JUSTICE SCALIA, concurring.

The various opinions in this case portray quite clearly the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it. The States have begun to grapple with these problems through legislation. I am concerned, from the tenor of today's opinions, that we are poised to confuse that enterprise as successfully as we have confused the enterprise of legislating concerning abortion--requiring it to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term. That would be a great misfortune.

While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide--including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes ``worthless,'' and the point at which the means necessary to preserve it become ``extraordinary'' or ``inappropriate,'' are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence, that even when it is demonstrated by clear and convincing

evidence that a patient no longer wishes certain measures to be taken to preserve her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored. It is quite impossible (because the Constitution says nothing about the matter) that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely (because we know no more about ``life-and-death'' than they do) that they will decide upon a line less reasonable.

The text of the Due Process Clause does not protect individuals against deprivations of liberty simpliciter. It protects them against deprivations of liberty ``without due process of law.'' To determine that such a deprivation would not occur if Nancy Cruzan were forced to take nourishment against her will, it is unnecessary to reopen the historically recurrent debate over whether ``due process'' includes substantive restrictions. Compare Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272 (1856), with Scott v. Sandford, 19 How. 393, 450 (1857); compare Tyson & Bro. v. United Theatre Ticket Offices, Inc., 273 U. S. 418 (1927), with Olsen v. Nebraska ex rel. Western Reference & Bond Assn., Inc., 313 U. S. 236, 246-247 (1941); compare Ferguson v. Skrupa, 372 U. S. 726, 730 (1963), with Moore v. East Cleveland, 431 U. S. 494 (1977) (plurality opinion); see

Easter-
brook, Substance and Due Process, 1982 S. Ct. Rev. 85; Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353 (1981). It is at least true that no ``substantive due process'' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference. Michael H. v. Gerald D., 491 U. S. ----, ---- (1989) (plurality opinion); Bowers v. Hardwick, 478 U. S. 186, 192 (1986); Moore, supra, at 502-503 (plurality opin-
ion). That cannot possibly be established here.

At common law in England, a suicide--defined as one who ``deli-
berately puts an end to his own existence, or commits any unlaw-
ful malicious act, the consequence of which is his own death,'' 4 W. Blackstone, Commentaries *189--was criminally liable. Ibid.

Although the States abolished the penalties imposed by the common law (i. e., forfeiture and ignominious burial), they did so to spare the innocent family, and not to legitimize the act. Case law at the time of the Fourteenth Amendment generally held that

assisting suicide was a criminal offense. See Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquesne L. Rev. 1, 76 (1985) (``In short, twenty-one of the thirty-seven states, and eighteen of the thirty ratifying states prohibited assisting suicide. Only eight of the states, and seven of the ratifying states, definitely did not''); see also 1 F. Wharton,

Criminal Law 122 (6th rev. ed. 1868). The System of Penal Law presented to the House of Representatives by Representative Livingston in 1828 would have criminalized assisted suicide. E. Livingston, A System of Penal Law, Penal Code 122 (1828). The Field Penal Code, adopted by the Dakota Territory in 1877, proscribed attempted suicide and assisted suicide. Marzen, O'Dowd, Crone, & Balch, 24 Duquesne L. Rev., at 76-77. And most States that did not explicitly prohibit assisted suicide in 1868 recognized, when the issue arose in the 50 years following the Fourteenth Amendment's ratification, that assisted and (in some cases) attempted suicide were unlawful. Id., at 77-100; 148-242 (surveying development of States' laws). Thus, ``there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed `fundamental' or `implicit in the concept of ordered liberty.' '' Id., at 100 (quoting Palko v. Connecticut, 302 U. S. 319, 325 (1937)).

Petitioners rely on three distinctions to separate Nancy Cruzan's case from ordinary suicide: (1) that she is permanently incapacited and in pain; (2) that she would bring on her death not by any affirmative act but by merely declining treatment that provides nourishment; and (3) that preventing her from effectuating her presumed wish to die requires violation of her bodily integrity. None of these suffices. Suicide was not excused even when committed ``to avoid those ills which [persons] had not the fortitude to endure.'' 4 Blackstone, supra, at *189. ``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.'' Blackburn v. State, 23 Ohio St. 146, 163 (1873). Thus, a man who prepared a poison, and placed it within reach of his wife, ``to put an end to her suffering'' from a terminal illness was convicted of murder, People v. Roberts, 211 Mich. 187, 198 N. W. 690, 693 (1920); the ``incurable suffering of the suicide, as a legal question, could hardly affect the degree of criminality . . . .'' Note, 30 Yale L. J. 408, 412 (1921) (discussing Roberts). Nor would the imminence of the patient's death have affected liability. ``The lives of all are equally under the protection of the law, and under that protection to their last moment. . . . [Assisted suicide] is declared by the law to be murder, irrespective of the wishes or the condition of the party to whom the poison is administered . . . .'' Blackburn, supra, at 163; see also Commonwealth v. Bowen, 13 Mass. 356, 360 (1816).

