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Competent Persons’ Constitutional Right to Refuse Medical Treatment in the U.S. and Japan: Application to Japanese Law

Naoki Kanaboshi*

I. Introduction**

The goal of this article is to clarify the meaning and scope of the constitutional right to refuse medical treatment in Japan. Once clarified, the constitutional right to refuse treatment could govern the interpretation and application of relevant statutes in certain situations. This thesis posits that the right to refuse treatment is protected under Article 13 of the Japanese Constitution, and that Japanese law must be consistent with the protection of this right.

According to scholars of Japanese constitutional law, the Japanese Constitution protects certain kinds of self-determination. Just as the Fourteenth Amendment to the U.S. Constitution protects certain rights which are not enumerated in the Constitution, Article 13 of the Japanese Constitution also protects some unenumerated rights. Most constitutional law scholars agree that Article 13 protects a spectrum of activity encompassed within “the right to self-determination.” Those

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** Editor’s Note: As a service to our readers, the Editorial Board normally checks cited material for both “Bluebook” form and substance. This article, however, relies extensively on sources available only in Japanese, which were unable to be “source-checked” in the traditional law review sense. The sources have been checked for “Bluebook” form.
acts of self-determination that are important for personhood enjoy a high degree of protection.\(^1\) Although an increasing number of constitutional scholars agree that the right to refuse medical treatment is a constitutional right, the discussion stops there and there seems little exploration on what this right means and requires. The lack of the recognition of the concrete meaning and scope of this right has arguably prevented it from being properly invoked outside of the discussions of constitutional law scholars. When leading criminal law scholars consider the criminality of a physician’s accepting her patient’s refusal of life-sustaining treatment, they seem to do so without considering the consistency of their arguments with the Constitution. Even when they mention this constitutional right, their arguments seem to allow the right to be easily outweighed by the government’s countervailing interests.\(^2\)

This article attempts to rectify this deficiency by showing the justifications for and scope of the right to refuse treatment under the Constitution of Japan. This article finds that this right generally prevails over significant state interests. It also finds that a patient’s life-expectancy or prognosis is not relevant to whether the right may be exercised, at least when the patient is competent. This article concludes that Japanese criminal law theories are too restrictive of the right to refuse treatment; therefore, they are not consistent with Article 13 and should be modified accordingly.

Part II of this article examines the basis of the constitutional protection of the right to refuse medical treatment. The discussion that has taken place in the United States about this right reveals that the right to refuse treatment, including life-sustaining treatment, is based on the value of autonomy in authoring one’s life, as well as the value of bodily integrity.

Part III considers the scope of the constitutional right to refuse treatment. It examines the American courts’ attitude toward the state’s countervailing interests and concludes that the constitutional right to refuse treatment generally outweighs the state interests. It finds, above all, that a competent patient’s constitutional right to refuse treatment is protected regardless of the patient’s life-expectancy or prognosis, and that refusal of treatment is not attempted suicide.

Part IV applies this right to Japanese law. It shows that this right is applicable to Japanese law through Article 13 of the Constitution of Japan, an article that has a role similar to the Due Process Clause. It critiques the arguments that have been offered against this constitutional right and that are inconsistent with the scope of the constitutional

\(^1\) See infra Part IV.A.1.
\(^2\) See infra Part IV.B.3.
protection of this right.

Although the discussion in this article may serve as a basis for further exploration with respect to the possibility of similar constitutional protection for certain incompetent persons, this article limits its focus to competent persons.

II. The Constitutional Right to Refuse Medical Treatment in the United States

The right to refuse medical treatment in the United States finds firm support in court precedent, as well as in moral and legal theories provided by commentators. This Part of the article explains two theoretical bases of this right: (i) autonomy in authoring one’s life and (ii) autonomy in controlling one’s body.

The Due Process Clause of the Fourteenth Amendment provides, “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”3 The substantive due process doctrine holds that some rights that are not explicitly written in the Constitution still are granted substantive protection under this Clause. It has been explained that such rights constitute “liberty” in the text of this Clause. As such, these rights are often called “liberty interests.”4

Under the U.S. Constitution, the Due Process Clause of the Fourteenth Amendment substantively protects both types of autonomy from state action but in separate lines of case law. Those cases that involve interests such as child rearing, procreation, abortion, and intimate relationships justify constitutional protection for these interests based upon the first kind of autonomy, autonomy in authoring one’s life. These protected interests are often described as fully with the scope of the “right to privacy.” Section A explains that constitutional protection for the refusal of medical treatment, particularly the refusal of life-sustaining treatment, is justified as autonomy in one’s life.

The second kind of autonomy, bodily autonomy, also referred to as bodily freedom, means freedom to choose whether to accept outer control of or invasion into one’s body. The Due Process Clause substantively protects this interest as well. The right to refuse medical treatment is freedom from unwanted medical control or invasion into one’s body.

A. Personal Autonomy in Authoring One's Life

The Supreme Court has clarified that the Due Process Clause protects autonomy in authoring one’s life. This kind of autonomous decision making can be rephrased as autonomous life choices, choices allowing for a person to be the “maker or author of his own life,” or as autonomous choices that allow people “to lead their lives out of a distinctive sense of their own character, a sense of what is important to and for them.” An individual’s status as the author of her own life gives her identity and personhood.

This Section shows that the value of autonomy in authoring one’s life justifies the constitutional protection of the right to refuse medical treatment, especially refusal of life-sustaining medical treatment, and that the Due Process Clause protects such choices.

1. Precedent

Constitutional protection of autonomy in authoring one’s life overlaps with the history of the right to privacy. The right to privacy stems from a famous article by Samuel D. Warren and Louis D. Brandeis describing the right to privacy as “the right to be let alone.” In this 1890 article, the authors proposed the notion of the right to privacy as the motivating force underlying such traditionally protected interests as an individual’s right to prevent disclosure of information relating to his or her personal affairs, his or her right to control the use of his image, and an author’s right to control his or her personal intellectual product. In this article, the authors explained the protection of a person’s private information in terms of importance to her personhood. Specifically, this article argued for the need to recognize this interest as a right to be indicated in tort.

In 1928, Brandeis, then a Justice of the Supreme Court, discussed the right to privacy in his dissenting opinion in *Olmstead v. United States.* In this case, the majority opinion held that police wiretapping

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9. *Id.* at 193.
of telephone conversations did not constitute search and seizure under the Fourth Amendment. Justice Brandeis’ dissent argued the right to privacy protects individuals not only from private parties, but also from the government. He wrote, the makers of the Constitution, in order to protect people from governmental infringements on their beliefs, thoughts, emotions, and sensations, conferred under the Fourth Amendment "the right to be let alone—the most comprehensive of rights and the rights most valued by civilized men."]

Since that time the right to privacy has developed beyond the Fourth Amendment. Its scope now encompasses not only private information or places but also private decision making essential to authoring one’s life or to one’s personhood, protected under the Due Process Clause.

In the 1920s, during the period in which the Court applied its laissez faire theory and invalidated several economic and social legislations, it also struck down statutes deemed to infringe on autonomy in one’s life choices. In Meyer v. Nebraska, the Court invoked the Due Process Clause to strike down a state statute that prohibited the teaching of foreign languages to students who had not passed the eighth grade. The Court stated that substantive protection of the Clause denotes both freedom from bodily restraint and such essential freedoms as engaging in occupations, acquiring knowledge, establishing a home, child rearing, and worshipping.

Two years later, in Pierce v. Society of Sisters, the Court struck down a state statute requiring all students to attend public schools. Applying Meyer, the Court held that the statute infringes on the parents’ and guardians’ right to direct the upbringing and education of their children.

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11. Id. at 466.
12. Id. at 478 (Brandeis, J., dissenting).
13. See Lochner v. New York, 198 U.S. 45, 75 (1905) (Brandeis, J. dissenting) (“This case is decided upon an economic theory which a large part of the country does not entertain.”).
16. Id. at 399.
18. Id. at 534-35. In Toxel v. Granville, 530 U.S. 57 (2000), the plurality opinion and concurring opinions concluded that a court order giving grandparents a visitation right over the parents’ opposition was unconstitutional. The plurality of four justices cited cases including Meyer and Pierce and held that parents have a substantive due process right to child rearing without governmental intervention. Id. at 65-66 (plurality opinion), and the four other justices generally agreed on this issue. Id. at 77-79 (Souter, J., concurring in the judgment), 80 (Thomas, J., concurring in the judgment), 86-87
With the end of the *Lochner* era,\textsuperscript{19} the Court no longer relied on the Due Process Clause as the basis for substantive protection of interests not explicitly written in the Constitution. In *Skinner v. Oklahoma*,\textsuperscript{20} the Court struck down a statute that required sterilization of a person who committed a felony two or more times. In this case, the Court applied the Equal Protection Clause and held that the distinction between those who committed grand larceny, who would be sterilized, and embezzlers, who were immunized from sterilization, violated the right to equal protection.\textsuperscript{21} By applying an equal protection analysis the Court avoided using the Due Process Clause to recognize a substantive right to procreation. Still the Court called marriage and procreation a "basic liberty,"\textsuperscript{22} and later cases described *Skinner* as recognizing marriage and procreation as constitutional rights because of their importance in forming one's life.\textsuperscript{23}

In *Griswold v. Connecticut*,\textsuperscript{24} the Court recognized a married couple's constitutional right to use contraceptives. Again, the Court did not invoke the Due Process Clause but instead explained that this right is protected by a penumbra "formed by emanations" from the First, Third, Fourth, Fifth, and Ninth Amendments.\textsuperscript{25} The Court stated that these penumbras create a zone of privacy which the government cannot enter, and that the marriage relationship is in this zone.\textsuperscript{26} The Court stressed the significance of a private place such as the marital bedroom rather than personal choices such as whether to procreate, but the Court came to focus more on autonomous choices in later cases. In addition to the change in focus from place to choices, the later cases resumed the development of substantive due process theory.

Two years later in *Loving v. Virginia*,\textsuperscript{27} the Court held that prohibitions against interracial marriage violated both the Equal Protection Clause and the Due Process Clause. As for the equal protection analysis, the Court found that such a prohibition constitutes "invidious" racial discrimination and applied strict scrutiny.\textsuperscript{28} It
concluded that the state showed no legitimate overriding purpose in justifying the prohibition and therefore invalidated the statute. As for the Due Process Clause, the Court’s two-paragraph discussion was very brief, but the Court suggested that this Clause also substantively protects the right to choose whether to marry. The court stated that “the freedom to marry or not marry” is “one of the basic civil rights of man,” and “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”

In *Eisenstadt v. Baird*, the Court invalidated a statute that made it a crime to give contraceptives to unmarried persons because the statute denied by distinguishing between married and unmarried people equal protection. Here, the Court went beyond *Griswold* and articulated the right to privacy as encompassing individual’s choices which are important to his or her personhood:

> If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

The following year, in *Roe v. Wade*, the Court held that the right to privacy includes a woman’s right to terminate a pregnancy and that this right is protected by the Due Process Clause. In *Roe*, the Court explained the importance of having the freedom to choose an abortion for a woman as an author of her own life by stressing the impact of an unwanted child to her health and her future life.

In *Carey v. Population Services International*, the Court struck down a state statute that prohibited the sale of nonmedical contraceptives, the advertisement and display of contraceptives, and sales of contraceptives to minors except by physicians. In its opinion, the Court suggested that the outer limits of the right to privacy may not be

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29. *Id.* at 11-12.
30. *Id.* at 12 (quoting *Skinner*, 316 U.S. at 541 (internal quotation marks omitted)).
31. *Id.* at 12. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court characterized marriage as “the most important relation in life,” and as ‘the foundation of the family and of society, without which there would be neither civilization nor progress.’ *Id.* at 384 (quoting *Maryland v. Hill*, 125 U.S. 190, 205, 211 (1888)).
33. *Id.* at 519.
34. *Id.* at 453 (emphasis in original).
36. *Id.* at 153.
37. *Id.* (pointing out psychological, mental and physical harm and other negative impacts caused by an unwanted child for a woman).
limited to the interests protected in the above cases. The Court stated that it is clear that the right to privacy includes personal decisions connected with marriage, procreation, contraception, family relationships, and child rearing and education.\(^3\)

In *Bowers v. Hardwick*,\(^4\) the Court sustained a state statute that criminalized homosexual conduct, framing the issue as whether the Constitution protects the right to homosexual sodomy.\(^4\) The Court decided that the right to privacy recognized in past cases did not encompass the right to homosexual sodomy. The Court explained that the interests protected by precedents are child rearing, education, family relationships, procreation, marriage, contraception, and abortion.\(^4\) The Court then considered whether homosexual sodomy merited protection under the substantive due process doctrine, and whether it was "deeply rooted in this Nation’s history and tradition."\(^4\) In light of the history of prohibitions of homosexual conduct,\(^4\) the Court concluded that homosexual conduct did not satisfy its new standard.\(^4\)

The Court’s opinion in *Hardwick* suggested an end to privacy jurisprudence based on substantive due process.\(^4\) This inference was strengthened by *Hardwick’s* reliance on "history and tradition" as seemingly the only permissible standard by which to identify which rights ought to be protected under substantive due process. It was believed that, if applied, this standard might well fail to encompass abortion rights.\(^4\)

Later cases, however, revealed that a majority of justices have not considered this standard to be exclusive. Liberal justices have

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39. *Id.* at 685.
41. *Id.* at 190.
42. *Id.* at 190-91.
43. *Id.* at 192, 194. The Court has cited history and tradition as one of the standards to determine whether certain interests can be considered as substantive due process rights. These standards, first used to decide which rights in the Bill of Rights were to be incorporated into the Fourteenth Amendment, *see* Snyder v. Massachusetts, 291 U.S. 97 (1934), are now used to determine substantive rights not written in the Constitution. After *Hardwick*, some Justices argued that the history and tradition standard is the only factor to be used to recognize substantive due process rights. *See* Michael H. v. Gerald D., 491 U.S. 110, 122-23 (1989) (plurality opinion); Reno v. Flores, 507 U.S. 292, 303 (1993); Washington v. Glucksberg, 521 U.S. 702, 710 (1997).
44. *Hardwick*, 478 U.S. at 192-94 & nn.5-6. *See* *id.* at 196-97 (Berger, C.J., concurring) (stressing the history that condemns homosexual conduct).
45. *Id.* at 194 (majority opinion).
47. *See* *id.* at 226-228 (arguing that the Court’s history and tradition approach is not consistent with *Roe*).
considered history and tradition as merely one of the applicable standards. The centrist justices, such as Justices O'Connor and Kennedy, have recognized that history is primary standard but is not the only factor to consider.

Indeed, later substantive due process cases such as Planned Parenthood of Southeastern Pennsylvania v. Casey continued to emphasize the importance of autonomy in determining one's own life and personhood. In Casey, the Court affirmed the central holding of Roe and again found the right to abortion to be a constitutional right protected under the Due Process Clause. The Court explained the value of the personal decisions protected in precedents as a right to privacy, invoking the notion of personal dignity and authoring of one's life.

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

In this case, the Court applied the "undue burden" test instead of strict scrutiny to the regulation of abortion before viability, and struck down the spousal notification requirement that obligated a married woman to notify her spouse about her intent to get an abortion, while upholding various other abortion restrictions.

More recently, in Lawrence v. Texas, the Court overruled Bowers v. Hardwick and struck down a state statute that criminalized homosexual conduct as applied to activities occurring between consensual adults at home. The Court noted the importance of autonomy in one's personal life as essential for preserving rights of the individual, regardless of sexual orientation, and recognized that a homosexual

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48. Cruzan, 497 U.S. at 304 (Brennan, J., dissenting) ("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.") (emphasis added).

49. See Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.") (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).


51. Id. at 851.

52. See id. at 887-98.

53. Id. at 879-87, 899-901 (plurality opinion).


55. Id. at 573-74. The Court also stated that such protection serves "their dignity as
relationship is "within the liberty of persons to choose without being punished as criminals." 56

In *Cruzan v. Missouri, Department of Health*, 57 the only Supreme Court case to squarely grapple with the constitutional dimension of refusing life-sustaining medical treatment, the Court held that the state could require clear and convincing evidence before permitting the withdrawal of artificial nutrition and hydration from a patient. In *Cruzan*, the patient was a woman who fell into a permanent vegetative state after a car accident and was hospitalized in a state hospital. The evidence showed that she had virtually no possibility of recovery from this state, but that she could survive for thirty years with artificial nutrition and hydration. 58 Her parents sought authorization to remove her life support, but the Missouri Supreme Court refused their request. The court required clear and convincing evidence that the patient would want to forego artificial nutrition and hydration 59 and found that such evidence had not been offered. 60 The U.S. Supreme Court held the state court's requirement of clear and convincing evidence was constitutional.

In its opinion, the Supreme Court recognized that a competent person has a right to refuse medical treatment. The Court based this determination primarily upon the precedents that recognized due process protection of bodily freedom. 61 At the same time, the Court stressed the importance of autonomous choices at the end of life. Since the decision to refuse life-sustaining treatment directly involves life and death, and because the decision of how to spend the last days of one's own life is a choice of how to conclude one's life, the choice of whether to refuse life-sustaining treatment implicates personal autonomy in authoring one's life. The Court in *Cruzan* recognized this, stating, "the choice between life and death is a deeply personal decision of obvious and overwhelming finality." 62 Because of this aspect of end-of-life decision making, the Court stressed the state's role in protecting the personal element of this right. 63 The Court implied that because of the importance of choosing between life and death for one's personhood and for the meaning of one's whole life, the patient's wish deserves respect.

