Expounding The State Constitution: The Substantive Right of Privacy in South Carolina

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EXPONDING THE STATE CONSTITUTION: THE SUBSTANTIVE RIGHT OF PRIVACY IN SOUTH CAROLINA

BY CONSTANCE BOKEN

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I. INTRODUCTION

The South Carolina Supreme Court recently created a new era of privacy law in this state in Singleton v. State. In Singleton the South Carolina Supreme Court recognized a substantive right of privacy in article I, section 10 of the South Carolina Constitution, which states, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable invasions of privacy shall not be violated." The court

* B.A. 1991, Old Dominion University; J.D. 1994, University of South Carolina. The author wishes to thank Professor William S. McAninch for his invaluable comments on earlier drafts.

2. See id. at ___, 437 S.E.2d at 61.

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held that the State violates this right of privacy by forcibly medicating a convict, incompetent to be executed, solely to facilitate execution. Although this privacy language has been in the Constitution for more than twenty years, Singleton gives the language a new meaning - a meaning with substantial jurisprudential implications and opportunities for South Carolina citizens. This Note explores the ramifications of recognizing a substantive right of privacy in the state constitution.

The right of an individual to be let alone has been recognized for more than one hundred years. An individual’s freedom from the watchful eye of Big Brother is a freedom that most Americans probably take for granted. Since the 1960s, the United States Supreme Court has struggled to strike a balance between our private lives and the governmental power to impinge on those lives in our best interests. The landmark decision of Griswold v. Connecticut gave the Supreme Court a vehicle by which it may protect individuals from unwarranted governmental intrusions into their personal lives. In Griswold the Court recognized a fundamental zone of privacy in the penumbra of the United States Constitution’s Bill of Rights. Thereafter, courts struck down as unconstitutional state legislation that unduly interfered with an individual’s substantive right of privacy.

The federal courts have grappled with construing this constitutional right to privacy ever since Griswold. Decisions in marriage, child-rearing, and

5. See infra text accompanying note 70.
7. See GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1947).
8. 381 U.S. 479 (1965) (striking down a Connecticut statute that forbade the use of contraceptives because the substantive right of privacy guaranteed by the Bill of Rights protects the right of married persons to use contraceptives).
9. Id. at 484. Justice Harlan’s concurrence suggests that the Fourteenth Amendment Due Process Clause does not have to incorporate or depend upon the specific Bill of Rights guarantees, but instead stands “on its own bottom” to protect values “‘implicit in the concept of ordered liberty.’” Id. at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). In accord with Justice Harlan’s opinion, the right to privacy found in Griswold within the penumbra of the Bill of Rights has evolved into a substantive due process analysis, in which the Supreme Court has found the right of privacy to be a part of the liberty guaranteed by the Fourteenth Amendment. See, e.g., Roe v. Wade, 410 U.S. 113, 153 (1973) (finding the right to privacy of the Fourteenth Amendment “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”).
10. See Zablocki v. Redhail, 434 U.S. 374 (1978) (striking down on privacy grounds a statute that dictated that a parent who was under a court order to support a child could not marry if that parent had not paid such support and could not demonstrate that the child would not become a
child-bearing, and the use of contraceptives established the basic contours of a federal right to privacy. However, in recent years the federal courts limited their decisions upholding a person's autonomy over state interests. Instead, under the notion of federalism federal courts deferred to the states to protect an individual's privacy interests. At the same time, the federal courts invited states to use their own constitutions to protect their citizens from unwarranted government interference with privacy rights.

The South Carolina Supreme Court used the state constitution's privacy provision to protect a prisoner's right to be free from unwarranted forced medication in Singleton. Part I of this Note will detail this forced medication analysis as well as other significant aspects of the decision, in which the supreme court also adopted a competency standard for convicts awaiting execution and defined the scope of remedies available in post conviction relief hearings. Part II explores the rationale and legitimacy of recognizing a substantive right of privacy in the South Carolina Constitution. Part III addresses the importance of developing a state constitutional right of privacy. Of course, with this development will come a new responsibility for the state courts. As the state judiciary bases its privacy decisions on the state constitution, it enters an area of law that is virtually nonexistent in this state. Therefore, the courts have a long, arduous task of providing textual and

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11. Cf. Pierce v. Society of Sisters, 268 U.S. 510 (1925). Although this case did not rely on the substantive right of privacy articulated in the subsequent Griswold decision, the Court held that parents have a right to direct the education of their children by invalidating a state statute requiring children to attend public schools.

12. See, e.g., Roe v. Wade, 410 U.S. at 113 (invalidating on right of privacy grounds a Texas statute that almost completely banned abortions).


15. See William S. Graebe, Comment, The Right to Privacy: A Proposal for North Carolina, 26 WAKE FOREST L. REV. 1185, 1186-87 & n.13 (1991) ("[T]he protection of a person's general right to privacy...is, like the protection of his property and of his very life, left largely to the law of the individual States." (quoting Katz v. United States, 389 U.S. 347, 350-51 (1967) (alteration in original)); see also Bowers, 478 U.S. at 190 (stating that the decision not to expand privacy rights did not affect "state-court decisions invalidating those laws on state constitutional grounds"). Indeed, former Chief Judge Sanders of the South Carolina Court of Appeals strongly urged litigants to raise the state constitution's right of privacy provision because of state courts' ability to expand upon federal rights by interpreting the state constitution. See State v. Austin, 306 S.C. 9, 15-17, 409 S.E.2d 811, 815 (Ct. App. 1991). For a discussion on the importance of federalism urged by Chief Judge Sanders in Austin, see infra part III.

theoretical interpretations of the state constitution’s right of privacy. Finally, Part IV will look at specific state constitutional challenges that may be made to South Carolina state action under the privacy umbrella. For example, South Carolina’s statute mandating HIV testing of sex offenders may be challenged. Also, the privacy provision may be instrumental in establishing a person’s privacy-based right to die.

Singleton created the possibility of a new attack on state action that impinges on a citizen’s right to privacy. The South Carolina courts may take this opportunity to fill in the gaps involving certain privacy issues that federal courts have chosen not to address or have construed narrowly. Accordingly, we should remember that it is the state constitution we are expounding.\(^\text{17}\)

II. Singleton v. State

Fred Singleton was convicted for murder, first-degree criminal sexual conduct, larceny of a motor vehicle, and burglary. He then was sentenced to be executed.\(^\text{18}\) On a second application for post conviction relief (PCR) in March 1990, “Singleton alleged that he was not competent to be executed.”\(^\text{19}\)

At the PCR hearing, in determining the proper standard to assess Singleton’s competency the judge adopted the American Bar Association Criminal Justice Mental Health Standard (A.B.A. Standard).\(^\text{20}\) The State urged the adoption of the standard Justice Powell set forth in his concurrence in Ford v. Wainwright.\(^\text{21}\) However, the PCR judge found Singleton incompetent to be executed under the A.B.A. Standard and Justice Powell’s standard.\(^\text{22}\)

Upon this finding of incompetency, the PCR judge vacated Singleton’s death sentence and imposed a life sentence on May 8, 1991. The State appealed, claiming that the PCR judge adopted the wrong standard to assess competency and erred in vacating the sentence. The supreme court then addressed the State’s forced medication of Singleton as a critical question inherent in both of the raised issues.\(^\text{23}\)

\(^{17}\) Justice Marshall once remarked that one cannot expect the Constitution to have the detail of a legal code because then the human mind could not embrace its fundamental premises: “[W]e must never forget, that it is a constitution we are expounding.” M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).


