

## The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory

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*This Article explores how the rhetoric of parental rights has been deployed to override minors' access to abortion, gender-affirming care, and education about critical race theory and gender identity.*

*The overruling of Roe v. Wade and controversies over gender-affirming care and "appropriate" material to be taught in schools have highlighted parent-child-state tensions. Long before Dobbs, states imposed restrictions on the abortion rights of minors, even when minors and their parents agreed on the decision to get an abortion.*

*The rhetoric of parental rights, however, has been weaponized to serve particular substantive ends, even though parents have differing rights and interests. Some parents, for example, are able to support their children's access to gender-affirming care, while other, similarly-supportive parents instead fear that they will be investigated for child abuse. Indeed, this Article suggests that the parent-child-state triad has another participant: political partisanship. The triad thus becomes a triangular pyramid, with partisanship at the top. The rhetoric of parental rights is used as a screen for restricting abortion rights, banning gender affirming care, preventing the teaching of critical race theory, and even limitations on drag queen shows—so it is not really about parental rights, at all.*

*The first Part of this Article reviews the research on the impact of access to contraception and abortion for teens. The second Part turns to the existing legal framework for such access, while the third surveys pre- and post-Dobbs conflicts that center on protecting parental rights over their children's rights to reproductive care. The next Part explores the reasons for increasing political partisanship in the country as a whole, framing the broader culture wars, and*

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bringing in related issues that allegedly implicate parental rights, such as gender-affirming care and school curricula that include critical race theory and gender identity.<sup>1</sup> The final Part concludes.

#### INTRODUCTION

In *Unpregnant*, seventeen-year-old Veronica takes a pregnancy test at school and discovers that she is pregnant.<sup>2</sup> She lives in Missouri, which requires parental consent before a minor can obtain an abortion, and Veronica learns, through a relatively complicated process, that the nearest clinic where she can obtain an abortion without parental consent is in Albuquerque, New Mexico.<sup>3</sup> Veronica does not want to tell her parents, lying to them about her whereabouts, as she and a friend drive cross-country to the clinic.<sup>4</sup> She ultimately gets the abortion, but to ensure she has enough money to come home, she ultimately confesses to her mother why she left.<sup>5</sup>

Or consider the case of G, a seventeen-year-old from Texas, who, represented by an attorney, asked a judge to authorize an abortion for her.<sup>6</sup> She graduated from high school, was working as a cashier at a supermarket, and had broken up with her boyfriend; neither of them

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<sup>1</sup> Parental rights become part of a “political practice” of originalism that is anti-abortion. Reva Siegel, *Memory Games: Dobbs’s Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023) (manuscript at 1) (discussing how the Dobbs reasoning is part of the “political practice of originalism”); see Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006) (describing the political practice of “fus[ing] aroused citizens, government officials, and judges into a dynamic and broad-based political movement”). For a discussion of parents’ rights in the effort to prevent critical race theory teaching, see Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK, (June 11, 2021), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06>.

<sup>2</sup> UNPREGNANT (Warner Max 2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

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

<sup>6</sup> Lizzie Presser, *She Wasn’t Ready for Children. A Judge Wouldn’t Let Her Have an Abortion*, N.Y. TIMES (Nov. 29, 2022), <https://www.nytimes.com/2022/11/29/magazine/teen-pregnancy-abortion-judge.html>.

thought they were ready to have children.<sup>7</sup> The judge sent her to a “crisis pregnancy center”<sup>8</sup> and denied the abortion.<sup>9</sup>

Long before *Dobbs*,<sup>10</sup> states imposed restrictions on the abortion rights of minors, even when minors and their parents agreed on the decision to get an abortion. Where a minor sought an abortion without the consent or notification of their parents, however, the minor could constitutionally be required to obtain consent from the court.<sup>11</sup>

The parent-child-state triad is a well-established concept in American family law, with the presumption that parents act in the best interests of their child while simultaneously recognizing that the State can intervene in the family at the point of abuse or neglect and mandate education to a certain age.<sup>12</sup> The balance has always had tensions, and doctrines such as the “mature minor” and emancipation have softened the full scope of parental control.<sup>13</sup> The overruling of *Roe v. Wade* and controversies over gender-affirming care and “appropriate” material to be taught in schools have highlighted these

<sup>7</sup> *Id.*

<sup>8</sup> A crisis pregnancy center tries to “intercept women with unintended pregnancies who might be considering abortion” and persuade them “that adoption or parenting is a better option” than abortion. Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, 20 *AMA J. ETHICS* 269, 269 (2018).

<sup>9</sup> Presser, *supra* note 6.

<sup>10</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

<sup>11</sup> *See infra* notes 49–62.

<sup>12</sup> *E.g.*, Matthew Patrick Shaw, *The Public Right to Education*, 89 *U. CHI. L. REV.* 1179, 1217 (2022) (listing state statutes requiring youth attendance); *see* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 *YALE L.J.* 1448, 1463 (2018) (noting places of state intervention in children’s autonomy by enumerating rights that children do not have, including “refuse an education”). States typically require education for students from ages six to sixteen (or older). *E.g.*, CAL. EDUC. CODE § 48200 (2023) (“Each person between the ages of [six] and [eighteen] years not exempted . . . is subject to compulsory full-time education”); N.J. STAT. ANN. § 18A:38-25 (2022) (ages six to sixteen).

<sup>13</sup> For example, the Restatement of Children and the Law provides:

Some minors by virtue of their status qualify as mature minors for the purpose of consenting to medical treatment without further inquiry into competence. Thus, a minor who is married or emancipated, or is a parent caring for a child can give valid consent to medical treatment for himself or herself or for the child.

RESTATEMENT OF CHILDREN AND THE LAW § 19.01 (AM. L. INST., Tentative Draft No. 2, 2019).

tensions: what happens when a minor, perhaps even with the support of their parents, wants an abortion but lives in a state with restrictions or an outright ban? What happens when a minor seeks gender-affirming care, either with or without parental support, but lives in a state that considers such care abusive? What happens to children's interests in states that prescribe the teaching of gender identity or critical race theory? And what happens when a minor seeks contraception without parental consent?<sup>14</sup>

The answers to these questions turn, somewhat, on parental rights. But there is a partisan divide on support for children,<sup>15</sup> with differing state approaches; this divide informs the framing of legally protected parental rights. Moreover, parents have differing rights and interests. Some parents, for example, support their children's access to gender-affirming care, while other parents, rather than provide those services for their children, instead fear that they will be investigated for child abuse.<sup>16</sup> This Article suggests that the parent-child-state triad has another participant, almost a fourth leg: political partisanship. The rhetoric of parental rights is used as a Trojan horse for restricting abortion rights, banning gender affirming care, preventing the teaching of critical race theory, and even limitations on "cabaret" (or drag) shows—regardless of what parents actually want—thus, it is not really about parental rights at all.<sup>17</sup>

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<sup>14</sup> In a 2022 Texas case, a father sued to ensure that his children could not access prescription contraceptives without his consent. *Deanda v. Becerra*, No. 2:20-CV-092-Z, 2022 WL 17572093 (N.D. Tex. Dec. 8, 2022); Ian Millhiser, *A Notorious Trump Judge Just Fired the First Shot Against Birth Control*, VOX: POL'Y & POL. (Dec. 13, 2022, 8:00 AM), <https://www.vox.com/policy-and-politics/2022/12/13/23505459/supreme-court-birth-control-contraception-constitution-matthew-kacsmayk-deanda-becerra>.

<sup>15</sup> Gabriel Borelli & Amina Dunn, *Partisans Tend to Cite Different Ideas for what more the Government Should do for Parents and Children*, PEW RSCH. CTR. (July 29, 2022), <https://www.pewresearch.org/fact-tank/2022/07/29/partisans-tend-to-cite-different-ideas-for-what-more-the-government-should-do-for-parents-and-children>.

<sup>16</sup> *Texas Parents of Transgender Kids Discuss Gov. Abbott's Gender-Affirming Care Order*, NPR (Mar. 11, 2022), <https://www.npr.org/2022/03/11/1086153778/texas-parents-of-transgender-kids-discuss-gov-abbotts-gender-affirming-care-orde>.

<sup>17</sup> When Ron DeSantis signed legislation that "buil[t] on actions Governor DeSantis ha[d] already taken to ban Critical Race Theory and the New York Times' 1619 project in Florida's schools," his press release noted that "[w]e also have a responsibility to ensure that parents have the means to vindicate their rights when it comes to enforcing state standards." Press Release, Ron DeSantis, Governor, Florida, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations>.

The first Part of this Article reviews the research on the impact of access to contraception and abortion for teens. The second Part turns to the existing legal framework for such access, while the third part surveys pre- and post-*Dobbs* conflicts that center on protecting parental rights over their children's rights to reproductive care. The next Part explores the reasons for increasing political partisanship in the country as a whole, framing the broader culture wars, and bringing in related issues that allegedly implicate parental rights, such as gender-affirming care and school curricula that include critical race theory and gender identity.<sup>18</sup> The final Part concludes.

#### I. THE DEMOGRAPHICS OF REPRODUCTIVE CARE FOR MINORS

The teen pregnancy rate—and abortion rate—have declined over the past few decades.<sup>19</sup> The percentage of pregnancies for teens halved from 2006 to 2017.<sup>20</sup> The decreasing rate is partially due to higher

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On the other issues, see Maxine Eichner, *Free-Market Family Policy and the New Parental Rights*, 101 N.C. L. REV. (forthcoming 2023); Kimberly Kindy, *GOP Targets Drag Shows with New Bills in at Least 14 States*, WASH. POST: POLITICS (Feb. 14, 2023, 6:00 AM), <https://www.washingtonpost.com/politics/2023/02/14/drag-shows-republican-bills-bans>; NPR, *What Florida's Parental Rights in Education Law Means for Teachers* (Apr. 5, 2022, 5:16 PM), <https://www.npr.org/2022/04/04/1090946670/what-floridas-parental-rights-in-education-law-means-for-teachers>; Mark Walsh, *What Do "Parents' Rights" Mean Legally for Schools, Anyway?*, EDUC. WEEK (Oct. 20, 2022), <https://www.edweek.org/policy-politics/what-do-parents-rights-mean-legally-for-schools-anyway/2022/10> (“The current movement in support of parental rights is motivated by various goals, including social, religious, and political ones that are tied up with conservatives’ aims of limiting discussions of race, LGBTQ rights, or other controversial topics in schools.”); Mary Ziegler & Naomi Cahn, *What Parents Are Really Getting from the GOP'S 'Parents' Right' Agenda*, CNN (Mar. 30, 2023), <https://www.cnn.com/2023/03/30/opinions/whose-parents-rights-trump-desantis-gop-ziegler-cahn/index.html>. Eichner provides another perspective on parental rights rhetoric, suggesting that “recent parental rights measures [] are motivated less by responding to real needs of children than by the confluence of interests among libertarian elites seeking to siphon political pressure away from adopting family economic supports,” Eichner, *supra* (draft at 4).

<sup>18</sup> Siegel, *supra* note 1; see Post & Siegel, *supra* note 1, at 549. For discussion of parents’ rights in the effort to prevent critical race theory teaching, see Schwartz, *supra* note 1.

<sup>19</sup> Hannah Lantos et al., *State-Level Abortion Restrictions Will Negatively Impact Teens and Children*, CHILD TRENDS (Oct. 20, 2022), <https://www.childtrends.org/blog/state-level-abortion-restrictions-will-negatively-impact-teens-and-children>; OASH: Office of Population Affairs, *Trends in Teen Pregnancy and Childbearing*, U.S. DEPT. OF HEALTH & HUM. SERVS. OFF. OF THE ASSISTANT SEC’Y OF HEALTH (2022), <https://opa.hhs.gov/adolescent-health/reproductive-health-and-teen-pregnancy/trends-teen-pregnancy-and-childbearing>.

