitutional right of the physician not to be prosecuted for assisting in the exercise of the patient's constitutional right.

Quill v. Koppell, 870 F.Supp. at 82.

¹⁷ 497 U.S. 261 (1990).

¹⁸ 505 U.S. 833 (1992).

¹⁹ 497 U.S. at 279.

²⁰ Brief for Respondents at 29, *Vacco* (No. 95-1858).

²¹ *Casey*, 505 U.S. at 851.

²² *Id.*

²³ See Brief for Respondents at 33, *Vacco* (No. 95-1858).

²⁴ See New York's "Health Care Agents and Proxies Act," N.Y. PUB. HEALTH LAW §§ 2980-2994 (McKinney 1993), allows a competent person to designate another to serve as an agent with authority to make decisions on behalf of the principal, including decisions to refuse life-saving medical treatment. In § 2982(2), the health care agent is given the authority to direct the termination of medical treatment. The agent may direct the termination of artificial nutrition and hydration if the principal's wishes in this regard are reasonably known or can be ascertained with reasonable diligence. Section 2989(3) specifies the legislature's intent that, "[t]his article is not intended to permit or promote suicide, assisted suicide, or euthanasia; accordingly, nothing herein shall be construed to permit an agent to consent to any act or omission to which the principal could not consent under law."

²⁵ See N.Y. PENAL LAW § 125.15 (McKinney 1987); N.Y. PENAL LAW § 120.30 (McKinney 1987).

stituted physician-assisted suicide. Physicians, however, could not assist in the suicide of a competent, terminally ill patient who was *not* dependent on life-saving treatment. They, for example, could not provide a prescription for drugs that would be used in a suicide. The plaintiffs argued that under equal protection of the law, all competent, terminally ill patients had the right to obtain physician assistance in ending their lives.²⁶

III. DISPOSITION

The United States District Court for the Southern District of New York rejected the plaintiffs' constitutional claims and dismissed the case.²⁷ The court held that physician-assisted suicide "does not involve a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment"²⁸ and held that "plaintiffs ha[d] not shown a violation of the Equal Protection Clause of the Fourteenth Amendment."²⁹

The district court was reversed in part on appeal.³⁰ The Second Circuit Court of Appeals agreed that the New York statutes did not infringe a fundamental right protected by the Due Process Clause³¹ but held that they did violate the Equal Protection Clause.³² The Second Circuit asserted the lack of any real distinction between a physician's withholding or withdrawing life-saving medical treatment and a physician's prescribing a lethal dose of medication.³³ The court determined that both constituted assisted suicide³⁴ and maintained that no state interest justified a legislative distinction between the two actions.³⁵ Thus, the statutes violated the Equal Protection Clause.³⁶

After considering the constitutional claims presented in *Vacco v. Quill*, the Supreme Court reversed the Second Circuit's Equal Protection holding.³⁷ The Court held that the New York statutes prohibiting as-

²⁶ See Brief for Respondents at 50, *Vacco* (No. 95-1858) ("[T]he criminal ban on the prescription of life-ending drugs cannot be upheld as a rational means of furthering any legitimate purpose.").

²⁷ See *Quill v. Koppell*, 870 F. Supp. at 84.

²⁸ *Id.* at 85.

²⁹ *Id.*

³⁰ See *Quill v. Vacco*, 80 F.3d 716 (2nd Cir. 1996).

³¹ *Id.* at 724-25.

³² *Id.* at 731.

³³ *Id.* at 729.

³⁴ *Id.*

³⁵ *Id.* at 730.

³⁶ *Quill v. Vacco*, 80 F.3d at 731.

³⁷ See *Vacco v. Quill*, 117 S. Ct. 2293 (1997) The Court dealt with the due process claim in *Washington v. Glucksberg*, 117 S.Ct. 2258 (1997).

sisted suicide did not deny terminally ill patients, or their physicians, equal protection of the law.³⁸

A. Equal Protection

According to the Supreme Court, the Equal Protection Clause requires that the states treat similarly those individuals who are similarly situated.³⁹ The Clause does not preclude legislative classifications⁴⁰ but does require that the classifications be justified by some state interest. If a classification is suspect or if it impinges upon a fundamental right, the Court will strictly scrutinize it to determine whether it is necessary to achieve a compelling state interest.⁴¹ If no suspect classification or fundamental right is involved, the Court will apply a mere rationality test to determine whether the classification is rationally related to a legitimate state interest.⁴²

B. The Court's Equal Protection Analysis

The Court's equal protection analysis of the New York statutes began with the observation that the statutes did not "infringe fundamental rights nor involve suspect classifications."⁴³ The statutes were therefore analyzed under the mere rationality test.

The Court looked at the New York statutes and concluded that they did not create a facial classification.⁴⁴ The statutes did not "treat anyone differently than anyone else or draw any distinctions between persons."⁴⁵ The Court explained that New York law permitted all competent indi-

³⁸ *Id.* at 2302.

³⁹ See *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

⁴⁰ *See id.*

⁴¹ Suspect classifications include those based on race, *Korematsu v. United States*, 323 U.S. 214 (1944), national origin, *Hernandez v. Texas*, 347 U.S. 475 (1954), and sometimes alienage. *Graham v. Richardson*, 403 U.S. 365 (1971) (*But see Ambach v. Norwick*, 441 U.S. 68 (1979)). Fundamental interests include voting, *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), *Harper V. Virginia State Board of Elections*, 383 U.S. 663 (1966), interstate migration, *Shapiro v. Thompson*, 394 U.S. 618 (1969), and in some situations, access to the courts, *Griffin v. Illinois*, 351 U.S. 12 (1956) and access to the ballot, *Lubin v. Panish*, 415 U.S. 709 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968). Some classifications, those based on gender and illegitimacy, are considered quasi-suspect and are subject to intermediate level review where the classification is tested to determine whether it is substantially related to an important governmental objective. *Clark v. Jeter*, 486 U.S. 456 (1988); *Craig v. Boren*, 429 U.S. 190 (1976).

⁴² *See F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

⁴³ *Vacco*, 117 S. Ct. at 2297 (citing *Glucksberg*, 117 S. Ct. at 2267-71).

