Not a Mere Creature of the State: Protecting Parental Rights in the Era of Anti-Trans Legislation

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Abstract

Beginning in 1923 with the seminal parental rights case, Meyer v. Nebraska, *the Supreme Court recognized the parental right to make decisions regarding the raising of a parent's child. Since then, the Court has expounded upon that right, clarifying its application outside of the education context, such as in medical situations; adding limitations for instances of child abuse and neglect; and limiting the rights of third parties to interfere with fundamental parental rights. In recent years, numerous states have passed bills prohibiting gender-affirming healthcare for transgender children, positing that these laws protect parental rights. Analyzing three of these state laws through the lens of parental right precedent, however, this Article demonstrates why these laws are unconstitutional because they infringe on parental rights, substituting a state's judgment for that of the otherwise fit parent. The Article first categorizes anti-trans legislation into four types, and it then elaborates on the pseudoscientific justifications being offered for these laws and explains why these justifications are not compelling. The Article next asserts that the parental rights undermined by anti-trans legislation should be construed comprehensively, not narrowly, in order to protect these long-established rights. Finally, the Article briefly discusses the viability of parental rights post-*Dobbs, *and it ponders the limits the doctrine might have when used to support progressive legal causes.*

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Introduction

Parker Saxton was fourteen years old when he wrote a letter to his father, Donnie Ray Saxton.[1] In it, Parker explained that he was trans.[2] Donnie Ray, at the time, knew nothing about what it meant to be transgender or how to best help his son.[3] Self-described as "the most unlikely parent of a transgender child," Donnie Ray loved his son deeply and unconditionally.[4] This acceptance was crucial because the family resided in Vilonia, a small, conservative city in Arkansas with a population of approximately 4,500—certainly not an easy place to live for someone like Parker, whose gender identity was different from that of most of his peers.[5] Parker had known he was a boy since he was nine,[6] but he told neither his dad nor his friends until much later.

Donnie Ray made sure to look out for his son, but things became even more difficult for Parker once he started puberty. He withdrew from family, friends, and society, and he started to suffer from anxiety and depression.[7] Donnie Ray ensured that Parker regularly saw a therapist and psychiatrist, and that he received a referral to the Gender Clinic at Arkansas Children's Hospital ("Gender Clinic").[8] At the Gender Clinic, Parker had access to gender-affirming healthcare.[9] Parker was prescribed a menstrual suppressant that alleviated some symptoms of anxiety and depression, but he still experienced dysphoria.[10]

After taking the suppressant and attending consistent check-ins at the Gender Clinic, Parker learned that testosterone might address his gender dysphoria more comprehensively.[11] Donnie Ray made sure that Parker understood what hormone treatment meant in the long-term and saw that he underwent a psychological evaluation before starting his new gender-affirming hormone treatment.[12] He further ensured that Parker had an appointment with a physician prior to starting testosterone to discuss the risks and benefits

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[1] Brandt v. Rutledge, 677 F. Supp. 3d 877, 899 (E.D. Ark. 2023). Parker is just one minor affected by this legislation. *Id.* The other plaintiffs in this case include Dylan Brandt and his mom Joanna; Sabrina and her parents Lacey and Aaron; and Brooke and her parents Amanda and Shayne. *Id.* at 896–98, 900.

[2] *Id.* at 899.

[3] *Id.*

[4] *Id.*

[5] *Id.*; *Vilonia, AR*, Data USA, https://datausa.io/profile/geo/vilonia-ar/ [https://perma.cc/4P6H-HRJN] (last visited May 24, 2024).

[6] *Brandt*, 677 F. Supp. at 899.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

of treatment.[13] Donnie Ray noticed that once Parker began the testosterone treatment, he quickly became happier and more confident. He also experienced a significant improvement in his gender dysphoria.[14]

However, this period did not last for long. One year after Parker started gender-affirming hormone treatment, Arkansas passed Act 626,[15] which banned gender-affirming healthcare for children.[16] Parker was devastated, to such a degree that Donnie Ray would sleep next to his son at night to make sure that he would not hurt himself.[17] Fortunately, a federal judge permanently enjoined Arkansas from imposing the strictures of Act 626.[18] The U.S. Court of Appeals for the Eighth Circuit affirmed the injunction after concluding that there was no abuse of discretion at the district court level, thereby allowing Parker to continue his treatment for the time being.[19] Despite the decision, Donnie Ray and Parker are still in limbo, forced to wait as the Supreme Court hears arguments on different challenged anti-trans legislation, uncertain if they might wake up one day with Parker no longer able to access critical gender-affirming healthcare.[20]

This example raises a critical question: how do we protect the children affected by these objectively discriminatory laws and ensure that they will have access to the same level of healthcare that cisgender children receive? Relatedly, how do we protect those that cannot vote from the consequences of those who can? This Article explores one available option—focusing litigation efforts on the rights of parents to determine the care of their children. At the outset, it is important to recognize that there are parents who are not as enlightened as Donnie Ray and who would exercise their right to control the upbringing of their children by preventing them from seeking gender-affirming healthcare. In those instances, however, the Equal Protection Clause of the Fourteenth Amendment might protect the children from impermissible gender discrimination—although there is significant uncertainty as to what standard of review would apply or whether transgender status constitutes a protected, or suspect, class under the Equal Protection Clause.[21] Because of

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 885.

[16] *Id.*

[17] *Id.* at 900; Brief of Plaintiffs-Appellees at 19, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 21-2875) (discussing how one of the doctors party to the suit reported receiving "calls from numerous families, panicking, because their children were expressing suicidal thoughts at the prospect of losing the healthcare they rely on for their well-being, and four of the clinic's patients—and three other transgender adolescents—were hospitalized after suicide attempts").

[18] *Brandt*, 677 F. Supp. at 885.

[19] Brandt v. Rutledge, 47 F.4th 661, 671 (8th Cir. 2022).

[20] *Id.* at 889–900; *Brandt et al v. Rutledge et al*, ACLU (Aug. 17, 2023), https://www.aclu.org/cases/brandt-et-al-v-rutledge-et-al [https://perma.cc/97KH-XT57]; Abbie VanSickle, *Supreme Court Will Hear Challenge to Tennessee Law Banning Transition Care for Minors*, N.Y. Times (June 24, 2024), https://www.nytimes.com/2024/06/24/us/politics/supreme-court-transgender-care tennessee.html#:~:text=The%20Supreme%20Court%20agreed%20on,that%20have%20enacted%20similar%20measures [https://perma.cc/8XG6-FHAQ].

[21] The Equal Protection Clause could provide protection because "[g]ender-affirming care bans discriminate based on transgender status because they prohibit providing" gender-affirming healthcare such as hormonal treatment or surgeries that are still available to "cisgender minors for the purpose of treating intersex conditions or 'disorder[s] of sexual development.'" *Outlawing*

the Supreme Court's hesitancy to determine the standard of review and class status, this Article focuses on the parental rights doctrine under the Due Process Clause of the Fourteenth Amendment.

Individuals are entitled to two forms of due process: substantive and procedural.[22] The Due Process Clause of the Fourteenth Amendment, which prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law," enshrine these protections.[23] Procedural due process encompasses rights related to fair and impartial adjudication[24]—for example, the right to an impartial trier of fact and law.[25] Substantive due process, on the other hand, is a legal principle that authorizes courts to protect certain fundamental rights from government interference even if the right is not explicitly enumerated in the Constitution.[26] Parental rights is an example of one such fundamental category protected under the substantive due process principle underlying the Fourteenth Amendment.[27] The parental rights doctrine is traditionally employed as a conservative legal argument.[28] However, as this Article sets forth, it also provides legal support for more progressive aims.[29] There are other theories under which transgender children could seek protection, but given the current conservative majority on the Supreme Court, this Article proposes parental rights as a uniquely effective vehicle for change.[30]

Yet, despite the fact that the liberty provision contained within the Fourteenth Amendment includes a parent's right to control the upbringing of their

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Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors, 134 Harv. L. Rev. 2163, 2179 (2021). However, the Supreme Court has not yet decided what standard of review governs discrimination based on transgender status outside of cases involving discrimination under Title VII. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) (holding that, within the exclusive context of Title VII, intermediate scrutiny applied to discrimination against transgender individuals, the same standard that governs sex discrimination). Several Courts of Appeals have held that discrimination based upon transgender identity would constitute sex discrimination, while others have considered it discrimination against "a protected class in its own right." *Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors*, *supra* note 21; Grimm v. Glouchester Cnty. Sch. Bd., 972 F.3d 586, 607 (4th Cir. 2020) (holding that "transgender people constitute at least a quasi-suspect class" and therefore, receive heightened scrutiny); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017) ("[T]his case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny. It is enough . . . [that] the record for the preliminary injunction shows sex [discrimination]").

[22] Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501, 1501 (1999).

[23] U.S. Const. amend. XIV § 1; Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 Colum. L. Rev. 833, 843 n.41 (2003).

[24] *Id.* at 848.

[25] *Id.*

[26] *Id.* at 836.

[27] *Id.* at 836–37.

[28] *See* Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 Harv. J.L. & Gender 303, 335–36 (2009) (discussing the "Christian Right" and its use of parental rights to challenge curriculum); Jamelle Bouie, *What the Republican Push for 'Parents' Rights' Is Really About*, N.Y. Times (Mar. 8, 2023), https://www.nytimes.com/2023/03/28/opinion/parents-rights-republicans-florida.html [https://perma.cc/7WTF-CZZJ] (discussing federal and state bills, introduced by Republicans, such as book-bans and Florida's "Don't Say Gay" bill, that use parental rights as justification).

[29] *See infra* Parts II–III.

[30] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 223 (2022) (overturning *Roe v. Wade* and *Planned Parenthood v. Casey*, which had previously found the right to bodily autonomy (in the form of abortion) embedded in the right to privacy under the Fourteenth Amendment).

children, hundreds of thousands of parents have had their liberty deprived by their state legislators through the passage of anti-trans legislation. These anti-trans laws are unconstitutional because they strip away parents' fundamental rights.

