LIBERTY UNIVERSITY

Liberty University Law Review

Volume 16
Issue 2 *Spring 2022*

Article 6

March 2022

Liberating Liberty: How the Glucksberg Test Can Solve the Supreme Court's Confusing Jurisprudence on Parental Rights

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ABSTRACT

This Note examines the Supreme Court's parental rights jurisprudence under a substantive due process theory. While the Supreme Court's current precedent regarding parental rights is confusing, a careful and disciplined application of the Court's history and tradition test for determining substantive due process would clarify and protect these rights. This would not only clarify parental rights but provide a path forward for the Court to define and protect other unenumerated, fundamental rights. To make this argument, this Note identifies the Court's substantive due process jurisprudence and the history of parental rights in the law, providing a solution that would clarify both parental rights and substantive due process.

Section II provides an overview of the Court's current substantive due process jurisprudence, its tests, and the methods it uses to determine and define unenumerated, fundamental rights. The genesis of due process is recounted, the history and tradition and ordered liberty tests are reviewed, and the Court's current application of these tests discussed. The case is made that the current framework is not consistently applied by the Court and is thus causing difficulty in defining and protecting unenumerated rights.

Section III of this Note argues that the Court's misapplication of its substantive due process tests has left a confused and unworkable parental rights jurisprudence. To highlight this, the Court's decision in Troxel v. Granville is discussed. Also, the effects of sociological positivism and the doctrine of parens patria and their effects on the use of substantive due process to parental rights are overviewed. Overall, the problem with using opinion and social conscience to formulate and define a right is revealed.

Section IV sets forth the author's proposed solution. A disciplined and careful application of the Court's history and tradition test as provided in Washington v. Glucksberg would not only help to identify and define

unenumerated rights like parental rights, but it would also provide a test to clarify the scope of such rights. Application of this test to parental rights would clarify their fundamental nature and ensure the use of strict scrutiny when considering a government infringement on these rights.

Thus, instead of arguing for immediate change to the law, this Note attempts to apply the current framework to protect parental rights and clarify how the Court should handle fundamental, unenumerated rights. Careful application of Glucksberg's history and tradition test would provide a comprehensive answer. While the long-term effects of substantive due process must be considered, this Note provides an immediate solution.

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NOTE

LIBERATING LIBERTY: HOW THE *GLUCKSBERG* TEST CAN SOLVE THE SUPREME COURT'S CONFUSING JURISPRUDENCE ON PARENTAL RIGHTS

Hugh C. Phillips[†]

I. INTRODUCTION

Parental rights are one of the most important and fundamental, unenumerated rights protected by our constitutional system. Yet parental rights, especially regarding children's education, have recently come to the forefront of political debate in the United States. The conflict was brought into focus when a well-known Democrat politician exclaimed in a gubernatorial debate: "I don't think parents should be telling schools what they should teach."[1] This debate and increasing regulation of children at schools to combat COVID-19 caused mass protests at school board meetings and spurred several states to introduce parental rights legislation.[2] Much has

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[1] *Virginia Gubernatorial Debate*, C-SPAN, at 30:11 (Sept. 28, 2021), https://www.c-span.org/video/?514874-1/virginia-gubernatorial-debate.

[2] Jack Schneider & Jennifer Berkshire, *Parents Claim They Have the Right to Shape Their Kids' School Curriculum. They Don't.*, WASH. POST (Oct. 21, 2021, 12:00 PM), https://www.washingtonpost.com/outlook/parents-rights-protests-kids/2021/10/21/5cf4920a-31d4-11ec-9241-aad8e48f01ff_story.html; Phillip Hamburger, *Is the Public School System Constitutional*, WALL ST. J. (Oct. 22, 2021, 6:41 PM), https://www.wsj.com/articles/public-school-system-constitutional-private-mcauli!e-free-speech-11634928722; H.R. Res. 241, 2021 H. Reg. Sess. (Fla. 2021) ("The state . . . may not infringe on the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of his or her minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by a less restrictive means."); S. Res. 996, Gen. Assemb., Reg. Sess. 2022 (Pa. 2022) ("General rule.--The liberty of a parent to direct the upbringing, education, care and welfare of the parent's child is a fundamental right."); H.R. Res. 1995, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022) ("No governmental entity, school district, or other public institution shall infringe on the fundamental rights of a parent to direct the upbringing, education, health care, or mental health of such parent's minor child without first demonstrating that such infringement is reasonable, narrowly tailored to

been said about the Supreme Court's recognition of parental rights. Yet, absent from this conversation, at least among the legal community, is a discussion of the appropriate standard of review the judiciary should apply when faced with a parental rights issue. The Court should hold that parental rights are fundamental and apply strict scrutiny to these and other rights that meet the substantive due process test for fundamental rights.

The American legal system was designed to protect the rights and liberties of every citizen. In an effort to accomplish this goal, the Framers enshrined key liberties within the Bill of Rights.[3] However, these rights enshrined within the Constitution have never been considered exclusive. In fact, the question remains open in American law of how to best identify and protect fundamental rights that are unenumerated in the Constitution.[4] For the past century, the Supreme Court used substantive due process to protect fundamental liberties, such as parental rights, that are not specifically enumerated within the Constitution.[5] Under the doctrine of substantive due process, the Court forbids any governmental interference with such rights "unless the infringement is narrowly tailored to serve a compelling state interest."[6]

The use of this doctrine to protect such rights has long been a debated question in legal scholarship. How the Court uses substantive due process and by what test it identifies and governs unenumerated constitutional rights has tremendous ramifications for defining and protecting those rights. The Court has utilized numerous tests in an attempt to define and protect those rights.[7] However, the Court has never consistently applied a single, coherent test.

When applying substantive due process, only a strict application of *Washington v. Glucksberg*'s "history and tradition test"[8] to unenumerated constitutional rights will sufficiently protect fundamental liberties. The Court's substantive due process jurisprudence, in light of *Glucksberg*'s application, will be examined to consider whether such a test successfully

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achieve a compelling state interest, and that such interest could not otherwise be served by less restrictive means.").

[3] *See* U.S. CONST. amends. I–X (encompassing what is known as the Bill of Rights).

[4] *See* O. John Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787, 787–88, 790 (1959).

[5] *See* Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923); Moore v. City of East Cleveland, 431 U.S. 494, 499–504 (1977); *see also* Zablocki v. Redhail, 434 U.S. 374, 382–86 (1978).

[6] Reno v. Flores, 507 U.S. 292, 302 (1993).

[7] *See Meyer*, 262 U.S. at 399 (expounding on the "orderly pursuit of happiness"); *see also* Palko v. Connecticut, 302 U.S. 319, 324–25 (1937); *Moore*, 431 U.S. at 503 (focusing on the history and tradition test); Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[8] *Glucksberg*, 521 U.S. at 721.

protects parental and other unenumerated rights. First, the Court's substantive due process framework will be considered along with the tests the Court has used to identify and define fundamental rights. Second, the problems with the Court's current application of the tests will be discussed, including the confusion that the Court's approach has caused within constitutional rights jurisprudence. Finally, *Glucksberg*'s history and tradition test will be applied in a disciplined and careful fashion as a solution to the current confusion in the Court's parental rights jurisprudence.

Current substantive due process jurisprudence fails to properly identify and define unenumerated, fundamental constitutional rights and does not provide a consistent framework for determining how or why an individual right is considered fundamental. Yet under the proposed standard, a purported fundamental constitutional right would first be carefully defined, and then that definition alone would undergo a historical analysis to determine whether it is truly a fundamental constitutional right.[9] A careful definition of parental rights and a historical analysis of those rights under the *Glucksberg* standard reveal that parental rights should be protected as fundamental and governed by a strict scrutiny standard.[10] The Court should reconsider its standard of review for parental rights jurisprudence under the *Glucksberg* standard to better protect parental rights and create a more coherent application of substantive due process regarding fundamental rights.

