PARENS PATRIAE OR GOVERNMENT OVERREACH: DO PARENTS HAVE A FUNDAMENTAL RIGHT TO CONTROL THEIR CHILDREN'S MEDICAL CARE?

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INTRODUCTION

Throughout the United States of America, every time a new baby is born, state medical professionals draw blood from the baby's heel and place it on a screening card.[1] The blood is then tested for a variety of different genetic disorders.[2] The state programs perpetuate an important government interest of providing children, parents, and doctors with critical information for detecting genetic diseases.[3] Nationally, every year four million babies will have their blood drawn

1. Natalie Ram, *America's Hidden National DNA Database*, 100 TEX. L. REV. 1253, 1254 (2022); *Conditions Screened By State*, BABY'S FIRST TEST, https://www.babysfirsttest.org/newborn-screening/states.

2. *Compare New York*, BABY'S FIRST TEST, https://babysfirsttest.org/newborn-screening/states/new-york *with Louisiana*, BABY'S FIRST TEST, https://babysfirsttest.org/newborn-screening/states/louisiana; Ram, *supra* note 1, at 1254.

3. Ram, *supra* note 1, at 1254.

and screened, but some doubts have begun to arise about these programs.[4]

Many states offer parents the ability to opt out on valid religious grounds, but otherwise, they will have to participate in the newborn screening program.[5] These programs are effective at protecting the life of a child, but legal issues arise when there has been improper informed consent.[6] Some states choose to store the blood of the newborn child for years or decades after the original drawing, creating a multitude of constitutional law issues when the information is sold without informed consent or is accessed for criminal investigations.[7]

This Comment will not address the criminal implications of the blood drawing program under the Constitution. Instead, it will analyze a current lawsuit in the United States District Court for the Eastern District of Michigan over the drawing and storage of children's blood without a parent or guardian's informed consent.[8] The district court dismissed the Plaintiff's original complaint using rational basis review.[9] However, the Sixth Circuit overturned the district court's ruling on the continued storage of the blood by creating a fundamental right for parents to control their children's medical care.[10] The Sixth Circuit's ruling was decided before *Dobbs v. Jackson*

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4. Tufik Y. Shayeb, *Informed Consent for the Use and Storage of Residual Dried Blood Samples from State-Mandated Newborn Genetic Screening Programs*, 64 BUFF. L. REV. 1017, 1017 (2016).

5. *See generally Conditions Screened By State*, BABY'S FIRST TEST, https://www.babysfirsttest.org/newborn-screening/states. Most states allow individuals to opt out but only on religious grounds.

6. Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 333 F. Supp. 3d 716, 718 (E.D. Mich. 2018), *aff'd in part, rev'd in part and remanded*, 927 F.3d 396 (6th Cir. 2019).

7. Shayeb, *supra* note 4, at 1018; Ram, *supra* note 1, at 1255.

8. *See Kanuszewski*, 333 F. Supp. 3d at 718 ("On February 8th, 2018, plaintiff Adman and Ashley Kanuszewski, Shannon Laporte, and Lynette Wiegand filed a complaint . . . alleg[ing] that the State of Michigan operates an unconstitutional Newborn Screening Program which involves sampling, testing, and storing infant blood without parental consent.").

9. *Id.* at 720, 730. The district court agreed that the state had a legitimate interest in protecting the life of the child: "Similarly here, it cannot be reasonably disputed (nor is it) that the State of Michigan has a legitimate interest in early detection of diseases in infants and that the blood testing is connected to that objective. Given the State's interest in safeguarding infant health, and the minimally invasive nature of the procedure (a heel stick drawing 5-6 drops of blood), the blood test does not violate the parents' right to make decisions concerning the care, custody, and control of their children." *Id.* at 721.

10. Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 927 F.3d 396, 418–19 (6th Cir. 2019) ("Thus, *it is logically* the parents who possess a fundamental right to direct the medical care of their children. For these reasons, parents' substantive due process right 'to make decisions concerning the care, custody,

Women's Health Organization solidified the conservative Supreme Court's substantive due process analysis that solely relies on the United States' traditions and history.[11] On remand, the district court opined that the "Sixth Circuit did not address the Nation's history or tradition of parents' right to direct their children's medical care or how that right is implicit in the concept of ordered liberty"; instead, the Sixth Circuit merely announced "that the Constitution 'would seem to naturally include parents' right to direct their children's medical care.'"[12]

This Comment has eight parts. Part I will provide the necessary background information on the origins of the state blood drawing program. Part II will outline the procedural posture and current arguments being made in the district court. Part III will analyze classical substantive due process rights from the American founding up until today's Court. Part IV will describe the analytical origins of the conservative Supreme Court's substantive due process framework. Part V will focus specifically on the Supreme Court's stance on parental rights and the history of parents' rights at common law. Part VI will discuss limitations on parental rights. Part VII will apply the Supreme Court's precedent and common law history to establish the right. Finally, Part VIII will reconcile the Sixth Circuit's decision in light of the current circuit split.

I. BACKGROUND: THE MANDATORY DRAWING OF CHILDREN'S BLOOD

In the early 1960s, Dr. Robert Guthrie made a major scientific breakthrough when he developed an "inexpensive and sensitive test for detecting the human gene associated with phenylketonuria."[13] After this discovery, states began drawing blood from newborns and placing the sample on a "Guthrie card," which included the "infant's last name, the mother's name, the infant's date of birth, and the infant's height, weight, and gender."[14] By 2003, every state in the union had adopted this program to detect possible genetic diseases in children.[15]

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and control' of their children includes the right to direct their children's medical care." (emphasis added) (quoting Troxel v. Granville, 530 U.S. 57, 72 (2000))).

11. 142 S. Ct. 2228, 2242 (2022) ("That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'").

12. Kanuszewski v. Shah, 627 F. Supp. 3d 832, 837 (E.D. Mich. 2022) (citation omitted), *vacated in part*, No. 1:18-CV-10472, 2022 WL 11964348 (E.D. Mich. Oct. 20, 2022) (quoting *Kanuszewski*, 927 F.3d at 418) (cleaned up).

13. Shayeb, *supra* note 4, at 1019.

14. *Id.* at 1020.

15. *Id.* at 1023. *Compare New York*, BABY'S FIRST TEST, https://babysfirsttest.org/newborn-screening/states/new-york, *with Louisiana*,

More than 98 percent of babies born within the United States each year have their blood drawn.[16] In 2008, commentators noticed that the number of samples that states had stored in biobanks for research purposes had risen to 270 million samples, which was growing at a rate of twenty million a year.[17] As discussed above, many states allow parents to opt out on valid religious grounds, but otherwise, parents have to participate in the newborn screening program.[18] Michigan's Newborn Screening Program has operated since the 1960s.[19] Their program includes a simple prick of the babies' heel and the testing of the blood for 58 disorders.[20] However, some states opt to store the blood of the newborn child for years or decades.[21] Not every state provides a clear opt in approach to allow parents to properly consent to subsequent research or the proper destruction of the blood samples.[22]

The jurisprudence surrounding these programs since their inception has been focused on parents' desire to prevent their children from participating in the blood drawing program.[23] Courts have been reluctant to strike down these programs as they are "likened to mandatory immunization and that mandatory immunization has been found to constitute a permissible use of state police power."[24] However, the state authorities in Minnesota stored the blood samples indefinitely unless the parents specifically requested its destruction.[25] It was discovered that 50,000 of the samples were used for studies unrelated to the blood drawing program.[26] The Minnesota Supreme Court reversed the appellate court,[27] holding that a Minnesota-specific law for genetic privacy had been violated.[28] The appellate court had improperly held that the statute had authorized the government to collect the blood samples and that the plaintiffs' failed to prove the blood had been used for "on-screening purposes

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BABY'S FIRST TEST, https://babysfirsttest.org/newborn-screening/states/louisiana; Ram, *supra* note 1, at 1254.

16. Kanuszewski v. Shah, 627 F. Supp. 3d 832, 835 (E.D. Mich. 2022).
17. Shayeb, *supra* note 4, at 1026.
18. *See supra* note 5 and accompanying text.
19. *Kanuszewski*, 627 F. Supp. 3d at 835.
20. *Id.*
21. Ram, *supra* note 1, at 1255.
22. *Kanuszewski*, 627 F. Supp. 3d at 836.
23. Some parents such as the Anaya family "refused to submit the child for blood spot collection, claiming that the activity was contrary to their 'sincerely held religious beliefs' that blood-letting would reduce their infant's lifespan." Shayeb, *supra* note 4, at 1031.
24. *Id.* at 1032 (citing Douglas Cnty. v. Anaya, 694 N.W.2d 601, 607 (2005)).
25. *Id.* at 1034.
26. *Id.*
27. Bearder v. State, 788 N.W.2d 144, 152 (Minn. Ct. App. 2010), *rev'd*, 806 N.W.2d 766 (Minn. 2011).
28. Shayeb, *supra* note 4, at 1036.

that would trigger the informed consent requirements of the genetic privacy act," and all samples from before 2014 were destroyed by the state.[29] It has been argued that "even if a state has the power to share residual samples with third-parties, without first obtaining informed consent, the state's legislature" can protect individuals' genetic data by passing genetic privacy laws, like in Minnesota.[30]

The Sixth Circuit rebuffed Shayeb's claim that a specific state law was necessary to protect children's medical data from third parties.[31] The Constitution, as analyzed below, places a limit on the states when they store and provide genetic information to third parties without parents' informed consent:[32] "We note that consent to allow the state to conduct research on the children's blood samples does not necessarily imply consent to allow the state to sell the blood samples to third parties."[33] There remains an ongoing debate if state legislators or the U.S. Constitution should protect children's biological data.[34] Most courts have been reluctant to reach the constitutional issues of these cases unless the children's biological information is being used for a purpose outside testing for diseases.[35]

