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ABSTRACT

This Comment discusses the standard of review for compulsory vaccine mandates for minor children under the Fourteenth Amendment. In Jacobson v. Massachusetts, the Court deferred to the wisdom of the legislature when the Board of Health in Cambridge, Massachusetts, created a compulsory vaccine mandate for every adult in Cambridge. Although the Court did not create the rational basis test in 1905, subsequent Supreme Court cases increasingly deferred to the state police and state parens patriae powers in justifying compulsory vaccine mandates for both children and adults. Both state and federal court opinions following Supreme Court precedent have upheld vaccine mandates and restrictions under the rational basis test. So long as the legislative means are rationally related to the legitimate objects of health and safety, courts often do not inquire further into legislative decision-making.

State legislatures, in turn, have created compulsory mandates which often criminalize the act of refusing a vaccine. In some cases, courts have even determined that parental failure to vaccinate one's children constitutes parental neglect. Although state laws widely vary, some states have drawn no distinction between mandates for public-school children and mandates for homeschool children. Considering the dramatic politicization of vaccine mandates in recent years as well as the measures that both federal and state governments have taken to ensure COVID-19 vaccine compliance, the current state of the law leaves parents with little recourse against the imposition of compulsory vaccine mandates. The law now permits the state to enter the sanctity of the home and compel parents to vaccinate their

children under threat of criminal penalty. There are few limits on state police power in the realm of compulsory vaccination.

This Comment proposes that parental vaccine refusal should be a fundamental right protected by strict scrutiny. Substantive due process analysis supports this proposal because the fundamental right comes from two preexisting liberty interests: (1) the bodily autonomy of the child and (2) the independent fundamental right of the parent in the care and custody of the child. Using history, tradition, and precedent from both liberty interests, the Court would have a sufficient legal basis to hold that parental vaccine refusal is a fundamental right. When there is a substantial burden on the proposed fundamental right, strict scrutiny would then be applied, shifting the burden to the state to justify its actions. Requiring the state to satisfy a higher standard would reinforce the delicate balance between individual rights and state interests by preventing overbroad grants of deference to state legislatures that may burden individual rights. As applied to COVID-19, the application of strict scrutiny would likely block compulsory vaccine mandates for minor children outside the public-school system.

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COMMENT

PARENTAL VACCINE REFUSAL AS A FUNDAMENTAL RIGHT: WHY *JACOBSON V. MASSACHUSETTS* CANNOT JUSTIFY RATIONAL BASIS REVIEW FOR COMPULSORY VACCINE MANDATES APPLIED TO MINOR CHILDREN

Ethan Carlson[†]

ABSTRACT

This Comment discusses the standard of review for compulsory vaccine mandates for minor children under the Fourteenth Amendment. In Jacobson v. Massachusetts*, the Court deferred to the wisdom of the legislature when the Board of Health in Cambridge, Massachusetts, created a compulsory vaccine mandate for every adult in Cambridge. Although the Court did not create the rational basis test in 1905, subsequent Supreme Court cases increasingly deferred to the state police and state parens patriae powers in justifying compulsory vaccine mandates for both children and adults. Both state and federal court opinions following Supreme Court precedent have upheld vaccine mandates and restrictions under the rational basis test. So long as the legislative means are rationally related to the legitimate objects of health and safety, courts often do not inquire further into legislative decision-making.*

State legislatures, in turn, have created compulsory mandates which often criminalize the act of refusing a vaccine. In some cases, courts have even determined that parental failure to vaccinate one's children constitutes parental neglect. Although state laws widely vary, some states have drawn no distinction between mandates for public-school children and mandates for homeschool children. Considering the dramatic politicization of vaccine mandates in recent years as well as the measures that both federal and state governments have taken to ensure COVID-19 vaccine compliance, the current state of the law leaves parents with little recourse against the imposition of

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I. INTRODUCTION

There is, perhaps, no human relationship more fundamental to the existence of society than the relationship between a parent and a child. The Supreme Court has consistently recognized that a parent has always possessed the "right, coupled with the high duty, to recognize and prepare [the child] for additional obligations."[1] Ever since the dawn of time, this responsibility and familial relationship has existed, not as an affirmative right granted by human law, but as a right held independent of governmental fiat.[2] Although the law may place various impositions or restraints on this parental right in the furtherance of a legitimate object of

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

[2] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 319 (Peter Laslett ed., Cambridge University Press 1960) (1690) ("The first Society was between Man and Wife, which gave beginning to that between Parents and Children; to which, in time, that between Master and Servant came to be added.").

government, normally it may not subvert or undermine the right of parents in the care and custody of their offspring.[3]

However, when vaccines are involved, the right of the parent is almost always subordinate to both the state police power and the *parens patriae* power of the state. Since *Jacobson v. Massachusetts*, the Supreme Court has permitted compulsory vaccine mandates to stand to further the state's interest in the health and safety of its populace.[4] The Court remarked in *Zucht v. King* in 1922 that state officials may vest "broad discretion" in public health officials to apply and enforce health laws.[5] Subsequently, all fifty states have implemented statutes and guidelines requiring mandatory immunizations of all children in public school.[6] Some states have even enacted statutes requiring *every child in the state* to be vaccinated, regardless of public-school attendance.[7] Penalties for failing to comply include criminal charges,[8] forcible vaccinations when the parent otherwise loses custody of the child,[9] and in some extreme circumstances, the forced removal of a child from their parent's custody because of the parent's decision to not vaccinate the child.[10] State courts have upheld such measures under the rational basis test, meaning courts refuse to closely examine statutes enacted by state legislatures when they determine that the statutes are rationally related to health and safety.[11]

These state statutes place a substantial burden on the right of the parent in the care and custody of their child, and they no longer require any exigent circumstance or danger to the child to be enforceable as a valid use

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[3] *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[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.").

[4] Jacobson v. Massachusetts, 197 U.S. 11, 26–27 (1905).

[5] *See* Zucht v. King, 260 U.S. 174, 175 (1922).

[6] *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 25, 2022), https://www.ncsl.org/health/states-with-religious-and-philosophical-exemptions-from-school-immunization-requirements.

[7] *See* N.C. GEN. STAT. § 130A-152.

[8] *See* 105 ILL. COMP. STAT. 5/27-8.1(5).

[9] *In re* Stratton, 571 S.E.2d 234, 235 (Ct. App. 2002).

[10] Cude v. State, 377 S.W.2d 816, 820–21 (Ark. 1964).

[11] *See infra* Section III.A.2.

of state police power. With the occurrence of the COVID-19 pandemic and the measures used by both state and federal governments to compel U.S. citizens to take the COVID-19 vaccine, there is no law or judicial holding which restricts the states from requiring both homeschool and public-school children to be vaccinated or from imposing strict penalties on those who does not comply.[12] Although an argument can be made that the right of bodily autonomy should be a fundamental right—thus placing a higher burden on the government to justify the imposition of vaccine mandates—this argument alone would likely fail because the Court has determined that bodily autonomy is a liberty interest but not a fundamental right.[13] To protect families from the imposition of arbitrary vaccine mandates while also enabling the state to validly exercise its police power, this Comment argues that in cases where the law places a substantial burden on the parental right to direct the upbringing and care of the child, the right of the parent to refuse mandatory vaccinations on behalf of the child should be considered a fundamental right. Thus, the court should apply strict scrutiny and place the burden on the government to prove that it has a compelling interest in creating compulsory vaccine mandates.

Part II of this Comment briefly addresses *Jacobson, Zucht,* and *Prince v. Massachusetts* as the origin of the Court's increasing leniency in upholding vaccine mandates for both children and adults. Part III of this Comment summarizes the legislative shift toward the imposition of penalties for parental failure to vaccinate their minor children and the insufficiency of the bodily autonomy argument in protecting children from arbitrary mandates under modern substantive due process.

Part IV of this Comment proposes that the right of the parent to refuse mandatory vaccinations is a fundamental right and warrants strict scrutiny review when it is substantially burdened. Within the public-school context, it would be highly likely that the state could still possess a compelling interest because of the higher likelihood that disease could spread due to the number of children in one place. However, overbroad statutes requiring mandatory vaccinations for the whole population would likely be

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[12] *See infra* Section II.

[13] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–78, 286–87 (1990) (noting that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions," but refraining from deciding that bodily autonomy is a fundamental right).

unconstitutional unless the state proves that it has a compelling interest in compulsory vaccine mandates. Part V of this Comment contains the conclusion.

II. BACKGROUND

In 1905, the Board of Health in Cambridge, Massachusetts, imposed a compulsory smallpox vaccine mandate on citizens within the City of Cambridge.[14] This mandate required every adult to either receive the free smallpox vaccine or be subject to a $5 fine.[15] When Jacobson refused to take the vaccine or to pay the fine, he sued the State of Massachusetts claiming that the mandate unconstitutionally invaded his personal liberty and his inherent right "to care for his own body and health in such way as to him seems best."[16] The Supreme Court held that each person does not have an "absolute right . . . to be, at all times and in all circumstances, wholly freed from restraint."[17] Because all are governed by certain laws for the "common good," and government is instituted "for the protection, safety, prosperity, and happiness of the people," state legislatures may make decisions which are "reasonably required for the safety of the public."[18]

However, the power of state legislatures to create health mandates for the health and safety of the public is not unlimited. The Court acknowledged that such mandates must not go beyond what is "reasonably required" for the safety of the public.[19] When the police power of the state is exerted in an arbitrary or oppressive manner, courts may be justified in their decision to invalidate a law "to prevent wrong and oppression."[20] Because the Court—and many others at that time—regarded smallpox as a "dangerous and contagious disease,"[21] if the Court had subverted the decision of the legislature at that time it would most likely have engaged in judicial policymaking. Within the context of the public emergency, which

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[14] Jacobson v. Massachusetts, 197 U.S. 11, 27–28 (1905).

[15] *Id.* at 12.

[16] *Id.* at 26.

[17] *Id.*

[18] *Id.* at 27–28.