II. BACKGROUND

Parental rights have long been protected by the Supreme Court using the doctrine of substantive due process.[11] Substantive due process has often sparked controversy because it is used by the Supreme Court to identify and protect what the Court both saw, and continues to see, as the fundamental liberties of Americans.[12] The Court originally derived its substantive due process analysis from the Due Process Clause of the Fourteenth Amendment.[13] This Amendment was passed immediately after the Civil War to ensure that all Americans, but especially African-Americans, who were

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[9] *Id.* at 721.

[10] Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring); *Glucksberg*, 521 U.S. at 720–21.

[11] *Troxel*, 530 U.S. at 65–66.

[12] Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock, *A Workable Substantive Due Process*, 95 NOTRE DAME L. REV. 1961, 1962 (2020).

[13] *See* CALVIN MASSEY & BRANNON P. DENNING, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 461–62 (6th ed. 2019); *see also* Lochner v. New York, 198 U.S. 45, 56 (1905).

recently freed from slavery, received justice under the law.[14]

The Fourteenth Amendment requires the states to ensure "due process of law" before any citizens are subjected to the forcible removal of their "life, liberty, or property" at the hands of the government.[15] Although on its face this requirement is largely procedural, the Court has expanded the Due Process Clause to protect the unenumerated liberties of citizens from arbitrary government interference.[16] While this seemed to benefit American law, expanding the meaning of the Due Process Clause through substantive due process created significant drawbacks. The Court has overly exalted "autonomy" and "individualism" in the law through its focus on modern individual rights such as abortion and gay marriage, while leaving more traditional liberties, such as parental rights, unprotected.[17] The apparent selective nature of the Court's jurisprudence regarding parental rights and other liberties incited ongoing debate over the proper role of the judiciary in defining the nature and boundary of fundamental human rights.[18] Against this backdrop, the Court's dilemma over parental rights arose and is brought into focus.

A. *History of Substantive Due Process*

Substantive due process is derived from the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause.[19] Yet, substantive due process was a relative latecomer to due process jurisprudence.[20] Although the Fourteenth Amendment was ratified in 1868 directly after the Civil War, the Court did not immediately derive substantive rights out of the Due Process Clause.[21] In the famous *Slaughter-House Cases*, the Court was confronted by a due process question arising out of the Fourteenth Amendment and refused to extend the Clause past its procedural

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[14] Laurent Frantz, *Enforcement of the Fourteenth Amendment*, 9 LAWS. GUILD REV. 122, 122–23 (1949).

[15] U.S. CONST. amend. XIV, § 1.

[16] MASSEY & DENNING, *supra* note 13, at 461; *Lochner*, 198 U.S. at 56.

[17] *See generally* Rena M. Lindevaldsen, *When the Pursuit of Liberty Collides with the Rule of Law*, 11 LIBERTY U. L. REV. 667 (2017) (containing a fuller discussion on this topic).

[18] ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 65, 96–119 (Harper Perennial rev. ed. 2003).

[19] *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[20] *See* William R. Musgrove, *Substantive Due Process: A History of Liberty in the Due Process Clause*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 125, 126 (2008).

[21] *See id.* at 127–28 (discussing that it seems substantive due process originally was the means by which the Court incorporated the Bill of Rights onto the States).

foundation through a doctrine of incorporation.[22]

When the Court first decided to make use of the substantive due process doctrine in *Lochner v. New York*, it was to support economic liberty.[23] In *Lochner*, the Court determined that while the State possessed the authority to exercise general police powers through legislation, it could not arbitrarily pass laws that had no valid governmental interest because this would violate the economic liberty interest inherent in the Fourteenth Amendment.[24] Over the next several decades, the Court used this theory of substantive due process to limit legislative authority and declare hundreds of government regulations invalid infringements on economic liberty.[25] Yet, this age of substantive due process came to a sharp halt when the Court decided *Ferguson v. Skrupa* and repudiated the doctrine of substantive due process entirely.[26] As the Court noted:

> The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases--that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely--has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.[27]

Despite this stark repudiation, it did not take long for the Supreme Court to revive substantive due process. However, the Court shifted its focus from protecting property rights under the doctrine to expanding liberty interests protected under the Clause.[28] The Court began this new era of substantive due process by applying it to protect parental rights. In *Meyer v. Nebraska*, the Court resoundingly protected parental rights by applying the Due Process Clause to protect the liberty interest of parents in having their children taught another language at school without government interference.[29] The Court, referring to the liberty interests protected by the Clause, reasoned:

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[22] Slaughter-House Cases, 83 U.S. 36, 80–81 (1872); MASSEY & DENNING, *supra* note 13, at 469–71.

[23] *See* Lochner v. New York, 198 U.S. 45, 57 (1905).

[24] *Id.* at 53–54.

[25] Musgrove, *supra* note 20, at 129; *e.g.*, Coppage v. Kansas, 236 U.S. 1, 17 (1915).

[26] Ferguson v. Skrupa, 372 U.S. 726, 729 (1963).

[27] *Id.* at 730.

[28] MASSEY & DENNING, *supra* note 13, at 486–87.

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

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration . . . . Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[30]

The Court eventually expanded its application of the substantive due process framework from parental rights to other societal liberties as exemplified by *Griswold v. Connecticut*.[31] In *Griswold*, the Court struck down a state statute banning the use of contraceptives by married couples on the basis that the ban interfered with couples' privacy interests as protected by the Due Process Clause.[32] While declining to "sit as a super-legislature to determine the wisdom, need, and propriety of laws," the Court used an expansive view of liberty found in freedom of association to rule that the statute was unconstitutional.[33]

The Court solidified its new substantive due process "liberty" jurisprudence when it used the Equal Protection Clause and Due Process Clause to protect the right of a bi-racial couple to marry, and again in *Roe v. Wade* when the Court declared a fundamental right to abortion.[34] Since then, the Court has used the doctrine of substantive due process to make substantial changes in the country's social policy, such as declaring sodomy laws unconstitutional, legalizing same-sex marriage, and redefining the meaning of sex.[35] Some of the changes brought under the substantive due process doctrine were necessary and just,[36] while others were made by judicial

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[30] *Id.* at 399.

[31] Griswold v. Connecticut, 381 U.S. 479, 482–85 (1965).

[32] *Id.* at 485.

[33] *Id.* at 482.

[34] Loving v. Virginia, 388 U.S. 1, 12 (1967); Roe v. Wade, 410 U.S. 113, 164 (1973).

[35] *See* Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[36] *See, e.g.*, *Loving*, 388 U.S. at 12.

fiat and have deeply divided the nation.[37] The history of the Court's substantive due process jurisprudence leaves critical questions unanswered, such as how the Court should define liberty under the Fourteenth Amendment, what the role of the judiciary is in defining fundamental rights, and what rights truly should be protected.

B. *Tests of the Court's Substantive Due Process Jurisprudence*

The Supreme Court has used several tests throughout its substantive due process jurisprudence to identify and protect rights the Court deemed fundamental. The test the Court uses to determine fundamental liberties such as parental rights is critical because the test determines the substance and extent of the right. When examining any unenumerated right under substantive due process, a court must determine (1) whether a liberty interest is at stake and (2) whether it is fundamental.[38] There are various substantive due process tests the Court has used to identify and protect fundamental liberties, such as parental rights.