<sup>20</sup> Lantos et al., *supra* note 19.

rates of contraceptive use as well as lower rates of sexual activity, particularly for younger teens, and changing economic conditions.<sup>21</sup> Abstinence-only programs, which were first supported by the federal government in 1981 and are in place in a number of school districts, have largely proven ineffective.<sup>22</sup> By contrast, more comprehensive sex education appears to have at least some impact on reducing teen births.<sup>23</sup>

Teen pregnancies are more likely to be unintended and end in abortion than are pregnancies among older individuals.<sup>24</sup> Approximately one in four teen pregnancies end in abortion.<sup>25</sup> Teen pregnancy rates are higher among youths who are poor, people of color, LGBTQ+, and those in foster care or the criminal justice system.<sup>26</sup> Inequities among communities based on access to contraceptive information and services, community characteristics (such as substance abuse or food insecurity), are factors associated

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<sup>21</sup> OASH: Office on Women's Health, *Decrease in Teen Pregnancy*, U.S. DEPT. OF HEALTH AND HUM. SERVS. OFF. OF THE ASSISTANT SEC'Y OF HEALTH, <https://www.womenshealth.gov/30-achievements/09> (last visited Apr. 9, 2023); JESSICA TOLLESTRUP, CONG. RSCH. SERV., *TEEN BIRTH TRENDS: IN BRIEF* 7 (2022). For example, when renters must pay more for their housing, birth rates decrease. Melissa S. Kearney et al., *The Puzzle of Falling US Birth Rates since the Great Recession*, 36 J. ECON. PERSP. 151, 159 (2022). Similarly, recessions cause at least temporary decreases in birth rates. *Id.* at 161.

<sup>22</sup> See John S. Santelli et al., *Abstinence-Only-Until Marriage: An Updated Review of U.S. Policies and Programs and Their Impact*, 61 J. ADOLESCENT HEALTH 273, 274 (2017).

<sup>23</sup> Nicholas D.E. Mark & Lawrence L. Wu, *More Comprehensive Sex Education Reduced Teen Births: Quasi-Experimental Evidence*, 119 PROC. NAT'L ACAD. SCI. U.S. 1, 1 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8872707>.

<sup>24</sup> Lantos et al., *supra* note 19; *Unintended Pregnancy in the United States*, GUTTMACHER INSTIT., <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> (last visited Apr. 9, 2023) ("When rates are recalculated including only those sexually active, women aged 15–19 have the highest unintended pregnancy rate of any age-group.").

<sup>25</sup> By comparison, 21 percent of pregnancies of individuals aged twenty to twenty-four end in abortion. Lantos et al., *supra* note 19.

<sup>26</sup> Tracey Wilkinson et al., *A Major Problem for Minors: Post-Roe Access to Abortion*, STAT NEWS (June 26, 2022), <https://www.statnews.com/2022/06/26/a-major-problem-for-minors-post-ro-e-access-to-abortion>. Moreover, the risks of infant mortality vary by both race and class, and "[t]he richest Black mothers and their babies are twice as likely to die as the richest white mothers and their babies." Claire Cain Miller et al., *Childbirth Is Deadlier for Black Families Even When They're Rich, Expansive Study Finds*, N.Y. TIMES (Feb. 12, 2023), <https://www.nytimes.com/interactive/2023/02/12/upshot/child-maternal-mortality-rich-poor.html>.

with teen rates of childbearing.<sup>27</sup> Individuals who have a baby before turning twenty are more likely to need public assistance and have low income as adults, while their children are more likely to have poorer health and educational outcomes than those of older parents.<sup>28</sup> By contrast, adolescents who choose abortion are more likely to have higher socioeconomic backgrounds, higher educational aspirations and achievements, mothers with higher educational levels, greater levels of self-esteem, stronger feelings of control over life, lower anxiety levels, “and are better able to conceptualize the future.”<sup>29</sup>

Movies and novels feature the “abortion road trip,”<sup>30</sup> although depictions of abortion in popular media are disproportionately about “whiter and wealthier” women than actual abortion recipients.<sup>31</sup> Even before *Dobbs*, supportive adults might fear legal consequences in helping minors access an abortion, and teens faced the same TRAP (targeted regulation of abortion provision) laws<sup>32</sup> that require waiting periods and multiple appointments.

When combined with delays in recognizing that a pregnancy has begun and presenting for medical care, which are more common among teens, abortion regulations based on weeks of pregnancy will

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<sup>27</sup> OASH: Office of Population Affairs, *supra* note 19 (“At the community level, teens who have mentors and have more connection to their communities are less likely to engage in sexual activity, and those who live in communities with higher rates of substance abuse, violence, and hunger are more likely to start having sex early and to have a child.”); see Lantos et al., *supra* note 19.

<sup>28</sup> TOLLESTRUP, *supra* note 21, at 7–8.

<sup>29</sup> Paula K. Braverman et al., *The Adolescent’s Right to Confidential Care When Considering Abortion*, 139 AM. ACAD. PEDIATRICS 1, 2 (2017). One explanation for this result is “that young women with a more positive view of their future may choose to have an abortion so that they can pursue that future.” *Id.* at 2.

<sup>30</sup> See, e.g., JENNI HENDRIKS & TED CAPLAN, UNPREGNANT (2019); Kylie Cheung, *From “Plan B” to “Grandma,” 5 Abortion Road Trip Movies That Reflect our Frustrating Reality*, SALON (June 6, 2021), (<https://www.salon.com/2021/06/06/abortion-road-trip-movies-plan-b-unpregnant-grandma>).

<sup>31</sup> Advancing New Standards in Reproductive Health (ANSIRH), ABORTION ONSCREEN IN 2022 1 (2022), (<https://www.ansirh.org/sites/default/files/2022-12/Abortion%20Onscreen%20Report%202022.pdf>); Katie Way, *How to Get an Abortion if You’re Under 18*, VICE (Sept. 8, 2021), (<https://www.vice.com/en/article/g5gek/How-to-get-an-abortion-if-youre-under-18>) (including a section on “What to do if you Have to go to Another State to Get a Clinical Abortion”).

<sup>32</sup> TRAP laws are designed to restrict access to abortion. See, e.g., Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 411 (2009); Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 EMORY L.J. 1235, 1265 (2007).

have a larger impact on teens' ability to access abortion care.<sup>33</sup> Even though almost half of all abortions are medication abortions, the abortion pill is only FDA-approved for abortions before the first ten weeks of the pregnancy.<sup>34</sup> While telehealth might be an option to improve access, spatial inequality (disparities in health care access based on location<sup>35</sup>), can also mean these services are unavailable to minors who may not have the funds or the ability to travel, particularly in light of other laws governing their access to abortion.<sup>36</sup>

The Turnaway Study, which recruited more than one thousand pregnant women from thirty abortion facilities around the country, found that those who were denied an abortion—and their children—had worse financial, health, and family outcomes than those who able to obtain one.<sup>37</sup> Although the findings of the Turnaway Study are

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<sup>33</sup> Ayesha Rascoe, *Teen Pregnancy Rates Have Declined Significantly*, NPR (Jan. 8, 2023, 8:00 AM), <https://www.npr.org/2023/01/08/1147737247/teen-pregnancy-rates-have-declined-significantly>; see generally Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, 104 AM. J. PUB. HEALTH 1687 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4151926>.

<sup>34</sup> *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation> (last visited Apr. 9, 2023).

<sup>35</sup> Jonathan M. Bearak et al., *Disparities and Change Over Time in Distance Women Would Need to Travel to Have an Abortion in the USA: A Spatial Analysis*, 2 LANCET: PUB. HEALTH e493, e493 (2017), <https://www.sciencedirect.com/science/article/pii/S2468266717301585?via%3Dihub>.

<sup>36</sup> The American Academy of Pediatrics lists a series of barriers to minors' abortion access, including legislation, finances, location, stigma, and anti-abortion crisis pregnancy centers. *The Importance of Access to Abortion*, AM. ACAD. PEDIATRICS, <https://www.aap.org/en/patient-care/adolescent-sexual-health/equitable-access-to-sexual-and-reproductive-health-care-for-all-youth/the-importance-of-access-to-abortion> (last visited Mar. 22, 2023); see also Laurie Sobel et al., *The Intersection of State and Federal Policies on Access to Medication Abortion via Telehealth*, KFF (Feb. 7, 2022), <https://www.kff.org/womens-health-policy/issue-brief/the-intersection-of-state-and-federal-policies-on-access-to-medication-abortion-via-telehealth/?msclkid=8c114b89d13211eca6dea82126d2f377> (showing states that ban access to telehealth for medication abortions); *Medication Abortion at Home (Telehealth)*, PLANNED PARENTHOOD METRO. WASHINGTON, D.C., INC., <https://www.plannedparenthood.org/planned-parenthood-metropolitan-washington-dc/patient-resources/abortion-dc/medication-abortion-home-telehealth#:~:text=Because%20of%20local%20laws%2C%20if,of%20our%20in%20person%20options> (last visited Mar. 22, 2023). As this Article goes to press, medication abortion is the subject of high-profile litigation.

<sup>37</sup> DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* 21–22 (2020)



compelling and included minors, the mean age was over twenty-five.<sup>38</sup> Similarly, a study of suicide rates found that state restrictions on access to reproductive care from 1974 to 2016 were associated with higher suicide rates for reproductive-aged women, although that study only focused on those over the age of twenty.<sup>39</sup> A 2016 study from Finland found that teens who have abortions, rather than give birth, typically have higher educational outcomes and less dependence on welfare.<sup>40</sup> Thus, the inability to access abortion has consequences that go beyond the mere inability to obtain a medical procedure.

## II. THE LAW AND MINORS' ACCESS TO REPRODUCTIVE JUSTICE

“Constitutional protection for the family began somewhat [indirectly, based on] dicta in early twentieth-century cases concerning due process, and in later cases concerning privacy rights between adult partners.”<sup>41</sup> Parental rights to control their children’s upbringing receives, in the Court’s most recent decisions, “special” deference.<sup>42</sup> Minors also have distinct rights under many state statutes,<sup>43</sup> and federal

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(study classified participants by whether they were just above or just below the gestational limit for an abortion in their jurisdictions).

<sup>38</sup> Loren M. Dobkin, et al., *Implementing a Prospective Study of Women Seeking Abortion in the United States: Understanding and Overcoming Barriers to Recruitment*, 24 WOMEN’S HEALTH ISSUES e115, e116, e121tbl. 4.

<sup>39</sup> Jonathan Zandberg et al., *Association Between State-Level Access to Reproductive Care and Suicide Rates Among Women of Reproductive Age in the United States*, JAMA PSYCH. (Dec. 28, 2022), [https://jamanetwork.com/journals/jamapsychiatry/article-abstract/2799597?utm\\_source=substack&utm\\_medium=email](https://jamanetwork.com/journals/jamapsychiatry/article-abstract/2799597?utm_source=substack&utm_medium=email).

<sup>40</sup> Suvi Leppälähti et al., *Is Underage Abortion Associated with Adverse Outcomes in Early Adulthood? A Longitudinal Birth Cohort Study up to 25 Years of Age*, 31 HUM. REPROD. 2142, 2142 (2016), <https://pubmed.ncbi.nlm.nih.gov/27402909>. A subsequent study found that Finnish teens who had given birth had a lower risk of suicide. Eerika Jalanko et al., *Increased Risk of Premature Death Following Teenage Abortion and Childbirth—A Longitudinal Cohort Study*, 27 EUR. J. PUB. HEALTH 845 (2017), <https://academic.oup.com/eurpub/article/27/5/845/3828490>.