⁴⁴ *Id.* at 2297-98.

⁴⁵ *Id.*

viduals to refuse life-saving medical treatment but prohibited all individuals from assisting in a suicide.⁴⁶ The statutes treated similarly those individuals who were similarly situated and thus on their faces involved no classification whatsoever.⁴⁷

The Court then addressed the Second Circuit's conclusion that New York law, as applied, actually allowed physician assistance in some, but not all, cases of suicide.⁴⁸ This conclusion rested on the premise that a physician commits "nothing more nor less than assisted suicide" when he withholds or withdraws life-saving medical treatment from a patient who has decided to forego such treatment.⁴⁹ According to the Second Circuit, the New York statutes violated the Equal Protection Clause because no legitimate state interest could justify prohibiting physician assistance in suicide for competent, terminally ill patients who are not dependent upon lifesaving treatment.⁵⁰

The Court refuted the premise on which the "as-applied" equal protection challenge rested. The Court reasoned that consuming a lethal dose of drugs to bring death clearly involves the elements of causation and intent necessary for the act to qualify legally as suicide.⁵¹ Refusing life-saving medical treatment lacks these necessary elements and, therefore, is not suicide. The Court determined that the element of causation is absent because "when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology."⁵² The element of intent is also absent with regard to both the patient and the physician. A patient who refuses treatment is not normally motivated by an intent to kill himself.⁵³ Rather, the desire to live "free of unwanted medical technology, surgery, or drugs"⁵⁴ usually underlies an individual's refusal or request for termination of treatment. A physician who honors a patient's refusal or request for termination of treatment "intends, or may so intend, only to respect his patient's wishes and 'to cease doing useless and futile or degrading things to the patient when [the patient]

⁴⁶ *Id.* at 2298.

⁴⁷ The Court stated, "Generally speaking, laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause." *Id.* (quoting *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979)).

⁴⁸ *Id.*

⁴⁹ *Quill v. Vacco*, 80 F.3d at 729.

⁵⁰ *Id.* at 727.

⁵¹ *Vacco*, 117 S. Ct. at 2298.

⁵² *Id.*

⁵³ See *Vacco*, 117 S. Ct. at 2299.

⁵⁴ *Id.* (quoting *Matter of Conroy*, 486 A.2d 1209, 1224 (N.J. 1985)).

no longer stands to benefit from them.”⁵⁵ On the basis of causation and intent, the Court concluded that there was a real difference between consuming a lethal dose of drugs and refusing medical treatment. The difference was, according to the Court, “both important and logical” and “certainly rational.”⁵⁶

The Court did briefly state, “[I]n some cases the line between [ending life-saving medical treatment and assisted suicide] may not be clear, but certainty is not required, even were it possible.”⁵⁷ It is here where the Court came closest to accepting the plaintiffs’ claim that refusing life-saving medical treatment may sometimes be used as a means to commit suicide. In some situations, treatment might be refused for the specific and admitted purpose of achieving death. If the refusal of treatment precipitates a downward decline in the health of someone otherwise expected to live for a long period of time, the refusal would indeed seem to constitute suicide.⁵⁸ It is here where the equal protection challenge to the New York statutes appeared most compelling. If refusing treatment were a means of committing suicide, some New York patients

⁵⁵ *Id.* at 2298-99 (quoting *Assisted Suicide in the United States: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 2d Sess., 368 (1996)).

⁵⁶ *Id.* at 2298.

⁵⁷ *Id.* at 2302. See also *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-16 (1976) (“Perfection in making the necessary classifications is neither possible nor necessary. Such action by a legislature is presumed to be valid. . . . [W]here rationality is the test, a State does not violate [equal protection] merely because the classifications made by its laws are imperfect.”)

⁵⁸ Several state court judges have maintained that this is actually the case. See, e.g., *Guardianship of Jane Doe*, 583 N.E.2d 1263, 1277 (Mass. 1992) (O’Connor, J., dissenting); *DeGrella v. Elston*, 858 S.W.2d 698, 714 (Ky. 1993) (Wintersheimer, J., dissenting). The Supreme Court itself seemed to agree on this point in *Cruzan* when it stated that termination of artificial nutrition and hydration, “would cause [Nancy’s] death.” *Cruzan v. Director, Miss. Dep’t of Health*, 497 U.S. 261, 267-268 (1990) (emphais added). In his concurrence, Justice Scalia clearly asserted the presence in some cases of a causal connection between the termination of treatment and death:

But to return to the principal point for present purposes: the irrelevance of the action-inaction distinction. Starving oneself to death is no different from putting a gun to one’s temple as far as the common-law definition of suicide is concerned; the cause of death in both cases is the suicide’s conscious decision to “pu[t] an end to his own existence.”

Id. at 296-97 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *189) (Scalia, J., concurring). Respondents in *Vacco* offered further evidence of a but-for causal connection by pointing to the charges of homicide that may follow the nonconsensual termination of treatment. Brief for Respondents at 36, *Vacco* (No. 95-1858). On this point, see Linda Miller Terman, *Triple Murderer Gets Death Sentence*, WASH. TIMES, Oct. 17, 1995, at C3 (hired hit-man convicted for killing disabled boy by disconnecting respirator). The argument here is that if such action constitutes murder, similar action toward oneself would logically constitute suicide.

did receive assistance in suicide while others were denied this option. The Court, however, reiterated its conclusion that the right to refuse treatment existed and it was logically distinct from the claimed right to physician assistance in suicide.⁵⁹

The Court ultimately held that the distinction between refusing medical treatment and assisted suicide is rationally related to legitimate state interests.⁶⁰ The Court stated that New York's interests in "prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding the possible slide towards euthanasia . . . [are] valid and important public interests."⁶¹ The Court agreed with the implicit conclusions of the New York legislature that these state interests are furthered by the prohibition of assisted suicide and not hampered by the simultaneous recognition of a right to refuse life-saving medical treatment.⁶² The Court unanimously held that New York's prohibition on assisted suicide does not violate the Equal Protection Clause of the Fourteenth Amendment.⁶³