Part I of this Article briefly discusses modern anti-trans legislation and the effect it has on children. It next discusses pseudoscientific justifications for anti-trans legislation and the Supreme Court's treatment of past pseudoscientific justifications, ultimately concluding that the medical establishment embraces gender-affirming healthcare. Part II lays out the lengthy precedent establishing parental rights, starting with the seminal decision in *Meyer v. Nebraska* and its progeny.[31] It then argues that the parental rights implicated in anti-trans legislation should be construed comprehensively rather than narrowly, and anti-trans state legislation infringes on this fundamental domain. Part III then examines pieces of anti-trans legislation from Georgia, Missouri, and Texas and concludes that they violate parental rights. Next, Part IV considers legislation from Colorado and Illinois, highlighting states that have chosen to protect parental rights. Lastly, Part V discusses the limits of applying parental rights to progressive legal causes and addresses the theory's viability in a post-*Dobbs* world.[32] The Article ultimately asserts that anti-trans state legislation violates a parent's right to ensure their children's well-being.

I. Modern Day Anti-Trans Legislation and its Effect on Children

In the last two decades, the discussion around gender became far more controversial and anti-trans legislation has been enacted more frequently than ever.[33] The total number of anti-trans bills introduced, debated, passed, or failed is constantly in flux. The American Civil Liberties Union (ACLU) finds that as of May 2024, there are 515 anti-LGBTQIA+ bills across the United States.[34] Another source estimates that there are 557 anti-trans bills.[35] At any given point in time in the 2023 legislative year, several hundred bills were active or advancing; just over a hundred bills were recently defeated; and close to a hundred bills had recently passed into law.[36]

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[31] *See* Meyer v. Nebraska, 262 U.S. 390, 401–03 (1923) (establishing parental rights).

[32] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 256 (2022) (discussing fundamental rights such as the right to marry, the right to contraception access, and parental rights).

[33] Kate Sosin, *Why Is the GOP Escalating Attacks on Trans Rights? Experts Say the Goal Is to Make Sure Evangelicals Vote*, PBS (May 20, 2022, 3:37 PM), https://www.pbs.org/newshour/politics/why-is-the-gop-escalating-attacks-on-trans-rights-experts-say-the-goal-is-to-make-sure-evangelicals-vote [https://perma.cc/X5ZL-HUJ3].

[34] *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024 [https://perma.cc/X9QE-E3R8] (last visited May 21, 2024).

[35] *2024 Anti-trans Bills Tracker*, Trans Legis. Tracker, https://translegislation.com https://perma.cc/E2AR-U6V4 (last visited May 23, 2024).

[36] *What Anti-trans Bills Passed in 2023*, Trans. Legis. Tracker, https://translegislation.com/bills/2023/passed [https://perma.cc/E85V-XNWX] (last visited May 23, 2024).

These legislative efforts can be generally categorized into four groups, each affecting a different aspect of a transgender child's existence. The first and most well-known type of regulation consists of the so-called "bathroom bills." These restrict or prohibit the ability of children to use the bathroom that aligns with their gender identity.[37] Second are the laws that target trans students, specifically in schools.[38] These bills inhibit and sometimes *prohibit* teachers and other school employees from using the children's preferred pronouns and may also ban certain books.[39] The third category includes bills that criminalize gender-affirming healthcare.[40] These laws range from imposing child abuse charges on those who help a child obtain gender-affirming healthcare to stripping away a doctor's license when they provide such care.[41] The fourth category encompasses "save women's sports" bills. These restrict children's ability to participate in sports and other events based on a binary conception of gender.[42]

Beginning with the first category of anti-trans legislation, bathroom bills are unfortunately so common that there is an entire Wikipedia article dedicated to the subject.[43] Take, for example, Florida HB 1521. Codified as Florida Statute § 553.865, it applies to schools, businesses, shelters, jails, and healthcare services, and prohibits a person from "willfully enter[ing] . . . a restroom or changing facility designated for the opposite sex."[44] If someone enters and then "refuses to depart," that person can be charged with trespass.[45] The bill also calls for detention facilities and educational institutions to "establish disciplinary procedures for any prisoner [or student] who willfully enters . . . and refuses to depart" any bathroom or changing room that does not correspond to the sex they were assigned at birth.[46]

Next are the bills that affect a child's school life. One subcategory regulates usage of a child's pronouns. Take, for example, Arizona SB 1001. Arizona SB 1001, which was passed but later vetoed by the governor, would have overridden the ability of both guardians and teachers to honor a student's pronouns.[47] The Arizona bill would have given public and charter school employees permission to disrespect a student's preferred pronouns if the student's pronouns were "contrary to the employee's or independent contractor's

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[37] *See, e.g.*, H.B. 1521, 55th Leg., 1st Reg. Sess. (Fla. 2023).

[38] *See, e.g.*, S.B. 1001, 56th Leg., 1st Reg. Sess. (Ariz. 2023); S.B. 1700, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

[39] *See* sources cited note 38.

[40] *See, e.g.*, H.B. 71, 67th Leg., 1st Reg. Sess. (Idaho 2023).

[41] *See, e.g.*, *id.*

[42] *See, e.g.*, H.B. 2238, 2023 Leg., Reg. Sess. (Kan. 2023).

[43] *Bathroom Bill*, Wikipedia, https://en.wikipedia.org/wiki/Bathroom_bill [https://perma.cc/L878-CHL7] (last visited Oct. 19, 2023).

[44] H.B. 1521, 55th Leg., 1st Reg. Sess. (Fla. 2023); Fla. Stat. § 553.865 (2024); Tristan Hardy, *Bathroom Bill Would Charge People with Misdemeanor if in Restroom Not Belonging to Their Sex at Birth*, First Coast News (Apr. 21, 2023), https://www.firstcoastnews.com/article/news/local/bathroom-bill-would-charge-people-with-misdemeanor-if-in-restroom-not-belonging-to-their-sex-at-birth/77-64a5f519-d614-41cd-a12b-f25f25cfa3b6 [https://perma.cc/WJ25-AJYM].

[45] H.B. 1521, 55th Leg., 1st Reg. Sess. (Fla. 2023).

[46] *Id.*

[47] S.B. 1001, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

religious or moral convictions."[48] Other bills target education, such as Arizona HB 1700. That bill, which ultimately died in committee, would have banned books that address gender or pronouns, and argued (incorrectly) that learning about pronouns or gender "groom[s] children into normalizing pedophilia."[49]

Bills that fit into the third group, such as Idaho HB 71 (already signed into law as Idaho Code § 18-1506C) criminalize gender-affirming health care.[50] Idaho HB 71 makes it a felony for "any medical practitioner" to "knowingly engage[]" in any practices that attempts "to alter the appearance of or affirm the child's perception of the child's sex if that perception is inconsistent with the child's biological sex."[51] Procedures that fall underneath this ban include surgeries that "sterilize or mutilate, or artificially construct tissue with the appearance of genitalia" that is not the child's biological sex, "including castration, vasectomy, [and] hysterectomy," among others; "[p]erforming a mastectomy;" providing puberty blockers, testosterone, or estrogen; and "[r]emoving any otherwise healthy or nondiseased body part or tissue."[52] Essentially, Idaho HB71 makes the conduct of the medical practitioners who provide gender-affirming healthcare to children felonious, thereby barring children from seeking and receiving healthcare.

But states aren't stopping at prohibiting children from seeking gender affirming healthcare or preventing parents and third parties from honoring a child's pronouns. Take, for example, Wyoming SF 0111, which (although defeated) would have resulted in child abuse charges for providing gender affirming healthcare to children under eighteen. The bill made it a felony, punishable by ten years, for "[a] person . . . [that] intentionally inflicts upon a child under the age of eighteen (18) years any procedure, drug, or other agent or combination . . . administered to intentionally or knowingly change the sex of the child."[53]

Beyond healthcare and pronouns, states are targeting sports as well. Although this fourth category is outside of the parental rights focus of this Article, it is important to recognize the legislation as a distinct category of bills impacting trans children. State legislators have expanded into other debates, such as the "save women's sports" crusade.[54] For instance, Kansas HB 2238 ("KS HB2238"), passed into law in April of 2023 and codified at Kansas Statutes Annotated §§ 60-5601–5606, bars trans women and nonbinary

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[48] *Id.*

[49] S.B. 1700, 56th Leg., 1st Reg. Sess. (Ariz. 2023); *2024 Anti-trans Bills Tracker*, *supra* note 35.

[50] H.B. 71, 67th Leg., 1st Reg. Sess. (Idaho 2023); Idaho Code § 18-1506C (2024); *2023 – H.B. 71 – Ban on Medical Care for Transgender Youth*, ACLU, https://www.acluidaho.org/en/legislation/2023-hb-71-ban-medical-care-transgender-youth [https://perma.cc/MMY6-FWEQ] (last visited Nov. 23, 2023).

[51] H.B. 71, 67th Leg., 1st Reg. Sess. (Idaho 2023).

[52] *Id.*

[53] S.F. 0111, 64th Leg., Gen. Sess. (Wyo. 2023); *2024 Anti-trans Bills Tracker*, *supra* note 35. There are many other anti-trans bills passed throughout the United States. For example, Arizona SB1698, although vetoed, sought to recategorize drag shows as an adult business. S.B. 1698, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

[54] *Save Women's Sports*, GLAAD (Apr. 21, 2023), https://glaad.org/gap/organization/save-womens-sports/ [https://perma.cc/XG5Y-TTY5] (describing the origins of the "save women's sports" movement).

individuals at the elementary, high school, and collegiate level from competing on "female student" sports teams if they are not "biological[ly]" female.[55] Further, KS HB 2238 mandates that sport teams be "expressly designated" based on biological sex, including: "(1) [m]ales, men or boys; (2) females, women or girls; or (3) coed or mixed."[56] It explicitly mandates that "[a]thletic teams or sports designated for females, women or girls shall not be open to students of the male sex."[57] Essentially, this precludes trans women, trans girls, and any other individuals assigned male at birth from competing on "female" sports teams.[58]

The anti-trans bills mentioned above attempt to restrict, inhibit, or bar trans children from all aspects or avenues of a normal childhood under the guise of parental rights.[59] They can no longer feel safe with their teachers, school employees, and guardians; they cannot seek the healthcare they need; and they cannot compete in sports. In fact, 71% of LGBTQIA+ children report that debates surrounding anti-trans legislation has "negatively impacted their mental health."[60] A significant number—86%—of trans and nonbinary children reported the same.[61] The Gay, Lesbian and Straight Education Network found that trans and nonbinary children at schools with athletic and medical bans "have reported higher rates of things like bullying and harassment."[62] Transgender high school students report suicide attempts at a rate four to six times higher than that of cisgender high schoolers.[63] Ninety-three percent of transgender youth experience stress surrounding access to gender-affirming healthcare.[64] Put simply, even before anti-trans legislation is passed, transgender youth are irreparably harmed.

