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ARTICLES

THE PEDIGREES OF RIGHTS AND POWERS IN SCALIA'S *CRUZAN* CONCURRENCE

*Benjamin C. Zipursky**

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I. INTRODUCTION

In *Cruzan v. Director, Missouri Department of Health*,¹ the Supreme Court decided that a State may prohibit the withdrawal of life-sustaining treatment absent clear and convincing evidence of the patient's wish for withdrawal of treatment.² For the petitioners in this case—Nancy Beth Cruzan and her parents—the Court's decision that Missouri may prolong Nancy's comatose life indefinitely was extreme. As a matter of constitutional interpretation, however, Chief Justice Rehnquist's opinion was notably moderate.³ Although it permitted Missouri to require that there be clear and convincing evidence of the choice to withdraw treatment, it nevertheless did so on the rather narrow ground that a state may "legitimately seek to safeguard the personal element of this choice through heightened evidentiary requirements."⁴

The Court's opinion might have taken the broader tack of stating that there was no right to refuse life-sustaining treatment under the Fourteenth Amendment, but it did not. After reciting both the common

1. 497 U.S. 261 (1990).

2. *Id.* at 282-84.

3. See, e.g., John A. Robertson, *Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139, 1143-45, 1155-56 (1991) (concluding that middle position taken by Supreme Court in *Cruzan* was correct).

4. 497 U.S. at 281. The Court's opinion in *Cruzan* has also been moderate in its effect, leaving right-to-die issues roughly where they were. See Alan Meisel, *A Retrospective on Cruzan*, 20 LAW, MED. & HEALTH CARE 340, 346 (1992) (concluding that *Cruzan* did not essentially alter the law in the right-to-die area).

law and the constitutional law supporting a Fourteenth Amendment right to refuse treatment, the Court stated, "for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."⁵

The dissenting and concurring opinions in the case staked out broader ground. Justice Stevens' dissent,⁶ and Justice Brennan's dissent (in which Justices Blackmun and Marshall concurred),⁷ argued for a sufficiently powerful Fourteenth Amendment right that the state may not skew that right with its choice of evidentiary rules.⁸ And Justice O'Connor, although she joined the majority opinion, also added a concurring opinion in which she made clear that she too believed the right to refuse life-sustaining treatment was encompassed by the Fourteenth Amendment.⁹

Only Justice Scalia went so far as to deny that there is a Fourteenth Amendment right to refuse life-sustaining treatment.¹⁰ Scalia's argument begins with what I shall call "the rights pedigree principle": no substantive due process claim "can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference."¹¹ Previewing his own argument, he writes: "*That cannot possibly be established here.*"¹² The reason it cannot "possibly" be established, according to Scalia, is that Nancy Cruzan's case cannot be distinguished from ordinary suicide, and states have historically prohibited suicide.¹³

Scalia's lone concurrence in *Cruzan* indicates a broader methodological divide between Scalia and other conservatives on the Court,¹⁴ a

5. *Cruzan*, 497 U.S. at 279.

6. *Id.* at 330.

7. *Id.* at 301.

8. For a powerful and extended argument in support of this position, and against the Court's opinion, see RONALD DWORKIN, *LIFE'S DOMINION* 179-217 (1993).

9. *Cruzan*, 497 U.S. at 287.

10. *Id.* at 293-94.

11. *Id.* at 294. See *infra* text accompanying notes 43-66 for a discussion of the rights pedigree principle.

12. *Id.* at 294 (emphasis added).

13. *Id.* at 294-300.

14. In addition to writing a concurring opinion, Justice Scalia joined the majority opinion in *Cruzan*. At first blush, it might therefore appear that distinctions between his view and that of Chief Justice Rehnquist's majority opinion cannot be drawn. However, the cluster of opinions by Rehnquist, O'Connor, and Scalia—all of whom were in the majority—suggests that there was indeed considerable variation among those who joined in the majority. Moreover, Rehnquist's opinion clearly indicates an inclination to declare that there is a Fourteenth Amendment protected

divide that pertains to how history and tradition ought to be used in constitutional adjudication.¹⁵ In substantive due process jurisprudence, several members of the Court appear to believe that the status of "protected liberty interest" under the Fourteenth Amendment cannot be extended to a purported right, unless that purported right is an instance of something historically and traditionally protected. In other words, a right does not get onto the map for substantive due process protection unless it is an instance of something that was historically protected. Moreover, even if it does attain "protected liberty interest" status, that does not end the inquiry. The right must then be considered against the state's interests. Although "compelling interest" has been the standard,¹⁶ the Rehnquist Court advocates a fairly deferential attitude towards the state's identification of the legitimacy and weight of its interests. Moreover, a historical judgment as to the legitimacy and weight of state interests deserves considerable deference from the Court, on this view. Thus, in *Cruzan* itself, the state prevailed because of the Court's deference to the state's judgment of the value of its interest in preserving life.

While Scalia purports to use this framework, he actually uses a qualitatively different framework, one that is significantly more rights-restrictive. The key question for Scalia is *not* whether the right asserted

liberty interest in refusal of unwanted medical treatment, but he declines from exercising that inclination, presumably because it is unnecessary to the disposition of the case.

Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in the refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for the purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

497 U.S. at 279.

15. Since *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), there has been significant commentary on divisions among the Court's conservative members. The analysis in this article, however—without purporting to comment on the soundness of other distinctions that may be drawn—divides Scalia not only from O'Connor, Kennedy, and Souter, but also from Chief Justice Rehnquist, Justice White, and other conservative thinkers such as Robert Bork. Cf. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (articulating division between moderate, standards-based jurisprudence of Court's center, and conservative, rules-based jurisprudence of Court's right wing—including Scalia and Rehnquist); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994) (contrasting Souter with Scalia-Bork originalism).

16. See *infra* note 120 and accompanying text.

by the individual is an instance of some *right* that *individuals* have historically and traditionally enjoyed. Rather, the question is whether the power asserted by the state is an instance of a *power* to regulate individual conduct, that *states* have historically and traditionally enjoyed. If the state can characterize its current attempt to control individual conduct as an extension of a power it has historically enjoyed, then the state must win, under Scalia's framework, even if there is a simultaneous infringement of liberty interests that have also been historically and traditionally protected.

Of course, it is not meant to be evident at this stage that the two frameworks sketched above really are different; it is the burden of this article to establish that point, using *Cruzan* to contrast the two frameworks. If the difference is real, however, then its implications extend well beyond *Cruzan*. Scalia's opinions on a range of constitutional issues reveal a jurisprudence that is profoundly "statist." Its orientation is not simply to preserve the past, and not merely to forestall extra-majoritarian legal evolution. Rather, his jurisprudence permits the Constitution's respect for state powers to evolve, but requires that individual rights remain precisely where they are. Ultimately, this article argues that this form of statism is not justified by the concerns of judicial restraint underlying the Rehnquist Court's more prevalent constitutional form of historicism; it is deeply at odds with precedent in substantive due process jurisprudence; and it is inconsistent with even a modest conception of a living Constitution.

Preliminarily, it is worth noting that Scalia's use of the notion of "historical and traditional" backing for rights has received considerable attention from several scholars, including Professor Tribe and Professor Dorf in their work, *On Reading the Constitution*.¹⁷ Tribe and Dorf's analysis differs from that offered here, however. Pointing to footnote 6

17. See, e.g., LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* (1991); Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981 (1992); David B. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895 (1993); Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853 (1991); Timothy L. Raschke, Note, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743 (1992); L. Benjamin Young, Jr., Note, *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581 (1992). See also David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991) (describing and criticizing Scalia's traditionalism).

of *Michael H. v. Gerald D.*,¹⁸ they argue that the most significant fact about Scalia's employment of history is his insistence that rights be specified at a very high level of specificity, rather than a high level of generality. Although Tribe and Dorf think that the very idea of seeking a metric of specificity in historical description of rights is wrong-headed, they also point out that, if such a project were possible, it would be undesirable, because the requirement of a high level of specificity for the establishment of rights would preempt the possibility of meaningful protection of as-yet unprotected rights. Numerous others have pointed to "specificity" as the earmark of Scalia's substantive due process jurisprudence.¹⁹

While *Michael H.* leaves no doubt that a focus on specificity has played some role in Scalia's due process thinking, and while Tribe and Dorf do offer an effective critique of the alleged specificity metric, it is interesting to note that in *Cruzan* the notion of specificity cuts no ice. Scalia cannot and does not contend that the power to prohibit the refusal of life-sustaining treatment is an instance of the power to prohibit suicide *at the most specific level*. Nor does he criticize the other justices for insufficient specificity in taking a patient's right to refuse artificial hydration and nutrition through a gastrostomy tube to be an instance of the right to refuse medical treatment. Thus, both as to the power and as to the right, levels of specificity do not appear to have played a role in *Cruzan*. More strikingly, on an intuitive level, the right to refuse medical treatment certainly appears to be, if anything, a *more* specific description of the right sought than Scalia's power to prohibit suicide.

Finally, if Scalia had sought to run an argument based purely on "specificity," the argument would have been much simpler and rested on more uncontroversial premises than the one he chose. He could have argued simply that the Cruzans failed to cite any well established tradition or history of permitting patients to refuse artificial hydration and nutrition through a gastrostomy tube to patients in a persistent vegetative state. And, indeed, the Cruzans did fail to cite any such history and tradition, and could not have done so. Scalia apparently did not think that such a specific historical or traditional "right" was a necessary condition, for he failed to note its absence in this case.²⁰

18. 491 U.S. 110 (1989) (plurality opinion). See *infra* text accompanying notes 93-96.

19. See *supra* note 17.

20. The authors of the Joint Opinion in *Casey* wrote "It is also tempting to suppose that the Due Process Clause protects only those practices defined at the most specific level, that were

Hence, specificity cannot be the key to the difference between Scalia and his colleagues in *Cruzan*, and, as I shall argue, it is not. The following analysis of *Cruzan* reveals that, even if specificity does play a significant role in the distinctiveness of Scalia's view, there are other distinctive aspects of that view: at the very least, an emphasis on the identification of traditionally and historically protected state powers as a means of ruling out the recognition of rights in our modern era.

