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# CHILD SACRIFICES: *THE* PRECARITY OF MINORS' AUTONOMY AND BODILY INTEGRITY AFTER *DOBBS*

Teri Dobbins Baxter\*

## INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that there is no constitutional right to abortion.<sup>1</sup> The decision has had a devastating impact on people seeking abortions in many states,<sup>2</sup> and it will have an even more profound effect on the rights and lives of minors.<sup>3</sup> Pregnant minors face greater risks than pregnant adults when they are forced to continue a pregnancy that can harm their physical and mental health and their educational and financial futures.<sup>4</sup> Very young minors are incapable of consenting to the sexual acts that result in pregnancy, but many states require

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<sup>1</sup> *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2284 (2022).

<sup>2</sup> See, e.g., Plaintiffs' Original Petition for Declaratory Judgment and Application for Permanent Injunction 1–2, *Zurawski v. Texas*, (Tex. 353rd Dist. Ct. Mar. 6, 2023) (No. D-1-GN-23-000968) (detailing plaintiffs' difficulty or inability to get abortions). One plaintiff was unable to get an abortion until her condition was life-threatening, and she suffered permanent damage to her fallopian tube as a result. *Id.* at 1. A second plaintiff learned that one of her twin fetuses was not viable and had to travel to another state to obtain an abortion in order to save her life and the life of the surviving twin. *Id.* See also Jasmine Cui, Chloe Atkins & Sarah Kaufman, *One Year Without Roe: Data Shows How Abortion Access Has Changed in America*, NBC NEWS (June 22, 2023), <https://www.nbcnews.com/data-graphics/dobbs-abortion-access-data-ro-v-wade-overturned-rcna88947> [<https://perma.cc/C7DY-X26M>] (“Data around abortion access reveals an increasingly unequal health care system for women, in which those with the fewest resources are increasingly the least likely to be able to get abortions.”).

<sup>3</sup> Megan Burbank, *Long Uncertain, Young People's Access to Abortion is More Complicated Than Ever*, NPR (Aug. 13, 2022), <https://www.npr.org/sections/health-shots/2022/08/13/1116775457/abortion-access-ro-v-wade-dobbs-opinion> [<https://perma.cc/CWC8-FY54>] (noting that access to abortion is even more difficult for many minors after the *Dobbs* decision).

<sup>4</sup> See discussion *infra* Part III.

even these young rape victims to sacrifice their health and well-being—and potentially their lives—for the sake of a future child.<sup>5</sup>

But the *Dobbs* opinion also calls into question other constitutional rights of minors. In *Dobbs* the Supreme Court interpreted its prior holdings to recognize a substantive right under the Fourteenth Amendment Due Process Clause *only* for (1) “rights guaranteed by the first eight Amendments,”<sup>6</sup> and (2) a “select list” of unenumerated fundamental rights.<sup>7</sup> “In deciding whether a right falls into either of these categories, the Court has long asked whether the right is ‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’” If a right does not fall within either of those categories, it is not entitled to substantive constitutional protection under that provision.<sup>8</sup> The Court concluded that the right to abortion was not protected by the Constitution.<sup>9</sup>

This limited view of the Due Process Clause implicates other rights of minors that were previously upheld under the substantive due process doctrine, such as the right to access contraception and the right to make some medical decisions. While the majority opinion rejected claims by the dissenting Justices that the decision in *Dobbs* casts doubt on other unenumerated rights,<sup>10</sup> the Court’s language limiting constitutional

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<sup>5</sup> See, e.g., Fortesa Latifi, *A 10-Year-Old Was Denied an Abortion in Ohio Because She Was More Than Six Weeks Pregnant*, TEEN VOGUE (July 6, 2022), <https://www.teenvogue.com/story/10-year-old-denied-abortion-ohio> [<https://perma.cc/A2FZ-FPBT>] (describing a 10-year-old pregnant girl’s need to travel to another state in order to obtain an abortion because Ohio banned abortions after six weeks and she was six weeks and three days pregnant).

<sup>6</sup> 142 S. Ct. at 2246.

<sup>7</sup> *Id.* (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019)).

<sup>8</sup> *Id.* The first eight Amendments initially only applied to the Federal Government, but through the doctrine of incorporation the Supreme Court has held that the majority of those rights apply to the States. *Id.*

<sup>9</sup> 142 S. Ct. at 2284. See also *id.* at 2301 (Thomas, J. concurring). While agreeing that the *Dobbs* opinion does not affect any precedent unrelated to abortion, he urged the Court to “reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*” because he believes that all substantive due process decisions are “demonstrably erroneous.” *Id.* (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring)).

<sup>10</sup> *Id.* at 2277–78 (“And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”). The Court emphasized the unique character of abortions, which ends what abortion opponents referred to as “potential life” or “unborn human beings.” *Id.* at 2258. According to the majority, the other substantive due process cases do not “involve[] the critical moral question posed by abortion” and, therefore, the decision in *Dobbs* does not undermine those decisions. *Id.*

protection to unenumerated rights that are “deeply rooted in the nation’s history and tradition” necessarily excludes rights recognized more recently, or rights that represent a break from the nation’s history and traditions.<sup>11</sup> This includes the constitutional rights of minors because minors have traditionally and historically enjoyed very few rights. In fact, children’s constitutional rights have only been articulated by the Supreme Court in recent decades.<sup>12</sup>

Some of the constitutional rights that the Court held apply to minors are derived from the express language of the Constitution.<sup>13</sup> For example, the Court has acknowledged that minors enjoy: the First Amendment right to freedom of speech,<sup>14</sup> the Fourth Amendment right to be protected against unreasonable search and seizure,<sup>15</sup> the Fifth Amendment right to due process and protection against self-incrimination,<sup>16</sup> and Eighth Amendment protection against cruel and unusual punishment.<sup>17</sup> Other rights, such as the right to not be subjected to involuntary servitude, are undoubtedly protected

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<sup>11</sup> *Id.* at 2319 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (pointing out that the right to abortion has been linked by the Court to the right to sexual privacy, same-sex marriage, and other settled freedoms involving bodily integrity, familial relationships, and procreation). “The lone rationale” for overturning the right to abortion recognized in *Roe* and *Casey* “is that the right to elect an abortion is not ‘deeply rooted in history . . . . The same could be said, though, of most of the rights the majority claims it is not tampering with.’” *Id.*

<sup>12</sup> See, e.g., Robert A. Burt, *Developing Constitutional Rights Of, In, and For Children*, 39 L. & CONTEMP. PROBS. 118 (1975) (attempting to formulate a rationale for the Supreme Court’s recent decisions recognizing the constitutional rights of parents and children); Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 1099–2100 (2011) (identifying the 1932 Supreme Court opinion in *Powell v. Alabama* as the first time the Supreme Court expressly acknowledged that children have constitutional rights); B. Jessie Hill, *Constituting Children’s Bodily Integrity*, 64 DUKE L.J. 1295, 1298 n.7 (2015) [hereinafter Hill, *Bodily Integrity*] (“Some scholarship from the 1970s onward addressed the nascent constitutional rights of children, which found recognition beginning in the 1960s.”).

<sup>13</sup> This includes rights articulated in the first eight constitutional amendments, although courts cite the Fourteenth Amendment Due Process Clause under the theory of incorporation. See 142 S. Ct. at 2246 (recognizing substantive rights under the Fourteenth Amendment Due Process Clause for “rights guaranteed by the first eight Amendments”).

<sup>14</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

<sup>15</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 336–37 (1985) (holding that the Fourth Amendment protects students from unreasonable searches by public school authorities).

<sup>16</sup> See *In re Gault*, 387 U.S. 1, 12 (1967) (articulating—for the first time—minors’ right to due process under the Fourteenth Amendment in a proceeding in which the minor is found to have engaged in illegal conduct and is committed to a state institution).

<sup>17</sup> See, e.g., *Miller v. Alabama*, 567 U.S. 460, 470 (2012) (“[M]andatory life-without-parole sentences for juveniles violate the Eighth Amendment.”).

even if they have not been expressly articulated by the Supreme Court.<sup>18</sup> While the scope and application of the rights may be adapted to account for the particular needs and vulnerabilities of minors,<sup>19</sup> the rights cannot be denied simply because of their age.<sup>20</sup>

In addition to enumerated rights, the Supreme Court has found that certain unenumerated rights are protected under the Fourteenth Amendment Due Process Clause under what has become known as the substantive due process doctrine.<sup>21</sup> Many of those rights have been characterized as liberty interests or privacy rights, and include: the right to marry,<sup>22</sup> the right to use contraception,<sup>23</sup> the right to privacy for consensual sexual activity,<sup>24</sup> the right to direct the upbringing of one's children,<sup>25</sup> and the right to refuse unwanted medical procedures.<sup>26</sup>

The Supreme Court has repeatedly held that children have many of these rights, but their rights are more limited<sup>27</sup> and are subject to the control of their parents and, to a lesser extent, the state.<sup>28</sup> For example, minors

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<sup>18</sup> Dailey, *supra* note 12, at 2100 (“Even if their rights were not litigated, children clearly had certain fundamental constitutional rights such as a Thirteenth Amendment right not to be enslaved and rights under the Due Process Clause not to be deprived arbitrarily of life or liberty.”).

<sup>19</sup> *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (“We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: 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>20</sup> *Id.* at 633 (“A child, merely on account of his minority, is not beyond the protection of the Constitution.”).

<sup>21</sup> See 142 S. Ct. at 2257–58 (acknowledging rights recognized by the Supreme Court under the doctrine of substantive due process and distinguishing those rights from the right to abortion).

<sup>22</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry a person of a different race); *Turner v. Safley*, 482 U.S. 78 (1987) (the right of prisoners to marry); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (right of same-sex couples to marry).

<sup>23</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to access contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the right to use contraceptives to unmarried persons).

<sup>24</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003) (recognizing a right to privacy for adult consensual sexual activity).

<sup>25</sup> See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (parents’ right to educate their children in private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to study a foreign language); *Wisconsin v. Yoder*, 406 U.S. 205 (1979) (holding that the First and Fourteenth Amendments prevent a state from compelling Amish children to attend school after the eighth grade).

<sup>26</sup> See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to not be forcibly sterilized).

<sup>27</sup> See *Bellotti v. Baird*, 443 U.S. 622 (1979) (“A child, merely on account of his minority, is not beyond the protection of the Constitution . . . . [T]he constitutional rights of children cannot be equated with those of adults . . .”).

<sup>28</sup> See discussion *infra* Part I.

generally are not allowed to marry without the consent of parents or court authorization, and very young minors may be denied the right to marry at all.<sup>29</sup> Likewise, statutory rape laws criminalize sexual intercourse between young minors and significantly older partners.<sup>30</sup> Nevertheless, courts have recognized that minors—especially older minors—have constitutionally protected privacy rights that empower them to make some decisions for themselves.<sup>31</sup>

Even after *Dobbs*, the Supreme Court is likely to find that many of the rights previously recognized in their substantive due process decisions are deeply rooted in the nation's history and tradition, but the Court could hold that those deep roots only apply to adults. For example, the right to bodily integrity and the right to make medical decisions will likely continue to be protected, but with the decision in *Dobbs*, it is unclear whether the Court will continue to recognize those rights for minors to the same extent as adults, or at all.

The issues become more complicated because states can choose to recognize and protect rights that are greater than those protected by the Constitution.<sup>32</sup> For example, even after *Dobbs*, many states continue to recognize a right to abortion.<sup>33</sup> But without a constitutional mandate, states may choose to restrict—or even eliminate—access for minors in favor of greater parental control over minors' ability to obtain an abortion. Similarly, minors could lose the right to obtain birth control without parental consent. Without access to abortion, this will lead to more young people giving birth

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<sup>29</sup> Teri Dobbins Baxter, *Child Marriage as Constitutional Violation*, 19 NEV. L.J. 39, 46 (2018) (noting the minimum age statutes in effect in each state and the exceptions that apply to minors).

<sup>30</sup> Leslie Y. Garfield Tenzer, *#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 UTAH L. REV. 117, 119 (2019) ("All states and the federal government have enacted a collection of crimes aimed at punishing sex between two persons when at least one is under the age of consent.").

<sup>31</sup> See discussion *infra* Parts III, IV (discussing minors' right to abortion, contraception, and medical decision-making).

<sup>32</sup> See *Mills v. Rogers*, 457 U.S. 291, 300 (1982) ("Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution.").

<sup>33</sup> See, e.g., COLO. REV. STAT. ANN. § 25-6-403 (West 2022) ("A pregnant individual has a fundamental right to continue a pregnancy and give birth or to have an abortion and to make decisions about how to exercise that right."); 775 ILL. COMP. STAT. ANN. 55/1-15 (West 2019) ("Every individual who becomes pregnant has a fundamental right to continue the pregnancy and give birth or to have an abortion, and to make autonomous decisions about how to exercise that right.").

and raising children after unplanned pregnancies.<sup>34</sup> Minors also will likely lose the right to make decisions about medical treatment, such as the gender-affirming care needed by transgender youth.<sup>35</sup> Without that treatment they can suffer extreme—even life-threatening—psychological distress.<sup>36</sup> In sum, the *Dobbs* decision could result in the loss or curtailment of their ability to make decisions that profoundly affect their lives.

This Article traces the evolution of minors' constitutional rights and the substantive due process doctrine, then examines the post-*Dobbs* rights of minors in three areas: (1) abortion, (2) medical decision-making, and (3) minors' parental rights.

Part I will review the history of minors' rights, starting with treatment of children as chattels during the early colonial period, through the twentieth century when the Supreme Court began to expressly hold that minors enjoyed significant constitutional rights. Part II will trace the origins and development of the substantive due process doctrine, including recognition of constitutional protections for parental rights, the right to marriage, and the right to make reproductive and medical decisions. This Part ends with a brief discussion of the *Dobbs* opinion and its potential impact on those rights.

Part III describes minors' right to abortion before *Dobbs* and considers how the rights of minors might differ from those of adults who seek abortions after *Dobbs*. In particular, this section acknowledges the higher risks of pregnancy and childbirth for minors and argues that banning abortions for

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<sup>34</sup> See Michael Levitt, Tinbete Ermyas & Ari Shapiro, *After the Dobbs Decision, Birth Rates Are Up in States with Abortion Ban States*, NPR (Nov. 24, 2023), <https://www.npr.org/2023/11/24/1215152734/after-the-dobbs-decision-birth-rates-are-up-in-states-with-abortion-ban-states> [<https://perma.cc/TZ4L-H6VD>] (discussing the rise in birth rates in states that have banned abortion); Karen Kaplan, *Study: Good Access to Birth Control Prevents Teen Pregnancy, Abortion*, L.A. TIMES (Oct. 1, 2014), <https://www.latimes.com/science/sciencenow/la-sci-sn-teen-pregnancy-contraception-choices-project-20141001-story.html> [<https://perma.cc/F3SM-BNCX>] (discussion project that gave teens at high risk for pregnancy free birth control and reporting that none of the teens became pregnant).

<sup>35</sup> See *L.W. v. Skrmetti*, 73 F.4th 408, 413–15 (6th Cir. 2023) (holding that parties challenging a Tennessee law banning gender-affirming surgeries and administration of hormones or puberty blockers to transgender minors were unlikely to prevail on their claims that the law violated their due process or equal protection rights); see also discussion *infra* Part IV.B (discussing minors' right to make medical decisions after *Dobbs*).

<sup>36</sup> See, e.g., Robin Fretwell Wilson, *Being Transgender in the Era of Trump: Compassion Should Pick Up Where Science Leaves Off*, 8 U.C. IRVINE L. REV. 583, 586–87 (2018) (noting the “enormous psychological distress” experienced by many transgender people and its implications for the transgender public health crisis).

those pregnant minors—especially very young minors whose pregnancies are the result of rape—violates their rights even under rational basis scrutiny. This section also considers how barring minors' access to abortion might violate the Fourteenth Amendment Equal Protection Clause if a state allows adults access to abortion but restricts access for minors. Finally, this section considers the argument that forced pregnancy could violate the Thirteenth Amendment prohibition on involuntary servitude.

Part IV examines minors' existing right to make medical decisions for themselves outside of the abortion context. While most states currently allow minors to have access to contraception and consent to certain treatments without parental notification (such as treatment for sexually transmitted infections, substance abuse treatment, and mental health treatment), those policies were enacted in part because they felt constrained by the Supreme Court's substantive due process jurisprudence. After *Dobbs*, many states are likely to scale back autonomy for minors and expand parental and state control over those decisions.

