THE ABORTION RIGHTS OF TEENS IN THE POST-*DOBBS* ERA

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I. INTRODUCTION

Needless to say, the Supreme Court's decision in *Dobbs v. Jackson Women's Health*,[1] overturning *Roe v. Wade*[2] and *Planned Parenthood v. Casey*,[3] has had devastating consequences across large swaths of the country. According to the Guttmacher Institute, abortion is now banned in 14 states, while others have enacted gestational limit bans ranging from about six to twenty weeks after a person's last menstrual period.[4] These laws typically contain only very narrow exceptions. Notably, only half of the total-ban states permit abortion when necessary to save the life of the pregnant person,

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[2] Roe v. Wade, 410 U.S. 113 (1973).

[3] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[4] *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., https://states.guttmacher.org/policies [https://perma.cc/WT9E-FLHD] (last updated Nov. 14, 2023); Becca Damante & Kierra B. Jones, *A Year After the Supreme Court Overturned* Roe v. Wade, *Trends in State Abortion Laws Have Emerged*, CTR. FOR AM. PROGRESS (June 15, 2023), https://www.americanprogress.org/article/a-year-after-the-supreme-court-overturned-roe-v-wade-trends-in-state-abortion-laws-have-emerged.

while the others also include a health exception.[5] However, as vividly and painfully illustrated by the case of *Zurawski v. Texas*, which was brought by women denied "necessary and potentially life-saving" abortion care, the statutory language of an exception may be so vague or confusing that it results in "pervasive fear and uncertainty throughout the medical community regarding the scope of the life and health exceptions [that] have put patients' lives and physicians' liberty at grave risk."[6]

With the notable exception of the two coasts, *Dobbs* has transformed the country into a veritable abortion desert punctuated by the islands of Colorado, Illinois, and Minnesota, where access remains protected.[7] Not surprisingly, in addition to this disproportionate geographic impact, the wreckage of *Dobbs* falls most heavily on vulnerable and historically marginalized communities. According to a 2022 report by the Commonwealth Fund:

> Compared with their counterparts in other states, women of reproductive age and birthing people in states with current or proposed abortion bans have more limited access to affordable health insurance coverage, worse health outcomes, and lower access to maternity care providers. Making abortion illegal risks widening these disparities, as states with already limited Medicaid maternity coverage and fewer maternity care resources lose providers who are reluctant to practice in states that they perceive as restricting their practice. The result is a deepening of fractures in the maternal health system and a compounding of inequities by race, ethnicity, and geography.[8]

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[5] Damante & Jones, *supra* note 4.

[6] Plaintiffs' Original Petition for Declaratory Judgment and Application for Permanent Injunction at 3, Zuwarski v. Texas, D-1-GN-23-000968 (Dist. Ct., Travis Co. Mar. 6, 2023). For further discussion regarding exceptions to abortion bans, see Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortions Bans: Implications for the Provision of Abortion Services*, KFF (May 18, 2023), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services.

[7] *See Interactive Map: US Abortion Policies and Access After Roe*, *supra* note 4.

[8] Eugene Declercq, Ruby Barnard-Mayers, Laurie C. Zephyrin & Kay Johnson, *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, COMMONWEALTH FUND (Dec. 14, 2022), https://www.commonwealthfund.org/publications/issue-briefs/2022/dec/us-maternal-health-divide-limited-services-worse-outcomes. The Commonwealth Fund's annual Scorecard on State Health Care Performance "ranks every state's health care system based on how well it provides high-quality, accessible, and equitable health care." *Id.* For further reading on the disparate impact of the *Dobbs* decision, see Cecilia Lenzen, *Facing Higher Teen Pregnancy and Maternal Mortality Rates, Black Women Will Largely Bear the Brunt of Abortion Limits*, TEX. TRIBUNE (June 30, 2022, 6:00 PM), https://www.texastribune.org/2022/06/30/texas-abortion-black-women; *see also* Katherine Gallagher Robbins, Shaina Goodman & Josia Klein, *State Abortion Bans Harm More than 15 Million Women of Color*, NAT'L P'SHIP FOR WOMEN & FAMS. (June 2023), https://nationalpartnership.org/wp-content/uploads/2023/02/state-abortion-bans-harm-woc.pdf; Damante & Jones, *supra* note 4.

