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## Judicial Bypass and Parental Rights After *Dobbs*

**ABSTRACT.** Under Supreme Court precedent, judicial bypass of laws mandating parental involvement for abortion historically balanced the minor's right to abortion and their parents' right to direct the minor's upbringing. This Note confronts the question: with the constitutional right to abortion newly jettisoned, will judicial bypass be vulnerable to parental-rights challenges? We answer: no. First, parental-rights case law embodies an antiquated coverture-like understanding of children. Properly understood, parental rights are coterminous with children's best interests — and therefore do not conflict with bypass. Second, bypass comports with entrenched common-law doctrines and a tacit consensus evident in statutes that minors should be allowed to self-consent to health care.

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**INTRODUCTION**

In 1979, the Supreme Court in *Bellotti v. Baird* described why a teenager weighing whether to end an unwanted pregnancy should not be forced to obtain parental consent to do so. “[T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.”<sup>1</sup> Beginning with this case, the Court has held that because children enjoy a constitutional right to abortion similar to that of adults, “a State [can] not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy.”<sup>2</sup> The Court reasoned that while it is appropriate to encourage a child to consult their parent when deciding whether to have an abortion, a state’s parental notice and consent (collectively, “parental involvement”) requirements must not unduly burden the minor’s right to seek an abortion.<sup>3</sup> As a constitutional requirement, therefore, state laws mandating parental involvement in a minor’s abortion decision had to provide a means by which that minor can go before a judge, prove they are mature enough to make the abortion decision on their own or that doing so would be in their best interests, and then be authorized to act without parental consultation or consent.<sup>4</sup>

This regime – judicial bypass<sup>5</sup> of parental-involvement laws – was constitutionally mandated because all people, minors and adults, had a right to abortion under the Fourteenth Amendment, as established in *Roe v. Wade*.<sup>6</sup> But on July 24, 2022, the Supreme Court overturned *Roe* and its progeny in a bitterly controversial opinion, explaining that, in its view, “[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.”<sup>7</sup> Given this shift in the Court’s abortion jurisprudence, what happens to the constitutionality of an absolute parental veto on a minor’s ability to have an abortion? Is a minor simply left to bear the “grave and indelible” consequences of an unwanted pregnancy because their parent says they must?

These questions, among many others, will undoubtedly be raised in this new era in which states are free to regulate individuals’ access to reproductive health

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1. *Bellotti v. Baird*, 443 U.S. 622, 642 (1979).

2. *Id.* at 639 (citing *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

3. *Id.* at 640-43.

4. *Id.* at 643-44.

5. Some states – most notably Florida – refer to this same process as “judicial waiver.” See, e.g., FLA. STAT. § 390.01114(6) (2022). For ease of reference, we will use the phrase “judicial bypass” throughout.

6. 410 U.S. 113 (1973).

7. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

care with few to no federal constitutional boundaries. Some states have responded, and will continue to respond, to the Court's decision in *Dobbs* by enacting outright bans on abortion with extremely narrow exceptions.<sup>8</sup> Some will double down on their commitment to ensuring abortion access, enshrining in their constitutions or statutes an absolute right to abortion.<sup>9</sup> But others will take the middle ground: although they will not ban abortion altogether, they will be amenable to legislation that chips away at their citizens' practical access to abortion. In these states, the Court's abandonment of the federal constitutional right to abortion will inevitably lead antiabortion activists to try to strengthen parental-involvement requirements and jettison the judicial-bypass portions of these laws.<sup>10</sup>

Antiabortion activists' efforts to eliminate adolescents' access to abortion may capitalize on the growing appeal of arguments rooted in the language of

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8. As of this Note's publishing, sixteen states have completely banned abortion. See *State-by-State Guide*, ABORTION FINDER, <https://www.abortionfinder.org/abortion-guides-by-state> [<https://perma.cc/ZBX5-HK78>]; see, e.g., ALA. CODE § 26-23H-4 (2022) (criminalizing abortion at any point in pregnancy); LA. STAT. ANN. § 40:1061 (2022) (same). In four of those states the total bans are currently blocked in court. *State-by-State Guide*, *supra*; see, e.g., *Planned Parenthood Ass'n of Utah v. State*, No. 220903886, 2022 WL 2314556 (Utah Dist. Ct. June 27, 2022).
  9. See, e.g., *In Response to Supreme Court Decision, Governor Newsom Signs Legislation to Protect Women and Providers in California from Abortion Bans by Other States*, OFF. GOVERNOR GAVIN NEWSOM (June 24, 2022), <https://www.gov.ca.gov/2022/06/24/in-response-to-supreme-court-decision-governor-newsom-signs-legislation-to-protect-women-and-providers-in-california-from-abortion-bans-by-other-states> [<https://perma.cc/A7K5-APYH>]; Shawna Chen, *California, Washington and Oregon Launch "West Coast Offense" to Protect Abortion Rights*, AXIOS (June 24, 2022), <https://www.axios.com/2022/06/24/abortion-rights-california-washington-oregon> [<https://perma.cc/C4Y8-6UB7>].
  10. The post-*Roe* Supreme Court already vacated and remanded the Seventh Circuit's decision affirming a preliminary injunction enjoining enforcement of an unconstitutional Indiana parental-notification law with a severely limited judicial-bypass procedure. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 142 S. Ct. 2893 (2022) (mem.). After the Supreme Court's mandate issued in July, the Seventh Circuit vacated the preliminary injunction (on the state's motion), noting only, without analysis, that "*Dobbs* requires" that the preliminary injunction "must be" vacated. *Order, Planned Parenthood of Ind. & Ky. v. Box*, No. 17-2428 (7th Cir. July 28, 2022). Even before *Roe* was overturned, in February of 2022, antiabortion groups filed petitions for Nevada ballot initiatives that would add a parental-notification requirement in the state. Riley Snyder, *Proposed Nevada Ballot Initiatives Seek Parental Notification for Minors' Abortion*, NEV. INDEP. (Feb. 24, 2022, 1:20 PM), <https://thenevadaindependent.com/article/proposed-nevada-ballot-initiatives-seek-parental-notification-for-minors-abortion> [<https://perma.cc/HY5G-C89K>]. And in 2017 Paul Benjamin Linton suggested that after *Roe*, states should enact parental-involvement requirements without judicial bypass. Paul Benjamin Linton, *Overruling Roe v. Wade: The Implications for the Law*, 32 ISSUES L. & MED. 341, 351 (2017).

“parental rights,” even in liberal states.<sup>11</sup> Such efforts are already emerging in both legislatures and courts. For example, in Connecticut, abortion opponents emboldened by *Dobbs* are pressuring lawmakers to enact a parental-notification requirement, citing the need to “facilitate parental guidance” and “protect[] families.”<sup>12</sup> In Louisiana, a bill introduced in April 2022 (several months before *Dobbs*, but when it was clear what was to come given the makeup of the Court) sought to amend the state’s already restrictive parental-involvement law by, among other things, permitting judges to appoint counsel to represent the interests of a minor’s parents in a judicial-bypass hearing.<sup>13</sup> On the litigation front, the State of Missouri filed a petition for a writ of certiorari with the Supreme Court asking the Court to vacate and remand an Eighth Circuit decision predicated on a minor’s right to seek judicial bypass for an abortion without notifying

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11. See, e.g., Sara Sirota, *Teenagers Already Face Extra Barriers to Abortion Care. It’s About to Get Worse.*, INTERCEPT (June 19, 2022, 8:00 AM), <https://theintercept.com/2022/06/19/abortion-minors-parents-roe> [<https://perma.cc/S2JD-A76J>]; Sarah Gibson, *In Narrow Vote, N.H. House Kills Controversial Parental Rights Bill Opposed by Sununu*, CONCORD MONITOR (May 30, 2022, 12:54 PM), <https://www.concordmonitor.com/gsnC-In-narrow-vote-N-H-House-kills-controversial-parental-rights-bill-opposed-by-Sununu-46562771> [<https://perma.cc/2QR8-6ZPR>]; Olga Khazan, *Red Parent, Blue Parent*, ATLANTIC (Feb. 22, 2022), <https://www.theatlantic.com/politics/archive/2022/02/new-partisan-fight-over-schools/622846> [<https://perma.cc/9M6G-XPTV>]; Jennifer C. Berkshire, *The GOP Has Revived Its Obsession with Parents’ Rights*, NEW REPUBLIC (Dec. 9, 2021), <https://newrepublic.com/article/164648/gop-obsession-parents-rights> [<https://perma.cc/X98P-ZLNK>]. In October 2022, Republican Representative Debbie Lesko introduced the Parental Rights Amendment in the House, an amendment to the Constitution to “enshrine” the “traditional” parental rights. *Parental Rights Amendment Introduced in Congress*, PARENTALRIGHTS (Oct. 18, 2022), <https://parentalrights.org> [<https://perma.cc/93GP-HAG2>].
  12. Jenna Carlesso, *CT Anti-Abortion Advocates Press for Parental Notification Legislation*, CT MIRROR (July 28, 2022, 5:00 AM), <https://ctmirror.org/2022/07/28/ct-roe-v-wade-anti-abortion-advocates-press-parental-notification-laws> [<https://perma.cc/N6TF-H83Y>] (internal quotation marks omitted).
  13. H.B. 989, 2022 Reg. Sess. (La. 2022).

their parent of the judicial-bypass hearing.<sup>14</sup> After *Dobbs*, the State argues, the question arises of whether the judicial-bypass right even exists.<sup>15</sup>

We predict that in *Dobbs*'s aftermath, antiabortion activists and pro-life state legislators will argue that, far from being constitutionally required, judicial-bypass provisions are constitutionally prohibited. Although that argument has not yet been made in so many words in a public forum,<sup>16</sup> the anti-judicial bypass efforts just described are a clear precursor thereto; the claim that judicial bypass is unconstitutional is the next step. Absent a minor's countervailing fundamental right to choose abortion, the argument would go, parents' constitutional right to direct the upbringing of their child is absolute.

That argument is not convincing. In this Note, we argue that the newfound authority of states to ban abortion altogether should not be taken to include the

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14. Petition for Writ of Certiorari, *Chapman v. Doe ex rel. Rothert*, No. 22-312 (Sept. 30, 2022). In 2018, Jane Doe (a pregnant minor) went to the Randolph County Courthouse to request a judicial bypass of parental consent for an abortion. *Doe v. Chapman*, 528 F. Supp. 3d 1051, 1055-56 (E.D. Mo. 2021). Chapman, a clerk at the court, informed Doe that she would need to notify her parents of the judicial-bypass hearing (which was not required under the Missouri parental-consent law). *Id.* Doe returned to the court the next month and Chapman again refused to accept a judicial-bypass petition without her notifying her parents. *Id.* at 1056. Doe then sued Chapman for violation of her constitutional rights. Chapman argued that she was entitled to qualified immunity because Doe did not have a clearly established constitutional right that Chapman violated. *Id.* at 1058-59. The district court rejected Chapman's argument, relying on Supreme Court and Eighth Circuit precedent that clearly established minors' abortion and judicial-bypass rights. *Id.* at 1059-60. In April 2022, the Eighth Circuit affirmed, reasoning that "Doe's constitutional right to apply for a judicial bypass without notifying her parents is clearly established by Supreme Court precedent." *Doe ex rel. Rothert v. Chapman*, 30 F.4th 766, 775 (8th Cir. 2022). In their September certiorari petition, Missouri argued that "[w]ith *Casey* overruled [by *Dobbs*], the case now 'raise[s] the threshold question whether the right [Appellant is] alleged to have violated even exists.'" Petition for Writ of Certiorari, *supra*, at 25 (quoting *Dillard v. O'Kelley*, 961 F.3d 1048, 1053 (8th Cir. 2020) (en banc)).
  15. See Petition for Writ of Certiorari, *supra* note 14, at 25. On March 20, 2023, the Supreme Court granted certiorari, vacated the Eighth Circuit's judgment, and remanded with instructions to dismiss the case as moot. *Chapman v. Doe ex rel. Rothert*, No. 22-312, 2023 WL 2563313 (mem.) (Mar. 20, 2023).
  16. Similar constitutional arguments about parental rights *have* already been made, and indeed succeeded, in the context of contraception. In December 2022, a federal district-court judge in Texas held that the administration of the Title X program under which participating health-care providers were not permitted to require parental consent to distribute contraception to minors violated parents' fundamental right to direct their children's upbringing. *Deanda v. Becerra*, No. 20-CV-092-Z, 2022 WL 17572093, at \*17 (N.D. Tex. Dec. 8, 2022). The judge concluded that "[p]arental rights in the care, custody, and control of their children include the right to direct a child's medical care—which includes the right to consent to contraception." *Id.* at \*12. Moreover, the judge reasoned, "omitting parental consent gives insufficient weight to the undesirability of teenage promiscuity" and "ignores that the use of contraception (just like abortion) violates traditional tenets of many faiths." *Id.* at \*16.

lesser authority to subject minors to an unyielding requirement of parental involvement. Judicial bypass does not depend on the federal constitutional right to abortion for its vitality and, in a post-*Roe* world, is not susceptible to a challenge based on constitutional “parental rights.” Judicial bypass is consistent with a growing recognition of children’s agency and right to decision-making in certain settings, including health care.

To be clear, judicial bypass does not give minors absolute autonomy over their reproductive health care. In order to truly respect a minor’s ability to make health-care decisions for themselves, states should eliminate parental-involvement laws altogether. Indeed, even in states that allow for judicial bypass, minors must still prove they are mature enough to make the decision to have an abortion or that it is in their best interests, and a judge may deny their petition. Thus, such minors still may be forced by their parents or a judge to endure pregnancy, allowing the state to “transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare.”<sup>17</sup> Nonetheless, the availability of some procedure for a minor to overcome their parents’ practical veto over their abortion decision reflects the state’s necessary role in effectuating children’s independent interests and agency.

In Part I, we briefly explain the development of parental-involvement laws and the Court’s precedents holding that judicial bypass is a constitutionally mandated procedure. We then proceed to answer two questions. First, after the overturning of *Roe* and consequent elimination of a federal constitutional right to abortion, is judicial bypass vulnerable to a legal challenge on constitutional parental-rights grounds? In Part II, we argue that it is not. As scholars have argued in increasing numbers, the view of parental rights as entailing absolute authority to make decisions on behalf of one’s child, embodied in an outdated reading of the Court’s jurisprudence on parental rights, relies on a coverture-style view of children as property. This framing devalues children’s rights and autonomy. Under the proper understanding, parental rights instead derive from and are coterminous with children’s welfare. Accordingly, when a parent’s wishes come into conflict with their child’s own expression of the child’s interests, the state’s deference to parental rights loses its foundation. Under this articulation, judicial bypass is a logical, permissible, and necessary (though limited) intervention into the family in the interest of respecting a child’s agency. It is an intervention that generally presumes and accepts parental involvement in children’s lives but allows a child to assert their own safety and security interests as well. Part II thus anticipates a legal challenge to judicial bypass and cuts it off at the pass.

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17. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

In Part III, we turn to the second question: absent the constitutional right to abortion, is judicial bypass an aberration unmoored from our legal tradition, one that existed *only* because of the constitutional right to abortion? We argue that judicial bypass fits easily into common-law traditions of the so-called “mature minor doctrine” and the right to bodily integrity. Judicial bypass is also not anomalous in state statutory law: there is a deeply rooted and growing consensus among state legislatures that some minors are mature enough to consent to medical care and that some health care is important enough that parents should not be able to prevent their children from accessing it. The numerous state laws allowing some minors to consent to some medical care strongly supports the ongoing legality of judicial bypass.

Finally, we conclude in Part IV with policy suggestions for the judicial bypass of a new era. We derive our recommendations from the existing body of appellate judicial-bypass cases from state courts across the country and from literature on the functionality of the bypass process.

Judicial bypass is not a perfect answer to the problem of minors being deprived the dignity, autonomy, and control that comes with being able to make decisions about their reproductive futures independently. But at the very least, judicial bypass is an important procedure that gives minors a greater ability to make health-care decisions with lifelong implications. States should not be convinced, by litigation or by policy, to do away with the judicial-bypass provisions of their parental-involvement laws simply because *Roe* has been overturned. Indeed, judicial-bypass procedures are a necessary and legally sound provision of any parental-involvement law.

## I. BACKGROUND ON JUDICIAL BYPASS

Adolescent abortion has long been the subject of intense public concern. It is the literal embodiment of anxieties around teen sexuality, deviant behavior, the decision-making capacity of adolescents, and the proper family structure and role of parents in governing their children’s behavior.<sup>18</sup> Reacting to this anxiety,

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18. See generally CAROL SANGER, *ABOUT ABORTION: TERMINATING PREGNANCY IN 21ST CENTURY AMERICA* (2017) (describing the stigmatizing discourse around abortion in the modern era); Lesley Hoggart, *Internalised Abortion Stigma: Young Women’s Strategies of Resistance and Rejection*, 27 *FEMINISM & PSYCH.* 186 (2017) (detailing the ways in which young women articulate strategies of resistance to internalized abortion stigma in England and Wales); Michelle Fine & Sara I. McClelland, *The Politics of Teen Women’s Sexuality: Public Policy and the Adolescent Female Body*, 56 *EMORY L.J.* 993 (2007) (examining how public policies, including parental-consent and parental-notification requirements for abortion, limit the sexual education and



many states require minors to obtain parental consent, notify their parents, or both in order to access abortion. As of January 2023, thirty-seven states require parental involvement: ten require notification,<sup>19</sup> twenty require consent,<sup>20</sup> and seven require both notification and consent.<sup>21</sup> The laws vary considerably. For example, three states require consent from or notification to *both* a minor's parents,<sup>22</sup> and nine states require that consent or notification forms be notarized.<sup>23</sup> But at present, every parental-involvement law has one thing in common: procedures for a minor to legally “bypass” the parental-involvement requirement.<sup>24</sup>

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support available to young women); Helen Wilson & Annette Huntington, *Deviant (M)others: The Construction of Teenage Motherhood in Contemporary Discourse*, 35 J. SOC. POL'Y 59 (2005) (exploring how normative perceptions of teenage motherhood have shifted in the United States, the United Kingdom, and New Zealand).

19. See COLO. REV. STAT. §§ 13-22-701 to -707 (2022); DEL. CODE ANN. tit. 24 §§ 1780-1789B (2022); GA. CODE ANN. §§ 15-11-680 to -688 (2022); IOWA CODE § 135L.3 (2022); MD. CODE ANN. HEALTH-GEN. § 20-103 (West 2022); MINN. STAT. § 144.343 (2022); MONT. CODE ANN. § 50-20-204 (2022); N.H. REV. STAT. ANN. § 132:33 (2022); S.D. CODIFIED LAWS § 34-23A-7 (2022); W. VA. CODE § 16-2F-3 (2022).
20. See ALA. CODE §§ 26-21-1 to -4 (2022); ARIZ. REV. STAT. ANN. § 36-2152 (2022); ARK. CODE ANN. § 20-16-804 (2022); IDAHO CODE § 18-609A (2022); KAN. STAT. ANN. § 65-6705 (2022); KY. REV. STAT. ANN. § 311.732 (2022); LA. STAT. ANN. § 40:1061.14 (2022); MASS. GEN. LAWS ch. 112, § 12R (2022); MICH. COMP. LAWS § 722.903 (2022); MISS. CODE ANN. § 41-41-53 (2022); MO. REV. STAT. § 188.028 (2022); NEB. REV. STAT. § 71-6902 (2022); N.C. GEN. STAT. § 90-21.7 (2022); N.D. CENT. CODE § 14-02.1-03 (2022); OHIO REV. CODE ANN. § 2919.121 (West 2022); 18 PA. CONS. STAT. § 3206 (2022); 23 R.I. GEN. LAWS § 23-4.7-6 (2022); S.C. CODE ANN. § 44-41-31 (2022); TENN. CODE ANN. § 37-10-303 (2022); WIS. STAT. § 48.375 (2022).
21. See FLA. STAT. §§ 390.01114(4)(a), (5)(a) (2022); IND. CODE § 16-34-2-4 (2022); OKLA. STAT. tit. 63, §§ 1-740.2, 1-744.1 (2022); TEX. FAM. CODE ANN. §§ 33.002(A)(2), 33.0021 (West 2022); UTAH CODE ANN. §§ 76-7-304 to -304.5 (West 2022); VA. CODE ANN. § 16.1-241 (West 2022); WYO. STAT. ANN. § 35-6-118 (2022).
22. See KAN. STAT. ANN. § 65-6705 (2022); MISS. CODE ANN. § 41-41-53 (2022); N.D. CENT. CODE § 14-02.1-03 (2022).
23. See ARK. CODE ANN. § 20-16-805 (2022); FLA. STAT. § 390.01114 (2022); IND. CODE § 16-34-2-4 (2022); KAN. STAT. ANN. § 65-6705 (2022); KY. REV. STAT. ANN. § 311.732 (West 2022); LA. STAT. ANN. § 40:1061.14 (2022); NEB. REV. STAT. § 71-6902 (2022); OKLA. STAT. tit. 63, § 1-740.2 (2022); VA. CODE ANN. § 16.1-241 (2022).
24. In every state except Maryland, a minor is able to petition a court for a judicial bypass. In Maryland, the providing practitioner may make the determination of whether or not to notify a minor's parent. MD. CODE ANN. HEALTH-GEN. § 20-103 (West 2022). As of the Seventh Circuit's recent vacating of the preliminary injunction, *see supra* note 10, in Indiana, attorneys representing minors in judicial-bypass cases must notify a minor's parents of the minor's intention to seek an abortion, unless the court personnel determine it not to be in the minor's best interests, IND. CODE § 16-34-2-4(e) (2022). Also in Indiana, a minor's health-care provider may petition a court for a judicial bypass of parental consent on the minor's behalf. *Id.* § 16-34-2-4(d).

