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Who Decides? The Role of Parental Rights in Abortion and Gender-Affirming-Care Decisions for Minors

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ABSTRACT. The American legal system presumes that children's interests are best protected by their parents and, secondarily, by the state's *parens patriae* authority. Yet this structure falters when parental authority and state power are infused with political and ideological agendas. This Essay examines how these dynamics have distorted decision-making authority in two contexts — minors' access to abortion and gender-affirming medical care — and allowed children's welfare and autonomy to be sacrificed to partisan aims. The law is inconsistent on the role of parental rights — typically empowering parents to grant or withhold consent to a minor's abortion but categorically stripping them of the power to consent to gender-affirming care for a minor. This inconsistency exposes "parental rights" as a selectively invoked political tool rather than a stable legal principle. Moreover, even a consistent approach to parental rights and decision-making for minors would likely fail to account sufficiently for the unique, lifelong consequences of denying access to abortion or gender-affirming care.

Part I situates these departures within the broader legal framework governing conflicts among parents, children, and the state, illustrating how minors' interests rarely prevail absent independent constitutional protection or statutory intervention. Part II explores how abortion and gender-affirming care laws have been shaped less by coherent doctrine than by partisan ideology, resulting in idiosyncratic approaches to these particular decisions with the potential for lasting harmful consequences. Part III argues that while fidelity to conventional principles would represent an improvement, at least with respect to gender-affirming care decisions, those principles may simply be inadequate to safeguard children's autonomy in life-altering decisions. The Essay concludes by urging reconsideration of how the legal system conceptualizes minors' self-determination, proposing that more attention be paid to how decisions might affect children's well-being than to who has the right to make them.

INTRODUCTION

The legal system in the United States ostensibly protects children through their parents, who are presumed to act in their children's best interests, and the state, which has special "super-parent" powers to intervene on behalf of children.

Minors, without the legal ability to make their own decisions, or even the ability to participate directly in democracy, are often at the mercy of their parents, the government, or both. This is by design, based on the assumption that this approach best meets children's needs. And while this system often works as designed, it is ill-suited for issues where politics and ideology have significant influence. In those situations, children become victims of the culture wars. Rather than protecting them, the legal system often allows children's interests to be sacrificed to religious, moral, and political concerns that are at odds with their best interests.

The potentially harmful consequences of a system that largely deprives minors of decision-making authority are on stark display in the context of abortion and gender-affirming-care decisions. In the United States today, many pregnant minors are deprived of access to abortion, and many transgender minors are denied gender-affirming care. Minors can be denied access to abortion because of generally restrictive state laws or because the state requires parental consent, and the parent refuses.[1] Minors can be denied gender-affirming care because a parent refuses to consent or because the state has enacted a categorical ban on providing such treatment to minors, regardless of parental consent.[2] The legal system has allocated decision-making power in each context in ways that may jeopardize rather than protect children's health, safety, and emotional well-being. The system fails to account sufficiently for children's interest in bodily autonomy and their interests in having some say over the arc of their future adult lives. The core legal question in both contexts is "who decides"? Should these life-altering decisions rest with parents, the government, or the minors themselves?

Under longstanding constitutional and common-law principles, the power to make decisions for children is determined based on consideration of constitutional parental rights, the state's power to protect, and children's own interests. But the three considerations do not get equal weight, and the result, in most cases, is that parents are entitled to make decisions for their children. American law trusts parents—not the state—to raise children. Parents do so within a sphere that is largely protected from governmental oversight and intrusion. The state's power to protect children operates as a backstop primarily when parental decision-making results in abuse or neglect, or when a parent is deemed unfit. Children's interests rarely have sufficient weight to overcome parental rights unless they are rooted in independent constitutional protections. When abortion was protected as a constitutional right, for example, minors were entitled to a mechanism to bypass a parental consent law.[3] States have also passed laws to

1. *See infra* text accompanying notes 58-88.

2. *See infra* text accompanying notes 90-104.

3. *See infra* text accompanying notes 58-82.

reallocate decision-making authority when children are deemed capable and deserving of independent decision-making authority (for example, "mature minor" laws that allow minors to consent to contraceptive and sexually transmitted infection care) or when a deviation serves other legitimate governmental interests such as public health (for example, compulsory vaccination laws). But in the absence of a special rule, the constitutional and common-law principles govern, parents hold most of the power, and conflicts are sorted out by courts on a case-by-case basis.

The legal rules that dictate whether a minor can obtain an abortion or whether a minor can access gender-affirming care cannot be explained solely by these basic principles. Rather, in each context, courts and legislatures have adopted a special set of rules that are neither consistent with each other nor consistent with the approach to other, similar decisions. Those rules are susceptible to two critiques. First, states have significantly departed from the longstanding principles that determine who makes decisions for children, with little justification other than political whim and virtually no effort to explain why the traditional principles should not guide the allocation of decision-making authority. Second, even if states did follow those traditional principles, children still may be irreparably harmed by deprivations of care that have deep implications for who they are and the adult lives they will lead.

The departures from the traditional principles are different for abortion and gender-affirming care, but for both, access to care turns more on whether the minor lives in a red or a blue state than whether accessing the care would be in their best interests. When red states believe parents will take a restrictive approach (denying their children an abortion), they give the power to decide to the parents through parental-involvement laws, even though most of those states grant minors the power to consent to contraceptive care without parental involvement. But when they believe some parents might take a permissive approach (providing their children with gender-affirming care), they seize power for themselves by enacting a categorical ban on care and wresting decision-making power away from parents completely. Both decisions are driven by the ideology of the governing party of the state—which is often at odds with the views of their own constituents—rather than by any evidence-based determination of the child's best interests or by any resort to conventional legal principles about who is best positioned to make decisions for children.

The resulting scheme makes a mockery of the parental rights that drive the conventional approach, turning the term "parental rights" into a shibboleth that is invoked when it aligns with the prevailing political winds, in the case of abortion, and discarded when it does not, in the case of gender-affirming care. The rules for gender-affirming care are also notable for their departure from the conventional approach in "who decides who decides." The categorical bans not only

strip parents of their usual decision-making authority, but they also deprive children and the state of the opportunity to argue in court that a parental decision to deny care should be overridden because of the child's individual needs.

Blue states are more likely to give minors control over their own sexual- and reproductive-health decisions (including abortion) and less likely to wrest decisions over gender-affirming care away from parents through categorical bans. Although political ideology might contribute to those rules as well, it is an ideology that operates in the abortion context to address the minor's current needs and also to preserve the minor's ability to become a fully autonomous adult. And, in the gender-affirming-care context, blue states have largely refrained from making special rules, allowing the conventional rules to dictate who has the authority to consent to care.

The second problem is thornier. Even if states follow the conventional approach in allocating decision-making power over abortion and gender-affirming care, children may still be irreparably harmed. The usual doctrinal approach to resolving conflicts among child, parent, and state might simply be ill-equipped to address decisions that so deeply affect a minor's self-determination and the arc of the minor's life. In our current system, the minor's interests are subordinated to those of the parents and the state unless the particular interest has been deemed fundamental or the state has seen fit to grant decision-making power to minors. Constitutional protection for the right to abortion meant parents did not have unfettered control over the minor's abortion decision because minors had a constitutional right to seek a judicial bypass of parental consent.[4] But now that there is no federal constitutional protection for abortion, that safeguard can be eliminated if the state so chooses. Minors' ability to seek abortion care can be handed over completely to parents, despite the potential lifelong (and potentially life-threatening) consequences of a parent's refusal to consent. And while most states have granted mature minors the power to consent to contraception, many fewer have done so for abortion.

When we allocate decision-making power over children, we ask who has the power to make the decision rather than whether a decision that aligns with the child's best interests has been or is likely to be made. The interests of children are represented only indirectly based on the assumptions that parents act in their children's best interests and that the state intervenes to protect their interests when necessary. But the assumption that parents and the state are acting in the service of children's interests may be less justifiable when the decisions are in such fraught areas. When a minor is deprived of access to an abortion, pregnancy and birth are imposed upon the child, as well as potential parenting responsibilities. A trans minor deprived of access to gender-affirming care may find that

4. *See* Bellotti v. Baird, 443 U.S. 622, 643 (1979).

gender dysphoria is harder to address after puberty and that the risk of suicide or other self-harm is increased both in the short- and long-term. Yet the law tilts in a way that favors deprivation of care.

These two areas of controversy raise important questions about how our legal system might better protect the autonomy interests of children—now and into adulthood. Is the traditional deference to parents appropriate when the decisions in question are so personal and the results potentially irrevocable? Should parental rights be balanced against the minor's interest in seeking these forms of medical care? Should the exercise of parental rights be guided by an obligation to consider the minor's interest in self-determination? Should the allocation of decision-making authority be shaped by whether it produces outcomes that promote the health, safety, and well-being of minors? Perhaps we should reconsider the conventional legal principles that leave children at the mercy of political leaders, even if they sometimes benefit from their whims. But given that the current system is shaped largely by longstanding and robust constitutional protection for parental rights, there is no easy blueprint for reform.

This Essay will argue that states should, at a minimum, be faithful to the conventional approach to allocating decision-making power for children. Gender-affirming care decisions should be made on an individual basis, usually by parents in consultation with the child's licensed medical providers. And while legislatures may vest the power to consent to abortion in parents, minors should have the opportunity to bypass their parents if they are capable of making their own decision. But the Essay will also raise questions about whether and how our system could better attend to a minor's interest in autonomy and self-determination in allocating such power, although this is the beginning rather than the end of a conversation. To do so, the Essay will first explore in Part I how conflicts among parent, child, and state are usually resolved, in order to illustrate the departures in these more controversial contexts. Part II will examine how decision-making power has been allocated for abortion and gender-affirming care decisions, drawing attention to the ways in which politics and ideology have supplanted the conventional approach. Finally, in Part III, the Essay will consider how the current approach undermines the well-being of minors and whether the conventional rules, if followed, would be up to the task of doing so. It will conclude with preliminary thoughts on how the rules might be adapted to account more effectively for the autonomy interests of minors.

I. WHO USUALLY DECIDES?

Before reaching the age of eighteen, the age of majority in the United States, children have relatively little decision-making authority. The question of who

has the authority to make decisions for minors—and what decisions can be made—is answered by a set of intersecting constitutional, common-law, and statutory rules. The resulting system is sometimes described as a "triangular" model of child-rearing, with rights and power over children balanced among parents, the state, and the children themselves. The law does allocate *some* power to each, but to the extent the triangle image is suggestive of an equal division of authority, it is misleading. The interests of each party vary in scope, strength, and origin, but parents hold the bulk of the power. Only by examining this conventional approach can we see where and how states have deviated when regulating minors' access to abortion and gender-affirming care.