Similar disparities exist when it comes to teens. Not only do sexually active teens between the ages of fifteen and nineteen have the highest unintended pregnancy rate of any age cohort,[9] according to the advocacy group *Power to Decide*:

> [S]tark disparities remain across the country and among young women of color and young women living in poverty. Despite significant declines, the teen birth rate is roughly twice as high among Latina teens (24 births per 1,000) and African American teens (24 births per 1,000) as compared with non-Hispanic white teens (10 births per 1,000).[10]

Accordingly, as with adults, the criminalization of abortion will undoubtedly compound pre-existing inequities.

Deepening the geographical and categorical inequities that are illustrative of the intersectional harms of *Dobbs*, teens are at further risk of the imposition of *age-specific* restrictions on their right to abortion. As discussed in this Article, two pressing threats include possible efforts to eliminate judicial bypass alternatives to parental involvement–which, in *Planned Parenthood v. Danforth*[11] and subsequently in *Bellotti v. Baird*,[12] the Court held was a constitutional requirement pursuant to *Roe*–and efforts to thwart cross-border abortion travel by teens–a long sought after goal of the anti-abortion movement.

Section II of this Article focuses on the abortion rights of teens in the pre-*Dobbs* era, with particular attention to the constitutional underpinnings of the requirement that states with a parental involvement requirement offer teens a judicial bypass alternative. It then takes a close look at the legislative struggle over the federal Child Custody Protection Act ("CCPA"), which was aimed at preventing the "circumvention" of parental involvement laws through cross-border abortion travel.[13] This history serves as a prelude to the discussion in Part IV of the current efforts to limit cross-border abortion travel by minors. It then considers how the disparate legal treatment of abortion and childbirth exemplifies abortion exceptionalism, which both reflects and reinforces the abortion's stigmatized status. Section III centers on the experiences of pregnant teens who seek court authorization for an abortion rather than involve their parents. It provides a brief overview of the legal landscape of state parental involvement laws and then focuses on

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[9] *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Jan. 2019), https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states.

[10] *National Data*, POWER TO DECIDE, https://powertodecide.org/what-we-do/information/national-state-data/national (last visited Oct. 12, 2023).

[11] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

[12] Bellotti v. Baird, 443 U.S. 622 (1979).

[13] H.R. 3682, 105th Cong. (1998).

reasons why some teens seek judicial authorization for an abortion rather than involve their parents, despite, as then discussed, the not-insignificant challenges posed by having to navigate the bypass process. In Section IV, the Article zeroes in on the abortion rights of teens in the post-*Dobbs* era. It starts by asking whether the decision in *Dobbs* eviscerates the impermissible delegation theory which undergirds the constitutional requirement that parental involvement laws include a bypass alternative. Postulating this possibility, it then considers how the existing consent rights of teens outside of the abortion context can be deployed to argue against vesting parents with final authority over their child's abortion decision. From here, it takes up the potential threat to cross-border abortion travel by teens with a focus on Idaho's abortion trafficking law. This discussion is situated within the broader context of the legal indeterminacy surrounding interjurisdictional conflicts between abortion-hostile and abortion-protective states.

In conclusion, Section V, while grieving the damage wrought by *Dobbs*, also considers how we can move forward to secure the abortion rights of teens in light of the powerful resistance to the decision that has been unleashed.

II. THE ABORTION RIGHTS OF TEENS IN THE PRE-DOBBS ERA

To understand better what is at risk for teens by way of potential age-specific restrictions on their abortion access, it is important to have a clear understanding of the nature of their rights prior to the decision in *Dobbs.* We begin by looking at the seminal decisions of *Planned Parenthood v. Danforth*[14] and *Bellotti v. Baird*,[15] which together established the constitutional framework for a minor's right to abortion–a framework that, as discussed below, is likely now on shaky grounds. From here, we look at the effort by anti-abortion lawmakers to enact the federal CCPA aimed at criminalizing the taking of a minor across state lines for an abortion; although ultimately unsuccessful, this earlier struggle anticipates the current interjurisdictional battles over cross-border abortion access for teens.[16] Lastly, we consider how both the bypass option and the attempted federal travel ban are prime examples of what is known as "abortion exceptionalism," thus signaling the precarity of teen abortion rights well before *Dobbs*.