As a preliminary matter, when analyzing fundamental rights under substantive due process, the key term to consider is liberty. It is this "liberty" interest in the Fourteenth Amendment that is used to define the limits of unenumerated fundamental rights. Shockingly, the Court has never defined the limits of "liberty."[39] Early American jurists defined the term as "freedom from restraint."[40] Specifically, the founding generation seemed to argue that the Constitution protects "civil liberty," which Noah Webster in his first American dictionary defined as "the liberty of men in a state of society, or natural liberty so far only abridged and restrained as is necessary and expedient for the safety and interest of the society, state, or nation."[41] Thus, at its core, liberty is the freedom of an individual to act confined only by his

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[37] The author does not mean to assert by this statement any manner of support for judicial activism in any form. Rather, the author supports the authority of the Court, within its judicial role, to strike down laws that are blatantly unconstitutional or contrary to the laws of nature and nature's God, even if such laws happen to be based on current cultural norms.

[38] Jeffrey C. Tuomala, The Casebook Companion to Constitutional Law, pt. 7, ch. 4: Substantive Due Process, 3–4 (Oct. 30, 2019) (unpublished manuscript) (on file with author).

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

[40] *Liberty*, NOAH WEBSTER'S FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Found. for Am. Christian Educ. 18th prtg. 2006) (1828).

[41] *Civil liberty*, NOAH WEBSTER'S FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Found. for Am. Christian Educ. 18th prtg. 2006) (1828) ("Civil liberty is an exemption from the arbitrary will of others, which exemption is secured by established laws, which restrain every man from injuring or controlling another. Hence the restraints of law are essential to *civil liberty*.").

obligations and duties as a citizen and neighbor.[42] Yet, the Court has not adopted this definition of liberty and instead opts for a much more "solitary, unconnected, individual, selfish liberty, as if every man was to regulate the whole of his conduct by his own will."[43] As a result, the Court struggles to develop proper tests for determining fundamental rights and has never held consistently to one approach.

While the Court has used many tests in its attempts to define and protect fundamental rights, historically two tests have predominated: the ordered liberty test and the history and tradition test.[44] The ordered liberty test was developed first[45] but the history and tradition test now carries the most weight with the Court.[46] However, both tests have had a tremendous impact on parental rights.

1. The Ordered Liberty Test

The first test the Court formulated was the ordered liberty test.[47] This test appears to have its origin in the natural law heritage of American jurisprudence because the Court used the concept to strike down government action long before the Fourteenth Amendment was written.[48] A perfect example of this is the Supreme Court's decision in *Fletcher v. Peck* where the Court upheld the transfer of stolen Indian lands and prevented the transfer from being annulled because the land was possessed by innocent

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[42] EDMUND BURKE, FURTHER REFLECTIONS ON THE REVOLUTION IN FRANCE 7–8 (Daniel E. Ritchie ed., 1992) (expounding a conservative view of liberty by noting that "[i]t is not solitary, unconnected, individual, selfish liberty, as if every man was to regulate the whole of his conduct by his own will. The liberty I mean is *social* freedom. It is that state of things in which liberty is secured by the equality of restraint. A constitution of things in which the liberty of no one man, and no body of men, and no number of men, can find means to trespass on the liberty of any person, or any description of persons, in the society. This kind of liberty is, indeed, but another name for justice; ascertained by wise laws, and secured by well-constructed institutions.").

[43] *Id.* at 7.

[44] The author has confined his analysis to these two tests because these tests are the only ones that grapple with defining an unenumerated right. Other tests, such as the "shocks the conscience test" are much more fact centered and practical and do not delve into the issue of unenumerated rights.

[45] *See* Hebert v. Louisiana, 272 U.S. 312, 316–17 (1926); *see also* Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (elucidating the ordered liberty test).

[46] *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[47] *See* O. John Rogge, *Concept of Ordered Liberty: A New Case*, 47 CALIF. L. REV. 238, 248 (1959) ("But the concept underlying due process of law began in the phrase, *per legem terrae*, by the law of the land.").

[48] Fletcher v. Peck, 10 U.S. 87, 132–34 (1810); MASSEY & DENNING, *supra* note 13, at 461.

parties.[49] In making this decision, the Court stated that "there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded" and that "[i]t may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power."[50]

This framework was retained and expounded on by the Court when it began to formulate the ordered liberty test during the *Lochner* era.[51] The Court applied this framework to substantive due process in *Hebert v. Louisiana* when it determined that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"[52] This reasoning was affirmed in *Palko v. Connecticut* when the Court reasoned that using the *Hebert* test to determine whether a state action violated a principle that is "implicit in the concept of ordered liberty" was the crux of a substantive due process claim.[53]

While this view of substantive due process was quashed by the Court in *Benton v. Maryland*, the test made a comeback in the Court's landmark case—*Bowers v. Hardwick*.[54] In *Bowers*, the Court rejected a claim that criminalizing sodomy was a violation of fundamental rights.[55] In doing so, however, it directly returned to *Palko's* ordered liberty standard to prevent the Court from simply manufacturing rights out of whole cloth.[56] In defense of its decision, the Court stated that, as an institution:

> [It] is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights

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[49] *Fletcher*, 10 U.S. at 139–40.

[50] *Id.* at 133, 135; MASSEY & DENNING, *supra* note 13, at 461.

[51] *See* Lochner v. New York, 198 U.S. 45, 53–54 (1905).

[52] Hebert v. Louisiana, 272 U.S. 312, 316–17 (1926).

[53] Palko v. Connecticut, 302 U.S. 319, 324–25 (1937); Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 222–23 (2007).

[54] Benton v. Maryland, 395 U.S. 784, 794–95 (1969); Bowers v. Hardwick, 478 U.S. 186, 190–96 (1986).

[55] *Bowers*, 478 U.S. at 191.

[56] *Id.* at 194–95.

> deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.[57]

While *Bowers* was later overturned by the Court's decision in *Lawrence v. Texas*, the ordered liberty test has retained a place in the Court's jurisprudence: as a factor in the Court's history and tradition test as elucidated in *Washington v. Glucksberg* and as defended in Justice Scalia's dissent in *Lawrence*.[58]

2. The History and Tradition Test

The second and more recent test the Court used to determine and define fundamental rights under substantive due process is the history and tradition test. This test was first posited by the Court in 1934 in *Snyder v. Massachusetts*.[59] In *Snyder*, the Court upheld a state murder conviction against procedural and substantive due process claims.[60] However, the Court defined a new test for identifying fundamental liberties under substantive due process when it held that state action would not be overturned "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[61]

The Court further applied and developed this test in *Moore v. City of East Cleveland*.[62] In *Moore*, the Court reasoned that "[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'"[63] Thus, only those rights that are "deeply rooted in this Nation's history and tradition" will be afforded fundamental status and protection under the Due Process Clause.[64] Critical to the background and thrust of this Note, however, is the fact that the Court first developed this test in *Moore* around a claim of parental rights and familial privacy.[65]

The Court further developed its history and tradition test for determining

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[57] *Id.*

[58] Lawrence v. Texas, 539 U.S. 558, 593 n.3 (2003) (Scalia, J., dissenting); Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[59] Farrell, *supra* note 53, at 225–26.

[60] *Id.*; Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

[61] *Snyder*, 291 U.S. at 105; Farrell, *supra* note 53, at 226.

[62] Farrell, *supra* note 53, at 226.

[63] *Moore*, 431 U.S. at 503.

[64] *Id.* at 503.

[65] *Id.* at 503–05.

fundamental rights when it used history and tradition as a key factor in deciding *Bowers v. Hardwick* and determined that there was not a historical right to homosexual sodomy.[66] However, the Court further expanded the test in its decision in *Michael H. v. Gerald D.*[67] In this case, the Court denied a paternal rights claim because the father's claim was not consistent with the history and tradition of the United States.[68] Justice Scalia, writing for the majority, noted:

> In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[69]

Justice Scalia further articulated this view of the history and tradition test in *Reno v. Flores* where he explained that if substantive due process is to be properly used to protect fundamental rights, the right must be thoroughly defined and then subjected to a historical analysis strictly limited to that definition.[70] Thus, novel rights or those not having a long history of acceptance within American society would not meet this test.[71]

The best articulation of the history and tradition test, however, was in the Court's decision in *Washington v. Glucksberg* where the Court declined to recognize a fundamental right to assisted suicide.[72] In *Glucksberg*, Justice Rehnquist, writing for the Court, reaffirmed the history and tradition test and restated Justice Scalia's two-pronged analysis: (1) carefully define the right and (2) subject that definition to a strict history and tradition analysis.[73] In defense of this test, Justice Rehnquist reasoned that:

> [T]he development of this Court's substantive-due-process jurisprudence . . . has been a process whereby the outlines of

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[66] Farrell, *supra* note 53, at 227.