A. Parental Rights

Under American law, parents retain most of the power to make decisions for children, including regarding most medical treatments. This structure is largely the product of federal constitutional protection for parental rights that limits the government's power to exert control over child-rearing decisions. Fit parents are presumed to act in the best interests of their children and are constitutionally entitled to "care, custody, and control" over them in the absence of a compelling reason for the government to interfere. This protection was established through a trilogy of cases.

In 1923, in *Meyer v. Nebraska*, the Supreme Court invalidated a Nebraska law banning instruction at home or school in any foreign language before ninth grade.[5] The state did have a right to try to "foster a homogeneous people with American ideals," the Court held, but that right was not strong enough to override the parents' right to have their children learn German.[6] These parental rights were rooted in the Due Process Clause of the Fourteenth Amendment, which the Court held

> denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[7]

The state had exceeded its power by trying to make a child-rearing decision without evidence that learning a foreign language was harmful to children or that the state had relevant expertise in the matter. Parents were thus well "within

5. 262 U.S. 390, 402-03 (1923).

6. *Id.* at 402.

7. *Id.* at 399.

the liberty of the [Fourteenth] Amendment" when deciding whether to instruct their children in a foreign language.[8]

Two years later, the Supreme Court reaffirmed that the balance of power between parents and the state tips strongly in favor of parents. In *Pierce v. Society of Sisters*,[9] the Court invalidated an Oregon law that required children ages eight to sixteen to attend public school.[10] A child was "not the mere creature of the State," the Court wrote, whose education could be standardized without regard for the desires of "those who nurture him and direct his destiny."[11] To the contrary, parents "have the right, coupled with the high duty, to recognize and prepare [children] for additional obligations."[12] The Oregon law thus "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[13]

And in the final installment of the parental rights trilogy in 1944, *Prince v. Massachusetts*, the Court affirmed the robust protection for parental rights even while upholding the conviction of a woman who allowed her niece to sell religious pamphlets on the street in violation of state labor law.[14] The Court held that the state had the power to prohibit child labor in its capacity as super-parent, or *parens patriae*, which was sufficient to outweigh the "the parent's claim to authority in her own household and in the rearing of her children."[15] The child's guardian could thus be convicted without violating constitutional parental rights. Citing *Meyer* and *Pierce*, the Court pronounced it "cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[16] In modern parlance, parental rights are fundamental

8. *Id.* at 400.

9. 268 U.S. 510 (1925).

10. *Id.* at 534-36.

11. *Id.* at 535.

12. *Id.*

13. *Id.* at 534-35.

14. 321 U.S. 158, 163 (1944).

15. *Id.* at 165.

16. *Id.* at 166 (citation omitted). These three parental rights cases were the starting point for the constitutional right of privacy that would evolve over the course of the next century to include protection related to marriage, sterilization, contraception, abortion (for forty-nine years), living arrangements, and consensual sexual behavior. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541-43 (1942); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); Loving v. Virginia, 388 U.S. 1, 12 (1967); Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972); Roe v. Wade, 410 U.S. 113, 154 (1973); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977); Lawrence v. Texas, 539 U.S. 558, 578 (2003); Obergefell v. Hodges, 576 U.S. 644, 675-76 (2015).

under the Due Process Clause, and courts must evaluate government infringements under the strict scrutiny standard.

The Court returned to a broad discussion of constitutional parental rights more than half a century later in the 2000 case *Troxel v. Granville*.[17] The earlier trilogy had established "that there is a constitutional dimension to the right of parents to direct the upbringing of children,"[18] and later cases recognized specific instances in which parents could or could not exercise those rights.[19] In this case, the Court considered the scope of parental rights to determine the rights of parents vis-à-vis nonparents. The *Troxel* plurality wrote that the rights of nonparents to seek visitation with children over the objection of a fit parent should be quite limited, noting that the "liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court."[20] The case thus represented a strong reaffirmation of robust constitutional protection for parental rights and of the proper framework for analyzing those rights.

Though not absolute, the Court explained, a fit parent must be presumed to be acting "in the best interests of their children" with every decision they make.[21] The "natural bonds of affection" lead parents to act in just that way — leaving "no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[22] The challenge in many cases in which a parental decision is questioned is to determine when the state or the child has a competing interest that is sufficient to offset parental rights, or when the parent is unfit and not entitled to these protections at all.[23] These competing interests are explored in the sections that follow.

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17. 530 U.S. 57 (2000).

18. *Id.* at 65.

19. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that unwed fathers have the right not to be categorically disregarded as a parents); Wisconsin v. Yoder, 406 U.S. 205, 207, 236 (1972) (holding that Amish parents have the right to cease formal education for their children after the eighth grade); Parham v. J.R., 442 U.S. 584, 600 (1979) (holding that children have the right not to be admitted to a mental institution by their parents without review by an independent authority); *In re* Gault, 387 U.S. 1, 30-31 (1967) (holding that children have a right to procedural due process in delinquency proceedings); Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) (holding that parents have a right to procedural due process before the state involuntarily terminates their parental rights).

20. *Troxel*, 530 U.S. at 65.

21. *Id.* at 68.

22. *Id.* at 68-69.

23. *Id.*

B. State Power

The most significant counterweight to parental rights is the state's power to protect the health, safety, and welfare of children. Beyond the general police power,[24] courts have recognized that states have a special power to protect children, known as *parens patriae*. As early as 1890, in *Mormon Church v. United States*, the United States Supreme Court described this doctrine as the "prerogative . . . inherent in the supreme power of every state" and "a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves."[25] Vested in the monarch under English common law, the Court wrote that "this beneficent function has not ceased to exist under the change of government from a monarchy to a republic"; rather, "it now resides in the legislative department, ready to be called into exercise whenever required for the purposes of justice and right."[26]

Today, the most significant expression of this power is the family-regulation system, through which the state implements its child-abuse and neglect laws.[27] That system has many features, including reporting, surveillance, investigation, and intervention. In addition to the need to comply with other constitutional requirements, like procedural due process, the state's power within this system is limited by parental rights. For example, the state must prove an allegation of child abuse or neglect by clear and convincing evidence and afford the parent constitutionally sufficient due process before it can take actions that significantly interfere with the parent-child relationship, such as termination of parental rights.[28] Although this system is the subject of many powerful critiques, it is

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24. While state governments must comply with the Federal Constitution, they have a general "police power" that enables them to "perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535 (2012).

25. 136 U.S. 1, 57 (1890).

26. *Id.* at 58. On the origins of this power, see also JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 709 (3d ed. 1843), which describes the state's right to interfere when a father "acts in a manner injurious to the morals or interests of his children."

27. On the history and parameters of these laws, see JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 262-85 (2011).

28. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 758-59, 769 (1982).

theoretically designed to protect children when parents are unfit or expose them to harm.[29]

The state's power to protect children is exercised in other ways as well, such as through compulsory education and vaccination laws, criminal child-endangerment laws, medical informed-consent laws, and so on. In each context — and in each particular conflict — the question is whether the state has sufficient power to curtail a parent's rights. Or, in more limited cases that I will discuss in the next Section, the question is whether the state has overstepped in a way that infringes on the child's own rights. Ultimately, the relationship between parents and the state is best understood not as a coequal partnership but as one of parents' primary control with the state's distant oversight. Laws concerning parental involvement in abortion and imposing categorical bans on gender-affirming care are exercises, if questionable ones, of this state power.

C. Children's Rights?

The question mark in the subheading is intentional. For the most part, children do not have independent rights that limit the state's power or must be balanced against the rights of parents.[30] Their interests, at least theoretically, are assumed to be protected because both parents and the state are acting to promote their best interests. There are, however, situations in which the minor has an articulable constitutional or statutory right that must expressly be weighed, or, in some cases, be given dispositive effect.

As a general matter, minors enjoy most of the same constitutional rights as adults, although they may be diluted to account for their lesser decision-making capacity or other unique attributes of being a minor. For example, a minor student who wishes to wear a black armband to protest a war has the First Amendment right to do so because it is not sufficiently disruptive to the educational environment to justify a restriction on the minor's speech.[31] But that same minor does not have the right to wear a shirt to school with a sexualized image or

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29. On the critique of the family-regulation system, see generally DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES — AND HOW ABOLITION CAN BUILD A SAFER WORLD (2023).

30. On children's rights in the American legal system, see generally Clare Ryan, *Are Children's Rights Enough?*, 72 AM. U. L. REV. 2075 (2023); Susan Gluck Mezey, *Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953-92*, 27 FAM. L.Q. 307 (1993); Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317 (2007); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 2006 UTAH L. REV. 173; and Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 CORN. L. REV. 549 (2012).

31. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969).

message because that balance is resolved differently.[32] And a state's restriction on marriage by minors is not unconstitutional even though the right to marry is fundamental because it delays rather than deprives them of that right.[33]

Similarly, states may decide to raise or reduce the age of minority for particular types of conduct—drinking, smoking, and driving, to take the most salient examples. Minors would not fare well in a constitutional challenge to these age restrictions, given that age classifications have not been deemed inherently suspect, and the state has a cognizable interest in protecting not only the minors themselves, but also the safety of other people in the community.[34]

But in many other contexts, the constitutional rights of minors are "virtually coextensive with [those] of an adult."[35] They are entitled to procedural due process and other standard constitutional protections when facing criminal charges or a juvenile-delinquency proceeding,[36] and they have rights when facing other potential deprivations like corporal punishment in school or the forfeiture of property.[37] Thus, in some contexts, children will win disputes against the state because of their own, independent rights.

Still, where the law accounts for children's rights, it treats them as less robust vis-à-vis their parents than against the state. Parents have a constitutional right to the "care, custody, and control" of their children, as discussed above. The flip side of those rights is that children are generally subject to parental decisions, even if they disagree with them.[38] If a parent wanted a child to attend private school, but the child wanted to attend public school, the parent would win the dispute in court. We would expect the same outcome for virtually all conflicts over child-rearing decisions, both significant and trivial, absent proof that the

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32. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683-86 (1986).

33. Moe v. Dinkins, 669 F.2d 67, 67-68 (2d Cir. 1982).

34. *See, e.g.*, Houser v. State, 540 P.2d 412, 413-15 (Wash. 1975) (upholding a drinking age of twenty-one against constitutional challenge).

35. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

36. *See In re* Gault, 387 U.S. 1, 30-31 (1967) (recognizing due process rights in juvenile-delinquency proceedings); *In re* Winship, 397 U.S. 358, 358-61 (1970) (explaining that criminal proceedings require the application of the essentials of due process); Breed v. Jones, 42 U.S. 519, 531-33 (1975) (holding that double jeopardy applies to juveniles).

