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Suicide, Liberty and Our Imperfect Constitution: An Analysis of the Legitimacy of the Supreme Court's Entanglement in Decisions to Terminate Life-Sustaining Medical Treatment

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SUICIDE, LIBERTY AND OUR IMPERFECT CONSTITUTION: AN ANALYSIS OF THE LEGITIMACY OF THE SUPREME COURT’S ENTANGLEMENT IN DECISIONS TO TERMINATE LIFE-SUSTAINING MEDICAL TREATMENT

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I. INTRODUCTION

Twentieth-century advances in medical technology have sustained productive, meaningful lives for many individuals who, in earlier times, would have had no chance of recovery from serious illness. Yet, medical technology has also created its own casualties by sustaining the lives of many individuals beyond the limits of human dignity. The casualties to which I refer are those persons who endure life in a persistent vegetative state—those who have neither cognizance of their environment nor knowledge of the identity of their family and friends; those who have no sense of pain or pleasure; those who are kept alive by artificial respiration, nutrition and hydration; those who have no chance of regaining their mental faculties or physical locomotion; those who, through no fault of their own, impart emotional suffering upon their families and financial burdens upon society; and those who, given a choice, probably would choose to terminate life-sustaining measures.

These casualties of medical science have compelled our state legislatures and state courts to examine the proper role of the state government in decisions relating to the termination of life-sustaining medical treatment. Discerning the proper governmental role, however, has not been an easy task. The decision to terminate life-sustaining medical treatment implicates the states' interests in


2. Life sustaining medical treatment has been defined as "any medical intervention that is administered to a patient in order to prolong life and delay death." The Hastings Center, Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying 140 (1987).
preserving and protecting life as well as considerations of morality, religion and individual autonomy. Remarkably, during the past fifteen years, the states have proffered solutions to the perplexing problem, either through statutes or case law or, more commonly, through a mixture of both. Subject to limitations and exceptions, the states have determined that persons who exist in a persistent vegetative state may refuse life-sustaining medical treatment even though the refusal of treatment results in death.

As the law developed in the states, the Supreme Court of the United States, in its 1990 opinion in *Cruzan v. Director, Missouri Department of Health*, determined that there exists a right to terminate life-sustaining medical treatment under the United States Constitution. As a result of the decision, new uncertainties have been infused into the state legislative and judicial responses to the issue.

After examining the *Cruzan* decision below, I probe the constitutional legitimacy and the prudence of the Supreme Court's role in decisions relating to the termination of life-sustaining medical treatment. I conclude that the Court in *Cruzan*, though exercising some self-restraint, has improperly usurped powers relegated to the states and has thereby perilously interfered with the development of sensitive state law.

II. CRUZAN v. DIRECTOR, MISSOURI DEPARTMENT OF HEALTH

A young Nancy Cruzan suffered injuries in an automobile accident that left her incompetent and in a persistent vegetative state. She was kept alive in a Missouri state hospital by food and water ingested through surgically implanted tubes. Medical experts testified that Nancy Cruzan could have lived for thirty years or more in her condition; they also acknowledged that she had virtually no chance of recovering from her vegetative state.

After the dim prognosis, Nancy Cruzan's parents, as her guardians, sought a court order to remove the feeding tubes, an action that all agreed would lead to her death. A state trial court granted the order on the basis that Nancy Cruzan (via her guardi-

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3. See infra text accompanying notes 118-155.
4. Id.
6. See infra text accompanying note 17.
ans) had a privacy right under the Missouri and United States Constitutions to refuse life-sustaining medical treatment. The court also found that Nancy Cruzan would not have wanted to continue living in a vegetative condition based upon the testimony of a former roommate who claimed that, prior to her accident, Nancy Cruzan had said that she would not wish to 'continue her life unless she could live at least halfway normally.'

The Supreme Court of Missouri reversed the order, refusing to find a right to privacy under either the state or the federal Constitution that would sanction the termination of Nancy Cruzan's life-sustaining medical treatment. The court did not challenge the right under the Missouri living will statute to refuse life-sustaining medical treatment, although the court did determine that such medical treatment could be refused only upon a finding by the court of clear and convincing evidence of the patient's intent to refuse such treatment. The court found that the testimony of Nancy Cruzan's roommate was unreliable for determining her intent to terminate medical treatment. Moreover, the court denied Nancy Cruzan's parents the right to make the decision to terminate treatment on the basis of their substituted judgment.

By a five-four vote, the United States Supreme Court affirmed. The narrow question before the Court was whether the Missouri high court erred in requiring "clear and convincing" evidence from Nancy Cruzan herself of her desire to refuse life-sustaining medical treatment under such circumstances. After

10. Cruzan, 760 S.W.2d at 417-418.
11. Id. at 425.
12. Id. at 426.
13. In August, 1990, the parents of Nancy Cruzan petitioned the Missouri state trial court for a re-hearing to present new evidence concerning their daughter's intention to refuse life-sustaining medical treatment. Three of Nancy Cruzan's former co-workers testified that Nancy Cruzan said to them that she would never want to "live like a vegetable." N.Y. Times, December 27, 1990, at 1, col. 1. On December 14, 1990, the trial court determined that the new testimony demonstrated the existence of clear and convincing evidence of Nancy Cruzan's intent to refuse life-sustaining medical treatment. Nancy Cruzan's feeding tubes were removed on December 14, 1990. She died on December 26, 1990, eight years after the automobile accident which left her in a vegetative condition.
15. Id. Many states have adopted the "substituted judgment" standard whereby court-appointed guardians are recognized to make treatment decisions
weighing Nancy Cruzan’s apparent right to refuse medical treatment against the State of Missouri’s interest in the protection and preservation of human life, the Court determined that “Missouri may legitimately seek to safeguard the personal element of [the choice between life and death] through the imposition of heightened evidentiary requirements.”

The larger, more significant question before the Court was whether the Constitution imparts a right to refuse life-sustaining medical treatment. Justice Rehnquist, writing for the majority, declared that one could infer from the Court’s prior decisions that “a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . . .” But, Rehnquist continued, “determining that a person has a ‘liberty interest’ under the Due Process Clause does not end the inquiry; ‘whether respondent’s constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.’

Although the Court implicitly recognized a new but limited constitutional right to refuse life-sustaining medical treatment, the Court refused to find a fundamental right to do so, thus avoiding the necessity of applying the heightened judicial scrutiny that normally accompanies a fundamental right. In footnote seven, the Court declared that “[a]lthough many state courts have held that a right to refuse treatment is encompassed by a generalized constitu-

on behalf of the incompetent. In those states, a guardian’s substituted judgment can be honored by the courts on the theory that the guardian acts in the incompetent’s best interest. Missouri has not adopted such a standard but instead requires the incompetent herself (prior to her incompetency) to show clearly her intent to refuse medical treatment.

16. Id. at 2852-53.

We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute. But not only does the standard of proof reflect the importance of a particular adjudication, it also serves as ‘a societal judgment about how the risk of error should be distributed between the litigants.’ The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual’s life-sustaining treatment.

17. Id. at 2851.
18. Id. at 2851-2852 (footnote omitted).
19. Id.
tional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.”