II. PROCEDURAL HISTORY OF *KANUSZEWSKI V. SHAH*

On February 8, 2018, Plaintiffs Adman and Ashley Kanuszewski, Shannon Laporte, and Lynette Wiegand filed a complaint alleging "that the State of Michigan operates an unconstitutional Newborn Screening Program which involves sampling, testing, and storing infant blood without parental consent."[36] After the babies' blood was drawn, the parents alleged it was transferred to Michigan Neonatal Biobank and "stored indefinitely for testing and further research."[37] The parents did not consent to the blood test or to the state storing

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29. *Id.*

30. *Id.*

31. Kanuszewski v. Michigan Dep't of Health & Hum. Servs., 927 F.3d 396, 425 (6th Cir. 2019).

32. The Sixth Circuit in *Kanuszewski* drew a line between a state providing a legitimate medical service and failing to inform the parents of their rights: "To the extent that the parents provided informed consent to Defendants' actions, no fundamental liberty interest would have been impinged because the parents *would not have been denied the right to control their children's medical care*, although it may be that merely 'present[ing] [parents] with an option to opt out of having their child's blood used for research' as the district court seemed to believe occurred here . . . is not *sufficient* if the default is for the state to use the samples for research." *Id.* at 420 (emphasis added).

33. *Id.*

34. *See infra* Part VIII.

35. *See, e.g.*, Shayeb, *supra* note 4, at 1031–33.

36. Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 333 F. Supp. 3d 716, 718 (E.D. Mich. 2018), *aff'd in part, rev'd in part and remanded*, 927 F.3d 396 (6th Cir. 2019).

37. *Id.* at 719 (citations omitted).

the blood samples.[38] The Michigan statute that governed the drawing of blood, MCL § 333.5431(1), directs health care professionals to administer the blood test. Violating the statute is a misdemeanor.[39] The statute exempts the blood sampling and testing from informed consent requirements."[40]

The original district court's opinion made three points to justify the actual drawing of the blood. First, the court acknowledged the Supreme Court precedent in *Troxel v. Granville*[41] and *Parham v. J. R.*[42] Nonetheless, the district concluded that "Supreme Court precedent, however, has not delineated the parameters of a 'parent's right to parent' in a way that can be neatly applied to new sets of facts."[43] Second, the court used *Spiering v. Heineman*,[44] a case with comparable facts, to establish that even though the parents' rights are fundamental, rational basis review applies.[45] Third, the blood drawing program is akin to mandatory vaccine policy that has long been an exception to personal liberty.[46]

The district court briefly addressed the constitutional substantive due process rights of the parents regarding the continued storage because "[p]laintiffs have made no effort to explain how the retention and use of the blood samples constitutes an independent violation."[47] The court held that it was not "reasonably in dispute that the parents were presented with an option to opt out of having their child's blood used for research, and there is no reason to believe that the parents' instructions were not respected."[48] The court dismissed the parents' and children's Fourth Amendment claims in

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38. *Id.* (citations omitted).

39. Mich. Comp. Laws § 333.5431(5) (2023).

40. *Id.* at 719 (citations omitted); Mich. Comp. Laws § 333.5431(2), (5) (2023).

41. 530 U.S. 57 (2000).

42. 442 U.S. 584 (1979). The district court compared and contrasted quotes from two Supreme Court cases, *Troxel* and *Parham*. *Kanuszewski*, 333 F. Supp. 3d at 721. These quotes reflected the tension between the state's interests in protecting the child's welfare and the parents' rights to control the child's upbringing. The quoted portions argued that the Court recognize the "fundamental right of parents to make decisions concerning the care, custody, and control of their children," *Troxel*, 530 U.S. at 66, but that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized," 442 U.S. at 603 (emphasis omitted). *Kanuszewski*, 333 F. Supp. 3d at 721.

43. *Kanuszewski*, 333 F. Supp. 3d at 721.

44. 448 F. Supp. 2d 1129, 1140 (D. Neb. 2006).

45. *Kanuszewski*, 333 F. Supp. 3d at 721.

46. *See id.* at 722 ("Plaintiffs appear to concede that the police power may, at times, override individual liberty interests when the police power is used to promote the public health and safety and to prevent a person from harming others" (emphasis omitted)).

47. *Id.* at 725.

48. *Id.*

the Tenth Circuit case *Dubbs v. Head Start, Inc.*[49] An analysis of the Fourth Amendment violations could be subject to another publication entirely. This Comment will only address the Fourteenth Amendment substantive due process claims.

After the district court dismissed the Plaintiffs' claims, the Sixth Circuit heard the appeal, reversing in part and affirming in part.[50] The Sixth Circuit refused to address the substantive constitutional rights of the children or the parents at the initial blood-drawing stage on qualified immunity grounds.[51] Some commentators have derided the Sixth Circuit's failure to reach the constitutional claim regarding the initial blood drawing.[52]

On the issue of the continued storage of the children's blood, the court was more than willing to delve into the constitutional rights of the parents.[53] The Plaintiffs' sought injunctive and declaratory relief for the "Defendants' retention, transfer, and ongoing storage of the children's blood samples."[54] The court reiterated that sovereign immunity prevented the Plaintiffs from recovering from Michigan, but they still could recover from the individual Defendants "in their official capacities."[55]

The Sixth Circuit significantly deviated from the lower court in two ways. First, the lower court had refused to address the issue of ongoing storage of the blood samples, citing the lack of independent violation.[56] In contrast, the Sixth Circuit recognized that "[p]arents possess a fundamental right to make decisions concerning the medical care of their children. It is well established that a parent has

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49. *Id.* at 727–29 (citing Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003)).

50. Kanuszewski v. Michigan Dep't of Health & Hum. Servs., 927 F.3d 396, 425–26 (6th Cir. 2019).

51. The court did not extend the fundamental right to the children themselves because "the Court has never so held for incompetent persons or minors, and it has in fact strongly suggested that this right does not extend to minor children." *Id.* at 414 (emphasis omitted). Furthermore, the Sixth Circuit held, "State sovereign immunity and qualified immunity therefore bar all of Plaintiffs' claims alleging that the parents' substantive due process rights were violated when Defendants drew their children's blood and screened it for diseases, and we decline to exercise our discretion to reach the merits of this issue." *Id.* at 416.

52. *See* Anne Hart, *An Insufficient Screening: The Constitutionality of Michigan's Newborn Screening Program*, 61 B.C. L. REV. E. SUPP. II. 213, II. 224–25 (2020) ("This exercise of discretion, however, limits future plaintiffs' opportunities to succeed in similar constitutional challenges. If courts continue to decline answering constitutional questions, as the Sixth Circuit did in *Kanuszewski II*, constitutional rights can never become clearly established.").

53. *Kanuszewski*, 927 F.3d at 418–21.

54. *Id.* at 418.

55. *Id.*

56. *See supra* notes 45–48 and accompanying text.

a substantive due process right 'to direct the education and upbringing of [his] children.'"[57] Furthermore, the court embraced the language of *Troxel*, which the district court had given less weight to, favoring the state's interest in protecting the health and safety of the children.[58]

The Sixth Circuit, in an demonstration of judicial activism, filled the apparent gap in Supreme Court precedent, arguing "a parent has a 'fundamental right to make decisions concerning the care, custody, and control of her' children, which would seem to *naturally include* the right to direct their children's medical care."[59] Even though children cannot make medical decisions for themselves, the Sixth Circuit established that this does not mean "no one has a fundamental right to direct the medical care of children right."[60]

Parents reserve the right to control their children's medical care because they "possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[61] Thus, it is assumed that children are subject to parental control.[62] The Sixth Circuit concluded that "it is logical[] the parents who possess a fundamental right to direct the medical care of their children"[63] and that "[g]overnment actions that burden the exercise of [the right] are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest."[64] The Sixth Circuit did not find the lack of clear Supreme Court precedent limiting for their decision. Instead, the court held that the right of parents to control their children's medical care was "naturally include[d]"[65] in parents fundamental right in decisions "concerning the care, custody, and control" of their child.[66]

The district court's treatment of the Sixth Circuit's strict scrutiny synthesis on remand helped the Plaintiffs win some of their claims at the summary judgment stage.[67] Still, other claims were denied and

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57. *Kanuszewski*, 927 F.3d at 418 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

58. *See supra* notes 40–42 and accompanying text.

59. *Kanuszewski*, 927 F.3d at 418 (quoting Troxel v. Granville, 530 U.S. 57, 72 (2000)); *id.* (quoting *Parham*, 442 U.S. 584, 604 (1979) ("[Parents] retain plenary authority to seek [at least some forms of medical] care for their children [including institutionalization], subject to a physician's independent examination and medical judgment.")).

60. *Id.* at 419.

61. *Id.* (quoting *Parham*, 442 U.S. at 602).

62. *Id.* (citing Schall v. Martin, 467 U.S. 253, 265 (1984)).

63. *Id.*

64. *Id.* (quoting Seal v. Morgan, 229 F.3d 567, 574–75 (6th Cir. 2000)).

65. *Id.* (quoting *Parham*, 442 U.S. at 604).

66. *Id.* at 418 (quoting Troxel v. Granville, 530 U.S. 57, 72 (2000)).