Part V discusses the seeming contradiction between the push for regulations to limit or eliminate minors' ability to terminate a pregnancy, and the relative autonomy for minors who choose to continue the pregnancy. It points out the degree to which minor parents' fundamental rights to direct the upbringing of their children might continue to be respected, even as their right to make decisions about their own bodies is restricted. The section then recognizes the ways in which minor parents can be pressured or manipulated into voluntarily terminating their parental rights and identifies safeguards that should be in place to assure that the fundamental constitutional rights of minor parents are not infringed upon.

The Article concludes with a warning about the perils of disregarding the rights of minors solely because they have only recently been recognized. History and tradition should not be the only basis for protecting rights, particularly the rights of a population as vulnerable as minors, and especially when losing those rights gives someone else control over decisions that can irreversibly alter the course of their lives.



## I. THE EVOLUTION OF CHILDREN'S CONSTITUTIONAL RIGHTS

From roughly the 1600s to the 1800s, children were considered the property of their parents—particularly their father—and parents had nearly unlimited discretion to rear their children in whatever way they saw fit.<sup>37</sup> While some authorities claim that parents had a duty to protect, feed, and clothe their children, there were no legal consequences for failure to meet those obligations.<sup>38</sup> Indeed, a Massachusetts law allowed parents to petition the government to reprimand “stubborn and rebellious” children.<sup>39</sup> Permissible punishment included capital punishment.<sup>40</sup> Abandoned or orphaned children became indentured servants.<sup>41</sup>

With industrialization, increased immigration, and the growth of urban areas, social reformers began to focus on saving children from the evils of poverty and vice, with an emphasis on rescue and rehabilitation rather than punishment.<sup>42</sup> Compulsory education and child labor laws were first passed during this time.<sup>43</sup> By the end of the nineteenth century, states had fully

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<sup>37</sup> See 1 DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN* 8 (2d ed. 2005) (describing children as property of their parents and its import from English common law values); HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 2 (2005) (describing the changing view of a child's role in society and their political identities).

During the late sixteenth century, children became a metaphor for obedience and submission to church and kingdom, wherein subjects were commanded to obey their religious and temporal superiors just as children should obey their parents. On some level this image transcended metaphor, became, in its pervasiveness, a structure through which many people understood their world.

*Id.*

<sup>38</sup> KRAMER, *supra* note 37, at 8 (acknowledging parental obligations but noting the lack of enforcement of those obligations). “Blackstone reported that while parents owed a duty to maintain, educate, and protect their children, it was a duty devoid of legal persuasion.” *Id.*

<sup>39</sup> *Id.* at 9 (discussing the “*Stubborn Child Law of 1646*”).

<sup>40</sup> *Id.* (noting that in Massachusetts punishment for disobedient children “could include capital punishment of the child”).

<sup>41</sup> *Id.* (characterizing families as a “work unit” and explaining that when orphaned or abandoned, children were placed in a “new work unit”).

<sup>42</sup> See *id.* (describing the changing views of children with industrialization and contrasting this period with the punishments seen in the era before).

<sup>43</sup> KRAMER, *supra* note 37, at 9–10 (noting that “the reformers of this period recognized the importance of education and the dangers of exploitative work in an industrial society”).

entered the “benevolent” era<sup>44</sup>, in which states’ *parens patriae* role began to develop.<sup>45</sup>

The first juvenile court systems were created, with a focus on addressing the problems of “abuse, neglect, dependency, delinquency, and status offenses.”<sup>46</sup> The goal of juvenile interventions was to protect and rehabilitate youths,<sup>47</sup> yet courts did not recognize children’s *rights*.<sup>48</sup> Courts were viewed as “the defender as well as the corrector of the child.”<sup>49</sup> Reformers believed that “society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’ but ‘[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.’”<sup>50</sup>

Attorneys were thought to “complicate” the juvenile proceedings and were deemed unnecessary<sup>51</sup> because the proceedings were not viewed as adversarial.<sup>52</sup> Instead the state was acting as *parens patriae*—a phrase that was not well-defined at the time and had no historical grounding or analog.<sup>53</sup> The term was derived from the practice of the state acting *in loco parentis* to protect the person and property of a child, but it had never been used in criminal proceedings.<sup>54</sup> Constitutional protections for children were thought unnecessary because children had no right to liberty, but only to the custody

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<sup>44</sup> *Id.* at 10 (characterizing the end of the nineteenth century as an era in which the juvenile court system “fully embraced the state’s *parens patriae* duties” and became a more ‘benevolent’ system).

<sup>45</sup> See Michael J. Higdon, *Parens Patriae and the Disinherited Child*, 95 WASH. L. REV. 619, 646 (2020) (explaining how American states adopted and expanded the *parens patriae* doctrine to allow states to exercise their equitable powers to protect and control those who could not protect themselves).

<sup>46</sup> KRAMER, *supra* note 37, at 10.

<sup>47</sup> *Id.* (describing the human-first approach taken by courts in addressing problems with children); see also 387 U.S. at 15–16 (“The child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive.”).

<sup>48</sup> KRAMER, *supra* note 37, at 10 (“Protection and rehabilitation remained the keystone, giving judges almost unlimited discretion. Mere suggestions of due process, adversarial settings, or children’s rights were anathemas.”).

<sup>49</sup> *Id.* (quoting HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 138 (1927)).

<sup>50</sup> 387 U.S. at 15.

<sup>51</sup> See KRAMER, *supra* note 37, at 10 (noting that attorneys during this time were thought to not serve the interests of the child).

<sup>52</sup> See 387 U.S. at 16 (describing the idea that court proceedings with children were not considered adversarial).

<sup>53</sup> See *id.* (“The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.”).

<sup>54</sup> See *id.* (describing the history of *parens patriae* and *in loco parentis*).

of their parents.<sup>55</sup> If parents failed to perform their obligation of providing for the child, the state could step in and take custody.<sup>56</sup> “On this basis, proceedings involving juveniles were described as ‘civil’ not ‘criminal’ and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.”<sup>57</sup>

The Supreme Court considered these arguments and found them lacking in *In re Gault*.<sup>58</sup> “The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures.”<sup>59</sup> Instead, children such as Gerald Gault could be confined for years after proceedings that lacked the protections afforded to adults, and could result in harsher sentences than those to which they would be subject as adults.<sup>60</sup> “The essential difference between Gerald’s case and a normal criminal case is that safeguards available to adults were discarded in Gerald’s case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of over 18.”<sup>61</sup>

The Court proceeded to reject the claim that children had no constitutional rights and held that several constitutional rights applied to children as well as adults, including: a due process right to notice of hearings that must “set forth the alleged misconduct with particularity;”<sup>62</sup> the right to counsel and to be notified of the right to counsel;<sup>63</sup> the privilege against self-

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<sup>55</sup> See *id.* at 17 (explaining that “a child, unlike an adult, has a right ‘not to liberty but to custody’”).

<sup>56</sup> See *id.* (discussing how the state could intervene if parents did not provide effective care for their children).

<sup>57</sup> 387 U.S. at 17.

<sup>58</sup> See *id.* at 18–23 (describing the unfair procedures and arbitrary outcomes under the early juvenile justice system).

<sup>59</sup> *Id.* at 18.

<sup>60</sup> See *id.* at 29 (describing the differences between punishments for adults and children).

If Gerald had been over 18, he would not have been subject to Juvenile Court proceedings. For the particular offense immediately involved, the maximum punishment would have been a fine of \$5 to \$50, or imprisonment in jail for not more than two months. Instead, he was committed to custody for a maximum of six years.

*Id.*

<sup>61</sup> *Id.*

<sup>62</sup> 387 U.S. at 33. “Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding.” *Id.*

<sup>63</sup> See *id.* at 40–41 (holding that the Due Process Clause requires that children and their parents be notified of a child’s right to counsel in proceedings involving potential delinquency).

incrimination;<sup>64</sup> and the right to confront and cross-examine witnesses.<sup>65</sup> The holdings in *In re Gault* were a clear and emphatic rejection of the juvenile justice system as a benevolent parent and ushered in a new era that recognized and protected children's constitutional rights. At around the same time that the Supreme Court decided *In re Gault*, the Court began recognizing privacy rights protected under the substantive due process doctrine.<sup>66</sup> Those rights were soon applied to minors as well as adults.<sup>67</sup>

## II. PRIVACY AND SUBSTANTIVE DUE PROCESS BEFORE AND AFTER *DOBBS*

Many early substantive due process cases involved parental rights, marriage, and reproductive rights. The earliest parental rights cases do not mention privacy or use the term "substantive due process."<sup>68</sup> Instead, they characterize these rights as being within the "liberty interests" protected by the Fourteenth Amendment, and they involved parents' rights to direct the upbringing of their children.<sup>69</sup> Eventually, the Court recognized a right of privacy in cases involving contraception and abortion.<sup>70</sup> In 2022, in *Dobbs v. Jackson Women's Health Organization* the Supreme Court overruled the cases

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We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

*Id.* at 41.

<sup>64</sup> *Id.* at 55 ("We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.").

<sup>65</sup> *Id.* at 57 ("We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.").

<sup>66</sup> See discussion *infra* Part II.A (discussing minors' rights to abortions after *Roe* and before *Casey*).

<sup>67</sup> See *id.* (describing how the right to abortion under *Roe* was extended to minors).

<sup>68</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (finding the right to direct the upbringing of one's children is within the liberty interests protected by the Fourteenth Amendment Due Process Clause).

<sup>69</sup> See *id.* (describing a parent's right to raise their child as a question of a parent's liberty and finding that this right falls within their liberty).

<sup>70</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding a right of privacy that protects married couples' right to use contraception); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (extending the right to single persons); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (recognizing the right to abortion).

finding a constitutional right to abortion.<sup>71</sup> In the opinion, the Court limited substantive due process protection to rights deeply rooted in the nation's history and tradition and concluded that abortion was not a constitutionally protected right.<sup>72</sup> That narrow view of substantive due process calls into question the rights recognized in earlier substantive due process cases.

#### A. SUBSTANTIVE DUE PROCESS BEFORE *DOBBS*

In *Meyer v. Nebraska*,<sup>73</sup> the plaintiff challenged a state law that prohibited teaching foreign languages to students until they completed the eighth grade.<sup>74</sup> The Supreme Court was asked to decide whether the law violated the plaintiff's liberty interests protected by the Fourteenth Amendment's Due Process Clause.<sup>75</sup> The Court did not attempt to define the precise scope or contours of those interests but did provide some guidance.

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>76</sup>

The statute was held to interfere with the right of language teachers to teach the subjects of their choice, the right of students to learn foreign languages, and the right of parents to hire teachers to instruct their children.<sup>77</sup>

The Court held that the statute arbitrarily interfered with those rights without furthering any legitimate interest of the state.<sup>78</sup> Consequently, the statute was unconstitutional and the judgment affirming the plaintiff's conviction for violating the statute was reversed.<sup>79</sup> Two years later in *Pierce v. Society of Sisters*, the Court relied on its holding in *Meyer* to strike down an

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<sup>71</sup> 142 S. Ct. at 2279.

<sup>72</sup> *Id.* at 2246–53.

<sup>73</sup> 262 U.S. at 390.

<sup>74</sup> *Id.* at 396–97.

<sup>75</sup> *Id.* at 399.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 401.

<sup>78</sup> 262 U.S. at 403 (“We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.”).

<sup>79</sup> *Id.*

Oregon law requiring parents and guardians to send all children between the ages of eight and sixteen to public schools.<sup>80</sup> 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>81</sup>

In *Prince v. Commonwealth of Massachusetts*, the Court reaffirmed parents’ liberty interests but enforced a limit on those rights.<sup>82</sup> In that case Sarah Prince appealed her conviction for allowing her niece (for whom Sarah was also guardian) to sell religious magazines on the street in violation of state child labor laws.<sup>83</sup> Sarah argued that the laws violated her parental rights as protected by the Fourteenth Amendment Due Process Clause.<sup>84</sup> The Court acknowledged the right of parents generally to control the upbringing of their children,<sup>85</sup> “[b]ut the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation.”<sup>86</sup>

Sarah also argued that her niece’s constitutional rights were violated by the laws.<sup>87</sup> The Court stated that although children have constitutional rights, those rights can be curtailed in light of particular vulnerabilities or dangers that exist for minors.<sup>88</sup> The Court discussed the concerns about exploitation of child labor that were alleged to have motivated passage of the laws,<sup>89</sup> and concerns about dangers to children selling at night on the

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<sup>80</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925). The law at issue was the Compulsory Education Act of 1922. Todd A. DeMitchell & Joseph J. Onosko, *A Parent’s Child and the State’s Future Citizen: Judicial and Legislative Responses to the Tension Over the Right to Direct an Education*, 22 S. CAL. INTERDISC. L.J. 591, 604–05 (2013) (discussing the motivation for the law challenged in the case, which would have resulted in the closure of all private schools). “The referendum campaign was organized and promoted primarily by the Ku Klux Klan and the Scottish Rite Masons. The Ku Klux Klan strategy was to ‘Americanize’ the schools in response to a wave of immigration.” *Id.*

<sup>81</sup> 268 U.S. at 534–35. The Court also held that it interfered with the rights of the schools’ property and business interests. *Id.* at 535–36.

<sup>82</sup> *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (finding that a Massachusetts child labor law prohibiting children from distributing religious materials on the street was constitutional).

<sup>83</sup> *Id.* at 159–60.

<sup>84</sup> *Id.* at 164. (noting that Ms. Prince buttressed her child’s freedom of religion claim “with a claim of parental right as secured by the due process clause of the latter Amendment”)

<sup>85</sup> *Id.* at 165–66 (agreeing that there is a “private realm of family life which the state cannot enter”).

<sup>86</sup> *Id.* at 166 (internal citations omitted).

<sup>87</sup> *Id.* at 165 (acknowledging that the Court has recognized children’s right to exercise their religion).

<sup>88</sup> See 321 U.S. at 168 (“[T]he mere fact a state could not wholly prohibit this form of adult activity, whether characterized locally as a ‘sale’ or otherwise, does not mean it cannot do so for children.”).

<sup>89</sup> See *id.* at 164 n.7 (describing these concerns as economic exploitation and the degrading nature of the work).

highway.<sup>90</sup> It held that “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case.”<sup>91</sup>

In addition to protecting “liberty interests,” the Court has identified certain rights as “fundamental” and it applies heightened scrutiny to laws that are alleged to violate those rights.<sup>92</sup> In *Skinner v. Oklahoma ex rel Williamson*<sup>93</sup> the Court struck down laws that punished “habitual” criminals by forcing them to undergo sterilization procedures.<sup>94</sup> The Court held that the statute violated the Equal Protection Clause since the law excluded some crimes that were essentially identical to others which could result in sterilization.<sup>95</sup> The Court noted that states need not achieve “abstract symmetry” with every law,<sup>96</sup> but it subjected the forced sterilization law to strict scrutiny because it “involve[d] one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”<sup>97</sup>

In *Loving v. Virginia*,<sup>98</sup> a couple challenged their convictions under a Virginia law prohibiting marriage between a white person and non-white person.<sup>99</sup> The majority of the decision is devoted to the analysis leading to the Court’s holding that the law violated the Equal Protection Clause, but the Court also held that that the law violated the Due Process Clause.

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men . . . . To deny

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90 *Id.* at 168 (“Among evils most appropriate for [state] action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street.”).

91 *Id.* at 170.

92 *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“The [Due Process] Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.”).

93 316 U.S. 535 (1942).

94 *Id.* at 536–37. A “habitual criminal” was defined by the Court as one convicted of at least two felonies of “involving moral turpitude.” *Id.* at 536.

95 *Id.* at 538–39. For example, multiple convictions for grand larceny could result in sterilization under the law, but convictions for felony embezzlement—which is essentially the same crime—would not because embezzlement was excluded from the crimes to which the law applied. *Id.*

96 *Id.* 539–40. “They [the states] may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience.” *Id.* at 540.

97 *Id.* at 541.

98 388 U.S. 1 (1967).