Separate opinions in *Cruzan* reinforced this principle. Justice

56. Id. at 567.
58. Id. at 267-68 & n.l.
60. Id. at 424, 426.
61. See infra Part II.B.1.
62. *Cruzan*, 497 U.S. at 281; *Glucksberg*, 521 U.S. at 725 (stating that the decision to refuse unwanted medical treatment is personal and profound).
O'Connor wrote, "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water." Justice Stevens most clearly indicated that the personal nature of death provides the basis for protection of the right to refuse life-sustaining medical treatment. "Because death is so profoundly personal, public reflection upon it is unusual." Justice Stevens continued:

Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality... indeed are essential incidents of the unalienable rights to life and liberty endowed us by our Creator. The more precise constitutional significance of death is difficult to describe; not 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. We may also, however, justly assume that death is not life's simple opposite, or its necessary terminus, but rather its completion. Our ethical tradition has long regarded an appreciation of mortality as essential to understanding life's significance. It may, in fact, be impossible to live for anything without being prepared to die for something.

Thus, the privacy cases and the Cruzan decision clearly show that the right to refuse medical treatment, particularly life-sustaining treatment, is justified by the value of personal autonomy in authoring one's life.

Seven years after Cruzan, in Washington v. Glucksberg and Vacco v. Quill, in which the Court declined to recognize a general right to suicide or assisted suicide, including for terminal patients, the Court again recognized the constitutional protection of refusing life-sustaining treatment.

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64. Id. at 289 (O'Connor, J., concurring).
65. Id. at 339 (Stevens, J., dissenting).
66. Id. at 343 (quoting Snyder, 291 U.S. at 105).
67. Cruzan, 497 U.S. at 343-44. See also id. at 310-11 (Brennan, J., dissenting) ("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 re Jobes, 529 A.2d 434, 451 (N.J. 1987) ("[T]he fateful decision to withdraw life-supporting treatment is extremely personal. Accordingly, a competent patient's right to make that decision generally will outweigh any countervailing state interests."); State v. Pelham, 824 A.2d 1082, 1088 (N.J. 2002) (same).
70. Glucksberg, 521 U.S. at 720; Vacco, 521 U.S. at 807. In this case, the five concurring justices, and the majority opinion to a lesser extent, suggested that there could be limited circumstances where the Constitution demands allowance for physician assisted suicide. Justice O'Connor's opinion, supported by Justices Breyer and Ginsburg, pointed out that there remains an answered question whether suffering patients have a
The Court distinguished refusal of life-sustaining treatment from physician assisted suicide in the following ways. First, it identified a difference in cause and effect; the patient who refuses life-sustaining medical treatment dies from the underlying disease, whereas the patient who takes prescribed lethal medication is killed by that medication. Second, the Court identified a difference in intent—the patient who refuses the medical treatment may not have specific intent to die, whereas the patient who commits suicide with a doctor's assistance necessarily has it. The Court also stressed the right to refuse medical treatment has a firmer constitutional basis than physician assisted suicide in that the former can also be justified as bodily freedom.

Accordingly, the Court in Glucksberg and Vacco declined to rely on the value of autonomy in one's life story to justify the right to physician assisted suicide. Nevertheless, the value of autonomy in one's life choices has been a substantial basis for the Court's jurisprudence in substantive due process and right to privacy cases. This autonomy justifies, and the constitutional substantive due process protection and the right to privacy include, the right to refuse medical treatment, especially the right to refuse life-sustaining medical treatment.

2. Commentators' Views on the Constitutional Protection of the Right to Refuse Treatment

The idea that substantive due process and right to privacy protections include the right to refuse medical treatment, especially life-sustaining medical treatment, is supported by scholarly commentary. Academic studies have articulated the nature of the right to privacy as encompassing essential personal choices for one's life and personhood. These studies have recognized that the right to refuse life-sustaining treatment is part of the right to privacy, i.e., an essential choice related to constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives." Glucksberg, 521 U.S. at 737 (O'Connor, J., concurring). Justice Breyer also suggested that if the patient is in severe pain which cannot be removed from the legally available medications, it may be necessary to consider whether the "right to die with dignity" is a constitutional fundamental right. Id. at 791 (Breyer, J., concurring in the judgment). Justice Souter's concurring opinion stated "I do not decide for all time that respondents' claim should not be recognized." Id. at 789 (Souter, J., concurring in the judgment). Justice Stevens emphasized that there is a possibility that some application of the statute prohibiting assisted suicide when applied to physician assisted suicide is unconstitutional, Glucksberg, 521 U.S. at 739 (Stevens, J., concurring in the judgment), and the majority agreed on this point. Id. at 735 n.24 (majority opinion).

71. Vacco, 521 U.S. at 801.
72. Id. at 802.
73. Id. at 715. Bodily freedom is discussed in Part II.B infra.
authoring one's life and to one's personhood.

In 1964, just before *Griswold*, Professor Edward J. Bloustein argued that the fundamental principle common to the legal protection of privacy under tort and non-tort laws, particularly constitutional law, is to give respect for human dignity, personality, and individuality. Professor Jeffery H. Reiman also argued that the right to privacy is essential to one's personhood and existence. He stated, "the right to privacy is fundamentally connected to personhood." He argued that privacy is a "social ritual" by which a society recognizes a person's existence and thereby the person establishes his personhood.

Professor David A.J. Richards extensively discussed the meaning and underlying values of the right to privacy and argued that the right to privacy consists of personal autonomy essential to forming and defining one's life. Based upon this meaning of the right to privacy, he then argued that the right to privacy includes one's decision making about how to die.

Professor Richards begins his argument by explaining the constitutional right to privacy in terms of inalienable human rights. This notion is the basis of American constitutionalism: the respect for human rights gives legitimacy to political power, and the notion of human rights is the basis for interpreting the Constitution. According to Professor Richards, the notion of human rights consists of two components: autonomy and treating persons as equals.

In regard to autonomy, Professor Richards' argument begins by distinguishing between higher-order and lower-order desires. The latter are simply desires to do or not do something based on pleasure or talent, which other non-human animals can also have. In contrast, only human

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75. *Id.*
76. *Id.* at 997.
78. *Id.* at 39 (emphasis omitted). Professor Charles Fried and Justice Stevens agree with Professor Reiman. *See* Charles Fried, *Correspondence*, 6 Phil. & Pub. Aff. 288 (1977); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (quoting *Charles Fried, Right and Wrong* 146-47 (1978)). Professor Reiman also says, "[P]rivacy is necessary to the creation of selves out of human beings, since a self is at least in part a human being who regards his existence—his thoughts, his body, his actions—as his own." Reiman, *supra* note 77, at 39.
80. RICHARDS, *supra* note 6, at 32 ("[T]he idea of human rights is the necessary hermeneutical principle that alone enables us to understand how it is that constitutional provisions have any meaning at all.").
beings have personhood,\textsuperscript{81} or the complex capacity for reflective self-evaluation,\textsuperscript{82} a capacity that allows them "self-critically to evaluate and give order and personal integrity to one's system of ends in the form of one's life."\textsuperscript{83} These capacities permit persons to take ultimate responsibility for how they live their lives.\textsuperscript{84} Treating persons as equals is another element of human rights.\textsuperscript{85} Richards avers that the idea of human rights indicates that all persons' capacities for autonomy have equal value.\textsuperscript{86} Based on this notion of human rights, which is embodied by the right to privacy and the provisions of the Bill of Rights, Richards suggests that the right to privacy includes autonomous basic life-plan choices; choices which define the meaning of one's life.\textsuperscript{87}

Richards argues that this right to privacy includes one's decision to die in certain circumstances, including the right to refuse life-sustaining treatment. He justifies this conclusion by pointing out that the consideration of how to die is an essential life choice. The meaning of life is considered important because of our inevitable death.\textsuperscript{88} "If personhood gives us the capacity of higher-order reflection on and evaluation of our system of ends and how they cohere in life, the terms of that reflection and evaluation are posed by the thought of our death . . . and by the need to make sense of it."\textsuperscript{89} Because of our self-consciousness about our whole life including death and because death frustrates the projects we set in the center of our lives,\textsuperscript{90} "making sense of death appears to be an inexorable part of making sense of life." In other words, "If death is senseless, life may be senseless too."\textsuperscript{91} Based upon this recognition, he argues that a person who has a right to define the meaning of one's life should have a corollary right to define the meaning of their death.\textsuperscript{92}

Professor Ronald Dworkin also argues for protecting the right to refuse life-sustaining treatment as autonomy in authoring one's life. Similar to Richards' distinction between higher-order decisions and lower-order preferences, Professor Dworkin divides people's interests
into experiential interests and crucial interests. The experiential interests are those whose value is determined by the fact that they offer pleasurable or exciting experiences. They can also be called "experiential preferences," and include such activities as playing softball, watching a football game, or listening to music. On the other hand, the critical interests people have are those that "make their life genuinely better to satisfy." An example of this is someone's close relationship with his children; this has value not just because one desires this experience, but also because one believes a life without it would be a much worse one.

Professor Dworkin argues how we die is a matter critical to the success of our whole life. It is critical in two ways. First, how we die is a critical question because death is part of our life and every part of our life is important. Second, death is a peculiarly important event as it is at the climax of one's life, and thus has important symbolic meaning.

The first aspect suggests that control of the manner of our death is critical to forming our lives. Both the memory a patient leaves to surrounding people and a patient's fear of dependence involve her dignity. A patient's sense of integrity and coherence in her life is intimately related to his decision whether to continue to live.

The second aspect underscores the importance of controlling the manner in which we die. Dworkin states, "There is no doubt that most people treat the manner of their deaths as of special, symbolic importance: they want their death, if possible, to express and in that way vividly to confirm the values they believe most important to their lives." Some want to die in battle while others would prefer to die in bed; some want to keep living, despite being in severe pain, for a crucial event such as birth of a grandchild. Others want to avoid prolonged life in a permanent vegetative state because such a manner of death might express an idea they abhor: that mere biological life has independent value.

Professor Dworkin's above argument does not directly refer to the Constitution. But if the Due Process Clause substantively protects

93.  DWORKIN, supra note 6, at 201-08.
94.  Id. at 201.
95.  Id. at 202.
96.  Id. at 201.
97.  Id.
98.  DWORKIN, supra note 6, at 202.
99.  Id. at 209.
100.  Id. at 210.
101.  Id.
102.  Id. at 211.
103.  Id. at 211-12.
various autonomous choices that are essential for authoring one's life, Professor Dworkin's explanation of the critical importance of certain end-of-life decision making justifies the protection of one's right to refuse medical treatment under the Clause.

Professor Dan W. Brock justifies respect for one's refusal of life-sustaining treatment based on the value of individual autonomy and individual well-being. His discussion also gives a basis for constitutional protection of the right to refuse life-sustaining treatment as autonomy in authoring one's life. Professor Brock argues that the value of self-determination is explained by its role in permitting "people to form and live in accordance with their own conception of a good life" and, in exercising self-determination, to let "people take responsibility for their lives and for the kinds of persons they become." People's capacity to control their lives in this way lies at the center of human dignity. Brock argues that the value of individual self-determination includes end-of-life decision making; he notes that people's concern about the nature of the last stage of their lives "reflects not just a fear of experiencing substantial suffering when dying, but also a desire to retain dignity and control during this last period of life."

The second basis of the right to refuse life-sustaining treatment is individual well-being. For competent persons, the value of well-being does not conflict with the value of self-determination, because patients' well-being is determined by the patient herself. Brock says, "when a competent patient decides to forgo all further life-sustaining treatment then the patient, either explicitly or implicitly, commonly decides that the best life possible for him or her with treatment is of sufficiently poor quality that it is worse than no further life at all."

104. Dan W. Brock, Voluntary Active Euthanasia, 22 HASTINGS CTR. REP. 10, 11 (1992). See also James F. Childress, When Is It Morally Justifiable to Discontinue Medical Nutrition and Hydration?, in BY NO EXTRAORDINARY MEANS: THE CHOICE TO FORGO LIFE-SUSTAINING FOOD AND WATER 67, 69 (Joanne Lynn ed., Expanded ed. 1989) ("Apart from constraints set by scarcity and principles of justice in the allocation of resource . . . the fundamental moral principles for decisions about withholding or withdrawing medical treatments that prolong life are (1) beneficence . . . and (2) respect for persons, often stated in terms of autonomy.").

105. Brock, supra note 104, at 11.

106. Id.

107. Id.

108. Id.

109. Id. See also H. TRISTRAM ENGELHARDT, JR., THE FOUNDATIONS OF BIOETHICS 340 (2d ed. 1996) ("The principle of permission sustains the secular moral right of free individuals for better or worse to choose their own ways of living and dying. In fact, the principle of beneficence, from the general perspective of secular ethics, gains content only in terms of such choices, for such choices fashion concrete visions of meaning and purpose.").
3. Alternative View on the Right to Privacy and Its Justification of the Right to Refuse Medical Treatment

After *Bowers v. Hardwick* and *Glucksberg*, some commentators provided alternatives to the idea of the right to privacy as a right to autonomy in authoring one's life or defining one's personhood. Even under one of these alternative views, the right to refuse treatment can be justified.

Professor Jed Rubenfeld suggests, as an alternative to the personhood principle that justifies the right to privacy based on its importance in personhood or formation of one's life, the view that the right to privacy is a "fundamental freedom not to have one's life too totally determined by a progressively more normalizing state." Under his approach, for example, the abortion ban would violate the right to privacy not because of the importance of choice of abortion for one's personhood, but rather because such a ban forces an identity as motherhood for a long period of time and shapes a woman's mind in a certain way through a bodily restraint called pregnancy. The refusal of life-sustaining medical treatment is also protected under Rubenfeld's approach. He argues that a ban on the refusal of life-sustaining treatment would force a patient into a rigidly standardized, almost completely occupied life on a hospital bed and would control the patient's bodily functions with an external agency against the patient's will.

Professor Louis Shepherd explains the right to privacy with what he calls a "meaning thesis." He says, "The meaning thesis suggests that the right of privacy should guarantee to individuals the right to make decisions that will profoundly affect the meaning they will find in their lives." Professor Shepherd proposes replacing the so-called "personhood thesis" that considers the right to privacy as consisting of important determinations to one's identity and personhood with the

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110. Jed Rubenfeld, *The Right of Privacy*, 102 *Harv. L. Rev.* 737, 784 (1989). He also rephrases that if the law makes a "totalitarian" intervention into one's life, the law violates the right to privacy. *Id.* at 787. In Japan, the academics take the conventional approach in the U.S. and consider what unenumerated right is constitutionally protected under the Article 13. However, there is a commentator that takes similar position to Professor Rubenfeld. Professor Ken Nemori argues that Article 13 provides for a right not to have the government infringe one's dignity. Ken Nemori, *Jinken to shite no Kojin no Songen [Dignity of Individuals as a Constitutional Human Right]*, 175 *Hogaku Kyoshitsu* 52, 54 (1995).

111. See *id.* at 788.

112. *Id.* at 788-89.

113. *Id.* at 795.

meaning thesis. He criticizes the personhood thesis, claiming among other things that it is backward-looking, writing, "Under the personhood thesis decisions define what already is, rather than what will be; decisions reflect who a person already is rather than form who that person will become." Then he argues that his "meaning thesis" is superior insofar as it "suggests that the right of privacy should guarantee to individuals the right to make decisions that will profoundly affect the meaning they will find in their lives."

Despite Professor Shepherd's assertions, this definition is substantially the same as the personhood thesis. This is because the personhood thesis considers that certain autonomous choices are important not only because they are important to retain one's current personhood but also because they affect one's future personhood. Indeed, it has been explained that the constitutional protection of an intimate association, for example, is important partly because "[f]or most of us, our intimate associations are powerful influences over the development of our personalities." It has been explained that the decision to have a child is important because "[t]o become a father or mother is to assume a new status, a new identity in the eyes of oneself and others."

In addition, Professor Shepherd argues that under the meaning thesis respect for one's decision concerning whether to continue a life is not justified because "death is the opposite of life... Death is not meaning and it is not life." Professor Shepherd's thesis fails to recognize the salient difference between being dead as a status and entering death as the completion of one's life. Moreover, it is obvious that death is not meaningless to one's life. As Professor Richards discussed, death and mortality lead a person to form one's life project; this project, and living according to it, give meaning to life.

The above cases and most academic studies support the thesis that the refusal of medical treatment, especially life-sustaining treatment, is protected under the Due Process Clause because such decision making is an essential autonomous choice intimately connected with the patient's authorship of her life. The next Section argues that refusal of medical treatment more generally is protected under the Due Process Clause.

115. See id. at 266-74, 301-03.
116. Id. at 272.
117. Id. at 301.
119. Id. at 637.
120. Shepherd, supra note 114, at 310.
121. Richards, supra note 6, at 249.
because this choice is a part of bodily autonomy/freedom, which is at the core of due process protection.

B. Bodily Freedom

As discussed in Part II.A.1 of this article, the U.S. Supreme Court has recognized the right to refuse medical treatment, especially life-sustaining treatment, as an element of an individual’s autonomy in authoring his own life. The right to refuse medical treatment in a broader context, however, is also justified by consideration of bodily freedom. For example, several recent Court cases have recognized competent persons’ right to refuse antipsychotic medication. This Section examines and analyzes the Court cases that articulate an interest in bodily freedom derived from the Fourteenth Amendment and other constitutional provisions. This Section then explores the right to refuse medical treatment in the state courts, in which the right to refuse treatment is seen as a logical corollary to the informed consent doctrine developed in common law as a means to protect a patient’s bodily integrity.