\(^{19}\) Id. at ___, 437 S.E.2d at 55.

\(^{20}\) Id. at ___, 437 S.E.2d at 55; see infra notes 25-28 and accompanying text.

\(^{21}\) 477 U.S. 399, 418 (1986) (Powell, J., concurring); see infra notes 29-31 and accompanying text.

\(^{22}\) Singleton, ___ S.C. at ___, 437 S.E.2d at 55.

\(^{23}\) Id. at ___, 437 S.E.2d at 55.
A. The Competency Standard for Execution

On appeal the State contended that the PCR court erred by not adopting Justice Powell's competency standard set forth in Ford v. Wainwright and by instead adopting the A.B.A. Standard.24 The A.B.A. Standard consists of a two-prong test:

A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.25

The court defined the first prong, "the cognitive prong," "as the ability to recognize the nature of the punishment and the reason for the punishment."26 The second prong, "the assistance prong," involves "the ability to assist counsel, or the court, in identifying exculpatory or mitigating information."27 A defendant's failure to satisfy either prong will warrant a stay of execution.28

In Ford v. Wainwright the Supreme Court concluded that the Eighth Amendment grants an insane prisoner the right not to be executed.29 However, only Justice Powell's concurring opinion proposed a standard addressing the meaning of insanity.30 Justice Powell stated, "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."31 Justice Powell's articulation mirrors the cognitive prong of the A.B.A. Standard. However, Justice Powell rejected the assistance prong of the A.B.A. Standard in a footnote addressing the more rigorous standards used in some states.32

24. Id. at __, 437 S.E.2d at 55.
25. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-5.6(b) (Am. Bar Ass'n
Criminal Justice Standards Committee 1987).
27. Id. at __, 437 S.E.2d at 56.
28. Id. at __, 437 S.E.2d at 58.
30. Id. at 421-22 (Powell, J., concurring); see also Leading Cases, 100 HARV. L REV. 100, 103-04 (1986) (summarizing Justice Powell's concurring opinion in Ford).
31. Ford, 477 U.S. at 422 (Powell, J., concurring), (quoted in Singleton, ___ S.C. at ___,
437 S.E.2d at 56).
32. See Ford, 477 U.S. at 422 n.3 (Powell, J., concurring). Justice Powell stated:
In Singleton the court adopted a modified A.B.A. Standard. Because this standard entails two prongs with failure of either prong warranting a stay of execution, the Singleton court embraced Justice Powell's cognitive standard only as a federal constitutional minimum. In adopting the two-prong standard, the court reviewed the development of the assistance prong in the common law. The court also pointed to the Washington Supreme Court's recent adoption of a test similar to the A.B.A. Standard in Washington v. Harris. The Singleton court recognized that the common law should remain in effect unless the legislature acts, implicitly inviting the legislature to do so. Therefore, with little South Carolina case authority to guide it, the court adopted the two-prong analysis because it found that this test was firmly rooted in English and American common law. However, the court slightly modified the assistance prong to include a rational communication element present in the Harris test. While the State could not execute Singleton if he failed either prong of the test, the court found that he failed both tests and that a stay of execution was warranted.

I find no sound basis for constitutionalizing the broader definition of insanity, with its requirement that the defendant be able to assist in his own defense. States are obviously free to adopt a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum.

Id. (Powell, J., concurring), quoted in Singleton, S.C. at 437 S.E.2d at 56.
33. Singleton, S.C. at 437 S.E.2d at 58.
34. See id. at 437 S.E.2d at 56 (citing Johnson v. Cabana, 818 F.2d 333 (5th Cir.), cert. denied, 481 U.S. 1061 (1987)).
35. Id. at 437 S.E.2d at 56-58 (citing e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES 389 (1769)).
36. 789 P.2d 60, 65-66 (Wash. 1990) (en banc) (basing its competency test upon the common law and not the Eighth Amendment).
37. Singleton, S.C. at 437 S.E.2d at 58 (citations omitted).
38. Cf. id. at n.2, 437 S.E.2d at 57 n.2 (noting that most states have statutorily adopted the assistance prong).
39. Id. at 437 S.E.2d at 58.
40. The standard adopted by the South Carolina Supreme Court involves the following analysis:

The first prong is the cognitive prong which can be defined as: whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. The second prong is the assistance prong which can be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel.

Id. at 437 S.E.2d at 58.
41. Id. at 437 S.E.2d at 58.
B. The PCR Remedy of Vacating a Sentence

The State also argued that a PCR judge cannot vacate a capital sentence. The State argued that, in effect, this remedy was a judicial commutation of the sentence that violated article IV, section 14 of the South Carolina Constitution. The court rejected the contention that the PCR judge’s order commuted the death sentence. Instead, the court held that the granted relief was beyond the scope of remedies available to a PCR court.

The court delineated the proper procedure and remedy available to a PCR court upon a finding of a convict’s incompetency. The court instructed the PCR judge to issue a temporary stay of Singleton’s execution, subject to mandatory review by the South Carolina Supreme Court. Once the stay is affirmed, the State will have the burden of establishing a defendant’s subsequent return to competency by a preponderance of the evidence. If the State meets this burden, the PCR court may lift the stay of execution, again subject to review by the South Carolina Supreme Court.

C. Forced Medication

The court next addressed the constitutionality of forcibly medicating Singleton to render him competent for execution. The court referred to the federal and state constitutions in discussing this question.

Two United States Supreme Court decisions involving forced medication established the required federal due process analysis. In *Washington v. Harper* the Court found that a prisoner had a significant liberty interest in avoiding the State’s forced use of antipsychotic drugs. The State, however, also had a significant interest in maintaining safety and security in its prisons. Balancing these interests, the Court held that the Due Process Clause permits the forced drug treatment of prisoners who have serious mental

42. Singleton, _ S.C. at _, 437 S.E.2d at 58-59. The South Carolina Constitution provides that “the Governor shall have the power . . . to commute a sentence of death to that of life imprisonment. The granting of all other clemency shall be regulated and provided for by law.” S.C. CONST. art. IV, § 14. The State also argued that § 17-25-370 of the South Carolina Code precluded the remedy that the PCR court afforded Singleton because the statute provides “that an execution must be carried out ‘unless stayed by order of the Supreme Court or respite or commutation of the Governor.’” Singleton, _ S.C. at _, 437 S.E.2d at 59 (quoting S.C. CODE ANN. § 17-25-370 (Law. Co-op. 1985)).