Anti-trans legislation, once enacted, has even graver consequences. In fact, "[d]etransitioning . . . exacerbate[s] gender dysphoria and collectively lead[s] to poor health outcomes."[65] Notably, even if the process of

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[55] H.B. 2238, 2023 Leg., Reg. Sess. (Kan. 2023); *KS HB2238*, Trans Legis. Tracker, https://translegislation.com/bills/2023/KS/HB2238 [https://perma.cc/4UFB-6WNJ] (last visited Aug. 29, 2023); Kan. Stat. Ann. § 60-5601–5606 (2024).

[56] H.B. 2238, 2023 Leg., Reg. Sess. (Kan. 2023).

[57] *Id.*

[58] *Id.*

[59] Rebecca Schneid, *In a Political Era of "Parental Rights," Texans Raising Trans Kids Say New Law Strips Them of Choice*, Tex. Tribune (July 20, 2023), https://www.texastribune.org/2023/07/17/texas-transgender-health-care/ [https://perma.cc/2BGS-PYTD] (quoting Emily Witt of the Texas Freedom Network, a "left-leaning state watchdog organization that supports public education and religious freedom," as saying "[parental rights have] been co-opted to tap into this cultural fear of not having control over your kids' lives . . . when really their agenda is erasing trans people").

[60] Ileana Garnand, *'Young People Are Being Harmed': The Effect of Anti-trans Legislation*, Ctr. for Pub. Integrity (June 6, 2023), https://publicintegrity.org/inequality-poverty-opportunity/young-people-harmed-anti-trans-legislation/ [https://perma.cc/WDW7-DH3S]; *Medical Organization Statements*, Transgender Legal Def. & Educ. Fund, https://transhealthproject.org/resources/medical-organization-statements/ [https://perma.cc/BA44-ZCAB] (last visited Aug. 12, 2023).

[61] Garnand, *supra* note 60.

[62] *Id.*

[63] Elana Redfield et al., Prohibiting Gender-Affirming Medical Care for Youth 15 (2023).

[64] *Id.*

[65] Garnand, *supra* note 60.

detransitioning were not harmful, gender-affirming healthcare is statistically beneficial for children's mental health. A study found that trans children who were given puberty suppression medicine reported lowered depression and improved "global functioning."[66] Further, in a different study, trans children who were able to seek gender-affirming healthcare, such as hormonal treatments, saw a steady improvement in global and psychological functioning.[67] A study from the United States found that children who received hormonal treatment saw a significant increase in "general well-being and a statistically significant decrease in suicidality."[68] Over a dozen studies demonstrate that gender-affirming healthcare improves mental health and functioning at a statistically significant level.[69] Practically no reputable, peer-reviewed studies show that gender-affirming healthcare is actually dangerous for the children that seek it,[70] nor do any reputable medical associations publicly stand against gender-affirming healthcare for children.[71]

Although anti-trans laws can be distinct in terms of their substance, proponents tend to defend the majority of them on similar pseudoscientific grounds.[72] However, these arguments lack merit because, as discussed in this Article, all objective analyses suggest that gender-affirming healthcare is supported both legally and medically. In fact, the Supreme Court has regularly struck down state laws and reversed past decisions that were based on pseudoscience.[73] Take *Loving v. Virginia*—in that case, a Virginia state law banned

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[66] *Id.* (quoting Christopher AhnAllen, a clinical psychologist whose practice includes individuals with gender dysphoria); Jack Turban, *The Evidence for Trans Youth Gender-Affirming Medical Care*, Psych. Today (Jan. 24, 2022), https://www.psychologytoday.com/us/blog/political-minds/202201/the-evidence-trans-youth-gender-affirming-medical-care [https://perma.cc/8UFC-PPBT] (discussing a Dutch study that found puberty blockers improved depression and "global functioning" in transgender adolescents).

[67] Turban, *supra* note 66 (discussing a Dutch study that found hormone treatment and gender-affirming surgery improved psychological and global functioning).

[68] *Id.* (discussing a study from Children's Mercy Hospital Gender Pathway Services Clinic in Missouri, which found that hormone treatment improved "general well-being" and led to a decrease in "suicidality").

[69] *Id.* (discussing sixteen studies that found gender-affirming healthcare improved transgender adolescents physical and mental well-being).

[70] *See, e.g.*, Susan D. Boulware et al., *Biased Science in Texas & Alabama*, Yale Sch. of Med., https://medicine.yale.edu/lgbtqi/clinicalcare/gender-affirming-care/biased-science/ [https://perma.cc/7X4R-YZ2J] (last visited July 10, 2024) (addressing the scientific invalidity of the studies relied on by Texas and Alabama in passing anti-trans legislation).

[71] *Doctors Agree: Gender-Affirming Care is Life-Saving Care*, ACLU (Apr. 1, 2021), https://www.aclu.org/news/lgbtq-rights/doctors-agree-gender-affirming-care-is-life-saving-care [https://perma.cc/JM6A-JT9L] (listing nine medical associations that publicly oppose anti-trans legislation).

[72] *See, e.g.*, G. Samantha Rosenthal, *Pseudoscience Has Long Been Used to Oppress Transgender Children*, Sci. Am. (Feb. 12, 2024), https://www.scientificamerican.com/article/pseudoscience-has-long-been-used-to-oppress-transgender-people/ [https://perma.cc/9PFN-ANKR] (discussing the historical waves of anti-trans regulation, and the pseudoscientific justifications used to support them).

[73] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 2–3 (1967); Brief for Respondents at 19–21, Lawrence v. Texas, 593 U.S. 558 (2003) (arguing that protecting consensual sex between two men "is not on par with th[e] sacred choices" of marriage, conception, and parenthood, and used the "long-standing moral disapproval of homosexual conduct, and the deterrence of such immoral sexual activity" as support for the ban on consensual sex between two men); Lawrence v. Texas, 593 U.S. 558, 564 (2003) (rejecting Respondent's arguments, concluding that the Court's obligation was to "define the liberty of all, not to mandate our own moral code," and holding that

interracial marriage, using pseudoscience to support it.[74] Virginia's brief stated, in part, that:

> On the biological phase there is authority for the conclusion that the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock . . . . In the absence of any uniform rule as to consequences of race cross, it is well to discourage it except in those cases where, as in the Hawaiian-Chinese crosses, it produces superior progeny, and that the [Black and white] and Filpino-European crosses do not seem to fall within the exception . . . . [S]cientific breeders have long ago demonstrated that the most desirable results are secured by specializing types rather than by merging them.[75]

Further, the Virginia Supreme Court of Appeals upheld the statute to "preserve the racial integrity of its citizens" and to "prevent 'the corruption of blood,'" among other racist rationales that were considered "scientific" when the law was passed.[76] The United States Supreme Court rejected this pseudoscience, holding the law unconstitutional.[77]

Gender-affirming healthcare is far from the pseudoscientific, experimental treatment that conservative legislators claim it is. Gender-affirming healthcare is well-established within the legitimate medical community as an accepted and beneficial medical procedure.[78] The American Medical Association and American Academy of Pediatrics both have publicly endorsed gender-affirming healthcare for transgender minors.[79] In fact, the American Medical Association passed a resolution— with the support of eight cosponsoring medical organizations—opposing any and all "criminal and legal penalties against patients seeking gender-affirming care" or against anyone who provides such care.[80] The resolution specifically states that the anti-trans legislation does "not reflect the research landscape" and mentions that over "2,000 scientific studies have examined aspects of gender-affirming care since

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consensual sex between two men is protected) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

[74] Loving v. Virginia, 388 U.S. 1, 2–3 (1967).

[75] Br. for Resp'ts at 67–69, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395) (internal quotations omitted).

[76] *Loving*, 388 U.S. at 7–8.

[77] *Id.* at 6, 11–12 (discussing previous Virginia Supreme Court of Appeals decision using racist, pseudoscientific reasoning to support anti-interracial marriage statutes, and subsequently rejecting them as unconstitutional race-based classifications).

[78] Endocrine Society, AMA strengthens its policy on protected access to gender-affirming care (June 12, 2023), https://www.endocrine.org/news-and-advocacy/news-room/2023/ama-gender-affirming-care [https://perma.cc/U6A3-YXVZ] [hereinafter Endocrine Society Press Release].

[79] Kareen M. Matouk & Melina Wald, *Gender-affirming Care Saves Lives*, Colum. Univ. Dep't of Psychiatry (Mar. 30, 2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives [https://perma.cc/VE96-E2CK].

[80] Endocrine Society Press Release, *supra* note 78.

1975."[81] Importantly, thirty medical associations have released public statements in support of gender-affirming healthcare for transgender minors.[82] Put simply, the claim that gender-affirming healthcare constitutes child abuse, or that children will want to detransition after receiving gender-affirming healthcare is pseudoscientific at best.

II. Parental Rights Are Deeply Rooted in Our Nation's History

A. The History of the Parental Rights Doctrine

Parental rights have a long history in the United States legal system, which this Article will address in order. The right was first recognized in *Meyer v. Nebraska*.[83] It was subsequently affirmed in *Pierce v. Society of Sisters*.[84] Then, in *Prince v. Massachusetts*, the Court clarified that States can regulate parental rights in limited circumstances, such as in instances of child labor.[85] Next, in *Stanley v. Illinois*, the Court specifically recognized *biological* parents' rights.[86] The Court firmly reiterated parental rights in *Wisconsin v. Yoder* later that year, and the decision provided additional clarifications on when States can and cannot regulate parents' choices.[87] Then, in *Parham v. J.R.*, the Court established that parents have extensive rights within the medical decision-making context, absent abuse or neglect.[88] Lastly, in *Troxel v. Granville*, the Court clarified the limits of third-party rights in areas involving parental rights.[89]

Choices surrounding child-raising shape an individual's destiny—both child and parent alike. The Supreme Court recognized this when it held that marriage fell among other fundamental rights such as "choices concerning contraception, family relationships, procreation, *and childrearing*, all of which are protected by the Constitution, . . . [are] among the most intimate that an individual can make."[90] The liberty provision of the Due Process Clause establishes that parents have the right to "establish a home and bring up children."[91] One hundred years ago, the Supreme Court in *Meyer v. Nebraska* established this fundamental right, declaring unconstitutional a state law that prohibited the teaching in school of any language except English.[92] In other words,

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[81] *Id.*; *Medical Association Statements in Support of Health Care for Transgender People and Youth*, GLAAD (June 21, 2023), https://glaad.org/medical-association-statements-supporting-trans-youth-healthcare-and-against-discriminatory/ [https://perma.cc/8JQ7-74DH].

