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WHO DECIDES IF THERE IS "TRIUMPH IN THE ULTIMATE AGONY?"¹ CONSTITUTIONAL THEORY AND THE EMERGING RIGHT TO DIE WITH DIGNITY

I went to the woods because I wished to live *deliberately*, to front only the essential facts of life, and see if I could not learn what it had to teach, *and not, when I came to die, discover that I had not lived. I did not wish to live what was not life, living is so dear; nor did I wish to practise resignation, unless it was quite necessary. I wanted to live deep and suck out all the marrow of life.*²

Although Thoreau was not writing about the right to death with dignity (RTDWD),³ his words eloquently capture much of the philosophy animating this right, and their echo can be heard in every reasoned request for assistance in hastening death, including Diane's. In a 1991 letter to the *New England Journal of Medicine*, Dr. Timothy Quill introduced the public to a woman named Diane and described the events preceding her decision to ingest a lethal dose of barbiturates.⁴ Diane had a type of leukemia that only one in every four patients survived.⁵ Moreover, her chance at survival came with a price—toxic and debilitat-

1. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 118 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Vintage Books ed. 1989) (1967).

2. HENRY D. THOREAU, WALDEN AND OTHER WRITINGS 81-82 (William Howarth ed., 1981) (emphasis added).

3. The RTDWD is the right of a competent person to control the circumstances surrounding her own death. This right entitles a person to assistance in the commission of suicide and encompasses a right to euthanasia in some situations. Because the exercise of the right to forego or discontinue medical treatment—the right to die (RTD)—involves physician assistance in many cases, *see infra* notes 286-91 and accompanying text, and is premised on individual interests identical to those justifying the RTDWD, *see infra* notes 324, 333-35 and accompanying text, it is subsumed within the RTDWD.

This Note will assume that any assistance in dying will be provided by a physician because the government has an interest in ensuring that those exercising the RTDWD are competent to do so. *See infra* notes 378-89 and accompanying text.

4. Timothy E. Quill, *Death and Dignity: A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691 (1991).

5. *Id.* at 692.

ing treatments that would probably confine her to a painful death in a hospital.⁶ Diane declined treatment because she wanted to live the remainder of her life according to her own conscience, in a dignified manner, and not as a prisoner of medical technology.⁷

Diane's efforts to live deliberately were frustrated, however, because her decision to forego treatment could not eliminate the risk of a progressively debilitating, undignified, and painful death. She could only ensure that her death would occur outside a hospital.⁸ In short, "her fear of a lingering death [was] interfer[ing] with [her ability to] get [] the most out of the time she had left."⁹

Certain that Diane was not despondent and that her decision was well-reasoned, Dr. Quill, upon Diane's request, prescribed a lethal dose of barbiturates to be taken when she decided that she could no longer live "fully."¹⁰ Secured and comforted by the knowledge that she could control her own death, Diane was able to spend the last months of her life "in the woods."¹¹

A striking aspect of Diane's story is the relationship it posits between life and death. Dr. Quill's account makes it clear that Diane's ability to control the events surrounding her own death enabled her to pursue her conception of a meaningful life. This is an intuitively powerful argument for a RTDWD, and, when considered with the other individual interests implicated by Diane's decision,¹² it underlies a compelling constitutional argument as well.

Despite the substantial interests underlying the RTDWD, the law and the medical profession have been slow to adjust to the rights and needs of individuals,¹³ as well as the realities of the

6. *Id.*

7. *Id.*

8. *Id.* at 693.

9. *Id.*

10. *Id.*

11. *See id.*

12. Diane's story indicates that several individual interests underlie the RTDWD: self-determination, which encompasses the related rights to life, bodily integrity, and freedom of conscience; personal dignity; and the mitigation of suffering. *Id.* at 692-93.

13. *See* GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW*

dying process.¹⁴ More disturbing, however, is that both the law and the medical community refuse to recognize explicitly and fully the panoply of interests implicated by decisions involving death and the level of constitutional protection those interests have received.

The American Medical Association (AMA), for example, suggests that a patient's right to limited control over the circumstances surrounding her own death is justified by three interests: bodily integrity, as developed through the tort of battery and the doctrine of informed consent; personal dignity; and the mitigation of suffering.¹⁵ As a result, the AMA confines a patient to a choice between refusing or discontinuing treatment and submitting to increasing doses of pain-relieving drugs while her doctor endeavors to maintain her dignity.¹⁶ These guide-

329-50 (1957).

14. See Yeates Conwell & Eric D. Caine, *Rational Suicide and the Right To Die: Reality and Myth*, 325 NEW ENG. J. MED. 1100, 1101 (1991) (noting the lack of attention paid to the suicide rate among the elderly, which is the highest in the United States); Timothy E. Quill et al., *Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-Assisted Suicide*, 327 NEW ENG. J. MED. 1380, 1381 (1992) (stating that, even with criminal sanctions in force, 6,000 deaths a day may be planned, many through the use of pain-relieving drugs that hasten death—the double-effect technique); Mark A. Sager et al., *Changes in the Location of Death After Passage of Medicare's Prospective Payment System*, 320 NEW ENG. J. MED. 433, 435 (1989) (finding that approximately 83% of those over age 65 die in a hospital or nursing home); Sidney H. Wanzel et al., *The Physician's Responsibility Toward Hopelessly Ill Patients*, 320 NEW ENG. J. MED. 844, 845-46 (1989) (noting that hospice and comfort care need to be improved and better insured).

15. See American Medical Association Council on Ethical and Judicial Affairs, *Withholding or Withdrawing Life Prolonging Medical Treatment*, in CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS § 2.20 (1994).

16. See *id.*; see also *id.* § 2.211 ("Physician assisted suicide is fundamentally incompatible with the physician's role as healer . . ."). Although a person must decide for herself if her dignity and bodily integrity will be preserved by confinement in a hospital room and a life of increasing sedation, her decision will be shaped by a consideration of her alternatives, which include starvation and suffocation (if her treatment requires a respirator). As Diane's case illustrates, however, this choice (without the possibility of additional assistance in the dying process) creates a "catch-22" dilemma. See *supra* notes 4-11 and accompanying text; see also Geoffrey N. Fieger, *The Persecution and Prosecution of Dr. Death and His Mercy Machine*, 20 OHIO N.U. L. REV. 659, 670 (1994) (discussing the irony of a societal shift toward more humane methods, such as lethal injection, of killing convicted criminals while those who desire a dignified and controlled death are still forced to undergo the tortuous processes of starvation or suffocation).

lines ignore the other important interests underlying an individual's right to control his death, such as self-determination and (a more sophisticated understanding of) bodily integrity, and promote a conception of physical, rather than spiritual and emotional, suffering that justifies continuous medical treatment.

Although each interest underlying the RTDWD has received legal protection, the statutory protection afforded these interests under the aegis of the right to die (RTD) is very limited in scope because existing RTD legislation arbitrarily restricts their reach. In addition, physician-assisted suicide (PAS) is prohibited in many states,¹⁷ and physician-committed euthanasia (PCE) is prohibited in all states.¹⁸ Furthermore, many courts have undervalued the individual interests underlying the RTDWD, thereby preventing a proper balancing of individual and state interests.¹⁹ Paralleling the AMA position, the legal status of the RTDWD also reflects an incomplete understanding of the relationship between the process of dying and the individual interests implicated by this process—individual autonomy, personal dignity, and the mitigation of suffering.

This Note will argue that many of the restrictions placed on an individual's ability to control the circumstances surrounding her own death are constitutionally impermissible. The next section will survey recent developments in the law and the medical profession involving the RTDWD and identify the significant legal and philosophical issues that they introduce. These issues will be addressed throughout the remainder of the Note. In the third section, this Note will examine the Supreme Court's substantive due process jurisprudence and argue that Justice Harlan's substantive due process theory is the proper analytical framework for addressing unenumerated liberty claims. Justice Harlan's theory will be employed to derive a constitutional RTDWD in the fourth section. The fifth section of this Note will evaluate the constitutionality of laws impacting this right. The final section will review the preceding sections and offer some

17. See *infra* note 338 and accompanying text.

18. See *infra* note 336 and accompanying text.

19. See, e.g., *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir.), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

concluding thoughts on the emerging RTDWD.

RECENT DEVELOPMENTS INVOLVING THE RIGHT TO DIE WITH DIGNITY

Beginning with the Supreme Court's decision in *Cruzan v. Director, Missouri Department of Health*,²⁰ recent developments regarding the constitutional status of the RTDWD have both challenged and endorsed the status quo and its supporting rationales. Across the country, a number of doctors have abandoned the AMA position and advocated legalizing certain forms of assisted suicide. In Washington, a federal district court articulated a constitutional right to PAS, only to be reversed by the Court of Appeals for the Ninth Circuit. In Oregon, voters approved a limited statutory right to PAS, the enactment of which was immediately enjoined by a federal district court. Like the Ninth Circuit, courts in Michigan and New York have also rejected arguments for a constitutional right to PAS. This section will explore these developments and illustrate the issues confronting an advocate for a constitutionally protected RTDWD.

*Cruzan v. Director, Missouri Department of Health*²¹

Decided in 1990, *Cruzan* represents the Supreme Court's only decision involving the RTD.²² In *Cruzan*, the Court was confronted with a constitutional challenge, brought by the guardians of a patient in a persistent vegetative state, to Missouri's requirement that there must be clear and convincing evidence of a previously competent²³ person's desire to have life-sustaining treatment withheld or discontinued before such a step can be taken.²⁴ Read narrowly, *Cruzan* indicates that the Constitution does not prevent Missouri from adopting this evidentiary

20. 497 U.S. 261 (1990) (plurality opinion).

21. *Id.*

22. *Id.* at 277.

23. A previously competent person is a person who at one time was competent, see *infra* note 379 and accompanying text, but has been rendered incompetent as a result of some event, such as the advent of a mental illness or a persistent vegetative state.

24. *Cruzan*, 497 U.S. at 268-69.

standard.²⁵ When read carefully, and in light of *Planned Parenthood v. Casey*,²⁶ however, the various opinions in *Cruzan* are of much greater constitutional significance.

Justices Rehnquist, White, and Kennedy

In *Cruzan*, three Justices assumed that a competent person has a constitutionally protected liberty interest in refusing medical treatment,²⁷ and balanced that interest against a state's unqualified interest in preserving life.²⁸ This balance favored

25. *Id.* at 284.

26. 112 S. Ct. 2791 (1992).

27. *Cruzan*, 497 U.S. at 279. The Justices derived this unenumerated and assumed liberty interest by focusing on the common-law doctrine of informed consent and its origins in the tort of battery. *Id.* at 269-79. By relying on the common law, these Justices were able to avoid any consideration of: the individual interests underlying the RTD; the constitutional precedent protecting these interests, such as decisions interpreting the First, Fourth, Eighth, and Fourteenth Amendments; and the existence of state legislation demonstrating a commitment to these interests. Consequently, these Justices were able to maintain a narrow definition of the assumed constitutional right, thus placing previously competent individuals outside the scope of its protection. The common-law tradition, however, prevented these Justices from further narrowing the scope of the assumed right by incorporating a proximity to death limitation on its exercise because a battery is not dependent upon the victim's proximity to death.

28. *Id.* at 279-82. The plurality's balancing, however, resembled rational basis review, *see, e.g.,* *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955) (finding a rational relation to a legitimate state objective), rather than a careful weighing of individual liberty and State interests. The Justices placed no weight on Nancy Cruzan's side of the balance because she was incompetent. Had she been competent, she would have been entitled to the weight of an assumed liberty interest. *Cruzan*, 497 U.S. at 279. The Court thus failed to articulate a constitutional right affected by the Missouri statute, a clear indication of extremely deferential review.

This view of the balance as a disguised form of rational basis review is reinforced by the plurality's analysis of the relevant State interests. The plurality recognized that the government has an *unqualified* interest, expressed in laws banning homicide and assisted suicide, in the protection and preservation of human life. *Id.* at 280-82. In endorsing this State interest, however, the Court failed to consider that the justifications for laws proscribing homicide and assisted suicide are different, *see infra* notes 299-318 and accompanying text, and that some states do not ban assisted suicide, *see infra* note 339 and accompanying text. Because the scales did not contain any countervailing individual right, however, the plurality did not examine the burden that this State interest, as furthered by the clear and convincing evidence requirement, placed on Nancy Cruzan. The plurality's relaxed scrutiny of the relevant State interests and the burdens that they created is also characteristic of rational basis review. *Cf. Williamson*, 348 U.S. at 483 (demonstrating the character-

the State's interest in life, and, therefore, the plurality upheld the clear and convincing evidence requirement.²⁹

Justice Scalia

Although he disagreed with both the plurality and Justice O'Connor, Justice Scalia agreed that the clear and convincing evidence requirement was constitutional because the State's interest in life was more than unqualified. He argued that "American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life."³⁰ Despite the fact that suicide is no longer illegal in any state,³¹ Justice Scalia posited that state governments retain the power to allow suicide only upon a showing of clear and convincing evidence.³² Justice Scalia bolstered his conclusion by making a larger point about unenumerated constitutional rights:

To raise up a constitutional right here we would have to create [it] out of nothing (for it exists neither in text nor tradition) 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.³³

Thus, Justice Scalia believed that there was no constitutional mechanism by which the Court could invalidate Missouri's evidentiary requirement.

istics of rational basis review).

29. *Cruzan*, 497 U.S. at 286-87.

30. *Id.* at 293, 296-97 (Scalia, J., concurring) (suggesting that starving oneself to death is no different from putting a gun to one's temple because the cause of death in both cases is the conscious decision to put an end to one's own existence).

31. *Quill v. Koppell*, 870 F. Supp. 78, 84 (S.D.N.Y. 1994).

32. *Cruzan*, 497 U.S. at 295 (Scalia, J., concurring). This retained power, however, would also allow a state to use an even higher evidentiary standard or to prohibit the exercise of the RTD entirely. *Id.* at 293 (Scalia, J., concurring).

33. *Id.* at 300-01 (Scalia, J., concurring).

Justice O'Connor

Differing with both the plurality and Justice Scalia, Justice O'Connor concluded that, because "the provision of nutrition and hydration implicate[d]"³⁴ concerns identical to those in the Court's substantive due process³⁵ and Fourth Amendment decisions³⁶ protecting physical freedom, self-determination, and dignity, "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water."³⁷ Justice O'Connor, therefore, explicitly articulated a constitutionally protected RTD but found that the clear and convincing evidence requirement was an appropriate expression of the State's interest in protecting life.³⁸

Justices Brennan, Marshall, and Blackmun

Differing sharply from the opinions of the plurality and Justice Scalia, and expanding on the views of Justice O'Connor, Justice Brennan categorized the right to refuse medical treatment as fundamental,³⁹ rather than as a liberty interest. As an infringement on a fundamental right, the clear and convincing evidence standard was therefore unconstitutional.⁴⁰

34. *Id.* at 288 (O'Connor, J. concurring).

35. *Id.* at 287 (O'Connor, J., concurring) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952); *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891)).

36. *Id.* (O'Connor, J., concurring) (citing *Winston v. Lee*, 470 U.S. 753, 759 (1985); *Schmerber v. California*, 384 U.S. 757, 772 (1966)).

37. *Id.* at 289 (O'Connor, J., concurring). Justice O'Connor's explicit articulation of a constitutionally protected RTD did not include a proximity to death limitation on its exercise. Furthermore, her definition of the RTD did not distinguish between presently and previously competent individuals, and her suggestion that a state may be constitutionally required to honor the decisions of an incompetent person's surrogate decisionmaker indicates that she would not draw such a distinction. *Id.* at 289-90 (O'Connor, J., concurring).

38. *Id.* at 292 (O'Connor, J., concurring) (failing to articulate the methodology for arriving at this conclusion).

39. *Id.* at 304-05 (Brennan, J., dissenting). Justice Brennan argued that, because the right to refuse medical treatment was protected by a longstanding common-law doctrine based on important individual interests, it was a fundamental right even within the stringent *Bowers* test. *Id.* (Brennan, J., dissenting); see *infra* notes 180-82 and accompanying text (discussing the *Bowers* test).

40. *Cruzan*, 497 U.S. at 312-13 (Brennan, J., dissenting) (stating that a "[s]tate

Justice Stevens

Justice Stevens also concluded that Nancy Cruzan had a fundamental right to refuse medical treatment.⁴¹ He went beyond Justice Brennan's view of a state's interest in life, however, and argued that a state's general interest in preserving life did not include a "life" such as Nancy Cruzan's. The State's general interest, therefore, could not conflict with Nancy Cruzan's fundamental RTD.⁴²

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"). Unlike the plurality, Justice Brennan also recognized that Nancy Cruzan did not lose her fundamental right simply by becoming incompetent. *Id.* at 308 (Brennan, J., dissenting). Moreover, Justice Brennan refused to limit the scope of the RTD based on an individual's proximity to death or the type of treatment involved because the RTD cannot be "qualified in its application by either the nature or purpose of the treatment, or the gravity of the consequences of acceding to or foregoing it." *Id.* at 306 (Brennan, J., dissenting) (quoting *Tune v. Walter Reed Army Medical Hosp.*, 602 F. Supp. 1452, 1455 (D.D.C. 1985)); see also *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (1986) (upholding the right of a quadriplegic woman with cerebral palsy to have her feeding tube removed); *In re Farrell*, 529 A.2d 404, 413 (N.J. 1987) (failing to include a proximity to death requirement in its definition of the RTD); *Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.Y. 1990) (allowing a patient to refuse a life-saving blood transfusion even though she was not terminally ill). This position accords with the common-law history underlying the RTD and the development of that right in state courts. The common-law right to refuse medical treatment is based on the application of the tort of battery to the medical profession. *Cruzan*, 497 U.S. at 269. For example, if a doctor fails to obtain a patient's informed consent before treatment, then that doctor is liable for a battery. *Id.* The corollary of this consent requirement is the patient's right to refuse consent, *id.* at 270, regardless of his underlying medical condition, unless that condition poses a threat of harm to others. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

41. Justice Stevens reasoned that an individual has a fundamental right to make decisions about matters that constitute the realm of private life, *Cruzan*, 497 U.S. at 341 (Stevens, J., dissenting), and that an individual's bodily integrity is an aspect of private life, *id.* at 342 (Stevens, J., dissenting). Choices about death that implicate bodily integrity are thus protected as fundamental rights. *Id.* at 342-43 (Stevens, J., dissenting).

42. *Id.* at 350 (Stevens, J., dissenting). Justice Stevens stated:

Missouri has arrogated to itself the power to define life, and only because the Court permits this usurpation, are Nancy Cruzan's life and liberty put into disquieting conflict. If Nancy Cruzan's life were defined by reference to her own interests . . . her constitutionally protected interest in freedom from unwanted [medical] treatment would not come into conflict with her constitutionally protected interest in life.