The second asserted distinction--suggested by the recent cases canvassed by the Court concerning the right to refuse treatment, ante, at 5-12--relies on the dichotomy between action and inac-

tion. Suicide, it is said, consists of an affirmative act to end one's life; refusing treatment is not an affirmative act ``causing'' death, but merely a passive acceptance of the natural process of dying. I readily acknowledge that the distinction between action and inaction has some bearing upon the legislative judgment of what ought to be prevented as suicide--though even there it would seem to me unreasonable to draw the line precisely between action and inaction, rather than between various forms of inaction. It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing. Even as a legislative matter, in other words, the intelligent line does not fall between action and inaction but between those forms of inaction that consist of abstaining from ``ordinary'' care and those that consist of abstaining from ``excessive'' or ``heroic'' measures. Unlike action vs. inaction, that is not a

--

line to be discerned by logic or legal analysis, and we should not pretend that it is.

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.'' 4 Blackstone, supra, at

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*189. See In re Caulk, 125 N. H. 226, 232, 480 A. 2d 93, 97 (1984); State ex rel. White v. Narick, ---- W. Va. ----, 292 S. E. 2d 54 (1982); Von Holden v. Chapman, 87 App. Div. 2d 66, 450 N. Y. S. 2d 623 (1982). Of course the common law rejected the action-inaction distinction in other contexts involving the taking of human life as well. In the prosecution of a parent for the starvation death of her infant, it was no defense that the infant's death was ``caused'' by no action of the parent but by the natural process of starvation, or by the infant's natural inability to provide for itself. See Lewis v. State, 72 Ga. 164 (1883); People v. McDonald, 49 Hun 67, 1 N. Y. S. 703 (1888); Commonwealth v. Hall, 322 Mass. 523, 528, 78 N. E. 2d 644, 647 (1948) (collecting cases); F. Wharton, Law of Homicide 134-135, 304 (2d ed. 1875); 2 J. Bishop, Commentaries on the Criminal Law 686 (5th ed. 1872); J. Hawley & M. McGregor, Criminal Law 152 (3d ed. 1899). A physician, moreover, could be criminally liable for failure to provide care that could have extended the patient's life, even if death was immediately caused by the underlying disease that the physician failed to treat. Barrow v. State, 17 Okla. Cr. 340, 188 P. 351 (1920); People v. Phillips, 64 Cal. 2d 574, 414 P. 2d 353 (1966).

It is not surprising, therefore, that the early cases considering the claimed right to refuse medical treatment dismissed as

specious the nice distinction between ``passively submitting to death and actively seeking it. The distinction may be merely verbal, as it would be if an adult sought death by starvation in- stead of a drug. If the State may interrupt one mode of self- destruction, it may with equal authority interfere with the oth- er.'' John F. Kennedy Memorial Hosp. v. Heston, 58 N. J. 576, 581-582, 279 A. 2d 670, 672-673 (1971); see also Application of President & Directors of Georgetown College, Inc., 118 U. S. App. D. C. 80, 88-89, 331 F. 2d 1000, 1008-1009 (Wright, J., in chambers), cert. denied, 377 U. S. 978 (1964).

The third asserted basis of distinction--that frustrating Nancy Cruzan's wish to die in the present case requires interference with her bodily integrity--is likewise inadequate, because such interference is impermissible only if one begs the question whether her refusal to undergo the treatment on her own is sui- cide. It has always been lawful not only for the State, but even for private citizens, to interfere with bodily integrity to prevent a felony. See Phillips v. Trull, 11 Johns. 486 (N. Y. 1814); City Council v. Payne, 2 Nott & McCord 475 (S. C. 1821); Vandeveer v. Mattocks, 3 Ind. 479 (1852); T. Cooley, Law of Torts 174-175 (1879); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 673 (1924); Restatement of Torts 119 (1934). That general rule has of course been applied to suicide. At common law, even