The judicial-bypass procedure derives from the Supreme Court's decision in *Bellotti v. Baird II* (*Bellotti II*)<sup>25</sup> and its progeny. Before *Bellotti II*, however, the Court first considered and struck down a parental-consent law in *Planned Parenthood of Central Missouri v. Danforth*.<sup>26</sup> The Court emphasized that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”<sup>27</sup> Because the parental-consent requirement impinged on minors’ fundamental right to abortion, the Court assessed whether the law furthered a significant state interest and concluded it did not. The Court considered and rejected the state’s proffered interests in preserving the family unit and parental authority:

It is difficult . . . to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient’s pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.<sup>28</sup>

Thus, the Court ruled that the absolute parental-consent requirement present in *Danforth* was constitutionally infirm.<sup>29</sup>

Parental-involvement laws returned to the Court three years later in *Bellotti II*—but this time, with a twist. Massachusetts’s parental-consent law had been before the Court before in *Bellotti I*, at which time the Court decided that it was susceptible to a constitutionally permissible reading and, accordingly, certified questions regarding the law to the Massachusetts Supreme Judicial Court.<sup>30</sup> Upon its return to the U.S. Supreme Court, the law had been interpreted to allow minors to obtain consent from a court.<sup>31</sup> The Court, therefore, faced the question of whether a parental-consent law with an escape hatch, in the form of judicial bypass, was constitutional.<sup>32</sup> The Court held that it was. In the articulation of the judicial-bypass requirement that persists today, the Court held that

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25. See 443 U.S. 622 (1979).

26. See 428 U.S. 52 (1976).

27. *Id.* at 74.

28. *Id.* at 75.

29. *Id.*

30. See *Bellotti v. Baird*, 428 U.S. 132 (1976).

31. *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 630-31 (1979).

32. *Id.* at 639-40.

[a] pregnant minor is entitled [to] . . . a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.<sup>33</sup>

The Court devised this test as the appropriate balancing of competing interests: on one hand, the state's interest in promoting the family and vindicating parents' right to direct their children's upbringing, and on the other, the minor's right to abortion. In support of parental rights, the Court found that children's constitutional rights could not be equated with those of adults for three reasons: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."<sup>34</sup> As to the last, the Court relied on its parental-rights jurisprudence.<sup>35</sup> As the plurality wrote, "[T]he belief that the parental role implies a substantial measure of authority over one's children" is "deeply rooted in our Nation's history and tradition" and "one of the basic presuppositions" of individual liberty.<sup>36</sup> In support of the minor's countervailing right, the Court described at length the particular importance of a minor's abortion decision. Although "abortion may not be the best choice for the minor,"<sup>37</sup> the Court reasoned, the "potentially severe detriment" of carrying a pregnancy to term "is not mitigated by . . . minority."<sup>38</sup> Quoting its decision in *Planned Parenthood of Central Missouri v. Danforth*,<sup>39</sup> the Court concluded that the state cannot "give a third party an absolute, and possibly arbitrary, veto" over a minor's decision to obtain an abortion.<sup>40</sup> Where a state wishes to further an interest in "encouraging a family . . . resolution of a

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33. *Id.* at 643-44.

34. *Id.* at 634.

35. *See id.* at 637-39.

36. *Id.* at 638.

37. *Id.* at 642.

38. *Id.*

39. 428 U.S. 52, 74 (1976).

40. *Bellotti II*, 443 U.S. at 643.

minor’s abortion decision,” it must provide a judicial procedure for a minor to prove their maturity or best interests,<sup>41</sup> notwithstanding their parents.<sup>42</sup>

The balancing of rights at the core of judicial bypass was reiterated and expanded upon in several subsequent cases. In 1990, in *Hodgson v. Minnesota*, the Court described: 1) states’ interest in protecting “the welfare of . . . young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely”; 2) parents’ interest in “controlling the education and upbringing of their children”; and 3) the family privacy interest, all of which were to be balanced with the minor’s right to abortion.<sup>43</sup> In *Hodgson*, a two-parent notification requirement upset the balance and violated the minor’s right because the state’s interest in ensuring that the minor’s decision is “knowing, intelligent, and deliberate” would have been adequately served by requiring only one parent be notified.<sup>44</sup> In *Ohio v. Akron Center for Reproductive Health*, the Court held that a judicial-bypass procedure was a constitutionally sufficient means to balance the competing rights at stake, writing that “[i]t is both rational and fair for the [s]tate to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature.”<sup>45</sup> As Justice Powell described in his concurrence in *H.L. v. Matheson*, “Numerous and significant interests compete when a minor decides whether or not to abort her pregnancy,” including the minor’s right to make that decision and parents’ “traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children.”<sup>46</sup>

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41. The best-interest determination may be one of two things, depending on the state: either that the abortion would be in the minor’s best interest, or that making the decision without their parent’s involvement would be in the minor’s best interest. Compare, e.g., IDAHO CODE § 18-609A(2)(b) (2022) (stating that a judge hearing a judicial-bypass petition must grant the petition if he finds that “the performance of an abortion would be in her best interests”), with, e.g., ALA. CODE § 26-21-4(d)(4) (2022) (requiring that a minor seeking judicial bypass allege either maturity or that “the consent of her parents, parent or legal guardian otherwise is not in her best interest”).

42. *Bellotti II*, 443 U.S. at 648.

43. 497 U.S. 417, 444-48 (1990).

44. *Id.* at 450.

45. 497 U.S. 502, 520 (1990).

46. 450 U.S. 398, 418-19 (1981) (Powell, J., concurring). The Court also addressed parental-involvement laws in *Planned Parenthood Ass’n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Lambert v. Wicklund*, 520 U.S. 292 (1997). See also *Ayotte v. Planned Parenthood of N. New Engl.*, 546 U.S. 320 (2006) (remanding for reconsideration of the appropriate remedy for a parental-notification statute with some concededly unconstitutional applications).

In sum, the Court's parental-involvement jurisprudence has conceived of judicial bypass as a compromise between the minor's right to abortion and the state's interest in, among other things, vindicating parental rights.<sup>47</sup>

## II. A PARENTAL-RIGHTS CHALLENGE TO JUDICIAL BYPASS?

The Supreme Court's parental-involvement jurisprudence, premised on the need to balance competing rights, raises the question: with the federal constitutional abortion right eliminated, is judicial bypass vulnerable to attack on parental-rights grounds? In this Part, we argue that the answer is an emphatic *no*. In Section II.A, we briefly trace the development of the Court's parental-rights jurisprudence from *Meyer v. Nebraska*<sup>48</sup> to *Troxel v. Granville*.<sup>49</sup> We make two claims as to this jurisprudence. First, a positive point: the Court's parental-rights cases are inapposite in the context of judicial bypass. Second, and more fundamentally, a normative point: the framing of parental rights largely embodied by this case law should be disregarded as antithetical to a modern understanding of children's agency. To make this argument, we start in Section II.B by describing the two main modes of conceptualizing the family and parental rights that scholars have theorized: the "natural law" approach and the "liberal" approach. We reject the "natural law" approach as fatally flawed. We argue that, instead of taking this antiquated approach to parental rights, we should take seriously minors' autonomy and human agency, and therefore find that "parental rights" exist only to the extent that they promote a child's well-being, and no further. We identify places in the Court's jurisprudence where this mode of thinking is evident. Finally, we argue in Section II.C that judicial bypass is wholly compatible with this framework. We endorse Professors Anne C. Dailey and Laura A. Rosenbury's two-tiered standard of review for government action infringing on the rights of parents, which acknowledges that limited intervention into the parent-child relationship may be justified to give effect to a child's independent interests, even if a parent is otherwise fit to care for their child.<sup>50</sup> When we properly understand parental rights as coterminous with children's interests, the permissibility and indeed necessity of judicial bypass becomes clear, even without a federal constitutional right to abortion.

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47. See Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J.L. POL'Y & FAM. 305, 308 (2004); Wendy-Adele Humphrey, *Two-Stepping Around a Minor's Constitutional Right to Abortion*, 38 CARDOZO L. REV. 1769, 1775 (2017).

48. 262 U.S. 390 (1923).

49. 530 U.S. 57 (2000).

50. See Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 81 (2021).

A. *The Court's Parental-Rights Jurisprudence*

Canonically, the foundational case for parental rights under the U.S. Constitution is *Meyer v. Nebraska*.<sup>51</sup> There, the Court held that a Nebraska law prohibiting schools from teaching any language other than English before the eighth grade was unconstitutional under the Due Process Clause of the Fourteenth Amendment.<sup>52</sup> In so holding, the Court invoked the “right of parents” to “engage” a teacher to instruct their children in German and reasoned that such a right was “within the liberty of the [Fourteenth] Amendment.”<sup>53</sup> The Court described the parental right as “the right of control,” corresponding with the duty of a parent to educate their children.<sup>54</sup> Two years later, the Court expanded on the newly derived parental rights in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*.<sup>55</sup> There, the Court assessed an Oregon compulsory-education law that required all children ages eight to sixteen to attend public school.<sup>56</sup> The Society of Sisters, a private school that conducted “[s]ystematic religious instruction and moral training according to the tenets of the Roman Catholic Church,” objected that the law was unconstitutional, and the Court agreed.<sup>57</sup> Following *Meyer*, the Court held that the law “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>58</sup> The Court opined that “[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.”<sup>59</sup> Thus, the *Pierce* Court solidified the right first alluded to in *Meyer*.

The Court picked up the thread again in 1944 in *Prince v. Massachusetts*; this time, however, parental rights did not win the day.<sup>60</sup> A member of the Jehovah’s Witnesses faith was charged with violating Massachusetts’s child-labor law by engaging her nine-year-old niece in sidewalk proselytizing.<sup>61</sup> The Court upheld

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51. 262 U.S. 390 (1923).

52. *Id.* at 396-403.

53. *Id.* at 400.

54. *Id.*

55. 268 U.S. 510 (1925).

56. *Id.* at 530-31.

57. *Id.* at 531-32, 534-36.

58. *Id.* at 534-35.

59. *Id.* at 535.

60. 321 U.S. 158 (1944).

61. *Id.* at 161-63.

the law against the plaintiff's religious-freedom and parental-rights challenges.<sup>62</sup> The plaintiff relied on *Meyer* and *Pierce*, in response to which the Court acknowledged that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."<sup>63</sup> Nonetheless, the Court held that parental rights were not absolute: "[T]he family itself is not beyond regulation in the public interest . . . [N]either rights of religion nor rights of parenthood are beyond limitation."<sup>64</sup> Pointing to laws requiring school attendance, prohibiting child labor, and others, the Court concluded that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."<sup>65</sup> In cabining parental rights, *Prince* appears to be an outlier in the Supreme Court's jurisprudence. But it is distinguishable from the general doctrine of parental rights in that it implicated a state interest in preventing child labor that was enough to overcome the interest in raising one's children in accordance with local culture and religious convictions, as established in *Meyer* and *Pierce*.<sup>66</sup>

The Court's parental-rights jurisprudence lay dormant for some thirty years until *Wisconsin v. Yoder*.<sup>67</sup> There, the Court invalidated a compulsory-education law, as applied to Amish parents, on parental-rights grounds. Under Wisconsin law, children were required to attend school until age sixteen. Plaintiffs, members of the Amish religion, stopped sending their children after the eighth grade and were convicted of violating the law.<sup>68</sup> In striking down the present application of the law, the Court emphasized that the Amish tradition continued informal, vocational education beyond the eighth grade and was worthy of respect.<sup>69</sup> The Court also reasoned that the purpose of compulsory-education laws in avoiding child labor was of less force in this case.<sup>70</sup> The Court noted, "There is no intimation that the Amish employment of their children on family farms is in

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62. *Id.* at 166-67, 170.

63. *Id.* at 166.

64. *Id.*

65. *Id.* at 166-67.

66. *Id.* at 168-69 ("Among evils most appropriate for [state regulation] are the crippling effects of child employment . . . [L]egislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.").

67. 406 U.S. 205 (1972).

68. *Id.* at 207-08.

69. *Id.* at 224-27.

70. *Id.* at 228-29.

any way deleterious to their health or that Amish parents exploit children at tender years.”<sup>71</sup> Within this context, the Court doubled down on the importance of parental rights, writing: “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>72</sup>

The most recent instance of the Court’s apotheosis of parental rights is *Troxel v. Granville*.<sup>73</sup> *Troxel* concerned a Washington law that permitted “any person’ to petition . . . for child visitation rights” and set the standard for a court’s determination of whether to grant a petition as to “the best interest[s] of the child.”<sup>74</sup> Pursuant to this law, a child’s paternal grandparents petitioned for visitation rights, and the petition was opposed by the child’s mother.<sup>75</sup> Before the Supreme Court, the mother argued that the visitation law violated her parental rights under substantive due process.<sup>76</sup> The Court agreed. The Court discussed its parental-rights jurisprudence, writing that “the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>77</sup> The Court criticized the Washington law’s breadth. Under the law, if a judge “disagree[s] with the parent’s estimation of the child’s best interests, the judge’s view necessarily prevails,” and therefore, a judge can essentially “disregard and overturn *any* decision by a fit custodial parent concerning visitation.”<sup>78</sup> The Court emphasized that there was no contention that the mother was unfit, highlighting that “there is a presumption that fit parents act in the best interests of their children.”<sup>79</sup> Therefore,

so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.<sup>80</sup>

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71. *Id.* at 229.

72. *Id.* at 232.

73. 530 U.S. 57 (2000) (plurality opinion).

74. *Id.* at 60 (quoting WASH. REV. CODE § 26.10.160(3) (2000), *invalidated by Troxel*).

75. *Id.* at 60–61.

76. *Id.* at 65.

77. *Id.*

78. *Id.* at 67.

79. *Id.* at 68.

80. *Id.* at 68–69.



Under this framework, the Court held, the Washington law clearly impinged on the mother's substantive-due-process parental rights.<sup>81</sup>

In sum, the U.S. Supreme Court has generally accorded parental rights primacy over countervailing state interests. Despite its facial impenetrability, this case law does not vitiate judicial bypass. In the first place, the parental-rights jurisprudence is inapposite because it concerns state intervention into parental autonomy where there is no question of a misalignment between parents' and children's interests. Neither *Meyer* nor *Pierce* even mentioned the independent interests of the child. At no point did the Court consider that the *parents'* conception of the child's interests may differ from the child's *own* understanding of their interests. Nor did the Court in *Troxel*, despite Justice Stevens's extensive treatment of the issue in his dissent.<sup>82</sup> The *Yoder* Court explicitly recognized the underlying assumption of aligned interests, emphasizing that the State's argument was "without reliance on any actual conflict between the wishes of parents and children."<sup>83</sup> As to a potential case in which a parent removed a child from school despite the child's expressed desire to continue attending, the Court stated unequivocally that "[t]here is no reason for the Court to consider that point since it is not an issue in the case" and that it would "neither reach nor

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81. It would be a conspicuous omission not to acknowledge that the *Dobbs* Court, in overturning the right to abortion, expressed hostility toward substantive due process as a whole. The *Dobbs* majority opinion narrowed the doctrine to cover only those rights, defined specifically, that are deeply rooted in the "history and tradition" of the nation, admonishing that when interpreting what is meant by the term "liberty," courts must not "ignore[] the 'appropriate limits' imposed by 'respect for the teachings of history.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). Justice Thomas went even further, arguing in his concurrence that the Court "should reconsider all of [its] substantive due process precedents." *Id.* at 2301 (Thomas, J., concurring). Because parental rights also derive from substantive due process, one might speculate that if the doctrine as a whole is not long for this world, then neither are parental rights. See, e.g., Julia Bowes, Opinion, *Overturning Roe Could Threaten Rights Conservatives Hold Dear*, WASH. POST, June 24, 2022, 11:26 AM EDT, <https://www.washingtonpost.com/outlook/2022/06/24/overturning-roe-could-threaten-rights-conservatives-hold-dear> [<https://perma.cc/H882-V5CM>]. However, we doubt that this Court would do away with parental rights, and other scholars see the historical approach to the substantive-due-process analysis employed by Justice Alito's majority opinion as consistent with parental rights. See, e.g., Michael Toth, Opinion, *Parental Authority Gets a Boost from Dobbs*, WALL ST. J., July 27, 2022, 6:49 PM ET, <https://www.wsj.com/articles/parental-authority-gets-a-boost-from-dobbs-justice-alito-glucksberg-unenumerated-rights-history-tradition-education-meyer-pierce-11658941498> [<https://perma.cc/RLZ2-2GVW>]. In any event, the fate of substantive due process is outside the scope of this Note.

82. See *Troxel*, 530 U.S. at 86 (Stevens, J., dissenting) ("Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.").

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

decide those issues.”<sup>84</sup> The Court’s parental-rights cases, therefore, are insufficient and inappropriate guides for the situation embodied in judicial bypass where a parent and child are in direct conflict.<sup>85</sup>

Even ardent contemporary defenders of parental rights do not view them as absolute, but as furthering the well-being of children. Their conception of parental rights, which we will explore further in the subsequent two sections, still explicitly endorses lesser deference to parents when a sufficiently mature child’s wishes are in conflict with those of their parent. For example, driven by concern about state intervention into the lives of marginalized families through the child-welfare system, Professors Clare Huntington and Elizabeth S. Scott argue that a strong conception of parental rights is the best means to protect the welfare of children, without which legal regulation of the family “would create substantial disruption in families and harm children, especially children in communities of color, who already experience heavy-handed intrusion by the state.”<sup>86</sup> Limiting parental rights carries risks, Huntington and Scott explain: “Given the inability of young children to make consequential decisions for themselves, the law can either defer to a parent’s decision or substitute parental judgment with that of judges, social workers, and other government actors who are strangers to the child.”<sup>87</sup> Even assuming the importance of a strong recognition of parental rights in the context of the child welfare system, judicial bypass represents a means for the state to give effect to a child’s *own expressed interests*. It is not a situation where the state substitutes the judgment of a third party—judge, social worker, or other government actor—for that of a parent, with all the risks of bias, disruption, and harm that may accompany such an intervention.<sup>88</sup> Contrary to the worries of

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84. *Id.* at 231-32.

85. Indeed, the district court in *Bellotti* made this very argument. The cases the State and intervenors (a class of parents) relied on to argue that parental rights must be given independent weight, the court reasoned, “uniformly concern situations where the parents’ claimed rights are compatible with the minor’s, not adverse.” *Baird v. Bellotti*, 393 F. Supp. 847, 856 (D. Mass. 1975). Thus, “[s]uch cases are of no assistance. Of course, parents have rights in proper instances, to act in their children’s interests. What is claimed here is something altogether different.” *Id.* at 856-57.

