

PARENTS AND MEDICAL CONSENT: AN ANALYSIS OF PARENTAL RIGHTS FROM THE COMMON LAW TO THE FOUNDING

*Nathan J. Wertjes**

INTRODUCTION

On September 30, 2022, Governor Gavin Newsom signed into law Senate Bill 107, which designated California as a “sanctuary state” for youth afflicted with gender dysphoria who wished to undergo sex-reassignment surgery or hormone therapy.¹ Under this law, a child from another state can travel to California and undergo sex-reassignment procedures, with or without parental knowledge or consent.² Additionally, the court may remove parental custody of the child if the child is “in this state for the purpose of obtaining gender-affirming health care.”³

Following California’s lead, states passed similar, if not identical laws.⁴ Similar to California, Washington State’s law blocks “warrants, subpoenas, extradition requests, [and] other court orders” from other

* J.D. Candidate, Notre Dame Law School, 2026. I am deeply grateful to Professor Nicole Garnett, Colten Stanberry, and my father, Alan J. Wertjes, for their helpful feedback and critiques. Additionally, I appreciate the *Notre Dame Law Review*, particularly the staff editors, who through their edits and feedback have made this Note far better than it deserves. Finally, I would like to thank my wonderful wife, Gloria, without whom law school would not be worth the trouble.

1 See S. 107, 2021–22 Leg., Reg. Sess. (Cal. 2022); Press Release, State of Cal. Dep’t of Just., Attorney General Bonta Commends District Court’s Decision Upholding Gender-Affirming Care for Transgender Individuals (Apr. 9, 2024), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-commends-district-court%E2%80%99s-decision-upholding-gender> [<https://perma.cc/MT8B-VEK8>].

2 See Cal. S. 107.

3 *Id.* § 4.

4 See, e.g., H.R. 146, 93d Leg., Reg. Sess. (Minn. 2023) (shield law allowing minors in or entering Minnesota to receive sex-reassignment surgery without parental consent and permitting revocation of custody from non-affirming parents, *see id.* § 2); S. 5599, 68th Leg., Reg. Sess. (Wash. 2023) (same); H.R. 2002, 82d Leg. Assemb., Reg. Sess. (Or. 2023) (permitting sex-reassignment surgery and hormone therapy without parental consent for minors fifteen years and older); H.R. 340, 131st Leg., 1st Spec. Sess. (Me. 2023) (permitting hormone therapy for minors sixteen years and older without parental consent).

states regarding out-of-state minor patients.⁵ While the bill was being debated, it was clear that the intention was to strip non-affirming parents of their parental rights, as one of the bill's sponsors stated that "what this bill speaks to" is a situation where children are unable to receive "gender-affirming care [due to] opposition and hostility from their family" and that "when a family is standing between their young person and essential health care services . . . we need to focus on the essential needs of the young person, ensure they're getting the care they deserve"⁶ Another state representative stated that when parents refuse to provide hormone therapy or gender-affirming care, "[w]e must step in" and "provide a place for this child."⁷ Some states have had legislation introduced to allow minors to consent to sex-reassignment procedures.⁸ Others allow counseling for gender dysphoria without parental consent or notification and mandate nondisclosure to parents, unless legally compelled, if a child socially transitions at school.⁹ From 2019 to the start of 2024, nearly 14,000 minors have received sex-reassignment therapy.¹⁰ Perhaps in response to this demand for gender transitions for minors, other states have taken a different approach.

As of publishing, twenty-five states have outlawed sex-reassignment surgery and hormone therapy for minors, regardless of parental consent.¹¹ Some states, such as Idaho and North Dakota, have made it

5 Lisa Baumann & Steve Karnowski, *Washington, Minnesota Become Trans Refuges, Shield Abortions*, AP NEWS (Apr. 27, 2023, 3:56 PM EDT), <https://apnews.com/article/abortion-transgender-shield-laws-washington-3ee92fd1f821319246313a463edac774> [<https://perma.cc/PA8U-D5D6>].

6 Wash. State Senate, *Senate Floor Debate -- March 1*, TVW (Mar. 1, 2023, 7:00 PM), <https://twv.org/video/senate-floor-debate-march-1-2023031100/> (statement of Sen. Marko Liias, Sponsor, at 1:24:48–1:26:00).

7 Wash. State House of Representatives, *House Floor Debate -- April 12*, TVW (Apr. 12, 2023, 4:20 PM), <https://twv.org/video/house-floor-debate-april-12-2023041141/> (statement of Rep. Jamila Taylor, at 1:44:58–1:45:03).

8 See, e.g., H.R. 4876, 103rd Gen. Assemb., Reg. Sess. (Ill. 2024) (not requiring parental consent and classifying non-affirming parents as child abusers).

9 See, e.g., N.J. DEP'T OF EDUC., *TRANSGENDER STUDENT GUIDANCE FOR SCHOOL DISTRICTS* 4, <https://www.nj.gov/education/safety/sandp/climate/docs/Guidance.pdf> [<https://perma.cc/VR7Z-YZ84>] ("A school district shall keep confidential a current, new, or prospective student's transgender status.").

10 See James Lynch, *Nearly 14,000 Minors Underwent Sex-Change Procedures in Recent Years, According to New Watchdog Database*, NAT'L REV. (Oct. 8, 2024, 11:43 AM), <https://www.nationalreview.com/news/nearly-14000-minors-underwent-sex-change-procedures-in-recent-years-according-to-new-watchdog-database/> [<https://perma.cc/3PMJ-VGMD>].

11 See Elliott Davis Jr., *States That Have Restricted Gender-Affirming Care for Trans Youth*, U.S. NEWS & WORLD REP. (Mar. 19, 2025), <https://www.usnews.com/news/best-states/articles/2023-03-30/what-is-gender-affirming-care-and-which-states-have-restricted-it-in-2023> [<https://perma.cc/SY6W-KXC5>].

a felony to perform sex-reassignment procedures on minors.¹² Texas state law directs the Texas Medical Board to revoke the medical licenses of doctors who perform sex-reassignment therapy on minors, and it has sued to enforce it.¹³

Unsurprisingly, both those parents who desire for their child to receive sex-reassignment therapy and those who don't have sued their respective state officials. On June 18, 2025, the Supreme Court issued its decision in *United States v. Skrmetti*, a case in which plaintiffs challenged a Tennessee state statute banning puberty blockers and other hormone treatments for minors.¹⁴ While the issue in the courts below was whether this ban violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment, the Supreme Court only took up and resolved the issue under the Equal Protection Clause, holding that Tennessee's law prohibiting sex-reassignment treatments for minors is not subject to heightened scrutiny, and satisfies rational basis review.¹⁵

On the other side, parents have unsuccessfully sued to enjoin California's and Washington's laws, alleging that these laws violate their parental rights under the Fourteenth Amendment.¹⁶ Because the Supreme Court only decided the Equal Protection question in *Skrmetti*,¹⁷ this Note will examine this conflict of state and parental rights under the Due Process Clause.¹⁸

To begin, this Note will examine the Court's precedent to illustrate that the Court has long recognized that parental rights are fundamental. Next, this Note will embark upon a general study of the

12 *Id.*

13 See S. 14, 88th Leg., Reg. Session (Tex. 2023); Press Release, Ken Paxton, Att'y Gen. of Tex., Attorney General Ken Paxton Sues Doctor for Illegally Providing Harmful "Gender Transition" Treatments to Nearly Two Dozen Texas Children (Oct. 17, 2024), <https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-sues-doctor-illegally-providing-harmful-gender-transition-treatments> [<https://perma.cc/9EJ4-BXYQ>].

14 *United States v. Skrmetti*, 145 S. Ct. 1816 (2025); L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 469 (6th Cir. 2023), *aff'd*, 145 S. Ct. 1816 (2025); Transcript of Oral Argument, *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) (No. 23-477).

15 See *Skrmetti*, 83 F.4th at 466, 472; see *Skrmetti*, 145 S. Ct. at 1829–37.

16 See *Our Watch with Tim Thompson v. Bonta*, No. 23-cv-00422, 2024 WL 1521477, at *1, *7 (E.D. Cal. Apr. 8, 2024); *Int'l Partners for Ethical Care, Inc. v. Inslee*, No. 23-05736, 2024 WL 2214707, at *2 (W.D. Wash. May 15, 2024), *aff'd*, 146 F.4th 841 (9th Cir. 2025).

17 *Skrmetti*, 145 S. Ct. at 1829–37.

18 It is reasonable to suggest that a better analysis would be under the Privileges or Immunities Clause of the Fourteenth Amendment, but as the Court has regrettably "read the Privileges or Immunities Clause out of the Constitution in the *Slaughter-House Cases*," this Note is confined to such precedent. *Saenz v. Roe*, 526 U.S. 489, 521 (1999) (Thomas, J., dissenting). However, under either analysis the historical approach would likely be similar. See *id.* at 522 (Justice Thomas would look to "history to ascertain the original meaning of the Clause."); see also *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

history and tradition of parental rights, beginning in sixteenth-century England and ending shortly after the Founding era. This Note will also examine, in greater detail, the rights of states to ban certain medical treatments, as well as the requirement of parental consent to such treatments. In conclusion, this Note will argue that what this history indicates is that while states have the right to ban certain treatments within their borders, parents ultimately retain the broad authority to proscribe permitted medical treatments for their children. This Note will also illustrate that there is little historical evidence or reasonable rationale for laws forcing parents to submit their children to experimental procedures.

I. FUNDAMENTAL LIBERTY INTEREST

The exact demarcation where parental rights diminish and state authority begins is difficult to locate. As the Court said in *Prince v. Massachusetts*, “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction.”¹⁹ Fortunately, the Court has provided a method by which the boundaries of unenumerated rights can be set. In *Washington v. Glucksberg*, the Court held that determining the rights under the Fourteenth Amendment’s Due Process Clause requires a two-step analysis.²⁰ First, the Court “protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”²¹ Secondly, the Court requires a “‘careful description’ of the asserted fundamental liberty interest.”²²

Most recently and significantly, in *Dobbs v. Jackson Women’s Health Organization*, the Court once again explained the appropriate analysis under the Fourteenth Amendment’s Due Process Clause.²³ The Court held that for “fundamental rights that are not mentioned anywhere in the Constitution,” such as parental rights, the “Court has long asked whether the right is ‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’”²⁴

19 *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

20 *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

21 *Id.* (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

22 *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)); see also *Nat’l Republican Senatorial Comm. v. Fed. Election Comm’n*, 117 F.4th 389, 407 (6th Cir. 2024) (en banc) (Bush, J., concurring dubitante) (providing collection of Supreme Court cases engaging in a history and tradition analysis), *cert. granted*, No. 24-621 (U.S. June 30th, 2025).

23 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2244 (2022).

24 *Id.* at 2246 (alteration in original) (first quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019); then quoting *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010); and then quoting *Glucksberg*, 521 U.S. at 721).

This same analysis was later emphasized again in *Department of State v. Muñoz*, though the order of the analysis was flipped.²⁵ Following the precedent of *Muñoz*, this Note will start with a “careful description of the asserted fundamental liberty interest.”²⁶ As many Supreme Court cases illustrate, parents have a fundamental right to direct the upbringing of their children, including most medical decisions.

The Supreme Court has repeatedly held that parental rights are fundamental. In *Meyer v. Nebraska*, the Court stated that while they had “not attempted to define with exactness the liberty thus guaranteed” under the Due Process Clause, it “[w]ithout doubt” included “the right . . . [to] establish a home and bring up children.”²⁷ Two years later, in *Pierce v. Society of Sisters*, the Court stated, rather famously, “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”²⁸ In *Prince*, while noting that the state may interfere some with parental authority, such as by regulating child labor or obstructing the deliberate causation of “ill health or death,”²⁹ the Court reaffirmed the position taken in *Pierce*, stating “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents.”³⁰ While somewhat cabined by the unique circumstances of the Amish,³¹ the Supreme Court held in *Wisconsin v. Yoder* that parents have the right to direct the upbringing of their children, subject to some “limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child.”³² Similarly, in *Moore v. City of East Cleveland*, the Court held that while “the family is not beyond regulation,” when the government undertakes “intrusive regulation of the family . . . usual judicial deference to the legislature is inappropriate” as “[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the

25 Dep’t of State v. Muñoz, 144 S. Ct. 1812, 1822 (2024).

26 *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

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

28 *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

29 *Prince v. Massachusetts*, 321 U.S. 158, 167, 166–67 (1944).