In her concurring opinion, Justice O'Connor indicated her agreement that “a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions . . . and that the refusal of artificially delivered food and water is encompassed within that liberty interest.” Justice O'Connor reiterated the majority's view that requiring a competent adult to undergo life-sustaining medical treatment against his or her will "burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, 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." While it is unclear from Justice O'Connor's concurrence whether she would recognize a broader liberty right to refuse medical treatment, Justice Scalia, in his concurring opinion, imparts no constitutional right whatsoever in a person's decision to terminate life-sustaining medical treatment because, he says, no such right exists under the Constitution. Scalia asserts that, under the Court's traditional substantive due process analysis, a fundamental constitutional right—such as the asserted right to refuse medical treatment—must at least be "so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" Scalia observed that the termination of life-sustaining medical treatment that causes a person's death before nature and science would otherwise allow is suicide, the regulation of which has always been within the police powers of the states:

While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce,

20. Id. at 2851 n.7.
21. Id. at 2856 (O'Connor, J., concurring).
22. Id. at 2857.
23. Id. at 2859 (Scalia, J., concurring).
25. Cruzan, 110 S. Ct. at 2859 (Scalia, J., concurring).
26. While Justice Scalia asserts that he agrees with the majority's analysis, his concurring opinion seems to repudiate Justice Rehnquist's analysis which recognizes a constitutional right to terminate life-sustaining medical treatment.
clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one’s life; that the point at which life becomes ‘worthless,’ and the point at which the means necessary to preserve it become ‘extraordinary’ or ‘inappropriate,’ are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence, that even when it is demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored. It is quite impossible (because the Constitution says nothing about the matter) that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely (because we know no more about ‘life-and-death’ than they do) that they will decide upon a line less reasonable. 27

Justices Brennan and Stevens each filed dissents antithetical to Scalia’s plea for judicial self-restraint. Justice Brennan avowed that Nancy Cruzan (or her surrogate) has a fundamental right to refuse life-sustaining medical treatment, a right that Missouri could not overcome by its general interest in the preservation and protection of life. 28 According to Justice Brennan, Missouri could legitimately interfere with a patient’s fundamental right to refuse life-sustaining medical treatment only to impose “procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan’s wishes . . . .” 29 Justice Brennan asserted that the state has no interest in a person’s life that could outweigh his or her choice to avoid medical treatment. 30 Similarly, Justice Stevens viewed the right to refuse life-sustaining medical treatment as a fundamental liberty that prevails over any state policy that ignores “the best interests of the individual, especially when buttressed by the interests of all related third parties . . . .” 31

27. Cruzan, 110 S. Ct. at 2859 (Scalia, J., concurring).
28. Id. at 2863-2864 (Brennan, J., dissenting).
29. Id. at 2871.
30. Id. at 2870.
31. Id. at 2889 (Stevens, J., dissenting).
III. THE LEGITIMACY OF THE SUPREME COURT’S RECOGNITION OF A RIGHT TO SUICIDE UNDER THE CONSTITUTION³²

As a result of the *Cruzan* decision, a competent person now seems to possess a limited constitutional right to refuse life-sustaining medical treatment under the due process clause of the fourteenth amendment. If such a right exists under the Constitution, as the Supreme Court has determined, the Court has acted within its proper boundaries of judicial review and the consequences of its decision will be endured; but if no such right exists, then the Court has improperly usurped the power of the states to make laws regulating the health, welfare and morals of their citizens.

Admittedly, it is no easy task to identify rights that deserve constitutional protection. With regard to individual rights, the Constitution is a murky document, devoid of clarity and certainty. Rational individuals often ascribe different meanings to the same words and phrases in the Constitution. Intellectuals engage in discourse attempting to convince others that the Constitution reflects a particular point of view. Supreme Court Justices opine persuasively that the Constitution means one thing or another.

Nevertheless, in spite of the difficulty and the confusion inherent in constitutional interpretation lies the true meaning of the Constitution—a true meaning that can be ascertained in a nation that follows the rule of law. In this section, I seek the true meaning of the due process clause of the fourteenth amendment to determine whether it encompasses a right to refuse life-sustaining medical treatment. To that end, I examine below the historical origins

³². A word about nomenclature. Over the past fifteen years, the commentators have referred imprecisely to a person’s right to refuse life-sustaining medical treatment in terms of a “right to die.” I hesitate to perpetuate the phrase because it connotes something that it is not. In the literature, the “right to die” generally means that a person who is terminally ill or in a vegetative condition has some legally enforceable right to decide for himself or herself whether to die sooner than nature and science would otherwise allow. Yet, the phrase “right to die” implies a broader, more substantive right to personal autonomy and destination which has not until recently existed in the law. The termination of life-sustaining medical treatment is a deliberate termination of one’s own life prior to its natural or scientific ending. Such an act is suicide. If government determines that a person has a right to refuse life-sustaining medical treatment, government confers a right to suicide. I refer to this more exculpatory concept of suicide as “justifiable suicide” because I believe that the phrase more aptly describes the legal right to terminate life-sustaining medical treatment than the more ambiguous notion of the “right to die.”
of rights under the Constitution and show how those rights have evolved into a dubious constitutional right to refuse life-sustaining medical treatment.

A. The Notion of Rights Under the Constitution

Whether a right to suicide exists under the Constitution depends upon a fair interpretation of the pertinent provisions of the Constitution and its amendments in accordance with the principles intended by the ratifiers. Although rights were preeminent in the Declaration of Independence, the exposition of rights in the United States Constitution was given scant attention. The reason for this can be traced to the framers' intent to produce a Constitution to function primarily as a framework for a limited federal govern-

33. I recognize that the inquiry into whether the Court's decision in \textit{Cruzan} was a legitimate exercise of constitutional power must be informed by some theory of constitutional law. While plentiful theories abound, I am compelled to apply the only neutral theory of constitutional adjudication which I regard as comporting with the role of the Supreme Court in our constitutional republic—the theory of original understanding. I do not undertake here to defend or propound the notion of original understanding since that task has been ably accomplished elsewhere. See generally Berger, \textit{Government by Judiciary: the Transformation of the Fourteenth Amendment} 363-372 (1977); Bork, \textit{The Tempting of America} (1990); Monaghan, \textit{Our Perfect Constitution}, 56 N.Y.U. L. Rev. 353 (1981); and Scalia, \textit{Originalism, The Lesser Evil}, 57 U. Cin. L. Rev. 849 (1989). Suffice it to say that the theory's logic—that "a judge is to apply the Constitution according to the principles intended by those who ratified the document"—seems to me unassailable. I find unconvincing competing theories of constitutional adjudication which rely upon the notion that the Constitution is an open-ended document which should be "molded to the views of contemporary society." As I see it, the danger in such theories is that they impart into the Constitution a notion of morality which may be used by a Justice of the Supreme Court to obtain a desired political result. This enables a Justice to wield power to make public policy which has been reserved under our constitutional scheme either to other branches of the federal government or to the states.

34. The Constitution is not entirely devoid of rights. For example, Article I, section 9 provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Likewise, the same section provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." Section 10 of Article I provides that "[n]o State shall... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts...." Section 2 of Article III provides that "[t]he trial of all Crimes... shall be by Jury...." And Article IV, section 2 provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states."
Explicit in the constitutional arrangement was the framers’ recognition that most rights and powers would be retained by the states and the people, and not by the federal government. Explicit in the constitutional arrangement was the framers’ recognition that most rights and powers would be retained by the states and the people, and not by the federal government.  