<sup>41</sup> Naomi Cahn, *CRISPR Parents and Informed Consent*, 23 SMU SCI. & TECH. L. REV. 3, 14 (2020).

<sup>42</sup> *Troxel v. Granville*, 530 U.S. 57, 66, 70 (2000).

<sup>43</sup> “At the most permissive end, Alabama and Oregon allow all minors over a certain age to self-consent to nearly any form of health care, without requiring any other person’s consent.” Jessica Quinter & Caroline Markowitz, *Judicial Bypass and Parental Rights After Dobbs*, 132 YALE L.J. (forthcoming 2023) (manuscript at 41), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4280735&dgcid=ejournal\\_html\\_email\\_family%3Achildren%27s%3Alaw%3Aejournal\\_abstractlink](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4280735&dgcid=ejournal_html_email_family%3Achildren%27s%3Alaw%3Aejournal_abstractlink) (the authors provide additional examples).

laws explicitly allow access to contraception.<sup>44</sup> Even outside of Title X-funded family planning services,<sup>45</sup> in almost half of states minors can consent to all, or some form of, contraception without parental involvement.<sup>46</sup> Four states have no stated policy on such access.<sup>47</sup>

Until *Dobbs*, minors enjoyed a version of the same right to abortion as adults,<sup>48</sup> although the Court had upheld a state's authority to impose additional requirements for minors who were not "mature."<sup>49</sup> Only three years after *Roe*, the Court struck down a Missouri statute that required parental consent unless the abortion was necessary to save the life of the child.<sup>50</sup> Effectively, the Court held that the State could not give a parent (or other third party) the unilateral right to veto a minor's abortion, although that outcome still did not give minors the unencumbered right to consent.<sup>51</sup> Instead, the Court's language acknowledged that the State could limit the rights of children in a

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<sup>44</sup> See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (plurality opinion) (invalidating state law that prohibited selling or distributing contraceptives to minors). Federal regulations provide that Title X, which authorizes grants for family planning projects, may not require parental consent for minors to access services. 42 C.F.R. § 59.10(b); 86 Fed. Reg. 56,144, 166 (2021). Although *Carey* has been read broadly to find a right for minors to access contraception without parental consent, "a majority of the Court has not clearly held that minors have a right to access contraception when their parents disapprove." B. Jessie Hill, *Constituting Children's Bodily Integrity*, 64 DUKE L.J. 1295, 1307 (2015).

<sup>45</sup> Title X provides family planning services for people who are low income or uninsured. *Title X Turns 50*, OASH, <https://opa.hhs.gov/grant-programs/title-x-service-grants/title-x-turns-50> (last visited Mar. 19, 2023). The relevant Title X regulations provide that "Title X projects may not require consent of parents or guardians for the provision of services to minors, nor can any Title X project staff notify a parent or guardian before or after a minor has requested and/or received Title X family planning services." 42 C.F.R. § 59.10(b). The *Deanda* court considered this an unconstitutional violation of the rights of parents. *Deanda v. Becerra*, No. 2:20-CV-092-Z, 2022 WL 17572093, at \*35 (N.D. Tex. Dec. 8, 2022).

<sup>46</sup> *Minors' Access to Contraceptive Services*, GUTTMACHER INST. (Feb. 1, 2023), <https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services>.

<sup>47</sup> *Id.*

<sup>48</sup> See *Bellotti v. Baird*, 443 U.S. 622, 643 (1979); Quinter & Markowitz, *supra* note 43 (manuscript at 7–9).

<sup>49</sup> See *Bellotti*, 443 U.S. at 643–44; see also RESTATEMENT OF CHILDREN AND THE LAW §19.02 cmts (AM. L. INST., Tentative Draft No. 2, 2019) (tracing Supreme Court cases on the rights of mature and immature minors to make the abortion decision).

<sup>50</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 58, 74 (1976).

<sup>51</sup> *Id.* at 74; see generally Hill, *supra* note 44, at 1362.

manner not applicable to adults, even as it concluded that the medical decision-making restriction in that case was unconstitutional.<sup>52</sup>

In subsequent cases, because of what it found to be differences between adults and minors, the Court has repeatedly held that states could establish special procedures for minors. In justifying these procedures, the Court acknowledged that children are unable “to make critical decisions in an informed, mature manner” and also pointed to “the guiding role of parents in the upbringing of their children [that] justifies limitations on the freedoms of minors.”<sup>53</sup> Moreover, the Court held that states could quite reasonably conclude that their families would “strive to give a lonely or even terrified minor advice that is both compassionate and mature.”<sup>54</sup> The Court noted that while minors might not appreciate that their parents were acting in their children’s best interests, the minors would “benefit from consultation.”<sup>55</sup>

Even though states can impose a requirement of parental consent, the Court has, in a number of cases, clarified what restrictions the state can impose. In *Bellotti v. Baird*, the Court held that when a court finds that a minor is mature, it must permit the minor to proceed with an abortion.<sup>56</sup> The Court also held that parental involvement cannot be required unless the pregnant minor had an opportunity “to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.”<sup>57</sup> Accordingly, states have developed “judicial bypass” procedures through which a minor can seek judicial permission to obtain an abortion. Pursuant to most judicial bypass statutes, a minor will be

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<sup>52</sup> *Danforth*, 428 U.S. at 74–75.

<sup>53</sup> *Bellotti*, 443 U.S. at 634, 637.

<sup>54</sup> *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990).

<sup>55</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (noting that although *Dobbs* overruled *Casey*, this statement about parental consultation is used simply to provide context for the Court’s treatment of pregnant minors and pregnant adults). As a student note powerfully commented, the same type of evidence used to strike down spousal notification laws could be used to strike down parental consent requirements. Alexandra Rex, Note, *Protecting the One Percent: Relevant Women, Undue Burdens, and Unworkable Judicial Bypasses*, 114 COLUM. L. REV. 85, 109 (2014). Moreover, minors face additional obstacles just in finding out about reproductive options. Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175, 189–93 (2011); Sanger, *supra* note 32, at 437–38 (discussing reasons that minors may be delayed in finding out they are pregnant).

<sup>56</sup> *Bellotti*, 443 U.S. at 651.

<sup>57</sup> *Id.*

permitted to proceed with an abortion by showing either: (i) the minor is sufficiently mature and informed to make the abortion decision by themselves; or (ii) even if they are not sufficiently mature and informed, the abortion is in their best interest.<sup>58</sup>

As a result of these decisions, in an apparent recognition of parents' rights,<sup>59</sup> many states have imposed some form of parental notice and consent requirements.<sup>60</sup> Judges may even mandate that the minor receive counseling from an organization that is anti-abortion.<sup>61</sup>

Constitutionally, the validity of such laws was determined by whether they unduly burdened the right of a minor to seek an abortion.<sup>62</sup> In the pre-*Dobbs* context, state laws requiring parental involvement in a minor's abortion decision were required to provide alternative means by which that minor could go before a judge and prove they were mature enough to make the abortion decision on their own (or that doing so would be in their best interests) before the minor was authorized to act without parental consultation or consent.<sup>63</sup>

Nearly 75 percent of states impose some form of parental involvement with respect to a minor's access to abortion: nine states require notification of one parent, while one state requires notification of both; twenty-one states require consent of one or both parents, with seven requiring both notification and consent.<sup>64</sup> States may establish

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<sup>58</sup> See Quinter & Markowitz, *supra* note 43 (draft at 5); see, e.g., *Doe by Next Friend Rothert v. Chapman*, 30 F.4th 766, 775 (8th Cir. 2022), *cert. granted, judgment vacated sub nom. Chapman v. Doe by Rothert*, 143 S. Ct. 857 (2023) (pre-*Dobbs* case finding that "*Bellotti* is clear: parental consent statutes are unconstitutional unless they provide the pregnant minor an opportunity to seek a court order without notifying her parents").

<sup>59</sup> Sanger, *supra* note 32, at 422 (in responding to the question of whether "the language of *Roe* regarding women's decisions include[d] 'little women' as well[, t]he answer emerged from a predictable collision between abortion jurisprudence and parental rights").

<sup>60</sup> Rebouché, *supra* note 55, at 179–80 (noting the two types of parental involvement laws and their development).

<sup>61</sup> See Helena Silverstein & Kathryn Lundwall Alessi, *Religious Establishment in Hearings to Waive Parental Consent for Abortion*, 7 U. PA. J. CONST. L. 473, 492–93 (2004) (discussing practice in three Alabama counties to require "pro-life counseling" at the "Sav-A-Life" center).

<sup>62</sup> *Bellotti v. Baird*, 428 U.S. 132, 147–48 (1976).

<sup>63</sup> *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979).

<sup>64</sup> *Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Sept. 9, 2022), <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> (note that sources sometimes provide numbers that may vary by one state).

additional procedures to satisfy the notification or consent requirement. In Louisiana, for example, the abortion cannot proceed unless a parent or guardian has signed a statement indicating that they have been informed of the minor's intent to obtain an abortion and they consent, and the statement must be notarized.<sup>65</sup> In almost all of these states, a court proceeding can serve as a bypass to parental involvement.<sup>66</sup> In addition, most states allow an abortion when there is a medical emergency, with a minority also allowing bypass of parental and court involvement in cases of abuse, assault, or incest.<sup>67</sup> Fourteen jurisdictions have no requirements, although that may be because their restrictions have been enjoined:<sup>68</sup> Alaska, California,

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All of the states requiring parental involvement included a judicial bypass procedure, which allows a minor to obtain approval from a court to obtain an abortion. Seven states permit a minor to obtain an abortion if a grandparent or other adult relative is involved in the decision. Most states that require parental involvement make exceptions under certain circumstances: 36 states permit a minor to obtain an abortion in a medical emergency, and 16 states waive parental involvement and permit a minor to obtain an abortion in cases of abuse, assault, incest, or neglect.

Am. Acad. of Pediatrics Comm. on Adolescence, *The Adolescent's Right to Confidential Care When Considering Abortion*, 139 (2) PEDIATRICS 1, 3 (Feb. 2017), <https://publications.aap.org/pediatrics/article/139/2/e20163861/59961/The-Adolescent-s-Right-to-Confidential-Care-When?autologincheck=redirected>.

<sup>65</sup> LA. STAT. ANN. § 40:1061.14 (2023). Only one parent must sign the statement. *Id.* Other states have similar requirements. *E.g.*, IND. CODE ANN. § 16-34-2-4 (2023) (requiring notarized written consent of one parent, custodian, or legal guardian accompanying a pregnant minor who is unemancipated). Pennsylvania requires the informed consent of both the minor and a parent, although does not mandate notarization. 18 PA. STAT. AND CONS. STAT. ANN. § 3206(a) (West 2023). Virginia requires permission in writing. VA. CODE ANN. § 18.2-76 (2023). West Virginia requires that notice be given "personally" by the doctor or their agent, and that notice be followed by a 48-hour waiting period. W. VA. CODE. § 16-2F-3 (2023).

<sup>66</sup> Order Amending the Rules and Forms for a Judicial Bypass of Parental Notice and Consent Under Chapter 33 of the Family Code (Tex. Sept. 6, 2022) (draft at 7) [hereinafter Judicial Bypass], <https://www.txcourts.gov/media/1454838/229077.pdf>.

<sup>67</sup> *E.g.*, MD. CODE ANN., HEALTH-GEN. § 20-103 (West 2022) (allowing a "qualified provider" to perform an abortion on a minor without parental notice, "if, in the professional judgment of the qualified provider: (i) Notice to the parent or guardian may lead to physical or emotional abuse of the minor; (ii) The minor is mature and capable of giving informed consent to an abortion; or (iii) Notification would not be in the best interest of the minor"). Florida, which requires both parental notice and consent, allows for a physician to proceed without such notice and consent, where there is a "medical emergency," although even then, the physician must make a good faith effort to contact the parents. FLA. STAT. ANN. § 390.01114 (West 2022).