a private person's use of force to prevent suicide was privileged. Colby v. Jackson, 12 N. H. 526, 530-531 (1842); Look v. Choate, 108 Mass. 116, 120 (1871); Commonwealth v. Mink, 123 Mass. 422, 429 (1877); In re Doyle, 16 R. I. 537, 539, 18 A. 159, 159-160 (1889); Porter v. Ritch, 70 Conn. 235, 255, 39 A. 169, 175 (1898); Emmerich v. Thorley, 54 N. Y. S. 791, 793-794 (1898); State v. Hembd, 305 Minn. 120, 130, 232 N. W. 2d 872, 878 (1975); 2 C. Addison, Law of Torts 819 (1876); Cooley, supra, at 179-180. It is not even reasonable, much less required by the Constitution, to maintain that although the State has the right to prevent a person from slashing his wrists it does not have the power to apply physical force to prevent him from doing so, nor the power, should he succeed, to apply, coercively if necessary, medical measures to stop the flow of blood. The state-run hospital, I am certain, is not liable under 42 U. S. C. 1983 for violation of constitutional rights, nor the private hospital liable under general tort law, if, in a State where suicide is unlawful, it pumps out the stomach of a person who has intentionally taken an overdose of barbiturates, despite that person's wishes to the contrary.

The dissents of JUSTICES BRENNAN and STEVENS make a plausible case for our intervention here only by embracing--the latter explicitly and the former by implication--a political principle

that the States are free to adopt, but that is demonstrably not imposed by the Constitution. ``The State,'' says JUSTICE BRENNAN, ``has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment.'' Post, at 14 (emphasis added). The italicized phrase sounds moderate enough, and is all that is needed to cover the present case--but the proposition cannot logically be so limited.

One who accepts it must also accept, I think, that the State has no such legitimate interest that could outweigh ``the person's choice to put an end to her life.'' Similarly, if one agrees with JUSTICE BRENNAN that ``the State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment,'' ibid. (emphasis added), he must also believe that the State must accede to her ``particularized and intense interest in self-determination in her choice whether to continue living or to die.'' For insofar as balancing the relative interests of the State and the individual is concerned, there is nothing distinctive about accepting death through the refusal of ``medical treatment,'' as opposed to accepting it through the refusal of food, or through the failure to shut off the engine and get out

of the car after parking in one's garage after work. Suppose that Nancy Cruzan were in precisely the condition she is in today, except that she could be fed and digest food and water without artificial assistance. How is the State's ``interest'' ------- in keeping her alive thereby increased, or her interest in deciding whether she wants to continue living reduced? It seems to me, in other words, that JUSTICE BRENNAN's position ultimately rests upon the proposition that it is none of the State's business if a person wants to commit suicide. JUSTICE STEVENS is explicit on the point: ``Choices about death touch the core of liberty. . . . [N]ot much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience.'' Post, at 13-14. This is a view that some societies ---- have held, and that our States are free to adopt if they wish. But it is not a view imposed by our constitutional traditions, in which the power of the State to prohibit suicide is unquestionable.

What I have said above is not meant to suggest that I would think it desirable, if we were sure that Nancy Cruzan wanted to die, to keep her alive by the means at issue here. I assert only that the Constitution has nothing to say about the subject. To raise up a constitutional right here we would have to create out of nothing (for it exists neither in text nor tradition) some constitutional principle whereby, although the State may insist that an individual come in out of the cold and eat food, it

may
not insist that he take medicine; and although it may pump
his
stomach empty of poison he has ingested, it may not fill
his
stomach with food he has failed to ingest. Are there, then,
no
reasonable and humane limits that ought not to be exceeded in
re-
quiring an individual to preserve his own life? There
obviously
are, but they are not set forth in the Due Process Clause.
What
assures us that those limits will not be exceeded is the
same
constitutional guarantee that is the source of most of
our
protection--what protects us, for example, from being assessed
a
tax of 100% of our income above the subsistence level, from
being
forbidden to drive cars, or from being required to send our
chil-
dren to school for 10 hours a day, none of which horribles
is
categorically prohibited by the Constitution. Our salvation
is
the Equal Protection Clause, which requires the democratic
major-
ity to accept for themselves and their loved ones what they
im-
pose on you and me. This Court need not, and has no
authority
to, inject itself into every field of human activity where
irra-

tionality and oppression may theoretically occur, and if it
tries
to do so it will destroy itself.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE
BLACKMUN
join, dissenting.

