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States May Protect Minors by Banning "Gender-Affirming Care"

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KEY TAKEAWAYS

The U.S. Supreme Court has recognized that parents have a constitutional right to direct their children's upbringing in specific contexts such as education.

Courts should resist creating substantive rights not in the Constitution's text, especially when an issue is the subject of public debate and legislative action.

Controversial medical interventions for minors' gender dysphoria are not, as the Supreme Court requires, "deeply rooted in [America's] history and tradition."

The American Psychiatric Association defines "gender dysphoria" as "psychological distress that results from an incongruence between one's sex…and one's…psychological sense of [his or her] gender."[1] "Gender-affirming care"—which prioritizes a person's claimed "gender identity" over his or her sex—has social, legal, medical, and surgical components.[2] It is "sometimes referred to as transition-related care"[3] because it is intended to facilitate an individual's movement away from his or her sex and toward a desired gender identity.

The U.S. Food and Drug Administration (FDA) has approved a group of drugs, called GnRH agonists, that suppress production of the hormones estrogen and testosterone. The FDA has approved this category of drugs to treat abnormally early puberty in minors, endometriosis, and prostate cancer[4] but "has never approved them for gender dysphoria" for either

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adults or minors.[5] They are nonetheless increasingly being prescribed for minors who wish to "make the[ir] body look and feel more like that of the opposite sex."[6]

While many drugs are prescribed for "off-label" uses, doing so "circumvents the FDA's authority to examine drug safety and efficacy, especially when the patients are children."[7] This is particularly hazardous when the promotion and off-label use of a drug are part of a high-profile political or cultural campaign. That appears to be the case with "gender-affirming" medical interventions.

Several European countries that uncritically embraced "gender-affirming care" for minors have already reconsidered or reversed course as the lack of evidence supporting the safety and effectiveness of these drugs becomes more widely known and evidence of negative long-term health consequences accumulates.[8] In the United States, the FDA is being sued for allegedly concealing records regarding the off-label use of puberty blockers and cross-sex hormones on minors.[9] In addition, nearly two dozen states have enacted laws prohibiting "gender-affirming" interventions for minors in most circumstances.[10]

Parents who seek to obtain such interventions for their children have filed lawsuits in several of these states, arguing that banning such treatment for minors violates the parents' constitutional right, protected by the Fourteenth Amendment, to direct the upbringing of their children.[11] This *Legal Memorandum* will evaluate that contention by examining the foundation and recognition of the parental rights involved and whether those rights extend to obtaining a specific type of medical intervention, such as those referred to as "gender-affirming care," for minor children.

The Fourteenth Amendment and Substantive Rights

The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law."[12] The Supreme Court of the United States has held that, while framed in procedural terms, the Due Process Clause also protects substantive rights.[13] This interpretive approach is called *substantive due process*.

Opening this door is potentially problematic. America's Founders created a written Constitution so that its limits on government "may not be mistaken or forgotten."[14] That purpose is made more difficult if the Constitution is said also to contain unwritten limits on government in the form of unenumerated substantive rights that only judges can discern. Nevertheless, as Supreme Court Justice Samuel Alito recently noted, "[b]y its terms, the

Due Process Clause is about procedure, but over the years, it has become a refuge of sorts for [substantive] constitutional principles."[15]

This path arguably gives the judiciary more power than the Founders designed it to have. The Constitution is the "supreme law of the land,"[16] and as the Supreme Court acknowledged in *Marbury v. Madison*, "[its] framers... contemplated that instrument as a rule for the government of *courts*, as well as of the legislature."[17] The Constitution cannot be such a rule, at least not fully, if judges can, in effect, add provisions that the Framers neither put there nor may even have contemplated.

The "natural human tendency to confuse what the [Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy"[18] makes substantive due process a "treacherous field."[19] The Supreme Court, therefore, has repeatedly urged the "utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[20] The Supreme Court has identified a few limiting principles that help avoid this result.

- Substantive rights protected by the Due Process Clause are limited to those that are, "objectively, 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.'"[21]

- Rights said to meet these criteria must be carefully or specifically described[22] rather than generally or vaguely stated. The Supreme Court "has always been reluctant to expand the concept of substantive due process" and has focused on "how [a] petitioner describes the [unenumerated] constitutional right at stake."[23] It has subjected both enumerated and unenumerated rights to a "careful analysis of the history of the right at issue."[24]

In addition to caution about creating any unenumerated substantive rights, the Supreme Court has held that, whether or not appearing in the text, constitutional rights are not absolute. Advocates of gun control, for example, often quote from Justice Antonin Scalia's opinion in *District of Columbia v. Heller*[25] that "the right secured by the Second Amendment is not unlimited."[26] President Biden has quoted these words in remarks about gun restrictions,[27] and the Giffords Law Center to Prevent Gun Violence highlights them with a large bold font on its website.[28]

In annual surveys of civic knowledge, freedom of speech is typically the only First Amendment right that a majority of Americans can identify.[29] Even freedom of speech, however, has its limits. It has become axiomatic that, as Justice Oliver Wendell Holmes originally put it, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[30]

Unenumerated constitutional rights are similarly limited. In *Roe v. Wade*, for example, the Court held that the general "right of privacy," which it had previously recognized,[31] "is broad enough to encompass a woman's decision whether or not to terminate a pregnancy."[32] That right, however, "cannot be said to be absolute."[33] Similarly, the "fundamental right of parents to make decisions concerning the care, custody, and control of children,"[34] while "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court,"[35] is "[not] beyond limitation."[36]

Foundation and Recognition of Parental Rights

In his *Commentaries on the Laws of England*, William Blackstone wrote of parents' common-law duty to provide for the maintenance, protection, and education of their children.[37] Professor Robert Sedler explains that this duty was later codified in state laws and became the basis for an unenumerated Fourteenth Amendment right of parents to direct the upbringing and care of their children.[38] The Supreme Court has similarly observed that the "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[39]

Blackstone emphasized that the duty of parents to provide a suitable education for children was "of far the greatest importance of any."[40] Similarly, consistent with the necessary caution in navigating this "treacherous field" of substantive due process, the Supreme Court's first recognition of parents' right to direct the upbringing of their children was limited to "the power of parents to control the education of their own."[41] Several precedents inform this analysis.