Part II of this article provides the background of the *Cruzan* case. Part III offers a critique of Scalia's concurrence in that case along the lines described above,²¹ and suggests that the concentration on the historical and traditional pedigree of *state powers* rather than individual rights is a significant component of Justice Scalia's constitutional jurisprudence. Part IV suggests that Scalia's use of historically backed state powers is motivated by his desire to reach outcomes in constitutional cases that conform to his *a priori* sense of which cases the judiciary should handle. Finally, Part V concludes that Scalia's peculiar form of state-powers traditionalism is inconsistent with even a limited notion of a living Constitution.²²

II. THE CRUZAN CASE

Nancy Beth Cruzan was severely injured and lost consciousness in an automobile accident on January 11, 1983.²³ She was thirty-two years old. After remaining in a coma for three weeks, she entered a condition referred to as PVS, persistent vegetative state, "generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function."²⁴ All medical experts involved agreed that Cruzan had virtually no chance of rehabilitation. In the Missouri state hospital where Cruzan lay, a gastrostomy tube was put in her mouth. Nutrition and hydration were supplied through this tube, and kept Nancy Cruzan alive.²⁵

protected against government interference by other rules of law when the Fourteenth Amendment was ratified." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2805 (1992) (citing *Scalia, J., Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989)). Scalia rejected this description of his framework in his *Casey* dissent, *id.* at 2874, and he is, I believe, entitled to do so. None of his opinions—including *Michael H.*—advocates a view that so plainly resists the articulation of rights previously unrecognized in a specific context.

21. See *infra* text accompanying notes 38-109.

22. See *infra* text accompanying notes 120-127.

23. *Cruzan*, 497 U.S. at 266.

24. *Id.*

25. *Id.*

Over the next few years, Nancy Cruzan's family came to believe that Nancy would not have wanted to continue this life-sustaining treatment. The state hospital refused to discontinue treatment.²⁶ In the fall of 1987, the Cruzans filed an action on Nancy's behalf seeking a declaration of her common law, state, and federal constitutional rights to refuse unwanted medical treatment.²⁷ The state probate court found that Nancy had a state and federal constitutional right to refuse treatment. It based this decision, in part, on its finding that, during conversations with friends several years earlier, Nancy Cruzan had stated on three different occasions that she would not want to be kept alive as a vegetable.²⁸

The Missouri Supreme Court reversed the Probate Court in a 4-3 decision.²⁹ It did not find a state constitutional right to privacy, and found that Cruzan could no longer be said to have a common law right to refuse life-sustaining treatment, since she was unable to make any judgments.³⁰ Grudgingly, and for the purposes of argument, the court assumed that there might be some federal constitutional right to privacy in this case, although it did not consider any other basis for constitutional protection.³¹ It then held that the Missouri Living Will statute³² reflected a state policy favoring preservation of life,³³ and concluded that the state interest in preserving life "outweighs any rights invoked on Nancy's behalf to terminate treatment in the face of the uncertainty of Nancy's wishes and her own right to life."³⁴ It claimed that the evidence of Nancy's thoughts on life in a vegetative state was not sufficiently reliable to allow co-guardians to exercise substituted judgment.³⁵ The Cruzans appealed, and the Supreme Court granted certiorari.³⁶ Although the Court upheld the Missouri Supreme Court's opinion, the Cruzans subsequently brought new evidence to a Missouri lower court in December of 1990. They were finally allowed

26. *Id.* at 267-68.

27. Petitioner's Brief at 9, *Cruzan* (No. 88-1503).

28. *Id.* at 5.

29. *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988) (en banc).

30. *Id.* at 417.

31. *Id.* at 418.

32. MO. ANN. STAT. §§ 459.010-.055 (Vernon 1992).

33. 760 S.W.2d at 419-20.

34. *Id.* at 426.

35. *Id.*

36. *Cruzan v. Director, Mo. Dep't of Health*, 492 U.S. 917 (1989).

to have Nancy's treatment discontinued. She died on December 26, 1990.³⁷

III. SCALIA'S CONCURRENCE

Scalia's opinion falls into five parts. The opinion begins with a broad and passionate assertion that right-to-die issues ought to be left to normal democratic processes.³⁸ He then argues, based on the historical prohibition of suicide and assisted suicide, that a substantive due process right to refuse life-sustaining treatment "cannot possibly be established here."³⁹ Scalia turns then to petitioners' attempts to distinguish this case from suicide on the ground that "preventing [Nancy Cruzan] from effectuating her presumed wish to die requires violation of her bodily integrity."⁴⁰ Next, Scalia presents a rebuttal of the dissenting opinions of Justice Brennan and Justice Stevens.⁴¹ Finally, he returns to his opening theme, emphasizing that the Court does not belong in this area.⁴²

A. *The Argument From the Rights Pedigree Principle*

1. *The Rights Pedigree Principle: Definition and Scope*

Scalia's explicit argument purports to rest upon what I have labelled "the rights pedigree principle" no substantive due process claim "can be maintained unless the claimant demonstrates that the state has deprived him of a right historically and traditionally protected against state interference."⁴³ This limitation is far from well-established. Indeed, Scalia's support is weak: a two-justice plurality including himself in a case of the previous Term: *Michael H. v. Gerald D.*⁴⁴ and the much-criticized *Bowers v. Hardwick*.⁴⁵ *Moore v. East Cleveland*,⁴⁶ which he cites, supports a logically distinct principle: historical protection of the right is a sufficient condition, not a necessary condition.⁴⁷

37. Tamar Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, NY TIMES, Dec. 27, 1990, at A1, A15.

38. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292-93 (1990).

39. *Id.* at 294.

40. *Id.* at 295.

41. *Id.* at 299-300.

42. *Id.* at 300-01.

43. *Id.* at 293-94 (citations omitted).

44. *See supra* note 18, at 122.

45. 478 U.S. 186, 192 (1986).

46. 431 U.S. 494 (1977) (plurality opinion).

47. *See id.* at 503; *Cruzan*, 497 U.S. at 304-05 (Brennan, J., dissenting) (concluding that

The rights pedigree principle is thus weakly supported. It is also quite contentious; arguably, a critical function of the Fourteenth Amendment has been to relieve citizens of historical forms of oppression. Moreover, as is famously articulated in Justice Cardozo's *Palko* opinion, the Fourteenth Amendment protects rights which are "implicit in the concept of ordered liberty,"⁴⁸ a broader, and more aspirational idea than the rights pedigree principle permits.⁴⁹

For the purposes of this article, I will accept the rights pedigree principle. It is important, however, to say a few words about its motivation.

2. *The Rights Pedigree Principle: Motivation*

With respect to the motivation for the rights pedigree principle, at least four sorts of reasons might be offered.

a. *Originalism*

To the extent that a right was socially recognized or recognized in common law at the framing of the Fourteenth Amendment, there is arguably some evidence that it was intended by the framers to be covered by the broad principles placed in that Amendment. Conversely—and more to the point—if the asserted interest is not an instance of any right that was recognized in the framers' time, it appears somewhat less likely that it was intended by the framers.⁵⁰

While this loose reasoning may justify historical practices as a *consideration* in due process jurisprudence, it is a weak argument for making a rights pedigree a *threshold requirement* in due process analysis—even assuming originalism. To make it a threshold requirement would effectively presume that the framers could not have intended broad principles whose content included rights not yet recognized in practice. The propriety of such a presumption is far from obvious either

being a liberty "deeply rooted" in history is a sufficient condition for being a fundamental liberty).

48. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

49. See James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 268-73 (1993) (concluding that the emphasis on historical practices in *Bowers* and *Moore* is more restrictive than principled conception of substantive due process as aspirational principles in *Palko*).

50. Scalia's commitment to originalism in Constitutional interpretation is articulated in Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

empirically or *a priori*. Nevertheless originalism is undoubtedly a partial motivation for the rights pedigree principle.⁵¹

b. Incrementalism and Continuity

Justice Harlan's dissent in *Poe v. Ullman* sheds light on a second motivation for the rights pedigree principle; the idea that the articulation of hitherto unrecognized constitutional rights should proceed not in leaps and bounds, but incrementally, in a manner that preserves continuity with tradition.⁵² A corollary of this idea is that when a new area of constitutional rights is recognized, that area ought to be an incremental outgrowth of rights already enjoying a deep historical basis of support in nonconstitutional law and social practice. This incrementalist norm is supported, in turn, by a concern with retaining stability by making small steps, by preserving continuity and correctibility.⁵³ To some extent, this value also embodies the idea—frequently attributed to Edmund Burke—that “cautiousness” or “prudence” is a virtue in political life and in the craft of judging.⁵⁴

c. History and Tradition as a Foundation for Discovery

In the third place, the rights pedigree principle is motivated by judicial sentiment that judges are not fit to articulate nontextually defined rights out of whole cloth—out of their abstract conceptions of fundamental rights. The right ought to have some basis outside of themselves and outside of the text, but nevertheless appropriate to the act of providing legally binding content for the broad phrases of the Constitution. Moreover, the judge ought to have a way of discovering what to count as fundamental that is not merely moral abstraction.⁵⁵ An answer to these concerns is our history: if a fundamental right cate-

51. See *infra* note 103.

52. See *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting).

53. See Young, *supra* note 15, at 654-55 (explaining Burkean emphasis on slow, incremental change).

54. See Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1569 (1985) (concluding that “prudence” as a political and judicial virtue was key to Bickel's constitutional and political philosophy); see generally ALEXANDER BICKEL, *THE MORALITY OF CONSENT* (1975). See also Robin West, *The Ideal of Liberty: A Comment On Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373, 1388-89 (1991) (Justice Brennan's references to history reflect commitment to conservative adjudicative virtues).

55. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (concluding that permitting judges to rest constitutional decisions on fundamental value judgments detracts from the rule-like quality of laws).

gorization is based on a historically and traditionally recognized right, then a judge declaring that such a right is a constitutional right is still reaching outside of herself, into a basis that is common to all. Moreover, when she deliberates over the right, she has a place to focus: our history of practices. Additionally, the rights that have a pedigree of time have been tried and tested, and have been identified and recognized by many individuals over many generations.⁵⁶

d. Rights Reduction

Finally, the adoption of the rights pedigree principle has been motivated in part by the desire to diminish the scope of the fundamental rights recognized. Rejecting out of hand whole segments of rights (those which are not instances of pedigreed rights) is, to some extent, simply a mechanism for reducing the occasions on which the judiciary interrupts the legislative process. But this is not necessarily an arbitrary limitation. Rather, it rejects all unenumerated rights *except* those that the Court deems itself unable to reject because the individual is able to ground her right in historical tradition and practice, and avail herself of even the rather narrow quasi-originalist, and Burkean basis for her claim.

