

## DNA TESTING FOR EDDY CURRY? CREATING A NEW CONSTITUTIONAL PROTECTION

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Think about what's at stake here . . . . As far as DNA testing, we're just at the beginning of that universe. Pretty soon, though, we'll know whether someone is predisposed to cancer, alcoholism, obesity, baldness and who knows what else.

Hand that information to an employer . . . and imagine the implications. If the NBA were to get away with it, what about everyone else in this country looking for a job[?]

—Alan Milstein, attorney for NBA player Eddy Curry<sup>1</sup>

In late March 2005, Chicago Bulls star Eddy Curry experienced an irregular heartbeat as he was preparing for a game against the Charlotte Bobcats.<sup>2</sup> Curry did not play that night, and he went on to miss the rest of the season.<sup>3</sup> Testing revealed that he had benign arrhythmia of the heart.<sup>4</sup>

The end of that season also marked the end of Curry's contract with the Bulls,<sup>5</sup> and, as the 2005–2006 season approached, the Bulls' management decided that it did not want to re-sign the team's twenty-two-year-old<sup>6</sup> star without first ascertaining if the irregular heartbeat had been a signal that Curry had a more serious ailment: a potentially fatal heart condition called hypertrophic cardiomyopathy.<sup>7</sup> The Bulls, therefore, offered Curry a long-term contract with

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<sup>1</sup> Quoted in *Bulls, Curry, Lawyers Tussle over DNA Testing*, USA TODAY (McLean, Va.), Sept. 29, 2005, at 12C.

<sup>2</sup> David Aldridge, *The Heart of the Matter: Curry Was Right to Refuse*, PHILA. INQUIRER, Oct. 9, 2005, at D17.

<sup>3</sup> Christine Brennan, *Curry's Case Foreshadows DNA-Tests-in-Sports Fight*, USA TODAY (McLean, Va.), Oct. 13, 2005, at 7C.

<sup>4</sup> Michael Morrissey, *Curry Is Ready for Return to Chicago*, N.Y. POST, Jan. 18, 2006, at 66.

<sup>5</sup> *Id.*

<sup>6</sup> Frank Isola, *Eddy Ready to Go: Curry Passes Physical, Joins Knicks*, DAILY NEWS (N.Y.), Oct. 8, 2005, at 74.

<sup>7</sup> *Tell-Tale Heart: Is Eddy Curry at Risk for Heart Disease?*, SPORTS ILLUSTRATED, Oct. 10, 2005, at 21. It was that condition that led to the tragic on-court deaths of the Boston Celtics' Reggie Lewis in 1993 and Loyola Marymount college star Hank Gathers in 1990. *Id.*

one condition: that he submit to DNA testing to gauge his genetic susceptibility to hypertrophic cardiomyopathy.<sup>8</sup>

Curry refused to take the test, arguing that consenting to it would violate his privacy.<sup>9</sup> Within weeks, the Bulls defused the situation: they traded away Curry to the New York Knicks, a team that did not require Curry to submit to DNA testing.<sup>10</sup> An *SI.com* journalist wrote at the time that, because of Curry's questionable health, "[a] black cloud is hanging over Madison Square Garden" for the season.<sup>11</sup>

In the 2005–2006 season, Curry played well for the Knicks, averaging over thirteen points a game and starting in sixty-nine of the Knicks' eighty-two games.<sup>12</sup> During the 2006–2007 season, Curry played even better. He consistently scored more than twenty points a game and emerged as the team's leader.<sup>13</sup> More importantly, he has not had any heart problems since the trade: "I haven't had any repercussions from it," Curry said. "I haven't felt anything, not from the medication or anything."<sup>14</sup>

Despite Curry's health so far, the "black cloud" still hangs over both Curry and the entire world of employer-employee relations: What limits (if any) should be placed on DNA testing by employers? What rights do individuals have in protecting their genetic information? The rancor the Curry issue has caused in the sporting world and the press shows how important the DNA privacy issue is to Americans. Indeed, the public is right to take the issue seriously; tremendous liberties are at stake. Should employers be allowed to act like the Bulls; must they act like the Knicks; or should they take a different approach altogether? Moreover, where should the line be drawn in a context outside of an employment relationship?

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<sup>8</sup> *Id.* The Bulls' management was aware that its offer would prove controversial, but General Manager John Paxson said he had Curry's well-being in mind. To show his goodwill, he offered Curry \$400,000 a year for the next fifty years if he failed the genetic test. Andrew Seligman, *Bulls Send Curry to Knicks*, USATODAY.COM, Oct. 3, 2005, [http://www.usatoday.com/sports/basketball/nba/2005-10-03-curry\\_x.htm](http://www.usatoday.com/sports/basketball/nba/2005-10-03-curry_x.htm).

<sup>9</sup> *Id.* At the time, several prominent cardiologists had cleared Curry to play, but the Bulls stuck by the differing opinion of Barry Maron, a world-renowned expert in hypertrophic cardiomyopathy, who had suggested the DNA test. *Id.*

<sup>10</sup> Isola, *supra* note 6. The Knicks' doctors cleared Curry to play, and after Curry passed the Knicks' doctors' tests, team president Isiah Thomas proclaimed, "I'm extremely confident in what we have and what we've done. Our Eddy's going to be playing in the NBA and living a healthy life for a long time." *Id.*

<sup>11</sup> *NBA Preview: Future World*, SI.COM, Nov. 1, 2005, <http://sportsillustrated.cnn.com/2005/basketball/nba/specials/preview/2005/10/31/experts.picks/2.html>.

<sup>12</sup> *Eddy Curry: New York Knicks Player Card*, ESPN.COM, <http://sports.espn.go.com/nba/players/profile?statsId=3514>. Curry would have started more games were it not for a leg injury. Stan McNeal, *Moving Parts*, SPORTING NEWS, Jan. 27, 2006, at 24.

<sup>13</sup> Howard Beck, *As Planned, Curry Becomes No. 1 Option*, N.Y. TIMES, Dec. 1, 2006, at D5.

<sup>14</sup> John Jackson, *Curry's Return One He'd Like to Forget: Former Bull Booted by United Center Fans, Injured and Fouls Out*, CHI. SUN-TIMES, Jan. 19, 2006, at 117.

This Comment will argue that Curry's DNA information should be afforded heightened protection under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. For these purposes, the state-actor problem of the Bulls will be ignored; the Bulls will be assumed to be a state actor that is trying to gain access to Curry's genetic information. The purpose of the Comment is to use the Curry situation to highlight a more important question: should an individual's genetic information be constitutionally protected from government interference?

In order to show the need for constitutional protection, Part I will begin by examining the flaws with the current system of genetic testing. The current system is not embodied in a comprehensive policy, law, or ruling, but is rather a mish-mash of federal, state, and private action that provides spotty protections. Part II will then provide a context for finding fundamental rights under the Due Process Clause of the Fourteenth Amendment and explain how protecting DNA information fits well within the existing judicial paradigm for fundamental rights. Part III will align protection of DNA information with existing equal protection law, explaining how Curry's situation fits each step of the analysis. Finally, Part IV will propose a potential statutory solution for the problem of unprotected DNA information in lieu of a court-imposed constitutional protection.

## I. FLAWS WITH THE CURRENT GENETIC PROTECTION POLICY

Today's scientific advances have allowed researchers to identify specific genes linked to such diseases as breast cancer, Huntington's Disease, glaucoma and colon cancer. Researchers hope to be able to identify genes related to asthma, diabetes, heart disease, and other cancers within three years, and to make genome testing routine within 20 years.

—E. David Krulewicz<sup>15</sup>

As genetic testing becomes more commonplace, one danger is that employers will use testing results to discriminate against employees because of anticipated future expenses in insurance costs and decreased productivity due to illness.<sup>16</sup> Scholars and policy makers have discussed this issue for some time. Writing last year in the *Journal of the American Medical Association*, the director and deputy director of the National Human Genome Research Institute called for more governmental protections for genetics, arguing that "potential discrimination in health insurance or employment based on the results of genetic testing[] has been apparent for several years and requires a

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<sup>15</sup> E. David Krulewicz, *Wearing Your Genes to Work: Use of Genetic Information in Hiring*, N.J. LAW., Mar. 20, 2006, at A3.