Id. at 351 (Stevens, J., dissenting). Justice Stevens thus also rejected a definition of the RTD that included proximity to death and presently competent restrictions on its

Dr. Quill and the Evolving Views of the Medical Profession

Since confessing his role in Diane's death, Dr. Quill has become a leading advocate for improvements in comfort and hospice care, as well as the legalization of PAS. Joined by two other physicians, Dr. Quill has proposed the legalization of PAS for competent individuals with incurable conditions associated with extreme suffering.⁴³ Interestingly, Dr. Quill's proposal rejected both proximity to death requirements⁴⁴ and the possibility of PCE.⁴⁵

*Compassion in Dying v. Washington*⁴⁶

In *Compassion in Dying*, a Washington statute barring all forms of assisted suicide was invalidated as an "undue burden on the exercise of a protected . . . liberty interest by terminally ill, mentally competent adults acting knowingly and voluntarily, . . . who wish to commit physician-assisted suicide."⁴⁷ The district court opinion, written by Chief Judge Rothstein, was the first to articulate explicitly a constitutional foundation for an individual's right to receive medical assistance, other than the withdrawing of treatment, in the commission of suicide.⁴⁸ The *Compassion in Dying* decision is therefore an important step toward a constitutional RTDWD.⁴⁹

exercise.

43. Quill et al., *supra* note 14, at 1380. Polls consistently demonstrate that many members of the medical community are in favor of PAS. See, e.g., David Brown, *Medical Community Still Divided on Oregon's Assisted Suicide Act*, WASH. POST, Nov. 13, 1994, at A20 (stating that 53% of Washington doctors support a right to PAS).

44. Quill et al., *supra* note 14, at 1381 (finding such requirements arbitrary when applied to individuals suffering from diseases like multiple sclerosis).

45. *Id.* (justifying this limitation on the rights of competent and incurably ill patients who cannot swallow or move on the grounds that PCE poses a greater risk of involuntary death than PAS).

46. 850 F. Supp. 1454, 1467 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

47. *Id.*

48. *Id.*

49. The decision was instrumental in shaping the constitutional challenges to laws banning assisted suicide in New York and Michigan. See, e.g., Quill v. Koppel, 870 F. Supp. 78, 84-85 (S.D.N.Y. 1994); People v. Kevorkian, 527 N.W.2d 714, 727 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795, and *cert. denied sub nom. Hobbins v.*

In striking down the Washington statute, the district court relied heavily on the Supreme Court's decision in *Planned Parenthood v. Casey*.⁵⁰ The court viewed the reasoning in *Casey* as incorporating a constitutional right to PAS because, "like the [constitutionally protected] abortion decision, the decision of a terminally ill person to end his or her life 'involves the most intimate and personal choices a person can make in a lifetime' and constitutes a 'choice central to personal dignity and autonomy.'"⁵¹ The court also reasoned that, because the suffering of a terminally ill patient cannot be deemed any less intimate than that of a pregnant woman, its mitigation is also constitutionally protected.⁵² Furthermore, because the federal court was obligated to prevent the State from resolving profound spiritual and moral questions in a categorical fashion,⁵³ it struck down the Washington law proscribing all forms of assisted suicide, just as the Court in *Casey* indicated that it would strike down statutes proscribing all abortions.

Also relying on *Casey* when protecting the right to PAS, the district court evaluated the effects of the statute under the undue burden test.⁵⁴ In applying the undue burden test, the court concluded that the State's interests in preventing suicide were incapable of justifying the absolute prohibition on assisted suicide.⁵⁵ The statute therefore constituted an undue burden on

Kelly, 115 S. Ct. 1795 (1995).

50. 112 S. Ct. 2791 (1992).

51. *Compassion in Dying*, 850 F. Supp. at 1459-60 (citing *Casey*, 112 S. Ct. at 2807). The court supported its conclusion by relying on *Cruzan* and the proposition that, "[f]rom a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment [for the purpose of hastening death] and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult." *Id.* at 1461.

52. *Id.* at 1459-60.

53. *Id.* at 1460 (citing *Casey*, 112 S. Ct. at 2806).

54. *Id.* at 1465 (citing *Casey*, 112 S. Ct. at 2820).

55. The State asserted two interests furthered by the statute: preventing suicide and preventing undue influence and abuse. *Id.* at 1464-65. The court characterized the State's interest in preventing suicide as narrowly focused on deterring suicide by children and by adults with significant remaining natural life spans. *Id.* at 1464. This interest was unaffected by the actions of a competent and terminally ill adult. *Id.* Borrowing from *Cruzan*, the opinion noted that the risks associated with PAS are also present when a person elects to forego treatment, yet the right to refuse treatment is not discounted on this basis. *Id.* at 1467.

the right of a competent and terminally ill person to PAS.⁵⁶

The Court of Appeals for the Ninth Circuit, however, reversed the Washington District Court.⁵⁷ Confining the language of *Casey* to the abortion context,⁵⁸ the court of appeals suggested that the *Cruzan* decision did not support a right to PAS because the plurality recognized a state's unqualified interest in preserving life—an interest exemplified by laws proscribing assisted suicide.⁵⁹ In addition, Judges Noonan and O'Scannlain found no support for the right to PAS in other Supreme Court precedent or in our national traditions.⁶⁰ The State's interests in preventing coercion and abuse were therefore sufficient to justify the ban on assisted suicide.⁶¹

Oregon's Measure 16

Like the decisions in *Cruzan* and *Compassion in Dying*, the enactment of Measure 16 was a legal first. Passed on November 8, 1994, the Oregon Death with Dignity Act is the only voter-initiated legislation to create a right to PAS.⁶² Although the law is very limited in its scope and very rigid in its regulation of the practice of assisted suicide, it is also an important step toward a RTDWD.⁶³

The law has several salient features. First, the right to PAS is possessed only by Oregon residents with less than six months to live.⁶⁴ Second, a doctor's obligations⁶⁵ before writing a pre-

56. *Id.* at 1465.

57. *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir.), *reh'g en banc granted*, 62 F.3d 297 (9th Cir. 1995).

58. *Id.* at 590.

59. *Id.* at 591 (citing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 280 (1990) (plurality opinion)).

60. *Id.*

61. *Id.* at 592-93. The dissent, however, argued that the *Casey* decision, when combined with the lack of a constitutionally significant distinction between the RTD and PAS, required the recognition of a constitutional right to PAS. *Id.* at 595-96 (Wright, J., dissenting).

62. See Brown, *supra* note 43.

63. It remains to be seen, however, whether the law will take effect. Implementation of Measure 16 has been temporarily enjoined pending the resolution of constitutional challenges to its provisions by doctors and their terminally ill patients, as well as residential care providers. See *Lee v. Oregon*, 869 F. Supp. 1491 (D. Or. 1994).

64. MEASURE 16, THE OREGON DEATH WITH DIGNITY ACT § 2.01, *reprinted in*

scription requested by a patient include explaining the patient's prognosis⁶⁶ and discussing alternatives to suicide.⁶⁷ Third, a second physician must examine the patient,⁶⁸ verify the diagnosis,⁶⁹ and attest that the person is capable and acting voluntarily.⁷⁰ If a patient appears to be suffering from a psychiatric illness, he must be referred for counseling,⁷¹ and no prescription can be written until he has overcome any diagnosed mental illness.⁷² Finally, the patient must obtain and take the drug⁷³ because the law specifically proscribes any form of euthanasia.⁷⁴

People v. Kevorkian⁷⁵

Rejecting the reasoning in *Compassion in Dying*, the Michigan Supreme Court in *Kevorkian* rebuked the constitutional challenges of Dr. Kevorkian and the Michigan ACLU and denied constitutional protection to those seeking assistance in the commission of suicide and those willing to provide it.⁷⁶ Foreshadowing the reasoning of the Ninth Circuit and a federal district court in New York, the majority refused to apply the reasoning of *Casey* to the RTDWD.⁷⁷ Moreover, the court also rejected the substantive due process inquiry utilized in *Casey* in favor of the framework articulated in *Bowers v. Hardwick*.⁷⁸ Applying the

Kathy T. Graham, *Last Rights: Oregon's New Death with Dignity Act*, 31 WILLAMETTE L. REV. 601 (1995).

65. Physicians are not required to assist in an individual's suicide. *Id.* § 4.01.

66. *Id.* § 3.01(2)(b).

67. *Id.* § 3.01(2)(e).

68. *Id.* § 3.02.

69. *Id.*

70. *Id.*

71. *Id.* § 3.03.

72. *See id.*

73. *See id.* § 4.01(1).

74. *Id.* § 3.14.

75. 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795, and *cert. denied sub nom.* Hobbins v. Kelly, 115 S. Ct. 1795 (1995).

76. *Id.* at 727-28.

77. *Id.* at 730. The court also distinguished *Cruzan* by stating that a constitutionally significant difference exists between withholding or withdrawing medical treatment and actively hastening death. *Id.* at 728-29.

78. *See id.* at 730.

Bowers methodology, the court concluded that there was no constitutional right to assisted suicide because there was no historical legal tradition protecting suicide.⁷⁹ In bolstering its conclusion, the majority argued that, even under a substantive due process theory derived from Justice Harlan's opinion in *Poe v. Ullman*,⁸⁰ on which the *Casey* joint opinion relied,⁸¹ it would have reached the same conclusion because the right to assisted suicide is a "radical departure from historical precepts."⁸²

Quill v. Koppell⁸³

For reasons very similar to those enunciated by the Michigan Supreme Court in *Kevorkian*, a federal district court in New York rejected a constitutional challenge to New York's ban on assisted suicide.⁸⁴ Like the Michigan Supreme Court and the Ninth Circuit, the *Quill* opinion refused to construe the Supreme Court's holdings in *Casey* and *Cruzan* as broad enough to protect the right to PAS.⁸⁵ Similarly, the court also refused to apply the substantive due process framework adopted by the joint opinion in *Casey* and, instead, relied on the Court's decision in *Bowers*.⁸⁶

79. *Id.* at 730-33.

80. 367 U.S. 497 (1961).

81. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805, 2806, 2811 (1992).

82. *Kevorkian*, 527 N.W.2d at 730. The dissenting opinions, however, argued that the reasoning underlying the *Casey* decision indicated a constitutionally protected right to PAS in some cases. *See, e.g., id.* at 750-51 (Levin, J. concurring in part and dissenting in part); *id.* at 752-53, 759 (Mallett, J., concurring in part and dissenting in part). Furthermore, one dissenter argued that the majority had misapplied Justice Harlan's theory of substantive due process. *See id.* at 756-57 (Mallett, J., concurring in part and dissenting in part).

83. 870 F. Supp. 78 (S.D.N.Y. 1994).

84. *Id.* at 84-85.

85. *Id.* at 83 (interpreting *Casey* as limited to decisions involving abortion, procreation, and childrearing, while suggesting that *Cruzan* did not articulate a constitutional RTD and that, if it had, there would be a constitutionally significant difference between the RTD and PAS).

86. *Id.* at 83-84.

The Legal and Jurisprudential Implications of These Recent Developments

As the recent developments involving the right to PAS indicate, the RTDWD must be constitutionally protected. Although the motives of the voters in Oregon and of the doctors who have proposed legalizing PAS are laudable, statutory protection for an important liberty is tenuous; what the present majority confers, a later majority can rescind⁸⁷ until the constitutional "limits [on the ability of a state to] experiment[] at the expense of the dignity and personality' of the individual"⁸⁸ are defined.

An advocate of the RTDWD must therefore identify the appropriate method for judicial derivation and protection of unenumerated rights because the adoption of a particular substantive due process theory can determine the outcome of a constitutional challenge.⁸⁹ Equally important is an advocate's utilization of the strong public support for various conceptions of a RTDWD⁹⁰ within that theory because the development of this

87. This is the paradox of a republican form of government designed to protect individual liberty, for

[a]s long as the reason of man continues [to be] fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.

THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

Developments in the RTDWD debate have followed Madison's prediction. In California and Washington, for example, initiatives to legalize PAS initially enjoyed widespread public support but failed after opposition groups successfully utilized emotionally and religiously charged advertising. See Mary M. Penrose, *Assisted Suicide: A Tough Pill To Swallow*, 20 PEPP. L. REV. 689, 708-11 (1993).

88. *Poe v. Ullman*, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring)).

89. Compare, e.g., *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994) (employing the *Bowers* test and denying constitutional recognition of a right to PAS), *cert. denied*, 115 S. Ct. 1795, and *cert. denied sub nom. Hobbins v. Kelly*, 115 S. Ct. 1795 (1995) with *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994) (utilizing the *Casey* methodology and the implications of the *Cruzan* decision to recognize a constitutional right to PAS), *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

90. See DEREK HUMPHRY, *LAWFUL EXIT: THE LIMITS OF FREEDOM FOR HELP IN DYING* 25 (1993) (70% of the worldwide population supports "physician-aided dying"); Brown, *supra* note 43; Nancy Gibbs, *Love and Let Die*, TIME, Mar. 19, 1990, at 62, 64 (57% of the respondents to a Time/CNN poll favored assisted suicide); Dick Lehr,

right should not be the type of activism frowned upon by a Court reluctant to engage in any form of substantive due process analysis,⁹¹ but should instead be seen as the rational expansion of a rooted and developing societal tradition shaped by the RTD, as well as by important interests currently protected by statutes, the common law, and the Constitution.

In deriving the RTDWD, the recent developments involving PAS indicate that its contours must be defined,⁹² and the import of the Court's decisions in *Casey*⁹³ and *Cruzan*⁹⁴ discerned. Moreover, in evaluating infringements on the RTDWD, courts must develop an appropriate level of judicial scrutiny⁹⁵ and must also articulate the government's interests in protecting life and ensuring competency.⁹⁶ The next section argues for a substantive due process framework in which this derivation can take place.

Death and the Doctor's Hand, BOSTON GLOBE, Apr. 26, 1993, at 1 (90% of those polled favored assisted suicide); see also *infra* notes 319-35 and accompanying text (discussing legislation involving the RTD).

91. See, e.g., *infra* note 177.

92. As the various positions presented have shown, this process will involve the evaluation of proximity to death and present competency requirements, see *supra* notes 22-27, 40, 47, 64 and accompanying text, as well as the evolution of the RTD and its relationship to PAS, see *supra* notes 30, 43, 55, 59, 85 and accompanying text, and PCE, see *supra* notes 45, 74 and accompanying text.

93. Drawing on the different views expressed in the opinions discussing PAS, this inquiry will focus on the relevance of Justice Harlan's substantive due process theory, see *supra* notes 80-82 and accompanying text, and the reasoning in *Casey*, see *supra* notes 50, 58, 77, 85-86 and accompanying text.

94. Because *Cruzan* is the only Supreme Court decision involving the RTDWD, this examination will analyze the positions taken in *Cruzan* and their implications, see *supra* notes 27-42 and accompanying text, and also will review the similarities between the conduct protected by the RTD and the RTDWD, see *supra* notes 30, 43, 55, 59, 85 and accompanying text.

95. Compare *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279-82 (1990) (utilizing a balancing test) with *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1463-64 (W.D. Wash. 1994) (adopting the undue burden standard), *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g en banc granted*, 69 F.3d 299 (9th Cir. 1995) and *People v. Kevorkian*, 527 N.W.2d 714, 730 (Mich. 1994) (employing rational basis review), *cert. denied*, 115 S. Ct. 1795, and *cert. denied sub nom. Hobbins v. Kelly*, 115 S. Ct. 1795 (1995).

96. Broadening the focus of the courts that have confronted this issue, this project will involve an evaluation of an individual's right to life and the history of laws proscribing suicide. See *supra* note 28.

DERIVING UNENUMERATED RIGHTS: THE SUPREME COURT'S
PUZZLING SUBSTANTIVE DUE PROCESS JURISPRUDENCE

As demonstrated by *Roe v. Wade*,⁹⁷ the Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment has a substantive, as well as a procedural, component.⁹⁸ Nevertheless, the Court's substantive due process jurisprudence has varied dramatically since *Roe*, as the members of the "least dangerous branch"⁹⁹ have struggled to define an analytical framework for the resolution of constitutional challenges involving individual liberties not within the scope of specific constitutional provisions. The end, however, has not justified the means. Twenty-two years of acrimonious debate within the Court have yielded several competing, yet coexisting, approaches to, rather than a consensus on, matters of Due Process Clause interpretation.

This section will trace the development of the Supreme Court's substantive due process jurisprudence from its resurrection in Justice Harlan's dissenting opinion in *Poe v. Ullman*¹⁰⁰ and argue that, based on precedent and constitutional values, the interpretive framework developed by Justice Harlan should govern unenumerated rights claims. The first two prongs of this argument suggest that, because Justice Harlan's views have implicitly shaped many of the Court's decisions, including *Roe v. Wade*,¹⁰¹ and explicitly molded others, including *Moore v. City of East Cleveland*,¹⁰² his substantive due process theory should remain the lens through which the Court views liberty claims. The third prong of the argument posits that several of the Court's decisions have misconstrued the constitutional values enmeshed in Justice Harlan's theory and that, as a result, many of the difficulties associated with substantive due process, in-

97. 410 U.S. 113 (1973).

98. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992).

99. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). Of course, this characterization depends on the definition of "danger," for a weak Court may endanger constitutional liberties by failing to confront legislative and executive power.

100. 367 U.S. 497, 539-55 (1961).

101. 410 U.S. 113.

102. 431 U.S. 494 (1977).

cluding its impact on the Court's constitutional legitimacy, are consequences of the improper application of this theory.¹⁰³ The fourth, and most important, prong of this argument contends that Justice Harlan's substantive due process theory, unlike others utilized by the Court, is entirely consistent with the constitutional role of the Supreme Court within a government of separated, yet balanced, powers.

The Phoenix Rises from Its Ashes: Justice Harlan's Dissent in Poe v. Ullman

After the *Lochner* era,¹⁰⁴ the specter of substantive due process haunted even those Justices dedicated to an expansive articulation of the substantive freedoms protected by the Constitution.¹⁰⁴ Despite its constitutional legacy, the doctrine of substantive due process reappeared briefly in *Rochin v. California*,¹⁰⁵ only to be banished again by the Warren Court and the ascendance of the Equal Protection Clause.¹⁰⁶ Dissatisfied with the constitutional landscape unfolding before him, Justice Harlan announced that the Due Process Clause could "stand[] . . . on its own bottom"¹⁰⁸ and articulated a theory of substantive due process that was sensitive to individual liberty, state interests, and the role of the federal courts in our constitutional system.

103. *But cf.* David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 1049-51 (1992) (arguing that the trauma resulting from the Court's errors in applying substantive due process overshadows the benefits realized from application of the doctrine).

104. The *Lochner* era was a period in the early twentieth century when the Supreme Court struck down New Deal legislation and other laws on the grounds that those laws violated substantive due process. The period was typified by the Court's landmark opinion in *Lochner v. New York*, 198 U.S. 45 (1905).

104. *See infra* note 156 (discussing Justice Douglas's opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

105. 342 U.S. 165 (1952) (holding that the forcible pumping of a person's stomach violated the Due Process Clause).

106. *Cf. Shapiro v. Thompson*, 394 U.S. 618, 658-59 (1969) (Harlan, J., dissenting) (noting "unwise" extensions of suspect classifications under the Equal Protection Clause and arguing that when "a classification is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution," substantive due process renders equal protection analysis unnecessary).

108. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring).

Deriving Unenumerated Liberty Rights

Justice Harlan's substantive due process jurisprudence was premised on the Court's decision in *McCulloch v. Maryland*¹⁰⁹ and his belief that the Constitution was "built upon postulates of respect for the liberty of the individual."¹¹⁰ Applying these views to the problem of defining the liberty protected by the Due Process Clause, Justice Harlan found the incorporation doctrine to be inconsistent with the tenor of our Constitution¹¹¹ because the liberties protected by the Due Process Clause were not "isolated" instances of protected conduct,¹¹² but were instead a broad and continuous range, or "rational continuum,"¹¹³ of human activities.¹¹⁴ Substantive due process analysis therefore required a determination of whether an asserted liberty right could be placed on this rational continuum.