Like the Constitution, the Bill of Rights originally offered few significant protections for civil liberties. Although the Bill of Rights was conceived as a “rights” document, it was neither a comprehensive rights document nor an affirmative rights document. For example, the Bill of Rights contained no provisions dealing with slavery, equality, consent of the governed, the right to vote, or liberty, even though many of these rights were advanced in the bills of rights of the various states, such as Virginia and Massachusetts, many of which were ratified prior to the federal Bill of Rights. The Bill of Rights was designed to protect against the illegitimate use of power by the federal government; it was not designed to limit or restrict the powers and rights of the states or private individuals.

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35. "But a minute detail of particular rights is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to one which has the regulation of every species of personal and private concerns." The Federalist No. 84 (A. Hamilton).

36. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

37. I offer here only a sampling of the affirmative rights granted under the Virginia and Massachusetts bills of rights. The Virginia bill of rights, adopted in 1776, provided, inter alia, that: “all men are by nature equally free” (Section 1); “all men . . . have the right of suffrage” (Section 6); “freedom of the press . . . can never be restrained” (Section 12); “all men are equally entitled to the free exercise of religion” (Section 16). See Va. Const. of 1776. Likewise, the Massachusetts bill of rights, adopted in 1780, provided, inter alia, that: “All men are born free and equal” (Article I); “all the inhabitants . . . have an equal right to elect officers” (Article IX); “The liberty of the press [ought not] be restrained” (Article XVI). See Mass. Const. of 1780. None of these rights were imparted affirmatively in the United States Bill of Rights. See also the Declaration of the Rights of Man and of Citizens (1789), prefixed to French Const. of 1791 which, like the bills of rights of the states, was heavily rights oriented. For a discussion of the modern relationship between the state and federal bills of rights, see generally Grad, The Legislative Drafting Research Fund of Columbia University, Constitutions of the United States: National and State 117-136 (January 1980).

All of the foregoing was not apparent to Justice Samuel Chase, who, in 1798, prior to his impeachment, declared in *Calder v. Bull* that the Constitution prohibited a legislature from enacting a law that takes "property from A and gives it to B." Notwithstanding that the Constitution itself imposed no such proscription, Chase found that such a law "is against all reason and justice" and is therefore forbidden under "the general principles of law and reason." Chase's reliance upon natural law was repudiated in an opinion by Justice Iredell:

[If] the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Perhaps Chase's reliance on natural law would have been repugnant if the Constitution had been conceived as a natural law document. The evidence shows, however, that the Constitution was intended as a positive law document, not as one with inherent natural rights. "The Founders were deeply committed to positivism, as is attested by their resort to written constitutions—positive law. Adams, Jefferson, Wilson, Madison and Hamilton . . . were seldom, if ever, guilty of confusing law with natural right." And although mention of the natural law would creep into Supreme Court decisions in the early days of the republic, Chief Justice Marshall would finally renounce the idea in *McCulloch v. Maryland*, proclaiming that the natural law has no place in the Supreme Court's constitutional jurisprudence.

39. 3 U.S. (3 Dall.) 386 (1798).
40. *Calder*, 3 U.S. (3 Dall.) at 388 (emphasis added).
41. *Id.*
42. *Id.*
43. *Id.* at 399 (Iredell, J., concurring).
44. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 252 (1977)(see also n. 15, at 252 and 393-396).
45. 17 U.S. (4 Wheat.) 316 (1819).
46. *Id.* Even earlier, in *Marbury v. Madison*, Chief Justice Marshall declared...
B. Expanding the Constitutional Scheme of Rights With Substantive Due Process

With the ratification of the three Civil War amendments, the Constitution is law and that the role of the Supreme Court is to interpret the law under the confines of the textual provisions of the Constitution:

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?...[T]he framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

5 U.S. (1 Cranch) 137, 176, 179-80 (1803).

47. In addition to the constitutional theory of substantive due process discussed hereinafter, rights under the Constitution have been expanded under at least two other constitutional theories which I mention only briefly here. First, the Court has found persuasive the argument that the due process clause of the fourteenth amendment integrates some or all of the Bill of Rights such that they have become applicable to the states in addition to the federal government. Although it is doubtful that the ratifiers of the fourteenth amendment intended that the federal Bill of Rights be made applicable to the states, the Court has accepted the notion and has struck down countless state laws as a result thereof. See, e.g., Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 134-156 (1977). Second, some commentators have speculated that the ninth amendment may serve as the basis for enforceable natural rights under the Constitution. See, e.g., Ely, Democracy and Distrust (1980); Tribe, American Constitutional Law (2d ed. 1988). Such a theory of rights has never been accepted by the Supreme Court, although Justice Goldberg's concurring opinion in Griswold v. Connecticut relies heavily upon the ninth amendment. Even there, Justice Stewart, in his dissenting opinion, rather disavows the idea: "The Ninth Amendment, like its companion the Tenth, which this Court held 'states but a truism that all is retained which has not been surrendered,' was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States." Griswold v. Connecticut, 381 U.S. 479, 529-530 (1965)(Stewart, J., dissenting)(citations omitted). "There is almost no history that would indicate what the ninth amendment was intended to accomplish. But nothing about it suggests that it is a warrant for judges to create constitutional rights not mentioned in the Constitution." Bork, The Tempting of America 183 (1990).

In sophisticated legal circles mentioning the Ninth Amendment is a surefire way to get a laugh. It's true that read for what it says the Ninth Amendment seems open-textured enough to support almost anything one might wish to argue, and that can get pretty scary. But this is equally true of the 'substantive due process' concept, which is generally accepted, albeit with some misgivings, in the selfsame sophisticated
infusion of natural law into constitutional jurisprudence recurred. The purpose of the amendments was to ensure that recently freed slaves received the same civil and political rights as free whites. The language of the thirteenth and fifteenth amendments was expressly limited to the slavery issues. But the language of the fourteenth amendment was not so limited:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The privileges and immunities clause of the fourteenth amendment mirrored that of the fifth amendment, which has generally been construed to mean that a state must grant the same civil and political rights to noncitizens as it does to its own citizens. Although there appears to be some merit in the argument circles.

ELY, DEMOCRACY AND DISTRUST 34 (1980).

48. The rationale for the ratification of the Civil War amendments was expressed by Justice Miller in the Slaughter-House Cases:

We repeat, then, in the light of this recapitulation of the events [of the Civil War amendments], almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.


49. U.S. Const. amend. XIV, § 1.

50. See NOWAK, ROTUNDA AND YOUNG, CONSTITUTIONAL LAW 318 (3d ed. 1986). However, as the aforesaid authors point out, the privileges and immunities clause of the fourteenth amendment, unlike the fifth amendment, “protects very few rights.” Id. at 319. The fourteenth amendment privileges and immunities clause protects only “those rights peculiar to being a citizen of the federal government; it does not protect those rights which relate only to state citizenship. Therefore, the clause only refers to uniquely federal rights, such as the right to petition Congress, the right to vote in federal elections, the right to interstate travel or commerce, the right to enter federal lands, or the rights of a citizen while in the custody of federal officers.” Id. at 319 (citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)). And Professor Tribe has remarked that “in at least one respect the fourteenth amendment privileges or immunities clause and its ancestor in article IV are much alike: courts rarely rely upon either to protect the privileges of
that the privileges and immunities clause of the fourteenth amendment was intended to propound substantive rights, its actual meaning has irrefutably been determined to add nothing of substance to the Constitution.