[19] *Id.* at 28.

[20] Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905).

[21] *Id.* at 34.

necessitated state interference, the Court held that the decision to create a vaccine mandate survived the balance between individual autonomy and state necessity and was not arbitrary or oppressive.[22]

Jacobson likely created a balancing test between individual rights and state police power.[23] When there is a public health crisis which poses a grave risk to the safety of society, individual liberties give way to a state mandate which bears a "real" or "substantial" relation to preventing disease and death.[24] Two months later, the Supreme Court again highlighted the existence of state police powers and noted that "there is a limit to the valid exercise of the police power by the State."[25] If there were no limits, state legislatures would have "unbounded power," and state police power would exist as a pretext for arbitrary increases in state power.[26]

Subsequent cases reveal, however, that *Jacobson* opened a proverbial "Pandora's Box." Only a few years later, Justice Oliver Wendell Holmes, Jr. used the principle established in *Jacobson*—that the state may restrict personal liberties and individual autonomy to protect the health, safety, and welfare of the public—to justify compulsory sterilization of the mentally disabled.[27] Further, although *Jacobson* took place during a public health emergency, at least one state supreme court held that a school board is "not required to wait until an epidemic actually exists before taking action."[28] In the absence of a health crisis that would necessitate state action, the Kentucky Supreme Court held that a vaccine mandate, as a condition precedent to public-school attendance, was nevertheless within the legislative discretion granted by *Jacobson*.[29]

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[22] *See id.* at 39.

[23] *See* Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children*, 12 YALE J. HEALTH, POL'Y, L., & ETHICS 39, 51 (2012).

[24] *See Jacobson*, 197 U.S. at 31.

[25] Lochner v. New York, 198 U.S. 45, 56 (1905).

[26] *Id.*

[27] Buck v. Bell, 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.").

[28] Bd. of Trs. v. McMurtry, 184 S.W. 390, 394 (Ky. 1916).

[29] *Id.*

This principle was reinforced by the musings of the Supreme Court in *Zucht v. King* only a few years later. In *Zucht*, a Texas ordinance required proof of vaccination to attend public school or any other place of education.[30] The plaintiff sued public officials claiming that the "ordinances deprive[d] [the] plaintiff of her liberty without due process of law" because the ordinances "leave to the board of health discretion to determine when and under what circumstances" the ordinance would be enforced.[31] When the case came before the Supreme Court on a writ of error, the Court dismissed the suit for lack of jurisdiction.[32] However, in opinion, the Court noted that "*Jacobson* . . . had settled that it is within the police power of a state to provide for compulsory vaccination."[33] The Court referenced other cases to support its claim that "a state may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative."[34] The Court remarked that such broad discretion does not involve the arbitrary use of police power but refrained from defining the term "arbitrary."[35] The ordinances, according to the Court, conferred "only that broad discretion required for the protection of the public health."[36]

A few decades later, the Court expanded the principle behind compulsory vaccination even further. In *Prince v. Massachusetts*, Mrs. Prince—an ordained minister and a Jehovah's Witness—permitted her two sons to hand out religious works and to engage in street preaching during the early hours of the evening.[37] When Massachusetts brought criminal charges against Mrs. Prince for violating Massachusetts child labor laws, she appealed claiming that the law burdened her parental right to "bring up the child[ren] in the way [they] should go" by preventing her sons from helping her hand out religious works in the streets.[38] While the Court acknowledged

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30 Zucht v. King, 260 U.S. 174, 175 (1922).

31 *Id.*

32 *Id.* at 176–77.

33 *Id.* at 176.

34 *Id.*

35 *Id.* at 177.

36 Zucht v. King, 260 U.S. 174, 175 (1922).

37 Prince v. Massachusetts, 321 U.S. 158, 161–62 (1944).

38 *Id.* at 163–64.

the existence of the "private realm of family life which the state cannot enter," it held that this liberty interest is counterbalanced by the "public interest."[39] The Court couched its rationale in dicta, noting that:

> [The] rights of parenthood are [not] beyond limitation. Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. . . . Thus, he cannot claim freedom from *compulsory vaccination* for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.[40]

The Court, by including the words "compulsory vaccination" within its decision, implicitly expanded *Jacobson*'s original holding—which applied initially to competent adults[41]—to the state's *parens patriae* power over children. Although the Court in *Prince* did not base its holding on the constitutionality of compulsory vaccine mandates, multiple lower courts followed in its footsteps and interpreted *Prince*'s dicta as binding precedent.[42]

Jacobson exists as the foundation of the rational basis test as applied to compulsory vaccine mandates.[43] The rational basis test legitimizes the actions of a state or legislature if they are rationally related to a legitimate governmental interest.[44] *Jacobson* itself recognized that the health, safety, and welfare of the public is a legitimate government interest.[45] Thus, if the

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[39] *Id.* at 166.

[40] *Id.* at 166–67 (emphasis added) (citing People v. Pierson, 68 N.E. 243 (N.Y. 1903)).

[41] Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905).

[42] McCarthy v. Boozman, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002); Brown v. Stone, 378 So. 2d 218, 222 (Miss. 1979); Wright v. DeWitt Sch. Dist., 385 S.W.2d 644, 647 (Ark. 1965).

[43] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

[44] *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152–54 (1938).

[45] *Jacobson*, 197 U.S. at 25 ("According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

legislature appears to be acting for the health, safety, and welfare of the public, many courts now defer to legislative judgment if the means used—the state statutes authorizing police power—are rational.[46] *Jacobson* has been used to entirely preclude legitimate questions of vaccine safety and substantive due process claims because courts frequently defer to the legislature.[47] Given such "extreme deference to the legislature," most plaintiffs have sued under a theory that the state should provide religious exemptions from compulsory vaccine mandates.[48] However, under *Prince,* the state is not compelled to provide any religious exemptions.[49] At least three states—Mississippi, Arkansas, and West Virginia—do not offer any religious exemptions.[50] At least one court suggested that state legislatures go even further than required by the Constitution in providing religious exemptions.[51] Thus, under a premise of protecting the public, the state legislatures may create compulsory vaccine mandates at will, and there are currently few constitutional limits on the power of a state to mandate vaccines for either children or adults.

III. PROBLEM

A. Courts Are Empowered By State Statutes To Impose Criminal Sanctions On Parents For Failure To Vaccinate Or To Take Children From The Home Upon A Finding Of Neglect.

Because there are few restraints on the power of the state to create compulsory vaccine mandates under *Jacobson*, state legislatures have created statutes that require both public-school children and homeschool children to be immunized under threat of criminal penalty.[52] Although the law in *Jacobson* originally imposed a monetary fine on those who refused to

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[46] Bd. of Educ. v. Maas, 152 A.2d 394, 403 (N.J. Super. Ct. App. Div. 1959); *see* People v. Adams, 597 N.E.2d 574, 581 (Ill. 1992).

[47] Phillips v. City of New York, 775 F.3d 538, 542 (2nd Cir. 2015).

[48] Holland, *supra* note 23, at 53.

[49] *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Davis v. State, 451 A.2d 107, 112 (Md. Ct. App. 1982).

[50] Donya Khalili & Arthur Caplan, *Off the Grid: Vaccinations Among Homeschool Children*, 35 J. L., MED. & ETHICS 471, 473 (2007).

[51] Phillips v. City of New York, 775 F.3d 538, 543 (2nd Cir. 2015).

[52] *See, e.g.*, 105 ILCS 5/27-8.1(5) (2022).

comply with the Board of Health's directives,[53] some states have now attached criminal liability to vaccine refusal and have even, in rare cases, taken custody of the child because vaccine refusal was seen as neglect.[54] Because some state statutes treat public-school children and homeschool children the same, and courts engage in rational basis review under *Jacobson*, logically the state can now punish any parent in the state for a refusal to vaccinate their child.

1. The Rise of Mandatory Vaccine Statutes & Requirements

In the absence of constitutional restraints on the power of the state to mandate vaccines, many states have indeed created broad regulations and statutes requiring the vaccination of children in public schools and sometimes both homeschool children and public-school children. Massachusetts was the first state that required vaccination of children in public schools, and that rule was subsequently adopted by many other states.[55] Today, all fifty states require proof of immunization as a condition precedent to public school attendance.[56] Many of these statutes and guidelines require parents to obtain proof of vaccination of at least ten different vaccines before a child even enters preschool. For example, as of 2021, Illinois and New York require the parent, at a minimum, to obtain proof of child vaccination for diphtheria, pertussis, tetanus, polio, measles, rubella, mumps, varicella, invasive pneumococcal disease (PCV), and Hepatitis B.[57] If the parents elect to send their children to public school, all these vaccines must be administered before a child enters preschool, kindergarten, or first grade and must be maintained all the way through

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[53] Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905).

[54] *See* 105 ILCS 5/27-8.1(5) (2022); Cude v. State, 377 S.W.2d 816, 820–21 (Ark. 1964).

[55] Andrew Zoltan, Jacobson *Revisited: Mandatory Polio Vaccination as an Unconstitutional Condition*, 13 GEO. MASON L. REV. 735, 741 (2005).

[56] *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 25, 2022), https://www.ncsl.org/health/states-with-religious-and-philosophical-exemptions-from-school-immunization-requirements.