IV. ANALYSIS

Under the mere rationality standard, state laws that do not involve a suspect classification or impinge upon a fundamental right are given a "strong presumption of validity."⁶⁴ Given this strong presumption, the Court could have upheld the challenged New York statutes without asserting an actual distinction between assisting in the termination of medical treatment and providing the means for one to commit suicide. If the Court adhered to the idea that "the primary function of the State [is] to preserve and promote liberty and the personal autonomy of the indi-

⁵⁹ The amicus brief filed by the American Center for Law and Justice provided the Court with additional support in this area. In its brief, the Center acknowledged that in some cases an individual's refusal of treatment is primarily motivated by intent to cause death and, therefore, does therefore constitute suicide. The Center asserted, however, the near impossibility of judicially determining the primary intent of the individual given the myriad of factors often involved in a decision to refuse treatment. Thus, a statutory designation of all refusals of treatment as being nonsuicidal is legitimate given the difficulty of pinpointing intent in this area and given the fact that most decisions to terminate treatment are not motivated by suicidal intentions. Brief Amicus Curiae of the American Center for Law and Justice Supporting Petitioners at 26-27, *Vacco* (No. 95-1858).

⁶⁰ *Vacco*, 117 S. Ct. at 2302.

⁶¹ *Id.*

⁶² "These valid and important public interests easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end." *Id.*

⁶³ *Id.* at 2296.

⁶⁴ *Id.* at 2297 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

vidual,”⁶⁵ a distinction between the two forms of action on the basis of causation and intent would not be necessary or relevant.⁶⁶ Prohibitions on assisted suicide that enjoyed a strong presumption of validity could pass the mere rationality test as conceivably necessary⁶⁷ to guard against infringements on personal autonomy that might attend the legalization of physician-assisted suicide.⁶⁸

In its equal protection analysis, however, the Court affirmed the importance and inherent logic of the distinction between refusing life-saving medical treatment and assisted suicide.⁶⁹ It also accepted the legitimacy of the state’s interest in preserving life and preventing intentional killing,⁷⁰ interests that limit personal autonomy. In these two important respects, the Court’s analysis comports with the philosophy that securing the inalienable right to life is a legitimate function of civil government.

A. *The Inalienable Right to Life*

The principle that civil government exists to secure inalienable rights is recognized in the Declaration of Independence. “We hold these

⁶⁵ *Fosmire v. Nicoleau*, 551 N.E.2d 77, 82 (N.Y. 1990).

⁶⁶ If autonomy of the individual is the goal, intent and causation in killing do not determine culpability. Culpability arises from violations of the individual’s autonomy.

⁶⁷ “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Federal Communications Comm’n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

⁶⁸ One lower court dealing with the issue of physician-assisted suicide stated that the practice may be as acceptable, in some cases, as the practice of terminating life-saving medical treatment. It concluded, however, that the danger of abuse and infringement of personal autonomy remains as a legitimate reason for the state to prohibit the former and allow the latter. *Lee v. Oregon*, 891 F. Supp. 1429, 1438 (D. Or. 1995), *vacated on other grounds and remanded by* 107 F.3d 1382 (9th Cir. 1997). In *Cruzan*, the Supreme Court acknowledged this state interest and upheld a Missouri standard of proof in part because of the state’s particular interest in safeguarding the personal nature of the decision to withdraw a feeding tube. There, the Court stated, “The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements.” *Id.* at 281. The Court recognized that

[n]ot all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, ‘[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient.’ A State is entitled to guard against potential abuses in such situations.

Id. (quoting *In re Jobes*, 529 A.2d 434, 447 (N.J. 1987)).

⁶⁹ *Vacco*, 117 S. Ct. at 2298.

⁷⁰ *Id.* at 2302.

truths to be self-evident, that all men are created equal, and are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these Rights, Governments are instituted among Men . . .”⁷¹ This principle has profoundly shaped American law and government.

1. History of the Inalienable Right to Life

When Thomas Jefferson wrote the Declaration of Independence and stated that all men have inalienable rights, he was not stating a new idea, or an idea that was just his own. He was drawing on hundreds of years of rights philosophy.⁷² In the Declaration, Jefferson stated “the common sense of the subject,”⁷³ common sense that included a well-known and well-respected philosophy of inalienable rights that was rooted in tradition.

In *The Idea of Natural Rights*, Brian Tierney⁷⁴ explains that the idea that men have natural rights, including an inalienable right to life, first grew into existence in the works of medieval jurists,⁷⁵ through the

⁷¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁷² In 1825, Jefferson wrote that in drafting the Declaration, he had not attempted to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent. . . . Neither aiming at originality of principles or sentiments, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind. . . . All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.

CARL L. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 25 (1942) (quoting THE WRITINGS OF THOMAS JEFFERSON (Ed. 1869) § VII).

⁷³ *Id.*

⁷⁴ Brian Tierney is the Bowmar Professor in Humanistic Studies, Emeritus, at Cornell University. He has studied the history of medieval canon law and political thought for over forty-five years and has established himself as “one of the world’s leading authorities” on the topic. Charles J. Reid, Jr., *The Medieval Origins of the Western Natural Rights Tradition: The Achievement of Brian Tierney*, 83 CORNELL L. REV. 437, 437 (1998) (reviewing BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625 (1997)). In his works, Tierney “has offered important new interpretations of the origins of Western constitutionalism, tracing many concepts believed to be modern or early modern innovations to the work of twelfth-century canon lawyers.” *Id.* He spent fifteen years exploring the origins of the Western notion of natural rights and in *The Idea of Natural Rights*, he “draws on a decade-and-a-half of research as well as deep knowledge of Western constitutional history to present a radical reconceptualization of the history of natural rights thought in Western civilization. *Id.*

⁷⁵ BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625 5 (1997).

work of canon lawyers and arising out of the Franciscan poverty debates.⁷⁶ According to Tierney, “[T]welfth-century civilization was . . . marked by a new emphasis on personalism or humanism”⁷⁷ and “[m]edieval society was saturated with a concern for rights.”⁷⁸ This concern for human rights, in turn, “spilled over into many areas of canon law.”⁷⁹ As the canonists sought to expound upon Gratian’s *Concordantia discordantium canonum*, commonly known as the *Decretum*,⁸⁰ a doctrine of human rights came to be asserted.⁸¹