1. Supreme Court Cases on Bodily Freedom

The Court has justified the right to refuse treatment based upon the constitutional protection of bodily integrity. In Cruzan,122 the Court based the right to refuse medical treatment upon bodily integrity as well as on autonomy in authoring one’s life. Referring to the Supreme Court’s precedent on bodily freedom including cases that involve involuntary vaccination,123 involuntary blood tests,124 involuntary transfer of prisoners to mental institutions,125 and corporal punishment in public school,126 the Court recognized “[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.”127

Cruzan relied on Washington v. Harper,128 which was decided in the same term. Harper involved a prison inmate’s refusal of antipsychotic medication. The Court upheld a prison regulation that allowed for the forceful medication of inmates without a prior hearing, relying on Turner v. Safley,129 which held that in the prison setting restrictions on

127. Cruzan, 497 U.S. at 278.
constitutional rights are scrutinized with a reasonable relationship test.\textsuperscript{130} Harper, however, affirmed that there is "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause."\textsuperscript{131} The Court in Harper also held that "[t]he forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty."\textsuperscript{132} The Court justified this right based on the aforementioned precedent recognizing bodily freedom.\textsuperscript{133}

In Riggins v. Nevada,\textsuperscript{134} the Court reversed the conviction of a defendant who was involuntarily treated with an antipsychotic drug during the trial. The Court stated that the "interest in avoiding involuntary administration of antipsychotic drugs was protected under the Fourteenth Amendment’s Due Process Clause."\textsuperscript{135} The Court stated that only an overriding state interest will suffice to outweigh the individual liberty implicated.\textsuperscript{136} It held that at least when the defendant is competent for trial without such medication, the state should prove that "treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of the defendant’s own safety or the safety of others."\textsuperscript{137}

Most recently in Sell v. United States,\textsuperscript{138} the Court articulated the conditions that are prerequisites for the government to constitutionally compel the administration of antipsychotic medication for the purpose of making a detainee competent for trial. Such forced administration is allowed when the involuntary administration will significantly further important governmental interests, such as the interest in bringing to trial

\begin{itemize}
  \item \textsuperscript{130} Harper, 494 U.S. at 223 (citing Turner, 482 U.S. at 89).
  \item \textsuperscript{131} Id. at 221-22. \textit{See also} id. at 237-38 (Stevens, J., dissenting) ("Every violation of a person’s bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death. Moreover, any such action is degrading if it overrides a competent person’s choice to reject a specific form of medical treatment. And when the purpose or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense.").
  \item \textsuperscript{132} Id. at 229 (majority opinion).
  \item \textsuperscript{133} Vitek, 445 U.S. at 488-01 (freedom from institutionalization in a mental health facility); Youngberg v. Romeo, 457 U.S. 307, 315-19 (1982) (freedom from physical restraint and basic training to avoid incurring injury in a state facility)); Parham v. J.R., 442 U.S. 584, 600-01 (1979) (freedom from confinement for medical treatment).
  \item \textsuperscript{134} Riggins v. Nevada, 504 U.S. 127 (1992).
  \item \textsuperscript{135} Id. at 134.
  \item \textsuperscript{136} Id. at 135. \textit{See} Sell v. United States, 539 U.S. 166, 178-79 (2003) ("In Riggins, the Court repeated that an individual has a constitutionally protected liberty ‘interest in avoiding involuntary administration of antipsychotic drugs’—an interest that only an ‘essential’ or ‘overriding’ state interest might overcome.").
  \item \textsuperscript{137} Riggins, 504 U.S. at 135.
  \item \textsuperscript{138} Sell v. United States, 539 U.S. 166 (2003).
\end{itemize}
an accused person of a serious crime;\textsuperscript{139} if less intrusive treatments or means for administering the drugs are unlikely to achieve substantially the same results;\textsuperscript{140} and if the administration of the drugs is medically appropriate.\textsuperscript{141}

The Supreme Court has also found that the Due Process Clause provides substantial protections for bodily integrity outside the context of treatment itself. In 1905, \textit{Jacobson v. Massachusetts}\textsuperscript{142} the Court implied that there is constitutional liberty in refusing the smallpox vaccine, which must be weighed against the state interest.\textsuperscript{143} In \textit{Meyer v. Nebraska}\textsuperscript{144} the Court implied that the core of the due process protection is freedom from bodily restraint.\textsuperscript{145} In \textit{Ingraham v. Wright},\textsuperscript{146} the Court recognized that the Due Process Clause encompasses freedom from corporal punishment in public schools.\textsuperscript{147} The Court held, however, that as long as the corporal punishment "is reasonably necessary for the proper education and discipline of the child,"\textsuperscript{148} it does not violate the Due Process Clause.\textsuperscript{149} In \textit{Parham v. J.R.},\textsuperscript{150} children in a mental health facility challenged a state’s commitment procedure that requested a guardian’s application and a physician’s diagnosis but did not require notice and a hearing. The major issue in \textit{J.R.} was whether the procedure was constitutional, but the Court recognized that children and adults have a substantial liberty interest in freedom from confinement or bodily restraint.\textsuperscript{151} \textit{Vitek v. Jones}\textsuperscript{152} struck down a state’s procedure for the transfer of prisoners to a state mental hospital. The Court held that the procedure did not provide adequate notice and hearing and was therefore violative of the Due Process Clause. In this ruling, the Court averred that

\begin{enumerate}
\item \textit{Id.} at 180-81.
\item \textit{Id.} at 181.
\item \textit{Id.}
\item \textit{Jacobson v. Massachusetts}, 197 U.S. 11, 39 (1905).
\item \textit{Id.} at 24-30.
\item \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923).
\item \textit{Id.} at 399 (“Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).
\item \textit{Id.} at 674.
\item \textit{Id.} at 670.
\item \textit{Id.} at 676 (“[T]here can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of [school officials’] common-law privilege.”).
\item \textit{Id.} at 600-01.
\end{enumerate}
an individual has a liberty interest in freedom from unwanted confinement and treatment in a mental hospital. \(153\) Youngberg v. Romeo\(154\) was decided on similar grounds. The Court recognized that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause."\(155\) It confirmed, "liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action."\(156\) In Foucha v. Louisiana,\(157\) the Court again reiterated the principle that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."\(158\)

In a 2003 case, Chavez v. Martinez,\(159\) the Court implied that the Due Process Clause of the Fourteenth Amendment substantively protects people from torture. In this case, the plaintiff sued a police supervisor under 42 U.S.C. § 1983 for his coercive interrogation of the plaintiff.\(160\) After the plaintiff was shot by another police officer during an altercation, arrested and transferred to a hospital, the police supervisor started asking him questions without giving the Miranda warnings, even after the plaintiff's plea for treatment and clear refusal to talk until treated.\(161\) The plaintiff was never charged with a crime.\(162\)

The opinions were severely divided. This case involved two constitutional provisions: freedom from torture under the Due Process Clause and freedom from self-incrimination under the Fifth Amendment. As for the Fifth Amendment issue, the plurality opinion by Justice Thomas, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, stated that the Fifth Amendment is not implicated unless the
government seeks to use the confession as evidence at trial.\footnote{163} As for protection under the substantive due process doctrine, Justice Souter wrote a one-sentence Court opinion remanding the case for examination of the substantive due process issues.\footnote{164} The five justices who joined the one-sentence court opinion also indicated in their separate opinions that the plaintiff has a strong case under substantive due process theory. Justice Souter, joined by Justice Breyer, suggested that the police conduct in this case violated the Due Process Clause of the Fourteenth Amendment, but was not sympathetic to the Fifth Amendment claim.\footnote{165} Justice Kennedy, joined by Justices Stevens and Ginsburg opined that the police conduct in this case would implicate both the Due Process Clause and the Fifth Amendment. He wrote:

\[
\text{[U]se of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person. . . .} \\
\text{The Constitution does not countenance the official imposition of severe pain or pressure for purpose of interrogation. This is true whether the protection is found in the Self-Incrimination Clause, the broader guarantee of the Due Process Clause, or both.}\footnote{166}
\]

Justice Kennedy continued that the constitutional violation is not limited to official imposition of severe pain but "[t]he police may not prolong or increase a suspect's suffering against the suspect's will."\footnote{167} Kennedy concluded that the record in this case showed the police conduct to be unconstitutional.\footnote{168} On remand, the Ninth Circuit found the police conduct to be in violation of the Due Process Clause.\footnote{169}

\footnote{163. Id. at 766-73. The Self-Incrimination Clause of the Fifth Amendment reads, "No person . . . shall be compelled in any criminal case to be a witness against himself" and thus one could interpret that this provision bars against a forced confession from a witness in a criminal trial, not in the stage of investigations. However, as early as 1897, in \textit{Bram v. United States}, 168 U.S. 532, 542 (1897), the Supreme Court recognized that it applies to criminal investigations. According to the Court, the historical background of the Self-Incrimination Clause is the principle of \textit{nemo tenetur}. Id. at 544-45 (quoting Brown v. Walker, 161 U.S. 591, 596 (1896)). This doctrine has its origin in protests against the coercive interrogation of criminal suspects, including torture, id. at 545, 547-48; Mark A. Godsey, Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination, 93 \textit{Calif. L. Rev.} 465, 479 (2005), and existed until 1688 in England. This doctrine was deeply embedded in the legal values of American colonists and they incorporated it into the Constitution. \textit{Bram}, 168 U.S. at 547-48. \textit{See also} Godsey, \textit{supra}, at 479-81. Under this Clause, the Court excludes evidence gained through physical and other coercive means.}

\footnote{164. \textit{Chavez}, 538 U.S. at 779-80 (majority opinion).}

\footnote{165. Id. at 779 (Souter J., concurring in the judgment).}

\footnote{166. Id. at 796 (Kennedy, J., concurring in part, dissenting in part) (emphasis in original).}

\footnote{167. Id. at 797.}

\footnote{168. Id.}

\footnote{169. \textit{See} Martinez v. City of Oxnard, 337 F.3d 1091 (9th Cir. 2003), \textit{cert. denied}, 542}
The Court has protected bodily freedom under other provisions too. In an 1891 case, *Union Pacific Railway Co. v. Botsford*, the U.S. Supreme Court mentioned the importance of the freedom to control one’s own body. In this case, the Court held that in a civil action a federal court has no power to force Ms. Botsford to submit to a surgical examination to determine the extent of the injuries she incurred in an accident. The Court said, “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”

In *Rochin v. California*, which would have been a Fourth Amendment case if it had been decided after the incorporation through the Fourteenth Amendment, the Court held that police conduct at issue, including a struggle to open the suspect’s mouth and forcibly extracting the contents of his stomach by means of a stomach pump, violated the Due Process Clause. The Court noted that the police’s conduct “shock[ed] the conscience” and “offend[ed] even hardened sensibilities.” In *Schmerber v. California* the Court held that involuntary administration of a blood test to a drunk driving suspect was reasonable under the Fourth Amendment. However, the Court stated that the Fourth Amendment protects “[t]he interests in human dignity and privacy” as “fundamental human interests.” In *Winston v. Lee*, where the issue was whether it was reasonable to force a suspect to submit to an involuntary surgical procedure to remove bullets from his body for the purpose of obtaining incriminating evidence, the Court held the procedure to be unconstitutional in view of its invasiveness and threat to the safety of the suspect, on the one hand, and the lack of a compelling need by the state to retrieve the bullet on the other.

The Court also suggested that pat down searches also involve one’s bodily freedom and integrity. In *Terry v. Ohio*, the Court articulated

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171. *Id.*
175. *Id.* at 172.
177. *Id.* at 769-70.
179. *Id.* at 763-65.
180. *Id.* at 765-66.
the prerequisites for such a search. The Court stated that a pat down search "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." The Court called the protected interest in this case the "right to personal security."

Moreover, the Court has suggested that abortion and procreation involve not only autonomy in authoring one's life but also bodily freedom. As discussed above, Skinner struck down the statute that required sterilization of some criminal convicts. Although the Court stressed the importance of procreation and marriage as important life choices, this case has also been construed as protecting an aspect of bodily freedom from unwanted surgical intrusion. In Casey, the Court not only justified the right to abortion as autonomy in authoring one's life but also as the right to bodily freedom. The Court concluded, "it is settled now... that the Constitution places limits on a State's right to interfere with a person's most basic decisions about... bodily integrity," and emphasized the mental and physical burden experienced in carrying a child to full term.

The importance of bodily freedom as a necessary foundation for other autonomous decision making is also stressed by commentators. Professor Radhika Rao stresses that the substantive due process protections include not only autonomy concerning personal intimate relationships but also bodily autonomy. She argues that bodily autonomy "defines a sphere of self-control, a sphere of decision-making authority about oneself, from which one can presumptively exclude others." She recognizes that the right to refuse life-sustaining medical

182. Id. at 27.
183. Id. at 17. See also United States v. Rodney, 956 F.2d 295, 300 (D.C. Cir. 1992) (Wald, J., dissenting) (arguing that because one's interest in body is far greater than property, a person who gives general consent for a body search in a public place would not mean this to include the genital area and, in the case of a woman, her breast area, whereas an individual's consent to a drug search in his car would mean all spaces in his car where drugs might be hidden).
185. See supra notes 20 to 23 and the accompanying text.
186. Skinner, 316 U.S. at 541.
187. See, e.g., Ingraham, 430 U.S. at 673 n.42; Casey, 505 U.S. at 915 (Stevens, J., concurring in part, dissenting in part).
188. Casey, 505 U.S. at 849 (majority opinion). See also Kelley v. Johnson, 425 U.S. 238,250-53 (Marshall, J., dissenting) (arguing that the right to personal appearance involves both the right to privacy and the right to bodily freedom).
189. Casey, 505 U.S. at 852 (citation omitted).
191. Id. at 428 (quoting Daniel R. Ortiz, Privacy, Autonomy, and Consent, 12 HARV. J. L. & PUB. POL’Y 91, 92 (1989)).
treatment is included in this autonomy.\footnote{192} Professor Tom Gerety says, "control over the body is the first form of autonomy and the necessary condition . . . of all later forms,"\footnote{193} and "[t]he body is the necessary condition of both identity and autonomy."\footnote{194}

Professor Rubenfeld argues that the Constitution guards against governmental intrusion into one's body.\footnote{195} He points out that governmental control of individuals' bodies is a way for the government to standardize and control our lives.

A person's life and identity may be shaped as forcefully through taking control over her body—as is done, for example, in some military or religious disciplines—as through the attempted control of her mind. Indeed, bodily control may be the more effective medium to the extent that thought cannot, as it were, meet such control head on, as it might when confronted by an idea that it is told to accept. The exertion of power over the body is in this respect comparable to the exertion of power over a child's mind: its effect can be formative, shaping identity at a point where intellectual resistance cannot meet it.\footnote{196}

2. State Courts' Justification of Right to Refuse Medical Treatment as Bodily Freedom

State courts have a tendency to justify the right to refuse treatment as bodily freedom, especially referring to the common law doctrine of informed consent.\footnote{197} The courts explained that the right to refuse

\begin{footnotes}
\footnote{192}{Id. at 389-90.}
\footnote{193}{Tom Gerety, Redefining Privacy, 12 HARV. C.R.-C.L. L. REV. 233, 266 (1977).}
\footnote{194}{Id. at 266 n.119. Professor Gerety asks, "if we don't control our bodies, what do we control?—and indeed who are we?" Id. (emphasis in original). See also Louis Henkin, Human Dignity and Constitutional Rights, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 210-11 (Michael J. Meyer and W. A. Parent eds. 1992) ("[H]uman dignity requires respect for every individual's physical and psychic integrity, for his (her) "personhood" before the law, for her (his) autonomy and freedom; these are not to be lightly sacrificed, even for the welfare of the majority or not for the common goods. Sometimes human dignity is seen as requiring more—the full development of the individual's personality, respect by society and by one's neighbors, security for one's 'honor' and self-esteem.").}
\footnote{195}{See Rubenfeld, supra note 110, at 788-91.}
\footnote{196}{Id. at 788-89.}
\footnote{197}{See, e.g., Cruzan, 497 U.S. at 269, Mack v. Mack, 618 A.2d 744, 755 (Md. 1993); Barber v. Super. Ct., 147 Cal. App. 3d 1006, 1015 (1983). Certainly, some courts did not mention the U.S. Constitution. However, it is established by the above cases that the Constitution protects competent persons' right to refuse medical treatment based on the value of bodily integrity, security and freedom. Also as the Courts often repeat, the substantive due process rights at least include liberties historically protected. Therefore, some courts' avoidance of invoking the constitution cannot mean that it is not a constitutional right or that the value of bodily freedom manifested in the common law
treatment is a logical corollary of this doctrine and often noted that this right is also protected under the Due Process Clause of the Constitution. Here, the state courts' explanation of the importance of the common law right of informed consent also gives the basis of the constitutional right to refuse treatment.

In 1905 and 1906, two state court cases, *Mohr v. Williams* and *Pratt v. Davis*, clarified that a surgical operation could not be undertaken without a patient's consent. In *Mohr*, the Minnesota Supreme Court found that operating on an ear without consent was illegal, and suggested, citing *Pratt*, that the patient had a right to autonomy over her own body. The court said that a person has "the right to the inviolability of his person," in other words, "the right to himself," and "this right necessarily forbids a physician or surgeon, however skilful or eminent, who has been asked to examine, diagnose, advise, and prescribe . . . to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anaesthetic for that purpose, and operating upon him without his consent or knowledge."

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198. After *Griswold*, *Eisenstadt*, and *Roe* made it clear that the constitutional right to privacy includes personal autonomy in authoring one's life, the lower courts started to justify the right to refuse treatment as a part of the right to privacy as well as bodily autonomy. The first case is *In re Yetter*, 62 Pa. D. & C.2d 619 (1973) in which a Pennsylvania court approved a patient's refusal of an operation in a state hospital. The patient was discovered to have a breast discharge indicating the possible presence of cancer. Although the patient's refusal came from her incorrect belief that her aunt had died of the same operation, the court respected her "irrational but competent decision." The court said, "the constitutional right of privacy [in *Roe v. Wade*] includes the right of a mature competent adult to refuse to accept medical recommendations that may prolong one's life and which, to a third person at least, appear to be in his best interests." *Id.* at 623. Following *Yetter*, the New Jersey Supreme Court in the well-known case *In re Quinlan*, 355 A.2d 647 (N.J. 1976) stated, "this right [to privacy] is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances." *Id.* at 663. (For cases that referred only to the right to privacy, see, e.g., *Satz v. Perlmutter*, 362 So. 2d 160, 161-62 (Fla. Dist. Ct. App. 1978)).

In the year following *Quinlan*, the Massachusetts Supreme Court in *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977) recognized that the right to refuse treatment derives from both the right to privacy and the common law doctrine of informed consent. In the case of *In re Conroy*, 486 A.2d 1209 (N.J. 1985), the New Jersey Supreme Court based the right to refuse treatment both on the common law doctrine of informed consent and the constitutional right to privacy.