<sup>16</sup> *Id.*

national legislative solution.”<sup>17</sup> Unfortunately, there is still no federal statutory scheme that provides a solution to the problem, and there are also no significant judicially-imposed protections.<sup>18</sup> The current state of genetic protection is a weak and ununified one, and it is unprepared to handle the onslaught of DNA testing that is soon to come.

### A. Statutory Protections

#### 1. Americans with Disabilities Act

There is no cohesive body of law on the privacy of an individual's genetic information. Various federal and state statutes touch on the topic, as do some judicial decisions. From a statutory perspective, the Americans with Disabilities Act<sup>19</sup> crystallizes the ambiguities behind federal law. The ADA prohibits discrimination against a “qualified individual with a disability,”<sup>20</sup> but the ADA definition of “disability” is subject to interpretation. As Marisa Anne Pagnattaro has pointed out, “a person with a genetic propensity for Parkinson's disease would not be ‘disabled’ under the Act merely by virtue of general information about how this condition usually affects individuals”; rather, the individual's specific situation would need to be examined.<sup>21</sup> Instead of giving the type of positive protection from DNA information that Eddy Curry sought, the Act protects discrimination against those who have already been proven to have a disability. Moreover, the Act only applies to employers with fifteen or more employees.<sup>22</sup>

The Equal Employment Opportunity Commission (EEOC) has tried to mold the terms of the ADA to hold employers to a stricter standard with genetic information. Since adopting guidelines against

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<sup>17</sup> Alan E. Gutmacher & Francis S. Collins, *Realizing the Promise of Genomics in Biomedical Research*, 294 JAMA 1399, 1401 (2005).

<sup>18</sup> IBM has taken the lead in providing protections for its own workers, *see infra* note 83 and accompanying text, but occasional employer-provided protection is not the solution.

<sup>19</sup> 42 U.S.C. §§ 12101–213 (2000).

<sup>20</sup> *Id.* §§ 12111(8), 12112(b)(5)(B).

<sup>21</sup> Marisa Anne Pagnattaro, *Genetic Discrimination and the Workplace: Employee's Right to Privacy v. Employer's Need to Know*, 39 AM. BUS. L.J. 139, 160 (2001); *see Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999) (ruling that courts must investigate a person's actual condition to determine if the person's genetic information falls within the meaning of “disability” under the ADA); *Bragdon v. Abbot*, 524 U.S. 624, 655 (1998) (placing HIV infection within the meaning of “disability”). Due to these interpretations of the ADA, “[t]he need for additional [action] to make explicit the prohibition against discrimination based upon genetic predisposition may be more imperative following the U.S. Supreme Court's recent decisions interpreting the ADA.” Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. HEALTH CARE L. & POL'Y 225, 242 (2000).

<sup>22</sup> 42 U.S.C. § 12111(5)(A).

genetic discrimination in 1995,<sup>23</sup> the EEOC has taken the position that an employer who fails to hire someone based on genetic traits—as the Bulls threatened to do with Curry—violates the ADA because the employer would be failing to hire someone the employer views as disabled.<sup>24</sup> This rule was first tested in a 2000 case against Burlington Northern Santa Fe Railway.<sup>25</sup> The company had been using genetic testing on workers who submitted claims of work-related carpal-tunnel injury; the genetic testing determined workers' predisposition to the injury.<sup>26</sup> The Railway decided on its own to discontinue its testing program,<sup>27</sup> and “[w]hether the courts will adopt the EEOC’s position . . . remains to be seen as there have been no cases deciding the issue.”<sup>28</sup>

## 2. Health Insurance Portability and Accountability Act

Another important federal law that regulates genetic discrimination is the 1996 Health Insurance Portability and Accountability Act (HIPAA).<sup>29</sup> The law specifically states that “a health insurance issuer offering group health insurance coverage in connection with a group health plan[] may not establish rules for eligibility” based on “[g]enetic information.”<sup>30</sup> In the United States, most individuals with private health insurance obtain their coverage through employment-based group health insurance.<sup>31</sup> Therefore, due to HIPAA, the only concerns about genetic discrimination in health insurance involve individual policies and nonemployer group plans to which HIPAA does not apply.<sup>32</sup> Importantly, HIPAA is limited to health-insurance decisions and would not apply to employment situations such as the

<sup>23</sup> 2 EQUAL EMPLOYMENT OPPORTUNITY COMM’N, COMPLIANCE MANUAL, § 902.8, available at <http://www.eeoc.gov/policy/docs/902cm.html>.

<sup>24</sup> See *id.* (amending definition of “handicapped individual” to include individuals who are discriminated against because of their genetic information); see also Victor Schachter, *Privacy in the Workplace*, in [1] 6TH ANNUAL INSTITUTE ON PRIVACY LAW: DATA PROTECTION—THE CONVERGENCE OF PRIVACY AND SECURITY 153, 192 (2005) (discussing the application of the EEOC’s guidelines to employment refusal).

<sup>25</sup> EEOC v. Burlington N. Santa Fe Ry. Co., No. 02-C-0456, 2002 WL 32155386 (E.D. Wis. May 8, 2002); see Schachter, *supra* note 24, at 192–93.

<sup>26</sup> *Burlington N.*, 2002 WL 32155386, at \*1, cf. EEOC v. Woodbridge Corp., 124 F. Supp. 2d 1132, 1139 (W.D. Mo. 2000) (alleging genetic discrimination in employment based partly on genetic predisposition to carpal-tunnel injury); Bradley v. Pizzaco of Neb., Inc., No. CV 86-0-753, 1992 U.S. Dist. LEXIS 19654 (D. Neb. Aug. 19, 1992) (mem.) (challenging a company policy that violated the rights of those with genetic skin disorders), *rev’d*, 7 F.3d 795 (8th Cir. 1993).

<sup>27</sup> Schachter, *supra* note 24, at 193.

<sup>28</sup> *Id.*

<sup>29</sup> Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. § 1182 (2000).

<sup>30</sup> *Id.* § 1182(a)(1)(F).

<sup>31</sup> Mark A. Rothstein, *Genetic Exceptionalism and Legislative Pragmatism*, HASTINGS CENTER REP. July–Aug. 2005, at 27, 32.

<sup>32</sup> *Id.*

one Curry faced. A bill passed by the 109th Senate would expand HIPAA's protections over genetic information,<sup>33</sup> but these protections would still be limited to the health-insurance sphere.<sup>34</sup>

### 3. *Executive Order 13145*

The federal law most directly applicable to Curry's situation is Executive Order 13145, signed by President Clinton on February 8, 2000.<sup>35</sup> The order prohibits genetic discrimination in federal employment,<sup>36</sup> and it specifically protects "information about an individual's genetic tests."<sup>37</sup> When explaining his actions, Clinton explained the rationale for encouraging genetic testing: "The fear of misuse of private genetic information is already very widespread in our Nation. Americans are genuinely worried that their genetic information will not be kept secret . . . . As a result, they're often reluctant to take advantage of new breakthroughs in genetic testing . . . ."<sup>38</sup>

While this Order would cover Curry if he were employed by the Bulls (state-actor problem aside), it still has several shortcomings. First, not all information about an individual's health is protected; to obtain protection it must fall within specifically defined categories outlined by the Executive Order.<sup>39</sup> This could potentially leave open for government examination information about an employee's physical exams and chemical, blood, or urine analyses.<sup>40</sup> Additionally, the Executive Order "does not create any legally enforceable right,"<sup>41</sup> and much of what it prohibits is also prohibited by section 502 of the Rehabilitation Act of 1973.<sup>42</sup> If an employee wants to seek redress for genetic discrimination, there is a long process involving "multiple steps of administrative review and investigation."<sup>43</sup> Indeed, in an employment context, "the existing protection . . . falls short of the comprehensive law needed to protect the rights of workers and to clarify

<sup>33</sup> Genetic Information Nondiscrimination Act of 2005, S. 306, 109th Cong. (as passed by Senate, Feb. 10, 2005); see also H.R. 1227, 109th Cong. (as introduced in House, Mar. 10, 2005) (addressing the same issues as the Senate legislation).