37. *See* Ingraham v. Wright, 430 U.S. 651, 664-72 (1977) (showing that juveniles have rights when facing corporal punishment); Goss v. Lopez, 419 U.S. 565, 574-75, 579-80 (1975) (holding that a student's entitlement to public education is a protected property interest requiring fundamentally fair procedures before suspension).

38. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 604 (1979) ("The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.").

parent's conduct or decision constituted abuse or neglect or interfered with a child's exercise of a constitutional right.

While there are discrete instances in which children's interests are sufficient to override their parents or the state, the broader takeaway is the uneven power dynamic that protects children's interests more indirectly than directly. That dynamic is clearly at play in the regulation of abortion and gender-affirming care, as explored below, often with significant lifelong consequences for the minors.

II. BALANCING CHILDREN'S RIGHTS AND INTERESTS IN MEDICAL DECISION-MAKING

Decisions about abortion and gender-affirming care for minors are medical decisions. For the most part, medical decisions for minors are governed by the traditional rules, which means, in essence, that they are typically delegated to parents. But both abortion and gender-affirming care decisions are subjected to special rules that are neither consistent with one another nor consistent with comparable decisions.

As with most legal rules regarding decision-making for children, the most powerful influence is constitutional protection for parental rights. The Supreme Court has made clear that the right to make medical decisions is one component of parents' right to the "care, custody, and control" of their children. In *Parham v. J.R.*, the Court noted that constitutional parental rights include "a 'high duty' to recognize symptoms of illness and to seek and follow medical advice," as well as the right to make medical decisions.[39] In that case, a child had challenged his parents' decision to commit him to a mental institution, but the court held that the state's review by an independent medical decision-making body was sufficient due process to protect the child from an erroneous deprivation of liberty.[40] This case sets a strong default in favor of parental decision-making about medical care for children.

Ordinarily, a medical provider will not treat a child without the informed consent of the child's parent.[41] Unless governed by a special rule, a child cannot request or consent to medical treatment for themselves. Parents also have the right, in most situations, to insist on medical care for children over their

39. *Id.* at 602; *see also In re* Storar, 420 N.E.2d 64, 73 (N.Y. 1981) ("Of course it is not for the courts to determine the most 'effective' treatment when the parents have chosen among reasonable alternatives." (quoting *In re* Hofbauer, 393 N.E.2d 1009, 1012 (N.Y. 1979))).

40. *Parham*, 442 U.S. at 606-07.

41. The parent's power to give or withhold consent is a function of their constitutional parental rights, as well as express statutory grants of power in many jurisdictions. *See, e.g.*, TEX. FAM. CODE ANN. § 151.001(a)(6) (West 2025).

objection—imagine a crying child trying to resist a childhood vaccine—though, depending on the type and necessity of care, and the age of the minor, some providers will refuse on ethical grounds to treat without the child's agreement.[42] But there are legal limits to this parental control. Every state has abuse and neglect laws that apply to medical care and allow for state intervention.[43] Courts generally draw the line when parents refuse to consent to life-saving care or provide their consent to care with an unjustifiable, life-threatening risk.[44] But even at those extremes, parents who are following the advice of a doctor are often permitted to make treatment decisions, even when the weight of medical authority would counsel a different approach than the parent chooses.[45]

Thus, in medical decision-making disputes governed only by common law and the Federal Constitution, parents usually prevail. But, in some circumstances, states have passed statutes to alter the allocation of power and rights. In the context of compulsory vaccinations, for example, most states mandate certain childhood vaccines as a condition of attending public schools;[46] many also

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42. *See Parham*, 442 U.S. at 606-07; *see also* Miller v. HCA, Inc., 118 S.W.3d 758, 768 (Tex. 2003) (recognizing that a parent has the right to consent or withhold consent for a child's medical care); Melinda T. Derish & Kathleen Vanden Heuvel, *Mature Minors Should Have the Right to Refuse Life-Sustaining Medical Treatment*, 28 J.L. MED. & ETHICS 109, 112-13 (2000) (discussing the general approach for consent to children's medical care); Marianne Sharko, Rachael Jameson, Jessica S. Ancker, Lisa Krams, Emily C. Webber & S. Trent Rosenbloom, *State-by-State Variability in Adolescent Privacy Laws*, 149 PEDIATRICS art. no. e2021053458, at 3-6 (2022) (comparing and analyzing state laws governing consent to medical care by adolescents). The American Academy of Pediatrics encourages minors to be included in the decision-making process as appropriate for their stage of development. *See* Aviva L. Katz & Sally A. Webb, *Informed Consent in Decision-Making in Pediatric Practice*, 138 PEDIATRICS art. no. e20161485, at 7-8 (2016).

43. *See, e.g.*, *In re* Willmann, 493 N.E.2d 1380, 1389 (Ohio 1986) (noting that "the authority of the parents must yield to that of the state" when necessary to save a child's life).

44. *See, e.g.*, *In re* Green, 292 A.2d 387, 390-93 (Pa. 1972) (holding that the state may override parental decision on medical care only if the child's life is imminently endangered); *see also* Maxine Eichner, *Bad Medicine: Parents, the State, and the Charge of "Medical Child Abuse,"* 50 U.C. DAVIS L. REV. 205, 239-46 (2016) (discussing the limits that courts have imposed on government intervention in medical-neglect cases). *See generally* Joseph Goldstein, *Medical Care of the Child at Risk: On State Supervision of Parental Autonomy*, 86 YALE L.J. 645 (1977) (exploring the balance between parental authority and state intervention in medical decision-making for children).

45. *In re* Hofbauer, 393 N.E.2d 1009, 1013-15 (N.Y. 1979) (concluding that a child was not neglected due to his parents' decision to reject one physician's advice and treat his cancer with Laetrile rather than chemotherapy, since they were following the advice of another physician and the treatment was not "totally rejected by all responsible medical authority").

46. *Vaccine-Specific Requirements: State Laws and Requirements by Vaccine as of May 2025*, IMMUNIZE.ORG (July 3, 2025), https://www.immunize.org/official-guidance/state-policies/requirements [https://perma.cc/EQP4-6ZNG].

mandate certain screening tests at birth to identify serious but often treatable diseases.[47] These mandates represent a categorical override of the parental right to refuse medical treatment for their child. They have been upheld as constitutional because the state's interest in protecting children from preventable disease and its public-health interest in limiting the transmission of contagious disease to others in the community is sufficient to justify the infringement.[48] Meanwhile, as discussed below, both abortion and gender-affirming care decisions are largely governed by still other special rules that deviate in significant ways from the typical allocation of decision-making power.

A. Sexual and Reproductive Healthcare

Many states have passed categorical overrides in the area of sexual and reproductive health for minors. But rather than superimposing the state's preferred outcome over the parent's, legislatures have reallocated decision-making power from the parent to the child. Within this category, however, states have generally treated abortion as a unique decision and granted minors less autonomy to make abortion decisions than other types of sexual and reproductive decisions, unless they are constitutionally required to do otherwise.

The approach taken by most states to contraceptive decision-making for minors reveals how unusual the rules are for abortion. Contraceptive care, like other types of medical care, typically requires the consent of a child's parent in the absence of a contrary statute.[49] However, all but four states have overridden that rule by statute, allowing for minors to consent on their own behalf in at least some circumstances.[50] This is not explained by the minors' federal constitutional rights. Although the Supreme Court held in *Carey v. Population Services*

47. *See Newborn Screening in Your State*, HEALTH RES. & SERVS. ADMIN. (Dec. 2024), https://newbornscreening.hrsa.gov/your-state [https://perma.cc/792K-3PEM].

48. *See, e.g.*, Itz v. Penick, 493 S.W.2d 506, 509 (Tex. 1973) (upholding a school-immunization law and noting that similar "statutes were the subject of frequent attack in the early years of the century and were universally upheld as proper exercises of the police power for the protection of the health and safety of the citizenry"); *cf.* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (upholding a compulsory smallpox vaccination law against challenge by an adult because "the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety").

49. *See, e.g.*, TEX. FAM. CODE ANN. § 32.003 (West 2025) (listing specific instances in which a minor can consent to her own treatment).

50. *See generally* Heather D. Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Medical Care*, GUTTMACHER INST. (Aug. 1, 2000), https://www.guttmacher.org/gpr/2000/08/minors-and-right-consent-health-care [https://perma.cc/5LA3-HL68] (discussing the evolution of minors' right to consent to their own medical care over time and across states).

International that states cannot restrict the sale of contraceptives based on age, it sidestepped the more important question of whether minors, like adults, have a constitutional right to obtain and use contraception.[51] The right to obtain and use contraception was established for married adults in *Griswold v. Connecticut*[52] and for single adults in *Eisenstadt v. Baird*,[53] but the Court never returned to the issue of minors' rights to obtain or use contraception. Therefore, the decision whether to require parental consent is left to the states, as long as any statutory override is not deemed an unconstitutional infringement on parental rights. And most states have decided that minors, at least older ones, are entitled to make it for themselves.

Most contraceptives are available only by prescription from a medical provider, which means someone must consent to the treatment.[54] About half the states and the District of Columbia permit minors to consent to contraceptive services on their own behalf, and another two dozen permit them to consent in at least some circumstances.[55] In the four states with no relevant statute, minors need parental consent as they would for any other medical procedure or prescription unless they seek services with a provider federally funded by Title X, which overrides state parental consent laws in this context.[56] The approach taken by most states reflects their determination that minors, at least those who are nearing adulthood, have both the capacity to make decisions about contraceptive care and an interest in controlling their own reproduction. States have drawn similar conclusions about sex itself, setting the age of consent at sixteen or

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51. 431 U.S. 678, 693-94 (1977).

52. 381 U.S. 479, 485-86 (1965).

53. 405 U.S. 438, 453 (1972).

54. The FDA approved the first over-the-counter birth-control pill in 2023 based on proof that it could be used safely and effectively by consumers with nonprescription labeling and no involvement of a healthcare provider. It is not restricted on the basis of age. *See FDA Approves First Nonprescription Daily Oral Contraceptive*, FOOD & DRUG ADMIN. (July 13, 2023), https://www.fda.gov/news-events/press-announcements/fda-approves-first-nonprescription-daily-oral-contraceptive [https://perma.cc/T6T8-RXMD].

55. *See Minors' Access to Contraceptive Services*, GUTTMACHER INST. (Aug. 30, 2023), https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services [https://perma.cc/6AK5-YLNV].