Medical technology has effectively created a twilight zone
of
suspended animation where death commences while life, in some
form, continues. Some patients, however, want no part of a
life sustained only by medical technology. Instead, they
prefer a plan of medical treatment that allows nature to take
its course and permits them to die with dignity.''

for Cert. A94. Ms. Comer described a conversation she and
Nancy

had while living together, concerning Ms. Comer's sister who had become ill suddenly and died during the night. The Comer family had been told that if she had lived through the night, she would have been in a vegetative state. Nancy had lost a grandmother a few months before. Ms. Comer testified that: ``Nancy said she would never want to live [as a vegetative state] because if she couldn't be normal or even, you know, like half way, and do things for yourself, because Nancy always did, that she didn't want to live . . . and we talked about it a lot.'' Tr. 388-389. She said ``several times'' that ``she wouldn't want to live that way because if she was going to live, she wanted to be able to live, not to just lay in a bed and not be able to move because you can't do anything for yourself.'' Id., at 390, 396. ``[S]he said that she hoped that [all the] people in her family knew that she wouldn't want to live [as a vegetable] because she knew it was usually up to the family whether you lived that way or not.'' Id., at 399.

The conversation took place approximately a year before Nancy's accident and was described by Ms. Comer as a ``very serious'' conversation that continued for approximately half an hour without interruption. Id., at 390. The Missouri Supreme Court dismissed Nancy's statement as ``unreliable'' on the ground that it was an informally expressed reaction to other people's medical conditions. 760 S. W. 2d, at 424.

The Missouri Supreme Court did not refer to other evidence of Nancy's wishes or explain why it was rejected. Nancy's sister Christy, to whom she was very close, testified that she and

Nancy had had two very serious conversations about a year and a half before the accident. A day or two after their niece was stillborn (but would have been badly damaged if she had lived), Nancy had said that maybe it was part of a ``greater plan'' that the baby had been stillborn and did not have to face ``the possible life of mere existence.'' Tr. 537. A month later, after their grandmother had died after a long battle with heart problems, Nancy said that ``it was better for my grandmother not to be kind of brought back and forth [by] medical [treatment], brought back from a critical near point of death . . . . Id., at 541.

Nancy Cruzan has dwelt in that twilight zone for six years. She is oblivious to her surroundings and will remain so. Cruzan v. Harmon, 760 S. W. 2d 408, 411 (Mo. 1988). Her body twitches only reflexively, without consciousness. Ibid. The areas of her brain that once thought, felt, and experienced sensations have degenerated badly and are continuing to do so. The cavities remaining are filling with cerebro-spinal fluid. The `` `cerebral cortical atrophy is irreversible, permanent, progressive and ongoing.' '' Ibid. ``Nancy will never interact meaningfully with her environment again. She will remain in a persistent vegetative state until her death.'' Id., at 422. Because she cannot swallow, her nutrition and hydration are delivered through a tube surgically implanted in her stomach.

A grown woman at the time of the accident, Nancy had previously expressed her wish to forgo continuing medical care under circumstances such as these. Her family and her friends are convinced that this is what she would want. See n. 20, infra. A

guardian ad litem appointed by the trial court is also convinced that this is what Nancy would want. See 760 S. W. 2d, at 444 (Higgins, J., dissenting from denial of rehearing). Yet the Missouri Supreme Court, alone among state courts deciding such a question, has determined that an irreversibly vegetative patient will remain a passive prisoner of medical technology--for Nancy, perhaps for the next 30 years. See id., at 424, 427.

Today the Court, while tentatively accepting that there is some degree of constitutionally protected liberty interest in avoiding unwanted medical treatment, including life-sustaining medical treatment such as artificial nutrition and hydration, affirms the decision of the Missouri Supreme Court. The majority opinion, as I read it, would affirm that decision on the ground that a State may require ``clear and convincing'' evidence of Nancy Cruzan's prior decision to forgo life-sustaining treatment under circumstances such as hers in order to ensure that her actual wishes are honored. See ante, at 17-19, 22. Because I believe that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and because I find that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right, I respectfully dissent. Nancy Cruzan is entitled to choose to die with dignity.