<sup>34</sup> *Five Bills to Watch in 2006*, in Matthew DoBias, *Climbing the Hill*, MOD. HEALTH CARE, Jan. 9, 2006, at 24, 25.

<sup>35</sup> Exec. Order No. 13,145, 3 C.F.R. 235 (2000), reprinted in 42 U.S.C. § 2000e-16 (2000).

<sup>36</sup> *Id.* § 1-101.

<sup>37</sup> *Id.* § 1-201(e)(1)(A).

<sup>38</sup> *Remarks on Signing an Executive Order to Prohibit Discrimination in Federal Employment Based on Genetic Information*, 1 PUB. PAPERS 198, 199 (Feb. 8, 2000).

<sup>39</sup> Exec. Order No. 13,145, § 1-201(e)(2), 3 C.F.R. at 236.

<sup>40</sup> *Id.*

<sup>41</sup> Pagnattaro, *supra* note 21, at 157.

<sup>42</sup> *Id.*; Rehabilitation Act of 1973, 29 U.S.C. § 792 (2000), as amended by Assistive Technology Act of 2004, Pub. L. No. 108-364, § 3(b)(3), 118 Stat. 1707, 1737.

<sup>43</sup> Pagnattaro, *supra* note 21, at 158.

the appropriate use of genetic information for employers.”<sup>44</sup> Even if the order were strengthened, it simply does not cover most American citizens; the law covers only 2.7 million federal employees.<sup>45</sup>

#### 4. State Protections

While some protections from genetic discrimination are offered by federal law, existing legislation does not offer comprehensive, fundamental protections over an individual’s right to keep genetic information private. In the absence of a federal genetic-testing policy, individual states have taken their own initiatives to protect genetic information.

The beginning of the Human Genome Project in 1990 served as a particular impetus that spurred many states to action.<sup>46</sup> Since 1990, “nearly every state has enacted legislation prohibiting genetic discrimination in health insurance; two-thirds of the states have enacted laws prohibiting genetic discrimination in employment, and other state laws have been enacted dealing with genetic discrimination in life insurance, genetic privacy, and genetic testing.”<sup>47</sup>

While states have taken the lead in this field, the levels of protection they offer vary by state.<sup>48</sup> Previously, many state laws only applied to specific genetic disorders.<sup>49</sup> For example, New York’s civil rights law proscribed employment discrimination only against carriers of the sickle-cell trait, Tay-Sachs disease, or Cooley’s anemia.<sup>50</sup> In August 2005, however, New York passed a law barring discrimination against the much broader class of anyone with “predisposing genetic characteristics.”<sup>51</sup> New York’s change reflects the general trend, in which states prohibit discrimination based on the general use of genetic information rather than on a specifically listed genetic disease. For example, in New Mexico, a 2005 law made it unlawful to use not only DNA genetic information but also family history in employment decisions.<sup>52</sup> Similarly, Massachusetts requires informed consent for an employee to hand over genetic information,<sup>53</sup> and Texas makes it

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<sup>44</sup> *Id.* at 156.

<sup>45</sup> Susanne B. Haga & Huntington F. Willard, Op-Ed., *Act Now to Prevent Genetic Discrimination*, WASH. POST, Dec. 28, 2005, at A21.

<sup>46</sup> Rothstein, *supra* note 31, at 27.

<sup>47</sup> *Id.* Currently, thirty-six states have genetic information privacy laws. Reginald C. Govan, *Workplace Privacy*, in [1] 34TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 273, 395 (2005).

<sup>48</sup> Haga & Willard, *supra* note 45, at A21.

<sup>49</sup> Schachter, *supra* note 24, at 193 & n.106.

<sup>50</sup> N.Y. CIV. RIGHTS LAW § 48 (McKinney 1992).

<sup>51</sup> N.Y. EXEC. LAW § 296(1) (McKinney 2005).

<sup>52</sup> H.R. 183, 47th Leg., Reg. Sess. (N.M. 2005).

<sup>53</sup> MASS. GEN. LAWS ANN. ch. 151B, §§ 1, 4 (LexisNexis 1999 & Supp. 2000).

unlawful for an employer to “fail[] or refuse[] to hire” based on genetic information.<sup>54</sup>

Currently, the status of genetic information is not settled at the statutory level. While states have begun to grant broader protections over genetic information in employment situations, there has yet to be a unified federal policy on the matter. In fact, recent federal legislation to protect against genetic discrimination has been bogged down,<sup>55</sup> partly because employer groups are concerned new legislation will result in many actions against employers.<sup>56</sup> Acting on this scattered and sparse statutory guidance, several judicial opinions have tried to both interpret and control the limits of government access to an individual’s genetic information. As with the legislature, however, no clear doctrine has emerged from the courts.

### B. Judicial Protections

The prominent state-actor cases concerning mandatory genetic testing, similar to the kind Curry faced, involve a prison or military context. In these cases, there were particularly strong state justifications for warranting access to an individual’s genetic determination. The facts around *Mayfield v. Dalton* show strong parallels to the Curry situation.<sup>57</sup> In *Mayfield*, government employees refused to give DNA samples at their employers’ request; specifically, servicemen in the armed forces resisted an effort by the government to collect their DNA samples as part of a general armed forces DNA “repository.”<sup>58</sup> The servicemen tried using the “search and seizure” feature of the Fourth Amendment as a shield against genetic information collection.<sup>59</sup>

The district court in *Mayfield* ruled that taking specimens from service members was not an unreasonable seizure in violation of the Fourth Amendment.<sup>60</sup> The court applied a balancing test, finding

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<sup>54</sup> TEX. LAB. CODE ANN. § 21.402 (LexisNexis 2006). Other states have also enacted laws that ban genetic testing in employment situations. See CAL. GOV’T CODE § 12926 (West 2005) (defining “genetic characteristics”); MICH. COMP. LAWS ANN. § 37.1202 (West 2001) (preventing employers from predicated employment on genetic testing); N.H. REV. STAT. ANN. § 141-H:3 (LexisNexis 2006 repl.) (forbidding employers from requiring or soliciting genetic tests before employment); N.J. STAT. ANN. §§ 10:5-5 to :5-47 (West 2002 & Supp. 2006) (banning employment discrimination based on genetic testing); N.Y. EXEC. LAW § 292 (McKinney 2005) (prohibiting discrimination based on genetics in hiring); and R.I. GEN. LAWS § 28-6.7-1 (2003) (forbidding the use of genetic tests in employment).

<sup>55</sup> Schachter, *supra* note 24, at 193.

<sup>56</sup> Haga & Willard, *supra* note 45, at A21.

<sup>57</sup> 109 F.3d 1423 (9th Cir. 1997).

<sup>58</sup> *Id.* at 1424.

<sup>59</sup> *Id.*

<sup>60</sup> *Mayfield v. Dalton*, 901 F. Supp. 300, 304 (D. Haw. 1995), *vacated*, 109 F.3d 1423 (9th Cir. 1997).

that the purpose of the collection—to assist in the identification of soldiers' remains—outweighed any yet unproven, nefarious uses by the government.<sup>61</sup> The Ninth Circuit, however, ultimately avoided endorsing any conclusory tests that weighed an individual's Fourth Amendment right to protection of genetic information; instead, it concluded that the appealing servicemen lacked standing since they had already been honorably discharged without ever having given any body samples for DNA analysis.<sup>62</sup> As a result, *Mayfield* ultimately provides "no support for a privacy basis for medical decision-making."<sup>63</sup>

Eight years later, in *United States v. Kincade*, the Ninth Circuit applied a balancing test when it again considered the protection of DNA information under the Fourth Amendment.<sup>64</sup> Specifically, the court considered the constitutionality under the Fourth Amendment of a federal law<sup>65</sup> that required convicted individuals to give bodily samples for DNA tests.<sup>66</sup> A recently released prisoner, Kincade, refused to give a sample, but the court determined that governmental interests in collecting information from convicted offenders outweighed any intrusion of Kincade's privacy rights.<sup>67</sup>

The Supreme Court has provided guidelines on forced testing of employees in its Fourth Amendment jurisprudence. It has recognized that requiring employees to submit to giving blood or body fluids implicates an individual's rights under the Fourth Amendment.<sup>68</sup> In *Chandler v. Miller*, the Court invalidated drug testing of all candidates for state offices because there was no substantial public interest in such a broad program.<sup>69</sup>

Therefore, while the Supreme Court gives some value to individuals' right to privacy over their body, and while both *Mayfield* and *Kincade* have specific language about the importance of an individual's DNA protection, no decisions give the right to a constitutional pro-

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<sup>61</sup> *Id.* at 304–06. Specifically, the court balanced the minimal intrusion of the sampling against the military's interest in accounting for soldiers on the field and the peace of mind of the next of kin.