[82] For a summary of medical associations that have officially supported gender-affirming healthcare for transgender minors, see *Medical Association Statements in Support of Health Care for Transgender People and Youth*, *supra* note 81.

[83] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[84] Pierce v. Soc'y of Sisters, 268 U.S. 529, 534–35 (1925).

[85] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[86] Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[87] Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1972).

[88] Parham v. J.R., 442 U.S. 584, 603–04 (1979).

[89] Troxel v. Granville, 530 U.S. 57, 60 (2000).

[90] Obergefell v. Hodges, 576 U.S. 644, 665–66 (2015) (emphasis added).

[91] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[92] *Id.* at 400–01.

parents have the freedom to educate and make certain decisions as to how they will bring their children up.

The Court expanded parental rights when it took the issue up again, only two years after *Meyer*. In *Pierce*, the Supreme Court concluded that parents have the right to "direct the upbringing and education of children under their control."[93] The Court held unconstitutional a state law that required children to attend public schools and noted that liberty, under the Due Process Clause, excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers.[94] In other words, a child is not a "mere creature of the State."[95] Instead, the child's parents have "the right" and responsibility to "nurture him and direct his destiny . . . coupled with the high duty, to recognize and prepare him for additional obligations."[96]

Nineteen years later, the Court affirmed parents' fundamental right to prepare their children for their futures in *Prince v. Massachusetts*. In *Prince,* the Court held 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."[97] The Court further held that the state may restrict the parent's control by requiring school attendance and regulating or prohibiting the child's labor.[98] Thus, the state can interfere with the parent/child relationship if there are other objectives at play, such as preventing child labor.

The Court ruled again on parental rights in *Stanley v. Illinois*, emphasizing that parents have the right to raise their child as they see fit and clarifying biological parents' rights. In *Stanley*, the Court concluded that parents have an "interest . . . in the companionship, care, custody, and management of . . . [their] children."[99] The Court declared unconstitutional a state law that automatically made the children of unmarried mothers wards of the state at the time of their mother's death under the Due Process and Equal Protection Clauses.[100] The Court held that the plaintiff father's rights were violated because the State terminated them without any showing that he was an "unfit" parent.[101] Essentially, the Court found a fundamental right of the biological parent to custody.

Then again, in the same year, the Court held in *Wisconsin v. Yoder* that Amish parents had the power to dictate the upbringing of their children—specifically, the right to prevent their children from attending high school.[102] In doing so, the Court noted that parents have the fundamental ability to guide the future of their children absent "some purpose within the competency of

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[93] Pierce v. Soc'y of Sisters, 268 U.S. 529, 534–35 (1925).
[94] *Id.*
[95] *Id.* at 535.
[96] *Id.*
[97] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
[98] *Id.* at 166–69.
[99] Stanley v. Illinois, 405 U.S. 645, 651 (1972).
[100] *Id.* at 651–58.
[101] *Id.* at 647–49.
[102] Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1972).

the State."[103] Further, the Court established in *Yoder* that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[104]

Five year later, the Supreme Court further clarified just how expansive parental rights are in *Parham v. J.R.* In *Parham,* the Court upheld "substantial" parental rights in medical decision-making, "absent a finding of neglect or abuse."[105] Parents, the Court reiterated, do not have "absolute" power to make their child undergo certain medical procedures, such as institutionalization.[106] However, parents have "plenary authority," so long as an "independent . . . medical judgment" does not counsel otherwise.[107] The Court further held that although the state has recognized interests in reducing medical costs by limiting "its costly mental health facilities" to those that genuinely need the service, it "has a significant interest in not imposing unnecessary procedural obstacles" that ultimately result in "discourag[ing]" parents and children from "seek[ing]" medical care.[108] Essentially, states do have an interest in setting certain standards for specific decisions, such as education and healthcare.[109] However, parental rights trump the state's interests when it comes to decisions that are critical to a child's upbringing, "absent" proof of certain limiting factors such as child "neglect or abuse."[110]

Eleven years later, the Court, in *Troxel v. Granville*, held that a Washington law which allowed anyone to "petition . . . for visitation rights 'at any time,'" was unconstitutional because it violated the biological mother's right to control the upbringing of her children.[111] The Court held that "so long as [a] parent adequately cares for [their] children . . . , there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[112] As a direct result, the Court strengthened parental rights by limiting "third-party" rights to interfere with parents' choices.[113]

Under the Supreme Court's precedent in *Troxel v. Granville*, "there is a presumption that fit parents act in the best interests of their children."[114] In other words, third parties must overcome this presumption, and the Court cannot "simply make a 'best interests of the child' determination and then grant'" the third party's requested decision relating to the child.[115] If the Court

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[103] *Id.*
[104] *Id.* at 232.
[105] Parham v. J.R., 442 U.S. 584, 604 (1979).
[106] *Id.* at 604.
[107] *Id.*
[108] *Id.* at 605 (1979).
[109] *See id.* at 604 (discussing parental and state interests in healthcare decisions); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (discussing parental and state interests in education).
[110] *Parham*, 442 U.S. at 602–04.
[111] Troxel v. Granville, 530 U.S. 57, 60 (2000).
[112] *Id.* at 68–69.
[113] *See id.* at 64–65, 67.
[114] *Id.* at 68.
[115] Kevin Clarkson, *Alaska Supreme Court Affirms Parental Rights for Minor Children*, 39 Alaska Bar Rag 21, 21 (2015).

were to decide, without prompt and against precedent, that its judgment was more proper as to what was in the child's best interests, it would infringe on the parent's constitutional rights to dictate the upbringing of their children.[116] In other words, the Court cannot, by itself, grant a third party's decision related to a child that is not their own by determining what is in the best interest of the child.[117] This holding, that third parties cannot dictate the upbringing of another parent's child,[118] is relevant to the current state anti-trans regulations. These regulations misconstrue, and are fundamentally at odds with, the Court's precedent.

What is true of the Court's precedent, however, is that since 1923 the Supreme Court has historically recognized and continuously upheld a parent's right to control the upbringing of their children. However, in limited situations, states can "terminate" parental rights "over parental objection."[119] The Court has held that in these specific instances the Due Process Clause requires states to present "clear and convincing evidence," rather than just a "'fair preponderance of the evidence.'"[120] In determining that state termination of parental rights must satisfy the Due Process Clause of the Fourteenth Amendment, the Court noted that there is a "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest."[121] This parental right is not erased "simply because [a parent] ha[s] not been [a] model parent[]."[122] States certainly can regulate parental rights in areas such as child abuse or parental right termination, health, and visitation.[123] However, to do so they may have to show a compelling reason to take such action, and such action might need to be narrowly tailored to the compelling interest.[124]

In determining whether a regulation is constitutional, the government must prove that its interest in the regulation is compelling.[125] State interests that are accepted as compelling include protecting children's welfare and safeguarding them from abuse.[126] So, if the regulation is similar to that in *Prince*, in that it protects children from abuse by setting child labor laws, the Court would examine whether the regulation promotes a compelling state interest and conclude that it does in fact promote a compelling interest in protecting

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[116] *Id.*
[117] Clarkson, *supra* note 115.
[118] *Troxel*, 530 U.S. at 68; Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
[119] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 747 (1982).
[120] *See, e.g.*, *id.* at 747–48 (quoting N.Y. Fam. Ct. Act § 622 (McKinney 1982)).
[121] *Id.* at 753.
[122] *Id.*
[123] *Id.* at 747 (noting that states "may terminate, over parental objection, the rights of parents . . . upon a finding that the child is 'permanently neglected'"); Prince v. Massachusetts, 321 U.S. 158, 166–67, 170–71 (1944) (noting again state power to regulate in areas of child abuse); Troxel v. Granville, 530 U.S. 57, 65–68 (2000) (noting limited state power to regulate in visitation settings, such as if the parents were found to be "unfit").
[124] *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in judgment). The Supreme Court has yet to settle on a singular standard of review for parental rights cases. *Id.* However, since parental rights are considered a fundamental right, Justice Thomas' insistence on strict scrutiny rings true as the likely appropriate standard of review. *See id.*
[125] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).
[126] *Id.*

children from abuse.[127] After the Court determines that the regulation furthers a compelling state interest, the regulation must also be narrowly tailored to promote that interest. In other words, it cannot be overinclusive (i.e., too broad) or underinclusive (i.e., not broad enough).[128] If the regulation is not over or underinclusive, then the regulation is constitutional.

Political figures and conservative media outlets claim that gender-affirming healthcare falls within the right of states to regulate parental rights in cases of "'child abuse.'"[129] However, this is incorrect for two reasons discussed above: (1) gender-affirming healthcare is a widely accepted medical practice, and (2) pseudoscience is not a recognized, legitimate, or compelling reason to infringe on constitutional rights.[130] Therefore, even though states have the authority to infringe upon parental rights to address child abuse, using child abuse as a pseudoscientific talisman of a state interest to ban medical procedures widely accepted as safe does not meet the necessary standard of review.[131]

Further, narrowly construing a right, especially one as historically broad as a parental right, contradicts precedent. The Supreme Court noted in *Obergefell v. Hodges* that a narrow construction often unfairly portrays whatever right is being litigated:

> *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.[132]

As the Supreme Court stated in *Obergefell*, a case that was arguably equally as controversial at the time it was decided as gender-affirming healthcare is right now—that "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[133] This approach to construing fundamental rights has been rejected time and time again in cases such as *Loving* in 1967 and *Obergefell* in 2015.[134] In fact, if we were to strictly define the parental right at issue in these anti-trans bills by referencing who exercised this right in the past, essentially only biological fathers would have the right to guide the upbringing of their children.[135]

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[127] *Id.* (describing strict scrutiny); Prince v. Massachusetts, 321 U.S. 158, 168–70 (1944) (describing the government interest in protecting children from abuse).