The contours of the rational continuum are illuminated by our living constitutional tradition,¹¹⁵ which consists of the purposes of the Constitution as they are rationally perceived and developed.¹¹⁶ An inquiry into the liberties protected by the Due Process Clause must therefore consider relevant constitutional precedent¹¹⁷ and society's evolving conception, as expressed in the

109. 17 U.S. (4 Wheat.) 316, 407 (1819) (stating that the nature of the Constitution "requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves").

110. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

111. See *id.* at 541-42 (Harlan, J., dissenting). Expanding on his two interpretive premises, Justice Harlan believed that the Due Process Clause was "an independent guaranty of liberty . . . more general and inclusive than the specific prohibitions" on government action contained in the first eight constitutional amendments. *Id.* at 542 (Harlan, J., dissenting).

112. *Id.* at 543 (Harlan, J., dissenting).

113. *Id.* (Harlan, J., dissenting).

114. *Id.* at 543-44 (Harlan, J., dissenting) (suggesting that the purposes behind the first eight amendments are evidence of a "rational continuum" of protected conduct that comprises the liberty protected by the Due Process Clause); see *Duncan v. Louisiana*, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting).

115. See *Duncan*, 391 U.S. at 176-77 (Harlan, J., dissenting); *Poe*, 367 U.S. at 543-44 (Harlan, J., dissenting); John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 944 (1963).

116. See *Poe*, 367 U.S. at 544 (Harlan, J., dissenting); Harlan, *supra* note 115, at 943-44.

117. See *Duncan*, 391 U.S. at 176 (Harlan, J., dissenting); *Poe*, 367 U.S. at 544

development of our nation's practices and laws, of the proper balance between individual liberty and state authority.¹¹⁸ Whether a liberty claim can take its place on the rational continuum is determined by its relationship to the living constitutional tradition.

No formula exists, however, for deciding what type of relationship must exist before constitutional protection will be afforded to an aspect of liberty.¹¹⁹ Instead, four principles guide this determination. First, constitutional interpretation requires judges to exercise rational and reasoned judgment.¹²⁰ Second, when confronted with an unenumerated rights claim, a judge must exercise restraint.¹²¹ Third, a decision granting constitutional protection to a liberty right must build on the shared aspects, not the incongruent elements, of the living constitutional tradition,¹²² recognizing that, although its three components will rarely be in complete harmony, a constitutional right may still exist. Fourth, a protected liberty right should not merely duplicate a historical practice but should take "its place in relation to what went before and further [cut] a channel for what is to come."¹²³

(Harlan, J., dissenting).

118. See *Duncan*, 391 U.S. at 176-77 (Harlan, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring); *Poe*, 367 U.S. at 542 (Harlan, J., dissenting); Harlan, *supra* note 115, at 943-44.

119. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). Although Justice Harlan suggested in 1961 that homosexuality, abortion, suicide, and euthanasia were not likely to receive constitutional protection (at that time), see *id.* at 547 (Harlan, J., dissenting), his statement does not prohibit utilizing his theory to derive constitutional protection for one of these activities because, as Justice Harlan noted, adherence to his theory "will not . . . obviate all constitutional differences of opinion among judges, nor should it." *Griswold*, 381 U.S. at 501 (Harlan, J., concurring). More importantly, given Justice Harlan's views on the evolutionary nature of the Due Process Clause, the fact that a right was not protected in 1961 cannot prevent that right's protection in the 1990s. See *Duncan*, 391 U.S. at 176-77 (Harlan, J., dissenting).

120. *Poe*, 367 U.S. at 542, 544-45 (Harlan, J., dissenting) (quoting *Rochin v. California*, 342 U.S. 165, 170-71 (1952)).

121. *Id.* at 542 (Harlan, J., dissenting); see *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

122. See *Duncan*, 391 U.S. at 176 (Harlan, J., dissenting); *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (stating that "[a] decision of this Court which radically departs from [our living constitutional tradition] could not long survive, while a decision which builds on what has survived is likely to be sound").

123. *Poe*, 367 U.S. at 544 (Harlan, J., dissenting) (alteration in original) (quoting

Determining If a Liberty Right Has Been Unconstitutionally Infringed

Mirroring his dissatisfaction with formalistic substantive due process analysis, Justice Harlan decried inflexible methods of determining whether a right protected by the Due Process Clause had been unconstitutionally infringed.¹²⁴ Relying on his view of the Due Process Clause as a balance between individual "liberty and the demands of organized society,"¹²⁵ Justice Harlan described the determination of whether a protected liberty right had been impermissibly infringed as a balancing of the impact of the government action on the exercise of that liberty against the state interests advanced by the regulation and the means chosen to effectuate those interests.¹²⁶

Justice Harlan's opinions in *Poe* and *Shapiro* indicate that this balance was calibrated according to the degree of government regulation implicated in each case. In *Poe*, for example, Connecticut *prohibited* a constitutionally protected liberty.¹²⁷ Because a ban constituted the greatest possible infringement on the exercise of a protected liberty, the balance was calibrated to favor Connecticut only upon a showing that the ban was narrowly tailored to further a compelling state interest.¹²⁸ When confronted, however, with a welfare residency requirement that *indirectly* and *insubstantially* impacted on the right to travel,¹²⁹ Justice Harlan concluded that the balance required the State to show that the regulation was "clearly suited" to the furtherance of "legitimate" state interests.¹³⁰

These decisions illustrate two important aspects of Justice

Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)). Justice Harlan's evolutionary view of tradition and the Due Process Clause accords with the judicial role articulated in *The Federalist*. See *infra* notes 148-53 and accompanying text.

124. See *Shapiro v. Thompson*, 394 U.S. 618, 661-62, 677 (1969) (Harlan, J., dissenting); *Griswold*, 381 U.S. at 500-01 (Harlan, J., concurring).

125. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

126. See *Shapiro*, 394 U.S. at 674, 676-77 (Harlan, J., dissenting); *Poe*, 367 U.S. at 554 (Harlan, J., dissenting).

127. *Poe*, 367 U.S. at 548-49 (Harlan, J., dissenting).

128. *Id.* at 543, 554 (Harlan, J., dissenting).

129. *Shapiro*, 394 U.S. at 676 (Harlan, J., dissenting).

130. See *id.*

Harlan's substantive due process theory. First, all government regulations, regardless of their degree of infringement on a protected liberty right, are subjected to a meaningful balancing test rather than formalistic scrutiny.¹³¹ Second, the balance is calibrated flexibly: as the burden imposed on the protected right becomes increasingly direct and substantial, the asserted state interests must be stronger and better-tailored in order to justify the regulation.¹³²

The implications of Justice Harlan's position appear when one compares his dissenting opinion with the majority's holding in *Shapiro*. In *Shapiro*, the majority struck down state laws conditioning welfare eligibility on a period of in-state residency.¹³³ Employing strict scrutiny review based on the fundamental rights strand of Equal Protection Clause analysis, the Court found the laws to be unconstitutional infringements on the right to travel.¹³⁴ Although Justice Harlan agreed that the residency requirement impacted on the right to travel, he argued that infringements on an unenumerated liberty were the province of substantive due process rather than equal protection.¹³⁵ Employing substantive due process principles, Justice Harlan con-

131. See TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 313 (1992).

132. *Poe* and *Shapiro* dealt with opposite ends of the spectrum of potential government regulation. At one pole is a complete ban on an activity that is subjected to strict scrutiny. See *Poe*, 367 U.S. at 548 (Harlan, J., dissenting). At the other pole is an indirect and insubstantial effect on an activity that is justified when the regulation is clearly suited to the furtherance of legitimate State interests. See *Shapiro*, 394 U.S. at 676-77 (Harlan, J., dissenting). It is logical to infer, then, that between these poles lie several types of government regulations that fall on a continuum from most burdensome to least burdensome, such as prohibitions, direct and substantial burdens, indirect and substantial burdens, direct and insubstantial burdens, and indirect and insubstantial burdens. As one moves along the continuum of burdens, from those that are indirect and insubstantial to those that are prohibitions, the balance is calibrated to require a more carefully justified government regulation.

133. *Shapiro*, 394 U.S. at 627.

134. *Id.* at 634, 638.

135. *Id.* at 659 (Harlan, J., dissenting). This difference was a critical distinction because the fundamental rights strand of substantive due process analysis did not exist in 1969. See *infra* note 167. Consequently, the Court might uphold a regulation evaluated under a substantive due process balancing test despite its infringement on an important liberty, whereas its evaluation under an equal protection test would lead to its invalidation.

cluded that several legitimate state interests¹³⁶ outweighed the indirect and insubstantial burden on the right to travel. In evaluating the majority's approach, Justice Harlan foreshadowed the attacks that would later be made on substantive due process analysis. He wrote that "extend[ing] the 'compelling interest' rule to all cases in which [fundamental] rights are affected [will] go far toward making this Court a 'super-legislature'"¹³⁷ in a way that a "judicial application of [substantive] 'due process'"¹³⁸ will not because "[v]irtually every state statute affects important rights."¹³⁹ Implicit in this critique of the Court's use of strict scrutiny was Justice Harlan's view that categorical approaches to protecting individual liberty were inconsistent with the constitutional doctrine of separated powers and with the role of government structure in "establishing and preserving American freedoms."¹⁴⁰

The Influence of Separation of Powers Principles on Substantive Due Process

Substantive due process is an important element of our constitutional system, for a charter designed to "secure . . . private rights against the danger of . . . a [majority] faction, and . . . preserve the *spirit* and *form* of popular government"¹⁴¹ would be poorly suited to the task if it protected only a finite number

136. *Shapiro*, 394 U.S. at 676 (Harlan, J., dissenting).

137. *Id.* at 661 (Harlan, J., dissenting).

138. *Id.* at 677 (Harlan, J., dissenting); see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 969-71 (1987) (stating that the Court's decisions in *Youngberg v. Romeo*, 457 U.S. 307 (1982) (relying on Justice Harlan's opinion in *Poe*), and *Plyler v. Doe*, 457 U.S. 202 (1982), reveal an effort by the Court, through balancing, to protect nontextual rights and keep the Court within the bounds of the Constitution). But cf. *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 218 (1992) (rejecting the use of balancing tests because they allow the federal courts to act as "superlegislatures").

139. *Shapiro*, 394 U.S. at 661 (Harlan, J., dissenting).

140. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring); see also *Shapiro*, 394 U.S. at 677 (Harlan, J., dissenting) (arguing that the majority's decision ignored the constitutional division of power among the three branches of the federal government).

141. THE FEDERALIST No. 10, *supra* note 87, at 80 (emphasis added). The constitutional balance, therefore, is not struck between individual liberty and *majoritarian* rule.

of individual liberties. In a constitutional system structured to protect liberty, the role of substantive due process must be shaped by principles of federalism and within the context of three separate and mutually checked governmental powers. As noted in *The Federalist*:

[The] separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty

. . . .

But the great security against a gradual concentration of the several powers in the same department consists in giving to . . . each department the necessary constitutional means and personal motives to resist encroachments of the others.

[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other¹⁴²

Substantive due process, as an aspect of judicial review,¹⁴³ is thus a check on legislative and executive power,¹⁴⁴ and is part of a constitutional structure designed to balance our commitments to individual liberty and the principles of republican government.

Our constitutional system, therefore, has an internal homeostasis—a theoretical point where the balance between individual liberty and legitimate government will be properly struck—that is realized when the proper amount of power is distributed in each of the three branches, as well as the states.¹⁴⁵ Although

142. THE FEDERALIST No. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

143. James Madison explicitly linked judicial review to the Bill of Rights. When he introduced the Bill of Rights to the first Congress, Madison stated that "independent tribunals of justice will consider themselves . . . guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative [sic] or executive." GALES & SEATON, ANNALS OF CONGRESS (1834), reprinted in BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 116 (1955) (emphasis added). The first eight amendments, however, were only a partial enumeration of constitutionally protected liberties and were supplemented by the Ninth Amendment. See *infra* notes 223-27 and accompanying text. Thus, the scope of judicial review of government actions implicating individual liberty was not entirely defined by the first eight amendments.

144. See THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the courts act as a "bulwark" against "encroachments").

145. See THE FEDERALIST No. 51, *supra* note 142, at 320-21 (arguing that liberty

no bright line test defines the appropriate amount of power for each constitutional actor, and no test could because power ebbs and flows between the branches and between the federal government and the states, the constitutional balance struck between liberty and both the spirit and form of popular government is threatened when power is allocated disproportionately among these actors. The constitutional balance can tilt unjustifiably toward unrestrained liberty or unfettered majority rule.¹⁴⁶

The issue confronting federal courts adjudicating constitutional claims based on the Due Process Clause thus becomes how to exercise the power of judicial review within this constitutional balance. Echoing Alexander Hamilton, Justice Harlan exhorted judges to use their judgment when engaging in this form of judicial review.¹⁴⁷

In *The Federalist*, Alexander Hamilton characterized the federal courts as "an intermediate body between the people and the legislature"¹⁴⁸ designed to maintain the constitutional balance by preventing, through the use of judicial review, "dangerous innovations in the government, and serious oppressions of the minor party in the community"¹⁴⁹ that would eventually "give [way] to better information, and more deliberate reflection."¹⁵⁰ While exercising judicial review in furtherance of the constitutional balance, however, the federal courts were not free to "substitute their own pleasure to the constitutional intentions of the

is protected in our constitutional system by "contriving the interior structure of the government [so] that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places").

146. This problem plagued democracies throughout history because government structures consistently failed to prevent democratic governments from fluctuating wildly between tyranny and anarchy. *THE FEDERALIST* No. 9, at 71 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The separation of powers, including principles of federalism, when combined with a system of checks and balances, was designed to maintain a balance between these two extremes. *Id.* at 72-73.

147. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting) (stating that substantive due process involves a "discriminating process of adjudication . . . [that] entails a 'gradual process of judicial inclusion and exclusion'") (quoting *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877)).

148. *THE FEDERALIST* No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

149. *Id.* at 469.

150. *Id.*

legislature."¹⁵¹ They could not "exercise WILL instead of JUDGMENT."¹⁵² The constitutional balance between individual liberty and the spirit and form of popular government therefore requires the sensitivity of federal courts to their constitutional role by exercising the power of judicial review in the service of reasoned judgment.¹⁵³

151. *Id.* at 468-69.

152. *Id.* at 469. *Cf.* *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (Harlan, J., concurring) (arguing that restrained judgment will prevent the federal courts from "roaming at large in the constitutional field"). Judicial will is thus the antithesis of judgment. The characteristics of judgment are discretion, as well as discerning and comparative reasoning, *see* BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921); *MERRIAM WEBSTER'S COLLEGIATE DICTIONARY* 633 (10th ed. 1993), which are also the trademarks of meaningful constitutional balancing and the derivation of unenumerated constitutional rights. The absence of these characteristics from the reasoning of a judicial opinion indicates an indiscriminate seizure or relinquishment of judicial power and a violation of the constitutional balance of power.

153. *See* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992); *Poe v. Ullman*, 367 U.S. 497, 544-45 (1961) (Harlan, J., dissenting). Justice Harlan's invocation of the separation of powers doctrine in response to the majority's use of strict scrutiny to invalidate incidental and insubstantial burdens on the right to travel in *Shapiro* was an objection to the exercise of judicial will. By employing strict scrutiny review, the majority in *Shapiro* failed to undertake the discretionary and discriminating process of evaluating the significance of the relevant State interests, as well as the degree of infringement on the affected liberty. Inherent in the doctrine of strict scrutiny, as it applies to *regulations* rather than *proscriptions*, *cf. supra* note 132, is judicial will because it otherwise indiscriminately invalidates any infringement on a fundamental right, thereby threatening the constitutional balance of power.

Moreover, the differences between will and judgment are also present in the context of deriving rights. For example, the doctrine of incorporation—a means of restricting and expanding the reach of the Due Process Clause—was a doctrine that prevented judges from exercising judgment when determining whether a right protected by the Bill of Rights was applicable against the states, *see* *Duncan v. Louisiana*, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting), or whether an unenumerated liberty was entitled to constitutional protection, *Poe*, 367 U.S. at 543 (Harlan, J., dissenting). If stringently applied, the incorporation doctrine would deny even minimal constitutional protection to some types of conduct, thereby granting the political majority unfettered authority to interfere with many individual liberties and violating separation of powers principles.

The proper exercise of judicial review is thus conditioned upon the exercise of judgment in both deriving rights and evaluating the constitutionality of burdens imposed on them. Formulas that reduce this process to a mechanical inquiry, such as strict scrutiny review, rational basis review, and the dichotomies between fundamental and nonfundamental rights, disturb the constitutional balance inherent in the separation of powers doctrine. An informed approach to deriving unenumerated rights, when accompanied by a meaningful balancing of competing interests, is the

*The Phoenix's Second Life: Griswold to Moore*Griswold v. Connecticut¹⁵⁴

In *Griswold*, the Supreme Court invalidated the Connecticut contraceptive law that prompted Justice Harlan's dissent in *Poe*.¹⁵⁵ Still wary of substantive due process, the Court failed to adopt Justice Harlan's theory. Instead, Justices Douglas and Goldberg penned two competing approaches to unenumerated rights analysis, both of which invalidated the law as a violation of marital privacy.¹⁵⁶

Eisenstadt v. Baird¹⁵⁷

Seven years later, in *Eisenstadt v. Baird*, the Court addressed the right of an unmarried person to receive contraceptive devices.¹⁵⁸ Although the Court determined that the Fourteenth Amendment protected this right, it did so on equal protection grounds.¹⁵⁹ In explaining its decision, the Court characterized the right of privacy as "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the *decision* whether to bear or beget a child."¹⁶⁰ With these words, the foundation of *Roe* became constitutional doctrine.¹⁶¹

most constitutionally legitimate method by which the judiciary can fulfill its obligation to protect individual liberties within a system of government dedicated to republican ideals.

154. 381 U.S. 479 (1965).

155. *Id.* at 480, 486; see also *Poe*, 367 U.S. at 499 (reviewing the same Connecticut statute).

156. Justice Douglas argued that the guarantees of the First, Third, Fourth, Fifth, and Ninth Amendments, when read together and applied by the Fourteenth Amendment, created a zone of privacy unjustifiably infringed by the Connecticut law. *Griswold*, 381 U.S. at 484-86. Justice Goldberg, on the other hand, relied on the Ninth Amendment and constitutional precedent to interpret the liberty protected by the Fourteenth Amendment to include a right of marital privacy. *Id.* at 486-87 (Goldberg, J., concurring).

157. 405 U.S. 438 (1972).

158. *Id.* at 446-47.

159. *Id.*

160. *Id.* at 453 (emphasis added).

161. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 543 (1994) (reviewing commentary on *Eisenstadt* that had concluded that *Eisenstadt* was "an unmistakably calculating effort to pave the

Roe v. Wade¹⁶²

The Supreme Court in *Roe* recognized that the right to privacy, grounded in the liberty protected by the Fourteenth Amendment's Due Process Clause, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁶³ After reviewing the history of abortion regulation¹⁶⁴ and relevant state interests,¹⁶⁵ the Court concluded that the right to an abortion was qualified,¹⁶⁶ but that its status within the fundamental right of privacy prevented its regulation in the absence of a narrowly tailored regulation furthering a compelling state interest.¹⁶⁷

Despite its reliance on the Due Process Clause, the *Roe* decision was not entirely consistent with Justice Harlan's substantive due process theory. In deriving the unenumerated right to a previability abortion, the *Roe* majority circumvented the breadth of the living constitutional tradition by failing to consider *explicitly* the balance between individual liberty and organized society reflected in evolving societal traditions and practices.¹⁶⁸ The

way for a constitutional right to choose abortion").

162. 410 U.S. 113 (1973).

163. *Id.* at 153. Twelve years after Justice Harlan's dissenting opinion in *Poe*, the Court accepted his contention that the Due Process Clause offered constitutional protection for unenumerated rights. The Court did not, however, consider the right to a previability abortion to be a liberty right. *Id.* Instead, the Court viewed the decision to terminate a pregnancy as a component of the right to privacy protected by the Due Process Clause. *Id.* at 154. Therefore, as *Eisenstadt* suggested, the right to privacy sheltered individual activities involving reproductive autonomy and functioned as an independent constitutional provision.

164. *Id.* at 129-52.

165. The Court found that a state's interests in safeguarding maternal health and protecting potential life were important and, at some point in the pregnancy, compelling. *Id.* at 154.

166. *Id.*

167. *Id.* at 155-56 (citing, ironically, *Shapiro v. Thompson*, 394 U.S. 618 (1968)). *Roe* imported fundamental rights and strict scrutiny concepts into substantive due process analysis. Utilizing strict scrutiny, the Court concluded that: during the first trimester, the abortion decision was between a woman and her physician, *id.* at 164; a state's interest in the health of the mother justified regulation of the abortion procedure in ways "reasonably related to maternal health" after the first trimester, *id.*; and a state's interest in potential life allowed postviability regulation and prescription of abortion absent interference with the life or health of the mother, *id.* at 164-65. This framework invalidated a large number of abortion regulations. *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973).

168. Although the *Roe* opinion surveyed the history of abortion regulation and

Court also abandoned the Harlan model with respect to the level of scrutiny to be given to abortion regulations,¹⁶⁹ thereby dis-

discussed relevant societal trends, *Roe*, 410 U.S. at 129-52, it did not incorporate the evolution of abortion regulation into its decision to recognize a right to a previability abortion. Instead, the Court relied exclusively on constitutional precedent. *Id.* at 152-54. Moreover, by locating the right to a previability abortion within the right to privacy, *id.* at 153, the Court may have created an analytically distinct category of unenumerated rights analysis, see *supra* note 163, in order to diminish the role of societal and historical traditions in unenumerated rights analysis, see G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV. 1509, 1567-68 (1993).

Under a proper conception of Justice Harlan's substantive due process theory, however, consideration of the relevant social and historical evidence would have suggested a right to a previability abortion. See Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765, 765-84 (1973). Initially, at common law, abortion was not illegal until the sixteenth to eighteenth week of pregnancy. *Roe*, 410 U.S. at 132. Nonetheless, abortion statutes designed to protect maternal health eventually prohibited abortions in most contexts. *Id.* at 139. The balance between individual liberty and State authority shifted again during the 1960s, however, as many states liberalized their abortion regulations. *Id.* at 140. This reversal, when combined with the medical profession's broad interpretations of the more liberal statutes, see GARROW, *supra* note 161, at 374-75, indicated that, at the time of *Roe*, the practices and laws of the nation drew a wavering line between a woman's liberty and State authority that allowed for: abortions in some circumstances (rape, incest, danger to the life or health of the mother) or possibly through a certain point in pregnancy; widespread regulation of abortion; and prohibitions on abortion throughout a little more than half of pregnancy. In addition, relevant precedent had developed the Constitution's dedication to individual liberty by protecting reproductive decisions. Thus, the holding in *Roe* could have stated explicitly that the elements of our living constitutional tradition suggested a woman's right to an abortion during the early stages of pregnancy.

169. Although a law *proscribing* a constitutionally protected liberty right would be subjected to strict scrutiny under Harlan's theory, see *supra* notes 128, 132 and accompanying text, *regulating* the exercise of that right would not, see *supra* notes 123, 129-30, 132 and accompanying text. Whereas the *Roe* trimester framework required a compelling State interest to justify an abortion regulation during pregnancy and found the government's interests to be compelling at 12 weeks for reasons of maternal health and at viability for the protection of potential life, a balancing approach would uphold properly tailored abortion *regulations* throughout pregnancy, provided that the effect on the abortion right was outweighed by a sufficient State interest.

Moreover, the balancing approach is consistent with the historical and societal traditions recognized by the *Roe* majority. As the majority in *Roe* noted, abortion regulation was being liberalized, not jettisoned, during the 1960s and early 1970s. *Roe*, 410 U.S. at 140. Recognizing a right to a previability abortion was an incremental broadening of a protected liberty justified by constitutional precedent protecting reproductive decisions. Denying the State the power to regulate previability abortions, however, was a significant departure from the evolving notion of the State's constitutional authority to participate in the abortion decision. This departure led to

rupting the constitutional balance maintained by a proper separation of powers.¹⁷⁰

Moore v. City of East Cleveland¹⁷¹

Although *Roe* was a seven-to-two decision, the Court's unenumerated rights jurisprudence was losing its supporters even when invoked in less controversial constitutional arenas. In *Moore*, a five-to-four decision, the Court struck down a city ordinance prohibiting a grandmother from living with her grandson because it interfered with family privacy.¹⁷² In deriving a right of family privacy, the majority expressly invoked,¹⁷³ and correctly applied, Justice Harlan's theory of substantive due process.¹⁷⁴ Ironically, the first Supreme Court decision to properly apply substantive due process theory was also the last.¹⁷⁵

the increasingly divisive abortion decisions of the 1980s and 1990s, *see, e.g.*, *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2818 (1992) (rejecting the trimester framework of *Roe*), and the abandonment of meaningful substantive due process review for other possible aspects of liberty as well, *see, e.g.*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (failing to overrule *Roe* by one vote); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (rejecting a liberty right claim in a five-to-four decision); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting a liberty right claim by a five-to-four vote again).

170. The majority's indiscriminate use of strict scrutiny implicated the same separation of powers concerns as those associated with the Court's holding in *Shapiro*. *See supra* note 153.

171. 431 U.S. 494 (1977).

172. *Id.* at 495-96, 506 (utilizing strict scrutiny review).

173. *Id.* at 501-02. By noting that substantive due process "counsels caution and restraint . . . not . . . abandonment," *id.* at 502, the Court recognized its role in maintaining the constitutional balance between individual liberty and the essence of popular government.

174. Reviewing the development of our constitutional purposes, the Court described its precedent as protecting "choices concerning family living arrangements." *Id.* at 499. Examining the balance struck between the family and the State throughout our nation's history, the Court found that protection of "a larger conception of the family," *id.* at 505, was "deeply rooted in this Nation's history and tradition," *id.* at 503. The Court thus had no difficulty harmonizing the elements of our living constitutional tradition and concluding that the right of a grandmother to live with her grandson was part of this tradition. Furthermore, the Court appropriately invoked strict scrutiny because the ordinance was a *ban* on a constitutionally protected activity.

175. Although *Youngberg v. Romeo*, 457 U.S. 307 (1982), explicitly invoked Justice Harlan's theory, it is more appropriately placed within the genre of Court decisions dealing with institutionalized persons.

The Phoenix's Second Death: Bowers to Cruzan

Bowers v. Hardwick¹⁷⁶

Concerned with its constitutional legitimacy,¹⁷⁷ the Court in *Bowers v. Hardwick*, another five-to-four decision, rejected both the claim that the Due Process Clause protected a right to consensual homosexual sodomy¹⁷⁸ and the Court's prior unenumerated rights jurisprudence as applied in *Roe* and *Moore*.¹⁷⁹ By departing from Justice Harlan's model of substantive due process, however, the Court's cure was far more constitutionally infirm than the disease.

In *Bowers*, the Court designed a test for unenumerated rights claims that constrained judicial discretion by focusing on tradition.¹⁸⁰ The Court stated that a liberty right was protected only when it was fundamental—"implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it was] sacrificed"¹⁸¹—or when it was "deeply rooted in this

176. 478 U.S. 186 (1986).

177. The Court was disturbed by what it perceived to be the role of personal values in unenumerated rights analysis. See *id.* at 191. The Court noted that it was: most vulnerable and . . . nearest to illegitimacy when it deal[t] with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . [As a result] [t]here should be . . . great resistance to expand[ing] the substantive reach of [the Due Process Clause] Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Id. at 194-95.

178. *Id.* at 189.

179. See *id.* at 194 (stating, "[n]or are we inclined . . . to discover new fundamental rights imbedded in the Due Process Clause").

180. See *id.* at 191-92; cf. *Moore v. City of E. Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting) (stating that "[w]hat the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable"). Justice White's inclinations in *Moore* were correct. The Court's reliance on history and tradition cannot eliminate judicial discretion, nor can it prevent a decisionmaking process shaped to some extent by a judge's personal jurisprudence. See *Michael H. v. Gerald D.*, 491 U.S. 110, 137-41 (1989) (Brennan, J., dissenting) (noting that the selection of a tradition, its level of generality, its content, and its period of existence are all value judgments requiring as much discretion as the recognition of fundamental rights through the use of reasoned judgment); accord JOHN H. ELY, *DEMOCRACY AND DISTRUST* 60-63 (1980).

181. *Bowers*, 478 U.S. at 191-92 (citing *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

Nation's history and tradition."¹⁸²

Although it retained the fundamental rights framework, the *Bowers* analysis was the jurisprudential antithesis of *Roe*. Whereas *Roe* had relied on a right to privacy that reduced the role of tradition in unenumerated rights analysis, *Bowers* shifted the focus of unenumerated rights claims to a liberty right¹⁸³ defined exclusively by tradition. This method of giving content to the liberty of the Due Process Clause altered the judicial role by forcing judges to resolve liberty claims on the basis of historical inquiry rather than careful examination of constitutional precedent and purposes.

In repudiating the *Roe* approach, however, the Court also abandoned sound constitutional decisionmaking. By emphasizing tradition over judicial reasoning, the Court characterized constitutionally protected liberties as isolated instances of individual conduct¹⁸⁴ and treated the Due Process Clause as nothing more than a proxy for traditional, or once majoritarian, values.¹⁸⁵

182. *Id.* at 192 (citing *Moore*, 431 U.S. at 503). This use of the *Moore* opinion was incorrect. The Court in *Moore* looked at the evolution of our constitutional purposes and found that protection of the family was "deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503. This use of tradition, however, was not the sole factor that determined whether the law challenged in *Moore* violated substantive due process nor was it a precondition for such a finding. Rather, the fact that the protection of the extended family was "deeply rooted" simply made it easier for the Court to reconcile the two elements of our living constitutional tradition and conclude that the family should be protected by the Due Process Clause.

183. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 n.7 (1990); Buchanan, *supra* note 168, at 1570-72.

184. See *Bowers*, 478 U.S. at 190-91 (describing the relevant constitutional precedent and concluding that "none of the rights announced in those cases bears any resemblance to the claimed constitutional right No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."). But cf. *id.* at 203-06 (Blackmun, J., dissenting) (stating that the Court's precedent, when read in conjunction, protected "sexual intimacy" and the right to engage in consensual sodomy).

185. See *id.* at 192-94 (noting that, until 1961, all 50 states outlawed sodomy but that, by 1986, only 24 states and the District of Columbia retained their sodomy bans). The majority's reliance on a minority position indicated a very cramped notion of tradition: once a majority of states bans an activity, that activity can never be afforded constitutional protection through the Due Process Clause unless a majority of states pass laws protecting that activity. A tradition is not created when a majority of states repeal criminal laws prohibiting a certain type of conduct.

This approach ignored the notion of a living constitutional tradition by failing to consider the evolution of societal views, as expressed in law, of the proper authority

The *Bowers* opinion not only ended meaningful substantive due process analysis; it also exacerbated the problems associated with the Court's previous analysis by retaining a scrutiny framework that violated the constitutional separation of powers.¹⁸⁶

Michael H. v. Gerald D.¹⁸⁷

The Court recognized the problems with its *Bowers* framework. Unfortunately, in responding to the retention of the "fundamental rights" dichotomy in *Bowers*, the Court failed to correct these problems in a manner consistent with the Court's role in maintaining the constitutional balance of power.¹⁸⁸

of the State and the liberty of the individual. See *id.* at 199-200 (Blackmun, J., dissenting). Moreover, by denying protection to a liberty right not *already* protected by a majority of the states, the *Bowers* test reduced the Due Process Clause to constitutional surplusage. See Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting). Under the Court's conception of the Due Process Clause in *Bowers*, the reach of judicial review was substantially shortened, for unenumerated rights challenges could only be successful when unnecessary.

186. The problems associated with substantive due process prior to *Moore* stemmed from the use of strict scrutiny to strike both bans on, and regulations of, protected liberty rights. The indiscriminate use of the power of judicial review, not the Court's recognition of protected liberties, resulted in a shift in the constitutional balance. Yet, the Court in *Bowers* eliminated the ability of the federal courts to recognize new liberties and retained, when it should have rejected, the strict scrutiny framework for evaluating infringements on protected liberty rights.

The *Bowers* test for substantive due process violated the constitutional doctrine of separation of powers in a manner exactly the opposite of that in *Roe*. Whereas the *Roe* formulation of unenumerated rights analysis was an exercise of a judicial "will-to-power," see NIETZSCHE, *supra* note 1, at 135, the *Bowers* articulation was an exercise of a judicial "will-to-nothingness," see *id.* at 122; see also CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 81-82 (1991) (describing *Bowers* as a "flight from reason"). In *Roe*, the Court utilized a broad framework for recognizing fundamental rights and strict scrutiny to strike down all infringements on those rights. In *Bowers*, however, the Court ensured that few, if any, liberties would be deemed fundamental and that government regulation of individual liberties not within the scope of the Bill of Rights, even if justified by only traditional notions of Judeo-Christian morality, would be upheld under rational basis review. The *Bowers* test therefore eliminated meaningful judicial review and promoted judicial abdication by equating judicial legitimacy with almost absolute deference to the democratic process. The *Bowers* test thus abolished the Court's role in maintaining the constitutional balance between individual liberty and the *spirit* and *form* of popular government, thereby violating separation of powers principles.

187. 491 U.S. 110 (upholding a California law presuming a child born to a married woman living with her husband to be the husband's child).

188. As a response to the two-tier scrutiny associated with the fundamental rights

In *Michael H. v. Gerald D.*, a fragmented five-to-four decision, Justice Scalia recognized that the use of tradition in *Bowers* invited a judge to rely upon personal values when interpreting the Constitution.¹⁸⁹ Although his opinion did not garner a majority, it revealed strong support for further refining the *Bowers* test and limited support for further constraining the process of deriving unenumerated rights by eradicating judicial discretion in the selection of tradition.¹⁹⁰ In contrast to the *Bowers* test, which was satisfied when either of its prongs was met,¹⁹¹ Justice Scalia articulated a two-part test for the recognition of a constitutionally protected form of liberty.¹⁹² Moreover, the basis of the first half of the test was a constrained historical inquiry designed to counter the role of judgment in substantive due process analysis.¹⁹³ Although Justice Scalia did not specify the

doctrine, the Court has viewed the rights protected by the Fourteenth Amendment as liberty interests. See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *Youngberg v. Romeo*, 457 U.S. 307 (1982). Although this approach had the potential to supplement the rigid strict scrutiny/rational basis dichotomy with a middle tier of scrutiny or a discriminating balancing test, the Court instead has protected liberty interests in a manner consistent with rational basis review. See Buchanan, *supra* note 168, at 1509; *supra* note 28.

189. *Michael H.*, 491 U.S. at 128 n.6 (stating that, because "general traditions provide such imprecise guidance, they permit judges to dictate rather than discern society's views"). This footnote was the only part of Justice Scalia's opinion not joined by Justices O'Connor and Kennedy. *Id.* at 132.

190. Ironically, Justice Scalia invoked Justice Harlan's concurring opinion in *Griswold* to support his articulation of the role of tradition in substantive due process analysis. *Id.* at 122-23.

191. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

192. *Michael H.*, 491 U.S. at 122 (stating that, in order for a liberty right to be protected by the Due Process Clause, it must be "fundamental" and a right that has "also . . . traditionally [been] protected by our society") (emphasis added). This two-part test further contorted the Court's Due Process Clause framework by suggesting that a right traditionally protected and fundamental should be treated as a "liberty interest." *Id.* at 127 ("This is not the stuff of which fundamental rights qualifying as liberty interests are made."). Infringements on liberty interests, however, were subjected to less scrutiny than were infringements on fundamental rights. See, e.g., *supra* note 28. Because liberty interests were "protected" by levels of scrutiny resembling rational basis review, a ban on a fundamental right qualifying as a liberty interest would be constitutionally permissible under Justice Scalia's formulation of the due process inquiry, but not under *Bowers*.

193. *Michael H.*, 491 U.S. at 127 n.6 (suggesting that judicial restraint and constitutional legitimacy would be served by limiting the substantive due process inquiry to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified").

level of scrutiny that would have been applied to a liberty right that survived his analytical framework, his approach, if it had been adopted, would have further narrowed the opportunity for meaningful judicial review of individual liberties, thereby exacerbating the separation of powers implications of *Bowers*.¹⁹⁴

*Cruzan v. Director, Missouri Department of Health*¹⁹⁵

Left without a clear approach to deriving unenumerated rights in the aftermath of three five-to-four decisions, the Court in *Cruzan* splintered on the issue of an appropriate substantive due process framework.¹⁹⁶ Although the plurality adopted a balancing test, any resemblance that this approach bore to Justice Harlan's theory was superficial, for the plurality failed to properly derive the unenumerated right.¹⁹⁷ Moreover, because the balancing test employed by the plurality was not calibrated in a meaningful manner,¹⁹⁸ it improperly shifted the constitutional balance through the exercise of judicial will.¹⁹⁹

194. The substantive due process framework adopted in *Bowers* violated the constitutional separation of powers by severely restricting the Court's ability to derive unenumerated rights and by subjecting nonfundamental liberties to rational basis review. The model advocated by Justice Scalia compounded this error by further curtailing the Court's ability to derive and protect unenumerated liberties.

195. 497 U.S. 261 (1990).

196. See *supra* notes 27-42 and accompanying text.

197. Compare *supra* notes 27-28 (discussing the reasoning of the *Cruzan* plurality opinion) with *supra* notes 109-40 (discussing Justice Harlan's model of substantive due process).

198. See *supra* note 28.

199. The plurality opinion violated separation of powers principles in two ways. First, by assuming, rather than recognizing, a constitutional right to refuse medical treatment, the plurality indicated an unwillingness to derive unenumerated rights. Second, by calibrating the balance in a manner similar to rational basis review, the plurality further suggested that it was unwilling to engage in any form of meaningful judicial review. See Buchanan, *supra* note 168, at 1509. In addition, Justice Scalia's rigid adherence to the text of the Constitution also indicated more than an unwillingness to derive unenumerated rights. Although the Court may have been correct in upholding the clear and convincing evidence requirement because of the importance of the State interest in safeguarding the decisionmaking process, *Cruzan*, 497 U.S. at 280-82, the manner in which it reached its conclusion revealed a deference to the democratic process that is inconsistent with the Court's role within our system of separated powers.