30 *Id.* at 166.

31 *But see* Brief of Professors Douglas Laycock, Richard W. Garnett, Helen M. Alvaré, Thomas C. Berg, and Michael W. McConnell as *Amici Curiae* Supporting Plaintiffs-Appellants’ Motion for Injunction Pending Appeal at 3, *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024) (No. 23-1890), *rev’d*, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025) (arguing that *Wisconsin v. Yoder*, 406 U.S. 205 (1972), provides strong protections for parental rights).

32 *Yoder*, 406 U.S. at 233–34.

Fourteenth Amendment.”³³ Later, the Court stated that there would be

little doubt that the Due Process Clause would be offended “[i]f a State were to attempt to force the breakup of a natural family, over the objections 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.”³⁴

In *Parham v. J.R.*, the Court stated that “[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”³⁵

The notion that parental rights are “fundamental” was again repeated in *Santosky v. Kramer*, where the Court held that the “fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”³⁶ Indeed, “[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”³⁷ Most recently, in a plurality opinion, the Court stated that a parent’s interest in the “care, custody, and control of their children” was “perhaps the oldest of the fundamental liberty interests recognized by this Court.”³⁸

Of course, as these cases and others illustrate, while fundamental, parental rights are not absolute. The state has a legitimate interest in protecting children and may at times interfere with otherwise unquestioned parental authority, particularly in the medical context. While not exactly on point, the Supreme Court upheld a state statute in *Jacobson v. Massachusetts* that allowed cities to mandate vaccination, with fines levied on those twenty-one years of age and older who refused.³⁹ In dicta, the Court remarked upon the increasingly common practice of states of “making the vaccination of children a condition of their right to enter or remain in public schools.”⁴⁰ Nowhere in the opinion did the court discuss the constitutionality of a universal vaccination program against the parent’s wishes, or removing parental custody for

33 *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

34 *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (alteration in original) (quoting *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment)).

35 *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

36 *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

37 *Id.*

38 *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

39 *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905).

40 *Id.* at 32.

parents that refused to vaccinate their children. Thus, to analyze the constitutionality of statutes in Tennessee that bar parents from subjecting their children to sex-reassignment treatment, or statutes like California's that threaten to remove parental custody if they refuse to allow these procedures, it is appropriate to embark on the second part of the *Glucksberg* analysis. The next Section will illustrate that while the state may bar certain medical procedures, parents retain the fundamental right to determine the medical decisions of their children and that this right is "'deeply rooted in [our] history and tradition' and . . . is essential to this Nation's 'scheme of ordered liberty.'"⁴¹

III. DEEPLY ROOTED

A. *English Common Law*

Unsurprisingly, parental rights were considered fundamental in the Anglo-American tradition. Within the English tradition, parental rights were often invoked to explain the rights of monarchs. John Poynt's 1553 catechism book, *Catechismus Brevis*, taught children that the same "love, feare and reverence" that they owed to their natural parents, "byndeth us also most humbly, and with most natural affection to obei the magistrate."⁴² Jean Bodin's *Les six Livres de la République*, written in 1576, was "a popular text among Cambridge scholars though not translated into English until 1606."⁴³ Bodin argued for monarchical supremacy by observing that "a familie which is the true image of a Commonweale can have but one head, and that all the lawes of nature guide us into a Monarchie."⁴⁴ In 1609, King James I, arguing for his own supremacy, also observed that:

the Father of a familie, they had of olde vnder the Law of Nature *Patriam potestatem*, which was *Potestatem vitæ & necis*, ouer their children or familie [A] Father may dispose of his Inheritance to his children, at his pleasure: yea, euen disinherit the eldest vpon iust occasions, and preferre the youngest, according to his liking; make them beggers, or rich at his pleasure; restraine, or banish out of his presence, as hee findes them giue cause of offence, or restore

41 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022) (first alteration in original) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)).

42 GORDON J. SCHOCHET, *PATRIARCHALISM IN POLITICAL THOUGHT: THE AUTHORITARIAN FAMILY AND POLITICAL SPECULATION AND ATTITUDES ESPECIALLY IN SEVENTEENTH-CENTURY ENGLAND* 79–80 (1975).

43 Edwin G. Burrows & Michael Wallace, *The American Revolution: The Ideology and Psychology of National Liberation*, in 6 *PERSPECTIVES IN AMERICAN HISTORY* 167, 171 (Donald Fleming & Bernard Bailyn eds., 1972).

44 *Id.* (quoting W.H. GREENLEAF, *ORDER, EMPIRICISM AND POLITICS: TWO TRADITIONS OF ENGLISH POLITICAL THOUGHT 1500-1700*, at 128 (1964)).

them in fauour againe with the penitent sinner: So may the King deale with his Subiects.⁴⁵

In 1680, Sir Robert Filmer continued to expand upon the similar relationship between parents and children and kings and subjects, arguing that similar to “Kingly Power” given by “the Law of God,” so too does the

Father of a Family govern[] by no other Law than by his own Will; not by the Laws and Wills of his Sons or Servants. There is no Nation that allows Children any Action or Remedy for being unjustly Governed; and yet . . . every Father is bound by the Law of Nature to do his best for the preservation of his Family . . .⁴⁶

Filmer, to emphasize the absolute power of parents, and thus also the monarch, would cite many examples of “parents who castrate or kill their children.”⁴⁷ However, Filmer may have been too strident. James Tyrell in his *Patriarcha non Monarcha*, responded to Filmer’s vision of an absolute parental authority by arguing that it would be “impossible . . . to accept Filmer’s belief that a father might maim, castrate, sell, or even kill his son without violating” his natural and holy duties.⁴⁸ John Locke also wrote to temper the absolute parental authority. Writing in his famous two-part treatise, Locke stated that “*Adam and Eve, and after them all parents were, by the law of nature, under an obligation to preserve, nourish, and educate the children they had begotten,*” an obligation for which they were “accountable” to the “Almighty.”⁴⁹ In this natural duty, the husband and wife equally wielded “*parental power.*”⁵⁰ Locke argued that Filmer’s examples of castration and death inflicted by a father were “*unnatural* perversions of parenthood” and would lead to the father losing “any right over” his children.⁵¹

Even in later Puritan attacks on the monarchy during the English Civil Wars, Puritans would be careful not to undermine parental power, arguing that while “a prince is a prince by the free suffrages of a community,” “[a] father is a father by generation . . . a natural head and root, without the free consent and suffrages of his children.”⁵²

45 King James I, *A Speech to the Lords and Commons of the Parliament at White-Hall* (Mar. 21, 1609), in *THE POLITICAL WORKS OF JAMES I* 306, 308 (1965).

46 ROBERT FILMER, *PATRIARCHA; OR THE NATURAL POWER OF KINGS* 78–79 (London 1680); see also *id.* at 12 (“I see not then how the Children of *Adam*, or of any man else can be free from subjection to their *Parents* . . .”).

47 Burrows & Wallace, *supra* note 43, at 177.

48 *Id.* at 175.

49 2 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 241 (Thomas Hollis ed., London, A. Millar et al. 1764) (1689).

50 *Id.* at 238.

51 Burrows & Wallace, *supra* note 43, at 177.

52 MICHAEL WALZER, *THE REVOLUTION OF THE SAINTS: A STUDY IN THE ORIGINS OF RADICAL POLITICS* 197 (1965) (quoting SAMUEL RUTHERFORD, *LEX, REX, OR, THE LAW AND THE*

Samuel von Pufendorf, a seventeenth-century German jurist and philosopher, would largely agree with Tyrell and Locke. He wrote that “*Paternal Power*” is “the most Ancient and the most Sacred Kind of Authority, whereby Children are obliged to reverence their Parents, to obey their Commands, and to acknowledge their Pre-eminence.”⁵³

Pufendorf and Locke were influential and would be cited by later writers such as English jurist William Blackstone.⁵⁴ In his *Commentaries on the Laws of England*, Blackstone lays out a similar understanding of parental authority. He states that the relationship between parent and child is the “most universal relation in nature” and consists of three duties: the maintenance, protection, and education of the child.⁵⁵ Contrasting English law with that of a Roman, who had the “power of life and death over his children,” he stated that the “power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience.”⁵⁶ Indeed, he described children under twenty-one as being under the “empire of the father.”⁵⁷ In *System of Moral Philosophy*, written a few decades earlier, Francis Hutcheson espoused similar views. Hutcheson believed that children are “rational agent[s], with rights valid against the parents; tho they are the natural tutors or curators, and have a right to direct [their] actions.”⁵⁸ According to Hutcheson, “children are sacredly bound to consult the inclinations of parents in such matters as are of high importance,” such as in marriage and education.⁵⁹

The English common law generally agreed with the same philosophy espoused by Blackstone, Locke, and Pufendorf and “recognized parental rights as a key concept [and] . . . as a fundamental cultural assumption about the family as a basic social, economic, and political

PRINCE 63 (Edinburgh, Robert Ogle and Oliver & Boyd 1843) (1644)). Walzer also argues that John Calvin advocated for the abolition of the family, but this appears to be a misunderstanding of both Calvin’s interpretation of Luke 14:26 and the Calvinist understanding of preordained salvation.

53 SAMUEL PUFENDORF, *THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE* 179 (Andrew Tooke trans., Ian Hunter & David Saunders eds., Liberty Fund 2003) (1673).

54 See Paul Lucas, *Ex Parte Sir William Blackstone, “Plagiarist”: A Note on Blackstone and the Natural Law*, 7 AM. J. LEGAL HIST. 142, 143 (1963); *Historic Document: Commentaries on the Laws of England (1765–69)*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/william-blackstonecommentaries-on-the-laws-of-england-1765-69> [https://perma.cc/4MUUY-GFLM] (last visited Mar. 29, 2025).

55 1 WILLIAM BLACKSTONE, *COMMENTARIES* *446.

56 *Id.* at *452.

57 *Id.* at *453.

58 2 FRANCIS HUTCHESON, *A SYSTEM OF MORAL PHILOSOPHY* 192 (London, R. & A. Foulis 1755).

59 *Id.* at 195, 195–97.

unit.”⁶⁰ Indeed, generally, “At the common law of England, a parent’s right to custody and control of minor children was a sacred right with which courts would not interfere except where by conduct the parent abdicated or forfeited that right.”⁶¹ A statute passed during the reign of Queen Mary forbid the marrying of women under the age of sixteen without the consent of their parents, and was written “in terms which implied that the custody and education of such females should belong to the father and the mother.”⁶² Frequently, English Courts of Equity emphasized the absolute *paternal* parental power, with the first known case of a court giving custody to a mother rather than a father occurring in 1774.⁶³

Prior to 1660, a father “had the supreme right to the guardianship of his infant heirs.”⁶⁴ This “guardianship was known as the guardianship by nature, and lasted until the heir reached the age of twenty-one.”⁶⁵ After 1660, and the passing of the Tenures Abolition Act, the father could appoint a guardian by will.⁶⁶ Common law court cases regarding parental rights almost always materialized in custody disputes, “usually in the form of a habeas corpus petition asking for the delivery of the child.”⁶⁷ Moreover, “a number of early English cases from the Court of Chancery established the right of parents to make educational choices for their children” even despite the preferences of the child or civil authorities.⁶⁸ By the 1700s, a father had the “sacred” right to direct the religious upbringing of his child, and these preferences would be respected even after his death.⁶⁹

However, this largely absolute parental right was not always respected in England. In the seventeenth century, many vagrant (not apprenticed) or orphaned children were forced to travel and work as

60 Bruce C. Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights”*, 1976 BYU L. REV. 605, 615.

61 Daniel E. Witte, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 190–91.

62 R.A.G. O’Brien, *Parents and Education*, 2 CATH. LAW. 279, 282–83 (1956) (citation omitted).

63 MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 17 (1994).

64 Sarah Abramowicz, Note, *English Child Custody Law, 1660–1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1366 (1999).