[57] *Minimum Immunization Requirements Entering a Child Care Facility or School in Illinois, 2022–2023*, ILL. DEPT. OF PUB. HEALTH (IDPH), https://dph.illinois.gov/topics-services/prevention-wellness/immunization/minimum-immunization-requirements.html; N.Y. PUB. HEALTH LAW § 2164 (Consol. 2022).

high school.[58] If the parent fails to comply with these requirements and the child cannot enter public school due to a failure to vaccinate, the child is considered truant and the parents or legal guardians of the child have committed a class C misdemeanor and may be fined or imprisoned.[59] In 2016, California required every child in public school to be vaccinated for the same ten diseases and eliminated the exemption for both personal and religious beliefs from their public-school mandatory child vaccination requirement.[60] Just like Illinois, California does not allow unvaccinated children to attend public school unless they have been fully and repeatedly vaccinated against all the same diseases.[61] Relying on the state police power and the *parens patriae* power of the state, California has declared in no uncertain terms that the individual right of the parent to control the upbringing of the child (within the public-school context) gives way to the power of the state.[62] Although there was a measles outbreak at Disneyland which partially contributed to these increased restrictions,[63] California now possesses the power to require compulsory vaccinations for any vaccine over the deeply-held religious convictions, personal, and philosophical beliefs of the parents.[64]

Although many states have not required homeschooled children to be vaccinated, there is now no law or prohibition which prevents any state legislature from intruding into the sanctity of the home and imposing a preventative medical treatment upon a child without the parent's consent. Eleven states require homeschooled students to be immunized but do not require homeschool parents to submit proof of immunization, while four

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[58] *Id.*

[59] 105 ILL. COMP. STAT. 5/27-8.1(5) (2022). (requiring notice of immunization to attend public or private school and noting that failure to comply results in a truancy charge); 105 ILL. COMP. STAT. 5/26-10 (2022) (mandating that the penalty for truancy may be thirty days imprisonment, a fine up to five hundred dollars, or both).

[60] CAL. HEALTH & SAFETY CODE § 120335 (Deering 2016); Stephanie Awanyai, *In Defense of California's Mandatory Child Vaccination Law: California Courts Should Not Depart from Established Precedent,* 50 LOY. L.A. L. REV. 391, 400 (2017) (noting that although California's requirements do not include homeschool children, the state removed personal belief and religious belief exemptions).

[61] CAL. HEALTH & SAFETY CODE § 120335 (Deering 2022).

[62] Awanyai, *supra* note 59, at 402–03.

[63] *Id.* at 393.

[64] *Id.* at 400.

states require homeschool parents to submit proof of immunization.[65] North Carolina has directly required compulsory vaccination of all children in the state, whether they attend public school, private school, or homeschool.[66] Although each child need only be immunized for six different diseases,[67] the state reserves the right to impose any other vaccine upon any child residing in the state if the Health Commission decides that immunization is in the interest of public health.[68] Failure to comply with this statute—that is, a failure to vaccinate the child for any disease listed—results in a misdemeanor[69] which is often punishable in the state of North Carolina by fines or imprisonment.[70] Thus, North Carolina may not only choose to impose any vaccine on children, but it may also impose criminal sanctions upon parents who have decided to homeschool their children despite the lack of a public health emergency or circumstance (such as the placement of the child into the public-school system) that would conceivably justify compulsory vaccinations. Other states (such as the Commonwealth of Virginia) also draw no distinction between children attending public school and children being homeschooled.[71] All parents in the Commonwealth—even those who do not send their children to school—are required to vaccinate their children for at least ten different diseases before the child even enters preschool and send proof of vaccination to the Commonwealth, which also requires repeated doses of many of these vaccines until the child graduates from high school.[72] The Department of Health in some states is empowered to lay compulsory vaccination mandates on all citizens, whether child or adult, even in the absence of any active disease or threat.[73]

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[65] *Homeschool Immunization Requirements*, COAL. FOR RESPONSIBLE HOME EDUC. (Feb. 15, 2015) https://responsiblehomeschooling.org/research/current-policy/homeschool-immunization-requirements/.

[66] N.C. GEN. STAT. § 130A–152 (2022).

[67] *Id.* ("Every child present in this State shall be immunized against diphtheria, tetanus, whooping cough, poliomyelitis, red measles (rubeola) and rubella.").

[68] *Id.*

[69] *Id.* at § 130A–25.

[70] *See id.* at § 15A–1340.23.

[71] VA. CODE ANN. § 22.1–271.4 (2022); N.Y. PUB. HEALTH LAW § 2164 (Consol. 2022).

[72] N.Y. PUB. HEALTH LAW § 2164 (Consol. 2022); VA. CODE ANN. § 32.1–46 (2022).

[73] GA. CODE ANN. § 31–12–3 (2022).

2. State Courts Have Used State Statutes to Either Forcibly Vaccinate Children or Take Custody

State courts have noted the broad grant of legislative authority to enact statutes that exist for the "health, safety, and welfare" of the public.[74] As applied to compulsory vaccine mandates, some courts have presumed that statutes requiring vaccination of children are rationally related to health and safety.[75] Moreover, assuming that vaccine mandates are rationally related to health and safety, some courts have found that the state may forcibly vaccinate children when the parents have neglected their children by failing to provide them with food, education, or shelter.[76] For example, in *In re Stratton*, the North Carolina Court of Appeals—pursuant to the same statute requiring both public-school children and homeschool children to be vaccinated—held that "when parents refuse to provide necessary medical care, their inaction can extinguish custody and support a finding of neglect."[77] When the children have been taken from their parents due to otherwise lawful neglect proceedings, the court may then decide what is in the "best interests" of the child and order the state to immunize the child against the parent's will.[78] Because the court does not inquire further into the legitimacy of a statute requiring vaccination if the statute furthers the general health and safety of the public in some conceivable way, the liberty interests of the child and the parent are sacrificed for the general welfare of the public.

This pattern of deference to the legislature is not confined to North Carolina. Other states have presumed that since "age-appropriate immunizations . . . are a reasonable means of ensuring the health and safety of the children[,] . . . . parental rights must yield" to the interests of the

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[74] Jasperson v. Jessica's Nail Clinic, 265 Cal. Rptr. 301, 307 (Cal. Ct. App. 1989); *see also* Sadlock v. Bd. of Educ., 58 A.2d 218, 220 (N.J. 1948).

[75] Cude v. State, 377 S.W.2d 816, 819 (Ark. 1964) ("[T]his principle is so firmly settled that no extensive discussion is required."); McCartney v. Austin, 31 A.D.2d 370, 370–71 (N.Y. App. Div. 1969) (noting that such statutes "are within the police power" of the state and that the constitutionality of such statutes is "too well established to require discussion").

[76] *In re* Stratton, 571 S.E.2d 234, 235, 237–38 (N.C. Ct. App. 2002).

[77] *Id.* at 237.

[78] *Id.* at 237–38.

legislature.[79] Because courts look at the perceived object of the statute—the health and safety of children—they do not question the means by which the state legislature enforces the statute, which sometimes force parents to comply under threat of criminal penalty.[80] Furthermore, some states have even determined that a failure to vaccinate constitutes legal neglect, and the state permits child protective services to take custody of the children over the adamant objection of the parents. In *Cude v. State*, the Arkansas Supreme Court held that the fact that the parents would not let their child attend public school because the school required mandatory vaccinations was sufficient to support a finding of neglect.[81] As a result, the court permitted the state welfare department to take the children from their parents.[82] Citing *Prince v. Massachusetts* as the authority for its decision,[83] the court held that, because the legislature created a statute which allowed a child to be taken when it is in the "best interest" of the child[84] and because it is within the police power of the state to require that school children are vaccinated,[85] the state may take custody of the child if the child does not attend school due to a failure to vaccinate.[86] Thus, Arkansas has maintained that "a child attending school in non-compliance with this health regulation is doing so in violation of the law . . . . This fact alone is sufficient evidence upon which to base a finding of neglect."[87]

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[79] N.J. Div. of Child Prot. & Permanency v. J.B., 212 A.3d 444, 453 (N.J. Super. Ct. App. Div. 2019); *In re* Elwell, 55 Misc. 2d 252, 256 (N.Y. Fam. Ct. 1967) ("[T]he [l]egislature, and not the courts, has the power and responsibility to decree whether immunization against poliomyelitis is prudent and the most desirable method of over-all prevention of this dreaded disease in the protection of the public health.").

[80] Anderson v. State, 65 S.E.2d 848, 852 (Ga. Ct. App. 1951) ("The validity of the statute is not questioned, and the wisdom of the legislative enactment is not a matter for the decision either of this court or of any individual citizen." "[Sending the child to school unvaccinated] is the cause of [the parent's] conviction.").

[81] Cude v. State, 377 S.W.2d 816, 817, 820–21 (Ark. 1964).

[82] *Id.*

[83] *Id.* at 819.

[84] *Id.* at 820.

[85] *Id.* at 819.

[86] *Id.* at 820–21.

[87] Mannis v. State, 398 S.W.2d 206, 207 (Ark. 1967) (reaffirming Cude v. State 377 S.W.2d 816 (Ark. 1964)).

These state statutes may be used as pretexts to directly take children from their parents. In 1995, the State of California charged Jacqueline Bishop with neglect—and her children were taken from her—because she refused to vaccinate them.[88] The California Department of Child and Family Safety (DCFS) invaded their home at one o'clock in the morning and forcibly took the children when the state possessed no other evidence of parental neglect.[89] Only one of the children was eventually returned.[90] California's actions demonstrate that there are currently few restrictions on the power of a state to define neglect and hold that a failure to vaccinate constitutes such neglect, enabling the state to either forcibly vaccinate the children or take custody. State legislatures may define neglect as they see fit and create health regulations almost without restriction. In response to these regulations, a court may often exercise its discretionary power to order vaccination of the child or removal of the child from its parents.[91]

3. The Logic Used by Federal and State Courts Can Easily Be Applied to Homeschool Children

Since many courts have held that compulsory vaccinations are within the police power of the state, it is highly likely that the state would have the police power to also take homeschool children from their parents or to levy criminal charges against parents who homeschool their children if they fail to comply with compulsory vaccine mandates. Because many courts have given the state deference to make any vaccine law that is rationally related to health and safety,[92] the inevitable next step would be to charge parents who homeschool their children with neglect if they fail to vaccinate their children in compliance with the law. State courts would then have the discretionary power to order forcible vaccination, levy criminal charges

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[88] Karin Schumacher, Note, *Informed Consent: Should It Be Extended to Vaccinations?* 22 T. JEFFERSON L. REV. 89, 116–17 (1999).