86. Clare Huntington & Elizabeth S. Scott, *The Enduring Importance of Parental Rights*, 90 *FORDHAM L. REV.* 2529, 2530 (2022) [hereinafter Huntington & Scott, *The Enduring Importance of Parental Rights*]. See generally Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 *MICH. L. REV.* 1371 (2020) [hereinafter Huntington & Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*] (articulating a child-well-being rationale for parental rights).

87. Huntington & Scott, *The Enduring Importance of Parental Rights*, *supra* note 86, at 2530.

88. It is true that a judge’s determination of a minor’s “maturity” and/or “best interests” during a judicial-bypass hearing (depending on the state’s legal standard) will likely introduce biases

Huntington and Scott about young children who cannot make consequential decisions for themselves, the logic of judicial bypass is that mature children *can and should* make consequential decisions for themselves, and the state should clear the way for that ability. Indeed, Huntington and Scott explicitly agree that judicial bypass and parental rights can coexist. They explain generally that parental rights hold less weight for older children and adolescents, who can begin to make decisions for themselves,<sup>89</sup> and specifically that extending mature minors the right to access abortion without parental involvement is consistent with their view of parental rights.<sup>90</sup>

### B. *Conceptualizing the Family*

Not only is the Court's parental-rights jurisprudence inapplicable to judicial bypass due to the misalignment between the parents' and child's interest, but, as a normative matter, the Court's parental-rights jurisprudence also should not apply to the issue of judicial bypass because that jurisprudence is premised on specific, outdated assumptions about the nature of the family and of parenting. Even those who defend a strong conception of parental rights recognize that the Court, in the canonical parental-rights cases described previously, was reasoning in part from the assumption that parents "owned" their children.<sup>91</sup> We should reject broad arguments about parental rights to the extent they rest on and derive from an antiquated "child coverture" mode of thinking.<sup>92</sup> When interrogated, an interpretation of the Court's parental-rights jurisprudence that advances absolute parental control of children is incongruous with the realities of the family

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on the part of the judge. *See infra* text accompanying notes 289-301. But these biases do not lead the judge to substitute their judgment about parenting decisions for that of a family member. Rather, they simply influence when a judge will give effect to the *minor's own* judgment about a decision affecting their own life. This decision, though undeniably also infected with bias on the part of the judge, represents a very different level of disruption of the family.

89. Huntington & Scott, *The Enduring Importance of Parental Rights*, *supra* note 86, at 2533 ("[D]eference to parental decision-making promotes child wellbeing because . . . parents are generally better positioned [than third parties] to understand a child's needs and make decisions that will further that child's interests. Older children and especially older adolescents can begin to make decisions for themselves, but younger children cannot, and thus a surrogate decision-maker will be required.").
90. Huntington & Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, *supra* note 86, at 1444 (discussing the Court's judicial-bypass case law and stating that "concern for the welfare of the pregnant minor and recognition that deference to parental authority may generate serious harm are embedded in the *Bellotti* framework").
91. Huntington & Scott, *The Enduring Importance of Parental Rights*, *supra* note 86, at 2351 n.17 (citing Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1041-50 (1992)).
92. *See generally* Dailey & Rosenbury, *supra* note 50 (defining and critiquing "child coverture").

and our modern understanding of the child as more than the mere property of their parents. In the following Section, we turn to the literature to explain the prevailing theories of the family. We critique the natural-law approach that has been advanced as the logical interpretation of the Court's parental-rights jurisprudence.

Scholars have theorized two main modes of conceptualizing the family and parental rights. First is the "natural-law" approach to the family. In this view, the family is "pre-political" — it exists outside of and separate from the state, and parents inherently have the right to control the upbringing of their children.<sup>93</sup> Professor Barbara Bennett Woodhouse traces the development of this view of the family from ancient Greek and Judeo-Christian traditions, through Roman law, to modern American law treating children as "chattels."<sup>94</sup> Her account demonstrates that "[p]aternal property rights grew naturally from a patriarchal account of procreation" put forth by Aristotle and others.<sup>95</sup> Children are understood as property because they are created both physically from the "seed" of men and biblically from Eve and Adam's rib.<sup>96</sup> This evolved into the legal tradition of "coverture," which encompassed the idea that both women and children were the property of a husband and father.<sup>97</sup> Even early cases about parents' right to withhold consent for their child's medical treatment were argued largely in the language of a father's ownership of his child and were pursued primarily for economic purposes.<sup>98</sup>

Though judges no longer speak explicitly of children as property, the logic underlying that approach persists, drawn from the prepolitical understanding of the family. "[T]he scope of parents' pseudo-property rights in their children has been only modestly curtailed . . . . [P]arental rights were property rights and remain functionally property rights, but it has become so taboo to speak of them as such."<sup>99</sup> Indeed, this view pervades the Supreme Court's parental-rights jurisprudence. As Woodhouse explains, while it may seem strange to hinge the right to control another person (in this case one's child) on the word "liberty" within

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93. See generally Melissa Moschella, *Natural Law, Parental Rights and Education Policy*, 59 AM. J. JURIS. 197 (2014) (explaining the applications of principles of natural law to parental rights).

94. Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1043-50 (1992).

95. *Id.* at 1044.

96. *Id.* at 1043.

97. Dailey & Rosenbury, *supra* note 50, at 85-88.

98. See, e.g., *Bakker v. Welsh*, 108 N.W. 94, 95 (1906) (describing the case in which a father sued a doctor for performing surgery on his minor son without the father's consent because, "as the father is the natural guardian of the child and is entitled to his custody and his services, he cannot be deprived of them without his consent").

99. Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 32 (2015).

the Fourteenth Amendment, the perspective that children are patriarchal property explains the Court's reasoning in *Meyer* and *Pierce*.<sup>100</sup> As she writes, "Property and ownership were indeed a powerful subtext of parental rights rhetoric in the era of *Pierce* and *Meyer*."<sup>101</sup> Both cases repeatedly use the term "control" to describe the rights that parents have over their children.<sup>102</sup> The Court, presented with questions of whether the state could "standardize its children" through the education system,<sup>103</sup> need not have made broad statements about the decision-making control that parents have over their children.<sup>104</sup> Rather, the Court could have more narrowly decided that, in the interest of promoting a pluralistic society, communities should have the ability to make decisions related to community concerns, such as whether to teach their children German and whether and how to practice religion. The broad language of control that the Court employed in these early cases is still understood by many scholars as justifying near-absolute deference to parental rights because "sometimes a parent may not act in the child's interest, but only if serious harm is threatened can we be confident that state intervention is warranted."<sup>105</sup>

Although formal marital coverture has ended, child coverture persists in the logic of these and other cases that use substantive due process to justify the absolute control of parents over their children. In the words of Dailey and Rosenbury:

It is no longer acceptable for husbands to imprison their wives, to beat them in the name of discipline, to isolate them from their friends and family, or to confiscate their money and squander it. Yet most of these things are still permissible in the case of children. Fathers no longer have exclusive control over their children, as their control must be shared by mothers or other legal parents, but the regime of parental control remains intact even when parental viewpoints may not be in the best interests of a child. The idea of children being the exclusive property of their

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100. See Woodhouse, *supra* note 94, at 1042.

101. *Id.*; see also Godwin, *supra* note 99, at 64 ("Scholars such as Woodhouse have noted that a large part of the reason why *Meyer* and *Pierce* and perhaps *Yoder* were regarded as such bulwarks of liberal constitutionalism is that they constitutionalized property-like parental rights in the context of defending cultural pluralism and diversity.").

102. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530 (1925).

103. *Pierce*, 268 U.S. at 535.

104. See, e.g., *Meyer*, 262 U.S. at 400 ("Corresponding to the right of control, it is the natural duty of the parent to give his children education." (emphasis added)).

105. Huntington & Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, *supra* note 86, at 1418.

fathers has faded, but law still subjects children to the control of both their parents.<sup>106</sup>

This perspective of children as property is reflected to a large extent in the Court's substantive-due-process parental-rights jurisprudence. It "has the effect of denying children equal moral consideration," amounting to "denying children equal protection."<sup>107</sup>

In contrast to this "natural-law" view of children as property, other scholars articulate a "liberal" approach to the family. In this formulation, parental rights exist insofar as states delegate them to advance a child's interests, based on the state's role in shaping its future citizens. Parental control is "not a natural state of affairs."<sup>108</sup> The state is properly conceived of as in the business of promoting *children's* interests, and the promotion of parental rights is simply a means to an end. Parental rights are nothing more than an imperfect conduit for children's welfare.<sup>109</sup> This view does not seek to eliminate altogether families' protections from interference by the state. Rather, it pragmatically recognizes that, sometimes, children's interests are inadequately protected by their parents.<sup>110</sup> Under this approach, children can exercise some autonomy, independent of their parents, to the extent that doing so facilitates their well-being (for instance, by promoting the expansion of their future options).<sup>111</sup> According to one scholar, "[A]dolescents, who are in the process of developing the capacity to exercise the sort of autonomy that adult citizens may exercise, should in some cases be authorized to exercise that autonomy regardless of their parents' wishes . . . 'in order to help develop their capacities to exercise their freedoms as adults.'"<sup>112</sup>

Under this liberal conception of the family, parental rights are not infringed when the state intervenes to recognize the expressed interests of children. "The

106. Dailey & Rosenbury, *supra* note 50, at 92 (footnotes omitted).

107. Godwin, *supra* note 99, at 5.

108. Dailey & Rosenbury, *supra* note 50, at 106.

109. See B. Jessie Hill, *Constituting Children's Bodily Integrity*, 64 DUKE L.J. 1295, 1323-24 (2015); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1471 (2018) ("Although parental rights may indirectly further children's interests, they are a circuitous and unreliable means of doing so.").

110. Godwin, *supra* note 99, at 24 (arguing that the assumption that parents act in children's best interests is illogical, because while parental affection may cause parents to *try* to act in their children's best interests, that affection "does not provide a reason to think that parental perception of a child's best interests approximate those best interests in some independent sense, or that this perception should be a lens through which best interests are determined").

111. Hill, *supra* note 109, at 1323 (explaining that "carrying a child to term would foreclose many future opportunities").

112. *Id.* (quoting and citing Amy Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 PHIL. & PUB. AFFS. 338, 354-55 (1980)).

contention that parents are injured if children express contrary values and seek opportunities to live their lives in ways not conforming with parental wishes only makes sense if it is assumed that children's wills and life preferences should be subsumed into those of their parents."<sup>113</sup> Parental rights exist in the liberal conception of the family, but they extend only so far as is consistent with a child's welfare. There will be countless times in children's lives where their best interests are uncertain, and so it behooves the state to delegate to parents the authority to make most decisions on behalf of their children and to raise their children as they see fit. But it would be a "rose-colored view" to assume that all parents represent their children's interests at all times.<sup>114</sup> In cases where the parents do not represent their children's interests, the question that must be asked "is not whether the state intervenes in the family but rather the kind of intervention that should occur."<sup>115</sup> And when a mature child, properly understanding the consequences, seeks to make a decision about their own body and their future that conflicts with their parents' wishes, a liberal understanding of parental rights counsels that the state's deference to parents must therefore fall away.

### C. *Limiting Parental Rights*

In this Section, we argue that when conceptualizing the family and parental rights, we should take seriously the autonomous agency of minors. Parental rights should exist only to the extent that they promote a child's well-being and autonomy.<sup>116</sup> If allowed far beyond this limited role, "[p]arental rights construct children predominantly as objects of control, rather than as people with values and interests of their own."<sup>117</sup> We first argue that (sometimes tacit) support for limiting parental rights to achieve children's self-expressed interests can be found throughout the Supreme Court's jurisprudence, suggesting that this view is not wholly novel or anathema to the Court. We then turn to an analysis of the proper role of the state in mediating between children's interests and parental

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113. Godwin, *supra* note 99, at 50-51.

114. Dailey & Rosenbury, *supra* note 50, at 98.

115. *Id.* at 84.

116. Dailey & Rosenbury, *supra* note 109, at 1452 ("Parental rights have a role to play . . . , but only to the extent they further children's broader interests . . ."); *see also* Alicia Ouellette, *Shaping Parental Authority over Children's Bodies*, 85 *IND. L.J.* 955, 971, 973 (2010) (arguing that parental rights "must be balanced against children's rights" and should be limited in cases of parental authority to consent on behalf of their child to "shaping" medical procedures such as liposuction); Leigh Johnson, Comment, *My Body, Your Choice: The Conflict between Children's Bodily Autonomy and Parental Rights in the Age of Vaccine Resistance*, 89 *U. CHI. L. REV.* 1605, 1612-13 (2022) (arguing in the context of vaccines that parental rights should give way when a minor seeks to exercise their autonomy and act in support of their health).

117. Dailey & Rosenbury, *supra* note 109, at 1471.

rights, and endorse Dailey and Rosenbury’s tiers of scrutiny for state intervention into the family. This approach provides clear support for the ongoing legality of judicial bypass because it does not threaten parents’ right to a relationship with their child, but merely allows state intrusion in the family in a limited manner to give effect to the child’s own expressed interests.

1. *Support in the Court’s Jurisprudence*

To be sure, the Court’s major parental-rights jurisprudence trades predominantly on an objectifying conception of the child.<sup>118</sup> However, there are strands of the thinking we advocate—cabining parental rights only to the child’s welfare—throughout the Court’s cases. Adopting a more limited, liberal approach to parental rights does not demand overturning the Court’s existing parental-rights jurisprudence.

Indeed, the Court’s judicial-bypass case law recognizes that a parent’s constitutionally protected interest in their child’s upbringing waxes and wanes to the extent the parent has assumed responsibility for their child. This is most apparent in *Hodgson v. Minnesota*.<sup>119</sup> Describing the parental interest implicated in parental-involvement laws, Justice Stevens wrote for the Court that “[p]arents have an interest in controlling the education and upbringing of their children but that interest is ‘a counterpart of the responsibilities they have assumed.’”<sup>120</sup> The mere fact of parentage does not alone give rise to a right to control the child’s upbringing. Rather, “[t]he demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility *may* give the natural parent a stake in the relationship with the child rising to the level of a liberty interest.”<sup>121</sup> Parental rights accrue only to one who has “demonstrated sufficient commitment to his or her children.”<sup>122</sup> As the Court also recognizes in its opinion, not every family lives up to the ideal: “The record reveals that in the thousands of dysfunctional families affected by” the two-parent notice requirement, the statute “proved positively harmful to the minor and her family” so that a requirement “ostensibly designed for the benefit of the minor” in fact “resulted

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118. See *supra* Section II.B; see also Woodhouse, *supra* note 94, at 1000-01 (arguing that *Meyer* and *Pierce* have a “dark side”: “[s]tamped on the reverse side of the coinage of family privacy and parental rights are the child’s voicelessness, objectification, and isolation from the community”).

119. 497 U.S. 417 (1990).

120. *Id.* at 445 (quoting *Lehr v. Robertson*, 463 U.S. 248, 257 (1983)).

121. *Id.* at 446 (emphasis added).

122. *Id.* at 447.



in major trauma to the child, and often to a parent as well.”<sup>123</sup> In such circumstances it can hardly be said that the law is living up to “the usual justification” that “it supports the authority of a parent who is presumed to act in the minor’s best interest.”<sup>124</sup> That presumption is not benign.<sup>125</sup> The reasoning the Court provides in *Hodgson* evinces an understanding that the purpose of parental rights is to effectuate children’s welfare. Courts should accept the corresponding proposition: where parental rights are at odds with a child’s expressed interests, parental rights should be accorded no independent weight.<sup>126</sup>

The Court also demonstrates an appreciation for the idea that parental rights should give effect to a child’s interests in cases addressing the rights of biological fathers. In *Lehr v. Robertson*, the Court held that the bare fact of biological parenthood did not imbue a parent with constitutionally protected rights.<sup>127</sup>

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.<sup>128</sup>

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123. *Id.* at 450-51; see also *id.* at 470 (Marshall, J., concurring) (“Forced notification [in abusive home situations] would amount to punishing the daughter for the lack of a stable and communicative family environment, when the blame for that situation lies principally, if not entirely, with the parents. Parental notification in the less-than-ideal family, therefore, would not lead to an informed decision by the minor.”).

124. *Id.* at 450 (majority opinion).

125. See *id.* at 471 (Marshall, J., concurring) (“Parental authority is not limitless. Certainly where parental involvement threatens to harm the child, the parent’s authority must yield.”).

126. In fact, the district court in *Bellotti* reasoned to this effect. The court considered and rejected the State and intervenors’ (a class of parents) argument about parental rights, noting that they had failed “to demonstrate why parents should be granted individual rights independent of the minor’s best interests.” *Baird v. Bellotti*, 393 F. Supp. 847, 856 (D. Mass. 1975). The court further reasoned,

It is not they who have to bear the child. Once born, the minor, and not they, will be responsible for it in all senses, financially and otherwise. It is difficult to think of any self interest that a parent would have that compares with those significant interests of the pregnant minor.

*Id.* (footnote omitted); see also Hill, *supra* note 109, at 1306 n.48 (noting the district court’s reasoning).

127. 463 U.S. 248, 267-68 (1983).

128. *Id.* at 262 (footnote omitted).

The Court there recognizes that parental rights are not *sui generis*; they are earned.<sup>129</sup> A parent must actually develop a meaningful relationship with the child in order for the state to presume that they will act in the child's interests, and only then does the parent obtain the corresponding protection of parental rights. By this logic, parental rights exist only to promote a child's welfare. Where they no longer serve that purpose, they should not prevail. "If parental rights were parasitic on children's best interests then we would expect them to extend only so far as is consistent with a child's best interest."<sup>130</sup>

The Court also acknowledged the reality that parents may not always act in their children's best interest in *Parham v. J.R.*<sup>131</sup> In holding that Georgia's statute providing for involuntary commitment of minors was constitutional with some safeguards, the Court noted that "the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized."<sup>132</sup> The Court invoked its precedents to support the proposition that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."<sup>133</sup>

Justice Stevens's dissent in *Troxel* also evinces respect for the proposition that children have agency and that parental rights should only be recognized to the extent they facilitate the child's interest. Justice Stevens wrote that while "the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State," the Court had "never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm."<sup>134</sup> As Justice Stevens pointed out, a parent's "fitness" alone does not make it appropriate to subsume the child's best interest into the parent's: "even a fit parent is capable of treating a child like a mere possession."<sup>135</sup> Justice Stevens further argued that children have liberty interests that

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129. See also *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.").

130. Godwin, *supra* note 99, at 17.

131. 442 U.S. 584, 602-03 (1979); see also Nicole A. Meier, *A Proposed Cure: More Expansive Conversion Therapy Legislation and the Limits of Parental Rights*, 93 S. CAL. L. REV. 345, 366 (2020) ("The notion that parental rights reach their limit when parental decisions harm or threaten harm to children was reaffirmed in [*Parham v. J.R.*]").

132. *Parham*, 442 U.S. at 620-21, 604.

133. *Id.* at 603.

134. *Troxel v. Granville*, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting).

135. *Id.*

must “be balanced in the equation.”<sup>136</sup> Children’s independent interests “require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.”<sup>137</sup> Furthermore, parental rights should not be extended to allow “the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.”<sup>138</sup>

Similarly, dissenting in part from the majority in *Yoder*, Justice Douglas argued: “Where the child is mature enough to express potentially conflicting desires” to those of their parents, “it would be an invasion of the child’s rights to permit . . . an imposition” of their parents’ views rather than vindicating the views of the child.<sup>139</sup> If a minor did in fact express such a desire and was “mature enough to have that desire respected,” Douglas reasoned, “the State may well be able to override the parents’ . . . objections.”<sup>140</sup> Otherwise, “the inevitable effect” would be “to impose the parents’” views on their children. Thus, Justice Douglas concurred with the majority as to one of the child plaintiffs who the record showed had made clear she desired to leave school, but he felt compelled to dissent as to the other two children whose desires were unknown.<sup>141</sup> After all, “[i]t [wa]s the future of the student, not the future of the parents, that [wa]s imperiled” by the Court’s decision.<sup>142</sup>

Of course, Justices Stevens’s and Douglas’s opinions were not the opinions of the Court. But their dissents and the other cases discussed above nonetheless demonstrate that the conceptualization of parental rights we urge is neither foreign nor anathema to the Court. Where cases have contemplated a conflict between children and parents, the Court has, albeit in fits and starts, recognized that parental rights derive from the vindication of children’s interests. Courts should take the next logical step: where parents’ wishes conflict with their mature children’s expressed interests, parental rights should be given no independent weight.