<sup>62</sup> *Mayfield*, 109 F.3d at 1427.

<sup>63</sup> Barbara J. Zanotti & Rick A. Becker, *Marching to the Beat of a Different Drummer: Is Military Law and Mental Health Out-of-Step after Jaffee v. Redmond?*, 41 A.F. L. REV. 1, 59 (1997).

<sup>64</sup> 379 F.3d 813, 839 (9th Cir. 2004). The Ninth Circuit also gave weight to genetic privacy rights in its 1998 decision in *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, when it allowed a claim of privacy over genetic information to survive summary judgment. 135 F.3d 1260, 1269, 1275 (9th Cir. 1998).

<sup>65</sup> DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2726.

<sup>66</sup> *Kincade*, 379 F.3d at 821.

<sup>67</sup> *Id.* at 840.

<sup>68</sup> See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (vacating a judgment that required drug testing of federal employees who did not carry firearms or deal with drug interdiction); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616–17 (1989) (finding a diminished expectation of privacy for railroad employees).

<sup>69</sup> 520 U.S. 305, 322 (1997).

tection of DNA information under the Fourteenth Amendment.<sup>70</sup> Instead, courts apply a balancing test, and *Kincade* exhibited the minimal weight given to an individual's privacy in a DNA testing situation, which the court deemed "not significant."<sup>71</sup> If constitutional weight had been given to the individual's right (by making it a fundamental right, and not just a factor to be considered in a Fourth Amendment analysis), perhaps the outcomes would have been different.

Although the Supreme Court has not yet addressed privacy rights with respect to genetic discrimination,<sup>72</sup> the Court has considered a case in the sporting world on privacy rights regarding drug testing. In *Board of Education v. Earls*, the Court ruled that randomly forcing high school athletes to submit to urine-based drug testing did not violate their Fourth Amendment rights.<sup>73</sup> Like the Ninth Circuit, the Court did not consider Fourteenth Amendment fundamental rights and did not give constitutional weight to the right to privacy in itself.<sup>74</sup> More importantly, while the *Earls* issue also involves the privacy right against bodily invasion, DNA rights, like the kind Curry sought, should be viewed differently because they do not implicate illegal activity.

Finally, courts have yet to expand or clearly outline the scope of genetic protections.<sup>75</sup> In *Robinson v. City of Seattle*, a Washington appellate court gave the right to DNA information the same weight as a fundamental constitutional right: the court held a genetic testing program subject to strict scrutiny.<sup>76</sup> Part of the rationale for the finding, however, was rooted in state constitutional protections.<sup>77</sup> Ultimately, despite such occasional victories for individual privacy, there remain no clear, judicially-imposed constitutional protections for DNA information.

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<sup>70</sup> See generally *Kincade*, 379 F.3d at 840 (upholding a law requiring certain federal offenders who were on probation, parole or supervised release to submit to compulsory DNA profiling); *Mayfield v. Dalton*, 109 F.3d 1423, 1425 (9th Cir. 1997) (refusing to consider service members' challenge to a rule requiring them to provide DNA samples on account of their lack of standing).

<sup>71</sup> *Kincade*, 379 F.3d at 836 (quoting *Skinner*, 489 U.S. at 625).

<sup>72</sup> *Miller*, *supra* note 21, at 252.

<sup>73</sup> 536 U.S. 822, 838 (2002); *cf. Von Raab*, 489 U.S. at 665 (allowing drug testing for federal employees).

<sup>74</sup> See generally *Earls*, 536 U.S. at 825 (holding that a school policy requiring athletes to submit to urine-based drug testing does not violate the Fourteenth Amendment because it is a reasonable means of furthering the school district's important interest in preventing drug use among students).

<sup>75</sup> See discussion *supra* Part I.A.1 (discussing the EEOC's attempts to have the courts interpret the ADA in a particular manner).

<sup>76</sup> 10 P.3d 452, 468–70 (Wash. Ct. App. 2000) (finding pre-employment drug testing for jobs with public safety implications "narrowly tailored to achieve compelling governmental interests").

<sup>77</sup> *Id.* at 460.

### C. Private Protections

Despite the absence of federal protections, there is a relatively low, yet significant, incidence of genetic testing occurring among private companies. The number of Fortune 500 companies engaging in genetic testing has declined since the mid-nineties, when at least twenty used such testing.<sup>78</sup> The trend now, however, is that genetic testing will only increase; according to Sharon Terry, president of the Genetic Alliance, “[i]t is a problem already, and the prospect is that the problem will only grow.”<sup>79</sup>

Two main factors will contribute to greater testing, both dealing with companies’ interest in securing the most productive employees possible. First, technological advances are allowing for screening of a wider variety of diseases at a cheaper price.<sup>80</sup> Second, rises in health care costs are providing employers with an increasingly strong interest in having healthy workers.<sup>81</sup>

In 2000, a poll by the National Center for Genome Resources found that “63 percent of workers would not take genetic tests if employers could get access to the results.”<sup>82</sup> While this employee anxiety only highlights the need for governmental protections, IBM recently took leadership in this field into its own hands when it “pledge[d] to not use genetic information in its hiring practices or in deciding eligibility for health insurance coverage for its 300,000 employees.”<sup>83</sup> While IBM’s pledge would provide Curry the protection he needed with the Bulls, trending towards privately given protections is not the best way to ensure individual protections. Since genetic privacy is not something employees are likely to consider when weighing an offer with a higher-paying firm, it is not even guaranteed that employees will reward employers who offer it, thus giving little incentive for other companies to join IBM. Even if companies were to join, that trend may take decades to spread to most employers. If individual protection of genetic information is something that is to be valued,

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<sup>78</sup> Schachter, *supra* note 24, at 192; accord AM. MGMT ASS’N, 2000 AMA SURVEY ON WORKPLACE TESTING: MEDICAL TESTING 3 (stating that while only seven companies responding to the survey admitted to genetic testing, follow-up interviews suggested that some companies may have been conducting testing they did not consider to fall precisely within the survey’s definition of “genetic testing”).

<sup>79</sup> Steve Lohr, *I.B.M. to Put Genetic Data of Workers Off Limits*, N.Y. TIMES, Oct. 10, 2005, at C1.

<sup>80</sup> Nathalie Smith, Note, *The Right to Genetic Privacy? Are We Unlocking the Secrets of the Human Genome Only to Risk Insurance and Employment Discrimination?*, 2000 UTAH L. REV. 705, 735–36.

<sup>81</sup> *Id.* at 736. In fact, one factor of the Bulls’ treatment of Curry may have been their insurance carrier’s refusal to continue insuring Curry’s heart. Lacy J. Banks, *Decision Befuddles Curry*, CHI. SUN-TIMES, July 20, 2005, at 150.

<sup>82</sup> Lohr, *supra* note 78.

<sup>83</sup> Haga & Willard, *supra* note 45; accord Lohr, *supra* note 78.

then that protection can only be achieved through governmental protection.