[67] *Id.* at 227–28.

[68] Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (internal citations omitted).

[69] *Id.* at 122.

[70] Reno v. Flores, 507 U.S. 292, 302–03 (1993); Farrell, *supra* note 53, at 228–30.

[71] *Flores*, 507 U.S. at 303.

[72] Washington v. Glucksberg, 521 U.S. 702, 705–07 (1997); Farrell, *supra* note 53, at 230–31.

[73] *Glucksberg*, 521 U.S. at 720–21; *see* Farrell, *supra* note 53, at 230.

> the "liberty" specially protected by the Fourteenth Amendment--never fully clarified, to be sure, and perhaps not capable of being fully clarified--have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review. In addition, by establishing a threshold requirement--that a challenged state action implicate a fundamental right--before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.[74]

Since its formulation in *Glucksberg*, the history and tradition test has been used sporadically by the Court to determine and protect fundamental rights.[75] The test was applied in *Lawrence v. Texas*,[76] although the majority was roundly criticized by Justice Scalia for what he considered to be the lack of strict application of the test.[77] Further, the test was mentioned but not really applied by the majority in *Obergefell v. Hodges*.[78] However, the test was championed and reaffirmed by Chief Justice Roberts in his dissent.[79]

These two tests, the history and tradition test and the ordered liberty test, are at the forefront of the Court's struggle to define fundamental liberties through a substantive view of the Due Process Clause. While these tests have not been universally applied by the Court, the ordered liberty test is essentially subsumed into the history and tradition test. When it comes to parental rights, the tests provide a framework from which to determine whether current law adequately protects parental rights or whether a new test or other, more drastic, solutions are needed.

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[74] *Glucksberg*, 521 U.S. at 722.

[75] Dist. Att'y's Off. v. Osborne, 557 U.S. 52, 72 (2009).

[76] Lawrence v. Texas, 539 U.S. 558, 572 (2003).

[77] *Id.* at 594–98 (Scalia, J., dissenting) ("The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a 'fundamental right' or a 'fundamental liberty interest,' nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is 'deeply rooted in this Nation's history and tradition,' the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules Bowers' holding to the contrary. . . . In any event, an 'emerging awareness' is by definition not 'deeply rooted in this Nation's history and traditions,' as we have said 'fundamental right' status requires.").

[78] Obergefell v. Hodges, 576 U.S. 644, 671–72 (2015).

[79] *Id.* at 698–99, 704–13 (Roberts, C.J., dissenting).

III. THE PROBLEM WITH PARENTAL RIGHTS AND SUBSTANTIVE DUE PROCESS

Despite the presence of these tests, the numerous Supreme Court cases on parental rights in the early twentieth century, and the array of Supreme Court dicta on the nature and importance of parental rights, the current state of parental rights protections under the law is unclear. Further, the circuit courts have struggled to apply the Court's precedents on this issue.[80] In fact, the Fourth Circuit noted in *Hodge v. Jones* that "[t]here is little, if any, clear guidance in the relevant caselaw that would permit us to chart with certainty the amorphous boundaries between the Scylla of familial privacy and the Charybdis of legitimate governmental interests."[81] In making determinations of law, the First and Fifth Circuits have likewise struggled to determine where to set the boundary between parental rights and proper state interests.[82] While acknowledging the importance of parental rights, these circuits complain that the Supreme Court has given no "clear" guidance on how important this right is and which substantive due process test should be used when examining parental rights.[83]

A. Troxel v. Granville *and the Court's Confusion Regarding Parental Rights*

The Court's confusion about the extent and importance of parental rights is somewhat surprising given the Court's past dicta about the significance of this area of law. Yet, no case shows the underlying confusion as to the nature and scope of parental rights more clearly than the Court's most recent excursion into parental rights.[84] In *Troxel v. Granville*, the Court considered parental rights in the context of a child visitation dispute between two unmarried individuals.[85] Specifically, the Court considered whether awarding visitation rights to the Troxels was a denial of Granville's parental rights under substantive due process.[86] The Court held that the specific

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[80] Hodge v. Jones, 31 F.3d 157, 164 (4th Cir. 1994).

[81] *Id.*; *see also* Frazier v. Bailey, 957 F.2d 920, 931 (1st Cir. 1992) ("[T]he dimensions of [the] right [to familial privacy] have yet to be clearly established."); Michael P. Farris, *The Confused Character of Parental Rights in the Aftermath of* Troxel, PARENTAL RTS. FOUND., Feb. 20, 2009, at 5, https://parentalrights.org/wp-content/uploads/2017/06/Aftermath-of-Troxel.pdf.

[82] *Frazier*, 957 F.2d at 931 ("[T]he dimensions of [the] right [to familial privacy] have yet to be clearly established."); Doe v. Louisiana, 2 F.3d 1412, 1416 (5th Cir. 1993) (noting while there is a constitutional right to "family integrity," it is not clearly established).

[83] *Frazier*, 957 F.2d at 931.

[84] *See generally* Troxel v. Granville, 530 U.S. 57 (2000).

[85] *Id.* at 61–62.

[86] *Id.* at 63–65.

application of Washington's visitation statute denied Granville of her parental rights under substantive due process because the State did not take into account "Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters."[87] The Court reasoned that the "[t]he liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court."[88] With these words, the Court reminded the legal community that parental rights have historically and continue to be one of the most important liberty interests that American law protects.[89]

While the majority in *Troxel* upheld the historical definition of parental rights and affirmed its importance—even labeling them "fundamental" rights under substantive due process—the Court was deeply divided over whether to actually treat the right as fundamental, what the scope of the right should be, and the proper standard of review for such cases.[90] While the Court's plurality recognized parental rights as a fundamental liberty arising out of the Fourteenth Amendment, it chose to only consider questions related to this liberty using a lower standard of review—rational-basis.[91] Thus, while the Court deemed parental rights to be fundamental in dicta, the plurality refused to treat parental rights as such and instead chose to allow the government to regulate this area as long as it could show a rational government interest for such regulation.[92]

Justice Souter in his concurrence acknowledged the confusion the Court's precedent created but urged the Court to avoid venturing into a discussion of substantive due process to determine the scope of parental rights and to instead simply decide the case at hand.[93] He also urged that the Court maintain the status quo and not create any "fresh furrows in the 'treacherous field' of substantive due process."[94] Thus, while agreeing that parental rights were important, Justice Souter argued for a case-by-case facial test to determine whether the historical parental right was violated.[95]

By contrast, Justice Thomas, in his concurrence, argued for a change in

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[87] *Id.* at 72.

[88] *Id.* at 65.

[89] *Id.*

[90] *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

[91] *Id.* at 65–75.

[92] *Id.* at 66–73.

[93] *See id.* at 75–79 (Souter, J., concurring).

[94] *Id.* at 76 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)).