65 *Id.*

66 *Id.* at 1369.

67 *Id.* at 1348; *see also id.* at 1348 n.17 (explaining how courts approached these cases).

68 Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years*, 38 J.L. & EDUC. 83, 110 (2009); *see also id.* at 110 n.178 (collecting cases).

69 *Id.* at 111.

indentured servants in the budding colony of Virginia.⁷⁰ The practice grew until other children, who were not vagrant or orphaned, were “spirited away” or “blatantly kidnapped and held prisoner for a month or so until sent off to sea.”⁷¹ The public became so outraged by this invasion of their parental rights that the attorney general of Charles II established a registry of all children contracted to work in the new colonies and “fierce[ly]” prosecuted those “caught spiriting.”⁷² As this history shows, the rights of parents under English tradition and common law were generally strong, and as Locke stated, established “by the law of nature.” This same respect for parental rights was carried across the water to the American colonies.

B. Colonial America

The colonial laws of the New World also generally reflected a strong, if not stronger, understanding of parental authority. *The Massachusetts Body of Liberties* was a systematic summary of the laws already established in that colony, published in 1641. It held that “no man shall be deprived of his wife or children” unless by due process of law.⁷³ In laws adopted by the colony of Connecticut in 1642, if any child above the age of sixteen cursed, smote, was generally rebellious, or stubborn towards their parents, they could be “put to Death.”⁷⁴ Nearly identical laws were adopted by the Massachusetts Bay Colony and New Hampshire in 1647 and 1680, respectively.⁷⁵ New Hampshire slightly softened the prescribed punishment, providing that in lieu of death the child could be “severely punished.”⁷⁶ Similarly, the Great Law of Pennsylvania, a series of statutes enacted by Pennsylvania’s first legislature in 1682, held that “Whosoever shall Assault or Menace a parent” and is proven guilty, “shall be Committed to the house of Correction” and will remain there at the “pleasure of the said parent.”⁷⁷

70 Holly Brewer, *The Transformation of Domestic Law*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580-1815) 288, 293–94 (Michael Grossberg & Christopher Tomlins eds., 2008).

71 MASON, *supra* note 63, at 32.

72 *Id.* at 33, 32–33.

73 See COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 71 (Donald S. Lutz ed., 1998) [hereinafter COLONIAL ORIGINS].

74 *Id.* at 230–31 (1998).

75 *Id.* at 7–8, 103.

76 *Id.* at 8.

77 CHARTER TO WILLIAM PENN, AND LAWS OF THE PROVINCE OF PENNSYLVANIA 113 (Staughton George, et al., eds., Harrisburg, Lane S. Hart 1879).

In 1650s New Netherland, couples required parental consent to marry⁷⁸ and the majority of colonies either had written laws or an enforced moral code that prevented children from marrying without parental consent.⁷⁹ Courts would enforce these laws, and “[c]ouples that did not follow these rules . . . might have their marriages annulled and be ordered ‘to separate and live apart.’”⁸⁰ Post-Revolution, these parental consent requirements for marriage either remained in effect, were ratified by states that had no previous law (such as North Carolina), or tweaked to establish ages by which parental consent was no longer required.⁸¹ The requirement of parental consent for marriages continued to be taken seriously through the Founding era.⁸²

78 2 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660-1730*, at 23 (2012).

79 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 1623–1682, at 190 (David Pulsifer ed., Boston, William White 1861) (A Plymouth Bay statute passed in 1636 states, “none bee allowed to Marry . . . but by [parental] Consent and approbation.”); THE CODE OF 1650, BEING A COMPILATION OF THE EARLIEST LAWS AND ORDERS OF THE GENERAL COURT OF CONNECTICUT 70 (Hartford, Silas Andrus 1822) (Minors still under the “government of parents” must seek their consent to marry.); COLONIAL ORIGINS, *supra* note 73, at 193–94 (A 1647 Rhode Island colony statute required parental consent for marriage and any man who married without consent “forfeit[ed] five pounds to the parents of the Maid,” *id.* at 194); HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 314–15 (2005) (Parental consent for marriage was required from the founding of the Pennsylvania colony in the late 1670s.). *See also* JOHN W. PURDON, *DIGEST OF THE LAWS OF PENNSYLVANIA, FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE SEVENTH DAY OF APRIL, ONE THOUSAND EIGHT HUNDRED AND THIRTY* 591 (Philadelphia, M’Carty & Davis 1831) (A 1730 Pennsylvania statute required written parental consent for those under 21.); 2 N.J. STATE LIBR. ARCHIVE AND HIST. BUREAU, *LAWS OF THE ROYAL COLONY OF NEW JERSEY 1703–1745*, at 256–60 (Bernard Bush ed., 1977) (A 1719 New Jersey act required parental consent for those under 21.); 1 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 15657 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823) (A 1632 Virginia colony statute required the same.); 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 484–86 (Thomas Cooper ed., Columbia, A.S. Johnston 1837) (In 1712 South Carolina enacted an English statute that required women under the age of 16 to obtain parental consent.); NICHOLAS L. SYRETT, *AMERICAN CHILD BRIDE: A HISTORY OF MINORS AND MARRIAGE IN THE UNITED STATES* 24 (2016) (“New Hampshire passed no law regulating age of marriage or parental consent until after the American Revolution and the Founding of the United States.”). Delaware and New York did not regulate parental consent to marry, but people followed the English common law. *See* SYRETT, *supra*, at 25. Maryland, Georgia and North Carolina did not formally regulate parental consent to marry. *See id.*

80 2 NELSON, *supra* note 78, at 23 (quoting *Schout v. Van Beeck*, New Netherland Council (Sept. 14, 1654), in 5 NEW YORK HISTORICAL MANUSCRIPTS: DUTCH COUNCIL MINUTES, 1652–1654, at 184, 183–84 (Charles T. Gehring ed. & trans., 1983)).

81 *See* SYRETT, *supra* note 79, at 27–28.

82 *See* Letter from President Thomas Jefferson to Robert R. Livingston, U.S. Minister to France (Nov. 4, 1803), *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-41-02-0495> [<https://perma.cc/4MQ8-CUN2>] (last visited Oct. 1, 2025) (explaining that while certain parties desired President Jefferson to prevent a marriage from taking

Parental rights and consent regarding apprenticeships were strengthened after the Revolution. Prior to the Revolution, many colonies had laws requiring parents to “teach, by themselves or others, their children & apprentices” the ability to “read the english tongue, & knowledg of the Capital laws.”⁸³ If parents refused or were unable to perform this basic duty, children could be removed from the home.⁸⁴ Children that did come under the care of the local civil authorities and were apprenticed out usually came from an abusive home, were born out of wedlock, were deserted, neglected, or suffered the death of a father.⁸⁵ Removal was particularly common in colonial Virginia and civil authorities “split families apart . . . without concern for the consent of either the parents or the child.”⁸⁶ This practice was patterned after English law.⁸⁷ This removal is unsurprising given that the colony of Virginia already had a history of using nonconsensual child labor.⁸⁸

By the 1750s, civil authorities in Massachusetts and Pennsylvania (already more hesitant than Virginia to separate families) began altering practices “so as to give more weight” towards keeping families together.⁸⁹ Additionally, this practice of separating families would not have been broadly tolerated in the New England colonies, which were comprised of family-run farms, “given the tendency of [those] parents to protect their children.”⁹⁰ Of course, parental consent was generally required for apprenticeships,⁹¹ and some colonies had laws stipulating damages if children were apprenticed without it or were abused.⁹²

place, the young man was over the age of twenty-one and did not require parental consent, and the eighteen-year-old lady had prevailed upon her parents to grant it).

83 THE COLONIAL LAWS OF MASSACHUSETTS 136 (Boston, William H. Whitmore 1889) (law in 1642).

84 See PAUL H. DOUGLAS, AMERICAN APPRENTICESHIP AND INDUSTRIAL EDUCATION 44 (1921).

85 Ruth Wallis Herndon & John E. Murray, “*A Proper and Instructive Education*”: *Raising Children in Pauper Apprenticeship*, in CHILDREN BOUND TO LABOR: THE PAUPER APPRENTICE SYSTEM IN EARLY AMERICA 9 (Ruth Wallis Herndon & John E. Murray eds., 2009).

86 BREWER, *supra* note 79, at 230.

87 See DOUGLAS, *supra* note 84, at 25–26.

88 See MASON, *supra* note 63, at 32.

89 See BREWER, *supra* note 79, at 258.

90 See 1 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660, at 128 (2008).

91 See Holly Brewer, *Age of Reason?: Children, Testimony, and Consent in Early America*, in THE MANY LEGALITIES OF EARLY AMERICA 293, 316 (Christopher L. Tomlins & Bruce H. Mann eds., 2001) (“Like marriage contracts, these labor contracts also became conditional on parental consent during minority.”).

92 See, e.g., THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 750 (Boston, T.B. Wait 1814) (“[E]very master of any outward bound ship or vessel that shall hereafter carry or transport out of this province any person under age, or bought or hired servant or apprentice, to any parts beyond the seas, without the consent of such master, parent

After the Revolution, while some poor children were still apprenticed without consent, parental rights in this area became stronger.⁹³ One of the catalysts for this change was “an increased idealization of the bonds between children and their natural parents, particularly their mothers” and “more effort was made to keep children with their natural parents.”⁹⁴ Regardless of the shift towards keeping poor families together, post-Revolutionary laws and custom required parental consent for children to be apprenticed out from stable homes.⁹⁵ This shift towards family integrity makes sense, for, as a member of the British House of Commons wrote in 1780, in Europe “fruitfulness [is] a matter of sorrow, and children a burthen” whereas “[i]n North America children are a blessing, are riches and strength to the parents; and happy *is every man that hath his quiver full of them*.”⁹⁶ Other endeavors also required parental consent if underage, such as serving in the militia.⁹⁷

Leading up to the Revolutionary War, the Americans and the Englishmen likened their relationship to “a family in which England enjoyed the rights and duties of parental authority over the colonies while the colonies enjoyed the corresponding rights and duties of children.”⁹⁸ The appearance of this parent-child theme in Revolutionary

or guardian signified in writing, shall forfeit the sum of fifty pounds.”); NELSON, *supra* note 90, at 87 & n.43 (referencing a Connecticut suit in 1660 where the father recovered damages against a master for the beating of his son).

93 Brewer, *supra* note 70, at 316–17.

94 Holly Brewer, *Apprenticeship Policy in Virginia: From Patriarchal to Republican Policies of Social Welfare*, in CHILDREN BOUND TO LABOR: THE PAUPER APPRENTICE SYSTEM IN EARLY AMERICA, *supra* note 85, at 184.

95 See, e.g., 2 LAWS OF THE STATE OF NEW-YORK 27 (New York, Thomas Greenleaf 1792).

96 THOMAS POWNALL, A MEMORIAL, MOST HUMBL Y ADDRESSSED TO THE SOVEREIGNS OF EUROPE, ON THE PRESENT STATE OF AFFAIRS, BETWEEN THE OLD AND NEW WORLD 56–57 (London, J. Almon, 2d ed. 1780).