[128] Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982).

[129] *See* Nicole Narea & Fabiola Cineas, *The GOP's Coordinated National Campaign Against Trans Rights, Explained*, Vox (Apr. 6, 2023, 2:50 PM), https://www.vox.com/politics/23631262/trans-bills-republican-state-legislatures [https://perma.cc/63QA-7KJJ].

[130] *See supra* notes 71–78 and accompanying text.

[131] *See supra* notes 120–24 and accompanying text.

[132] Obergefell v. Hodges, 576 U.S. 644, 671 (2015).

[133] *Id.*

[134] *Id.*; Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

[135] *See Fatherhood and Motherhood in Colonial America*, Digit. Hist. https://www.digitalhistory.uh.edu/topic_display.cfm?tcid=83#:~:text=Fathers%2C%20not%20mothers%2C%20received%20custody,disruptive%20children%2C%20and%20unruly%20servants [https://perma.

Some courts have not heeded these words, in fact, the Sixth Circuit construed the parental rights involved in challenges to anti-trans legislation narrowly, as the right of parents to force their children to undergo sometimes "irreversible medical treatments."[136] However, that construction of the right is not what is being asked by parents seeking equal rights for their children. The question is about whether parents have the right, in the comprehensive sense, to "control" the upbringing of their children.[137] This right is well-established,[138] and the right to direct medical care is consistently included under the umbrella of parental rights to dictate a child's upbringing.[139]

A common criticism of construing fundamental rights broadly is that doing so can obfuscate democracy, functioning as a judicial end-run around the legislative branch.[140] However, using established precedent is not an attempt to circumvent the legislature and legislative process. Democracy is, without doubt, the primary channel by which to preserve liberty. But, when an individual is "'injured by the unlawful exercise of governmental power'" and "the rights of persons are violated, 'the Constitution requires redress by the courts.'"[141] The benefit of having a judicial system separate from the partisan legislature is that constitutional rights can be invoked and construed properly, even if particularly vocal parts of society disagree with the right and how it is framed.[142] Therefore, despite the fact that parents could petition their state legislatures to pass legislation protecting their children, that is not the only method of relief that parents of trans children have. Parents, just like others whose rights are violated, have the ability to petition the courts for redress.

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cc/XF5M-46J9] (last visited Sept. 6, 2023) (describing that only fathers retained custody of their children in the event of a divorce and that a father was almost entirely in charge of the upbringing of children); *see also From Father's Property to Children's Rights: A History of Child Custody Preview*, Berkeley L., https://www.law.berkeley.edu/our-faculty/faculty-sites/mary-ann-mason/books/from-fathers-property-to-childrens-rights-a-history-of-child-custody-preview/ [https://perma.cc/C6AM-TH6H] (last visited Sept. 6, 2023).

[136] *See* L.W. v. Skrmetti, 73 F.4th 408, 419 (6th Cir. 2023) (describing gender-affirming healthcare as "irreversible medical treatment[]").

[137] *See* Brandt v. Rutledge, 677 F. Supp. 3d 877, 922 (E.D. Ark. 2023) (describing a parent's right as one allowing them to "make decisions concerning the care, custody, and control of their children[,] includ[ing]the right to direct their children's medical care") (quoting Kanuszewski v. Mich. Dep't of Health and Human Serv's, 927 F.3d 396, 419 (6th Cir. 2019)).

[138] Wisconsin v. Yoder, 406 U.S. 205, 232 (1971) ("[The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

[139] Parham v. J.R., 442 U.S. 584, 604 (1979).

[140] *See, e.g.*, *Obergefell*, 576 U.S. at 709–10 (Roberts, C.J., dissenting); Schuette v. BAMN, 572 U.S. 291, 313 (2014) ("It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."); William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 700 (1976) ("Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.").

[141] *Obergefell*, 576 U.S. at 676–77 (citing and quoting in part *Schuette*, 572 U.S. at 311, 313).

[142] *Id.* at 677.

B. How Parental Rights in Anti-Trans Legislation Challenges Have Been Interpreted

As parents challenge state anti-trans legislation, circuit courts have, in fact, construed parental rights differently. The U.S. Court of Appeals for the Eighth Circuit applied the traditional broad parental right recognized by the Supreme Court when it affirmed the unconstitutionality of Arkansas' bill. The U.S. Court of Appeals for the Sixth Circuit, by contrast, narrowly construed the right and upheld Tennessee's anti-trans legislation.[143] The fates of the Arkansas and Tennessee bills serve as noteworthy examples of how anti-trans bills are treated when subject to challenge. Both demonstrate that the step-zero determination in challenging these laws is deciding how the fundamental right will be construed.

The parental right implicated in Arkansas's anti-trans bill was construed broadly when challenged. In June 2023, a federal district judge blocked an Arkansas law banning gender-affirming healthcare for people under eighteen.[144] In this decision, the court held that the ban violated the First Amendment, the Fourteenth Amendment's Equal Protection Clause, and the Due Process Clause of the Fifth and Fourteenth Amendments.[145] The court took explicit measures to define the constitutional right at issue, describing parental rights as "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court."[146] In finding that the Arkansas bill violated the due process rights of parents, the court held that "Parent Plaintiffs have a fundamental right to seek medical care for their children and . . . make a judgment that medical care is necessary."[147] Former Arkansas Governor Asa Hutchinson even conceded this point when he vetoed the Arkansas bill.[148] Specifically, he stated that the bill "is too extreme . . . [because it] interrupt[s] treatment that the parents had agreed to, the patient had agreed to and the physician recommended" and "puts a vulnerable population in a more difficult position."[149] The Arkansas House and Senate overrode his veto, after which Governor

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[143] L.W. v. Skrmetti, 83 F.4th 460, 417 (6th Cir. 2023). There are several cases across the United States addressing parental rights in anti-trans legislation contexts. For example, see Koe v. Noggle, No. 1:23-cv-2904-SEG, 2023 WL 5339281 at *1, 9 (N.D. Ga. Aug. 20, 2023) (granting a preliminary injunction in favor of the Plaintiffs, who challenged Georgia Senate Bill 140, arguing that SB140 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

[144] Daniel Breen, *First in the Nation Gender-Affirming Care Ban Struck Down in Arkansas*, NPR (June 20, 2023, 9:58 PM), https://www.npr.org/2023/06/20/1183344228/arkansas-2021-gender-affirming-care-ban-transgender-blocked#:~:text=Judge%20strikes%20down%20Arkansas%20transgender%20care%20ban%20%3A%20NPR&text=Judge%20strikes%20down%20Arkansas%20transgender%20care%20ban%20A%20federal%20judge,motivated%20by%20ideology%2C%20not%20science [https://perma.cc/9FZ3-AW6C].

[145] Brandt v. Rutledge, 677 F. Supp.3d 877, 917–18, 922–23, 925 (E.D. Ark. 2023); Breen, *supra* note 144.

[146] *Id.* at 922 (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).

[147] *Id.* at 923.

[148] Breen, *supra* note 144.

[149] Vanessa Romo, *Arkansas Gov. Asa Hutchinson on Transgender Health Care Bill: 'Step Way Too Far'*, NPR (Apr. 6, 2021, 7:36 PM), https://www.npr.org/2021/04/06/984884294/arkansas-gov-asa-hutchinson-on-transgender-health-care-bill-step-way-too-far [https://perma.cc/9APZ-BZRZ].

Hutchinson told reporters that he hoped his "veto will cause . . . [his] Republican colleagues across the country to resist the temptation to put the state in the middle of every decision made by parents and health care professionals."[150] Clearly, this plea went unheard.[151] On appeal, the Eighth Circuit affirmed the lower court opinion, holding that the judge did not abuse its discretion.[152]

Tennessee's anti-trans legislation, on the other hand, construed parental rights narrowly when challenged. A Trump-appointed federal judge partially blocked Tennessee's ban on gender-affirming healthcare for people under eighteen.[153] Plaintiffs brought a claim alleging that the Tennessee ban violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[154] The judge held partially in favor of the plaintiffs, recognizing that it "has plainly [been] found that parents have a fundamental right to direct the medical care of their children without indicating that the right pertains only to the *refusal* of certain medical treatments."[155] In other words, the Tennessee ban was unconstitutional because parents have a fundamental right to direct the upbringing of their children. Included in this right is the right to manage the child's medical care, which can involve both refusing certain medical treatment and demanding it.[156] In reaching this ruling, the court held that the Plaintiffs lacked standing to challenge the ban on gender-affirming surgery but had standing to challenge the hormone- and puberty-blocker bans.[157] Tennessee appealed the district court's decision to the Sixth Circuit.[158] On appeal, the Sixth Circuit held that the district court "likely abused its discretion" when it granted an expansive injunction, and the

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[150] Breen, *supra* note 144.

[151] *See, e.g.*, *Overriding Governor's Veto, Arkansas Lawmakers Enact Ban on Gender Affirming Care for Trans Youth*, Associated Press (Apr. 7, 2021, 10:27 AM), https://www.pbs.org/newshour/nation/overriding-governors-veto-arkansas-lawmakers-enact-ban-on-transgender-youth-treatment [https://perma.cc/CF7M-TNMZ] (noting that the Arkansas legislature overrode Governor Hutchinson's veto, despite his public pleas).

[152] Brandt v. Rutledge, 47 F.4th 661, 667 (8th Cir. 2022).

[153] L.W. v. Skrmetti, 679 F. Supp. 3d 668, 677 (M.D. Tenn. 2023); Marianna Bacallao, *As Tennessee Ban on Gender-Affirming Care Takes Effect, Young Trans People are Impacted*, wbur (July 20, 2023), https://www.wbur.org/hereandnow/2023/07/20/tennessee-trans-youth-care-ban# [https://perma.cc/43GS-2S8P]; *see Federal Judge Blocks Tennessee's Ban on Trans Youth's Health Care*, ACLU, (June 28, 2023), https://www.aclu.org/press-releases/federal-judge-blocks-tennessees-ban-on-trans-youths-health-care#:~:text=Federal%20Judge%20Blocks%20Tennessee's%20Ban%20on%20Trans%20Youth's%20Health%20Care,-Case%3A%20L.W.%20v&text=NASHVILLE%2C%20Tenn.,the%20law%20proceeds%20in%20court [https://perma.cc/EWB8-S5WU].