*The Phoenix's Third Life?: Planned Parenthood v. Casey*²⁰⁰

In *Casey*, the Supreme Court had an opportunity to repudiate conclusively substantive due process by overturning its most symbolic vestige, *Roe v. Wade*.²⁰¹ Instead, Justices Blackmun and Stevens concurred in parts of an extraordinary joint opinion by Justices O'Connor, Kennedy, and Souter that invoked Justice Harlan's theory of substantive due process²⁰² and upheld the "central holding" of *Roe*.²⁰³

Applying Justice Harlan's theory, the joint opinion reaffirmed a woman's right to a previability abortion on the basis of the right's relationship to constitutional principles²⁰⁴ and their development through relevant precedent.²⁰⁵ Consistent with Justice Harlan's model, these Justices also struck down the trimester framework and its connection to strict scrutiny.²⁰⁶ By replacing this framework with an undue burden standard, however, the authors of the joint opinion incorrectly applied Justice Harlan's approach to balancing and the separation of powers doctrine.²⁰⁷

200. 112 S. Ct. 2791 (1992).

201. *Id.* at 2803-05 (joint opinion) (considering and rejecting the incorporation and most-specific-tradition approaches to substantive due process as inconsistent with the nature of the Constitution as illustrated by the Ninth Amendment).

202. *Id.* at 2805, 2806, 2811.

203. *Id.* at 2821.

204. *Id.* at 2805 ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.").

205. *Id.* at 2807, 2810-11; see *infra* notes 229-57 and accompanying text. Because the Court did not confront for the first time in *Casey* the argument for a constitutionally protected right to a previability abortion but evaluated *Roe* and the constitutionality of state legislation enacted pursuant to that decision, an inquiry into the evolution of state laws and practices as an expression of constitutional tradition was implicit in the decision.

206. *Casey*, 112 S. Ct. at 2817-19. The trimester framework and its relationship to strict scrutiny undervalued the important State interests accepted by the *Roe* majority—protection of maternal health and protection of potential life—by preventing the State from pursuing these interests through previability regulations. *Id.* By eliminating strict scrutiny review of some previability abortion regulations but maintaining it for others, the joint opinion moved toward a constitutionally legitimate balancing of interests.

207. Rather than adopt a carefully calibrated balancing test, the Justices explained that an abortion regulation placing an undue burden on the abortion decision would be struck down. *Id.* at 2820. The Court defined an undue burden as a law having "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*; cf. *Shapiro v. Thompson*, 394

Nonetheless, as the narrowest unenumerated rights theory sustaining a woman's right to a previability abortion, Justice Harlan's substantive due process framework was catapulted into a position of interpretive preeminence by the joint opinion. The *Casey* decision therefore represents, with the exception of *Moore*, the Supreme Court's most accurate application of Justice Harlan's views and, consequently, its most constitutionally legitimate exercise of substantive due process.

Justice Harlan's Theory of Substantive Due Process As the Constitutional Standard

The Supreme Court's substantive due process jurisprudence and its quest for legitimacy have come full circle since *Roe*, as Justice Harlan's theory of substantive due process once again anchors the Court's approach to the Due Process Clause. A number of approaches to substantive due process, developed in a string of five-to-four decisions, however, remain, and the Court has not indicated the criteria that determine which framework

U.S. 618, 674 (1969) (Harlan, J., dissenting) (defining an undue burden as the point when, in the balancing of interests, a state's interests and their effectuation through regulation are outweighed by the burden imposed on a protected liberty).

Although the authors of the joint opinion did not indicate how the undue burden standard related to the previous strict scrutiny/rational basis dichotomy found in fundamental rights analysis, the implication was clear: whereas traditional strict scrutiny would strike down virtually any infringement of a fundamental right, the undue burden test would subject only substantial obstacles, including a ban, to strict scrutiny. Other regulations based on legitimate interests would receive rational basis review. See Elizabeth A. Schneider, Comment, *Workability of the Undue Burden Test*, 66 TEMP. L. REV. 1003, 1027 (1993). In essence, the undue burden standard reflects a refined strict scrutiny/rational basis framework—one that requires a greater degree of infringement of a liberty right in order to trigger strict scrutiny review, rather than a balancing test. Although the undue burden standard is not entirely consistent with separation of powers doctrine, it represents a more constitutionally legitimate accommodation of State and individual interests than does the use of strict scrutiny in *Roe* and the use of the rational basis test in *Bowers*.

It remains to be seen, however, if the undue burden standard will be utilized in other unenumerated rights contexts or in other areas of constitutional law. *Casey*, 112 S. Ct. at 2878-80 (Scalia, J., dissenting) (suggesting that the joint opinion did not address this issue but that the undue burden standard should be limited to the abortion context). But see *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994) (adopting the undue burden standard in the assisted suicide context), *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

applies to a particular case. This phenomenon has tarnished the Supreme Court's constitutional legitimacy by implying that the Justices select and shape interpretive standards based on the results that they want to reach in particular cases. Furthermore, many of the approaches *are* constitutionally illegitimate because they disregard the balance between individual liberty and the spirit of republican government embedded in the Constitution.

Adoption of Justice Harlan's theory would enhance the Court's constitutional legitimacy by reducing the perception of the Court as results-oriented and by harmonizing the Court's substantive due process jurisprudence with the Constitution's commitment to separation of powers principles. Justice Harlan's theory of substantive due process is therefore the constitutionally appropriate standard for interpreting the Due Process Clause and will be utilized to derive the constitutionally protected RTDWD.²⁰⁸

DERIVING THE CONSTITUTIONAL RIGHT TO DIE WITH DIGNITY

In order for an unenumerated liberty to receive protection under the Due Process Clause, it must be placed within the contours of our living constitutional tradition, which is shaped by our constitutional principles and their development. *A priori*, an unenumerated liberty must be clearly defined as a product of this living constitutional tradition. In its current form, however, the RTDWD is neither clearly defined nor the product of our living constitutional tradition.

Despite its prominent perch in American consciousness, the RTDWD is a poorly defined liberty. Because different influences shape its definition in different contexts,²⁰⁹ courts, scholars, and members of the medical community have disagreed about its meaning.²¹⁰ Yet, these definitions share an internal inconsis-

208. Nevertheless, the choice of a different Fourteenth Amendment framework does not diminish the force of the following arguments, it merely channels them toward a characterization of the RTDWD as fundamental and a description of tradition that cannot supplant this depiction.

209. See, e.g., Robert A. Sedler, *Constitutional Challenges to Bans on "Assisted Suicide": The View from Without and Within*, 21 HASTINGS CONST. L.Q. 777 (1994) (distinguishing the right to PAS advocated by the Michigan ACLU from Dr. Kevorkian's arguments and actions).

210. *Compare Compassion in Dying*, 850 F. Supp. at 1462 (holding that "a com-

tency: they arbitrarily limit the reach of the RTDWD when the interests underlying the right do not imply such limitations. An advocate for the RTDWD can avoid these analytical pratfalls, however, by arguing for the right at its most philosophically consistent and powerful level, thereby elevating the interests underlying the right to their appropriate constitutional status and placing the RTDWD squarely within the liberty protected by the Fourteenth Amendment's Due Process Clause.

Properly defined, the RTDWD is the right of a competent individual to control the circumstances surrounding her death.²¹¹ This right includes not only the right to refuse medical treatment, but also a right to PAS and, in some cases, PCE.²¹² Underlying this right are three interrelated individual interests: self-determination, including the right to life in its broadest sense and the rights of bodily integrity and freedom of conscience; dignity; and the mitigation of suffering.²¹³ Thus defined, the RTDWD is intertwined with our living constitutional tradition and entitled to constitutional protection because it is based on our Constitution's respect for liberty, the definition of liberty found in constitutional precedent, and society's evolving conception of the proper balance between individual liberty and state authority as reflected by our laws and practices.

Constitutional Purposes (As Perceived)

The Constitution represents a careful balancing of two potentially conflicting principles inherent in a free society—individual liberty and the “spirit and the form of popular government.”²¹⁴ The Due Process Clause of the Fourteenth Amend-

petent, terminally ill adult has a constitutionally guaranteed right under the Fourteenth Amendment to commit physician-assisted suicide”) and *Quill et al.*, *supra* note 14, at 1381 (suggesting that physicians should be able to aid their competent and incurably suffering and terminally ill patients in committing suicide) with Thomas J. Marzen, “Out, Out Brief Candle”: *Constitutionally Prescribed Suicide for the Terminally Ill*, 21 HASTINGS CONST. L.Q. 799 (1994) (arguing that, because the RTD is based on the common law of battery and informed consent, it includes only the right to refuse medical treatment).

211. See *supra* note 3.

212. See *supra* note 3.

213. See *supra* note 12.

214. See *supra* note 141.

ment, as a microcosm of this balance,²¹⁵ requires the Supreme Court, when confronted with an unenumerated rights claim, to exercise the power of judicial review in a manner that is consistent with this balance and that properly respects both of its components. Although "there can be no doubt that the meaning of 'liberty' must be broad indeed,"²¹⁶ the Supreme Court often has focused solely on the Constitution's commitment to democratic government when considering unenumerated rights claims, thereby undermining the Constitution's dedication to individual liberty.²¹⁷ A proper analysis of constitutional purposes in the context of an unenumerated rights claim therefore requires an understanding of constitutional theory as it relates to the scope of the term "liberty."

In *Two Treatises of Government*, John Locke argued that government existed as a response to the perils of its theoretical alternative—the state of nature. He noted that:

[M]an in the state of nature . . . [is] absolute lord of his own person and possessions [Y]et the enjoyment of [his absolute freedom] is very uncertain . . . [because it is] constantly *exposed to the invasion of others* [Therefore,] he seeks out and is willing to join in society with others who are already united, or have a mind to unite, for the mutual *preservation of their lives [and] liberties*.²¹⁸

According to Locke, the purpose of government is to protect individual rights and liberties, which are insecure in the state of nature because of the unchecked liberty and power of others.

Constructing a government capable of protecting these liberties but incapable of tyranny was, however, a difficult task. The Constitutional Convention attempted to meet this challenge by creating a government of limited powers. According to Federalist theory, a government of limited powers does not threaten individual liberties because its authority is constrained by its enu-

215. See *supra* note 125.

216. *Moore v. City of E. Cleveland*, 431 U.S. 494, 546 (1977) (White, J., dissenting) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972)).

217. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986).

218. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 184 (Thomas I. Cook ed., 1947) (emphasis added).

merated powers.²¹⁹ The logical force of this theory is diminished, however, by the presence of specific exceptions to government authority in Article I of the Constitution.²²⁰ Seizing on these examples, the Anti-Federalists argued that government is not limited by its enumerated powers and that liberties not specifically enumerated in Article I were threatened by the proposed Constitution.²²¹

Although the Constitution was ratified, James Madison urged the First Congress to respond to these concerns by proposing the Bill of Rights. Introducing the first eight amendments, he noted:

It cannot be a secret . . . that . . . there is a great number of our constituents who are dissatisfied with [the Constitution]; among whom are many . . . respectable for the jealousy they have for their *liberty*, which, though mistaken in its object, is laudable in its motive We ought not . . . disregard their inclination but . . . [should instead] expressly declare the great rights of mankind secured under this constitution.²²²

The decision to introduce a limited number of amendments revived Anti-Federalist concerns that a partial enumeration of individual liberties would not protect the panoply of retained liberties because "there [was] great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude."²²³ The First Congress

219. See THE FEDERALIST No. 84, at 513-15 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

220. See, e.g., U.S. CONST. art. I, § 9, cl. 2 (providing that the "privilege of the Writ of Habeas Corpus shall not be suspended"); U.S. CONST. art. I, § 9, cl. 3 (providing that "[n]o Bill of Attainder or ex post facto Law shall be passed"); see also THE FEDERALIST No. 84, *supra* note 219, at 511-15 (reviewing Anti-Federalist arguments against the Constitution and other specific exceptions to government authority).

221. See THE FEDERALIST No. 84, *supra* note 219, at 513-14 (reviewing and rejecting the argument: "why . . . should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?").

222. GALES & SEATON, *supra* note 138, at 108 (emphasis added).

223. Letter from James Madison to Thomas Jefferson (Oct. 17, 1778), in 1 THE FOUNDERS' CONSTITUTION 477 (Philip B. Kurland & Ralph Lerner eds., 1987). James Wilson expressed similar sentiments when he addressed the Pennsylvania Ratifying Convention: "In all societies, there are many . . . rights which cannot be particularly enumerated. . . . I consider that there are very few who understand the whole of these rights. All the political writers . . . have treated on this subject; but [none

thus was faced with a constitution unable to fulfill its primary purpose—protecting individual liberties—because the Bill of Rights was incapable of adequately circumscribing government authority.

In response to these concerns, James Madison proposed what would become the Ninth Amendment. He stated:

It has been objected . . . against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and . . . by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.²²⁴

However, Madison also added that “[t]he exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people.”²²⁵ As a result, the Ninth Amendment indicates not only that substantive due process cannot be limited by the incorporation doctrine²²⁶ but also that, in light of the political theories of Locke, Paine, and Madison, substantive due process should be viewed as a constitutional mandate requiring the courts to interpret the liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to protect “individual rights [not] fully derivable from [a] single [constitutional] provision but implicit in several, or in the structure of the Bill of Rights as a whole.”²²⁷

The balance between individual liberty and principles of republican government expressed in the Constitution is premised

has] . . . complete[ly] enumerat[ed the] rights appertaining to the people . . .” *Id.*, in 1 THE FOUNDERS’ CONSTITUTION, *supra*, at 454.

224. GALES & SEATON, *supra* note 138, at 115.

225. *Id.* at 111.

226. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992); *Griswold v. Connecticut*, 381 U.S. 479, 491-92 (1965) (Goldberg, J., concurring); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 53-54 (1991).

227. Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 107 (1987); cf. *supra* notes 109-23 and accompanying text (discussing Justice Harlan’s views on the derivation of unenumerated rights).

on the view that our system of government is "*built* upon postulates of respect for the liberty of the individual."²²⁸ The possibility of a constitutionally protected RTDWD is thus inherent in the Constitution's dedication to individual liberty. To conclude that such a right exists, however, one must examine the development of the Constitution's dedication to individual liberty.

Constitutional Purposes (As Developed)

Supreme Court Precedent

Whether the RTDWD is a part of our living constitutional tradition depends to a large extent upon its relationship to relevant constitutional precedent. Fidelity to our constitutional vision is not maintained, however, merely by examining the similarities between the RTDWD and other constitutionally protected liberties. Rather, the Constitution's dedication to individual liberty requires that an unenumerated rights inquiry into the development of constitutional purposes be a broad one, looking not only to the individual liberties protected by the Fourteenth Amendment and other constitutional provisions, but also to the purposes behind these provisions and the individual interests underlying recognized liberties. Placing an unenumerated liberty within our living constitutional tradition, therefore, depends upon establishing its resemblance to previously recognized liberties, the extent to which the interests it protects are in accord with the purposes of our constitutional provisions, and the degree of protection these interests have received in other contexts. An inquiry into constitutional precedent that is narrower in scope ignores the notion of liberty advanced by the Constitution.

The Court in *Casey* recognized the role of constitutional purpose in framing substantive due process decisions.²²⁹ Consequently, the Court conducted a broad inquiry into the relationship between the previability abortion right and the sphere of liberty protected by constitutional precedent.²³⁰ The Court ulti-

228. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (emphasis added).

229. *Casey*, 112 S. Ct. at 2806.

230. *Id.* at 2807-08, 2810-11.

mately concluded that the right to a previability abortion was protected by the Due Process Clause because the interests underlying this right were within the constitutional principle unifying three separate, yet overlapping, conceptions of the liberty protected by the Due Process Clause and other constitutional provisions.²³¹

An inquiry into whether the RTDWD merits constitutional protection should thus begin with a comparison of the individual interests underlying this right and the three strands of liberty identified by the *Casey* joint opinion because, as the district court in *Compassion in Dying* noted, the "reasoning in *Casey* [is] highly instructive and almost prescriptive on the . . . issue [of the RTDWD]." ²³² Nonetheless, because the Court in *Casey* was not confronted with the RTDWD, the individual interests underlying its holding are an illustrative, rather than exhaustive, list of relevant constitutionally protected interests. Consideration of Supreme Court decisions interpreting the First, Fourth, Eighth, and Fourteenth Amendments bolsters the conclusion that there is a constitutionally protected RTDWD.

Decisional Autonomy and the Right To Die with Dignity

The first strand of liberty identified by the Court in *Casey* involved a string of substantive due process decisions exemplified by *Griswold*.²³³ The Court noted that these decisions, including *Roe*, protected a sphere of liberty relating to intimate relationships, the family, and decisions about "whether to bear or beget a child."²³⁴ Considered together, the components of this strand of liberty demonstrate constitutional protection for an individual's right to make important decisions regarding the course of her life.²³⁵ This strand of liberty therefore encompass-

231. *Id.* at 2807.

232. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459, *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

233. *Casey*, 112 S. Ct. at 2810-11 (reviewing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

234. *Id.* at 2807 (quoting *Eisenstadt*, 405 U.S. at 453).

235. *See id.*; *see also Bowers v. Hardwick*, 478 U.S. 186, 218 (1986) (Stevens, J.,

es an individual's intertwined interests in self-determination and the framing of a life plan,²³⁶ which are two of the individual interests underlying the right to make one of life's most important decisions—the decision to die.

Placing an individual's interest in living the remainder of her life "in the woods"²³⁷ within this strand of constitutionally protected liberty is further suggested by an examination of the interests protected by the First Amendment. In *West Virginia State Board of Education v. Barnette*,²³⁸ the Court interpreted the First Amendment as "[reserving] from all official control"²³⁹ the "sphere of [individual] intellect and spirit."²⁴⁰ As a result, the Court held that the role of government in shaping individual lives was to be a limited one. The First Amendment prohibited the government, for example, from "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion or forc[ing] citizens to confess by word or act their faith therein."²⁴¹ Echoing the holding in *Barnette*, Justice Douglas's opinion in *Doe v. Bolton*²⁴² indicated that the First Amendment also prevented the government from interfering with an individual's "autonomous control over the development and expression of [his] intellect, interests, tastes, and personality."²⁴³

The right to control the circumstances surrounding one's death implicates these First Amendment protections because the psychological security provided by the RTDWD is essential to one's ability to live in a personally meaningful way.²⁴⁴ When

dissenting); *supra* notes 157-61 and accompanying text (discussing *Eisenstadt*).

236. *See supra* notes 4-11 and accompanying text.

237. *See supra* note 2 and accompanying text.

238. 319 U.S. 624 (1943).

239. *Id.* at 642.

240. *Id.*; *see also* *Procunier v. Martinez*, 416 U.S. 396, 427 (Marshall, J., concurring) ("The First Amendment serves . . . the needs of . . . the human spirit.").

241. *Barnette*, 319 U.S. at 642.

242. 410 U.S. 179 (1973).

243. *Id.* at 211 (Douglas, J., concurring) (emphasis omitted). Justice Brennan held the same views. *See* GARROW, *supra* note 161, at 535-36 (reviewing the genesis of Justice Douglas's concurring opinion).