99 *Id.* at 4.

this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.<sup>100</sup>

The Court concluded that the right to marry is an individual constitutional right that cannot be infringed upon by the State.<sup>101</sup>

Starting in the late 1960s, the Court decided a series of cases in which it expressly recognized constitutionally protected "privacy" rights. While the Constitution does not mention privacy, the Court opined that some privacy rights are implied or derived from specific constitutional provisions.

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'<sup>102</sup>

Although there always has been disagreement about the precise source of various privacy rights, the Court has relied most consistently on the Due Process Clause of the Fourteenth Amendment.<sup>103</sup> The protected privacy rights included the right to make decisions about reproduction without government interference.

In *Griswold v. Connecticut*, the Court held that a law making it illegal for married couples to use birth control and for others to counsel or assist them in such use violated their constitutionally protected rights.<sup>104</sup> "Such a law cannot stand in light of the familiar principle, so often applied by this Court,

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<sup>100</sup> *Id.* at 12.

<sup>101</sup> *Id.*

<sup>102</sup> 381 U.S. at 484 (internal citations omitted).

<sup>103</sup> See 142 S.Ct. at 2245 (stating that the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* "grounded its decision solely on the theory that the right to obtain an abortion is part of the 'liberty' protected by the Fourteenth Amendment's Due Process Clause").

<sup>104</sup> 381 U.S. at 485.



that a ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’”<sup>105</sup> Justice Douglas, writing for the majority, stated that such an intrusion into the marital home and relationship in order to find evidence of contraceptive use was “repulsive to the notions of privacy surrounding the marriage relationship.”<sup>106</sup>

In *Eisenstadt v. Baird*<sup>107</sup> the Court extended constitutional privacy protection to unmarried people. Although the *Griswold* decision focused heavily on the marital relationship, in *Eisenstadt* the Court found that the rights at issue must be recognized in married and unmarried people alike.<sup>108</sup>

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>109</sup>

Because the law treated unmarried people and married people differently, it violated the Equal Protection Clause of the Fourteenth Amendment.<sup>110</sup>

A year later, the Court recognized a constitutional right to abortion in *Roe v. Wade*.<sup>111</sup> In that case, the plaintiffs argued that the Texas statutes criminalizing abortion violated their rights under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution.<sup>112</sup> At least one plaintiff argued that she had a right of privacy that derived from one or all of those constitutional provisions.<sup>113</sup> The Court conceded that the Constitution did not mention a right of privacy, but it pointed out a long line

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<sup>105</sup> *Id.* at 485 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

<sup>106</sup> *Id.* at 486.

<sup>107</sup> 405 U.S. 438 (1972.)

<sup>108</sup> *Id.* at 453.

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

<sup>110</sup> *Id.* at 454–55.

<sup>111</sup> 410 U.S. 113, 153 (1973).

<sup>112</sup> *Id.* at 120.

<sup>113</sup> *Id.* Plaintiff Jane Roe (her pseudonym) “claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.” *Id.*

of cases recognizing a right of privacy under the Constitution, rooted in each of the amendments cited by the plaintiffs.<sup>114</sup>

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>115</sup>

The right was not absolute, as the Court acknowledged that states have "important" interests in women's health, setting appropriate medical standards, and in protecting potential life.<sup>116</sup> "At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."<sup>117</sup>

The Court adopted a trimester framework under which a pregnant person's right to an abortion was not subject to regulation during the first trimester.<sup>118</sup> From the end of the first trimester until viability, the state could regulate abortion to protect the health of the pregnant person.<sup>119</sup> After viability, the state's interest in "potential life" became compelling, and states were free to regulate, or even prohibit, abortions.<sup>120</sup>

Nearly twenty years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>121</sup> the Court modified its position with respect to the constitutional right to abortion. Importantly, the Court affirmed that "it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy,"<sup>122</sup> but the Court rejected the trimester framework of *Roe* and imposed an "undue burden" standard for abortion regulations.<sup>123</sup> At all points during

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<sup>114</sup> *Id.* at 152–53 (citing numerous cases including *Griswold*, *Meyer*, *Loving*, *Skinner*, *Eisenstadt*, *Pierce*, and *Prince* among others).

<sup>115</sup> *Id.* at 153.

<sup>116</sup> *Id.* at 153–54.

<sup>117</sup> *Id.* at 154.

<sup>118</sup> *Id.* at 163 (noting that before the end of the first trimester, the mortality rate for women after an abortion is lower than the rate for normal childbirth). "[F]or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 163–64 ("This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.").

<sup>121</sup> 505 U.S. 833 (1992).

<sup>122</sup> *Id.* at 869.

<sup>123</sup> *Id.* at 878.

the pregnancy, the state could enact regulations for the health and safety of women and provide information aimed at ensuring pregnant women made an informed decision.<sup>124</sup> The Court also held that attempts to persuade pregnant people to choose childbirth over abortion did not violate constitutional rights.<sup>125</sup> All such measures were constitutional so long as they did not impose an undue burden on a woman's right to obtain an abortion before viability.<sup>126</sup> After viability, states could regulate and even proscribe abortion.<sup>127</sup>

### B. SUBSTANTIVE DUE PROCESS AFTER *DOBBS*

In *Dobbs*, the Supreme Court reversed its holdings in *Roe* and *Casey* and held that the Constitution does not protect a right to access abortion care.<sup>128</sup> Noting that the right to abortion is not included in the text of the original Constitution or its amendments, the Court held that it must be “deeply rooted” in the nation's history and tradition in order to enjoy constitutional protection.<sup>129</sup> After a detailed (and, arguably, flawed) examination of the history of abortion regulation in America, the Court reached the “inescapable conclusion [] that a right to abortion is not deeply rooted in the Nation's history and traditions.”<sup>130</sup> Consequently, it concluded that the right to abortion is not protected by the Constitution.<sup>131</sup> While the decision only affects the right to abortion, the language limiting constitutional protection to incorporated enumerated rights and those that are “deeply rooted in the nation's history and traditions” necessarily casts doubts on the continued

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (holding that such measures “will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion”).

<sup>126</sup> *Id.* (“These measures must not be an undue burden on the right [to obtain an abortion before viability].”).

<sup>127</sup> *Id.* at 879 (citing *Roe v. Wade*, 410 U.S. 113, 164–65 (1973)).

<sup>128</sup> 142 S. Ct. at 2253.

<sup>129</sup> *Id.* (holding that the Fourteenth Amendment Due Process clause “has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation's history and tradition’ and ‘implicit in the concept of ordered liberty.’”).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 2279 (holding that “that the Constitution does not confer a right to abortion” and overruling *Roe* and *Casey*).

protection of the right to contraception and other reproductive and sexual privacy rights.<sup>132</sup>

### III. MINORS' ABORTION RIGHTS

In order to understand how *Dobbs* is likely to impact the abortion rights of minors, one must understand how the Supreme Court articulated and protected the rights of minors who sought abortions between *Roe* and *Dobbs*, and how the Court's abortion decisions influenced state laws and policies regarding the rights of minors in other contexts. The Court never held that the rights of minors were identical to those of adults, but instead held that their right to make choices about whether to continue a pregnancy could not be ignored or dismissed.<sup>133</sup> In several cases, the Justices struggled to achieve the proper balance between recognizing parents' right to direct the upbringing of their children and minors' right to bodily autonomy and to make decisions that could irrevocably alter their lives.<sup>134</sup>

#### A. MINORS' ABORTION RIGHTS BETWEEN *ROE* AND *DOBBS*

Once the Supreme Court held that women had a right to abortion that was protected by the Fourteenth Amendment Due Process Clause, it soon faced the question of whether and to what extent that right applied to pregnant minors. The Court answered those questions in a series of cases including *Planned Parenthood of Central Missouri v. Danforth*<sup>135</sup> and *Bellotti v. Baird*.<sup>136</sup>

In *Danforth*, the plaintiffs challenged a Missouri statute that required, among other things, the permission of both parents before a pregnant minor could obtain an abortion.<sup>137</sup> Missouri defended the constitutionality of the

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<sup>132</sup> *Id.* at 2319 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (pointing out that the right to abortion has been linked by the Court to the right to sexual privacy, same-sex marriage, and "other settled freedoms involving bodily integrity, familial relationships, and procreation").

<sup>133</sup> *See, e.g., Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding that states could not give parents or the courts absolute veto power over a minor's decision to have an abortion).

<sup>134</sup> *See discussion infra* Part III.A.

<sup>135</sup> 428 U.S. 52 (1976).

<sup>136</sup> 443 U.S. 622 (1979).

<sup>137</sup> 428 U.S. at 58 (requiring "consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years" before a physician could perform an abortion).

statute by arguing that minors lack the capacity to act in their own best interest with respect to some decisions, and states routinely limit their ability to act in those circumstances.<sup>138</sup> The state cited minimum age requirements for the purchase and sale of alcohol, firearms, and cigarettes as examples.<sup>139</sup> Missouri further noted that parents have wide discretion to act in the best interests of their children.<sup>140</sup>

With respect to abortion, the Supreme Court concluded that “the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent.”<sup>141</sup> While the Court acknowledged that the State has an interest in “safeguarding of the family unit and of parental authority,”<sup>142</sup> those interests were outweighed by “the right of privacy of the competent minor mature enough to have become pregnant.”<sup>143</sup> The Court emphasized that the State need not allow all pregnant minors, “regardless of age or maturity,” to obtain an abortion without the consent of a parent or judicial approval.<sup>144</sup> “The fault with [the Missouri statute] is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor’s termination of her pregnancy and does so without a sufficient justification for the restriction.”<sup>145</sup>

A few years later in *Bellotti v. Baird*, the Court considered a Massachusetts statute that required parental consent before an unmarried minor could obtain an abortion. In contrast to the statute in *Danforth*, the Massachusetts law allowed the pregnant minor to seek an order from a superior court judge to allow the abortion “for good cause shown.”<sup>146</sup> The Supreme Judicial

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<sup>138</sup> *Id.* at 72.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 74.

<sup>142</sup> *Id.* at 75.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (“We emphasize that our holding that § 3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.”). Thus, very young minors or those who lack the maturity to make decisions of such great consequence, might not have the right to give consent to an abortion. *See id.*

<sup>145</sup> *Id.*

<sup>146</sup> 443 U.S. 622, 625 (1979):

If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If

Court of Massachusetts interpreted that law to require parents “to consider exclusively what will serve her best interests” when deciding whether to give consent to their daughter’s abortion.<sup>147</sup> If one or both parents refuse to give consent and the pregnant minor sought a judicial order, “judicial consent for an abortion shall be granted, parental objections notwithstanding, . . . if found to be in the minor’s best interests. The judge ‘must disregard all parental objections, and other considerations, which are not based exclusively’ on that standard.”<sup>148</sup> Importantly, the judge was entitled to withhold consent even if the judge found that the minor was capable of making an “informed and reasonable decision” to get an abortion if the judge thought that it was not in the minor’s best interests.<sup>149</sup>

The Supreme Court started from the premise that “[a] child, merely on account of his minority, is not beyond the protection of the Constitution,”<sup>150</sup> yet the Court has “recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: 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>151</sup> According to the Court, these concerns will sometimes justify departing from the constitutional standards and practices applied to adults.<sup>152</sup>

With respect to children’s vulnerability, the Court stated that “although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability and their needs for ‘concern, . . . sympathy, and . . . parental attention.’”<sup>153</sup> Second, states have been allowed to limit minors’ ability to make “important, affirmative choices

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one or both of the mother’s parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary.

*Id.* (quoting MASS. GEN. LAWS ANN., CH. 112, § 12S (West Supp.1979)).

<sup>147</sup> *Id.* at 630.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 630–31 (noting that the mature-minor rule did not apply to abortions).

<sup>150</sup> *Id.* at 633.

<sup>151</sup> *Id.* at 634.

<sup>152</sup> *Id.* “These rulings [recognizing minors’ due process rights] have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults. Indeed, our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults.” *Id.* at 635.

<sup>153</sup> *Id.* (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)).

with potentially serious consequences”<sup>154</sup> because “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”<sup>155</sup> Finally, the Court agreed that parents’ right to direct the upbringing of their children sometimes justified limitations on the child’s rights.<sup>156</sup> “[D]eeply rooted in our Nation’s history and tradition, is the belief that the parental role implies a substantial measure of authority over one’s children”<sup>157</sup> and “[u]nder the Constitution, the State can ‘properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility.’”<sup>158</sup>

The Court then turned to the precise question to be answered in the case: whether the Massachusetts parental consent statute violated the constitutional rights of pregnant minors.<sup>159</sup> Starting with its decision in *Danforth*, the Court reaffirmed that if a State requires that one or both parents consent before the minor can obtain an abortion, the State must provide an “alternative procedure” by which the minor can get authorization.<sup>160</sup>

A pregnant minor is entitled in such 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>161</sup>

In short, parental notice and consent regulations cannot operate as an “absolute, and possibly arbitrary veto” on the minor’s choice to get an abortion.<sup>162</sup>

Applying these rules to the Massachusetts statute, the Court held that it was unconstitutional in two respects. First, the statute required parental notification for every non-emergency abortion; only if the parents did not

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<sup>154</sup> *Id.* at 635.

<sup>155</sup> *Id.* For example, the Court has held that minors’ constitutional rights are not violated by state laws restricting sales of sexually oriented material to minors or by laws prohibiting child labor. *Id.*

<sup>156</sup> *Id.* at 637. “This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.” *Id.* at 638.

<sup>157</sup> *Id.* at 638.

<sup>158</sup> *Id.* at 639 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

<sup>159</sup> *Id.* at 640 (“The question before us—in light of what we have said in the prior cases—is whether [the parental notice and consent statute] provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion.”).

<sup>160</sup> *Id.* at 643.

<sup>161</sup> *Id.* at 643–44.

<sup>162</sup> *Id.* at 643 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

consent did the pregnant minor have the right to seek judicial authorization.<sup>163</sup> The Court concluded that this would pose an undue burden on pregnant minors seeking an abortion since a parent opposed to the abortion could obstruct the minor's access to the courts and, consequently, to an abortion.<sup>164</sup> Instead, it held that every minor must have the right to seek court authorization "without first consulting with their parents."<sup>165</sup>

If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion.<sup>166</sup>

Because of the "important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision,"<sup>167</sup> the judge can take the nature of the family relationships into account when deciding whether the abortion is in the minor's best interests. If the judge does not believe that an abortion is in her best interests without parental consultation, the judge can refuse to authorize it or decline to rule until the parents have been consulted.<sup>168</sup>

Second, the Court held that if a pregnant person is sufficiently mature to make an informed and reasonable decision regarding whether to get an abortion, the judge could not refuse authorization because of the judge's own conclusion that it is not in the minor's best interest.<sup>169</sup> While in many instances a state may require a minor to wait until they reach majority before exercising particular rights, a pregnant minor cannot delay the decision to terminate a pregnancy.<sup>170</sup> In that unique context, the Court held that "if the

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<sup>163</sup> *Id.* at 646.

<sup>164</sup> *Id.* at 647 (noting that "are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court").

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 647-48.

<sup>167</sup> *Id.* at 648. "[P]arents naturally take an interest in the welfare of their children—an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents." *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 650.

<sup>170</sup> *Id.* (noting that "we are concerned here with the exercise of a constitutional right of unique character").



minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently.”<sup>171</sup> Because the Massachusetts law gave the judge the right to overrule a “mature and fully competent” decision, it was unconstitutional.<sup>172</sup>

## B. AFTER *DOBBS*

Of course, many pregnant minors will choose to continue a pregnancy and either raise the child or place it for adoption. Those choices should be respected, and those minors should be supported. But for those who wish to terminate the pregnancy, the decision in *Dobbs* poses a significant obstacle if the state in which the minor resides regulates or bans abortions for minors. After *Dobbs*, states no longer need to consider a minor’s fundamental constitutional rights when crafting laws regulating abortion access. Indeed, states can enact laws that completely deny abortion access for all residents so long as the laws are rationally related to a legitimate government interest.<sup>173</sup> Since the Supreme Court has already affirmed the State’s legitimate interest in “potential” or “unborn” life, many states will impose restrictions, confident

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<sup>171</sup> *Id.* This conclusion is consistent with the “mature minor” doctrine adopted by many states. See Kimberly M. Mutcherson, *Whose Body Is It Anyway—An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL’Y 251 (2005) (noting that many states have adopted the mature minor doctrine when determining whether to allow minors to make healthcare decisions for themselves). “The mature minor doctrine ‘holds that if a minor is of sufficient intelligence and maturity to understand and appreciate both the benefits and risks of the proposed medical or surgical treatment, then the minor may consent to that treatment without parental consent . . . .’” *Id.* (quoting JAMES MORRISEY ET AL., CONSENT AND CONFIDENTIALITY IN THE HEALTH CARE OF CHILDREN AND ADOLESCENTS 2 (1986)). See discussion *infra* Part III.B.3.