Similarly, the due process clause of the fourteenth amendment was commonly understood to annex no substantive rights to the Constitution. Neither the language of the provision itself nor the history of its ratification suggests that any substantive rights were intended. As the phrase "due process" implies, the aim of the provision was to ensure fair and lawful procedures. "What recorded comment there was at the time of replication in the Fourteenth Amendment is devoid of any reference that gives the provision more than a procedural connotation." Notwithstanding the clarity of the language and the ratifiers' intent, the fourteenth amendment "became and has remained the great engine of judicial power." Generations of legal technicians and courts would resort to the fourteenth amendment to ascertain natural rights not otherwise identifiable in the text of the Constitution. The catchphrase would become "substantive due process," and the concept would be employed by the Supreme Court time and again to strike down state laws that did not comport with the Court's notion of natural justice.

For instance, in Allgeyer v. Louisiana, the Supreme Court found unconstitutional a Louisiana state statute that prohibited its citizens from contracting for insurance from any company not chartered by the State of Louisiana. Justice Peckham, writing for the Court, said that such prohibitions impinge upon the liberty provision of the due process clause of the fourteenth amendment:

The liberty mentioned in [the fourteenth amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is 51. See Slaughter-House Cases, 83 U.S. (16 Wall.) at 123 (Bradley, J., dissenting). See also ELY, DEMOCRACY AND DISTRUST 22-30 (1980).
52. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
53. See generally ELY, DEMOCRACY AND DISTRUST 14-21 (1980).
54. Id.
55. Id. at 15.
56. Id.
58. 165 U.S. 578 (1897).
deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.69

In *Lochner v. New York*,60 the Supreme Court reviewed the constitutionality of a New York statute that placed restrictions on working hours for bakers. The statute was designed to protect the health, safety and welfare of bakers, normally powers well within the states exhaustive police powers. But the Court struck down the statute on the basis that it interfered with a constitutional right to freedom of contract, a right that the Court found under the liberty provision of the due process clause.61 In both *Allgeyer* and *Lochner*, the Supreme Court resorted to notions of natural justice to trump the power of the state to enact economic regulations not otherwise barred by the Constitution.

In the 1930s, after decades of adherence to a doctrine of "economic" substantive due process that was nowhere to be found in the text of the Constitution, the Supreme Court repudiated the doctrine in *Nebbia v. New York*62 (upholding a law that fixed the selling price for milk) and in *West Coast Hotel Co. v. Parrish*63 (upholding minimum wage laws). In 1949, in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*,64 the Supreme Court acknowledged in no uncertain terms its rejection of the concept of economic due process:

In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket

59. *Id.* at 589.
60. 198 U.S. 945 (1905).
61. *Id.*
63. 300 U.S. 379 (1937).
64. 335 U.S. 525 (1949).
when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.\(^6\)

But the Supreme Court never really sounded the death knell for the doctrine of substantive due process—it repudiated only the economic aspects of the doctrine. As a result, the doctrine would continue to slither into constitutional jurisprudence, albeit in different contexts.

C. Devising a Right to Privacy Under the Constitution

By the nature of our constitutional form of limited federal government, states have been guaranteed wide latitude to enact laws that affect the health, morals, welfare and safety of their citizens.\(^6\) The Supreme Court generally will defer to a state's so-called police power as long as it does not contravene the federal Constitution.\(^7\) Since the mid-1960s, however, the Supreme Court has stricken numerous state laws enacted under the police power on the premise that such laws violate a constitutionally protected right to privacy.

The constitutional right to privacy was first discovered by the justices of the Supreme Court in the 1965 case of Griswold v. Connecticut.\(^8\) Connecticut law made it a crime to use contraceptives or to counsel others to use them. The Supreme Court invalidated the law, finding, \textit{inter alia}, that the penumbras of the first, third, fourth and fifth amendments create a constitutional right to privacy that protects traditional marital relationships against state laws that intrude into such affairs.\(^9\)

65. \textit{Id.} at 536-537.
67. \textit{Id.}
68. 381 U.S. 479 (1965).
69. Griswold, 381 U.S. at 484. The so-called right to privacy emanating from Griswold has been aptly summarized by Professor Lawrence Tribe:

\begin{quote}
The [right to privacy has] been located in the 'liberty' protected by the due process clauses of the fifth and fourteenth amendments. They have been cut from the cloth of the ninth amendment—conceived as a rule against cramped construction—or from the privileges and immunities clauses of article IV and of the fourteenth amendment. Encompassing rights to shape one's inner life and rights to control the face one presents to the world, they have materialized from the 'emanations' and 'penumbras'—most recently dubbed simply the 'shadows'—of the first, third, fourth, and fifth amendments. They elaborate the 'blessings of liberty mentioned in the Preamble, and have been held implicit in the eighth amendment's prohibition against cruel and unusual punishments.
\end{quote}
In 1973, the Court, in *Roe v. Wade*, invalidates a Texas law that proscribed all abortions except those necessary to save a woman's life. The Court in *Roe* determined that state restrictions on abortion violate a woman's constitutional right to privacy unless the state can show compelling reasons for its restrictions. The decision in *Roe* has been likened to the Court's decision in *Dred Scott v. Sanford*, where the Court decided, *inter alia*, that the federal government had no power to prohibit slavery inasmuch as slave ownership was a constitutional right. The right to own slaves was nowhere mentioned in the Constitution any more than the right to an abortion was mentioned. Nevertheless, Chief Justice Taney relied upon notions of the natural law to find a constitutional right to own slaves just as Justice Blackmun, writing for the majority in *Roe v. Wade*, found a constitutional right to an abortion in the natural law. In each case, the Court ignored the boundaries of the written Constitution and instead applied its own idea of natural justice.

In *Moore v. East Cleveland*, the Court again invoked substantive due process to strike down a city zoning statute. Justice Powell, writing for a plurality, asserted that "[o]ur decisions estab-

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70. 410 U.S. 113 (1973).

71. *Id.* at 155. Finding abortion to be a fundamental right, the Court determined that a state could never show a compelling reason to prevent an abortion during the first trimester of pregnancy, except to require that any abortion during the period be performed by a licensed doctor. After the first trimester, the states could impose reasonable restrictions in order to protect the health of the mother. After the second trimester, when the fetus' life becomes "viable," the states may then assert a compelling interest in the preservation of the unborn's life by prescribing abortion.

72. 60 U.S. (19 How.) 393 (1856).