202. *Id.*
203. *Id.* The court also said ""The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal right."" *Id.* at 14-15 (quoting EDGAR B. KINKEAD, COMMENTARY ON THE LAW OF TORTS: A PHILOSOPHIC...
A 1914 New York case, Schloendorff v. Society of New York Hospital, also involved a surgical operation undertaken without the patient's consent. In that case, Judge Benjamin N. Cardozo articulated patients' autonomous right over their own bodies, writing, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages."

In 1960, the Kansas Supreme Court recognized the negligence of a physician who had not provided adequate explanation of the risk of cobalt radiation therapy to the patient. In this case, Natanson v. Kline, the court articulated not only the informed consent principle but also the right to refuse treatment based on bodily autonomy, describing such autonomy as firmly rooted in the American law system. The court stated, "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 performance of life-saving surgery, or other medical treatment."

In sum, the Due Process Clause and other provisions of the Constitution protect bodily freedom. This freedom is at the core of the substantive due process doctrine, and it is a necessary basis for other autonomous decision making. The notion of bodily freedom, together with the personal autonomy in authoring one's life, justifies the constitutional right to refuse medical treatment.

DISCUSSION OF THE GENERAL PRINCIPLE UNDERLYING CIVIL WRONGS EX DELICTO § 375 (1903)).


205. At this time, the Court had not used the term "informed consent." It was first used in the Nuremberg Code which required obtaining informed consent from human subjects for medical research. The first American court case that used this term is Salgo v. Leland Stanford, Jr., Univ Bd. of Trs., 317 P.2d 170 (Cal. Ct. App. 1957).

206. Schloendorff, 105 N.E. at 93 (This quote of then Judge Cardozo, later a Supreme Court Justice, is frequently cited in cases that involve informed consent and refusal).

207. Natanson v. Kline, 350 P.2d 1093 (Kan. 1960). Two years after Natanson, a New York court in Erickson v. Dilgard, 252 N.Y.S.2d 705 (N.Y. Sup. Ct. 1962) approved a competent patient's choice of refusing blood transfusion and explained his right to refuse life-saving treatment without mentioning religious grounds. Id. at 706. The court based the right to refuse treatment on America's individualistic governmental system. It said, "[I]t is the individual who is the subject of a medical decision who has the final say and . . . this must necessarily be so in a system of government which gives the greatest possible protection to the individual in furtherance of his own desires." Id. Another New York case, Application of Long Island Jewish-Hillside Med. Ctr., 342 N.Y.S.2d 356 (N.Y. Sup. Ct. 1973) also recognized the patient's right by citing the above quoted part of Schloendorff. Id. at 397-98.

208. Natanson, 350 P.2d at 1104.
III. Scope of the Right to Refuse Medical Treatment

A. Scrutiny of Judicial Review in the Right to Refuse Treatment Cases

Courts deciding right to refuse treatment cases have not used the deferential rational basis test. Rather, the courts have applied a careful balancing approach and concluded, in most cases, that the patient's interest outweighed the government's. Similarly, as seen in Part II, in the cases concerning refusal of antipsychotic medication by incarcerated persons, the U.S. Supreme Court applied heightened scrutiny and required the government to make a showing of important governmental interest, that the involuntary administration of the medication significantly furthers this interest and that the medication used is medically appropriate and minimally intrusive.\(^{209}\) These cases involved incarcerated persons, whose legal rights are subject to greater governmental restriction than those of the general population and the constitutionality of the restrictions on these people are generally scrutinized with more lenient standards. Therefore, the Court might well apply even higher scrutiny to the refusal of antipsychotic treatment outside of these settings.

Generally, when examining the constitutionality of governmental restrictions upon a right substantively protected under the Due Process Clause, the Court applies heightened scrutiny. It is so even in those cases where the Court did not explicitly declare the right in question to be a fundamental right. For example, in \textit{Sell}, the Court used heightened scrutiny, without announcing that the right to refuse medical treatment is a fundamental right or fundamental liberty interest. In \textit{Casey}, the Court applied the undue burden test for restrictions placed on abortions prior to the viability of the fetus without announcing that abortion is a fundamental right.\(^{210}\) In \textit{Lawrence}, the Court required the government to show a strong justification for a ban on homosexual sex,\(^{211}\) again, without announcing that the right to engage in a homosexual relationship is a fundamental right.

As will be seen below, when the courts balance the right to refuse treatment against state interests, the courts apply a heightened scrutiny

\(^{209}\) \textit{See Sell}, 539 U.S. at 179-81 (requiring government to show that there are important state interests, the involuntary medication is necessary to and substantially furthers the interests, and the administration of the drug is medically appropriate); \textit{Riggens}, 504 U.S. at 135 (stating that the state would have satisfied the substantive due process if it demonstrated that "that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of [the criminal defendant's] own safety or the safety of others.").

\(^{210}\) \textit{Casey}, 505 U.S. at 874-901.

\(^{211}\) \textit{Lawrence}, 539 U.S. at 575-78.
standard. The courts recognize that the state interest in protecting life is not merely legitimate but is an important state interest.\textsuperscript{212} It might not be difficult to find some reasonable relationship between the state interest in protecting life and the ban on the refusal of life-sustaining treatment. Still, the courts have not allowed the state to prohibit refusal of treatment due to imposing a heightened form of review.

A comparison with the physician assisted suicide cases is illustrative. In \textit{Glucksberg} and \textit{Vacco}, the Court distinguished refusal of life-sustaining treatment from physician-assisted suicide, and declined to give constitutional protection to the latter.\textsuperscript{213} In \textit{Glucksberg}, unlike the cases of refusal of treatment, the Court used a deferential, rational basis approach. The Court in \textit{Glucksberg} was satisfied with finding that these state interests were “legitimate” and that there were mere “reasonable relationships” with the governmental ban on physician assisted suicide.\textsuperscript{214}

\subsection*{B. Countervailing State Interests in Cases Addressing the Right to Refuse Treatment}

In the right to refuse treatment cases, the courts have recognized four governmental interests against which the right to refuse treatment should be balanced: preservation of life, prevention of suicide, protection of innocent third parties, and the ethical integrity of the medical profession. After this balancing, courts in most cases have ruled in favor of the individual.

1. State Interest in the Preservation of Life

Of those governmental interests, the interest in the preservation of life is considered most significant.\textsuperscript{215} In the cases involving a competent

\textsuperscript{212} See, e.g., \textit{Cruzan}, 497 U.S. at 282 (despite recognizing “an unqualified interest in the preservation of human life,” the Court went into a detailed analysis of the Missouri statute); \textit{Conroy}, 286 A.2d at 1123-24 (despite recognition that the state interest in preserving life is “certainly strong,” the court held that it does not outweigh the patient’s right); McKay v. Bergstedt, 801 P.2d 617, 622 (Nev. 1990) (despite finding the state interest in preservation of life is “fundamental and compelling” the court honored the competent person’s refusal of life-sustaining treatment).

\textsuperscript{213} \textit{Glucksberg}, 521 U.S. at 719-28; \textit{Vacco}, 521 U.S. at 799.

\textsuperscript{214} \textit{Glucksberg}, 521 U.S. at 728-35, 728 n.21 (“Our inquiry, however, is limited to the question whether the State’s prohibition is rationally related to legitimate state interests.”).

patient, the courts have held that the patient’s interest outweighs this governmental interest, even when the patient is not in a terminal condition. In *Lane v. Candura*, a Massachusetts appellate court authorized a 77-year-old woman’s refusal of the amputation of a gangrenous leg, despite the refusal leading to the woman’s death. In light of her constitutional right to refuse treatment and considering her competency, the court ruled, “[t]he law protects her right to make her own decision to accept or reject treatment, whether that decision is wise or unwise.”

In *Bartling v. Superior Court*, a California appellate court concluded that the right to refuse treatment is not limited to terminally ill patients. In the following year, another appellate court in *Bouvia v. Superior Court* ordered a hospital to respect a 28-year-old woman’s wish to refuse life-sustaining nutrition and hydration. The court followed *Bartling* and stated that the exercise of the right to refuse medical treatment is not limited to terminal patients.

In the case *In re Conroy*, the New Jersey Supreme Court, examining previous state cases that honored a non-terminal and competent Jehovah’s Witness’ refusal of a blood transfusion, reasoned that a competent patient’s right to refuse treatment is not affected by her medical condition or prognosis. In *McKay v. Bergstedt*, the Nevada Supreme Court, citing *Bouvia*, confirmed the right of a competent non-terminal quadriplegic patient to remove her respirator. In *Thor v.*
Superior Court, the California Supreme Court declined to authorize the involuntary use of a gastronomy tube to feed and medicate a competent quadriplegic inmate. Affirming the lower court cases Bartling and Bouvia, the court suggested that a patient’s refusal removes a physician’s right and duty to treat regardless of the patient’s life-expectancy and the kinds of medical procedures needed for treatment.

In addition, some courts found that the state interest in preserving life means protecting the life that the patients themselves believe is worth protecting. Under this view, the essence of the state interest in the preservation of life lies in respect for personal autonomy. In Superintendent of Belchertown State School v. Saikewicz, the court recognized that “the sanctity of individual free choice and self-determination [are] fundamental constituents of life.” In Brophy v. New England Sinai Hospital, Inc., in which the Massachusetts Supreme Court supported withdrawal of a gastronomy tube, the court more clearly articulated this view: “The 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.”

The court in Conroy demonstrated the view that the patient’s life should be protected consistent with her autonomy. The court recognized two aspects of the state’s interest in preserving life: an interest in preserving the life of a particular patient and an interest in preserving the sanctity of all life. As for the first interest, Conroy argued that patients’ autonomy should generally prevail over this interest “because the life that the state is seeking to protect in such a situation is the life of the same person who has competently decided to forego the medical intervention; it is not some other actual or potential life that cannot adequately protect itself.” The latter interest, the court said, is so

231. See id. at 381-82.
234. In Brophy, the court did not order the private hospital to remove the gastronomy tube, but rather authorized the incompetent patient’s wife to move him to a suitable place. See id. at 639-40.
235. Id. at 635. See also Thor, 855 P.2d at 383 (quoting and affirming this statement); Cruzan, 497 U.S. at 321 (Brennan, J., dissenting) (“The possibility of a medical miracle is indeed part of the calculus, but it is a part of the patient’s calculus.”) (emphasis in original).
236. Conroy, 486 A.2d at 1223. See also Brophy, 497 N.E.2d at 640; Thor, 855 P.2d at 383; Cruzan, 760 S.W.2d at 419; In re Longeway, 549 N.E.2d 292, 320 (Ill. 1989).
237. Conroy, 486 A.2d at 1223.
"indirect and abstract"\textsuperscript{238} that it is generally superseded by "the patient's much stronger personal interest in directing the course of his own life."\textsuperscript{239} Insofar as several courts have found that the "life" in the state interest in preserving life is the patient's autonomous life, this interest cannot logically stand against the patient's personal autonomy in medical treatment.

While the state interest in preserving life generally cannot outweigh competent persons' right to refuse life-sustaining medical treatment, it does not mean the government cannot take other measures for protecting this interest which are less restrictive of the right to refuse treatment, so long as they are not an undue burden\textsuperscript{240} on the patient's decision to refuse treatment.

The government can and arguably should, as a matter of public policy, provide an environment where more competent persons would choose to undergo life-sustaining treatment and live longer. The physical pain or burden of treatment can, in most cases, be minimized by proper medication.\textsuperscript{241} Furthermore, the government can and should take measures to remove mental burdens faced by sick or disabled persons. Disability rights advocates point out that there is a tendency for persons with disabilities to be viewed by others and by themselves as burdens on society and their families and also note that there is societal pressure on these people to choose to die.\textsuperscript{242} A good public policy should be that the government removes such a sense of burden and the pressure.\textsuperscript{243}

\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{241} NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 40 (2d ed. 2000).
\textsuperscript{242} Paul Steven Miller, The Impact of Assisted Suicide on Persons with Disabilities—Is It a Right Without Freedom?, 9 ISSUES L. & MED. 47, 56 (1993); Paul K. Longmore, Elizabeth Bouvia, Assisted Suicide and Social Prejudice, 3 ISSUES L. & MED. 141, 168 (1987) ("Given the lumping together of people with disabilities with those who are terminally ill, the blurring of voluntary assisted suicide and forced 'mercy' killing, and the oppressive condition of social devaluation and isolation, blocked opportunities, economic deprivation, and enforced social powerlessness, talk of their 'rational' or 'voluntary' suicide is simply Orwellian newspeak. The advocates of assisted suicide assume a nonexistent autonomy. They offer an illusory self-determination."); id. at 159 ("[R]ather than upholding [disabled people's] right to live productively and meaningfully, this society chooses to engineer [their] death."); SHINYA TATEIWA, YOWAKU ARU JIYU E [FREEDOM TO BE WEAK] 52-55 (2000) (arguing that general self-determinations of people with incurable diseases or severe disabilities has not been easily respected whereas their self-determination to die has, because the fulfilling of the former self-determination is inconvenient for surrounding people and society whereas the latter releases the family and society from the burden of caring for these people.).
\textsuperscript{243} SHINYA TATEIWA, ALS: FUDO NO SHINTAI TO IKISURU KIKAI [ALS: AN
Moreover, as a matter of public policy, the government can and should not only provide financial support for life-sustaining treatment and physical and mental care for the sick or disabled persons, but should also assist them achieve more autonomous, independent life, so that, for example, the persons like Ms. Bouvia can be employed and/or live independently at home.\textsuperscript{244} Another factor to be considered is that a competent person who refuses life-sustaining medical treatment may be suffering from depression or other mental disorders.\textsuperscript{245} When her depression or mental disorder does not render her incompetent,\textsuperscript{246} she can still retain as strong a right to refuse treatment as other competent persons. However, when a competent patient is refusing life-sustaining treatment, as Professors Brock and Lynn note, the refusal may well be her “dramatic, last-resort

\textsuperscript{244}See Stanley S. Herr, et al., No Place to Go: Refusal of Life-Sustaining Treatment by Competent Persons with Physical Disabilities, 8 ISSUES L. & MED. 3, 24-26 (1992). Professor Longmore writes about Ms. Elizabeth Bouvia’s struggles to be independent. She was a competent woman suffering since birth from cerebral palsy and arthritis, and she was also quadriplegic. At the time of the case she was 28 years old, and was totally dependent on others for all of her needs. \textit{Id.} at 1136. A tube had been attached to her chest for reducing chronic physical pain with a periodic dose of morphine. \textit{Id.} The hospital inserted a nasogastric tube against her will. \textit{Id.} It was found that she could live another 10-15 years with sufficient feeding. Professor Longmore stresses that her current condition and wish to die are caused by the prejudice and discrimination against her. At the time of litigation, Ms. Bouvia was bed-ridden, depressed, with a feeding tube inserted, and wishing to die. However, he says, “[t]his is a woman who operated a power wheelchair and was on her way to a master’s degree and a career in social work. This is a woman who married, made love with her husband and planned to become a mother. This is a woman who aimed at something more significant than mere physical self-sufficiency. She struggled to attain self-determination, but she was repeatedly thwarted in her efforts by discriminatory actions on the part of her government, her teachers, her employers, her parents, and her society. . . . [W]hat makes life with a major physical disability ignominious, embarrassing, humiliating, and dehumanizing is not for extensive physical assistance, but the dehumanizing social contempt toward those who require such aid.” Longmore, \textit{supra} note 242, at 158.


\textsuperscript{246}See, e.g., Jobes, 529 A.2d at 454 n.4 (“If a patient refusing medical treatment is depressed, should that asserted choice be disregarded . . .?”) and Harper, 494 U.S. at 219-36 (discussing the limitation of competent inmate’s right to refuse antipsychotic treatment).
plea to others for help. In such cases, the government can encourage, or require an attending physician to encourage the refusing patient, if medically appropriate, to undergo psychiatric treatment and to notify various support systems in the community, as long as such measures do not inflict an undue burden upon the patient’s exercise of the right to refuse treatment. A government which both cherishes personal autonomy and life can and should take such measures without restricting the constitutional right to refuse medical treatment.

2. State Interest in Preventing Suicide

Today assisted suicide is often considered a crime while suicide itself is generally not. The argument for constitutional protection of suicide in general has neither been accepted in courts nor widely accepted by scholars. Thus, generally, a government can constitutionally intervene in attempted suicide. However, the courts have distinguished refusal of life-sustaining treatment from attempted suicide.

At common law, suicide is “an individual . . . purposefully set[ting] in motion a death-producing agent with the specific intent of effecting his own destruction or, at least, serious injury.” There are two components of suicide: (i) specific intent to die and (ii) purposeful setting in motion of the death-producing agent. Some activity is considered attempted suicide only when both components are satisfied.

The courts have found that a patient’s refusal of life-sustaining treatment does not meet the definition of suicide. As for the second component, refusal of life-sustaining treatment can be distinguished from

249. But see id. at 735 n.24. The Court suggested some possibilities where even suicide is constitutionally protected in exceptional circumstances.
250. Before Quinlan, a judge in the D.C. Circuit suggested, as one of the reasons for the authorization of a compelled blood transfusion, that a patient’s refusal of a lifesaving blood transfusion is a form of suicide. *Georgetown Coll.*, 331 F.2d at 1006-10. The patient was a 25-year-old Jehovah’s Witness and the mother of a seven-month old child, and the patient’s life was in danger because of a ruptured ulcer. Overriding her and her husband’s refusal, the judge authorized a blood transfusion, stating, “where attempted suicide is illegal by the common law or by statute, a person may not be allowed to refuse necessary medical assistance when death is likely to ensue without it.” *Id.* at 1008-09. The courts since Quinlan have disagreed with this view.
252. *Id.* at 18; *Saikewicz*, 370 N.E.2d at 426 n.11. See also Bergstedt, 801 P.2d at 625 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1968) (“[T]he act or an instance of taking one’s own life voluntarily and intentionally; the deliberate and intentional destruction of his own life by a person of years of discretion and of sound mind; one that commits or attempts self-murder.”)).
attempted suicide because it merely allows the disease or injury to take
its natural course. The U.S. Supreme Court affirmed this distinction in
Vacco v. Quill. Lower courts have focused on the second component
(purposeful setting in motion of a death-producing agent), because
regardless of whether the first component (patient's specific intent to die)
is met, refusal of treatment does not satisfy the second component.