[89] Vin Suprynowicz, *$2 Billion Paid Out for Vaccine Injuries to Kids*, LAS VEGAS REV.–J. (Aug. 26, 2012, 1:12 AM), https://www.reviewjournal.com/opinion/2-billion-paid-out-for-vaccine-injuries-to-kids/.

[90] *Id.* The other child died in foster care from repeated blows to the head. *Id.*

[91] *See, e.g.*, *In re* Christine M., 157 Misc. 2d 4, 21–22 (N.Y. Fam. Ct. 1992) (explaining that although the court declined to exercise its discretionary power, it still possessed the power under state statute to order mandatory vaccination of Cristine M.).

[92] *See supra* Section III.A.1.

against parents who fail to vaccinate their children, or even, in extreme circumstances, forcibly take the children from their parents. As some states—such as Virginia and North Carolina[93]—already have statutes requiring both homeschool and public-school children to be vaccinated, and some public-school children have already been either forcibly vaccinated or taken from their parents, the state could, under *Prince v. Massachusetts*, use the same measures against families who homeschool. The measures used could certainly appear to be an extreme use of state police power, but the state would justify it under the premise that such measures are reasonably necessary to keep the children safe and healthy. In other words, the legitimate end of health and safety would justify the means used to achieve it.

Some scholars have proposed that state governments have the power to require that all school-age children provide proof of vaccination in the state in which they reside.[94] If the parents refuse to vaccinate their children the state may label homeschool children "truant," and local child services can "intervene" to ensure the health and safety of the children.[95] Although such a sanction forcibly brings about a direct assault on the bodily integrity of the child, the prospect still remains a "live option" for the state.[96] The intrusions could be justified under the theory of "herd immunity," in which all must be vaccinated for the benefit of all.[97] The intrusion would be justified, even in the absence of any public health emergency, because the state decided to place restrictions on personal liberty.

Moreover, with the advent of the COVID-19 pandemic and the intense politicization of vaccines, COVID-19 vaccine mandates for children could be the next inevitable intrusions into the personal liberty interest of both

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93 *See supra* Section III.A.1.

94 Khalili & Caplan, *supra* note 50, at 474.

95 *Id.* at 475.

96 Katie Attwell & Mark C. Navin, *Childhood Vaccination Mandates: Scope, Sanctions, Severity, Selectivity, and Salience*, 97 MILBANK Q 978, 984-85 (2019).

97 Mary Holland & Chase E. Zachary, *Herd Immunity and Compulsory Childhood Vaccination: Does the Theory Justify the Law?* 93 OR. L. REV. 1, 3–4 (2014) ("The theory describes a form of indirect protection in which non–immune individuals are protected from those that have acquired a disease and recovered. Promoters of universal vaccination adopted this theory, suggesting that it applies to vaccine–induced immunity as well. Today, herd immunity is the central rationale for compulsory vaccination.").

child and parent. Even though COVID-19 rarely poses any threat to children below the age of sixteen,[98] if each state legislature mandates the COVID-19 vaccine, along with the other mandatory six to ten vaccines,[99] and if state statutes draw no distinction between public-school children and homeschool children, parents will be subject to the same penalties[100] and will have no legal recourse or remedy because state and local officials would justify vaccine mandates under a general theory of "health and safety." Courts could—and likely would—defer once again to the legislature or local department of health. Under rational basis review, because "health and safety" is often deemed a legitimate state interest,[101] many courts would likely decide that the legislature has a rational basis for enacting COVID-19 vaccine mandates for any child in the state and would not interfere.

B. The "Bodily Autonomy" Argument

Under the Due Process Clause of the Fourteenth Amendment, the States are prohibited from "depriv[ing] any person of life, liberty, or property, without due process of law."[102] Drawing upon the clause's use of "liberty," certain rights, such as the right of privacy,[103] the right to interracial marriage,[104] and the right to have children,[105] have been accorded "fundamental" status. When a right has been recognized as fundamental and the court finds that a state has placed a substantial burden on that right, the burden falls on the government to prove that it has a compelling interest in the legislation or action and that the legislation is narrowly tailored to achieve its objective.[106] To prevent the state from infringing upon their

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[98] *See* Jonas F. Ludvigsson, *Systematic Review of COVID-19 in Children Shows Milder Cases and a Better Prognosis than Adults,* 109 ACTA PAEDIATRICA 1088, 1088–90 (2020) ("[C]hildren have so far accounted for 1%–5% of diagnosed COVID-19 cases, they often have milder disease than adults and deaths have been extremely rare.").

[99] *See* discussion supra Section III.A.1.

[100] *See* discussion *supra* Section III.A.2.

[101] *See* discussion *supra* Section III.A.2.

[102] U.S. CONST. amend. XIV.

[103] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[104] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[105] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[106] *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal

"bodily autonomy" by imposing vaccine mandates, some plaintiffs have argued that the right of bodily autonomy is so fundamental that the government should not impose any restrictions on their individual bodily interest unless the government demonstrates that it has such a compelling interest.[107] However, this argument has failed because no court has found that the right of bodily autonomy as applied to vaccine mandates, standing alone, is entitled to fundamental status.[108]

1. From the Right to Privacy to Bodily Autonomy

In the last seventy years, the United States Supreme Court has gradually but steadily developed the concept of substantive due process. In the twentieth century, the Court began to legally recognize rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[109] even though they are not expressly enumerated in the Bill of Rights. The right to privacy, as implied from the "penumbra" of the zones of privacy in the First, Third, Fourth, Fifth, and Ninth Amendments, was sufficient to protect the interests of a married couple in the use and purchase of contraception.[110] Almost forty years later, the Court in *Cruzan v. Director, Missouri Department of Health* acknowledged "that a competent person has a "general liberty interest in refusing unwanted medical treatment."[111] Drawing upon *Jacobson*, the Court noted that each person has an implicit right to refuse medical treatment.[112] Similar cases reinforce the Court's commitment to recognizing that the unwanted administration of medical treatment or an interference with the bodily functions of a person

liberty, the State may prevail only upon showing a subordinating interest which is compelling.").

[107] Norris v. Stanley, 567 F.Supp. 3d 818, 821 (W.D. Mich. 2021); Bauer v. Summey, 568 F. Supp. 3d 537, 589 (D.S.C. 2021).

[108] For now, *Jacobson* acts as a direct foil against any court finding a fundamental right (under substantive due process) in bodily autonomy alone. *See generally* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (holding that liberty was not unconstitutionally deprived by the state's smallpox vaccine mandate).

[109] Griswold v. Connecticut, 381 U.S. 479, 487–88 (1965) (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)) (holding that the state's ban of the use of contraceptives violated the constitutional right to privacy).

[110] *See id.* at 484–86.

[111] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–78 (1990).

[112] *See id.* at 278.

is a significant intrusion into the bodily autonomy and privacy of an individual.[113] For example, in *Sell v. United States*, the Court held that because individuals have a "constitutionally protected liberty interest" in avoiding forced medication, individuals who are incompetent to stand trial could be forcibly medicated by the state only if the treatment is "necessary . . . to further important governmental trial-related interests."[114]

Only a few years prior to *Sell*, the Court in *Washington v. Glucksberg* summarized a two-part analysis from the Court's substantive due process framework that delineates the existence of a fundamental right. "First, . . . the Due Process Clause . . . protects those . . . rights . . . which are . . . 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[115] "Second, . . . a 'careful description' of the asserted fundamental liberty interest[]" is essential in determining whether rational basis or strict scrutiny applies.[116] The source of a fundamental right, then, if not enumerated in the Constitution, drawn from precedent, or implied from the Ninth Amendment, must stem from history, tradition, or what the Court calls the "collective conscience" of the American people.[117] In addition, such a right must be carefully articulated at a specific level of generality.[118] The state certainly may not deprive a person of liberty under the Fourteenth Amendment, but the specific right claimed must be traced from one right to another back to liberty.[119]

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[113] Washington v. Harper, 494 U.S. 210, 221–22 (1990); Vitek v. Jones, 445 U.S. 480, 494 (1980) (holding that transfer to a mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); *see generally* Rochin v. California, 342 U.S. 165, 172 (1952) (holding that the actions of police officers in forcibly extracting the contents of a suspect's stomach "shock[ed] the conscience" and violated the personal bodily autonomy of the individual).

[114] Sell v. United States, 539 U.S. 166, 178–181 (2003).

[115] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citations omitted).

[116] *See id.*

[117] Griswold v. Connecticut, 381 U.S. 479, 486–90, 493 (1965) (Goldberg, J., concurring) (citations omitted).

[118] *See* Reno v. Flores, 507 U.S. 292, 302 (1993).

[119] In the oral argument for *Dobbs v. Jackson Women's Health Organization*, the respondents articulated a woman's right to an abortion as stemming directly from liberty itself. Transcript of Oral Argument at 71–72, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392). Justice Thomas asked whether the level of generality should

2. The Bodily Autonomy Argument Often Succumbs to the State's Overriding Interest

The claimed right of "bodily autonomy" as applied to vaccine mandates has not been regarded as a fundamental right (and thus not entitled to strict scrutiny) because both the source and the scope of the right likely would not satisfy the Court's analysis in *Glucksberg*.[120] *Jacobson*, as applied to competent adults, has foreclosed bodily autonomy as a fundamental right because the state has an overriding interest. As demonstrated in both *Jacobson* and *Zucht v. King*, the interest is always articulated as one in "health" or "safety."[121] In other words, the needs of the many outweigh the liberty interest of the individual.

Recent litigation addressing the constitutionality of COVID-19 vaccine mandates has thoroughly demonstrated the reluctance of lower courts to recognize any fundamental liberty interest or right of an individual to freedom from vaccine mandates. The United States District Court for the District of South Carolina found that plaintiffs claiming the fundamental right of bodily autonomy to strike down a COVID-19 vaccine mandate did not carefully describe the liberty interest.[122] Even if other plaintiffs could carefully describe such an interest and attempt to show that the right of the individual to be free from vaccine mandates as a condition precedent to university attendance, job security, or even the ability to enter "covered premises" is "implicit in the concept of ordered liberty," according to the district courts, *Jacobson* instantly quashes such an attempt.[123]

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be lowered to "be a little bit more specific," but the respondents maintained that the right stemmed directly from liberty, impliedly proposing that the articulation step be skipped entirely. *Id.* at 72–73.