73. "The [liberal contractarian model of constitutional adjudication] was central to Chief Justice Roger Brooke Taney, who wrote the decision of the Supreme Court in the *Dred Scott* case and who was a liberal. It was central to the Earl Warren Court, which used virtually the same language Taney had used." *BICKEL, THE MORALITY OF CONSENT* 5 (1975). "[O]nce it is conceded that a judge may give the due process clause substantive content, *Dred Scott*, *Lochner*, and *Roe* are equally valid examples of constitutional law. You may or may not like the judge's politics or his morality, but you have conceded, so far as the Constitution is concerned, the legitimacy of his imposing that politics and morality upon you. Lenin is supposed to have written: 'who says A must say B.' In that he was logically correct. Who says *Roe* must say *Lochner* and *Scott*." *BORK, THE TEMPTING OF AMERICA* 32 (1990).

lish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”75 In his dissent, Justice White argued that judge-made constitutional law, employed by the plurality, would intrude into the ability of Congress and the states to respond to a changing social order: “What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable.”76

The constitutional landscape began to change in 1986 when the Supreme Court, in *Bowers v. Hardwick,*77 determined that the Constitution does not confer a right (fundamental or otherwise) upon homosexuals to engage in sodomy. In the Court’s plurality opinion, Justice White found no support in the Constitution to protect acts of homosexual sodomy:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution . . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.78

In 1989, the Supreme Court, in *Webster v. Reproductive Health Services,*79 upheld provisions of a Missouri statute regulating the performance of abortions. The Court found that a statutory ban on the use of public employees and facilities for performance or assistance of nontherapeutic abortions did not contravene the federal Constitution.80 The Court did not repudiate the holding of *Roe v. Wade,* although it did raise questions about its continued effectiveness.81

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75. Id. at 503.
76. Id. at 549 (White, J., dissenting).
77. 478 U.S. 186 (1986).
78. Id. at 194.
80. Id.
D. Finding a Right to Suicide in Substantive Due Process

The majority in *Cruzan* recognized that the Constitution protects a person’s right to refuse life-sustaining medical treatment. In basing such a protection in the liberty clause of the fourteenth amendment rather than in a right to privacy, the Court was able to escape the more demanding constitutional tests under a right to privacy analysis that require the finding of a compelling state interest to outweigh the asserted privacy right. The *Cruzan* decision suggests that the Court is moving further away from (or perhaps has abandoned) the concept of a constitutional right to privacy that was the basis for decisions in *Griswold* and *Roe*. But the *Cruzan* decision does not suggest that the Court is prepared to abandon the concept of substantive due process. To the contrary, the *Cruzan* decision, by recognizing a right to refuse life-sustaining medical treatment, is kin to *Dred Scott* and *Lochner* in that all of these decisions were based in part upon substantive due process, a concept nowhere to be found in the Constitution.

Legal scholars have argued that decisions of the Supreme Court, such as the *Cruzan* decision, which are based upon the notion of substantive due process are illegitimate usurpations of constitutional power by the Supreme Court because the doctrine has no anchor in the written Constitution. The logic of such an argument is persuasive. But the decision in *Cruzan* which found a right to terminate life-sustaining medical treatment can be eschewed on other grounds as well. That is to say, the *Cruzan* decision seems incorrect based upon the standards which the Court traditionally has applied to determine whether an individual liberty is deserving of constitutional protection. Under the Court’s traditional analysis, the unwritten liberty interests to be protected are those that are “implicit in the concept of ordered liberty” and that are “deeply rooted in this Nation’s history and tradition.” Suicide (or the right to terminate life-sustaining medical treatment) is not such a liberty interest that has been historically and traditionally protected against state interference. As the following section shows, suicide has been historically and traditionally condemned and proscribed by society.

82. See supra note 17 accompanying text.
83. See supra note 33.
86. For general discussions of society’s attitudes toward suicide from Biblical
1. Proscriptions Against Suicide in Early American Common Law

In the seventeenth century, when Jamestown and Boston were being settled, the common law of England imposed stiff penalties for the act of suicide, including the forfeiture of the suicide's personal estate and ignominious burial. 87 Blackstone, while recognizing natural rights emanating from the common law, found that the right to suicide was no such natural right:

This natural life, being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. 88

The law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. 89

The views of the colonists toward suicide mirrored the prevailing English attitudes. 90 Most of the colonies imposed penalties for suicide, and many of them imposed the common law penalties of forfeiture and dishonorable burial. 91 Pennsylvania appears to be the only colony that expressly prohibited the forfeiture of a suicide's estate. 92 All of the other colonies appear to have punished the act of suicide either under the common law or under statutory

88. 4 W. Blackstone, Commentaries *132.
89. Id. at *189.
90. See Marzen, O'Dowd, Crone & Balch, supra note 87, at 64-66.
91. Id.
92. Id. at 66-67.
Civil and criminal punishments for suicide were short-lived in America. By the end of the eighteenth century, most states had abolished the penalties for suicide, either by statute or by state constitution. Why were such penalties abolished? Did the abolition of the penalties reflect the new nation's belief in natural rights and individual freedom? Was suicide a natural right not to be interfered with by the state's police power? Probably not:

It has sometimes been supposed that the abolition of forfeiture and ignominious burial as punishment for suicide occurred because the colonists had come to believe that suicide was an individual autonomous choice without adverse impact on the rights of others and society and that therefore government should not interfere with it. . . . [But the] anachronistic assumption that our forebears held and applied a political philosophy derived from Mills is not borne out by the available evidence.

In their analysis of the matter, Marzen, O'Dowd, Crone and Balch have found that the probable reason for the abolition of punishments for suicide was not "because suicide itself was viewed as a lesser evil or as a human right, but because the penalties punished the innocent family of the suicide, without in any way reaching the real perpetrator of the act."

By the beginning of the nineteenth century, most states had abolished punishments for suicide, but suicide continued to be held in disrepute. At the time that the fourteenth amendment was ratified, twenty-one of the thirty-seven states had enacted laws making it a crime to assist someone in committing suicide. Of the thirty states that ratified the fourteenth amendment, eighteen had laws that made it a crime to assist in a suicide.

93. Id.
94. Id. at 67-68.
95. Id. at 68 (footnotes omitted).
96. Id. at 69 (relying upon SWIFT, A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT 304 (n.p. 1795)).
98. Marzen, O'Dowd, Crone & Balch supra, note 87, at 76.
99. Id.
2. The Emergence of a Common Law Tort Remedy for Unwanted Medical Treatment

Around the turn of the century, a series of decisions by state courts recognized a common law right to refuse medical treatment. Courts and commentators sometimes rely upon these cases to contend that suicide (the right to refuse life-sustaining medical treatment) is deeply rooted in American traditions such that it deserves constitutional protection. Yet none of these cases concerns the constitutional issues relating to the alleged right to refuse life-sustaining medical treatment. The cases involved state tort law issues concerning private parties, such as claims of a patient against a doctor. In the prominent case that involved a claim of a citizen against the state, the state, not the citizen, was successful.

In Mohr v. Williams, a patient sued her doctor on the tort of assault and battery for operating on her right ear without her consent. She had consented to surgery, but only to her left ear. The Supreme Court of Minnesota, while granting the doctor's motion for a new trial because of excessive damages, permitted the patient to recover from the doctor under state tort law. The court quoted Pratt v. Davis, an Illinois Supreme Court case with similar facts wherein a patient sued her doctor for the tort of trespass to person and was permitted to recover:

Under a free government, at least, the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person; in other words, the right to himself—is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skillful or eminent, who has been asked to examine [a patient] . . . 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.


101. 95 Minn. 261, 104 N.W. 12 (1905)(overruled on other grounds by Genzel v. Halverson, 248 Minn. 534, 80 N.W.2d 854 (1957)).

102. 224 Ill. 300, 79 N.E. 562 (1906).