I

The question before this Court is a relatively narrow one: whether the Due Process Clause allows Missouri to require a

now-
incompetent patient in an irreversible persistent
vegetative
state to remain on life-support absent rigorously clear and
con-
vincing evidence that avoiding the treatment represents
the
patient's prior, express choice. See ante, at 13. If a
funda-
mental right is at issue, Missouri's rule of decision must
be
scrutinized under the standards this Court has always applied
in
such circumstances. As we said in Zablocki v. Redhail, 434 U.
S.
374, 388 (1978), if a requirement imposed by a State
``signifi-
cantly interferes with the exercise of a fundamental right,
it
cannot be upheld unless it is supported by sufficiently
important
state interests and is closely tailored to effectuate only
those
interests.'' The Constitution imposes on this Court the
obliga-
tion to ``examine carefully . . . the extent to which [the
legi-
timate government interests advanced] are served by the
chal-
lenged regulation.'' Moore v. East Cleveland, 431 U. S. 494,
499
(1977). See also Carey v. Population Services International,
431
U. S. 678, 690 (1977) (invalidating a requirement that bore
``no
relation to the State's interest''). An evidentiary rule,
just
as a substantive prohibition, must meet these standards if
it
significantly burdens a fundamental liberty interest.
Fundamen-
tal rights ``are protected not only against heavy-handed
frontal
attack, but also from being stifled by more subtle
governmental
interference.'' Bates v. Little Rock, 361 U. S. 516, 523
(1960).

The starting point for our legal analysis must be whether a competent person has a constitutional right to avoid unwanted medical care. Earlier this Term, this Court held that the Due Process Clause of the Fourteenth Amendment confers a significant liberty interest in avoiding unwanted medical treatment. Washington v. Harper, 494 U. S. ----, ---- (1990). Today, the Court concedes that our prior decisions ``support the recognition of a general liberty interest in refusing medical treatment.'' See ante, at 14. The Court, however, avoids discussing either the measure of that liberty interest or its application by assuming, for purposes of this case only, that a competent person has a constitutionally protected liberty interest in being free of unwanted artificial nutrition and hydration. See ante, at 15.

JUSTICE O'CONNOR's opinion is less parsimonious. She openly affirms that ``the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause,'' that there is a liberty interest in avoiding unwanted medical treatment and that it encompasses the right to be free of ``artificially delivered food and water.'' See ante, at 1.

But if a competent person has a liberty interest to be free of unwanted medical treatment, as both the majority and JUSTICE O'CONNOR concede, it must be fundamental. ``We are dealing here with [a decision] which involves one of the basic civil rights of man.'' Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535,

541
(1942) (invalidating a statute authorizing sterilization of certain felons). Whatever other liberties protected by the Due Process Clause are fundamental, ``those liberties that are `deeply rooted in this Nation's history and tradition' '' are among them. Bowers v. Hardwick, 478 U. S. 186, 192 (1986) (quoting Moore v. East Cleveland, supra, at 503 (plurality opinion). ``Such a tradition commands respect in part because the Constitution carries the gloss of history.'' Richmond Newspapers, Inc. v. Virginia, 448 U. S. 555, 589 (1980) (BRENNAN, J., concurring in judgment).

The right to be free from medical attention without consent, to determine what shall be done with one's own body, is deeply rooted in this Nation's traditions, as the majority acknowledges. See ante, at 5. This right has long been ``firmly entrenched in American tort law'' and is securely grounded in the earliest common law. Ibid. See also Mills v. Rogers, 457 U. S. 291, 294, n. 4 (1982) (``the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician''). `` `Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body,

and he may, if he be of sound mind, expressly prohibit the per-
formance of lifesaving surgery, or other medical treatment.'
''
Natanson v. Kline, 186 Kan. 393, 406-407, 350 P. 2d 1093,
1104
(1960). ``The inviolability of the person'' has been held as
``sacred'' and ``carefully guarded'' as any common law right.
Union Pacific R. Co. v. Botsford, 141 U. S. 250, 251-252
(1891).
Thus, freedom from unwanted medical attention is
unquestionably
among those principles ``so rooted in the traditions and
consci-
ence of our people as to be ranked as fundamental.'' Snyder
v.
Massachusetts, 291 U. S. 97, 105 (1934).

That there may be serious consequences involved in refusal of
the medical treatment at issue here does not vitiate the right
under our common law tradition of medical self-determination.
It
is ``a well-established rule of general law decides if
treatment--any treatment--is to be given at all. . . . The
rule
has never been qualified in its application by either the
nature
or purpose of the treatment, or the gravity of the
consequences
of acceding to or foregoing it.'' Tune v. Walter Reed Army
Medi-
cal Hospital, 602 F. Supp. 1452, 1455 (DC 1985). See also
Downer
v. Veilleux, 322 A. 2d 82, 91 (Me. 1974) (``The rationale of
this
rule lies in the fact that every competent adult has the right
to
forego treatment, or even cure, if it entails what for him
are
intolerable consequences or risks, however unwise his sense

of
values may be to others'').