For example, in Saikewicz, the court said, "even if the patient did
[have the specific intent to die], to the extent that the cause of death was
from natural causes the patient did not set the death producing agent in
motion with the intent of causing his own death." In the case In re
Fiori, a 1996 case that authorized the withdrawal of life-sustaining
treatment from a permanently vegetative patient, the Pennsylvania
Supreme Court concluded, by referring to just the second component,
that the state interest in prevention of suicide was not involved.
In contrast to the right to refuse treatment cases, hunger strikes are more
likely to meet the second component: whether the individual's refusal
becomes suicide depends on the first component. In a case of a
prisoner's hunger strike, an appellate court in Florida found that the
hunger strike meets the second component but not the first. The court
held that the hunger strike in this case was for protest purpose and not for
terminating life itself, and thus the hunger strike was not attempted
suicide. When another court found the hunger strike in issue was for the
purpose of termination of life, it concluded such conduct is an attempt to

253. See Saikewicz, 370 N.E.2d at 426 n.11; Satz v. Perlmutter, 362 So. 2d 160, 162
(Fla. Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla. 1980); Conroy, 486 A.2d at 1223-
254. See Vacco, 521 U.S. at 801-02 ("[W]hen a patient refuses life-sustaining medical
treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests
lethal medication prescribed by a physician, he is killed by that medication.").
255. Saikewicz, 370 N.E.2d at 426 n.11. See also Perlmutter, 362 So. 2d at 162,
(authorized removal of a respirator from a competent 73-year-old patient with
amyotrophic lateral sclerosis, explaining that disconnecting the respirator would result in
death from natural causes).
257. Id. at 910. In McKay v. Bergstedt, the Nevada Supreme Court discussed at
length the patient's intent after it found there was no purposeful setting in motion of a
death-producing agent. The court tried to limit the kind of cases in which the court could
recognize that a patient did not have specific suicidal intent, explaining, "[t]o a large
extent, a patient's attitude or motive may be judged from such factors as severity of
physical condition, diagnosis, prognosis, and quality of life." Bergstedt, 801 P.2d at 627.
Under such an approach, a curable patient is more likely to be considered as having a
specific suicidal intent. However, if a patient's refusal of life-sustaining treatment does
not satisfy the second component, purposeful setting in motion of a death-producing
agent, a court's finding of possible suicidal intent itself is not enough to see such a refusal
to be attempted suicide.
259. Id. at 1109.
commit suicide.⁶⁰

In *Cruzan*, Justice Scalia suggested that the right to refuse life-sustaining treatment is generally equivalent to attempted suicide but this view is unsustainable. His concurrent opinion in *Cruzan* stated,

> [I]t 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.⁶¹

The flaw in Justice Scalia's reasoning is that he fails to recognize the difference between situations where the person purposefully puts himself or herself in danger and where the person is unintentionally or forcefully put in danger. If a person is involuntarily taken into the sea or locked into a freezer, and ceases attempts at self-rescue, their conduct is not described as suicide. Likewise, a patient who is refusing life-sustaining treatment is not attempting suicide, unless the patient intentionally contracts a disease or suffers an injury in order to die.⁶²

In sum, when the courts have considered the state interest in preventing suicide, they have found that the refusal of life-sustaining treatment does not constitute an attempt to commit suicide. The courts have found that a patient's refusal of treatment does not satisfy the second component, because the refusal of treatment is merely allowing the disease or injury to take its natural course.

3. State Interest in the Protection of Innocent Third Parties

Courts have recognized this interest when the patient has a minor child or is pregnant. Unlike other state interests, this state interest supersedes the patient's right to refuse treatment in some limited situations.

a. When the patient has a minor child

In *Application of President and Directors of Georgetown College, Inc.*,⁶³ a federal circuit judge referred to the female patient's seven-month-old child as a basis for permitting the hospital to give a blood transfusion against the wishes of the patient and her husband. After this

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⁶². Thus, the government can constitutionally provide emergency medical treatment to survivors of attempted suicide against their wishes.
case, however, the courts addressing the issue have generally come to agree that unless the patient’s refusal and the resulting death leaves no one who is capable of caring for the child, the patient’s refusal outweighs the state interest. In the case of *In re Osborne*, the D.C. Court of Appeals honored the patient’s refusal of a blood transfusion, partly because it was revealed that the children’s other family members would care for the children and supply their material needs. In *In re Farrell*, the New Jersey Supreme Court authorized the removal of a respirator from a patient suffering from amyotrophic lateral sclerosis even though she had two teenage sons. The court said that the patient’s right prevailed over the state interest in protecting third parties. This was because her husband had the capability to care for the children and they had already suffered from stress caused by her illness; consequently, the decision to withdraw treatment would not cause any more stress to them.

In *Fosmile v. Nicoleau*, the New York Court of Appeals suggested that the state’s interest in protecting a child’s welfare generally cannot override a patient’s right to refuse treatment. In *Nicoleau*, the patient’s refusal was based on her religious beliefs, but the court based its decision on the general right to refuse treatment. The court pointed out that the patient’s right to choose to undergo or forego treatment is not conditioned on the patient being without minor children. The court also referred to the fact that states had not interfered with every personal decision that could jeopardize the family unit or the parental relationship, such as the adoption and divorce laws that sometimes elevate the rights of parents above those of children, or the criminal punishments administered even when it causes problems for the criminal’s family. Also, the court pointed out that there is no law prohibiting parents from engaging in dangerous activities because of the possible risk of leaving children as orphans.

265. *Id.* at 374.
267. *Id.* at 413.
269. *Id.* at 80 (“The question as to whether this order violates the patient’s constitutional rights to religious freedom or to determine the course of her own medical treatment raises important and sensitive issues. However, they need not be resolved here because in our view the patient had a personal common-law and statutory right to decline the transfusions.”).
270. *Id.* at 83 (citing *Schloendorff v Society of N.Y. Hosp.*, 105 N.E. 92 (N.Y. 1914)).
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 84.
Other courts did not go as far as New York, but stressed the high possibility that the child’s other parent and other persons may protect the children. The Massachusetts Supreme Court supported the refusal of a lifesaving blood transfusion by the mother of a five-year-old child. The court held that the patient’s right outweighed the state’s interest in protecting third parties. It required, but did not find, compelling evidence that the child would be abandoned. It noted that the husband had financial resources and the husband’s sister and brother-in-law could help the husband take care of the child. In the case *In re Dubreuil*, the Florida Supreme Court supported a patient’s refusal of a lifesaving blood transfusion. The patient had two children and a husband from whom she was separated. The court required the state to show with clear and convincing evidence that her death would cause her children to be abandoned despite the presence of the husband and other persons including family members and found that sufficient evidence was not presented.

Accordingly, courts have generally ruled that a state’s interest in protecting a minor child supersedes the patient’s rights when the patient’s child will be abandoned after the patient’s death. However, the courts have generally honored the patient’s wish to refuse treatment unless it is clearly shown that the patient’s child will likely not be supported by the child’s other parent or family members.

b. When the patient is pregnant with a viable fetus

The state interest seems strongest in exceptional cases in which the patient is pregnant with a viable fetus and the patient is refusing the treatment offered to protect the fetus. Some courts have found a compelling interest in protecting a viable fetus. In *In re Brown*, an appellate court in Illinois supported a pregnant woman’s refusal of a blood transfusion based on her religious belief. Her pregnancy had advanced to 34 and 3/7 weeks and her fetus was viable; under *Roe v. Wade* the state had a compelling interest in the fetus’ potential life. Nevertheless, the Illinois court distinguished this refusal-of-treatment

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276. *Id.* at 1024-25.
277. *Id.*
278. *In re Dubreuil*, 629 So. 2d 819 (Fla. 1993).
279. *Id.* at 827-28.
280. *Id.*
283. *See id.* at 163.
case from abortion or abuse cases\textsuperscript{284} and concluded that the woman’s right to refuse treatment outweighed the state’s interest.\textsuperscript{285}

However, in \textit{Pemberton v. Tallahassee Memorial Regional Medical Center},\textsuperscript{286} a federal district court in Florida found that the state interest in preserving the life of a fetus outweighs a pregnant woman’s right to refuse a Caesarian section. In \textit{Pemberton}, a pregnant woman who had undergone more than one day of labor at home refused a Caesarean section when she came to the hospital emergency room for intravenous hydration. Though a physician advised her to undergo a Caesarean section, she refused and went home.\textsuperscript{287} A state attorney obtained an order from a federal circuit judge that she return to the hospital and that a Caesarean section be performed.\textsuperscript{288} The district court upheld the order by arguing that \textit{Roe}'s finding of the state’s compelling interest in a fetus’s life after viability applies to a case involving a woman’s right to refuse Caesarean section and thus the state interest outweighs the woman’s right.\textsuperscript{289}

Despite \textit{Pemberton}, it is not clear whether \textit{Roe} should be applied to cases involving a Caesarean section. Although this article does not reach a conclusion with respect to this question, it would appear that abortion cases and refusal-of-treatment cases are distinguishable by introducing, by analogy, the distinction between attempted suicide and the refusal of lifesaving treatment. A pregnant woman who medically needs a Caesarean section and refuses it may not have a specific intent of destroying the fetus; and the death of the fetus would not be caused by purposeful conduct, but by the natural course of the woman’s medical condition.\textsuperscript{290} Moreover, with abortion cases generally silent on the issue of fetal rights as against Caesarian sections, it appears that a state’s interest in preserving the life of the fetus has not historically been

\textsuperscript{284} Brown, 689 N.E.2d at 405.
\textsuperscript{285} See also \textit{In re Doe}, 632 N.E.2d 326, 332 (Ill. App. Ct. 1994). Another appellate court of Illinois also said, “[A] woman’s right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy. The woman retains the same right to refuse invasive treatment, even of lifesaving or other beneficial nature, that she can exercise when she is not pregnant. The potential impact upon the fetus is not legally relevant.” \textit{Id.} (citing Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988)).
\textsuperscript{287} \textit{Id.} at 1249.
\textsuperscript{288} \textit{Id.} at 1249-50.
\textsuperscript{289} \textit{Id.} at 1251-52 & n.9.
\textsuperscript{290} Cf. Ferguson v. City of Charleston, 532 U.S. 67 (2001) (holding that a state hospital’s performance of a diagnostic test, without consent of the patient, to obtain evidence of a patient’s criminal conduct for law enforcement purposes is an unreasonable search under the Fourth Amendment, and that the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine cannot justify a departure).
extended to non-abortion cases.\footnote{291}

4. State Interest in the Maintenance of the Ethical Integrity of the Medical Profession

Courts which have addressed a state’s interest in the ethical integrity of the medical profession in the context of a patient’s right to refuse treatment have generally upheld the patient’s right as against the state’s interest because withdrawal of treatment based on the patient’s autonomy is widely accepted as sound medical practice.\footnote{292} The New Jersey court in Conroy, for example, citing Francis Bacon\footnote{293} as well as recent surveys, explains that “medical ethics do not require medical intervention in disease at all costs” and that

\begin{quote}
\begin{quote}
even if doctors were exhorted to attempt to cure or sustain their patients under all circumstances, the moral and professional imperative, at least in cases of patients who were clearly competent, presumably would not require doctors to go beyond advising the patient of the risks of foregoing treatment and urging the patient to accept the medical intervention.\footnote{294}
\end{quote}
\end{quote}

Some of the cases cite the views of medical bodies in the state, which support respect for the patient’s refusal of medical treatment.\footnote{295}

C. Distinctions between Ordinary and Extraordinary Treatment; Medical Treatment and Nutrition and Hydration.

The right to refuse medical treatment encompasses the refusal of all treatments, including artificial nutrition and hydration. Proponents for the distinction between “ordinary” and “extraordinary” treatment argue that certain kinds of medical treatment are “ordinary” and thus cannot be refused, while other treatments are “extraordinary” and thus can be refused. Along with this distinction, it is argued that a patient’s right to refuse medical treatment does not extend to artificial nutrition and hydration. It is stressed, as a distinct feature of nutrition and hydration,
that feeding the needy and helpless has "symbolic importance, as a sign of the interdependency of human life in any viable community."296

This distinction should not be applied at least in case of competent patients for the following reasons. First, contrary to this view, the courts have explained that competent persons have a right to refuse any treatment.297 Second, the proponents for distinctions between ordinary and extraordinary, or between nutrition and hydration and other kinds of treatment, seem to be assuming only the situations where the patient is incompetent. Professor Daniel Callahan, arguing against allowing the refusal of nutrition and hydration, says that part of the reason that the issue of cessation of artificial nutrition and hydration is a matter not only of private morality but also of public policy is that welfare of incompetent patients is at stake.298 Also, those who argue for the symbolic role of food and water are discussing care for people who want and accept it or who cannot express their preference with regard to the nutrition and hydration, not the competent person who explicitly refuses them.299

IV. Constitutional Protection of the Right to Refuse Medical Treatment into Japanese Law

This Part attempts to apply our observation of American theories regarding the constitutional right to refuse medical treatment to Japanese

297. In Bouvia, the court stated that the competent person can refuse any treatment, including artificial nutrition and hydration, and denied the distinction between artificial nutrition and other treatment for the purpose of the right to refuse medical treatment. Bouvia, 179 Cal. App. 3d 1127. Accord, Thor, 855 P.2d at 378-79 (holding the competent inmate has a right to refuse any treatment including artificial nutrition and hydration); Conroy, 486 A.2d at 1236 (stating that competent persons have a right to refuse any treatment). See also In re Delio, 129 A.D.2d 1, 19 (N.Y. Sup. Ct. App. 1987); Barber v. Super. Ct., 147 Cal. App. 3d 1006, 1017; In re Longeway, 549 N.E.2d 292, 296 (Ill. 1989); Corbett v. D'Alessandro, 487 So. 2d 368, 371 (Fla. App. 1986); In re Grant, 747 P.2d 445, 452-54 (Wash. 1987); In re Gardner, 534 A.2d 947, 954-55 (Me. 1987); In re Fiori, 543 Pa. at 910; In re Guardianship of L.W., 482 N.W.2d 60, 66-67 (Wis. 1992).
298. Callahan, supra note 296, at 62.
299. See, e.g., Derr, supra note 296, at 36 (while criticizing foregoing food and water to incompetent patients, agreeing that competent persons can choose treatment based on their assessment of the benefit and burden of the treatment and recognizing that tube feeding can be a burden for competent patients). Also Ronald A. Carson, The Symbolic Significance of Giving to Eat and Drink, in BY NO EXTRAORDINARY MEANS: THE CHOICE TO FORGO LIFE-SUSTAINING FOOD AND WATER 84, 85 (Joanne Lynn ed., Expanded ed. 1989) stresses a symbolic meaning of offering food and water to allay hunger and thirst of dying person; not discussing obliging or forcing food and water.
law. This Part argues that the theories applied in the United States, at least with respect to competent patients, are applicable to Japanese law, that the Japanese Constitution protects the right to refuse treatment, and that consequently the governmental restriction of this right should be reviewed with heightened scrutiny as it is in the United States. This Part critiques current interpretations of Japanese criminal law that are not consistent with this constitutional right.

As will be explained in this Part, Japanese courts and criminal law scholars tend to avoid mentioning the Constitution. Even when they mention a patient's right to refuse treatment (or more broadly, the right to self-determination), they do not consider the right to be of constitutional dimensions, or, even if they mention the Constitution, they do not go into a detailed consideration about what the Constitution requires with regard to this right. It seems that the "right" is treated as if it were a moral right that does not control or regulate statutory interpretation, application or enactment of laws. In addition to the inadequate analysis of the meaning and strength of the right to refuse treatment, the commentators have allowed this right to be outweighed by the governmental interest in life. However, such interpretations of criminal law contradict the Constitution.

However, most of the scholars who do not mention the constitutional protection of this right are not denying that it merits constitutional protection. Thus, the detailed analysis of the meaning and limitation of the constitutional protection contained in this article could further the development of the scholarly dialogue with regard to the governmental prohibition of the physician's acceptance of a patient's refusal of treatment.

This Part will first consider constitutional provisions and theories that cover unenumerated rights under the Japanese Constitution. As shown in Part II, in the United States the right to refuse medical treatment is a constitutional right under the Due Process Clause of the Fourteenth Amendment, and is rooted in principles of autonomy in authoring one's life and bodily freedom. In Japan, the Pursuit of Happiness Clause, in the second section of Article 13, has a role similar to substantive due process. This Clause has been considered to provide a textual basis for certain rights that are not enumerated in the Constitution. The right to refuse medical treatment can be protected under this provision and perhaps also under the other articles that protect freedom from bodily restraint.

300. There is an argument by an eminent commentator that denies the constitutional protection of the patient's right to self-determination, including the right to refuse treatment. As seen below, this argument is untenable. See Part IV.A.4.
This Part then considers the levels of scrutiny that should be applied to the right to refuse treatment in Japan. Under Japanese constitutional law theories regarding the standards for judicial review, which have been based on America’s case law, governmental interference with the right to refuse medical treatment should require heightened scrutiny, as it does in American courts. Based upon this discussion on the textual basis and strength of the constitutional right to refuse treatment, this Part then critically analyzes the Japanese criminal law theories.