[154] *L.W.*, 679 F. Supp. 3d at 680.

[155] *Id.* at 684.

[156] *Id.* (discussing that precedent from the Sixth Circuit and United States Supreme Court have never indicated that parental rights are limited to simply refusing medical treatment on behalf of their children, rather that "the right to 'direct' care would naturally include the right to refuse certain treatments *and* the right to request provision of certain treatments"). Importantly, the Court in *Washington v. Glucksberg* distinguished between the "right to refuse unwanted medical treatment" and the "right to assistance in committing suicide." *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 725–26 (1997)). However, the right to have assistance in completing suicide is different than the right to seek affirmative medical care to extend a life, rather than end it. Further, precedent does not establish that parents only have the right to refuse medical treatment. *Glucksberg*, 521 U.S. at 725–26.

[157] *L.W.*, 679 F. Supp. 3d at 681–82.

[158] L.W. v. Skrmetti, 83 F.4th 460, 466 (6th Cir. 2023).

Sixth Circuit construed the fundamental right narrowly, describing that the Plaintiffs "seek to extend the constitutional guarantees [of Due Process and Equal Protection] to new territory."[159] The right that the Plaintiffs sought, according to the Sixth Circuit, was a right to "experimental" and "reasonably banned [medical] treatments for their children."[160] The Sixth Circuit stayed the district court's preliminary injunction.[161] The ACLU and Lambda Legal, on behalf of the parents, recently petitioned the Supreme Court to review the Sixth Circuit's decision.[162] The Supreme Court agreed to hear the case, with a decision expected to come in June or July 2025—until then, however, the law remains in effect.[163]

III. Anti-trans State Laws Are Unconstitutional: An Analysis of Several State Laws

Because the parental rights doctrine is firmly established, state laws criminalizing transgender children who attempt to access gender-affirming healthcare and their healthcare providers are unconstitutional because the laws deprive parents of their right to guide these decisions. The bills instead improperly place the decision-making power in law enforcement, state officials, and state agencies. The following analysis will focus first on Georgia Senate Bill 140.[164] Next, the Article will examine Missouri Senate Bill 49,[165] after which it will analyze Texas Senate Bill 14.[166]

Georgia Senate Bill 140 ("GA SB 140") criminalizes providing gender-affirming healthcare for children.[167] It bans both gender-affirming surgical procedures and hormone replacement, though the statute does not apply to

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[159] *Id.* at 471. The Sixth Circuit did not specifically opine on what parental rights did include, but rather noted that "[l]ife-tenured federal judges should be wary of removing a vexing and novel topic of medical debate from the ebbs and flows of democracy . . . [and that] [c]onstitutionalizing new areas of American life is not something federal courts should do lightly[.]" *Id.* Meanwhile, the Eighth Circuit, in discussing the right, found the right of parents in anti-trans legislation contexts fell within the right of parents to direct the medical care of their children. Brandt v. Rutledge, 47 F.4th 661, 667 (8th Cir. 2022).

[160] *L.W.*, 83 F.4th at 473, 475.

[161] *Id.* at 491.

[162] *Tennessee Families and Doctors Urge Supreme Court to Block Ban on Essential Health Care for Transgender Youth*, ACLU (Nov. 1, 2023, 9:17 AM), https://wp.api.aclu.org/press-releases/tennessee-families-and-doctors-urge-supreme-court-to-block-ban-on-essential-health-care-for-transgender-youth [https://perma.cc/23NP-R9FS].

[163] *Id.*; Amy Howe, *Supreme Court Takes up Challenge to Ban on Gender-Affirming Care*, SCOTUSblog (Jun. 24, 2024, 10:03 AM), https://www.scotusblog.com/2024/06/supreme-court-takes-up-challenge-to-ban-on-gender-affirming-care/#:~:text=In%20a%20list%20of%20orders,June%20or%20early%20July%202025 [https://perma.cc/57ZZ-X578].

[164] S.B. 140, 56th Leg., 1st Reg. Sess. (Ga. 2023). Georgia Senate Bill 140 is codified at § 31-71-3.5. For consistency, it will be referred to by its Senate bill number throughout this Article.

[165] S.B. 49, 120nd Gen. Assemb., 1st Reg. Sess. (Mo. 2023). Missouri Senate Bill 49 is contained in §§ 191.1720, 208.152, 217.230, and 221.120. For ease of reading, it will be referred to by its Senate bill number throughout this Article.

[166] S.B. 14, 88th Leg., 1st Reg. Sess. (Tex. 2023). Texas Senate Bill 14 is codified at Texas Health and Safety Code § 161.702. For consistency, it will be referred to by its Senate bill number throughout this Article.

[167] S.B. 140, 56th Leg., 1st Reg. Sess. (Ga. 2023).

transgender children who had already initiated gender-affirming hormonal treatment prior to the passage of the law in July of 2023.[168] There are several other notable exceptions to the law as well. Under GA SB 140, children have limited access to puberty blockers, as well as surgical and hormonal treatment, *if* they have "hormonally-induced conditions" and "biologically combined sex organs . . . [or in] 'medically necessary' [situations]."[169] Outside of these circumstances, however, medical professionals face "license revocation, civil penalties, and criminal charges" if they provide gender-affirming healthcare to transgender minors.[170] In essence, the statute removes all decision-making power from parents and guardians if their children have not already started gender-affirming hormonal treatment prior to the bill's passage, and it is a complete ban on providing gender-affirming surgery—unless the providers want to face criminal charges.

GA SB 140 violates the Due Process Clause of the Fourteenth Amendment because it strips away parents' constitutional rights to raise their children. Under the law, parents do not have the ability to consent to their child receiving gender-affirming healthcare, unless the child fits under the two exemptions (1) allowing children to use puberty blockers if, prior to the bill's passage, had already started such use, and (2) narrowly permitting surgery and hormone treatment for children with a hormone-induced condition, "biologically combined sex organs," or any situation where it is medically necessary.[171] However, this exemption does not provide enough protection to make it constitutional because it is not narrowly tailored. GA SB 140 would allow for children like Parker to continue taking puberty blockers if he had started prior to the passage of the law, but not after—excluding children for no reason other than the date with which they started receiving the healthcare. If the purported state interest is to protect children from irreversible medical treatment,[172] and the state argues gender-affirming treatment is as such, allowing some children continued access merely because of the date they started such "irreversible" treatment is not narrowly tailored.

Further, GA SB 140 appropriates the parental decision-making rights away from the child's guardians and transfers them instead to the government to dictate how a child, about whom they know functionally nothing, will be raised. Georgia's actions are akin to those of Wisconsin in *Wisconsin v. Yoder*, albeit with higher stakes.[173] In that case, the Court proclaimed:

> 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

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[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972) (deciding whether Wisconsin's refusal to allow Amish parents to decline to send their children to high school was constitutional).

> with the high duty, to recognize and prepare him for additional obligations.[174]

Georgia certainly has the power to regulate certain aspects of the parent-child relationship—it can, for instance, prevent abuses like child labor. However, the state cannot force parents to raise their child a certain way, nor regulate how their child presents themselves. Certainly, Georgia cannot force a child to forgo medical care that their primary care physician and their parents agree are the best option for the child. States have long tried to restrict parents and what they felt was best for their child—after all, the parents in *Meyer* thought their children would be best suited to learn languages other than English, and Nebraska disagreed.[175] The Court held that decision to be unconstitutional.[176] Here, Georgia seeks to intervene in an even more personal, private matter. If a state cannot refuse to allow parents to do something as simple as dictate what languages their child learns, it follows that the state also cannot unilaterally decide what healthcare parents do or do not provide for their children, absent a compelling public health or safety justification.[177]

Missouri Senate Bill 49 ("MO SB 49"), also known as the Missouri Save Adolescents from Experimentation (SAFE) Act, prohibits providing to minors gender-affirming healthcare, including surgery, hormonal treatment, and puberty blockers.[178] There is a small exception allowing transgender minors to continue to have access to hormonal treatment and puberty blockers if they were "receiving such treatment prior to August 28, 2023[,]" or if minors have "medically verifiable disorders of sex development" or other ailments "exacerbated by gender transition surgeries, drugs, or hormones."[179] One other exemption allows surgeries or treatment if "the minor suffers from a condition that would place him or her in imminent danger of death or impairment of a major bodily function unless surgery is performed."[180] If a healthcare provider violates MO SB 49, they can face consequences such as license revocation or a separate legal cause of action.[181] Essentially, MO SB 49 prohibits all surgery-based gender-affirming healthcare unless (1) the minor suffered from a life-threatening condition where surgery is required, or (2) it aims to 'fix' aliments exacerbated by previous gender-affirming healthcare—a codification of the misinformed conception that individuals who undergo gender-affirming medical treatment later seek to 'undo' their medical transitions.

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[174] *Yoder*, 406 U.S. at 232–33 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)).
[175] Meyer v. Nebraska, 262 U.S. 390, 397 (1923).
[176] *Id.* at 402–03.
[177] *See infra* Part V.
[178] S.B. 49, 120nd Gen. Assemb., 1st Reg. Sess. (Mo. 2023).
[179] *Id.*
[180] *Id.*
[181] *Id.*; Gabrielle Hays, *Judge Denies Request to Halt Missouri's Gender-Affirming Medical Care Ban*, PBS (Aug. 29, 2023, 12:49 PM), https://www.pbs.org/newshour/politics/judge-denies-request-to-halt-missouris-gender-affirming-medical-care-ban [https://perma.cc/Q9DU-JC5Q] ("Sad these guys [Missouri Republicans] act like banning healthcare for kids is protecting them. More baffling though when they also say they're on the side of 'freedom' in the same breath. Freedom—except when they disagree with you and your doctor about what's best for your kid.").