120 *See Glucksberg*, 521 U.S. at 720–21.

121 *See* Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905); Zucht v. King, 260 U.S. 174, 176–77 (1922).

122 Bauer v. Summey, 568 F. Supp. 3d 573, 592 (D.S.C. 2021) ("Plaintiffs overly general[ized] [their] characterization of the rights at issue.").

123 *See* Caviezel v. Great Neck Pub. Schs., 500 Fed. App'x 16, 19 (2d Cir. 2012) ("Although the Caviezels argue that [*Jacobson*] was wrongly decided, we are bound by Supreme Court precedent."); Klaassen v. Trs. of Ind. Univ., 7 F.4th 592, 592–93 (7th Cir. 2021) (denying an injunction on a mandatory vaccine requirement for attendance at Indiana University even though the court assumed that the plaintiffs had a right of bodily autonomy); Dixon v. De Blasio, No. 21-cv-5090, 2021 U.S. Dist. LEXIS 196287, at 19–20 (E.D.N.Y. 2021) (holding that the New York mayor's vaccine mandate for all "covered

Therefore, an argument solely based on bodily autonomy or even the right to refuse unwanted medical treatment would likely not, under the Supreme Court's current jurisprudence, create a fundamental right or place a higher burden on the government to justify its actions and show that it has a compelling interest in mandatory vaccine mandates. Although individuals under cases such as *Cruzan* and *Glucksberg* have a liberty interest in bodily autonomy, such an interest has not been adjudicated a fundamental right and vaccine mandates are permissible if they satisfy rational basis scrutiny. Yet, under such scrutiny, the court engages in "rational speculation" and does not even consider evidence or empirical data in assessing the rationality of the legislative decision.[124] As applied to vaccine mandates for children, then, attempting to articulate a right in bodily autonomy alone would most likely lead to deference to the legislature in which the court does not even consider evidence or data related to the mandate used to ensure "health and safety."[125]

IV. PROPOSAL

A. Parents Should Have the Fundamental Right to Refuse a Vaccine on Behalf of Their Minor Children

Supreme Court precedent has consistently protected the right of a parent to the care and custody of their child. When this right is combined with the child's right to individual bodily autonomy, both of which stem from liberty within the text of the Fourteenth Amendment, the Court has a sufficient basis to find a fundamental right in parental vaccine refusal. *Jacobson* should not prevent courts from finding that the right to refuse a vaccine is fundamental. As applied, strict scrutiny would limit statutes that require every child in the state be routinely immunized in the absence of any exigent circumstance unless the state could present evidence to support the existence of a compelling interest in requiring mandatory vaccinations under threat of criminal penalty. Within the COVID-19 context, strict

premises" was entitled to rational basis review under *Jacobson*); Am.'s Frontline Drs. v. Wilcox, No. 21-1243, 2021 U.S. Dist. LEXIS 144477, at 11–13 (C.D. Cal. 2021) (holding that a vaccine mandate was subject to rational basis review because the interest at issue, bodily autonomy, was not shown by the plaintiffs to be fundamental).

[124] FCC v. Beach Commc'ns, 508 U.S. 307, 312, 314–15 (1993).

[125] *See generally id.*

scrutiny would be based on necessity and would be difficult to satisfy, but this could change quickly with the development of the disease.

1. Precedent Lays the Groundwork for a Recognition of the Parent–Child Relationship as a Parental Fundamental Right

The relationship between a parent and a child has been repeatedly protected by Supreme Court precedent. The Supreme Court declared in *Meyer v. Nebraska* that "liberty" includes the right to "establish a home and bring up children."[126] Although the police power of the state may place certain restrictions upon this right, a "[d]etermination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."[127] Parents who "nurture . . . and direct [the] destiny" of the child "have the right, coupled with the high duty, to recognize and prepare [the child] for additional obligations."[128] "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[129] It is beyond dispute that parents have a "fundamental right . . . to make decisions concerning the care, custody, and control of their children."[130]

In the years since *Meyer* and *Pierce*, the Supreme Court has derived multiple, similar parental rights from this generalized fundamental right because each of the rights derived inheres naturally in the right and "high duty" of the parent to care for and protect their child. The Court in *Quilloin v. Walcott* noted that:

> [T]he Due Process Clause would be offended [if] a State were to attempt to force the breakup of a natural family, over the objection of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.[131]

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126 Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923).

127 *See id.* at 400.

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

129 Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

130 Troxel v. Granville, 530 U.S. 57, 66 (2000); *see* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974).

131 Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (citations omitted).

The Court thus implied that parents have a fundamental right to retain custody of their children absent a showing of unfitness. In *Stanley v. Illinois*, the Court held that an unwed, biological father was not presumed to be unfit upon the death of the mother because an unwed biological father has a liberty interest in retaining control and providing care for his children.[132] Only a year after *Quilloin*, the Court recognized in *Parham v. J.R.* that the "high duty" of the parent also includes the duty and right "to recognize symptoms of illness and to seek and follow medical advice."[133] Because a parent is presumed to act in the best interests of their child and the "natural bonds of affection lead parents to act in the best interests of their children,"[134] the Court declared that governmental power should not subvert the authority of the parent "in *all* cases [just] because [child] abuse and neglect" may exist in *some* cases.[135] The fundamental right of parents does not "evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[136] The Court recognized this once more in *Troxel v. Granville*, stating that:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), 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.[137]

When the fundamental right of the parent in the care and custody of their child is implicated, the Court usually gives weight to the parent's decision regarding how the parent exercises control over the child.

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[132] *See* Stanley v. Illinois, 405 U.S. 645, 652 (1972). Although deciding the case on equal protection grounds, the Court recognized that an unwed, biological father should retain control and care over his biological children. *Id.*

[133] *See* Parham v. J.R., 442 U.S. 584, 602 (1979).

[134] *Id.* at 602 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447).

[135] *See id.* at 603 ("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.").

[136] Santosky v. Kramer, 455 U.S. 745, 753 (1982).

[137] Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

2. Substantive Due Process Supports a Parental Fundamental Right in Refusing a Vaccine

The right at issue is the right of a parent to refuse a compulsory vaccine on behalf of that parent's minor children. There are two general rights from which this specific right is derived.[138] The first is the right of the child in his or her bodily autonomy. The second is the right of the parent in the care and custody of the child. Both rights, standing alone, would be less likely to satisfy the Supreme Court's reticence to recognize certain rights as fundamental.[139] However, taken together, the Court could have a sufficient legal basis to determine that the right of the parent to refuse a compulsory vaccine on behalf of the child is fundamental.

a. A "careful description" of the liberty interest

First, if articulated at a specific level of generality, the right would satisfy the Court's requirement that "a 'careful description' of the asserted fundamental liberty interest" is necessary.[140] The right claimed would not be a generalized right of "bodily autonomy" or even "liberty." Rather, there would be a natural progression from the more general rights of "liberty" or "bodily autonomy" to the specific right of vaccine refusal. Liberty comes straight from the text of the Fourteenth Amendment.[141] The right to privacy is then derivative of liberty, as noted in *Griswold*.[142] The right of bodily autonomy is derivative of privacy, and the right to refuse medical treatment is derivative of bodily autonomy, as indicated in *Cruzan*.[143] According to some state courts, even incompetent individuals retain the right to refuse

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[138] This approach is somewhat analogous to a hybrid rights argument. "Hybrid rights" refers to an argument stemming from multiple constitutional clauses (e.g., the Free Exercise Clause and the Due Process Clause, or the Due Process Clause and the Equal Protection Clause). *See* Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2357 (2020). However, this argument takes multiple rights within the Due Process Clause itself and concludes that their combination should receive strict scrutiny.

[139] *See* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.").

[140] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citations omitted).

[141] U.S. CONST. amend. XIV, § 1.

[142] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[143] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–78 (1990).

medical treatment,[144] and an unconscious patient still possesses an "interest in bodily integrity . . . even if the patient can no longer sense a bodily invasion."[145] This principle was not expressly rejected in *Cruzan*,[146] so logically a child—even if considered "incompetent" or "unconscious" because they have no awareness of their right of bodily autonomy—should also have a right to refuse medical treatment because the child still has the same interest in bodily autonomy.[147] This is reinforced by the fact that at common law and earlier in the twentieth century, medical treatment administered without patient consent was treated as a battery in tort.[148]

The right to refuse a mandatory vaccine is naturally derived from the right to refuse medical treatment. While some may argue that a vaccine injection does not constitute medical treatment, legally the term "medical treatment" has been broadly defined and applied.[149] Administration of a

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[144] *See, e.g.*, Conservatorship of Drabick, 200 Cal. App. 3d 185, 208 (1988); *In re* Conservatorship of Torres, 357 N.W.2d 332, 339 (Minn. 1984); John F. Kennedy Mem'l Hosp. v. Bludworth, 452 So. 2d 921, 926 (Fla. 1984) ("We hold that the right of a patient, who is in an irreversibly comatose and essentially vegetative state to refuse extraordinary life-sustaining measures, may be exercised . . . by his or her close family members."); *In re* Guardianship of Barry, 445 So. 2d 365, 370 (Fla. Dist. Ct. App. 1984) ("While we agree that the state has a definite interest in preserving life, we must balance that right against the rights of an individual.").

[145] Norman L. Cantor, *The Permanently Unconscious Patient, Non-Feeding, and Euthanasia*, 15 AM. J.L. & MED. 381, 404 (1989).

[146] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 280–81 (1990) ("An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right").

[147] Even though the constitutional rights of a child are not precisely identical to those of a parent regarding substantive due process claims, the child has many of the same claims and rights as an adult. Bellotti v. Baird, 443 U.S. 622, 634 (1979) ("With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult.").