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[14] *Danforth*, 428 U.S. 52.

[15] *Bellotti*, 443 U.S. 622.

[16] *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).

A. The Constitutional "Compromise": The Judicial Bypass Alternative to Parental Involvement

The Supreme Court's decision in *Roe*, holding that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[17] was silent as to whether its use of the word "woman" included teens.[18] Given that states generally have considerably more latitude to regulate where minors are concerned due largely to their presumptive immaturity and the constitutionally protected right of parents to direct the upbringing of their children,[19] it is not surprising that some of the earliest legislative efforts to limit the scope of *Roe* took aim at teens.

In the 1976 case of *Planned Parenthood v. Danforth*, in considering a constitutional challenge to Missouri's parental consent requirement, the Court began from the premise that "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors as well as adults are protected by the Constitution and possess constitutional rights," including the right to abortion.[20] However, in recognition of the long-standing principle that "the State has somewhat broader authority over children than adults," the Court declared that its task was to determine whether there was "any *significant state interest* in conditioning an abortion on the consent of a parent or person In loco parentis[.]"[21] Reasoning that providing parents with "absolute power to overrule a determination made by the physician and his minor patient," did not serve the interest of the state in "strengthen[ing] the family unit," or "enhanc[ing] parental authority or control,"[22] the Court concluded that Missouri's parental consent law violated the "strictures of *Roe*" and was thus unconstitutional.[23] Of critical importance, it stressed that "the State does not have the constitutional authority to give a third party an absolute, and

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[17] Roe v. Wade, 410 U.S. 113, 153 (1973).

[18] A brief note about language use is in order here. When discussing a specific case or statute that uses gendered language, the Article will track that usage; otherwise, it will use inclusive language, including the "they/them/theirs" pronoun series.

[19] *See generally* Clare Huntington & Elizabeth Scott, *Conceptualizing Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020); Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131 (2020); Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345 (1998).

[20] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74-75 (1976).

[21] *Id.* at 75 (emphasis added). Without any discussion, the Court here moves away from the strict scrutiny standard used in *Roe* to the intermediate standard of review, thus suggesting that the abortion rights of teens are not deserving of the same level of protection as those of adults. *See id.*

[22] *Id.* at 75.

[23] *Id.*

possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."[24] At the same time, however, the Court intimated that it might be willing to accept a less intrusive parental involvement law that avoided a "special-consent provision, exercisable by a person other than the woman and her physician."[25]

Three years later, in the case of *Bellotti v. Baird*,[26] the Court considered the constitutionality of the Massachusetts parental consent law. As in Missouri, minors were required to seek parental consent for an abortion; however, if consent was denied, they had the option of seeking judicial authorization for the abortion, thus avoiding the possibility of a *direct* parental veto. Recognizing, however, that "many parents have strong views on the subject of abortion,"[27] the Court concluded it was therefore "unrealistic . . . to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most,"[28] since parents could simply prevent their child from ever reaching the courthouse or the reproductive health clinic.

Although reinforcing *Danforth's* anti-parental-veto holding, the *Bellotti* Court nonetheless stressed that states have a "*special interest*" in "encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child."[29] Elaborating, it spelled out that this special interest encompassed two considerations—namely, the inability of at least some teens "to make fully informed choices that take account of both immediate and long-range consequences"[30] in tandem with the parental "'claim to authority in their own household to direct the rearing of their children'."[31]

Seeking to accommodate the abortion rights of teens with this newly-minted "special interest" of the state, the *Bellotti* Court held that if a state "decides to require a pregnant minor to obtain one or both parents' consent to an abortion,"[32] it also must also provide "every minor [with the] opportunity–if she so desires–to go directly to a court without first consulting

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[24] *Id.* at 55.

[25] *Id.* at 74.

[26] Bellotti v. Baird, 443 U.S. 622 (1979).

[27] *Id.* at 647.

[28] *Id.*

[29] *Id.* at 639 (emphasis added).

[30] *Id.* at 640.