No material distinction can be drawn between the treatment
to
which Nancy Cruzan continues to be subject--artificial
nutrition
and hydration--and any other medical treatment. See ante, at
2

(O'CONNOR, J., concurring). The artificial delivery of
nutrition
and hydration is undoubtedly medical treatment. The technique
to
which Nancy Cruzan is subject--artificial feeding through a
gas-
trostomy tube--involves a tube implanted surgically into
her
stomach through incisions in her abdominal wall. It may
obstruct
the intestinal tract, erode and pierce the stomach wall or
cause
leakage of the stomach's contents into the abdominal cavity.
See
Page, Andrassy, & Sandler, Techniques in Delivery of
Liquid
Diets, in Nutrition in Clinical Surgery 66-67 (M. Deitel 2d
ed.
1985). The tube can cause pneumonia from reflux of the
stomach's
contents into the lung. See Bernard & Forlaw, Complications
and
Their Prevention, in Enteral and Tube Feeding 553 (J. Rombeau
&
M. Caldwell eds. 1984). Typically, and in this case (see
Tr.
377), commercially prepared formulas are used, rather than
fresh
food. See Matarese, Enteral Alimentation, in Surgical
Nutrition
726 (J. Fischer ed. 1983). The type of formula and method of
ad-
ministration must be experimented with to avoid
gastrointestinal
problems. Id., at 748. The patient must be monitored daily
by
--
medical personnel as to weight, fluid intake and fluid
output;
blood tests must be done weekly. Id., at 749, 751.

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Artificial delivery of food and water is regarded as

medical
treatment by the medical profession and the Federal Government.
According to the American Academy of Neurology, ``[t]he
artifi-
cial provision of nutrition and hydration is a form of
medical
treatment . . . analogous to other forms of life-
sustaining
treatment, such as the use of the respirator. When a patient
is
unconscious, both a respirator and an artificial feeding
device
serve to support or replace normal bodily functions that
are
compromised as a result of the patient's illness.'' Position
of
the American Academy of Neurology on Certain Aspects of the
Care
and Management of the Persistent Vegetative State Patient,
39
Neurology 125 (Jan. 1989). See also Council on Ethical and
Judi-
cial Affairs of the American Medical Association, Current
Opin-
ions, Opinion 2.20 (1989) (``Life-prolonging medical
treatment
includes medication and artifically or technologically
supplied
respiration, nutrition or hydration''); President's Commission
88
(life-sustaining treatment includes respirators, kidney
dialysis
machines, special feeding procedures). The Federal
Government
permits the cost of the medical devices and formulas used in
en-
teral feeding to be reimbursed under Medicare. See Pub.
L.
99-509, 9340, note following 42 U. S. C. 1395u, p. 592
(1982
ed., Supp. V). The formulas are regulated by the Federal
Drug
Administration as ``medical foods,'' see 21 U. S. C. 360ee,
and
the feeding tubes are regulated as medical devices, 21
CFR
876.5980 (1989).

Nor does the fact that Nancy Cruzan is now incompetent
deprive
her of her fundamental rights. See Youngberg v. Romeo,
457

U. S. 307, 315-316, 319 (1982) (holding that severely retarded man's liberty interests in safety, freedom from bodily restraint and reasonable training survive involuntary commitment); Parham v. J. R., 442 U. S. 584, 600 (1979) (recognizing a child's substantial liberty interest in not being confined unnecessarily for medical treatment); Jackson v. Indiana, 406 U. S. 715, 730, 738 (1972) (holding that Indiana could not violate the due process and equal protection rights of a mentally retarded deaf mute by committing him for an indefinite amount of time simply because he was incompetent to stand trial on the criminal charges filed against him). As the majority recognizes, ante, at 16, the question is not whether an incompetent has constitutional rights, but how such rights may be exercised. As we explained in Thompson v. Oklahoma, 487 U. S. 815 (1988), ``[t]he law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain `rights,' to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind.'' Id., at 825, n. 23 (emphasis added). ``To deny [its] exercise because the patient is unconscious or incompetent would

be
to deny the right.'' Foody v. Manchester Memorial Hospital,
40
Conn. Super. 127, 133, 482 A. 2d 713, 718 (1984).