<sup>68</sup> For example, although New Jersey justified its parental notification law on "the rights of parents to rear their children" (among other bases), the Supreme Court of

Connecticut, Hawaii, Illinois, Maine, Minnesota, New Jersey, New Mexico, New York, Oregon, Vermont, Washington and Washington, D.C., while Delaware, Massachusetts, and Montana only require parental notification if the minor is under sixteen.<sup>69</sup>

In more than half of the states with judicial bypass statutes, minors must prove their case by a preponderance of the evidence for a grant of judicial bypass; in fifteen states, however, the burden of proof is “clear and convincing.”<sup>70</sup> After Texas adopted this heightened standard, in late 2015, the result was a marked increase in judicial bypass denials for teens.<sup>71</sup> In exploring the lack of standards for determining whether minors are mature, a judge might decide

all minors who would use the bypass procedure are by definition immature. Remarkably, one could just as easily reach the opposite conclusion and reason that every time a minor seeks an abortion, a judge must grant it. In Robert Mnookin’s words: “[H]ow could the judge determine that it

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New Jersey struck down the provision as a violation of the equal protection guarantee in the state constitution. *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 622, 638–39 (2000). This situation may change as a result of *Dobbs*.

<sup>69</sup> *Parental Consent and Notification Laws*, PLANNED PARENTHOOD (Nov. 3, 2022), <https://www.plannedparenthood.org/learn/teens/stds-birth-control-pregnancy/parental-consent-and-notification-laws>; *Parental Consent/Notification Requirements for Minors Seeking Abortions*, KFF (Mar. 1, 2023), <https://www.kff.org/womens-health-policy/state-indicator/parental-consentnotification/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>; see *Judicial Bypass*, *infra* note 82, at (draft at 7, n.19). Each of the no-requirements states, except Alaska, is typically characterized as “blue,” and they generally have strong supports for families and children. See generally Naomi Cahn & June Carbone, *Supporting Families in a Post-Dobbs World: Politics and the Winner-Take-All Economy*, 101 N.C. L. REV. (forthcoming 2023) (discussing state support for families in red and blue states).

<sup>70</sup> Haley Hawkins, Comment, *Clearly Unconvincing: How Heightened Evidentiary Standards in Judicial Bypass Hearings Create an Undue Burden Under Whole Woman’s Health*, 67 AM. U. L. REV. 1911, 1922 (2018).

<sup>71</sup> Amanda Jean Stevenson et al., *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, 352–53 (2020), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305491> (finding that the percentage of judicial bypass denials spiked “more than threefold to 10.3 [percent] among [an organization that provides free legal representation to pregnant minors] cases and 13.2 [percent] among all cases” in the year immediately following the amendment and that denials have remained relatively elevated); TEX. FAM. CODE ANN. § 33.003 (2023) (effective Jan. 1, 2016).

is in the interest of a minor to give birth to a child if she is too immature even to decide to have an abortion?”<sup>72</sup>

Laws governing minors’ access to abortion are dependent on state approaches to abortion itself.<sup>73</sup> In states where abortion is restricted, those same limitations apply to minors; minors then face the additional burdens of parental involvement<sup>74</sup> and may face more onerous restrictions from states.<sup>75</sup> Moreover, judges have a great deal of discretion in ruling on requests for judicial bypass of parental involvement.<sup>76</sup> Judicial bypass statutes vary by state, but many require that a pregnant minor who is unemancipated or unmarried be sufficiently “mature” and “well-informed” for the petition to be granted.<sup>77</sup> In their decision-making, judges have considered factors such as the pregnant minor’s grades, participation in extracurricular activities, and current living situation.<sup>78</sup> Although there are some state-

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<sup>72</sup> Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 634 (2002).

<sup>73</sup> See Cahn & Carbone, *Supporting Families*, *supra* note 69; June Carbone & Naomi Cahn, *The Court’s Morality Play: The Punishment Lens, Sex, and Abortion*, 96 SO. CALIF. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4319373](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4319373); David Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 28 (2023).

<sup>74</sup> That is, in a state that restricts access to abortion based on the number of weeks, a minor must qualify to receive an abortion and then comply with parental involvement laws in order to receive the abortion.

<sup>75</sup> Idaho has enacted the first “abortion trafficking” bill, which criminalizes taking a minor across state lines for an abortion without parental consent. Christine Vestal, *First State law to Criminalize ‘Abortion Trafficking’ May Inspire Others*, USA TODAY (April 7, 2023), <https://www.usatoday.com/story/news/nation/2023/04/07/idaho-law-criminalizing-abortion-trafficking-inspires-other-states/11621952002/>. This may also serve as a test for the rights of adults. Its language is drawn from model legislation drafted by the National Right to Life Committee, which defended the abortion trafficking provision based on parental rights. *Id.*

<sup>76</sup> “Since bypass hearings were first introduced in the late 1970s, petitions have been denied for reasons that, on any fair reading of the facts, are simply hard to take.” Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 433 (2009); Jody Lyneé Madeira, *Aborted Emotions: Regret, Relationality, and Regulation*, 21 MICH. J. GENDER & L. 1, 61 (2014) (“guidelines . . . are subjective, hard to apply, and sometimes must be proven by clear and convincing evidence”); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 571–74 (2000).

<sup>77</sup> See, e.g., ALASKA STAT. § 18.16.030 (2021); OHIO REV. CODE ANN. § 2151.85 (West 2013); 18 PA. CONS. STAT. § 3206 (2023).

<sup>78</sup> See *In re* Jud. Waiver of Parental Notice & Consent of Doe, 333 So. 3d 265, 268, 270–71 (Fla. Dist. Ct. App. 2022); *In re* Doe, No. 03-20-00317-CV, 2020 Tex. App. LEXIS 4423, at \*11 (Tex. App. June 12, 2020) (Goodwin, J., dissenting); *In re* Anonymous 5,

by-state studies,<sup>79</sup> it is difficult to know what happens in these cases, given that they are confidential.<sup>80</sup> A report on Florida judicial bypass hearings from December 2019 to January 2023 found variations between counties, with one county denying half of all petitions compared to a rate of 12 percent for the state.<sup>81</sup>

Given that states can now ban abortion entirely, albeit with a rational basis for such legislation, minors will be unable to access abortion. In one of the early post-*Dobbs* cases considering minors' rights, the Texas Supreme Court approved amendments to the procedures for minors' ability to access abortion with parental notification and consent or a judicial bypass, albeit only where there was a life-threatening condition related to the pregnancy.<sup>82</sup>

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838 N.W.2d 226, 234 (Neb. 2013). Minors have explained that they felt as though judges "based their decisions or treatment of adolescents on their own personal opinions of abortion." Kate Coleman-Minhan, et al., *Young Women's Experiences Obtaining Judicial Bypass for Abortion in Texas*, 64 J. ADOLESCENT HEALTH 20, 23 (2019); see Shefali Luthra, *Local Judges Now Have More Power to Decide Who Gets an Abortion*, 19<sup>TH</sup> NEWS (Aug. 31, 2022), <https://19thnews.org/2022/08/local-judges-abortion-decision-restrictions>.

<sup>79</sup> See, e.g., Arek Sarkissian, *Florida Court Says Teen Isn't Mature Enough to Get an Abortion*, POLITICO (Aug. 16, 2022), <https://www.politico.com/news/2022/08/16/parentless-teen-cant-have-an-abortion-under-state-parental-consent-law-00052211> (showing that of 200 petitions filed annually by minors seeking abortions through judicial bypass in Florida, only about eighteen are denied).

<sup>80</sup> *Bellotti v. Baird*, 443 U.S. 622, 644 (1979) ("The proceeding . . . must assure that a resolution of the issue, and any appeals that may follow will be completed with anonymity."); see, e.g., VA. CODE ANN. § 16.1-241 (2022); see also Anne Branigin, *How Hard Is it to Get a Court-Approved Abortion? For One Teen, it Came Down to GPA*, WASH. POST: LIFESTYLE (Jan. 27, 2022, 11:07 AM), <https://www.washingtonpost.com/lifestyle/2022/01/27/florida-abortion-judicial-bypass-case-gpa> (describing experience of seeking a judicial bypass).

<sup>81</sup> HUMAN RIGHTS WATCH, ACCESS DENIED: HOW FLORIDA JUDGES OBSTRUCT YOUNG PEOPLE'S ABILITY TO OBTAIN ABORTION CARE (Feb. 9, 2023), <https://www.hrw.org/report/2023/02/09/access-denied/how-florida-judges-obstruct-young-peoples-ability-obtain-abortion>. The report found that when parental involvement laws became more stringent, such as by requiring consent rather than notice, the denial rate increased. *Id.*

<sup>82</sup> Judicial Bypass, *supra* note 66.



## III. PARENTS' RIGHTS

The parental involvement laws might be seen as efforts to balance the paradigmatic parent-child-state triad,<sup>83</sup> recognizing parental rights.<sup>84</sup> The emphasis on parental consultation builds on the traditional deference to parents to control the upbringing of their children, based on the expectation that parents can generally be expected to act in their children's best interests. The judicial bypass accounts for situations when absolute control may be contrary to children's best interest.<sup>85</sup> Indeed, while parents have historically had "broad authority over a child's upbringing, which included the authority to make medical decisions for a child[, t]his authority is not absolute," and the State can act *in parens patriae* to protect the child.<sup>86</sup> Accordingly, the scope of parental authority over minors' decisions provides a critical backdrop to arguments for retaining the judicial bypass procedure and recognizing rights of minors.<sup>87</sup> Questions

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<sup>83</sup> "The field of children and law currently rests on the foundational question of who has authority over children's lives—parents, the state, or (less frequently) children themselves. . . . Analysis may be best conceptualized as an inverted triangle, with parents and the state occupying the top points and children the bottom." Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1456 (2018).

<sup>84</sup> Of course, others have critiqued the idea of a triad, noting, for example, the existence of others with whom a child has formed important relationships, Sacha M. Coupet, *Neither Dyad Nor Triad: Children's Relationship Interests Within Kinship Caregiving Families*, 41 U. MICH. J.L. REFORM 77, 85 (2007), or pointing to the lawyer for a juvenile as a substitute for the parent, Margaret Etienne, *Managing Parents: Navigating Parental Rights in Juvenile Cases*, 50 CONN. L. REV. 61, 88 (2018).

<sup>85</sup> See *Bellotti v. Baird*, 443 U.S. at 644 (discussing a minor judicial bypass statute that allows a judge to ignore objections by parents that are not based on the best interests of the minor, acknowledging that parents may not always be acting in such interests).

<sup>86</sup> RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 2.30 cmt. a (AM. LAW INST., Tentative Draft No. 1, 2018). A parent's right includes broad authority with respect to medical decision-making, although a parent does not have the authority to consent to treatment that does not provide benefits to the child and might, instead, seriously harm the child. *Id.* at § 2.30(1). On their own, unless the minor is deemed "mature," they cannot consent to medical treatment. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 19.01(a) (AM. LAW INST., Tentative Draft No. 2, 2019). But the Restatement clarifies that "[p]arents' acts that threaten harm to their children are not shielded from state intervention under the rubric of parental rights." RESTATEMENT OF THE LAW: CHILDREN AND THE LAW ch. 1, intro. note (AM. LAW INST., Tentative Draft No. 1, 2018).