## II. DUE PROCESS AND FUNDAMENTAL RIGHTS

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

—Due Process Clause, Fourteenth Amendment, U.S. Constitution<sup>84</sup>

In its due process jurisprudence, the Supreme Court has given substantive meaning to the word “liberty” in the Fourteenth Amendment, finding that “some liberties are so important that they are deemed to be ‘fundamental rights.’”<sup>85</sup> In order to establish a due process right, therefore, Curry needs to establish that protection of DNA information is a fundamental liberty interest.

Once a right is established as fundamental, courts use strict scrutiny to examine laws concerning it, which means that the government cannot infringe upon the right unless “the government . . . justif[ies] its interference by proving the action is necessary to achieve a compelling government purpose.”<sup>86</sup>

### A. Overview of Fundamental Rights

Over the 138 years since the Fourteenth Amendment was ratified, the Court has found various rights to be fundamental.<sup>87</sup> Originally, the Court viewed only economic rights as fundamental,<sup>88</sup> but starting in the 1920s, it began expanding the notion of fundamental rights to include *personal* rights.<sup>89</sup> In *Meyer v. Nebraska*, the Court recognized the right to raise children as a fundamental right.<sup>90</sup> Two years later, in *Pierce v. Society of Sisters*, the Court invalidated a state law requiring attendance at public schools because of the parents’ liberty interest in controlling their children’s education.<sup>91</sup> These two cases opened the door for other findings of fundamental rights based on personal or family privacy.

<sup>84</sup> U.S. CONST. amend. XIV, § 1, cl. 3.

<sup>85</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 762 (2d ed. 2002).

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (finding a fundamental right to marry); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (finding a fundamental right to teach one’s children a language other than English).

<sup>88</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment . . .”), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>89</sup> CHERMERINSKY, *supra* note 84, at 590.

<sup>90</sup> 262 U.S. at 403.

<sup>91</sup> 268 U.S. 510, 534–35 (1925).

In 1942, the Court in *Skinner v. Oklahoma ex rel. Williamson* found a fundamental right in reproduction when it overturned a state statute that sterilized individuals based on alleged genetic defects.<sup>92</sup> In 1965, the *Griswold* Court found a fundamental right of privacy in the right to access contraceptives in order to control family size.<sup>93</sup> Eight years later, the *Roe v. Wade* Court found that the right to privacy over reproduction decisions extended to a woman's body in decisions regarding whether or not to have an abortion.<sup>94</sup> While these cases do not provide an exhaustive list of the fundamental rights established by the Court, they do show the thematic importance of the right to bodily privacy in the Court's decision to classify a right as fundamental.

### B. Whalen, Curry, and the Right to Privacy of Medical Information

The Court's 1977 decision in *Whalen v. Roe* is the closest the Court has come to deciding an issue such as that presented by Curry, and it also provides the strongest indication that Curry's DNA information should be viewed under a fundamental-right rubric.<sup>95</sup> Thus far, *Whalen* is the only time the Court has ruled on the fundamental privacy rights implicated when an individual's medical information is obtained by the state.

*Whalen* concerned a New York statute that required a centralized database of all the names and addresses of persons who obtained certain prescription drugs.<sup>96</sup> Significantly, the Court proclaimed that constitutional privacy

in fact involve[s] at least two different kinds of interests. One is the individual interest in *avoiding disclosure of personal matters*, and another is the interest in *independence in making certain kinds of important decisions*. . . .

We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.<sup>97</sup>

In its ruling, the Court ultimately upheld the New York program since the possibilities of public disclosure were minimal. The Court did acknowledge that "the right to privacy might be recognized in the future to include the right to control [personal] information."<sup>98</sup> Near

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<sup>92</sup> 316 U.S. 535, 541, 543 (1942).

<sup>93</sup> *Griswold v. Connecticut*, 381 U.S. 479, 481-84 (1965).

<sup>94</sup> 410 U.S. 113, 153 (1973). Here the Court reaffirmed that the "right of privacy" is founded in the Fourteenth Amendment's concept of personal liberty. *Id.* at 152-53.

<sup>95</sup> 429 U.S. 589 (1977).

<sup>96</sup> *Id.* at 591.

<sup>97</sup> *Id.* at 599-600 (emphases added) (citations omitted).

<sup>98</sup> CHEMERINSKY, *supra* note 84, at 826. See generally Heyward C. Hosch III, Note, *The Interest in Limiting Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139

the end of his majority opinion, Justice Stevens wrote, "We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information . . . . [M]uch of [the information] is personal in character and potentially embarrassing or harmful if disclosed."<sup>99</sup>

With such language, the Curry situation fits perfectly into the Supreme Court's rubric. In fact, Curry's case is a logical extension of the Court's reasoning: protection of DNA information involves "avoiding disclosure of personal matters," and, particularly because this is an employment matter, Curry's ability to retain "independence in . . . important decisions" is the heart of the issue.

While the *Whalen* Court found that mere collection of information was not enough of a risk of maltreatment to violate the Constitution, the Curry case is different because it extends into the realm of employment protections—the Bulls made an employment offer contingent on the collection of information. This is precisely the type of maltreatment the Court said was lacking in *Whalen*.

Additionally, and most importantly, *Whalen* shows that the Court is willing to extend the fundamental right to privacy into the realm of personal information.

### C. Washington, Cruzan, and the Right to Refuse Treatment

In the 1990 case *Washington v. Harper*, the Court held that prisoners "possess[] a significant liberty interest in avoiding the unwanted administration" of certain drugs.<sup>100</sup> Similarly, that Term's *Cruzan v. Director, Missouri Department of Health*, while not clearly embracing strict scrutiny,<sup>101</sup> did say that "for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."<sup>102</sup>

Although this Court-recognized right to refuse medical treatment is not directly related to Curry's right to keep his genetic information private, the right has two implications for Curry. First, Curry could argue that not submitting to testing is tantamount to refusing treatment; this argument is made particularly strong here because the Bulls made it clear they would not sign Curry otherwise. Second, this line of cases provides Curry with a potential constitutional safeguard

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(1983) (setting forth constitutional arguments for the protection of individuals' liberty interests through controlling information the government collects).

<sup>99</sup> *Whalen*, 429 U.S. at 605.

<sup>100</sup> 494 U.S. 210, 221 (1990).

<sup>101</sup> CHEMERINSKY, *supra* note 84, at 821.

<sup>102</sup> 497 U.S. 261, 279 (1990).

that may still allow him to play basketball even if he were to submit to testing.

#### D. *The Bowers Framework and the Test for Granting a New Right*

There is no clear test by which an unenumerated right becomes a fundamental liberty interest, and the Court continually struggles with that notion each time it considers a new potential fundamental right. On the one hand, recognizing a fundamental right may seem like the just and consistent thing to do—particularly if privacy interests are involved—but on the other hand, the Court would not want to open up the floodgates and dilute the idea of a fundamental right to the point where nearly every governmental law is examined under strict scrutiny.

Justice White's opinion for the majority and Justice Blackmun's dissent in *Bowers v. Hardwick*<sup>103</sup> highlight the Court's analysis of the differing sides of this issue, and provide a framework under which to evaluate the Curry situation.

*Bowers* was a test case brought by Michael Hardwick, a private citizen who was arrested under a Georgia antisodomy statute.<sup>104</sup> Hardwick claimed that the Georgia statute violated his fundamental right to privacy. The Eleventh Circuit agreed with Hardwick, citing the right to privacy as established in *Griswold* and *Roe*, among others.<sup>105</sup> The Supreme Court, however, reversed in a 5–4 decision.<sup>106</sup>

In his majority opinion, Justice White defined *fundamental rights* in a relatively fixed manner: he argued that earlier determinations of fundamental rights were limited to family and reproduction, and because homosexual activity did not fall under these previously defined categories, it could not be a fundamental right.<sup>107</sup> He further wrote that an activity not protected by the Constitution's text, the Framers' intent, or a tradition of being safeguarded could not be made into a fundamental right.<sup>108</sup>

Justice Blackmun employed a more thematic approach to the issue of determining fundamental rights. Rather than defining fundamental rights by looking at the mere facts of each case (such as declaring that one case is about "schooling" and that another case is about "sodomy"), he claimed the analysis should be based on the *val-*

<sup>103</sup> 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

<sup>104</sup> CHEMERINSKY, *supra* note 84, at 814.