The notion of inalienable rights existed in the medieval period. Inalienable rights, rights that were rooted in duties, “were prominent in medieval and early modern thought.”⁸² The foremost example, according to Tierney, is the inalienable right of self-preservation. “In medieval thought self-preservation always had been seen in moral terms as a duty enjoined by divine law that implied a corresponding right of self-defense and a right to acquire the necessities of life.”⁸³

The doctrine of human rights that grew up in the medieval period persisted in later political theory as it was transmitted “through the encyclopedic works of the later medieval lawyers.”⁸⁴ These medieval lawyers were “well known to those of the sixteenth-century Spanish scholastics who were jurists as well as theologians; and these writers in turn often influenced seventeenth-century rights theories.”⁸⁵ The medieval doctrine of human rights was also transmitted through the work of William of Ockham, for “Ockham relied more on earlier canonistic teachings

⁷⁶ *Id.* at 36. Tierney notes that, in *La formation de la pensee juridique moderne*, 4th ed. (Paris, 1975) 226, Michel Villey “quoted the eminent jurist Gabriel Le Bras as saying that the idea of subjective rights goes all the way back to Adam and Eve.” *Id.* at 13. Tierney allows for the possibility that “a doctrine of natural rights was always implicit in Judeo-Christian teaching,” but he maintains that this doctrine has not always been explicit in Judeo-Christian thought. *Id.* at 46.

⁷⁷ *Id.* at 55.

⁷⁸ *Id.* at 54.

⁷⁹ TIERNEY, *supra* note 75 at 56.

⁸⁰ The *Decretum* (c. 1140) was a reordering of church law that had accumulated over many centuries.

⁸¹ See TIERNEY, *supra* note 75 at 58.

⁸² *Id.* at 79.

⁸³ *Id.* at 322. Tierney states that the canonists discussed the right of self-preservation more in terms of rights than duties and maintains that “an emphasis on the duty of self-preservation arose out of attacks on the Franciscan’s claim that they had renounced all rights.” *Id.* at 79 n.9.

⁸⁴ *Id.* at 76.

⁸⁵ *Id.*

than on his own innovative nominalist philosophy in formulating his theories on property and poverty and natural rights."⁸⁶

The work of Hugo Grotius linked the idea of natural rights that "grew up among Catholic jurists and theologians during the medieval era"⁸⁷ with the work of seventeenth-century Protestant political theorists. These seventeenth-century theorists were influenced by their medieval counterparts as Grotius "assimilated . . . much of the medieval heritage into his new 'modern' synthesis."⁸⁸ Through Grotius, "the new theory lived on into the modern world."⁸⁹

The works of seventeenth and eighteenth-century political theorists repeatedly discuss the inalienable right to self-preservation that arises from one's duty to preserve his life.⁹⁰ Pufendorf maintained that a man's duty to preserve his life was a duty commanded by the law of nature. Thus, no man had a right to destroy himself and a criminal condemned to death could seek to avoid punishment "by denial, hiding or flight."⁹¹ In this regard, Henry of Ghent believed that although a judge had a right to hold and kill a criminal, the criminal "had an equal, indeed greater right to escape if he could."⁹² If the criminal "were left unbound, with the door of his gaol open, he ought to escape; not to do so would be the equivalent of suicide."⁹³ Jacques Almain also concluded that, if a criminal could escape, "he is bound to do so, because by natural law he is bound to preserve the life of his body."⁹⁴

⁸⁶ TIERNEY, *supra* note 75 at 58. The works of those who expounded upon the *Decretum* "were widely diffused in the law schools of Europe by the end of the twelfth century and, transmitted in eclectic works like the ordinary gloss to the *Decretum* and Guido de Baisio's *Rosarium*, they continued to influence late medieval writers, not least Ockham and Gerson." *Id.* at 54. Ockham's teachings were derived from "a rationalist ethic applied to a body of juristic doctrine available to him in the canon law collections that he knew well and frequently cited." *Id.* at 8.

⁸⁷ *Id.* at 316.

⁸⁸ *Id.* at 342.

⁸⁹ *See id.*

⁹⁰ As regards the right to life, or to self-preservation, Grotius "wrote that God willed the existence of his creation and so gave to each individual the natural properties necessary for self-preservation. From these principles he deduced two laws: 'It is licit to defend one's life. . . .' and 'It is licit to acquire and retain the things useful for life.'" TIERNEY, *supra* note 75 at 322 (quoting HUGONIS GROTHI DE JURE PRAEDEAE COMMENTARIUS 7, 10 (H.G. Hamaker ed. 1968)).

⁹¹ *Id.* at 82 (quoting SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO § 8.3.5 (1688)).

⁹² *Id.* at 85.

⁹³ *Id.*

⁹⁴ *Id.* at 88 (quoting JACQUES ALMAIN, EXPOSITIO CIRCA DECISIONES MAGISTRI GUILLELMI OCCAM in JOHANNES GERSONII OPERA OMNIA (L.E. du Pin ed. 1706), 3: col. 1103).

John Locke similarly stated that [e]very one . . . is bound to preserve himself,⁹⁵ and there exists a "right of self-preservation."⁹⁶ Locke did maintain that, in certain cases, a man may forfeit his life "by some act that deserves death."⁹⁷ Thus, unlike Pufendorf, Henry of Ghent and Jacques Almain, Locke probably would have concluded that the condemned criminal should not assert his right to life against the civil authorities.

John Witherspoon, Scottish moral philosopher and President of Princeton during the eighteenth century, explained that "[r]ight in general may be reduced, as to its source, to the supreme law of moral duty; for whatever men are in duty obliged to do, that they have a claim to, and other men are considered as under an obligations [sic] to permit them."⁹⁸ Witherspoon maintained that "[n]atural rights are such as are essential to man" and every man "has a natural right to act for his own preservation."⁹⁹ He further stated that the right to self-preservation is an inalienable right, one that cannot be surrendered or given up by our own act.¹⁰⁰

According to Jean-Jacques Burlamaqui,¹⁰¹ a Swiss-born jurist, an individual receives his life from the Creator¹⁰² and it is the will of the Creator that each individual "labor for his own preservation . . ."¹⁰³ The

⁹⁵ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 6 (C.B. Macpherson ed. 1980).