244. *See supra* notes 4-11 and accompanying text; *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (suggesting that the First Amendment can be interpreted as protecting conduct that fosters individual self-realization and self-determination without improperly interfer-

an individual is denied this security by a law prescribing what is orthodox in death, the government has invaded the realm of individual spirit and substantially diminished an individual's ability to control the course of her life.²⁴⁵ This type of restriction on an individual's ability to make important decisions determining the course of her life is thus inconsistent with the strand of individual liberty associated with *Griswold* and its affinity to the purposes of the First Amendment.

Autonomy, Bodily Integrity, and the Right To Die with Dignity

The second strand of liberty that the Court recognized in *Casey* involved the protection of an individual's interests in autonomy and bodily integrity.²⁴⁶ Developed primarily through cases involving medical treatment,²⁴⁷ these interests, in their narrowest formulation, consistently have protected one aspect of the RTDWD—the right to refuse medical treatment.²⁴⁸

Autonomy and bodily integrity, however, also serve as justifications for a woman's right to a previability abortion.²⁴⁹ They complement the right of self-determination protected by *Griswold* and its progeny by protecting both a right to make important decisions regarding one's body and a right to medical assistance in having those decisions implemented.²⁵⁰ Because the RTDWD incorporates the right to refuse medical treatment, is a decision predicated on notions of personal autonomy and

ing with the legitimate claims of others).

245. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992) (foreshadowing the invalidation of such a law by questioning the proposition that a state can "resolve . . . [profound moral, spiritual and] philosophic[al] questions in such a definitive way that a [person] lacks all choice in the matter").

246. *Id.* at 2810.

247. See *id.* (reviewing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *Rochin v. California*, 342 U.S. 165 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)); see also *Winston v. Lee*, 470 U.S. 753 (1985) (utilizing the Fourth Amendment to prevent the surgical removal of a bullet from an unwilling patient); *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person . . .").

248. See *infra* note 254.

249. *Casey*, 112 S. Ct. at 2810.

250. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

bodily integrity, and requires medical assistance to be exercised, it is a right consistent with this strand of liberty.

Mitigation of Suffering and the Right To Die with Dignity

A woman's right to a previability abortion is not justified solely by her interests in self-determination, autonomy, and bodily integrity.²⁵¹ The *Casey* decision indicated that the right to a previability abortion constituted a unique thread of individual liberty,²⁵² justified in large part by concerns for a woman's suffering.²⁵³ The Court described a pregnant woman's suffering as:

too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives²⁵⁴

An individual's interest in mitigating suffering, in addition to autonomy and integrity concerns, is thus an important justification for a right to medical intervention as a component of individual liberty.²⁵⁵

Intimate and personal suffering, however, is not confined to the context of pregnancy. A person confronting death or an incurable and debilitating disease, for example, may also experience, and wish to avoid, both physical and spiritual suffering.²⁵⁶ In this circumstance, an individual's decision to hasten

251. See *Casey*, 112 S. Ct. at 2810-11 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

252. See *id.*

253. See *id.* at 2807.

254. *Id.* A person's interest in mitigating suffering is thus essential to an accurate understanding of individual liberty and the limits of legal and societal practices in shaping that liberty. See *id.* Similarly, under the rubric of "evolving standards of decency," concerns for human suffering can also justify departures from widely accepted societal practices. See *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (construing the Eighth Amendment and quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

255. See *Casey*, 112 S. Ct. at 2807.

256. See *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1460 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995); see also *Quill*, *supra* note 4 (describing the case of Diane); Timothy E.

death with medical assistance is shaped by a deeply personal notion of the value of life compared with the suffering that it entails. This decision therefore must be entrusted primarily to her judgment.²⁵⁷

Personal Dignity and the Right To Die with Dignity

Although notions of individual dignity reverberate in the Court's discussions of autonomy, bodily integrity, and suffering, the *Casey* opinion did not address specifically the dignity interest underlying the RTDWD as an independent aspect of the liberty protected by the Due Process Clause.²⁵⁸ Nonetheless, personal dignity in the context of death is protected explicitly by Supreme Court decisions interpreting the Fourteenth and Eighth Amendments.²⁵⁹

In her concurring opinion in *Cruzan*, Justice O'Connor drew on the Court's Fourth and Fourteenth Amendment jurisprudence, stating that "[r]equiring a competent adult to endure [medical treatment] against her will burdens [her interests in] liberty, *dignity*, and freedom Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment"²⁶⁰ Although the entire *Cruzan* decision, when read carefully, suggests that medical decisions implicating death are protected because they involve questions of human dignity,²⁶¹ explicit constitutional protection for a dying person's interest in dignity can be found in the Supreme Court's interpretation of the Eighth Amendment.²⁶²

Quill, *Doctor, I Want To Die. Will You Help Me?*, 270 JAMA 870 (1993) (describing the suffering of those facing death).

257. See *Casey*, 112 S. Ct. at 2807.

258. See *id.*

259. See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 173 (plurality opinion), *vacated*, 429 U.S. 875 (1976); *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

260. *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring) (emphasis added); see also *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 613-14 (1989) (stating that the Fourth Amendment protects individual dignity).

261. See *Cruzan*, 497 U.S. at 261.

262. See *Gregg*, 428 U.S. at 173; *Furman*, 408 U.S. at 270 (Brennan, J., concurring).

Notwithstanding the Court's rejection of constitutional challenges to modern methods of execution,²⁶³ several Justices have stated that the Eighth Amendment protects the basic "dignity of man" in the process of dying.²⁶⁴ Paralleling an individual's constitutionally protected interest in mitigating suffering, this dignity interest protects, at a minimum, an individual's interest in avoiding a "lingering death."²⁶⁵ Correspondingly, the Eighth Amendment prohibits a government from inflicting unnecessary pain and suffering during the dying process²⁶⁶ and from deliberately denying prisoners medical assistance that would alleviate their pain and suffering.²⁶⁷

The Eighth Amendment, therefore, explicitly protects one of the key interests underlying the RTDWD and demonstrates a constitutional commitment to the prevention of government action that causes an individual to suffer unnecessary pain or a lingering death, such as laws confining a person's right to control his own death to the process of starvation.²⁶⁸ It would be contrary to principles of constitutional interpretation and sadly ironic for the Court to utilize the Eighth Amendment to protect only those committing the most heinous crimes while denying the benefit of the humanity underlying this constitutional provision to those sentenced by life itself to struggle with the cruelty of the human condition.²⁶⁹

263. See Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 614 (1994).

264. See, e.g., *Gregg*, 428 U.S. at 173; *Furman*, 408 U.S. at 270 (Brennan, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

265. *In re Kemmler*, 136 U.S. 436, 447 (1890) (stating that "[p]unishments are cruel when they involve . . . lingering death").

266. See *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (plurality opinion).

267. See *Estelle*, 429 U.S. at 103-05.

268. See *Feiger*, *supra* note 16, at 670.

269. See *id.*

The Conduct Protected by the Right to a Previability Abortion, the Right To Die, and the Right To Die with Dignity

Although every interest underlying the RTDWD has received constitutional protection, a review of constitutional purposes would be incomplete without an examination of the contours of a woman's right to a previability abortion and the implications of an individual's right to refuse or withdraw medical treatment. When considered together, the interests underlying the RTDWD, as well as the specific types of conduct already protected by these interests, yield a conception of liberty that recognizes a right to control the circumstances surrounding death.

The rights recognized in the *Roe*, *Casey*, and *Cruzan* decisions indicate that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."²⁷⁰ This principle's protection of conduct in the abortion context provides strong support for a constitutionally protected RTDWD.

Abortion is an act "unique to the human condition."²⁷¹ Because one can view the right to a previability abortion as a liberty involving medical assistance in the *termination* of potential *life*, this right forms a distinctive strand of liberty protected by the Constitution, and is based on a balancing of interests like no other in constitutional law.²⁷² The individual liberty on the woman's side of the scale implicates constitutionally significant interests in self-determination, personal autonomy, bodily integrity, and the mitigation of suffering.²⁷³ The balancing analogy, however, is not entirely suited to the issue of a woman's right to an abortion because, unlike most constitutional balances that weigh an individual's liberty interest against *the State's* countervailing interests,²⁷⁴ the interests arrayed against a woman's liberty are not simply those of the State.²⁷⁵

270. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2810 (1992) (citations omitted).

271. *Id.* at 2807.

272. *See id.*

273. *See id.*

274. *See, e.g., Winston v. Lee*, 470 U.S. 753, 760 (1985).

275. *See Casey*, 112 S. Ct. at 2807.

Instead, the conflicting interests of a "quasi-third party," the fetus,²⁷⁶ are subsumed in the State's interest in protecting potential life and weighed against those of the woman.²⁷⁷ The law, however, generally restricts the scope of individual liberty in an effort to prevent harm to third parties.²⁷⁸ The act of abortion does not, and should not be forced to, fit within this general model.²⁷⁹ Similarly, because of the presence of the fetus, the act of abortion cannot be construed strictly as an act of self-regarding behavior.²⁸⁰ The right to a previability abortion, as an accommodation of these uniquely conflicting interests, is thus strong support for the principle that the State's interest in life, even when based on the potential life of a quasi-third party, cannot override entirely the exercise of an individual liberty requiring morally controversial medical assistance.²⁸¹

Consequently, if supplementing the State's interest in life with the interests of a quasi-third party cannot tilt the constitutional balance in favor of the State, then the removal of the quasi-third party interest from this balance, all other factors being equal,²⁸² would result in a *significant* shift in favor of individual liberty. The RTDWD results from such a shift.

The RTDWD is similar to a woman's right to a previability abortion in three constitutionally significant ways. First, every interest underlying a woman's right to a previability abortion also supports an individual's RTDWD.²⁸³ Second, like the right

276. For the purposes of this analysis, a previability fetus is considered to be a quasi-third party because, although it cannot be a person within the meaning of the Constitution, *Roe v. Wade*, 410 U.S. 113, 158 (1973), it is an entity that can be distinguished from the mother.

277. See *Casey*, 112 S. Ct. at 2807.

278. See, e.g., MINN. STAT. ANN. §§ 609.185-205 (West 1987) (homicide); MISS. CODE ANN. § 97-3-19 (1994) (homicide).

279. See, e.g., MINN. STAT. ANN. §§ 609.2661-2665 (creating a unique crime for terminating a fetus outside the abortion context); MISS. CODE ANN. § 97-3-37 (same).

280. See *Casey*, 112 S. Ct. at 2807.

281. See *id.*

282. All other things may not be equal, however, for the removal of the quasi-third party's interests from the balance may also, in the case of a competent individual, expel the State's interest in protecting life from the process of balancing competing interests. See *infra* notes 299-318 and accompanying text. For the purposes of the following analysis, however, the existence of an unqualified State interest in the preservation of life, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 282 (1990), will be assumed to be in conflict with the individual liberty in question.

283. Compare *supra* note 3 (listing the interests justifying the RTDWD) with *su-*

to a previability abortion, the exercise of the RTDWD also requires morally controversial medical assistance. Third, this assistance, in the form of PAS or PCE, is obtained for the purpose of *terminating a life*—albeit the life of the individual exercising the right rather than the potential life of the fetus. In the context of the RTDWD, everything else is equal except that the conflicting interests of a quasi-third party are absent. Because the combination of the State's interest in potential life and the presence of a quasi-third party does not outweigh a woman's right to obtain a previability abortion,²⁸⁴ the State's interest in the protection of life alone cannot outweigh an individual's right to medical assistance in the process of dying, which does not involve the interests of a third or quasi-third party.

The Court's decision in *Cruzan* confirms this reading of the implications of the right to a previability abortion, for at least five Justices explicitly argued that a state's interest in protecting life cannot override entirely an individual's liberty interest in hastening his own death.²⁸⁵ The only difference remaining between the RTDWD and the right recognized in *Cruzan* is the manner in which the individual can exercise her right to hasten death.

A comparison of the RTDWD with the conduct protected by the RTD and a woman's right to a previability abortion indicates that distinguishing between the methods used to hasten death is constitutionally insignificant.²⁸⁶ The decisions in *Casey* and *Cruzan*, both of which supported liberties involving medical assistance, have already protected the type of conduct underly-

pra notes 232-57 and accompanying text (discussing the interests justifying the previability abortion right).

284. See *Casey*, 112 S. Ct. at 2807.

285. See *Cruzan*, 497 U.S. at 288-89 (O'Connor, J., concurring); *id.* at 304-05 (Brennan, J., dissenting); *id.* at 350 (Stevens, J., dissenting); *supra* notes 34-42 and accompanying text.

286. See Sedler, *supra* note 209, at 787-88 ("No principled difference can be found in the applicable constitutional doctrine"); *supra* note 30. But see Yale Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?*, HASTINGS CENTER REP., May-June 1993, at 32, 33-34. Because it is able to rationally unify two related liberties, this position is consistent with Justice Harlan's substantive due process theory. See *supra* notes 109-40 and accompanying text. For a discussion of why the distinction between the RTD and the RTDWD is, nevertheless, a powerful one, see *infra* note 370.

ing the RTDWD. With respect to the previability abortion right, the physician's role in performing an abortion is very similar to a doctor's role in PAS or PCE.²⁸⁷ Regarding the RTD, the role of a physician in discontinuing medical treatment is both causally²⁸⁸ and ethically²⁸⁹ identical to the role of a doctor assisting in a patient's suicide or committing euthanasia—in each case the physician is acting to end an individual's life.²⁹⁰ The conduct underlying the RTDWD therefore falls within the constitutionally protected sphere of liberty requiring medical assistance in the termination of life or potential life. Consequently, this right is entitled to constitutional protection.²⁹¹

287. See *supra* notes 270-80 and accompanying text.

288. See James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78, 80 (1975); John A. Robertson, *Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139, 1176-77 (1991) ("[I]f the competent patient has a right to cause her death passively by refusing medical care, then her right to kill herself by active means should logically follow as should her right to have the assistance of others in pursuing that end."); Tom Stacy, *Euthanasia and the Supreme Court's Competing Conceptions of Religious Liberty*, 10 ISSUES L. & MED. 55, 64-65 (1994) ("The distinction between active and passive euthanasia, although meaningful to some, is at bottom unpersuasive. Physician-assisted suicide, active euthanasia, and passive euthanasia all involve a person's following a course of action or inaction that the person knows is substantially certain to cause death."); Dan W. Brock, *Voluntary Active Euthanasia*, HASTINGS CENTER REP., Mar.-Apr. 1992, at 10, 12-14. The acts of disconnecting a respirator and injecting a patient's intravenous tube with a lethal dosage of drugs, for example, are different, but equivalent, means of hastening death, for they require the same degree of physician involvement in the process of dying. The distinction between the right to have medical treatment discontinued and the right to PAS is also unsound because PAS requires less physician involvement in the process of dying than the disconnection of a respirator or feeding tube.

289. There is no moral distinction between the discontinuation of a patient's treatment by a doctor and the processes of PAS and PCE, unless the latter actions are viewed as morally superior because they more effectively diminish suffering and enhance autonomy and dignity. See Rachels, *supra* note 288, at 80.

290. See *supra* notes 270-80, 288 and accompanying text; *infra* notes 371-77 and accompanying text.

291. See *TRIBE & DORF, supra* note 224, at 78 ("The lesson of Justice Harlan's *Poe* dissent applies no less to the enterprise of connecting cases than it does to that of connecting clauses of the Constitution.").

The Right To Die with Dignity Fits Comfortably Within the Principle Unifying Constitutionally Protected Liberties

The principle unifying the Supreme Court's liberty jurisprudence provides additional support for the RTDWD. Invoking Justice Harlan's view that the purposes and interpretation of specific liberties enumerated in the Constitution are representative of a "rational continuum" of constitutionally protected conduct,²⁹² the Court's opinion in *Casey* articulated a principle that unified the rights and interests currently protected by the liberty of the Due Process Clause and described the nature of rights that would be entitled to future judicial protection.²⁹³ The Court stated:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²⁹⁴

The RTDWD implicates *every* aspect of liberty's rational continuum because it is supported by an individual's interests in self-determination, autonomy, bodily integrity, dignity, and the mitigation of suffering.²⁹⁵ These interests and the conduct they protect, moreover, have consistently been afforded constitutional protection.²⁹⁶ The RTDWD, therefore, is entirely consistent with the Court's development of our constitutional purposes and may be the matter *most* central to the liberty protected by the Fourteenth Amendment.

292. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2811 (1992).

293. *See id.* at 2807.

294. *Id.*

295. *See supra* notes 233-69 and accompanying text.

296. *See supra* notes 233-91 and accompanying text.

The Evolving Balance Between Individual Liberty and State Authority Expressed in This Nation's Practices and Laws

At any moment in time, American laws and practices reflect a societal view of the proper balance between individual liberty and State authority.²⁹⁷ As such, they comprise one aspect of our larger constitutional tradition. These laws and practices, however, are not static, nor are they the product of a single generation or moment in time. Rather, the laws and practices of our society are situated within an evolutionary process that began with the adoption of the Constitution. The task of an advocate of an unenumerated liberty, therefore, is twofold. First, she must identify the relevant strands of this evolutionary process, understanding that the "reasons that animate a tradition are more important than that tradition's bare existence."²⁹⁸ Second, she must demonstrate that the relationship between State authority and individual liberty posited by her unenumerated liberty is sufficiently compatible with these strands to be considered part of our larger constitutional tradition.

Three aspects of this constitutional tradition are relevant to the RTDWD. First, the legal history of suicide demonstrates that the State's interest in protecting life is not in conflict with the RTDWD. Second, the development of statutory and judicial protections for the RTD reflects this conception of the State's interest in protecting life by recognizing that an individual can rationally choose to hasten his own death and has a right to do so. Third, although euthanasia is currently proscribed in every state, and assisted suicide is criminalized in many, the impact of these laws is diminished by the presence of RTD legislation, two societal practices, and the countermajoritarian power of an individual's interest in mitigating suffering.

The Legal History of Suicide

Although suicide was initially an ecclesiastical offense, by the fourteenth century it became a felony in England.²⁹⁹ Ironically,

297. See LOCKE, *supra* note 218, at 184-85.

298. Stacy, *supra* note 288, at 67.

299. Maria T. CeloCruz, *Aid-in-Dying: Should We Decriminalize Physician-Assisted*

if the person survived the attempt,³⁰⁰ their crime was punishable by death.³⁰¹ Because punishment and deterrence were not furthered by criminalizing suicide, the primary purpose of the crime was to raise revenue for the State through the creation of a new class of felons subject to asset forfeiture.³⁰²

The conception of suicide as a crime was later replaced by the view that suicide was the act of a mentally ill and irrational individual.³⁰³ A survivor of a suicide attempt, therefore, required treatment rather than punishment.³⁰⁴ Consequently, although a government expresses its interest in protecting life by discouraging suicide, attempted suicide is not punished criminally in the United States today.³⁰⁵

Because the State's interest in discouraging suicide is intertwined with the assumption that an attempted suicide is the product of irrationality and mental illness,³⁰⁶ the State's interest in discouraging suicide decreases substantially when a competent³⁰⁷ individual makes an informed decision to commit suicide.³⁰⁸ In fact, the State's interest decreases to the point at which the State's interest in protecting life does not conflict with a competent individual's decision to commit suicide. The State's interest, therefore, cannot outweigh that individual liberty.³⁰⁹

Suicide and Physician-Committed Euthanasia?, 18 AM. J.L. & MED. 369, 373 (1992).