A. Protection of the Right to Refuse Medical Treatment under the Japanese Constitution

1. Article 13 of the Japanese Constitution

Chapter Three of the Constitution of Japan of 1946 provides for a series of civil liberties. This includes equality (Art. 14), the right to suffrage (15), the right to petition (16), freedom from involuntary servitude (18), freedom of thought and conscience (19), freedom of religion (20), freedom of assembly, association, and expression (21), freedom to travel and change and choose occupation (22), academic freedom (23), marriage (24), social rights (25), education (26), labor rights (28), property, (29), and other rights involving criminal procedure and punishment (31-40). Although this listing of the civil liberties in the Japanese Constitution is relatively extensive compared with the U.S. Constitution, it still does not cover all significant rights and freedoms.

Article 13 of the Constitution, which is followed by articles for specific individual rights, provides that:

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.
Unlike the specific rights and freedoms enumerated in the Constitution, the right to life, liberty and the pursuit of happiness (hereinafter, "the right to the pursuit of happiness") is obviously not specific. It is therefore no surprise that the meaning of this right has been debated since the Constitution of Japan of 1946 was enacted.

Contrary to the majority view today, Article 13 used to be considered simply as a provision with "programmatic" or ethical meaning, which does not give any specific rights to people but only urges the government to protect and respect the various enumerated rights in the articles following Article 13. Professor Tatsukichi Minobe, a leading scholar of the pre- and post-war era, wrote in his treatise of the Constitution of 1946, "[Article 13] is not a provision concerning concrete specific rights, but it rather manifests that respect for each individual's personhood/person (jinkaku), which should be a foundation of all rights and freedoms, shall be fundamental of the government." 304

In 1958, however, some Justices of the Japanese Supreme Court recognized that the right to the pursuit of happiness can provide the basis for unenumerated rights. Chief Justice Tanaka and Justice Shimoizaka wrote,

Those human rights and freedoms listed in the Constitution are done so simply because they are historically recognized and significant, but the list is not exhaustive. Hence, it is impossible to say that there are no other rights or freedoms or that they are not protected. . . . They merely have no name. They consist as part of a general liberty or the right to the pursuit of happiness.305

In the 1960s, the Japanese courts and constitutional law scholars came to recognize Article 13 as the basis of certain unwritten rights. A district court case in 1964, the "After the Banquet" case,306 was the first case to

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303. Generally in Japanese discussions, the right to life, liberty and the pursuit of happiness is called "the right to the pursuit of happiness."


305. Hoashi v. Japan (Passport Denial case), 12-13 MINSHU 1969, 162 HANREI JIHO 6, 7 (Sup. Ct., G.B., Sep. 10, 1958) (Tanaka, C.J. and Shiomiizaka, J., concurring); Cf. Japan v. Aonuma (Gambling Hall case), 4-11 KEISHU 2380, 2383 (Sup. Ct., G.B., Nov. 22, 1950) (Kuriyama, J., concurring in the judgment) (suggesting a possibility that there are some unenumerated constitutional rights to be found by the courts). This article partly uses the translations of the Japanese Supreme Court cases in COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60 (John M. Maki ed., 1964); CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70 (Hiroshi Itoh & Lawrence Beer eds., 1978); CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1971-1990 (Lawrence Beer & Hiroshi Itoh eds., 1996). Translations are in part modified in order to keep consistency in the text.

306. Arita v. Hirano ("Utage no Ato [After the Banquet]" case), 385 HANREI JIHO 12
use Article 13 as the basis for an unenumerated right. In this case, the novelist Yukio Mishima published a novel\textsuperscript{307} modeled on a famous politician who failed in an election for the governor of Tokyo and who divorced his wife after the defeat. The novelist vividly depicted, with imagination, the politician and his wife’s relationship, including their sexual life, leading readers to feel that they were entering into the politician’s private life. The court found there is a right to privacy under tort law,\textsuperscript{308} and ordered that compensation be paid to the politician. Although this was a civil tort case, the court referred to the Constitution as the basis of the right, noting,

The thought of the dignity of individuals, which is a fundamental idea of modern law and on which the Constitution is based, can be concrete only after personhood is mutually respected and one’s self is protected from unjust invasion. Therefore... divulging other person’s private affairs must not be allowed without a just reason.\textsuperscript{309}

In the Kyoto Gakuren case,\textsuperscript{310} the Supreme Court of Japan for the first time recognized that Article 13 can be a basis of unenumerated individual rights and recognized the right not to be photographed without consent under Article 13. In this case, a student struck a police officer taking photographs of allegedly illegal demonstrations, including the images of the student. The student asserted that his activity should be justified because the officer’s action unconstitutionally invaded the student’s right to freedom from unwanted photography as an aspect of the right to privacy protected under Article 13. The court found the officer’s activity was not unconstitutional and upheld the conviction, but at the same time acknowledged that “[Article 13] provides that the people’s freedom with respect to their private lives should be protected against the exercise of state powers such as the police. As one freedom of individuals with respect to private life, all people have the freedom to not have their own face or physical appearance... photographed involuntarily and without permission.”\textsuperscript{311}

Along with the cases that recognized some unenumerated rights,\textsuperscript{312}

\begin{footnotes}
\item[307] Yukio Mishima, After the Banquet (Donald Keene trans., 1963).
\item[308] See “After the Banquet,” 385 Hanrei Jiho at 27-29.
\item[309] Id. at 28.
\item[311] Kyoto Gakuren, 577 Hanrei Jiho at 19.
\item[312] See also Japan v. Nakaya (Serviceman Enshrinement case), 42-5 Minshu 277, 1277 Hanrei Jiho 34, 46 (Sup. Ct., G.B., June 1, 1988) (Ito, J., dissenting) (“I am of the opinion that in modern society the interest of not being disturbed in one’s mind by unwanted stimuli from others, that is, the interest of peace of mind, can be a legal interest under tort law. When this interest is acknowledged with respect to religion, we might
constitutional law scholars came to agree that Article 13 provides a basis for various individual rights. The view of the majority of today's constitutional scholars regarding the interpretation of Article 13 is based on Professor Harumi Taneya's view. Professor Taneya argued that the right to the pursuit of happiness consists of various rights or interests that are essential for an individual to exist as a being that has personhood.

According to Professor Taneya, the first part of Article 13, which reads "All of the people shall be respected as individuals," (hereinafter, the Respect for Individual Clause) \(^{313}\) manifests the fundamental constitutional principle that the government should respect each individual's personhood, dignity, and equal, independent value as a person. \(^{314}\) Therefore, the next sentence of Article 13, "Their [all of the people's] right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs," (the Pursuit of Happiness Clause) can be viewed as protecting various interests that are essential for an individual to exist as a being with personhood (personhood interests). \(^{315}\)

The right to the pursuit of happiness conceptually includes both enumerated and unenumerated rights. \(^{316}\) The relationship between the right to the pursuit of happiness and enumerated rights is the same as the relationship between a general rule and special rules, and the principle of *specialia generalibus derogant* (special things derogate from general ones) applies. \(^{317}\) Therefore, when a personhood interest is not covered by an enumerated right, Article 13 is invoked.

Professor Koji Sato, one of the leading constitutional law scholars in Japan today, has developed Professor Taneya's idea of the right to the pursuit of happiness as a comprehensive fundamental right. He call it the personhood right of religion or of religious privacy; the terminology can be worked out. Arguably, it might be based on Article 13 of the Constitution.

\(^{313}\) Professor Taneya calls the clause "Individual's Dignity Clause" because the Clause has the same meaning as Article 1, Section 1 of the German Constitution, which provides for the respect to human dignity. *See* GG., art. 1, § 1 ("The dignity of man is inviolable. To respect and protect it is the duty of all state authority.").


\(^{315}\) *Id.*

\(^{316}\) However, Professor Taneya argues that the social rights are not included in Article 13 but rather in Article 25 which provides general rules of social rights. *See* *KENPO* [JAPAN CONST.], art. 25 ("All people shall have the right to maintain the minimum standard of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.").

\(^{317}\) Taneya, *supra* note 314, at 137-38.
emphasizes the notion of personal autonomy more than personhood. Professor Sato argues that the right to the pursuit of happiness in Article 13 protects the rights that are essential for a person to exist as a being that has personal autonomy.\footnote{318} He also explains that the rights under Article 13 are "the rights concerning one’s personhood."\footnote{319} Following Professor Taneya’s view, Sato argues that the Respect for Individual Clause of Article 13 prescribes that "each human being must be respected to the maximum extent as a holder of ‘personhood.’"\footnote{320} Combined with this Clause, he argues, the Pursuit of Happiness Clause provides a comprehensive right to personal autonomy that is essential for an individual to exist as a being that has personal autonomy.\footnote{321} Citing authorities including Professors Joseph Raz, Professor Sato argues that the right to autonomy under Article 13 guarantees a person to be an author of her own life without being subject to other persons’ intent.\footnote{322} Conceptually the Pursuit of Happiness Clause includes both enumerated and unenumerated rights. But, again, this Clause functions as a general rule and the principle of \textit{specialia generalibus derogant} applies here. Thus Article 13 can be invoked for those autonomous choices that are not covered by other enumerated provisions of constitutional rights.\footnote{323}

2. Recognition of the Constitutional Right to Refuse Treatment in Japan as Autonomy in Authoring One’s Life

Professor Sato further categorizes the unenumerated rights protected

\footnote{318} Koji Sato, \textit{Kenpō} [Constitutional Law] 445 (3d ed. 1995) [hereinafter \textit{Kenpō}]. Professor Sato defines autonomy as meaning that a person is the author of her own life, without being subjected to other persons’ intentions. Koji Sato, \textit{Kenpogaku ni oite "Jikoketteiken" o Iukoto no Imi [Meaning of Discussing “the Right to Self-Determination” in Constitutional Law Study]}, 1989 \textit{Hotetsugaku Nenpo} 76, 86. [hereinafter \textit{Meaning}]. He explains that the reason why autonomy is stressed these days is that since the end of the 19th century, in order to realize a welfare nation, the governments have intervened more and more into people’s private lives, and thus the individual’s autonomy is now in danger. Koji Sato, \textit{Nihonkoku Kenpō to "Jikoketteiken" [The Japanese Constitution and “the Right to Self-Determination”]}, 98 \textit{Hogakusu Kyoshitsu} 6, 9-10 (1988) [hereinafter \textit{Self-Determination}] (citing David A. J. Richards, \textit{Rights and Autonomy}, 92 Ethics 3, 4 (1981); Joseph Raz, \textit{The Morality of Freedom} 407 (1986); Robert B. Young, \textit{Personal Autonomy} 1 (1986)). Therefore, people’s personal autonomy should be the basis of all constitutional rights. Sato, \textit{Self-Determination, supra}, at 10.

\footnote{319} SATO, \textit{KENPO}, supra note 318, at 447.

\footnote{320} Id. at 444. Therefore, Professor Sato’s argument can consist with Professor Taneya’s.

\footnote{321} Id. at 445-48.

\footnote{322} Sato, \textit{Meaning, supra} note 318, at 86 (citing Raz, \textit{supra} note 5, at 204, 398). See also SATO, \textit{KENPO}, \textit{supra} note 318, at 448 (stating that the Right to Pursuit of Happines is a general declaration of constitutional protections of rights and freedoms that are essential for an individual to be the author of her own life).

\footnote{323} SATO, \textit{KENPO}, \textit{supra} note 318, at 448.
under the Pursuit of Happiness Clause into (1) bodily freedom outside of criminal settings and the right to life; (2) rights involving the value of personhood itself (e.g., rights involving reputation, informational privacy, and environment); (3) the right to self-determination, and (4) procedural due process outside of criminal settings. Professor Sato states that the right to refuse life-sustaining treatment is covered by the Pursuit of Happiness Clause, because an individual is the author of her life and because death is one of the stages of life. According to Professor Sato, the first category (bodily freedom) and third category (the right to self-determination) implicate the right to refuse medical treatment. Scholars of constitutional law have recognized constitutional protections of the right to refuse treatment on both grounds, but with more emphasis on the right to self-determination than on a right to bodily integrity.

The scholars have commented that generally the right to refuse medical treatment is part of the constitutional right to self-determination. Even though there has been little further discussion of the detailed meaning and applications of this constitutional right, these general comments demonstrate the importance these scholars attribute to constitutional protection of the right to refuse treatment. For example, Professor Hiroyuki Takai, who examined American case law through the 1980s concerning patients' constitutional right to self-determination, concluded that under the Japanese Constitution it is possible to recognize competent persons' right to refuse life-sustaining treatment in some situations. Professor Ashibe recognizes that the right to refuse treatment implicates Article 13. Professor Hitoshi Serizawa recognizes that when a decision whether to refuse life-sustaining medical treatment is made by an adult or a minor with decision making

324. Id. at 450.
325. Id. at 450-58.
326. Id. at 459-62.
327. Id. at 462-44 (procedural due process in criminal settings are enumerated in Article 31).
328. Sato, Meaning, supra note 318, at 89.
329. SATO, KENPO, supra note 318, at 450, 460.
330. Hiroyuki Takai, Iryo ni okeru Jikoketteiken no Kenporonteki Ichikosatsu (2) [A Review of the Rights to Self-determination in Medicine from the Constitutional Point of View (2)], 123-24 HOGAKU RONSO 97, 121 (1988); Hiroyuki Takai, Seimei no Jikokettei to Jiyu [Self-determinations and Liberties Concerning Life], 978 JURUSUTO 106, 106, 108-09 (1991) (arguing that it is possible to justify the refusal of life-sustaining treatment as personal autonomy protected under Article 13). In the first of these articles, Professor Takai suggests that competent person's refusal of life-sustaining treatment is allowed only when the treatment is highly invasive to the body. However, he does not give further explanation on this suggested limitation.
331. ASHIBE, KENPOGAKU II, supra note 301, at 400.
capacities, that decision should be respected under the Constitution. Professor Yasuo Hasebe says that Japanese Supreme Court’s recent Jehovah’s Witness Blood Transfusion case involves the constitutional right to self-determination, which consists of various choices that “trump” governmental intervention.

Moreover, several scholars specializing in criminal law recognize, at least at an abstract level, that the right to refuse treatment is encompassed within the constitutional right to self-determination. Professor Tatsuhiko Tateyama recognizes that refusal of life-sustaining treatment implicates the right to self-determination protected under Article 13. Professor Hisao Kato points out that involuntary hospitalization of people with mental disease implicates Articles 13, 18, and the provisions involving criminal procedure. Professor Katsunori Kai writes that the right to refuse treatment is the very manifestation of the principle of respecting individuals and their right to the pursuit of happiness provided under Article 13. Professor Minoru Oya also recognizes that refusal of life-sustaining treatment implicates Article 13.

3. Constitutional Protection of the Right to Refuse Medical Treatment as a Bodily Freedom

Under the Japanese Constitution, it is also possible to consider the

332. Hitoshi Serizawa, Kodomo no Jikoketteiken to Hogo [Children’s Right to Self-Determination and Children’s Protection], in JIKOKETrEIKEN TO Ho [RIGHT TO SELF-DETERMINATION AND LAW], 147, 164 (Takashi Ebashi et al. eds, 1998).
333. Id. at 160.
335. YASUO HASEBE, KENPO [CONSTITUTIONAL LAW] 167 (2d ed. 2001). Professor Hasebe explains that the Constitution protects certain autonomous choices as trumps. Id. at 120-21 (“For many, life’s meaning is given only by designing, choosing and living their own lives. At least for certain matters, the right to make autonomous choices should be given to individuals as a [constitutional] human right. . . . In other words, the meaning of “trump” should be given to [constitutional] human rights so that they override the governmental power regarding public welfare.”) (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977)).
336. TATSUMIKO TATEYAMA, JIKOKETrEIKEN TO SHINU KENRI [RIGHT TO SELF-DETERMINATION AND DEATH RIGHTS] 15 (Revised ed. 2002).
339. See MINORU OYA, INOCHI NO HORITSUGAKU: SEIMEI NO TANJO KARA SHI MADE [LEGAL STUDY OF LIFE: FROM BEGINNING TO END OF LIFE], 24-28, 156-57 (2d ed. 1994).
right to refuse medical treatment to be a right protected under the articles regarding the freedom from bodily restraint. At a minimum, these provisions explain the value of bodily freedom and reinforce the protection of the right to refuse treatment as an unenumerated right under Article 13.340

Article 18 guarantees freedom from slavery and involuntary servitude. The Japanese Constitution also contains detailed provisions that protect individuals in criminal settings. Article 31 provides for due process in criminal procedures and Article 33 requires a warrant for apprehension. Article 34 offers freedom from unreasonable detention while Article 35 protects freedom from unreasonable search and seizure. Article 36 absolutely forbids torture and cruel punishments.

Even assuming these provisions do not directly protect bodily freedom outside of criminal procedure, the importance and value of one’s bodily freedom provided in and recognized by these articles strengthen its protection under Article 13. As discussed above, Article 13 has a supplemental role of protecting important rights not covered by other provisions,341 and thus it can be a basis of bodily freedom outside of criminal settings if the other specific provisions are not. Professor Sato’s first category of unenumerated rights includes this freedom.342

The right to refuse medical treatment in terms of a bodily freedom has received even less attention in Japan than has the same right described in terms of personal autonomy in authoring one’s life. However, there are still a few commentators who have discussed the constitutional protection of the right to refuse treatment based upon bodily freedom. Professor Sato has commented that the first category of unenumerated right (the right to bodily freedom outside of criminal settings and the right to life) includes refusals of medical treatment and the doctrine of informed consent.343 Professor Isao Takenaka argues that involuntary psychiatric treatment violates not only the right to self-determination protected under Article 13 but also bodily freedom protected by Articles 13 and 18.344 Professor Masakazu Doi argues for

340. Indeed, the commentators have long called these provisions and the provisions of criminal defendants in the Constitution to be the provisions of “bodily freedom (jinshin no jiyu / shintai no jiyu).” See, e.g., SATO, KENPO, supra note 318, at 585 (categorizing Articles 18, 31-39 as provisions of “protection of bodily freedom and procedural protection in criminal procedure”); Yasuo Sugihara, Jinshin no Jiyu [Bodily Freedom], in KENPO III: JINKEN (2) [CONSTITUTIONAL LAW III: HUMAN RIGHTS (2)] 85 (Nobuyoshi Ashibe ed. 1981) (“Bodily Freedom”); Hasebe, supra note 335, at 252 (same).
341. See supra notes 317, 323 and the accompanying text.
342. See supra note 324 and accompanying text.
343. SATO, KENPO, supra note 318, at 460.
recognition of the right to refuse treatment as a right to bodily integrity under the Japanese Constitution.\textsuperscript{345}

4. A View that Denies a Constitutional Right to Refuse Medical Treatment

Accordingly, the right to refuse treatment can and should be protected under Article 13 of the Japanese Constitution and the constitutional scholars in an abstract level have come to agree. However, one noted scholar argues against constitutional protection of patients' self-determination, including refusal of treatment.