<sup>172</sup> *Id.* (agreeing with the district court that the state “cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.”).

<sup>173</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2283 (2022) (holding that “rational-basis review is the appropriate standard” for challenging abortion restrictions). “A law regulating abortion, like other health and welfare laws, is entitled to a ‘strong presumption of validity.’ It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.” *Id.* at 2284 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

that they will be upheld.<sup>174</sup> A state can choose to: ban all abortions;<sup>175</sup> allow some abortions for adults but not for minors; allow some abortions for adults and allow abortions for minors only with parental consent; or allow abortions for adults and minors equally. The last option leaves minors in the best position to exercise their right to bodily autonomy. The others raise constitutional concerns.

1. *Minors' rights if all abortions are illegal*

While many assume that states can ban abortions for everyone without running afoul of the Constitution, there are still some open questions, including whether states must allow abortions to save the life of the mother.<sup>176</sup> That issue takes on particular salience when the pregnant person is a minor. Although the Supreme Court has held that there is no fundamental right to abortion, state laws regulating abortions still must satisfy rational basis scrutiny by proving that prohibiting an abortion is rationally related to a legitimate state interest.<sup>177</sup>

Even if the state has a legitimate interest in protecting potential or unborn life, the state also has an interest in protecting existing lives. Requiring anyone, but especially a minor, to sacrifice their life is irrational, particularly in the case of very young minors who were not even able to consent to the sexual activity that resulted in pregnancy. Punishing a young rape victim—

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<sup>174</sup> *Id.* at 2317 (Breyer, Sotomayor, and Kagan, JJ., dissenting). “An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions.” *Id.* (noting that many states have already passed strict regulations in anticipation of a decision overruling *Roe* and *Casey*).

<sup>175</sup> Many have argued or assumed that the state must allow abortions to save the life of the mother, but a state could argue that it is rational to choose to save the unborn child even at the cost of the mother's life. The majority opinion in *Dobbs* did not address this issue, so it is one that may need to be addressed in a later case. *See id.* at 2336 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (“The majority says a law regulating or banning abortion ‘must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.’ *Ante*, at 2284. And the majority lists interests like ‘respect for and preservation of prenatal life,’ ‘protection of maternal health,’ elimination of certain ‘medical procedures,’ ‘mitigation of fetal pain,’ and others. *Ante*, at 2284. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in?”).

<sup>176</sup> *Id.*

<sup>177</sup> 142 S. Ct. at 2283 (holding that rational basis scrutiny applies to abortion restrictions).

or any pregnant person—by sentencing them to death does not further any legitimate state interest.

Even if the pregnant person's life is not in danger, the Court's holding in *Dobbs* cannot be applied to pregnant minors without further analysis. Unless the pregnancy was the result of rape, competent adults and mature minors who are denied access to abortions are arguably being forced to endure the consequences of their own voluntary conduct. This is an oversimplification of the circumstances for many pregnant people—and it does not justify ignoring their right to bodily autonomy—but there is no consensual conduct in the case of very young minors who are incapable of consenting to sexual intercourse. They are forced to pay a high price for someone else's crime, and the penalty is a sentence ranging from nine months to their entire lifetime.

Teen pregnancy has been associated with many negative outcomes, including high dropout rates for teen mothers, lower educational achievement, more health problems, higher incarceration rates, and higher unemployment rates.<sup>178</sup> “Teen pregnancy and childbearing are associated with increased social and economic costs through immediate and long-term effects on teen parents and their children.”<sup>179</sup> Jeopardizing the health and economic future of an existing young life for the sake of a potential or unborn life is not rational.<sup>180</sup>

The teen parent is not the only one at risk. Children born to a teen parent are at higher risk for low birth weight, infant mortality, chronic medical

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<sup>178</sup> *About Teen Pregnancy*, CDC *Reproductive Health: Teen Pregnancy Home*, CENTERS FOR DISEASE CONTROL AND PREVENTION, [hereinafter “About Teen Pregnancy”] (Nov. 15, 2021), <https://www.cdc.gov/teenpregnancy/about/index.htm> [<https://perma.cc/5GPR-SCE7>]

Pregnancy and birth are significant contributors to high school dropout rates among girls. Only about 50% of teen mothers receive a high school diploma by 22 years of age, whereas approximately 90% of women who do not give birth during adolescence graduate from high school. The children of teenage mothers are more likely to have lower school achievement and to drop out of high school, have more health problems, be incarcerated at some time during adolescence, give birth as a teenager, and face unemployment as a young adult.”

*Id.*

<sup>179</sup> *Id.*

<sup>180</sup> A teen who voluntarily accepts those risks in order to continue the pregnancy should receive medical, educational, social, and financial support, but those who do not want to give birth should not be forced to undertake those very significant risks.

conditions, and behavior problems.<sup>181</sup> They also are less likely to be prepared to enter school, and *more* likely to be placed in foster care, become incarcerated during adolescence, drop out of high school, become pregnant as a teen, and become unemployed as a young adult.<sup>182</sup> Taking all of these factors into consideration, barring access to abortion is irrational and does not further any legitimate state interest.

The Thirteenth Amendment is another source of rights. Although rarely discussed and quickly dismissed by many, the prohibition against involuntary servitude deserves renewed consideration in the context of forced pregnancies for minors.<sup>183</sup> In *Plessy v. Ferguson*, the Court stated that “[s]lavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least *the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services.*”<sup>184</sup> Forced pregnancy requires the pregnant person to sacrifice their body for the benefit of the fetus.<sup>185</sup> Consequently, “[m]andated, forced or compulsory pregnancy contravenes enumerated rights in the Constitution, namely the 13<sup>th</sup> Amendment’s prohibition against involuntary servitude and protection of bodily autonomy, as well as the 14<sup>th</sup> Amendment’s defense of privacy and freedom.”<sup>186</sup>

The link between reproductive rights and involuntary servitude predates the Thirteenth Amendment. Enslaved people were considered chattel with

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<sup>181</sup> *The Adverse Effects of Teen Pregnancy*, YOUTH.GOV, <https://youth.gov/youth-topics/pregnancy-prevention/adverse-effects-teen-pregnancy> [<https://perma.cc/4EHH-9FRD>] (describing physical, mental, behavioral, educational, and economic risks to children born to a teen parent).

<sup>182</sup> *Id.*

<sup>183</sup> See, e.g., Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense Of Abortion*, 84 NW. U. L. REV. 480 (1990) (“When women are compelled to carry and bear children, they are subjected to ‘involuntary servitude’ in violation of the thirteenth amendment.”); Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, In Defense of Incarcerated Women’s Reproductive Rights*, 15 BERKELEY J. AFR.-AM. L. & POL’Y 117, 155 (2013) (“[P]olicies banning abortion, or having the effect of forcing women to reproductively labor in prison, impose a condition of servitude that is markedly akin to slavery.”).

<sup>184</sup> *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (emphasis added), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>185</sup> See Koppelman, *supra* note 183, at 487 (“The pregnant woman may not serve at the fetus’ *command*—it is the state that, by outlawing abortion, supplies the element of coercion—but she is serving involuntarily for the fetus’ *benefit*, and this is what the Court has said that the amendment forbids.”).

<sup>186</sup> Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html> [<https://perma.cc/JX53-K5DD>].

no constitutional protection.<sup>187</sup> Even free people of African descent were held to be excluded from the class of people to which the Constitution granted rights.<sup>188</sup>

It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union. Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.<sup>189</sup>

Thus, any right to bodily integrity was not extended to enslaved women. Instead, they were raped and forced to carry and give birth to children who were then considered property of their enslavers.<sup>190</sup> “If cotton was euphemistically king, Black women’s wealth-maximizing forced reproduction was queen. Ending the forced sexual and reproductive servitude of Black girls and women was a critical part of the passage of the 13th and 14th Amendments.”<sup>191</sup>

The argument that anti-abortion laws violate the Thirteenth Amendment has not received much traction, although some courts have indicated a willingness to consider it.<sup>192</sup> In part, there was no need to give serious consideration to such a controversial argument when the Supreme Court had already grounded the right to abortion in the Fourteenth Amendment Due Process Clause. But the argument is also controversial because it is inconsistent with the image of motherhood as a blessing and the

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<sup>187</sup> See *Dred Scott v. Sandford*, 60 U.S. 393, 410–11, (1857), *superseded* (1868) (holding that people of African descent were not “people” as that term was used in the Constitution and, therefore, were not entitled to any of the protections or rights therein). “The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.” *Id.* at 410.

<sup>188</sup> *Id.* at 411–12.

<sup>189</sup> *Id.*

<sup>190</sup> Goodwin, *supra* note 186.

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

<sup>192</sup> See *Jane L. v. Bangerter*, 61 F.3d 1505, 1515 (10th Cir. 1995) (“Without expressing a view on the merits of the involuntary servitude argument, we hold that it is not frivolous.”). The United States District Court for the District of Columbia requested briefing on the issue of whether an argument that abortion bans violate the Thirteenth Amendment is foreclosed by the opinion in *Dobbs*. See *United States v. Handy*, No. CR 22-096 (CKK), 2023 WL 1777534, at \*2 (D.D.C. Feb. 6, 2023) (directing the parties to “address in their forthcoming briefing: (1) whether the scope of *Dobbs* is in fact confined to the Fourteenth Amendment and (2) whether, if so, any other provision of the Constitution could confer a right to abortion as an original matter”).

notion that women should gladly sacrifice themselves for the benefit of their children.<sup>193</sup> But when the pregnant person is a minor or the pregnancy is the result of rape, the sacrifice becomes even more apparent and troubling and the involuntary servitude argument more compelling.

## 2. *Minors' rights if abortions are legal only for adults*

Even if a state allows abortions under some (or most) circumstances, it might bar minors' access to abortion. An outright ban could be challenged on Equal Protection grounds, but it would probably only be subject to rational basis scrutiny since there is no fundamental right involved and age is not a suspect class that typically triggers heightened scrutiny.<sup>194</sup> Consequently, the state would only need to prove that barring abortion access for minors is rationally related to a legitimate government interest. States can argue that abortions are medical procedures that carry risks to the pregnant person.<sup>195</sup> Refusing to allow abortion eliminates that risk. Additionally, the Supreme Court has already affirmed that states have a legitimate interest in protecting potential or unborn life, and banning abortion for minors is arguably related to that interest.<sup>196</sup>

Neither of these arguments should prevail. First, the risks of getting an abortion are lower than the risks associated with childbirth if performed early in the pregnancy.<sup>197</sup> Moreover, the risks of pregnancy and childbirth are

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<sup>193</sup> See Koppelman, *supra* note 183, at 487 (responding to criticisms of his argument that forced pregnancy is a form of involuntary servitude).

Some of those to whom I have made this argument have responded less with skepticism than with horror. They consider it a libel on motherhood, which, far from being like slavery, is an exhilarating, awe-inspiring, and joyous experience . . . . The objection gathers whatever force it has by focusing on the experience of women who *want* to be mothers. The thirteenth amendment, however, does not apply to them. The servitude it prohibits is *involuntary*.

*Id.*

<sup>194</sup> See *Mass. Bd. Retirement v. Murgia*, 427 U.S. 307, 311–12 (1976) (refusing to apply heightened scrutiny in a case alleging discrimination based on age).

<sup>195</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022) (identifying "the protection of maternal health and safety" as a legitimate state interest).

<sup>196</sup> *Id.* (stating that "legitimate interests include respect for and preservation of prenatal life at all stages of development").

<sup>197</sup> See, e.g., Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215 (2012) ("Legal induced abortion is markedly safer than childbirth. The risk of death associated with childbirth is approximately 14 times higher than that with abortion. Similarly, the overall morbidity associated

higher for young girls than for adults.<sup>198</sup> Thus, it is irrational to prevent an abortion to protect the physical health of a young girl. Forced pregnancy may also have negative mental health consequences. Moreover, the same risks apply to adults, so allowing adults to get abortions but not minors draws a distinction that is not rationally related to a legitimate interest.

Hoping to prevent future trauma is also irrational since the pregnant minor may never regret the abortion, and there is significant evidence that having a child at a young age is associated with poorer physical and mental health, lower educational achievement,<sup>199</sup> and future poverty.<sup>200</sup> In addition, the minor must either raise the child themselves (presumably with the support of their parents) or place the baby for adoption. Neither is likely to be an easy decision, and each may lead to future regrets.<sup>201</sup> Moreover, the same risk of regret exists for adults. Prohibiting abortion on these grounds for minors but not adults would be irrational.<sup>202</sup>

If abortion is not allowed, then fundamental fairness demands that if the state is going to force a minor to give birth, the state must also provide additional support for pregnant minors. This may take the form of free healthcare, counseling and parenting support,<sup>203</sup> free childcare, baby supplies (such as car seats, cribs, diapers, wipes, and breast pumps), formula

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with childbirth exceeds that with abortion.”). See also Dobbs, 142 S. Ct. at 2328–29 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (“[A]n American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion.” (citing *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 618 (2016))).

198 *Teen Pregnancy Issues and Challenges*, AM. PREGNANCY ASS’N, <https://americanpregnancy.org/unplanned-pregnancy/teen-pregnancy-issues-challenges/> [https://perma.cc/6SR2-RJ3M] (noting that those who get pregnant before age 15 are at greater risk of premature birth, low birth weight, anemia, high blood pressure, and infant mortality).

199 *Teen Pregnancy, Poverty, and Income Disparity*, [https://rhylclearinghouse.acf.hhs.gov/sites/default/files/docs/21116-Why\\_it\\_Matters-Teen\\_Pregnancy.pdf](https://rhylclearinghouse.acf.hhs.gov/sites/default/files/docs/21116-Why_it_Matters-Teen_Pregnancy.pdf) (Mar. 2010) (“Two-thirds of families begun by a young unmarried mother are poor.”). Teen mothers are more likely to drop out of school, which leads to lower income over their lifetimes. See *id.*

200 About Teen Pregnancy, *supra* note 178 (noting the long-term economic costs of teen pregnancy).

201 See Malinda L. Seymore, *Sixteen and Pregnant: Minors’ Consent in Abortion and Adoption*, 25 YALE J. OF L. & FEMINISM 99, 133–34 (2013) (describing the author’s greater anguish from placing her child for adoption than from getting an abortion).

202 Note that this argument does not assume that all minors should be allowed to get an abortion regardless of their level of maturity and without any parental or court involvement. Instead, I argue that minors cannot be categorically prohibited from obtaining an abortion under all circumstances.

203 This could take the form of parenting classes, well-baby checkups, assistance in applying for aid, and transportation to and from appointments.

and food, clothing, and education for the child.<sup>204</sup> Some of these necessities may be available through existing government programs, but others (including counseling, childcare, and supplies) may not be available to every parent.<sup>205</sup>

Few minors are financially able to provide for themselves, much less a child. Even getting adequate healthcare can be a challenge for pregnant people.<sup>206</sup> Non-pregnant minors are not obligated to take on the burdens of financially providing for another person or sacrificing their childhood in order to care for another person, and there is no rational argument for placing this burden on pregnant minors. Providing these necessities is even more important if the minor's parents are unwilling or unable to provide that support.

Opponents may argue that the baby may be given up for adoption, thereby relieving the minor of the responsibilities associated with parenthood. While abortion opponents—and the Supreme Court majority in *Dobbs*—assure everyone that there are enough loving parents eager to adopt every baby that would have been aborted,<sup>207</sup> statistics contradict those assurances. Some children are more likely to be adopted than others.<sup>208</sup> Children with complex medical needs may end up in foster care because their

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<sup>204</sup> These also should be provided to adults who are forced to give birth, especially those who became pregnant as a result of rape.

<sup>205</sup> Maya Manian, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127, 194 (2016) (arguing that parenting minors may need additional support in order to retain custody and avoid having their rights terminated). “If abuse or neglect has occurred, advocates for minor parents should focus on obtaining appropriate services for the minor so that she can exit the child welfare system with her parental rights intact.” *Id.* Nonparent mentors may also be important for providing support while respecting the autonomy of the minor parent. *Id.* at 197.