⁹⁶ *Id.* at § 11.

⁹⁷ *Id.* at § 23.

⁹⁸ John Witherspoon, *Lectures on Moral Philosophy*, *Lectures at Princeton University in THE SELECTED WRITINGS OF JOHN WITHERSPOON* 181 (Thomas Miller ed. 1990).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 182.

¹⁰¹ Jefferson was largely influenced by the work of Burlamaqui, WHITE, *supra* note 7 at 5, and in THE PHILOSOPHY OF THE AMERICAN REVOLUTION, Morton White shows how this is evidenced in Jefferson's drafts of the Declaration. See also KNUD HAAKONSEN, NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTTIUS TO THE SCOTTISH ENLIGHTENMENT 337 n.71 (1996). Haakonssen states,

Burlamaqui was professor at the University in Geneva and contributed significantly to its reputation as, in Jefferson's words half a century later, one of "the two eyes of Europe," the other eye being Edinburgh. After the French Revolution had spilled over into Geneva, Jefferson actively promoted the idea of importing the whole of the Geneva faculty . . . and locating it "so far from the federal city as moral considerations would recommend and yet near enough to it to be viewed as an appendix of that, and that the splendor of the two objects would reflect usefully on each other."

Id. (quoting Letter to George Washington, 23 Feb. 1795, in WRITINGS OF JEFFERSON, 19:113.)

¹⁰² See JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 110 (Nugent, trans., Arno Press Inc. 1972) (1807). See also 1 WILLIAM BLACKSTONE, COMMENTARIES, *129 ("Life is the immediate gift of God . . .").

¹⁰³ BURLAMAQUI, *supra* note 102 at 112.

will of the Creator that an individual continue living imposes a duty to the Creator to continue living.¹⁰⁴ Jefferson and other revolutionary philosophers such as John Witherspoon, saw this duty as the source of the right to continue living or the "right to life."¹⁰⁵

The right to life, or the right to preserve one's life, does two things. It gives the right-holder a certain sphere of freedom within which he may act to preserve his life.¹⁰⁶ No other person can enter into this sphere and thus, the second thing it does is serve as a protective guard against anyone who would, without authority, seek to enter into this sphere of personal freedom. The right is both active and passive¹⁰⁷ because an individual has both the right to live and the right not to be murdered.

Both Locke and Blackstone maintained that a man possesses certain rights, including the right to life, or the right to preserve one's life, independent of civil society. Locke spoke of a "right of self-preservation" that existed in the state of nature.¹⁰⁸ When Blackstone wrote about absolute rights, among which was the right to life,¹⁰⁹ he stated that these were the rights of individuals "such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it."¹¹⁰

2. The Purpose of Civil Government

The Declaration, of course, states that civil government exists to secure the inalienable rights of life, liberty and the pursuit of happiness.¹¹¹ Both Locke and Blackstone believed that this is true. In his *Second Treas-*

¹⁰⁴ *Id.* at 110.

¹⁰⁵ WHITE, *supra* note 7 at 147.

¹⁰⁶ In *The Idea of Natural Rights*, Brian Tierney states,

By around 1200 many canonists were coming to realize that the old language of *ius naturale* [natural right] could be used to define both a faculty or force of the human person and a 'neutral sphere of personal choice,' . . . [b]ut they did not, like some modern critics of rights theories, expect such language to justify a moral universe in which each individual would ruthlessly pursue his own advantage. Like most of the classical rights theorists down to Locke and Wolff they envisaged a sphere of natural rights bounded by natural moral law.

TIERNEY, *supra* note 75 at 77.

¹⁰⁷ "To have a passive right is to have a right to be given or allowed something by someone else, while to have any active right is to have the right to do something oneself." RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 6 (1995).

¹⁰⁸ LOCKE, *supra* note 95 at § 11.

¹⁰⁹ See 1 WILLIAM BLACKSTONE, COMMENTARIES *125 ("Life is the immediate gift of God, a right inherent by nature in every individual . . .").

¹¹⁰ *Id.* at *119.

¹¹¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

tise of Government, Locke stated that the uncertainty of life outside of civil government makes men

willing to join in society with others . . . for the mutual *preservation* of their lives, liberties and estates, which [Locke called] by the general name, *property*. . . . The great and *chief end*, therefore, of men's uniting into common-wealths, and putting themselves under government, is *the preservation of their property*.¹¹²

William Blackstone had a similar view as to the purpose of civil society.

In his *Commentaries on the Laws of England*, Blackstone stated that the principle aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in him by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human law is to maintain and regulate these absolute rights of individuals.¹¹³

Thus, a man possesses these natural rights independent of civil society and the very purpose of civil society is to protect these rights.

In certain instances, however, it appears that civil government need not secure a man's right to preserve his life and may even take his life. This is true where an individual has, without lawful authority, violated another's right to life, or right to preserve his life. Thus, if one man murders another, the state may put him to death.¹¹⁴ Blackstone stated, "This natural life . . . may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments."¹¹⁵ Importantly, Blackstone does not state here that a man forfeits his *right* to life; he forfeits his life. Locke similarly states that a man forfeits his *life* if he "puts himself into the state of nature with another."¹¹⁶ This comports with the principle that the right to life is inalienable because, if a right is inalienable, there is nothing a man can do to divest himself of it. It is an element of his essence. Further, when a man is condemned to die, only one with lawful authority may put him to death. If another person took it upon himself to kill the convict, *that* person would then be guilty of murder. Even when a convict has been condemned to death, his right to life, or his right to preserve

¹¹² LOCKE, *supra* note 95 at §§ 123-24.

¹¹³ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *47-48.

¹¹⁴ "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." *Genesis* 9:6.

¹¹⁵ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *129.

¹¹⁶ LOCKE, *supra* note 95 at § 172.

his life, persists. The civil authority is just not bound to secure it as against its own authority to take his life.¹¹⁷

3. Limits on State Authority

Very importantly, the notion that civil government exists to secure inalienable rights carries an inherent limitation on the scope of civil government's authority. This is true because an inalienable right is based on a duty that is owed to the Creator alone and civil government does not have authority to enforce duties that are owed to the Creator alone. In his 1784 *Memorial and Remonstrance on the Religious Rights of Man*, James Madison stated this principle when speaking about man's duty to worship the Creator.