II

A

The right to be free from unwanted medical attention is a
right
to evaluate the potential benefit of treatment and its
possible
consequences according to one's own values and to make a
personal
decision whether to subject oneself to the intrusion. For a
pa-
tient like Nancy Cruzan, the sole benefit of medical treatment
is
being kept metabolically alive. Neither artificial nutrition
nor
any other form of medical treatment available today can cure
or
in any way ameliorate her condition.
Irreversibly vegetative patients are devoid of thought,
emotion
and sensation; they are permanently and completely
unconscious.
See n. 2, supra.
As the President's Commission concluded in approving the
with-
drawal of life support equipment from irreversibly vegetative
pa-
tients:

> [T]reatment ordinarily aims to benefit a patient
> through
> preserving life, relieving pain and suffering, protecting
> against disability, and returning maximally effective function-
> ing. If a prognosis of permanent unconsciousness is correct,
> however, continued treatment cannot confer such benefits. Pain
> and suffering are absent, as are joy, satisfaction, and pleas-
> ure. Disability is total and no return to an even minimal lev-
> el of social or human functioning is possible.'' President's
> Commission 181- 182.

There are also affirmative reasons why someone like Nancy might
choose to forgo artificial nutrition and hydration under
these
circumstances. Dying is personal. And it is profound.
For
many, the thought of an ignoble end, steeped in decay,

is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence. ``In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve.'' Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417, 434, 497 N. E. 2d 626, 635-636 (1986) (finding the subject of the proceeding ``in a condition which [he] has indicated he would consider to be degrading and without human dignity'' and holding that ``[t]he duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity''). Another court, hearing a similar case, noted:

It is apparent from the testimony that what was on [the patient's] mind was not only the invasiveness of life-sustaining systems, such as the [nasogastric] tube, upon the integrity of his body. It was also the utter helplessness of the permanently comatose person, the wasting of a once strong body, and the submission of the most private bodily functions to the attention of others.'' In re Gardner, 534 A. 2d 947, 953 (Me. 1987).

Such conditions are, for many, humiliating to contemplate, as is visiting a prolonged and anguished vigil on one's parents, spouse, and children. A long, drawn-out death can have a debilitating effect on family members. See Carnwath & Johnson, Psychiatric Morbidity Among Spouses of Patients With Stroke, 294 Brit. Med. J. 409 (1987); Livingston, Families Who Care, 291 Brit. Med. J. 919 (1985). For some, the idea of being remembered in their persistent vegetative states rather than as they were before

their illness or accident may be very disturbing.

Although the right to be free of unwanted medical intervention, like other constitutionally protected interests, may not be absolute, no State interest could outweigh the rights of an individual in Nancy Cruzan's position. Whatever a State's possible interests in mandating life-support treatment under other circumstances, there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so. Missouri does not claim, nor could it, that society as a whole will be benefited by Nancy's receiving medical treatment. No third party's situation will be improved and no harm to others will be averted. Cf. nn. 6 and 8, supra.

The only state interest asserted here is a general interest in preserving life. But the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment. ``[T]he regulation of constitutionally protected decisions . . . must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. . . . Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity.'' Hodgson v. Minnesota, ---- U. S. ----, ---- (1990) (Opinion of STEVENS, J.) (slip op., at 14) (emphasis added). Thus, the State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment. There is simply nothing legitimately within the State's

purview to be gained by superseding her decision.

Moreover, there may be considerable danger that Missouri's rule of decision would impair rather than serve any interest the State does have in sustaining life. Current medical practice recommends use of heroic measures if there is a scintilla of a chance that the patient will recover, on the assumption that the measures will be discontinued should the patient improve. When the President's Commission in 1982 approved the withdrawal of life support equipment from irreversibly vegetative patients, it explained that ``[a]n even more troubling wrong occurs when a treatment that might save life or improve health is not started because the health care personnel are afraid that they will find it very difficult to stop the treatment if, as is fairly likely, it proves to be of little benefit and greatly burdens the patient.'' President's Commission 75. A New Jersey court recognized that families as well as doctors might be discouraged by an inability to stop life-support measures from ``even attempting certain types of care [which] could thereby force them into hasty and premature decisions to allow a patient to die.'' In re Conroy, 98 N. J. 321, 370, 486 A. 2d 1209, 1234, (1985). See also Brief for American Academy of Neurology as Amicus Cruae 9 (expressing same concern).