43. Singleton, _ S.C. at _, 437 S.E.2d at 59.

44. Id. at _, 437 S.E.2d at 59-60.

45. Id. at _, 437 S.E.2d at 60.

46. See id. at _, 437 S.E.2d at 60-61.


48. Id. at 221-22.

49. See id. at 225-26.
disabilities only when the prisoners present a danger to themselves or others, and the treatment is medically appropriate.\textsuperscript{50}

In \textit{Riggins v. Nevada}\textsuperscript{51} a defendant who was given prescribed antipsychotic drugs moved to terminate the medication for the trial.\textsuperscript{52} Because the trial court denied this motion, the Supreme Court held that the continued forced medication of the defendant during the trial violated due process unless the State showed that the medication was medically appropriate, essential for safety purposes and that no less intrusive means existed.\textsuperscript{53}

After summarizing these decisions, the South Carolina Supreme Court did not resort to this required federal due process analysis in \textit{Singleton}. Instead, it turned to a state constitutional analysis, relying primarily upon \textit{Louisiana v. Perry},\textsuperscript{54} a similar Louisiana case.

In \textit{Perry} the Supreme Court of Louisiana addressed whether a State could give a prisoner incompetent for execution antipsychotic drugs without his consent. The trial court ordered the forced medication after finding the prisoner incompetent without the drugs. On a writ of habeas corpus the United States Supreme Court vacated the order and remanded the case in light of \textit{Washington v. Harper}. Subsequently, the trial court reinstated the order, finding \textit{Washington v. Harper} inapplicable to a determination of competency for execution.\textsuperscript{55}

On appeal the Louisiana Supreme Court refused to address the federal due process question altogether because an adequate state constitutional ground disposed of the case, removing any need for federal review.\textsuperscript{56} The state ground involved the express guarantee of the right of privacy in the Louisiana Constitution.\textsuperscript{57} The Louisiana Constitution provides this right of privacy: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."\textsuperscript{58} The court recognized that this language not only

\textsuperscript{50} \textit{Id.} at 227.

\textsuperscript{51} Id. at __ U.S. __, 112 S. Ct. 1810 (1992).

\textsuperscript{52} \textit{Id.} at __, 112 S.Ct. at 1812-13.

\textsuperscript{53} \textit{Id.} at __, 112 S.Ct. at 1815-17. However, the Supreme Court did not address whether a competent defendant may refuse medication if the termination of the medication would render the defendant incompetent to stand trial. \textit{Id.} at __, 112 S.Ct. at 1815.

\textsuperscript{54} 610 So. 2d 746 (La. 1992).

\textsuperscript{55} \textit{Id.} at 748.

\textsuperscript{56} See \textit{Perry}, 610 So.2d at 751. For a discussion of the independent and adequate state grounds doctrine, see \textit{infra} part IV.

\textsuperscript{57} \textit{See Perry}, 610 So.2d at 755. The court had to distinguish \textit{Washington v. Harper}, 494 U.S. 210 (1990), which allowed forced medication in certain circumstances. The court reasoned that forcing drugs to facilitate execution does not constitute medical treatment as discussed in \textit{Harper} and that the forced medication does not rationally further the medical interest of the prisoner or the state's interest in safety. \textit{Perry}, 610 So.2d at 751-52.

\textsuperscript{58} LA. CONST. art. I, § 5.
affected search and seizure law, but also "incorporate[d] the principles of the United States Supreme Court privacy decisions in explicit statement." 59 accordingly, the Louisiana Supreme Court held that the state constitution provided a right to decide upon medical treatment, and forcing medication upon a prisoner for execution infringed upon this right. 60

The Singleton court noted the similarity between Louisiana's constitutional section providing a substantive right of privacy and article I, section 10 of the South Carolina Constitution, which states, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ." 61 The court's analysis of this provision was cursory: "This provision in the South Carolina Constitution is no less compelling than the provision in the Louisiana Constitution. Moreover, when the provision is weighed with the due process inquiry mandated by Harper, it becomes apparent that the analysis followed by Louisiana is correct." 62 Therefore, the supreme court held that the State violates the right of privacy in the South Carolina Constitution by forcibly medicating a convict solely to expedite execution. 63 Arguably, this holding represents the recognition of a substantive right of privacy in the South Carolina Constitution. 64

III. THE ORIGIN OF THE SUBSTANTIVE RIGHT OF PRIVACY IN THE SOUTH CAROLINA CONSTITUTION

This Part will discuss the legitimacy of the judicial recognition of a substantive right of privacy in the South Carolina Constitution. The possibility

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59. Perry, 610 So. 2d at 756 (citing Hondroulis v. Schuhmacher, 553 So. 2d 398 (La. 1988)).

60. Id. at 757. Because the court rested its decision explicitly on the state constitution, the decision was insulated from federal court review. See Michigan v. Long, 463 U.S. 1032 (1983) (holding that the Supreme Court will not review a state court decision when the state court makes it clear that the decision does not rest on federal grounds); see also infra notes 98-99 and accompanying text.


62. Singleton, ___ S.C. ___, ___, 437 S.E.2d 53, 61 (1993). The court also referred to the ethical code of the American Medical Society and the American Psychiatric Associations, which oppose participation of medical professionals in executions because administering the drug responsible for death would violate a physician's Hippocratic oath. This ethical code reinforced the prohibition of forced medication in Singleton. See id. at ___, 437 S.E. 2d at 61.

63. See id. at ___, 437 S.E.2d at 61-62.

64. It should be noted that in 1991 the United States District Court for South Carolina recognized an individual's right to privacy in S.C. CONST. art. I, § 10. See Watson v. Medical Univ. of S.C., No. 9:88-2844-18, 1991 WL 406979 (D.S.C. Feb. 7, 1991), aff'd 974 F.2d 482 (4th Cir. 1992). This court held that, like the United States Constitution, the South Carolina Constitution's right to privacy protected a blood donor's right to be free from a discovery request for personal information concerning the donor. Id. at *5.
of including this privacy right in the state constitution has not been specifically discussed by commentators or the judiciary. As noted earlier, the Singleton court did not discuss the origin or the purpose of the privacy provision other than to say that the provision creates a right of privacy extending past search and seizure cases. Instead, the court relied on the similarity between South Carolina's and Louisiana's privacy provisions and adopted the reasoning of Louisiana v. Perry. Ideally, the legitimacy of recognizing a substantive privacy right should be examined in light of the legislative history of the relevant clause and not the textual similarity of another state's constitution. However, little legislative history exists to determine the drafters' intent for article I, section 10. In some ways the existing history differs significantly from Louisiana's history in its drafting of a privacy provision.