<sup>87</sup> There is an irony, as June Carbone has observed:

[T]he consequences of a decision to proceed with a pregnancy cannot be contained within a discrete family unit. The result compels a

involving how to balance the rights of parents and children appear throughout family and criminal law, including child custody, abuse and neglect, parental liability for children's actions, filial support laws, and donor conception.<sup>88</sup>

Notwithstanding the strength of the presumption that parents act in their children's best interests and promote their well-being,<sup>89</sup> parental rights are subject to some limits. For example, the State is justified in intervening at the point of abuse or neglect.<sup>90</sup> The standards for such intervention are contested.<sup>91</sup> Indeed, even before the point of abuse and neglect, scholars and policymakers differ on the

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pregnant teen to become the mother of a child she does not want. Once the child is born, the reluctant mother acquires far greater independence in deciding how to care for the child than she enjoyed in deciding to give birth.

JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 221 (2000).

<sup>88</sup> E.g., *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1155 (1978) (stating that in custody proceedings, "the child is not a party but rather is the individual whose interests—once determined—must by law prevail"); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1694 (1996) ("[A] coherent rights theory permits the child to make rights claims and to have them heard."); Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1078 (2014). The State also intervenes in cases involving sterilization of minors, and a parent cannot force a child to have an abortion, regardless of the child's age. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 2.30 (AM. LAW INST., Tentative Draft No. 1, 2018) ("A parent does not have authority to consent to medical procedures or treatments that impinge on the child's constitutional rights to bodily integrity or reproductive privacy."); RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 19.02 cmt. b (AM. LAW INST., Tentative Draft No. 2, 2019).

<sup>89</sup> E.g., Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2531 (2022). *But see* Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 78 (2021) (suggesting that a "romanticized view of the family" gives parents expansive rights). There is, however, general recognition that "children's primary attachment to their parents is the single most important factor in children's wellbeing and development." *Id.* at 78–79; Anne L. Alstott et al., *Psychological Parenthood*, 106 MINN. L. REV. 2363, 2373 (2022); Huntington & Scott, *supra*, at 2529 ("[P]arental rights promote the stability of the parent-child relationship.").

<sup>90</sup> See, e.g., DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 36 (2022) (discussing the impact of the family policing system).

<sup>91</sup> For allegations of bias, see *id.*

role and goals of the state<sup>92</sup> given the counterbalancing factor that state intervention may not advance a child's interests or protect the child.<sup>93</sup>

There is some agreement that parental rights should exist to the extent that they promote a child's well-being and autonomy.<sup>94</sup> If allowed beyond this limited role, Dean Laura Rosenbury and Anne Dailey argue that “[p]arental rights construct children predominantly as objects of control, rather than as people with values and interests of their own.”<sup>95</sup> By contrast, Clare Huntington and Elizabeth Scott would not impose limits on parental decision-making unless there is a “clear risk of harm to the child or a strong consensus on children's needs,” at which point third parties, including the State, could override parental decision-making.<sup>96</sup> And Catherine Smith argues that children need their own rights, in order to protect themselves and, at least sometimes, their parents.<sup>97</sup>

Indeed, the Court's judicial bypass cases recognizes that parental rights are not all-encompassing.<sup>98</sup> In *Hodgson v. Minnesota*,<sup>99</sup> Justice Stevens wrote that “parents have an interest in controlling the education and upbringing of their children but that interest is ‘a counterpart of the responsibilities they have assumed.’”<sup>100</sup> The mere

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<sup>92</sup> See, e.g., Dailey & Rosenbury, *supra* note 89, at 79; Huntington & Scott, *supra* note 89, at 2529.

<sup>93</sup> See, e.g., ROBERTS, *supra* note 90.

<sup>94</sup> See Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1452–53 (2018) (“Parental rights have a role to play . . . but only to the extent they further children's broader interests.”); see also Alicia Ouellette, *Shaping Parental Authority Over Children's Bodies*, 85 IND. L.J. 955, 971 (2010) (arguing that parental rights should be balanced against children's rights and limited in cases of parental authority to consent on behalf of their child to “shaping” medical procedures such as liposuction); Huntington & Scott, *supra* note 89, at 2535.

<sup>95</sup> Dailey & Rosenbury, *supra* note 94, at 1471. They also claim that “[a]lthough parental rights may indirectly further children's interests, they are a circuitous and unreliable means of doing so.” *Id.*

<sup>96</sup> Huntington & Scott, *supra* note 89, at 2540.

<sup>97</sup> Catherine E. Smith, *Keynote Speech: “Children's Equality Law” in the Age of Parents' Rights*, 71 KANSAS L. REV. 533, 545 (2023). Professor Smith also notes: “[P]arents' rights are not only used to chill the development of children's rights, but they are sometimes used as a cudgel to limit young people's rights and their respective gains.” *Id.* at 542.

<sup>98</sup> See *infra*. The Court has recognized children's rights in other context. See *In re Gault*, 387 U.S. 1, 13 (1967) (criminal context); Smith, *supra* note 100, at 540–41 (discussing additional contexts); but see *Michael H. v. Gerald D.*, 491 U.S. 110, 111 (1989) (dismissing the child's interests).

<sup>99</sup> 497 U.S. 417, 445 (1990).

<sup>100</sup> *Id.* at 446 (quoting *Lehr v. Robertson*, 463 U.S. 248, 257 (1983)).

fact of parentage does not alone give rise to a right to control the child's upbringing. Rather, "the demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest."<sup>101</sup>

To be sure, claims of parental rights are double sided. Parents do typically act in their children's best interests, and a claim of parental rights can be used to defend parents who support their children in seeking access to abortion or gender-affirming care:<sup>102</sup> that is, a parent and child may jointly resist the state or political actors attempting to impose their own vision of appropriate behaviors.<sup>103</sup> The critical issues concern the parameters under which the State can override decisions made by parents and children jointly by either supporting parents who want to override their children's choices,<sup>104</sup> or supporting children who want to override their parent's decision.<sup>105</sup> A blanket claim of

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

<sup>102</sup> See, e.g., *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2183–84 (2021) ("Prohibiting parents from authorizing medically necessary treatment for their children when they believe this care in their children's best interests is just the kind of intrusive government conduct that parental due process rights guard against.").

<sup>103</sup> The paradigmatic high school student free speech case, *Tinker v. Des Moines Indep. Comm. School Dist.*, involved schoolchildren supported by their parents in wearing black armbands to protest the Vietnam War. 393 U.S. 503, 505 (1969). And in *Meyer and Pierce*, parents and children were aligned. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Alternatively, consider the parents who supported their child's gender-affirming care and were investigated by Texas child protective services. See Plaintiffs' Original Petition at 21, *Doe v. Abbott* (filed March 1, 2022); Anne M. Coughlin & Naomi Cahn, *Texas Is Trampling Parents' Rights in its Investigations of Trans Kids*, WASH. POST (Apr. 8, 2022), <https://www.washingtonpost.com/outlook/2022/04/08/texas-transgender-family-law>.

<sup>104</sup> At times, the law recognizes that "parents' view of the right decision may be based on their own values and interests rather than on concern for their child's health and welfare per se." Scott, *supra* note 76, at 571.

<sup>105</sup> See, e.g., Sacha M. Coupet, *Valuing All Identities Beyond the Schoolhouse Gate: The Case for Inclusivity as a Civic Virtue in K-12*, 27 MICH. J. GENDER & L. 1, 6 (2020) (noting the tensions when schools' efforts to teach—particularly on issues involving sex and sexuality—potentially conflict with claims of parental authority). There are some contexts, such as education, in which the State mandates such activities. E.g., MD. CODE ANN., EDUC. § 7-301 (West 2022) (mandating education for children, although allowing for home-schooling if the child is otherwise "receiving regular, thorough instruction"); Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179, 1217 (2022) (noting the state-imposed requirement for school attendance). Vaccination requirements have similarly been upheld. *Zucht v. King*, 260 U.S. 174,

parental rights obscures each of these distinctions while serving as a proxy for the state's interests, which may—or may not—be aligned with the child's, parent's, or family's interests.<sup>106</sup>

The current round of such rhetoric, including with respect to issues such as the availability of gender-affirming care, abortion, or education concerning critical race theory and gender identity in schools, serves to curtail minors' rights. As states move to restrict abortion, they may decide to eliminate judicial bypass procedures and require parental consent with no alternative for minors.<sup>107</sup> There are certainly strong constitutional arguments for retaining the alternative processes that are distinct from those justifying an abortion.<sup>108</sup> That is, even if the Due Process Clause no longer protects the right to an abortion (regardless of age), other legal bases might support minors' ability to access abortion care, including the right to liberty under *Lawrence v. Texas*, common law health care decision-making concepts, and children's common law rights in the family.<sup>109</sup> This Article assumes that parents are owed great deference.<sup>110</sup> But even with that basis, the question remains: at which point does deference end and either the state's or the child's interests override the parents'?

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175, 177 (1922); see also Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1427 (2020) (noting that parents do not receive deference for medical decision-making if such decisions “poses a substantial risk of serious harm to the child”).

<sup>106</sup> Cf. Michele Goodwin, *Opportunistic Originalism: Dobbs v. Jackson Women's Health Org.*, SUP. CT. REV. 41 (draft on file with author) (emphasis added) (“The District Court in *Dobbs* used the term “gaslighting” to describe the phenomenon in Mississippi whereby the state claimed its abortion ban reflected beneficence—in this case protecting the health and safety of pregnant women.”).

<sup>107</sup> Judicial Bypass, *supra* note 66.

<sup>108</sup> These are powerfully articulated in Judicial Bypass, *supra* note 66, and in other scholarship.

<sup>109</sup> *Id.*; Dailey & Rosenbury, *supra* note 89.

<sup>110</sup> Huntington & Scott, *Conceptualizing Legal Childhood*, *supra* note 105, at 1424. Given that the focus of the judicial bypass is not parental fitness, arguably, the “intrusion upon parental prerogatives in the bypass context is merely partial.” Richard F. Storrow & Sandra Martinez, “Special Weight” for Best-Interests Minors in the New Era of Parental Autonomy, 2003 WIS. L. REV. 789, 834 (2003). This provides more grounding for the claim that requiring consent is not fundamentally justifiable as protecting parental rights.

## IV. POLITICAL PARTISANSHIP, CULTURE WARS, AND PARENTAL RIGHTS RHETORIC

Public opinion polls show that a majority of people believe health care professionals should notify a minor's parent or legal guardian before performing an abortion.<sup>111</sup> In fact, most minors do consult their parents before obtaining an abortion. As such, those seeking to either enact or maintain existing parental involvement laws seem to be in accord with a majority of the public, as well as these minors.<sup>112</sup>

On the other hand, when minors do not consult their parents, it is because they fear exacerbating familial dysfunction.<sup>113</sup> One fifth of all minors who are pregnant have been victims of familial abuse, and 30 percent of pregnant teens who do not discuss an abortion with their parents are afraid of violence or being forced out of their home.<sup>114</sup>

If the state actually were to act *in parens patriae*, however, then laws might exhibit more uniformity with respect to requirements for consent or notification. Instead, these laws show the impact of a fourth actor on minors' abortion rights: political partisanship. While it is difficult to determine the precise causative impact of parental involvement laws on minor abortion rates, research shows that states that adopted parental involvement laws before 1997 reduced minor abortion rates by 15 to 20 percent.<sup>115</sup> Qualitative interviews with staff members at abortion facilities show that parental involvement laws resulted in less administrative efficiency, less patient-centeredness, and

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<sup>111</sup> *America's Abortion Quandary*, PEW RSCH CTR., <https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary> (last visited Apr. 9, 2023).

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

<sup>113</sup> *Laws Restricting Teenagers' Access to Abortion*, ACLU, <https://www.aclu.org/other/laws-restricting-teenagers-access-abortion> (last visited Mar. 19, 2023).