56. The four states with no relevant statute are North Dakota, Ohio, Rhode Island, and Wisconsin. *See id.* On Title X's parameters, see 42 U.S.C. § 300(a) (2024); and 42 C.F.R. § 59.5(a)(4) (2024). The Fifth Circuit upheld a district court's ruling that Title X does not preempt Texas's requirement of parental consent for contraceptive care. *See* Deanda v. Becerra, 96 F.4th 750, 768-69 (5th Cir. 2024).

seventeen (and sometimes younger if the sexual partner is close in age).[57] At least for older minors, the conventional approach to sexual and reproductive decision-making means that the minors themselves often have exclusive decision-making rights. As demonstrated below, the same cannot be said for abortion, where the legal rules regarding minors have been caught up in the political fights over abortion generally.

The legal landscape for minors' access to abortion is more complicated and, in general, more deferential to parents than in comparable sexual and reproductive contexts. Although some states have granted any person who is pregnant the right to consent to an otherwise lawful abortion, regardless of age, the majority of states have not done so. Moreover, the landscape has been in flux since the Supreme Court's elimination of constitutional protection for abortion in *Dobbs v. Jackson Women's Health Organization* in 2022.[58] The law in most states is largely still structured around the constraints imposed by the prior constitutional protection for abortion, which allowed states to require parental notification or consent in order for a minor to access an abortion, as long as the state also allowed for a judicial bypass procedure to circumvent such parental involvement. Most states have done so, even though many of those states have granted some minors the power to consent to their own contraceptive care. Many states have thus deviated from the conventional approach to sexual and reproductive decision-making for minors by giving parents such a substantial role.

Abortion, like most forms of contraceptive care, is a medical procedure that would ordinarily require informed consent by the minor's parent in the absence of any special rule or constitutional constraint. Prior to *Dobbs*, the abortion rights of minors were determined not only by *Roe v. Wade*[59] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[60] which protected the constitutional right to seek abortion before a certain point in pregnancy, but also by a series of cases specifically addressing the abortion rights of minors. In *Planned Parenthood of Missouri v. Danforth*, the Court invalidated a Missouri law requiring all unmarried women under eighteen to obtain parental consent for an abortion on the grounds that granting an absolute veto to a parent was an unconstitutional infringement of the minor's right to abortion, even if they did not possess precisely the same right as adult women.[61] Then, a few years later, the Court expressly

57. *See 50-State Age of Majority v. Age of Consent*, SOL REFORM, http://sol-reform.com/50-state-age-of-majority-v-age-of-consent [https://perma.cc/R4UQ-ATZQ]. Most states set the age of consent at sixteen or seventeen, with the possibility of a lower age if the sexual partner is close in age. *Id.*

58. 597 U.S. 215, 302 (2022).

59. 410 U.S. 113, 164-65 (1973).

60. 505 U.S. 833, 869 (1992).

61. 428 U.S. 52, 74-75 (1976).

held in *Bellotti v. Baird* that a "child, merely on account of his minority, is not beyond the protection of the Constitution," and this includes the right to abortion.[62]

Because minors do (or did) have a federal constitutional right to abortion, the Court in *Bellotti* reasoned that no third party, including a parent, can be given an absolute veto over a minor's decision to terminate a pregnancy.[63] But the right could be diluted to account for the unique circumstances of minors.[64] In the Court's words, "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."[65] The Court further explained that "[s]tates validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences" 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."[66] The abortion decision was held to be one such choice, providing the pretext for some form of state involvement.[67]

Moreover, the Court explained that parents have a role in the abortion context both because they serve to protect children "from their own immaturity" and because they have the constitutional right to exercise control over their children.[68] Deference to parents in child-rearing promotes "the affirmative process of teaching, guiding, and inspiring by precept and example," which the Court thought "essential to the growth of young people into mature, socially responsible citizens."[69] This process "is beyond the competence of impersonal political institutions," and the "affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society

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62. 443 U.S. 622, 633 (1979); *see also* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 326-28 (2006) (invalidating a 48-hour waiting period after parental notification because it failed to include a maternal-health exception and holding that minors are entitled to the same constitutional safeguards for abortion as adults).

63. 443 U.S. at 643 (citing *Danforth*, 428 U.S. at 74).

64. *See generally* Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2123-35 (2011) (considering different ways of understanding how the Supreme Court decides whether and how autonomy-based rights apply to minors).

65. *Bellotti*, 443 U.S. at 634.

66. *Id.* at 635.

67. *Id.* at 642.

68. *Id.* at 637 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).

69. *Id.* at 638.

constitutionally committed to the ideal of individual liberty and freedom of choice."[70] Parental authority, in the Court's view, "is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter."[71] Thus, "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."[72]

The Court, in *Bellotti*, balanced the minor's constitutional right to seek an abortion against both the state's interest in protecting the minor from making an ill-considered decision and the parent's interest in exercising control over the minor. The Court reconciled these competing rights and interests by holding that state laws requiring parental notification or consent for abortion are constitutional only if the state provides a judicial bypass procedure that allows the minor to seek permission from a court to make the decision on her own.[73] Moreover, the Court spelled out the exact parameters for a constitutionally sufficient judicial bypass procedure: it must allow the minor to make her own decision if (1) she is mature enough to make an informed decision *or* (2) if her best interests would be served by having an abortion.[74] If the minor establishes either prong, the court *must* grant the minor permission to consent to her own abortion.[75] The proceeding must guard anonymity and occur expediently enough for an abortion to be sought.[76] The Court invalidated the Massachusetts law because it offered a bypass procedure that did not satisfy these standards.[77]

At the time *Dobbs* was decided in 2022, thirty-seven states required parental involvement in a minor's decision to have an abortion; all were subject to the constitutional requirement of judicial bypass.[78] In the remaining states, minors had the same rights as adults to seek an abortion, although they were (and are)

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70. *Id.*

71. *Id.*

72. *Id.* at 638-39.

73. *Id.* at 649-51.

74. *See id.* at 643-44; *see also* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 511-12 (1990) (upholding Ohio's bypass procedure against a constitutional challenge); Lambert v. Wicklund, 520 U.S. 292, 297-99 (1997) (per curiam) (upholding Montana's bypass procedure against a constitutional challenge).

75. *Bellotti*, 443 U.S. at 647-48.

76. *Id.* at 644.

77. *Id.* at 651; *see also* Hodgson v. Minnesota, 497 U.S. 417, 423 (1990) (upholding a law requiring notification of both parents but with a judicial bypass provision).

78. *See Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (2022), https://web.archive.org/web/20220623202430/https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions [https://perma.cc/QBX8-XNUS].

more likely to face practical barriers given their relative lack of economic independence, freedom of movement, knowledge of options, and so on.[79] Some states have granted these rights through a statute or constitutional provision that treats the right to have an abortion as fundamental and provides that any person who is pregnant has the right to choose to terminate the pregnancy (within any other statutory limits that exist). In Illinois, for example, the legislature adopted a statute in 2019 providing that "[e]very 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."[80]

The federal doctrinal landscape for minors' abortion rights changed when the Supreme Court eliminated constitutional protection for abortion in *Dobbs*. The Court overruled not only *Roe* and *Casey*, but also implicitly overruled those cases or holdings that depended on the constitutionally protected status of abortion, such as *Danforth* and *Bellotti*.[81] States are arguably now free to impose parental consent or notification requirements without maintaining a judicial bypass procedure unless they are limited by state constitutional rights.[82] They are thus able to deviate even further from the conventional approach to sexual and reproductive decisions by giving parents perhaps the unfettered power to deny the minor's access to abortion.

So far, however, the law in most states has not changed, with a few notable exceptions. The Montana Supreme Court recently held that the state's parental consent law for abortion violated the due process and equal protection clauses of the state constitution because they were not designed to enhance the protection of minors, and the existence of a judicial bypass procedure did not cure the constitutional defects.[83] Minors thus now can consent to their own abortions, as

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79. *See infra* text accompanying notes 137-140.

80. 775 ILL. COMP. STAT. 55 / 1-15 (2025); *see also* COLO. REV. STAT. § 25-6-403 (2025) ("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."); N.Y. PUB. HEALTH LAW § 2599-aa (McKinney 2025) ("Every individual who becomes pregnant has the fundamental right to choose to carry the pregnancy to term, to give birth to a child, or to have an abortion, pursuant to this article.").

81. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022).

82. There may be other bases for defending a judicial bypass option, rooted in state constitutions or common-law principles. *See, e.g.*, Jessica Quinter & Caroline Markowitz, *Judicial Bypass and Parental Rights After* Dobbs, 132 YALE L.J. 1908, 1914 (2023) (arguing that a judicial bypass option is "consistent with a growing recognition of children's agency and right to decision-making in certain settings, including health care").

83. *See* Planned Parenthood of Mont. v. State, 554 P.3d 153, 173 (Mont. 2024), *cert. denied*, 145 S. Ct. 2627 (2025) (mem.). Although Justice Alito joined the denial of certiorari, he filed a statement to make clear that it is an open question whether a state's grant of abortion rights to

long as they are otherwise lawful. And Illinois repealed its parental-notification law in 2021, as part of a general effort to protect abortion rights at the state level.[84]

Meanwhile, some states are moving in the opposite direction. In Nevada, a July 2025 court ruling allowed a parental-notification law previously deemed unconstitutional to take effect.[85] And anchoring the far-right end of the spectrum, an appellate court in Florida recently ruled that the judicial bypass procedure enacted to comply with *Bellotti* violates constitutional *parental* rights.[86] The court reasoned that parents are vested with the authority to make medical decisions for their minor children, and, without constitutional protection for abortion, there is no counterweight against which those rights must be balanced.[87] Florida minors thus currently have no access to abortion without parental consent.[88] A parent can lawfully force their child to give birth.

Thus, depending on whether a state has an enforceable parental-involvement law on the books and a judicial bypass process, abortion decisions are made either by minors alone or by minors and their parents. Moreover, even though parental rights generally include the right to insist on medical treatment for a child, a parent cannot force a minor to have an abortion. Abortion providers generally will not treat an unwilling patient, even if the parent consents, and a forced abortion risks criminal liability under feticide laws or specific laws prohibiting coerced abortion.[89] The pregnant minor also may claim parental rights over a

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minors without a requirement of parental consent might violate parental rights under the Federal Constitution. *Planned Parenthood of Mont.*, 145 S.Ct. at 2627 (statement of Alito, J.).

84. *See* 750 ILL. COMP. STAT. ANN. 70 / 15 (West 1995), *repealed by*, Act of Dec. 17, 2021, § 90, 2021 Ill. Laws 14026, 14030.

85. Planned Parenthood Monte Mar, Inc. v. Ford, No. 3:85-cv-00331, slip op. at 1 (D. Nev. July 22, 2025) (lifting a temporary administrative stay of an order vacating an injunction of the parental notification law).

86. *See* Doe v. Uthmeier, 407 So. 3d 1281, 1291 (Fla. Dist. Ct. App. 2025).