[95] *Id.* at 78–79.

parental rights jurisprudence.[96] First, he hinted that the Court should reexamine its substantive due process doctrine and whether it was proper for the judiciary to protect unenumerated rights as "fundamental" under the Due Process Clause.[97] However, since this issue was not before the Court, Justice Thomas argued that because the Court's precedent held parental rights to be a fundamental right, they should be treated as such by the courts and evaluated using strict scrutiny.[98] This would force the government to prove a *compelling* state interest before it could infringe on the right of a parent to direct their child's upbringing.[99]

Diverging from the majority, Justices Stevens,[100] Scalia,[101] and Kennedy dissented.[102] Justice Stevens argued that parental rights were actually much more limited than the majority suggested and that the focus should be aimed more towards the interests of the child.[103] By contrast, Justice Scalia, while arguing that parental rights were a God-given fundamental right, rejected substantive due process immediately and argued that unenumerated rights should not be protected by a theory of substantive due process.[104] Instead, he urged that policymaking, such as protecting parental rights, was the role of the legislature and that the federal courts have no role to play in such dispute.[105]

Thus, *Troxel v. Granville* shows that while the Court's majority,[106] Justice Souter,[107] and Justice Thomas[108] held parental rights to be an important unenumerated right—and a majority of the Justices are even willing to call it fundamental—[109]there is disagreement as to whether the right should actually be treated as fundamental and how this would affect state law.[110] Yet, this

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[96] *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

[97] *Id.* at 80 (Thomas, J., concurring).

[98] *Id.*

[99] *Id.*

[100] *See id.* (Stevens, J., dissenting).

[101] *See id.* (Scalia, J., dissenting).

[102] *See Troxel*, 530 U.S. at 80 (Kennedy, J., dissenting).

[103] *Id.* at 80–91 (Stevens, J., dissenting).

[104] *Id.* at 91–92 (Scalia, J., dissenting).

[105] *Id.* at 93 (Scalia, J., dissenting).

[106] *Id.* at 57, 65.

[107] *Id.* at 77 (Souter, J., concurring).

[108] *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

[109] *Id.* at 66 ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

[110] *See id.* at 86–87, 90–91 (Stevens, J., dissenting).

confusion about how the Court defines and protects unenumerated fundamental rights under the Due Process Clause is not confined to merely parental rights but extends to other areas of the law as well. Abortion is a prime example.[111] While the Court has not qualified abortion as a fundamental right since *Roe v. Wade*, and abortion is often analyzed using only an intermediate scrutiny standard,[112] the Court has rarely upheld a regulation imposed on abortion.[113] This suggests that, at least in practice, the Court views the right as fundamental. By contrast, the Court deemed an amorphous right to privacy fundamental, yet the Court has neither defined the boundaries of such a right nor dealt with the challenges to privacy posed by modern technological advances.[114] Clearly, it is necessary for the Supreme Court to present a test that clarifies rights, such as parental rights, and provides guidance on the scope of these rights and how to protect them.

B. *The Effect of Sociological Law on Parental Rights Jurisprudence*

Confusion as to the nature and scope of parental rights is not limited merely to the Supreme Court's ambiguous application of its own precedent. Recent developments in modern law as well as the changing nature of the family itself have also contributed to the pressing need for the Court to address the question of how best to identify and protect parental rights. Social change inevitably causes confusion in the area of fundamental rights jurisprudence, especially when a court attempts to consider the nature and scope of an unenumerated right. This is because any "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right . . . ."[115] The often dramatic effects that sociological changes in family structure and social order have on the law further reveal the importance of having a proper standard for identifying and balancing a citizen's rights and responsibilities, grounded in more than just dependence on the "new insight" and changed understandings of any one generation as to what constitutes a

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[111] The author's use of abortion should in no way be construed as agreement with the suggestion that the Due Process Clause protects a right to abortion. On the contrary, the author contends that *Roe*, as well as its progeny, was, as the Court has noted of another terrible decision affecting human rights, "gravely wrong the day it was decided" and "has no place in law under the Constitution." Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (citation omitted). In the context of this Note, abortion is merely used to show the Court's inconsistency when defining fundamental rights.

[112] *See* June Med. Servs. v. Russo, 140 S. Ct. 2103, 2132–33 (2020).

[113] *See* Planned Parenthood v. Casey, 505 U.S. 833, 974–901 (1992).

[114] *See* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965).

[115] Reno v. Flores, 507 U.S. 292, 302 (1993) (citations omitted).

liberty interest.[116]

The Court's confusion on the correct standard for parental rights and the fundamental nature of the rights under the law stems from the modern confusion among the legal community about the definition and role of the family in society.[117] The family was once clearly defined as a separate institution in society protected by the law.[118] However, modern trends towards individual autonomy and cosmopolitanism have changed the law's view of the family.[119]

Historically, the law clearly defined the family as an institution established by the law of nature—a voluntary association between a man and a woman, their children, and their extended family.[120] The family unit was the most important association in life and therefore the foundation, not only of civil society, but of government itself.[121] This view of the family created a high regard for parental rights in the common law.[122] However, the Court's changing interpretation of substantive due process rights during the twentieth century created an underlying shift in the legal definition of the family.[123]

At the beginning of the twentieth century, the law still retained a traditional view of the family as the legal definition for purposes of the common law.[124] It was on the basis of this relationship—the sanctity of the family and its privacy interest—that the Supreme Court took the first drastic step in its right to privacy jurisprudence and invalidated Connecticut's anti-

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[116] *See* Obergefell v. Hodges, 576 U.S. 644, 660, 664 (2015).

[117] *See id.* at 663–72 (reasoning of the Court here provides a perfect example of the type of shift in beliefs about the family that directly affect parental rights); Moore v. City of East Cleveland, 431 U.S. 494, 503–06 (1977); *see also* WIS. FAM. IMPACT SEMINARS, WHAT IS A FAMILY? 18–23 (2015), https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s_wifis01c02.pdf.

[118] 1 JOSEPH STORY, NATURAL LAW, ENCYCLOPEDIA AMERICANA 152 (Francis Lieber ed., Phila., Lea & Blanchard 1844); Scott Yenor, *The True Origin of Society: The Founders on the Family*, HERITAGE FOUND. (Oct. 16, 2013), https://www.heritage.org/political-process/report/the-true-origin-society-the-founders-the-family#_ftn49.

[119] The author is extremely interested in more research on how the redefinition of the family and the jurisdictional conflict between the family and the State have transformed American law in the modern day. However, the author will leave this scholarship for another day. Here the family's deep roots in law is meant only to spur a discussion of substantive due process and how the Court should best protect unenumerated fundamental rights in the law.

[120] 1 STORY, *supra* note 118, at 152.

[121] *Id.* at 152–54.

[122] *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[123] *See* Obergefell v. Hodges, 576 U.S. 644, 658–81 (2015).

[124] *See* Meyer v. Nebraska, 262 U.S. 390, 400–402 (1923).

contraception law.[125] However, not long after this, the Court shifted from viewing such laws within the framework of marriage to holding that the primary question of substantive due process in the law was always one of *individual* rights.[126] This began a monumental shift of focus in American law from analyzing individuals in relation to their associations and commitments as spouses, parents, and citizens to analyzing them only on the basis of their autonomous, selves.[127]

While the Court briefly returned to a traditional view of the family in *Bowers v. Hardwick* by refusing to extend due process rights beyond traditional norms,[128] it quickly developed a confused jurisprudence that placed "the autonomy of the person" over everything else in due process considerations.[129] This view of autonomy in due process jurisprudence was brought to a head in the Supreme Court's 2016 decision of *Obergefell v. Hodges*.[130] In *Obergefell*, the Court used the Due Process Clause of the Fourteenth Amendment to recognize the legality of homosexual marriage.[131] Yet, to declare homosexual marriage a fundamental right under the Constitution's framework of liberty, the Court had to completely redefine the family and break with centuries of legal tradition.[132] This monumental shift was largely the product of the Court's shifting view of liberty and due process.[133] Yet, as this Note seeks to show, the effect of such a shift on parental rights will be severe.