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136. *Id.* at 88.

137. *Id.* at 89.

138. *Id.*

139. *Wisconsin v. Yoder*, 406 U.S. 205, 242 (1972) (Douglas, J., concurring in part and dissenting in part).

140. *Id.*

141. *Id.* at 243.

142. *Id.* at 245.

2. *Tiers of Review for State Action Intruding on Parental Rights*

Because, properly understood, parental rights exist only to actualize children's welfare, parental rights are weakest when parents' conception of their children's interests and those children's own conception of the same are at odds. Underlying such conflicts is the reality that a parent who is otherwise fit to care for their child will not always necessarily act in their child's best interest, at which point the state may need to step in to vindicate the child's interest. At the same time, only the most extreme circumstances will ever justify a child's *removal* from the care of a parent.<sup>143</sup>

Accordingly, we endorse the model of parental rights that Dailey and Rosenbury present in their article *The New Parental Rights*.<sup>144</sup> Dailey and Rosenbury propose a two-tiered standard of review for state action that implicates parental authority. Their model affirms parental rights' status as a fundamental right under the Due Process Clause, but injects nuance that "brings children's interest to the forefront of the analysis."<sup>145</sup> As is customary in cases implicating fundamental rights, they believe that the highest degree of judicial scrutiny (strict scrutiny) should be applied in some cases: to "[s]tate action that threatens the physical separation of parents and children."<sup>146</sup> Therefore, in these cases, the states must justify their action with a compelling governmental interest and utilize means that are narrowly tailored.<sup>147</sup> Strict scrutiny is appropriate for cases threatening physical separation given the importance of the parent-child bond to a child's welfare. In contrast to an absolute view of parental rights, however, Dailey and Rosenbury's model "rejects the notion that state involvement in families should always be subject to the highest scrutiny."<sup>148</sup> Rather, they argue, parental rights must be limited "in order to foster children's other interests."<sup>149</sup> Thus, a lower standard of review, intermediate scrutiny, should be utilized for state conduct that seeks to promote children's welfare in a less intrusive way – "one that asks whether the government action substantially furthers children's independent interests and agency."<sup>150</sup> Dailey and Rosenbury do not define specifically the set of

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143. See Dailey & Rosenbury, *supra* note 50, at 154-62.

144. See generally *id.* (proposing a new model of parental rights).

145. *Id.* at 113.

146. *Id.* at 81.

147. *Id.* at 115.

148. *Id.*

149. *Id.* at 113-14.

150. *Id.* Professor Richard F. Storrow and Sandra Martinez have also argued that state action should be accorded lower scrutiny in the case of judicial bypass because the "intrusion upon

children's interests which the law can or should seek to promote, explaining that this important task is one that must be left to a wide range of stakeholders including parents, doctors, developmental scientists, and others. But they point to several broad categories of children's interests, including "relationships with parents as well as with children and other adults; exposure to new ideas; expressions of identity; personal integrity and privacy; and participation in civic life,"<sup>151</sup> as well as "identity expression, bodily integrity, and emotional well being."<sup>152</sup> In summary, this two-tiered model focuses on the child's need for consistent, nurturing care from a parent while acknowledging that children have interests and identities separate from their parents that the state can and should protect.<sup>153</sup>

Judicial bypass clearly fits within the second category of state action, which Dailey and Rosenbury would subject to a lower standard of review. It is a limited intervention into the family that does not threaten the physical separation of parent and child. It is a process that allows minors to express their own independent interests and to act on that interest with judicial, rather than parental, consent. When subjected to intermediate scrutiny, judicial bypass is clearly permissible even despite a countervailing parental interest in controlling the child's medical care. It "substantially furthers children's own interests" in bodily autonomy and access to health care, as well as their agency to direct their own lives, without "unduly disrupting or threatening the parent-child relationship."<sup>154</sup>

Under the existing parental-rights regime, parents are categorized as either "fit" or "unfit." In the former category, parents are wholly insulated from state intervention. In the latter, children are removed from their parents. Dailey and Rosenbury reject this binary. Their approach overcomes the coverture-like conception of parental rights embodied in the idea that a fit parent has complete control over their child. They recognize that a parent may be otherwise "fit" but that the parent may ascribe to certain ideologies that differ from those of their child. In such circumstances, the state should be able to intervene in the parent-child relationship in a limited manner to vindicate the child's expressed interests, but without necessarily declaring the parent categorically unfit. Dailey and Rosenbury's two-tiered model thus "conceives of parental rights in relational terms

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parental prerogatives in the bypass context is merely partial," as opposed to higher scrutiny in cases of termination of parental rights. Richard F. Storrow & Sandra Martinez, "Special Weight" for Best-Interests Minors in the New Era of Parental Autonomy, 2003 WIS. L. REV. 789, 834.

151. Dailey & Rosenbury, *supra* note 50, at 120.

152. *Id.* at 135.

153. *See id.* at 112.

154. *Id.* at 115.

rather than as rights of control,”<sup>155</sup> recognizing the importance of promoting stable familial relationships but respecting that a child might, nonetheless, sometimes need to be shielded from the complete control of their parents.<sup>156</sup>

The classic parental-rights cases such as *Meyer* and *Pierce* address contexts where the interests of parents and children are in alignment against the state, not where parents and children are in direct conflict, as in the case of judicial bypass. Those cases, therefore, should not control on the issue of judicial bypass. The Court in *Meyer*, *Pierce*, *Yoder*, and even *Prince* was addressing the rights of immigrants and religious minorities to educate and raise their children in accordance with the values of their communities. The Court had no reason to believe that the children had an independent desire to be educated in another manner.<sup>157</sup> The situation a child faces when they seek an abortion over their parents’ lack of consent is entirely different. In that situation, parents are cutting their child off from the needed support of others in the community: doctors, teachers, and others who would support their obtaining reproductive health care.<sup>158</sup> As Dailey and Rosenbury emphasize, “[U]ncumbered parental rights that suppress children’s independent interests and agency may leave children isolated from broader communities . . . .”<sup>159</sup> Moreover, the justification often given for strong parental rights – the promotion of family harmony – collapses in the context of abortion and judicial bypass, as it does in other contexts where children seek to make personal medical decisions over the objection of their parents.<sup>160</sup> Dailey and Rosenbury explain that, for example, “even well-intentioned parents may reject their child’s chosen gender identity . . . . The broad scope of parental rights

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155. *Id.* at 112.

156. See also *Troxel v. Granville*, 530 U.S. 57, 86–89 (2000) (Stevens, J., dissenting) (“[T]he right of a parent to maintain a relationship with his or her child is among the interests included most often in the constellation of liberties protected through the Fourteenth Amendment. . . . [But] constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.”).

157. Indeed, as discussed above, in *Yoder*, Justice Douglas emphasized in his opinion that one of the three student plaintiffs expressed desires aligned with her parents, whereas the desires of the other two students were unknown. See *supra* text accompanying note 141.

158. See Maya Manian, *Functional Parenting and Dysfunctional Abortion Policy: Reforming Parental Involvement Legislation*, 50 FAM. CT. REV. 241, 248–49 (2012) (arguing that parental-involvement laws should allow minors to consult a broader array of trusted adults).

159. Dailey & Rosenbury, *supra* note 50, at 79.

160. Professor Alicia Ouellette argues that parental rights should be understood in light of a non-subordination principle, and accordingly, “parental rights are . . . limited by the rights and moral status of children.” Ouellette, *supra* note 116, at 977–79.

hides parent-child differences and divisions behind a false front of family unity.”<sup>161</sup>

Dailey and Rosenbury’s approach to parental rights is not without criticism. Huntington and Scott worry that even Dailey and Rosenbury’s well-intentioned approach—limiting parental rights in the interest of child welfare—will allow the state or other third parties to “limit a child’s horizons and opportunities” in the same way Dailey and Rosenbury fear parents might.<sup>162</sup> Huntington and Scott are understandably concerned with state intervention, driven by societal biases that demand all parents conform to middle-class parenting norms, that threatens injurious disruption and even removal of children from parents where no serious harm has occurred.<sup>163</sup> But Huntington and Scott acknowledge that there are nonetheless significant areas of agreement between themselves and Dailey and Rosenbury, most notably that “adolescents should have increased decision-making autonomy.”<sup>164</sup> Huntington and Scott specifically point to their acceptance of “rules governing access to reproductive health care, including abortion, as well as the mature minor doctrine regulating consent to other medical decisions.”<sup>165</sup> While these scholars debate the extent to which third-party intervention overriding parents’ judgments will promote or harm children’s interests, their shared approval of adolescents’ independent access to health care shows

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161. Dailey & Rosenbury, *supra* note 50, at 79; *see also id.* at 135-42 (discussing transgender youth medical decision-making and the fallacy of arguments that strong parental rights promote “family harmony”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976) (explaining that parental authority to veto a minor’s abortion decision does not promote family unity).

162. Huntington & Scott, *The Enduring Importance of Parental Rights*, *supra* note 86, at 2535-40.

163. *Id.* at 2533 (“[S]tate actors are more likely to override [the] child-rearing decisions [of parents of color and low-income parents], often based on views of child wellbeing infused with middle-class biases.”). Professor Dorothy E. Roberts, similarly concerned about racial disproportionality in the child-welfare system, argues that parents’ freedom to raise their children without state intervention is important not only to individuals but also to the welfare or even survival of ethnic, cultural, and religious groups. Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171. But, as we describe above in our discussion of the Court’s parental-rights jurisprudence, it is possible to respect parents’ and communities’ ability to raise their children in accordance with their beliefs and cultures without preventing the state from intervening in a very limited manner to vindicate the desire of a minor to make a discrete decision about their own health. This intervention will not inherently threaten the familial relationships or cultural heritage of the minor. *See supra* Section II.C.1.

164. Huntington & Scott, *The Enduring Importance of Parental Rights*, *supra* note 86, at 2536; *see also supra* notes 89-90 and accompanying text.

165. Huntington & Scott, *The Enduring Importance of Parental Rights*, *supra* note 86, at 2536 n.55. *See also infra* Part III for an explanation and endorsement of the mature minor doctrine and its application to minors’ self-consent for abortion.

that any proper understanding of parental rights should make room for children's own interest in obtaining reproductive health care.<sup>166</sup> Judicial bypass is not a state intervention that threatens the separation of parent and child, and therefore our understanding of parental rights can and should accommodate it (as Dailey and Rosenbury's two-tiered approach does).

We do not claim that the state should intervene every time a child disagrees with a decision of their parents on some matter that impacts their lives – it would be incredibly disruptive for fit parents to be prevented from making immediate, coherent, and consistent decisions about banal matters pertaining to their children's lives free from government interference.<sup>167</sup> But when a minor seeks the autonomy to make a life-changing decision about their body and their future, it is appropriate that the state intervene in a limited manner to determine whether

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166. Huntington & Scott demonstrate where their disagreement with Dailey & Rosenbury begins by pointing to a hypothetical scenario where a parent believes a child should not participate in an after-school LGBTQIA+ club, while an uncle believes that the club would broaden the horizons of the child. They explain that while the uncle may be correct, vindicating the uncle's view (as Dailey and Rosenbury's approach would allow) invites confrontation and litigation that would disrupt the family and open the door to other coercive intervention by the state. See Huntington & Scott, *The Enduring Importance of Parental Rights*, *supra* note 86, at 2537. But this hypothetical ignores an assumption in the types of scenarios Dailey and Rosenbury's two-tiered approach addresses, and certainly in the scenarios where judicial bypass is invoked. This is the scenario where the child themselves wants to participate in the LGBTQIA+ club and goes to their uncle for support because their parent has refused to allow them to participate or because they do not feel safe even asking their parent. Dailey and Rosenbury explain that in these likely scenarios, strong parental rights would only protect an imagined idea of family harmony. See Dailey & Rosenbury, *supra* note 50, at 79. Judicial bypass, insofar as it allows a child on their own or with the support of trusted third parties to access abortion without the involvement of an unsupportive parent, squarely fits within the type of scenario that Dailey and Rosenbury's two-tiered approach to parental rights would allow, and which Huntington and Scott's concerns do not address. To extend the hypothetical scenario described here to a real-world example of the limits of parental rights, there is a necessary role for parental-rights arguments to curb growing attempts to redefine gender-affirming health care for minors as "child abuse." See, e.g., *In re Abbott*, 645 S.W.3d 276, 280 (Tex. 2022) (considering a Texas Attorney General opinion and a Texas Governor's letter to the Commissioner of the Department of Family and Protective Services that defined certain gender-affirming health care as "child abuse"). But what about children who wish to access gender-affirming care over the objection of their parents, with or without the support of other community members? Dailey and Rosenbury's approach to parental rights would prohibit the State from investigating and punishing parents in the former scenario while permitting children to vindicate their own rights to necessary health care through judicial bypass or some other procedure in the latter.

167. We acknowledge that there is a gray area between clearly banal matters that parents should be able to make decisions about, like a child's precise bedtime or a teenager's curfew, and clearly life-changing decisions. However, the exercise of drawing the appropriate line for this inquiry is outside the scope of this Note. In any event, wherever the line should be drawn, a minor's decision to have an abortion clearly falls into the category of decisions important enough to warrant state intervention to give effect to the minor's own wishes.



that minor is capable of exercising such autonomy and to overcome their parents' treatment of them as a "mere possession."<sup>168</sup> We likewise do not propose that children's desires should automatically trump those of their parents. Rather, we have argued that, under a modern understanding of parental rights, it is perfectly legitimate to presume that parents will be involved in their children's lives but also allow for a process by which a judge can give effect to children's own express interests, rather than those interests being automatically subjugated to those of their parents. Judicial bypass is not about allowing third parties to substitute their judgment for that of fit parents where there is no reason to disrupt healthy family bonds, risking the type of coercive state intervention into the family that scholars rightly fear due to the harms of the child-welfare system. To the contrary, judicial bypass of parental-involvement laws represents a very limited intrusion into the family in order to respect children's own independent interests and agency—precisely what undergirds a proper understanding of parental rights.

### III. JUDICIAL BYPASS IS STILL ON SOLID DOCTRINAL GROUND

As we demonstrated in the previous Part, parental rights are best understood as coterminous with a child's well-being and autonomy.<sup>169</sup> Framed this way, parental rights are not absolute and judicial bypass is permissible even absent a child's constitutional right to abortion. However, even recognizing the limited nature of parental rights, it is true that *Bellotti's* balance of parents' and minors' rights has been upset by the Court's elimination of a child's constitutional right to abortion.<sup>170</sup> The question thus persists: whether, after *Dobbs*, judicial bypass is actually inconsistent with the legal reality of minority, as many opponents may argue.

This Part will show that judicial bypass remains on solid ground even without a federal constitutional abortion right. Legitimizing judicial bypass does not require novel legal arguments. In Section III.A, we argue that judicial bypass fits easily into the common-law traditions of the mature minor doctrine and the right to bodily autonomy—it need not rely on *Roe* or other constitutional reasoning. Moreover, the existence of the mature minor doctrine demonstrates that judicial bypass is not a sharp deviation from a strict rule that only legal adults can consent to medical treatment; the common law itself recognizes a general exception for mature minors. As we describe below, though only six states have explicitly adopted the mature minor doctrine, courts in many other states have

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168. *Troxel v. Granville*, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting).

169. See *supra* Part II.

170. See *supra* Part I.

acknowledged it in cases that did not present the proper opportunity to formally adopt it, and even counseled that their state courts or legislature should adopt it in the future.<sup>171</sup> In Section III.B, we show that judicial bypass of parental involvement for abortion is not an anomalous feature of the law. We survey existing state laws across the United States that affirmatively recognize a minor's right to self-consent to medical care in a variety of circumstances. There is a deeply rooted and growing consensus among state legislatures and courts that some minors are mature enough to consent to at least some health care, and that some health care is important enough that parents should not be able to prevent their children from accessing it. Judicial bypass can and should be situated within this trend.

#### A. *The Mature Minor Doctrine*

Judicial-bypass procedures are consistent with the common-law “mature minor doctrine,” an exception to the general requirement of parental consent for medical treatment.<sup>172</sup> *Black's Law Dictionary* defines the doctrine as “[a] rule holding that an adolescent, though not having reached the age of majority, may make decisions about his or her health and welfare if the adolescent demonstrates an ability to articulate reasoned preferences on those matters.”<sup>173</sup> Similarly, the *Restatement (Third) of Torts* states that a minor is able to effectively consent when “the person is capable of appreciating the nature, extent, and potential consequences of the conduct consented to, even if the parent, guardian, or other person responsible does not consent to the conduct.”<sup>174</sup> Prosser and Keeton explain, “Capacity exists when the minor has the ability of the average person to understand and weigh the risks and benefits.”<sup>175</sup> The mature minor doctrine recognizes that the ability of children to consent to medical care depends on both the general characteristics of the child, namely their capacity for rationality and therefore consent, and their reasoned consideration of the specific medical treatment that is sought.

The right to some procedure to overcome a parent's veto on their child's decision to have an abortion fits squarely into this common-law doctrine. A minor

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171. See *infra* notes 192-199 and accompanying text.

172. *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.”).

173. *Mature-Minor Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

174. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 15 cmt. b (AM. L. INST., Tentative Draft No. 4, 2019).

175. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 18, at 115 (5th ed. 1984).

who can prove to a judge that they understand the nature, extent, and consequences of an abortion has the legal capacity as a mature minor to consent to their abortion. This ability to consent exists independent of any constitutional right to such medical treatment. Therefore, the common-law mature minor doctrine provides a legal justification for judicial bypass as a means of balancing the mature minor's common-law right to consent to medical treatment and a parent's claim to a right to withhold consent. Any legal challenge to judicial bypass should therefore fail, even without the federal constitutional right to abortion from which bypass was initially conceived.

The mature minor doctrine originally arose in cases where parents alleged battery against health-care providers for treating their children without parental consent. These battery claims were vitiated where the child's maturity rendered them legally capable of self-consenting. One of the earliest uses of the mature minor doctrine in this way was in 1928, in the case of *Gulf & S.I.R. Co. v. Sullivan*.<sup>176</sup> The Supreme Court of Mississippi held that a seventeen-year-old effectively consented to his vaccination for smallpox.<sup>177</sup> In reaching this conclusion, the court reasoned that the adolescent was "of sufficient intelligence to understand and appreciate the consequences of the vaccination, usually a very simple operation, resulting in no harm other than a temporary inconvenience."<sup>178</sup> The Kansas Supreme Court similarly dismissed a parent's battery claim because their seventeen-year-old had effectively consented to surgery.<sup>179</sup> Expanding the reasoning from Mississippi to the context of surgical treatment, the Kansas court explained that "the sufficiency of a minor's consent depends upon his ability to understand and comprehend the nature of the surgical procedure, the risks involved and the probability of attaining the desired results in the light of the circumstances which attend."<sup>180</sup> In Tennessee, a 1987 case extended the mature minor exception to a seventeen-year-old treated by an osteopath for back pain, which resulted in serious injuries.<sup>181</sup> In West Virginia, a 1992 case extended it to a minor who had signed a "do not resuscitate" order.<sup>182</sup>

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176. 119 So. 501 (Miss. 1928).

177. *Id.* at 502.

178. *Id.*

179. *Younts v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 469 P.2d 330, 338 (Kan. 1970).

180. *Id.* at 337.

181. *Cardwell v. Bechtol*, 724 S.W.2d 739, 748-49 (Tenn. 1987) (adopting the mature minor doctrine and reasoning that doing so "would be wholly consistent with the existing statutory and tort law in this State as part of 'the normal course of the growth and development of the law.'" (quoting *Powell v. Hartford Accident & Indem. Co.*, 398 S.W.2d 727, 732 (Tenn. 1966))).

182. *Belcher v. Charleston Area Med. Ctr.*, 422 S.E.2d 827, 837 (W. Va. 1992) (adopting the mature minor doctrine: "We believe that the mature minor exception is part of the common law rule of parental consent of this state").