The discussion above is not meant to defend the rights pedigree principle, nor is it meant as an exhaustive description of the particular reasons that some judges have adhered to the principle. It is rather an attempt to sketch, as charitably as possible, the reasons that the rights pedigree might be deemed justifiable. We turn next to the question of whether it is really the rights pedigree principle Scalia applies in *Cruzan*.

3. Scalia's Purported Application of the Rights Pedigree Principle

Scalia argues that the right claimed by Nancy Cruzan has no pedigree. His argument is that Nancy Cruzan's asserted right is an instance of the right to commit suicide, and that states have traditionally enjoyed the power to prohibit suicide. Scalia's treatment of this topic is rather one-sided. It should at least be pointed out that many states historically decriminalized suicide, and that states currently do not

56. See Young, *supra* note 15, at 655 (explaining Burkean emphasis on the need for "models and patterns of approved utility" and tried and tested practices, rather than mere abstract speculation).

criminalize attempted suicide.⁵⁷ Moreover, Scalia's argument from the punishability of aiding suicide is hardly dispositive; this law arguably functions, in part, not to prohibit the immoral act of suicide or to save even unwanted life, but to preempt the homicide concealed as an aided suicide. And finally, Scalia concedes that by the time of the ratification of the Fourteenth Amendment, the states no longer penalized suicide.⁵⁸

Again, however, for the sake of the argument, I shall assume that Scalia is correct on the historical claim that states traditionally have had the power to prohibit suicide. I shall also assume, for the purposes of argument, that refusing life-sustaining treatment is an instance of committing suicide. And I shall assume the correctness of the rights pedigree principle. Scalia asserts that these premises together entail the conclusion that there is no substantive due process right to refuse life-sustaining treatment.⁵⁹ That conclusion is based on a logical fallacy, as will be demonstrated below.

By saying that states in fact prohibited suicide, Scalia is demonstrating that states in fact enjoyed the power to prohibit suicide. From this fact, Scalia infers that there is no historically and traditionally protected right to commit suicide.⁶⁰ But even this does not bring Scalia's argument far enough. The rights pedigree principle says that there is no substantive due process protection for a right unless it is historically and traditionally protected. That means that there must be some historically and traditionally protected right of which this is an instance. Scalia shows (at most) that there is *some* right that historically and traditionally has *not* been protected, of which Cruzan's asserted right is an instance. But it does not follow that there is *no* historically and traditionally protected right of which Cruzan's right *is* an instance.

Consider the following analogy. Suppose that there is a rule saying that a person is ineligible to join the Healers' Club unless he is a member of a profession traditionally and historically regarded as among the healing professions. Suppose it is proved that Jones is a lawyer, and law is not a profession traditionally and historically regarded as among the healing professions—on the contrary, suppose it is traditionally and historically regarded as not among the healing professions. Does this prove

57. Alan Meisel, *The Right To Die* 65 (1989).

58. *Cruzan*, 497 U.S. of 294.

59. *See id.* at 294-300.

60. *Id.* at 295 (stating that "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.'") (quoting Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 100 (1985) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

that Jones is ineligible to join the Healers' Club? Certainly not. It is entirely possible that Jones is also a member of some other profession: that he is a physician or a nurse, for example. If that were the case, then Jones would be eligible for the Healers' Club notwithstanding the fact that he is a lawyer, that law is not traditionally and historically regarded as a healing profession, and that only members of healing professions are eligible. The leap from his being a lawyer to his being ineligible for the Healers' Club is simply a non-sequitur.

Likewise, the leap from the conclusion that the asserted right to refuse life-sustaining treatment is an instance of the asserted right to commit suicide to the conclusion that this right cannot have due process protection⁶¹—if made purely on the basis of the premises Scalia offers—is a non-sequitur. There may well be some other category of rights that *is* historically and traditionally protected of which the right to refuse life-sustaining treatment is *also* an instance. Of course, this is just what eight members of the Court apparently maintain. As Chief Justice Rehnquist, Justice O'Connor, and Justice Brennan each detail in some length, the right to refuse life-sustaining treatment is an instance of the right against invasions of bodily integrity, and more particularly, of the right to refuse medical treatment. Both are historically and traditionally protected,⁶² as well as being explicitly recognized in

61. See *Cruzan*, 497 U.S. at 294-300.

62. With respect to the historical pedigree for the right against invasions of bodily integrity, see *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."). More generally, the wrongfulness of imposing unwanted medical treatment upon someone has been recognized explicitly for at least two centuries. *Slater v. Baker*, 95 Eng. Rep. 860, 862 (1767) (concluding that the surgeon's performance of a surgical procedure on his patient's callous without prior consent was improper and contrary to the "law of surgeons"). See also *Schloendorff v. New York Hosp.*, 105 N.E. 92, 93-94 (N.Y. 1914); *Pratt v. Davis*, 79 N.E. 562, 565 (Ill. 1906); *Mohr v. Williams*, 104 N.W. 12, 14-15 (Minn. 1905); *O'Brien v. Cunard Steamship Co.*, 28 N.E. 266, 266 (Mass. 1891); *Janney v. Housekeeper*, 16 A. 382, 384 (Md. 1889); *Caldwell v. Farrell*, 28 Ill. 438, 444 (1862) (concluding, in case where eye surgery should not have been performed, that under certain circumstances surgery without consent would be a tort and surgery with wrongfully procured consent would also be a tort).

Numerous scholars have suggested that, while consent in some form played a role in medical practice in the Nineteenth Century, the concept of "informed" consent, as we have come to appreciate it, was largely absent prior to the 1950s. RUTH R. FADEN & TOM L. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* 86 (1986); JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984); Martin S. Pernick, *The Patient's Role in Medical Decisionmaking: A Social History of Informed Consent in Medical Therapy*, in *MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP* (1982); see also *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 317 P.2d 170,

several constitutional decisions, including *Washington v. Harper*, decided the same Term as *Cruzan*.⁶³ Hence, the rights pedigree principle

181 (Cal. Dist. Ct. App. 1957) (introducing the term "informed consent" into the case law). Moreover, patients were understood to be implicitly deferential to their physicians, and therefore consent was often inferred from the act of going to the physician. Pernick, *supra* at 119. Accordingly, there are few reported medical-legal decisions from the Nineteenth Century predicated on lack of consent. Nevertheless, the medical literature of the mid-Nineteenth Century appears to indicate that physicians and surgeons understood their patients to have a right to refuse medical treatment. FADEN & BEACHAMP, *supra* at 78-81 (concluding that reports in medical journals from 1828-1837 reveal a respect for patient refusals and the seeking of consent in some cases).

Faden & Beauchamp, Katz, and Pernick raise significant questions about the conception of the doctor-patient relationship in the Nineteenth Century; they suggest that the concept of autonomy played only a minor role in the justification of Nineteenth Century consent notions. They also agree that there was little explicit recognition of the right to win a law suit predicated solely on lack of consent. This is, therefore, not a particularly strong point in the Cruzans' position. However, in light of the fact that there is (1) significant legal precedent dating back to 1767 for a right to refuse medical treatment, (2) ample evidence of social values respecting the right to refuse treatment, (3) a centuries-old right against invasions of one's body without consent, (4) direct support in Supreme Court precedent for the recognition of a right to refuse medical treatment, see note 63, *infra*, and (5) considerable disagreement about the power to outlaw suicide in the Nineteenth Century, these ambiguities in Nineteenth Century consent law arguably do not constitute a significant weakness in the Rehnquist-O'Connor-Brennan opinions, even given the rights pedigree principles. Nevertheless, it is notable that Scalia fails to mention this historical debate about refusal of treatment, and merely addresses the history of suicide prohibition. This failure to do so underscores the central contention of this article—that Scalia's focus is on the pedigrees of state powers, not on the pedigrees of individual rights.

63. 494 U.S. 210, 229, 108 L. Ed. 2d 178, 203, 110 S. Ct. 1028, 1041 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"). *Harper* involved a mentally ill prisoner deemed to be dangerous to prison officials and fellow inmates. The Court reasoned that, while the liberty interest prong of *Harper*'s substantive due process claim was satisfied by the right against administration of medical treatment without consent, *Harper*'s claim nevertheless failed because the state met the light "rationality" burden required to justify prison regulations under *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987).

The Justices in *Cruzan* cited numerous other cases as a firm constitutional basis for the right to refuse medical treatment. Chief Justice Rehnquist wrote:

Still other cases support the recognition of a general liberty interest in refusing medical treatment. *Vitek v. Jones*, 445 U.S. 480, 494, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); *Parham v. J.R.*, 442 U.S. 584, 600, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979) ("[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment.").

Cruzan, 497 U.S. at 278-79.

In addition to citing *Botsford*, *Harper*, and *Parham*, Justice O'Connor pointed to numerous landmark cases under the Due Process Clause of the Fourth Amendment, in which a medical procedure invading someone's bodily integrity was resoundingly rejected as the violation of a "cherished" constitutional right. *Cruzan*, 497 U.S. at 287-88 (O'Connor, J.) (citing *Winston v. Lee*, 470 U.S. 753, 759, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985) (Fourth Amendment); *Schmerber v. California*, 384 U.S. 757, 772, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966) (Fourth Amendment); *Rochin v. California*, 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (1952) (Due Process

is satisfied. Scalia's comments about suicide—at least in connection with the rights pedigree principle—seem entirely beside the point.

This analysis illuminates recent controversial cases regarding the constitutionality of assisted suicide statutes. Because these decisions do not involve the right to refuse medical treatment or the right against invasions of bodily integrity—which provided the historical pedigree in *Cruzan*—one would expect that courts following the Supreme Court's "conservative" framework, would reject the constitutional claims, and reach what commentators would probably refer to as a "conservative" result in favor of the state. Conversely, one would expect that any court that did find a protected liberty interest, must have departed from the rights pedigree principle, and drawn from less conservative frameworks of due process analysis. Both of these results have been borne out.