[148] *See Cruzan*, 497 U.S. at 269, 271; Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 435, 438 (Ariz. 2003) ("The law is well established that a health care provider commits a common law battery on a patient if a medical procedure is performed without the patient's consent."); Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93–94 (N.Y. 1914), *abrogated by* Bing v. Thuing, 143 N.E.2d 3, 8–9 (N.Y. 1957).

[149] Washington v. Harper, 494 U.S. 210, 221–22 (1990) ('We have no doubt that . . . [prisoner] possesse[d] a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs."); *see* Parham v. J.R., 442 U.S. 584, 587, 600 (1979) (noting that a child sent to treatment in a state mental hospital has a substantial liberty

preventative treatment intended to build up the immune response of a person against a specific disease, then,[150] would likely constitute medical treatment. However, a minor child often cannot make such medical decisions on their own. As a representative of both the child's interest and their own, the parent's right in the care and custody of the child is implicated.

This parental right is also derived from the concept of liberty. From liberty, the right of privacy is derived, as indicated in *Griswold*.[151] *Griswold* also implicitly reinforced the right of familial privacy as enumerated in *Meyer* and *Pierce*.[152] From the fundamental right of the parent in the care and custody of the child,[153] the right of a parent to make informed medical decisions for the child would be derived.[154] The right to refuse a mandatory vaccine, then, would naturally fall within the right of a parent to make medical decisions on behalf of the child. Thus, the right at issue is derived from two different angles—from the child's perspective in their own bodily autonomy and from the parent's perspective in their own liberty interest in caring for the child.

b. The proposed right is "deeply rooted in history and tradition"

Second, the proposed fundamental right of the parent in refusing mandatory vaccinations is still "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[155] Although *Jacobson, Zucht*, and *Prince* would seem to weigh against the finding of a fundamental right in refusing a compulsory vaccine mandate, ancient stare decisis, if incongruent with newer precedent, should not reign supreme in

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interest in not being confined unnecessarily for medical treatment, thus implying that the act of treating mental disorders constitutes medical treatment).

150 *See Vaccine*, MERRIAM WEBSTER DICTIONARY, https://www.merriam–webster.com/dictionary/vaccine (last visited Feb. 18, 2023).

151 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

152 *Id.* at 482–85.

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

154 *Parham v. J.R.* provides some implicit support for this proposition. *See* Parham v. J.R., 442 U.S. 584, 602 (1979) ("[Parents have] a 'high duty' to recognize symptoms of illness and to seek and follow medical advice.").

155 *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977)).

perpetuity. *Jacobson* was decided within the context of a specific health crisis in which the Court expressed the fear that a "[s]ociety based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy."[156] Yet voluntary compliance with public education campaigns that advocate for vaccines has been successful, and the concern that allowing individuals to choose their vaccination status would lead to anarchy is no longer well founded.[157]

Modern reliance on *Jacobson* within the parent–child relationship is incongruent with modern substantive due process analysis. Cases such as *Troxel* and *Parham* illustrate the deference given to parental decision-making and the sphere of familial privacy into which the state cannot normally intrude.[158] Yet holdings in older cases such as *Zucht* and *Prince* would subject parental decision-making within the area of vaccine mandates to a determination by the state legislature that such measures are conceivably rational. It is strange indeed that in many other areas the Court defers to the interests of the parent in the care and custody of the child yet defers to the legislature when it decides that parental rights should be subjugated to the *parens patriae* power of the State within the area of vaccine mandates. Parents and guardians hold the original parental power and responsibility to make decisions—medical or otherwise—for their children. The authority of the parent to speak and act on behalf of their children is reflected in the common law and is "[s]o deeply imbedded in our traditions . . . that the Constitution itself may compel a State to respect it."[159] The interest in a parent's own offspring precedes the existence of organized government and exists outside any attempted positive grant of authority by the State.[160] Although the Supreme Court has denied any reliance on natural law in judicial decision-making,[161] natural law itself undergirds the concept

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156 Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

157 Schumacher, *supra* note 88, at 116.

158 *See* Troxel v. Granville, 530 U.S. 57, 68 (2000); *Parham*, 442 U.S. at 602.

159 *Parham*, 442 U.S. at 621 (Stewart, J., concurring).

160 *See Locke*, *supra* note 2, at 319.

161 Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) ("[T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own[,] whether it be of its Legislature or of its Supreme Court[,] should utter the last word."); Guaranty Trust Co. v. York, 326 U.S. 99, 102 (1945) ("[The] law was conceived as a 'brooding omnipresence' of

of parental decision-making and the very essence of the family.[162] An implicit recognition of this is likely the reason why the parental interest in the care and custody of the child is regarded by the Supreme Court as a fundamental right.[163]

c. Parents are in a better position than the state to make decisions about their child's health

Moreover, parents are often in the best position to determine what is in the best interest of their child. This strongly supports deference to the parent, not to the state. The position of the parent in the family may be analogized to the position of a trial judge in a civil trial. For example, evidentiary rulings of a trial judge are reviewable by a court of appeals or supreme court only for abuses of discretion.[164] A trial judge's determination of fact or of the credibility of witnesses (when the judge is the only trier of fact) is reviewable by appellate courts only for clear error.[165] This is because the trial judge is the one who (1) is directly confronted with the facts, (2) observes witness testimony, and (3) has a closer nexus to the facts than any appellate court.[166] In contrast, the appellate court only possesses a written "cold record" that is often insufficient to enable the court to second-guess a decision by a trial judge concerning a question of fact.[167] Similarly, parents often have a closer nexus to their child than anyone else.

Reason, of which decisions were merely evidence and not themselves the controlling formulations.").

[162] Melissa Moschella, *Natural Law, Parental Rights and Education Policy*, 59 AM. J. JURIS. 197, 199 (2014) ("From the natural law perspective, parents legitimately claim that they are the ones primarily responsible for the education and upbringing of their children, and thus that they have the authority to make decisions about how best to carry out their task.").

[163] *See Troxel*, 530 U.S. at 66.

[164] *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997).

[165] *See* Fed. R. Civ. P. 52(a)(6); Anderson v. Bessemer City, 470 U.S. 564, 575–76 (1985).

[166] *Anderson*, 470 U.S. at 575 ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.").

[167] Davis v. Ayala, 576 U.S. 257, 274 (2015) (quoting Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) ("Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation.").

Personal relationships are based on unique and irreplaceable characteristics that often create personal dependencies.[168] Parent–child relationships create a unique dependency of the child on the parent that exists during the child's formative years.[169] The parent, understanding this dependency and the specific needs of the child, is like a trial judge. The parent (1) is directly confronted—often daily—with the wants and specific needs of the child, (2) observes the child all throughout their formative years, and (3) has a closer nexus to the child than anyone else. Family members are closely situated and in the best position to make medical decisions for their children. As stated by Justice Brennan in *Cruzan*:

> Family members are best qualified to make substituted judgments for incompetent patients not only because of their peculiar grasp of the patient's approach to life, but also because of their special bonds with him or her . . . . It is . . . they who treat the patient as a person, rather than a symbol of a cause. The State, in contrast, is a stranger to the patient.[170]

The state is like an appellate court. The state has a "cold record" of facts through the testimony of witnesses, medical records, and other information but is not closely situated to the child and potentially may harm the child by overriding parental decision-making.[171] The state may thus be viewed as possessing a "subsidiary" role in ensuring the well-being of children.[172] This is further supported by the Court's statement in *Troxel* that "so long as [the] parent adequately cares for [the] child[], there will normally be no reason for the State to inject itself into the private realm of the family

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[168] Moschella, *supra* note 161, at 204; Parham v. J.R., 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.").

[169] *See* Moschella, *supra* note 162, at 207.

[170] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 327–28 (1990) (Brennan, J., dissenting) (citations omitted).

[171] Moschella, *supra* note 161, at 213 (noting that at least within the context of education, state interference could prevent parents from fulfilling their obligations toward their children, violating parents' integrity and potentially harming the children both directly and indirectly).

[172] *Id.*

to . . . question" parental decision-making.[173] This is exactly why parental decision-making within the area of compulsory vaccine mandates should be entitled to strict scrutiny. Placing the burden on the state to prove that it has a "compelling state interest"[174] in overriding both parental decision-making and the bodily autonomy of the child would reflect the state's role as a subsidiary caretaker. Utilizing strict scrutiny would also be consistent with the doctrine of *parens patriae*. The very concept of *parens patriae* denotes that "the state must care for those who cannot care for themselves, such as children who lack proper care and supervision from their parents,"[175] thus implying that state interference is only justified when parents have abdicated their responsibility as the primary caregivers of their children.

A mere refusal to vaccinate the child cannot be prima facie evidence of child abuse or neglect unless the state satisfies strict scrutiny review. Child neglect standards are often products of state law.[176] State law cases dealing with child abuse or neglect often occur within the context of severe parental maltreatment of the child or other grossly negligent behavior toward the child that puts the child in a *present*, *non-speculative* threat of injury, abuse, or death.[177] In contrast, by definition, vaccinations are administered in order to prevent potential *future* diseases and *future* threats of injury.[178] Penalizing parents for failure to administer a prophylactic measure in order to prevent a *possible* disease or sickness is hardly consistent with child neglect law because there is often no imminent threat to a child resulting

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173 Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

174 Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

175 Admin. for Child.'s Servs. v. Erica A., 537 Misc. 3d 639, 650 (N.Y. Fam. Ct. 2012).

176 *See, e.g.*, W. VA. CODE § 49–1–201 (2022); N.J. STAT. ANN § 9:6–8.21 (West 2022); TENN. CODE ANN. § 39–15–401 (2022).