In *Meyer v. Nebraska*,[42] a teacher challenged a state law that prohibited any person, "individually or as a teacher…in any private, denominational, parochial, or public school" from teaching "any subject to any person in any language than the English language" until after the eighth grade.[43] The Nebraska Supreme Court affirmed the teacher's conviction for using German to teach reading, holding that the statute "comes reasonably within the police power of the state"[44] and did not violate the Fourteenth Amendment.

The issue before the U.S. Supreme Court in *Meyer* was whether this statute "unreasonably infringes the liberty guaranteed…by the Fourteenth Amendment."[45] The Court held that it did, overturned the conviction, and struck down the statute. The Court had previously interpreted the Due Process Clause to include "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[46] The "established doctrine" at the time the Court decided *Meyer* was that "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."[47]

Pierce v. Society of Sisters[48] challenged a law, adopted by the voters in Oregon, requiring that children between the ages of eight and 16 attend public schools. The Society of Sisters of the Holy Names of Jesus and Mary, which operated schools providing both secular and religious education, and the Hill Military Academy, which provided private education for boys who were five to 21 years old, challenged the law. Citing *Meyer*, the Supreme Court held as "entirely plain" that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[49]

The standard, the Court said, was that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."[50] The plaintiffs in *Meyer* could challenge the law because the "unwarranted compulsion…over present and prospective patrons of their schools"[51] meant "destruction of their business and property."[52]

In *Prince v. Massachusetts*,[53] a Jehovah's Witness challenged her conviction under Massachusetts' child labor law for permitting her nine-year-old niece, over whom she had custody, to sell religious literature. She claimed that the law violated both her First Amendment right to exercise religion and, citing *Meyer*, her Fourteenth Amendment right to direct the upbringing of a child in her custody. "It is cardinal with us," the Court said, "that the custody, care and nurture of the child reside first in the parents…. But the family itself is not beyond regulation in the public interest…. [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[54]

The Court also held that "[t]he state's authority over children's activities is broader than over like actions of adults" but not unlimited.[55] Put in more personal terms, "[p]arents may be free to become martyrs themselves. But it does not follow they are free…to make martyrs of their children before

they have reached the age of full and legal discretion when they can make that choice for themselves."[56] In this light, the Supreme Court affirmed the conviction.

Troxel v. Granville[57] involved a challenge to a Washington State law allowing any person to petition a court for visitation rights whenever "visitation may serve the best interest of the child."[58] After the father of two girls died, their paternal grandparents petitioned for visitation rights over their mother's objection. The Washington Supreme Court held that the statute violated the mother's Fourteenth Amendment right to rear her children. The U.S. Supreme Court agreed,[59] noting that under the "breathtakingly broad" visitation statute, "a parent's decision that visitation would not be in the child's best interest is accorded no deference."[60] The Court limited its conclusion to this specific factual context, declining to speculate as to whether a narrower statute that gave more deference to a parent's evaluation of the child's best interest might also be unconstitutional.[61]

The U.S. Supreme Court has thus recognized a Fourteenth Amendment right of parents to direct the upbringing of their children but has done so in specific contexts such as education or with reference to particular facts such as the "breathtakingly broad" visitation statute in *Troxel*.[62] This background helps to clarify the novelty of the plaintiffs' claim that banning "gender-affirming care" for minors is unconstitutional. These challenges exist far outside the familiar education context. A "careful description" of their argument is that the Fourteenth Amendment protects their right to obtain a specific kind of medical intervention for someone else and that has not been found to be safe and effective if used as the parents want it used. Each basic element of this claim pushes substantive due process past where it has ever been.

In *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*,[63] terminally ill patients claimed a Fourteenth Amendment right to access experimental drugs that had "passed limited safety trials but had not been proven safe and effective."[64] The U.S. Court of Appeals for the D.C. Circuit, sitting *en banc*, concluded that such a right is not deeply rooted in America's history and tradition. Rather, "our Nation has long expressed interest in drug regulation, calibrating its response in terms of the capabilities to determine the risks associated with both drug safety and efficacy."[65]

Today, it is the FDA that allows marketing of particular drugs for specific uses by determining that they are safe and effective for those uses.[66] The D.C. Circuit concluded that "FDA regulation of post-Phase I drugs is entirely consistent with our historical tradition of prohibiting the sale of unsafe drugs."[67] As will be discussed more fully below, the Supreme Court has never

recognized "a general right to receive new medical or experimental drug treatments,"[68] even for adults; therefore, "[t]here's little reason to think that a parent's right to make decisions for a child sweeps more broadly than an adult's right to make decisions for herself."[69]

State Bans on "Gender-Affirming Care"

Establishing that the general right of parents to direct the upbringing and care of their minor children is not absolute and that courts have not recognized a right to obtain medical care that is experimental or has not been found to be safe and effective makes the answer to the next question clear. Do state laws prohibiting "gender-affirming" medical interventions for minors violate parents' constitutional rights? The answer is no. These bans are consistent both with the authority of states to regulate the practice of medicine generally and with the traditional understanding of parental rights as recognized by federal courts for more than a century.

Criticisms of "Gender-Affirming Care." Advocates want to portray "gender-affirming care" as ordinary medical care, no different from familiar drug therapies or surgical procedures. It is not. As noted above, the FDA has not found puberty blockers or cross-sex hormones to be safe and effective for treating gender dysphoria. Clarifying that these interventions are in fact controversial, novel, and unproven provides important context for answering the legal question raised in lawsuits over state prohibitions.