Louisiana added the privacy clause when drafting its present constitution in 1974. At that time, Griswold v. Connecticut had articulated the concept of a right of privacy that protects personal choices. Therefore, as one commentator pointed out, "[I]t seems scarcely possible that the committee members could have failed to appreciate the potential import of a state constitutional right of 'privacy.'" The commentator also noted that specific drafting history shows an intent to incorporate autonomous rights in the privacy language. The Louisiana courts did not have occasion to consider the breadth of the privacy provision as it relates to autonomous decisions until 1989. In Hondroulis v. Schuhmacher the Louisiana Supreme Court held that included in a person's state constitutional right of privacy is the right to reject or obtain medical treatment without government interference. This holding allowed the court to extend the state privacy right to protect a convict's right to refuse antipsychotic drug treatment solely for execution purposes in Louisiana v. Perry.

The Committee to Make a Study of the Constitution drafted the present privacy provision in the South Carolina Constitution during 1966-1969. The General Assembly adopted the provision as amended in 1971. Although the Supreme Court decided Griswold six years before this amendment, the federal

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65. John Devlin, Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade Be Alive and Well in the Bayou State?, 51 LA. L. REV. 685, 691-95 (1991); see id. at 694 n.31 (listing several federal court cases that had protected family privacy rights in different contexts prior to 1974).

66. Id. at 700 (noting other evidence which demonstrates that the privacy issue was presented explicitly).

67. Id. at 703.

68. 533 So. 2d 398 (La. 1988).

69. Id. at 415.

70. See 610 So. 2d 746, 756-57 (La. 1992).

courts had just begun to extend the contours of the decision into other substantive areas of privacy.

Indeed, the existing legislative history does not even mention the Griswold decision or suggest a privacy right in a person's autonomous sense. Instead, the history demonstrates the drafters' concern with expanding the right of privacy in the search and seizure arena because of the advent of computer data technology and electronic surveillance. However, the history also indicates the drafters' awareness of the possible expansion of the right of privacy. The drafters specifically agreed that the privacy provision should fall upon the courts to interpret, developing the case law necessary to effectuate the provision in South Carolina. One committee member stated, "What our goal is, is to insert into the Constitution that which would give an aggrieved individual a cause for action if the authorities get out of hand in invasion of privacy by whatever means." Another committee member supported the use of more broad provisional language because "the court can take 'unreasonable' and push it any way they want to do it. . . . [T]his is something that the courts are going to write."75

In Singleton the court expanded the right of privacy into a personal choice, based on the similarity of South Carolina and Louisiana's privacy provisions, without discussing the legislative history. A look at this history may suggest that the drafters did not intend to expand the privacy scope in an autonomous sense. The recorded minutes contain comments supporting the broad privacy language; however, committee members made these comments in discussions about electronic surveillance. Arguably, the committee members supported the broad language only to address possible search and

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72. See Committee to Make a Study of the Constitution of South Carolina, 1895, Minutes of Committee Meeting 6 (Sept. 15, 1967) (unpublished minutes, on file with the University of South Carolina School of Law Coleman Karesh Library) ("The committee agreed that [the search and seizure provision] should remain, but that it should be revised to take care of the invasion of privacy through modern electronic devices."). Indeed, the drafters used the proposed Maryland Constitution as a model: "The right of the people to be secure . . . against unreasonable searches and seizures and in their oral or other communications against unreasonable interceptions shall not be violated." Id. at 7. However, the drafters voted to change the wording as it appears today because interception seemed too confined to communications, whereas the words "invasions of privacy" would also cover data processing banks and other technology then unknown to the drafters. Minutes of the Committee to Make a Study of the Constitution of South Carolina, 1895, Minutes of Committee Meeting at 3-4 (Oct. 6, 1967) (unpublished minutes, on file with the University of South Carolina School of Law Coleman Karesh Library).

73. Id. at 5. ("[W]e are going to have to revert back to a phrase, 'against unreasonable invasions of privacy' and rely upon the court to develop a history just as it has upon the unreasonable search of your house.") (statement of Robert H. Stoudemire).

74. Id. (statement of W.D. Workman, Jr.).

75. Id. at 6 (statement of Huger Sinkler). Mr. Sinkler went on to say, "I think this is an area that, really, should develop and should not be confined to the intent of those who sit around this table." Id.
seizure privacy situations implicated by new technology, not to expand the right of privacy into other substantive areas, such as forced medication of prisoners.  

However, the language adopted is broad enough not to be limited to search and seizure issues. The drafters' reasoning for selecting this language may justify the court's expansion of the South Carolina Constitution's right of privacy. Although perhaps not even considered by the drafters, this expansion is necessary and proper to protect the citizens of the state against unreasonable governmental intrusion into their private lives.

IV. THE SIGNIFICANCE OF A SUBSTANTIVE RIGHT OF PRIVACY IN A STATE CONSTITUTION: INDEPENDENT AND ADEQUATE STATE GROUNDS

A state court that uses its own constitution to invalidate government action at the same time insulates its decision from federal review by virtue of the independent and adequate state ground doctrine. This section will examine the underlying rationale and the importance of this doctrine.

A. Federalism

The independent and adequate state ground doctrine rests upon the concept of federalism as embodied in the Ninth and Tenth Amendments of the United States Constitution. A state's inherent sovereignty designates the state courts as ultimate authorities for interpretation of state law, as long as their interpretations do not conflict with or infringe upon any federally guaranteed rights. Federal authority also will act when an area of law is based on a strong national policy, requiring consistency among the states to carry out that national policy in a uniform manner. Therefore, federalism offers individuals a "double security" of their rights.

76. Article I, § 10 supports this view because the drafters also added that a warrant shall not issue without particularly describing "the information to be obtained." S.C. CONST. art. I, § 10. This language demonstrates the possible limitation of the privacy provision to only search and seizure situations involving electronic surveillance.

77. See U.S. CONST. amends. IX-X.

78. See 28 U.S.C. § 1257 (1988) (allowing Supreme Court review of final judgments rendered by state courts on writ of certiorari only if the decision draws into question its validity on the ground that it is repugnant to the United States Constitution or federal laws); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874) (establishing that the Supreme Court will not review state decisions independently and adequately based on state law).

79. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

80. James Madison described the federalist system as follows:
As the ultimate interpreter of the state constitution, the state court should be the primary protector of its citizens' individual rights. The states have not always been active in this role, however. For a period during the 1960s and 1970s, the United States Supreme Court intervened in states' affairs to expand "protection of individual privacy rights against unreasonable state regulations," particularly in criminal and family privacy. This federal activism restrained state involvement in privacy decisions because federal supremacy precluded the states from asserting state grounds that conflicted with federal decisions. However, in the 1980s the federal expansion into the protection of privacy rights diminished. The federal courts again are leaving the state courts to assume the role of primary protectors of individual rights. As the federal courts refuse to address a privacy issue or construe an issue too narrowly, the states can assert independent and adequate state grounds for protection of their citizens. Therefore, the recognition of a substantive right of privacy in a state constitution becomes more imperative.

B. The Importance of Independent and Adequate State Grounds

If a court rests its decision on a state constitutional right to privacy, the decision has important consequences, not only for the state citizens, but also for the concept of federalism as a whole. First, the state can offer its citizens more rights than the United States Constitution can offer. While the Supremacy Clause subordinates state constitutional law to federal constitutional interpretations, the state may provide additional rights beyond the rights required by the federal Constitution if those rights do not conflict with federal

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.


81. See Graebe, supra note 15, at 1194.
82. Id. at 1195 (footnote omitted).
83. For a list of Supreme Court decisions demonstrating its activism in guaranteeing individual privacy rights in marriage, procreation, and family during this era, see id. at nn.23-55 and accompanying text.
84. Id. at 1195; see also supra text accompanying notes 14-15.
86. See U.S. CONST. art. VI, cl. 2.
law. The state’s ability to articulate and vindicate an individual’s fundamental interests becomes even more important when the Supreme Court construes individual rights too narrowly or not at all.

In Singleton, for example, the state court granted a convict a right to be free from forced medication used to facilitate execution. This right goes beyond any federal interpretation of the substantive right to privacy because the Supreme Court has not ruled on this specific situation. However, on the basis of federalism, the state court could provide Singleton with independent protection. Had the state court not relied on the state right of privacy and used only the federal due process analysis set forth in Washington v. Harper and Riggins v. Nevada, the decision then would be subject to federal review because it would not rest on independent and adequate state grounds. This federal substantive analysis could have limited Singleton’s right to make a personal choice of whether to be medically treated.

The independent and adequate state ground doctrine may provide individuals with greater fundamental rights, as well as benefit the individual because, arguably, state judges have better insight into what the state’s citizens

87. See, e.g., Oregon v. Hass, 420 U.S. 714 (1975); Devlin, supra note 65, at 686. An example of a state affording its citizens greater protection than that afforded by the federal constitution occurred in Robins v. Pruneyard Shopping Center, 592 P.2d 341 (Cal. 1979), aff’d, 447 U.S. 74 (1980). In Robins the California Supreme Court invoked the state constitution’s free speech guarantee to require private shopping mall owners to grant access to otherwise orderly persons soliciting petition signatures. Id. at 347. Although the United States Supreme Court previously held that the First Amendment of the United States Constitution does not protect free speech activity in private malls, see, e.g., Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), the California Supreme Court could grant its citizens greater freedom of speech rights than are granted under the United States Constitution.

88. Justice Uuter of the Washington Supreme Court has suggested that attorneys who fail to raise state constitutional challenges as protection for their clients may be close to committing malpractice. Robert F. Utter & Sanford E. Pitler, Presenting a State Constitutional Argument: Comment on Theory and Technique, 20 Ind. L. Rev. 635, 640 (1987) (footnote omitted). Indeed, failure to raise valid constitutional challenges deprives a client of the double security the founding fathers intended to create through federalism. Id. at 643; see supra note 80 and accompanying text.

89. See discussion supra part I.C.

90. The court had to explicitly state that its decision rested on state grounds to preclude federal review. See infra notes 98-99 and accompanying text.

91. See supra notes 47-52 and accompanying text. It is not enough for a court to say that a right exists without a sound textual and theoretical approach supporting an extension of privacy rights. Therefore, because state constitutional law has developed more slowly, to a great extent litigants must rely on federal law where a federal analog to a particular right of privacy exists. See Graebe, supra note 15, at 1205 (discussing the necessity of state courts using federal precedent to establish a sound basis for privacy decisions, which in turn would develop stable state privacy precedents); see also Utter & Pitler, supra note 88, at 644-45 (explaining the inherent tension created by the supremacy clause and federal constitutional minimum standards when a state court relies on federal precedent to support state constitutional arguments).
expect their rights of privacy to include. South Carolina judges may be better able to define which South Carolinians' privacy concerns the state constitution should protect.\textsuperscript{92} Of course, the judiciary may be open to criticism that it is acting as a superlegislature, violating the separation of powers doctrine within the state. However, perhaps it is better for the courts to endure such criticism than for South Carolina citizens' right of privacy to be defined by only an occasional federal decision.

In addition to granting individuals greater fundamental rights under the state constitution, the court promotes federalism by using an independent and adequate state ground for its privacy decisions. As noted above, the state court is the final interpreter of state rights, and the federal court exercises its supremacy over issues in which uniformity is needed. Therefore, the states face the struggle of defining the boundaries of a state constitutional right of privacy. However, the state courts are the most appropriate places for this struggle to occur.\textsuperscript{93} As Justice Brandeis once noted in a dissenting opinion, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."\textsuperscript{94}

Establishing an independent and adequate state right to privacy also promotes federalism by spurring activity in federal courts.\textsuperscript{95} While litigants seeking vindication of their privacy rights in state courts may reduce the burden on the federal system, federal judges may begin to borrow from the rationale of state constitutional privacy decisions.\textsuperscript{96} This activity promotes the constitutional framers' intent of creating a double security of fundamental interests with one system showing mutual respect for and dependence on the other system's decisions.

This discussion presupposes that article I, section 10 of the South Carolina Constitution provides an adequate and independent basis for a substantive right of privacy decision. Only if the privacy provision truly supports the court's decision will federal review not be necessary.\textsuperscript{97} Invoking this section is adequate because it legitimately rests upon an interpretation of the state

\textsuperscript{92} Some commentators also argue that state judges may be more willing to grant greater privacy rights than federal judges. Because a privacy decision of the federal court implicates the rights of citizens in many states, federal judges are more prone to receive criticism for judicial activism. See, e.g., Paula A. Brantner, Note, Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws, 19 HASTINGS CONST. L.Q. 495, 512 (1992).

\textsuperscript{93} See Graebe, supra note 15, at 1200.

\textsuperscript{94} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), quoted in Graebe, supra note 15, at 1200.


\textsuperscript{96} See id.