The Supreme Court of Michigan and the United States District Court for the Southern District of New York have both applied the rights pedigree principle, although not under this name.⁶⁴ Despite *Cruzan*'s apparent recognition of a right to refuse unwanted medical treatment, they have decided that there is no right to engage in physician-assisted suicide. The *only* right of which the right to physician-assisted suicide was said to be an instance was a general autonomy right to make personal choices about how and when one will die. This purported right does not have a historical pedigree, according to these courts. Therefore, there is *no* historically and traditionally protected right of which the right to physician assisted suicide is an instance, and the substantive due process claim must fail.⁶⁵

Clause)).

64. *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 63 U.S.L.W. 3770 (U.S. Apr. 24, 1995); *Quill v. Koppel*, No. 94 Civ. 5321, 63 U.S.L.W. 2406, 1994 U.S. Dist. LEXIS 17965 (S.D.N.Y. Dec. 15, 1994).

65. *Kevorkian*, 527 N.W.2d at 714 ("It would be an impermissibly radical departure from tradition, and from the principles that underlie that tradition, to declare that there is such a fundamental right protected by the Due Process Clause."); *Quill*, 63 U.S.L.W. at 2407 ("[plaintiffs] have pointed to nothing in the historical record to indicate that even this [limited] form of assisted suicide has been given any kind of sanction in our legal history that would help establish it as a constitutional right . . . This court holds that the type of physician-assisted suicide at issue in this case does not involve a fundamental liberty interest protected by the Due Process Clause.").

In *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994), the United States District Court for the Western District of Washington *has* found a protected liberty interest in the physician-assisted suicide context, but it has clearly rejected the rights pedigree principle, and adopted a broad conception of autonomy of the sort articulated by Justice Stevens in his *Cruzan* dissent. While it may depart methodologically from the conservative framework, the *Compassion in Dying* approach is methodologically consistent with (although not necessarily required

To return to the "Healers' Club" analogy,⁶⁶ if Ms. Brown is only a lawyer, and not also a physician or nurse, her eligibility for the Healers' Club *does* turn on whether she can make the argument that law is historically and traditionally one of the healing professions, and the plausible determination that law has not traditionally and historically been regarded as among the healing professions does in fact render Brown ineligible for the Healers' Club. Returning to the assisted suicide context, because the claimants only asserted basis for a right was a broad autonomy interest to make choices regarding one's death—an autonomy-based right to suicide—their argument (assuming, *arguendo*, the soundness of the rights pedigree principle) turned on the historical pedigree of a right to suicide, and therefore failed. However, in *Cruzan*, the eligibility of the right to refuse life sustaining medical treatment for protected liberty status did not turn solely on whether there was a pedigreed right to suicide. It depended on whether there was a pedigreed right to refuse medical treatment, and thus, protected liberty interest status was properly established.

B. The Argument From the Power Pedigree Principle

1. Reconstructing Scalia's Argument

While the explicit text of Scalia's opinion does contain the fallacy revealed above, a more fruitful approach to understanding his view would begin by assuming that Justice Scalia is not really endorsing a non-sequitur or attempting to persuade with sophistical arguments. As described below, this leads to the conclusion that it is not really the rights pedigree principle that Scalia has in mind.

The basis on which Scalia rejects the asserted right to refuse life-sustaining treatment is that it is an instance of a form of conduct—suicide—which is *not* a historically and traditionally protected right.⁶⁷ More fundamentally, Scalia points out that states typically have prohibited suicide, as a historical and traditional matter. The linchpin of his argument appears to be that *Cruzan's* asserted right pertains to a form of conduct that states have traditionally and historically enjoyed the power to prohibit.⁶⁸ That fact—coupled with his char-

by) the "ordered liberty" conception of substantive due process. Consistent with the conservative framework described above, the Ninth Circuit recently reversed the District Court in *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995).

66. See *supra* text accompanying notes 60-61.

67. *Id.* at 294-95.

68. *Id.* at 298-99.

acterization of this case as an instance of suicide—is sufficient under Scalia's framework (whatever that may be) to entail that there is no due process protection for Cruzan's asserted right.

The structure of this argument suggests that the pivotal question for Scalia is not whether the individual *right* is an instance of a right historically and traditionally protected, but whether the state's asserted *power* is an instance of some state power that is historically and traditionally protected. In particular, Scalia appears to endorse the premise: *Substantive due process protection for a given form of individual conduct cannot possibly exist if the power to prohibit that form of conduct is an instance of a power that states have traditionally and historically enjoyed.* I shall refer to this premise as "the power pedigree principle."⁶⁹

With the power pedigree principle, Scalia's argument is clear. Since the power to prohibit suicide has a pedigree, it follows that, if the power to prohibit the refusal to continue life-sustaining treatment is an instance of the power to prohibit suicide, then the state's exercise of the power to prohibit the refusal of life-sustaining treatment cannot be a violation of substantive due process.

The distinction between the two principles can be seen by taking a

69. Students of Hohfeld may be initially perplexed by this formulation. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28 (1913). First, the opposite of X's "right" against Y's doing A to X, under Hohfeld's scheme, was Y's "privilege" to do A to X, and the term "power" referred to something quite different. In light of the fact that Y, in constitutional decisions, is principally the state, the term "power" strikes me as more appropriate as the label for Y's enjoyment of the ability to do A to X; Hohfeld was dealing principally with "jural" relations between private parties, where "privilege" is surely a more conventional term for what I have called "power."

Second, several commentators on this article have suggested that if the rights pedigree principle and the power pedigree principle are to have different consequences, then the notion of "power" cannot merely be the opposite of "right." That intuition is not strictly correct, I believe. The power pedigree principle can be reformulated in terms of rights: There will be no substantive due process protection for an asserted right if there is some right against the state, of which the asserted right is an instance, that was historically and traditionally denied protection. Thus, the critical difference between the two principles can be understood as follows: the conservative (O'Connor) believes that it is a necessary condition for current protection that there existed some category of rights that was historically and traditionally protected, of which this is an instance. Scalia believes that it is a necessary condition that there not have existed any category of rights that were historically and traditionally denied protection, of which the asserted right is an instance. I believe Scalia's position is more easily phrased in terms of powers, but the concept of powers is not intended to contain any extra feature.

Finally, note that a further difference between the rights pedigree principle and the power pedigree principle is that rights at *common law* between *private* individuals are capable of forming a basis for rights protection against the state, under a rights pedigree approach, but not under an approach that merely focuses on state powers.

somewhat different look at the case of suicide. Consider the following hypothetical example. Suppose that a terrorist group does not like the fact that certain people get down on their knees by their bedside to pray every night, and members of this group begin to conceal themselves in people's homes and shoot them when they pray. Suppose further that public and credible threats to continue this practice are made. Given these circumstances, it might well be suicide for a person who knew of these facts to kneel down and pray to God in the privacy of her home, but it would not follow that there was no right to kneel down and pray to God in one's home. The right to do this would not be predicated on the right to suicide, but on the right to free exercise.

The example is meant only to highlight the difference between the power pedigree principle and the rights pedigree principle. The fact that a kind of action can be classified as "suicide" and that there is no right to suicide does not mean that there is no right to perform that kind of action; it merely means that if there is a right to perform that kind of action, it must be grounded elsewhere.⁷⁰ Thus, the fact that suicide was historically within the state's power to prohibit does not mean that the refusal of life-sustaining treatment must be within the state's power to prohibit, *even if the refusal of life-sustaining treatment is suicide*.⁷¹

Scalia's conflation of the rights pedigree principle and the power pedigree principle can also be seen by comparing the text of his opinion

70. Of course, Scalia could object that the presence of a First Amendment basis changes the example. But a hypothetical will work equally well by replacing the act of praying with an established Fourteenth Amendment unenumerated right, such as the right to live with one's family. The point is that rights that are concededly pedigreed would not cease to be pedigreed merely by virtue of a situation in which a pedigreed state power was also implicated: the need to evaluate the state's interest in exercising that power would simply enter the analysis. Similarly, where the question is whether a form of conduct is an instance of a pedigreed right, the fact that it implicates a pedigreed state power is not dispositive.

71. Scalia's actual argument is weaker than this. He does not argue that there is a case of suicide here, but only that because the judiciary is not competent to argue that Nancy Cruzan's act is *not* a case of suicide, there is no right to perform this kind of act. For the moment, let us grant the premise that the judiciary is not competent to argue that Cruzan's act is not a case of suicide. This does not mean that the judiciary cannot produce an argument to distinguish the two, but that it cannot produce an argument that is grounded solely in the Constitution or in pure legal analysis. In essence, it means that while the state's extension of historical suicide to Nancy Cruzan's act may be ad hoc and ill-supported, any attempt by the judiciary to refute this argument will be unacceptable if it includes any form of reasoning in addition to logic, text, and tradition. As demonstrated above, even in the argument where the state succeeds in defending the stronger premise that Cruzan's act is a case of suicide, the argument fails. This argument is even weaker.

in *Michael H.* to footnote 6 of that opinion. In the text, Scalia refers explicitly to what I have called the rights pedigree principle:

In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.⁷²

However, in footnote 6, where he argues that his view is superior to Brennan's because he has a criterion for selecting the relevant category of rights upon which to focus, Scalia refers in the same breath, apparently without noticing, to traditions "protecting" and traditions "denying protection to" certain rights.

We refer to the most specific level at which a relevant tradition *protecting, or denying protection to*, the asserted right can be identified.⁷³

As we have seen, the question of whether a tradition exists protecting a certain right—whether there is a rights pedigree—is entirely different from the question of whether a tradition exists of denying protection to that right—a power pedigree. In *Cruzan*, as in *Michael H.*, Scalia advertised the rights pedigree principle but decided on the basis of the power pedigree principle. The quoted passage suggests that he simply considers the two questions as one.

2. *The Unjustifiability of the Power Pedigree Principle*

The power pedigree principle does not follow from the motivations underlying the rights pedigree principle.

a. *Originalism*

In a context like *Cruzan*, where the individual is able to offer a clearcut pedigree for the right asserted, originalism lends no support to the power pedigree principle. Of course, the state can argue that the fact that states enjoyed a power traditionally shows that the framers of the Due Process Clause did not intend to cover an instance of that power. However, the argument is equally strong (or weak) that the individual's traditional enjoyment of a certain right shows that the framers did intend to cover an instance of that right. The presence of a

72. *Id.* at 122.