To be sure, the mature minor doctrine was not originally established as a self-conscious vindication of children's autonomy.<sup>183</sup> The doctrine first developed as a defense for doctors who treated minors without obtaining their parent's consent; however, it has since applied in cases directly presenting the question of a minor's ability to refuse or consent to medical care. Therefore, the application of the mature minor doctrine to protect children's interests in controlling their own health-care decisions would not be novel. For example, the Supreme Court of Illinois held in *In re E.G.* that a seventeen-year-old Jehovah's Witness dying of leukemia was mature enough to refuse life-sustaining treatment, over the objection of the state asserting an interest as *parens patriae* in sustaining her life.<sup>184</sup> The court explained that the age of majority was not an "impenetrable barrier that magically precludes a minor from possessing and exercising certain rights normally associated with adulthood."<sup>185</sup> Ultimately, the court concluded that clear and convincing evidence demonstrated that E.G. was "mature enough to appreciate the consequences of her actions" and so was a mature minor who should be afforded "the common law right to consent to or refuse medical treatment."<sup>186</sup> Notably, the court invoked a similar point about the state's *parens patriae* authority to one we make about parents' rights: "The *parens patriae* authority fades . . . as the minor gets older and disappears upon her reaching adulthood."<sup>187</sup>

Another state – Maine – also adopted the mature minor doctrine in a case that presented the question of whether a minor could refuse life-sustaining medical treatment. In *In re Swan*, Maine's highest court held that the preference of a patient in a persistent vegetative state to be allowed to die should be honored, even though those views were articulated when the patient was seventeen years old.<sup>188</sup> Although his minority at the time of his statements was a factor to be

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183. See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 19.01 cmt. a (AM. L. INST., Tentative Draft No. 2, 2019) ("[A] key purpose of the mature minor rule and also of statutes embodying the rule is to limit the liability of physicians who have cared for minors when a parent is unavailable or unwilling to consent on the child's behalf. Scholars have criticized the rule on this basis.").

184. 549 N.E.2d 322, 323-28 (Ill. 1989). *In re E.G.* presents a unique procedural posture. E.G.'s mother, also a Jehovah's Witness, acquiesced in her daughter's wishes to refuse necessary blood transfusions. The state then filed a medical-neglect petition, pursuant to which E.G. was assigned a temporary guardian with the power to consent on her behalf. The case before the Illinois Supreme Court, therefore, was one as between the minor E.G. and the state standing in for her parents, on the question of "whether a minor like E.G. has a right to refuse medical treatment." *Id.* at 325.

185. *Id.* at 325.

186. *Id.* at 327-28.

187. *Id.* at 327.

188. 569 A.2d 1202, 1202, 1205-06 (Me. 1990) (per curiam).

considered, it was not dispositive.<sup>189</sup> The court found that the patient was “a normally mature high school senior” and “had expressed well-formed desires as to medical treatment,” which should be adhered to.<sup>190</sup> *In re E.G.* and *In re Swan* demonstrate that the mature minor doctrine recognizes the autonomy of children to direct their own health care – even in circumstances as dire as the refusal of life-saving care. Applying the doctrine, courts have treated with seriousness and respect the idea that minors are independent arbiters of their own interests. More recently, scholars have advocated that the mature minor doctrine be applied to cases governing the rights of minors to consent to vaccination, including the COVID-19 vaccine.<sup>191</sup>

To date, at least six states have formally adopted the mature minor doctrine, as described above.<sup>192</sup> Three other states’ courts, in cases about the right of a minor to refuse life-saving treatment, have referenced the doctrine in dicta or recommended that it be adopted in a more appropriate case.<sup>193</sup> The D.C. Circuit

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189. *Id.* at 1205.

190. *Id.* at 1206.

191. See, e.g., Larissa Morgan, Jason L. Schwartz & Dominic A. Sisti, *COVID-19 Vaccination of Minors Without Parental Consent: Respecting Emerging Autonomy and Advancing Public Health*, 175 JAMA PEDIATRICS 995, 996 (2021); Robert S. Olick, Y. Tony Yang & Jana Shaw, *Adolescent Consent to COVID-19 Vaccination: The Need for Law Reform*, 137 PUB. HEALTH REPS. 163, 164 (2022); see also Lois A. Weithorn & Dorit Rubinstein Reiss, *Providing Adolescents with Independent and Confidential Access to Childhood Vaccines: A Proposal to Lower the Age of Consent*, 52 CONN. L. REV. 771, 771 (2020) (recommending the “creation of a limited exception to parental decision-making authority by permitting certain older minors to provide legally binding consent for childhood vaccinations”).

192. *Supra* notes 176–190 and accompanying text.

193. *In re Rosebush*, 491 N.W.2d 633, 636 n.4 (Mich. Ct. App. 1992) (explaining in dicta that “[t]he advance directive of a mature minor, stating the desire that life-sustaining treatment be refused, should be taken into consideration or enforced when deciding whether to terminate the minor’s life-support treatment or refuse medical treatment,” and citing as support the Maine and Illinois cases adopting the mature minor doctrine, see *supra* notes 184–190 and accompanying text); *In re Rena*, 705 N.E.2d 1155, 1156–57 (Mass. App. Ct. 1999) (citing the same cases from Maine and Illinois adopting the mature minor doctrine and explaining that, as part of a determination of the best interests of a child, a court can “consider the maturity of the child to make an informed choice,” but dismissing the case as moot); *In re Application of Long Island Jewish Med. Ctr.*, 557 N.Y.S.2d 239, 243 (Sup. Ct. 1990) (holding that the minor in question was not mature enough to independently refuse life-saving medical treatment, but, in reliance on Illinois and Tennessee cases cited in this Note, recommending “that the legislature or the appellate courts take a hard look at the ‘mature minor’ doctrine and make it either statutory or decisional law in New York State”); see also *Newmark v. Williams*, 588 A.2d 1108, 1116 n.9 (Del. 1991) (the mature minor doctrine was not raised by the parties, but nonetheless noted by the court in a footnote: “Although we decline to comment on the applicability of the ‘mature minor doctrine’ under Delaware law, it is doubtful that even the most precocious three year old could meet the standard. Yet, while not dispositive, there was evidence that . . . Colin was able to perceive the very real dangers of the treatment”).

has also tacitly approved of the doctrine.<sup>194</sup> Two states have been presented with the opportunity to adopt the mature minor doctrine and declined to do so, but because of fact-specific considerations. In a Texas case, the court explained that there was not sufficient evidence of the minor's maturity and that the state had not yet adopted the mature minor doctrine.<sup>195</sup> The court did not reject the mature minor doctrine outright. Similarly, the Connecticut Supreme Court was presented in a recent case with the question of whether a minor was competent to make medical decisions for herself, but the court did not reach the question of whether to adopt the mature minor doctrine "because the evidence does not support a finding that [the minor in question] was a mature minor under any standard."<sup>196</sup> Other states have also declined to reach the question of whether to adopt, as a general matter, the mature minor doctrine in cases where the court could decide the case on other grounds.<sup>197</sup> In a Pennsylvania case to this effect, it is notable that one justice of the Supreme Court of Pennsylvania concurred to explain that he would have adopted the mature minor doctrine as a general matter even though it would not have changed the decision in the specific case.<sup>198</sup> Only one case interpreting state law – from Georgia – has outright rejected the mature minor doctrine, but this decision was limited only to the situation of a minor seeking to refuse medical treatment, and so arguably does not foreclose the

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194. *Kozup v. Georgetown Univ.*, 851 F.2d 437, 439 (D.C. Cir. 1988) (noting that consent of a minor's parents is not required in certain circumstances, including where "the patient is a 'mature minor'").

195. *O.G. v. Baum*, 790 S.W.2d 839, 842 (Tex. Ct. App. 1990).

196. *In re Cassandra C.*, 112 A.3d 158, 160 (Conn. 2015).

197. See, e.g., *San Joaquin Cnty. Hum. Servs. Agency v. Marcus W.*, 185 Cal. App. 4th 182, 184-187 (Ct. App. 2010); *Commonwealth v. Nixon*, 761 A.2d 1151, 1154 (Pa. 2000) (declining to adopt the mature minor doctrine specifically as a defense to a wrongful-death suit against parents, but explaining that it was deciding the case "without passing comment upon the wisdom of the mature minor doctrine itself" because "a terse review of the facts and circumstances which confronted the courts of our sister states readily reveals why the doctrine is not applicable to [the instant] case"); *In re Conner*, 140 P.3d 1167, 1169-71 (Or. Ct. App. 2006) (declining to reach the issue of whether to adopt the mature minor doctrine because the case was moot); *In re Sheila W.*, 835 N.W.2d 148, 150 (Wis. 2013) (same, explaining that "it [is] unwise to decide such substantial social policy issues with far-ranging implications based on a singular fact situation in a case that is moot").

198. *Nixon*, 761 A.2d at 1158 (Cappy, J., concurring) (agreeing that the minor described in the case was not sufficiently mature to refuse medical treatment, but explaining that he would have adopted the mature minor doctrine generally: "I believe that when it is demonstrated that a minor has the capacity to understand the nature of his or her condition, appreciate the consequences of the choices he or she makes, and reach a decision regarding medical intervention in a responsible fashion, he or she should have the right to consent to or refuse treatment. I would, therefore, adopt the mature minor doctrine").

state's future adoption of the mature minor doctrine where the minor seeks to self-consent to treatment such as abortion.<sup>199</sup>

Importantly, the mature minor exception to the general rule that minors cannot consent to medical treatment is often considered most compelling in the case of access to “stigmatizing” health care and in cases where the minor has an interest in preserving their life course. Nearly every state grants minors the statutory right to self-consent to some or all of care for a continuing pregnancy (such as prenatal care and/or childbirth-related medical care), sexually transmitted infection (STI) and HIV care, mental-health care, and drug-dependency treatment.<sup>200</sup> These laws derive partially from the recognition that children may be dissuaded from seeking needed care by the associated social stigma, and that requiring parental consent may exacerbate that stigma.<sup>201</sup> There are at least some types of health care, these laws seem to say, that are important enough that society cares more that a child who needs that care gets it than that they do so with the consent of their parents.<sup>202</sup> Likewise, the mature minor doctrine carries more weight where the denial of medical care may narrow the life opportunities available to a child.<sup>203</sup> For example, a federal district court deciding a parental-rights challenge to an in-school condom-distribution program reasoned: “The parental consent requirement . . . is far from absolute. Parental consent may be waived when the parent’s refusal of consent likely would compromise the minor’s long-term prospects for health and well-being . . . .”<sup>204</sup> This life-course-preserving

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199. *Novak v. Cobb Cnty.-Kennestone Hosp. Auth.*, 849 F. Supp. 1559, 1576 (N.D. Ga. 1994), *aff'd*, 74 F.3d 1173 (11th Cir. 1996) (“[T]he Court finds that Georgia provides no ‘mature minor’ exception to its general rule that only adults may refuse unwanted medical care.”).

200. *See infra* Section III.B; *see also* Huntington & Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, *supra* note 86, at 1440-44 (discussing statutes granting minors the ability to consent to substance-abuse treatment, sexually-transmitted-disease treatment, and some reproductive-health treatments, as well as the mature minor doctrine’s acceptability within a child-welfare framework of parental rights).

201. *See infra* Section III.A.2; *see also* RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 19.01 cmt. b (AM. L. INST., Tentative Draft No. 2, 2019) (“The minor, as an adolescent with developmentally normal privacy concerns, may not want the parent’s involvement; this could be due to the sensitive nature of the minor’s medical condition or to the fact that the minor is unwilling to share with a parent the circumstances that led to the need for treatment. . . . Under these conditions, although authorizing the minor to consent may limit parental authority to an extent, it can promote the mature minor’s welfare by facilitating access to beneficial medical treatment that the minor otherwise might not obtain.”).

202. *See infra* Section III.B.

203. *See* Jennifer Rosato, *What Are the Implications of Roper’s Dilemma for Adolescent Health?*, 20 J.L. & POL’Y 167, 181-83 (2011).

204. *Parents United for Better Schs., Inc. v. Sch. Dist. of Phila. Bd. of Educ.*, 978 F. Supp. 197, 206 (E.D. Pa. 1997).

characteristic of medical care has also been invoked in support of children’s ability to self-consent to COVID-19 vaccination.<sup>205</sup> These arguments easily extend to the right of mature minors to obtain abortion care without their parents’ consent. Like all reproductive health care, abortion care is certainly stigmatizing,<sup>206</sup> and, as the Supreme Court itself has recognized, abortion care undeniably affects a person’s life course.<sup>207</sup>

1. *The Mature Minor Doctrine and Existing Judicial-Bypass Procedures*

Judicial bypass cleanly and comfortably fits into the various standards articulated by state courts that have adopted the mature minor doctrine. First, the indicia of maturity enumerated in mature minor case law are a close match for those already used in judicial-bypass maturity determinations. Second, abortion bears both characteristics associated with the most compelling invocations of the mature minor doctrine: stigma and life-course preservation. Finally, under both the mature minor doctrine and judicial bypass, the maturity determination is made by a third party – most often a medical provider or a judge.<sup>208</sup>

State-court cases that have found a common-law right of mature minors to consent to medical treatment reason in slightly different ways about how to establish the requisite maturity. But general themes have emerged as to what factors should be weighed:

- (1) age, ability, experience, education, training, and degree of maturity or judgment obtained by the child;
- (2) conduct and demeanor of the child at the time of the procedure or treatment; and
- (3) whether the minor has the capacity to appreciate the nature, risks, and consequences of the medical procedure/treatment.<sup>209</sup>

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205. See, e.g., Morgan et al., *supra* note 191, at 995; Susanna McGrew & Holly A. Taylor, *Adolescents, Parents, and COVID-19 Vaccination – Who Should Decide?*, 386 *NEW ENG. J. MED.* art. no. e2(1) (2022).

206. See *infra* note 214 and accompanying text.

207. See *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 642 (1979) (describing the abortion decision as having “grave and indelible” consequences).

208. See *infra* note 220 and accompanying text.

209. See, e.g., *Cardwell v. Bechtol*, 724 S.W.2d 739, 748 (Tenn. 1987). The court highlighted the fact that the minor at issue “was only five months short of the age of majority at the time of this incident.” *Id.* at 755; see also *Belcher v. Charleston Area Med. Ctr.*, 422 S.E.2d 827, 838 (W. Va. 1992) (“Whether the child has the capacity to consent depends upon the age, ability, experience, education, training, and degree of maturity or judgment obtained by the child, as



We will not comment extensively on the normative propriety of the characteristics routinely assessed for proof of a minor's maturity, as this is outside the scope of our Note.<sup>210</sup> Regardless, it is true that the characteristics judges use to assess maturity in mature minor determinations closely mirror the criteria used in judicial-bypass proceedings. Courts in various states have made findings of maturity in judicial-bypass proceedings based on age, experience, education, demeanor, and other factors commonly looked to in mature minor determinations.<sup>211</sup> In Florida, a statute specifically enumerates the factors a court is to consider in determining a minor's maturity in judicial-bypass cases:

- a. Age.
- b. Overall intelligence.
- c. Emotional development and stability.
- d. Credibility and demeanor as a witness.
- e. Ability to accept responsibility.
- f. Ability to assess both the immediate and long-range consequences of the minor's choices.

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well as upon the conduct and demeanor of the child at the time of the procedure or treatment.”); *Younts v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 469 P.2d 330, 338 (Kan. 1970) (reasoning that the minor “was of sufficient age and maturity to know and understand the nature and consequences” of the medical treatment).

210. It is our view that the factors used to assess a minor's maturity in existing judicial-bypass procedures are imperfect, especially because they open the door to allowing the judge's biases to influence the outcome. Judicial-bypass procedures should certainly evolve to provide mature minors with greater autonomy over their reproductive-health-care decisions. *See infra* Part IV (providing policy suggestions to improve judicial-bypass procedures). Our argument, however, is that even without a constitutional right to abortion, judicial bypass is easily defended as a necessary provision of parental-involvement laws, as it is entirely consistent with standards used to assess minors' ability to consent to other forms of health care in the common-law mature minor doctrine.
211. *See, e.g., In re Anonymous*, 655 So. 2d 1052, 1054 (Ala. Civ. App. 1995) (finding a minor mature based on her obtaining a pregnancy test, going to a clinic to discuss the procedure and risks, working, attending school, and having plans for the future); *In re Doe*, No. C-020443, 2002 WL 1769389, at \*1-2 (Ohio Ct. App. July 10, 2002) (per curiam) (finding a minor mature based on her academic standing, her participation in extracurricular activities, her age (close to eighteen), her plans to attend college, and her consideration of alternatives to abortion); *In re Doe*, No. 03AP-1185, 2003 WL 22871690, at \*2 (Ohio Ct. App. Dec. 5, 2003) (finding a minor mature based on her having sought counseling regarding side effects, consideration of alternatives, good grades, plans for her future, consideration of consequences, and her age (close to eighteen)).

g. Ability to understand and explain the medical risks of terminating her pregnancy and to apply that understanding to her decision.<sup>212</sup>

Both mature minor and judicial-bypass cases also assess and weigh the degree to which the minor is able to appreciate “the nature, extent, and probable consequences” of the medical treatment (and has done so).<sup>213</sup>

Moreover, abortion as a medical procedure carries both stigma and significance for preserving one’s future options—characteristics that counsel in favor of the heightened importance of the mature minor doctrine. Abortion is a highly

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212. FLA. STAT. ANN. § 390.0114 (West 2022). For an example of a court applying these factors and adjudging a minor mature, see *In re Doe*, 113 So. 3d 882, 886-89 (Fla. Dist. Ct. App. 2012). See also *In re Doe*, No. 11 CO 34, 2011 WL 6164526, at \*3-4 (Ohio Ct. App. Dec. 7, 2011) (applying the eight factors from Florida law and finding a minor mature).

213. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 15 cmt. b (AM. L. INST., Tentative Draft No. 4, 2019). Compare *Younts*, 469 P.2d at 337 (“[T]he sufficiency of a minor’s consent depends upon his ability to understand and comprehend the nature of the surgical procedure, the risks involved and the probability of attaining the desired results in light of the circumstances which attend.”), and *Belcher*, 422 S.E.2d at 838 (noting that the focus in determining whether the mature minor exception applies should be “on the maturity level of the minor at issue, and whether that minor has the capacity to appreciate the nature and risks involved of the procedure to be performed, or the treatment to be administered or withheld”), with *In re Anonymous*, 771 So. 2d 1043, 1045 (Ala. Civ. App. 2000) (per curiam) (weighing the fact that the minor was aware of what the abortion procedure entails and its effects), *In re Anonymous*, 678 So. 2d 783, 784 (Ala. Civ. App. 1996) (per curiam) (crediting the fact that the minor had consulted an obstetrician-gynecologist who had informed her of the procedure and risks), *In re Doe*, 866 P.2d 1069, 1074 (Kan. Ct. App. 1994) (per curiam) (defining “mature and well-informed” as “hav[ing] the intellectual capacity, experience, and knowledge necessary to substantially understand the situation at hand and the consequences of the choices that can be made”), and *In re Doe*, No. 02CA00067, 2002 WL 31492302, at \*3 (Ohio Ct. App. Sept. 16, 2002) (per curiam) (emphasizing that the minor was aware of the nature of the procedure and what it involved, and researched and weighed its risks to her health).

stigmatized medical procedure.<sup>214</sup> Abortion stigma trades on pernicious sex stereotypes, such as sexual promiscuity and inevitable motherhood.<sup>215</sup> That stigma is only amplified for minors seeking abortion care,<sup>216</sup> who simultaneously experience stigma attending adolescent pregnancy.<sup>217</sup> Furthermore, an adolescent's decision whether to terminate a pregnancy does not occur in a vacuum; their alternative is to continue the pregnancy. As compared with carrying a pregnancy to term, abortion often preserves an adolescent's future opportunities. It is axiomatic that having and rearing a child requires a person to forgo other opportu-

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214. See Anuradha Kumar, Leila Hessini & Ellen M.H. Mitchell, *Conceptualising Abortion Stigma*, 11 CULTURE, HEALTH & SEXUALITY 625, 625 (2009) (describing abortion stigma as a negative attribute ascribed for transgressing feminine ideals of perpetual fertility, the inevitability of motherhood, and instinctive nurturing); Alison Norris, Danielle Bessett, Julia R. Steinberg, Megan L. Kavanaugh, Silvia De Zordo & Davida Becker, *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 WOMEN'S HEALTH ISSUES S49, S51 (2011) (building on Kumar et al., *supra*, in explaining the roots of abortion stigma and its manifestations); Paula Abrams, *The Bad Mother: Stigma, Abortion and Surrogacy*, 43 J.L. MED. & ETHICS 179, 180-84 (2015) (describing similarities between stigmas associated with abortion and surrogacy); Franz Hanschmidt, Katja Linde, Anja Hilbert, Steffi G. Riedel-Heller & Anette Kersting, *Abortion Stigma: A Systematic Review*, 48 PERSPS. ON SEXUAL & REPROD. HEALTH 169, 169 (2016) (reviewing existing qualitative studies and finding that a "majority of studies showed that women who have had abortions experience fear of social judgment, self-judgment and a need for secrecy").
215. See, e.g., Kumar et al., *supra* note 214, at 628-29.
216. See, e.g., Nicole Phillis, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 MICH. J. GENDER & L. 271, 274-75, 290-92 (2011); Maya Manian, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127, 130-31, 149-50 (2016); Kate Coleman-Minahan, Amanda Jean Stevenson, Emily Obront & Susan Hays, *Judicial Bypass Attorneys' Experiences with Abortion Stigma in Texas Courts*, 269 SOC. SCI. & MED. 1, 2 (2021); Kate Coleman-Minahan, Amanda Jean Stevenson, Emily Obront & Susan Hays, *Adolescents Obtaining Abortion Without Parental Consent: Their Reasons and Experiences of Social Support*, 52 PERSPS. ON SEXUAL & REPROD. HEALTH 15, 17-21 (2020).
217. See, e.g., Christie A. Barcelos & Aline C. Gubrium, *Reproducing Stories: Strategic Narratives of Teen Pregnancy and Motherhood*, 61 SOC. PROBS. 466, 466 (2014); May Friedman, "100% Preventable:" *Teen Motherhood, Morality, and the Myth of Choice*, in *MTV AND TEEN PREGNANCY: CRITICAL ESSAYS ON 16 AND PREGNANT AND TEEN MOM* 70, 79 (Letizia Guglielmo ed., 2013); Kyla Ellis-Sloan, *Teenage Mothers, Stigma and Their 'Presentations of Self'*, 19 SOCIO. RSCH. ONLINE 16, 18 (2014); Chris Barcelos & Aline Gubrium, *Bodies That Tell: Embodying Teen Pregnancy Through Digital Storytelling*, 43 SIGNS: J. WOMEN CULTURE & SOC'Y 905, 905 (2018); Coleman-Minahan et al., *Adolescents Obtaining Abortion Without Parental Consent*, *supra* note 216, at 20.

nities. From a purely medical perspective, abortion is vastly safer than childbirth.<sup>218</sup> Pregnancy itself is extremely risky, particularly for adolescents.<sup>219</sup> In these ways, abortion constitutes the paradigmatic procedure for which the mature minor doctrine is most compelling.

Lastly, both mature minor cases and judicial-bypass proceedings contemplate that a third party may make the determination of a minor's maturity—either a medical provider or a judge.<sup>220</sup> In sum, abortion and judicial bypass fit comfortably within the existing mature minor doctrine jurisprudence. The mature minor cases described in this Section illustrate that when a procedure is simple enough for a minor to understand its nature and consequences and when the procedure preserves the minor's future, the minor may persuade a judge that they are able to consent to it before the arbitrary age of eighteen. Therefore, the common-law mature minor doctrine provides doctrinal footing for judicial bypass even without the federal constitutional right to abortion. The mature minor doctrine also makes clear that a judicial-bypass procedure is appropriate and necessary in the context of abortion.

## 2. *The Mature Minor Doctrine Should Be Read Broadly*

The mature minor doctrine should be read broadly because the law recognizes minors' maturity elsewhere, and because there is a rich and complementary common-law tradition of recognizing all people's right to bodily integrity. Across legal contexts, courts have acknowledged and acted on the fact that “minors

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218. Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215, 216 (2012) (finding that the risk of death associated with childbirth in the United States between 1998 and 2005 was approximately fourteen times higher than that associated with abortion and that “[e]very complication was more common among women having live births than among those having abortions”).

219. See, e.g., Xi-Kuan Chen, Shi Wu Wen, Nathalie Fleming, Kitaw Demissie, George G. Rhoads & Mark Walker, *Teenage Pregnancy and Adverse Birth Outcomes: A Large Population Based Retrospective Cohort Study*, 36 *INT'L J. EPIDEMIOLOGY* 368, 368 (2007) (finding that “[e]ven pregnancy increases the risk of adverse birth outcomes . . . independent of important known confounders”); Stephanie J. Ventura, TJ Mathews, Brady E. Hamilton, Paul D. Sutton & Joyce C. Abma, *Adolescent Pregnancy and Childbirth—United States, 1991–2008*, 60 *MORBIDITY & MORTALITY WKLY. REP. SUPP.*, Jan. 14, 2011, at 105.

220. See *In re E.G.*, 549 N.E.2d 322, 327 (Ill. 1989) (“The trial judge must determine whether a minor is mature enough to make health care choices on her own.”); *Belcher v. Charleston Area Med. Ctr.*, 422 S.E.2d 827, 838 (W. Va. 1992) (“Where there is a conflict between the intentions of one or both parents and the minor, the physician's good faith assessment of the minor's maturity level would immunize him or her from liability for the failure to obtain parental consent.”).

achieve varying degrees of maturity and responsibility” throughout their adolescence.<sup>221</sup> The fact that minors are deemed capable of rationality and consent in other areas of law and in numerous state statutes bolsters the argument for the mature minor doctrine’s wide implementation.

As courts have pointed out in cases adopting the mature minor doctrine, criminal law recognizes adolescents’ maturity in the prosecution of minors as adults.<sup>222</sup> Indeed, every state allows for or requires offenders under the age of eighteen to be prosecuted as adults for certain offenses.<sup>223</sup> In Georgia, Texas, and Wisconsin, the maximum age of juvenile-court jurisdiction is sixteen, meaning all seventeen-year-olds are within the jurisdiction of adult courts.<sup>224</sup> A number of jurisdictions have also historically recognized the common law “Rule of Sevens” for capacity to form the intent to commit a tort<sup>225</sup> and/or a crime.<sup>226</sup> Under this rule, a child under the age of seven has no capacity; between seven and fourteen, a rebuttable presumption of no capacity; and between fourteen and

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221. *Cardwell v. Bechtol*, 724 S.W.2d 739, 744-45 (Tenn. 1987). This argument was ably made in the American Civil Liberties Union of Connecticut’s amicus brief in *In re Cassandra C.* See Brief of *Amicus Curiae* the American Civil Liberties Union Foundation of CT in Support of Minor Child and Respondent Mother, *In re Cassandra C.*, 112 A.3d 158 (Conn. 2015) (No. 19426).
222. See, e.g., *In re E.G.*, 549 N.E.2d at 326 (“In an analogous area of law, no ‘bright line’ age restriction of 18 exists . . . . When a minor is mature enough to have the capacity to formulate criminal intent, both the common law and our Juvenile Court Act treat the minor as an adult.”); see also J. Shoshanna Ehrlich, *Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Legal Status of Adolescents*, 18 WIS. WOMEN’S L.J. 77, 104 (2003) (identifying state-law shifts toward context-dependent adult status for juveniles in criminal courts).
223. See Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT’L CONF. STATE LEGISLATURES (Apr. 8, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx> [https://perma.cc/2RXQ-5F7Z].
224. See *id.*; GA. CODE ANN. § 15-11-2(10)(B) (2020) (defining “child” as a person under 17 when that person has committed a crime); TEX. FAM. CODE ANN. § 51.02(2) (West 2021); WIS. STAT. ANN. §§ 48.02(1d), (2), 938.12(2) (West 2021).
225. Suzanne Meiners-Levy, *Challenging the Prosecution of Young “Sex Offenders”: How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 511 (2006); see also, e.g., *Welch v. Jenkins*, 155 S.E.2d 763, 766-67 (N.C. 1967) (describing the “rule of sevens” approach for determining a minor’s capacity to be contributorily negligent). Other courts have recognized the capacity for tort liability in even younger children. E.g., *Neal v. Gillet*, 23 Conn. 437, 442 (1855) (stating that “[i]t may not be easy to fix upon the exact age when ‘childish instinct,’ and thoughtlessness, shall cease to be an excuse for conduct” but that thirteen- and sixteen-year-old defendants “had clearly passed that age”).
226. E.g., *In re Stephen W.*, 761 S.E.2d 231, 233-34 (S.C. 2014) (discussing South Carolina’s history of following the “rule of sevens” when criminally prosecuting children); *Juv. Ct. v. State ex rel. Humphrey*, 201 S.W. 771, 773 (Tenn. 1918).

twenty-one (eighteen, for today’s age of majority), a rebuttable presumption of capacity.<sup>227</sup>

If adolescents have the mental capacity to foresee harm and to be held criminally and civilly liable, it follows that minors are also able to understand and consent to at least some forms of medical treatment. Therefore, states that have not yet formally recognized the mature minor doctrine in their common law should do so to harmonize the standards by which they judge the decision-making capacity of adolescents in different areas of the law.<sup>228</sup> In states that have already formally adopted the mature minor doctrine, the recognition of minors’ capacity to make intelligent decisions elsewhere in the law provides even more support for the legality of judicial bypass. Indeed, existing judicial-bypass case law provides support for its ongoing validity – courts routinely find that minors are in fact mature enough to make the decision to have an abortion.<sup>229</sup>

The mature minor doctrine is not the only place where the common law recognizes that people have the right to make decisions about their bodies. There is also a common-law right to bodily integrity, independent of any constitutional right to the same, which courts have read broadly to mean that all people must have the freedom to make decisions about their bodies. Federal courts have recognized that the constitutional right to bodily integrity in fact derives from the common law.<sup>230</sup> The Supreme Court explained in 1891 that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all

227. See Meiners-Levy, *supra* note 225, at 511.

228. See, e.g., *Kramer v. Petisi*, 940 A.2d 800, 806 n.8 (Conn. 2008) (“Whenever possible, courts should, as a matter of common law adjudication, assure that the body of law – both common and statutory – remains coherent and consistent . . . .” (quoting *Williams Ford, Inc. v. Hartford Courant Co.*, 657 A.2d 212, 225 (Conn. 1995) (brackets and internal quotation marks omitted))); *State v. Hutton*, 776 S.E.2d 621, 627 (W. Va. 2015); *Cardwell v. Bechtol*, 724 S.W.2d 739, 748-49 (Tenn. 1987) (reasoning in adopting the mature minor doctrine that doing so “would be wholly consistent with the existing statutory and tort law in this State as part of ‘the normal course of the growth and development of the law’” (quoting *Powell v. Hartford Accident & Indem. Co.*, 398 S.W.2d 727, 732 (Tenn. 1966))).

229. In Massachusetts by the 1990s, for example, “[t]he overwhelming majority of petitions (97-98 percent) were granted on the ground of maturity.” *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 836 n.12 (Cal. 1997).

230. See, e.g., *Guertin v. Michigan*, 912 F.3d 907, 918 (6th Cir. 2019) (“The liberty interests secured by the Due Process Clause ‘include[] the right generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men.’ These common-law privileges, the Supreme Court has held, specifically embrace the right to bodily integrity.” (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977))); *United States v. Charters*, 829 F.2d 479, 490-91 (4th Cir. 1987); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062-63 (6th Cir. 1998); *Hootstein v. Amherst-Pelham Reg’l Sch. Comm.*, 361 F. Supp. 3d 94, 111-12 (D. Mass. 2019).

restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>231</sup> Nothing in this doctrine suggests that minors do not also possess this common-law right. In fact, case law has shown that this right extends to all people, even those who are among the most marginalized in the law—incapacitated people, incarcerated people, and others.<sup>232</sup> The existence of the right to bodily integrity outside of constitutional law shows that the mature minor doctrine is not an aberration. The common law recognizes that all people, no matter if they are children or are otherwise deprived of full legal rights, are deserving of dignity and autonomy, especially in the context of medical treatment. Judicial bypass is therefore completely consistent with the common law’s consistent overall recognition of minors’ maturity, capacity, and right to autonomy.

A broad reading of the mature minor doctrine is not only a defense for existing judicial-bypass provisions, but may mean that judicial bypass is required. Without the federal constitutional abortion right, parental-involvement laws may be modified to remove an exception for mature minors (via judicial bypass or otherwise). But so long as the statute does not explicitly abrogate mature minors’ common-law right to consent to medical treatment, the mature minor doctrine may actually *overcome* a statutory requirement of parental consent.<sup>233</sup> In *Baird v. Attorney General*, the Massachusetts Supreme Judicial Court took this argument seriously.<sup>234</sup> Despite ultimately finding that judicial bypass was required due to the constitutional right of minors to abortion, the court did discuss the common-law mature minor doctrine. In particular, the defense argued that when creating a statutory requirement of parental consent for abortion, the “[l]egislature did not intend to abrogate any common law right to consent to an

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231. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

232. See, e.g., *Comm’r of Corr. v. Coleman*, 38 A.3d 84, 94 (Conn. 2012) (recognizing an incarcerated person’s qualified common-law right to bodily integrity); *People v. Medina*, 705 P.2d 961, 967 (Colo. 1985) (recognizing an involuntarily committed psychiatric patient’s common-law right to bodily integrity in refusing treatment that poses a significant risk to their physical well-being); *DeGrella ex rel. Parrent v. Elston*, 858 S.W.2d 698, 705 (Ky. 1993) (recognizing an incompetent patient’s common-law right to bodily integrity).

233. In *Roddy v. Volunteer Medical Clinic, Inc.*, an appellate Tennessee court affirmed the trial court’s award of summary judgment to the medical provider in a suit brought by parents of a fifteen-year-old alleging that the provider committed battery and/or malpractice by performing an abortion on their daughter without their consent. 926 S.W.2d 572, 576 (Tenn. Ct. App. 1996). The court held that, by virtue of her age, the daughter was presumed a mature minor capable of self-consenting to the abortion. *Id.* The court was also unconvinced by the parents’ argument that the provider’s failure to comply with Tennessee’s abortion parental-consent law vitiated any consent their daughter had given—that law did not provide a private civil right of action. *Id.* at 575-76.

234. 360 N.E.2d 288 (Mass. 1977).

abortion which a minor had and that a mature minor at common law could obtain a valid court order authorizing an operation without prior parental consultation.”<sup>235</sup> The court rejected this claim but only because it found that the language of the statute actually did indicate that the legislature intended to overturn the common-law right.<sup>236</sup> This reasoning implicitly recognizes that if a statute were worded differently, the common-law right of mature minors to bypass parental consent would survive even an explicit statutory requirement. No court has, to our knowledge, accepted this type of argument, but certainly one could be made to support the idea that judicial-bypass provisions are not only *permissible* post-*Dobbs*, but are still legally necessary.

### B. State Statutory Norms

Finally, a minor’s right to consent to abortion is also consistent with state statutory norms.<sup>237</sup> Despite fearmongering to the contrary,<sup>238</sup> judicial bypass and minor self-consent to abortion are not novel – both easily comport with existing legal norms. Statutory law across the United States (in addition to common law, as discussed above) evinces a shared norm that at least some minors can self-consent to at least some forms of health care with or without their parents’ consent. These statutes are not necessarily driven by a judgment of minors’ maturity but rather a legislative recognition that some health-care decisions are so stigmatizing or life-altering that even minors should have some autonomy over them – a clear vindication of children’s interests. The ability of minors to self-consent to abortion and other reproductive health care fits squarely within these categories of general statutory exceptions, as abortion can be both stigmatizing

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235. *Id.* at 295.

236. *Id.* (explaining that the statute preserves “any common law rights of any *other* person,” but does not refer to the minor, and therefore indicates that the legislature intended to abrogate any common-law right to an abortion). For general recognition of the fact that statutes should not be interpreted as in derogation of the common law, see, for example, *United Bank v. Mesa N.O. Nelson Co.*, 590 P.2d 1384, 1388 (Ariz. 1979); *Kuehn v. Cotter*, 77 A.3d 272 n.5 (Del. 2013); *San Juan Agric. Water Users Ass’n v. KNME-TV*, 257 P.3d 884, 889 (N.M. 2011); *State Highway Comm’n v. Sheridan-Johnson Rural Electrification Ass’n*, 784 P.2d 588, 591 (Wyo. 1989).

237. See J. Shoshanna Ehrlich, *Minors as Medical Decision Makers: The Pretextual Reasoning of the Court in the Abortion Cases*, 7 MICH. J. GENDER & L. 65, 69 (2000) (“[I]n the area of medical decision-making, particularly with regards to pregnancy and other sensitive issues, minors possess significant self-consent rights.”).

238. See Carlesso, *supra* note 12 (quoting an antiabortion advocate in Connecticut organizing to pass a new parental-notification and -consent law as saying, “In Connecticut, you need parental permission to get a body piercing or to go to the suntan parlor. But you can get an abortion without your parents even knowing about it”).



and life-altering.<sup>239</sup> Therefore, legal challenges to judicial-bypass provisions of existing parental-involvement laws that will arise on the basis of *Roe*'s reversal should be doubly unconvincing due to bypass's consistency with the existing, coherent policy judgments of most state legislatures.

Although the laws vary in scope, every state allows for a subset of minors to consent to at least some types of health care without the consent of their parents. At the most permissive end, Alabama and Oregon allow all minors over a certain age to self-consent to nearly any form of health care, without requiring any other person's consent.<sup>240</sup> Many other states allow some minors who are living separately from their parents (even if they are not formally emancipated) to self-consent to some kinds of medical care.<sup>241</sup> Beyond these general allowances, most states allow minors to self-consent to several specific categories of health care: pregnancy or family planning,<sup>242</sup> sexually-transmitted-infections testing and

239. See *supra* Section III.A & note 201.

240. ALA. CODE § 22-8-4 (2022) ("Any minor who is 14 years of age or older . . . may give effective consent to any legally authorized medical, dental, health or mental health services for himself or herself, and the consent of no other person shall be necessary."); OR. REV. STAT. § 109.640 (2022) (allowing any minor fifteen years or older the authority to consent to a wide variety of medical care).

241. ALASKA STAT. § 25.20.025(a)(1) (2022) (allowing a minor living apart from their parents to self-consent to medical care); ME. STAT. tit. 22, § 1503 (2022) (same); MD. CODE ANN., HEALTH-GEN. § 20-102(a)(3) (2022) (same); MINN. STAT. § 144.341 (2022) (same); MONT. CODE ANN. § 41-1-402 (2021) (same); NEV. REV. STAT. § 129.030 (2021) (same); WYO. STAT. ANN. § 14-1-101 (2022) (same); COLO. REV. STAT. § 13-22-103 (2022) (same for minors ages fifteen or older); HAW. REV. STAT. § 577D-2 (2022) (permitting minors ages fourteen or older who are living apart from their parents to self-consent to medical care when the practitioner reasonably believes that "the minor understands the significant benefits and risks of the proposed primary medical care and services and can communicate an informed consent"); 410 ILL. COMP. STAT. 210/1.5 (2022) (allowing minors ages fourteen or older who are living apart from their parents to self-consent to primary medical care); IND. CODE § 16-36-1-3 (2022) (allowing minors ages fourteen or older who are living apart from their parents to self-consent to medical care).