[W]e hold it for a 'fundamental and undeniable truth' that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. . . . This right is, in its nature, an unalienable right . . . because what is here a right towards men, is a duty towards the Creator.¹¹⁸

Blackstone had similarly concluded that civil government should not enforce certain duties.

But with regard to the absolute *duties*, which man is bound to perform considered as a mere individual, it is not to be expected that any human municipal laws should at all explain or enforce them. For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no business or concern with any but social or relative duties.¹¹⁹

¹¹⁷ Should the convict *assert* his right to life against the civil authorities? Some rights philosophers, such as Pufendorf, Henry of Ghent, and Jacques Almain said yes, insofar as he should escape if possible to do so without committing violence against his holder). See *supra* notes 91-94 and accompanying text. Henry of Ghent said that failure to make such an escape would be the equivalent of suicide. See *supra* notes 92-93 and accompanying text. The convict, however, should not resist by asserting his right to life. The civil authority who is carrying out an execution is acting as an agent of God. See Romans 13:4 ("For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil.") If the convict were to resist the civil authority, he essentially would be resisting God. See Romans 13:2 ("Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.") He essentially would be asserting his right to life against God, which he cannot do as God has ultimate authority over the lives of all men. 1 Samuel 2:6 ("The LORD killeth, and maketh alive: he bringeth down to the grave, and bringeth up.)

¹¹⁸ JAMES MADISON, *MEMORIAL AND REMONSTANCE ON THE RELIGIOUS RIGHTS OF MAN* quoted in HERBERT W. TITUS, *GOD, MAN AND LAW: THE BIBLICAL PRINCIPLES* 72 (1994).

¹¹⁹ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *119-20.

Thus, as regards the inalienable right to life, although the state should prohibit one man from infringing the inalienable right to life of another, it should not dictate the manner in which the duty to live, owed to the Creator alone, is fulfilled. If, for example, an individual learns that he has cancer, he is accountable to God alone for the manner in which he treats his disease. If he believes that God would have him undergo chemotherapy, civil government should not interfere with him obtaining this treatment. If he believes that a different therapy is appropriate, the choice is his. If he chooses to forego medical care, the civil authorities have no authority to force him to accept treatment. Certainly, he should make his decisions in a spirit of charity toward God and others, but if he does not, the state should not try to force him to fulfill this duty which is owed to the Creator alone.

B. The New York Laws Protect the Inalienable Right to Life

The Supreme Court held that the New York legislature's distinction between refusing life-saving medical treatment and physician-assisted suicide was rationally related to numerous legitimate state interests including the state's interest in preventing intentional killing and preserving life.¹²⁰ The distinction is also justified by the philosophy that civil government exists to secure inalienable rights. The New York statute prohibiting assisted suicide protects the inalienable right to life. The statute permitting the refusal of medical treatment comports with the principle that a man is accountable to God alone for the manner in which he fulfills, or fails to fulfill, his duty to preserve his life.

1. Prohibiting Assisted Suicide.

Laws prohibiting assisted suicide¹²¹ are fully consistent with the principle that civil government exists to secure the inalienable right to

¹²⁰ *Vacco*, 117 S. Ct. at 2302.

¹²¹ See ALASKA STAT. § 11.41.120 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-1103 (West 1989); ARK. CODE ANN. § 5-10-104.a(2) (Michie 1993); CAL. PENAL CODE § 401 (West 1988); COLO. REV. STAT. ANN. § 18-3-104.1(b) (West 1990); CONN. GEN. STAT. ANN. § 53a-56(a) (West 1994); DEL. CODE ANN. tit. 11, § 645 (Michie 1995); FLA. STAT. ANN. § 782.08 (West 1992); GA. CODE ANN. §16-5-5 (Harrison 1994); HAW. REV. STAT. § 707-702.1(b) (1993); 720 ILL. COMP. STAT. ANN. 5/12-31 (West 1997); IND. CODE ANN. § 35-42-1-2.5 (Michie 1994); IOWA CODE ANN. §§ 707A.1-707A.3 (West Supp. 1997); KAN. STAT. ANN. § 21-3406 (1995); KY. REV. STAT. § 216.300-216.308 (Michie 1995); LA. REV. STAT. ANN. § 14:32.12 (West 1997); ME. REV. STAT. ANN. tit. 17-A, § 204 (West 1983); MINN. STAT. ANN. § 609.215 (West 1987); MISS. CODE ANN. § 97-3-49 (1994); MO. ANN. STAT. § 565.023.1(2) (West Supp. 1998); MONT. CODE ANN. § 45-5-105 (1997); NEB. REV. STAT. § 28-307 (1995); N.H. REV. STAT. ANN. § 630:4 (1996); N.J. STAT. ANN. § 2C:11-6 (West 1995); N.M. STAT. ANN. § 30-2-4 (Michie 1994); N.Y. PENAL LAW § 125.15(3) (McKinney 1987); N.D. CENT.

life. If an individual disregards the duty he owes to his Creator to continue living, the duty still remains.¹²² Since the duty persists, so does the right. The right is inalienable. In other words, a person who no longer wishes to continue living and consents to another's deadly actions still has the duty and therefore the right to continue living. This right remains and continues to protect the individual from the harmful actions of others even when the individual no longer wishes to be protected. A government that seeks to secure inalienable rights must prohibit and punish such harmful actions even when the individual would consent to them.

2. Permitting Withdrawal or Withholding of Life Saving Medical Treatment.

Laws that permit physicians to comply with a patient's refusal of life-saving medical treatment are similarly consistent with the idea that civil government exists to secure inalienable rights. Such laws do not sanction violations of the inalienable right to life. They actually indicate a respect for the personal nature of the duty that is the very foundation of the right.