97 Prior to the Revolution, Pennsylvania required parental consent for those under the age of twenty-one that wished to join the militia, a requirement that remained during the Revolutionary War. See BREWER, *supra* note 79, at 138–39. During the War of Independence, concern remained regarding the enlistment of eighteen-year-olds without parental consent, although Alexander Hamilton eventually advised that those “who have arrived at the age of eighteen . . . ought to be inlisted” without consent of any person. Letter from Alexander Hamilton to Lieutenant Timothy Taylor (June 21, 1799), *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-23-02-0217> [https://perma.cc/F7KN-KGMT] (last visited Oct. 5, 2025); see Letter from Lieutenant Timothy Taylor to Alexander Hamilton (June 8, 1799), *The Papers of Alexander Hamilton Digital Edition*, ROTUNDA, <https://rotunda.upress.virginia.edu/founders/ARHN-01-23-02-0171> [https://perma.cc/JWS5-MYYT] (last visited Oct. 5, 2025); see also Letter from Gen. Ebenezer Huntington to Alexander Hamilton (July 1, 1799), *The Papers of Alexander Hamilton Digital Edition*, ROTUNDA, <https://rotunda.upress.virginia.edu/founders/ARHN-02-01-02-0606> [https://perma.cc/8RA7-5Z9N] (last visited Oct. 5, 2025) (asking the legality of enlisting apprentices under the age of twenty-one without parental consent).

98 Burrows & Wallace, *supra* note 43, at 168.

literature was “employed so frequently[,] . . . deliberately[, and] consistently” that it became very “close to being the very *lingua franca* of the Revolution.”⁹⁹ In 1765, John Adams stated that while it was commonly understood that “Britain [was] the mother and we the children [and] that a filial duty and submission [was] due from us to her,” children still had “a right to complain when their parents [were] attempting to break their limbs, to administer poison, or to sell them to enemies for slaves.”¹⁰⁰ Additionally, those who warned against independence frequently invoked the analogy of a disobedient child.¹⁰¹

The image of parental authority also provided, ironically, the basis for independence. Colonialists, “contemplating America’s rapid social and economic development over the previous half-century, had somewhat tentatively advanced the idea that the once-helpless infant colonies were beginning to grow up” and with adulthood came independence.¹⁰² Language of inappropriate parental abuse became frequent.¹⁰³ Thomas Paine, in his work *American Crisis*, wrote, “To know whether it be the interest of the Continent to be independent, we need only ask this easy, simple question: Is it the interest of a man to be a boy all his life?”¹⁰⁴

Later debates and literature surrounding the ratification of the Constitution sometimes also invoked the rights of parents. In 1788, the anonymous Federalist writer “Conciliator” responded to concerns posed by “An Honest American” that fundamental rights would not be protected under the new Constitution.¹⁰⁵ Conciliator responded by invoking the commonly understood relationship between parent and child:

99 *Id.*

100 John Adams, “VI. A Dissertation on the Canon and the Feudal Law,” No. 4, BOS. GAZETTE, Oct. 21, 1765 (available online at *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/06-01-02-0052-0007> [<https://perma.cc/3ZAA-FUHZ>]); see also Letter from John Adams to John Quincy Adams (Aug. 18, 1782), *Educating Youth*, MASS. HIST. SOC’Y, https://www.masshist.org/JQA/08-diplomat_advises_other/ja-tojq17820818p1.html [<https://perma.cc/K6VL-7LNA>] (last visited Oct. 5, 2025) (“[T]here is nothing more sacred than the Relations of Brother and sister, except that of Parent and Child.”).

101 Burrows & Wallace, *supra* note 43, at 196 n.18 (If the colonies refused to submit to England, they would “forfeit the rights of sons, and justly bring upon them the indignation and chastisement of the mother country.” (quoting FOUR DISSERTATIONS, ON THE RECIPROCAL ADVANTAGES OF A PERPETUAL UNION BETWEEN GREAT-BRITAIN AND HER AMERICAN COLONIES 28 (Philadelphia, William & Thomas Bradford 1766)).

102 Burrows & Wallace, *supra* note 43, at 200.

103 See, e.g., *id.* at 204 (General Gage had “totally dissolved our allegiance to the King . . . [W]e swore allegiance to him as *King*, not as a *Tyrant* . . . as *Father*, not as a *Murderer*.” (quoting *Letter to General Gage*, BOS. GAZETTE, July 17, 1775, at 1)).

104 THOMAS PAINE, *THE AMERICAN CRISIS* 40 (London, R. Carlile 1819) (1776).

105 Conciliator, *To an Honest American*, PHILA. INDEP. GAZETTEER, Jan. 15, 1788.

In every separate government, the power extends *to all cases whatsoever* that are not excepted, and the rights of the governed are rights of *reservation*; a parent has full power over his child, save only the child's *reserved* rights: The state we live in has, like a parent, full power over us its children, save only our *reserved* rights¹⁰⁶

In the American colonies, like in their mother country, parental rights were well established and largely respected. Parents had the authority to direct and manage their child's affairs, and the motif of powerful parent and obedient child was so universal that it was used both as an avenue of complaint against the English monarchy and as the justification for rebellion. Unsurprisingly, parents in the Founding era also had the right to determine what available medical treatments their children would undergo.

1. Medical Consent at the Founding

a. Background

Perhaps most relevant for this Note is the requirement of parental consent for medical procedures on children during the Founding era. As many colonists lived in rural areas without access to a physician, mothers and wives often were the healer for the family, and "performed a range of tasks that we might call medical practice: diagnosing illnesses, prescribing and making medicines, and providing support and comfort to the sick."¹⁰⁷ In 1801, Martha Jefferson illustrated this point well in a letter to her father. Her children and newborn niece were afflicted with whooping cough, and, reflecting on her household duties, she wrote, "My God what moment for a Parent. . . . I had to act in the double capacity of nurse to my children and comforter to their Father."¹⁰⁸ This role of nurse and healer was also filled by women twenty-five years earlier, during the 1775–1782 smallpox epidemic.¹⁰⁹

This particular smallpox epidemic ravaged the American colonies and fledgling United States, resulting in more than a hundred-thousand deaths.¹¹⁰ At that time, the mortality rate for naturally arising

¹⁰⁶ *Id.*

¹⁰⁷ REBECCA J. TANNENBAUM, *THE HEALER'S CALLING: WOMEN AND MEDICINE IN EARLY NEW ENGLAND* 22 (2002).

¹⁰⁸ *THE FAMILY LETTERS OF THOMAS JEFFERSON* 213 (Edwin Morris Betts & James Adam Bear, Jr., eds., 1966).

¹⁰⁹ See, e.g., ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE 1767-1821*, at 23–24 (1977) (recounting Jackson's mother nursing him back to health after he contracted smallpox on a British prison ship).

¹¹⁰ See JEANNE E. ABRAMS, *REVOLUTIONARY MEDICINE: THE FOUNDING FATHERS AND MOTHERS IN SICKNESS AND IN HEALTH* 29 (2013).

cases was twenty-five percent.¹¹¹ John Adams, in a letter to his wife Abigail wrote, “The small Pox! The small Pox! What shall We do with it? I could almost wish that an innoculating Hospital was opened, in every Town in New England.”¹¹² What John Adams was referring to was the method of mitigating the deadly effects of smallpox by inoculation, a procedure that was relatively new to the colonies.¹¹³ Inoculation had been shown to have significant success in lowering the mortality rate. In 1730 a physician recorded that only one in thirty-three of those inoculated had died from smallpox and in 1764, only five out of three thousand.¹¹⁴

b. Controversy and Prohibitions

For a variety of reasons, this treatment was highly controversial. Some American patriots resisted inoculation due to its alleged connection to the English crown.¹¹⁵ Others opposed it on religious grounds, believing that it interfered with God’s will.¹¹⁶ Additionally, some were appropriately concerned that inoculation would lead to the spread of smallpox in their community.¹¹⁷ Inoculation could usually only be afforded by the affluent, and unlike modern vaccines, often resulted in a highly contagious virus easily spread to others, including the more vulnerable poor.¹¹⁸ This concern stemmed “not from ‘fear and superstition,’ . . . but from a realistic appraisal of working-class risks and opportunities.”¹¹⁹ While smallpox from inoculation was less dangerous than naturally occurring variety, it was “more dangerous and unpleasant than no smallpox at all, and many people hoped, with some reason, that if inoculation was prohibited, they could avoid the disease altogether.”¹²⁰ Resistance to inoculation sometimes became violent. The pioneering inoculator Dr. Zabdiel Boylston was threatened with

111 *Id.* at 84.

112 Letter from John Adams to Abigail Adams (June 26, 1776), in *THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY 1762–1784*, 137, 138 (L.H. Butterfield et al. eds., 1975).

113 Abrams, *supra* note 110, at 27–28.

114 WILLIAM CURRIE, *AN HISTORICAL ACCOUNT OF THE CLIMATES AND DISEASES OF THE UNITED STATES OF AMERICA* 38–39 (Philadelphia, T. Dobson 1792).

115 See GAVIN WEIGHTMAN, *THE GREAT INOCULATOR: THE UNTOLD STORY OF DANIEL SUTTON AND HIS MEDICAL REVOLUTION* 82–84 (2020); ELIZABETH A. FENN, *POX AMERICANA: THE GREAT SMALLPOX EPIDEMIC OF 1775–82*, at 287 n.50 (2001) (collecting sources of the same).

116 See ABRAMS, *supra* note 110, at 28.

117 *Id.* at 28–29.

118 See *id.*

119 See FENN, *supra* note 115, at 42 (quoting CARL BRIDENBAUGH, *CITIES IN REVOLT: URBAN LIFE IN AMERICA, 1743–1776*, at 329 (1955)).

120 See John B. Blake, *Smallpox Inoculation in Colonial Boston*, 8 J. HIST. MED. & ALLIED SCIS. 284, 296 (1953).

hanging, and someone attempted to bomb the home of minister-physician Cotton Mather, another advocate for the procedure.¹²¹

Considering this controversy, and likely due to a reasonable fear of unchecked inoculation causing an epidemic, many colonies passed laws requiring special permission to inoculate. In 1760, Connecticut passed a statute that prohibited inoculation “without first obtaining a certificate from . . . the civil authority, and [the approval] of the select-men of such town.”¹²² The law was updated in 1777 to require a two-thirds vote of the township.¹²³ Similar laws were passed in South Carolina in 1764,¹²⁴ Georgia in 1768,¹²⁵ Virginia in 1769,¹²⁶

121 See ABRAMS, *supra* note 110, at 28; see also FENN, *supra* note 115, at 36 (The would-be bomber attached a note to the bomb that stated “I’ll inoculate you with this, with a Pox to you.” (quoting 8 DIARY OF COTTON MATHER 658 (Mass. Hist. Soc’y 1912)).

122 See tit. 148, ch. 1, § 19 (Mar. 1760), in THE PUBLIC STATUTE LAWS [OF] THE [STATE OF] CONNECTICUT 614 (Hartford, Hudson & Goodwin 1808). Selectmen were effectively the executive branch of colonial local government, responsible for carrying out executive and administrative tasks. For example, “[i]n Boston, political life centered on the town meeting, which annually elected six selectmen to serve as a municipal governing board.” GARY B. NASH, THE URBAN CRUCIBLE: THE NORTHERN SEAPORTS AND THE ORIGINS OF THE AMERICAN REVOLUTION 17 (1986).

123 See tit. 148, § 19.

124 See Act of Aug. 10, 1764, *reprinted in* 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 182, 183–84 (Thomas Cooper ed., Columbia, A.S. Johnston 1838) (requiring leave for inoculation from the “Governor or Commander-in-chief” and the “General Assembly if sitting, if not, with the approbation of the Council,” *id.* at 183). An earlier act, passed in 1738, had prohibited inoculation within the city limits or within two miles of Charleston, subject to a 500 pound penalty. See Act of Sept. 18, 1738, § 1 *reprinted in* 3 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra*, at 513, 513–14.