73. *Id.* at 127 n.6 (emphasis added).

power pedigree is therefore incapable of sustaining an argument that, under original intent theory, the asserted right could not have existed.

b. Incrementalism and Continuity

Similarly, the power pedigree principle is not justified by incrementalist concerns. The incrementalist concerns are met once it is demonstrated that a rights pedigree exists. For example, as Justice O'Connor's concurrence in *Cruzan* demonstrates, the move from consistent common law recognition of a right to refuse medical treatment to a constitutional right to refuse the provision of hydration and nutrition, is really only an incremental change in the right to provide it.⁷⁴ The existence of the right, moreover, provides for the possibility of continuity. The purported fact that the right to prohibit suicide is historically and traditionally protected is simply immaterial.

c. History and Tradition as a Foundation for Discovery

The recognition of a historical and traditional basis for the right provides a judge with a broad, nationally significant, basis for the right outside herself. Moreover, she has a tried and tested foundation for the right. In asserting that this is a fundamental right, she is nevertheless retaining a sort of philosophical humility, and refraining from drawing purely upon her own sense of what is morally fundamental, in a way that many conservative judges and scholars have deemed appropriate for an Article III judge. Whether or not a power can be found of which this is also an instance does not address the question of whether the right is made of "whole cloth;" it addresses the question of what the right might conflict with.

d. Rights Reduction

Unlike the other three justifications for the rights pedigree principle, the "rights reduction" goal does have an important connection to the power pedigree principle, even in a case where the rights pedigree principle itself is satisfied. If a justice's goal is to find principles that will operate as devices to diminish the range of constitutional rights, then the power pedigree principle gets high marks. It succeeds remarkably well in this goal because there is such a wide range of powers states have enjoyed in the past. *Cruzan* is an example of the strength of

74. *Cruzan*, 497 U.S. at 287-89.

the principle: the rights pedigree principle does not succeed in ruling out the right to refuse life-sustaining treatment, but the power pedigree principle does.

The "rights reduction" justification comes perilously close to begging the question of which rights are protected by the Constitution; it appears to begin with an extra-constitutional assumption that the outcome ought to be "no rights protection." I shall comment on this point at greater length in concluding. For the moment, it is sufficient to note that the rights pedigree principle: (1) *tempers* the rights reduction agenda with the recognition that, under the Court's long history of due process jurisprudence, there must be at least a fragment of cases in which substantive due process protection is granted, and (2) provides a narrow (and arguably principled) ground for that small domain of rights: they were historically and traditionally recognized. Scalia's rights reduction agenda is incorporated in the power pedigree principle with no principled attempt to preserve any of the Court's established doctrine.

To summarize, provisionally: Scalia's affirmative argument from the state's power to prohibit suicide is based on an equivocation between two principles, what I have called "the rights pedigree principle" and "the power pedigree principle." The rights pedigree principle, which is controversial but has enjoyed significant support from other members of the Court, will not get Scalia his conclusion, for he has not argued for the absence of a historical pedigree by arguing for the presence of a power pedigree. On the other hand, the power pedigree principle would get Scalia his conclusion, yet it is unjustifiable by reference to the concerns underlying the rights pedigree principle,⁷⁵ and it is not a position for which Scalia cites authority.⁷⁶ Thus, he attempts to run his argument by presenting explicitly the rights pedigree principle, but implicitly employing the power pedigree principle. The argument is therefore unsound.

C. Amplifying and Rephrasing the Power Pedigree Principle

Scalia's apparent desire to give inertia to state powers is seen even beyond the power pedigree principle. That principle is supplemented in two important ways: first, Scalia argues essentially that an individual

75. See *supra* Part III.A.2 for a more detailed discussion of the rationale for the rights pedigree principle.

76. For a powerful critique of other aspects of Scalia's traditionalism, see Strauss, *supra* note 17.

must bear the burden of showing that an asserted state power is *not* an instance of a historically and traditionally protected power (at least where such a power has been proffered by the state).⁷⁷ Second, Scalia argues that even if one gets beyond the first stage of due process analysis and begins to weigh state interests against individual rights, the state interest underlying its exercise of power must prevail so long as, historically and traditionally, states have valued the interest in question above the individual right asserted.⁷⁸ Like the power pedigree principle, Scalia's attempted burden-shifting and traditionalist balancing standard are not evident on the face of the opinion. Those positions are uncovered and criticized below.

1. *Shifting the Burden of Proof*

In the middle section of his concurring opinion, Scalia argues that one cannot assert that there is a right to bodily integrity in this case without first proving that it is not suicide, because if it were suicide there would not be a right to bodily integrity.⁷⁹ Arguably, the petitioners have a way to distinguish suicide, which Scalia ignores. While Scalia does respond to some possible distinctions from suicide, he fails to consider the argument that refusal to continue life-sustaining treatment is not suicide because its intent is not to end life.⁸⁰ But even if there were not yet a distinction on this ground, and even if Scalia's power pedigree principle were correct, his objection would not be well taken as a matter of pure logic. It does not follow from the purported fact that, if refusal of life-sustaining treatment were suicide, there would be no right to bodily integrity, that one must argue *first* that it is not suicide. It does not follow from the fact that one's premises have certain implications that one must establish the truth of those implications *independently*. If it did, it would never be possible to offer a valid deductive argument; one only learns from deductive arguments because they have implications one does not already know. Hence, it may well be that the right to bodily integrity is clearly and powerfully evident in this case, and that the power to prohibit suicide is so clear that we are forced to conclude from these alone that it is not suicide. Scalia would

77. See *Cruzan*, 497 U.S. at 294-97.

78. See *id.* at 298-99.

79. *Id.* at 298.

80. See, e.g., Ronald Dworkin, *The Right to Death*, THE NEW YORK REVIEW OF BOOKS, Jan. 31, 1991, at 14, 17 (arguing that a person would not be committing suicide if she refused to have her leg amputated, even if she knew that would lead to her death).

say that it begs the question, but as a matter of logic, this is not true. It can only be said to beg the question if one assumes that a justification for a claim of a right to bodily integrity could not properly be done without first putting aside the question of suicide.

This is one of the argument forms Scalia relies upon in his abortion opinions: he argues that, since the conclusion that there is a right to have an abortion could not be true unless the fetus were not a person, one cannot reach this conclusion without begging the question as to whether the fetus is a person (i.e., without assuming that the fetus is not a person).⁸¹ For the reasons already stated, the last step of this argument is incorrect as a matter of logic, and would be incorrect even if the central premise were true.

But Scalia's argument is deficient at a more basic level. His specific reason for denying constitutional protection to bodily integrity in this case is that the state would be entitled to invade it if it were to prevent a felony, and that prevention of suicide is equivalent to invasion of bodily integrity for prevention of a felony.⁸² But Scalia's argument distorts the nature of due process analysis. The idea that the prevention of a felony is a reason which the state can cite to justify its invasion of bodily integrity is surely a case of the state citing a compelling interest to justify the deprivation of a protected liberty interest. Hence, the fact that prevention of a felony would be sufficient reason to justify the state's action does not undercut the presence of a right to bodily integrity, it merely justifies its invasion in this case. If prevention of suicide does justify the state's action in this case, it is not because the power to prevent suicide negates the existence of a protected liberty interest, but because it is sufficiently compelling to give the state power to override the concededly protected interest.

This is not merely a point of semantics. By pretending that the Cruzans cannot identify a protected liberty interest without making the suicide distinction, Scalia is able (or so it seems) to saddle the Cruzans with the burden of showing that this is *not suicide*.⁸³ Assuming, arguendo, that it is difficult to draw this distinction (without straying from a narrow conception of "legal analysis") it seems the judiciary must exceed its competence to find a Fourteenth Amendment liberty interest here. The standard framework, however would require the individual to demonstrate that there is a protected interest—quite apart from the

81. See *Casey*, 112 S. Ct. at 2875 (Scalia, J., dissenting).

82. 497 U.S. at 298.

83. See *id.* at 294-300.

question of the state's interest—and then give the state the opportunity to show that it has sufficiently weighty interests that it enjoys the power under the Constitution to act—even if the protected individual interests are infringed. As the majority opinion itself noted:

[D]etermining 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."⁸⁴

If this is correct, then, as all other Justices in the case appear to have decided, there is a protected interest in Nancy Cruzan's case, and the question is only whether the state can show that its interest is sufficiently important to outweigh that interest. Given the structure of Scalia's affirmative argument, this has several important implications. First, it suggests that the suicide question does not need to be addressed by the petitioner in order for her to establish a protected liberty interest in this case on the basis of a right to bodily integrity. Second, it suggests that, insofar as the petitioner needs to distinguish her case from suicide at all (and for the reasons stated above, I believe she does not), she does not need to address the question until the respondent has provided a credible argument that it *is* suicide. For surely it is not the claimant's task to show the Court, *ab initio*, that there is *no* sufficiently important state interest; it is the state's job to show that there is one. This suggests, in turn, that the state must prove that it *is* suicide, if it intends to cite as its interest the prevention of suicide. And, in light of Scalia's own comments about the delicateness of *any* arguments in this area, it is in fact an open question whether *the state* can produce an argument assimilating this case to suicide. In short, Scalia's sophistical charge that the petitioners begged the question is a pretense for him to shift the burden of showing whether this is or is not suicide.⁸⁵

2. *Transformation at the Level of State Interests*

A third aspect of Scalia's statist framework is found in his re-

84. *Id.* at 279 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).

85. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989) (Scalia, J.) (concluding that prior to identification of an interest as a "liberty interest," the Court must consider the effects of the act which is the subject of that interest). This view is effectively criticized by *TRIBE & DORF*, *supra* note 17, at 106-09, who point out that, under Scalia's view, every alleged liberty interest that a state might seek to invade could be denied due process protection merely by recharacterizing it in terms of effects that the State has the power to regulate.

sponse to the dissents of Justices Brennan and Stevens.⁸⁶ This response implicitly accepts, for the purposes of argument, that there is a protected liberty interest. The power pedigree principle is effectively transformed, however, into a principle that ensures that even if there is a protected interest, the state's countervailing interest will always (or almost always) win out.