242. ALA. CODE § 22-8-6 (2022); ALASKA STAT. § 25.20.025(a)(4) (2022); CAL. WELF. & INST. CODE § 14503 (West 2022); COLO. REV. STAT. §§ 13-22-103.5 to -105 (2022); DEL. CODE ANN. tit. 13, § 710 (2021); FLA. STAT. § 743.065 (2022); GA. CODE ANN. § 31-9-2 (2022); HAW. REV. STAT. § 577A-2 (2022); 410 ILL. COMP. STAT. 210/1 (2022); IND. CODE § 16-36-1-3.5 (2022) (allowing minors ages sixteen or older to consent); KAN. STAT. ANN. § 38-123 (2022); KY. REV. STAT. ANN. § 214.185 (West 2022); LA. STAT. ANN. § 40:1079.1 (2022); ME. STAT. tit. 22, § 1908 (2022); MD. CODE ANN., HEALTH-GEN. § 20-102 (West 2022); MICH. COMP. LAWS § 333.9132 (2022); MINN. STAT. § 144.343 (2022); MISS. CODE ANN. § 41-41-3 (2022); MO. REV. STAT. § 431.061 (2022); MONT. CODE ANN. § 41-1-402 (2021); N.J. STAT. ANN. § 9:17A-1 (West 2022); N.M. STAT. ANN. § 24-1-13.1 (2022); N.Y. PUB. HEALTH LAW § 2504 (McKinney 2022); N.D. CENT. CODE § 14-10-19 (2021); OKLA. STAT. tit. 63, § 2602 (2022); OR. REV. STAT. § 109.640 (2022); 35 PA. CONS. STAT. §§ 10101, 10103 (2022); 23 R.I. GEN. LAWS ANN. § 23-4.6-1 (2022); TEX. FAM. CODE ANN. § 32.003 (West 2021); VA. CODE ANN. § 54.1-2969 (2022).

treatment,<sup>243</sup> treatment for drug dependency or abuse,<sup>244</sup> and mental health care.<sup>245</sup>

Laws that allow minors to consent to mental-health care are particularly emblematic of important norms relevant to judicial bypass. First, these laws demonstrate that minors with some indicia of maturity can make their own health decisions without their parents' consent. Connecticut law, for example, provides that minors may consent to their own outpatient mental-health treatment if, among other things, the "minor is mature enough to participate in treatment

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243. ALA. CODE § 22-8-6 (2022); ALASKA STAT. § 25.20.025(a)(4) (2022); ARK. CODE ANN. § 20-16-508 (2022); CAL. FAM. CODE § 6926 (West 2022); CAL. HEALTH & SAFETY CODE § 121020 (West 2022); COLO. REV. STAT. § 25-4-409 (2022); CONN. GEN. STAT. § 19a-216 (2022); DEL. CODE ANN. tit. 16, § 715 (2021); FLA. STAT. § 384.30 (2022); GA. CODE ANN. § 31-17-7 (2022); HAW. REV. STAT. § 577A-2 (2022); 410 ILL. COMP. STAT. 210/4 (2022); IND. CODE § 16-36-1-3 (2022) (allowing minors ages 12 or older to consent); KY. REV. STAT. ANN. § 214.185 (West 2022); LA. STAT. ANN. § 40:1121.8 (2022); ME. STAT. tit. 32, §§ 2595, 3292 (2022); MD. CODE ANN., HEALTH-GEN. § 20-102 (West 2022); MICH. COMP. LAWS § 333.5127 (2022); MINN. STAT. § 144.343 (2022); MO. REV. STAT. § 431.061 (2022); MONT. CODE ANN. § 41-1-402 (2021); NEV. REV. STAT. § 129.060 (2021); N.J. STAT. ANN. § 9:17A-4 (2022); N.M. STAT. ANN. § 24-2B-3 (2022); N.D. CENT. CODE § 14-10-17 (2021); OHIO REV. CODE ANN. § 3709.241 (West 2021); OKLA. STAT. tit. 63, § 1-532.1 (2022); OR. REV. STAT. § 109.610 (2022); 35 PA. CONS. STAT. §§ 521.14a, 10103 (2022); S.D. CODIFIED LAWS ANN. § 34-23-16 (2022); UTAH CODE ANN. § 26-6-18 (West 2022); VT. STAT. ANN. tit. 18, § 4226 (2022); VA. CODE ANN. § 54.1-2969 (2022); WASH. REV. CODE § 70.24.110 (2022); W. VA. CODE § 16-4-10 (2022); WYO. STAT. ANN. § 35-4-131 (2022).
244. ALA. CODE § 22-8-6 (2022); ARIZ. REV. STAT. ANN. § 44-133.01 (2022); CAL. FAM. CODE § 6929 (West 2022) (allowing minors ages twelve or older to consent); COLO. REV. STAT. § 13-22-102 (2022); DEL. CODE ANN. tit. 16, § 2210 (2021); GA. CODE ANN. § 37-7-8 (2022); 410 ILL. COMP. STAT. 210/4 (2022); IOWA CODE § 142A.11 (2022); KY. REV. STAT. ANN. § 222.441 (West 2022); LA. STAT. ANN. §§ 40:1079.2-13 (2015); ME. STAT. tit. 32 §§ 2595, 3292, 3817 (2022); MD. CODE ANN., HEALTH-GEN. § 20-102 (West 2022); MASS. GEN. LAWS ch. 112, § 12E (2022); MINN. STAT. § 144.343 (2022); MO. REV. STAT. § 431.061 (2022); MONT. CODE ANN. § 41-1-402 (2022); NEV. REV. STAT. § 129.050 (2021); N.J. STAT. ANN. § 9:17A-4 (2022); N.D. CENT. CODE § 14-10-17 (2021); OKLA. STAT. tit. 43A, § 5-503 (2022); OKLA. STAT. tit. 63, § 2602 (2022); OR. REV. STAT. § 109.675 (2022); 71 PA. CONS. STAT. § 1690.112 (2022); TEX. FAM. CODE ANN. § 32.003 (West 2021); VT. STAT. ANN. tit. 18, § 4226 (2022); VA. CODE ANN. § 54.1-2969 (2022); W. VA. CODE § 60A-5-504 (2022).
245. CAL. FAM. CODE § 6924 (West 2020); CAL. HEALTH & SAFETY CODE § 124260 (West 2022); COLO. REV. STAT. § 12-245-203.5 (2022); CONN. GEN. STAT. § 19a-14c (2022); DEL. CODE ANN. tit. 16, § 5003 (2021); D.C. CODE § 7-1231.14 (2022); HAW. REV. STAT. § 577-29 (2022); KY. REV. STAT. ANN. § 214.185 (West 2022); MD. CODE ANN., HEALTH-GEN. § 20-104 (West 2022); MICH. COMP. LAWS § 330.1707 (2022); MONT. CODE ANN. § 53-21-112 (2021); N.J. STAT. ANN. § 9:17A-4 (2022); N.M. STAT. ANN. § 32A-6A-15 (2022); N.Y. MENTAL HYG. LAW § 33.21 (McKinney 2022); OR. REV. STAT. § 109.675 (2022); 35 PA. CONS. STAT. § 10101.1 (2022); TEX. FAM. CODE ANN. § 32.004 (West 2021); VT. STAT. ANN. tit. 18, § 8350 (2022); VA. CODE ANN. § 54.1-2969 (2022).

productively.”<sup>246</sup> Similarly, California law states that a minor can consent to mental-health treatment or counseling if “the minor . . . is mature enough to participate intelligently in the outpatient services or residential shelter services.”<sup>247</sup>

Second, these laws demonstrate an understanding that parents may not always promote their child’s well-being, and in those contexts, minors can make some health decisions over the objection of a parent. Statutes clearly contemplate conflict between minors and their parents and conclude that the minor should prevail. In D.C., for example, minors sixteen or older may legally consent to psychotropic medications if their parents refuse to consent, and the medical provider determines the minor has capacity to consent.<sup>248</sup> Just recently, in 2021, Maryland amended their law to lower the age at which minors may self-consent to mental-health care from sixteen to twelve years old.<sup>249</sup> The sponsor of the bill testified before the Senate Finance Committee that the law “alleviate[s] a barrier to care by providing flexibility for providers to make an appropriate determination if parental consent is not in the best interest of the minor child.”<sup>250</sup> Additionally, many mental-health consent laws permit the treating medical provider to notify a self-consenting minor’s parents, unless parental involvement “would be inappropriate”<sup>251</sup> or “detrimental to the minor’s”<sup>252</sup> care or well-being.<sup>253</sup> These laws demonstrate awareness of the uncomfortable truth that not all parents act in the interest of their children in all situations, and there should be room for mature minors, alongside their doctor or other health-care provider, to

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246. CONN. GEN. STAT. § 19a-14c (2021).

247. CAL. FAM. CODE § 6924 (2020).

248. D.C. CODE § 7-1231.14 (2022).

249. 2021 Md. Laws 0041 (codified at MD. CODE ANN., HEALTH-GEN. § 20-104 (West 2021)).

250. *Mental Health Access Initiative: Hearing on S.B. 41 Before the S. Comm. on Fin.*, 2021 Leg., 443d Sess., at 03:01:46 (Md. 2021) (statement of Sen. Malcom Augustine, Member, S. Fin. Comm.), [https://mgaleg.maryland.gov/mgawebbsite/Committees/Media/false?cmte=fin&ys=2021RS&clip=FIN\\_2\\_2\\_2021\\_meeting\\_1&url=https%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F2c7a8b00-782c-49f5-98f8-d64boeco1f36%2F%3Fcatalog%2Fo3e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D10765085](https://mgaleg.maryland.gov/mgawebbsite/Committees/Media/false?cmte=fin&ys=2021RS&clip=FIN_2_2_2021_meeting_1&url=https%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F2c7a8b00-782c-49f5-98f8-d64boeco1f36%2F%3Fcatalog%2Fo3e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D10765085) [https://perma.cc/XY6D-HUV2]; see also *Testimony Before the House Health and Government Operations Committee \*\*Support\*\* SB 41*, NAT’L ASS’N OF SOC. WORKERS, (Mar. 23, 2021), [https://mgaleg.maryland.gov/cmte\\_testimony/2021/hgo/1q8E7EPpilQAod-4Gr-yU7Pml9LMQdyYw.pdf](https://mgaleg.maryland.gov/cmte_testimony/2021/hgo/1q8E7EPpilQAod-4Gr-yU7Pml9LMQdyYw.pdf) [https://perma.cc/5CGR-RCTP] (“While we know that the involvement of parents and caregivers is important when addressing the mental health needs of minors, we also know that this is not always possible; and in some cases, may be of harm to the minor.”).

251. HAW. REV. STAT. § 577-29 (2021).

252. COLO. REV. STAT. § 12-245-203.5 (2022).

253. See also, e.g., CAL. FAM. CODE § 6924 (West 2020) (stating that mental-health providers should attempt to involve parents “unless, in the opinion of the professional person who is treating or counseling the minor, the involvement would be inappropriate”).

make health-care decisions without parental involvement. When it comes to certain forms of stigmatizing, life-altering health care, state laws therefore allow minors to access such care without the involvement of their parents.

Several other common types of statutes outside of the context of health care further demonstrate legislatures' understanding that minors can and should make decisions about their own futures, even when those decisions conflict with their parents' views. For example, approximately a dozen states require that minors of a certain age consent to their own adoption,<sup>254</sup> and several states require that a child consent to the reinstatement of parental rights over themselves.<sup>255</sup> These statutes provide further evidence of a general consensus within state statutory schemes that minors can and should be given autonomy and control over important aspects of their own lives.

It is true that not all states have explicitly adopted the mature minor doctrine. However, as mentioned in Section III.A, at least six have formally adopted it.<sup>256</sup> Regardless, even in the absence of the mature minor doctrine, the statutory background in states across the country recognizes that at least some minors can consent to all or some forms of health care. Judicial-bypass procedures, by which minors can self-consent to abortion after a showing of some level of maturity and understanding, therefore are not inconsistent with a general legislative scheme. Legal challenges to judicial-bypass provisions of parental-involvement laws, based on a false notion that these laws were only permissible due to the constitutional right of minors to abortion, should thus fail. Judicial bypass does not depend on the constitutional right to abortion—judicial bypass can find grounding in both the common law and general state statutory norms.

#### IV. POLICY SUGGESTIONS

Although we have spent this Note urging that judicial bypass be preserved, we are acutely aware that it is far from an ideal process for all parties involved—

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254. ALASKA STAT. § 25.23.040(a)(5) (2022); DEL. CODE ANN. tit. 13, § 907(b) (2022); D.C. CODE § 16-304(b)(1) (2022); IND. CODE § 31-19-9-1(a)(5) (2022); MASS. GEN. LAWS ch. 210, § 2 (2022); OKLA. STAT. tit. 10, § 7503-2.1(C) (2022); OR. REV. STAT. § 109.328 (2022); TENN. CODE ANN. § 36-1-117(i)(1) (2022); UTAH CODE ANN. § 78B-6-120(1)(a) (West 2022); VT. STAT. ANN. tit. 15A, § 2-401(c) (2022); WASH. REV. CODE ANN. § 26.33.160(1)(a) (West 2022).

255. See DEL. CODE ANN. tit. 13, § 1116(a)(5) (2021); ME. STAT. tit. 22, § 4059(8)(C)(4) (2011); NEV. REV. STAT. § 128.190(2)(a) (2007).

256. See *supra* Section III.A for a discussion of case law from Illinois, Kansas, Maine, Mississippi, Tennessee, and West Virginia.

most importantly the minors who rely upon it.<sup>257</sup> A total absence of state-mandated parental involvement in the abortion decisions of children would be consistent with the proper, modern understanding of parental rights that we articulate in this Note, as well as the state common-law and statutory norms recognizing a minor's ability to consent to health care in other contexts. In fact, in recognition of the harm caused by denying minors autonomy over their own reproductive health care, we would argue that minors ought to have total freedom to choose, or not choose, an abortion without the involvement of either a parent or a judge.<sup>258</sup> However, this position would require striking all parental-involvement laws, which may not be politically feasible in states where parental-involvement laws have been on the books for a long time, or where there is strong support for such laws.

As we discussed in the Introduction, we predict that some states' parental-involvement laws will shift in the wake of the Court's decision in *Dobbs*.<sup>259</sup> To that end, now may be an inflection point to influence the judicial-bypass procedure moving forward. Parental-involvement laws will likely become stronger and more widespread amongst states that do not go as far as banning abortion altogether, and judicial bypass will remain an important way that many minors are able to access abortion care. In this final Part, we offer concrete suggestions to improve judicial bypass to make it a more reliable and effective process. We discuss both literature on minors' experiences with the judicial-bypass process and the existing case law of individual bypass cases across the country in order to inform our suggestions. These improvements are necessary, but certainly not sufficient, to ensure that the judicial-bypass process produces predictable, foreseeable results and to eliminate procedural and practical barriers so that a minor who meets the criteria of maturity and/or best interests will properly have their petition granted. We stress that, despite the flaws of judicial bypass described below, the process is necessary and must be preserved and improved.

**Recommendation 1:** Set strict deadlines for court action on judicial-bypass petitions. At most, upon receipt of a petition, the court should set a hearing within two calendar days, after which the judge must rule immediately.

Many of the concrete harms to minors of judicial bypass can be traced at least in part to delays in accessing care that the process causes. A delay of even one or two days can foreclose a person's ability to access medication abortion instead of

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257. See generally Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 589 (2002) (analyzing how "the Supreme Court used a construct of children's constitutional 'rights' to restrict the rights of children").

258. See *infra* notes 290-295 and accompanying text.

259. See *supra* notes 10-13 and accompanying text.

aspiration abortion, to access a one-day procedure instead of a two-day procedure, or to obtain an abortion altogether. Medication abortion<sup>260</sup> is generally available through ten weeks of pregnancy (as measured from the first day of a person's last menstrual period (LMP)).<sup>261</sup> People may prefer a medication abortion for a variety of reasons<sup>262</sup> – not the least of which is that it is usually less expensive than an in-clinic abortion.<sup>263</sup> Empirical research has shown that judicial bypass increases the out-of-pocket cost of an abortion to a minor, due mostly to increased procedure costs from delay.<sup>264</sup> Similarly, a delay of a few days may require a more complicated abortion procedure, including one that must be completed over the course of two days. Typically, health-care practitioners are able to complete an abortion using only manual or vacuum aspiration before sixteen weeks LMP.<sup>265</sup> After that time, a practitioner may need to also use instruments in a procedure known as dilation and evacuation (D&E).<sup>266</sup> Although still extremely safe, D&E is riskier than an aspiration,<sup>267</sup> and often pricier.<sup>268</sup> Finally,

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260. Medication abortion refers to the use of two medications (mifepristone and misoprostol) to end and expel a pregnancy in a process similar to a miscarriage. See *The Abortion Pill*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill> [<https://perma.cc/N9M8-MY28>].

261. *The Safety and Quality of Abortion Care in the United States*, NAT'L ACADS. SCIS., ENG'G, & MED. 51 (2018), <https://nap.nationalacademies.org/catalog/24950/the-safety-and-quality-of-abortion-care-in-the-united-states> [<https://perma.cc/TFK6-ZTE2>].

262. See, e.g., Erin Wingo, Lauren J. Ralph, Shelly Kaller & M. Antonia Biggs, *Abortion Method Preference Among People Presenting for Abortion Care*, 103 *CONTRACEPTION* 269, 274 (2021) (explaining how “some perceive that medication abortion provides them greater privacy and autonomy over the process”); Tara Shochet & James Trussell, *Determinants of Demand: Method Selection and Provider Preference Among US Women Seeking Abortion Services*, 77 *CONTRACEPTION* 397, 400 (2008) (describing how patients in a study who selected medication abortion “commonly did so to be home for the abortion (34%), to avoid the aspiration procedure (20%) and/ or because they believed that the method was less invasive (20%), less painful (20%), less frightening (19%) or more natural (19%)”).

263. See, e.g., Pam Belluck, *Abortion Pills Take the Spotlight as States Impose Abortion Bans*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/26/health/abortion-medication-pills.html> [<https://perma.cc/H5FQ-56SD>].

264. See Allison L. Gilbert, Isabel R. Fulcher, Alischer A. Cottrill & Elizabeth Janiak, *The Financial Burden of Antiquated Laws: The Case of Massachusetts' Parental Involvement Law for Abortion*, 2 *WOMEN'S HEALTH REPS.* 550, 551 (2021).

265. *The Safety and Quality of Abortion Care in the United States*, *supra* note 261, at 63.

266. *Id.*

267. *Id.* at 63–65.

268. See Rachel K. Jones & Jenna Jerman, *Time to Appointment and Delays in Accessing Care Among U.S. Abortion Patients*, *GUTTMACHER INST.* 13 (2016), [https://www.guttmacher.org/sites/default/files/report\\_pdf/delays-in-accessing-care.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/delays-in-accessing-care.pdf) [<https://perma.cc/2JS4-T9YQ>].

delay may push a minor past the gestational age limit at which abortion is available altogether in the state.<sup>269</sup> Adolescents already tend to discover that they are pregnant later than do adults, owing to myriad factors such as frequent lack of a regular menstrual cycle and less familiarity with the symptoms of pregnancy.<sup>270</sup> Thus, time is utterly of the essence for a young person accessing abortion care.

The judicial-bypass process has been shown to add significant delay to a young person's access to abortion. One study of adolescents in Massachusetts, for example, found that minors using judicial bypass obtained their abortions an average of six days later than those using parental consent from the time of their first call to a clinic.<sup>271</sup> Additionally, studies of mandatory waiting periods for abortion care show that delays of one to two days translate to much longer delays in practice.<sup>272</sup> Currently, every parental-involvement law contains deadlines for courts acting on petitions – those time limits vary widely, however.<sup>273</sup> To alleviate the delays associated with the judicial-bypass process, we recommend that judges be required to hold a hearing on a filed petition within two days and to rule directly thereafter.