125 See Act of Apr. 11, 1768, *reprinted in* 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 22, 23 (Allen D. Candler ed., 1911) (prohibiting inoculation without permission, subject to penalty of 100 pounds sterling); see also Act of May 29, 1764, *reprinted in* ACTS PASSED BY THE GENERAL ASSEMBLY OF GEORGIA 3, 3–5 (Savannah, James Johnston 1764) (prohibiting inoculation in Savannah and other towns); A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 367 (Oliver H. Prince ed., Milledgeville, Grantland & Orme 1822) (A provision in the 1817 Georgia code subjected inoculation without permission from the inferior court of the county to a fine of up to 1000 dollars and imprisonment.).

126 See An Act to Regulate the Inoculation of the Small-Pox within this Colony, §§ 1, 4, *reprinted in* 8 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 371, 371–74 (William Waller Hening ed., Richmond, J. & G. Cochran 1821) (prohibiting the transportation of material for inoculation, subject to a 1000 pound penalty for each offense, and inoculation without a license from the civil authorities, subject to a 100 pound penalty for each violation); see also An Act to Amend an Act Intituled an Act to Regulate the Inoculation of the Smallpox within this Colony, § 2, *reprinted in* 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, *supra*, at 371, 371 (updating the statute in 1777 to permit inoculation at home, so long as there was consent by a “majority of the housekeepers residing within two miles”).

New Hampshire ¹²⁷ and Rhode Island in 1776,¹²⁸ and in Florida in 1832.¹²⁹

But not all colonies and eventual states had laws restricting inoculation. For example, the colony of New York had a thriving private inoculation industry until 1775 when New York's Provincial Congress "unexpectedly instituted its own inoculation ban," likely in "reaction to growing rumors that the British intended to infect the Continental army and might do so by spreading smallpox among the soldiers."¹³⁰ Some doctors in colonies where inoculation was unregulated would even place advertisements in neighboring colonies' newspapers, promoting their private inoculation hospitals "to those who may choose to come abroad to take that Disorder."¹³¹

The colony and eventual Commonwealth of Massachusetts had particularly complex laws that governed the time, manner, and practitioner of inoculation. In 1764, a statute was passed that prohibited the practice of inoculation within Boston until thirty families had contracted the disease, and then only by permission of the selectmen.¹³² Additionally, "no house" could be "erected or used as an inoculating-hospital without the consent of the town or district where such house may be."¹³³ If consent was not obtained, the home "shall be deemed a common nuisance" and "any inoculated person therein, shall forfeit and pay the sum of one hundred pounds."¹³⁴ This type of local control is well illustrated by the town of Braintree, which in 1792 "[v]oted, that

127 See *New Hampshire Gazette*, Feb. 25, 1777, PORTSMOUTH ATHENAEUM (June 23, 2022), https://portsmouthathenaeum.org/new-hampshire-gazette_1777-02-25/ [https://perma.cc/8QVT-B5R6] (preserving a copy of the Gazette that published a 1776 New Hampshire statute requiring license from the General Assembly or Committee of Safety to inoculate, subject to a penalty of 30 pounds); see also Act of Dec. 25, 1792, reprinted in CONSTITUTION AND LAWS OF THE STATE OF NEW-HAMPSHIRE; TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES 319, 320 (Dover, Samuel Bragg 1805) (stating that if there is a danger of contracting smallpox, permission for inoculation may be granted by the selectmen and physicians had a duty to prevent the spread of smallpox under penalty of bond).

128 See 1776 R. I. Acts & Resolves 92–94 (permitting each county to set up inoculation hospitals, subject to state regulations, and allowing counties to "lay such Fines and Penalties upon the Offenders as they shall think proper," *id.* at 94).

129 See Act of Feb. 10, 1832, § 50, reprinted in COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA, PASSED PRIOR TO 1840, at 113, 122 (John P. Duval ed., Tallahassee, Samuel S. Sibley 1839).

130 ANDREW M. WEHRMAN, THE CONTAGION OF LIBERTY: THE POLITICS OF SMALLPOX IN THE AMERICAN REVOLUTION 195 (2022); see also 4 PETER FORCE, AMERICAN ARCHIVES 406 (Washington D.C., M. St. Clair Clarke & Peter Force 1843).

131 Alexander Stenhouse, *To the Inhabitants of Virginia*, VA. GAZETTE, Mar. 17, 1774, at 3.

132 1764 Mass. Acts 668.

133 1764 Mass. Acts 728–29, 729.

134 *Id.* at 729.

this Town will not consent that there be any more persons Inoculated in it for the small pox.”¹³⁵

During the siege of Boston “from April 1775 to March 1776, smallpox ran rife in the town, but the revolutionary government was able to keep it from getting into the army or the surrounding countryside.”¹³⁶ However, after the evacuation of the British army and subsequent contact with the smallpox-afflicted American army, the disease began to spread.¹³⁷ In response, in early July 1776, the Massachusetts General Assembly passed a law allowing inoculation within hospitals licensed by general courts of the county.¹³⁸ Soon thereafter, it became apparent to the General Assembly that smallpox was still spreading uncontrollably within the town of Boston, and it permitted inoculation within the town, up until July 15, 1776.¹³⁹ The emergency practice of permitting local courts to license hospitals was soon met with opposition, and it revised the statute in 1777 to only permit hospitals where towns had given their consent.¹⁴⁰ The General Assembly then prohibited inoculation in the towns surrounding Boston, but when the town of Boston voted to allow inoculation, it “passed a resolve temporarily permitting any town in the state to erect inoculation hospitals under the regulation of the Selectmen alone, dispensing . . . with the need for a license from the county court.”¹⁴¹

There are examples of towns acquiescing and then later revoking their consent for inoculations. In 1773, Dr. James Latham was permitted to operate an inoculation hospital in Salem.¹⁴² This decision was made in no small part due to the recent loss of twenty-one people to the disease.¹⁴³ Dr. Latham was practicing an allegedly superior technique of inoculation, the “Suttonian” method.¹⁴⁴ This method called for smaller incisions, isolation during recovery, and a “cold treatment” that required the recovering patient to be exposed to the outside air.¹⁴⁵ While Dr. Latham’s inoculations began reasonably well, the

135 RECORDS OF THE TOWN OF BRAINTREE: 1640 to 1793, at 619 (Samuel A. Bates ed., Randolph, Daniel H. Huxford 1886).

136 Blake, *supra* note 120, at 293.

137 *Id.*; see 1776 Mass. Acts 552–53.

138 See 1776 Mass. Acts 552–53.

139 1776 Mass. Acts 555–57. It is worth noting that inoculation remained a voluntary procedure for the citizens of Boston, though they were required to remain quarantined if they chose to undergo the endeavor. See *id.* at 555–56.

140 Blake, *supra* note 120, at 294.

141 *Id.* at 294–95.

142 WEHRMAN, *supra* note 130, at 145.

143 See *id.*

144 See *id.*; see also *id.* at 142.

145 DONALD R. HOPKINS, THE GREATEST KILLER: SMALLPOX IN HISTORY 60 (2002); see *id.* at 59–60.

townspeople began to turn against him as more and more of his patients died.¹⁴⁶ Dr. Latham, an enthusiastic adherent to the Suttonian cold treatment regimen, had exposed his patients to the “uncommonly severe” 1774 January weather, “throwing open patients’ windows, asking them to take walks outside, recommending only cold water to drink, and allowing no fires.”¹⁴⁷ He also provided his patients “secret medicines” which likely contained a near-fatal dose of mercury.¹⁴⁸ The final straw for Dr. Latham was when a natural outbreak of smallpox occurred in his hospital.¹⁴⁹ The town voted to close the hospital and suspend inoculations.¹⁵⁰ Dr. Latham left Salem, in part likely to due to an influential reverend calling for his “public punishment” and regretting that there was “no law for *hanging* mountebanks.”¹⁵¹

These laws limiting inoculation were not always popular. In letters responding to the French author Charles Marie de La Condamine’s book on inoculation, several anonymous Americans complained about a local prohibition of inoculation.¹⁵² Abigail Adams wrote to her husband, stating “In many Towns, already around Boston the Selectmen have granted Liberty for inoculation. I hope the necessity is now fully seen.”¹⁵³ Notably, future President George Washington was upset by Virginia’s decision in 1769 to restrict inoculation, stating that “Surely that Impolitic Act, restraining Inoculation in Virginia, can never be continued—If I was a Member of that Assembly I would rather move for a Law to compell the Masters of Families to inoculate every Child born within a certain limited time under severe Penalties.”¹⁵⁴ However, despite these sentiments, there is ample evidence that the laws and customs regulating inoculation were enforced.

c. Enforcement

Unlicensed practitioners were often penalized. In Massachusetts, if an inoculating hospital was found by the General Court to “not

146 See WEHRMAN, *supra* note 130, at 148–55.

147 *Id.* at 150.

148 *Id.* at 148–50.

149 *Id.* at 152–53.

150 *Id.* at 155. The town would later vote to allow inoculations under a different doctor. *Id.*

151 *Id.*

152 See M. DE LA CONDAMINE, *THE HISTORY, OF INOCULATION* 32–35 (New Haven, T. & S. Green 1773).

153 Letter from Abigail Adams to John Adams (July 13, 1776), *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/04-02-02-0026> [https://perma.cc/CK7P-ZM3V] (last visited Oct. 5, 2025).

154 Letter from Gen. George Washington to John Augustine Washington (June 1, 1777), *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-09-02-0583> [https://perma.cc/C8ZF-NLDL] (last visited Oct. 5, 2025).

answer the good purposes for which it was intended, either from its situation or a non-observance of the regulations prescribed,” it could be “discontinue[d].”¹⁵⁵ Any person who practiced inoculation after this discontinuance, or was providing “aid or assist[ance]” to someone practicing inoculation, could be fined, whipped, or put to hard labor for up to three months.¹⁵⁶ Similarly, in Rhode Island, those caught “wilfully and purposely” inoculating without the consent of the “Town-Council” were to “suffer the Pains and Penalty of Death,” and those convicted of the lesser charge of “wickedly endeavouring” to do the same were to “be sentenced to be whipped, not exceeding Thirty-nine Lashes, and suffer Six Months Imprisonment, and to be kept to hard Labour.”¹⁵⁷

There is evidence that there were actual prosecutions of those that gave or received inoculations without local consent. In 1777, four men were prosecuted for violating Connecticut’s ban on inoculation, and three were convicted and made to pay fifty-pound fines.¹⁵⁸ State archives indicate that Connecticut also brought prosecutions for violating the ban in 1780 and 1794.¹⁵⁹ In one of these prosecutions, Irijah Terrill was indicted on November 4, 1794 for inoculating “Almira Terrill . . . and . . . others.”¹⁶⁰ It is almost certain that the “others”

155 1777 Mass. Acts 633.

156 *Id.*

157 See *At a Town-Council Held in and for the Town of Providence, on the First Day of September, A.D. 1792*, U.S. CHRON., Sept. 6, 1792, at 2.

158 See Sarah Morin, “Greatly Endangering the Inhabitants of Said Town & Contrary to the Statute Law”: *Illegal Inoculation*, CONN. STATE LIBR. (Dec. 7, 2021), <https://libguides.ctstatelibrary.org/archives/uncoveringnewhaven/blog/Greatly-Endangering-the-Inhabitants-of-Said-Town-and-Contrary-to-th> [<https://perma.cc/4ZKT-V3UJ>]; *Governor & Co. of Conn. v. Simon Hide* (New Haven Cnty. Ct. 1777), <https://ctdigitalarchive.org/node/2802172> [<https://perma.cc/S4L7-VECD>] (guilty); *Governor & Co. of Conn. v. William Russel* (New Haven Cnty. Ct. 1777), <https://ctdigitalarchive.org/node/3232083> [<https://perma.cc/TTR7-XY6R>] (guilty); *Governor & Co. of Conn. v. Moses Gaylord* (New Haven Cnty. Ct. 1777), <https://ctdigitalarchive.org/node/79749> [<https://perma.cc/4W9K-SBB3>] (guilty); *Governor & Co. of Conn. v. Jesse Cole* (New Haven Cnty. Ct. 1777), <https://ctdigitalarchive.org/node/3388698> [<https://perma.cc/J43Z-MBDW>] (not guilty).