[31] *Id.* at 638 (quoting Ginsburg v. State of New York, 390 U.S. 629, 639 (1968)).

[32] *Id.* at 643.

or notifying her parents."[33] In short, she must be allowed to bypass her parents completely (thus commonly referred to as a "judicial bypass hearing"). In court, a teen is entitled to show that she is "mature and well enough informed to make her own decision . . . independently of her parents' wishes" in which case, she is entitled to make her own decision.[34] If, however, she is determined not to be mature enough to "make this decision independently," the judge must then decide if "the desired abortion would be in her best interest."[35]

According to this schema, if a judge determined both that a teen was too immature to make their own abortion decision, and that the abortion was not in their best interest, they would be catapulted into parenthood by operation of judicial fiat.[36] Ironically, the Court completely elides the fact that this perversely metamorphizes the teen who was deemed to lack decisional capacity when it came to abortion into a legal adult with responsibility for the care and custody of their child.[37] As discussed below, this seeming paradox is explained by abortion exceptionalism.

In the 1992 case of *Planned Parenthood v. Casey*,[38] the Court reaffirmed the constitutionality of parental involvement laws "provided that there is an adequate judicial bypass procedure."[39] In so doing, it declared it a "quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interest at heart."[40] Notably, in sharp contrast to the Court's well-developed and evidence-based discussion of the harms of

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[33] *Id.* at 647. The Court made clear that the alternative to parental involvement did not have to be in the nature of a court hearing, but since that was the statutory option before it, it would "discuss the alternative procedure . . . in terms of judicial proceedings." *Id.* at 643.

[34] *Id.* at 644.

[35] *Id.*

[36] The *Bellotti* Court was seemingly aware that it was vesting judges with veto power over a minor's abortion decision. However, without any explanation, it deemed this to be different from vesting a parent with veto authority. *Id.* at 640. Perhaps this is because, at least in theory, a judge is supposed to limit their inquiry to an evaluation of a teen's maturity and best interest, without being clouded by considerations of the morality of abortion or teen sex, as likely would be the case with a parent.

[37] However, as Manian argues, although teens may possess formal adult legal rights in relation to their children, in practice, the law "fails to protect adolescents' rights as parents . . . particularly within the contexts of child welfare and adoption law," especially when the "[m]ultiple vectors of discrimination, including gender, race, and class intersect with age-based concerns." Maya Manian, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127, 159-61 (2016). *See also* Kendra Huard Fershee, *A Parent is a Parent, No Matter How Small*, 18 WM. & MARY J. WOMEN & L. 425 (2012).

[38] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[39] *Id.* at 899.

[40] *Id.* at 895. For an analysis of why the *Casey* Court should have invalidated Pennsylvania's parental consent requirement as an undue burden on abortion based upon the empirical evidence as it did with respect to its spousal notification provision, see Alexandra Rex, *Protecting the One Percent: Relevant Women, Undue Burdens, and Unworkable Judicial Bypasse*s, 114 COLUM. L. REV. 85 (2014).

Pennsylvania's spousal notification provision leading it to ultimately conclude that it was unconstitutional to permit a husband to exercise this degree of dominion over his wife,[41] the Court simply asserted the above regarding the beneficial nature of parental consultation as a truism, without any review of the literature on parental abuse or contemporary understandings of children as rights-holding juridical persons as it had done vis a vis married women.

According to a study by Michael J. New, by adopting the less-rigorous undue burden standard for evaluating the constitutionality of abortion restrictions,[42] *Casey* gave "parental involvement laws . . . additional constitutional protection."[43] In turn, the number of states with parental involvement laws increased from twenty in 1992 to thirty-two in 2000.[44] This trend, however, seems to have set in motion a fear among conservative lawmakers that this majoritarian approach to the regulation of teen abortion access could be readily circumvented by cross-border abortion travel to a non-conforming state; accordingly, in 1998, they sought to devise a federal solution to this problem by way of the CCPA.[45]

B. Deterring Cross-Border Abortion Travel By Minors: The Child Custody Protection Act[46]

By the late 1990's, anti-abortion lawmakers were growing concerned that "strangers" were apparently in the practice of secreting teens across jurisdictional borders for a clandestine abortion in circumvention of the parental involvement law of their home state. In an effort to put an end to this practice, in 1998 they lined up behind the CCPA, which, as lead sponsor Ileana Ros-Lehtinen (R-FL) put it, was intended to "assure that the rights of parents across the Nation are not trampled by strangers who, without the knowledge of the parents, take the minor girls to obtain an abortion."[47] Specifically, the CCPA declared it a federal crime to "knowingly transport[] a minor across a State line, with the intent that such individual obtain an

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[41] *Casey*, 505 U.S. at 886-89.