<sup>114</sup> *Abortion and Parental Involvement Laws*, ADVOC. FOR YOUTH, <https://www.advocatesforyouth.org/resources/fact-sheets/abortion-and-parental-involvement-laws> (last visited Apr. 9, 2023).

<sup>115</sup> Theodore J. Joyce et al., *The Impact of Parental Involvement Laws on the Abortion Rate of Minors*, 57 DEMOGRAPHY 323 (2020), <https://read.dukeupress.edu/demography/article/57/1/323/168092/The-Impact-of-Parental-Involvement-Laws-on-the>. The early state adopters were: "Georgia (1992, notice), Maryland (1992, notice), Minnesota (1990, notice), Mississippi (1993, consent), Nebraska (1991, notice), North Carolina (1995, notice), Pennsylvania (1994, consent), South Carolina (1990, consent), and Tennessee (1992, notice)." *Id.* at 339.

more delay.<sup>116</sup> The jurisdictions today that do not require parental involvement are blue, with the exception of Alaska.<sup>117</sup>

Since *Roe*, attitudes towards abortion have diverged as measured by ideology and party alignment. While Republicans were more likely than Democrats to support abortion in the 1970s, the parties have diverged since the 1990s; at the same time, liberals have consistently been more likely to support abortion rights than conservatives, but the gap has increased since the 1970s.<sup>118</sup> Even religion is moderated by party; more than twice as many Catholics who are Republican or lean Republican believe abortion should be illegal in most cases compared with Catholics who are Democrats or lean Democratic (46 percent to 20 percent).<sup>119</sup>

Contemporary political polarization stems from the realignment that occurred in the 1960s and 1970s after the Civil Rights and women's rights' movements and also due, in part, to Richard Nixon's Southern Strategy.<sup>120</sup> Congressional polarization has increased steadily

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<sup>116</sup> Kari White et al., *Parental Involvement Policies for Minors Seeking Abortion in the Southeast and Quality of Care*, 19 *SEXUALITY RSCH. & SOC. POL'Y* 264 (2022).

<sup>117</sup> See *supra* text accompanying notes 68–69.

<sup>118</sup> Michael Hout et al., *Stasis and Sorting of Americans' Abortion Opinions: Political Polarization Added to Religious and Other Differences*, 8 *SOCIUS* 1, 2–4 (2022). In 1975, 55 percent of Republicans believed abortion should be legal “only under certain circumstances,” while that was true of 51 percent of Democrats, and 18 percent of Republicans, compared to 19 percent of Democrats thought it should be legal, regardless of circumstances. *Abortion Trends by Party Identification*, GALLUP (2023), <https://news.gallup.com/poll/246278/abortion-trends-party.aspx>. In 1976, close to 30 percent of the electorate did not believe the parties had ideological differences. EZRA KLEIN, *WHY WE'RE POLARIZED* 7 (2020).

<sup>119</sup> Gregory A. Smith, *Like Americans Overall, Catholics Vary in Their Abortion Views, with Regular Mass Attenders Most Opposed*, PEW RSCH. CTR. (May 23, 2022), <https://www.pewresearch.org/fact-tank/2022/05/23/like-americans-overall-catholics-vary-in-their-abortion-views-with-regular-mass-attenders-most-opposed>. While Catholic Democrats are more opposed to abortion than non-Catholic Democrats, they “tend to more closely resemble other Democrats than they do Catholic Republicans.” *Id.*

<sup>120</sup> The Southern strategy is described as an effort by Republicans “to court Southern white voters by capitalizing on their racial fears,” although this is an “oversimplified version” of what actually happened in the South. Angie Maxwell, *What We Get Wrong About the Southern Strategy*, WASH. POST: MADE BY HISTORY (July 26, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/07/26/what-we-get-wrong-about-southern-strategy/>; see generally ANGIE MAXWELL & TODD SHIELDS, *THE LONG SOUTHERN STRATEGY: HOW CHASING WHITE VOTERS IN THE SOUTH CHANGED AMERICAN POLITICS* (2019); Elizabeth Kolbert, *How Politics Got So Polarized*, NEW YORKER (Dec. 27, 2021), <https://www.newyorker.com/magazine/2022/01/03/how-politics-got-so-polarized>. See LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR*

since 1971, albeit with Republicans moving further right than Democrats to the left.<sup>121</sup>

The process of devolution has meant that states have more control.<sup>122</sup> Conservative activists realized that, rather than a federal-only strategy, they could turn to states to implement their proposals.<sup>123</sup> A combination of forces have, consequently, resulted in increasing divergence between the parties and more ideological homogeneity within each.<sup>124</sup> Moreover, abortion has certainly been a battleground, and the increasing attention to parental rights rhetoric takes its place within that fight.<sup>125</sup>

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IDENTITY 33 (2018); SAM ROSENFELD, *THE POLARIZERS: POSTWAR ARCHITECTS OF OUR BIPARTISAN ERA* ch. 5 (2018) (exploring the polarization that started with Nixon's election); KLEIN, *supra* note 118, at 29–36. Klein traces how the 1964 Civil Rights Act “cleared the way for southern conservatives to join the Republican Party and northern liberals to join the Democratic Party [which let the parties] sort themselves ideologically.” KLEIN, *supra* note 118, at 36.

<sup>121</sup> See Drew Desilver, *The Polarization in Today's Congress Has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades>.

<sup>122</sup> As Jennifer Karas Montez explains, “[d]evolution has provided states greater discretion over which policies and programs to fund and at what levels”). Jennifer Karas Montez, *Deregulation, Devolution, and State Preemption Laws' Impact on US Mortality Trends*, 107 AM. J. PUB. HEALTH 1749, 1749 (2017). See Cahn & Carbone, *supra* note 69 (manuscript at 18).

<sup>123</sup> ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION* 11 (2019).

<sup>124</sup> Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1022–1023 (2011); Jennifer Karas Montez et al., *US State Polarization, Policymaking Power, and Population Health*, 98 MILBANK Q. 1033, 1041–42 (2020).

<sup>125</sup> The states that have increasingly seen opposition to gender-affirming care and to parental rights to control education are also the ones that are opposed to abortion rights. See Brooke Migdon, *Here Are the States Planning to Restrict Gender-Affirming Care Next Year*, HILL (Dec. 29, 2022), <https://thehill.com/changing-america/respect/diversity-inclusion/3789757-here-are-the-states-planning-to-restrict-gender-affirming-care-next-year>; *Healthcare Laws and Policies: Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (Mar. 2, 2023), [https://www.lgbtmap.org/equality-maps/healthcare\\_laws\\_and\\_policies/youth\\_medical\\_care\\_bans](https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies/youth_medical_care_bans) (The Movement Advancement Project (MAP) notes that Tennessee “prohibited medical providers from providing hormone-related medication to ‘prepubertal minors,’” but “[b]est practice medical care for transgender youth can (though does not always) include hormone-related medication, but only once a youth has entered puberty, not prior to it. In other words, this law . . . set[s] a dangerous precedent for further restrictions of medical care for transgender youth.”).



Greater partisan polarization has only increased policy differences between the states.<sup>126</sup> That is, state governments are becoming more polarized, with almost 75 percent of Americans likely to live in a state where one party controls the legislature and the governorship, while thirty years ago, under 40 percent of states had the same political polarization.<sup>127</sup> Voters' ratings of the opposing political party have become more negative.<sup>128</sup> State elections have become more "nationalized," as voters are increasingly likely to view the other party negatively, regardless of the level of government.<sup>129</sup> More extreme candidates have become more likely to win.<sup>130</sup> At least part of the reason is that current state voting systems, including partisan gerrymandering<sup>131</sup> and identity-based voting, contribute to the selection of more extreme candidates within each party.<sup>132</sup> With gerrymandering creating safe seats for a particular party, the primary

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<sup>126</sup> See, e.g., Montez, *Deregulation*, *supra* note 122; Jennifer Karas Montez, et al., *US State Policies, Politics, and Life Expectancy*, 98 MILBANK Q. 668, 668–69 (2020). Greater partisan polarization, polls show, translates into increasingly hostile judgments of members of the opposing party. Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 129 (2019).

<sup>127</sup> *American Policy Is Splitting, State by State, into Two Blocs*, ECONOMIST (Sept. 3, 2022), <https://www.economist.com/interactive/briefing/2022/09/03/american-policy-is-splitting-state-by-state-into-two-blocs>.

<sup>128</sup> ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* 6 (2018).

<sup>129</sup> Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUD. 12, 18 (2016) (“[V]oters now view their choices in elections at all levels through the lens of negative partisanship: at all levels of government, the greatest concern of party supporters is preventing the opposing party from gaining power. For this reason, negative partisanship has nationalized American elections.”). “Religion and race, as well as class, geography, and culture, are dividing the parties in such a way that the effect of party identity is magnified.” LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* 14 (2018).

<sup>130</sup> See, e.g., Cassandra Handan-Nader et al., *Polarization and State Legislative Elections* 1 (Stan. Inst. Econ. Pol’y Rsch., Working Paper No. 22–05), <https://drive.google.com/file/d/1upxvKgeCYcjxEYv3T6CtbT-dP0D-QRwb/view> (analyzing polarization of candidates for office, the degree to which more extreme candidates are favored during primaries, and how more moderate candidates fare during general elections).

<sup>131</sup> “Right now, many congressional districts are gerrymandered, shielding incumbents from competitive primaries while making them hostage to the extremist portion of their base.” Yascha Mounk, *The Doom Spiral or Pernicious Polarization*, ATLANTIC (May 21, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/us-democrat-republican-partisan-polarization/629925>.

<sup>132</sup> See, e.g., Kang, *supra* note 124, at 1022–23 (observing that the major political parties have been nominating more ideologically extreme candidates).

will determine the candidate, and it is at that stage that candidates are pulled toward extremes.<sup>133</sup>

Abortion, which was not a partisan issue at the time of the *Roe* decision,<sup>134</sup> has become a marker of political identity,<sup>135</sup> and thus divisions between the states over the issue are intensifying.<sup>136</sup> At the same time, legislators—particularly on issues related to abortion—have been more extreme than their constituents.<sup>137</sup>

The role of outside organizations has, as discussed earlier, increased. In pushing policy agendas, they may use minors as test

<sup>133</sup> See Mike Cummings, *Polarization in U.S. Politics Starts with Weak Political Parties*, YALENEWS (Nov. 17, 2020), <https://news.yale.edu/2020/11/17/polarization-us-politics-starts-weak-political-parties> (responding to a question about why “unrepresentative voters on the[] fringes” and their funders have so much power, Yale political scientist Ian Shapiro noted that this was “due to the role of primaries at the presidential level and the interaction of primaries and safe seats in Congress. The basic problem with [today’s primaries] is they are usually marked by very low turnout and the people on the fringes of the parties vote disproportionately in them.”). These voter challenges do not appear in Justice Alito’s opinion in *Dobbs*, in which he notes that women are a majority of voters. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2277 (2022).

<sup>134</sup> See Linda Greenhouse & Reva B. Siegel, *Backlash to the Future? From Roe to Perry*, 60 UCLA L. REV. DISCOURSE 240, 244 (2013) (“Polling on the eve of [*Roe*] showed that ... [m]ore than two-thirds of self-identified Republicans—more Republicans than Democrats—and 56 percent of Catholics told Gallup that ‘[t]he decision to have an abortion should be made solely by a woman and her physician.’ Three major surveys conducted in the immediate aftermath of *Roe*—Harris, Field, and NORC—all showed that the decision did not reduce but rather consolidated these broad levels of popular support.”).