159 *Governor & Co. of Conn. v. Eunice Atwater* (New Haven Cnty. Ct. 1780), <https://www.ctdigitalarchive.com/node/1901036> [<https://perma.cc/UVV7-Z676>]. The selectmen had granted permission for six individuals to become inoculated. *Id.* When one declined the operation, Ms. Atwater “was informed that there was a door open for her” and was substituted in. *Id.* Despite this permission, and perhaps due to some bureaucratic mishap, she was still later prosecuted. See *id.* The court, however, declined to impose a fine. See *id.*; see also *Connecticut v. Eliakim Elmore* (New Haven Cnty. Ct. 1794), <https://prod.ctda.dgicloud.com/node/3723200> [<https://perma.cc/QT9X-6W5U>] (inoculation without permission); *Connecticut v. Irijah Terrill* (New Haven Cnty. Ct. 1794), <https://ctdigitalarchive.org/node/3723224> [<https://perma.cc/7DPY-GPKN>].

160 See *Irijah Terrill*, at 6 (New Haven Cnty. Ct. 1794), <https://ctdigitalarchive.org/node/3723224> [<https://perma.cc/7DPY-GPKN>].

included Jared Terrill, his brother, as Jared was indicted for receiving the inoculation without permission at the same time.¹⁶¹ Furthermore, while speculative, Almira may have been the legal name for Irijah's daughter, Alma, who sadly passed away on May 17, 1794.¹⁶² Speculating further, her death may have been caused by the inoculation, as the indictment states that Irijah gave the inoculation on or around March 10, 1794, and dying from an inoculation gone wrong could take several months.¹⁶³ This interpretation of events seems at least plausible—a child who suffers and dies from smallpox is unlikely to go unnoticed by a tight-knit community and town authorities—a death possibly leading to her father's prosecution.

Additionally, records show that sometime between November 1, 1784, and June 10, 1785, inhabitants of the county of Berkshire committed the crime of inoculation without permission.¹⁶⁴ Apparently, out of fear of catching the natural disease, they had inoculated themselves, contrary to law, and “rendered themselves liable to fines and penalties.”¹⁶⁵ Ultimately, in 1785, upon the petition of Representatives Erastus Sergeant and John Paterson, the General Assembly of Massachusetts absolved these residents of the crime.¹⁶⁶

In another example, in June 1767, Dr. John Dalglish privately inoculated his apprentice, Robert Bell, in Norfolk, Virginia.¹⁶⁷ Dalglish apparently wished his apprentice to have immunity so that he would be able to attend to smallpox-afflicted patients without catching it himself.¹⁶⁸ However, despite Virginia having no law at the time against inoculation, the selectmen of Norfolk censured him for failing to receive permission from the town.¹⁶⁹ Dr. Dalglish would continue to inoculate without permission, earning further ire from the town,

161 See *Connecticut v. Jared Terrill* (New Haven Cnty. Ct. 1794), <https://ctdigitalarchive.org/node/3723219> [<https://perma.cc/2XLT-WS3P>]; see also William Terrill, *Descendants of Roger Terrill and Abigail Ufford*, GENEALOGY.COM (DEC. 9, 2004), <https://www.genealogy.com/forum/surnames/topics/terrell/913/> [<https://perma.cc/TWE9-QYGV>].

162 See *Irijah Terrill*, at 6; Terrill, *supra* note 161.

163 *Irijah Terrill*, at 6; see also Per-Olof Hasselgren, *The Smallpox Epidemics in America in the 1700s and the Role of the Surgeons: Lessons to be Learned During the Global Outbreak of COVID-19*, 44 WORLD J. SURGERY 2837, 2838 (2020).

164 See RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 48 (Boston, Adams & Nourse 1785).

165 *Id.*

166 See *id.*

167 See WEHRMAN, *supra* note 130, at 73.

168 See *id.* at 74.

169 See *id.*; see also John Dalglish, Letter to the Editor, VA. GAZETTE, Oct. 20, 1768, at 2 (describing his practice of inoculating his apprentices for smallpox, which he had done “not only without censure, but with approbation, until the last time”), <https://research.colonialwilliamsburg.org/DigitalLibrary/va-gazettes/VGSinglePage.cfm?issueIDNo=68.PD.47&page=1&res=LO> [<https://perma.cc/7LZR-9AQP>].

who attested that he and those he inoculated had “never consulted the publick whether it was agreeable or disagreeable.”¹⁷⁰ Ultimately, his actions would cause him to be arrested and face trial¹⁷¹ and cause Governor Botetourt, who presided over the proceedings, to recommend that Dr. Dalgleish “not inoculate any more except in cases of necessity” until the controversy was resolved.¹⁷² On the courthouse steps, William Nelson, who would later become the acting governor of Virginia, stated to a “cheerful Norfolk crowd” that if he had the power, he “would hang up every man that would inoculate even in his own house.”¹⁷³ The Virginia General Assembly, largely in response to this controversy, passed the 1769 act banning inoculation without permission.¹⁷⁴

Social pressure, aside from any enforced law, could also prevent those who wished to inoculate. In the fall of 1773, the town of Newbury, Massachusetts, learned that the prominent land speculator Moses Little intended on inoculating his family without permission from the selectmen.¹⁷⁵ The selectmen warned that while there was currently no law prohibiting inoculation, the town did have laws permitting the selectmen to “Remove any Person that has got an infectious Distemper” and would pose a “Danger” to the community.¹⁷⁶ The selectmen believed that performing such a procedure would create such a danger, and advised him to wait until the spring if he wished to perform the inoculation, when the town “may be moderated.”¹⁷⁷ Otherwise, they “fear[ed] Violence w[ould] be used” against Little and his family.¹⁷⁸ Little decided not to inoculate his family that fall.¹⁷⁹

d. Parental Consent for Inoculation

Whenever towns or states did permit inoculation, parents decided whether to inoculate their children.¹⁸⁰ This can be illustrated by diary

170 See WEHRMAN, *supra* note 130, at 77, 74–84.

171 See *id.* at 84–86.

172 See *id.* at 87.

173 See *id.*

174 See *id.* at 88.

175 Correspondence from the Selectmen of Newbury (Mass.) to Moses Little (Nov. 27, 1773) (on file with the Francis A. Countway Library of Medicine) (available online at <https://curiosity.lib.harvard.edu/worlds-of-change/catalog/149-990146098670203941?locale=it> [<https://perma.cc/KHW8-7CTM>]); see also WEHRMAN, *supra* note 130, at 1 (recounting the same).

176 See Correspondence from the Selectmen of Newbury (Mass.) to Moses Little, *supra* note 175.

177 *Id.*

178 *Id.*

179 WEHRMAN, *supra* note 130, at 2.

180 This had been the case in England. See PHILIP ROSE, AN ESSAY ON THE SMALL-POX; WHETHER NATURAL, OR INOCULATED 14 (H. Curll, London, 2d ed. 1727) (stating that parental consent was required in England for inoculation).

entries, letters, and other Founding-era records. In 1721, when the procedure of inoculation had just been developed (and laws against it not yet passed), Samuel Mather, whose Harvard roommate had just died from smallpox, “begs to have his Life saved, by receiving the *Small-Pox*, in the way of *Inoculation*.”¹⁸¹ His father, the Reverend Cotton Mather, despite being a firm advocate for the practice of inoculation, was reluctant.¹⁸² If Mather did not “suffer this Operation upon the child,”¹⁸³ “Sammy might die from natural smallpox and he would be accountable; if he did consent, the public . . . would hold ‘infinite Prejudices’ against him and his ministry.”¹⁸⁴ Ultimately, Samuel’s grandfather recommended that Samuel be inoculated in secret, which Mather ultimately decided to do.¹⁸⁵

Benjamin Franklin was an advocate for the procedure and after losing his four-year-old son Francis to smallpox in 1736, encouraged parents to inoculate their children.¹⁸⁶ In his autobiography, Franklin would recount his own “bitter[] . . . regret that [he] had not given [smallpox] to [Francis] by inoculation.”¹⁸⁷ He mentioned this “for the sake of parents who omit that operation, on the supposition that they should never forgive themselves if a child died under it; my example showing that the regret may be the same either way, and that, therefore, the safer should be chosen.”¹⁸⁸

Franklin also published a pamphlet with the physician William Heberden, aimed at convincing parents to inoculate their children.¹⁸⁹ In it, he lamented the low inoculation rate among “the common people in *America*.”¹⁹⁰ He attributes this low inoculation rate to “*Scruples of conscience* . . . concerning the *lawfulness* of the practice” and the fact that “if one parent or near relation is against it, the other does not chuse to inoculate a child without free consent of all parties.”¹⁹¹

181 2 DIARY OF COTTON MATHER 635 (Frederick Ungar Publ’g Co., 1957); Amalie M. Kass, *Boston’s Historic Smallpox Epidemic*, 14 MASS. HIST. REV. 1, 46 n.87.

182 Kass, *supra* note 181, at 25–26.

183 2 DIARY OF COTTON MATHER, *supra* note 181.

184 Kass, *supra* note 181, at 26 (quoting 2 DIARY OF COTTON MATHER, *supra* note 181).

185 See 2 DIARY OF COTTON MATHER, *supra* note 181, at 635–38. Samuel did not take the inoculation well, causing his father much distress, as he was tending to two other dying children. *Id.* at 638–44.

186 See ABRAMS, *supra* note 110, at 91; BENJAMIN FRANKLIN, AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 244 (John Bigelow ed., Philadelphia, J.B. Lippincott & Co. 1868).

187 FRANKLIN, *supra* note 186.

188 *Id.*

189 See Benjamin Franklin, *Preface to WILLIAM HEBERDEN, SOME ACCOUNT OF THE SUCCESS OF INOCULATION FOR THE SMALL-POX IN ENGLAND AND AMERICA* 3 (London, W. Strahan 1759).

190 *Id.* at 5.

191 *Id.*

Franklin recommended that the “Clergy” alleviate these concerns.¹⁹² When Franklin’s grandson Benjamin Franklin Bache was born in 1769, he advised his daughter Sally to inoculate him, which she ultimately did.¹⁹³

Other Founding-era letters illustrated that it was the parents who determined their children’s medical decisions. In 1764, John Adams went to an inoculation hospital to undergo the procedure.¹⁹⁴ Writing to his then-fiancée Abigail Smith, John Adams shared her “Lamentation” that her parents would not permit her to undergo the procedure.¹⁹⁵ Speaking rather harshly, he stated that parents who “restrain[ed] their Children” from undergoing inoculation “must be lost in Avarice or Blindness.”¹⁹⁶ Abigail Adams would have to wait until 1776 to become inoculated, when she took advantage of a temporary lifting of the ban on inoculations in Boston and took her four children there to undergo the procedure.¹⁹⁷ Until that point, Mrs. Adams had heeded her mother’s prohibitions against the procedure.¹⁹⁸ Writing to her husband, Mrs. Adams wrote that she “yesterday arrived and was with all 4 of our Little ones inoculated for the small pox.”¹⁹⁹

Still more letters and other family records illustrate the same. In 1773, when smallpox threatened the town of Edenton, North Carolina, the widow Penelope Dawson decided to inoculate her children, for fear of otherwise “running [them] into danger.”²⁰⁰ One South Carolinian husband wrote to his wife regarding his newborn son, stating “I think my love you had better have him inoculated as soon as ever you

192 *Id.*

193 See Letter from Benjamin Franklin to Deborah Franklin (June 10, 1770), *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-17-02-0093> [<https://perma.cc/PL6S-Y22E>] (last visited Oct. 6, 2025).