<sup>206</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. at 2338–39 (Breyer, Sotomayor, & Kagan, JJ., dissenting). “The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. *See Ante*, at 2258–2259. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away.” *Id.*

<sup>207</sup> *Id.* at 2259 (claiming that “a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home”).

<sup>208</sup> For example, not only are Black children more likely to end up in foster care, so too they spend an average of 9 months longer in foster care than White children. U.S. GOV’T ACCOUNTABILITY OFF., AFRICAN AMERICAN CHILDREN IN FOSTER CARE, ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 16 (July 2007) (identifying “the lack of appropriate adoptive homes for children” as one obstacle to getting African American children out of foster care).



biological families lack the resources to meet their needs.<sup>209</sup> It is often difficult to find foster care placements and permanent homes for these children.<sup>210</sup>

In some communities, placing children for adoption is discouraged and the pregnant person may feel pressure to raise the child themselves.<sup>211</sup> In fact, most women who cannot obtain an abortion choose to parent the child themselves.<sup>212</sup>

[T]he choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. The reality is that few women denied an abortion will choose adoption. The vast majority will continue, just as in *Roe* and *Casey*'s time, to shoulder the costs of childrearing.<sup>213</sup>

Raising a child as a child or teen may be the only socially acceptable option even if the minor does not want to be a parent.

In addition, having been forced to remain pregnant until giving birth, what would have been a private issue is likely to be common knowledge. Instead of terminating the pregnancy before anyone (or only a few people) knew about the pregnancy, carrying the baby to term may mean having to explain the circumstances that led to them becoming pregnant, no matter how traumatic or embarrassing. Even if no explanation is sought or given, if the pregnant person is below the age of consent, it is clear that the pregnancy is most likely the result of rape.<sup>214</sup> No other rape victim is forced to advertise

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<sup>209</sup> Rebecca R. Seltzer, et al, Medical Complexity and Placement Outcomes for Children in Foster Care, 83 CHILDREN & YOUTH SERVICES REV. 285, 285-86 (noting that some children with complex medical needs are placed in foster care when their parents are unable to provide the "intense level of care required").

<sup>210</sup> *Id.* at 290. "There are challenges with recruiting and maintaining foster parents for CMC due to limited desire or ability to care for children with special needs." *Id.* Foster parents may choose not to adopt children with complex medical needs because they lose financial support that is available to them as foster parents. *Id.*

<sup>211</sup> See Seymore, *supra* note 201, at 114–15 (noting that pregnant African American teens were less likely to place their children for adoption than pregnant White teens in the post-World War II and pre-*Roe v. Wade* era); see also *id.* ("While some African American teen and unwed mothers did place children for adoption in this period, most did not . . ."). A mother of a black pregnant teen was quoted saying: "It would be immoral to place the baby [for adoption]. That would be like throwing away your own flesh and blood." *Id.* at 115.

<sup>212</sup> Dobbs, 142 S.Ct. at 2339 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (discussing evidence that women who are denied abortions do not typically choose to place their baby for adoption).

<sup>213</sup> *Id.* (citing a study that found only nine percent of women denied an abortion because the pregnancy was too far along chose to place the child for adoption).

<sup>214</sup> The only circumstance in which it would not be rape is if the person who impregnated the pregnant minor is married to them or if they are also a minor who is close in age, and the state defines

their past trauma. Finding competent mental health support for these minors is a challenge that states are unlikely to meet in light of the current difficulties in finding affordable, available mental health providers.<sup>215</sup>

3. *Minors' rights if parental consent is required for minors to get an abortion*

A state could choose to allow adult women to have abortions but require parental consent for minors seeking abortions. Such laws may be more defensible, though they would still be troubling. To the extent that the parents are involved, there is the potential for them to support the pregnant minor's decision to obtain an abortion. Moreover, a parent would be able to take the minor's individual circumstances into account in making the decision whether to consent, including their willingness to support the minor through the pregnancy and either help raise the child or provide emotional support if the child is placed for adoption.

Parental involvement does not solve the problem if the pregnant minor desires an abortion and the parents will not consent. The minor is left to bear the physical and emotional burden of a pregnancy, which is likely to result in social isolation, judgment, and educational disruption. There may be negative health consequences that last a lifetime.<sup>216</sup> If the minor—or their

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statutory rape as intercourse between two parties who are at least a certain number of years apart in age. *See, e.g.*, 8 PA. STAT. AND CONS. STAT. ANN. § 3122.1 (West) (defining sexual assault with reference to marital status and the relative age of the parties). Pennsylvania defines first degree sexual assault to include engaging in sexual intercourse with someone to whom the person is not married “who is under the age of 16 years and that person is either: (1) four years older but less than eight years older than the complainant; or (2) eight years older but less than 11 years older than the complainant” *Id.* at § 3122.1(a). It is a first-degree felony in Pennsylvania to have sexual intercourse “with a complainant under the age of 16 years and that person is 11 or more years older than the complainant and the complainant and the person are not married to each other.” *Id.* at § 3122.1(b).

<sup>215</sup> *Over one-third of Americans live in areas lacking mental health professionals*, USAFACTS <https://usafacts.org/articles/over-one-third-of-americans-live-in-areas-lacking-mental-health-professionals/> [<https://perma.cc/95P5-E973>] (last updated July 14, 2021) (“An estimated 122 million Americans, or 37% of the population, lived in 5,833 mental health professional shortage areas as of March 31. The nation needs an additional 6,398 mental health providers to fill these shortage gaps.”). The need is especially acute for patients of color. *See* SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2021 NATIONAL SURVEY ON DRUG USE AND HEALTH 2 (Dec. 2022) <https://www.samhsa.gov/data/report/2021-nsduh-annual-national-report> [<https://perma.cc/W9YY-6S8H>] (reporting that racial minorities are less likely to receive mental health services than Whites).

<sup>216</sup> *See Teen Pregnancy Issues and Challenges*, *supra* note 198.

parents—choose to raise the child, the mental and emotional strain may last a lifetime. While the minor may not suffer financially as an individual—certainly states would need to provide financial support, at least until they reach majority—if the family is not wealthy, an additional child is a financial burden that can lower the standard of living for the entire family. Any of those challenges would be daunting for adults. Placing these burdens on a minor against their will is not rationally related to any legitimate state interest.

Despite these concerns, the Court is likely to approve of regulations that allow abortion only with parental consent. The prior decisions point to this result. In *Danforth* and *Bellotti*, the Court acknowledged the history and tradition of parental control over important decisions affecting their children's well-being.<sup>217</sup> “Under the Constitution, the State can ‘properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.’”<sup>218</sup> This has historically included the right to make decisions about medical procedures.<sup>219</sup> This respect for the rights of parents is likely enough to make such laws enforceable.<sup>220</sup>

In addition, even after *Danforth* and *Bellotti*, the vast majority of states required parental consent to the extent allowed by the Constitution.<sup>221</sup> In other words, states appear to have given minors the right to consent to abortion because they were compelled to do so, not because they thought it sound policy. It is worth noting that the parental consent and judicial bypass

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<sup>217</sup> *Bellotti v. Baird*, 99 S. Ct. 3035, 3045 (1979) (“[D]eeply rooted in our Nation’s history and tradition, is the belief that the parental role implies a substantial measure of authority over one’s children.”).

<sup>218</sup> *Id.* at 3046 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)); *Planned Parenthood v. Danforth*, 428 U.S. 52, 73 (1976) (conceding that historically, “[p]arental discretion . . . has been protected from unwarranted or unreasonable interference from the State”).

<sup>219</sup> See *Hill*, *supra* note 12, at 1305 (noting that state laws allow parents to consent to medical interventions on behalf of their children). “Rarely has it been suggested that children’s constitutional right to bodily integrity is implicated when state law delegates decisionmaking authority over children’s bodies to the parents.” *Id.*

<sup>220</sup> *In re Rosebush*, 491 N.W.2d 633, 636 (Mich. App. 1992) (“It is well established that parents speak for their minor children in matters of medical treatment.”).

<sup>221</sup> Manian, *supra* note 205, at 145 (identifying thirty-eight states that require parental consent or judicial approval as constitutionally required); *Id.* (“The popularity of legislation mandating parental involvement with abortion is quite striking, especially in contrast to the autonomy that almost all states grant to minors who choose to carry a pregnancy to term.”).

options persisted even in light of evidence that these mandates do not always help—and can harm—pregnant adolescents.<sup>222</sup>

For pregnant minors who are not living with or in contact with their parents, or who have been neglected or abused by their parents, obtaining parental consent may be difficult or impossible.<sup>223</sup> The judicial bypass option gives minors another path to obtain an abortion, but barriers may include costs, lack of transportation, and lack of familiarity with the process.<sup>224</sup> Minors and advocates have also recounted experiences with judges who are hostile, ask deeply personal and inappropriate questions, accuse the minor of lying, and judges who seek to shame the pregnant minor or deny approval for reasons unrelated to maturity.<sup>225</sup>

[O]ne judge . . . questioned a minor about what types of contraceptives she had used and if she was “dating around.” Other judges required the recital of anti-abortion tropes (such as contested risks associated with abortion) or expected expressions of regret. A participant noted that a judge in her jurisdiction did not believe any minor was well informed unless that minor repeated to the court that abortion “kills the unborn child inside of her.” Another participant remembered a client who had several hallmarks of maturity—she was seventeen, employed, and had good grades—but her petition was denied because of her accent and because she could not list numerous risks of abortion in detail.<sup>226</sup>

While the oft-stated justification for these mandates is to assist minors with such a significant decision and help them avoid regret, many have

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<sup>222</sup> *Id.* at 148 (noting that public health research suggested that parental consent mandates are unnecessary and sometimes harmful, and judicial bypass proceedings serve primarily to shame girls for having premarital sex); see also Nicole Phillis, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 MICH. J. GENDER & L. 271, 292 (2011) (arguing that parental consent and judicial bypass options both punish pregnant minors); *Id.* (“Because of her decision to seek an abortion, the minor female is particularly punished. She has two options: (1) seek the involvement of her parents and risk ‘being rejected [by her family], kicked out of the family home, or punished physically’ or (2) petition a judge and subject herself to an inquisition of her purported ‘maturity’ in which she is expected to provide information about ‘her grades and after-school jobs’ as well as why she has chosen to circumvent the guidance of her parents.” (citing Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT’L J. L. POL’Y & FAM. 305, 312) (2004)).

<sup>223</sup> See Rachel Rebouché, *Report of a National Meeting: Parental Involvement Laws and the Judicial Bypass*, 37 LAW & INEQ. 21, 28 (2019) (noting that parental consent laws presume that parents act in the best interest of their children, but that does not hold true for minors subject to abuse or neglect; the laws also complicate matters for minors who are not in contact with the parents).

<sup>224</sup> *Id.* at 34–35 (detailing obstacles to obtaining judicial bypass).

<sup>225</sup> *Id.* at 36–37 (noting that some judges are sympathetic and seek to put the applicant at ease but others seem more hostile).

<sup>226</sup> *Id.* at 37.

argued that the true purpose is to prevent minors from obtaining abortions.<sup>227</sup>

Mature minors may have a stronger case for a holding that the parental consent requirement violates the Equal Protection Clause. In states that recognize the doctrine, minors who meet specified criteria are deemed sufficiently mature to make medical decisions on their own, without need for parental consent or approval.<sup>228</sup> The criteria for determining whether a minor is mature vary by state.<sup>229</sup> In Illinois, if the minor proves by clear and convincing evidence that “the minor is mature enough to appreciate the consequences of her actions, and that the minor is mature enough to exercise the judgment of an adult, then the mature minor doctrine affords her the common law right to consent to or refuse medical treatment.”<sup>230</sup> Tennessee also has adopted the mature minor doctrine.<sup>231</sup> “Its application is a question of fact for the jury to determine whether the minor has the capacity to consent to and appreciate the nature, the risks, and the consequences of the medical treatment involved.”<sup>232</sup> However, not all states recognize the mature

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<sup>227</sup> See Manian, *supra* note 205, at 148–49 (explaining the negative consequences of parental consent and judicial bypass requirements); Rebouché, *supra* note 223, at 27 (reporting that “some organizations and legislators who express the strongest support for consent/notice laws care primarily about undermining abortion rights rather than encouraging policies that strengthen child-parent relationships in all families”).

<sup>228</sup> See Shawna Benston, *Not of Minor Consequence?: Medical Decision-Making Autonomy and the Mature Minor Doctrine*, 13 IND. HEALTH L. REV. 1, 2 (2016) (explaining that the mature minor doctrine allows minors “to be deemed capable of making their own medical decisions”).

<sup>229</sup> *Id.* (noting that minors “must satisfy various criteria predetermined by their respective states’ common-law determinations”).

<sup>230</sup> *In re E.G.*, 549 N.E.2d 322, 327–28 (Ill. 1989) (applying the mature minor doctrine when an unemancipated minor refused blood transfusions that would violate her religious beliefs).

<sup>231</sup> See *Cardwell v. Bechtol*, 724 S.W.2d 739, 748–49 (Tenn. 1987) (holding that the mature minor exception to the common law rule requiring parental consent before a doctor could treat a minor was “wholly consistent with the existing statutory and tort law in this State” and part of the normal evolution of the law).

<sup>232</sup> *Id.* In *Cardwell*, the question was whether the plaintiff was a mature minor who could consent to medical treatment for back pain. *Id.* at 742–43.

minor doctrine, and several others have limited use of the doctrine in the face of controversial vaccinations<sup>233</sup> and treatments.<sup>234</sup>

The mature minor doctrine has particular applicability in the context of consent to abortion. Undoubtedly, this is at least partially due to the Supreme Court's holding in *Bellotti* that "if the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision" then approval must be granted by the court without parental consent regardless of whether the judge believes that the abortion is in the minor's best interest.<sup>235</sup> The point of requiring parental involvement is to assist minors in making decisions they are ill-equipped to make on their own. If the minor is mature enough to understand the risks and benefits of abortion—physical, emotional, social, and mental—and weigh them against the risks and benefits of continuing the pregnancy, then they should not be bound by the judgment of their parents or a judge in a matter that so profoundly affects them. In those circumstances, a law requiring parental consent is irrational and does not further a legitimate state interest.

Outside of the abortion context, there has never been widespread legal enforcement of minors' right to consent to medical treatment. After *Dobbs*, minors can no longer rely on the right to privacy recognized by the Supreme Court in *Danforth*, *Bellotti* and other abortion cases. Without a historically and traditionally recognized right to make decisions about their own bodies and reproductive choices, any push to increase parental rights at the expense of minors' rights is likely to withstand constitutional challenges.

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<sup>233</sup> See, e.g., Mature Minor Doctrine Clarification Act, TENN. CODE ANN. § 63-1-165 (2023) (stating that the mature minor doctrine applies "only in the context of tort law and jury considerations" and declaring that parental consent is required for medical treatment of minors, including vaccinations). See also Mike Cason, *How Alabama lawmakers voted on parental consent for COVID-19 vaccines*, AL.COM (Nov. 6, 2021, 7:14 AM), <https://www.al.com/news/2021/11/how-alabama-lawmakers-voted-on-parental-consent-for-covid-19-vaccines.html> [https://perma.cc/K5PZ-8K2N] (reporting on law passed in Alabama to require parental consent for COVID vaccines for all minors, creating an exception to a law that allows minors to consent to medical treatment at age 14).

<sup>234</sup> For example, some states are pushing to prohibit gender-affirming healthcare for transgender youth. See *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163 (2021) ("Gender-affirming healthcare for minors has become a new frontier in the culture war. In the first months of 2020 alone, legislators in at least fifteen states introduced bills that would have prohibited and, in many cases, criminalized providing gender-affirming healthcare services to minors."). Even if laws are not entirely banning such treatments, laws might be passed requiring parental consent for gender-affirming treatment for all minors.

<sup>235</sup> *Bellotti v. Baird*, 99 S. Ct. 3035, 3052 (1979).