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269. See Kari White et al., *Parental Involvement Policies for Minors Seeking Abortion in the Southeast and Quality of Care*, 19 *SEXUALITY RSCH. & SOC. POL'Y* 264, 269 (2022).
270. See Am. Acad. Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion*, 139 *PEDIATRICS* 1, 5 (2017) (citing Lawrence B. Finer, Lori F. Frohworth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 *CONTRACEPTION* 334, 334-44 (2006)); Onur Altindag & Ted Joyce, *Judicial Bypass for Minors Seeking Abortion in Arkansas Versus Other States*, 107 *AM. J. PUB. HEALTH* 1266, 1270 (2017).
271. Elizabeth Janiak et al., *Massachusetts' Parental Consent Law and Procedural Timing Among Adolescents Undergoing Abortion*, 133 *OBSTETRICS & GYNECOLOGY* 978, 978, 982 (2019); see also White et al., *supra* note 269, at 269 (describing how the judicial-bypass process frequently prolongs the time it takes for minors to obtain abortions); Lauren J. Ralph, Lorie Chaiten, Emily Werth, Sara Daniel, Claire D. Brindis & M. Antonia Biggs, *Reasons for and Logistical Burdens of Judicial Bypass for Abortion in Illinois*, 68 *J. ADOLESCENT HEALTH* 71, 74-75 (2021) (same).
272. See Jessica N. Sanders, Hilary Conway, Janet Jacobson, Leah Torres & David K. Turok, *The Longest Wait: Examining the Impact of Utah's 72-Hour Waiting Period for Abortion*, 26 *WOMEN'S HEALTH ISSUES* 483, 485 (2016); Kari White, *Travel for Abortion Services in Alabama and Delays Obtaining Care*, 27 *WOMEN'S HEALTH ISSUES* 523, 524 (2017); Jason M. Lindo & Mayra Pineda-Torres, *New Evidence on the Effects of Mandatory Waiting Periods for Abortion 1-5* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26228, 2020); Theodore J. Joyce, Stanley K. Henshaw, Amanda Dennis, Lawrence B. Finer & Kelly Blanchard, *The Impact of State Mandatory Counseling and Waiting Period Laws on Abortion: A Literature Review*, *GUTTMACHER INST.* 9 (2009), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/MandatoryCounseling.pdf> [<https://perma.cc/Y4Z9-2JD4>].
273. Louisiana, for example, requires a hearing to be set within four days after a petition is filed, *LA. STAT. ANN.* § 40:1061.14(B)(3)(a)(2021), whereas Idaho requires a hearing to be held within 48 hours, excluding weekends and holidays, *IDAHO CODE ANN.* § 18-609A(6) (West 2015).

**Recommendation 2:** Do not limit venue. Minors should be able to file a judicial-bypass petition in any of the courts of competent jurisdiction in the state, without limits on geography. This goes for both resident and out-of-state minors.

Some states have limited the venue in which a minor may file a judicial-bypass petition to the court with jurisdiction over the geographical area wherein the minor resides.<sup>274</sup> This is unnecessarily and arbitrarily limiting.<sup>275</sup> A minor may have privacy concerns exacerbated by such a requirement.<sup>276</sup> A family member of the minor or an adult who knows the minor otherwise may work at the local court, thereby jeopardizing the minor's anonymity. Aside from employees, a minor is generally more likely to run into someone they know at their local court, especially in lower population areas. This fact alone may dissuade a minor from seeking a needed bypass to which they would be entitled. Additionally, such venue restrictions may have the effect of prohibiting altogether an out-of-state minor from seeking a bypass in that state.<sup>277</sup> In some places, venue is critical because only a few judges will even hear judicial-bypass cases.<sup>278</sup> Judges in some

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274. See, e.g., *In re Anonymous*, 812 So. 2d 1218, 1219-20 (Ala. Civ. App. 2001) (denying a minor's judicial-bypass petition for lack of jurisdiction).

275. See generally Bella Mancini Pori, Note, "What Makes You Think You Can Do That?": How Venue Restrictions Prevent Access to Abortion for Minors in Arkansas, 42 *CARDOZO L. REV.* 685 (2021) (contending that venue restrictions can prevent minors from accessing abortion); Shelia Cheaney & Laura Smith, *Staying Open: How Restricting Venue in Texas's Judicial Bypass Cases Would Hurt Minors and Violate the Constitution*, 9 *SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST.* 45, 61, 64 (2006) (same).

276. One early examination of judicial bypass in Minnesota found that it was not unusual for "as many as 23 strangers" to learn of a teenager's pregnancy as she wound her way through the court process. *REPROD. FREEDOM PROJECT, PARENTAL NOTICE LAWS: THEIR CATASTROPHIC IMPACT ON TEENAGERS' RIGHT TO ABORTION*, ACLU FOUND. 12 (1986). See also, e.g., *In re Moe*, 817 N.E.2d 817 (Mass. App. Ct. 2004) (unpublished table decision) (exemplifying a petitioner's anonymity regarding her abortion request); Rachel Rebouché, *Report of a National Meeting: Parental Involvement Laws and the Judicial Bypass*, 37 *MINN. J.L. & INEQ.* 21, 32 (2019) (noting that some minors "travel to neighboring counties within a state because the closest court will not hear petitions or has proven hostile to petitioners").

277. See, e.g., Verified Petition for Declaratory Judgment Declaring Act 482 of the 2021 Regular Legislative Session Unconstitutional and for Temporary Restraining Order Preliminary and Permanent Injunction at 8, *Lift La. v. State* (19th Jud. Dist. Ct., Parish of E. Baton Rouge July 29, 2021) [hereinafter Verified Petition] (challenge to new bypass requirements in Louisiana which, *inter alia*, limited venue to the parish in which a minor resides and thereby prohibited out-of-state minors from seeking a bypass in the state); see also *In re Doe 07-B*, 973 So. 2d 627, 628, 630 (Fla. Dist. Ct. App. 2008) (reversing trial court that had dismissed the petition of a Georgia-resident minor for lack of jurisdiction).

278. Rebouché, *supra* note 276, at 38; Caroline A. Placey, Comment, *Of Judicial Bypass Procedures, Moral Recusal, and Protected Political Speech: Throwing Pregnant Minors Under the Campaign Bus*, 56 *EMORY L.J.* 693, 696 (2006) (noting that in several states "judges have publicly announced their refusal to hear any case in which a girl seeks judicial bypass").



geographic areas routinely recuse themselves from bypass cases on moral grounds, refusing to hear them altogether.<sup>279</sup> Accordingly, we recommend that venue be proper anywhere geographically in the state.

**Recommendation 3:** Train judges and other court personnel on the judicial-bypass process.

The judicial-bypass procedure is meaningless if a minor is unable to access it due to court staff's lack of familiarity with the process (or outright refusal to help). Mystery-caller research in several states has shown a stunning ignorance of the bypass process among court personnel.<sup>280</sup> One study of courts in Alabama, Pennsylvania, and Tennessee, for example, found that "[s]ome 51 percent of the courts . . . proved absolutely or materially ignorant of their responsibilities under their states' judicial-bypass provisions."<sup>281</sup> Even in courts where information was eventually accessible, reaching that point took repeated phone calls— as many as twelve or seventeen.<sup>282</sup> Training court personnel and judges can help ensure that the judicial-bypass process functions effectively and efficiently.<sup>283</sup>

**Recommendation 4:** Allow for hearings to be held outside of school hours and via video conference.

Most minors seeking judicial bypass are currently enrolled in school. To attend court in the middle of the day, therefore, is often no small task. Minors may

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279. See generally Lauren Treadwell, Note, *Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Refusals*, 58 HASTINGS L.J. 869, 870 (2007) (noting the prevalence of routine judicial recusal from bypass cases "[i]n states as varied as Tennessee, Minnesota, Pennsylvania, and Alabama").

280. HELENA SILVERSTEIN, *GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS* 39-93 (2007); Stephanie Loraine Pineiro & Erin Carroll, *The Judicial Waiver Process in Florida Courts: A Report*, LAWYERING FOR REPROD. JUST. 6 (2019) (finding that over half of counties in Florida were entirely unprepared to assist a minor in the judicial-bypass process); Verified Petition, *supra* note 277, at 4-5 (noting that, as of the week of the case's filing, "a phone survey of every Clerk of Court Office in Louisiana revealed that not a single Court outside of Orleans and Caddo has the judicial bypass application forms, notwithstanding that every Clerk of Court has been required to have the forms on hand"); Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175, 188-89, 190 (2011); see also J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61, 140 (2003) (describing additional logistical difficulties).

281. SILVERSTEIN, *supra* note 280, at 69.

282. *Id.* at 77, 79.

283. Rebouché, *supra* note 276, at 36 ("Some stakeholders spoke of success in hosting trainings for a court; often judges can open the door to conversations and trainings with other judges.").

experience difficulty missing school.<sup>284</sup> Even where they are able to do so, absence from school may be brought to the attention of their parents and compromise the necessary confidentiality of the judicial-bypass process.<sup>285</sup> We therefore recommend that judges be accommodating in scheduling hearings and allow for hearings to take place outside of school hours. Minors also often lack access to transportation.<sup>286</sup> Even if a minor can drive, which many cannot, they might lack reliable access to a car. Having to arrange for transportation to and from court may further jeopardize a minor's privacy.<sup>287</sup> The barrier of transportation is even more acute for minors petitioning a court far away from where they live, owing to any of the venue problems discussed above. We recommend that courts hold hearings via video conference when that is a minor's preference.<sup>288</sup>

**Recommendation 5:** Clearly lay out the factors that judges are to consider in adjudicating a judicial-bypass petition in the statute, court rules, or other binding judicial guidance.

The two standards to be adjudged in the judicial-bypass process, "maturity" and "best interest," are extremely amorphous. Studies have shown that there is little rhyme or reason to the ways judges make the required determinations;

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284. See *id.* at 31 ("When still enrolled in school . . . youth may miss class for clinic and court appointments or may have to drop out of extracurricular activities."); Hannah Matthews, *Jane's Due Process Continues to Help Teens in Texas Access Abortion*, TEEN VOGUE (Oct. 1, 2021), <https://www.teenvogue.com/story/janes-due-process-texas-teens-abortion> [https://perma.cc/25KJ-5Z8J] (recounting the story of a minor who went through the judicial-bypass process and had to invent excuses to miss school); Rebouché, *supra* note 280, at 191 ("[A] minor seeking a bypass might take several unexcused school absences, which can ultimately lead to expulsion or truancy charges.").

285. Rebouché, *supra* note 276, at 31 (explaining that in some instances "[school] personnel notified parents of absences, despite those absences being excused").

286. *Id.* at 31-32; Ehrlich, *supra* note 280, at 140 ("Many of the young women also recounted difficulties in arranging to get to court. Transportation was often hard to obtain and unreliable."); Veronika Grando, *At 17, I Had to Go to Court to Fight for My Abortion*, POPSUGAR (Apr. 24, 2019), <https://www.popsugar.com/news/Do-Teenagers-Need-Parent-Permission-Abortion-46027085> [https://perma.cc/ZD3Q-65N6]. In one study of interviews with minors using judicial bypass in Texas, the authors highlighted minors' need to arrange transportation and quoted one adolescent: "The courthouse was really far from my house. And then I had to find a ride there." Kate Coleman-Minahan, Amanda Jean Stevenson, Emily Obront & Susan Hays, *Young Women's Experiences Obtaining Judicial Bypass for Abortion in Texas*, 64 J. ADOLESCENT HEALTH 20, 22 (2019); see also Rebouché, *supra* note 280, at 191 ("A trip (or trips) of any significant length can be extremely daunting for a young woman who may not have a driver's license, access to a car, or money for travel and related costs.").

287. Rebouché, *supra* note 276, at 31.

288. See Rebouché, *supra* note 280, at 221 (noting the potential promise of using teleconferences for bypass hearings).

standardization is wanting, to say the least.<sup>289</sup> In order to ensure that the judicial-bypass process is functioning as intended and to eliminate the risk that judges subject minors to unnecessarily probing and even humiliating questioning, states should enumerate the particular facts that judges are to consider in making these assessments.

Of all the literature that examines judicial bypass, the lion's share examines the stigma that the process embodies, reifies, and inflicts on the minors who rely on it. Judicial bypass requires that minors "perform maturity" to judges who "evaluate [their] performances on the basis of their adherence to gender and age conventions."<sup>290</sup> Bypass hearings serve to "punish" the minor for making the decision to seek an abortion by humiliating them in court.<sup>291</sup> Evidence shows that this goal is realized: minors who have gone through the judicial-bypass process report it being a "frightening, nerve-wracking, and humiliating experience."<sup>292</sup> As one study of the experiences of adolescents in Texas found, "State actors – including judges and [guardians ad litem] who under the law should act in the best interest of the minor – enacted abortion stigma, humiliating adolescents by requiring them to recount their full sexual history and family traumas and publicly shamed their abortion decisions in court."<sup>293</sup> Although not a panacea, specifically listing and limiting the factors that judges are to consider in deciding judicial-bypass petitions can help mitigate the stigma that pervades the procedure. This would go a long way toward improving a necessary process.

Delineating what judges are to consider in deciding bypass petitions also serves a crucial notice role. Putting to one side the propriety of the factors a state decides its judges should consider,<sup>294</sup> listing them in a statute, court rule, or

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289. See, e.g., Christine Cregan Sensibaugh & Elizabeth Rice Allgeier, *Factors Considered by Ohio Juvenile Court Judges in Judicial Bypass Judgments: A Policy-Capturing Approach*, 15 POL. & LIFE SCI. 35, 43-45 (1996); Susanne Yates & Anita J. Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 AM. J. PUB. HEALTH 646, 648-49 (1988); see also Anna C. Bonny, *Parental Consent and Notification Laws in the Abortion Context: Rejecting the "Maturity" Standard in Judicial Bypass Proceedings*, 11 U.C. DAVIS J. JUV. L. & POL'Y 311, 322-23 (2007) (discussing the scattershot manner in which judges have determined "maturity").

290. Brian S. Amsden, *Performing Maturity in the Parental Consent and Notification Judicial Bypass Procedure*, 12 COMM'N & CRITICAL/CULTURAL STUDS. 1, 3 (2015). See generally Khiara M. Bridges, *An Anthropological Meditation on Ex Parte Anonymous – A Judicial Bypass Procedure for an Adolescent's Abortion*, 94 CALIF. L. REV. 215 (2006) (examining the expectations of performance embedded in one Alabama Supreme Court judicial-bypass opinion).

291. Carol Sanger, *Decision Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 418 (2009).

292. Ehrlich, *supra* note 280, at 173.

293. Coleman-Minahan et al., *supra* note 286, at 24.

294. A determination of what factors a state *should* consider is outside the scope of this Note, and could be a topic for further explanation in future scholarship.

other binding and publicly available guidance means minors can at least be aware of those requirements and proceed accordingly. For example, judges have often privileged a minor's having consulted with the clinic or practitioner who is going to provide the abortion.<sup>295</sup> If a state wishes for that to be a consideration, it should be listed in the statute. Minors, and those assisting them, can then set themselves up for success in the bypass process, as opposed to being surprised by apparently secret requirements that a particular judge has for granting a petition. A minor can hardly be expected to prove their maturity if a judge has *carte blanche* to invent what is needed to do so and change it from one hearing to the next.

*Recommendation 5a:* Require judges to address the enumerated factors in a written opinion.

Requiring a written opinion for judicial-bypass petitions is a critical way to guard against bias. The need to justify a decision may dissuade a judge from denying a petition on inappropriate grounds. Indeed, appellate state courts have sometimes reversed trial courts' denial of judicial-bypass petitions in part for failure to issue specific findings as required by statute.<sup>296</sup>

*Recommendation 5b:* Prohibit consideration of factors that constitute an assertion of the judge's personal opinions about abortion or adolescent sexual activity and pregnancy.

Judges hearing judicial-bypass cases have often injected their own biases and opinions about adolescent sexual activity, pregnancy, and abortion into their decisions. This is evident in reasoning that trades on stereotypes surrounding the pregnant adolescent seeking an abortion. The Mississippi Supreme Court, for example, reasoned in denying a minor's bypass petition that she was "afraid of the responsibility of motherhood."<sup>297</sup> An Ohio court noted in denying a petition that "[t]his is the [minor's] third pregnancy, indicating she is in need of parental guidance."<sup>298</sup> Other judges have considered a minor's understanding of the supposed emotional or psychological "trauma" of an abortion.<sup>299</sup> Still others have

295. See, e.g., *In re Doe*, 19 S.W.3d 346, 361 (Tex. 2000).

296. See, e.g., *In re Anonymous*, 782 So. 2d 791, 792-93 (Ala. Civ. App. 2000); *In re Anonymous*, 711 So. 2d 1043, 1046 (Ala. Civ. App. 2000); *In re Anonymous*, 597 So. 2d 225, 226 (Ala. Civ. App. 1992); *In re Anonymous*, 956 So. 2d 427, 428-29 (Ala. Civ. App. 2006); *In re Doe*, 866 P.2d 1069, 1075-76 (Kan. Ct. App. 1994); *In re Doe*, 113 So. 3d 882, 889 (Fla. Dist. Ct. App. 2012); *In re Doe*, 46 So. 3d 1172, 1174 (Fla. Dist. Ct. App. 2010); *In re Doe*, 932 So. 2d 278, 282 (Fla. Dist. Ct. App. 2005); *In re Doe* 10, 78 S.W.3d 338, 340-41 (Tex. 2002).

297. *In re A.W.*, 826 So. 2d 1280, 1281 (Miss. 2002).

298. *In re Doe*, No. 89968, 2007 WL 1969784, at \*2 (Ohio Ct. App. June 13, 2007).

299. See, e.g., *In re Anonymous*, 618 So. 2d 722, 725 (Ala. 1993); *In re Anonymous*, 869 So. 3d 498, 502 (Ala. Civ. App. 2003); *In re Anonymous*, 964 So. 2d 1239, 1242 (Ala. Civ. App. 2007); *In re L.P.*, 64 So. 3d 850, 851 (La. Ct. App. 2011); *In re Doe*, 166 P.3d 293, 296 (Colo. App. 2007).

required minors to consult an antichoice organization, privileged their having done so, or penalized their failure to have done so.<sup>300</sup> Judges should not be permitted to use such personal opinions as “evidence” of a minor’s immaturity. Recognizing this, appellate courts have sometimes reversed trial courts’ denials of petitions for evidence of improper bias.<sup>301</sup> In enumerating factors to be considered, states should be cautious not to facilitate bias.

The foregoing recommendations are by no means an exhaustive list of the ways states can improve their judicial-bypass procedures. Rather, they are meant as a starting point for improving an imperfect but necessary process, and to help it achieve accurate, reliable results for minors in need of access to reproductive health care.

## CONCLUSION

After the Supreme Court overturned *Roe v. Wade* and abolished the federal constitutional right to abortion in *Dobbs*, numerous states immediately banned abortion altogether. In other states, previously enjoined bans on abortion after as little as six weeks of pregnancy newly took effect.<sup>302</sup> Such bans on abortion are currently unencumbered by a federal constitutional right to abortion. But does the lack of such a right mean that other states – those that will not ban abortion altogether but where antiabortion activists will find success chipping away at access to abortion, both practically and legally – must get rid of the judicial-bypass provisions of their parental-involvement laws?

In this Note, we prove that the answer is *no*. States need not do away with judicial bypass simply because minors no longer have a countervailing constitutional right to abortion that must be balanced against the parental right to withhold consent. Parental rights, properly understood, are not absolute. They exist only insofar as they protect the interests of the child, and they should command no respect when they conflict directly with the expressed wishes of a mature child

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300. See, e.g., *In re Anonymous*, 618 So. 2d 717, 718 (Ala. Civ. App. 1992); *In re Anonymous*, 8 So. 3d 1004, 1005 (Ala. Civ. App. 2008).

301. See, e.g., *In re Anonymous*, 733 So. 2d 429, 432-33 (Ala. Civ. App. 1999); *In re Anonymous*, 810 So. 2d 786, 794-95 (Ala. 2001); *In re Doe 13-A*, 136 So. 3d 723, 748 (Fla. Dist. Ct. App. 2014).

302. See, e.g., Jeffrey Collins, *Court Allows SC to Enforce More Restrictive Abortion Law*, AP NEWS (June 27, 2022), <https://apnews.com/article/abortion-us-supreme-court-politics-health-south-carolina-cd8c2c29deda28b3edcdb7e6bbf90bc8> [https://perma.cc/UW7M-SB3S]; Morgan Trau, *Ohio Attorney General Dave Yost Has Six-Week Abortion Ban Put into Effect*, OHIO CAP. J. (June 27, 2022 3:55 AM), <https://ohiocapitaljournal.com/2022/06/27/ohio-attorney-general-dave-yost-has-six-week-abortion-ban-put-into-effect> [https://perma.cc/Z799-WXUY].

competent to make their own health-care decisions. Additionally, judicial bypass is defensible based on other common-law doctrines and statutory schemes that recognize that some minors can, or even must, be able to independently consent to some health care.

Justices Breyer, Kagan, and Sotomayor powerfully expressed in their dissent in *Dobbs* that

*Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. . . . Even in the face of public opposition, we uphold the right of individuals – yes, including women – to make their own choices and chart their own futures.<sup>303</sup>

A proper understanding of the rights of both parents and children shows that minors also have the right to chart their own futures. Judicial bypass provides an important, albeit imperfect, means for minors to do just that.

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303. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2320 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).