MO SB 49 violates the Due Process Clause of the Fourteenth Amendment because it strips away parents' constitutional rights to raise their children and is not narrowly tailored. MO SB 49, similarly to GA SB 140, would again allow for children like Parker to continue hormonal treatment if he had started prior to the passage of the law, but not after—excluding minors merely because of the date they started such treatment. If Missouri's purported state interest is to "[s]ave [a]dolescents from [e]xperimentation,"[182] allowing some adolescents to continue their 'experimental' treatment because of the date that they started is not narrowly tailored.

Further, MO SB 140 is even more restrictive than GA SB 140 because it contains only two true exceptions: one, mentioned above, which permits gender-affirming hormonal treatment if the child has already been receiving it prior to the bill's passage, and two, surgery *only* if the child is in imminent danger from a certain health condition or seeks to 'fix' ailments from past treatments.[183] The irony is lost on the legislators, who fail to see that, by banning gender-affirming healthcare, they are putting these children in imminent danger from the lack of healthcare access to medically necessary procedures.

Texas Senate Bill 14 ("TX SB 14") criminalizes providing gender-affirming healthcare for children under eighteen.[184] This bill prohibits healthcare providers from providing "gender transitioning" and "gender reassignment procedures" for children if the healthcare sought is for the purpose of affirming the "child's perception of the child's sex . . . [and] that perception is inconsistent with the child's biological sex."[185] The ban covers all types of gender-affirming healthcare, including hormonal treatments, puberty blockers, and "remov[ing] an otherwise healthy or non-diseased body part or tissue."[186] However, medically necessary procedures are not prohibited for children who are "born with a medically verifiable genetic disorder of sex development,"[187] if the hormonal treatment was started prior to June 1, 2023, and the "child had attended 12 or more sessions of mental health counseling or psychotherapy during a period of at least six months before the date the course of treatment . . . began."[188] Under this law, the Texas Attorney General can bring a

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[182] S.B. 49, 120nd Gen. Assemb., 1st Reg. Sess. (Mo. 2023).

[183] *Compare* S.B. 49, 120nd Gen. Assemb., 1st Reg. Sess. (Mo. 2023) (containing essentially one exemption on the ban against gender-affirming healthcare), *with* S.B. 140, 56th Leg., 1st Reg. Sess. (Ga. 2023) (containing two clear exemptions on Georgia's gender-affirming healthcare ban).

[184] S.B. 14, 88th Leg., 1st Reg. Sess. (Tex. 2023).

[185] *Id.*

[186] *Id.*

[187] "[M]edically verifiable genetic disorder[s] of sex development" as defined under the bill include: "(i) 46,XX chromosomes with virilization; (ii) 46,XY chromosomes with undervirilization; or (iii) both ovarian and testicular tissue; or (B) does not have the normal sex chromosome structure for male or female as determined by a physician through genetic testing." *Id.* Essentially, this means that children who (1) have XX chromosomes and ovaries, but "external genitals that appear male", (2) have XY chromosomes, ambiguous or "clearly female" external genitals, with internal testes that are "normal, malformed, or absent," or (3) ovotesticular disorder of sex development (i.e., having 1 ovary and 1 testis or a gonad with both testicular and ovarian tissue) are permitted, under the bill, to undergo surgical proceeds that other children are not afforded. *See Differences of Sex Development*, MedlinePlus, https://medlineplus.gov/ency/article/001669.htm [https://perma.cc/MA5M-EEUE] (last visited July 12, 2024).

[188] S.B. 14, 88th Leg., 1st Reg. Sess. (Tex. 2023).

cause of action against any provider that they have "reason to believe . . . is committing, has committed, or is about to commit a violation" of the law.[189] Effectively, TX SB 14 only bans gender-affirming healthcare for those seeking it because they are trans and wish to affirm a gender identity different from the one they were assigned at birth.

TX SB 14 violates the Due Process Clause of the Fourteenth Amendment because it violates parents' constitutional rights to direct the upbringing of their children. TX SB 14 is even more restrictive than MO SB 140 because it bans completely gender-affirming healthcare for any child seeking healthcare to affirm a gender that is different than the child's gender assigned at birth. The only exception, as noted above, is highly exclusionary.[190] It strips parents' constitutional decision-making power away from them and actively seeks to prohibit gender-affirming healthcare for children previously undergoing such treatment, if they had not met with a counselor or psychotherapist at least a dozen times. TX SB 14 thus violates parental rights.

IV. Not All is Lost: An Overview of Several State Laws that Embrace Parental Rights

As bleak as some state legislation is, there are some states passing legislation that protect parents' rights in guiding the medical care of their children. These bills properly place the decision-making power into the hands of the parents. This Part will first briefly survey Colorado Senate Bill 188.[191] Next, it will consider Illinois House Bill 4664,[192] ultimately illustrating how states have pushed back against anti-trans legislation to provide a safe harbor for their LGBTQIA+ citizens.

Thankfully, not all state legislation is as bleak as GA SB 140, MO SB 49, and TX SB 14. For example, a Colorado law provides more robust protections for trans individuals, albeit through a bill that primarily codifies reproductive rights.[193] Colorado Senate Bill 188 ("CO SB 188"), which "ensure[s] that every individual has the fundamental right to reproductive and gender-affirming health care," applies to both Colorado citizens and those who travel to Colorado for reproductive and gender-affirming health care.[194] It also provides protections for healthcare providers who offer essential reproductive

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[189] *Id.*

[190] *Id.*

[191] S.B. 188, 73rd Gen. Assemb., 1st Reg. Sess. (Co. 2023). Colorado Senate Bill 188 modified numerous provisions and is contained throughout §§ 10-4-109.6; 10-16-121; 10-16-705.7; 12-30-121; 13-1-140; 13-21-133; 13-64-402.5; 16-3-102; 16-3-301; 16-5-104; 16-15-102; 16-19-107; 17-1-114.5; 18-9-313; 18-13-133; 24-30-2102; 24-30-2103; 24-30-2104; 24-30-2105; 24-31-101; 21-116-101 through 24-116-102; 25-6-404; 25-6-407; 25-37-103; 29-20-104; and 30-28-115. For ease of reading, it will be referred to by its Senate bill number throughout this Article.

[192] H.B. 4664, 102nd Gen. Assemb., 1st Reg. Sess. (Ill. 2023). Illinois House Bill 4664 is located at Illinois Public Act 102-1117. For consistency, it will be referred to by its House bill number throughout this Article.

[193] S.B. 188, 73rd Gen. Assemb., 1st Reg. Sess. (Co. 2023).

[194] *Id.*

healthcare.[195] CO SB 188 "prohibits a court . . . from issuing a subpoena in connection with a proceeding in another state" regarding someone who accessed "legally protected health-care" while in Colorado, as well as those who "perform[ed], assist[ed], or aid[ed] in the performance of a legally protected health-care activity in Colorado."[196] Neither can an officer "knowingly arrest" someone who had engaged "in a legally protected health-care activity," unless they had committed an act that was criminal in Colorado.[197] Although the law is not explicitly designed to protect parental rights, it does provide parents with protections if they need to travel to across state lines into Colorado to seek reproductive health care for their children. For example, CO SB 188 would protect Donnie Ray if he traveled to Colorado to help Parker obtain a hysterectomy or other reproductive healthcare. In other words, families living in states with anti-trans legislation can seek temporary refuge in Colorado and access needed care.

Colorado is not alone in its fight to provide protections for trans individuals. Some states have gone even further. Providing some of the most robust protections in the Midwest, Illinois recently passed House Bill 4664 ("IL HB 4664"), which preserves access to reproductive and gender-affirming healthcare.[198] This law ensures that individuals who travel to Illinois for healthcare banned in their homes state will be protected by (1) protecting providers' licenses who provide health care procedures legal in Illinois, but illegal in a different state and (2) preventing the Governor from surrendering someone charged with traveling to Illinois for medical procedures banned in other states, but protected under Illinois law.[199] Similar to but more expansive than CO SB 188, IL HB 4664 guarantees all treatment Donnie Ray would seek for Parker if Arkansas's anti-trans legislation came back into effect, not just reproductive healthcare. IL HB 4664 provides strong protections for parental rights, especially for families who come from states with a history of particularly restrictive gender-affirming healthcare regulations.

The Colorado and Illinois legislation protects parental rights by placing decision-making power back into the hands of parents and allowing them to determine if they want to pursue gender-affirming healthcare options for their children. In doing so, these laws embody the premise behind parental rights—that parents have plenary decision-making authority when it comes to questions on how to raise their children.

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[195] *Id.*

[196] *Protections for Accessing Reproductive Health Care*, Co. Gen. Assemb. https://leg.colorado.gov/bills/sb23-188 [https://perma.cc/C4JN-JP4H] (last visited July 10, 2024).

[197] *Id.*

[198] H.B. 4664, 102nd Gen. Assemb., 1st Reg. Sess. (Ill. 2023).

[199] *Id.*; Illinois Government, Gov. Pritzker Signs Sweeping Reproductive Rights Protections Into Law (Jan. 13, 2023), https://www.illinois.gov/news/press-release.25906.html#:~:text=Chicago—Today%20Governor%20JB%20Pritzker,and%20options%20across%20the%20state [https://perma.cc/72ED-TGKC].

V. Limits of Parental Rights and Viability in the Post-*Dobbs* World

Anti-trans legislation likely violates parental rights. However, there are limits to the theory's successful application. This Part will first focus on where it would be *unhelpful* for advancing progressive legal causes. Next, this Part will discuss where, although parental rights are strong, the government's interest could be stronger. And, lastly, this Part discusses the viability of parental rights after the Supreme Court's decision in *Dobbs*, concluding that it is still very much on the table.