#### IV. MINORS' RIGHT TO MAKE MEDICAL DECISIONS— BEYOND ABORTION

In general, adults must give informed consent for medical procedures<sup>236</sup> and competent adults have the right to refuse medical treatment, even if medical experts deem the treatment necessary to save the person's life.<sup>237</sup> The substantive due process doctrine has been invoked to protect minors' rights to "decisional autonomy and bodily integrity,"<sup>238</sup> but their rights are more limited than those of adults.<sup>239</sup> In the context of medical decisions, "two constitutional rights have the potential to clash directly in this realm: the parents' rights to make decisions about the care and upbringing of their children free from state interference, and minors' rights to bodily integrity."<sup>240</sup> After *Dobbs*, minors' constitutional rights may be weakened, thereby giving parents greater rights to make decisions about medical treatment for their children.

In *Dobbs*, the Court limited substantive due process protection to rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."<sup>241</sup> Unfortunately, express recognition of children's right to bodily autonomy is a rather recent development in the American jurisprudence, and it has been recognized in only a few contexts.<sup>242</sup> Many of the cases addressing minors' right to make medical decisions concern reproductive rights.<sup>243</sup> "In most other areas where minors' bodily

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<sup>236</sup> B. Jessie Hill, *Medical Decision Making by and on Behalf of Adolescents: Reconsidering First Principles*, 15 J. HEALTH CARE L. & POL'Y 37, 39–40 (2012) [hereinafter Hill, *First Principles*] (stating the rule requiring informed consent from a competent adult before all medical procedures).

<sup>237</sup> *Id.* at 40.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* (noting that the substantive due process doctrine "protects minors' medical decision-making rights, those protections are subject to additional limitations unique to minors").

<sup>240</sup> *Id.* at 56 (arguing that parents' right to consent to treatment for their children who lack the capacity to consent on their own is in conflict with recognition of children's right to bodily integrity).

<sup>241</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). This includes enumerated rights that have been incorporated by the Fourteenth Amendment. *Id.* at 2246.

<sup>242</sup> See Hill, *Bodily Integrity*, *supra* note 12, at 1308 (noting that children's constitutional rights have been recognized primarily in the context of reproductive decisions).

<sup>243</sup> *Id.* at 1305 ("Minors' right to bodily integrity is uniquely salient in one area of constitutional jurisprudence—reproductive rights."); see, e.g., *In re Doe*, 33 A.3d 615, 618 (Pa. 2011) (overruling trial court determination that a pregnant minor was not "'mature and capable' of giving informed consent" to obtain an abortion because she did not seek parental consent); *Alfonso v. Fernandez*,

integrity right may be implicated, regulation occurs through several common law and statutory doctrines that rarely refer to one another or to the constitutional privacy right.”<sup>244</sup> Consequently, minors’ rights with respect to medical decisions are more precarious after *Dobbs*.

#### A. THE RIGHT TO MAKE MEDICAL DECISIONS BEFORE *DOBBS*

Parents have historically had wide discretion when making medical decisions for their children.<sup>245</sup> “The general rule, applicable in almost all situations, is that a parent is free to sort among alternatives and elect the course of treatment based on his or her assessment of the child’s best interests.”<sup>246</sup> This includes cosmetic treatments that are not medically necessary, physically invasive procedures, and treatments that may be dangerous or harmful.<sup>247</sup> Parental rights are limited only by minors’ constitutional rights<sup>248</sup> and laws prohibiting abuse and neglect.<sup>249</sup> Consequently, aside from decisions to refuse life-saving treatment, parents

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606 N.Y.S.2d 259, 263 (1993) (holding that requiring parental consent for distribution of condoms to minors did not violate minors’ constitutional rights).

<sup>244</sup> *Id.*

<sup>245</sup> See Maxine Eichner, *Bad Medicine: Parents, the State, and the Charge of “Medical Child Abuse,”* 50 U.C. DAVIS L. REV. 205, 241 (2016) (“The Court has made clear that parents’ constitutionally protected authority over their children includes the right to make decisions regarding health care.”); Alicia Ouellette, *Shaping Parental Authority over Children’s Bodies*, 85 IND. L.J. 955, 966–67 (2010) (describing parents’ broad discretion over medical treatment decisions for their children); Jonathan F. Will, *My God My Choice: The Mature Minor Doctrine and Adolescent Refusal of Life-Saving or Sustaining Medical Treatment Based Upon Religious Beliefs*, 22 J. CONTEMP. HEALTH L. & POL’Y 233, 246 (2006) (“Parents have a fundamental right, protected by the Due Process Clause of the Fourteenth Amendment, to raise their children as they see fit. This right, grounded in both law and ethics, extends to inculcating religious values and making medical decisions for their incompetent children.”).

<sup>246</sup> Ouellette, *supra* note 245, at 966–67 (characterizing legal treatment of parents’ rights to make medical decisions as no different from other decisions, such as where to send the child to school).

<sup>247</sup> *Id.* (“As a practical matter, the law allows parents with financial means and access to a willing provider to make and implement decisions to size or sculpt their children.”); see also Hill, *Bodily Integrity*, *supra* note 12, at 1310–11 (noting that “in the vast majority of cases, parents are empowered to consent to medical care on behalf of their children” even if the treatment is not “medically necessary or life-saving.”).

<sup>248</sup> *Bellotti v. Baird*, 99 S. Ct. 3035, 3043 (1979) (“A child, merely on account of his minority, is not beyond the protection of the Constitution.”).

<sup>249</sup> Hill, *Bodily Integrity*, *supra* note 12, at 1310 (noting that “in the vast majority of cases, parents are empowered to consent to medical care on behalf of their children, limited only in extreme situations by neglect or abuse laws that may prevent them from denying necessary care or perhaps from imposing unnecessary treatments.”).



generally do not face scrutiny for the medical decisions they make on behalf of their children.<sup>250</sup>

A corollary to the rule allowing parents to make medical decisions for their children is the rule that minors are not allowed to obtain treatment in non-emergencies without parental consent.<sup>251</sup> Some exceptions to the general rule have developed that allow minors to seek treatment without parental consent, particularly when the minor is an older adolescent and when the medical treatment is sought for reproductive care, sexually transmitted diseases, substance abuse, or mental health treatment.<sup>252</sup> But these exceptions are motivated by policy decisions at least as much as they are by respect for minors' constitutional rights.<sup>253</sup> "[T]he rule that adolescents can freely consent to medical treatment for sexually transmitted infections represents an application of the traditional exemption from parental control for medical emergencies, rather than a recognition of adolescents' right to sexual or health care autonomy."<sup>254</sup> Moreover, the right to consent does not necessarily mean that the minor has the right to refuse treatment if the parent has consented.<sup>255</sup> Allowing parents to overrule mature

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<sup>250</sup> *Id.* (noting that parental rights are limited by laws protecting children from abuse and neglect, including refusal of life-saving treatment and some unnecessary and harmful treatments).

<sup>251</sup> See Carolyn O'Connor, *Illinois Adolescents' Rights to Confidential Health Care*, 82 ILL. B.J. 24 (1994) ("Because contracts entered into by minors are voidable under the common law, treating a minor without parental consent generally creates some legal risks for the health care provider."); Hill, *First Principles*, *supra* note 236, at 38 (noting and challenging the prevailing presumption that "parents have a legal entitlement to make medical decisions for their minor children.").

<sup>252</sup> Hill, *First Principles*, *supra* note 236, at 42–43 (noting that all states have statutes allowing minors to consent to some medical treatments). "[M]any states allow minors to consent on their own to substance abuse treatment, mental health services (on an outpatient basis), examination and treatment for sexual assault, prenatal care, and contraceptive services." *Id.*; see also Jason Potter Burda, *Prep and Our Youth: Implications in Law and Policy*, 30.2 COLUM. J. GENDER & L. 295, 323 (2016) ("All United States jurisdictions and the District of Columbia permit providers to rely on a minor's consent in the context of sexually transmitted diseases.").

<sup>253</sup> Hill, *First Principles*, *supra* note 236, at 43 (crediting policy goals of encouraging minors to seek treatment they might choose to forgo if parental consent was required as motivation for the exceptions).

<sup>254</sup> Manian, *supra* note 205, at 131.

<sup>255</sup> *Id.* at 44 (citing Maryland laws that allow minors to consent to drug abuse treatment without parental consent, but do not give minors the right to refuse treatment if their parent consents). Similarly, parents' right to consent to treatment does not always mean that parents have the right to refuse treatment on behalf of the minor. *Id.* at 45.

minors highlights states' continued prioritization of parents' rights in the medical context.<sup>256</sup>

1. *Mature minor doctrine and emancipation*

The mature minor doctrine has been applied in some states to empower minors who are closer to the age of majority to have a say in—or even final authority to make—medical decisions. The right has been recognized in the context of reproductive care as a liberty interest protected under the Fourteenth Amendment Due Process Clause.<sup>257</sup> For example, the Supreme Court struck down a law barring access to contraception for minors under the age of sixteen on the ground that it violated the constitutionally protected privacy right of minors.<sup>258</sup> The opinion did not prevent states from requiring parental consent before allowing minors to access contraception (that issue was not before the Court), but many courts and scholars have understood the case to require such access without parental consent, at least consistent with the right to abortion.<sup>259</sup>

Emancipation is another means by which a minor can obtain the right to make medical decisions without parental consent or approval.<sup>260</sup> A minor can be emancipated based on statutory authority—often due to status such as marriage, military service, pregnancy, or already being a parent—or by court order.<sup>261</sup> Unlike the mature minor doctrine, which allows the minor to make decisions in the limited context of medical decisions, emancipation

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<sup>256</sup> *Id.* at 44 (positing that the purpose of allowing minors to consent is to encourage treatment rather than empowering minors to make decisions on their own).

<sup>257</sup> See Hill, *Bodily Integrity*, *supra* note 12, at 1303 (noting that the Supreme Court has recognized that “the right to freedom from unreasonable bodily restraint and punishment was a fundamental liberty interest protected by the Fourteenth Amendment”).

<sup>258</sup> See *Carey v. Population Servs., Int’l*, 431 U.S. 678, 694 (1977) (“Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed.”).

<sup>259</sup> See Hill, *Bodily Integrity*, *supra* note 12, at 1307–08 (noting that although the Court in *Carey* did not hold that minors have a right to access contraception without parental consent, “both courts and commentators have inferred such a right, which may seem to be a logical corollary of the abortion right.”)

<sup>260</sup> See Mutcherson, *supra* note 171, at 266 (describing emancipation as a means of attaining legal adulthood while still a minor).

<sup>261</sup> *Id.* at 266–67.

gives the minor the status of an adult for most purposes.<sup>262</sup> “Although under eighteen, they are ‘considered as being over the age of majority’ for most of their dealings with parents and third parties.”<sup>263</sup>

## 2. *The right to refuse treatment*

The right of minors—particularly older adolescents—to *refuse* treatment varies by state and, sometimes, depends on the medical provider’s understanding of applicable law (or lack of understanding). Professors Doriane Lambelet Coleman and Philip M. Rosoff argue that early in the twentieth century, doctors exercised their judgment when treating patients, without consistent regard for parental rights.<sup>264</sup> By the second half of the twentieth century, patient rights became more firmly entrenched and enforced, and parents were allowed to exercise their right to make decisions for their minor children.<sup>265</sup>

Progressive scholars and advocates pushed for greater autonomy for adolescents in the medical context, and pushed for physicians to defer to adolescent patients’ will, even when they conflicted with the will of parents.<sup>266</sup> Some scholars, advocates, and pediatric ethicists pushed the idea of adolescent rights even though the laws in effect in most states and the rights recognized by the Supreme Court were more limited.<sup>267</sup> “Over time, it is

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<sup>262</sup> *Id.* at 266 (describing emancipation as a mechanism to remove “the disability of their minority” and obtain the power to act as an adult in most settings, including entering into binding contracts, acquiring property, and being free of parental control or authority).

<sup>263</sup> *Id.* That freedom comes with corresponding responsibility, since parents are no longer responsible for the care and support of an emancipated minor. *Id.* (noting that “while emancipated minors can sign contracts and stay out late, their adult status also means that their parents are no longer responsible for the minors’ support.”).

<sup>264</sup> Doriane Lambelet Coleman & Philip M. Rosoff, *Adolescent Decisionmaking Rights: Reconciling Medicine and Law*, 47 AM. J. L. & MED. 386, 400–401 (2021) (noting that parental rights were “more theoretical than real for parents who lack the will or capital to intervene”).

<sup>265</sup> *Id.* at 401 (“[P]aternalistic exercises of physician autonomy were strongly discouraged in favor of patient autonomy . . . and parents were understood to stand in the shoes of their children through the period of their minority.”).

<sup>266</sup> *Id.* at 401–402 (stating that “[s]cholars and advocates sought rights, not just interests, for adolescents, and they imagined that these rights could be enforced as against adults, including their parents.”).

<sup>267</sup> *Id.* at 402 (noting that many either misunderstood or misrepresented the law). Professors Coleman and Rosoff point to a book published by Angela Roddy Holder, *Legal Issues in Pediatrics and Adolescent Medicine*, which made claims that Coleman and Rosoff characterize as misleading. *Id.* at 402–403. Specifically, the book claimed that the mature minor rule explained why no parent

likely that adolescents have had medical decisionmaking rights whenever non-parental adults in a position to facilitate them have allowed their exercise and parents have lacked the will or the cultural capital necessary to enforce their own.”<sup>268</sup> In other words, many physicians might believe that adolescents have rights that the law does not actually recognize. Those physicians will consequently allow adolescents to make decisions about their medical treatment even though the law might grant parents the right to make those decisions.<sup>269</sup>

### 3. *Parens Patriae*

However states choose to balance the rights of parents and minors, both exist only to the extent that they do not conflict with states’ obligation to ensure the health and well-being of children as reflected in the *parens patriae* doctrine.<sup>270</sup> States have the right to intervene when a child is being abused or neglected, even if it means acting contrary to the desires of the parents, and even if the action conflicts with the minors and parents’ sincere religious beliefs.<sup>271</sup> This obligation also generally prevents states from allowing or inflicting bodily harm on minors unless there is a compelling reason to do so. One such compelling reason might be mandating painful medical treatment if it is the only way to save the child’s life.<sup>272</sup>

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had ever recovered damages from when a physician treated a minor over the age of fifteen without parental consent. *Id.* They believe that assertion was misleading because so few cases are actually reported and many more are settled to avoid litigation. *Id.* at 403. Thus, a lack of reported cases does not indicate an absence of physician liability. A second source of misinformation was a publication by the AAP Committee on bioethics. *Id.* “Throughout the statement, the details about the role and authority of parents and children are imagined very differently from, and sometimes are flatly inconsistent with, formal law.” *Id.*

<sup>268</sup> *Id.* at 400.

<sup>269</sup> *Id.* at 403 (“Holder’s advice is about what physicians might get away with rather than what the law actually says.”)

<sup>270</sup> See Higdon, *supra* note 45, at 647 (“Within the law of domestic relations, *parens patriae* is understood to stand for the proposition that a parent’s right to direct the upbringing of a child is not absolute but must instead yield to the state’s interest in protecting the child from abuse and neglect.”).

<sup>271</sup> *Id.* at 648–49 (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)). In *Prince*, the Supreme Court affirmed the conviction of a guardian who violated child labor laws by having her niece sell religious pamphlets. *Prince*, 321 U.S. at 170. “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.” *Id.*

<sup>272</sup> See, e.g., *In re Willmann*, 493 N.E.2d 1380, 1390 (Ohio Ct. App. 1986) (ordering that a dependent

#### 4. *Medical treatment to benefit a third-party*

Short term unhappiness or discomfort may be justified by the prospect of long-term benefits. But such sacrifices generally are only justified when the child benefits from that sacrifice, not when the beneficiary is someone else.<sup>273</sup> When determining whether a medical procedure is in the child's best interest, courts have considered the child's emotional well-being, and the well-being of the family, in addition to the child's physical health. In *Curran v. Bosze*, the court identified "three critical factors which are necessary to a determination that it will be in the best interests of a child to donate bone marrow to a sibling. First, the parent who consents on behalf of the child must be informed of the risks and benefits inherent in the bone marrow harvesting procedure to the child. Second, there must be emotional support available to the child from the person or persons who take care of the child . . . . Third, there must be an existing, close relationship between the donor and recipient."<sup>274</sup>

None of the three requirements guarantee consultation with the child. In *Curran*, that was understandable since the potential donor children were under the age of four, and it was generally agreed that they were too young to understand the necessity of the procedure, the risks to themselves if they donated, or the consequences if they did not donate. Still, it is notable that the court was willing to allow parents to provide consent to allow a young child to undergo a painful procedure that had no health benefit for them but would benefit a family member.