67. The defendants also won some of their summary judgment claims, leaving Fourth Amendment claims that will now proceed to trial. Kanuszewski v. Shah, 551 F. Supp. 3d 747, 776 (E.D. Mich. 2021), *opinion vacated in part on*

would have to go to trial.[68] After the district court granted summary judgment, the Plaintiffs' filed a motion for reconsideration.[69] The district court pointed out that the Sixth Circuit had not addressed the traditions and histories of parents' rights to control their children's medical care, a necessary analysis in a post-*Dobbs* world.[70] The district court argued that the "right exists within a split among the circuits" [71] and was reluctant to apply the Sixth Circuit's standard.[72] The major health effects of placing an injunction on the Michigan program compelled the court to only apply the injunctive relief "to the claims of only nine Michiganders."[73] Nonetheless the court held that "Plaintiff-parents have a constitutionally protected right to refuse informed consent for their children's medical care."[74] The court then proceeded to go through the Plaintiffs' claims and found initially "[t]here is no way to 'confirm' Plaintiffs' 'understanding' that their children's DBS would be sold to a third-party researcher without that being on the informed-consent form."[75] Under the strict scrutiny analysis, the court found that Michigan had failed to meet the highest

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reconsideration, 627 F. Supp. 3d 832, 851 (E.D. Mich. Sept. 13, 2022), *vacated in part*, 636 F. Supp. 3d. 781, 783, 784 n.1 (E.D. Mich. Oct. 20, 2022) ("Defendants have since filed a motion for a certificate of appealability on three state-law statutory-interpretation issues and a motion to stay the case pending appeal of those three issues[,]" and "[t]he order should have read that 'there is no genuine question of fact that the parents of RFK, CKK, LRW, CJW, and HJW did not give their informed consent to research.'").

68. *Id.* at 775.

69. Kanuszewski v. Shah, 627 F. Supp. 3d 832, 835 (E. D. Mich. 2022).

70. *Id.* at 837–38.

71. *Id.*

72. *Id.* at 838 ("Yet the Sixth Circuit's order requires this Court to apply strict scrutiny to any of Defendants' conduct that lacked informed consent under Michigan law." (citing Cochran v. Trans-Gen. Life Ins., 60 F. Supp. 2d 693, 698 (E.D. Mich. 1999))). *See also* United States v. Montgomery, 582 F.Supp.3d 485, 496 (E.D. Mich. 2021) ("In the absence of Supreme Court precedent directly on point, a district court should decline to 'underrule' established circuit court precedent." (quoting Hall v. Eichenlaub, 559 F. Supp. 2d 777, 782 (E.D. Mich. 2008))).

73. *Id.* at 836 ("Considering the 6,000-ish newborns that would not have otherwise been diagnosed with rare blood disorders, it is well understood that enjoining Michigan's unconstitutional conduct would have significant consequences.").

74. *Id.* at 844 (citing *Kanuszewski*, 927 F.3d at 418.)

75. *Id.* at 846.

level of scrutiny required by the Sixth Circuit.[76] The court then allowed the remaining constitutional claims to go trial.[77]

III. CLASSICAL SUBSTANTIVE DUE PROCESS

The jurisprudence of substantive due process arose from the Fourteenth Amendment commitment to the natural law and common law tradition that placed procedural limitations upon the government from infringing on an individuals' life, liberty, and property.[78] John Locke argued that rights must be protected "with 'substantive rules of common law or statute' that protect property and personal security. Although he focuse[d] primarily on procedural protections in civil and criminal proceedings, he employ[ed] 'due process' and 'law of the land' as restraints on arbitrary government."[79] Originally, the Privileges and Immunities clause would serve as a bulwark to protect enumerated and unenumerated rights.[80] One of the main sponsors of

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76. Implementing strict scrutiny, the district court found that the defendants' "conduct fails strict scrutiny with respect to posttesting research, storage, transfer, sale, discard, and all other use of the tested DBS. Defendants allege they need the posttesting DBS to maintain and to expand the NSP and to conduct medical and public-health research . . . ." *Id.* at 850. The district court criticized the invasive means the state used "[d]efendants could simply obtain informed consent, which is obviously less restrictive on Plaintiffs' rights than not obtaining their consent. For example, Defendants could simply create a form with separate checkboxes for all the conduct for which Michigan law does not waive informed consent." Additionally, "[d]efendants' conduct also fails strict scrutiny with respect to research, storage, transfer, sale, discard, and all other use of the one identification DBS." *Id.* at 851.

77. *Id.* at 852.

78. EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY 3 (1996); *see* U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.").

79. KEYNES, *supra* note 78, at 14.

80. Randy E. Barnett & Evan D. Bernick, *The Original Meaning of "Privileges or Immunities" The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment of "Privileges or Immunities"*, 95 NOTRE DAME L. REV. 499, 501 (2019). According to Senator Jacob Howard the Fourteenth Amendment rights were to protect the "mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . . ." (quoting Senator Jacob Howard CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866)). Mr. Barnett and Mr. Bernick critiqued Kurt T. Lash for taking a new stance on the Privileges and Immunities clause, complaining that "[a]lthough this recapitulation has been read by a number of scholars as communicating that the Privileges or Immunities Clause would *absolutely* protect unenumerated fundamental rights associated with the Privileges and Immunities Clause, *as well* as the personal rights set forth in the first eight amendments, Lash reads it differently." *Id.* at 520.

the Fourteenth Amendment, Senator Jacob Howard, read from Justice Washington's 1823 opinion, which laid out these rights.

> Washington went on to explain that privileges and immunities "may . . . be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."[81]

The Fourteenth Amendment would protect both enumerated and unenumerated rights from government overreach. Unfortunately, the Supreme Court in the *Slaughter-House Cases* virtually nullified the privileges and immunities clause.[82] In the years after *Slaughter-House*, the Supreme Court began to rely upon the Fourteenth Amendment's due process clause to limit state's undue inference using police powers.[83]

During the Lochner era, the Court in *Meyer v. Nebraska* recognized that certain unenumerated rights were protected via the Fourteenth Amendment's due process clause.

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen.[84]

The Court looked to the country's common law history and alluded to its traditions to help inform the existence of those rights that must be protected from government overreach in areas long respected in society.[85]

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81. *Id.* at 500 (quoting Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230)).

82. *Id.* at 529–30; Ilan Wurman, *The Origins of Substantive Due Process* 87 U CHI. L. REV. 815, 872 (2020) ("There is a debate in the literature about whether the privileges and immunities of citizens protected by this clause include only federal rights, or also state-defined civil rights like contract and property rights. Most scholars agree that the clause referred at a minimum to state-defined rights and that Justice Samuel Miller was incorrect in the Slaughter-House Cases to limit the clause only to the privileges of national citizenship.").

83. Wurman, *supra* note 82, at 869.

84. 262 U.S. 390, 399 (1923) (emphasis added).

85. *Id.* at 399–400.

In *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, the Court extended the doctrine to protect the parent's right to educate their children in the manner they wished.[86] This right arose from the fundamental sense that liberty:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[87]

The Court recognized the right of American parents to preserve their autonomy from state interference within the near-sacred domain of the home, free from the government.[88]

In Justice Stone's famous footnote four of *United States v. Carolene Products Co.*,[89] the Court ceased to apply the Lochner era's respect for unenumerated rights in the economic domain, but continued to enforce those rights established in *Pierce* and *Meyer*.[90] In *Prince*, the Court once again recognized the familial right, reiterating that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[91]

Over the next thirty years, the Court expanded these unenumerated privacy rights to married couples' use of contraceptives in *Griswold v. Connecticut*,[92] the unmarried couple's right to a contraceptive in *Eisenstadt v. Baird*,[93] and finally, abortion in *Roe v. Wade*.[94] These three rights would become the zenith of the unenumerated right to privacy in the Supreme Court's case law. All

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86. 268 U.S. 510, 534–35 (1925).

87. *Id.* at 535.

88. *Id.*

89. 304 U.S. 144, 152 n.4 (1938).

90. *Id.* ("[F]or regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." & "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Soc'y of Sisters, 268 U.S. 510 . . . or national, Meyer v. Nebraska, 262 U.S. 390 . . . Bartels v. Iowa, 262 U.S. 404 . . . Farrington v. Tokushige, 273 U.S. 284 . . . or racial minorities.") (cleaned up).

91. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

92. 381 U.S. 479, 486 (1965).

93. 405 U.S. 438, 453–54 (1972).

94. 410 U.S. 113, 166 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

three cases relied upon the foundations laid out by *Pierce*, *Meyer*, and *Prince v. Massachusetts*.[95] However, Justice Black's dissent in *Griswold* laid the framework of backlash that the next fifty years of jurisprudence would bring.[96]

This backlash began in the 1970s with the case *San Antonio Independent School District v. Rodriguez*.[97] Even though this case focused on equal protection, the majority of the Court criticized the unenumerated Fourteenth Amendment fundamental right jurisprudence that "[t]he Court today does [not] 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.'"[98] Marshall's dissent formulated the analytical framework that the conservative court was shifting away from. Marshall stated that "[a]s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."[99] The unenumerated rights

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95. *Compare Griswold*, 381 U.S. at 482–83 ("By Pierce v. Soc'y of Sisters, *supra*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By Meyer v. Nebraska, *supra*, the same dignity is given the right to study the German language in a private school . . . without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the Pierce and the Meyer cases."), *with Eisenstadt*, 405 U.S. at 457 (Douglas, J., concurring), *and Roe*, 410 U.S at 153 ("[F]amily relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Soc'y of Sisters, 268 U.S. 510, 535, (1925), Meyer v. Nebraska, *supra*.") (cleaned up).

96. *Griswold*, 381 U.S. at 521–22 (Black, J., dissenting) ("The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country." & "And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law.").