87. *Id.* at 1290. The court certified the question about the constitutionality of the judicial bypass regime to the Florida Supreme Court. *Id.* at 1291-92.

88. Under a peculiar feature of Florida law, an intermediate-appellate ruling is binding on the entire state unless there is a contrary precedent from the state supreme court or contrary opinion from an appellate court of the same level. *Id.* at 1292 (citing Sys. Components Corp. v. Fla. Dep't of Transp., 14 So. 3d 967, 973 n.4 (Fla. 2009)). The Center for Reproductive Rights maintains a current map of abortion restrictions, including those related to parental involvement. *See After* Roe *Fell: Abortion Laws by State*, CTR. REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state [https://perma.cc/Z9PQ-C8ZF].

89. *See, e.g.*, Lawrence v. State, 240 S.W.3d 912, 917-18 (Tex. Crim. App. 2007) (holding that it is a crime to cause the death of a person's unborn child against their will); NEB. REV. STAT. § 71-6902.02 (2025) ("No parent, guardian, or any other person shall coerce a pregnant woman to obtain an abortion.").

developing fetus that outweigh the parent's rights to make medical decisions for the minor.

The legal questions raised by parental-involvement laws therefore relate only to whether a parent has the opportunity to withhold consent for an abortion—not whether the parent makes the abortion decision either way. And unless they have granted minors the power to consent to their own abortions by statute or a court has recognized abortion rights under the state constitution, states treat abortion decisions more restrictively than decisions about contraception, though the consequences are arguably even more significant. But even in the most restrictive states, there are no categorical rules that infringe on the ability of the appropriate party to consent to an otherwise lawful abortion for a minor, unlike with gender-affirming care, as discussed in the next Section.

B. Gender-Affirming Care

The battles over who should decide whether a transgender minor can receive gender-affirming care are of more recent vintage than the battles over abortion-care decisions.[90] Until a few years ago, there were no special rules regarding consent to this type of care. For minors to receive gender-affirming care, a parent or guardian would only have had to consent to it, and providers would have been free to prescribe any FDA-approved drugs or perform any procedure within their scope of practice. But the landscape has changed dramatically as states have

90. There is an emerging literature on the legal, political, and cultural issues surrounding gender-affirming care for minors. *See generally* Kyle C. Velte, *"Save Our Children" Redux: How History, Political Psychology, and a Shifting Media Landscape Help Explain Today's Bans on Gender-Affirming Care for Minors*, 26 GEO. J. GENDER & L. 1135 (2025) (exploring the historical and psychological reasons for the retrenchment of LGBTQ rights and the rise of restrictions on gender-affirming care); Ido Katri & Maayan Sudai, *Intersex, Trans, and the Irrationality of Gender-Affirming-Care Bans*, 134 YALE L.J. 1521 (2025) (arguing that bans on gender-affirming care fail to satisfy even the lowest level of constitutional scrutiny because their ostensible concern with protecting minors from harmful medical interventions contradicts their allowance of gender-affirming interventions for cisgender and intersex youths); Mary Ziegler, Maxine Eichner & Naomi Cahn, *Retrenchment by Division: The New Politics of Parental Rights*, 123 MICH. L. REV. 669 (2025) (describing how a new, broader strain of parental rights serves as a palatable but diversionary argument for restricting the equality rights of minors and, ultimately, adults); Hila Keren, *Due Care in a Conservative Court*, 2025 WIS. L. REV. 1 (criticizing the Supreme Court in *United States v. Skrmetti*, 605 U.S. 495 (2025), for selectively certifying the government's equal protection issue while declining to hear the due process parental rights argument raised by parents of transgender children); Lewis A. Grossman, *Criminalizing Transgender Care*, 110 IOWA L. REV. 281 (2024) (arguing that bans on puberty blockers and other sex hormones violate the fundamental right under the Due Process Clause to obtain standard-of-care medical treatment).

begun adopting categorical bans on such treatment for minors—regardless of whether doctors recommend it or whether a parent consents.

Gender-affirming care is widely agreed as appropriate for transgender minors. Professional societies began publishing evidence-based guidelines for the care of transgender and gender-diverse (TGD) youth in 1998.[91] They have converged on "the gender-affirming model," based on the "basic premise . . . that every individual is entitled to live in the gender that is most authentic to them."[92] Under those guidelines, a minor may be eligible for various types of gender-affirming care after receiving a thorough assessment by a mental-health gender specialist. The care can include puberty blockers "to pause puberty, prevent otherwise permanent development of secondary sex characteristics that are not aligned with a person's affirmed gender identity, and allow time for further gender exploration," and eventually gender-affirming hormone treatment to effectuate a phenotypic transition.[93] Hormone treatment is typically not recommended until age sixteen, although assessments are on a case-by-case basis.[94] Only recently have clinical-practice guidelines allowed for the possibility of irreversible, surgical treatments for gender dysphoria, although the general recommendation is to delay surgery until age eighteen and consider it only in rare cases and only after at least one year of living in the affirmed gender.[95]

Despite the weight of professional opinion, Arkansas passed the first ban on gender-affirming care for minors in 2021, prohibiting a physician from providing care or making a care referral for "gender transition procedures" on a person under the age of eighteen.[96] The name of that first law reveals a lot about the politicization of the issue: the Arkansas Save Adolescents from Experimentation (SAFE) Act.[97] The law was initially blocked by a preliminary injunction soon

91. For an overview of relevant guidelines and their origins, see generally Janet Y. Lee & Stephen M. Rosenthal, *Gender-Affirming Care of Transgender and Gender Diverse Youth: Current Concepts*, 27 ANN. REV. MED. 107 (2024). For links to dozens of statements from relevant professional associations, see *Medical Association Statements in Support of Care for Transgender People and Youth*, GLAAD (June 26, 2024), https://glaad.org/medical-association-statements-supporting-trans-youth-healthcare-and-against-discriminatory [https://perma.cc/J2M8-PGH4].

92. Lee & Rosenthal, *supra* note 91, at 108.

93. *Id*.

94. *Id.*

95. *Id.* at 111.

96. ARK. CODE ANN. §§ 20-9-1501 to -1504 (2025).

97. Arkansas Save Adolescents from Experimentation (SAFE) Act, No. 626, § 3, 2021 Ark. Acts 2819, 2823.

after enactment, a ruling that was affirmed by the Eighth Circuit.[98] After a trial on the merits, the district court issued a permanent injunction, which was just overturned by the Eighth Circuit in August 2025, allowing for enforcement for the first time.[99] Despite this procedural posture, the law started a trend, with twenty-six additional states adopting similar bans within four years.[100] All but one of those bans were permitted to take effect upon enactment,[101] and they all impose categorical restrictions on healthcare providers, without regard for whether a parent has consented to care.[102] Arizona and New Hampshire only ban surgical gender-affirming care for minors, but the rest ban all forms of gender-affirming care, including puberty blockers.[103] A few provide weaning periods or exceptions for minors already receiving care at the time the law was enacted.[104]

The U.S. Supreme Court recently upheld Tennessee's ban—and, by extension, cleared the way for enforcement of other state bans—against a challenge on equal protection grounds in *United States v. Skrmetti*.[105] The Court held that the ban does not constitute sex discrimination that would merit heightened scrutiny and upheld the ban under rational-basis review.[106] But the Court only agreed to review the equal protection claim and thus said nothing about the parental rights claim discussed and rejected by the lower court,[107] where the challengers had argued that the ban interfered with parents' rights to make decisions concerning the care, custody, and control of their children. While this particular

98. Brandt v. Rutledge, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021), *aff'd sub nom.*, Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 672 (8th Cir. 2022).

99. *See* Brandt v. Rutledge, 677 F. Supp. 3d 877, 925 (E.D. Ark. 2023), *rev'd. sub nom.*, Brandt *ex rel.* Brandt v. Griffin, 147 F.4th 867 (8th Cir. 2025).

100. *See* Lindsey Dawson & Jennifer Kates, *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions*, KAISER FAM. FOUND. (Aug. 12, 2025), https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker [https://perma.cc/8L4V-S77C].

101. Montana's ban was enjoined. *See* Cross *ex rel.* Cross v. State, 560 P.3d 637, 654 (Mont. 2024). The Movement Advancement Project maintains a current map of state laws affecting gender-affirming care. *See Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (Oct. 1, 2025), https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans [https://perma.cc/4275-PQHM].

102. Kaiser Family Foundation maintains a current map of gender-affirming-care bans, with links to each statute. *See* Dawson & Kates, *supra* note 100.

103. *See id.*

104. *See id*.

105. 605 U.S. 495, 525-26 (2025).

106. *Id.* at 1830-32, 1836.

107. *See* L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 475-77 (6th Cir. 2023).

ban can now take effect, a parental rights challenge may well be considered by the Court in a later case.

The parental rights claim against gender-affirming-care bans has been considered by a few state and federal courts, with mixed results. The most significant point of contention is how to frame the right at stake—what is the appropriate level of generality? If the right is fundamental, then the bans constitute an infringement that warrants strict scrutiny; if it is not, then the court need only apply a much more deferential standard of review. There is no question, as discussed above, that the right to make medical decisions for children is a core component of constitutional parental rights.

An Ohio appellate court, which invalidated the state's ban on grounds that it violated the state constitution's protection for parental rights, framed it as "a fundamental right [of parents] to seek a specific form of health care for their children, subject to a physician's independent examination and medical judgment, which would include the gender-affirming medical care banned by H.B. 68."[108] The court discussed at length the issue of how the right should be framed. It rejected the state's attempted framing of the right as "a fundamental right to direct a child's gender transition" or "a broader right to direct a child's healthcare even when the State has barred the particular practice the parents seek."[109] Rather, it explained that parental rights are typically cast in general terms, such as the right to "care, custody, and control" or the right to make "childrearing decisions."[110] The alternative would mean, among other things, that newer medical treatments would never meet the test for a fundamental right, which looks to history and tradition to determine which rights are protected.[111]

But in contrast to the Ohio court's approach, the Eighth Circuit recently defined the right much more specifically—as the "right of a parent to obtain for his or her child a medical treatment that, although the child desires it and a doctor approves, the state legislature deems inappropriate for minors."[112] So defined, the court concluded that the right was not rooted "in this Nation's history and tradition" and therefore is not fundamental.[113] With that level of specificity, the court rejected the claim that Arkansas's SAFE Act unconstitutionally infringes on

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108. Moe v. Yost, 265 N.E.3d 158, 190 (Ohio Ct. App. 2025). The challenge was directed only at the ban on nonsurgical gender-affirming care. *Id.* at 162.