As reported by the UCLA School of Law's Williams Institute, more than 300,000 high school–aged (ages 13–17) children in the United States today identify as "transgender,"[70] comprising the largest share of the overall transgender-identified population.[71] Moreover, between 2017 and 2021, the number of children in the United States taking puberty blockers or cross-sex hormones doubled.[72] Double mastectomies performed on adolescent girls increased by nearly 400 percent during the same period.[73]

As noted above, gender dysphoria is an inherently subjective or impressionistic diagnosis, based as it is on an individual's "psychological sense of [his or her] gender."[74] This means that factors that would not affect the incidence of other medical conditions might have a profound effect on this precipitous rise in the number of minor children expressing sudden onset gender dysphoria. Many critics, in fact, are exploring the "transgender craze"[75] as part of the incursion of gender ideology into every facet of American life. Unfortunately, the medical establishment has not shown the kind of rigorous objectivity that this phenomenon requires. Before this recent surge in the diagnosis of gender dysphoria, up to 94 percent of adolescents

with such distress experienced a resolution of symptoms after they passed through puberty.[76] Nevertheless, much of the medical establishment has uncritically embraced "gender-affirming care" as the preferred treatment.

The American Academy of Pediatrics (AAP), for example, endorses the World Professional Association of Transgender Health (WPATH) approach to gender dysphoria: the irreversible altering of a minor's secondary sex traits through surgeries and cross-sex hormones. WPATH's guidelines for treating gender dysphoria are highly suspect, however.[77] Its Standards of Care for adolescents seeking hormones, for example, are based largely on a single study now known as the "Dutch Study" and its related protocol.[78] That protocol was far more restricted and conservative than WPATH's preference, and even the Dutch study has been subjected to withering and widespread criticism for its biased methodology, inapplicability to current clinical practice in Western countries, and unimpressive findings.[79]

James Cantor, a researcher at Toronto's Center for Sexual Health, reported in the *Journal of Marital & Sexual Therapy* that the AAP's policy statement on "[e]nsuring comprehensive care and support for transgender and gender-diverse children and adolescents"[80] was deeply flawed. Not only did the AAP statement fail to include any of the actual outcomes literature on cases of "gender diverse" children, but it also misrepresented the contents of its citations, which repeatedly said the opposite of what AAP attributed to them.[81] The AAP's affirm-only/affirm-early position regarding the treatment of gender dysphoria in minors has been on shaky ground at least since 2018.[82]

Problems with scientific research methods regarding gender dysphoria and the conclusions drawn from them abound. As a result, a medical consensus for minors regarding the bundle of interventions referred to collectively as "gender-affirming care" simply does not exist. One paper posted on the National Institutes of Health website, for example, asserts that "virtually nothing is known regarding adolescent-onset [gender dysphoria]."[83] Sweden, the Netherlands, the United Kingdom, Finland, and now Denmark[84] have backtracked from earlier representations that medical interventions were needed for gender-dysphoric minors and now recommend more conservative approaches, including "watchful waiting."[85] Notably, in the United Kingdom, one clinical journal attributed the lack of safeguards for children in England's largest pediatric gender clinic to the uncritical "affirmative model," which "originated in the USA."[86]

The medical interventions that comprise "gender-affirming care" not only can but are intended to have lifelong consequences. Information on the long-term impact of these treatments, however, is scant. Reuters news service recently reported on this paucity of evidence, noting that:

> Puberty blockers and sex hormones do not have U.S. Food and Drug Administration (FDA) approval for children's gender care. No clinical trials have established their safety for such off-label use. The drugs' long-term effects on fertility and sexual function remain unclear. And in 2016, the FDA ordered makers of puberty blockers to add a warning about psychiatric problems to the drugs' label after the agency received several reports of suicidal thoughts in children who were taking them. More broadly, no large-scale studies have tracked people who received gender-related medical care as children to determine how many remained satisfied with their treatment as they aged and how many eventually regretted transitioning.[87]

In addition to the lack of affirmative evidence for these treatments, the growing number of adolescents who later regret receiving them illustrates the need for deliberation and careful analysis in pediatric gender medicine. A 2021 study by Dr. Lisa Littman published in the *Archives of Sexual Behavior*[88] suggests that the number of detransitioners[89] has been underestimated and that these adolescents often have complex, underlying mental health conditions that a reflexive move to transition did not solve.

- A majority of respondents had been diagnosed with at least one psychiatric or neurodevelopmental issue.
- More than one-third reported experiencing trauma before the onset of gender dysphoria.
- Almost half of respondents stated that the medical counseling regarding transition was overly positive about its benefits and lacked any discussion of risks or possible side effects.
- Some participants even reported that mental health and medical clinicians pressured them into "gender-affirming" medical transition.[90]

The statistics on the comorbidity of gender dysphoria and mental illness similarly reinforce the need for a cautious "wait and see" approach when dealing with adolescent gender dysphoria and related distress. Based on a survey of more 10,000 patients, for example, a 2019 study[91] found that nearly 60 percent of transgender-identified patients in a more than 10,000-patient survey were diagnosed with at least one psychiatric disorder. A recent Heritage Foundation report found that "easing access to cross-sex treatments without parental consent significantly increases suicide rates."[92] And a

major long-term study out of Sweden revealed that adults who underwent "gender-affirming" surgery were 19 times more likely than the general population to die by suicide.[93]

If there is a consensus regarding the best approach to gender dysphoria and "gender-affirming" care, it is evidenced by nearly every clinical and professional association in the world using approaches to helping gender-dysphoric children that are far more conservative than the affirm-and-transition approach favored by prominent American medical associations. In other words, it is groups like the AAP in the United States that are out of step with the consensus when they insist instead that their regime for the affirmation of gender identity is the only acceptable approach. Their approach has led to a proliferation of gender clinics nationwide and an increase in the number of children's hospitals and clinics performing "gender-affirming" chemical and surgical treatments.[94] It has also implicated the government's interest in protecting vulnerable minors from irreparable bodily modification and harm.

State Authority to Ban "Gender-Affirming" Medical Treatment for Minors. In response to the proliferation of "gender-affirming" medical interventions across the country, 23 states have enacted restrictions for children under the age of 18.[95] Most of these bans restrict any combination of modalities for gender dysphoria, including puberty blockers, cross-sex hormones, and body-altering surgeries for the purpose of changing a child's gender-based appearance.[96] One recent case provides insight into whether such bans are constitutional.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[97] These powers include what is often referred to as a general "police power" to provide for "[p]ublic safety, public health, morality, peace and quiet, [and] law and order."[98] As recently as 2022, in *Cameron v. EMW Women's Surgical Center, P.S.C.*, the Supreme Court held that "[p]aramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law."[99] A state's opportunity to exercise its sovereign power to enact laws governing its own citizens "should not be lightly cut off."[100] This includes the creation of rights not found in the Constitution's text or deeply rooted in the nation's history or tradition that prevent states from exercising their reserved police power.