\textsuperscript{97} See Herb v. Pitcairn, 324 U.S. 117 (1945).
constitution,98 and, unlike the federal Constitution, the state constitution affirmatively guarantees a right to privacy. The state court need only ensure that its decision is truly independent of federal policy and decisions. The state court, therefore, may not wholly defer to federal decisions for its reasoning because then it would appear that the decision rested on federal grounds, making the decision subject to federal review.99 Finally, to ensure the preclusion of federal review, the state court must explicitly state that it is not relying on federal precedent.100 This explicit statement that the South Carolina decision rested on the privacy provision in the state constitution assures that the courts likely will not run afoul of the Supremacy Clause.

V. CHALLENGING STATE ACTION
WITH THE STATE CONSTITUTIONAL RIGHT OF PRIVACY

If a litigant raises article I, section 10 as an independent and adequate state ground to extend the substantive right of privacy, a court must then face the legitimacy of the privacy claim itself. This Part will analyze a potential privacy claim and apply that analysis to a South Carolina statute subject to attack on privacy grounds and to the right to die. Then, this Part will address the possibility of placing the right to die within the purview of the state constitution’s right to privacy.

Most likely, South Carolina courts will adopt the substantive privacy claim analysis already formulated by the federal system. In this analysis, the court first must determine whether a fundamental privacy right exists in the case.101 Second, the court must determine whether a compelling state interest outweighs an individual’s privacy interest and whether an invasion of that privacy interest is narrowly drawn to achieve the state’s interest.102 With this analysis in place, the following discussion considers the statute mandating HIV testing for sex offenders, and the right to die.

98. See, e.g., Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965); Black v. Cutter Labs., 351 U.S. 292 (1956).
99. See Michigan v. Long, 463 U.S. 1032, 1042 (1983) (emphasizing that the Court will assume that a decision relied primarily on federal law unless expressly stated to the contrary).
100. Id. at 1041 (stating that if the state decision clearly indicates “bona fide separate, adequate, and independent grounds,” the Supreme Court will not undertake to review the decision).
A. Mandatory HIV Testing for Convicted Sex Offenders Statute

One statute subject to an invasion of privacy claim is section 16-3-740 of the South Carolina Code.103 This section represents one legislative response to the Acquired Immune Deficiency Syndrome (AIDS) crisis. It mandates that any person convicted of a crime involving sexual conduct, who exposed the victim to blood or vaginal or seminal fluids, be tested for the Human Immunodeficiency Virus (HIV) that causes AIDS. The test may be administered without the offender’s consent, and the results may be disclosed to the health authorities and the victim.104 Because of the intrusive nature of this forced blood test, an offender could challenge the statute as a violation of the right of privacy in the South Carolina Constitution.105

To effectively challenge the statute, offenders must first show the court that they have a fundamental privacy interest. The nonconsensual testing for HIV implicates the private right to make an autonomous decision106 because offenders are not free to decide if or when they want to face whether they have a disease equivalent to a death sentence.107 Not only must the offender who tests positive for HIV face this traumatic reality unwillingly, but the offender must then face the stigma and discrimination inherent in being labeled HIV positive.108 Finally, the offender faces another intrusion into privacy when the results are released to the victim and placed in the offender’s permanent prison health record.109

104. Id.
105. This Note will not address the more frequent, but rejected, challenge to similar statutes based on the Fourth Amendment’s unlawful search and seizure clause. See, e.g., People v. Adams, 597 N.E.2d 574 (Ill. 1992) (holding that a statute requiring convicted prostitutes to be tested for HIV did not constitute an unreasonable search and seizure); People v. Thomas, 529 N.Y.S.2d 429 (Co. Ct. 1988) (holding that it was reasonable under the Fourth Amendment to subject a convicted rapist to an HIV test); In re Juveniles A, B, C, D, E, 847 P.2d 455 (Wash. 1993) (en banc) (holding that Washington’s mandatory HIV testing statute for sex offenders did not violate the Fourth Amendment). But see Paul H. MacDonald, Note, AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders, 43 VAND. L. REV. 1607, 1632 (1990); Bernadette Pratt Sadler, Comment, When Rape Victims’ Rights Meet Privacy Rights: Mandatory HIV Testing, Striking the Fourth Amendment Balance, 67 WASH. L. REV. 195, 210-12 (1992).
106. In re Juveniles A, B, C, D, E, 847 P.2d at 462-63 (holding that although the right of privacy was implicated by the testing, the state’s interest in notifying the victim was compelling, and the means were narrowly tailored to serve that interest).
109. Id. A prisoner may have a diminished expectation of privacy. Hudson v. Palmer, 468
The court then must balance these privacy interests against the state interests in testing the offender. Only if the compelling state interests override the privacy interests should the court declare the statute constitutional. The state interests in requiring the testing of sex offenders for HIV are threefold: to allay the fear of the victim, to prevent further transmission of the disease, and to inform the victim to ensure proper medical treatment.

These interests are compelling, assuming that the mandatory testing meets them. As many commentators have noted, however, mandatory HIV testing generally does not serve the state interests.\(^{110}\) The problems inherent in the testing procedure itself preclude the assumption that the state interests outweigh the privacy interests.

First, the testing is not one hundred percent conclusive and accurate, given the virus’s latency period and the possibility of false results.\(^{111}\) Therefore, the test results may give either false hope or unnecessary anxiety to the victim.\(^{112}\) Unfortunately, the test results reveal nothing positive about the victim’s status, especially since the victim cannot be tested conclusively for six months after exposure.\(^{113}\) Second, a false negative could create a false sense of security for the victim and increase the risk that the victim will further transmit the disease.\(^{114}\) Third, the medication available to HIV-positive persons will not benefit the victim more when the offender was tested than six months after the exposure,\(^{115}\) when the victim could be tested conclusively.\(^{116}\)

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\(^{110}\) See e.g., Eisenstat, supra note 108, at 358-60.

\(^{111}\) See Sadler, supra note 105, at 198-99 (discussing the unreliability of HIV testing).

\(^{112}\) See id. at 211.

\(^{113}\) The HIV test is a misnomer because the tests now available do not test for the HIV infection, but detect the presence of antibodies that develop to fight the HIV infection. The HIV-infected person may not develop antibodies to the virus for several weeks or even months after infection, and sometimes these antibodies never develop. See MacDonald, supra note 105, at 1615.

\(^{114}\) E.g., Eisenstat, supra note 108, at 358.

\(^{115}\) See id. at 360. Medication such as AZT is used primarily to prevent the appearance of symptoms or delay the progression of symptoms. Additionally, medical evidence does not show that AZT is more effective if administered to an infected person within two weeks, as opposed to six months, after exposure. AZT should be administered prior to the appearance of symptoms, but usually symptoms will not develop for years after exposure. Id. (footnotes omitted).