<sup>135</sup> Partisan differences became more pronounced after the mid-1980s. See Edward G. Carmines & James Woods, *The Role of Party Activists in the Evolution of the Abortion Issue*, 24 POL. BEHAV. 361 (2002) (finding that abortion views have become more highly correlated with party voting and exploring the role of party activists); Samuel Collitt & Benjamin Highton, *The Policy Polarization of Party Activists in the United States*, 49 AM. POL. RSCH. 386, 391 (2021) (noting that the pace of polarization on abortion “picked up considerably” after the 1970s).

<sup>136</sup> See, e.g., Rebecca J. Mercier et al., *TRAP Laws and the Invisible Labor of US Abortion Providers*, 26 CRITICAL PUB. HEALTH 77, 78 (2016) (noting differences among states in Targeted Regulation of Abortion Providers’ laws).

<sup>137</sup> See Geoffrey C. Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 104 (2006) (explaining that increased polarization among party activists is a likely cause of both mass and elite polarization); Ted G. Jelen & Clyde Wilcox, *Causes and Consequences of Public Attitudes Toward Abortion: A Review and Research Agenda*, 56 POL. RSCH. Q. 489, 495 (2003) (stating that characteristics of legislators, not the characteristics of voters in the district, best predicted votes on abortion-related issues).

cases.<sup>138</sup> The Susan B. Anthony Pro-Life America organization would like to limit interstate travel rights for minors seeking an abortion, for example, recognizing that such a strategy might be declared unconstitutional for adults.<sup>139</sup> Numerous efforts to restrict abortion have similarly focused on minors.<sup>140</sup> These organizations may be able to affect policy because state legislators may be poorly paid, have limited staff, often work part-time, and may be new to government;<sup>141</sup> the outside organizations, by contrast, are well-funded.<sup>142</sup> Consequently, legislatures depend heavily on lobbyists who push particular agendas and supply draft bills, information, and campaign funding.<sup>143</sup> Moreover, state legislators, in some cases because of

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<sup>138</sup> See, e.g., Lydia Bean & Maresa Strano, *Punching Down: How States are Suppressing Local Democracy*, NEW AMERICA: POL. REFORM (July 11, 2019, 4:57 PM), <https://www.newamerica.org/political-reform/reports/punching-down> (observing that “[m]ost GOP legislators are elected with the indispensable support of socially conservative interest groups and special interests . . . [and] [t]hese interest groups further supply policy advice and expertise to state lawmakers who are often under-resourced, underinformed, overextended, and, therefore, susceptible to assistance.”); see Cahn & Carbone, *supra* note 69 (further discussion of partisan polarization). The director of Jane’s Due Process, which helps minors access abortion care, noted that because “minors are often vulnerable in the sense that they can’t vote, they often don’t have voices at the legislature, it will continue to be that anti-abortion lawmakers try to attack judicial bypass.” Alisa Chang et al., *Now that Roe Is gone, a Process that Allows Minors to get an Abortion Could Disappear*, NPR (June 24, 2022), <https://www.npr.org/2022/06/14/1104649399/scotus-roe-v-wade-abortion-minors-law-texas>.

<sup>139</sup> Sarah McCammon, *What States Are Looking to Do with Abortion Legislation in 2023*, NPR: LAW (Jan. 5, 2023, 5:45 PM), <https://www.npr.org/2023/01/05/1147256379/what-states-are-looking-to-do-with-abortion-legislation-in-2023>.

<sup>140</sup> Alexa Ura, *Republicans Set Sights on Minors Seeking Abortions*, TEX. TRIB. (Apr. 23, 2015, 9:00 AM), <https://www.texastribune.org/2015/04/23/republicans-set-sights-minors-seeking-abortions>.

<sup>141</sup> See, e.g., HERTEL-FERNANDEZ, *supra* note 123, at 9 (“Many state legislators, and especially incoming legislators, simply do not have the experience in government that might otherwise be necessary to formulate concrete positions on a range of issues.”). On salaries, see *id.* at 89 (documenting disparities, including several states that pay less than \$15,000).

<sup>142</sup> *Id.* Hertel-Fernandez details the intertwined efforts of the State Policy Network, Americans for Prosperity, which mobilizes public opinion, and the American Legislative Exchange Council (ALEC), which develops and disseminates model legislation. *Id.*; see Jeremy Pilaar, *Starving the Statehouse: The Hidden Tax Policies Behind States’ Long-Run Fiscal Crises*, 37 YALE L. & POL’Y REV. 345, 380 (2018) (discussing how this operated with respect to tax cuts).

<sup>143</sup> Alexander Hertel-Fernandez & Carlos Guillermo Smith, *Revitalizing People-Based Government*, STAN. SOC. INNOV. REV. (Winter 2020), [https://ssir.org/articles/entry/revitalizing\\_civic\\_infrastructure\\_at\\_the\\_state\\_level\\_is\\_necessary\\_for\\_a\\_healthy\\_democracy](https://ssir.org/articles/entry/revitalizing_civic_infrastructure_at_the_state_level_is_necessary_for_a_healthy_democracy) (observing that “these groups succeed by providing state legislators with

partisan gerrymandering,<sup>144</sup> are often more ideologically driven than their constituents or other officials elected at the state or local level.<sup>145</sup> This dynamic may further drive state-level polarization in policies, with states adopting even more restrictions on reproductive rights, including the implementation of policies that impose additional limits on abortion access for minors. With increasing devolution of authority to the states, and the ability of state governments to preempt local law-making, policy choices have become “hyperpolarized along partisan lines.”<sup>146</sup>

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the exact resources—including model bills, research support, political strategy, and mobilizing power—that legislators often lack. Regardless of partisanship and ideology, legislators in states with fewer staff, shorter sessions, and lower salaries are more likely to copy and paste bill ideas from corporate-backed conservative networks.”). The budgets of these organizations have increased, while Republican party committees’ have decreased over time. Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and Republican Party Extremism*, 14 PERSPS. ON POL. 681, 683 (2016) (showing increases in the budgets of think tanks, such as the Heritage Foundation, constituency organizations, such as Americans for Prosperity, and “non-party funders” (such as the Koch seminars), and a decrease in Republican party committees from 2001–2002 to 2013–2014). The Koch seminars are semi-annual meetings of “very wealthy conservatives aiming to push the Republican Party and U.S. government toward libertarian and ultra-free market politics.” Alexander Hertel-Fernandez et al., *When Political Mega-Donors Join Forces: How the Koch Network and the Democracy Alliance Influence Organized U.S. Politics on the Right and Left*, 10 STUD. AM. POL. DEV. 1, 2 (2018), <https://stonecenter.gc.cuny.edu/files/2022/09/Hertel-Fernandez-3.pdf>.

<sup>144</sup> For example, Duke University researchers analyzing the district map in Wisconsin found “that the Wisconsin redistricting plan is highly gerrymandered and . . . shows more Republican bias than in over 99 [percent] of the plans.” Gregory Herschlag et al., *Evaluating Partisan Gerrymandering in Wisconsin 1* (Sept. 2, 2017) (unpublished manuscript), <https://services.math.duke.edu/~jonm/Redistricting/wisconsinRedistricting-InitialVersion.pdf>.

<sup>145</sup> Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1230 (2018). In Ohio, although less than 14 percent of the population prefers a ban on abortions with no exception for rape or incest, state law prohibits abortion after six weeks unless continuing the pregnancy will result in a risk of death or serious injury. Jane Mayer, *State Legislatures are Torching Democracy*, THE NEW YORKER (Aug. 6, 2022), <https://www.newyorker.com/magazine/2022/08/15/state-legislatures-are-torching-democracy>.

<sup>146</sup> Jennifer Karas Montez, *US State Polarization, Policymaking Power, and Population Health*, 98 MILBANK Q. 1033, 1039 (2020). For an explanation of the some of the reasons for this pre-emption, see Lori Riverstone-Newell, *The Rise of State Preemption in Response to Local Policy Innovation*, 47 PUBLIUS: J. FEDERALISM 403, 406 (2017) (observing that “the surge of preemption legislation in recent years has been fueled in part by efforts of industry groups and conservative organizations to rein in cities”).

A. *Banning Abortion and Parental Involvement*

Advocates calling for parental-involvement laws explain that their ultimate goal is banning abortion, and laws restricting minors' access represent one step towards that goal.<sup>147</sup> In a 2006 case considering a parental notification requirement, New Hampshire explained its goal of “express[ing] profound respect for the life of the unborn.”<sup>148</sup> That is, focusing on parental involvement, which appears to give deference to the appropriate constitutional balancing of rights, simultaneously providing a basis for achieving political goals of protecting the fetus. Those who defend these laws focus on parental rights.<sup>149</sup>

Advocating for parents' rights has, however, become a trope for those seeking to defend traditional notions of strict parenting,<sup>150</sup> with

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<sup>147</sup> See e.g., Jenna Carlesso, *CT Anti-Abortion Advocates Press for Parental Notification Legislation*, CT MIRROR: POL. (July 28, 2022, 5:00 AM), <https://ctmirror.org/2022/07/28/ct-roe-v-wade-anti-abortion-advocates-press-parental-notification-laws> (“[A]nti-abortion advocates are pressing for a bill on parental notification . . . ‘We believe in the sanctity of life, and we also believe in the cohesion, the importance of protecting families’ said [one anti-abortion advocate]”).

<sup>148</sup> Brief for Petitioner at 10, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) (No. 04-1144).

<sup>149</sup> See, e.g., Sara Burnett, *Illinois Governor Repeals Law Requiring Parental Notification of Abortion*, PBS: NEWS HOUR (Dec. 17, 2021, 7:02 PM), <https://www.pbs.org/newshour/politics/illinois-governor-repeals-parental-notification-of-abortion> (quoting an Illinois Republican legislator arguing that “[p]arents deserve the right to know if their minor child is seeking any major medical procedure, especially one like an abortion where there can be serious short and long term consequences”); Jenna Carlesso, *CT Republicans Introduce Bills on Parental Notification for Abortion*, CT MIRROR: HEALTH (Jan. 20, 2023, 12:35 PM), <https://ctmirror.org/2023/01/20/ct-parental-notification-abortion-bill-republicans> (quoting a Connecticut Republican legislator claiming that “people are expressing their concerns about the erosion of parental rights” and that “[p]arents [the legislator has] talked to—they’re very concerned. They want to know what’s going on with their minor children, and they want to make sure they know what’s being done to their children.”); *Alaska Supreme Court: Parents Can be Left in Dark When Child Seeks Abortion*, ALL. DEFENDING FREEDOM (July 22, 2016), <https://adflegal.org/press-release/alaska-supreme-court-parents-can-be-left-dark-when-child-seeks-abortion> (quoting an ADF-allied attorney saying, “Parents are the individuals who care most for the physical and emotional well-being of their children. . . . We had hoped the Alaska Supreme Court would . . . permit a parental notice law designed to protect parental rights and the safety of children.”).

<sup>150</sup> George Lakoff has identified the “strict father” worldview as one based on a paternal figure with the “authority and responsibility to set and enforce stringent disciplinary rules of behavior for children.” GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* 33 (2d ed. 2002). He contrasts that with the “nurturant parent,” who is loving and empathetic, with a goal that children become self-disciplined.” *Id.* at 33–34; see Naomi Cahn, *State Representation of Children’s Interests*, 40 FAM. L.Q. 109, 117–18 (2006) (articulating Lakoff’s strict father/nurturant parent

the focus being on parental prerogatives rather than children themselves. Using parental rights as the grounding provides a cover for substantive policies that may or may not serve children's interests.