300. WILLIAMS, *supra* note 13, at 275.

301. CeloCruz, *supra* note 299, at 373.

302. WILLIAMS, *supra* note 13, at 274; CeloCruz, *supra* note 299, at 373-75.

303. CeloCruz, *supra* note 299, at 375.

304. *Id.*

305. *Quill v. Koppell*, 870 F. Supp. 78, 84 (S.D.N.Y. 1994).

306. *See* CeloCruz, *supra* note 299, at 375.

307. For a definition of competency, see *infra* notes 379-87 and accompanying text.

308. *See* CeloCruz, *supra* note 299, at 376.

309. *See id.* The Court's articulation of the principle linking its cases on abortion to its cases on the right to refuse medical treatment—that the State's interest in life cannot entirely override individual liberty, *see supra* note 270 and accompanying text—may therefore stand for two analytically distinct propositions. With respect to abortion, the principle suggests that the State's interest in life conflicts with, but cannot outweigh, the individual liberty involved. In the context of the RTDWD, however, this principle suggests a tautology: a State interest that does not conflict with an individual liberty cannot outweigh that individual liberty. Alternatively, if one assumes that a state's interest in protecting life conflicts with a competent individual's decision to commit suicide, the history of this interest, when compared

This conception of the relationship between the State's interest in protecting life and a competent individual's liberty accords with the right to life protected by the Constitution. Recalling the political philosophy of Locke, government is instituted by individuals because of the threat others pose to the enjoyment of life and liberty.³¹⁰ Individual rights in this system of government are based on the notion that an individual has the right to be left alone and that others have a duty to leave him alone.³¹¹ As a result, the right to life is a right to be protected from others—the right to be free from nonconsensual harms.³¹²

Suicide is a "harm" to self. Both competent and incompetent individuals can commit this harm.³¹³ When an incompetent person commits suicide, the act is a nonconsensual harm to self because, absent improper influences, such as a major mental illness, the person would probably forego suicide.³¹⁴ Consequently, the act of suicide by an incompetent individual can be envisioned as the infliction of harm on another—the competent self.³¹⁵

In the context of suicide, the State's interest in life protects the competent self from the incompetent self.³¹⁶ When a competent individual reaches the decision to commit suicide, however, the State's interest in protecting life is not implicated because there is no conceptual basis for finding the infliction of a nonconsensual harm on another.³¹⁷ When viewed in the context

to the Court precedent supporting individual liberty, suggests that it is not powerful enough to abridge the RTDWD. The remainder of this Note, however, will treat the State's interest in protecting life and a competent person's right to control the circumstances surrounding his own death as harmonious interests.

310. See LOCKE, *supra* note 218, at 184.

311. See *id.* at 122-24; see also *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that the right to be "let alone" is the most comprehensive of individual rights).

312. See NORMAN L. CANTOR, *ADVANCE DIRECTIVES AND THE PURSUIT OF DEATH WITH DIGNITY* 9 (1993).

313. See *infra* notes 379-89 and accompanying text.

314. See David C. Clark, "Rational" Suicide and People with Terminal Conditions or Disabilities, 8 ISSUES L. & MED. 147, 154 (1992).

315. See CelozCruz, *supra* note 299, at 375-76.

316. See *id.*

317. See *id.*; cf. Franklin G. Miller & John C. Fletcher, *The Case for Legalized Euthanasia*, 36 PERSP. BIOLOGY & MED. 159, 162 (1993) (stating that practicing voluntary euthanasia is not surrendering to the control of others).

of an individual's right to life, the legal history of suicide indicates that a state has no legitimate interest in preventing a competent individual from exercising the RTDWD.³¹⁸

Statutory Protection for the Right of a Previously Competent Individual To Refuse or Discontinue Medical Treatment

Modern medicine has radically altered the way we die, and the fields of law and medicine have responded slowly to the needs of competent patients who face the prospect of incurable suffering or terminal illness.³¹⁹ Regrettably, the law has been even slower to respond to, and in many cases has been less protective of, the rights of the previously competent.³²⁰ Nonetheless, all but four states offer some form of statutory protection for a previously competent individual's decision to refuse medical treatment.³²¹ Although this legislation is inadequate in many instances,³²² it suggests that the balance between individual

318. See CeloCruz, *supra* note 299, at 376.

319. There is, however, little need for legislative enactments regarding the right of a presently competent individual to refuse medical treatment. See *supra* notes 27-42 and accompanying text. Nonetheless, many living will statutes indicate that a presently competent individual can refuse medical treatment or have it withdrawn at any time. See, e.g., CAL. HEALTH & SAFETY CODE § 7185.5(a) (West Supp. 1995).

320. As a result of their age, mental disability, or physical condition, some people are always rendered incompetent. Because these people can never decide voluntarily to hasten death, law and medicine should be very hesitant to include these individuals within the class of people qualifying for the RTDWD.

321. See *infra* note 323 and accompanying text. The federal government has also demonstrated a commitment to the rights of the previously competent by requiring hospitals that receive Medicaid and Medicare funds to provide their patients with information about the state law regarding advanced directives. 42 U.S.C. § 1395cc(f)(1)(A)(i) (Supp. V 1993).

322. Because this legislation, in many cases, distinguishes between the rights of the presently and previously competent, it may be unconstitutional after *Cruzan*. The four dissenting opinions argued that the RTD is not forfeited when an individual is rendered incompetent but that it, in fact, remains constant in its scope. See *supra* notes 39-42. Justice O'Connor, however, did not specifically address the issue of whether the rights of a previously competent individual were narrower in scope than those of a presently competent individual. See *supra* note 37. Nonetheless, she indicated that a state could be constitutionally required "to implement the decisions of a patient's duly appointed surrogate." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring). This position is consistent with the principle that the right to refuse medical treatment remains constant for both competent and incompetent individuals. See *infra* note 332 and accompanying text.

liberty and State authority currently reflected in our law is similar to the balance contemplated by the RTDWD.

Forty-six states and the District of Columbia currently have statutes allowing individuals to draft living wills.³²³ These statutes demonstrate a societal recognition that "an adult . . . has the fundamental right to control the decisions relating to the rendering of his . . . own medical care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition."³²⁴ Although the basic premise underlying each statute is that a person has a right, when competent, to make decisions about the course of his medical treatment should he become incompetent,³²⁵ the states vary in the protection that they afford this right. Every state with living will legislation protects, at a minimum, a previously competent individual's decision to withhold or withdraw medical treatment³²⁶ in the event of *terminal illness*,³²⁷ provided that the living will was validly executed.³²⁸ Thirteen states, however, do not require the individual to be terminally ill in order to refuse medical treatment,³²⁹ and they will enforce the living will of a person in a persistent vegetative state.³³⁰

Perhaps as a response to the limitations of living will statutes, more than thirty states allow an individual to appoint someone, a surrogate, to make her post-competence health care

323. See CANTOR, *supra* note 312, at 33; JAMES M. HOEFLER & BRIAN E. KAMOIE, *DEATHRIGHT: CULTURE, MEDICINE, POLITICS, AND THE RIGHT TO DIE* 193 (1994).

324. CAL. HEALTH & SAFETY CODE § 7185.5(a) (West Supp. 1995). This right is predicated on an individual's interests in autonomy, dignity, and the mitigation of suffering. *Id.* § 7185.5(c)-(d).

325. See CANTOR, *supra* note 312, at 34. For both the RTD and the RTDWD, a presently incompetent individual who did not express his intent regarding post-competency health care decisions while competent—through a living will, appointment of a surrogate, or other approved method—has waived his right to any medical assistance in hastening his death.

326. Six states prohibit the withdrawal of nutrition and hydration. *Id.* at 39. Such a position may be unconstitutional after *Cruzan*. See *Cruzan*, 497 U.S. at 288-89 (O'Connor, J., concurring); *supra* notes 34-42 and accompanying text.

327. See CANTOR, *supra* note 312, at 35. This requirement may also be unconstitutional after *Cruzan*. See *supra* notes 34-42 and accompanying text.

328. See CANTOR, *supra* note 312, at 33-34.

329. HOEFLER & KAMOIE, *supra* note 323, at 195.

330. See *id.*

decisions.³³¹ These devices are flexible, in many cases allowing a surrogate "to make the same range of decisions . . . that the principal could make if competent."³³² Legislation allowing the appointment of surrogates therefore harmonizes the rights of presently and previously competent individuals in several states by eliminating the proximity to death requirement that exists in many living will statutes.

The statutorily protected right to refuse medical treatment is the current manifestation of an evolving legal movement that protects many of the essential components of the RTDWD. For example, the interests protected by the previously competent person's right to refuse treatment are identical to those underlying the RTDWD.³³³ Moreover, by protecting these interests through the formulation of a right to refuse medical treatment, society has endorsed the principle that a person can rationally and competently choose to hasten death,³³⁴ thereby bolstering the conclusions drawn from a careful analysis of *Cruzan*. Because the effectuation of this principle requires medical assistance, such as the removal of a feeding tube or the disconnection of a respirator, the policies animating RTD legislation also protect other forms of medical assistance in dying, including PCE, which is an essential element of the RTDWD and the constitutional equivalent of the conduct protected by the RTD.³³⁵ Finally, although the RTD legislation is sometimes inconsistent with respect to the rights of competent and previously competent individuals, it demonstrates that the evolving societal conception of the balance between individual liberty and State authority

331. CANTOR, *supra* note 312, at 42. This arrangement grants the surrogate durable power of attorney over health care decisions for the presently incompetent individual.

332. *Id.* at 43.

333. Compare CAL. HEALTH & SAFETY CODE § 7185.5(c) (West Supp. 1995) (providing that, in the interest of protecting individual autonomy, prolonging the process of dying in some circumstances may violate patient dignity) with *supra* note 12 (articulating the interests underlying the RTDWD). Statutory law, common law, and the Constitution protect an individual's interests in dignity, autonomy, bodily integrity, and the mitigation of suffering.

334. The RTD statutes, in effect, presume competency. See CANTOR, *supra* note 312, at 25-32.

335. See *supra* notes 285-91 and accompanying text; *infra* notes 369-77 and accompanying text.

currently is tipped in favor of the RTDWD because society recognizes circumstances in which a person's right to hasten her death does not conflict with the State's interest in protecting life.

The Legal Status of Assisted Suicide and Euthanasia

The occasional differences in statutory protection for the rights of previously and presently competent individuals indicate that societal views are not always applied consistently. Criminal laws barring assisted suicide and euthanasia are evidence of this conundrum because they not only are inconsistent with the interests underlying a right already protected by society, the RTD, but they also highlight the difference between a law as written and as enforced. These criminal prohibitions cannot, standing alone, prevent the RTDWD from being considered part of our living constitutional tradition.

State law is not protective of the conduct comprising the RTDWD. Throughout the United States, euthanasia is treated as murder,³³⁶ and the "victim's" consent is not a defense.³³⁷ Assisted suicide is banned by statute in thirty-two states and proscribed by common law in twelve states and the District of Columbia.³³⁸ In six states, the legal status of assisted suicide is unclear.³³⁹

Several societal practices undermine the force of these laws. To begin with, the crime of assisting suicide is a legal anomaly. A person assisting in the commission of a crime is normally charged with the crime itself through an aiding and abetting theory of liability. According to this theory, a person who assists in the commission of a suicide should be charged with the crime of suicide. Suicide, however, is not a crime,³⁴⁰ and no legal theory of liability can criminalize the assistance of a legal act. Instead, the unique theoretical status of the crime of assisting suicide is based on an innovative approach to the principles of crim-

336. CeloCruz, *supra* note 299, at 380.

337. *Id.*

338. HOEFLE & KAMOIE, *supra* note 323, at 144.

339. *Id.*

340. See *Quill v. Koppell*, 870 F. Supp. 78, 84 (S.D.N.Y. 1994).

inal liability. Such innovation, however, signals the potential for conflict with other precepts of our law.

The interests underlying the RTDWD are statutorily protected by the right to refuse or discontinue medical treatment. Nonetheless, many of the states that protect the right to refuse medical treatment in its broadest sense also criminalize euthanasia and assisted suicide,³⁴¹ even when these acts involve a doctor and a competent, consenting patient. These two positions cannot be reconciled, for sweeping bans on assisted suicide and euthanasia undermine important individual interests already protected by state law. These bans also represent arbitrary restrictions on the means available to an individual who wishes to hasten his own death and are unsupported by the State's interest in protecting life. As a result, the import of these laws as a legal tradition is limited, particularly when one considers how they are enforced.

In the United States, approximately 6,000 deaths each day are planned.³⁴² Many of these deaths occur with the help of doctors who administer increasing amounts of pain-relieving drugs to alleviate a patient's suffering.³⁴³ These increasing doses, however, have the "double effect" of hastening a patient's death.³⁴⁴ Although this medical assistance constitutes euthanasia, it is rarely prosecuted as murder.³⁴⁵ This lack of enforce-

341. Compare HOEFLE & KAMOIE, *supra* note 323, at 145 (charting 32 states that explicitly criminalize assisted suicide, 12 states in which the common law criminalizes it, and six states in which its status is unclear) with *id.* at 195 (explaining that while 44 states criminalize assisted suicide through statute or common law, states have enacted statutes that permit the withdrawal of life support under certain conditions) and *id.* at 197 (charting the states with provisions for the appointment of surrogates and proxy decisionmakers) and *id.* at 201 (noting the diversity among the states regarding the withholding or withdrawing of artificial nutrition and hydration).

342. See Quill et al., *supra* note 14, at 1381.

343. *Id.*

344. *Id.*

345. Fifty-six prosecutions for mercy killings were brought in the United States between 1920 and 1985, and many of these cases did not involve doctors. HOEFLE & KAMOIE, *supra* note 323, at 164. Thirty-five defendants were convicted, but only 10 were imprisoned. *Id.* Fifteen defendants were acquitted. *Id.* Charges were dismissed against six. *Id.* Five others were not even brought to trial. *Id.* Moreover, as evidenced by the refusal of a New York grand jury to indict Dr. Quill for assisting in the suicide of Diane, laws against assisted suicide will also not be en-

ment against doctors, when coupled with the inconsistency of these laws and other statutory protections and the statutorily protected RTD, militates against the conclusion that the societal balance between individual liberty and State authority does not protect the RTDWD.

The Evolving Balance Between Individual Liberty and State Authority Supports the Right To Die with Dignity

The three legal traditions illustrating the societal balance between the individual liberty to hasten death and the State's authority to interfere with that liberty suggest that the RTDWD is within the conduct protected by this balance. In its current form, this balance indicates that the State has no interest in preventing a competent individual from hastening her own death. This balance also reflects widespread societal protection for the interests underlying the RTDWD and an individual's right to hasten her own death with medical assistance. Evaluated in light of these societal judgments, the unenforced laws criminalizing every instance of assisted suicide and euthanasia cannot tilt the balance toward a societal recognition that government can legitimately proscribe the RTDWD.³⁴⁶ Although additional state laws such as Oregon's Measure 16 would strengthen this conclusion, they are not necessary because the societal balance is informed by an examination of the practices and purposes that shape existing laws and by an evolutionary perspective on the path of the law.³⁴⁷

forced against doctors assisting in the voluntary death of a competent patient. See *id.* at 150.

346. Although the irreconcilable conflict between laws protecting the RTD and laws proscribing assisted suicide and euthanasia is enough to prevent the tipping of the balance toward government authority, the additional conflict between these restrictive laws and the constitutionally protected interest in the mitigation of suffering guarantees that the balance will not tip toward the State. See *supra* notes 254, 263-69 and accompanying text.

347. *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting). Without this perspective, the Due Process Clause would be reduced to a constitutional redundancy. See *supra* notes 109-23, 185 and accompanying text.

The Right To Die with Dignity Is Embedded in Our Living Constitutional Tradition

The shared aspects of our living constitutional tradition indicate that the RTDWD is entitled to constitutional protection. To begin with, the political theory underlying our Constitution suggests that one of the primary purposes of government is to protect individual liberties, particularly those that do not interfere with the liberty of others. This purpose manifests itself in a theory of constitutional interpretation and judicial review that views the Bill of Rights as an illustration of a larger sphere of individual liberty that the federal courts have a constitutional duty to protect. An application of this constitutional theory to the right to life and its relationship to suicide, as well as the protection afforded the RTD by the Constitution, the states, and the common law, indicates that the State's interest in life cannot prevent a competent individual from hastening her own death. Moreover, because the interests and conduct underlying the RTDWD are identical to those protected by the RTD and because these interests and conduct have received independent constitutional protection, our living constitutional tradition must be viewed as incorporating the right of a person to control the circumstances surrounding her death. The RTDWD, therefore, represents a point on liberty's continuum because it is grounded on the shared aspects of our living constitutional tradition.

PROTECTING THE CONSTITUTIONAL RIGHT TO DIE WITH DIGNITY

Deriving the RTDWD, however, does not end the constitutional inquiry. The boundaries of this right must be defined through a balancing process, and the burdens imposed on this right must be weighed against the interests supporting these legislatively enacted encumbrances. This section will demonstrate that a state cannot constitutionally ban the RTDWD, impose a proximity to death requirement on its exercise, or allow PAS while prohibiting PCE. A state does, however, possess broad authority to ensure competency in those exercising the RTDWD.

Legitimate State Interests Implicated by the Right To Die with Dignity

The State's compelling interest in protecting life does not conflict with the right of a competent individual to hasten her own death.³⁴⁸ This interest does, however, allow a state to adopt procedures designed to prevent an incompetent person from hastening his own death, provided that the rights of competent individuals are not thereby overly burdened.

Protecting third parties from the exercise of individual liberty is also a legitimate State interest.³⁴⁹ Because courts have consistently held that this State interest cannot outweigh an individual's RTD,³⁵⁰ the interest in protecting third parties cannot be viewed as outweighing an individual's RTDWD³⁵¹ and will not be treated as an interest underlying legislation addressing the RTDWD.³⁵²

The State also has a legitimate interest in protecting the integrity of the medical profession.³⁵³ Like the State's interest in protecting third parties, this interest is incapable of outweighing the RTD³⁵⁴ and consequently is incapable of outweighing the RTDWD.³⁵⁵ Like the State's interest in preventing harm to third parties, this interest will not be viewed as supporting regulations impacting on the RTDWD.

348. See *supra* notes 299-318 and accompanying text. To the extent that a state can demonstrate an interest in preserving the sanctity of life, this concern is subsumed within its interest in protecting life. See Stephen A. Newman, *Euthanasia: Orchestrating "The Last Syllable of . . . Time,"* 53 U. PITT. L. REV. 153, 174 (1991).

349. See *supra* notes 310-12 and accompanying text.

350. See, e.g., *In re Farrell*, 529 A.2d 404, 411-12 (N.J. 1987).

351. See *supra* notes 270, 309 and accompanying text.

352. The rejection of spousal notification provisions in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2830 (1992), indicates that this type of interest cannot outweigh an individual's RTDWD.

353. See, e.g., *Farrell*, 529 A.2d at 411.

354. *Id.* at 411-12.

355. This conclusion is strengthened by a consideration of society's acceptance of the double effect technique and the failure of this State interest to support permissible regulations of the right to a previability abortion. See *Casey*, 112 S. Ct. at 2821.