\(^{116}\) Notably, because the statute requires conviction, see S.C. CODE ANN. § 16-3-740 (Law. Co-op. Supp. 1993), the victim could be tested more accurately then because the time it takes to secure most convictions will at least equal the latency period of the virus. Given this fact alone,
Because of these medical fallacies inherent in serving the state’s interests, the court should respect the privacy interests of the offender and strike down the statute as a violation of the offender’s right to privacy. However, it still is doubtful that a constitutional privacy challenge to the statute would be successful. The hysteria and fear caused by the AIDS epidemic do not make a court’s decision any easier. The simple truth of the situation has been succinctly stated as follows:

Invasions of privacy of people charged with or convicted of crimes, especially if sanctioned by the legislature, are unlikely to be overturned by courts, even if the measures serve no real public health purpose. The people being tested are widely despised, while the people for whose supposed benefit the testing is being done - like rape survivors . . . - excite compassion. . . . Unfortunately, legislators are much quicker to impose mandatory testing and disclosure than to appropriate funds for HIV counseling for people who have been assaulted . . . .

Ultimately, it is difficult to predict the outcome of a challenge to the statute in South Carolina when the court balances a sex offender’s privacy interest and the state’s interests coupled with the victim’s interests and concerns. But if the nonconsensual testing of a convicted offender does not sufficiently allay the fears of the victim, prevent further transmission of the disease, or become useful in a medical diagnosis for the victim, then the testing is an unjustified intrusion into the offender’s privacy. Indeed, testing the victim would serve the same interests more effectively. Therefore, section 16-3-740 properly is subject to attack on state constitutional right-to-privacy grounds.

B. The Right to Die Controversy

The decision of a terminally ill patient to forego life-sustaining treatment has been the subject of much debate in recent years. The right-to-die issue arises in a variety of different circumstances, ranging from the more easily answered inquiry of whether a state must honor a living will to the more controversial inquiry of whether a state must allow assisted suicide.

In 1990 the United States Supreme Court addressed this issue, but not on privacy grounds, in Cruzan v. Director, Missouri Department of Health. Nancy Cruz suffered severe brain damage in an automobile accident and had

the three state interests in mandating an HIV test for sex offenders are served by the less intrusive means of testing the victim, not the unconsenting offender.


been in a “persistent vegetative state”\textsuperscript{119} since 1983 with virtually no chance of becoming conscious again. Cruzan was kept alive by a feeding and hydration tube implanted in her stomach. Her parents sought a court order to remove this tube, which would result in her death.\textsuperscript{120} The Court recognized that a competent adult has a Fourteenth Amendment liberty interest in not being forced to undergo unwanted medical procedures.\textsuperscript{121} However, relying on the Missouri Supreme Court’s interpretation of its living will statute,\textsuperscript{122} the Court denied permission to remove the feeding tube because it found that the Cruzans could not provide “clear and convincing” evidence that Nancy would want the tube removed if she were competent to make that decision.\textsuperscript{123}

The majority decision turned primarily on whether the Missouri statute’s heightened requirement that a guardian show the intent of the incompetent patient by clear and convincing evidence unconstitutionally burdened the patient’s liberty interest. The Court recognized this liberty interest based on the Fourteenth Amendment, not on right to privacy grounds.\textsuperscript{124} The Court held only that (1) a competent adult has a liberty interest in refusing medical treatment\textsuperscript{125} and (2) an incompetent adult’s liberty interest is not unconstitutionally impinged if the state requires clear and convincing evidence that the patient would refuse the treatment if competent before it will allow termination of medical treatment.\textsuperscript{126}

The scope of protection of an incompetent person’s liberty interest in refusing medical treatment remained wholly undefined. However, Justice O’Connor suggested that the states should define this protection,\textsuperscript{127} thereby leaving open the opportunity to recognize a privacy interest in refusing medical treatment in the state constitution.\textsuperscript{128}

\textsuperscript{119} Id. at 266. The Court defined a persistent vegetative state as “a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function.” Id.

\textsuperscript{120} Id. at 266-68.

\textsuperscript{121} Id. at 278.

\textsuperscript{122} See Cruzan, 497 U.S. at 268-69.

\textsuperscript{123} Id. at 285.

\textsuperscript{124} See id. at 279 n.7 (“Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.” (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

\textsuperscript{125} Id. at 278-79.

\textsuperscript{126} Id. at 282-83.

\textsuperscript{127} See id. at 292 (O’Connor, J., concurring) (“Today we decide only that one State’s practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents’ liberty interests is entrusted to the ‘laboratory’ of the States.” (citation omitted)).

\textsuperscript{128} Before Cruzan a few state courts already recognized as a privacy right the right to refuse medical treatment. E.g., In re Quinlan, 355 A.2d 647, 662-64 (N.J.) (holding that a patient has
accepted this implicit invitation in *In re Guardianship of Browning.* The court discussed privacy as "a fundamental right of self-determination subject only to the state's compelling and overriding interest." The state constitution explicitly provided for this privacy right, and the court acknowledged that a competent individual has a constitutional right to make all medical choices under this privacy provision. Instead, a surrogate could exercise the person's constitutional right to refuse treatment upon clear and convincing evidence of the patient's intent, absent a compelling state interest, which the court did not find. In this particular case, the patient had expressly authorized the termination of life-sustaining procedures, including nutrition and hydration, if she became terminally ill. The state, therefore, had to honor the surrogate's decision to terminate the medical procedures.

If South Carolina courts apply the substantive privacy analysis to the right to die issue, the courts first must recognize that a person's privacy interests are

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a constitutional privacy right to be free from unwanted medical intervention under the state and federal constitutions, *cert. denied, 429 U.S. 922 (1976).*

Other courts ground the right to refuse medical treatment in the common law, *see, e.g., In re Estate of Longeway, 549 N.E.2d 292, 297 (Ill. 1989) ("[B]ecause a physician must obtain consent from a patient prior to initiating medical treatment, it is logical that the patient has a common law right to withhold consent and thus refuse treatment."); In re Gardner, 534 A.2d 947, 951 (Me. 1987) ("The personal right to refuse life-sustaining treatment is now firmly anchored in the common law doctrine of informed consent, which requires the patient's informed consent to the administration of any medical care.") (citations omitted)), and statutory law, *see, e.g., Cruzan v. Harmon, 760 S.W.2d 408, 419 (Mo. 1988) (en banc) (recognizing that Missouri's living will statute permits competent persons to express their intent to refuse life-sustaining procedures once they become terminally ill and incompetent in contravention to the state's strong policy of favoring life), aff'd sub nom. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990).* However, this article deals only with the constitutional recognition of this right.