The claim of parental rights is used in contexts that extend beyond minors' access to abortion, illustrating the claim's political resonance and showing how it has been manipulated.<sup>151</sup> For example, banning Critical Race Theory in schools is justified as protecting

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framework). In *Deanda v. Becerra*, the plaintiff-father claimed that minors should not be able to access reproductive health services without parental consent because of the parental right to control their children's upbringing, a moral worldview that fits within the "strict father" model. *Deanda v. Becerra*, 2:20-CV-092-Z, 2022 WL 17572093, at \*1 (N. D. Tex. Dec. 8, 2022); see also Jill Lepore, *Why the School Wars Still Rage*, NEW YORKER (Mar. 14, 2022), <https://www.newyorker.com/magazine/2022/03/21/why-the-school-wars-still-rage> (reporting that "[t]oday's parents'-rights groups, like Moms for Liberty, are objecting to a twenty-first-century Progressive package").

<sup>151</sup> E.g., Jonathan J. Cooper, *Youngkin: Victory Shows Winning GOP Path on Education*, AP NEWS (Nov. 18, 2021), <https://apnews.com/article/joe-biden-education-parental-rights-school-curricula-604edece27a483155c409187f258a058>. As discussed *infra*, the same parental rights rhetoric appears with respect to policies on trans students in schools or teaching about sexual identity. See, e.g., *2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools*, VA. DEP'T EDUC. 1 (2022), <https://www.doe.virginia.gov/programs-services/student-services/student-assistance-programming/gender-diversity>; Ansley Skipper, *Glenn Youngkin Believes in "Parents' Rights"—But Only for the "Right" Kinds of Parents*, BULWARK: CULTURE WAR (Oct. 19, 2022, 5:41 AM), <https://www.thebulwark.com/glenn-youngkin-believes-in-parents-rights-but-only-for-the-right-kinds-of-parents>; At Liberty Podcast, *'Protecting Women and Children' Is a Shield for Transphobia*, ACLU, at 07:37, <https://www.aclu.org/podcast/protecting-women-and-children-is-a-shield-for-transphobia> ("[L]ook back further in American history to this long history of child protection and what we find is that it actually doesn't really have a lot to do with protecting children and has a lot more to do with protecting race and gender roles"). In Texas, Governor Greg Abbott tweeted that, based on his "Parental Bill of Rights, parents will be restored to their rightful place as the primary decision makers for their children." Greg Abbott (@GregAbbott\_TX), TWITTER (Jan. 24, 2022, 5:41 PM), <https://perma.cc/G5TM-2B5B>; see Alex Nguyen, *"I want to fight:" LGBTQ Texans Ready for Legislative Session as GOP Lawmakers Target Them in Dozens of Bills*, TEX. TRIB. (Jan. 9, 2023, 5:00 AM), <https://www.texastribune.org/2023/01/09/transgender-laws-gender-care-texas-legislature> (juxtaposing Abbott's statements on parental rights with the Texas GOP's platform which states that the party "oppose[s] all efforts to validate transgender identity" and claims that homosexuality is "an abnormal lifestyle choice"). But Abbott does not support all parents. See J. David Goodman & Amanda Morris, *Texas Governor Pushes to Investigate Medical Treatments for Trans Youth as "Child Abuse"*, N.Y. TIMES (Feb. 23, 2022), <https://www.nytimes.com/2022/02/23/science/texas-abbott-transgender-child-abuse.html> (discussing Gov. Abbott's February 2022 letter to the Texas Department of Family and Protective Services ordering them to investigate parents who consent to their minor children accessing gender-affirming care).

parental rights.<sup>152</sup> When Florida adopted legislation that barred classroom instruction on LGBTQ-related issues for students in kindergarten through third grade and required schools to inform parents about mental services their child was receiving, it was called the “Parental Rights in Education” bill.<sup>153</sup> After signing it, the governor issued a statement proclaiming that the new law “reinforce[d] parents’ fundamental rights to make decisions regarding the upbringing of their children.”<sup>154</sup> Florida is not alone—other states require that schools teach about LGBTQ issues “in a negative light.”<sup>155</sup> There are similar claims about the “betrayal” of parents’ rights by authorizing gender-affirming care or by not revealing information about a child’s exploration of gender identity.<sup>156</sup>

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<sup>152</sup> E.g., Melissa Moschella, *School Choice: Protecting Parental Rights, Resolving Curriculum Wars, and Reducing Inequality*, HERITAGE FOUND. (Mar. 25, 2022), <https://www.heritage.org/education/commentary/school-choice-protecting-parental-rights-resolving-curriculum-wars-and>; see Edward Larson, *Crusading for Parental Rights may Cloak Other Motives*, WASH. POST (Sept. 22, 2022), <https://www.washingtonpost.com/made-by-history/2022/09/19/crusading-parental-rights-may-cloak-other-motives> (detailing Governor Glenn Youngkin’s attacks on critical race theory, and noting that this was “hardly the first time a politician invoked the innocuous-sounding issue of parental control over public education to advance an agenda”). Larson notes that William Jennings Bryan, who sought to ban teaching about human evolution, used a “benign appeal to parental rights.” *Id.*

<sup>153</sup> H.B. 1557, 27th Leg., Second Reg. Sess. (Fl. 2022).

<sup>154</sup> Press Release, Ron DeSantis, Governor, Florida, Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education (Mar. 28, 2022), <https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education>. One Florida newspaper framed the debate as: “What’s in a name: ‘don’t say gay’ vs. ‘parental rights.’” Jacob Reyes, *What’s in a Name: ‘Don’t Say Gay’ vs. ‘Parental Rights’*, TAMPA BAY TIMES (Mar. 31, 2022), <https://www.tampabay.com/news/florida-politics/2022/03/31/whats-in-a-name-dont-say-gay-vs-parental-rights>.

<sup>155</sup> Bobbi M. Bittker, *LGBTQ-Inclusive Curriculum as a Path to Better Public Health*, 47 HUM. RTS. MAG. (July 5, 2022), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/intersection-of-lgbtq-rights-and-religious-freedom/lgbtq-inclusive-curriculum-as-a-path-to-better-public-health](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/lgbtq-inclusive-curriculum-as-a-path-to-better-public-health). For a listing of states that are classified as having laws that “require sex education curriculum to include discriminatory, stigmatizing, shame based, or medically inaccurate information about sexual orientation” or “requirements that instruction promote ‘honor and respect for monogamous, heterosexual marriage’ and/or ‘benefits of monogamous, heterosexual marriage,’” see *Sex Ed State Law and Policy Chart 6*, SIECUS 13–15 (chart 2) (2020), [https://siecus.org/wp-content/uploads/2020/05/SIECUS-2020-Sex-Ed-State-Law-and-Policy-Chart\\_May-2020-3.pdf](https://siecus.org/wp-content/uploads/2020/05/SIECUS-2020-Sex-Ed-State-Law-and-Policy-Chart_May-2020-3.pdf).

<sup>156</sup> Tim Doescher, *Biden’s Push for “Gender-Affirming Care” Betrays Parental Rights*, HERITAGE FOUND. (July 7, 2022), <https://www.heritage.org/gender/commentary/bidens-push-gender-affirming-care-betrays-parental-rights>. School districts face an increasing number of lawsuits in which they are accused of not involving parents in

In each of these cases, while some parents may welcome the efforts, others will view them as violating their rights; parents are not an essentialist group. Moreover, the new rhetoric of parental rights may actually harm children, regardless of their parents' views.<sup>157</sup> Claiming to protect parents and ensure that they receive the appropriate respect for their constitutional rights can well be political posturing that covers the real agenda.<sup>158</sup>

#### V. CONCLUSION

Parental-involvement laws reflect political efforts to ban abortion, reject transgender rights, and deny the country's history of race relationships by preventing the teaching of Critical Race Theory, all cloaked in a rhetoric that appeals to traditional values of parental authority. Judicial bypass hearings allow courts to override not just the needs of minors seeking an abortion, but also the recommendations of healthcare professionals. While *Roe* was, at times, criticized for its

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their children's education based on the school's support of a child's exploration of gender identity. Katie J.M. Baker, *When Students Change Gender Identity, and Parents Don't Know*, N.Y. TIMES (Jan. 23, 2023), <https://www.nytimes.com/2023/01/22/us/gender-identity-students-parents.html>.

<sup>157</sup> See, e.g., Complaint & Demand for Jury Trial, *Equality Florida v. DeSantis*, ¶¶ 166–67 (N.D. Fla. 2022) (No. 4:22-cv-00134-AW-MJF) (including the worries of some parents that the challenged legislation concerning the teaching of sexual orientation or gender identity in Florida schools would result in bullying of some children and an incomplete education); Karen M. Matouk & Melina Wald, *Gender-Affirming Care Saves Lives*, COLUM. UNIV. DEPT OF PSYCH. (Mar. 30, 2022), <https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives> (noting that state limits on gender-affirming care for minors threaten those minors' mental health).

<sup>158</sup> To be sure, as June Carbone and I argued in *Red Families v. Blue Families*, those with traditional family values do feel that the unity of sex, marriage, and childbearing is critical to taking responsibility for children. NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 43 (2010); see June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, 45 U.S.F. L. REV. 313, 317–30 (2010) (noting the existence of different value systems, with cultural conservatism holding that the family is a system for channeling reproduction into marriage along with the importance of parental ability to punish deviation from the right moral values as critical to maintenance of this system). Cf. Richard Schragger & Micah Schwartzman, *Religious Freedom and Abortion*, 108 IOWA L. REV. (forthcoming 2023) (manuscript at 3) (noting the ability to manipulate the free exercise doctrine and stating “despite the justices’ expansive rhetoric and doctrine concerning religious freedom, the Court will deny religious exemptions in the abortion context. It will do so not only because of the justices’ political inclinations, but also because the doctrine is sufficiently manipulable.”).



overreliance on medical decision-making,<sup>159</sup> its respect for healthcare professionals' judgment placed abortion access in the hands of those who are trained to evaluate health needs. *Dobbs* puts it in the hand of state legislators.

State involvement is typically warranted—and justified—as protecting minors' interests. But the fourth actor, political interests, means that state action becomes not a means for protecting minors but a smokescreen for values that may have nothing to do with the actual interests of minors. Parental rights rhetoric can instead be seen as undermining minors' decisions and the rights of parents who support those minors.<sup>160</sup> If states truly wanted to protect minors, they would undertake more comprehensive public welfare programs that actually provide the support that minors and their families need, such as healthcare, education, affordable housing, and nutrition.<sup>161</sup> If they wanted to ensure that minors were protected and fully informed, they might provide evidence-based resources.<sup>162</sup> While abortion access for minors may appear to be part of ongoing debates about the extent of parental rights, the questions are in fact about politics, with minors' interests subordinated to partisanship. The parent-child-state triad becomes a triangular pyramid, with partisanship at the top point, controlling the parent, child, and state.

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<sup>159</sup> “In *Roe*, the Court repeatedly suggests that states should defer to private decisions respecting abortion because they reflect the expertise of a medical professional, not because the community owes any particular deference to women's decisions about whether to assume the obligations of motherhood.” Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 273–74 (1992); “*Roe* illustrates the extreme medicalization of pregnancy.” Susan Reid, *Sex, Drugs, and American Jurisprudence: The Medicalization of Pleasure*, 37 VT. L. REV. 47, 63 (2012). *But see* B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 515 (2009) (critiquing the medicalization critique); Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 117 (2013) (“Although *Roe* was rightly criticized as over-medicalizing the abortion decision . . . we have now shifted to the opposite extreme.”).

<sup>160</sup> See Ziegler & Cahn, *supra* note 17.

<sup>161</sup> See Cahn & Carbone, *supra* note 69 (discussing the lack of support for families in states that restrict abortion).

<sup>162</sup> *E.g.*, Rebouché, *supra* note 55, at 214–15 (discussing the work of counselors to provide information for minors about the bypass system).