The scholar argues that one primary reason to deny constitutional protection of the right to refuse treatment is that it could lead to a situation in which the theories of constitutional law might govern informed consent principles between private physicians and patients; thus it would prevent development of informed consent theory under civil law.\textsuperscript{346} Moreover, it is argued that there is no necessity for constitutional protection of patients' self-determinations.\textsuperscript{347}

I disagree. To recognize an interest as a constitutional right is a separate issue from having the Constitution regulate every detail of matters regarding patients' choices of treatment.

The Japanese Constitution generally does not govern relationships between private parties. Certainly, the Japanese Supreme Court has implied a possibility that protection of constitutional rights includes, in limited circumstances, protection from infringement by private parties. In the Mitsubishi Plastics case,\textsuperscript{348} a plaintiff employee was fired because of his political activities while in college; he then sued for reinstatement and damages. The Court denied the general claim that the Japanese Constitution's provisions of equality and a freedom of conscience applies to the relationships between private parties,\textsuperscript{349} but the Court stated that when there is an excessive infringement of a person's interests by another private person, a person's fundamental liberties and equality could be protected through civil law provisions.\textsuperscript{350} In the Nissan Motors case,\textsuperscript{351} the Court held that contracts that provide different mandatory

\textsuperscript{346}. Norio Higuchi, Kanja no Jikoketteiken [Patients' Right to Self-Determination], in JIKOKETTEIKEN TO HO [RIGHT TO SELF-DETERMINATION AND LAW], 63, 73 (Takashi Ebashi et al. eds., 1998).
\textsuperscript{347}. Id. at 70, 73-75.
\textsuperscript{349}. Id., 724 HANREI JIHO at 20-21.
\textsuperscript{350}. Id. at 21.
\textsuperscript{351}. Nissan Motors, Inc. v. Nakamoto (Nissan Motors case), 35-2 MINSHU 300, 998
retirement age for men and women are void under Article 90 of the Civil Code,\(^\text{352}\) which nullifies contracts and transactions that violate a public order/policy (kojo ryozoku).\(^\text{353}\) Thus it is possible to see that the constitutional provision, or its background idea, has some role in the interpretation of Article 90. Some constitutional law scholars explain that these cases indirectly applied constitutional law into private relationships via Article 90 of the Civil Code.\(^\text{354}\) However, it is also possible to describe this phenomenon by saying that the courts are merely applying the Civil Code by referring to the values embodied in the Constitution.\(^\text{355}\) At any rate, however, it is obvious that such constitutional involvement in the activities of private parties is, if any, a collateral effect of the constitutional protection of certain rights.\(^\text{356}\)

Indeed, there seems to be no phenomenon in Japan in which the courts' application of constitutional provisions to private relationships has hindered sound development of civil law.

Moreover, denial of the necessity of a constitutional right to refuse medical treatment in Japan underestimates the likelihood of governmental intrusion into self-determination by patients. There are circumstances in which the right to refuse medical treatment cannot be explained in terms of civil law right alone. First, the government might prosecute physicians who accept a patient's refusal of life-sustaining treatment. Thus far, there has been no case in which a physician has been prosecuted for accepting a patient's refusal. However, as discussed below,\(^\text{357}\) there is an active debate among criminal law scholars regarding a patient's decision to forego life-sustaining treatment, which demonstrates a possibility that physicians may be subject to prosecution in the future. When the government tries to prosecute a physician who accepted a patient's refusal of life-sustaining treatment, the patient's constitutional right becomes an integral defense.

Second, denials of the necessity of a constitutional right to refuse

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\(^{352}\) Id., 998 HANREI JIHO at 4.

\(^{353}\) MINPO [CIVIL CODE], art. 90.


\(^{355}\) See SATO, KENPO, supra note 318, at 437-38 (explaining that even a position for direct application of the Constitution to private parties does not deny that it applies through private law's provisions).

\(^{356}\) There are constitutional provisions designed to apply private parties. The slavery in private parties, for example, is prohibited by the Constitution. See, e.g., KENPO [JAPAN CONST.] art. 18 (prohibition of involuntary servitude); art 27, para. 3 (prohibition of child exploitation); art. 28 (workers' rights to organize and do collective bargaining).

\(^{357}\) See infra Part IV.C.3-4.
treatment also overlook the various circumstances in which patients must directly confront the government which seeks to force treatment upon them. Governmental intervention into patients’ self-determination is not limited to the government’s indirect regulation of patients’ rights by regulating physicians’ acts through criminal law.

For example, until 1992, the government had involuntarily confined, segregated and treated people suffering from Hansen’s disease. In a 2001 case, a district court held that the confinement and segregation infringed not only the patient’s right to travel under Article 22 but also the patient’s personhood rights protected under Article 13 of the Constitution, because the governmental segregation substantially impaired any meaningful opportunities to develop their lives as human beings. The court stated that segregation is allowed only when there are no other less restrictive means to avoid contagion and it found that as early as 1960 medical technology abrogated the need for segregation. Although the court did not directly use the word self-determination or autonomy, it found that the government infringed the patients’ personhood rights in that it had deprived them of personal autonomy in authoring one’s life.

The government has also involuntarily confined and treated persons with infectious disease or mental illness. A Japanese statute allows the government to involuntarily hospitalize persons with infectious diseases. Another statute authorizes involuntary hospitalization of persons with mental illnesses who are likely to hurt themselves or harm others, and to keep the patients hospitalized until the government finds

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359. KENPO [JAPAN CONST.] art. 22, para. 1 (“Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.”).
360. Id. at 99 (“The segregation of the patients of Hansen’s disease generally is prolonged for a long period of time. But only a few years of segregation have devastating effects on their life. Some are forced to give up studying, lose his or her job or lose a chance for a dreamed job. Others are forced to lose a chance to marry, have a family and raise children, or are severely restricted to have an intimate life with family members. The opportunities to develop one’s life in every respect, which every person should have as a human being, are destroyed. These restrictions on constitutional human rights reach all aspects of social life. The reality of these restrictions [constitutes] the infringement of the right to personhood protected under Article 13.”).
361. Id. at 99-100.
362. Id. at 100.
363. Kansensho no yobo oyobi kansensho no kanja ni taisuru iryo ni kansuru horitsu [Law of Prevention of Infectious Diseases and Medical Treatment of the Patients with Infectious Disease], Law No. 114 of 1998, art. 20.
364. Seishin hoken oyobi seishin shoagaisu fukushi ni kansuru horitsu [Law of Mental Health and Welfare of Persons with a Mental Disease], Law No. 123 of 1950, arts. 29, 29-2.
that there is no such likelihood of harm, based on the opinion of the hospital.\textsuperscript{365}

Here, it is not naïve to recognize the constitutional right to refuse treatment and to consider the constitutionality of these statutes. As for involuntary hospitalization of people with mental illnesses, Professor Kato suggests “protecting, as a legal right, the patient’s simple thought that ‘it is unbearable to be confined and deprived of freedom of activities just because he happens to suffer from mental illness.’”\textsuperscript{366} He implies that under the Japanese Constitution involuntary hospitalization is allowed only when the person with mental illness has engaged in criminal activity or violated others’ legal interests and when a judge or prosecutor finds that the undesirable behavior would likely be repeated if the patient was not hospitalized.\textsuperscript{367}

If one pursues the development of civil law doctrines beyond control of the Constitution, one should argue that private physicians’ conduct should not be controlled by the Constitution rather than deny the constitutional right itself. To deny the existence of a constitutional right because of a fear that recognition of the right would have undesirable statutory consequences, as the above scholar’s argument seems to do, is not an appropriate method of constitutional exegesis; the meaning of the constitution does not depend on statutes. The Constitution generally does not control civil law interpretation, nor can civil law interpretation as such control the interpretation of the Constitution. Moreover, a categorical denial of certain constitutional rights could be so broad that it might deprive an individual of an effective defense from governmental power.\textsuperscript{368}

\textbf{B. Standards of Judicial Review and the “Double Standard” Theory}

The constitutional law scholars’ discussions on the right to refuse treatment have gone little further than the general recognition that the Japanese Constitution protects the right to refuse medical treatment, and the scope of this right has little yet been discussed.\textsuperscript{369} In contrast, there

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\item \textsuperscript{365} Id. art. 29-4.
\item \textsuperscript{366} Kato, supra note 337, at 89.
\item \textsuperscript{367} Id. at 87-88, 97-98.
\item \textsuperscript{368} The commentator also argues that a reason why the right to refuse medical treatment is recognized as a constitutional right in the U.S. but should not in Japan is that in the U.S. it had to be argued in order to gain federal jurisdiction. Higuchi, supra note 346, at 69. However, this explanation does not stand here. Most of the American courts that recognized the constitutional right to refuse treatment are the state courts which do not have to find a federal question for their jurisdiction. The fact that the state courts nevertheless mentioned the Constitution suggests that they realized the obvious importance of the right to refuse medical treatment as a constitutional right.
\item \textsuperscript{369} Professor Sato writes that the refusal of life-sustaining treatment is favored at
have been active discussions over the scopes of the constitutional protections of spiritual rights (seishinteki jiyuken), including freedom of conscience, freedom of expression, religion, and academic study. Japanese constitutional scholars have argued for, and the courts have partially adopted, the "double standard" theory, stating that heightened scrutiny applies to spiritual freedoms, while only a deferential standard applies to economic freedoms. This difference in the level of constitutional scrutiny has been explained that the spiritual freedom is necessary to secure the democratic process while economic freedom is not and that the spiritual freedom has more important substantive value than economic rights. If the value of spiritual rights can explain courts' application of heightened scrutiny to the governmental restrictions of spiritual rights, the right to refuse treatment should also be protected from governmental intrusions with heightened scrutiny, because of this right's crucial value as autonomy in authoring one's life and bodily freedom.

1. Double Standard Theory between Spiritual Freedom and Economic Freedom

The Japanese Constitution explicitly provides for the court's power of judicial review. Article 81 states, "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act." The lower courts have this power as well.

Referring to U.S. cases and theories, Japanese constitutional scholars have developed theories concerning the standards for judicial review. Today, it is established among scholars that spiritual freedoms

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370. See KENPO [JAPAN CONST.], art. 19 ("Freedom of thought and conscience shall not be violated.").
371. See id. art. 21 ("Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.").
372. See id. art. 20 ("Freedom of religion is guaranteed to all. . . . (2) No person shall be compelled to take part in any religious act, celebration, rite or practice. . . .").
373. See id. art. 23 ("Academic freedom is guaranteed.").
374. KENPO [JAPAN CONST.], art. 81.
375. See Japan v. Yanagi (Food Control Act case), 4-2 KEISHU 73, 75-76 (Sup. Ct., G.B., Feb. 1, 1950).
376. See generally Hidenori Tomatsu, Judicial Review in Japan: An Overview of
require more heightened scrutiny than economic freedoms.\textsuperscript{377}

Since the 1970s, the Supreme Court of Japan has to some extent accepted this two-tier approach.\textsuperscript{378} Though the Court has never used strict scrutiny to strike a statute restricting free speech or other spiritual freedoms, the Court has suggested in dicta as a general principle that there are two different standards of judicial review for spiritual freedom and economic freedom.

The two-tier approach was first announced in the Supreme Court by Justice Tanaka in his dissenting opinion in a 1969 obscenity case.\textsuperscript{379} The Grand Bench (en banc) of the Supreme Court,\textsuperscript{380} in an 11-to-4 vote, affirmed the conviction of the publisher who sold a translation of the Marquis de Sade's \textit{In Praise of Vice}. Criticizing the Court's view that freedom of expression is equally subject to the demand of public welfare as is economic freedom, Justice Tanaka expressed the view that free expression goes beyond public welfare and is only subject to its own internal limitation. He wrote that freedom of "speech, the press and all other forms of expression ... and academic freedom ... constitute the very basis of democracy and ... thus extremely significant; such constitutional freedom should be given ... substantial protection. ... This freedom ... is different from freedom to choose occupation and to choose and change residence."\textsuperscript{381}

Justice Tanaka's distinction between spiritual and economic freedom was accepted by the majority in 1972 and 1975. In the 1972 case,\textsuperscript{382} which upheld as constitutional a statute that required a certain distance between market complexes for small retail businesses, the en banc Court stated, "As for an individual person's freedom of economic..."
activity, different from an individual's spiritual freedom and the other freedoms, the Constitution anticipates, and also allows, certain reasonable measures that restrict the freedom of economic activities of individual citizens as a means of implementing social economic policies." 383 In the 1975 case, 384 the Court struck down as unconstitutional under Article 22 the minimum distance requirement between drug stores. In spite of its conclusion that the particular economic regulation was unconstitutional, the Court referred to the two-tier approach between economic and spiritual liberties: "the demand for regulation by public authority on freedom to choose an occupation is stronger than on other constitutionally guaranteed freedoms, especially on the spiritual freedom." 385 More recently, in 1989, the Court's unanimous opinion noticed in dicta, "the strict standard [is] generally required when the freedom of expression is restricted." 386

The two-tier approach in Japan has its origin in the U.S. Supreme Court case, United States v. Carolene Products Co., 387 which was decided just after the Supreme Court stopped judicial intrusion into economic legislation in West Coast Hotel Co. v. Parrish. 388 In Carolene Products Co., Justice Stone, writing for the Court, recognized the constitutionality of legislation that prohibited the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat. He held that the legislation enjoys a presumption of constitutionality and it would be found constitutional as long as it was supported by a rational basis. 389

In Footnote 4, 390 however, Justice Stone outlined three categories of law to which the presumption of constitutionality is not given and heightened scrutiny is applied: legislation (1) which is "within specific prohibition of the Constitution, such as those of the first ten amendments," (2) "which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and (3) which is inimical to "discrete and insular minorities." 391

Professor Ashibe explains that Footnote 4 expresses the idea that since spiritual freedom is essential to a democratic political process, the

383. Id., 687 HANREI JIHO at 25.
389. Carolene Products Co., 304 U.S. at 152-54.
390. Id. at 152 n.4.
391. Id.
legislation that restricts spiritual freedom cannot be removed through the democratic political process. Such legislation must be reviewed under heightened scrutiny, while the rational basis test should be applied to economic legislation. The same analysis is applied to legislation that restricts the rights of minorities.392

On the other hand, Professor Ashibe argues, Footnote 4 should not be understood as excluding evaluation of each right’s substantive value.393 First, he explains that the first paragraph of Footnote 4394 is premised on a substantive value judgment with respect to protected rights, independent from their functions in protecting or reinforcing the democratic political process.395 Second, Professor Ashibe points out that, although the first paragraph was added at Chief Justice Hughes’s request, 396 Justice Stone wholly accepted this idea: in Jones v. Opelika,397 when then-Chief Justice Stone said that the First Amendment rights occupy a “preferred position”398 in the constitutional system, he was engaged in a judgment with respect to the relative substantive value of those rights.399

Therefore, though Professor Ashibe says the double standard theory is primarily explained by spiritual freedom’s function in protecting the democratic political process, he admits that the double standard is secondarily based on the substantive value of spiritual rights. He supports Professor Laurence H. Tribe’s view that constitutions are

392. ASHIBE, KENPOGAKU II, supra note 301, at 215.
393. Id. at 216-18. Professor Ashibe also presents, as a basis for the double standard theory, the Japanese Constitution’s principles of representative democracy and a social welfare state (see, e.g., KENPO [JAPAN CONST.], art. 25 (social rights)), the limitation of the judicial system in its ability for reviewing economic legislation, and the fact that only the text of Articles 22 (freedom of occupation) and 29 (property rights), not the articles of spiritual freedom, explicitly refers to the limitation by the “public welfare.” ASHIBE, KENPOGAKU II, supra note 301, at 225.
394. The first paragraph reads, “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.” (citation omitted).
395. ASHIBE, KENPOGAKU II, supra note 301, at 216. See Luis Lusky, Footnote Redux: A Carolene Products Reminiscence, 82 COLUM. L. REV. 1093, 1097, 1099-1100 (1982) (arguing that when Chief Justice Hughes suggested to Justice Stone that he add the first paragraph, he was suggesting that “[s]ome rights . . . deserve more judicial attention than others because they are mentioned in the text of the Constitution, even though the text, on any fair interpretation, has fallen short of affording the protection the Court is now asked to provide.”).
396. See Lusky, supra note 395, at 1096-1100.
398. Id. at 608 (Stone, C.J., dissenting).
399. ASHIBE, KENPOGAKU II, supra note 301, at 217.
systems of substantive values that hold "human dignity" in their core.400

2. Standard of Judicial Review for the Right to Refuse Medical Treatment

Professor Ashibe develops the double standard theory in several respects and this development is generally supported by constitutional law scholars. First, he applies this theory to protecting the right to self-determination (which he calls the right to privacy). Footnote 4 of the Carolene Products Co. case does not mention this right, but Professor Ashibe argues for protecting this right with heightened scrutiny because of its substantive value: the right to privacy (self-determination) lies at the core of the principle of non-violability of one's personhood (human dignity). . . . Only the highest degree of protection for an individual's personhood and autonomy enables people to realize themselves and wholly enjoy the protection of spiritual freedom. Hence, in cases where the issue is the alleged violation of the right to privacy, which involves marriage, procreation, childrearing and others and which is fundamental to an individual's personal or autonomous existence, 'strict scrutiny' ('compelling interest' test . . .) is required, pursuant to spiritual freedom cases.401

He also argues that privacy interests which are less fundamental still require intermediate scrutiny,402 and supports Cruzan since it considered the right to refuse treatment to be one of the protected constitutional rights that require heightened scrutiny.403

Thus, following Professor Ashibe's theory of judicial review based on U.S. theories and the recognized value of the right to refuse treatment in the U.S., a governmental infringement on the right to refuse treatment in Japan should be subject to heightened scrutiny. Under this level of scrutiny, the government is at least required to show that there is an important interest, that the means of restrictions substantially furthers the interest, and that the means is the least restrictive one.