129. 568 So. 2d 4 (Fla. 1990).
130. *Id.* at 9-10.
132. *Browning,* 568 So. 2d at 10.
133. *Id.* at 12. The court also held that the right is not qualified further depending upon the "denomination of a medical procedure as major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining, or otherwise." *Id.* at 11 n.6.
134. *Id.* at 13-14. Courts generally will honor the substituted judgment of a surrogate or guardian in cases involving incompetent patients with clear evidence of the patients' intent. However, the right to die becomes increasingly more complicated when the incompetent patient never was competent or did not provide clear evidence of intent while competent. *See generally Thomas A. Eaton & Edward J. Larson,* *Experimenting with the "Right to Die" in the Laboratory of the States,* 25 Ga. L. Rev. 1253, 1278-95 (1991) (discussing case law that defines the standards and procedures used to exercise the right to die in a variety of factual contexts).
135. *Browning,* 568 So. 2d at 13.
implicated in the decision of whether to accept medical treatment. Because the concept of privacy encompasses procreation, contraception, marriage, and abortion, it may also encompass the right to control one’s own medical treatment. Indeed, the right to control one’s medical treatment has roots in the common law. Several states already recognize the right to refuse treatment as a privacy right, relying on privacy or similar provisions in their constitutions.

Next, the courts must determine whether any compelling state interests outweigh the person’s recognized privacy right. The means used to carry out those interests must be narrowly tailored in the least intrusive manner possible to protect the privacy right. Such interests may include “the preservation of life, the protection of innocent third parties, the prevention of suicide, and maintenance of the ethical integrity of the medical profession.” The court in In re Browning discussed each of these interests and determined that the patient’s privacy interest outweighed the state interests.

Once courts determine that a privacy interest exists and that state interests do not override it, they then must face the difficult issue of formulating the procedures and standards used in implementing the right to die. Fortunately, there is a rich body of case law and statutory interpretations from other states in this area. However, some disparity in the procedures and standards exists among the states. South Carolina must consider issues such as what type of evidence is admissible to determine an incompetent’s intent, what weight the court should give to the evidence, and what role the court should play in a surrogate or guardian’s decision to terminate an incompetent’s medical treatment.

136. See supra notes 10-13 and accompanying text. 137. See, e.g., sources cited supra note 128.


139. See Browning, 568 So. 2d at 14.

140. Id. First, the court discounted the state’s interest in preservation of life because the patient’s condition was incurable. Therefore, the patient’s right to refuse treatment outweighed this state interest. Second, the court found the third party interest inapplicable. Third, the interest in suicide prevention was without merit because the patient would die from natural causes upon discontinuation of life support. Finally, the court found the state interest of maintaining the ethical integrity of the medical profession alone insufficient to override the constitutional right of privacy. Id. But see, e.g., Commonwealth v. Kallinger, 580 A.2d 887 (Pa. Commw. Ct. 1990) (holding that a prisoner who wanted to starve himself to death could be treated involuntarily because the state’s interest in the orderly administration of its prisons outweighed the prisoner’s diminished right to privacy).

141. For an excellent overview of cases that discuss the issues arising from the recognition of the right to die in the state laboratory, see Eaton & Larson, supra note 134.
The state legislature has not been silent on this issue. South Carolina has enacted the Death With Dignity Act\textsuperscript{142} that essentially provides for the citizens of the state to execute living wills. However, this act does not allow the removal of a nutrition and hydration tube without express prior authorization by the incompetent.\textsuperscript{143} Also, any declaration under the act is ineffective during the course of a woman’s pregnancy.\textsuperscript{144} It remains for the courts to decide whether the constitution permits these prohibitions. Further, the courts must decide whether expression of a living will under this act will be the only evidence used to determine the intent of an incompetent.

While South Carolina courts have yet to address the basic issue of whether the right to die should be a constitutionally protected privacy right, other state courts are addressing far more controversial issues. For example, California had to address whether a person had a constitutional right to the premortem cryogenic suspension of his body. In Donaldson v. Van de Kamp,\textsuperscript{145} the plaintiff Thomas Donaldson, who was suffering from a brain tumor that would result in his persistent vegetative state and death, wanted to be frozen before his death, hoping for future reanimation.\textsuperscript{146} Recognizing first that Donaldson had a constitutional privacy right to refuse medical treatment, the court found that Donaldson’s request ultimately was an assisted suicide. The court held that the state interests in protecting society against abuses and in enforcing the criminal law prohibiting assisted suicide substantially outweighed Donaldson’s privacy interest.\textsuperscript{147} Therefore, the court affirmed the dismissal of Donaldson’s request.\textsuperscript{148}

Also, Michigan is considering the well-publicized case of Dr. Jack Kevorkian and his “‘suicide machine,’” a device that permits a person to intravenously inject anesthetic and a fatal dose of potassium chloride.\textsuperscript{149} Michigan charged Kevorkian with violating a Michigan statute that made it a felony to assist in another person’s suicide. The Michigan Circuit Court recently declared this statute impermissibly overbroad because it unconstitutionally restricted a terminally ill person’s liberty interest in committing rational suicide.\textsuperscript{150} The Michigan Court of Appeals affirmed the lower

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\textsuperscript{143} See id. § 44-77-20(2).
\textsuperscript{144} Id. § 44-77-70.
\textsuperscript{145} 4 Cal. Rptr. 2d 59 (Ct. App. 1992).
\textsuperscript{146} Id. at 60-61.
\textsuperscript{147} Id. at 62-63.
\textsuperscript{148} Id. at 60.
court's declaration of the statute's unconstitutionality, but held that the right to commit rational suicide is not constitutionally protected.\textsuperscript{151}

The right-to-die issue implicates a variety of difficult questions and disparate circumstances that probably can be answered only by weighing an individual's privacy right against the state interests. The South Carolina state court may be willing to expand privacy rights to encompass the right to die because it expressly recognizes a right to privacy in the state constitution. If this right is recognized as a state constitutional right, any decision to terminate medical treatment of a patient will be precluded from federal review.\textsuperscript{152}

VI. CONCLUSION

This Note detailed the importance of \textit{Singleton} and its recognition of a substantive right of privacy in the South Carolina Constitution. Challenges to state action that unreasonably intrude upon a citizen's right to privacy may become insulated from federal review on the independent and adequate state grounds doctrine. These challenges may include the statute mandating HIV testing for sex offenders and may establish the right to die as a privacy right under the South Carolina Constitution. Even if these particular challenges fall short, they will develop state constitutional privacy law and begin to provide a basis for future challenges. In particular, the equally troublesome cases dealing with the homeless, the sodomy statute, the right to assisted suicide, the right of homosexuals to adopt, the rights of surrogate mothers, and cryo-genetics represent areas of autonomous decisions which may be better dealt with in the laboratory of the state courts, expounding their own state constitutions. As one commentator pointed out, "Privacy ... rarely has come to those who have not actively sought it."\textsuperscript{153}

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\textsuperscript{151} See Hobbins, 518 N.W.2d at 492-94.
\textsuperscript{152} See supra part III.
\textsuperscript{153} Gormley & Hartman, supra note 97, at 1323.