An individual's fulfillment of their duty to live does not necessitate subjecting oneself to any and every form of medical treatment. An individual may believe it is best to fulfill the duty in a less intensive or an alternative manner. Even if an individual intends to precipitate his or

CODE § 12.1-16-04 (Michie Supp. 1997); OK. STAT. ANN. tit. 21, §§ 813-818 (West 1993); OR. REV. STAT. § 163.125.1(b) (1995); 19 PA. CONS. STAT. ANN. § 2505 (West 1983); R.I. GEN. LAWS § 11-60-1 to 5 (Michie 1994); S.D. CODIFIED LAWS ANN. § 22-16-37 (Michie 1988); TENN. CODE ANN. § 39-13-216 (Michie 1997); TEX. PENAL CODE § 22.08 (West 1994); WASH. REV. CODE ANN. § 9A.36.060 (West 1988); WIS. STAT. ANN. § 940.12 (West 1996).

¹²² See BURLAMAQUI, *supra* note 102 at 52.

[T]here are rights, which may be lawfully renounced, and others, that cannot. . . . The reason of this difference is, that there are rights, which of themselves have a natural connection with our duties, and are given to man only, as means to perform them. To renounce this sort of rights would be therefore renouncing our duty, which is never allowed.

Id.

It seems to be self-evidently true, that no man can have a right to manage his own person, or to dispose of it in such a manner, as will render him incapable of doing his duty. For his duty is a restraint, which arises from the law of nature; he cannot therefore have any right to free himself from that, unless he has a right to free himself from all restraints, which the law of nature has laid him under. The consequence of this is, that a man's right to his life or his limbs is a limited right; they are his to use, but not his to dispose of. . . . A duty, which we can release ourselves from at pleasure, is unintelligible; it is in effect no duty.

RUTHERFORTH, THE INSTITUTES OF NATURAL LAW, 146-47, quoted in KNUD HAAKONSEN, NATURAL LAW AND MORAL PHILOSOPHY 314-15 (1996).

her own death by refusing treatment, and if it were conceded that the refusal is the but-for cause of death, a physician complying with a patient's refusal of treatment is not violating the patient's right to life. Rather, the physician is refraining from forcing the patient to fulfill the duty to live. He is refraining from intruding into the sphere of personal decision-making created by a duty that is owed to the Creator alone.

Thus, civil laws that prohibit assisted suicide but allow an individual to refuse medical treatment, and allow a physician to assist in the termination of treatment, conform to the principle that civil government should secure inalienable rights, but should not interfere with duties that are owed to the Creator alone. When civil government prohibits a physician from introducing an element for a patient to use to kill himself, it is essentially prohibiting that physician from interfering with the patient's discharge of his duty. When civil government allows a patient to terminate medical treatment and a physician assists in the termination of the treatment, both are essentially refusing to interfere with the patient's duty to live that is owed to the Creator alone.

C. Autonomy

Where civil government exists to secure inalienable rights, the autonomy of individuals necessarily will be constrained. Autonomy has been described by Joel Feinberg, a professor of philosophy at the University of Arizona, as the "realm of inviolable sanctuary most of us sense in our own beings."¹²³ The word autonomy comes from the Greek roots of "self," and "law" or "rule," which literally means "the having or making of one's own laws."¹²⁴ According to the modern theory of individual autonomy, a man would be free to exert lethal force against another if this act comported with his will and the will of the one he is killing.¹²⁵

Where, however, it is acknowledged that individuals possess inalienable rights and government exists to secure these rights, a man does not have this freedom. One man may not kill another, even on request, because every man has an inalienable right to life.¹²⁶ Even when a man

¹²³ JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 27 (1986)).

¹²⁴ *Id.*

¹²⁵ Feinberg explains, if one person voluntarily asks another to kill him, the latter may kill him. The request "creates a privilege (liberty) to kill." *Id.* at 179.

¹²⁶ As Locke stated, a man cannot, by compact or his own consent, *enslave himself* to any one, nor put himself under the absolute, arbitrary power of another, to take away his life, when he pleases. No body can give more power than he has himself; and he that cannot take away his own life, cannot give another power over it.

wishes to die and asks another to kill him, he still has a right to life – the right is inalienable. No man can get a way from the right; it exists as long as he lives. It is a part of his very essence.¹²⁷ Although civil government should not interfere with an individual's fulfillment of, or failure to fulfill, his duty to live, it should proscribe the actions of others that violate the inalienable right to life that flows from the duty.

D. The Diminishing State Interest Test

Individual autonomy is a central part of the diminishing state interest test,¹²⁸ a test that the *Vacco* respondents implicitly asked the Court to adopt.¹²⁹ According to this balancing test, the state's interest in preserving life decreases when the patient's condition becomes seemingly hopeless with no foreseeable recovery.¹³⁰ Concomitant with the state's decreasing interest is an increasing interest in personal dignity and autonomy.¹³¹ Ultimately, the individual's deteriorated medical condition causes the individual's interest in dignity and autonomy to outweigh the state's interest in preserving life.¹³² The Second Circuit had adopted this test and had determined that the state's interest diminishes to be non-

LOCKE, *supra* note 95 at § 23.

¹²⁷ *Cruzan*, 497 U.S. at 295 (quoting *Blackburn v. State*, 23 Ohio St. 146, 163 (1873)).

The life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.

Id.

¹²⁸ The concept of a diminishing state interest was advocated by the New Jersey Supreme Court in the Karen Quilan case, *In re Quilan*, 355 A.2d 647, 664 (N.J. 1976), cert. denied, 492 U.S. 922 (1976) (in banc). ("We think that the State's interest . . . weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately, there comes a point at which the individual's rights overcome the State's interest."). Many state courts have adopted this view. See, e.g., *Rasmussen v. Fleming*, 741 P.2d 674, 683 (Ariz. 1987); *McConnell v. Beverly Enterprises-Conn., Inc.*, 553 A.2d 596, 608 (Conn. 1989); *Brophy v. New Eng. Sinai Hosp., Inc.*, 497 N.E.2d 626, 635 (Mass. 1986); *Superintendent of Belchertown State Schools v. Saikewicz*, 370 N.E.2d 417, 425-6 (Mass. 1977); *Guardianship of L.W. v. L.E. Phillips Career Dev. Center*, 482 N.W.2d 60, 74 (Wis. 1992).