Admittedly, the parental rights doctrine has limited utility when applied to other legal fights. For example, compare the strengths of the interests on both sides of the anti-critical race theory (CRT) and anti-vaccine movements. Parental rights would likely be a less effective vehicle to challenge legislation banning CRT taught in school because a parent's interest is stronger in medical decision-making situations.[200] How is this possible, given the Court's holding in *Meyer*, where Nebraska's prohibition of the teaching of German was deemed unconstitutional?[201] The answer might be the historical racialization and politicization of parental rights, especially in the education context, favoring White parents' parental rights.[202] Take Florida, where the legislature used parental rights as a mantle to ban CRT and other concepts from being taught in schools.[203] Arguably, doing so values the rights of some parents (i.e., White) over others (i.e., Black, Indigenous, LGBTQIA+) by allowing some (White) parents to make decisions about what the whole of the student population will learn in a way that is actually is contrary to parental rights.[204] In essence, it appears that some parental rights in education, such as the right to non-English language instruction in *Meyer*, are considered stronger, while the application of parental rights is less clear in education policies banning CRT or other related concepts.[205] Because of this uncertainty, the historical racialization of parental rights, and the fact that medical decision-making is considered a stronger interest because of a state's strong interest in protecting

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[200] *Compare* Elizabeth Tobin-Tyler, *The Past and Future of Parental Rights: Politics, Power, Pluralism, and Public Health*, 30 Va. J. Soc. Pol'y & L. 312, 322–25 (2023) (describing parental rights in healthcare decision-making), *with id.* at 330–34 (describing parental rights in education, specifically CRT).

[201] Meyer v. Nebraska, 262 U.S. 390, 400–03 (1923).

[202] Tobin-Tyler, *supra* note 200, at 333–34; LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 Yale L.J. 2139, 2139, 2144–45 (2023) (discussing the historical racialization of parental rights and the "epic shift in the national dialogue about race and racism" after the murder of George Floyd in Minneapolis in 2020).

[203] Tobin-Tyler, *supra* note 200, at 334.

[204] *Id.*; Clark, *supra* note 202, at 2146, 2193, 2197 (arguing that anti-CRT and "parents' rights movements seek to protect White children form color consciousness and possibilities of emotional distress to protect Whiteness. Parents' rights do not support all parents in safeguarding all children but rather support only White parents as protectors of White children in the service of protecting Whiteness).

[205] Clark, *supra* note 202, at 2199–2200 (discussing parental rights precedent in education-related decisions and comparing to the anti-CRT parental rights movement).

public health, using parental rights to challenge anti-CRT legislation would likely not bear much fruit for progressive causes.[206]

On the other hand, in the vaccination context, the government has a markedly strong interest in maintaining public health through vaccination requirements, with some limited room for religious exemptions and even fewer for "philosophical exemptions."[207] Put differently, although parents have a very strong interest in medical decisions related to their children (such as healthcare outside of the vaccination context), the government has an even stronger one when the parent's medical decision-making specifically affects public safety and implicates the state's police power.[208] In fact, gender-affirming healthcare arguably does not implicate a government's police power because it does not implicate public health—the only related police power is preventing *child abuse*, which, if abuse is found, is a compelling state interest.[209] However, as discussed above, gender-affirming healthcare does not constitute abuse.[210] To compare with vaccination requirements, the government's interest is in protecting *public health*, and vaccinations against communicable diseases clearly fall within this police power.[211] The same cannot be said about gender-affirming healthcare and the state's police power to prevent child abuse. In the public health vaccination context, because the government has such a strong interest, parental rights would likely be ineffective grounds for challenging government actions.

Further, although substantive due process is weaker post-*Dobbs*, the parental rights doctrine still has legal purchase. Justice Thomas made clear his desire to reconsider substantive due process rights; however, Justice Alito took pains to distinguish abortion (a right no longer protected under the Fourteenth Amendment's Due Process Clause) from fundamental rights (such as parental rights), which are protected under substantive due process.[212] Notably, Justice Thomas is the same justice who insisted on analyzing state actions he viewed as infringing on parental rights under strict scrutiny.[213] Academic discussion also distinguishes abortion from the parental rights established in *Meyer* and *Pierce*.[214] The distinction lies primarily in what is considered to be

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[206] *Id.* at 322–25, 330–34; *but see* Clark, *supra* note 202, at 2199 ("Parents do not have sole control over their children's education; for example, states routinely compel parents to educate their children or require vaccinations to attend school."). Further, schools arguably "would be unable to function . . . if every parent had the right to exert their preferences on curriculum, teaching, and training." *Id.* at 2200.

[207] Tobin-Tyler, *supra* note 200, at 325.

[208] Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905) (holding the vaccination program had a "real [and] substantial relation to the protection of the public health and safety").

[209] *See* Prince v. Massachusetts, 321 U.S. 158, 168–69 (1944); Parham v. J.R., 442 U.S. 584, 602–03 (1979).

[210] See *supra* Part I and related discussion.

[211] *Jacobson*, 197 U.S. at 39.

[212] *Compare* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 229–33 (2022) (distinguishing fundamental rights), *with id.* at 331 (Thomas, J., concurring) (urging reconsideration of all substantive due process precedent).

[213] Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

[214] *See, e.g.*, Jessica Quinter & Caroline Markowitz, *Judicial Bypass and Parental Rights After* Dobbs, 132 Yale L.J. 1908, 1968–69 (2023) (grappling with parental rights post-*Dobbs*, concluding, in part, that: "Parental rights, properly understood, are not absolute. They exist insofar as they protect the interests of the child[.]")

"deeply rooted in this nation's history and tradition . . . [and] implicit in the concept of ordered liberty."[215] Although Justice Thomas's concurrence leaves room for speculation as to whether parental rights could be "not long for this world,"[216] several academics and legal commentators express doubt as to this, and parental rights still appears consistent with Justice Alito's substantive due process analysis in *Dobbs*.[217] In sum, parental rights, unlike abortion, is a substantive due process right that the majority of the Court considers sufficiently grounded in our nation's history.[218] However, it is not a "fix-all" legal theory for progressive causes, because if applied in other contexts, such as those to anti-CRT policies, it could endanger challenges. Instead, it could be viewed as a potential backstop for some, but not all, efforts.

Conclusion

Excluding parents from allowing their children to receive appropriate and needed healthcare conflicts with the central premise of established parental rights regarding childrearing. Parental rights provides decision-making power to parents in a wide array of decisions. State anti-trans legislation ignores this fundamental right and instead provides a clear and threatening message to parents: Third parties can decide how you raise your children.

Parents are rightfully the primary locus of concern in parental rights litigation. However, Plaintiff's brief for the appeal of *Brandt* to the Eighth Circuit succinctly summarizes the consequences of narrowly defining parental rights:

> Defendant's brief never acknowledges Dylan, Sabrina, Parker, or Brooke Dennis. But the outcome of this appeal will dramatically impact the course of their lives, as well as the lives of many other young people like them whose health and well-being require treatment that the State seeks to deny them.[219]

In every state that has an anti-trans law, there is a Donnie Ray and a Parker—a parent that merely wants to do the best for their children, and a child whose wellbeing hangs in the balance. Although this Article focuses on parents' rights, children will be harmed in the interim, and long after these

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[215] *See, e.g.*, Tobin-Tyler, *supra* note 200, at 342.

[216] *See, e.g.*, Quinter & Markowitz, *supra* note 214, at 1924 n.81.

[217] *See, e.g.*, *id.*; Tobin-Tyler, *supra* note 200, at 342; Michael Toth, *Parental Authority Gets a Boost from* Dobbs, Wall. St. J. (July 27, 2022, 6:49 PM ET), https://www.wsj.com/articles/parental-authority-gets-a-boost-from-dobbs-justice-alito-glucksberg-unenumerated-rights-history-tradition-education-meyer-pierce-11658941498 [https://perma.cc/6BX4-6DB2].

[218] *Compare Dobbs*, 597 U.S. at 256 (listing parental rights as a fundamental right under substantive due process, distinguishable from abortion, which is no longer considered such), *with id.* at 331 (Thomas, J., concurring) (showing that only Justice Thomas argued that "we should reconsider all of this Court's substantive due process precedents").

[219] Brief for Plaintiffs-Appellees at 25, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 21-2875).

state laws are overruled and declared unconstitutional.[220] Joanna Brandt asks for her son, Dylan, to have access to healthcare.[221] Lacey and Aaron Jennen ask for their daughter, Sabrina, to be able to receive the medical treatment she needs.[222] Amanda and Shayne Dennis ask for their daughter, Brooke, to be able to access gender-affirming healthcare.[223] The parents' requests are quite simple—they seek the liberty to support their children in the manner that they choose, as the Constitution guarantees.

Parents who do not want their children to have access to specific forms of medical treatment are free to disagree[224] with Donnie Ray's decision to provide the life-changing gender-affirming healthcare for Parker. However, what they cannot do is impose their beliefs upon Donnie Ray and strip away his rights to raise Parker as he sees fit. Donnie Ray and the numerous other parents affected by these laws do not wish for anything more than the ability to exercise the right that the Constitution grants them as parents, and to use that decision-making power to provide their children, such as Parker, with access to gender-affirming healthcare. The parents challenging these state laws merely ask for liberty under the law. Supreme Court precedent establishes that "[t]he Constitution grants them that right."[225]

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[220] *See* Stacy Weiner, *States Are Banning Gender-Affirming Care for Minors. What Does That Mean for Patients and Providers?*, AAMC (Feb. 20, 2024), https://www.aamc.org/news/states-are-banning-gender-affirming-care-minors-what-does-mean-patients-and-providers [https://perma.cc/YY8P-SYXG]. Children who lack access to gender-affirming healthcare suffer from an increased risk of suicide, psychological challenges, and even be forced to go through puberty, which is quite difficult to reverse and could exacerbate their gender dysphoria. *Id.*

[221] Brandt v. Rutledge, 677 F. Supp. 3d 877, 896 (E.D. Ark. 2023).

[222] So many unnamed parents and children are affected by anti-trans legislation. For another example, see Janet Shamlian & Nic Cutrona, *Arkansas Family Tries to Navigate Wave of Anti-trans Legislation*, CBS News (June 7, 2023, 7:48 PM), https://perma.cc/23CM-Z6R6 ("'Before [I transitioned], I was suicidal' . . . 'I was miserable. I didn't take photos of myself. I didn't take pictures of my face.'"). Mother, Lizz Garbett, and her son, Simon (17), were notable critics opposing the Arkansas bill that banned gender-affirming healthcare. *Id.* Simon had socially transitioned before the anti-trans bill passed in Arkansas but has since changed his name and started hormone therapy. *Id.; see also Brandt*, 677 F. Supp. 3d at 897, 899–900.

[223] *Brandt*, 677 F. Supp. 3d at 901.

[224] *See supra* note 21 and accompanying text (discussing potential Equal Protection application in these situations).

[225] Obergefell v. Hodges, 576 U.S. 644, 681 (2015).