[42] Michael J. New, *The Effect of Parental Involvement Laws on the Incidence of Abortion Among Minors*, FAM. RSCH. COUNCIL (2008). For a discussion of *Casey*'s undue burden standard, see Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291 (2010).

[43] New, *supra* note 42; Borgmann, *supra* note 42.

[44] New, *supra* note 42. According to New, this uptick also reflects the gains that Republicans made at the state level during the 1990s. *Id.*

[45] H.R. 3682 105th Cong. (1998).

[46] *Id.*

[47] Rebekah Saul, *The Child Custody Protection Act: A 'Minor' Issue at the Top of the Antiabortion Agenda*, GUTTMACHER INST. (Aug. 1, 1998), https://www.guttmacher.org/gpr/1998/08/child-custody-protection-act-minor-issue-top-antiabortion-agenda.

abortion," in circumvention of a state's parental consent or parental notification law, "and thereby in fact abridges the right of a parent under a law."[48] Showcasing the power of "social conservatives within the Republican party [the CCPA] made a meteoric rise to the top of the congressional agenda[,]"[49] with GOP leadership promising to "push [it] through Congress and onto President Bill Clinton's desk" by the end of the year.[50] Despite this promise, the CCPA ultimately failed to gain the necessary votes to become law. Undaunted by this lack of success, the CCPA was reintroduced multiple times between 1999 and 2013, again without success.[51]

Not surprisingly, however, as Cohen and his co-authors predicted in their seminal article, the *Dobbs* decision has ushered in "a novel world of complicated interjurisdictional legal conflicts over abortion."[52] Critically, for present purposes, teens are front and center in this renewed effort to impose what Hill refers to as "spatial legal regulations" aimed at deterring cross-border travel in "circumvention" of home state restrictions.[53] To set the stage for the below discussion of this newly revitalized campaign, we take a close look at the original legislative debate over the CCPA, which encapsulates themes which remain salient today.

During the 1998 legislative hearings on the CCPA, proponents and opponents of the CCPA unsurprisingly framed what was at stake in deeply polarized ways.[54] Distilled to its essence, as Senator Sam Brownback (R-KS), a sponsor of CCPA, put it, "[t]he Child Custody Protection Act is really a family values bill which preserves the parental right to oversee their child's medical treatment of the most intrusive kind–namely, that of abortion. This bill is about choosing to support parents, rather than unrelated strangers."[55] Likewise capturing the crux of the opposing position, Representative Nancy

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[48] H.R. REP. No. 105-605, at 2 (1998).

[49] Saul, *supra* note 47.

[50] T. R. Goldman, *Putting Teeth in Parental Consent Laws*, 152 N.J. L.J. 856 (1998).

[51] Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081, 1093 (2022). In addition to the CCPA, starting in 2005, anti-abortion lawmakers also sought to enact the Child Interstate Abortion Notification Act ("CIANA"), which, subject to limited exceptions, sought to impose a federal parental notification requirement on abortion providers in instances where a minor was seeking an out-of-state abortion in a jurisdiction without a parental involvement requirement. *Id.* at 1093; *see also The Teen Endangerment Act: Harming Young Women Who Seek Abortions* CTR. FOR REPROD. RTS. (July 2005) https://reproductiverights.org/wp-content/uploads/2020/12/pub_bp_tea.pdf.

[52] Cohen, Donley & Rebouché, *supra* note 16, at 4.

[53] H.R. 3682, 105th Cong. (1998).

[54] The core arguments on both sides remained relatively constant over the various iterations of the CCPA, and in some years, the bill died before there were any legislative hearings. Accordingly, this section draws on the extensive legislative record from 1998.