This is not to say that the State has no legitimate interests to assert here. As the majority recognizes, ante, at 17, Mis-

souri has a parens patriae interest in providing Nancy Cruzan,
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now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances. Second, if and when it is determined that Nancy Cruzan would want to continue treatment, the State may legitimately assert an interest in providing that treatment. But until Nancy's wishes
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have been determined, the only state interest that may be asserted is an interest in safeguarding the accuracy of that determination.

Accuracy, therefore, must be our touchstone. Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination. The Missouri ``safeguard'' that the Court upholds today does not meet that standard. The determination needed in this context is whether the incompetent person would choose to live in a persistent vegetative state on life-support or to avoid this medical treatment. Missouri's rule of decision imposes a markedly asymmetrical evidentiary burden. Only evidence of specific statements of treatment choice made by the patient when competent is admissible to support a finding that the patient, now in a persistent vegetative state, would wish to avoid further medical treatment. Moreover, this evidence must be clear and convincing. No proof is required to support a finding that the incompetent person would wish to continue treatment.

The majority offers several justifications for Missouri's heightened evidentiary standard. First, the majority explains that the State may constitutionally adopt this rule to govern determinations of an incompetent's wishes in order to advance the State's substantive interests, including its unqualified interest in the preservation of human life. See ante, at 17-18, and n. 10. Missouri's evidentiary standard, however, cannot rest on the State's own interest in a particular substantive result. To be sure, courts have long erected clear and convincing evidence standards to place the greater risk of erroneous decisions on those bringing disfavored claims. In such cases, however, the choice to discourage certain claims was a legitimate, constitutional policy choice. In contrast, Missouri 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. See supra, at 13-14. Just as a State may not override Nancy's choice directly, it may not do so indirectly through the imposition of a procedural rule.

Second, the majority offers two explanations for why Missouri's clear and convincing evidence standard is a means of enhancing accuracy, but neither is persuasive. The majority initially argues that a clear and convincing evidence standard is necessary to compensate for the possibility that such proceedings will lack the ``guarantee of accurate factfinding that the adversary process brings with it,'' citing Ohio v. Akron Center for Reproduc-

tive Health, ---- U. S. ----, ---- (1990) (upholding a clear and convincing evidence standard for an ex parte proceeding). Ante, at 17. Without supporting the Court's decision in that case, I note that the proceeding to determine an incompetent's wishes is quite different from a proceeding to determine whether a minor may bypass notifying her parents before undergoing an abortion on the ground that she is mature enough to make the decision or that the abortion is in her best interests.

An adversarial proceeding is of particular importance when one side has a strong personal interest which needs to be counterbalanced to assure the court that the questions will be fully explored. A minor who has a strong interest in obtaining permission for an abortion without notifying her parents may come forward whether or not society would be satisfied that she has made the decision with the seasoned judgment of an adult. The proceeding here is of a different nature. Barring venal motives, which a trial court has the means of ferreting out, the decision to come forward to request a judicial order to stop treatment represents a slowly and carefully considered resolution by at least one adult and more frequently several adults that discontinuation of treatment is the patient's wish.

In addition, the bypass procedure at issue in Akron, supra, is ex parte and secret. The court may not notify the minor's

parents, siblings or friends. No one may be present to submit evidence unless brought forward by the minor herself. In contrast, the proceeding to determine Nancy Cruzan's wishes was neither ex parte nor secret. In a hearing to determine the treatment preferences of an incompetent person, a court is not limited to adjusting burdens of proof as its only means of protecting against a possible imbalance. Indeed, any concern that those who come forward will present a one-sided view would be better addressed by appointing a guardian ad litem, who could use the State's powers of discovery to gather and present evidence regarding the patient's wishes. A guardian ad litem's task is to uncover any conflicts of interest and ensure that each party likely to have relevant evidence is consulted and brought forward--for example, other members of the family, friends, clergy, and doctors. See, e. g., In re Colyer, 99 Wash. 2d 114, 133, 660 P. 2d 738, 748-749 (1983). Missouri's heightened evidentiary standard attempts to achieve balance by discounting evidence; the guardian ad litem technique achieves balance by probing for additional evidence. Where, as here, the family members, friends, doctors and guardian ad litem agree, it is not because the process has failed, as the majority suggests. See ante, at 17, n. 9. It is because there is no genuine dispute as to Nancy's preference.