Why is this shifting social and legal view on the nature of the family important to the consideration of the proper test for judging parental rights under substantive due process? Because it shows that formulation of a fundamental right, especially an unenumerated one, must be based on more than just shifting social morays. To base the formulation of a fundamental right on shifting social morays would threaten fundamental rights and undermine the doctrine of substantive due process by transforming the Court's decisions into simply "the policy preferences of the members of [the] Court."[134] To prevent this, a more absolute and unchanging standard must

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[125] Griswold v. Connecticut, 381 U.S. 479, 482–86 (1965); Yenor, *supra* note 118.

[126] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[127] *Id.*; BORK, *supra* note 18, at 5, 10, 56–65.

[128] Bowers v. Hardwick, 478 U.S. 186, 190–96 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[129] *Lawrence*, 539 U.S. at 571–75.

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

[131] *Id.* at 663–75.

[132] *Id.* at 658–81.

[133] *See Bowers*, 478 U.S. at 194–95; *Obergefell*, 576 U.S. at 671–78.

[134] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

be applied. Under the Court's current substantive due process precedent, a disciplined and careful application of the Court's *Glucksberg* history and tradition test would be enough to clarify the nature and scope of parental rights as well as other unenumerated rights.[135]

C. *The Growing Jurisdictional Conflict Between Parents and the State: The Modern Presumption of the State as* Parens Patriae

Another effect of the ascendence of autonomy in fundamental rights jurisprudence that has caused confusion on the proper application of unenumerated parental rights in American law is the modern presumption that the State has almost absolute authority over the family and children under the doctrine of *parens patriae*. The doctrine of *parens patriae*, which is translated as "parent of the country" was essentially defined by the Supreme Court in *Alfred L. Snapp & Son, Inc. v. Puerto Rico* as the duty of the government to step in to protect and care for people who cannot care for themselves as long as there is some quasi-governmental interest.[136] Traditionally, American law limited this doctrine to limited situations: when an individual is incapable of caring for themselves or when a group is in need of protection.[137]

The question of how this doctrine applies to parental rights is unclear. However, historically the Court held that the *parens patriae* interest is best served when the family unit is maintained.[138] Despite the limited nature of this doctrine in American law, it seems that some modern day legal scholars would extend it so far that even liberties protected by the Due Process Clause, such as parental rights, would suffer.[139] In fact, some go so far as to argue that government control over traditional parental functions should per se

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[135] The question of the proper test for determining rights should lead the Court to realize that fundamental rights cannot simply be based in history and tradition. Law must be based on a deeper absolute of right and wrong and should lead back to a natural law jurisprudence as the only proper and unchanging foundation of liberty.

[136] Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600–01, 607 (1982) ("[A] State has a quasi-sovereign interest in the health and well-being--both physical and economic--of its residents in general.").

[137] Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 58 (1890).

[138] Santosky v. Kramer, 455 U.S. 745, 766–67 (1982).

[139] *See* Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 57–59 (2020) (asserting that homeschooling should be banned and that the burden is on parents to demonstrate justification for receiving permission to homeschool).

preempt parental wishes in key areas such as education.[140] This argument is grounded in the belief that the State's view of how a child should be raised is more important than the individual family's view.[141] Yet, because of the implied nature of the child's right within the American system of government and modern controversy surrounding the limits and extent of such a right, the correct line to draw in protecting such a right remains unclear. This makes parental rights the perfect case through which to reexamine the Court's substantive due process framework and how it affects parental and other unenumerated rights.

The current problem in parental rights jurisprudence is highlighted by the Court's inconsistent application of a test for parental rights, the Court creeping towards a sociological application of substantive due process, and the effect that changing views of liberty have on the law. The confusion on the limits and scope of parental rights raises the question of whether the Court's substantive due process doctrine provides an adequate method of discovering and protecting unenumerated rights. Is the doctrine itself inadequate or is it simply a matter of the test's inadequate application to certain areas of the law? Should the Court even attempt such an analysis or leave the question solely to the political sphere to define the rights and liberties of Americans? A coherent solution to these questions may be presented through careful application of the *Glucksberg* test to such situations.

IV. PROTECTING PARENTAL RIGHTS UNDER *GLUCKSBERG*'S HISTORY AND TRADITION TEST

Despite the Court creating confusion around parental rights and acknowledging the difficulty of the issue, a disciplined and meticulous application of the Court's history and tradition test under substantive due process, as laid out in *Washington v. Glucksberg*, may not only be enough to solve this issue, but also protect parental rights and provide clarity in this area of the law. While the Court, in dicta, provided a historical analysis of parental rights and acknowledged the rights' fundamental nature, even the Court's latest opinion admits that it has not conscientiously applied the history and tradition test to parental rights to define the scope and boundary of these

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[140] *Id.* at 57 ("The new legal regime should impose a presumptive ban on homeschooling, allowing an exception for parents who can satisfy a burden of justification. And it should impose significant restrictions on any homeschooling allowed under this exception.").

[141] *Id.* at 58, 66. ("There are bases in current law for thinking that the Supreme Court should conclude that the Federal Constitution provides children with positive rights to education and protection. One lies in the [D]ue [P]rocess [C]lause of the Fourteenth Amendment.").

rights.[142] The history and tradition test is by no means the only, or even possibly the most effective, way to protect unenumerated liberties.[143] However, a careful and disciplined application of the history and tradition test in the past has resulted in clearly defined rights and the protection of liberty.[144] The best example of this is the Court's scrupulous analysis and rejection of an asserted right to assisted suicide in *Washington v. Glucksberg*.

To prove the test's saliency, this Note will apply *Glucksberg*'s careful articulation of the history and tradition test to parental rights and conclude that such application will better define and clarify the right. First, parental rights will be defined by applying Justice Rehnquist's assiduous application of the history and tradition test, and then a historical analysis will be conducted to see if these rights are "deeply rooted" in the "history and tradition[s]" of the American people.[145] Not only can the Court clearly define parental rights, but that definition is plainly protected by judicial and legal history. Because parental rights are easily defined and deeply grounded in the history and tradition of American law, they should be afforded fundamental status and governed under a strict scrutiny standard of review.[146]

A. *Parental Rights Defined*

The first step in applying the *Glucksberg* history and tradition test to parental rights is fairly simple: define the terms.[147] Defining the terms is meant to provide a "careful description" of the right at issue and to provide a solid basis for the historical analysis of the right.[148] While acknowledging that not all issues can be perfectly or specifically defined, the Court held that attempts to define the right in question limit the power of judicial review and at the very least allows the right to be "carefully refined by concrete examples."[149]

Parental rights, as a general term, have often been defined by the Supreme

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[142] Troxel v. Granville, 530 U.S. 57, 78 (2000) (Souter, J., concurring).

[143] This solution leaves unanswered the debate over substantive due process and judicial review. However, this debate should be engaged in to determine the proper limits on the scope of the judiciary in considering social issues and a long-term solution to more adequately defining and protecting rights and institutions from radical autonomy.

[144] *See* Washington v. Glucksberg, 521 U.S. 702 (1997); Bowers v. Hardwick, 478 U.S. 186 (1986).

[145] *Glucksberg*, 521 U.S. at 720–21 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

[146] *Id.*

[147] *Id.* at 721.

[148] *Id.*

[149] *Id.* at 722.

Court as "the liberty of parents and guardians to direct the upbringing and education of children under their control."[150] This definition has a historical basis in the Western legal tradition. Sir William Blackstone similarly defined these rights when he noted that parents have an obligation to their children's "maintenance, their protection, and their education."[151] This definition will be used throughout this Note to refer to the authority of parents to direct the total upbringing of their children,[152] such a definition has never been greatly debated. The only question is whether the right is fundamental and if strict scrutiny should apply, thereby requiring the government to prove a compelling interest before interfering with that right. With this definition settled, the second step is to proceed to a historical analysis of the right.