¹²⁹ The *Vacco* respondents conceded that the State has an interest in protecting life but maintained that "those in the final stages of terminal illness who are not on life-support and who seek to . . . choose a death free of unbearable pain and suffering" should be permitted to obtain physician assistance in suicide. Brief for Respondents at 35, *Vacco* (No. 95-1858).

¹³⁰ See *In re Quilan*, 355 A.2d at 664.

¹³¹ *Id.*

¹³² *Id.*

existent when a life is "all but ended."¹³³ The Supreme Court, however, chose to reaffirm the principle recognized in *Cruzan* that a state may preserve human life no matter how serious an individual's health has been debilitated.¹³⁴

The Court rightly rejected the problematic diminishing state interest test. Under it, the interests of the individual are ultimately at the mercy of the state's interests. If a person's autonomy increases as the state's interest in preserving his life diminishes, the implication is that personal autonomy diminishes when the state's interest in preserving life increases. Autonomy is thus dependent on the level of interest that the state has in preserving an individual's life. In terms of medical decisions, if the state has a diminished interest in a person's life, that person will have a lot of freedom to choose a course of treatment. If, however, the state has a strong interest in preserving someone's life, it might not only prohibit that individual from obtaining assistance in suicide, but it might also force him to undergo treatment that is unwanted.

The diminishing state interest test also invites a mindset that countenances the denial of desired treatment. When the state is said to have a decreased interest in preserving the lives of people whose physical condition is seriously compromised, the inherent value of these individuals is called into question.¹³⁵ If the state's interest in the life of these patients is diminished, the denial of treatment may become a less important state concern. Denials of treatment against the patient's wishes do occur.¹³⁶ Thus, it is quite uncertain whether the idea of personal auton-

¹³³ *Quill v. Vacco*, 80 F.3d at 729.

¹³⁴ "Finally, we think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." *Cruzan*, 497 U.S. at 282.

¹³⁵ See Rachel D. Kleinberg & Toshiro M. Mochizuki, *The Final Freedom: Maintaining Autonomy and Valuing Life in Physician-Assisted Suicide Cases*, 32 HARV. C.R.-C.L. L. REV. 197, 212 (1997).

The State should not weigh human lives according to the amount of pain they are experiencing nor how long they have until they die. One person may lead as fruitful and enriched a life with a debilitating disease as another who is perfectly healthy. Nor does length of life translate to worth of life, either for the individual or for society as a whole. Thus any sort of analysis based upon questions of quality or quantity of life are inaccurate and dangerous ways of expressing the value we place on human life. Such an illegitimate valuation should be struck from the court's balancing test.

Id.

¹³⁶ *In re Wanglie*, No. PX-91-283, slip op. (P. Ct. Hennepin County Minn. June 28, 1991) (hospital attempted to withhold life sustaining medical treatment from elderly woman despite her request for such treatment); Wesley J. Smith, *The Baby Ryan Case: A Precursor of What is to Come?*, NATIONAL RIGHT TO LIFE NEWS, July 9, 1997, at 9 (doctors unilaterally withdrew dialysis treatment from infant on grounds that the treatment was

omy will really safeguard decisions *in favor of* medical treatment when an individual's physical condition is poor and the state consequently does not have a strong interest in preserving his life.

Finally, individuals in whose lives the state declares a diminished interest are susceptible to the harmful actions of others. Although it is claimed that respect for personal autonomy will prevent undue influence over individuals who are terminally ill,¹³⁷ in reality no individual is completely immune from the pressures and expectations of others.¹³⁸ The terminally ill individual may be forced to justify his continued existence when, for example, the economic realities of continued living and treatment press in.¹³⁹ If the state determines that he may obtain the assistance of another in killing himself, it essentially has stated that he has no inalienable right to life. He is thus left without a major protective justification for his continued existence.¹⁴⁰

The state that seeks to secure the inalienable right to life ultimately provides greater freedom for individuals than the state that offers varying degrees of autonomy based on the state's interest in preserving an individual's life. Where civil government exists to secure inalienable rights a man may not whatever he wishes, but neither may the state. As regards the inalienable right to life, the state may prohibit one man from killing another but it may not interfere with a man's discharge of his duty to live. His medical decisions are his own to make. Where civil government follows the diminishing state interest test, a person's freedom to make medical decisions will always depend upon the level of interest that the state has in preserving his life. Ultimately, the state that seeks to secure the inalienable right to life provides greater certainty and greater protection of individual freedom than the state that seeks to balance varying degrees of the state's interest in preserving life with varying degrees of personal autonomy.

futile and filed a complaint with Child Protective Services on grounds that treatment constituted child abuse; infant was transferred, survived and ultimately weaned off dialysis); *In re Baby "K"*, 16 F.3d 590 (4th Cir. 1994), cert. denied 513 U.S. 825 (1994) (hospital fails to obtain declaration of court that it is not obligated to treat Baby "K" who suffers from occasional episodes of respiratory distress). VA. CODE ANN. § 54.1-2990 (Michie 1998) grants physicians the right to refuse "to prescribe or render medical treatment to a patient that the physician determines to be medically or ethically inappropriate." (emphasis added). A group of hospitals in Houston, Texas have developed a policy to deny medical treatment that is deemed by the hospital to be futile. Amir Halevy & Baruch A. Brody, *A Multi-Institution Collaborative Policy on Medical Futility*, 276 JAMA 571 (1996).

¹³⁷ Brief for Respondents at 3, *Vacco* (No. 95-1858).

¹³⁸ Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1768-69 (1992).

¹³⁹ Ellen Wilson Fielding, *Jack the Reaper*, 23 HUMAN LIFE REV. 35, 37 (1997).

¹⁴⁰ *Id.*

V. CONCLUSION

With the Supreme Court's rejection of the due process and equal protection challenges to Washington's and New York's prohibitions on assisted suicide, those who want to see assisted suicide legalized must now work at the state level to achieve their goals. In their uphill battle, the strongest philosophical argument they will come up against is that the right to life is inalienable and civil governments exist for the purpose of securing this right. Proponents of physician-assisted suicide must convince others to abandon this philosophy if they are to achieve their objective. A renewed commitment to the theory of inalienable rights holds the greatest hope for decisively thwarting their plans.

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