<sup>105</sup> Hardwick v. Bowers, 760 F.2d 1202, 1211 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

<sup>106</sup> *Bowers*, 478 U.S. at 186, 191, 196.

<sup>107</sup> *Id.* at 191.

<sup>108</sup> *Id.* at 194.

ues that underlie the constitutional right to privacy.<sup>109</sup> For Blackmun, *Bowers* was not about sodomy, but “about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’”<sup>110</sup> Under this view, therefore, an historical basis for protection is not necessary. In fact, Blackmun quotes Justice Holmes; writing “I believe that ‘[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.’”<sup>111</sup> Blackmun uses this framework to conclude that private consensual sexual activity fits within the idea of privacy the Court has embraced as a fundamental right, and that “[o]nly the most willful blindness” could conclude otherwise.<sup>112</sup>

This Comment argues that Justice Blackmun’s contention is correct: there should be no previously defined set list of fundamental rights based on history; rather, the values behind the fundamental rights should be the basis for determining the existence of new rights. Indeed, the Supreme Court may have implicitly endorsed Justice Blackmun’s contention when it overruled *Bowers* in its *Lawrence* decision.<sup>113</sup>

Additionally, six years after *Bowers*, the Court majority in *Planned Parenthood of Southeastern Pennsylvania v. Casey* provided a newer and more liberal view of the process by which an unenumerated right generally gains constitutional protection under the Due Process Clause.<sup>114</sup> The language in *Casey* focuses on the importance of personal dignity and autonomy, and it summed up due process fundamental-right protection: “[M]atters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>115</sup> DNA information can certainly be construed in the same light.

<sup>109</sup> *Id.* at 199.

<sup>110</sup> *Id.* (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967)).

<sup>111</sup> *Id.* (quoting Oliver Wendell Holmes, Address at the Dedication of the New Hall of the Boston University School of Law: The Path of the Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 469 (1897)).

<sup>112</sup> *Id.* at 205.

<sup>113</sup> This endorsement depends on how one characterizes O’Connor’s concurrence, which classified the decision as one of equal protection. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring). The majority found a freedom to engage in sodomy through an approach from the broad set of values protected by Fourteenth Amendment liberty: “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.” *Id.* at 562 (majority opinion).

<sup>114</sup> 505 U.S. 833, 914 (1992) (Stevens, J., concurring in part and dissenting in part).

<sup>115</sup> *Id.* at 851 (majority opinion).

Similar to the majority in *Bowers*, the *Casey* majority also mentioned the importance of historical protection of a right, saying that due process is partly determined by “regard to what history teaches” us about how we should treat that right.<sup>116</sup> While there is no lengthy historical precedent for affording DNA information a heightened status, *Loving* shows that the relatively recent protection of the right by society can suffice.<sup>117</sup> Indeed, the Court in *Casey* underscored that “[d]ue process has not been reduced to any formula.”<sup>118</sup> There is, therefore, no constitutional bar on giving DNA information the status of a fundamental right. Senator Diane Feinstein spoke in 2006 about the importance of remaining flexible in adding fundamental protections under the Fourteenth Amendment: “If an originalist analysis were applied to the 14th amendment, women would not be provided equal protection under the Constitution, interracial marriages could be outlawed, schools could still be segregated, and the principle of one man, one vote would not govern . . . .”<sup>119</sup>

Under such a framework, granting the fundamental right of privacy to Curry is an easy decision. DNA information concerns an individual’s private medical information, and the Court has already recognized in *Whalen* that such a consideration is in line with the Court’s conception of what due process privacy should be. Indeed, this case is about Curry’s ability to control his body and not be tested; this is similar to the right to control one’s body framed in *Griswold* and *Roe*, and even the right to refuse medical treatment put forth in *Washington* and *Cruzan*. Ultimately, the Court’s jurisprudence should make it simple to reach a finding that DNA information is protected; to find *otherwise* would entail departing from the Court’s many precedents of providing protections for individuals’ right to control their bodies.

Erwin Chemerinsky amalgamates past Supreme Court decisions to provide a three-step analysis for completing the analysis of a law’s legitimacy once a right is deemed to be fundamental.<sup>120</sup> He argues that, after determining the existence of a fundamental right, the Court will then ask if there is an infringement of the right, if there is a sufficient justification for the government’s infringement, and if the means is

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<sup>116</sup> *Id.* at 850 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1960) (plurality opinion) (Harlan, J., dissenting)).

<sup>117</sup> See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (protecting interracial marriage, even though the country did not have a long history of doing so).

<sup>118</sup> 505 U.S. at 849 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1960) (plurality opinion) (Harlan, J., dissenting)).

<sup>119</sup> Press Release, Sen. Diane Feinstein, Senator Diane Feinstein Details Her Reasons for Opposing Judge Samuel Alito to Be an Associate Justice of the Supreme Court (Jan. 26, 2006), available at <http://feinstein.senate.gov/06releases/r-alito-floor126.pdf>.

<sup>120</sup> CHEMERINSKY, *supra* note 84, at 764.

sufficiently related to the purpose.<sup>121</sup> Regardless of whether there would be compelling governmental interest in the Bulls' case, Curry deserved to have his right to his genetic information analyzed as a fundamental right under the liberty component of the Due Process Clause.

### III. EQUAL PROTECTION

[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

—Equal Protection Clause, Fourteenth Amendment, U.S. Constitution<sup>122</sup>

In addition to a due process claim, Curry also has an equal protection claim. Indeed, due process and equal protection analyses often overlap. The Equal Protection Clause of the Fourteenth Amendment focuses on the justification of a law's classification of individuals.<sup>123</sup> Unlike due process, where Curry had a privacy right over the information itself, equal protection gives Curry the right to prevent the government from discriminating against him based on his genetic information. In addition, in order to give substance to such an equal protection right, equal protection must also give Curry a right to decline DNA testing in the first place.

The Equal Protection Clause was largely ignored by the Court until *Korematsu v. United States*<sup>124</sup> in 1944 and *Brown v. Board of Education*<sup>125</sup> in 1954, which then ushered in the "modern era of equal protection jurisprudence."<sup>126</sup> Since then, the Court has frequently used the Equal Protection Clause to combat invidious discrimination.<sup>127</sup> Equal protection jurisprudence over the years has evolved a three-part analysis,<sup>128</sup> and the Curry situation concerning privacy of DNA information meets each of the three steps.

#### A. Question One: What Is the Classification?

This question asks how the government distinguishes among people. The answer here is not that the government would be distinguishing among people based on their DNA analysis. For the pur-

<sup>121</sup> *Id.* at 766–68.

<sup>122</sup> U.S. CONST. amend. XIV, § 1, cl. 4.

<sup>123</sup> CHEMERINSKY, *supra* note 84, at 643.

<sup>124</sup> 323 U.S. 214 (1944).

<sup>125</sup> 347 U.S. 483 (1954).

<sup>126</sup> CHEMERINSKY, *supra* note 84, at 642.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 644–47. While the Court has not clearly defined equal protection with such a test, this model, like many of the possible models, incorporates the Court's analysis from its equal protection cases. *Id.* at 643.

poses of the Comment, the answer is that government would be distinguishing among people based on their *willingness* to provide DNA information.<sup>129</sup> The issue is privacy.

### B. Question Two: What Is the Appropriate Level of Scrutiny?

It is in addressing this question that the Court has provided a variety of levels of scrutiny to apply to government classifications, and it is here where analysis will reveal that DNA information should be given heightened scrutiny.