Scalia quotes Justice Brennan's conclusion that

the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment.⁸⁷

He then argues that, however moderate Brennan's balancing appears,

the proposition cannot *logically* be so limited. One who accepts it must also accept, I think, that the State has no such legitimate interest that could outweigh "the person's choice to *put an end to her life*."⁸⁸

Scalia has already argued, however, that states constitutionally have the power to prohibit suicide.⁸⁹

This argument is best understood as a historically based challenge to the dissent's weighing of interests. He is arguing that the fact that suicide is prohibitible demonstrates that, as a constitutional matter, "the state's interest in life, completely abstracted from the interest of the person living that life," *does* outweigh the person's "intense interest . . . in her choice whether to continue living or to die."⁹⁰ But then he argues that the interest in refusing medical treatment is no greater than this other self-determination interest, and the state's interest is the same.⁹¹ Hence, the state's interest must still outweigh the individual interest, and the right to refuse medical treatment cannot be constitutionally protected.⁹²

The first problem of this argument is that it does not follow from the fact that suicide prohibitions were understood to be constitutionally acceptable that the protection of life itself abstracted from the person's interests was viewed as being a legitimate state interest. Suicide laws

86. *Cruzan*, 497 U.S. at 299-300.

87. *Id.* at 313 (Brennan, J., dissenting) (quoted by Scalia, J., 497 U.S. at 299).

88. *Id.* at 299 (emphasis added).

89. *Id.* at 298.

90. *Id.* at 299.

91. *Id.*

92. *Id.*

do not need to be understood as having been for that interest; they may well have been either: (i) to prevent what was regarded as the immoral act of intentionally willing the end of one's life, or (more acceptably in a morally pluralistic culture); (ii) a mere prophylactic mechanism for the protection of the life of the sort of person who does have an interest in her life, but who is depressed or mentally disturbed or for some other reason fails to recognize her interest at the moment she seeks to end her life.⁹³

Now let us assume that none of these is correct, but that states actually have the protection of life itself in mind, and that, moreover, insofar as it was understood to be within constitutional limits that states prohibit suicide, it was understood that it was because of the legitimacy and weight of this interest. The second problem is that the argument relies upon the tacit premise that if something was historically viewed as a legitimate state interest for constitutional purposes, then it is a legitimate state interest. Note that this is not precedent, it is mere historical understanding. Nor is it justified by the rights pedigree principle. If it is justified, it is justified by a self-imposed principle of judicial deference; we should not second guess state interests when they are historical and traditional. It does not take much to see that this principle would permit many historical forms of oppression.

Note, however, that even this high level of historicism on the legitimacy of state interests is not enough for Scalia. He wants what might be called *the balance-of-interests pedigree principle*.⁹⁴ This states that if, as a historical matter, a particular state interest was understood to be constitutionally legitimate and weighty enough to outweigh certain individual interests, then for purposes of present constitutional analysis, it must be viewed as outweighing those interests. In light of what Scalia himself describes as "the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it,"⁹⁵ it would seem especially inappropriate to insist on a particular balancing of interests solely because that balancing of interests was historical. The rationality, advisability and, compulsoriness of deferring to a particular historical judgment is surely

93. *Id.* at 347 (Stevens, J., dissenting) (concluding that suicide laws are based on the supposition that a suicide victim's life has potential interest).

94. By ascribing this principle to Scalia, I do not mean to suggest the he favors balancing. Clearly, he does not. *See, e.g.,* Scalia, *supra* note 55. The principle would only be used, for Scalia, assuming arguendo that balancing was to be conducted.

95. *Id.* at 292.

sensitive to whether the judgment was really made about the same issue. If, as Scalia himself says, conditions are now changing so that life now continues past the point where a reasonable individual would want to inhabit her body, whereas life did not last so long before, surely this is material to the issue of what the proper balance between life itself and an individual's wishes for that life are. In particular, if it has just come to be the case that persons are kept alive beyond the point where it is *reasonable* not to want to inhabit one's body, then the previous judgment about what weight should be given to a person's decisions to end her life must now be considered of questionable relevance. In the past, what hung on one side of the balance was *unreasonable* decisions, for the most part; in the present, in increasing number, what hangs on that side of the balance may well be *reasonable* decisions.

D. Summary of the Critique

Justice Scalia's opinion is contentious even from within a conservative point of view. First, he runs together the idea that the claimant needs a basis for her right in history with the idea that if the state has *any* basis for its power in history, then the state wins.⁹⁶ The first idea, referred to here as the rights pedigree principle, is a controversial conservative principle advocated recently. But the second idea, "the power pedigree principle," is a different, state-power oriented or "statist"⁹⁷ proposal which Scalia does not articulate explicitly and does not defend.⁹⁸

A second major defect is Scalia's failure to see that the identification of the liberty interest in this case does not require any distinction from suicide. The question of whether it is suicide enters in the discussion of whether the state can produce a sufficiently compelling interest to outweigh the individual's interest.⁹⁹ Again, Scalia tries to suggest that the petitioner must answer this question before the demonstration of any liberty interest, but we saw that this was also an unsound position.

Third, Scalia fails to recognize the subtlety of translating a balancing of interests on the issue of suicide to the current context, where

96. *Id.* at 294-98.

97. *Cf.* Larry Kramer, *Judicial Asceticism*, 12 CARDOZO L. REV. 1789 (1991) (Scalia's rigidity and extremism inconsistent with fundamental judicial role of dispensing justice).

98. *Cf.* Strauss, *supra* note 17, at 1710-15 (criticizing Scalia's traditionalism and its purported defenses).

99. *Cruzan*, 497 U.S. at 294-98.

the action in question is not the intentional taking of life, but rather where life, for the first time, can now be sustained to the point where "no reasonable person would want to inhabit it."

E. Suggestions of the Power Pedigree Principle Beyond Cruzan

Without purporting to provide a comprehensive account of Scalia's constitutional jurisprudence, this analysis sheds light on Scalia statism in several other opinions. In *Michael H.*, the issue was whether California's conclusive presumption in favor of the paternity of a woman's husband at the time of conception violates the substantive or procedural due process rights of a man who can prove with a 98.07% probability that he is the biological father of the child. Writing for a plurality, Justice Scalia rejected Michael H.'s argument, holding that there can be no due process violation because states have historically and traditionally enjoyed the power to prevent adulterers from encroaching on the legitimate family by challenging paternity.¹⁰⁰ As we now see, the existence of this pedigreed state power of which California's power to exclude Michael H. was an instance, does not prove that there is not also a pedigreed individual right, of which Michael H.'s right to foster a relationship with his daughter was an instance. The rights pedigree principle is satisfied in *Michael H.*, but Scalia does not see this because he conflates the two principles.¹⁰¹

100. *Michael H.*, 491 U.S. at 121-26.

101. In his dissenting opinion, Justice Brennan did not have to reach the sort of broad questions of constitutional jurisprudence that plague the Court when it is called upon, as it arguably was in *Cruzan*, to open up a new category of substantive due process rights. Rather, *Michael H.* very directly follows the precedents of *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Caban v. Mohammed*, 441 U.S. 380 (1979). Both cases accord substantive due process protection to the interest of an unwed father in his relationship with his children. If a right with a pedigree had to be named in those cases or in *Michael H.* (and Justice Brennan disputes the need for such a pedigree) the historically and traditionally protected right of which this is an instance is the right of a parent to foster a relationship with his or her child.

In *Reno v. Flores*, Justice Scalia's majority opinion appears more faithful to the rights pedigree principle, but closer examination suggests that it is really the power pedigree principle operating again. 113 S. Ct. 1439 (1993). The plaintiffs in *Reno* were illegal alien children who had no legal guardians. Specific adults in the community were willing to take responsibility for the care of these children, but the United States Immigration and Naturalization Service, despite its conclusion that these children posed no risk of flight or of harm to themselves or others, maintained a policy that the children must remain institutionalized. *Id.* at 1443-45. Plaintiffs challenged this policy on substantive due process and procedural due process grounds. *Id.* at 1446. The Court upheld the policy. *Id.* at 1454.

At first blush, Scalia's opinion appears to entertain various candidates as rights of which the plaintiffs' asserted rights are instances. *Id.* at 1447 (considering the right to be free from physical restraint, the right to come and go at will, the right to be in the custody of one's parents or legal

Some of Scalia's decisions concerning procedural due process also present forceful examples of the power pedigree principle. In *Pacific Mutual Life Ins. Co. v. Haslip*,¹⁰² Scalia is explicit that historical permissibility of punitive damage awards conclusively establishes that punitive damages awards could not violate the Due Process Clause.¹⁰³ In

guardian, and the right to be released into a non-custodial setting). Rejecting each, Scalia also goes on to reject the idea that each child deserves a hearing on his or her best interests before she is kept in the government institution. *Id.* at 1449-51. However, as in *Cruzan, Michael H.*, and the abortion cases, Scalia's opinion is absolutely unresponsive to his colleagues' rights-based arguments. And, as in *Cruzan*, it is Justice O'Connor (whom Justice Souter joined) whose concurring opinion provides the sharpest contrast to Scalia's, while still remaining overall conservative in its jurisprudence. Justice O'Connor points out that this is not a case in which the Court is "deciding whether the constitutional concept of 'liberty' extends to some hitherto unprotected aspect of personal well-being . . . but rather whether a governmental decision implicating a squarely protected liberty interest comports with substantive and procedural due process." *Reno*, 113 S. Ct. at 1456 (citations omitted). The "squarely protected liberty interest" is "freedom from institutional confinement." *Id.* at 1454-56. Of course, freedom from institutional confinement not only has a historical and traditional pedigree, it is also already recognized by substantive due process precedent.

On closer examination, Scalia rejects the argument that respondents' right to come and go at will is implicated on the ground that "juveniles, unlike adults, are always in some form of custody." *Id.* at 1447. Essentially, this is an argument that the power to keep these children institutionally confined is an instance of the state's power to maintain custody over children who are not in the custody of their parents. Because the latter power is well established, and because it conflicts with the asserted right to be free from institutional confinement, that asserted right cannot merit due process protection, according to Scalia. *Id.* at 1447-49. The key inference is that a right to be free from certain state actions could not exist, since those actions are instances of conduct states have traditionally enjoyed the power to engage in.