#### B. THE RIGHT TO MAKE MEDICAL DECISIONS AFTER *DOBBS*

Without the constitutional right to abortion, the right to access contraception becomes even more important. For sexually active minors capable of consenting to sexual intercourse, access to contraception may be

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child receive "the medical care and treatment deemed to be necessary, including but not limited to chemotherapy and/or surgery" over the objection of his parents who refused to consent on religious grounds).

<sup>273</sup> See, e.g., *Curran v. Bosze*, 566 N.E.2d 1319, 1331 (1990) ("We hold that a parent or guardian may give consent on behalf of a minor daughter or son for the child to donate bone marrow to a sibling, only when to do so would be in the minor's best interest.").

<sup>274</sup> *Id.* at 1343

the only way to avoid becoming a teen parent.<sup>275</sup> In a future case, the Supreme Court could hold that the right to access contraception is still protected by the Due Process Clause, but that outcome is not guaranteed since the right to contraception is not mentioned in the Constitution and it has not historically or traditionally been protected.<sup>276</sup> The Connecticut ban was not struck down until the *Griswold* decision in 1965.<sup>277</sup>

It is even less likely that the Court would continue to protect minors' access to contraception.<sup>278</sup> If neither the right to abortion nor to access contraception are protected, the rate of unplanned pregnancies and births among minors is likely to significantly increase.<sup>279</sup> States will need to deal with the fallout for the minors, their babies, and society at large.

The rights of adolescents are particularly vulnerable since they were not universally recognized before *Dobbs*, and, aside from abortion and contraception, were largely driven by policy concerns and not a

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<sup>275</sup> Everyone has the option of not being sexually active, but requiring abstinence of all minors in order to avoid pregnancy is not reasonable, rational, or realistic.

<sup>276</sup> Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. F. 349, 350 (2015) (noting that contraception was first banned in the years following the Civil War). “The 1873 Comstock Act was premised on the view that it was obscene to separate sex and procreation. Soon after, many states passed laws modeled on the Comstock Act criminalizing contraception and abortion.” *Id.* at 350–51.

<sup>277</sup> *Griswold*, 381 U.S. at 484.

<sup>278</sup> Because the overwhelming majority of women use birth control at some point in their lives and a strong majority of both Democratic and Republican voters support greater access to birth control, states are unlikely to ban access to contraception for adults or minors. *See, e.g.*, Kimberly Daniels & Joyce C. Abma, *Current Contraceptive Status Among Women Aged 15–49: United States, 2017–2019*, CDC NAT'L CENTER HEALTH STAT. DATA BRIEF, no. 388, Oct. 2020 (reporting that “approximately 65% of women aged 15–49 were using some type of contraceptive method” and “Nearly all women use contraception in their lifetimes”); Anika Dandekar & Evangel Penumaka, *A Bipartisan Majority of Voters Support Expanding Access to Birth Control*, DATA FOR PROGRESS (June 7, 2022) <https://www.dataforprogress.org/blog/2022/6/7/a-bipartisan-majority-of-voters-support-expanding-access-to-birth-control> [<https://perma.cc/W6XP-7TWH>] (reporting poll results showing that voters across parties overwhelmingly support access to the pill without needing a doctor's prescription, and a majority of voters want the Food and Drug Administration (FDA) to move forward with allowing the pill to be sold over the counter). But states may require parental consent for minors. If parents refuse to consent, minors are at risk for unplanned and unwanted pregnancies without the guaranteed option of terminating the pregnancy.

<sup>279</sup> Michael Levitt, Tinbete Ermyas, & Ari Shapiro, *After the Dobbs Decision, Birth Rates Are Up in States with Abortion Ban States*, NPR.ORG (Nov. 24, 2023), [<https://perma.cc/9SYG-7DRM>] (discussing the rise in birth rates in states that have banned abortion); Karen Kaplan, *Study: Good Access to Birth Control Prevents Teen Pregnancy, Abortion*, LATIMES.COM (Oct. 1, 2014) (discussion project that gave teens at high risk for pregnancy free birth control and reporting that none of the teens became pregnant).

constitutional mandate.<sup>280</sup> Further strengthening parents' rights comes at the cost of adolescent autonomy in a variety of circumstances. Restricting access to contraception and abortion leads to unwanted pregnancies that can have life-long physical and emotional consequences.<sup>281</sup> Forcing a minor to undergo unwanted treatment can force a minor to suffer through painful treatment or an even more painful disease with little hope of a cure. Parental insistence on a treatment that violates the religious beliefs of the minor may save their life but force them to live with the belief that they will suffer eternal damnation. Withholding treatment that the minor believes will be helpful or necessary for their quality of life can lead—from the minor's point of view—to unnecessary suffering.

In some circumstances, states have stripped both minors *and* their parents of the right to make certain medical decisions. A recent and potentially life-threatening example is the recent push to prevent youth from accessing gender-affirming medical care.<sup>282</sup> Effective medical treatments exist to help transgender minors conform their bodies to their gender identities.<sup>283</sup> However, “[g]ender-affirming healthcare for minors has become a new frontier in the culture war.”<sup>284</sup> As of November 13, 2023, twenty-two states had enacted laws restricting or banning gender-affirming care.<sup>285</sup> Experts in

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<sup>280</sup> See Hill, *First Principles*, *supra* note 236, at 43 (arguing that states allow minors to make decisions about some medical and mental health treatments because of concerns about public health).

<sup>281</sup> See *supra* Part IV for further discussion.

<sup>282</sup> See *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163 (2021) (discussing the need for gender-affirming care for transgender youth and legislative attempts to block access to that care); Ariana Eunjung Cha, ‘Our state is at war with our family’: Clergy with trans kids fight back, WASH. POST (Feb. 28, 2023) [<https://perma.cc/GCQ7-HWCT>] (describing more than thirty bills introduced by the Republican supermajority in Missouri related to LGBTQ persons, including a bill targeting gender-affirming care for transgender youth).

<sup>283</sup> *Id.* (noting that advances in the medical field and in the understanding of the needs of transgender youth make it possible “to bring their bodies into alignment with their gender identities”).

<sup>284</sup> *Id.* The term “gender-affirming care” can describe “the range of medical services that trans youth use to bring their bodies and lived experiences into alignment with their gender identities.” *Id.*

<sup>285</sup> As of November 13, 2023, Human Rights Campaign identified twenty-two states that had passed laws restricting or banning gender-affirming care. HRC Foundation, *Map: Attacks on Gender Affirming Care by State*, HUMAN RIGHTS CAMPAIGN (Nov. 13, 2023) [<https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map>] [<https://perma.cc/7U24-B768>] (noting that “[a]s of November 2023, three in ten (35.1% or 105,200 total) trans youth aged 13-17 are living in states that have passed bans on gender affirming care”); Annette Choi & Will Mullery, *19 States Have Laws Restricting Gender-Affirming Care, Some with the Possibility of a Felony Charge*, CNN.COM (June 6, 2023), [<https://www.cnn.com/2023/06/06/politics/states-banned-medical-transitioning-for-transgender-youth-dg/index.html>] [<https://perma.cc/6GMG-9MD3>] (noting that “[t]ransgender

treating transgender youth emphasize that these treatments are necessary and potentially life-saving.<sup>286</sup> The Association of American Medical Colleges joined other medical organizations in opposing attempts to limit access to care, noting that “extensive scientific evidence exists to support those therapies and that the law would force doctors to risk endangering their patients by not providing that care.”<sup>287</sup>

[T]rans persons experience enormous psychological distress across their lives. By one estimate, as many as four in ten trans individuals attempt suicide. Beyond suicide risk, trans individuals often struggle with depression and anxiety at rates that “far surpass the rates of those for the general population.” For children raised in unwelcoming households, this psychological distress is amplified and can be crushing.<sup>288</sup>

Barring treatment or placing obstacles in the path of someone seeking this care places their well-being and their lives at greater risk.

Even if the care is available, parents opposed to the treatments can force their children to suffer even though the minor sees the treatment as vital.<sup>289</sup> Before *Dobbs*, adolescents had a stronger argument that their substantive due process rights were violated by parental consent requirements or laws barring access to the treatments. After *Dobbs*, arguments about the rights of adolescents are on shakier ground and are more likely to be rejected in favor of parental rights or the state’s interest in protecting minors from medical treatments that the state deems harmful or ill-advised. Older adolescents can argue that the bans are irrational in light of the medical evidence of their effectiveness and the corresponding risks of delaying or denying treatment. However, state courts—especially in states hostile to LGBTQA+ rights and

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medical treatment for minors continues to be a political target, especially in red states, and has quickly emerged as a key issue leading up to the 2024 election.”); see also Patrick Boyle, *What is Gender-Affirming Care? Your Questions Answered*, AAMC.ORG (Apr. 12, 2022), <https://www.aamc.org/news-insights/what-gender-affirming-care-your-questions-answered> [<https://perma.cc/48DQ-FT6M>] (noting the proliferation of bills in state legislatures targeting gender-affirming care for transgender minors).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* Dr. Katherine Imborek explained that she has seen gender-affirming care change the lives of youth and adults by decreasing depression, anxiety, and suicide attempts. *Id.* “To her, that care is ‘a medical necessity, like providing insulin to a person with diabetes.’” *Id.*

<sup>288</sup> Wilson, *supra* note 36, at 586–87 (arguing that debates about what causes a person to be transgender lose sight of the “enormous psychological distress” experienced by many transgender people).

<sup>289</sup> See O’Connor, *supra* note 250 at 24 (noting the risks to physicians who treat minors without parental permission).



to gender-affirming care—have argued that the laws do not violate any constitutional rights.<sup>290</sup>

Some courts have already upheld laws banning gender-affirming care.<sup>291</sup> In *L.W. v. Skrmetti*, three transgender minors and their parents challenged a Tennessee law that banned certain treatment for gender dysphoria.<sup>292</sup> The district court enjoined enforcement of the law after determining that it likely violated the Fourteenth Amendment Due Process and Equal Protection Clauses.<sup>293</sup> The state appealed to the Sixth Circuit Court of Appeals, seeking an emergency stay of the district court's order.<sup>294</sup> The Sixth Circuit first noted that the claims were not within the "original fixed meaning" of either clause.<sup>295</sup> Second, the court viewed the claim as an attempt to "extend the constitutional guarantees to new territory,"<sup>296</sup> which made it difficult for the plaintiffs to prove that they were likely to prevail on the merits of their claim.<sup>297</sup> Third, state legislatures across the country were "engaged" on the issue and the court was reluctant to decide the issue before states had the opportunity to debate and reach their own conclusions on the issue.<sup>298</sup> "Leaving the preliminary injunction in place starts to grind these all-over-the-map gears to a halt. . . . To permit legislatures on one side of the debate to have their say while silencing legislatures on the other side of the debate under the U.S. Constitution does not further these goals."<sup>299</sup>

The court then addressed the constitutional issues directly. "Parents, it is true, have a substantive due process right 'to make decisions concerning the care, custody, and control of their children'"<sup>300</sup> but "[n]o Supreme Court

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<sup>290</sup> See *L.W. v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023) (discussing how Tennessee defended its law banning gender affirming care against claims that it violated transgender minors' constitutional rights).

<sup>291</sup> *Id.* at 418 (holding that parties challenging a Tennessee law banning gender-affirming surgeries and administration of hormones or puberty blockers to transgender minors were unlikely to prevail on their claims that the law violated their due process or equal protection rights).

<sup>292</sup> *Id.* at 413.

<sup>293</sup> *Id.* at 412–13.

<sup>294</sup> *Id.* at 413.

<sup>295</sup> *Id.* at 415.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 415–16 ("The burden of establishing an imperative for constitutionalizing new areas of American life is not—and should not be—a light one, particularly when 'the States are currently engaged in serious, thoughtful' debates about the issue.").

<sup>298</sup> *Id.* at 416.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 416–17 (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

case extends it to a general right to receive new medical or experimental drug treatments.”<sup>301</sup> Moreover, the court stated that it was not “deeply rooted in our history and traditions.”<sup>302</sup> While testimony from medical experts was persuasive, the court noted many gender-affirming treatments use drugs for a non-approved purpose.<sup>303</sup> “Tennessee decided that such off-label use in this area presents unacceptable dangers. Many medical professionals and many medical organizations may disagree. . . . [But it] is well within a State’s police power to ban off-label uses of certain drugs.”<sup>304</sup> The court also drew a distinction between a constitutional right to *refuse* treatment and a right to *demand* treatment and noted that most courts have rejected the argument that there is a constitutional right to treatment that the government has banned.<sup>305</sup> The court concluded that “the plaintiffs’ efforts to expand our substantive due process precedents to this new area are unlikely to succeed.”<sup>306</sup>

Turning to the equal protection claim, the court assumed the law would easily pass rational basis scrutiny,<sup>307</sup> but it addressed the plaintiff’s contention that the law discriminated on the basis of sex and, therefore, should be subject to heightened scrutiny.<sup>308</sup> It noted that minors of both sexes are prohibited from obtaining gender-affirming care.<sup>309</sup> The fact that the law mentioned the word “sex” did not persuade the court that heightened scrutiny should apply, relying on the Court’s holding in *Dobbs* that heightened scrutiny was not required simply because only women received abortion care.<sup>310</sup> “If a law restricting a medical procedure that applies only to women does not trigger heightened scrutiny, as in *Dobbs*, a law equally applicable to all minors, no matter their sex at birth, does not require such

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<sup>301</sup> *Id.* at 417.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 418. This is often referred to as “off-label” use. *Id.*

<sup>304</sup> *Id.* (internal citations omitted).

<sup>305</sup> *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 725-26 (1997)).

<sup>306</sup> *Id.* at 418.

<sup>307</sup> *Id.* at 419 (“The State plainly has authority, in truth a responsibility, to look after the health and safety of its children. . . . Tennessee could rationally take the side of caution before permitting irreversible medical treatments of its children.”).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* “The reality that the drugs’ effects correspond to sex in these understandable ways and that Tennessee regulates them does not require skeptical scrutiny.” *Id.*

scrutiny either.”<sup>311</sup> Because the Supreme Court had never applied heightened scrutiny to transgender persons, the Sixth Circuit held that rational basis scrutiny was appropriate, and under that test, the plaintiffs were not likely to succeed on the equal protection claim.<sup>312</sup>

Other courts have held that bans on gender-affirming care violate the Due Process and Equal Protection Clauses. In *Brandt v. Rutledge*,<sup>313</sup> plaintiffs challenged Arkansas Act 626, which “prohibits a physician or other healthcare professional from providing ‘gender transition procedures’ to any individual under eighteen years of age . . . .”<sup>314</sup> Judge Moody of the Eastern District of Arkansas held that Act 626 was unconstitutional and granted a motion for permanent injunction to enjoin enforcement of the law.<sup>315</sup>

Unlike the Sixth Circuit in *Skremetti*, Judge Moody held that Act 626 should be subject to heightened scrutiny.<sup>316</sup> “Act 626 discriminates on the basis of sex because a minor’s sex at birth determines whether the minor can receive certain types of medical care under the law.”<sup>317</sup> The court also noted that transgender people qualified as a suspect (or at least a quasi-suspect) class:

- (1) they have historically been subject to discrimination; (2) they have a defining characteristic that bears no relation to their ability to contribute to society; (3) they may be defined as a discrete group by obvious, immutable, or distinguishing characteristics; and (4) they are a minority group lacking political power.<sup>318</sup>

In order to survive heightened scrutiny, Arkansas would need to put forth an “exceedingly persuasive justification” for the ban by showing that it is substantially related to an important government interest.<sup>319</sup>

Arkansas claimed that it had an interest in “protecting children from experimental medical treatment and safeguarding medical ethics.”<sup>320</sup> Judge Moody found that the evidence presented at trial did not support this

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<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 WL 4073727 (E.D. Ark. June 20, 2023).

<sup>314</sup> *Id.* at \*1.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at \*31.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* (citing *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 610–13 (4th Cir. 2020)).

<sup>319</sup> *Id.* at \*32 (quoting *Brandt* by & through *Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022)).