Laws Proscribing Assisted Suicide and Euthanasia

Laws prohibiting assisted suicide and euthanasia completely abridge the RTDWD. The abridgement of a constitutionally protected liberty will be outweighed only upon a showing that the proscription is narrowly tailored to effectuate a compelling State interest.³⁵⁶ The State does not have a compelling interest in preventing a competent individual from hastening her own death. Although blanket prohibitions on assisted suicide and euthanasia also prevent incompetent individuals from harming themselves, they are not narrowly tailored approaches that further the State's interest in ensuring competency because they deny individuals an opportunity to demonstrate competency. Laws banning all acts of assisted suicide and euthanasia are therefore unconstitutional.³⁵⁷

356. See *supra* note 132.

357. A state might argue that exceptions for competent individuals are not preconditions for meeting the narrowly tailored requirement because competent individuals do not commit suicide. See *supra* note 303 and accompanying text. An irrebuttable presumption, however, is an indication of improper tailoring, see, e.g., *Craig v. Boren*, 429 U.S. 190, 199-204 (1976), and is difficult for a state to sustain, see *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (plurality opinion) (stating that a minor is constitutionally entitled to a proceeding where she can demonstrate "that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician"); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (striking down a statute that conclusively presumed unmarried minors to be incapable of consenting to abortion procedures).

In this case, the presumption would be disingenuous in light of the recognition by 46 states and the District of Columbia that an individual can rationally choose to hasten his death. See *HOEFLE & KAMOIE, supra* note 323, at 193. Moreover, psychological evidence suggesting that a *minimum* of six to twelve percent of all suicides have been committed by competent individuals would contradict the presumption. See, e.g., *Clark, supra* note 314, at 153; *Conwell & Caine, supra* note 14, at 1101. These studies, however, were based either on the medical records of mental patients who committed suicide or on the psychological profiles of noninstitutionalized individuals who committed suicide, *Clark, supra* note 314, at 150, rather than on the profiles of individuals who committed suicide when confronted with an incurable illness or form of suffering, *id.* at 151-53. If the individuals involved in the 6,000 planned deaths that occur each day in this country, see *Quill et al., supra* note 14, at 1381, were profiled, the percentage of suicides committed by competent individuals would undoubtedly be greater than six to twelve percent. Although additional psychological evidence on the terminally ill would be helpful in evaluating legislation impacting on the RTDWD, see *infra* notes 379-89 and accompanying text, a conclusive presumption that denies competent individuals their RTDWD is unconstitutional because it is not narrowly tailored.

Defining the Right To Die with Dignity To Include Only the Terminally Ill or Those with Less Than Six Months To Live

Many advocates of PAS argue that it is a right possessed exclusively by the terminally ill.³⁵⁸ This position is a common one, for all legislative proposals for a right to PAS have restricted its availability to those with less than six months to live.³⁵⁹ Because both of these related limitations on the RTDWD are unconstitutional restrictions on the class of individuals capable of exercising the RTDWD, they will be treated as identical regulations in the following analysis.³⁶⁰

Restricting the class of people possessing the RTDWD to those with less than six months to live is a perversion of the State's interest in protecting life. It implies that the State's interest in protecting life depends on the remaining life span of the individual to be protected; thus, the State's interest begins to decrease immediately after an individual is born. The State's interest in protecting an individual's life, however, is compelling as long as that person wishes to continue living; it does not diminish with age or proximity to death.

Defining the RTDWD as contingent upon an individual's remaining life span can only be explained as an irrebuttable presumption regarding competency. Individuals with more than six months to live are conclusively presumed incapable of competently deciding to hasten death, whereas those with less than six months to live are given an opportunity to demonstrate competency. Evaluating this restriction within a substantive due pro-

358. See, e.g., *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1464 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995); Wanzer et al., *supra* note 14. But see Quill et al., *supra* note 14, at 1381 (arguing that those with incurable illnesses and those who are suffering possess a right to commit PAS).

359. See MODEL DEATH WITH DIGNITY ACT § 1.02(j), in HUMPHRY, *supra* note 90, at 135; Penrose, *supra* note 87, at 711-15 (discussing California Proposition 161 and Washington Ballot Initiative 119); *supra* note 64 and accompanying text.

360. Conceptually, however, they are not identical. If the term "terminally ill" has meaning, it is only through a reference to an expected time of death. Cf. CANTOR, *supra* note 312, at 36-38 (arguing that "terminally ill" is a term that cannot be defined); Marzen, *supra* note 210, at 814-19 (same). In one sense, therefore, a terminal illness requirement is not a limit on the class of individuals eligible to commit PAS because everyone is terminally ill.

cess framework³⁶¹ indicates that the restriction is unconstitutional because the burden that it places on the RTDWD outweighs the State's poorly tailored effort to ensure competency.

In the balancing of interests, the State is attempting to further its interest in ensuring competency by conclusively presuming that those with more than six months to live are incompetent. This presumption, however, has no foundation in the medical understanding of competency³⁶² and is entirely arbitrary. Moreover, this irrebuttable presumption conflicts with the constitutional right to refuse treatment that allows a person to hasten death regardless of her remaining life span.³⁶³

The burden that this regulation places on the RTDWD is twofold. First, it operates as a ban on the RTDWD for those with more than six months to live. Second, a proximity to death requirement is a quality of life determination made by the government indicating that the lives of those with more than six months to live are too meaningful to be ended by PAS or PCE, but not so valuable that they cannot choose to starve or suffocate to death, regardless of their underlying medical condition.³⁶⁴ This presumption violates every constitutionally protected interest underlying the RTDWD.³⁶⁵

The burden placed on a competent individual's RTDWD by a proximity to death requirement is severe. In order to outweigh this burden, the government regulation must be narrowly tailored to further a compelling State interest. With respect to a proximity to death limitation on the RTDWD, however, the State cannot meet this burden. Although the State's interest in

361. Although this classification may violate equal protection guarantees, it will be treated as a violation of substantive due process. *See supra* note 135 and accompanying text. The Equal Protection Clause, however, remains an important constitutional provision for an advocate of the RTDWD, particularly in circumstances in which Justice Harlan's theory is not employed.

362. *See supra* note 357.

363. *See supra* 27-42; *see also supra* notes 319-35 and accompanying text (discussing various statutory protections for the RTD). The following analysis also applies to the proximity to death restrictions contained in these statutes.

364. *Cf. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 282 (1990) (approving a state's decision not to become involved in quality of life determinations).

365. *See Quill et al., supra* note 14, at 1381; *supra* note 12 and accompanying text.

ensuring competency is compelling, the proximity to death requirement is not tailored to effectuate this purpose because it arbitrarily denies individuals with more than six months to live an opportunity to demonstrate competency.

Defining the Right To Die with Dignity To Include Physician-Assisted Suicide But Not Physician-Committed Euthanasia

Advocates of PAS have also attempted to limit the scope of the emerging RTDWD by distinguishing between assisted suicide and euthanasia.³⁶⁶ This puzzling distinction is based on two hypothetical implications of PAS: a greater risk of an involuntary death and an inappropriate shift in the role of the physician.³⁶⁷ Such a tenuous distinction within the RTDWD is unconstitutional.³⁶⁸

The physician's role in committing euthanasia is indistinguishable from a physician's role in helping a patient exercise her right to refuse medical treatment by disconnecting a respirator or feeding tube, and is very similar to a doctor's role in providing an abortion.³⁶⁹ In cases involving discontinuing treatment and euthanasia, a doctor takes an active role in hastening the patient's death. An argument against euthanasia based on the physician's role is not compelling.³⁷⁰

366. See, e.g., Quill et al., *supra* note 14, at 1381; *supra* note 74 and accompanying text.

367. Quill et al., *supra* note 14, at 1380-81; Wanzer et al., *supra* note 14, at 849. If courts or legislators adopt such a distinction, two people identically situated, except for their physical capabilities, will not share identical rights. Instead, the person capable of ingesting a lethal dose of chemicals without aid will possess a RTDWD, whereas the physically incapable person will be forced to hasten death by refusing medical treatment.

368. Although this classification may also be challenged as a violation of the Equal Protection Clause, this section will not address that claim. See *supra* note 135 and accompanying text.

369. See *supra* notes 270-91 and accompanying text.

370. There may, however, be a powerful emotional difference between withdrawing medical care and administering a lethal injection. See Brock, *supra* note 288, at 13. In addition, many people are unable to distinguish between a killing that is morally justified and one that is not so justified, despite the widespread acceptance of the morality of discontinuing treatment and justifying homicides in cases of self-defense. See *id.* Doctors, therefore, should not be required to commit euthanasia. See *supra* note 65; Quill et al., *supra* note 14, at 1382.

If a greater risk of involuntary death arises in situations involving PCE than in those involving PAS, then the State's interest in ensuring that the RTDWD is exercised voluntarily may justify treating euthanasia differently than PAS. Any difference in treatment, however, must be balanced against the burden that it imposes on a physically incapable, yet competent, individual. Moreover, when this difference constitutes a ban on a competent person's right, it must be narrowly tailored to ensure voluntariness. A comparison of euthanasia and the right to refuse medical treatment demonstrates that banning PCE is not an appropriately tailored method of promoting voluntary conduct.

In at least two situations, an individual's RTDWD depends on the availability of PCE, and her corresponding right to refuse medical treatment also depends on medical intervention. In one instance, an individual may be conscious and competent, yet physically unable to remove her feeding tube or ingest a lethal dose of barbiturates without assistance. Similarly, an individual in a persistent vegetative state is unable to effectuate her own death without the aid of a physician.

In the first example, the RTD does not depend on the patient's ability to remove her feeding tube.³⁷¹ Rather, her right to have medical treatment *withdrawn* is identical to an individual's right to *refuse* medical treatment, regardless of the risks posed by the physician's role. Analogously, the RTDWD should not be contingent upon a person's ability to hasten death without assistance because the risk of an involuntary death posed by a physician's injection of drugs into an alert and competent patient's intravenous tube is identical to the risk involved when a doctor disconnects that person's feeding tube³⁷²—in both instances the patient dictates when the medical assistance will be rendered and has unlimited opportunities to change her mind prior to giving this authorization. The risk of physician-committed involuntary euthanasia is, therefore, very small and already accepted.³⁷³

371. See, e.g., *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1144-45 (1986).

372. See Stacy, *supra* note 288, at 65.

373. Proponents of the slippery slope argument suggest avoiding the acknowledg-

In the second example, the State can require clear and convincing evidence of the patient's intent to refuse medical treatment in order to reduce the risk of an involuntary death.³⁷⁴ This evidence is generally provided by the existence of an unrevoked writing that was executed and witnessed while the presently incompetent individual was competent.³⁷⁵ There is no difference between requiring a doctor to disconnect a patient's respirator pursuant to a living will and requiring a doctor to administer a lethal objection pursuant to the same document. Any objection to the degree of risk involved in this situation is thus an objection to the requirements of a valid living will or durable power of attorney,³⁷⁶ not the actual act of PCE.

The risk of an involuntary request to hasten death is identical in situations involving the withdrawal of medical treatment and circumstances surrounding the administration of a lethal injection. The presence of this risk, however, does not restrict a competent individual's RTD to circumstances involving the refusal of medical treatment. Consequently, there is no basis for denying a physically incapable individual the right to PCE while allowing physically capable individuals to commit PAS. A ban on PCE is thus not an appropriately tailored means of furthering the State's interest in ensuring that decisions to hasten death are voluntary, particularly in light of the State's authority to regulate the RTDWD in order to ensure competency.³⁷⁷

ment of the similarities between these two actions because such acknowledgment would be the first of several inevitable steps toward involuntary euthanasia. See, e.g., Kamisar, *supra* note 286, at 36. These arguments, however, tend to underestimate an individual's will to live, as well as the explicitly voluntary nature of the RTDWD and the likelihood of a substantial number of regulations designed to ensure competency.

374. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 280 (1990).

375. See CANTOR, *supra* note 312, at 34.

376. The states have the constitutional authority to make these requirements more effective in ensuring competency. See *infra* notes 378-89 and accompanying text.

377. See *infra* notes 378-89 and accompanying text. A legislature could, however, restrict the availability of PCE to those physically incapable of committing PAS suicide. See Steven J. Wolhandler, Note, *Voluntary Active Euthanasia for the Terminally Ill and the Constitutional Right to Privacy*, 69 CORNELL L. REV. 363, 368-69 (1984).

Determining Competency Within the Context of the Right To Die with Dignity

Regulations designed to ensure that only competent individuals exercise the RTDWD are the primary expression of the State's properly defined interest in protecting life. Under the fundamental tenets of substantive due process, the State possesses broad authority to regulate pursuant to this interest.³⁷⁸ In order to assess the constitutionality of regulations designed to ensure competency, however, an accurate definition of competency in the context of the RTDWD must be established.

Competency in the context of the RTDWD is an elusive concept. It is essentially a shorthand reference for a finding that an individual is reasoning in a rational manner, from fully and accurately understood premises, and without the presence of undue influences, including certain types of mental illness.³⁷⁹ An exhaustive inquiry into competency therefore involves three interrelated encounters with a person wishing to exercise her RTDWD.³⁸⁰

378. See *supra* notes 124-40 and accompanying text. The "crafting [of] appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States." *Cruzan*, 497 U.S. at 292 (O'Connor, J., concurring). But cf. *Lee v. Oregon*, 869 F. Supp. 1491, 1502 (D. Or. 1994) (finding that the public interest and balance of hardships weigh in favor of maintaining the status quo, while thoroughly considering the constitutionality of Measure 16).

Nonetheless, competency regulations will be struck down when the burden that they impose on the RTDWD outweighs the State's tailoring effort. For example, such an imbalance may result from the enactment of regulations providing doctors with too much authority over an individual's decision or from the creation of a byzantine system of competency procedures that delay the exercise of the RTDWD to an extent that undermines a person's autonomy, bodily integrity, and desire to mitigate suffering. The nature of substantive due process, however, requires that these regulations be carefully evaluated on a case-by-case basis.

379. See *Conwell & Caine*, *supra* note 14, at 1101-02; *Quill*, *supra* note 256, at 870-73; *Quill et al.*, *supra* note 14, at 1381-82.

380. Because a state has broad authority to ensure competency by regulation, it can utilize that authority in varying degrees. For example, in the RTD context, competency is presumed because a state has the burden of proving incompetency before it can subject a person to medical treatment for her own protection, see, e.g., ILL. STAT. ANN. ch. 405, para. 5/1-119, 5/2-107 (West 1993), and a doctor may be liable in tort for any unwanted medical treatment that he provides, see *supra* notes 27, 40. The model of competency that follows is not exclusive; it suggests only the elements that comprise an exhaustive inquiry into competency. The procedures that states adopt pursuant to these principles can vary widely.

Responding to an individual's request for aid in dying is the first step in the process of determining competency. This request should not be viewed as the symptom of mental illness nor as an indication of a reasoned plan.³⁸¹ Rather, the request should be viewed as a chance to review the circumstances of that individual's life. If the person is ill, a doctor should discuss with him: the nature of his disease; his prognosis; and his treatment alternatives and their implications, such as palliative and hospice care.³⁸²

If, after having received full and accurate information about his medical circumstances, an individual again requests aid in dying, the doctor evaluating this request must determine if the individual is reasoning rationally from accurate premises or whether the patient is asking to die because of the presence of undue influences such as coercion or mental illness.³⁸³ In order to make this determination, a doctor must explore fully with the patient why death is preferable to continued life, while paying particular attention to whether the individual is accurately applying the information given to him by the doctor and whether his reasons for requesting death are based on the interests underlying the RTDWD or just the interests of others.³⁸⁴ At the same time, however, the doctor must also screen for the presence of a mental illness, such as clinical depression,³⁸⁵ which

381. Clark, *supra* note 314, at 161; Quill, *supra* note 256, at 870-73; Quill et al., *supra* note 14, at 1380. Many requests for aid in dying are made by people who wish to live but have misunderstood the consequences of their illness or the implications of alternative courses of treatment. See Quill, *supra* note 256, at 870-72.

382. See Quill, *supra* note 256, at 870-73; Quill et al., *supra* note 14, at 1381-82. This discussion should include information that will enable the patient to determine if the consequences of treatment are worth the corresponding impact on his interests in dignity, self-determination, bodily integrity, and the mitigation of suffering. See Quill et al., *supra* note 14, at 1382. For example, a patient may want to know whether a course of treatment will confine him to a hospital, the level of sedation that will be required to relieve his suffering, and the effects of a course of treatment on his body and mind. See Quill, *supra* note 256, at 870-73.

383. Quill, *supra* note 256, at 872; Quill et al., *supra* note 14, at 1382. At no time, however, can a physician substitute his judgment for that of the individual.

384. Quill, *supra* note 256, at 871.

385. The difference between clinical depression and the depression associated with incurable illness or suffering is subtle, see Conwell & Caine, *supra* note 14, at 1101, but important because nonclinical depression does not prevent a person from exercising rational judgment, see *id.*, and, therefore, the RTDWD.

could affect a person's rational judgment.³⁸⁶ If the doctor diagnoses a mental illness with the potential to affect a person's judgment, a state could constitutionally prevent that person from exercising the RTDWD until the illness is properly treated.³⁸⁷

The process of determining competency suggests that, although the RTDWD appears to be a broad right to suicide, it is a narrowly defined constitutional liberty based on the important interests and needs of a limited number of people in our society. The number of individuals actually exercising the RTDWD will be small, primarily because of the strength of the human will to live.³⁸⁸ For many, then, control over death will be provided by comfort and hospice care. Furthermore, many who request aid in dying will be found incompetent because their physical conditions will place them in a class of individuals whose suicidal impulses correlate to a large extent with the presence of major psychiatric disorders.³⁸⁹ Finally, additional screening procedures will ensure that those who are ready to leave the woods are competent to do so.

CONCLUSION

Modern health care has created problems for the law, which is incapable of growing at a rate equal to that of the medical developments that it needs to govern. Advancements in medicine have made it possible for doctors to forecast death and prolong life. For some, this ability is a blessing. For others, given the intractable shortcomings of hospice and palliative care, this ability is a curse. Death was once a matter of fate. Now, it must be a matter of choice.

The Constitution protects this choice, and the first step toward a constitutional RTDWD is the selection of a substantive due process theory. This Note has argued that Justice Harlan's substantive due process framework is the appropriate lens through which unenumerated liberty claims should be viewed.

386. *Id.*; see Quill, *supra* note 256, at 872; Quill et al., *supra* note 14, at 1382.

387. See *supra* notes 299-318 and accompanying text.

388. Clark, *supra* note 314, at 160-61.

389. *Id.* at 153-55; Conwell & Caine, *supra* note 14, at 1101.

Utilizing Justice Harlan's theory, this Note has demonstrated that constitutional protection for the emerging RTDWD is found in Supreme Court precedent protecting the interests and conduct underlying the RTDWD, and that this precedential support is not diminished, and perhaps is strengthened, by the evolving balance between individual liberty and State authority that is expressed in society's laws and practices. Consequently, laws proscribing the RTDWD, or arbitrarily restricting its scope, are unconstitutional infringements on a protected liberty.

Although the debate surrounding the RTDWD probably is incapable of resolution as a religious or philosophical matter, it can be settled as a question of constitutional law. This Note has attempted to redefine and advance the debate over the constitutional status of the RTDWD and to demonstrate that a competent individual, rather than the State, has the constitutional authority to decide when there is triumph in the ultimate agony.

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