B. *A Strict History and Tradition Analysis of Parental Rights*

The next step in analyzing parental rights under the history and tradition test is to subject the definition to a strict history and tradition analysis.[153] Under this analysis, the specific definition is carefully examined to see whether it "objectively" fits within the historical and traditional rights protected by American law.[154] If it fits, the right is viewed as fundamental and can only be overturned after passing a strict scrutiny standard of review.[155] The purpose behind this historical analysis is to determine whether the right in question is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[156]

An analysis of parental rights demonstrates that the intimacy of family life and parental rights have always been regarded with extreme deference under American law.[157] For example, the rights of parents to direct the upbringing of their children is deeply rooted in the Western legal tradition and protected

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[150] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("[T]he right of the individual to . . . establish a home and bring up children[.]"); Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children.").

[151] 1 WILLIAM BLACKSTONE, COMMENTARIES *434.

[152] *Troxel*, 530 U.S. at 65.

[153] *Glucksberg*, 521 U.S. at 723.

[154] *Id.* at 720–21.

[155] *Id.* at 721 (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

[156] Synder v. Massachusetts, 291 U.S. 97, 105 (1934).

[157] Griswold v. Connecticut, 381 U.S. 479, 482–83, 486 (1965) (Noting that while infamous for its extension of an ill-defined right to privacy, the Court's grappling with the issue of State interaction with different human "associations" has often been overlooked).

in dicta by multiple Supreme Court precedents.[158] Because of this, parental rights should be afforded deference as a fundamental right in American jurisprudence. Parental rights' place in the Western legal tradition will be examined and then Supreme Court precedent on the right will be addressed.

1. Parental Rights in the Western Legal Tradition

Parental rights have long held an exalted place in Western legal tradition. In the early days of the American republic, Blackstone, looking to preeminent patriarchs of the Western legal tradition such as Puffendorf and Montesquieu, argued that the right of parents, indeed the "duty" of parents, to direct their child's upbringing was inherent in the law of nature.[159] James Kent noted in his *Commentaries* that "the obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws."[160] Furthermore, Kent laid out the legal standard for parental rights in early American law arguing that "[w]hat is necessary for the child is left to the discretion of the parent . . . there must be a clear omission of duty, as to necessaries, before a third person can interfere . . . ."[161] Thus, the early days of the Republic were marked by great deference to parental rights in the highest levels of American law.[162]

Yet, this respect for parental rights was grounded in more than just a cultural moray. Indeed, the respect for parental rights in early American law was grounded in a distinctive jurisprudence that held an even deeper respect for the unique and distinct role of the family as a separate jurisdictional unit from the State with different obligations and duties.[163] As Eric DeGroff notes, Blackstone and other early scholars of the Western legal tradition viewed the family, as created by God, to be the very first governmental and societal unit in creation.[164] As a result, the family has historically been viewed by American

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[158] 1 BLACKSTONE, *supra* note 151, at *434–38; *see also* Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting* Mozert *after 20 Years*, 38 J.L. & EDUC. 83, 108–10 (2009).

[159] 1 BLACKSTONE, *supra* note 151, at *435.

[160] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 183 (8th ed. 1854).

[161] *Id.* at 186 (questioning what constitutes "necessaries," such a debate reveals deep ideological and worldview conflicts); *see also* DeGroff, *supra* note 158, at 112 (quoting 2 KENT, *supra* note 160, at 192).

[162] 2 KENT, *supra* note 160, at 186.

[163] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 185 (8th ed. 1883) (stating marriage "is the parent and not the child of Society"); Yenor, *supra* note 118.

[164] *See* DeGroff, *supra* note 158, at 110.

law as an institution with sovereignty independent of the State.[165] Justice Parker of the Alabama Supreme Court highlighted this sovereignty by quoting and agreeing with Abraham Kuyper who affirmed:

> Behind these organic spheres, with intellectual, aesthetical and technical sovereignty, the sphere of the family opens itself, with its right of marriage, domestic peace, education and possession; and in this sphere also the natural head is conscious of exercising an inherent authority,--not because the government allows it, but because God has imposed it. Paternal authority roots itself in the very life-blood and is proclaimed in the fifth Commandment. . . . A people therefore which abandons to State Supremacy the right of the family . . . is just as guilty before God, as a nation which lays its hands upon the rights of the magistrates.[166]

However, this view of family sovereignty was not confined to a uniquely religious view of American law. John Locke, a key Enlightenment philosopher who was heavily influenced by the Biblical foundation of Anglo-American law, held the same view and argued that the State and the family were completely different governmental units, sovereign within their own jurisdictions.[167] In fact the Supreme Court recognized this point in *Parham v. J.R.* when it ruled that the Western legal tradition has long held the family to be a separate jurisdictional unit from the State; so much so that there is a presumption in favor of parental authority and wisdom unless proven abuse has occurred in that case.[168] Thus, American law was founded on a deep respect for and recognition of the family as a separate institution and the unique role of parents in raising their children.

2. Supreme Court Precedent on Parental Rights

However, when analyzing a right under the history and tradition test, not only must the general Western legal tradition be consulted, but prior

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[165] *Ex Parte* E.R.G., 73 So. 3d 634, 650–51. (Ala. 2011) (Parker, J., concurring).

[166] *Id.* at 651 (quoting ABRAHAM KUYPER, LECTURES ON CALVINISM: THE STONE LECTURES OF 1898, LECTURE THREE: CALVINISM AND POLITICS 123, 127 (1898)).

[167] *Ex Parte E.R.G.*, 73 So. 3d at 651 (Parker, J., concurring) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 71).

[168] Parham v. J.R., 442 U.S. 584, 602–03 (1979) ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."); *Tradition of Parental Rights*, PARENTAL RTS. FOUND., https://parentalrightsfoundation.org/legal/parental_rights_tradition/ (last visited Feb. 24, 2022).

Supreme Court precedent on the issue must also be considered. This is because prior Supreme Court precedent is a helpful guidepost in revealing whether the right at issue really is grounded in American legal tradition to the extent necessary to classify it as a fundamental right.[169] Thus, if a right is fundamental, it is likely, although not certain, that the Supreme Court will have considered the issue before.

The Supreme Court has long acknowledged parental rights as a fundamental and basic principle of American law with protections that the Court largely grounded in the Fourteenth Amendment's Due Process Clause.[170] In the landmark parental rights decision *Pierce v. Society of Sisters*, the Supreme Court recognized the rights of parents as "fundamental" and acknowledged that parents, not the State, have the primary duty to raise their children to be good adults and citizens.[171] The Court opined that the rights of parents to lead and guide their children's upbringing are critical rights recognized in American law.[172] Further, the Court accepted the arguments of the appellee that parental rights are part of "the very essence of personal liberty and freedom."[173] The Court noted:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[174]

This decision built upon the Supreme Court's ruling in *Meyer v. Nebraska*, which explicitly rejected a statist view of childrearing and held that "our institutions rest[ed]" on much different grounds.[175] In *Meyer*, the Court rejected a Nebraska state law that forbade teaching children in any language but English.[176] The Court held that while the State had a proper interest in educating and preparing the children of the United States to be good citizens,

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[169] Washington. v. Glucksberg, 521 U.S. 702, 721 (1997).

[170] Troxel v. Granville, 530 U.S. 57, 65–66 (2000).

[171] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[172] *Id.* at 534–35.

[173] WILLIAM D. GUTHRIE & BERNARD HERSHKOPF, *Brief on Behalf of Appellee*, *in* OREGON SCHOOL CASES: COMPLETE RECORD 223, 274 (1925).

[174] *Pierce*, 268 U.S. at 535.

[175] Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923).