<sup>320</sup> *Id.*

claim.<sup>321</sup> To the contrary, the unrefuted expert testimony and the testimony of the plaintiffs established that the treatments were effective and improved the lives of minors with gender dysphoria.<sup>322</sup> In addition, the court found that the evidence demonstrated that the benefits of the treatment “greatly outweigh[ed] the risks,”<sup>323</sup> and that doctors are not negligently prescribing gender-affirming treatments to minors.<sup>324</sup> Consequently, the court held that the law unconstitutionally discriminated on the basis of sex, in violation of the Fourteenth Amendment. “Based on the record, the Court concludes that Act 626 prohibits medical care on the basis of sex and the State has failed to meet its demanding burden of proving the Act advances its articulated interests. The Court finds that Act 626 violates Plaintiffs’ rights to equal protection.”<sup>325</sup>

Judge Moody also held that Act 626 violated the Due Process Clause.<sup>326</sup> Although protecting the health and well-being of children is a compelling interest, the ban on all gender-affirming care was not narrowly tailored to achieve that interest.<sup>327</sup> The court held that “the State has failed to present evidence that the gender-affirming procedures banned by Act 626 jeopardize the physical or psychological well-being of a minor with gender dysphoria.”<sup>328</sup> The plaintiffs’ testimony revealed that their decision to seek gender-affirming care for their children was reached after “thorough research, counseling, and consultation with a doctor. They are acting in the best interest of their children. Act 626 would take away these parents’ fundamental right to provide healthcare for their children and give that right to the Arkansas Legislature.”<sup>329</sup> For those reasons, the court held that the ban violated the plaintiffs’ substantive due process rights.<sup>330</sup> The *Brandt* and

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<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at \*33 (“The State failed to provide sufficient evidence that the banned treatments are ineffective or experimental.”).

<sup>323</sup> *Id.* at \*34.

<sup>324</sup> *Id.* at \*34-35. (“The State’s experts admitted that they have had no contact with any Arkansas doctors or information about how doctors in Arkansas treat minors with gender dysphoria.”).

<sup>325</sup> *Id.* at \*35.

<sup>326</sup> *Id.* at \*36.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* The court also held that Act 626’s provision that prohibited healthcare professionals from referring minors to other providers for gender-affirming care violated the healthcare professionals’ First Amendment Rights. *Id.* at \*37-38.

*Skrmetti* cases demonstrate the varying positions that states and courts may take when deciding cases that implicate the constitutional rights of minors and the dire consequences when minors and their parents are deprived of the right to make medical decisions for minors that seriously impact their physical and mental health. Eventually, the Supreme Court will need to resolve the inconsistent holdings and clarify minors' rights post-*Dobbs*. Unfortunately, that clarity may come at the expense of minors' bodily autonomy.

## V. MINORS' PARENTAL RIGHTS

If a minor becomes pregnant and chooses to continue the pregnancy (or if the minor is unable to obtain an abortion) and delivers the baby, that minor becomes a parent. This section considers the constitutional rights of minor parents. Specifically, it discusses how states protect or fail to protect their parental rights, including their right to make medical decisions for their children, and the right to decide whether to place the child for adoption. It then considers how the *Dobbs* decision might affect those rights.

### A. PRENATAL CARE AND CARE FOR THE MINOR'S CHILDREN

While most states require parental consent or judicial approval before a minor can obtain an abortion, a large majority of states allow minors to access prenatal care without parental or court involvement.<sup>331</sup> The reason most often given for allowing minors greater control over their bodies when they choose to continue a pregnancy than when they wish to terminate the pregnancy is that states want to make it easy for minors to get the care they need for themselves and their future child.<sup>332</sup> This is consistent with states' interest in protecting the health of minors and their interest in protecting potential life.<sup>333</sup> Thirty states and the District of Columbia also allow minor

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<sup>331</sup> Manian, *supra* note 205, at 142–43 (stating that thirty-six states and the District of Columbia expressly allow prenatal care for minors without parental or court approval). Only one state—North Dakota—expressly requires parental consent for prenatal care. *Id.*

<sup>332</sup> *Id.* at 143 (“[T]he vast majority of states have made the legislative policy decision that the health of a pregnant adolescent outweighs parents’ rights to be involved in their adolescent’s important treatment decisions.”).

<sup>333</sup> *Id.*

parents to consent to medical care for their children.<sup>334</sup> The other twenty states have no express policy for consent by minor parents.<sup>335</sup> This willingness to trust minors to make decisions for their children is not as easily explained.

Perhaps the most likely explanation is that the constitutional right to direct the upbringing of one's children applies to minor parents as well.<sup>336</sup> As long as their parental rights have not been terminated, the state must respect their rights as parents. However, it is difficult to reconcile the fact that a minor can make medical decisions for their minor child, but not themselves. It is also important to remember that parents' rights are not without limits; the state has the right and obligation to intervene if the child is in danger of abuse or neglect.<sup>337</sup>

As a practical matter, the respect for minors' rights as parents may be relatively limited. Minor parents have a higher number of interactions with government agencies and are at higher risk of having their children removed from their care than their adult counterparts.<sup>338</sup>

Minor parents are generally more likely to come into contact with the child welfare system than adult parents. For mothers age fifteen or younger, the risk of the state removing their child from their care due to neglect or abuse are nearly double that of mothers between twenty and twenty-one years old.<sup>339</sup>

If a pregnant minor is poor, and especially if the minor is in foster care, states may unjustifiably—even illegally—separate the minor parent from their child and withhold resources in order to pressure them to “voluntarily” terminate their rights.<sup>340</sup> Thus, the rights of minor parents may depend more on their financial status than on what the law dictates. But even minor

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<sup>334</sup> *State Laws and Policies: Minors' Rights as Parents*, GUTTMACHER INSTITUTE (Aug. 31, 2023), <https://www.guttmacher.org/state-policy/explore/minors-rights-parents> [https://perma.cc/HF4R-KG5P].

<sup>335</sup> *Id.*

<sup>336</sup> Manian, *supra* note 205, at 157 (“Although minor parents are not automatically ‘emancipated’ from their own parents’ authority in most jurisdictions, they still possess full parental authority over their infants in all states, at least in theory.”).

<sup>337</sup> See Hill, *Bodily Integrity*, *supra* note 12, at 1310 (noting that parental rights are limited by laws protecting children from abuse and neglect).

<sup>338</sup> See Manian, *supra* note 205, at 163 (noting the correlation between poverty and state intervention). “[P]overty places minor parents at a greater risk of oversight from the child welfare system.”

<sup>339</sup> *Id.* at 164.

<sup>340</sup> *Id.* at 166 (“Supposedly ‘voluntary’ surrenders of infants to foster care or adoption frequently resulted from coercive pressures, including lack of financial resources, denial of housing unless the minor parent surrendered her legal rights to her infant, and lack of understanding of legal rights.”).

parents in less precarious situations face more challenges and greater oversight than adult parents, whether because they live with their parents or other adults, or because they regularly interact with other adults—such as teachers—who will intervene if they are concerned about the minor or the minor’s child. “[T]eenage parents are likely to have their parenting more closely scrutinized and are more likely to interact with individuals who are mandated reporters of abuse and neglect who may assume that children of minor parents are at risk simply by virtue of the parents’ minority.”<sup>341</sup>

As the number of minor parents increases as abortions become more difficult to obtain, states must ensure that the constitutional rights of minor parents are respected and enforced. It is unclear whether the Supreme Court would enforce the parental rights of minors to the same extent as adult parents under the “history and tradition” analysis, but the right to parent is likely on stronger ground than the right to abortion since minors having children is nothing new and states have generally supported the right of minors to parent their children.<sup>342</sup>

#### B. ADOPTION AND TERMINATION OF MINORS’ PARENTAL RIGHTS

In contrast to laws requiring parental or court approval for a minor who wishes to terminate a pregnancy, most states require no such consent when a minor who has given birth wishes to voluntarily terminate their parental rights and place the child for adoption.<sup>343</sup> Only four states (Louisiana, Michigan, Minnesota, and Rhode Island) require the minor’s parents to consent to placing the minor’s child for adoption.<sup>344</sup> In New Hampshire the court *may* require parental consent.<sup>345</sup> Pennsylvania requires parental

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<sup>341</sup> *Id.* at 168–69. Once the minor is under the scrutiny of the state, that scrutiny is likely to continue and, perhaps, escalate to having their parental rights terminated. *Id.* at 169.

<sup>342</sup> *See id.* at 142–43 (noting that states have not distinguished between adult and minor parents).

<sup>343</sup> *Id.* at 174 (“Other than a limited number of exceptions, most states’ adoption laws either explicitly provide that the minority status of a parent does not affect her competency to consent or make no mention of treating minor parents differently.”). If parents refuse to consent to the adoption, the minor will be forced to parent against their will. This raises significant concerns for both the minor parent and the child. *See* discussion *supra* Part III.B.

<sup>344</sup> *State Laws and Policies: Minors’ Rights as Parents*, GUTTMACHER INSTITUTE (Aug. 31, 2023), <https://www.guttmacher.org/state-policy/explore/minors-rights-parents> [<https://perma.cc/HF4R-KG5P>]. Louisiana allows a court to “waive parental consent if the minor is ‘sufficiently mature and well informed’ or the adoption is in the infant’s best interest.” *Id.*

<sup>345</sup> *Id.*

notification, but not consent.<sup>346</sup> Connecticut, Kentucky, Missouri, Montana, and Washington do not require parental consent, but they require that the minor have legal counsel to advise the minor.<sup>347</sup> The remaining forty states and the District of Columbia give minor parents the right to relinquish their rights and place the child for adoption without parental notification or consent.<sup>348</sup>

The reasons for giving minors this autonomy are not clear and may vary by jurisdiction, but they cannot be justified by the same public health concerns that underlie policies allowing minors to access prenatal care.<sup>349</sup>

The assumption seems to be that, once a decision to forgo abortion is made, the decision to place a child for adoption rather than raising the child as a single teen parent is the only rational choice under the circumstances, so no protections are needed to protect that minor mother's interests.<sup>350</sup> In addition, parents of the pregnant teen might pressure them to place the child for adoption.<sup>351</sup>

Such pressure can be especially effective if the minor has no means of supporting themselves or their child and no knowledge of resources available to help provide that support.

There are also concerns that when courts consider what is in the child's best interest, older, wealthier adoptive parents may be viewed as more deserving of being parents.<sup>352</sup> Indeed, as the number of infertile couples seeking to adopt rises and pregnant people increasingly decide to parent their

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<sup>346</sup> *Id.*

<sup>347</sup> *Id.* In Connecticut, Kentucky, Missouri, and Washington, the court appoints counsel for the minor.

<sup>348</sup> Manian, *supra* note 205, at 143–44 (noting that minor parents are treated like adults with respect to adoption); see also Seymore, *supra* note 201, at 129–133 (discussing the role of independent counsel and guardian ad litem in adoptions with a minor parent).

<sup>349</sup> Manian, *supra* note 205, at 144 (“[A] minor’s freedom to give up her child for adoption without parental involvement is difficult to justify as a matter of public health.”).

<sup>350</sup> Seymore, *supra* note 201, at 101.

<sup>351</sup> Manian, *supra* note 205, at 173 (“[S]ome teenage mothers ‘voluntarily’ relinquish their infants as a result of pressure from their own family, adoptive families and agencies, or state officials, and these mothers face extreme difficulties getting their infants back when they wish to set aside their consent to the adoption.”).

<sup>352</sup> See Seymore, *supra* note 201, at 118. According to Professor Seymore “if the decision of who was the rightful parent of the child rested solely on ‘best interests of the child,’ any number of biological parents would lose their children to ‘better’ parents—and in a best interest of the child analysis, that “better” parent often means one who is wealthier, older, and more stable.” *Id.* While equating the “best interests of the child” with the wealth may be offensive, “the reality in adoption is that adoptive parents are usually financially far better positioned than birth families.” *Id.*



children if they do not or cannot obtain an abortion,<sup>353</sup> there are concerns that pregnant minors may be pressured to place their children for adoption with couples who can provide a “better” life for the child.<sup>354</sup> States that allow minors to terminate their parental rights and surrender a child for adoption without requiring parental consent, independent legal counsel, or a guardian ad litem may leave adolescent parents vulnerable to such tactics.

In particular, a minor may not understand that there are resources available to provide support if they choose to parent their child, and they may not understand the effect of terminating their parental rights. For example, a teen who is receiving help from a family member might think that adoption formalizes an arrangement that had, up to that point, allowed the teen to remain a part of the child’s life.<sup>355</sup> In one Montana case, the minor had difficulty understanding the adoption paperwork. The adoptive mother had called repeatedly to encourage her to sign the documents and promised the teen that she would be able to see her child anytime she wanted.<sup>356</sup> The teen did not realize that the promise was not enforceable and that if she signed the paperwork she would have no right to future contact with the child.<sup>357</sup> The court invalidated her consent, noting that the reason Montana required independent counsel is to prevent adolescents from making irrevocable decisions without understanding the consequences.<sup>358</sup>

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<sup>353</sup> See *id.* at 116 (“With delayed childbearing and increased infertility, the demand for adoption has increased while the supply of children has decreased.”).

<sup>354</sup> *Id.* at 116–17 (describing adoption counseling agency training programs whose methods were designed to steer pregnant teens toward adoption). In the 1930s and 1940s, social workers pressured unmarried women to place their children for adoption instead of raising them. *Id.* at 113. “One scholar describes this time in American adoption history as a time of ‘pressure, coercion, and inhumanity in procuring consents.’” *Id.* (quoting David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 7 (2007)). After the *Roe* decision was rendered and the stigma of being an unwed parent subsided, most people who chose to continue the pregnancy also chose to raise the child instead of surrendering it for adoption. *Id.* at 115–16. Another modern trend is that there are fewer babies currently available for adoption compared to the immediate aftermath of World War II. *Id.* at 116. With the increased demand for adoption and lower supply of children there is evidence that some adoption agencies are returning to the coercive tactics of an earlier era in order to convince teens to choose adoption. *Id.* at 116–17.

<sup>355</sup> *Id.* at 130–31 (describing the role of independent counsel and circumstances in which a minor may not understand the documentation related to the adoption or the consequences of signing the documents).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 131.

<sup>358</sup> *Id.*

Finally, there seems to be a belief that minors may regret their choice to get an abortion, but that there will be no such emotional trauma from a decision to place a child for adoption. Professor Malinda L. Seymore emphatically rejects that narrative.<sup>359</sup>

I have given a baby up for adoption, and I have had an abortion, and while anecdotes are not evidence, I can assert that abortions may or may not cause depression—it certainly did not in me, apart from briefly mourning the path not taken—but adoption? That is an entirely different matter. I don't doubt that there are women who were fine after adoption, and there is emphatically nothing wrong with that or with them; but I want to point out that if we're going to have a seemingly neverending discussion about the sorrow and remorse caused by abortion, then it is about goddamn time that we hear from birth mothers too.

Believe me when I say that of the two choices, it was adoption that nearly destroyed me—and it never ends.<sup>360</sup>

Given the potentially devastating emotional consequences, allowing a minor to make an uninformed decision seems irrational and not related to a legitimate state interest.

Requiring independent counsel ensures that minors have accurate and objective information about the process and consequences of proceeding with adoption and ensures that information is not filtered through adults—including parents—who have a stake in the outcome. More importantly, it respects the minor parent's fundamental constitutional right to make the most consequential decision about the upbringing of the child—whether to remain the child's parent or place the child with another family. Providing support and objective guidance for a minor facing this decision respects that right, while pressuring or manipulating the minor to surrender the child violates the right for no legitimate—much less compelling—reason.

## CONCLUSION

The *Dobbs* decision has altered the constitutional terrain for everyone, but minors may be more affected than most. Recognition of minors' rights is a relatively recent development, and their rights have always been subject, to some degree, to the rights of their parents. Unlike minors' rights, the right of parents to make decisions that affect their children are deeply rooted in the

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<sup>359</sup> *Id.* at 133–34 (describing her experiences with abortion and adoption).

<sup>360</sup> *Id.*

nation's history and tradition. Consequently, those rights are likely to survive even as minors risk losing constitutional protection of their rights. However, minor parents may see the erosion of their fundamental right to direct the upbringing of their children as states seek to exercise greater control over children.

It would be a mistake to dismiss minors' rights without serious consideration of the consequences. Diminishing minors' autonomy in decisions so crucial to their futures as whether to obtain an abortion, whether to consent to or refuse medical care, and whether to terminate their parental rights, can have profound and detrimental effects on their long-term health and well-being, and that of society as a whole. Courts and legislatures would do well to tread carefully.

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