194 Letter from John Adams to Abigail Smith (Apr. 7, 1764), MASS. HIST. SOC’Y, <https://www.masshist.org/digitaladams/archive/doc?id=L17640407ja&rec=sheet&archive=letters&hi=1&numRecs=28&query=inoculate&queryid=&start%E2%80%A6> [<https://perma.cc/L6W2-XZAK>] (last visited Oct. 6, 2025).

195 See Letter from John Adams to Abigail Smith (Apr. 26, 1764), MASS. HIST. SOC’Y, <https://www.masshist.org/digitaladams/archive/doc?id=L17640426ja&rec=sheet&archive=letters&hi=1&numRecs=28&query=inoculate&queryid=&start%E2%80%A6> [<https://perma.cc/NV5T-TGJD>] (last visited Oct. 6, 2025).

196 *Id.*

197 ABRAMS, *supra* note 110, at 136.

198 *Id.*

199 *Id.* (quoting Letter from Abigail Adams to John Adams (July 13, 1776), *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/04-02-02-0026> [<https://perma.cc/XVG5-7SRG>] (last visited Oct. 6, 2025)).

200 Letter from Penelope Dawson to Samuel Johnston (Dec. 16, 1773) (on file with the Library of the University of North Carolina at Chapel Hill) (available online at <https://dc.lib.unc.edu/cdm/singleitem/collection/00ddd/id/501915/rec/29> [<https://perma.cc/K8CX-5KMZ>]); see also Alan D. Watson, *Combating Contagion: Smallpox and the Protection of Public Health in North Carolina, 1750 to 1825*, 90 N.C. HIST. REV. 26, 35 (2013).

& your friends think it can be done with safety.”²⁰¹ In March 1777, when the town of Westborough, Massachusetts voted to permit inoculation, Reverend Ebenezer Parkman wrote in his diary that his twenty-one and nineteen year old daughters were “very much set upon” receiving inoculation.²⁰² He eventually permitted it, as he “could not resist their Importunity.”²⁰³ Moses Little, who had been pressured several years earlier into forgoing the procedure, was finally able to inoculate his family in 1778 when the town of Newbury permitted it.²⁰⁴ Writing to one of his sons, he “strongly advised” him to get inoculated, and if his mother would permit it, his younger brother as well.²⁰⁵ Similarly, Thomas Jefferson had his two daughters inoculated in 1782, and fifteen years later he wrote to his daughter Martha regarding his grandchildren, stating that “I entirely approve of your resolution to have the children inoculated.”²⁰⁶ There were, of course, those that disregarded state bans on inoculations, and potentially even parental consent. George Washington, who had spoken so stridently against the Virginia ban on inoculations,²⁰⁷ had his entire family inoculated in the spring of 1777.²⁰⁸

2. Deprivation of Parental Rights

However, while this history shows that parents at the Founding had the right to determine their children’s medical decisions, there was one group of parents utterly deprived of this right: enslaved ones.

201 Letter from John Kean to Susan Kean (Apr. 8, 1788) (on file with Kean University) (available online at https://digitalcommons.kean.edu/lhc_1780s/198/?utm_source=digitalcommons.kean.edu%2Flhc_1780s%2F198&utm_medium=PDF&utm_campaign=PDFCoverPages [<https://perma.cc/83XB-84M8>]).

202 The Diary of Rev. Ebenezer Parkman (Mar. 29, 1777) (on file with the Am. Antiquarian Soc’y) (available online at *The Ebenezer Parkman Project*, WESTBOROUGH PUB. LIBR., <https://diary.ebenezerparkman.org/1777/03/29/> [<https://perma.cc/5WPV-EDLX>]); see also WEHRMAN, *supra* note 130, at 223.

203 The Diary of Rev. Ebenezer Parkman (Apr. 3, 1777) (on file with the Am. Antiquarian Soc’y) (available online at *The Ebenezer Parkman Project*, WESTBOROUGH PUB. LIBR., <https://diary.ebenezerparkman.org/1777/04/03/> [<https://perma.cc/HVL3-7NN6>]).

204 See Correspondence from Col. Moses Little to his son (Mar. 14, 1778) (on file with Francis A. Countway Library of Medicine) (available online at <https://curiosity.lib.harvard.edu/worlds-of-change/catalog/149-990146015830203941> [<https://perma.cc/TM2Y-KT3D>]).

205 *Id.*; see also WEHRMAN, *supra* note 130, at 3.

206 See Letter from Thomas Jefferson to James Madison (Nov. 26, 1782), *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-06-02-0195> [<https://perma.cc/HFE3-EC3A>] (last visited Oct. 6, 2025); Letter from Thomas Jefferson to Martha Jefferson Randolph (Apr. 9, 1797), *The Papers of Thomas Jefferson Digital Edition*, ROTUNDA, <https://rotunda.upress.virginia.edu/founders/TSJN-01-29-02-0274> [<https://perma.cc/42R8-C462>] (last visited Oct. 6, 2025).

207 See *supra* note 154 and accompanying text.

208 WEHRMAN, *supra* note 130, at 225.

Included in George Washington's illegal act was the inoculation of some two hundred slaves.²⁰⁹ While difficult to know for certain, it seems highly unlikely that Washington asked enslaved parents for their consent to this procedure for either themselves or their children. The historical record would certainly not suggest as much. While some enslavers, such as Washington, inoculated their slaves, many found that it was not economical to do so, and simply let the slaves die of smallpox.²¹⁰ Zabdiel Boylston, largely credited for bringing inoculation to the American colonies,²¹¹ recorded trying the procedure on his son Thomas, as well as on his enslaved person, Jack, and his son, Jackey.²¹² Boylston also recorded inoculating other enslaved children, the only consent mentioned being that of their enslavers.²¹³

Dr. Dalglish, who would be eventually fined by the city of Norfolk for inoculating without a license, wrote in 1768 that he inoculated "a Negro woman pregnant five months, at Mr. Charles Driver's, on Pagan creek."²¹⁴ She recovered well, and he hoped that this experiment may "lessen the dread of married women when they cannot retire from an infected house."²¹⁵ He also noted that the "black woman's infant is now three years old" and that he wished "to have it inoculated to increase knowledge."²¹⁶ Dalglish continued, stating that "Mr. Driver is so obliging as to give me leave to do it," making clear that the enslaved mother's consent was not required for this procedure.²¹⁷ Sadly, this deprivation of enslaved persons' parental rights would continue for many more years until the ratification of the Thirteenth and Fourteenth Amendments.²¹⁸

209 *Id.*

210 *Id.* at 225, 243–44.

211 See ROBERT E. BROWN, *Boylston, Zabdiel*, in *THE BLOOMSBURY ENCYCLOPEDIA OF THE AMERICAN ENLIGHTENMENT 167–68* (Mark G. Spencer ed., 2015). Interestingly, Boylston learned of inoculation from Cotton Mather, who in turn had learned of it from his slave Onesimus and Greek physicians Emanuel Timonius and Jacob Pylarinus. See *id.* According to the account given by Mather, Onesimus stated that prior to being enslaved, "he had undergone an operation which had given him something of the smallpox, and would forever preserve him from it." Letter from Cotton Mather to Dr. John Woodward (July 12, 1716) in *SELECTED LETTERS OF COTTON MATHER* 214 (Kenneth Silverman ed., 1971).

212 ZABDIEL BOYLSTON, *AN HISTORICAL ACCOUNT OF THE SMALL-POX INOCULATED IN NEW ENGLAND* 2 (London, S. Chandler 1726).

213 See *id.* at 24, 11, 12, 17, 23, 27.

214 John Dalglish, Letter to the Editor, *VA. GAZETTE*, Apr. 14, 1768, at 1.

215 *Id.*

216 *Id.*

217 *Id.*

218 There is a good deal of historical evidence illustrating that unequal treatment of formerly enslaved parents played a role in the ratification of the Fourteenth Amendment. See Nate Wertjes, *Parental Rights and the Fourteenth Amendment: A History* (April 30, 2026) (unpublished essay) (on file with author).

IV. ANALYSIS

In *United States v. Rahimi*, the Court stated that when the constitutionality of a regulation is challenged, “the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.”²¹⁹ The judicial task is to “ascertain whether the new law is ‘relevantly similar’ to laws that our tradition is understood to permit, ‘apply[ing] faithfully the balance struck by the founding generation to modern circumstances.’”²²⁰

What our legal history of parental rights suggests is that states, like colonies during the Founding era, have the ability to ban certain medical procedures, and, at the same time, parents retained the right to refuse to subject their children to suggested medical care. During the Founding era, there was a patchwork of state and local regulations regarding inoculation. For instance, many municipalities would locally prohibit the procedure, which would be later followed by a ban from the state government.²²¹ This was the case in South Carolina, where Charleston passed an early ban on the procedure within and around the city in 1738, followed by a state ban (unless with explicit permission) in 1764.²²² Of course, not every state had similar prohibitions, and some individuals took advantage of the lack of regulations to be inoculated.²²³

Local and state laws limited the delivery of medical care, as these laws were enforced. Inoculators in Massachusetts and Rhode Island who disregarded prohibitions on the procedures could be fined, whipped, or imprisoned.²²⁴ Irijah Terrill was prosecuted for inoculating his brother Jared, and possibly his daughter Almira.²²⁵ Some who broke the law were forced to seek absolution from the state legislature,²²⁶ and even prominent doctors, such as Dr. Dalglish, were arrested and fined for performing illicit inoculations.²²⁷ In other

219 *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (citing *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2131–34 (2022)). Of course, the Court in *Rahimi* considered Founding-era regulations circumscribing the Second Amendment’s right to keep and bear arms, an enumerated right. *Id.* at 1897–98. However, until further direction from the Court, the language of “relevantly similar” is helpful when examining what restrictions may be placed on a reasonably well-established unenumerated right, such as parental rights. *See id.* at 1898 (quoting *Bruen*, 142 S. Ct. at 2132).

220 *Id.* (quoting *Bruen*, 142 S. Ct. at 2132, 2133 n.7).

221 *See supra* notes 122–39 and accompanying text.

222 *See supra* note 124.

223 *See supra* notes 130–31 and accompanying text.

224 *See supra* notes 155–57 and accompanying text.

225 *See supra* notes 160–62 and accompanying text.

226 *See supra* notes 164–66 and accompanying text.

227 *See supra* notes 171–72 and accompanying text.

instances, the receipt of inoculations was delayed. Abigail Adams, for example, had to wait until Boston allowed the procedure to inoculate her children.²²⁸

This history of prohibitions and prosecutions suggests that laws barring parents from accessing sex-reassignment procedures for their children satisfy the “relevantly similar” requirement. Evidence from the Founding era illustrates similarities between parents who wished their children receive inoculation and parents who wish for their child to undergo sex-reassignment therapy. As is the case now for parents who seek sex-reassignment procedures but are barred by state law, parents in the Founding era, like Irijah Terrill, were similarly prevented by state (or local) laws from receiving inoculations. Today, parents in states like Idaho and North Dakota may be prosecuted if they disregard prohibitions on certain medical procedures that subject their children to sex-reassignment therapy.²²⁹ If historical examples are a guide, the record of legislative limitations on medical practices indicates there is nothing unconstitutional with states disallowing medical procedures considered harmful or unproven.

Additionally, there are other similarities between the restrictions on inoculations for smallpox, and restrictions on sex-reassignment therapy that deserve a cursory review. At the Founding, inoculations were restricted because the procedure was considered by many to be potentially harmful, contagious, and experimental. While receiving immunity to smallpox via inoculation was considered to be safer than receiving it naturally, inoculation was “more dangerous and unpleasant than no smallpox at all.”²³⁰ Similarly, treating gender dysphoria with sex-reassignment surgery or hormone therapy may actually inflict more harm on the patient.²³¹ This is especially concerning for minors afflicted with gender dysphoria, as large majorities of minors diagnosed with gender dysphoria later desist.²³² Additionally, the

228 See *supra* note 197 and accompanying text.

229 See *supra* note 12 and accompanying text.

230 Blake, *supra* note 120, at 296.

231 See, e.g., Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L.V. Johansson, Niklas Långström & Mikael Landén, *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS ONE, Feb. 22, 2011, at 7 (finding “substantially higher rates of overall mortality, death from cardiovascular disease and suicide, suicide attempts, and psychiatric hospitalisations in sex-reassigned transsexual individuals compared to a healthy control population” and that while “surgery and hormonal therapy alleviates gender dysphoria, it is apparently not sufficient to remedy the high rates of morbidity and mortality found among transsexual persons”); see also *United States v. Skrmetti*, 145 S. Ct. 1816, 1841–45 (2025) (Thomas, J., concurring) (discussing the potential dangers of sex-reassignment therapy).