97. Charles J. Ogletree, Jr., *The Legacy and Implications of San Antonio Independent School District v. Rodriguez*, 17 RICH. J.L. & PUB. INT. 515, 532–34 (2014) ("As noted above, the shift from the Warren Court to the Burger Court likely played a principal role in the Supreme Court's decision in Rodriguez.").

98. 411 U.S. 1, 31 (1973) (quoting Shapiro v. Thompson, 394 U.S. 618, 655, 661 (1969), *overruled by* Edelman v. Jordan, 415 U.S. 651 (1974)).

99. *Id.* at 102–03 (Marshall, J., dissenting); *id.* at 103 ("Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now

must be based within a nexus of constitutional and non-constitutional right to gain a fundamental status.

IV. THE CONSERVATIVE SUPREME COURT'S STANCE ON SUBSTANTIVE DUE PROCESS

After the 1970s, the Supreme Court continued to slowly weaken the Fourteenth Amendment substantive due process rights, particularly with abortion law, which had reached its height in *Roe*.[100] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court shifted abortion away from a fundamental right that received strict scrutiny to a liberty interest that received rational basis review.[101] Justice Blackmun's dissent recognized the shift in judicial scrutiny occurring and stated that the Court "has held that limitations on the right of privacy are permissible only if they survive 'strict' constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest."[102]

Not only did the Court begin to weaken *Roe*'s status as a fundamental right, but Blackmun criticized the history and traditions framework that now dominates the substantive due process jurisprudence under the conservative Court.[103] The recognition of

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understood to be important because of its interaction with the established constitutional right of privacy.").

100. *Compare* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 419 n.1 ("In sum, it appears that the dissent would uphold virtually any abortion regulation under a rational-basis test"), *overruled by Casey*, 505 U.S. 833, *with id.* at 462 (O'Connor, J., dissenting) (quotation omitted) ("If the impact of the regulation does not rise to the level appropriate for our strict scrutiny, then our inquiry is limited to whether the state law bears some rational relationship to legitimate state purposes.").

101. *See* 505 U.S. 833, 846 (1992) ("And third is the principle that the State has *legitimate interests* from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.") (emphasis added), *overruled by Dobbs*, 142 S. Ct. 2228.

102. *Id.* at 929 (Blackmun, J., concurring) (citing *Griswold*, 381 U.S. at 485). However, Justice Blackmun outright stated that this was the incorrect level of scrutiny that must be applied: "But while a State has 'legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child,' . . . legitimate interests are not enough. To overcome the burden of strict scrutiny, the interests must be compelling." *Id.* at 932 (emphasis added). *See also* KEYNES, *supra* note 78, at 200 ("In balancing the competing private and public claims, the plurality employed a vague 'unduly burdensome' yardstick rather than the more precise empirical standard that Circuit Judge Walter Stapleton had employed. The plurality also abandoned Blackmun's trimester analysis and 'compelling interest' standard.").

103. *Casey*, 505 U.S. at 940–41 (Blackmun, J., concurring) ("This constricted view is reinforced by THE CHIEF JUSTICE's exclusive reliance on tradition as

new personal liberties has been severely limited as the Court inadvertently binds itself to "perpetuating the prejudices of past generations."[104] This has been a common critique of common law since America's founding. Thomas Jefferson had "express[ed] his distrust of judges and his preference for legislative certainty,"[105] and he "blamed the 'sly poison' of Mansfield, which had been 'admirably seconded by the celebrated Dr. Blackstone.'"[106] Thomas Jefferson's distrust of the common law centered on English land law, which he attributed to "'Norman lawyers' who had 'found means to saddle' the lands of the Saxons with the contrivances of 'feudal burthens' based on the 'fictitious principle that all lands belong originally to the king.'"[107] Jefferson found that aristocratic prejudice was being passed down.[108]

The major pitfall of the Supreme Court's history and traditions jurisprudence is that it relies heavily on Blackstone's Commentaries[109] and English common law, which even Thomas

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a source of fundamental rights . . . . Given THE CHIEF JUSTICE's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.").

104. John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY 172, 198 (2009).

105. David Thomas Koning, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common Law Adjudication*, *in* THE MANY LEGALITIES OF EARLY AMERICA 97, 116 (Bruce H. Mann and Christopher L. Tomlins eds., 2001).

106. *Id.* at 106 (quoting Jefferson to John Brown Cutting, Oct. 1788 ("sly poison"), Papers of Jefferson, XIII, 649; Jefferson to Philip Mazzei, Nov. 28, 1785, IX, 70–71 ("celebrated Dr. Blackstone")).

107. *Id.* at 114–15 (quoting THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA: SET FORTH IN SOME RESOLUTIONS INTENDED FOR THE INSPECTION OF THE PRESENT DELEGATES OF THE PEOPLE OF VIRGINIA, NOW IN CONVENTION 20 (Williamsburg Va., Clementina Rind 1774)).

108. *Id.*

109. Cruzan by Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 294 (1990) (Scalia, J., concurring) ("At common law in England, a suicide-defined as one who 'deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death . . .- was criminally liable." (quoting 4 W. Blackstone, Commentaries, at *189)); Washington v. Glucksberg, 521 U.S. 702, 712 (1997) ("Centuries later, Sir William Blackstone, whose Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th-century American lawyers, referred to suicide as 'self-murder' and 'the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure. . . .'" (quoting 4 W. Blackstone, Commentaries, at *189); Dobbs v. Jackson Women's Health Org., 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2249 (2022) ("And writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a 'quick' child was 'by the ancient law homicide or manslaughter'" (citing Henry de Bracton, 2 De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879)), "and at least a very 'heinous misdemeanor'" (citing Sir Edward Coke, 3 Institutes of the Laws of

Jefferson found constraining over almost 250 years ago.[110] The tradition framework empowers justices to frame certain traditions narrowly when they wish to uphold a specific law, but when they embrace a more general definition of tradition, they can strike the law down.[111] The unintended–or perfectly intended–consequences are the rejection of settled precedent and societal norms established in modernity such as contraceptives, which under this framework could be the "next likely candidate for his list of outcasts."[112] The justices on the Court run the risk of binding the whole nation to past notions when the rights they try assert are no longer socially acceptable, as Jefferson had complained about aristocratic English land law.[113]

Justice Scalia strengthened the history and tradition analytical framework in *Michael H.*[114] Justice Scalia sought to limit the construction of substantive due process by stating:

> [W]e have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[115]

The Court attempted to ground the Fourteenth Amendment jurisprudence within the country's history and traditions by citing Justice Harlan's concurrence in *Griswold* to substantiate his assertion.[116] The Court argued that there was a "historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the *unitary* family."[117] The Court evaluated the states' common law and the common law history from Blackstone onward[118] to decide whether the "natural father" had the power "to assert parental rights over a child

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England 50–51 (1644) and Sir William Blackstone, 1 Commentaries on the Laws of England 129–30 (7th ed. 1775))).

110. Koning, *supra* note 105, at 106, 114–16.

111. Toro, *supra* note 104, at 186–87.

112. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 941 (1992) (Blackmun, J., concurring), *overruled by* Dobbs, 142 S. Ct. at 2228.

113. Koning, *supra* note 105, at 115–16.

114. 491 U.S. 110, 122–23 (1989) (plurality opinion).

115. *Id.* at 122 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (Cardozo, J)).

116. *Id.* at 122–23 (Harlan, J., concurring) ("[C]ontinual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society." (quoting Griswold, 381 U.S. at 501)).

117. *Id.* at 123 (citing Stanley v. Illinois, 405 U.S. 654, 651 (1972); Quilloin v. Walcott, 434 U.S. 246, 254–55 (1978); Caban v. Mohammed, 441 U.S. 380, 389 (1979); Lehr v. Robertson, 463 U.S. 248, 261 (1983)).

118. *Id.* at 124–25.

born into a woman's existing marriage with another man."[119] The Court used the traditions and history framework to rule against the biological father and uphold the California law that "rebut[s] the presumption of legitimacy is a concern that allowing persons other than the husband or wife to do so may undermine the integrity of the marital union."[120]

The facts of *Michael H.* demonstrate that at common law, there was a strong presumption that the child came from married parents unless there was "proof that a husband was incapable of procreation or had had no access to his wife during the relevant period."[121] However, this presumption ignores the advent of DNA testing and the "98.07% probability that Michael was Victoria's father."[122] As discussed above, the Court may be binding the country to certain common law precedents that may "perpetuate[] the prejudices of past generations."[123] But here, it may not even be prejudice, but instead changes in medical technology that can identify a father down to the percentage, making the original intricate purpose of the common law obsolete, even if the overarching values have remained the same.[124]

The gulf between these two arguments is typified in Justice Brennan's scathing dissent of the current conservative jurisprudence:[125] "Nevertheless, because the plurality opinion's exclusively historical analysis portends a significant and unfortunate departure from our prior cases and from sound constitutional decision making."[126] For Justice Brennan, the conservative court invoked history and tradition as their cornerstone of substantive due process jurisprudence only to achieve their personal desired outcome.[127] Justice Brennan recognized the seductive characteristics of such jurisprudence: "[I]t would be comforting to believe that a search for

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119. *Id.* at 126.

120. *Id.* at 132.

121. *Id.* at 124.

122. *Id.* at 114.