109. *Id.* at 188 (quoting Merit Brief of Appellees at 74, *Moe*, 265 N.E.3d 158 (No. 24AP-483)).

110. *See supra* text accompanying notes 5-23.

111. *Moe*, 265 N.E.3d at 192-93 ("It is axiomatic that we must view constitutional rights at a level of generality sufficient to ensure 'the basic principles' that define our rights 'do not vary' in the face of 'ever-advancing technology.'" (quoting Moody v. NetChoice, LLC, 603 U.S. 707, 733 (2024))).

112. Brandt *ex rel.* Brandt v. Griffin, 147 F.4th 867, 887 (8th Cir. 2025).

113. *Id.*

parental rights.[114] The level of generality is the whole ball game—whether the court finds an infringement of parental rights turns on how it frames the right at stake.

Because the framing of the right dictated the level of scrutiny in these two cases, it also introduced another difference in approach. The Ohio court, applying strict scrutiny, looked at the fit between the legislature's stated ends and its means. Although the state's articulated interest was the protection of children, the ban it adopted was not a good means for advancing this interest. Rather, the court concluded, "Such a sweeping and inflexible ban on parents' ability to access medical care for their children is not narrowly tailored to advance the state's articulated interest: the protection of children."[115] The state had substituted "its own cost-benefit analysis concerning the efficacy of puberty blockers and hormone therapy relative to their risks, supplanting the role of parents, who are presumed to act in the best interests of their children."[116] This is of course in contrast to the approach for children's medical care generally, in which parents are trusted, in consultation with medical providers, to make the best decisions for their children. Meanwhile, the Eighth Circuit upheld the Arkansas ban with no real discussion of the government's means or ends.[117] The level-of-generality problem is certainly not unique to these cases, but the highly politicized context in which these bans were adopted raises the specter that the desired outcome will drive the level of generality rather than the reverse.

There are likely to be additional rulings on the parental rights claims and other challenges to gender-affirming-care bans, but, for now, most of the bans are enforceable. As a result, forty percent of minors in the United States live in a state with a ban,[118] and an ever-growing number of medical facilities in non-ban states have ceased providing gender-affirming care to minors due to threats from the Trump Administration.[119] The right of a parent to consent to gender-

114. *Id.*

115. *Moe*, 265 N.E.3d at 201.

116. *Id.*

117. *Brandt*, 147 F.4th at 881-84, 888.

118. Dawson & Kates, *supra* note 100.

119. *See* Jill Cowan, *Hospitals Are Limiting Gender Treatment for Trans Minors, Even in Blue States*, N.Y. TIMES (July 22, 2025), https://www.nytimes.com/2025/07/22/us/trump-transgender-healthcare-california-hospitals.html [https://perma.cc/C27H-9DM8]. The Trump Administration issued an executive order announcing that "it is the policy of the United States that it will not fund, sponsor, promote, assist, or support the so-called 'transition' of a child from one sex to another, and it will rigorously enforce all laws that prohibit or limit these destructive and life-altering procedures." Protecting Children from Chemical and Surgical Mutilation, Exec. Order No. 14,187, 90 Fed. Reg. 8771, 8771 (Jan. 28, 2025). The order is

affirming care has also played out in custody battles and child-welfare proceedings, although those disputes are less common now with the categorical bans.[120]

C. The Departures from the Usual Approaches

Although both abortion and gender-affirming care are highly politicized issues that have been at the center of recent culture wars, the legal system has deviated from the standard allocation of decision-making power in these two contexts in remarkably different ways. As discussed above, most states have allocated abortion decision-making primarily to parents through parental-involvement laws — at least, granting them the power to *refuse* consent. The judicial bypass procedure, where available, gives pregnant minors an option (though a harrowing one) to *prove* themselves capable of making their own decisions, when those same minors have been given exclusive power over contraception decisions.[121] And in states with no parental-involvement law, the state has allocated the decision-making authority directly to minors, who may or may not choose to involve their parents in the decision. The power to refuse an abortion seems to belong to minors, regardless of parental involvement laws.

The typical approach to abortion decision-making neither aligns with the general rules on medical decision-making, which would defer almost completely to parents, nor with the most common rules for sexual and reproductive care, which would defer to minors, at least older ones. The rules are better explained by anti-abortion politics than by any understanding of who is best suited to make decisions for minors about whether to terminate a pregnancy.

Although states may harbor a desire to protect minors from abortion as part of a general antiabortion policy, no legislature has adopted an abortion ban that is applicable only to minors. Nor has it imposed any added penalties on providers who perform abortions on properly consented minors. Two states with strict general abortion bans have passed special rules designed to prevent minors from receiving help procuring an abortion without parental consent, but both have

currently subject to a nationwide preliminary injunction. *See* PFLAG, Inc. v. Trump, 769 F. Supp. 3d 405, 454-55 (D. Md. 2025).

120. *See generally* Courtney G. Joslin & Catherine Sakimura, *Fractured Families: LGBTQ People and the Family Regulation System*, 13 CALIF. L. REV. ONLINE 78, 101-04 (2022) ("In some states, like Texas, affirming parents are being specifically targeted, and their very behavior in supporting their children is identified as the ground for surveillance and intervention . . . . [T]he Texas Attorney General declared that parents who facilitate the provision of gender-affirming care for their children may be engaged in child abuse." (citations omitted)).

121. *See supra* text accompanying notes 5-23.

been partially enjoined as presumptively unconstitutional.[122] That said, many states have treated abortion for minors more restrictively than other sexual-and-reproductive-healthcare decisions such as whether to have sex, whether to obtain or use contraception, and whether to test for or treat sexually transmitted infections. Yet they are often deprived of the power to protect themselves from forced birth.

For gender-affirming care, meanwhile, state legislatures have taken the decision away from both parents and minors. In the states with enforceable bans, a minor simply cannot receive this type of medical care, even with parental consent, and even when supported by the medical establishment. These laws are startling in two ways. First, they represent a staggering incursion into parental rights, which, as discussed above, generally allow parents to make medical decisions for their children unless the state has public-health concerns that might lead them to mandate an alternative approach (for example, compulsory vaccination for children attending public schools) or the state believes minors are capable of making their own decisions. Further, the safety of available medical care is facilitated by federal regulation of drugs and devices and state regulation of providers.[123]

Parents, in general, are allowed to consent to medical care that their children do not want and are allowed to refuse care that their children do want (and which doctors might be urging), as long as the decision to pursue or refuse care does not threaten their lives. Or in certain narrow circumstances, minors are given the right to consent to care themselves (for example, contraception and refusal of abortion). But outside the transgender-healthcare context, there are no other situations in which *neither* a minor nor the minor's parent can consent to medical care that is otherwise lawful and available.

These divergences from the conventional approach and the inconsistency between the two contexts reflect the politicized decision-making that has shaped the law in these two particular contexts. The ideological commitments of conservative politicians have supplanted long-standing doctrine and substituted their own purported expertise for that of parents and medical providers. That alone should give us pause. But the problem is far worse than doctrinal

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122. *See* IDAHO CODE § 18-623 (2025). A federal district court issued a preliminary injunction on grounds that the law was unconstitutionally overbroad. Matsumoto v. Labrador, 701 F. Supp. 3d 1032, 1069 (D. Idaho 2023), *aff'd in part*, 122 F.4th 787 (9th Cir. 2024); *see also* TENN. CODE ANN. § 39-15-201 (2025) (similar abortion-trafficking law); Welty v. Dunaway, 749 F. Supp. 3d 882, 917 (M.D. Tenn. 2024) (enjoining Tennessee's abortion-trafficking law because of unconstitutional overbreadth and to prevent irreparable injuries).

123. On the division of authority in the regulation of medical care, see Nathan G. Cortez & Joanna L. Grossman, *Who Regulates Abortion Now?*, 110 IOWA L. REV. 1579, 1594-99 (2025).

inconsistency; it promotes outcomes that are actively harming minors in ways that will reverberate throughout their lives, as discussed in the next Part.

III. THE IMPACT OF DENYING MINORS ACCESS TO ABORTIONS AND GENDER-AFFIRMING CARE

It is well-established that parents are typically given enormous latitude to make medical decisions for minor children, even demonstrably bad ones. Children often suffer consequences from bad parenting, even when it doesn't rise to the level of abuse or neglect that would justify state intervention. And states make many bad laws, which also cause people to suffer. But given how the law of abortion and gender-affirming care has developed, there is little opportunity within the existing rules to consider the consequences for a minor who is denied either a wanted abortion or gender-affirming care. And even if states abandoned these special rules and simply reverted to the conventional parent-child-state doctrine, there would still be little space for such an inquiry. Yet, the research suggests strongly that the consequences of such deprivations can be both significant and life-altering. In a system that operates under the pretense of protecting children and promoting their well-being, it is problematic to focus most of the attention on who has the right to make the decision, rather than on what the right decision might be.

We should be less tolerant of this reality when a system that is ostensibly designed for the protection of children leaves them at the mercy of parents, politicians, and other third parties who are blinded by the latest culture war, motivated by their own personal beliefs, and often reliant on disinformation. The legal system should be attentive to these risks when it allocates power over decisions that will have an enormous impact on the minor's present and future, as well as the minor's core sense of self. This Part will briefly consider what is at stake when we fail to consider the minor's interest in self-determination and bodily autonomy.

A. The Harms of Denying Abortion Access to Pregnant Minors

As explained above, the legal system allocates authority in a way that makes abortion less likely. A parent cannot force a pregnant minor to have an abortion and might well be able to prevent them from having one. In most states, there is no constitutional or other protection for the minor's right to decide, and, after *Dobbs*, there is no federal constitutional right at stake. Thus, minors face substantial legal obstacles to obtaining an abortion—but none to remaining pregnant. This state of affairs is consistent with the sharp rightward turn of the U.S. Supreme Court, as well as with the full embrace of an anti-abortion position in

red states. There are, however, significant and life-altering consequences for minors who are denied an abortion.

There is no question, for example, that abortion is safer than pregnancy or childbirth, whether performed surgically or with medication. Since *Dobbs*, the percentage of abortions performed with medication has increased dramatically, now accounting for sixty-three percent of all abortions in the United States.[124] Medication abortion produces fewer complications than Tylenol or Viagra and has been proven safe by "[m]ore than 100 scientific studies, spanning continents and decades . . . ."[125] While some patients who take abortion medications seek emergency care for complications, it is a small percentage of patients, and most of the complications are minor.[126] The risk of death from pregnancy and childbirth, meanwhile, is fourteen times higher than the risk of death from abortion,[127] and there are other adverse health effects from giving birth.[128] It is also well-established that, despite the claims of the anti-abortion movement, most people who have abortions do not regret them or suffer adverse mental-health consequences.[129] Women who have abortions are not more likely than those who are denied access to abortion to experience depression, anxiety, or suicidal ideation; ninety-five percent of women report five years later that

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124. Karen Diep, Bryana Castillo Sanchez, Usha Ranji & Alina Salganicoff, *Abortion Trends Before and After* Dobbs, KAISER FAM. FOUND. (July 15, 2025), https://www.kff.org/womens-health-policy/abortion-trends-before-and-after-dobbs/ [https://perma.cc/8SQX-JASH].