102. 111 S. Ct. 1032, 1047 (Scalia, J., concurring) (process that accords with tradition of American courts and does not violate enumerated rights "necessarily constitutes 'due' process").

103. *Haslip* involved a challenge to a procedural feature of the law of Alabama; its permission of the imposition of punitive damages in civil actions. The issue framed by Scalia in concurrence was whether a procedure that was accepted at the time of the ratification of the Due Process Clause could be violative of that clause.

Scalia argued in *Haslip* that the phrase "due process of law" was historically taken to mean "by the law of the land." He then inferred that "due process of law" *should* be interpreted to mean "by the law of the land," and argued that "by the law of the land" entails *in accordance with the settled course of judicial proceedings*. This led him to the conclusion that if a procedure had historically and traditionally been utilized by courts, then its current use could not be a violation of due process of law. The legal conclusion, as applied to the issue raised in *Haslip*, was that the permissibility of punitive damage awards under the Due Process Clause was established conclusively by the fact that such awards were traditionally and historically permitted. In short, history established that punitive damage awards were "the law of the land" and "due process" cannot forbid whatever is the law of the land.

Translated into the substantive due process context, *Haslip's* "law of the land" theory states that whatever was the substantive law of the land at the time of the ratification of the Fourteenth Amendment could not now be properly deemed a violation of the Fourteenth Amendment. And again, that is because "due process" simply means "in accordance with the law of the land." As applied to *Cruzan*, the *Haslip* jurisprudence might be taken to imply that because suicide prohibition was part of the law of the land when the Fourteenth Amendment was ratified, prohibition of

Burnham v. Superior Court of California,¹⁰⁴ the issue was whether procedural due process was satisfied when a state predicated its exercise of personal jurisdiction upon personal service on a physically present defendant. While Justice Brennan engaged in the usual *International Shoe* inquiry and eventually concluded that due process had not been violated, Scalia opined that the case was governed by one simple fact: it is "[a]mong the most firmly established principles of personal jurisdiction in American tradition that the courts of a State have jurisdiction over nonresidents who are physically present in the State."¹⁰⁵ In short, because states have traditionally enjoyed the power to exert personal jurisdiction over those who are served when physically present, the state's current exercise of that power must be constitutional.

Scalia's emphasis on state powers may also be found outside of the due process context.¹⁰⁶ In *Lee v. Weisman*,¹⁰⁷ for example, the Court held that inclusion of prayers in public high school graduation ceremonies violated the Establishment Clause, and Justice Scalia offered a biting dissent: "In holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public-school graduation ceremonies them-

refusal of lifesaving treatment could not be a violation of the Fourteenth Amendment.

All of the problems we have already identified with Scalia's argument form generally apply to the "law of the land" version of his argument. First, and not trivially, suicide criminalization, as Scalia himself concedes, was not part of the law of the land when the Fourteenth Amendment was ratified. Scalia attempts to argue that, notwithstanding this fact, states were still understood to enjoy the power to prohibit suicide, but there were particular procedural and equitable reasons for removing these laws from the books. From Scalia's literalist "law of the land" perspective, this is not enough. Second, even if one assumes that somehow the permissibility of suicide prohibitions was part of the law of the land, the question still remains whether prohibition of refusal of life-sustaining treatment was part of the law of the land. There is no evidence that this was the case. Only a conceptual argument linking this with suicide would show that. However, once one is permitted to make this argument, one should also be able to make the argument that protection against unwanted invasions of one's body was part of the law of the land, and that this is an instance of such an invasion. Or, more particularly, one could argue—in accordance with O'Connor—that protection against unwanted medical invasions was part of the law of the land, and that therefore Nancy Cruzan's treatment is a violation of due process under the "law of the land" theory.

104. *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

105. *Id.* at 610.

106. Scalia purports to limit his use of history somewhat in *Haslip*, 111 S. Ct. at 1054 (in Equal Protection cases and interpretation of certain other provisions of the Constitution, history not dispositive), but as *Smith* and *Weisman* and numerous other decisions indicate, Scalia's historicist statism goes far beyond interpretation of the Due Process Clause.

107. 112 S. Ct. 2649 (1992).

selves. . . ."¹⁰⁸ While Justice Scalia—as a matter of thoroughness—contested the majority's analysis of the coercive effect of prayers at graduation, this was not the core of his dissent. Rather, as the above-quoted passage indicates, this is yet another example of a case that should be trivial for the Court, according to Scalia. The state *must* win because the conduct it is engaging in—the power it is exercising—is a power that it has historically and traditionally enjoyed.¹⁰⁹

IV. THE OUTCOME-ORIENTATION OF SCALIA'S STATISM

I have argued above that Scalia's statism is a significant component of his constitutional jurisprudence, but that it is not warranted by the concerns underlying the rights pedigree principle: originalism, incrementalism and continuity, history and tradition as a basis for knowledge, and rights reduction. Why, then, does Scalia adhere to the rights pedigree principle? It is possible, of course, that Scalia does not, in fact, distinguish the power pedigree principle and the rights pedigree principle, or that he labors under the misapprehension that one of the aforementioned justifications does apply to the power pedigree principle. However, I want to suggest a somewhat different, common sense explanation of Scalia's position.

The critical commentary in Part III, above, was qualified by noting that the goal of diminishing rights protection is served, to some extent, by the power pedigree principle.¹¹⁰ In other words, insofar as

108. *Id.* at 2678-79.

109. *Employment Division v. Smith* can be understood as a consistent application of his general statist framework. *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595 (1990). The question in *Smith* was whether state law and conduct penalizing the use of certain substances infringed the rights of persons who used peyote—a proscribed substance—as part of religious rituals. According to Justice O'Connor, First Amendment analysis prior to *Smith* would have determined first whether the conduct asserted by the individual was protected by the Free Exercise Clause, and second, if so, whether the state had asserted a sufficiently compelling interest to justify the encroachment on that protected right. *Id.* at 1608-09 (O'Connor, J., concurring). Scalia turned this analysis on its head. The critical question, for Scalia, was whether the narcotics prohibition law was a statute of general applicability that it was within the state's power to enact. If the answer to that question was affirmative, then virtually any exercise of that power was deemed legitimate, regardless of its effect on the individual. This is so despite the fact that the individual interests in question were incontestably rights specifically enumerated under the First Amendment's Free Exercise Clause. Formally, of course, Scalia's view can be rendered consistent: he is obviously interpreting the scope of the rights under the Free Exercise Clause to be sufficiently narrow as to make room for the state's exercise of certain powers. But the essence of the holding in *Smith* was startling: recognition of the legitimacy of a general state power *dictates* that the scope of a clearly enumerated individual right must be interpreted as very narrow.

110. *See supra* Part III.

this principle (and its supplements) are understood as outcome-oriented, as devices for skewing the outcome against rights, employment of the power pedigree principle is coherent. That principle is, of course, more powerful in reducing rights recognition than the rights pedigree principle would be if used alone.¹¹¹

I do not mean to suggest that Scalia's statism is only comprehensible as a political tool, in the sense of being a rule designed to give states victories on certain political issues. Scalia may or may not be political in this sense; I do not purport to judge that issue. Scalia's jurisprudence is outcome-oriented in a subtler but broader sense. The goal of skewing the outcome against rights, according to Scalia himself, is to take fewer questions off of the legislative agenda, with the ultimate goal of providing more power to democratically elected officials (legislators and executives) and less power to moralizing, unaccountable judges, whose exercises of discretion are, on Scalia's view, inconsistent with an appropriate conception of the rule of law as a law of rules.

Thus, for example, in *Cruzan*, Scalia's doctrinal arguments are introduced and concluded with forceful prose deriding the Court's willingness to engage in any analysis in the right-to-die area:

While I agree with the Court's analysis today, and therefore join its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that [power pedigree argument] . . . , 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 his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored.¹¹²

This is a bold assertion that the Constitution should not be interpreted as having any implications for individual rights protection in right-to-die issues. We have seen, however, that Scalia's doctrinal argument itself fails, unless he has some ground that I have not adequately canvassed for the power pedigree principle. Thus, Scalia's statism appears to rely on his own *prior judgment of political theory that it is intolerable*

111. None of Scalia's opinions suggest that he would reject a pro-state decision based solely on the rights pedigree principle; the power pedigree principle is used as a limitation supplementing, not a replacement of, the rights pedigree principle.

112. 497 U.S. at 293.

ble to permit federal courts to enter this area of decision-making. Indeed, this is just what Scalia reveals in concluding his opinion:

This Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself.¹¹³

The analysis above thus suggests that the ultimate justification for the power pedigree principle is a strong commitment to rights reduction, founded on a view of the limited competence of the judiciary. Because rights are more effectively reduced by the power pedigree principle, that is the principle Scalia has chosen. This points to what is perhaps the deepest difference between the rights pedigree principle and the power pedigree principle. The rights pedigree principle is used by the conservatives on the assumption that some effort must be made to *interpret* the Constitution, and that history and tradition ought to play a guiding role in that interpretation. Scalia, by contrast, takes himself to know merely by virtue of *a priori* political reasoning which issues should be on the legislative agenda and which should not, what is within the judiciary's competence and what is not. In the *Cruzan* case (as in most) he claims to know that the issue in question (the prohibitability of removing life-sustaining treatment) should be permitted to stay on the legislative agenda.¹¹⁴ The power pedigree principle apparently serves as a *post hoc* device for accomplishing this task.

In one sense, this analysis is hardly surprising, for Scalia has been explicit about his blanket opposition to substantive due process and unenumerated rights under the Fourteenth Amendment.¹¹⁵ However, as a Justice of the Supreme Court at this point in time, blanket opposition to unenumerated rights is contrary to precedent. By openly purporting to adopt the rights pedigree principle, rather than simply writing a pure condemnation of substantive due process, Justice Scalia is apparently manifesting a recognition of his obligation to respect that precedent. The power pedigree principle, masquerading as the rights pedigree principle, permits Scalia to maintain the appearance of respect for precedent while simultaneously minimizing substantive due process rights.

What is surprising about Scalia's position—if the analysis of this section is correct—is that text, precedent, and history do not play an

113. *Id.* at 300-01.