123. Toro, *supra* note 103, at 198.

124. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 157 (1989) (Brennan, J., dissenting) "[P]assing finally to the notion that the Court always has recognized a cramped vision of 'the family,' today's decision lets stand California's pronouncement that Michael—whom blood tests show to a 98 percent probability to be Victoria's father—is not Victoria's father. When and if the Court *awakes* to *reality*, it will find a world very *different* from the one it *expects*." (emphasis added), *with Id.* at 141–42 ("[T]hat of a parent and child in their relationship with each other—that was among the first that this Court acknowledged in its cases defining the 'liberty' protected by the Constitution . . . and I think I am safe in saying that no one doubts the wisdom or validity of those decisions.").

125. *Id.* at 136–37.

126. *Id.* at 137.

127. *Id.* ("'tradition' . . . can be as malleable and as elusive as 'liberty' itself, the plurality pretends that tradition places a discernible border around the Constitution.").

'tradition' involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history."[128] However, quoting Justice White, Justice Brennan explained the severe limitation this framework places on unenumerated rights:

> Yet, as Justice WHITE observed in his dissent in Moore v. East Cleveland... "What the deeply rooted traditions of the country are is arguable." Indeed, wherever I would begin to look for an interest "deeply rooted in the country's traditions," one thing is certain: I would not stop (as does the plurality) at Bracton, or Blackstone, or Kent, or even the American Law Reports in conducting my search. Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of "liberty," the plurality has not found the objective boundary that it seeks.[129]

Comparing these two viewpoints, it is evident that Justice Scalia would prefer to recite three hundred years of history to establish a specific tradition in the past,[130] whereas Justice Brennan, derides Scalia's jurisprudence and interpretation of the Constitution as backwards: "It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[131]

However, Brennan and Scalia are supporting the same argument, even though their reasonings for doing so may differ. For example, although Justice Brennan left a scathing review of the majority, Justice Brennan also strengthens the argument of parental rights[132] saying "that of a parent and child in their relationship with each other—that was among the first that this Court acknowledged in its cases defining the 'liberty' protected by the Constitution . . . . and I think I am safe in saying that no one doubts the wisdom or validity of those decisions."[133] Therefore, even with the more liberal

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128. *Id.*

129. *Id.* at 137 (Brennan, J., dissenting) (quoting Moore v. East Cleveland, 431 U.S. 494, 549 (1977)). In Justice Scalia's footnote 6, he responds to Brennan's argument "[b]ecause such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference—or at least to announce, as Justice BRENNAN declines to do." *Id.* at 127 n.6. Instead, Justice Scalia saw Justice Brennan's broader argument as "[a]lthough assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all." *Id.*

130. *Id.* at 127 n.6.

131. *Id.* at 141.

132. *Id.* at 141–42.

133. *Id.*

jurisprudence, parental rights exist, even if they are not only rooted in the country's histories and traditions.

Justice Brennan's more flexible framework expands upon Justice Marshall's nexus between unenumerated right and the "specific constitutional guarantee" from *Rodriguez*.[134] Instead of examining history and traditions to establish fundamental rights, "the better approach–indeed, the one commanded by our prior cases and by common sense–is to ask whether the specific parent-child relationship under consideration is close enough to the interest that we have already protected to be deemed an aspect of 'liberty' as well."[135] Combining Justice Marshall's nexus framework and Justice Brennan's approach, there is ample room under liberal jurisprudence for a parental right to control their children's medical care.

After *Michael H.*, the conservative Court consistently began to invoke the history and tradition argument in *Cruzan v. Director, Missouri Department of Health*,[136] *Washington v. Glucksberg*,[137] Chief Justice Rehnquist's dissent in *Casey*, and *Dobbs*.[138] These cases established this framework to either uphold certain cases or strike down others. They demonstrate the conservative Court's commitment to recognizing only rights rooted firmly in the nation's traditions and history, even if when some view it as a type of analysis that makes the Constitution a "stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[139] Justice Scalia's fear that "a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all"[140] is reasonable. However, Justice Scalia's solution runs the risk of binding the present day to outdated history as Thomas Jefferson

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134. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 102–03 (1973) (Marshall, J., dissenting).

135. Michael H. v. Gerald D., 491 U.S. 110, 142 (1989) (Brennan, J., dissenting).

136. 497 U.S. 261, 269–70 (1990).

137. 521 U.S. 702, 703 (1997).

138. *See Cruzan*, 497 U.S. at 269, 284 ("At common law, even the touching of one person by another without consent and without legal justification was a battery" & "In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state."); *Glucksberg*, 521 U.S. at 721 ("Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking'"); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) ("That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" (quoting *Glucksberg*, 521 U.S. at 721)); Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 940–41 (1992) (Blackmun, J., dissenting).

139. *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

140. *Id.* at 127 n.6.

felt the English common law had done during the Revolutionary era.[141] If the Court can conform humanity's broad universal commitments to family and parents' rights then, as Justice Brennan demonstrated, those rights become fundamental–without the need to slice the historical salami so thin that the cherry picked right may seem foreign to most.[142] There must be a middle ground to reconcile these two vastly different schools of jurisprudence to help resolve true issues of rights being infringed.

V. THE COMMON LAW AND SUPREME COURT HISTORY OF PARENTS' RIGHT TO CONSENT TO THEIR CHILDREN'S MEDICAL CARE

Given the current conservative Court's jurisprudence on the Fourteenth Amendment, the Sixth Circuit should have sought to root parents' fundamental right to control their children's medical care in the United States' history and traditions.[143] Even though a vast amount of criticism has been lodged against the history and traditions framework, it does not change the reality that this is the method the Court uses to establish fundamental rights.[144] This section will seek to ground parents' right to control their children's medical care in Anglo-American common law tradition and history. Blackstone's *Commentaries* will provide the bedrock, and American Tort law on informed consent will demonstrate the progression since the 1700s.

William Blackstone's *Commentaries* provide a thorough summary of British law up until he published them from 1765–1769.[145] The 257-year-old commentaries provide the historical basis for the views, values, and culture of English family life from a time long past. However, they provide the necessary background to root parental rights deep in the nation's history and traditions. For Mr. Blackstone, the father's control over his family was nearly supreme:

> The legal power of a father, for a mother, as such, is entitled to no power, but only to reverence and respect; the power of a

141. *Supra* notes 106–08 and accompanying text; *Michael H.*, 491 U.S. at 138 (Brennan, J., dissenting) ("[T]he plurality acts as though English legal treatises and the American Law Reports always have provided the sole source for our constitutional principles. They have not. Just as common-law notions no longer define the 'property' that the Constitution protects").

142. *Michael H.*, 491 U.S. at 141–42 (Brennan, J., dissenting) ("[P]arent and child in their relationship with each other—that was among the first that this Court acknowledged in its cases defining the 'liberty' protected by the Constitution . . . and I think I am safe in saying that no one doubts the wisdom or validity of those decisions.").

143. *Dobbs*, 142 S. Ct. at 2235.

144. *Supra* note 139.

145. *See generally* 1 WILLIAM BLACKSTONE, COMMENTARIES (Transcriber's Notes), https://www.gutenberg.org/files/30802/30802-h/30802-h.htm.

> father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father, or other guardian, gives place to the *empire* of reason. Yet, till that age arrives, this *empire* of the father continues even after his death; for he may by his will appoint a guardian to his children.[146]

The child did not become autonomous until they reached the age of twenty one when, under Blackstone's calculus, they gained the proper reasoning to make their own decisions.[147] Out of this tradition, American informed consent laws arose to establish a father's strength to rule the family when the children still lacked reason.[148] The tort law on informed consent, in general, is in agreement with these precepts.[149]

At common law, if an individual refuses to consent, but there is still an "intentional invasion of their interest[,]" it is considered assault.[150] The individual's infancy, mental incompetence, failure to object, "or even his active manifestation of consent will not protect the defendant."[151] Common law courts accepted that parental consent over their children's medical care was generally absolute, and was only subject to limitations if the child faced immediate harm, was close to maturity, or had been emancipated.[152] However, if a parent

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146. F. Lee Francis, *Who Decides: What the Constitution Says about Parental Authority and the Rights of Minor Children to Seek Gender Transition Treatment*, 46 S. ILL. UNIV. L.J. 535, 539 (2022) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 446, 453 (St. George Tucker ed., Augustus M. Kelley 1969) (1803)) (emphasis added).

147. *Id.*

148. *Id.* at 539–40 ("American law, then, rightly presumes that children lack the requisite capacity to make critical reasoned decisions and thus necessitates adult direction. Our law, as it was similarly reflected at common law, granted broad authority to parents over their children.").

149. *See infra* notes 154–59.

150. WILLIAM L. PROSSER, HANDBOOK OF LAW OF TORTS 101 (4th ed. 1978) ("'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass."); Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 277 (1990) ("As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.").