The Supreme Court made this plain in *Dobbs v. Jackson Women's Health Organization*,[101] a case challenging a Mississippi ban on most abortions after 15 weeks of pregnancy. States had used their police power to prohibit

abortion for more than 150 years before the Supreme Court, in *Roe v. Wade*,[102] blocked that power by creating a fictitious constitutional right to abortion. In *Dobbs*, the Supreme Court overruled both *Roe v. Wade*[103] and *Planned Parenthood v. Casey*,[104] holding that "the Constitution does not confer a right to abortion."[105] The result returned "authority to regulate abortion" to "the people and their elected representatives."[106]

The states' police power includes regulating the medical profession[107] by proscribing certain procedures or setting standards for performing them and by regulating, restricting, or prohibiting certain medical treatments altogether.[108] As the Supreme Court held in *Dobbs*, these laws are constitutional "if there is a rational basis on which the legislature could have thought that [they] would serve legitimate state interests."[109] Protecting minors[110] from catastrophic harm certainly falls within this category of interest and is not limited only to medical interventions that are, as is the case currently with "gender-affirming care," experimental or when their safety and efficacy have not yet been established.

The states' power to protect minors in this context also means that public policy issues that the Constitution does not clearly withdraw can be addressed through public debate and representative democracy. Abortion advocates attempted to constitutionalize abortion after failing to achieve their objectives in state legislatures.[111] Gender activists today are using the same strategy to remove decisions about "gender-affirming" interventions from the people and their elected representatives. Yet like abortion, this issue has more than just a legal dimension; it raises profound moral, social, and cultural concerns that are not the domain of science and medicine. They are, rather, the kind of matters that are rightly addressed through the political process.

The Court in *Dobbs* relied on its 1997 decision in *Washington v. Glucksberg*[112] for the way to determine whether a right not found in the Constitution's text prevents the state from enacting a particular law. In *Glucksberg*, the Court held that the Fourteenth Amendment's Due Process Clause does not protect a right to assisted suicide. That right, the Court explained, was not "deeply rooted in this Nation's history and tradition" and therefore could be regulated through the democratic process.

In addition, the Court offered counsel that is relevant to this analysis. Courts should not derive fundamental rights "from abstract concepts of personal autonomy."[113] In fact, "the mere novelty" of an asserted right was "reason enough to doubt that [the Constitution] sustains it."[114] That aptly describes an asserted right to "gender-affirming" puberty blockers, cross-sex hormones, and sex-trait modifying surgeries on minors. These are not

only novel and controversial; they have not been approved either separately or jointly by the relevant regulatory authority as safe and effective for treating gender dysphoria, and far from reflecting a widespread medical consensus, they are out of step with the practices in other countries where health authorities have conducted systematic reviews of the scientific evidence. This is strong support for the conclusion that the Constitution does not protect a parental right to obtain "gender-affirming" care for minors.

Litigation Involving State Bans on "Gender-Affirming" Medicine for Minors

As of this writing, parents of minor children seeking "gender-affirming care" have challenged bans in at least 14 states: Florida, Georgia, Montana, Texas, North Dakota, Alabama, Idaho, Arkansas, Indiana, Oklahoma, Tennessee, Nebraska, Missouri, and Kentucky.[115] Three federal appellate courts have reached different conclusions on the constitutionality of these state bans. In each case, plaintiff parents assert an unlimited Due Process Clause substantive right of parents to choose any medical treatment for their children, claiming that there is a well-settled, universal consensus regarding chemical and medical treatment of gender dysphoria in minors or adolescents. In addition, on behalf of their children, they claim that these statutes violate the Constitution's guarantee of equal protection by discriminating against transgender individuals.

Brandt v. Rutledge.[116] An Arkansas statute prohibits "gender transition procedures"[117] for minors. The law defines those procedures as including "any medical or surgical procedure…intended to [a]lter or remove physical or anatomical characteristics or features that are typical for the individual's biological sex" or "[i]nstill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex."[118] Youth plaintiffs argued that the ban discriminated on the basis of sex and transgender status and therefore violated the Fourteenth Amendment's Equal Protection Clause; parent plaintiffs claimed that the ban violated their right under the Due Process Clause; and physician plaintiffs asserted that the law violated their First Amendment right to freedom of speech.

The Eighth Circuit affirmed the lower court's injunction against the law, concluding that it likely violated the Equal Protection Clause.[119] It therefore did not address the Due Process Clause or free speech claims. Judge Jane Kelly, writing for the three-judge panel, held that the state statute discriminated on the basis of transgender status and therefore should be evaluated under the "heightened scrutiny" standard usually applied to sex discrimination.[120] That standard required the state to prove that the ban on

"gender-affirming" care was "substantially related to an important interest"[121] in preventing these procedures. Arkansas argued that its "interest in protecting children from experimental medical treatment and regulating ethics in the medical profession"[122] was sufficient.

Judge Kelly wrote that "the biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not"[123] and was unable to find any "exceedingly persuasive justification" from the government that was sufficient to meet the heightened scrutiny standard.[124] Notably, she cited the controversial WPATH standards, uncritically emphasizing that puberty-suppressing hormones might be "appropriate for adolescents at the onset of puberty who have exhibited persistent gender nonconformity and who are already addressing any coexisting psychological issues."[125]

Eknes-Tucker v. Governor of Alabama.[126] Alabama's Vulnerable Child Compassion and Protection Act[127] has language similar to the Arkansas statute. It provides that "no person shall engage in or cause" the prescription or administration of puberty-blocking medication or cross-sex hormone treatment to a minor "for the purpose of attempting to alter the appearance of or affirm the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor's sex." Transgender minors and their parents challenged the law on both due process and equal protection grounds.