[176] *Id.* at 400–03.

the fundamental common law rights of parents to oversee their children's education trumps the State's interest.[177] As Carl Zollmann noted, a key feature of the decision—one that would shape all other parental rights decisions after it—was the *Meyer* Court's determination to ground parental rights in a substantive due process analysis of the Fourteenth Amendment.[178] Thus, for the first time, the Court held that the rights of parents in raising their children as they see fit is a "privilege[] long recognized at common law as essential to the orderly pursuit of happiness by free men."[179]

Later, in *Prince v. Massachusetts*, the Supreme Court, while acknowledging that the State has an interest in the propagation of morality and civic virtue, affirmed a high view of parental independence.[180] The Court determined that any conflict between parents and the State "over [the] control of the child and his training" is extremely significant, but especially regarding matters of worldview.[181] The Court held that:

> It 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. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.[182]

Thus, the Court's dicta yet again showed a level of deference to parental rights that can only be maintained by judging the right under a standard of strict scrutiny.[183]

The Supreme Court held such a view of parental rights, at least in dicta if not in practice, until *Troxel*, where the Court revealed the unclear test that failed to give a distinct standard for how the Court should govern its decisions with these issues.[184] This decision, while upholding parental rights, revealed the flaw inherent in the Court's previous parental rights jurisprudence: the Court had never explicitly acknowledged a standard by which parental rights issues should be judged. It is clear from the Court's

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[177] *Id.* at 400–02.

[178] Carl Zollmann, *Parental Rights and the Fourteenth Amendment*, 8 MARQ. L. REV. 53, 54 (1923).

[179] *Meyer*, 262 U.S. at 399.

[180] Prince v. Massachusetts, 321 U.S. 158, 166, 168–69 (1944).

[181] *Id.* at 165.

[182] *Id.* at 166 (citations omitted).

[183] *Id.* at 165–68 (presenting the conflict between two spheres of authority: the government and the family).

[184] Farris, *supra* note 81, at 7.

current precedent that while the Court has not treated parental rights as fundamental in the standard of review it has applied, it has acknowledged parental rights to be fundamental rights on numerous occasions.[185] This lack of clarity as well as the Court's confusion in recent years as to the definition of the family has created a crisis of parental rights in modern law.[186]

C. *Results of* Glucksberg*'s Application to Parental Rights*

Application of the *Glucksberg* test to parental rights reveals a fundamental right. In applying *Glucksberg*'s two-part test, first defining the right and then providing a historical analysis, it is clear that parental rights can be specifically defined and have a long application in U.S. legal history.[187] Parental rights may be easily defined as the "liberty of parents and guardians to direct the upbringing and education of children under their control."[188] The ready ability of the Court to come up with a succinct and clear definition lends credence to the argument that parental rights, although unenumerated, are fundamental.

Application of the second prong of the *Glucksberg* test also shows that parental rights are deeply embedded in Western legal tradition, which has always recognized hem as important. Even the earliest American legal scholars argued that parental control over the upbringing of their children was preeminent.[189] The Supreme Court upheld this view of parental rights in dicta on multiple occasions with the Court determining that parents have the preeminent responsibility and authority to raise their children and that the State may not infringe on this relationship other than in the most exigent circumstances.[190] Thus, a historical analysis of parental rights reveals that the rights of parents are part of the most "basic values that underlie our society."[191]

Parental rights easily meet the *Glucksberg* two-prong test of being (1) easily definable and (2) backed by history and tradition.[192] What does this mean for the standard of review? Parental rights should be afforded the highest and strictest standard of protections because it has proven to be "so rooted in the

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185 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); *Prince*, 321 U.S. at 166.

186 *See* Obergefell v. Hodges, 576 U.S. 644, 666–73 (2015).

187 Washington v. Glucksberg, 521 U.S. 702, 720–22 (1997).

188 *Pierce*, 268 U.S. at 534–35.

189 2 KENT, *supra* note 160, at 186.

190 *Prince*, 321 U.S. at 168–69.

191 Moore v. City of East Cleveland, 431 U.S. 494, 503–506 (1977).

192 *Glucksberg*, 521 U.S. at 720–22.

traditions and conscience of our people as to be ranked as fundamental."[193] Being a fundamental right, the Court should examine challenges to parental rights using a strict scrutiny framework, and any balancing of state interests against that right should weigh heavily in favor of the parental right such that it would require a *compelling* governmental interest to overcome the presumption in favor of parental rights.[194]

Many have argued that unenumerated rights such as parental rights should be enumerated through constitutional amendment or statutory enactment instead of relying on the Court to protect the right through strict scrutiny.[195] This approach would be extremely helpful because it would provide clear protections for these rights as well as an opportunity for a spirited social debate on such issues. Further, when considering rights that are fundamental, there must be a stopgap mechanism to provide immediate and realistic protection without resorting to the uncertainty of the political process. Further, apart from the debate on substantive due process, parental liberty is so fundamental in its essence that it is within the inherent judicial duty of the Court to protect it from government overreach.[196]

Moreover, applying the *Glucksberg* test by the Court to parental rights opens an opportunity for the Court to clarify its unenumerated fundamental rights jurisprudence under the Due Process Clause. The Court should expand its use of the *Glucksberg* test to all unenumerated fundamental rights. If the Court does this, a more coherent view of substantive due process would emerge as rights are carefully defined and subjected to a historical analysis to determine whether they are fundamental in nature. This would clarify and limit the application of substantive due process to only those rights the Court can define and then show by historical analysis to be "deeply rooted" in the "history and tradition[s]" of the American people.[197] Such a result would protect liberty while allowing the State to limit modern "rights" such as abortion that have no grounding in history or tradition and do great harm to society, its institutions, and its people.

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[193] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[194] *Glucksberg*, 521 U.S. at 720–22.

[195] The author is in favor of a parental rights amendment to the United States Constitution as he believes this to be the only way to provide lasting protection for the fundamental right. However, substantive due process is a good stopgap until that goal can be accomplished.

[196] Such an analysis would be best grounded in the Privileges and Immunities Clause and based on a proper natural law framework.

[197] *Glucksberg*, 521 U.S. at 720–21 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

V. CONCLUSION

When afforded proper deference through application of *Glucksberg*'s history and tradition test, it becomes clear that although unenumerated, parental rights are a fundamental right. The Supreme Court should revise its interpretation of substantive due process to use *Glucksberg*'s clear two-part test for any unenumerated rights question arising under the substantive due process framework. This will clarify unenumerated fundamental rights and allow the Court to properly define them and outline their correct scope. When the Court does this, it will afford parental rights proper deference as a fundamental right and govern it under a standard of strict scrutiny.[198]

This Note has overviewed the Court's current framework for substantive due process and demonstrated that while the Court posits a clear and coherent history and tradition test for defining and clarifying unenumerated fundamental rights, the test is inconsistently used and often the Court has been more concerned with issues of personal autonomy than with the actual law.[199] This has greatly affected fundamental rights jurisprudence and left lower courts confused regarding the definition of a fundamental right and how to define and determine the scope of such rights.[200] Because parental rights—like most fundamental rights—touch on key values debated within society, it is imperative the Court have a clear test to follow in defining and setting the scope of unenumerated fundamental rights before allowing the State to interfere. As legal scholars struggle with the question of whether substantive due process is the most adequate means of protecting fundamental rights, the *Glucksberg* history and tradition test should provide a way forward on parental rights and all other unenumerated fundamental rights questions.

A careful defining of parental rights and a historical analysis of those rights under the *Glucksberg* standard reveals that Courts should protect parental rights as fundamental and govern it under a strict scrutiny standard. The Court should reconsider its parental rights jurisprudence under the *Glucksberg* standard to make application of the right more consistent with its own dicta and a coherent application of substantive due process. Application of this test would provide a stricter and more workable theory of substantive due process when applied to unenumerated fundamental rights and protect one of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,"—the right to direct the upbringing

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

[199] *Glucksberg*, 521 U.S. at 727–28.

[200] Hodge v. Jones, 31 F.3d 157, 164 (1994).

of their children.[201]

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