151. PROSSER, *supra* note 150, at 102.

152. These cases were articulated and collected in PROSSER, *supra* note 150, at 103 n.50. Zoski v. Gaines, 271 Mich. 1, 9, 260 N.W. 99, 102 (1935) ("Except in the very extreme cases, a surgeon has no legal right to operate upon a child without the consent of its parents or guardian."); Rishworth v. Moss, 191 S.W. 843, 847 (Tex. Civ. App. 1916) ("In our former opinion we held that a physician is liable for operating upon a person unless he obtains the consent of such person, if competent to give consent, and, if not, of someone who, under the

unreasonably withheld care, the state could step in and "act for the welfare of the child, remove him from the custody of the parent, and appoint a custodian, who may then consent to the operation."[153] If the medical emergency is severe, "these requirements must be waived, and the surgeon must be free to operate without delaying to obtain consent." [154]

The Restatement of Torts conformed to these common law traditions that "[a]ctual consent exists only if the person has the capacity to consent."[155] However, the individuals that authored the Restatement have hedged the historical presumption against children's ability to consent with broader reasonableness language.[156] *Restatement of the Law - Children and the Law* recognized the common law rule restated above that "'[a]lthough a minor ordinarily lacks the authority to consent to medical treatment' they still may 'provide legally sufficient consent to routine, beneficial medical treatment. Subject to § 19.02, other medical treatment requires the consent of a parent or guardian.'"[157] The Restatement listed two Supreme Court cases, *Parham*[158] and *Bellotti v. Baird*,[159] that

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circumstances, would be legally authorized to give the consent; that in the case of a child of tender years consent must be obtained from the parent or guardian."); Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941) ("In the great majority of the states, this question seems never to have arisen, nor are there any federal cases on the subject. However, the general rule is that the consent of the parent is necessary for an operation on a child. . . . There are, of course, exceptions to the rule. One of them is in cases of emergency, when obviously an operation is necessary, Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106, 41 L.R.A.,N.S., 290; Sullivan v. Montgomery, 155 Misc. 448, 279 N.Y.S. 575 . . . others perhaps in cases in which the child has been emancipated, or where the parents are so remote as to make impracticable the obtaining of their consent in time to accomplish proper results. And where the child is close to maturity, it has been held that the surgeon may be justified"); Tania E. Wright, *A Minor's Right to Consent to Medical Care*, 25 HOWARD L.J. 525, 529 (1982).

153. PROSSER, *supra* note 150, at 103 n.50.

154. In PROSSER, the age of a mature minor, listed in footnote 150, was around 17–18 years old, at least for minor operations. *Id.* at 103 n.51 (citing Bakker v. Welsh, 144 Mich. 632, 108 N. W. 94 (1906) (17 years); Gulf & S. I. R Co. v. Sullivan, 119 So. 501 (1928) (same); Bishop v. Shurly, 211 N.W. 75 (1926) (19 years); Lacey v. Laird, 130 N.E.2d 25 (1950) (18 years)).

155. RESTATEMENT (THIRD) OF TORTS: INTEN. TORTS TO PERSONS § 15 cmt. b (AM. L. INST., Tentative Draft No. 4, 2019).

156. *Id.* ("If the person consenting is a child or has an intellectual disability, the consent is nevertheless effective if the person is capable of appreciating the nature, extent, and potential consequences of the conduct consented to, even if the parent, guardian, or other person responsible does not consent to the conduct.").

157. RESTATEMENT OF THE LAW - CHILD. AND THE L. § 19.01 (AM. L. INST., Tentative Draft No. 2, 2019).

158. Parham v. J. R., 442 U.S. 584, 585 (1979).

159. 443 U.S. 622, 622 (1979).

recognized that generally there is a presumption that minors are unable to consent unless they are mature minors.[160]

The presumption in favor of the parent's ability to make medical decisions for their children is rooted in the nation's common law tradition.[161] The Supreme Court's recognition of parental consent thus favors the argument that unless the child is near the age of maturity, threatened with death or bodily harm, or care is unreasonably withheld, parents must have the right to consent to medical care.[162] Furthermore, the Supreme Court examined adult consent law using the history and tradition framework, which invoked the common law rights of consent to determine the standard that guardians must use when turning off life support machines that are keeping an incapacitated individual alive.[163]

However, the Court has never outright held that parents have a fundamental right to control their children's medical care. Instead, as demonstrated above, they have implied it through parental consent doctrine in *Parham* and *Bellotti* and then in cases such as *Meyer* and *Pierce*.[164]

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160. In *Parham*, Justice Stewart explained that minors' have limited capacity to consent because "parents possess what a child lacks in maturity, experience and capacity for judgment necessary to make life's difficult decisions ... the natural bonds of affection lead parents to act in the best interest of their children." RESTATEMENT OF THE LAW - CHILD. AND THE L. § 19.01 cmt. b (quoting Parham v. J.R., 442 U.S. 584 (1979)). The Supreme Court has pointed to the presumed incompetence of minors as decisionmakers as one basis for limiting minors' constitutional rights, including the right to make medical decisions about abortion. *Bellotti*, 443 U.S. at 635 ("States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences ... minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them). But the Court also made clear in *Bellotti* that mature minors have the right to consent to abortion without parental involvement. *Id.* at 651. In *Parham*, Justice Stewart explained that "[f]or centuries it has been a canon of the common law that parents speak for their minor children." 442 U.S. at 621 (Stewart, J., concurring). However, the Court did not directly create the fundamental right of parents to control the medical care of their children: "[I]t was error to hold unconstitutional the State's procedures for admitting a child for treatment to a state mental hospital." *Id.* at 620; *see supra* note 152 and accompanying text.

161. *Parham*, 442 U.S. 584 (1979); *Bellotti*, 443 U.S. 622 (1979).

162. *See supra* notes 150–52 and accompanying text.

163. *See* Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 269, 284 (1990) ("At common law, even the touching of one person by another without consent and without legal justification was a battery" & "In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.").

164. *See supra* note 160; *infra* note 165; Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("*establish a home and bring up children*, to worship God according to the

The care, custody, and control language in the *Troxel*, a plurality opinion written by Justice O'Connor, remains the closest the Court has gotten to recognizing the right as fundamental.[165] In *Troxel*, Justice O'Connor recited the cases in the Court's past that had recognized parents' fundamental right to control the care, custody, and control of their children.[166] The visitation order in *Troxel* was "was an unconstitutional infringement on Granville's *fundamental right* to make decisions concerning the care, custody, and control of her two daughters."[167] Thus, combining *Troxel*, *Cruzan*, *Parham*, and *Bellotti*, it is natural that the Fourteenth Amendment right to control children's medical care is deeply rooted with the history and

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dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen") (emphasis added); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925) ("excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

165. Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion) ("In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the *fundamental right* of parents to make decisions concerning the care, custody, and control of their children.") (emphasis added).

166. *Id.* at 66. Justice O'Connor proceeded to list a comprehensive set of cases that establishes parental rights: "Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'" (citation omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children") (citing *Meyer* and *Pierce*))."

167. *Id.* at 72.

traditions of the nation and the jurisprudence of the Supreme Court.[168]

VI. A PARENTAL RIGHT TO CHILDREN'S MEDICAL CARE IS NOT ABSOLUTE

The lofty parental rights discussed above, however, are not absolute and are subject to reasonable limitations. The landmark case of *Jacobson v. Commonwealth of Massachusetts*[169] provided a limitation upon parental rights. The Supreme Court held that:

> The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.[170]

The law in *Jacobson* applied to "*all the inhabitants thereof*" and gave children the ability to opt out if a physician signed off.[171] In *Zucht v. King*, the Supreme Court chose not to extend jurisdiction over the child's vaccine issue because it was their "duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ,

168. In *Bellotti*, the Court recognized that states "may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635 (1979). The Court also addressed that "many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, 'constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.'" *Id.* at 638 (citing Ginsberg v. New York 390 U.S. 629, 639 (1968)). In *Parham*, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 442 U.S. 584, 621 n.1 (1979) (Stewart, J., concurring) (quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)).

169. 197 U.S. 11, 39 (1905).

170. *Id.* at 26–27.

171. *Id.* at 12–13 (emphasis added).

substantial in character."[172] The Court recognized that they had already decided in *Jacobson* that police powers enabled states to regulate compulsory vaccines: These vaccine restrictions could prevent a child from attending public and private school.[173] In these circumstances, parental rights may recede to the background if they interfere with a legitimate state interest.[174] When faced with "the pressure of great dangers," the states may restrain parental liberty "with reasonable regulations . . . as the safety of the general public may demand"[175] The major limitation may be placed upon parents and citizens in society if the vaccine regulation assuages the *"pressure of great dangers*" and "the safety of the general public [so] demand."[176] Since these two early constitutional cases, courts have consistently applied rational basis review for vaccine mandates.[177] The Supreme Court's limitation on liberty for health and safety issues has contributed to the circuit split as different courts attempt to reconcile a parent's fundamental right with the rights of society as a whole.

VII. SYNTHESIZING A PARENT'S RIGHT TO CONTROL THEIR CHILDREN'S MEDICAL CARE

The recognition of certain unenumerated substantive due process rights by the Supreme Court has been subject to much debate since the 1960s. However, the Sixth Circuit's creation of a fundamental right for parents to control their children's medical care should survive both liberal jurisprudence and the newly empowered conservative history and traditions jurisprudence.[178] When

172. Zucht v. King, 260 U.S. 174, 176 (1922) (citing Sugarman v. United States, 249 U. S. 182, 184 (1919)).

173. *Id.* at 175–76.

174. *Jacobson*, 197 U.S. at 38.

175. *Id.* at 29.

176. *Id.* (emphasis added).

177. The Court in *Goe v. Zucker* restated that "as we further noted in *Phillips*, 'no court appears ever to have held' that '*Jacobson* requires that strict scrutiny be applied to immunization mandates.' To be sure, courts have consistently rejected substantive due process challenges to vaccination requirements without applying strict scrutiny." 43 F.4th 19, 31–32 (quoting *Phillips v. City of New York*, 775 F.3d 538, 542 n.5 (2d Cir. 2015), and citing B.W.C. v. Williams, 990 F.3d 614, 622 (8th Cir. 2021)); Workman v. Mingo Cnty. Bd. of Educ., 419 F. App'x 348, 355–56 (4th Cir. 2011) (summary order); Boone v. Boozman, 217 F. Supp. 2d 938, 956–57 (E.D. Ark. 2002); Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir. 1996)).