125. Amy Schoenfeld Walker, Jonathan Corum, Malika Khurana & Ashley Wu, *Are Abortion Pills Safe? Here's the Evidence*, N.Y. TIMES (Mar. 25, 2024), https://www.nytimes.com/interactive/2023/04/01/health/abortion-pill-safety.html [https://perma.cc/Q49Z-9RBT].

126. *See, e.g.*, Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 OBSTETRICS & GYNECOLOGY 175, 181-82 (2015) (reviewing 2009-2010 Medicaid data in California and finding major complications in only 0.31% of medication abortions and that the "vast majority" of complications for women obtaining medication abortions were "minor and expected").

127. *See* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 217 (2012).

128. *See* Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2021*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 16, 2023), https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.htm [https://perma.cc/9G27-G3HX]; *see also* Laura G. Fleszar et al., *Trends in State-Level Maternal Mortality by Racial and Ethnic Group in the United States*, 330 JAMA 52, 53 (2023) (finding that the United States has a higher maternal-mortality rate than other high-income countries and the United States's rate is increasing).

129. *See, e.g.*, M.A. Biggs, Ushma D. Upadhyay, Julia R. Steinberg & Diana G. Foster, *Does Abortion Reduce Self-Esteem and Life Satisfaction?*, 23 QUALITY LIFE RSCH. 2505, 2505-06, 2512 (2014); Corinne H. Rocca, Katrina Kimport, Heather Gould & Diana G. Foster, *Women's Emotions One Week After Receiving or Being Denied an Abortion in the United States*, 45 PERSPS. ON SEXUAL & REPROD. HEALTH 122, 122-23 (2013).

having an abortion was the right decision.[130] On the other hand, women who are denied abortions are more likely to suffer anxiety and loss of self-esteem in the short term.[131]

The evidence also demonstrates particular harms associated with the denial of an abortion. The Turnaway Study has been a crucial resource in comparing outcomes for people who obtain abortions with those for people who wanted an abortion but were turned away. Women who are denied abortions experience greater poverty for at least four years than those who obtain abortions, as well as other financial consequences such as a decreased credit rating and bankruptcy.[132] The study also found that "women who were denied an abortion were more likely to experience violence from the man involved in the pregnancy than women who received an abortion."[133] The existing and future children of women who are denied abortion are also negatively impacted by the experience; among other effects, the denial of abortion reduces the likelihood that subsequent children will be raised in a home with a male partner.[134]

Although there is less research about minors and abortion, the available studies suggest that their experiences in trying to access abortion are as bad or worse than those of adult abortion-seekers. Even without legal constraints, minors are likely to face greater practical barriers to accessing abortion than adults. According to one recent study, adolescents are more likely than adults (which were deemed people over the age of twenty-five years old) to have received a ride from someone to the provider, borrowed money or sold something to pay for the abortion, or had the abortion later than they wanted because they did not know they were pregnant or did not know where to get an abortion.[135] Moreover, teenage girls will be affected even more harshly than adult women by the new wave of abortion bans and early gestational limits, as teenagers experience less regular menstrual cycles and therefore will be less likely to detect a pregnancy in time.[136]

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130. *See* DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING — OR BEING DENIED — AN ABORTION 107-24 (2020).

131. *Id.*

132. *Id.* at 172-82, 279, 289.

133. *Id.* at 232, 238-39.

134. *Id.* at 200-03, 206.

135. Doris W. Chiu, Ava Braccia & Rachel K. Jones, *Characteristics and Circumstances of Adolescents Obtaining Abortion in the United States*, 21 INT'L J. ENV'T RSCH. & PUB. HEALTH, art. no. 477, at 11-12 (2024).

136. *See* Paula J. Adams Hillard, *Menstruation in Adolescents: What's Normal, What's Not*, 1135 ANNALS N.Y. ACAD. SCIS. 29, 31 (2008); *see also* Megan K. Donovan, *Gestational Age Bans: Harmful at Any Stage of Pregnancy*, GUTTMACHER INST. (2020), https://www.guttmacher.org/gpr/2020/01/gestational-age-bans-harmful-any-stage-pregnancy [https://perma.cc/NF3V-7ZG9] (describing the harms of gestational age bans).

Adolescents are more likely than adults to have second-trimester abortions, which increases the risk and cost.[137] One recent study found that the post-*Dobbs* bans have harsher effects for minors, who were already known to face challenges related to transportation, finances, and the ability to travel, and these effects are amplified for members of marginalized groups.[138]

The legal constraints add insult to injury. Even though *Bellotti* was effectively overruled by *Dobbs*, every state but Florida that requires parental involvement in the abortion decision offers a judicial bypass procedure.[139] Although the Supreme Court deemed this procedure necessary to safeguard the then-protected constitutional right of minors to seek an abortion, it has always been fraught. Studies have shown that the process of obtaining a judicial bypass—even if granted—is often detrimental to the minor. The hearings, for example, often reinforce stereotypical attitudes about female sexuality and force minors into a situation where they must beg an authority figure for autonomy.[140] Teens who endure the process report experiencing stress, humiliation, and fear, among other consequences.

The harms of forced birth are not limited to the physical or emotional risks. Teen pregnancy and parenting inhibit the minor's ability to pursue educational and career opportunities. This is especially true for minor girls of color, for

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137. Chiu et al., *supra* note 135, at 12-13.

138. *See* Laura D. Lindberg, Julie Maslowsky & Paz Baum, *Implications of Abortion Restrictions for Adolescents*, 179 JAMA PEDIATRICS 675, 675-676 (2025); *see also* Andrea J. Hoopes et al., *Elevating the Needs of Minor Adolescents in a Landscape of Reduced Abortion Access in the United States*, 71 J. ADOLESCENT HEALTH 530 (2022) (discussing how abortion restrictions impact adolescents and arguing for targeted policy responses).

139. *See supra* text accompanying notes 60-88.

140. For discussion of how the bypass system operates in practice, see generally Amanda Jean Stevenson, Kate Coleman-Minahan & Susan Hays, *Denials of Judicial Bypass Petitions for Abortion in Texas Before and After the 2016 Bypass Process Change: 2001-2018*, 110 AM. J. PUB. HEALTH 351 (Mar. 2020); Murray Levine, Leah Wallach, David I. Levine & Deborah Goldfarb, *An Illustration of the Intersection of Social Science and the Law: The Legal Rights of Adolescents to Make Medical Decisions*, 30 HASTINGS WOMEN'S L.J. 241 (2019); Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409 (2009); CAROL SANGER, *Sending Pregnant Teenagers to Court*, *in* ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA 154 (2017); Rachel Rebouché, *Report of a National Meeting: Parental Involvement Laws and the Judicial Bypass*, 37 LAW & INEQ. 21 (2019); Jamin B. Raskin, *The Paradox of Judicial Bypass Proceedings*, 10 AM. U. J. GENDER SOC. POL'Y & L. 281 (2002); and *Whose Abortion Is It? The Harms of State-Mandated Parental Notification for Abortion and Judicial Bypass in the United States*, HUM. RTS. WATCH & IF/WHEN/HOW: LAWYERING FOR REPROD. JUST. (Oct. 2025), https://ifwhenhow.org/wp-content/uploads/2025/10/us_abortion1025-web.pdf [https://perma.cc/L494-GQPN].

whom the barriers to contraceptive access are greatest.[141] The ability to pursue education and vocational or professional opportunities is an important aspect of self-determination. Indeed, as the Supreme Court noted in *Bellotti*, "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."[142]

In the early challenges to contraceptive bans, litigants expressly drew on the connection between unwanted pregnancy and education, arguing that if young women could not control whether or when to have children, they would not be able to obtain a professional education.[143] Early litigation strategies pressed the connection between controlling fertility and equal educational opportunity. The Supreme Court initially drew repeatedly on this idea in its earlier abortion jurisprudence, even though it never grounded the abortion right in principles of equality rather than privacy.[144] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, for example, the joint opinion observed that the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[145] And in a later pregnancy-discrimination case, Justice Ginsburg argued in dissent that "[c]ertain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens."[146] But this thread largely has been lost as abortion law has developed,[147] and it is certainly absent in *Dobbs*, which pointed to women's increasing equality in the public sphere as evidence that reliance interests would not be sufficiently harmed by overruling *Roe*.[148]

There is scant mention in judicial opinions or legislative debates of the effects on educational or career opportunities for minors who are stripped of the right to consent to abortion and unable to navigate the obstacles created by post-*Dobbs*

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141. *See, e.g.*, Sadia Haider, Cynthia Stoffel, Geri Donenberg & Stacie Geller, *Reproductive Health Disparities: A Focus on Family Planning and Prevention Among Minority Women and Adolescents*, 2 GLOB. ADVANCES HEALTH & MED. 94, 96 (2013).

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

143. *See* Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J.F. 349, 355 (2015).

144. *See* Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63, 73 (2013).

145. 505 U.S. 833, 856 (1992).

146. AT&T Corp. v. Hulteen, 556 U.S. 701, 724 (2009) (Ginsburg, J., dissenting).

147. *See, e.g.*, Deborah L. Brake & Joanna L. Grossman, *Reproducing Inequality Under Title IX*, 43 HARV. J. GENDER & L. 171, 210-15 (2020).

148. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 289 (2022) (explaining that women have electoral and political power, as evidenced by women's higher percentage of voter registration than men).

abortion bans. Feminist scholars have long argued that unique gender roles in the reproductive process cannot be ignored. Those who can become pregnant play a more extensive and burdensome role; those who identify as mothers carry disproportionate parenting burdens. These differences have been a key determinant of women's inequality in other areas of life, such as education and work.[149] Yet, the way decision-making rights are determined does not leave much room to consider these effects, leaving the system vulnerable to Reva Siegel's critique that "courts and the nation often do not grasp the relationships" between women's reproductive control and sex equality.[150] States that insist on denying abortion generally or giving parents total control over the abortion decision for a minor are contributing to women's inequality that will reverberate far beyond the eighteenth birthday of a pregnant minor.