The district court ruled in the plaintiffs' favor, concluding that the Fourteenth Amendment protects a parental right to "treat [one's] children with transitioning medications subject to medically accepted standards" and that Alabama's justifications for the statute did not meet the heightened scrutiny standard under the Equal Protection Clause.[128] On August 21, 2023, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously reversed the district court on both issues.

In an opinion written by Judge Barbara Lagoa, the Court of Appeals held that "[t]he plaintiffs have not presented any authority that supports the existence of a constitutional right to 'treat [one's] children with transitioning medications subject to medically accepted standards.'"[129] Additionally, the court found that because that right does not exist, the district court applied the wrong standard of judicial review. As the Supreme Court had done in *Dobbs* after concluding that no constitutional right to abortion exists, the Eleventh Circuit held that the statute has a "strong presumption of validity" and need only be rationally related to a legitimate government interest. The Alabama law easily met that standard, furthering the state's interest in protecting children from unproven and potentially irreversible medical procedures.

Next, the court looked more specifically at whether the general Fourteenth Amendment right of parents to direct the upbringing of their children included an unfettered right to choose transitioning medical treatments for them. It applied the *Dobbs/Glucksberg* analysis, asking whether such a right "is 'deeply rooted in [our] history and tradition' and 'essential to our Nation's scheme of ordered liberty.'" The court's answer was that "the use of these medications in general—let alone for children—almost certainly is not 'deeply rooted' in our nation's history and tradition."[130]

The court's analysis reflected the need to reason forward from sound principles rather than a rush to find some justification for a predetermined conclusion. Because the judges were being asked to break new ground in the field of substantive due process under the Fourteenth Amendment, Lagoa wrote that they were bound to exercise the "utmost care." She pointed out that the lower court had "grounded its ruling in an unprecedented interpretation of parents' fundamental right to make decisions concerning the 'upbringing' and 'care, custody, and control' of one's children" and then had compounded the injury by applying the wrong judicial review standard.[131]

L.W. v. Skrmetti.[132] Statutes in Tennessee and Kentucky prohibit certain medical treatments for minors with gender dysphoria. Specifically, Tennessee bans puberty blockers, cross-sex hormones, and sex-transition surgery. Transgender minors and their parents challenged the laws on both due process and equal protection grounds. In Tennessee, the district court enjoined the law, concluding that it violated the parents' "fundamental right to direct the medical care of their children" and also failed to meet the heightened scrutiny standard under the Equal Protection Clause.[133]

The U.S. Court of Appeals for the Sixth Circuit consolidated the two cases and, as the Eleventh Circuit had done, reversed the district court decisions on both issues.[134] Writing for the 2–1 majority, Chief Judge Jeffrey Sutton inquired whether the people of this country "ever agreed to remove debates of this sort—over the use of innovative, and potentially irreversible, medical treatments for children—from the conventional place for dealing with new norms, new drugs, and new public health concerns: the democratic process."[135] "Life-tenured federal judges," Sutton wrote, "should be wary of removing a vexing and novel topic of medical debate from the ebbs and flows of democracy by construing a largely unamendable Constitution to occupy the field."[136] Citing *Glucksberg*, he cautioned that "[c]onstitutionalizing new areas of American life is not something federal courts should do lightly, particularly when 'the States are currently engaged in serious, thoughtful' debates about the issue."[137]

In both cases, the plaintiff parents claimed that the Constitution was not neutral about legislative regulation on this issue but instead affirmatively gave them the right to choose new and possibly irreversible medical interventions for minors.[138] The Sixth Circuit disagreed, holding that the government's interests in "regulating health and welfare," protecting "the integrity and ethics of the medical profession," and "preserving and promoting the welfare of the child" come with "broad power to 'limit[] parental freedom,'...when it comes to medical treatment."[139]

Particularly relevant to "gender-affirming care," the court emphasized that this "presumption of legislative authority to regulate healthcare gains strength in areas of 'medical and scientific uncertainty.'" Otherwise, "[courts] will impose a constitutional straitjacket on legislative choices before anyone knows how that 'medical and scientific uncertainty will play out."[140] As noted above, one of the safeguards against courts improperly creating substantive rights through the Due Process Clause is that a proposed right must be described carefully and concretely. The Sixth Circuit followed this counsel in *Skrmetti,* with Sutton writing that the plaintiffs were "climbing up the ladder of generality to a perch—in which parents control all drug and other medical treatments for their children—that the case law and our traditions simply do not support."[141]

Conclusion

For a century, the U.S. Supreme Court has recognized that parents have a fundamental right to direct the care and upbringing of their children. The Court has done so only in certain contexts, such as education and visitation, and has also held that this right must be weighed against state interests such as traditional police power regarding the practice of medicine. While most parents may have the best interests of their children at heart, state interests are particularly strong with respect to novel or experimental medical interventions, drugs that have not been found to be safe and effective, and situations in which an active debate regarding public policy in a specific context is being conducted.

As a result, courts should be cautious about creating substantive rights that "place the matter outside the arena of public debate and legislative action." Medical interventions for gender dysphoria in minors are clearly in this category. The FDA has not approved puberty blockers or cross-sex hormones to treat gender dysphoria; criticism of what little science exists in this area continues to accumulate; and several Western nations that, like the United States, uncritically embraced "gender-affirming" interventions have pulled back to a more cautious approach.

Using life-altering drugs and radical surgeries to alter a minor's appearance is not, as *Glucksberg* and *Dobbs* require, deeply rooted in America's history and tradition. The two federal appeals courts to address the issue properly came to this conclusion. A third considered only an associated claim—that a state law banning "gender-affirming" care for minors violated the Constitution's Equal Protection Clause because it discriminated based on transgender status. As a result, the third court never considered the constitutionality of the parent plaintiffs' claimed right to choose "gender-affirming care" for their children over the state's objection.

When the expected circuit split on the precise issue of parental rights under the Due Process Clause occurs,[142] the Supreme Court will likely have to address the issue once again.