[55] 144 CONG. REC. 20060 (1998).

Pelosi (D-CA) declared the CCPA to be "invasive and intrusive and denies a young woman the right to face a difficult choice with safety and dignity."[56]

We now turn to an analysis of the key themes that each side of the debate introduced in support of their position. Although I have separated out the themes advanced by each for the sake of clarity, as will become quickly apparent, they are dynamically intertwined in mutually reinforcing ways.

1. Proponents of the Child Custody Protection Act

Proponents of the CCPA lined up behind a staunchly conservative agenda that was fueled by a deep commitment to traditional family values in tandem with their zealous 'pro-life' views. Not surprisingly, these are tightly woven together to advance an agenda that positions parents as the gatekeepers of their children's reproductive bodies.

a. Protecting the Rights of Parents

As lead sponsor Representative Ros-Lehtinen made clear, the CCPA was intended to support the "inherent right" of parents to "counsel [their] children in their time of need."[57] Elaborating on this theme, Senator Spencer Abraham (R-MI) stressed that "[t]oday, any child is at significantly increased risk of drug abuse, crime, poverty and even suicide…Only by being a part of their lives can parents provide their children with the guidance they need and maintain the mutual trust necessary to teach them how to lead good, productive lives."[58] To ensure that parents were not divested of this right by strangers or the so-called abortion industry (discussed below), Senator Paul Coverdell (R-GA) insisted that Congress was obligated to "do everything [it] can to ensure that parents are able to exercise the responsibilities of guiding and protecting their children."[59]

In turn, by "protecting that most important relationship of all[–]that of parents and their children[–]" supporters vouchsafed that the family unit–which Ros-Lehtinen proclaimed was the "fundamental, crucial and indispensable basis of our civilization…[without which] our children will grow up without role models, without a sound knowledge of how they ought to behave and for what they ought to strive"–would be preserved.[60] To this end, Brownback warned against allowing "abortion activists with baseless constitutional claims" to erode the rights of parents, as this would constitute an "assault against the precious institution of 'family,' which we prize and

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56 144 CONG. REC. E1381 (daily ed. July 22, 1998) (statement of Rep. Nancy Pelosi).

57 144 CONG. REC. H5300 (daily ed. July 25, 1998) (statement of Rep. Ileana Ros-Lehtinen).

58 144 CONG. REC. S10196-97 (daily ed. Sept. 10, 1998) (statement of Sen. Spencer Abraham).

59 144 CONG. REC. S10419 (daily ed. Sept. 16, 1998) (statement of Sen. Paul Coverdell).

60 144 CONG. REC. S751 (daily ed. Feb. 12, 1998) (statement of Sen. Spencer Abraham).

which has been harmed and is a fundamental foundation for our culture and this society."[61]

b. Thwarting the Interlopers

Proponents of the CCPA repeatedly stressed that the right of parents to participate in their children's abortion decision was being trammeled by nefarious interlopers who were ferrying them across state lines in order to secure secret abortions.[62] In particular, their ire was directed at two categories of ostensibly reprehensible interlopers–the adult "stranger" and "abortion mills."[63] In this regard it should be noted that the statutory language itself quoted above reinforced this perception that the rights of parents were being trammeled as it elided the fact that the constitutionally mandated judicial bypass alternative also enabled teens to "secure secret abortions."

The stranger was generally portrayed as a predator, most often pinpointed as an older man, who, as Ros-Lehtinen put it, takes it upon himself to "make possible life-threatening decisions" for "innocent minor girls" by transporting them across state lines for secret abortions.[64] According to Brownback, "most alarming" was that some "'absconding' adults can exhibit the extremes of irresponsibility and disregard for the physical well-being of their "charges." There are tragic examples of young women who have been plied with alcohol, raped, impregnated, and then taken across State lines for secret abortions."[65] Moreover, as Senator Dan Coats (R-IN) testified:

> [M]any of these men are vulnerable to statutory rape charges. This vulnerability provides these men with a strong incentive to pressure the much younger girl to agree to an abortion without revealing the pregnancy to the parents. Currently, a man seeking to do so can evade the law and hide his crime by driving his victim across state lines. [66]

Seeking to support this predator theory, Coats and others pointed to a 1993 study by Males and Chew which found that approximately two-thirds of school-age mothers gave birth with a "post-school-age adult partner who, on average was more than 4 years older."[67] They asserted that this "gap is especially significant because teenage mothers with much-older partners are

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61 144 CONG. REC. 20060 (1998).