B. The Harms of Denying Transgender Minors Gender-Affirming Care

As discussed in Part II, for gender-affirming care, parents in ban states have been stripped of all authority to consent to treatment, even though the treatments are otherwise lawful and, in the case of medications and devices, FDA-approved. And this is so even though, despite the political controversy about the care, the weight of medical authority supports access.[151]

Although this is a relatively new area of research, the evidence suggests that, as with abortion, access to gender-affirming care promotes the well-being of minors who seek it. Trans youth have higher rates of mental-health disorders, but studies suggest this is the result of societal disapproval rather than "intrinsic to their gender identity."[152] Moreover, "TGD youth presenting for gender-affirming medical care at earlier pubertal stages demonstrated better mental health and sense of well-being at baseline in comparison to older adolescents presenting at later pubertal stages, pointing to the potential benefits of gender-affirming medical treatment earlier in life."[153] Several studies have demonstrated that gender-

149. *See* Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 603-05 (2009); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 24-28 (1985); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 178, 192-99 (1982); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 958-59, 1033 (1984).

150. *See* Siegel, *supra* note 144, at 80.

151. *See supra* text accompanying notes 91-95.

152. Lee & Rosenthal, *supra* note 91, at 109.

153. *Id.*

affirming care for minors is life-saving, with early intervention reducing the lifetime risk of suicidal ideation.[154]

Because surgical intervention for minors is relatively new, there are only small-scale studies available. But those studies show generally positive mental-health effects and support the possibility of earlier intervention when justified by the patient's physical and mental status.[155] Researchers continue to study the effect of gender-affirming care on physical health, including its effect on height, brain development, fertility, and bone density, but so far, there are no findings that would undermine the recommendation that gender-affirming care be available when needed.[156] There is no question that there are gaps in the research on appropriate treatment for trans youth, and clinical-practice guidelines are likely to continue evolving. But the current research strongly supports the availability of gender-affirming care for transgender minors, and the Trump Administration's effort to defund research about "gender ideology" means that additional research will be impaired and may suffer from bias.[157]

Yet, even where the minor and the minor's parents agree that gender-affirming care is desirable — and doctors recommend it — more than half of the states do not allow it. This intrusion into the minor's right of privacy and bodily autonomy led the Montana Supreme Court recently to invalidate the state's ban on state constitutional grounds.[158] But it also represents a significant incursion into parental rights that cannot be reconciled with the general approach to medical decision-making for minors, nor with the positions taken by many of these states in conflicts over sex education, banned books, or LGBTQ+ or anti-racism content in educational materials. The Supreme Court just recently held, for example, that parents with a religious objection have a constitutional right to receive notice and the opportunity to remove their child from educational lessons in

154. *See, e.g.*, Jack L. Turban, Dana King, Jeremi M. Carswell & Alex S. Keuroghlian, *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 PEDIATRICS art. no. 31974216, at 5-8 (2020).

155. *Id.*

156. Lee & Rosenthal, *supra* note 91, at 109-11.

157. *See* Lindsey Dawson & Jennifer Kates, *Overview of President Trump's Executive Actions Impacting LGBTQ+ Health*, KAISER FAM. FOUND. (Sep. 25, 2025), https://www.kff.org/other/fact-sheet/overview-of-president-trumps-executive-actions-impacting-lgbtq-health [https://perma.cc/MTV9-CGG2]; *see also* Rob Stein, *White House Orders NIH to Research Trans 'Regret' and 'Detransition'*, NAT'L PUB. RADIO (Apr. 11, 2025), https://www.npr.org/sections/shots-health-news/2025/04/10/nx-s1-5355126/trump-nih-trans-regret-detransition-research [https://perma.cc/VX6M-7HWL] (describing the Trump Administration's efforts to study "regret" and "detransition").

158. Cross *ex rel.* Cross v. State, 560 P.3d 637 (Mont. 2024) (invalidating a ban on gender-affirming care for minors).

public school that involve exposure to LGBTQ+ themes.[159] Yet a parent who, in consultation with a licensed physician, decides to consent to gender-affirming care for a transgender child is deprived of that ability in half of the states.

C. Taking Account of a Minor's Interest in Self-Determination and Autonomy

The American legal system presumes that children's interests are best protected by their parents and, secondarily, by the state's *parens patriae* authority. Yet this structure falters when parental authority and state power are infused with political and ideological agendas. These dynamics have distorted the allocation of decision-making authority in the two contexts examined here: minors' access to abortion and gender-affirming medical care. By adopting rules that align with the prevailing political ideology, states have allowed children's welfare and autonomy to be sacrificed to partisan aims. At a minimum, we should expect states to treat these critical decisions based on the longstanding principles that have guided the allocation of decision-making power for minors. Fit parents should be trusted to make decisions for their children, unless there is a counterweight sufficient to justify a different approach. If we were to apply the rules and logic from the large body of law involving child-rearing decisions, we would expect parents to have a lesser role in abortion decisions, as they do with other sexual and reproductive decisions, one that diminishes even further as the minor matures. We would also expect parents to have significant—perhaps exclusive—control over gender-affirming care decisions, similar to the control they have over medical decisions outside of the sexual and reproductive realm. We would not expect what we have—a system that can be explained only by who is winning the latest culture war.

The current approach to abortion and gender-affirming care decisions for minors can thus only be explained in ideological terms—to the extent parents are likely to act in alignment with the political party that controls a state, their parental rights will be respected; to the extent they threaten to make decisions that the ruling party disagrees with, they will forfeit those rights. That simply cannot be the approach to constitutional parental rights, which were established over 100 years ago, and have always been understood to allow parents to make subjective and even idiosyncratic decisions about child-rearing. Nor should it be the approach in a legal system that purports to allocate the power to decide based on the best interests of children and which recognizes the right of older minors to make certain sexual and reproductive decisions.

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159. *See* Mahmoud v. Taylor, 606 U.S. 522, 530 (2025).

Children are not being adequately protected when ideology trumps all, and parental rights are also sacrificed. The Constitution requires that parents be given significant deference when making decisions about their children; this has traditionally operated as an inherent limit on the state's ability to impose its own substantive preferences and promotes pluralism among families. The bans on gender-affirming care should be struck down on this ground alone. There might still be difficult questions that arise when, for example, two fit parents disagree about whether to consent to such care of a minor. But when the minor, the parents, and the treating physician all agree to seek care, the state is overstepping by making that impossible. States have demonstrated no expertise that would make them best positioned to decide whether minors should receive gender-affirming care.

The same can be said for a parental-involvement law for abortion that does not include a judicial bypass procedure (and even, perhaps, if it does). The decision whether to remain pregnant, give birth, and potentially become a parent is life-changing in every respect (and sometimes life-ending). If a pregnant minor and the minor's parent agree that abortion is the right decision, the state should not stand in the way. But even when the minor's parent objects to abortion, the state should consider more closely the costs and benefits of requiring parental involvement, as well as the minor's interest in bodily autonomy and self-determination. A judicial bypass procedure is the absolute minimum in terms of protecting the minor's autonomy, but arguably, this approach does not go far enough to protect the minor's interest in self-determination. Despite *Dobbs*, the Supreme Court has opined repeatedly about the importance of the decision whether to bear or beget a child—and the right of an individual to make that decision for themselves. A minor arguably has even more at stake in such a decision since early pregnancy and parenting can drastically alter the trajectory of a person's life. Why would a parent's feelings about abortion be more important than the pregnant minor's?

Regardless of how the balance of power is resolved in each of these contexts, "parental rights" cannot just be a phrase that is invoked as a pretext for the imposition of the state's ideology. The Constitution says that the term means something—and it has to mean the same thing even when the state has particular political preferences that diverge from that meaning. It should be uncontroversial to suggest that states should apply longstanding constitutional and common-law principles to abortion and gender-affirming care decisions, as they do with other important medical decisions for children. But that arguably does not go far enough. These two areas of controversy present the occasion for a long-overdue conversation about whether the autonomy interests of children—now and into adulthood—are adequately protected by the odd-shaped triangle that

blindly defers to parents and does not have a meaningful mechanism to resist state usurpation.

In the family-law context, courts consider a variety of factors when determining a child's best interests for purposes of a custody dispute, a proposed adoption, reunification of a child with parents following removal, or any other issue that centers around children. Physical health and safety, emotional well-being, socialization, and educational opportunity are among the key factors that help a court determine the arrangement or household that will maximize the child's chance of growing into a happy, healthy, well-adjusted, economically secure adult. If we were to consider those factors in the abortion and gender-affirming care decisions, the outcomes might look quite different than those produced by the current approaches. But how to do that is complicated by the robust constitutional protection for parental rights.

Parental decisions about child-rearing cannot be overridden, based on a pure "best interests" analysis,[160] nor should they be. But there may be room within the current framework to require parents to take account of their children's interest in self-determination, as several scholars have argued.[161] The new Restatement of Children, for example, supports greater attention to children's well-being within the existing framework.[162] Or it may be that a more robust conception of children's rights as a whole is warranted, as others have argued.[163] It is beyond the scope of this Essay to provide a blueprint to better account for children's

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160. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 68 (2000).

161. *See, e.g.*, Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 424 (2023) (arguing for a new framework that "recognizes parents' fundamental constitutional duties to respect children's rights as developing democratic citizens while still protecting the integrity of the parent-child relationship"); Anne C. Dailey & Laura A. Rosenbury, *Beyond Home and School*, 91 U. CHI. L. REV. 567, 591 (2024) (arguing that "the law governing children in society should take account of shared authority over and responsibilities to children, attempting to balance in a more nuanced way the roles of parents, state actors, and other important persons in children's lives").

162. *See* RESTATEMENT OF CHILDREN AND THE LAW (A.L.I., Tentative Draft 6, 2024); *see also* Elizabeth S. Scott, *Restating the Law in a Child Wellbeing Framework*, 91 U. CHI. L. REV. 279, 281 (2024) (arguing that the field of children and the law revolves around the core principle of promoting the well-being of children and that the Restatement has the same primary focus).

163. Scott, *supra* note 162, at 282 (arguing in support of a "child wellbeing framework, which "clarifies that the allocation of legal authority over children is not a zero-sum competition among the state, the parents, and the child, as it is conventionally understood" but is rather "a regime in which the goal of advancing child well-being melds the interests of the state, parent, and child"); *see* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1377, 1424 (2020) (proposing the "child wellbeing framework," which argues for the protection of children through robust parental rights and strong parent-child bonds).

autonomy interests, but the consequences of failing to account for them are deeply concerning.

CONCLUSION

The current controversies surrounding abortion and gender-affirming care have revealed the vulnerability of children in our current legal system. We have seen their interests ignored in service of political goals, and the courts have not reliably reined in recent legislative power grabs. And while a return to first principles would correct some of the harms, it may be that these conflicts reveal weaknesses in those principles as well. The law should concern itself not only with "who decides" but also with whether the decisions made are promoting the well-being of minors.

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