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Endnotes

1. American Psychiatric Association, What Is Gender Dysphoria?, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.
2. *Id*.
3. Human Rights Campaign, Get the Facts on Gender-Affirming Care (last updated July 25, 2023), https://www.hrc.org/resources/get-the-facts-on-gender-affirming-care.
4. *See* Kristof Chwalisz, *Clinical Development of the GnRH Agonist Leuprolide Acetate Depot*, 4 F&S Reports 33–39 (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10201295/.
5. *Id*.
6. Gerald Posner, *The Truth About "Puberty Blockers,"* Wall St. J., June 7, 2023, https://www.wsj.com/articles/the-truth-about-puberty-blockers-overdiagnosis-gender-dysphoria-children-933cd8fb.
7. *Id*.
8. See *infra* notes 70–96 and accompanying text.
9. The complaint in *America First Legal Foundation v. U.S. Food and Drug Administration* may be found at https://media.aflegal.org/wp-content/uploads/2023/02/09040951/1-main.pdf?_ga=2.33067894.919083893.1695742116-2000694914.1695742116.
10. *See* Brooke Migdon, *Montana Judge Blocks State Ban on Gender-Affirming Care for Trans Youth*, The Hill, Sept. 27, 2023, https://thehill.com/homenews/lgbtq/4225862-montana-judge-blocks-state-ban-on-gender-affirming-care-for-trans-youth/#:~:text=Twenty%2Dtwo%20states%20since%202021,care%20for%20certain%20transgender%20adults; Human Rights Campaign, Gender-Affirming Care Bans Impacting Youth (last updated Sept. 15, 2023), https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map.
11. *See*, *e.g.*, Eknes-Tucker v. Marshall, 603 F.Supp.3d 1131, 1144 (M.D. Ala. 2022); Morgan Watkins, *Can States' Bans on Transgender Care Hold Up in Court?*, NPR, July 28, 2023, https://www.npr.org/2023/07/28/1190673042/trans-health-care-bans-gender-affirming-federal-supreme-court-kids-lawsuits.
12. U.S. Const. art. XIV, § 1.
13. *See*, *e.g.*, Washington v. Glucksberg, 521 U.S. 702, 719 (1997); Troxel v. Granville, 530 U.S. 57, 65 (2000); Reno v. Flores, 507 U.S. 292, 301–02 (1993).
14. Marbury v. Madison, 5 U.S. 137, 176 (1803).
15. Mallory v. Norfolk Southern Railroad, No. 21–1168, slip op. (July 2023) (Alito, J., concurring).
16. U.S. Const. art. VI.
17. *Marbury*, 5 U.S. at 180 (emphasis in original).
18. Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2247 (2022).
19. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).
20. *Glucksberg*, 521 U.S. at 720.
21. *Id*. at 720–21 (internal citations omitted).
22. *See Reno*, 507 U.S. at 302 (1993).
23. Collins v. City of Harker Heights, Texas, 503 U.S. 115, 125 (1992).
24. *Dobbs*, 142 S.Ct. at 2246.
25. 554 U.S. 570 (2008).
26. *Id*. at 627.
27. *See*, *e.g.*, *Remarks by President Biden on Gun Violence in America*, June 2, 2022, https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/06/02/remarks-by-president-biden-on-gun-violence-in-america/.
28. *See* https://giffords.org/lawcenter/gun-laws/second-amendment/the-supreme-court-the-second-amendment/#:~:text=%E2%80%9CLike%20most%20rights%2C%20the%20right,whatsoever%20and%20for%20whatever%20purpose.%E2%80%9D.
29. The Annenberg Public Policy Center at the University of Pennsylvania, for example, has conducted an annual survey of Americans' civic knowledge, including their knowledge of the Constitution, since 2006. In its 2023 survey, 77 percent of respondents identified freedom of speech, but no other First Amendment freedom was named by a majority. This paralleled the results in 2022 when freedom of speech was recognized by 63 percent of respondents—more than twice as many as recognized any other right.
30. Schenck v. United States, 249 U.S. 47, 52 (1919).
31. *See*, *e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) ("specific guarantees in the Bill of rights have penumbras, formed by emanations from those guarantees" including the "right of privacy").

32. Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by* Dobbs, v. Jackson Women's Health Organization, *supra* note 18.
33. *Roe*, 410 U.S. at 154.
34. *Troxel*, 530 U.S. at 66.
35. *Id*. at 65.
36. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
37. Blackstone's Commentaries on the Laws of England, Book 1, Chapter 16, https://avalon.law.yale.edu/18th_century/blackstone_bk1ch16.asp.
38. Robert A. Sedler, *From Blackstone's Common Law Duty of Parents to Educate Their Children to a Constitutional Right of Parents to Control the Education of Their Children*, The Forum on Public Policy (2006), https://files.eric.ed.gov/fulltext/EJ1098491.pdf.
39. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). *See also* Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basis in the structure of our society.").
40. Blackstone's Commentaries, *supra* note 37.
41. Meyer v. Nebraska, 262 U.S. 390, 401 (1923).
42. 262 U.S. 390 (1923).
43. *Id*. at 397.
44. Meyer v. State, 197 Neb. 657 (1922).
45. *Meyer*, 262 U.S. at 399.
46. *Id*.
47. *Id*. at 399–400.
48. 268 U.S. 510 (1925).
49. *Id*. at 534–35.
50. *Id*. at 535.
51. *Id*.
52. *Id*. at 536.
53. 321 U.S. 158 (1944).
54. *Id*. at 166–67.
55. *Id*. at 168. *See also id*. at 168–69 ("It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action."). *See also Ginsberg*, 390 U.S. at 634 (citing *Prince*).
56. *Prince*, 321 U.S. at 170.
57. 530 U.S. 57 (2000).
58. Wash. Rev. Code § 26.10.160(3).
59. *Troxel*, 530 U.S. at 72.
60. *Id*. at 67.
61. *Id*. at 73.
62. *See also Prince*, 321 U.S. at 171 ("Our ruling does not extend beyond the facts the present case presents.").
63. 495 F.3d 695 (D.C. Cir. 2007) (*en banc*).
64. *Id*. at 697.
65. *Id*. at 703.
66. *See* Thomas Jipping and Sarah Parshall Perry, *States May Restrict Abortion Drugs*, Heritage Found. Legal Memorandum No. 316, Nov. 17, 2022, at 3–5, https:www.heritage.org/government-regulation/report/states-may-restrict-abortion-drugs.
67. *Abigail Alliance*, 495 U.S. at 706.
68. L.W. by and through Williams v. Skrmetti, 73 F.4th 408, 417 (6th Cir. 2023).
69. *Id*. at 418. *See also* PJ ex rel. Jensen v. Wagner, 603 F.3d 1182, 1197 (10th Cir. 2010), in which the Court held that parents do not have a clearly established constitutional right to direct their children's specific medical care; to the contrary, "states have a compelling interest in and a solemn duty to protect the lives and health of the children within their borders."

70. Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States*? The Williams Institute, UCLA School of Law (2002), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf.
71. *Id.*
72. Chad Terhune et al., *As More Transgender Children Seek Medical Care, Families Confront Many Unknowns*, Reuters, Oct. 6, 2022, https://www.reuters.com/investigates/special-report/usatransyouth-care/. While the majority of gender-related surgical procedures are undergone by adults, those procedures also have increased significantly, nearly tripling in the three years between 2016 and 2019. Jason D. Wright et al., *National Estimates of Gender-Affirming Surgery in the US*, JAMA Network Open, Aug. 23, 2023, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2808707.
73. Jennifer L. Marino et al., *Childhood and Adolescence Gender Role Nonconformity and Gender and Sexuality Diversity in Young Adulthood*, 177 JAMA Pediatrics 1176–86 (2023), https://pubmed.ncbi.nlm.nih.gov/37747725/.
74. See *supra* note 1.
75. *See* Abigail Shrier, Irreversible Damage: The Transgender Craze Seducing Our Daughters (2020).
76. Thomas D. Steensma et al., *Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-up Study*, 52 J. Am. Acad. Child Adolesc. Psychiatry 582–90 (2013), http://pubmed.ncbi.nlm.nih.gov/23702447/.
77. Leor Sapir, *"Trust the Experts" Is Not Enough: U.S. Medical Groups Get the Science Wrong on Pediatric "Gender Affirming" Care*, Manhattan Inst., Oct. 17, 2022, *available at* https://media4.manhattan-institute.org/sites/default/files/how-to-respond-to-medical-authorities_claiming_gender_affirming_care_safe.pdf.
78. A. L. De Vries et al., *Puberty Suppression in Adolescents with Gender Identity Disorder: A Prospective Follow Up Study*," 8 Journal of Sexual Medicine 2276–83 (2011); A. L. De Vries et al., *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, 134 Pediatrics 696–704 (2014), https://pubmed.ncbi.nlm.nih.gov/25201798/.
79. Stephen B. Levine et al., *Reconsidering Informed Consent for Trans-Identified Children, Adolescents, and Young Adults*, 48 Journal of Sex and Marital Therapy 706–27 (2022), https://pubmed.ncbi.nlm.nih.gov/35300570/; Michael Biggs, *The Dutch Protocol for Juvenile Transsexuals: Origins and Evidence*, 49 Journal of Sex and Marital Therapy 348–68 (2023); Stephen B. Levine et al., *The Value of Disagreement*, Journal of Sex and Marital Therapy (forthcoming).
80. Dr. Jason Rafferty, author of the AAP statement, claimed that a "watchful waiting" approach, wherein clinicians delay social and medical transition as long as possible in order to exhaust all efforts to help youth in distress feel comfortable in their bodies, is a form of "conversion therapy." He argues that clinicians should always "affirm" (i.e., agree with) the gender self-declarations of their pediatric patients. *See* Sapir, *supra* note 77. Rafferty made this declaration even though the Supreme Court has explicitly recognized that minors are routinely recognized to be immature, often reckless, impulsive, risk-taking, and "more vulnerable to negative influences and outside pressures, including from their family and peers" than adults. Montgomery v. Louisiana, 577 U.S. 190, 207 (2016).
81. James M. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Polic*y, 46 J. Sex Marital Ther. 307–13 (2020), *available at* https://pubmed.ncbi.nlm.nih.gov/31838960/#affiliation-1.
82. Jason Rafferty et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 Pediatrics 2018–2162 (2018), https://.
83. Riittakerttu Kaltiala-Heino et al., *Gender Dysphoria in Adolescence: Current Perspectives*, 9 Adolescent Health, Medicine and Therapeutics 31–41 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5841333/pdf/ahmt-9-031.pdf.
84. *See* Mette Vinther Hansen et al., *Sundhedsfaglige tilbud til børn og unge med kønsubehag*, 185 Ugeskr Læger (2023), https://content.ugeskriftet.dk/sites/default/files/2023-06/V11220740_WEB.pdf.
85. Do No Harm, Reassigned (2023), *available at* https://donoharmmedicine.org/wp-content/uploads/2023/01/Do-No-Harm-Reassigned-Report.pdf.
86. The Cass Review, Independent Review of Gender Identity Services for Children and Young People: Interim Report (2022), https://cass.independent-review.uk/wp-content/uploads/2022/03/Cass-Review-Interim-Report-Final-Web-Accessible.pdf.
87. Chad Terhune et al., *Reuters Special Report*: *As More Transgender Children Seek Medical Care, Families Confront Many Unknowns*, Reuters, Oct, 6, 2022, *available at* https://www.reuters.com/investigates/special-report/usa-transyouth-care/.
88. Lisa Littman, *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners*, 50 Arch. Sex. Behav. 3353–69 (2021), *available at* https://pubmed.ncbi.nlm.nih.gov/34665380/.
89. Detransitioners are people who previously identified as transgender, received medical and/or surgical interventions, and ultimately stopped taking these interventions because they later regretted their decision to medically transition. These individuals no long identify as transgender.
90. Littman, *supra* note 88.
91. Jonathon W. Wanta et al., *Mental Health Diagnoses Among Transgender Patients in the Clinical Setting: An All-Payer Electronic Health Record Study*, 4 Transgend. Health 313–315 (2019), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6830528/.
92. Jay P. Greene, *Puberty Blockers, Cross-Sex Hormones, and Youth Suicide*, Heritage Found. Backgrounder No. 3712, June 13, 2022, https://www.heritage.org/gender/report/puberty-blockers-cross-sex-hormones-and-youth-suicide.