177 *See, e.g.*, *In re* A.L.C.M., 801 S.E.2d 260, 262–63 (W. Va. 2017) (holding that a child born with illegal drugs in its system was abused and neglected because the parent knowingly inflicted physical injury on the child); Dept. of Child. & Fams., Div. of Child Prot. & Permanency v. E.D.–O., 121 A.3d 832, 834 (N.J. 2015) (holding that a mother who left her nineteen-month-old baby in the car at a store neglected her child but deserved a hearing); State v. Goodman, No. M2001-02880-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 288, at *5, *35 (2003) (holding that a rational jury could have determined that the defendant neglected her child when she did not seek medical attention more than once for her malnourished child for over four months).

178 *See Vaccine*, MERRIAM WEBSTER DICTIONARY, https://www.merriam–webster.com/dictionary/vaccine (last visited Feb. 18, 2023).

from a failure to vaccinate. As demonstrated earlier, some states require a routine immunization schedule throughout the youth of the child that applies regardless of the existence of any health crisis, disease outbreak, or any other imminent threat to the child.[179] As a matter of constitutional law and the specific case law generated in the last fifty years regarding both bodily autonomy and parental rights, compulsory vaccine mandates for minor children should be subjected to strict scrutiny. While the application of strict scrutiny to compulsory vaccine mandates generally is not a novel idea,[180] there are special constitutional justifications for prioritizing parental rights within the vaccine context.[181]

B. The Supreme Court's Decision in Dobbs v. Jackson Women's Health Organization Does Not Change This Result.

In the 2022 case of *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned both *Roe v. Wade* and *Planned Parenthood v. Casey*.[182] After decades of insisting that the right to have an abortion is a fundamental right, the Court announced that "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives. 'The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by

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[179] *See* discussion *supra* Section III.A.1.

[180] *See* Christopher Richins, *Jacobson Revisited: An Argument for Strict Judicial Scrutiny of Compulsory Vaccination*, 32 J. LEGAL MED. 409, 409–10 (2011).

[181] This is not to say, of course, that no minor children below the age of eighteen could get vaccinated unless their parents or legal guardians approved. Within abortion cases, the Supreme Court has authorized decisions of a minor to receive an abortion against parental wishes. Bellotti v. Baird, 443 U.S. 622, 647 (1979) ("[E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents[,]" and "[i]f [the minor] satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent."). Such deference within the vaccine context would likely depend on the age and maturity of the child. While the precedential value of *Baird* is called into question by *Dobbs v. Jackson Women's Health Organization*, the concept that older children are not always subject to their parent's control naturally carries over from *Baird*.

[182] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

citizens trying to persuade one another and then voting.'"[183] The Court noted that "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . ."[184] Because the right to an abortion is not "deeply rooted in this Nation's history and tradition," nor was it "implicit in the concept of ordered liberty,"[185] it is no longer protected by the Constitution and no longer subject to heightened scrutiny.[186] Instead, the Court now reviews legislative decisions that curtail abortion rights under rational basis review, noting "[t]hat respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance."[187]

Although the Court "stated unequivocally that nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion,"[188] other justices have expressed doubts that the majority's rationale in *Dobbs* can be limited to abortion. Justice Breyer in his dissent observed that "[t]he right [in] *Roe* and *Casey* . . . does not stand alone" and is "linked . . . to other settled freedoms involving bodily integrity, familial relationships, and procreation."[189] Justice Thomas would sweep away the doctrine of substantive due process entirely, arguing that "substantive due process exalts judges at the expense of the People from whom they derive their authority."[190] Because "the Court's approach for identifying those fundamental rights unquestionably involves policymaking rather than neutral legal analysis,"[191] Justice Thomas would overrule all substantive due process cases. The point raised by Justice Thomas would seem to provide implicit support for the idea that parental rights, bodily autonomy, and the right to refuse compulsory vaccines should remain in the hands of the state legislatures, not in the hands of the Court. The dissent's premonition that

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183 *Id.* at 2243 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

184 *Id.* at 2242.

185 *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

186 *See id.* at 2283.

187 *Id.* at 2284.

188 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2280 (2022).

189 *Id.* at 2319 (Breyer, J., dissenting).

190 *See id.* at 2302 (Thomas, J., concurring in judgment) (citation omitted).

191 *Id.* (quoting United States v. Carlton, 512 U.S. 26, 41–42 (1994).

the Court may overrule other areas of substantive due process may yet come to pass in the future.

However, such an approach would utterly fail to protect parental rights and the bodily autonomy of the child. Unlike abortion, the right to refuse a mandatory vaccine is deeply rooted in the history and tradition of honoring parental rights and the bodily autonomy of the child.[192] Continuing to defer to the states would permit the states to exercise extraordinary power over the parent–child relationship and to subject parents to criminal penalties for abstaining from injecting their children with a prophylactic potion.[193] Further, abortion is fundamentally distinct from a refusal to vaccinate a child. "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."[194] When a woman decides to terminate the potential life developing within her, she intentionally disrupts the natural process of fetal development. When the legislature decides to restrict or outlaw abortion, in most cases, the "harm" that results to the woman is the "harm" of being forced to naturally deliver the fetus that she likely decided to bring into existence or at least assumed the risk of creating.[195] However, when the legislature creates a law that requires a parent to vaccinate their child, the legislature intentionally disrupts the natural relationship between parent and child and forces the child to be injected with an unnatural vaccine. The state forces the parent to comply with this disruption, not desist from an act that they are already performing.

Finally, vaccinating a child may cause serious harm to that child. The National Vaccine Injury Compensation Program was created by Congress in 1986 to "compensate individuals, or families of individuals, who have

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192 *See* discussion *supra* Section IV.A.2.b.

193 *See* discussion *supra* Section IV.A.2.c.

194 Harris v. McRae, 448 U.S. 297, 325 (1980).

195 Pregnancies do sometimes result from rape. *See* Melisa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women,* 175 AM. J. OBSTETRICS GYNECOLOGY 320, 322 (1996) (estimating that up to 5% of rapes result in pregnancies in victims between twelve and forty-five). Some women sadly die from pregnancy or delivery complications. *See Preventing Pregnancy-Related Deaths*, CDC, https://www.cdc.gov/reproductivehealth/maternal-mortality/preventing-pregnancy-related-deaths.html (last visited Feb. 16, 2023). Yet many pregnancies result from consensual sexual intercourse, whether the pregnancy was intended or not.

been injured by childhood vaccines . . . ."[196] Parents have successfully claimed that vaccines directly caused severe injuries such as seizures[197] and spinal cord inflammation.[198] The Vaccine Adverse Event Reporting System (VAERS) was created in 1990 and exists for the purpose of "detect[ing] possible safety problems in U.S. licensed vaccines."[199] If parents may be forced to vaccinate their children, and the vaccination causes severe adverse consequences to the child, the state indirectly causes harm to the child by disrupting the parent–child relationship. Such an unjust result should no longer be protected under rational basis review.

C. Application of Strict Scrutiny

The state could likely still satisfy strict scrutiny. Depending on the context, the state could easily have a compelling interest in protecting its citizens by compulsory vaccination. Some may argue that intermediate scrutiny should be applied, but intermediate scrutiny would be insufficient to protect the family from undue state interference. Within the COVID-19 context, the state would likely not satisfy strict scrutiny because the severity of the disease for minor children would not be high enough to make the state's interest compelling. However, as more data becomes available, the state could likely present sufficient evidence to demonstrate that it has a compelling interest in compulsory vaccination.

1. The Relationship Between Strict Scrutiny, Public Schools, And Intermediate Scrutiny

Applying strict scrutiny would not obviate the legitimate interest of the state in the health and safety of the public, nor would it hamper public-school systems from enacting vaccine requirements as condition precedents to admission and education. Under strict scrutiny, the state must prove that it has a compelling government interest and its actions are "narrowly

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[196] *National Vaccine Injury Compensation Program*, BENEFITS.GOV, https://www.benefits.gov/benefit/641 (last visited Feb. 16, 2023); *see also* Andreu v. Sec'y of HHS, 569 F.3d 1367, 1370 (Fed. Cir. 2009).

[197] *See Andreu*, 569 F.3d at 1371–83; Grant v. Sec'y of HHS, No. 88-70V, 1990 U.S. Cl. Ct. LEXIS 298, at *64 (Cl. Ct. 1990).

[198] *See* Hargrove v. Sec'y of HHS, No. 05-0694V, 2009 U.S. Claims LEXIS 171, at *127 (Fed. Cl. 2009).

[199] *About VAERS*, HHS, https://vaers.hhs.gov/about.html (last visited Feb. 16, 2023).

tailored" to achieve that interest.[200] Within the vaccine context, vaccine mandates would likely be "narrowly tailored" to fit the state interest because during a health emergency, the state could decide—and the court could find—that there is no other way for the state to respond to keep its citizens safe.[201] Thus, the sole inquiry would likely be whether the state has a compelling interest in creating compulsory vaccine mandates and criminalizing the failure of the parent to vaccinate the child.

Within the public-school context, the state could likely prove that it has a compelling interest in requiring mandatory vaccinations. Because school children are placed within proximity to one another daily, from a constitutional standpoint, the necessity of state action would likely be greater. In other words, the state's interest in compulsory vaccinations could be compelling because its legitimate interest in health and safety would be enhanced by the dangers of mass disease outbreaks among children in a close area. Moreover, within the context of education and equal protection, the Supreme Court has declined to apply heightened scrutiny on at least one occasion.[202] If viewed as intertwined with public education, compulsory vaccine mandates in public schools would probably survive.

However, strict scrutiny would likely eviscerate overbroad statutes that draw no distinction between public-school children or homeschool children. Mandating vaccine requirements for the entire state—in the absence of any exigent circumstance—would likely fail to constitute a compelling interest because there would be less necessity outside the public-school context for such measures. Utilizing draconian measures—such as criminalizing vaccine hesitancy—would, in most instances, be outside the

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[200] Abrams v. Johnson, 521 U.S. 74, 91 (1997).

[201] *See* Ben Horowitz, *A Shot in the Arm: What a Modern Approach to* Jacobson v. Massachusetts *Means for Mandatory Vaccinations During a Public Health Emergency*, 60 AM. U. L. REV. 1715, 1741 (2011) ("A less-restrictive course of action need not be taken when it is not as effective as the challenged government conduct."); *see also* Richins, *supra* note 180, at 442–43.