114. *Id.*

115. See *Haslip*, *supra* note 102; *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2726-27 (1993) (Scalia, J., concurring).

intrinsic role in Scalia's "power pedigree" jurisprudence of the Due Process Clause. They enter only after the fact as a rationale for a decision made independently on grounds of political theory.¹¹⁶ This is ironic in light of Scalia's own insistence on the importance of text and history in constitutional adjudication.

Perhaps Scalia's enthusiasm for *stare decisis* is tepid,¹¹⁷ and perhaps he is ultimately concerned with a construction of the Constitution that embodies a defensible conception of the judicial role, and minimizes the judicial opportunity to exercise discretion.¹¹⁸ The primary emphasis of this article has been to contrast Scalia's statist traditionalism with what I have called the "conservative" due process framework, and to argue that the rationales underlying the conservative framework do not justify adherence to Scalia's statism. I have not attempted to argue against Scalia's entire conception of the Constitution and the proper role of the judiciary—an adequate portrayal of Scalia's jurisprudence and a full response to those views would exceed the scope of this article.¹¹⁹ I shall conclude, however, by suggesting a further contrast

116. Of course, Scalia would argue that the critical fact in his interpretation of the Constitution is the absence of text addressing the right to refuse life-sustaining treatment or medical treatment generally; in this sense, it is textually based. However, as Scalia recognizes regretfully, see *supra* text accompanying notes 43-47, the Court's doctrine does not admit an argument based on the premise that only enumerated rights are protected. Moreover, insofar as his argument is based on the originalism suggested in *Haslip*, it does not speak to the proper resolution of cases where history and tradition provide both a right and a tradition, see *supra* text accompanying notes 73-74, and *supra* note 102, and therefore cannot carry the weight of his argument.

117. See, e.g., *Casey*, 112 S. Ct. at 2873 (Scalia, J., dissenting) (*Roe* should be overruled; suggesting Justice need not respect *stare decisis* where he or she believes precedent was badly wrong).

118. See Scalia, *supra* note 50; Scalia, *supra* note 55; Sullivan, *supra* note 15.

119. In particular, it is worth examining the possibility that Scalia views the Bill of Rights as, in the first instance, an articulation of certain kinds of state conduct that are, for reasons that can be stated without reliance on a notion of individual liberties, outside of the state's proper power, and not as an articulation of spheres of precious individual liberties. This article is not intended to rule out the possibility that there are some contexts in which Scalia's general focus on state powers (as opposed to his particular endorsement of the power pedigree principle) might, in fact, explain some of Scalia's decisions *against* states. For example, in *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992), Scalia does not find the unprotectedness of the individual's speech to dispose of the First Amendment claim; the crucial point is that because the state has engaged in the wrongful conduct at which the First Amendment is aimed—discrimination on the basis of viewpoint—the state conduct violates the First Amendment. In *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), Scalia, concludes that South Carolina's regulation on use of property, which deprived petitioner of the value of his land, was a "taking" unless the State's regulation is aimed only at uses of land that the State would have had the power to prohibit through the common law of nuisance and property.

Of course, these comments are only meant to be suggestive; Scalia's treatment of speech and property obviously merit in-depth analysis.

between Scalia's framework and that of his conservative colleagues, and a more general reason for questioning the tenability of Scalia's framework at a broader level.

V. CONCLUDING REMARKS: SCALIA'S STATISM AND THE NOTION OF A LIVING CONSTITUTION

Cruzan is a dramatic illustration of a prevalent kind of constitutional case. Changes in society, knowledge, and technology have created areas of human behavior in which states wish to regulate, and some individuals wish to remain free from regulation. The Constitution, the precedents, and our history of practices do not speak directly to the issue. History includes an individual right, which individuals are able to argue should extend to this new issue. But history also includes a state power, which states are able to argue should extend to this new issue. Because of these changes, we have an issue which lies in the gray area of the right and the power.

Traditional Fourteenth Amendment analysis would proceed as follows: the individual would need to show that there is a protected interest in this new kind of case. This can be done by showing that it is an instance of an enumerated right, or otherwise, that it is an instance of a right that is historically and traditionally protected, or that it is essential to the concept of ordered liberty. If this is indeed shown, then the question becomes whether the state can articulate a sufficiently compelling interest to justify this deprivation, or (subsequent to *Casey*) whether the state has placed an undue burden on that right.¹²⁰ Scrutiny, once the right has been identified, is a core exercise of the power of judicial review.

In recent years, the more conservative members on the Supreme Court—Chief Justice Rehnquist, Justice White, Justice O'Connor, Justice Kennedy, Justice Souter, Justice Thomas, and frequently Justice Scalia himself—have advocated greater restraint in the articulation of unenumerated rights under the Fourteenth Amendment. This advocacy has altered the framework in principally two forms, corresponding to the two parts of substantive due process analysis. First, they have begun to require a historical pedigree for any unenumerated right to gain

120. In *Casey*, the joint opinion rejected a strict scrutiny—compelling government interest test for an undue burden test in the context of abortion. See *Casey*, 112 S. Ct. at 2819. The extent to which the undue burden analysis applies to rights other than abortion is unclear. See, e.g., *Compassion in Dying*, *supra* note 65 (applying undue burden analysis in right to physician assisted suicide case).

"protected interest" status.¹²¹ This is what has been called the "rights pedigree principle." And second, they have increased their openness to state claims about the identification and weighting of legitimate interests, holding that historical judgment is a significant factor in this analysis.

The influence of these aspects of the Court's developing jurisprudence is amply illustrated in the various opinions in *Cruzan*. Justice Stevens' opinion might be thought a fine example of Fourteenth Amendment analysis from its heyday, delving into the profound ethical questions surrounding our conception of death, articulating the value of liberty from the state in that arena, and expressing deep suspicion of the state's thinly veiled attempts to impose its religiously motivated moralism on individuals where it counts most.¹²² To the extent that his opinion *depends* on those types of arguments—and that is unclear—it is vulnerable to criticism from the conservative due process framework.

However, Stevens's dissenting opinion was unjoined—he was one among nine—and none of the other opinions in this case accept the unrevised due process framework. Justice Brennan, Justice O'Connor, and Chief Justice Rehnquist each begins the analysis by showing both precedent and a historical pedigree for the right in question. Each considers the state to have a legitimate interest in preserving life. And each appears to believe that the existence of a right to refuse life-sustaining treatment depends on whether that interest is sufficient to outweigh the individual's right.

Yet Justice Scalia's opinion conflicts with the position reached by both O'Connor and Brennan, and explicitly left as an open possibility by Rehnquist. As should be evident by now, this is because Scalia is not using the familiar conservative due process framework. He has added to that framework state-power enhancing principles: as we have seen, the power pedigree principle, and the balance-of-interest pedigree principle. On this view, the Court's task is not to articulate constitutional rights and powers in a way that pays high regard to history, disdains novel evaluation of interests, and takes seriously the state's conception of legitimate interest. That was the conservative framework. Now the Court's task is to ensure that the state may assert *any* extension of powers once enjoyed.

The conservative framework provides a narrow principle of growth

121. *But see Casey, supra* note 15 (joint opinion of O'Connor, Kennedy, Souter, J.J.).

122. *Cruzan*, 497 U.S. at 330-57.

in the Constitution, for the increasing sorts of behaviors that are possible and regulations that states may attempt. If it appears that a new kind of regulation on a new kind of behavior is indeed an infringement of a protected interest, the question is whether the Constitution should be interpreted to permit that kind of infringement. The Court cannot make that judgment without considering the state's interest, and an intelligent consideration will pay respect to history. All in all, it will attempt to allow both rights and powers to grow in a way that is consonant with the constitutional vision.

Note that this is a different kind of constitutional growth than is often referred to by moderate conservatives such as Justice Harlan¹²³ or liberals such as Justice Brennan. It need not involve any change in values. And it need not involve any new sort of self-awareness or self-understanding. It need not involve any recognition that what we once thought was a right is not really a right. Nor need it involve any conflict with original intent. It is consistent with (although not necessarily guided by) the set of individual rights and state powers as originally understood. This conservative conception of constitutional growth was well put by Judge Robert Bork, in the concurring opinion in *Ollman v. Evans*,¹²⁴ where he sharply disagreed with then-Judge Scalia's unwillingness to permit for any form of evolution in individual rights:¹²⁵

There would be little need for judges—and certainly no office for a philosophy of judging—if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application.¹²⁶

These words capture a rather narrow version of "the notion of a living constitution"—the sense endorsed by then-Justice Rehnquist in an ad-

123. See *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting).

124. 750 F.2d 970, 993 (D.C. Cir. 1984) (en banc) (Bork, J., concurring, with Ginsburg, MacKinnon, and Wilkey, JJ., joining the concurrence), cert. denied, 471 U.S. 1127 (1985).

125. *Id.* at 1036, 1038 (Scalia, J., dissenting) ("It seems to me that the identification of 'modern problems' to be remedied is quintessentially legislative rather than judicial business . . .").

126. *Id.* at 995. Of course, Judge Bork's view of substantive due process and unenumerated rights is extremely narrow, and the broader quoted passage from which the quotation in the text is excerpted reveals that narrowness. However, the point is not that Bork would have disagreed with Scalia in *Cruzan*—this article does not comment on that issue—but that, as a general matter of constitutional jurisprudence, Scalia's statism is inconsistent with even a highly conservative notion of constitutional growth such as Bork's.

dress by that name, where he observed that the framers "left to succeeding generations the task of applying [general] language to the increasingly changing environment in which they would live."¹²⁷ It is not surprising that in *Cruzan* this restrained view of the Constitution was endorsed by Justice O'Connor and the Chief Justice himself.

Scalia's *Cruzan* opinion is an attempt to reject even this narrow conception of a living Constitution. In its place, he offers the power pedigree principle. This says that as long as the state has any power which it can argue extends to this case, the state should be permitted to extend it. On this view, the set of constitutionally protected kinds of behavior remains the same, as the set of possible behaviors increases, and the set of possible regulations of behaviors also increases. The set of recognized state powers may grow and grow, but recognized individual rights must remain precisely where they are. This remains true even if the growth of powers and the stillness of rights flies in the face of our historic values.

127. William H. Rehnquist, *Observation: The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976).