103. Mohr, 95 Minn. at 268, 104 N.W. at 14 (quoting Pratt, 224 Ill. 300, 79 N.E. 562 (1906)).
In Schloendorff v. Society of New York Hospital, a patient sued her doctor for the tort of trespass to person for removing a tumor without her consent. The patient alleged that, as a result of the removal of the tumor, she developed gangrene which necessitated the removal of some of her fingers. Judge Cardozo permitted the patient to recover, asserting that "[e]very 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 Jacobson v. Massachusetts, Jacobson sued the state over its requirement that he be immunized against smallpox, claiming that he had a liberty right not to receive medical treatment against his will. This case ultimately went to the United States Supreme Court, where the Court determined that it was within Massachusetts' police power to require such an immunization, even against Jacobson's alleged liberty claim. The Court declared that:

the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.

3. Extrapolating the Tort Remedy Into a Right to Suicide?

By the 1960s, cases implicating a patient's right to refuse medical treatment in non-tort situations began to surface in state courts, and some of these cases did indeed acknowledge a right to terminate life-sustaining medical treatment. In Erickson v. Dillgard, for example, a New York court permitted a competent patient to refuse a blood transfusion over the objection of his physi-

104. 211 N.Y. 125, 105 N.E. 92 (1914).
105. Id. at 129-30, 105 N.E. at 93.
106. 197 U.S. 11 (1905).
107. Id.
108. Id. at 26. Prior to the Cruzan decision, the Supreme Court did recognize that a person has a significant liberty interest in refusing unwanted medical treatment, but the Court had never theretofore extended the protected liberty interest to life-sustaining medical treatment. See Washington v. Harper, 110 S. Ct. 1028 (1990); Youngberg v. Romeo, 457 U.S. 307 (1982); and Parham v. J.R., 442 U.S. 584 (1979).
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cian even though his life may have been jeopardized by refusing the transfusion. In *In re Estate of Brooks*,\(^{110}\) the Supreme Court of Illinois also permitted a patient to refuse a blood transfusion on the basis of the patient's first amendment right to free exercise of religion. At the same time, other courts refused to allow the termination of life-sustaining medical treatment. For example, in *In re President and Directors of Georgetown College, Inc.*,\(^{111}\) a patient objected on religious grounds to a blood transfusion deemed necessary to preserve her life. The court, which granted a request from the hospital to force the transfusion upon the patient, reasoned in part that the patient's refusal to accept the transfusion might be deemed attempted suicide.\(^{112}\)

By the 1970s, state legislatures and state courts began to recognize the problems associated with advances in medical science designed to keep people alive beyond hope; a problem that had not existed previously because medical science was not able to sustain efficiently persons in a persistent vegetative state. As reported below in Part IV, the states reacted with legislation and state court decisions recognizing that, in some situations, a person should have the right to refuse life-sustaining medical treatment. Thus, although there now exists among the states an almost universal (albeit limited) right to refuse medical treatment, such a right is most recent—and certainly not one that has been "historically and traditionally protected" against state interference as that phrase is understood in the constitutional jurisprudence of substantive due process. American history and tradition are replete with instances of state intervention to prevent suicide. Even today, the living will statutes "in no less than ten states, including Washington, D.C., expressly repudiate suicide and euthanasia, albeit with no penalties. No states expressly legalize suicide through either legislation or constitution,"\(^{113}\) except as provided by living will statutes. What's more, today, over half of the American states continue to proscribe the assistance of suicide.\(^{114}\) And although the punishment of attempted suicide has occurred only rarely in the United States, attempts to commit suicide are also subject to legal penalties in other countries.

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110. 32 Ill. 2d 361, 205 N.E.2d 435 (1965).
112. *Id.* at 1008.
114. *Id.* at 11.
States, there is reason to believe that it may continue to exist as a common law crime.

As Marzen et al. have concluded:

there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' Indeed, the weight of authority in the United States, from colonial days through at least the 1970's has demonstrated that the predominant attitude of society and the law has been one of opposition to suicide. It follows that courts should not hold suicide or its assistance to be a protected right under the United States Constitution.

In finding a Constitutional right to suicide in the Cruzan decision, the Supreme Court has exceeded the boundaries of its own formula of substantive due process. Moreover, if we understand the Constitution in the manner intended by the framers and ratifiers, the Court's decision in Cruzan—creating a constitutional right from whole cloth rather than from the text of the Constitution—exceeds the legitimate boundaries of judicial review and thus usurps the powers reserved to the states.

IV. THE PRUDENTENCE OF A CONSTITUTIONAL RIGHT TO SUICIDE

The state courts and legislatures have recognized the issues associated with advances in medical technology that serve to sustain the lives of many people who might prefer to be dead. The courts and legislatures have dealt with the problems by acknowledging that there are times when traditional attitudes toward suicide

115. See State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961)(stating that nearly all courts "agree that suicide is malum in se... For the reason that suicide may not be punished, it is argued that this common law offense is now obsolete and serves no practical purpose for the protection of society. We do not agree." id. at ----, S.E.2d at 855-56.). State v. Carney, 69 N.J.L. 478, 55 A. 44 (1903)(upholding a conviction for attempted suicide).

The law had always made an exception from punishment for the insane, but it came explicitly to regard a suicide attempt as itself evidence, if not of insanity, at least of mental disturbance for which help was more desirable than condemnation. 'Help' meant prevention of suicide and an effort to treat the cause of the attempt, not assistance in completing suicide. Sympathy for the individual ... emphatically did not mean approval of the act.

Marzen, O'Dowd, Crone & Balch, supra note 87, at 85.


117. Marzen, O'Dowd, Crone & Balch, supra note 87, at 100.
should give way and allow someone who is terminally ill the right to suicide. The states have moved rapidly to develop a body of statutory and case law that recognizes both the rights of their citizens and the important interests of the state in preserving life where possible. The states have acted responsibly and effectively in dealing with difficult issues.

How will the Court’s decision in *Cruzan* affect the development of state law? The answer to this question will determine whether the Court, as a matter of constitutional prudence, should have ignored the issue presented in *Cruzan* even though the Court may have possessed the raw power to decide the issue.

A. *State Responses to Advances in Scientific Prolongation of Life*

The first recognition of a right to justifiable suicide in the United States appeared in the seminal case of *In re Quinlan*, decided by the New Jersey Supreme Court in 1976. In *Quinlan*, the court permitted the father of Karen Quinlan to remove artificial respiration from Karen, an act which the doctors believed would hasten her death. The New Jersey court determined that the right to privacy under the United States Constitution gave Karen Quinlan or her surrogate the right to refuse artificial respiration, even though such a refusal would lead to her death. (This right to privacy rationale was repudiated by the New Jersey Supreme Court nine years later in *In re Conroy*.) The court recognized that the state had legitimate interests in preserving the sanctity of human life and in defending the right of the physician to administer medical treatment according to his or her best judgement. But after balancing the state’s interests against Karen Quinlan’s right to refuse medical treatment, the court found that Karen Quinlan’s interests outweighed the interests of the state.