[202] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–18 (1973).

power of the state because strict scrutiny is based on the premise that the governmental interest is of "exceeding importance."[203]

Some might argue that since courts have recognized that parental rights warrant heightened scrutiny but have not applied strict scrutiny,[204] vaccine mandates would not warrant strict scrutiny either. Yet applying intermediate scrutiny or a balancing test would be insufficient to competently protect the interests of the parent and the child. Intermediate scrutiny only examines whether the state measure is substantially related to an important government interest.[205] This standard is inherently ambiguous and provides no answers because intermediate scrutiny has often been equated to a balancing test.[206] Balancing tests—at least when associated with intermediate scrutiny—are often incredibly inconsistent, provide no intelligible principles or framework for consistent analysis, and permit the court to interject its own policy preferences into legal analysis.[207] Applying a

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[203] *See* Nicholas Nugent, Note, *Toward a RFRA that Works*, 61 VAND. L. REV. 1027, 1054 (2008) ("[C]ompelling interest . . . [generally] refers to a governmental interest of exceeding importance.").

[204] *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (reasoning that the Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation but refraining from applying a level of scrutiny in their analysis); Hutchins v. District of Columbia, 188 F.3d 531, 541 (D.C. Cir. 1999) (applying intermediate scrutiny to a juvenile curfew law); N.Y. Youth Club v. Town of Smithtown, 867 F. Supp. 2d 328, 337–38 (E.D.N.Y. 2012) (deciding that intermediate scrutiny applies when assessing an ordinance's impact on parental rights).

[205] Craig v. Boren, 429 U.S. 190, 197 (1976).

[206] Free Speech Coal., Inc. v. AG United States, 787 F.3d 142, 152 (3rd Cir. 2015) ("Our analysis when applying intermediate scrutiny 'always encompasses some balancing of the state interest and the means used to effectuate that interest . . . .'" (citing Bartnicki v. Vopper, 200 F.3d 109, 124 (3d Cir. 1999), *aff'd*, 532 U.S. 514 (2001))); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992) (describing intermediate scrutiny as "overt balancing").

[207] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("We have no established criterion for 'intermediate scrutiny' either, but essentially apply it when it seems like a good idea to load the dice."); *Boren*, 429 U.S. at 221 (Rehnquist, J., dissenting) ("[The intermediate scrutiny standard is] so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particulars types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough."); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 398 (1985) (arguing that balancing is unlikely to yield uniform, predictable, and impartial results); Martin H. Redish, *The Content Distinction in*

balancing test within a challenge to a compulsory vaccine mandate would neither provide analytical consistency nor protect familial interests because judges could incorporate their own political views in the guise of applying a legal standard. With the politicization of COVID-19 vaccines, the necessity for solid guidelines becomes even more apparent. While strict scrutiny is not a perfect solution, it places the burden on the State to prove that it has a strong enough interest in disregarding family interests while also providing the State with a sufficient legal basis to do so based on context, not on deference to the legislature.

2. Strict Scrutiny Applied: COVID-19

Assume that a state legislature enacted a new law requiring every child in the state to receive the Pfizer COVID-19 vaccine. This law would be virtually identical to North Carolina's vaccine law, which draws no distinction between homeschooled and public-school children,[208] and it would also require mandatory COVID-19 immunizations under threat of criminal penalty.[209] Would this law survive strict scrutiny?

To satisfy strict scrutiny, the state would have the burden of proving that it has a compelling interest[210] in creating a compulsory COVID-19 mandate for all children in the state. This would likely depend on several factors, including at least the morbidity and mortality rates of the disease, the severity of disease symptoms, and the severity of the side effects associated with a specific vaccination.[211] Balanced against the liberty interests at stake—the fundamental right of the parent to refuse vaccines on behalf of the child and the child's own interest in bodily autonomy—the nature of the disease would be highly relevant in determining whether the state's role as a subsidiary caretaker transforms into that of a primary caretaker in protecting the child. At this time, COVID-19 vaccine mandates for minor children outside the public-school system would likely fail strict scrutiny for at least two reasons.

First Amendment Analysis, 34 STAN. L. REV. 113, 119 n.44 (1981) ("[Balancing tests] inevitably become intertwined with the ideological predispositions of those doing the balancing . . . ."(citation omitted)).

208 N.C. GEN. STAT. § 130A–152 (2022).

209 *Id.* § 130A–25.

210 Abrams v. Johnson, 521 U.S. 74, 91 (1997).

211 Richins, *supra* note 180, at 443.

First, the infection rates and severity of COVID-19 symptoms for minor children are, in most cases, extremely low. Many children appear to be less susceptible to infection by SARS-CoV-1 and SARS-CoV-compared to other viruses such as influenza and RSV.[212] During the height of COVID-19's reign, more than 90% of all SARS-Cov-2 cases in the United States occurred in individuals sixteen years of age or older.[213] Even if a child is infected with COVID-19, several studies have found that the vast majority of the children infected are either asymptomatic or have mild symptoms such as coughing, fever, or sore throat, among other symptoms.[214] COVID-19 poses much less of a health risk to otherwise healthy children than it does to many adults.[215] The known benefits of a COVID-19 vaccine to children are limited.[216] Therefore, the state would likely fail to demonstrate that it has a compelling interest in ignoring personal liberty because the necessity for state action would be negligible at best.

Second, the politicization of COVID-19 and legitimate questions of vaccine safety would be problematic for the state in establishing its compelling interest. In May 2020, Operation Warp Speed was designed to accelerate the COVID-19 vaccine developmental process,[217] yet many Americans "on both sides of the aisle" believe that the "COVID-19 vaccine

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[212] Nitin Dhochak et al., *Pathophysiology of COVID-19: Why Children Fare Better than Adults?*, 87 INDIAN J. PEDIATRICS 537, 539 (2020).

[213] Naik Ramachandra, *Summary Basis for Regulatory Action—Comirnaty*, FDA, 4–5 (Nov. 8, 2021), https://www.fda.gov/media/151733/download.

[214] Ludvigsson, *supra* note 98, at 1090 ("In the largest child case series so far, more than 90% of the 2,143 children diagnosed with laboratory-verified or clinically diagnosed COVID-19 had asymptomatic, mild, or moderate disease."); Petra Zimmermann & Nigel Curtis, *Coronavirus Infections in Children Including COVID-19: An Overview of the Epidemiology, Clinical Features, Diagnosis, Treatment and Prevention Options in Children*, 39 PEDIATRIC INFECTIOUS DISEASE J. 355, 359 (2020) ("There are 3 case series that report a total of 41 children who were affected by SARS-CoV . . . . Symptomatic children with SARS-CoV infection were reported to have fever (91%–100%), myalgia (10%–40%), rhinitis (33%–60%), sore throat (5%–30%), cough (43%–80%), dyspnea (10%-14%), headache (14%–40%) and, less commonly, vomiting (20%) abdominal pain (10%), diarrhea (10%) and febrile seizures (10%).").

[215] Dhochak, *supra* note 212, at 542.

[216] Dorit R. Reiss & Arthur L. Caplan, Essay, *Considerations in Mandating a New Covid-19 Vaccine in the USA for Children and Adults*, J.L. & BIOSCIENCES 1, 4 (2020).

[217] Madison N. Heckel, *Do I Have To? Mandating a Vaccine in a Politicized Pandemic*, 30 STUDENT HEALTH POL'Y & L. REV. LOY. U. CHI. SCH. L. 183, 187 (2020).

approval process is being driven by politics rather than science."[218] "[S]hared skepticism in the safety or effectiveness of a vaccine" could very well "lead a court to find that individual liberty outweighs the value of the vaccine to public safety."[219] There is also some evidence that vaccine development has been rushed. Vaccine testing usually takes years,[220] but Moderna skipped animal studies and moved straight to testing its vaccine on people.[221]

Under rational basis review, these considerations would not impact any court's decision because the judiciary does not consider empirical data at the rational basis stage,[222] but under strict scrutiny, clear answers to these issues would be necessary to survive strict scrutiny. Strict scrutiny would at least allow the court to consider various factors which would determine whether the state truly has a sufficiently compelling reason to invade personal liberty.

V. CONCLUSION

When a state imposes mandatory vaccine requirements on every child in the state and criminalizes those parents who fail to comply, deference to the legislature is inappropriate. To preserve individual liberty, the measures used by the state to achieve its legitimate interest in health and welfare should be more closely examined when the state law endangers both the child's right of bodily autonomy and the parent's fundamental right in the care and custody of that child. Viewed together, both rights are implicated in the immunization context and require judicial scrutiny, not judicial indifference. Although *Jacobson* sought to give the legislature leeway to protect the public, the Court's decision in 1905 now unavoidably clashes with the Court's jurisprudence in the areas of parental rights and bodily

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218 *Id.* at 189.

219 *Id.* at 194.

220 Reiss & Caplan, *supra* note 216, at 5.

221 Eric Boodman, *Researchers Rush to Test Coronavirus Vaccine in People Without Knowing How Well it Works in Animals*, STATNEWS, (Mar. 11, 2022), https://www.statnews.com/2020/03/11/researchers-rush-to-start-moderna-coronavirus-vaccine-trial-without-usual-animal-testing/.

222 *See* FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.").

rights. If this conflict persists, the law as it stands permits unprecedented interference into the sphere of the family, especially with the advent of COVID-19 and the political furor surrounding it. While some might say that state measures are justified by the state's interest in health and safety, the words "health and safety" should not be used as a talisman to justify state interference when the state measures are conceivably rational. Emphasizing the general concept of health and safety over the law used to accomplish public health has grave implications for individual liberty, which is why strict scrutiny for childhood vaccine mandates is a step towards recognizing the sanctity of that childhood, the parent's role as primary caretaker of the child, and the state's *parens patriae* role as a subsidiary caretaker.