232 See Devita Singh, Susan J. Bradley & Kenneth J. Zucker, *A Follow-Up Study of Boys with Gender Identity Disorder*, FRONTIERS IN PSYCHIATRY, Mar. 29, 2021, at 1 (87.8% of young boys diagnosed with gender dysphoria later desisted.); see also Christian J. Bachmann, Yulia Golub,

Founding generation had valid anxieties about the inoculated spreading smallpox within their communities.²³³ Likewise, there are justifiable concerns that “gender-affirming care” may actually cause gender dysphoria to become “socially contagious.”²³⁴ While somewhat controversial, several studies have begun to validate this concern.²³⁵ Finally, inoculation in general, and specifically several particular methods, were seen as experimental. For instance, Dr. Latham was run out of Salem, and his experimental method of inoculation restricted, due to the harm and death inflicted on his patients.²³⁶ Similarly, there remains little evidence regarding long-term health benefits of sex-reassignment therapy for those struggling with gender dysphoria, and it remains an experimental procedure.²³⁷ The ramifications of these procedures are especially acute for minors. Not only have children with

Jakob Holstiege & Falk Hoffman, Research Letter, *Gender Identity Disorders Among Young People in Germany: Prevalence and Trends, 2013-2022*, 121 DEUTSCHES ÄRZTEBLATT 370, 370 (2024) (finding after five years, on average, a persistence rate of only 36.4%).

233 See *supra* notes 118–19 and accompanying text.

234 See generally ABIGAIL SHRIER, IRREVERSIBLE DAMAGE: THE TRANSGENDER CRAZE SEDUCING OUR DAUGHTERS (2020); see *id.* at 196 (recounting a conversation with an adult transitioner who is concerned that “we’re never going to be able to help those who actually need it if we’re fast-tracking transition for troubled girls caught up in a social contagion”).

235 See, e.g., Lisa Littman, *Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, PLOS ONE, Aug. 16, 2018, at 2 (finding that in over a third “of the friendship groups described, parent participants indicated that the majority of the members became transgender-identified,” and evidence indicating “the possibility of a potential new subcategory of gender dysphoria (referred to as rapid-onset gender dysphoria) that has not yet been clinically validated and the possibility of social influences and maladaptive coping mechanisms”); Eleanor Hayward, *Number of Children with Gender Dysphoria Soars 50-fold in a Decade*, THE TIMES (Jan. 24, 2025), <https://www.thetimes.com/uk/healthcare/article/number-of-children-with-gender-dysphoria-rises-50-fold-in-a-decade-8q79bfbwfj> [<https://perma.cc/LLJ5-H7JE>] (“[M]ore than 10,000 under-18s identified as transgender . . . in 2021, up from about 200 in 2011. . . . [P]ossible explanations include ‘social factors’ . . .”).

236 See *supra* notes 142–51 and accompanying text.

237 See Dhejne et al., *supra* note 231, at 7; see also Tamara Syrek Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, *Gender Dysphoria and Gender Reassignment Surgery*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Aug. 30, 2016), <https://www.cms.gov/medicare-coverage-database/view/ncacal-decision-memo.aspx?proposed=N&NCAId=282> [<https://perma.cc/ZN48-N253>] (“[T]here is not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria.”); see also *Responding to the Transgender Moment: A Conversation with Ryan T. Anderson*, ALBERT MOHLER (June 4, 2018), <https://albertmohler.com/2018/06/04/ryan-anderson/> [<https://perma.cc/8TLZ-U42M>] (“We’ve always had people who struggled with their gender identity, people who experienced a gender identity disorder, a gender identity conflict, what’s now called gender dysphoria. But never before have we really entertained the idea that, that meant someone was the opposite sex.”); see also *United States v. Skrmetti*, 145 S. Ct. 1816, 1837 (2025) (“This case carries with it the weight of fierce scientific and policy debates about the safety, efficacy, and propriety of medical treatments in an evolving field.”); *Id.* at 1844–45 (Thomas, J., concurring) (discussing the lack of evidence for and experimental nature of sex-reassignment therapies).

gender dysphoria been shown to have high desistence rates, but there are growing concerns that minors who undergo hormone therapy or sex-reassignment surgery may regret these procedures. This concern is best illustrated by the growing number of “detransitioners,” individuals who have undergone sex-reassignment procedures, but later express regret and attempt to reverse course.²³⁸ These similarities deserve further examination, but they may begin to satisfy the higher level of scrutiny at least one Justice has called for in a history-and-tradition analysis.²³⁹

At the same time, however, there is a paucity of historical support for the state forcing medical care on children whose parents oppose that care. As the historical record illustrates, parents had plenary power over their children’s lives and decisions. King James I, in advancing an argument for monarchical supremacy, likened his power to that of a father over his family.²⁴⁰ While later scholars, such as Locke, Pufendorf, and Blackstone, would temper the absolute power of the monarchy, and thus the father, they still held that parental power was broad, and, as Blackstone stated, children lived within the “empire of the father.”²⁴¹

This power manifested itself in Colonial America as parents having the authority, among others, to dictate whom their children would marry²⁴² and for most households, to whom their children would be apprenticed to.²⁴³ In the medical context, when states or municipalities decided to permit inoculation, parents determined whether to submit their children to such a procedure. Letters, such as those between John Adams and his fiancée Abigail, illustrate that parents often did

238 See Singh, *supra* note 232; Dan Hart, *Under the Radar, the Detransitioner Movement is Surging*, WASH. STAND (Dec. 14, 2022), <https://washingtonstand.com/commentary/under-the-radar-the-detransitioner-movement-is-surging> [<https://perma.cc/7LCW-8DVA>] (recounting the stories of individuals, including minors, who medically or socially transitioned and then detransitioned); see also *Skrmetti*, 145 S. Ct. at 1846–47 (Thomas, J., concurring) (discussing “detransitioners”).

239 See *United States v. Rahimi*, 144 S. Ct. 1889, 1932 (2024) (Thomas, J., dissenting) (arguing that while a historical analogue “need not be a ‘historical twin,’ it must be ‘well-established and representative’ to serve as a historical analogue” (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022))).

240 See *supra* note 45 and accompanying text.

241 1 WILLIAM BLACKSTONE, COMMENTARIES *452; see *supra* notes 49–61 and accompanying text. Since sex-reassignment surgery often involves the removal of sexual organs, it is worth mentioning that Tyrell and Locke believed parents lacked the authority to castrate their children, a notion Locke deemed an “unnatural perversion[] of parenthood” and would result in the loss of parental rights. See *supra* notes 48–51 and accompanying text.

242 See *supra* notes 78–81 and accompanying text.

243 See *supra* notes 91–92 and accompanying text.

prevent their children from obtaining immunization.²⁴⁴ Diary entries illustrate how difficult these decisions were, with parents like Reverend Cotton Mather carefully weighing the benefits of such a procedure and the accompanying risks.²⁴⁵

Moreover, pro-inoculation literature, such as Benjamin Franklin's pamphlet, sought to persuade parents to inoculate their children, as it was clear that parents' "free consent" was required.²⁴⁶ It is also telling that Franklin recommended that the "Clergy" address parental concerns regarding inoculation, and did not advocate that the government issue a mandate obliterating parental authority.²⁴⁷ Aside from George Washington's stray comment,²⁴⁸ there is no evidence that compulsory inoculation, or the removal of custody if parents did not comply, was even considered during the Founding era. This is understandable, especially given the experimental nature of inoculation.

Therefore, states like California, Washington, and Minnesota, whose laws threaten to remove parental custody and subject children to experimental²⁴⁹ sex-reassignment therapy or surgery without parental consent, are completely inconsistent with historical laws and are therefore constitutionally suspect. There is simply no "relevantly similar" Founding-era medical regulation that replaced parents with state officials as decisionmakers concerning a child's medical care.

Indeed, the only parents that were disallowed these basic parental decisions were parents who were slaves. Prior to the ratification of the Fourteenth Amendment, enslaved parents were unable to make medical decisions for their children. For example, the enslaver, Mr. Driver's, consent, and not the enslaved mother's, was required for Dr. Dalglish to experiment on her child.²⁵⁰ Arguing that parents today should be forced to subject their children to gender-affirming care on the basis that during the 19th century, the children of slaves could be forced to undergo medical care treatment is not a compelling argument. If anything, compelling medical care for the children of slaves but not for children of freemen supports the argument that "free" persons retained control over a child's medical care.

244 Letter from John Adams to Abigail Smith, *supra* note 195; *see also supra* notes 196–98, 201–04 and accompanying text.

245 *See supra* notes 182–85 and accompanying text; *see also supra* notes 200–201 and accompanying text.

246 Benjamin Franklin, *supra* note 189, at 5.

247 *Id.*

248 *See* Letter from Gen. George Washington to John Augustine Washington, *supra* note 154.

249 *See generally* Hilary Cass, THE CASS REVIEW, INDEPENDENT REVIEW OF GENDER IDENTITY SERVICES FOR CHILDREN AND YOUNG PEOPLE: FINAL REPORT (2024).

250 *See* Dalglish, *supra* note 214.

V. CONCLUSION

What the history of inoculation during the Founding era illustrates is that colonies, and later states, circumscribed what medical treatment is available, especially when that treatment is considered harmful or experimental.²⁵¹ At the same time, the rights of parents to shepherd, safeguard, and raise their children has always been a fundamental assumption of the American Republic.²⁵² This separation of authority between parent and state is a “deeply rooted” tradition and consistent with our “Nation’s ‘scheme of ordered liberty,’” where not all liberties are granted, and some are strongly protected.²⁵³ As the minister Levi Hart famously said to a congregation of freedmen in 1784, ordered liberty is not primarily “*doing as we please*” or being free “from all law and government.”²⁵⁴ Instead, such a liberty is the freedom “to act for the general good[] without incurring the displeasure of the ruler or censure of the law.”²⁵⁵ Within any respectable understanding of ordered liberty, parents should be free to make informed decisions regarding their children’s medical treatments and act for their “general good,” while states are free to pass laws limiting the use of certain treatments, with the full weight and “censure of the law.”

251 See also *United States v. Skrmetti*, 145 S. Ct. 1816, 1837 (2025) (The Court leaves “questions regarding [medical] policy to the people, their elected representatives, and the democratic process.”); *id.* at 1841 (Thomas, J., concurring) (“When legislation does not cross constitutional lines, States must have leeway to effect the judgment of their citizens—no matter whether experts disagree.”); *id.* at 1852 (Barrett, J., concurring) (“As we have emphasized before, ‘state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty.’” (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007))).

252 There may be specific and limited situations where the state has stepped in to compel lifesaving treatment for children. Unfortunately, analyzing these unique circumstances is beyond the scope of this Note. However, there is an obvious distinction between ordering a lifesaving blood transfusion and compelling parents to accept a treatment protocol the benefits of which are, at best, dubious. See *supra* notes 232–38.

253 See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2235 (2022) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)).

254 LEVI HART, *LIBERTY DESCRIBED AND RECOMMENDED* 10, 13 (Hartford, Eben. Watson 1775); see also *WHERMAN*, *supra* note 130, at 322 (also referencing Hart’s exhortation in his conclusion).

255 HART, *supra* note 254, at 13.