93. Cecelia Dhejne et al., *Long-Term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 Plos One e16885 (2011), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3043071/pdf/pone.0016885.pdf.
94. These hospitals and clinics have received $104 million in government grants from the U.S. Department of Health and Human Services since January 2021. Parker Thayer and Katie Cagle, *Biden Administration Gives Universities and Children's Hospitals $100 Million to Prop Up Transgenderism*, Capital Research Center, Sept. 12, 2023, *available at* https://capitalresearch.org/article/biden-administration-gives-universities-and-childrens-hospitals-100-million-to-prop-up-transgenderism/.
95. Human Rights Campaign, Map: Attacks on Gender Affirming Care by State (last updated Sept. 5, 2023), https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map.
96. These bans represent greater American sentiment on the issue. A recent Harvard-Harris poll found that 78 percent of Americans believe "surgery to change gender and puberty blockers" should be allowed only for people over 18 years old. Harvard CAPS [Center for American Political Studies] Harris Poll, June 14–15, 2023, *available at* https://harvardharrispoll.com/wp-content/uploads/2023/06/HHP_June2023_KeyResults.pdf.
97. U.S. Const., amend. X.
98. Berman v. Parker, 348 U.S. 26, 32 (1954).
99. Cameron v. EMW Women's Surgical Center, P.S.C., 142 S. Ct. 1002, 1011 (2022).
100. *Id.*
101. 142 S. Ct. 2228 (2022).
102. 410 U.S. 113 (1973).
103. *Id.* at 153, *overruled by* Dobbs v. Jackson Women's Health Organization, *supra* note 18. In Roe, the Court held that its previously created "right to privacy…is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153.
104. 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Organization, *supra* note 18. In *Casey*, the Court reaffirmed *Roe*'s "central holding" that a woman has a constitutional right "to choose to have an abortion before viability." *Casey*, 505 U.S. at 833.
105. *Dobbs*, 142 S. Ct. at 2279.
106. *Id.*
107. See Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 Annals Health L. 201, 218 (1999). The Supreme Court has asserted that the state police power includes overseeing medical practice and includes the prohibition of illegal drugs. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 597 (1977); Robinson v. California, 370 U.S. 660, 664 (1962).
108. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 270 (2006).
109. *Dobbs*, 142 S. Ct. at 2284. In *Roe* and subsequent decisions, the Supreme Court recognized a variety of interests supporting pro-life laws, characterizing them as valid, legitimate, important, strong, and significant. These interests exist throughout pregnancy. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 61 (1976); Beal v. Doe, 432 U.S. 438, 445–46 (1977); Maher v. Roe, 432 U.S. 464, 478 (1977); Harris v. McRae, 448 U.S. 297, 313, 324 (1980); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992); Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 428 (1983). *See also Roe*, 410 U.S. at 153–54 ("The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a *State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.*") (emphasis added).
110. *See* Parham v. J. R., 442 U.S. 584, 603 (1979), wherein the Supreme Court recognized as a general matter that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."
111. See Thomas Jipping, *The Attack on Legal Protection for the Unborn Moves to State Courts*, Heritage Found. Legal Memorandum No. 322, January 5, 2023, at 4–6.
112. 521 U.S. 702 (1997).
113. *Glucksberg*, 521 U.S. at 703.
114. *Id.* at 723 (quoting Reno v. Flores, 507 U.S. 292, 303 (1993)).
115. Movement Advancement Project, Equality Maps: Bans on Best Practice Medical Care for Transgender Youth, www.mapresearch.org/equality-maps/healthcare/youth_medical_care_bans.
116. Brandt by and Through Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).
117. Ark. Code Ann. § 20-9-1502(a), (b).
118. Id. § 20-9- 1501(6)(A).
119. The Equal Protection Clause of the Fourteenth Amendment states that "No State shall…deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. In classifications based on gender (sex), the government must show that the challenged classification satisfies intermediate scrutiny review: specifically, that it serves an important state interest and that the classification is at least substantially related to serving that interest. *See* Heckler v. Mathews, 465 U.S. 728, 744 (1984).

120. The U.S. Supreme Court has never reached such an overly broad conclusion, and such a result would be a significant departure from decades of the Court's equal protection jurisprudence. Further discussion of the equal protection arguments brought by plaintiffs seeking "gender-affirming" care is outside the scope of this paper but will likely factor into the Supreme Court's rationale should the Court decide to grant review.
121. *Brandt*, 47 F.4th at 670.
122. *Id*.
123. *Id*.
124. *Id.*
125. *Id.* at 671.
126. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023).
127. Ala. Code § 26-26-1.
128. Eknes-Tucker v. Marshall, 603 F. Supp.3d 1131, 1147–1148 (M.D. Ala. 2022).
129. Eknes-Tucker v. Governor of Alabama, 80 F.4th at 1210.
130. *Id.* at 1220.
131. *Id.* at 1225–1226.
132. L. W. by and Through Williams v. Skrmetti, 83 F.4th 460 (6th Cir., 2023).
133. L.W. by and Through Williams v. Skrmetti, ____ F.Supp.3d____, 2023 WL 4232308 (M.D. Tenn.), June 28, 2023.
134. L. W. by and Through Williams v. Skrmetti, 83 F.4th at 491.
135. *Id.* at 471.
136. *Id.*
137. *Id.*. (citing *Glucksberg*, 521 U.S. at 719).
138. As in nearly all litigation on state bans to date, plaintiffs also raised equal protection guarantee arguments on the basis of "sex" discrimination, arguing that transgenderism was tantamount to a categorization of sex. We decline to address those arguments here, *but see* discussion of the 8th Circuit's opinion in Brandt, *supra*.
139. Skrmetti, 83 F.4th at 473 (citations omitted).
140. *Id.*
141. *Id.* at 475.
142. On October 6, 2023, the U.S. Court of Appeals for the Eighth Circuit granted the Arkansas Attorney General's request for initial rehearing *en banc* in *Brandt by and Through Brandt v. Rutledge*, *supra*, note 116. This rehearing by all 11 judges in the Eighth Circuit may yield a true circuit split on the equal protection and due process claims common to all current legal challenge brought by parent plaintiffs.