119. *Id.* at 42, 355 A.2d at 664. Karen Quinlan actually did not die until many years after the artificial respiration had been removed by court order. It should be noted that Karen Quinlan’s guardians refused to seek the termination of life-sustaining hydration and nutrition.
120. *Id.* at 38-42, 355 A.2d at 662-64.
121. See *infra* note 137 and accompanying text.
123. The court asserted that the “State’s interest contra weakens and the individual’s right to privacy grows as the degree of bodily invasion increases and
In *Superintendent of Belchertown State School v. Saikewicz,* a severely retarded elderly man who had been hospitalized in a state institution for most of his life developed leukemia. His doctors recommended that chemotherapy not be administered because of the low probability of successful treatment and because of possible side effects and discomforts. The Massachusetts Supreme Court agreed and allowed the patient's guardian to refuse medical treatment based upon the "substituted judgment" of the guardian that the patient would not have wanted the treatment if he were competent and able to make the decision himself. The court found that a person has a "strong interest in being free from nonconsensual invasion of his bodily integrity." Even aside from the common law doctrine of informed consent, however, the court also relied upon "the unwritten constitutional right of privacy found in the penumbra of specific guarantees of the Bill of Rights," citing for its authority the New Jersey *Quinlan* case of the previous year. The court recognized four state interests that must be balanced against an individual's right to refuse medical treatment, including (1) the interest in the preservation of life, (2) the interest in the protection of innocent third parties, (3) the interest in maintaining the ethical integrity of the medical profession, and (4) the interest of the state in preventing suicide (although it is doubtful that there is any difference between the state's interest in preserving life and the state's interest in preventing suicide). The court balanced the state's interests and the patient's right to refuse medical treatment (through his surrogate) and determined that the patient's rights were more compelling.

The courts in each of the two preceding cases determined that the decision to withhold medical treatment could be made by the patient's surrogate even if the patient had not expressed any wishes about the desirability of life-sustaining medical procedures.
But in two 1981 New York cases, *In re Storar* and *In re Eichner*, the New York Court of Appeals rejected the so-called substituted judgment approach adopted by the courts in *Quinlan* and *Saikewicz* and refused to permit the termination of life-sustaining medical treatment without clear and convincing evidence of the same from the patient. The court, however, did permit the termination of life-sustaining medical treatment where the patient clearly expressed his approval for such action. In those cases, the court recognized a common law right to refuse medical treatment but refused to find a federal constitutional right to privacy.

In *In re Conroy*, the New Jersey Supreme Court, the same court that decided *Quinlan* a decade earlier, determined that an individual’s right to refuse medical treatment emanated from the common law and not from any federal constitutional right to privacy which the court found to be speculative. Similarly, in *In re Westchester County Medical Center on behalf of O'Connor*, the New York Court of Appeals recognized a right to refuse medical treatment based upon the common law, not the federal Constitution. And in *In re Estate of Longeway*, the Illinois Supreme Court found a right to refuse medical treatment under the common law doctrine of informed consent rather than relying on the uncertain boundaries of the federal right to privacy.

At the same time that the state courts began to wrestle with the complicated questions concerning the termination of medical treatment for terminally ill patients, the state legislatures con-

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133. *Id.* Storar and Eichner were companion cases.
134. *Id.* at 378-79, N.Y.S.2d at 274, 420 N.E.2d at 72.
135. *Id.*
136. *Id.* at 376, 438 N.Y.S.2d at 272-73, 420 N.E.2d at 70. “Father Eichner urges that [the right to refuse medical treatment] is also guaranteed by the Constitution, as an aspect of the right to privacy. Although several courts have so held, this is a disputed question, which the Supreme Court has repeatedly declined to consider.” *Id.* (citations omitted).
138. *Id.* 348, 486 A.2d at 1223.
140. *Id.* at 528, 438 N.Y.S.2d at 890, 531 N.E.2d at 611, where the court asserted that “[i]t has long been the common-law rule in this State that a person has the right to decline medical treatment, even life-saving treatment, absent an overriding State interest.” (citation omitted)
141. 133 Ill. 2d 33, 549 N.E.2d 292 (1989).
142. *Longeway*, 133 Ill. 2d at 44, 549 N.E.2d at 297.
fronted the issue. In 1976, California enacted its “Natural Death Act,” the first such statute in the nation providing for living wills. Since the enactment of the California living will statute, forty-four additional states and the District of Columbia have enacted similar statutes. Although each of the statutes has its own unique provisions, there are some general ones that most seem to contain. For example:

Those similar provisions include: 1) who may make a declaration; 2) the manner of execution of the document; 3) definition sections; 4) revocation procedures; 5) declarations that the current wishes of the patient will supersede any previous declaration; 6) declarations for the transfer of the patient if the attending physician will not comply; and 7) declarations stating that complying

144. A living will is a document in which an individual states his or her preference to forgo life-sustaining medical treatment in the event that he or she becomes incapacitated and terminally ill.
physicians will be provided with immunity from civil and criminal penalties.\textsuperscript{146}

In addition to these general provisions, some states now recognize an individual's right under a living will to delegate medical decisions by proxy to an agent.\textsuperscript{147} And twelve states allow someone other than the patient to execute a living will on the patient's behalf.\textsuperscript{148} All of the living will acts contain provisions designed to protect medical care personnel from liability as a result of their following the instructions in a living will.\textsuperscript{149} Many states further protect medical care personnel for refusing to follow the directives of a living will.\textsuperscript{150}

There are some limits on the effectiveness of living wills. For policy reasons, all living will statutes prevent minors and incompetents from executing living wills.\textsuperscript{151} More than half of the states restrict the effectiveness of living wills during a woman's pregnancy.\textsuperscript{152} A majority of the living will statutes do not permit the withdrawal of food and water, and all such statutes require the existence of a terminal medical condition prior to their effectiveness.\textsuperscript{153}

In addition to living will statutes, about half of the states have enacted durable power of attorney statutes that enable individuals to designate a proxy to make medical decisions.\textsuperscript{154} Other states permit such a delegation by implication of the existence of a power of attorney act.

Although different from state to state, the state statutes and case law can be summarized as follows: First, with respect to incompetent or severely disabled individuals who are terminally ill or in a persistent vegetative state and unable to make medical decisions for themselves, there exists a limited right of an individual to justifiable suicide by refusing life-sustaining medical treatment. Some courts allow a surrogate to refuse medical treatment on be-

\textsuperscript{147} \textit{Cruzan}, 110 S. Ct. at 2858 n.4. (O'Connor, J., concurring).
\textsuperscript{148} Note, \textit{supra} note 146 at 111 n.41.
\textsuperscript{149} \textit{Id.} at 120.
\textsuperscript{150} \textit{Id.} at 118-119.
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.} at 14.
\textsuperscript{154} \textit{Id.} at 11.
half of the incompetent patient and others require that the patient himself or herself make the decision by clear and convincing intent prior to his or her incompetency.

Second, competent persons who are terminally ill may refuse life-sustaining medical treatment on the basis of state living will statutes or on the basis of the common-law doctrine of informed consent or on some state constitutional law theory. For example, if a competent person develops a terminal bone disease, he or she could legitimately refuse to seek treatment, even though the failure to obtain such treatment could hasten his or her death. The cases and statutes would not, however, permit a competent person who is not terminally ill from refusing medical treatment.155

B. The Effect of the Supreme Court Decision in Cruzan on the Development of State Law

The Cruzan decision undoubtedly will have significant consequences upon the evolving state laws relating to justifiable suicide. The most obvious consequence of the Cruzan decision is the effect the decision may have upon the state living will statutes. These laws were carefully molded to ensure that the interests of the state and of the individual are amply protected. The statutes extend protection to the individual (or his or her family) who chooses to exercise the right to refuse medical treatment just as the laws protect the medical personnel who carry out the individual’s request. Importantly, in the execution of living wills, the statutes require adherence to certain formalities designed to protect state and individual interests.