In sum, Professor Ashibe incorporated the two-tier approach of


401. Ashibe, Kenpogaku II, supra note 301, at 242. See also Sato, Meaning, supra note 318, at 20 (the acts of self-determination that are directly connected with one's personhood require a heightened scrutiny such as that requiring a compelling state interest).

402. Ashibe, Kenpogaku II, supra note 301, at 242.

403. Id. at 399-400.
judicial review developed in U.S case law into Japanese law and supplemented it. The Japanese Supreme Court, albeit in part, accepted it.\textsuperscript{404} Under this widely accepted view, the right to refuse treatment, as a part of the right to self-determination, can and should be protected with heightened scrutiny.

C. Application of the Constitutional Right to Refuse Treatment in Japan

1. Case of Jehovah’s Witness’ Refusal of Blood Transfusion\textsuperscript{405}

In 2000, the Supreme Court of Japan recognized the right to refuse a blood transfusion under tort law. Despite that the Court did not mention the Constitution, it clarified that the right to refuse medical treatment is justified because of its importance for one’s personhood. Moreover, the Court’s opinion implies that this right outweighs countervailing governmental interests.

The patient of this case was a Jehovah’s Witness and suffering from liver cancer. She was looking for a physician and hospital that would honor her wish to operate without a blood transfusion even if a transfusion proved necessary for saving her life. One of the defendant physicians advised the patient to undergo tests immediately, saying that the operation could be performed without a blood transfusion if the malignancy had not yet metastasized. The patient accepted the advice. While the patient was in the hospital, the physicians recognized the possibility that the transfusion might be necessary during the operation, but they did not explain to the patient their hospital’s policy that the transfusion be performed even against the patient’s wish if necessary to save the patient’s life. Before the operation, the patient gave the physicians a waiver that stated that she could not accept blood transfusion and that she waived her claim for any injury caused by performing the surgery without blood transfusion. During the operation, the physicians determined that a transfusion was necessary to save her life due to hemorrhage, and gave the transfusion.

The Court recognized the patient’s right to refuse treatment as a part of a personhood right under tort law and found the physicians liable. The Court stated:

\[ \text{[W]hen a patient retains a clear wish of refusal of treatment that accompanies blood transfusion because it violates her religious belief, the right to such decision making must be respected as a part} \]
of the personhood right. [The physicians] knew that the patient had
[such a religious belief] and [the patient] had entered [the hospital]
expecting to undergo the operation without blood transfusion—under
such facts in the present case, when the physicians realized that they
could not deny a possibility of facing the situation during the
operation where a blood transfusion is the only way to save her life,
they should have explained to her that [the hospital] has a policy of
giving blood transfusions in such a situation . . . and let her decide
whether to stay at [the hospital] and undergo the operation performed
by [the physicians].

Although this case involves tort law and the patient’s religious
beliefs, one can find significant constitutional implications in this case,
supporting the proposition that in Japan, like America, the right to refuse
medical treatment is protected by its constitution. While the Court did
not explicitly state that the right to refuse treatment is protected by the
Constitution, it declared the right to refuse treatment as a part of
“personhood rights” in tort law doctrine. As discussed above, it is
generally agreed among constitutional law scholars that the Pursuit of
Happiness Clause of Article 13 of the Japanese Constitution consists of
the rights that are essential for one’s personhood. Hence, if a right is
recognized as essential to one’s personhood in tort law doctrine, it is
logically possible to recognize the same interest under the Constitution
against the government. In this case, the patient’s refusal was
motivated by her religious belief, but the American cases have protected
patients’ refusal regardless of the patient’s religious belief. Thus, it is
possible to consider that non-religious refusal is equally protected by the
Japanese Constitution.

Additionally, the patient was not terminally ill, but the Court

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406. Id., 1710 HANREI JIHO at 99-100.
407. See supra Part IV.A.1.
408. Isamu Noguchi, Ehoba no Shonin Mudan Yuketsu Sosho to Infomudo-Konsento
no Hori [Jehovah’s Witness Unauthorized Blood Transfusion Case and the Principle of
Informed Consent], 549 HOGAKU SEMINA 65, 66 (2000) (commenting that although the
opinion did not cite certain article of the Constitution, a recognition of the constitutional
value of individual dignity under Article 13 of the Constitution lies at the basis of the
reasoning of this case).
409. See ASHIBE, KENPOGAKU II, supra note 301, at 360-61 (arguing that important
personhood interests protected in private law can and should be protected under Article
13 of the Constitution).
410. The American courts do not distinguish religious and non-religious treatment
and apply the same standard of judicial review to the religious and non-religious refusal
cases. Compare the religious refusal cases, e.g., Erickson v. Dilgard, 252 N.Y.S.2d 705
(N.Y. Sup. Ct. 1962); In re Melideo, 390 N.Y.S.2d 523 (N.Y. Sup. Ct. 1976); Public
Health Trust of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989) with the non-religious
refusal case discussed in Parts II and III.
411. She lived for about five years after the treatment. See id. at 99.
recognized the right to refuse life-sustaining treatment. Therefore, the Court's holding is consistent with the American courts' idea that a competent patient's right to refuse treatment must be protected regardless of the patient's life-expectancy or prognosis.\textsuperscript{412} The Japanese Supreme Court itself did not consider the patient's diagnosis or life-expectancy or other objective elements when it held that her right to refuse treatment should have been honored.\textsuperscript{413}

A commentator argues that the Jehovah's Witness Blood Transfusion case recognized the right to refuse medical treatment only as a religious right and its scope is limited to religious refusal.\textsuperscript{414} This understanding is too narrow. The Japanese Supreme Court did not discuss a distinctive nature of the religion-based refusal of treatment. Moreover, as seen above, cases in the U.S. have not distinguished between religious- and nonreligious-based convictions with respect to refusal of treatment. It is because a competent person's refusal of life-sustaining treatment has sufficient value as autonomy in authoring one's life and bodily freedom to warrant protection under the Constitution that a person does not need to have a religious conviction to gain constitutional protection and invoke heightened scrutiny against restrictions that impair such decision making.

As seen below, mainstream criminal law theories are much less receptive to honoring a competent patient's wishes than this case. The rest of this article will examine the consistency between the constitutional right to refuse treatment and the views of Japanese lower courts and criminal law scholars over the interpretation of criminal law involving the decision to forgo life-sustaining treatment.

2. Tokai University Case

In Japan, no health care provider has been indicted for honoring a patient's refusal of lifesaving treatment and withholding or withdrawing the treatment.\textsuperscript{415} However, in the Tokai University case,\textsuperscript{416} a district

\textsuperscript{412} See supra Part III.B.1.

\textsuperscript{413} Moreover, the Court never implied that the refusal of lifesaving treatment is an attempted suicide or that a physician or hospital's respect for a patient's refusal and the resulting death ruin ethical integrity of medical profession.


\textsuperscript{415} In contrast, there were criminal cases involving active euthanasia in lower courts and they have suggested that active euthanasia might be allowed in extreme circumstances under criminal law. See Euthanasia case, 15-9 Kokeishu 674, 324 Hanrei Jiho 11 (Nagoya High Ct., Dec. 22, 1962). The court noted a controversial standard for allowing euthanasia: euthanasia is allowed only when (1) the patient is suffering an incurable disease and death is imminent; (2) physical pain is so severe that
court mentioned, in dicta, the requirements for allowing a decision to forego life-sustaining treatment under criminal law.

The case involved a physician’s active termination of the life of a terminally-ill patient, whose death was imminent, because of persistent requests by the patient’s son. The 58-year-old male patient was suffering cancer but, according to the family members’ requests, had not been informed of disease or life-expectancy. Five days before his death, he became half-conscious, and because he tried to remove a feeding tube and drip infusion, his limbs were bound. On the morning of the day of his death, his family members requested the removal of the tube and infusion, and the defendant physician honored the request. In the evening, a family member who could not bear the sight of the patient’s labored breathing demanded repeatedly and persistently that the defendant end the patient’s life. The defendant finally injected potassium chloride and verapamil hydrochloride into the patient, who died eleven minutes later.

The prosecutor indicted the defendant only for this deadly injection, not for his other activities such as withdrawing life-sustaining treatment. The court convicted him of murder and sentenced him to two years’ imprisonment with two year’s probation.417

In dicta, the court set forth circumstances in which the decision to forego life-sustaining treatments would be honored. Foregoing life-sustaining treatment is allowed when (1) the patient is suffering an incurable disease and is in a terminal situation where there is no expectation of recovery,418 and (2) there is the patient’s expressed wish of foregoing treatment at the very moment of foregoing the treatment, or there is the patient’s wish that can be found by the family members who know the patient well and have communicated with him or her.419 The
court also added that all treatment can be foregone including nutrition and hydration.\footnote{Id. at 38.} The court explained that the reason the patient’s terminal condition is required is that otherwise it would possibly cause “a general climate of undervaluing life.”\footnote{Id. at 39.}

3. Problems of Tokai University and Criminal Law Theories in Japan

There are at least three major problems with the Tokai University analysis. First, unlike American courts which first discuss a competent person’s right to refuse treatment and then deal with issues unique to incompetent patients, the court in Tokai University tried to set conditions for allowing forgoing treatment applicable to both competents and incompetents, without considering the nature and scope of a competent person’s right to refuse treatment. While the court mentioned “the idea of self-determination,”\footnote{Id. at 36-37.} the court did not treat it as an important individual right that controls interpretation of criminal law, but rather mentioned it as if it were merely one of the several factors to consider and is easily overridden by some governmental interests. This problem leads to the second and third problems.

The second problem in the opinion of Tokai University regarding the right to refuse treatment lies in the requirement that the patient be in a terminal condition. The court set this requirement without distinguishing between competent and incompetent people.

A governmental committee report also required that a patient’s condition be terminal. One year before the Tokai University case, the Special Committee of Death and Medical Treatment of the Science Council of Japan (a committee that advises the government consisting of scholars from various fields) issued a report on foregoing life-sustaining treatment. The report found that “based on the principle of informed consent, which is the starting point of medical treatment, the way of living or ending one’s life which the patient chooses should be respected.”\footnote{NIHON GAKUJUTSU KAIGI, SHI TO IRYO TOKUBETSU IINKAI [SPECIAL COMMITTEE OF DEATH AND MEDICAL TREATMENT, THE SCIENCE COUNCIL OF JAPAN], SONGENSHI NI TSUITE [ON DEATH WITH DIGNITY] (1994), reprinted in 1061 JURISUTO 70, 71 (1995) [hereinafter Committee Report].} The report then discusses competent patients’ foregoing of treatment. It says, “[S]ince the legal principle of informed consent governs in medical treatment, when a terminal competent patient refuses life-prolonging treatment, the physicians should be subject to the

\footnote{Id. at 36-37.}
\footnote{Id. at 39.}
\footnote{Id. at 38.}
\footnote{Id. at 39.}
The Committee Report went on to discuss medical integrity and the difference between attempted suicide and refusal of life-sustaining treatment. It correctly says, "[I]f there is a patient’s request, foregoing life-prolonging treatment is not against the ethics of physicians. . . . Foregoing life-prolonging treatment is a measure for allowing a natural death to occur, and, therefore, such death is not suicide or homicide by a physician." However, the Committee Report suggests that both a competent and incompetent patient’s refusal should be honored when the patient is in a terminal situation. The Report does not adequately explain this limitation.

Commentators support the requirement that the patients’ conditions be terminal. For example, Professor Oya, who drafted this committee report, argues that the refusal of life-sustaining medical treatment is allowed only when the competent patient is terminal and has no possibility of recovery, even though he agrees that there is constitutional protection of the right to refuse treatment and he recognizes the importance of a competent person’s right prior to a consideration of the issues presented by incompetent people. He explains that this restriction is necessary because of the importance of respecting human life. Other leading scholars in criminal law suggest that the permissible circumstances should even more narrowly be limited to those in which the patient’s death is imminent.

This requirement is too narrow to withstand constitutional scrutiny. The American courts since Quinlan have consistently found that the state interest in preserving life cannot outweigh patients’ constitutional right to refuse treatment regardless of their life-expectancy or prognosis. As Professor Oya says, the interest in protecting life is unquestionably very important. However, the American cases have clarified that, at least for competent persons, the importance of the constitutional right to refuse treatment generally outweighs the importance of the governmental interest in preserving the patient’s life. Moreover, the Japanese Supreme Court in the above Jehovah’s Witness Blood Transfusion case confirmed the principle that a competent person’s right prevails regardless of life-expectancy. Therefore, as for competent patients, their right to refuse

424. Id.
425. Id.
426. OYA, supra note 339, at 164.
427. Id. at 156-57.
428. Id. at 164.
treatment under the Japanese Constitution must generally be sustained regardless of life-expectancy.\textsuperscript{430} Competent persons should have a final say regarding when to forgo their own treatment, not the government.

Third, the Tokai University court’s justification for requiring the patient’s condition to be terminal is not satisfactory. The court explained that such a requirement is necessary because allowing the foregoing of life-sustaining treatment for non-terminal patients, including competent people, might cause a “general climate of undervaluing life.”\textsuperscript{431} Here, the court gave no explanation for what this climate might be or the likelihood that it might occur. Neither did it explain any possible causal relationship between honoring non-terminal patients’ refusal of life-sustaining treatment and this putative climate.\textsuperscript{432} A constitutional right that invokes heightened scrutiny requires the government to show at least an important governmental interest and its substantial connection with the governmental restriction of the constitutional right. A hypothetical, abstract interest cannot be a recognizable important governmental interest. Or even assuming it can, one cannot find a substantial, not remote, relationship between a hypothetical fear and the governmental restriction. Moreover, even if a court found such a relationship, the government would still have to show that a total ban of non-terminal patients’ refusal is a minimum means to further the important governmental interest.

Furthermore, the Supreme Court’s Jehovah’s Witness Blood Transfusion case did not take the same approach as the district court in Tokai University: the Supreme Court recognized a patient’s right to refuse treatment when the patient is not in terminate condition. Indeed, there seems no argument that this Supreme Court case has caused a “general climate of undervaluing life.”

4. Physicians’ Duty to Treat the Patient Regardless of the Patient’s Choice

The Tokai University court set a patient’s terminal condition as a requirement for allowing foregoing treatment, explaining that the physician’s legal duty lasts until the patient’s disease becomes

\textsuperscript{430} See TATEYAMA, supra note 336, at 26 (arguing that there is no necessity at all to limit the foregoing life-sustaining treatment to terminal patients as long as the patient’s wish is clear).

\textsuperscript{431} Tokai University, 1539 HANREI JIHO at 37.

\textsuperscript{432} See Conroy, 486 A.2d at 1223 (“In cases that do not involve the protection of the actual or potential life of someone other than the decision maker, the state’s indirect and abstract interest in preserving the life of the competent patient generally gives way to the patient’s much stronger personal interest in directing the course of his own life.”).
terminal. This view has received support among the leading commentators.

In the case of competent persons, however, the court’s requirement of a terminal condition, and its justification based upon the physician’s legal duty to treat, would be in conflict with the Constitution. The court treated a patient’s right to self-determination and the physician’s duty to treat as different and independent factors that need to be weighed. This is an incorrect understanding of the nature of the physicians’ duty; when the patient is competent, the physician’s duty to treat should disappear at the moment when the patient refuses the treatment. When the patient is competent, a physician has a duty to treat only as far as the patient accepts.

A physician’s duty to treat under the criminal law is surely based upon the government’s important interest in preservation of life. As discussed above, however, this governmental interest cannot supersede a competent person’s constitutional right to refuse treatment just because the patient is not in a terminal condition.

In conclusion, the Constitution of Japan, like the U.S. Constitution, protects the right to refuse medical treatment. The constitutional right to refuse treatment requires that a governmental intrusion into this right pass heightened scrutiny of judicial review. Under the Japanese Constitution, a competent person’s refusal of treatment, including life-sustaining treatment, should generally outweigh the important state interest in preserving life, regardless of life expectancy. A physician’s duty to treat patients should disappear at a competent patient’s refusal. The interpretations of statutes regarding foregoing of life-sustaining treatment should be developed following the constitutional requirements.


434. Nakayama, *supra* note 429, at 154; Naito, *supra* note 429, at 200-01 (stating that physicians’ duty to treat disappears when the patient is in terminal condition and there is consent of a patient).

435. See KAI, supra note 338, at 209, 281 (stating that a physician’s duty to treat disappears with a patient’s wish). See also Yoshihiko Nakamori, *Ishi no Shinryo Hikiuke Gimu Ihan to Keiji Sekinin [Physicians’ Duty to Undertake Medical Treatment and Criminal Responsibilities]*, 91 HOGAKU RONSO 1, 1 (1972) (“One of the most important occupational duties of a physician is to treat sick persons . . . at their request.” (emphasis added)).

436. See supra Part III.B.1.

V. Conclusion

This article has shown that in both the United States and Japan the right to refuse medical treatment is an important constitutional right. The right to refuse treatment deserves constitutional protection because of the moral value in autonomy in authoring one's own life and bodily freedom. Government restrictions of the right to refuse treatment require heightened scrutiny by the courts, and under such scrutiny, a competent person's right generally outweighs state interests, including the interest in preservation of life. The American courts have paved the way for the constitutional protection of individual autonomy in their own body and most personal end of life choices. It is time for Japanese courts to similarly take a stand for establishing the right to refuse medical treatment as a concrete constitutional norm.