The lowest and most general level of scrutiny the Court has applied has been rational-basis review.<sup>130</sup> Here, the Court allows great legislative discretion in classifying individuals in order to meet the legislative purpose. For example, the Court declared in *United States Railroad Retirement Board v. Fritz* that with regard to “line-drawing” in legislative classifications, “[w]here, as here, there are plausible reasons for Congress’ action, our inquiry is at an end.”<sup>131</sup> Under this test, the classification must simply be “rationally related to a legitimate government purpose,”<sup>132</sup> and “the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.”<sup>133</sup>

On the other extreme, the Court has identified race as the quintessential example of a classification that should receive strict scrutiny. Based on a confluence of American history and the fundamental idea that race should not be a basis for determining classifications, the governmental action is given “the most rigid scrutiny”<sup>134</sup>: the government needs the strongest possible rationale to justify a race-based classification.<sup>135</sup> The Court has determined that laws under this classification should be subjected to a two-part test: “they must be justified

<sup>129</sup> This is the same issue that made potential ADA protections moot. See discussion *supra* Part II.A.1.

<sup>130</sup> CHEMERINSKY, *supra* note 84, at 645.

<sup>131</sup> 449 U.S. 166, 179 (1980) (writing about the fairness of making distinctions among employees in a railroad retirement provision).

<sup>132</sup> CHEMERINSKY, *supra* note 84, at 646. The Court has also considered cases where there is “rational basis with bite,” Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779 (1987), wherein the burden shifted from the plaintiff to the state. In these cases, the Court was more suspicious of the rationale for the government’s classification. See, e.g., *Romer v. Evans*, 517 U.S. 620, 624 (1996) (homosexuality); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (mental disabilities); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (communal living).

<sup>133</sup> *Fritz*, 449 U.S. at 179.

<sup>134</sup> *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Ironically and ignominiously, although *Korematsu* was the first case in which the Court gave race heightened protection, the Court still managed to find that the government met its burden to intern all Japanese-Americans. *Id.* at 224.

<sup>135</sup> CHEMERINSKY, *supra* note 84, at 645.

by a compelling governmental interest and must be ‘necessary . . . to the accomplishment’ of their legitimate purpose.”<sup>136</sup>

The Court has also found that a variety of classifications qualify under “intermediate” or “heightened” scrutiny, where, unlike under rational-basis review, the government has the burden of proof to justify its classifications.<sup>137</sup> The Court has given heightened protections here to laws that discriminate by gender<sup>138</sup> as well as to laws that discriminate against children born from nonmarital families.<sup>139</sup> More recently, the Court has given a higher level of scrutiny to laws that discriminate against gays and lesbians.<sup>140</sup>

While there has yet to be one clear test for determining whether a classification should get heightened scrutiny, a commonality among heightened classifications is that the characteristic upon which the classification is based is something that individuals have not “earned” but which has been given to them or placed upon by them by circumstances wholly outside of their control. In other words, classifications have received heightened scrutiny because they are *like* race in this regard. The focus on something an individual cannot change has been one constant throughout the heightened equal protection cases from *Korematsu* all the way through *Lawrence*—and this is exactly the situation with DNA information.

A strong case can be made for heightened protection when the government distinguishes among people based on their DNA information. One’s DNA information is an immutable characteristic, like race, and laws that discriminate on the basis of an immutable characteristic should be given heightened scrutiny. If the Court is to be consistent with its goal of allowing people to compete on an individual basis, then DNA information must receive heightened protection from government policies that attempt to take advantage of knowledge of genetic information.

The classification explored for the purposes of the Curry situation, however, is discrimination based on the willingness to provide DNA information. Willingness to provide is not an immutable char-

<sup>136</sup> *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964)).

<sup>137</sup> CHEMERINSKY, *supra* note 84, at 645.

<sup>138</sup> *See, e.g., Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (using a stronger test than rational-basis review to scrutinize an Idaho law that gave preference to males in intestate cases).

<sup>139</sup> *See, e.g., Clark v. Jeter*, 486 U.S. 456, 465 (1988) (overturning a state law that required nonmarital children to establish paternity by the age of six in order to receive child support); *Levy v. Louisiana ex rel. Charity Hosp. of La. at New Orleans Bd. of Adm’rs*, 391 U.S. 68, 72 (1968) (finding unconstitutional a state law that barred nonmarital children from suing under a wrongful death statute).

<sup>140</sup> *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (invalidating a Texas antisodomy law); *see also Romer v. Evans*, 517 U.S. 620, 624 (1996) (striking down legislation directed at homosexuals as class-based).

acteristic like the content of one's DNA, but for the right of privacy of DNA information to have substance, it *must* include the right to refuse a DNA test.

There are several explanations for this conclusion. First, if the Courts were to give strict scrutiny to discrimination based on DNA information, they could only be applying strict scrutiny to government actions—such as mandatory testing—that access that information. Second, we can ask, why would the government test for DNA information without intending to *use* the DNA information? Once taking action based on DNA content is barred, there is a tremendously challenging enforcement problem in preventing the government from using the information it has obtained. But since the government probably would not have tested if it could not use the information, we can circumvent the enforcement problem and instead disallow the government from getting its hands on the genetic information to begin with.

Certainly, there may be a government interest in having DNA information that overcomes strict scrutiny, such as collecting information in the aggregate in a way that does not identify individuals with their DNA. This would be like the government collecting information on another immutable characteristic, race, in its census figures. The government asks for racial information, but it does not ask for names, and does not keep track of what individual is of what race.

This, however, was not the situation Curry faced. The collection of his DNA information was not for anonymous, aggregative purposes, but instead to find out information about him specifically. In order to have control over his DNA information, Curry needed to have control over whether or not he could consent to DNA testing. Because he did not have such a right, Curry was faced with a Hobson's choice—by refusing testing, he was out of a job, regardless of what his DNA information said. If he had accepted testing, he would have sacrificed control over his DNA content and potentially lost his job because of it. Either way he chose, he would have lost.

As a policy matter, we do not want employers to be able to put their employees in this position. The key factor in Curry's case was not the DNA information but the willingness to provide it. For the right to not be discriminated against based on one's DNA content to have any meaning at all, one needs to have the affirmative right to not consent to government-imposed testing.

There is inevitably a concern that recognizing an additional right will open the door of heightened protection to undeserving rights. This was precisely the concern when an individual's right to private, consensual sodomy was affirmed by the Court in *Lawrence*, the three members of the dissent were concerned about a slippery slope toward other outlawed forms of sexual behavior: “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation,

adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices."<sup>141</sup> However, the Court has now granted heightened scrutiny numerous times over the last sixty years. Each time it has done so it has been very specific and narrow about the right it is granting. There is no reason to believe that it would not choose its words carefully here. As Brett McDonnell has observed, "the fact that the Court has now gone partway down a slippery slope does not mean that it is irrevocably committed to going further."<sup>142</sup> Moreover, though there may be the potential for a slippery slope, the risk of that potential becoming reality is small compared with the benefits from giving protection over an individual's genetic makeup.

### C. Question Three: Does Government Action Meet the Level of Scrutiny?

Under this final step of the analysis, the legality of an action depends both upon the nature of the government action and on whether the action is sufficiently targeted to the purpose it claims.<sup>143</sup> In Curry's case, if the Bulls were the government, they would claim the health of the player outweighs any privacy interests Curry has. A court would examine the facts to determine the extent of the danger to Curry's health. From Curry's side, if DNA information had heightened protection, his right to privacy would weigh particularly heavily—heavier than the prisoner's and the servicemen's rights to privacy without the cover of the Equal Protection Clause in *Kincade*<sup>144</sup> and *Mayfield*.<sup>145</sup>

In addition, due to heightened scrutiny, the Court should be more suspicious of a governmental assertion regarding health and should carefully examine such claims to determine their veracity; this is unlike the great latitude courts give the government in a non-heightened rational-basis review. Here, the fact that several prominent cardiologists cleared Curry to play would weigh heavily against the government.<sup>146</sup> Ultimately, with constitutional weight behind his right to genetic privacy, Curry would have a strong case. Regardless of the outcome, Curry deserves the most protection possible.

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<sup>141</sup> *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

<sup>142</sup> Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 338 (2004).

<sup>143</sup> See CHEMERINSKY, *supra* note 84, at 647 (expounding on the distinction between overinclusive and underinclusive laws in achieving their ends).