178. *See Kanuszewski*, 927 F.3d at 419 ("[I]t is logically the parents who possess a fundamental right to direct the medical care of their children" and that "[g]overnment actions that burden the exercise of [the right] are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest."); furthermore, the Court argued that "[t]he right of parents to direct the medical care of their children has further support in the case law as well. In *Cruzan*, the Supreme Court held that "a competent person has a

recognizing a fundamental right, the Sixth Circuit erred when it only referenced the Supreme Court jurisprudence but failed to root the right in the history and traditions of American common law.[179]

The conservative justices since *Michael H.* have leaned on the history and tradition framework[180] because, as Justice Brennan stated, it "pretends that tradition places a discernible border around the Constitution."[181] Thus, the justices will look for this discernible border to determine possible fundamental rights. Justice Scalia in his dissent in *Lawrence v. Texas* reiterated this consistent reliance: "We have held repeatedly, in cases the Court today does not overrule, that only fundamental rights qualify for this so-called 'heightened scrutiny' protection—that is, rights which are 'deeply rooted in this Nation's history and tradition.'"[182] The current Court most likely will not implement a framework articulated by Justice Kennedy that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[183]

The Sixth Circuit analysis may have partially satisfied the history and tradition framework when they cited *Glucksberg*,[184] *Meyer*, *Pierce*, *Parham*, *Cruzan*, *Schall v. Martin*,[185] and *Troxel*, which all helped lay the foundation for creating a parents' fundamental right over "decisions 'concerning the care, custody, and control.'"[186] If the Sixth Circuit wished to create a fundamental right with a heightened level of scrutiny, it needed to do more than merely hold that parents' right to control their children's medical care is "naturally included" after listing off Supreme Court case law.[187]

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constitutionally protected liberty interest in refusing unwanted medical treatment." *Id.* at 418 (quoting *Cruzan*, 497 U.S. at 278).

179. *Kanuszewski*, 627 F.Supp.3d at 838, *vacated in part*, No. 1:18-CV-10472, 2022 WL 11964348 (E.D. Mich. Oct. 20, 2022).

180. *See* Lawrence v. Texas, 539 U.S. 558, 559 (2003) ("The Nation's laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."). *See also* Washington v. Glucksberg, 521 U.S 702, 703 (1997) ("This asserted [right to suicide] has no place in our Nation's traditions, given the country's consistent, almost universal, and continuing rejections of the right").

181. Michael H. v. Gerald D., 491 U.S. 110, 137 (1989) (Brennan, J., dissenting).

182. 539 U.S. at 593 (Scalia, J., dissenting) (citing *Glucksberg*, 521 U.S., at 721). Justice Scalia additionally cited *Meyer*, where he emphasized "*privileges long recognized at common law.*" *Id.* at 593 (Scalia, J., dissenting) (citing *Meyer*, 262 U.S. at 399).

183. *Id.* at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (cleaned up)).

184. 521 U.S. 702 (1997).

185. 467 U.S. 253 (1984).

186. Kanuszewski v. Michigan Dep't of Health & Hum. Servs., 927 F.3d 396, 418–19 (6th Cir. 2019) (quoting Troxel v. Granville, 530 U.S 57, 72 (2000)).

187. *Id.* at 418.

Parents' right to control their children's medical care is deeply rooted in the country's history and traditions, as the survey of Blackstone, tort restatements, Supreme Court precedent, and the common law demonstrate.[188] However, as discussed above, this right is subject to legitimate limitations based upon the age or maturity of the child, their emancipation status, and the risk of major issues of health and safety.[189] The combination of Supreme Court case law and common law acceptance of this parental right implies that it was more than reasonable for the Sixth Circuit to create the strict scrutiny right.[190] The heightened standard places the burden on the government to prove that a statute are "narrowly tailored to a compelling governmental interest."[191] The heightened level scrutiny will satisfy the common law limitations on parents' rights to control their children's medical care.

Under the liberal court's jurisprudence, the Sixth Circuit's decision to create a fundamental right for parents to control their medical care will most likely also survive. Justice Brennan vehemently disagreed with the history and tradition analysis in *Michael H.*[192] However, he still recognized that the parent-child relationship "was among the first that this Court acknowledged in its cases defining the 'liberty' protected by the Constitution . . . and I think I am safe in saying that no one doubts the wisdom or validity of those decisions." [193] The question remains: Would parental rights over medical care be included under a purely non-historical unenumerated rights analysis? Justice Marshall's and Justice Brennan's framework of unenumerated rights provides ample justification to recognize parents' right to control their children's medical care. Justice Marshall argued that "[a]s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."[194] Justice Brennan argued that the question "is to ask

188. *See supra* notes 144–59 and accompanying text.

189. *Supra* note 152.

190. *See supra* notes 144–59 and accompanying text; *Troxel*, 530 U.S. at 66.

191. *See Kanuszewski*, 927 F.3d at 419.

192. Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) ("It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.").

193. *Id.* at 141–42.

194. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 103 (1973) (Marshall, J., dissenting) ("Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with

whether the specific parent-child relationship under consideration is close enough to the interest that we have already protected to be deemed an aspect of 'liberty' as well."[195]

Here, the non-constitutional interest is a parent's right to control their children's medical care. The recognized interest is those rights the Court has deemed fundamental rights granted to parents.[196] While the basis of those rights is not in the text of the Constitution, those rights can be tethered to the Constitution as the parents in *Kanuszewski* demonstrated by arguing their case under the Fourth Amendment.[197] This is a specific textual right that would strengthen any argument in favor of substantive due process under Marshall's framework.[198] Justice Brennan's argument under his flexible framework would recognize a parent's right to control their children's medical care under the due process clause in the Fourteenth Amendment because it bears a close relationship to the many cases articulated in *Troxel*.[199] These cases show that parents' control over their children's medical care is "close enough to the interest that [the Court] ha[s] already protected,"[200] reflected in the Court's commitment to "liberty" in the parent and child relationship.[201] The Sixth Circuit's creation of a fundamental right for parents to control their children's medical care[202] is strengthened when incorporated with parents' common law right to consent to their children's medical care, Justice Brennan's jurisprudence and recognition of parents' rights, and Justice Marshall's jurisprudence.[203] Despite this ample support, a circuit split arose from the Sixth Circuit's inability to determine the level of judicial scrutiny required for a fundamental right that is subject to the countervailing requirements that limits unfettered liberty of government vaccine programs in *Jacobson*.[204]

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constitutional guarantees. Procreation is now understood to be important because of its interaction with the established constitutional right of privacy.").

195. *Michael H.*, 491 U.S. at 142 (Brennan, J., dissenting).

196. Troxel v. Granville, 530 U.S. 57, 66 (2000).

197. Kanuszewski v. Michigan Dep't of Health & Hum. Servs., 927 F.3d 396, 404 (6th Cir. 2019).

198. *Id.* at 425 ("For this reason, Plaintiffs have plausibly stated a claim upon which relief can be granted, and the district court erred in dismissing their Fourth Amendment claims relating to the ongoing storage and potential future use of the blood samples.").

199. *Supra* note 166.

200. *Michael H.*, 491 U.S. at 142 (Brennan, J., dissenting).

201. *Id.*

202. Parham v. J. R., 442 U.S. 584, 604 (1979) ("[Parents] retain plenary authority to seek [at least some forms of medical] care for their children [including institutionalization], subject to a physician's independent examination and medical judgment.").

203. *See supra* notes 144–59, 194, 202 and accompanying text.

204. *See generally* Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003); Goe v. Zucker, 43 F.4th 19 (2d Cir. 2022).

VIII. THESE INTERPRETATIONS APPLIED TO THE CIRCUIT SPLIT

The Second, Third, Sixth, and Tenth Circuits have all addressed parents' rights to consent to their children's medical care. The Tenth Circuit correctly interpreted that a "right to consent to medical treatment for oneself and one's minor children—may be 'objectively, deeply rooted in this Nation's history and tradition.'"[205] The court further explained that "[i]t is not implausible to think that the rights invoked here—the right to refuse a medical exam and the parent's right to control the upbringing, including the medical care, of a child—fall within this sphere of protected liberty."[206] However, the Court was unwilling to reach the merits of the case because the "district court gave only cursory treatment to the parents' substantive due process claim."[207]

The Eastern District of Pennsylvania relied on Third Circuit precedent that would only recognize parental rights when "[a] conflict with the parents' liberty interest will not lightly be found, and, indeed, only occurs when there is some 'manipulative, coercive, or restraining conduct by the State.'"[208]

Finally, the Second Circuit held that vaccine mandates for children are not subject to strict scrutiny under *Jacobson*.[209] The Second Circuit rejected the idea that "[t]he choice to vaccinate a child remains with the parent and her treating physician. For these same reasons, we also reject Plaintiffs' *liberty interest* in parenting and liberty interest in *informed consent claims*."[210] The Second Circuit specified that the parents' right over their children's medical exemption for immunization should only receive rational basis

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205. *Dubbs*, 336 F.3d at 1203 (quoting *Glucksberg*, 521 U.S. at 720–21).

206. *Id.* (quoting *Cruzan*, 497 U.S. at 278 ("[The] principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.")).

207. *Id.* at 1204.

208. Jenn-Ching Luo v. Owen J. Roberts Sch. Dist., No. CV 14-6354, 2016 WL 11448760, at *10 (E.D. Pa. June 29, 2016) (quoting J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist., 650 F.3d 915, 933–34 (3d Cir. 2011)), *report and recommendation adopted in part, rejected in part sub nom.*, Luo v. Roberts, No. CV 14-6354, 2016 WL 6831122 (E.D. Pa. Oct. 27, 2016)*, on reconsideration in part sub nom.* Luo v. Owen J. Roberts Sch. Dist., No. CV 14-6354, 2016 WL 6962547 (E.D. Pa. Nov. 28, 2016), *and aff'd sub nom*, Jenn-Ching Luo v. Owen J. Roberts Sch. Dist., 737 F. App'x 111 (3d Cir. 2018).