In this regard, the Cruzan decision raises some troubling questions. The tenor of the Court’s opinion suggests that an individual may have a constitutionally protected right to suicide even if the formalities of a living will statute are not followed. In her concurrence, Justice O’Connor asserted that “[s]tates which decline to consider any evidence other than [living wills executed in accordance with the formalities of living will statutes] may frequently fail to honor a patient’s intent.”156 She intimates that under these

155. The California Court of Appeals appears to be the only court which has permitted a person who is competent and not terminally ill to refuse life-sustaining hydration and nutrition. See Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Repr. 297 (1986)(the court permitted the termination of artificial feeding of a quadriplegic patient who suffered from cerebral palsy).

circumstances, the courts may be constitutionally obliged to "protect the patient's liberty interest in refusing medical treatment." 5

If the formalities required by the living will statutes do not establish the legal parameters for decisions to refuse life-sustaining medical treatment, what becomes of the laws themselves? Are the statutes rendered useless and ineffective? Are they merely supplementary or secondary to the ambiguous constitutional right? Moreover, since living will statutes offer protection to families and medical personnel who often make life and death decisions, will these people be protected under state law if a court (construing *Cruzan*) orders them to terminate life-sustaining medical treatment where the provisions of a living will statute have not been followed?

In those states that have not enacted living will statutes and where the right to terminate life-sustaining medical treatment is determined by the state courts, the impact of the *Cruzan* decision may be significant. For example, as of this writing, the Pennsylvania legislature has failed to enact a living will statute, even though legislative momentum seems to be building. It is plausible to assert that Pennsylvania has bucked the national trend toward adoption of such statutes because the legislature has been sensitive to issues that have been linked to the "right to privacy," such as abortion. Because Pennsylvania is one of the most anti-abortion states in the nation, it would be a mistake to conclude that the abortion issue and the issue of justifiable suicide are not politically connected in the mind of a legislator confronted with the issues. The Pennsylva-

(O'Connor, J., concurring). Justice O'Connor asserts that "[f]ew individuals provide explicit oral or written instructions regarding their intent to refuse medical treatment should they become incompetent." *Id.* at 2857. To remedy this, O'Connor suggests that the states enact durable power of attorney statutes expressly authorizing a patient to appoint a proxy to make health care decisions on his or her behalf. O'Connor intimates that if a person executes such a durable power of attorney, such an appointment may deserve constitutional protection even though there is no state statute authorizing the appointment of such a proxy. O'Connor's assertions in this regard are puzzling. It is difficult to comprehend why a person would be more inclined to execute a durable power of attorney than a living will. Also, I suggest that many states will not enact durable power of attorney statutes which delegate health care decisions for public policy reasons which Justice O'Connor has failed to consider. Those public policy reasons include the state's interest in preserving and protecting life. One can imagine the consequences of a health care proxy in the hands of an estranged child of an incompetent, elderly parent who owns a large estate.

157. *Id.* at 2857.
nia legislature's ambivalence on the matter of living wills may be indicative of its attitude toward the sanctity of human life. Perhaps the Pennsylvania legislature (or the legislature of any other state that has not yet adopted living will legislation) does not favor the termination of life-sustaining medical treatment except where nature and science have run their courses. After Cruzan, however, the Pennsylvania courts may have no other choice but to follow the uncertain constitutional mandate set forth in Cruzan thereby disregarding the implicit intention of the elected Pennsylvania legislature.

Other deeply troubling questions arise from the Cruzan decision. No doubt there exist elderly individuals who may be competent and in good health but who, for one reason or another, are no longer interested in pursuing life. Does the Court's decision send a moral message to these people suggesting that, at some point, life is worth giving up? What about a middle-aged or elderly person who develops curable cancer but who, relying on the Cruzan decision, decides to forgo medical treatment in order to end his or her life? Can it be denied that the decision, so applied, encourages suicide? And what about those people who sign living wills authorizing the removal of life-sustaining medical treatment only because the document was placed before them by an estates attorney who did not take the time to explain the consequences of the document? Does Cruzan require that the medical treatment be terminated under such circumstances? Alternatively, if a person executes a living will, knowing of its consequences, but later decides that he or she would rather accept life-sustaining medical treatment, does the Cruzan decision require that the life-sustaining treatment be terminated?

And where does it all end? Does the opinion suggest that competent adults who are not terminally ill may constitutionally refuse life sustaining medical treatment? Or, for that matter, may they refuse food and water? The Court in Cruzan assumed for the pur-

158. [T]he suicide rate for older Americans is almost 50% above the rate for the general population and rising. Between 1948 and 1981, the suicide rate for older persons dropped from 28.1 to 17.1 per 100,000. But in the past several years, the rate has again risen, from 18.3 in 1982 to 19.2 in 1983 to 21.6 in 1986. In addition, it is generally believed that official suicide statistics underestimate the true rate of suicide.

poses of the case "that the United States Constitution would grant a competent person a constitutionally protected right to refuse life-saving hydration and nutrition."$^{159}$ Probably the Court meant to say that the Constitution would grant a terminally ill, competent person a constitutional right to refuse treatment, because the Court later asserts that states are not "required to remain neutral in the face of an informed and voluntary decision by a physically-able adult to starve to death."$^{160}$ But such ambiguities may send the wrong message to those who would challenge state laws that prescribe suicide.

These questions demonstrate the potential impact of a Supreme Court decision that sets policy for a matter that is intensely personal to the individual and his or her family. State laws concerning the right to refuse life-sustaining medical treatment can be changed if they do not respond adequately to the problem. Likewise, state courts have before them statutes and common law upon which they may rely to find a "good" answer in any particular case. But when the Supreme Court decides issues normally reserved to the states (such as the regulation of suicide), it makes final pronouncements of public policy that cannot be reviewed except by the Supreme Court itself. Though the Court may possess the raw power to find a constitutional right to refuse life-sustaining medical treatment, the Court's involvement in these complicated issues at this time appears to serve no legitimate purpose and will likely result in unanticipated and undesirable consequences.

V. CONCLUSION

The Supreme Court in *Cruzan* found a new constitutional right to suicide. But for two compelling reasons, the Court should have avoided entangling itself in decisions relating to the termination of life-sustaining medical treatment. First, although the Court purported to locate the new right to suicide in the liberty provision of the fourteenth amendment, history reveals that the framers and ratifiers of the fourteenth amendment never intended that the due process clause would encompass substantive rights. Moreover, a right to suicide fails the Court's own test to determine which rights deserve constitutional protection under the due process clause because such a right is not one that is "deeply rooted in this Nation's history and tradition." Second, the Court's imprudent interference

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159. *Cruzan*, 110 S. Ct. at 2852.
160. *Id.*
in decisions to terminate life-sustaining medical treatment comes at a time when all of the states have moved forward with solutions to the complex problem. As a result, the Court's decision in *Cruzan* is likely to cause unintended complications beyond the confines of the Nancy Cruzan case.