<sup>144</sup> See *United States v. Kincade*, 379 F.3d 813, 834 (9th Cir. 2004) ("[C]onditional releaseses enjoy severely constricted expectations of privacy relative to the general citizenry . . .").

<sup>145</sup> See *Mayfield v. Dalton*, 109 F.3d 1423, 1425 (9th Cir. 1997) (identifying the diminished privacy expectations of soldiers in the United States military).

<sup>146</sup> See *supra* note 9.

While the Bulls situation is still not a slam-dunk case for Curry, there will certainly be other situations where, even under heightened scrutiny, government interventions into genetic information (and subsequent discrimination based on the information gathered) will hold up.<sup>147</sup> As with the exceptions in due process, such analysis is outside the scope of this Comment.

#### IV. THE STATUTORY ALTERNATIVE

[T]hree in four Americans (76 percent) say Congress should pass a law specifically to protect a person's genetic information from being used to discriminate against them.

—Research!America, September 2006<sup>148</sup>

There could be alternative means for Curry to stay on the Bulls without submitting to testing. In addition to a potential Fourth Amendment argument,<sup>149</sup> Curry could also gain protection under a statutory solution.

The federal government could merely codify into legislation what already should be a fundamental right. While no such legislation is currently proposed, its goal could entail two simple parts: (1) to protect individuals from employment discrimination based on their willingness to submit to DNA testing; and (2) to stop employers from using any obtained DNA information in a discriminatory fashion. The advantage of a statutory solution is that it would make the law clear now, instead of prolonging the resolution of this debate through the wait for ideal test cases to go up to and be decided by the Supreme Court. In addition, it would avoid the political claims of illegitimacy of judicial legislating that may arise if the Court were to find a new right.

Indeed, such a policy orientation is not farfetched; in fact, it would be in line with current administration policy. Reacting to a ruling by the Fourth Circuit on HIPAA's privacy rule, a Bush official declared, "This administration strongly supports a policy of providing

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<sup>147</sup> For example, the federal Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14132 (2000), *as amended by* Justice for All Act of 2004, Pub. L. No. 108-405, §§ 203, 302, 118 Stat. 2260, 2269–70, 2272 (2004) *and* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1002, 119 Stat. 2960, 3084 (2006), which establishes a national DNA database for criminals, would likely be found constitutional upon a demonstration that the database helps law enforcement catch violent criminals across the nation. *See also supra* note 131 (discussing a justification for governmental discriminatory action based on race, the recipient of the highest tier of scrutiny).

<sup>148</sup> Press Release, Research!America, Americans Willing to Donate Genetic Material for Research: Federal Law Needed to Protect Genetic Privacy (Sept. 19, 2006), *available at* <http://www.researchamerica.org/media/releases/9.19.06.personalizedmed.html>.

<sup>149</sup> *See supra* Part I.B (discussing courts' interpretations of search and seizure with respect to genetic information).

a first-time-ever federal level of protection for the medical records of all Americans."<sup>150</sup>

In addition to the medical component, the law could also be sold as a simple consolidation and clarification of the type of employment and privacy protections that businesses are already utilizing and that the American people already want.<sup>151</sup> States could still retain flexibility to have more strict DNA protections if they choose.

## V. CONCLUSION

[T]he era of genomic testing may have already begun. According to a recent report, at least one rugby team down under is already testing players for *ACTN3* and 10 other sports-related genes to help players optimize their workouts. For example, athletes with "power" genotypes might be given additional weight training, while those with "endurance" genotypes might be asked to run longer distances. The team's physiologist predicts such screening will soon become routine for sports teams.

—Duke Institute for Genome Sciences and Policy, 2006<sup>152</sup>

There is no question that something needs to be done about the state of genetic privacy. There are no clear statutory or judicial doctrines, and, dangerously, private industry is beginning to take the matter into its own hands.<sup>153</sup>

The potential for the subsequent abuse of DNA information that has come into the employer's hands is real. Anita Silvers and Michael Ashley Stein suggest that, "[f]or example, individuals who provide DNA to be tested for susceptibility to heart disease could, years later, find that they have been dismissed . . . because of new data that the gene has some expression for an early onset of Alzheimer's disease."<sup>154</sup> Indeed, the fears are legitimate "that employers will use

<sup>150</sup> Press Release, Tommy G. Thompson, Sec'y of Health and Human Servs., Regarding the Ruling by the U.S. Court of Appeals for the 4th Circuit Regarding Constitutional Challenge to the Privacy Rule (Apr. 14, 2003), available at <http://www.hhs.gov/news/press/2003pres/20030429a.html>.

<sup>151</sup> See Lohr, *supra* note 78 (identifying IBM as a primary force in bringing this issue to state and federal attention).

<sup>152</sup> *Of Jocks and Genes*, GENOMELIFE (Duke Inst. for Genome Scis. and Policy, Durham, N.C.), May/June 2006, at 1, 3.

<sup>153</sup> In addition to the range of (and lack of) protections offered by private companies, the NBA itself, in response to the Curry incident, has introduced mandatory cardiac testing. While stopping short of requiring DNA testing, the tests give the NBA much more information about a player's health. See Howard Beck, *The N.B.A. Is the First League to Begin Standardized Cardiac Screening*, N.Y. TIMES, Sept. 17, 2006, SportsSunday, at 5. One of the architects of the new league policy is Dr. Barry Maron—the same doctor who urged the Bulls to have Curry tested. *Id.*

<sup>154</sup> Anita Silvers & Michael Ashley Stein, *Human Rights and Genetic Discrimination: Protecting Genomics' Promise for Public Health*, 31 J.L. MED. & ETHICS 377, 378 (2003).

these data to discriminate against currently healthy applicants with 'time-bomb' genetic profiles."<sup>155</sup>

The dissent in *Kincade* warned us about the potential for a slippery slope without high barriers to obtaining DNA information, noting that if weight is not given to the privacy right for DNA information, governmental justifications would always outweigh in a balancing test: "it is difficult to imagine that the balancing of interests . . . would not justify the [gathering of] data regarding *all* Americans . . ." <sup>156</sup> The time to act is now, as employers are increasingly embracing the need for testing, focusing on job performance and health-care costs. <sup>157</sup>

There is no question that American society acknowledges the need for protection of DNA information. As Victor Schachter has noted, "[g]enetic testing has replaced HIV testing as the current hot-button health testing issue."<sup>158</sup> The Executive, Congress, state legislatures, the courts at various levels, and even private industry have all acknowledged the need for some protection of workers' genetic rights, yet there is still no comprehensive protection.

The framework for providing a constitutional protection over DNA information is already there; providing such protection would be not a departure from but a mere continuation of the Court's evolving Fourteenth Amendment jurisprudence.

In Eddy Curry's situation, the Bulls should not have been able to try to force him into submitting personal genetic information. The right to privacy over DNA information is too important to be treated in the scattered manner it is now. Ultimately, Alan Milstein, Curry's attorney, is right: "[i]f the NBA were to get away with it, what about everyone else in this country looking for a job[?]" <sup>159</sup>

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<sup>155</sup> Schachter, *supra* note 24, at 192. At least one federal judge agrees:

[i]n our age in which databases can be "mined" in a millisecond . . . and in which this data can easily be stored and shared by governments and private parties worldwide, the threat of a loss of privacy is real, even if we cannot yet discern the full scope of the problem.

United States v. *Kincade*, 379 F.3d 813, 842 (9th Cir. 2004) (Gould, J., concurring).

<sup>156</sup> *Kincade*, 379 F.3d at 844 (Reinhardt, J., dissenting).

<sup>157</sup> See Lohr, *supra* note 78 ("The time is right," explained Harriet Pearson, I.B.M.'s chief privacy officer. "The market and medical practice is moving in this direction—to gather and use genetic information."); see also *supra* Part I.C (discussing the reasons for greater genetic testing by companies in the future).

<sup>158</sup> Schachter, *supra* note 24, at 191.

<sup>159</sup> *Bulls, Curry, Lawyers Tussle over DNA Testing*, *supra* note 1.