209. Goe v. Zucker, 43 F.4th 19, 31–32 n.14 (2d Cir. 2022) ("Finally, as we further noted in Phillips, 'no court appears ever to have held' that 'Jacobson requires that strict scrutiny be applied to immunization mandates.' To be sure, courts have consistently rejected substantive due process challenges to vaccination requirements without applying strict scrutiny." (quoting Phillips v. City of New York, 775 F.3d 538, 542 n.5 (2d Cir. 2015))) (cleaned up).

210. *Id.* at 32 n.14.

review.[211] The Court cited *Immediato v. Rye Neck Sch.*,[212] which stated that the "Supreme Court, however, has never expressly indicated whether this 'parental right,' when properly invoked against a state regulation, is fundamental, deserving strict scrutiny, or earns only a rational basis review. Our reading of the appropriate caselaw convinces us that rational basis review is appropriate."[213]

The circuit courts have been unable to consistently articulate the nature of parents' rights and determine the level of scrutiny that will apply when there is a conflict in a *Jacobson*-type vaccine case. Depending on the medical procedure in question, some courts apply strict scrutiny, while others use rational basis review.[214] The circuit courts must separate the two fundamental differences between parental rights and the legitimate goal of protecting citizenry under *Jacobson*. These courts must not forget that some rights are so deeply rooted in the nation's tradition and history deserving of the "'heightened scrutiny' protection."[215] The best way to reconcile these different cases is for the Supreme Court to recognize that parents have a fundamental right to control their children's medical care under the strict scrutiny standard.

Another possible solution is that the judiciary refrains from placing an affirmative limitation on the states via the Fourteenth Amendment and allow state legislatures to protect individuals' genetic data by passing laws.[216] This solution, however, most likely could only occur at the state level. Passing state-level legislation would be akin to Justice Black's and Justice Stewart's solution in *Griswold*. Justice Black saw the Court entering into a legislative role, as the Sixth Circuit does here, criticizing that "[t]he power to make such decisions is of course that of a legislative body."[217] Justice Stewart agreed with Justice Black:

> If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to

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211. *Id.* at 30 ("Plaintiffs contend that the new regulations violate their right to a medical exemption from school immunization requirements, their rights to life and liberty, and the rights of their children to an education. They argue that these rights are fundamental, and that therefore the regulations are subject to strict scrutiny. We are not persuaded, and we conclude that "fundamental rights" are not implicated.").

212. Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 454 (2d Cir. 1996).

213. *Id.* at 461.

214. *See supra* notes 176–77, 204–12 and accompanying text.

215. Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

216. Shayeb, *supra* note 4, at 1036.

217. Griswold v. Connecticut, 381 U.S. 479, 512 (1965) (Black, J., dissenting).

> repeal it. That is the constitutional way to take this law off the books.[218]

If society agrees that state officials selling personal medical information without informed consent is wrong, then an argument can be made that the Michigan legislature should step in and repeal the blood drawing statutes. Another solution is for the Michigan legislature to pass a genetic privacy law as Minnesota has done to protect its citizens' genetic information.[219]

Despite these solutions, the legislature acting after individuals' rights have been violated or the judiciary staying out is unlikely to occur after the parents' fundamental rights over their children has been rooted in Supreme Court precedent, common law history, and has been accepted in the Restatement. However, parental rights over their children's medical care should be subject to those limitations accepted by the common law. Those exceptions include mature minors, those in immediate need of medical care, medical care that was unreasonably withheld, and children that were emancipated.[220] These exceptions would not have to be enumerated. Instead, most reasonable individuals would agree that protecting a child's health with a vaccine is a compelling end using the least restrictive means. Fundamental parental rights will most likely recede behind the state's compelling interest in imposing vaccine mandates and other health programs.[221]

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, Justice Gorsuch wanted to apply strict scrutiny to Governor Andrew Cuomo's pandemic restriction on churches, which Justice Gorsuch argued violated the First Amendment.[222] Justice Gorsuch recognized that *Jacobson* arose before the modern tiers of scrutiny, but there, the Court had "essentially applied rational basis review."[223] The Court "*normally* applies [rational basis review] to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based

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218. *Griswold,* 381 U.S. at 531 (Stewart, J., dissenting).

219. *See supra* notes 27–30 and accompanying text.

220. *See supra* notes 151–54 and accompanying text.

221. *See supra* note 176 and accompanying text; *infra* note 225–26.

222. Roman Cath. Diocese of Brooklyn v. Cuomo, 208 L. Ed. 2d 206, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) ("As almost everyone on the Court today recognizes, squaring the Governor's edicts with our traditional First Amendment rules is no easy task. People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of 'essential' businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces.").

223. *Id.* at 70.

on race or some other ground, or a claim of fundamental right."[224] Justice Gorsuch argued that *Jacobson* would have most likely survived a strict scrutiny analysis given the other available options to opt out.[225] Under Justice Gorsuch's reasoning, parents' strict scrutiny rights over their children's medical care[226] would not override vaccine mandates and the blood drawing program. Those programs would survive strict scrutiny so long as they were truly the least restrictive means that provided proper informed consent procedures and the ability to opt out[227] However, applying strict scrutiny to vaccines cuts against a century of Supreme Court case law.[228] Another possible solution is to apply strict scrutiny to all state-run children's medical procedures that require parental consent but leave vaccines within their traditional realm of rational basis review.

Protecting the state-run blood drawing program is incredibly beneficial because "preserving the welfare of children is at its zenith when the life of the child is at stake, and in such circumstances the state in its role of *parens patriae* may subordinate the interest of the child's parents to its own interest in keeping the child alive."[229] In *Kanuszewski*, the district court limited the holding specifically to the parents in the case because the program has uncovered 6,000 newborns with rare blood disorders: "Enjoining Michigan's

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224. *Id.*

225. *Id.* at 71 ("The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and *might even* have survived strict scrutiny, given the opt-outs available to certain objectors.") (emphasis added).

226. Justice Gorsuch's argument was rejected in *Prince v. Massachusetts*: "Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." 321 U.S. 158, 166–67 (1944) (citing People v. Pierson, 176 N.Y. 201, 68 N.E. 243, 63 L.R.A. 187, 98 Am.St.Rep. 666).

227. Kanuszewski v. Shah, 627 F. Supp. 3d 832, 850–51 (E.D. Mich. 2022), *vacated in part*, No. 1:18-CV-10472, 2022 WL 11964348 (E.D. Mich. Oct. 20, 2022) ("Moreover, Defendants could simply obtain informed consent, which is obviously less restrictive on Plaintiffs' rights than not obtaining their consent. For example, Defendants could simply create a form with separate checkboxes for all the conduct for which Michigan law does not waive informed consent.").

228. *See generally* James M. Beck, *Not Breaking News: Mandatory Vaccination Has Been Constitutional for Over a Century*, A.B.A. (Oct. 28, 2021), https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2021/winter2022-not-breaking-news-mandatory-vaccination-has-been-constitutional-for-over-a-century/.

229. Kanuszewski v. Michigan Dep't of Health & Hum. Servs., 927 F.3d 396, 419 (6th Cir. 2019).

unconstitutional conduct would have significant consequences."[230] The Fourteenth Amendment limitation is not absolute, and under most circumstances, most medical mandates would survive the strict scrutiny standard. Taking blood and vaccinating children to protect their lives is an inherently compelling interest with the least restrictive means.[231] However, as the Eastern District of Michigan noted, taking the blood from children without their parents' informed consent and using it for research is a direct violation of parental rights under the strict scrutiny standard.[232]

CONCLUSION

This Comment demonstrates that the Sixth Circuit's controversial decision would find acceptance under both conservative and liberal jurisprudence. This should naturally compel other federal circuits to put more states on notice that there is a fundamental right for parents to control their children's medical care. The importance of applying strict scrutiny is that it compels states to justify their conduct versus irrationally storing the data and selling it to third parties.[233] The rights of Americans can be protected at the same time as recognizing a state's interest in protecting the "safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."[234] Notwithstanding this argument, it would be more advantageous to err on the side of caution and compel the states to meet the strict scrutiny standard when interfering with a right rooted in Supreme Court precedent and common law history. Rather than giving states plenary power to impose an irrational blood storage programs that lack informed consent protections, the courts should protect its citizens' right "to

230. *Kanuszewski*, 627 F. Supp. 3d at 836.

231. The district court insistence on the importance of the blood drawing program demonstrates the compelling interest it perpetuates. *Id.* at 835–37.

232. *Kanuszewski*, 333 F. Supp. 3d at 719, *aff'd in part, rev'd in part and remanded*, 927 F.3d 396 (6th Cir. 2019) ("The DBS cards are ultimately transferred to the Michigan Neonatal Biobank and stored indefinitely for testing and further research. Id. ¶ 10–11, 33. The parents of the infant children in this case did not consent to the blood test or to the State taking custody of the blood samples."); *Kanuszewski*, 627 F. Supp. 3d. at 850 ("Defendants' conduct fails strict scrutiny with respect to posttesting research, storage, transfer, sale, discard, and all other use of the tested DBS. Defendants allege they need the posttesting DBS to maintain and to expand the NSP and to conduct medical and public-health research . . . . Moreover, Defendants could simply obtain informed consent, which is obviously less restrictive on Plaintiffs' rights than not obtaining their consent.").

233. *Kanuszewski*, 627 F. Supp. 3d at 851.

234. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 29 (1905).

enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[235]

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235. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

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