62 *Id.* at 1445.

63 *Id.* at 1446.

64 144 CONG. REC. H5300 (daily ed. July 25, 1998) (statement of Rep. Ileana Ros-Lehtinen).

65 144 CONG. REC. 20060.

66 *Id.* at 20055.

67 *Id.*; *see also* H.R. REP. NO. 105-605, at 9 (1998); S. REP. NO. 105-268, at 9 (1998); Mike Males & Kenneth S. Y. Chew, *The Ages of Fathers in California Adolescent Births*, *1993*, 86 AM. J. PUB. HEALTH 565, 567 (1996).

disproportionality the childhood victims of sexual assault by adult men."[68] However, even if accurate, which, as addressed below, is highly questionable, nothing in their study even remotely suggested that these predatory older men were coercing their "childhood victims" across state lines for the purpose of obtaining secret abortions. Rather, based on their findings, the authors recommended that "prevention/intervention programs concerning school-age fertility," expand their focus beyond peer-age couples to also include "adult male involvement,"[69] with zero mention of, as it is now referred to, "abortion trafficking."

In terms of the accuracy of their findings, a 1997 study by Lindberg, Sonenstein, Ku & Martinez found that researchers, including Males and Chew, had "overestimated the extent of the problem," by treating "teenage mothers and their adult partners as a homogenous group" rather than disaggregating them based on minority/majority status, the extent of the age gap, and marital status.[70] By disaggregating these factors, rather than the two-thirds figure alarmingly cited by Males and Chew and repeated by proponents of the CCPA, the authors found that "only 8% of births to 15-19 year olds in 1988 in the United States involved unmarried 15-17 year olds and men who were at least five years older."[71] They also found that least some of these relationships appear to have been "closer and more ongoing" than relationships between "more age-matched parents," thus suggesting that not all "relationships between young mothers and much older fathers . . . are predatory."[72]

Proponents of the CCPA also took aim at abortion providers. Disparagingly characterizing clinics as predacious "abortion mills," they claimed that they were seeking to "lure children from their parents"[73] through clinic ads announcing they were located in a state without a parental involvement law. Representative Mario Diaz-Balart (R-FL) minced no words in his fierce condemnation of "an industry [that] has developed, in effect, to void, to evade, to dodge those laws passed by the sovereign will of the people of 20 States who have said we want there to be parental

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[68] Males & Chew, *supra* note 67 at 567.

[69] *Id.*

[70] Laura Duberstein Lindberg, Freya L. Sonenstein, Leighton Ku & Gladys Martinez, *Age Differences Between Minors Who Give Birth and Their Adult Partners*, 29 FAM. PLAN. PERSPS. 61, 65 (1997).

[71] *Id.* at 65.

[72] *Id.* at 65. The authors did voice particular concern for the vulnerability of the fifteen-year-olds, the youngest mothers in the study, who had a child with a man five or more years older, and, similar to Males & Chew, *supra* note 67, they recommended "[i]nterventions that would prevent very young adolescents from becoming sexually involved with much older men . . . ." *Id.* at 66.

[73] 144 CONG. REC. 15363 (1998).

notification."[74] Accordingly, he proclaimed that by passing the CCPA, we are saying:

> [N]o, no, they should not be able to, by subterfuge, by plan, evade and dodge those laws. We are saying no, no, they cannot create an industry that, in effect, even in writing, in publications such as the phone books, the yellow pages, an industry that says evade the law, dodge the law in one State, come across the border, and the law will not apply.[75]

Proponents thus argued that the CCPA was simply intended to help states enforce their parental involvement laws by closing the loophole enabling interlopers to "escort young girls across State lines to obtain a life-threatening medical procedure in complete disregard for the law."[76]

c. Protecting Children, Both "Born and Unborn"

Although touted as a parental rights bill, as Representative Linda Smith (R-WA) bluntly put it, "the real purpose of the bill is to protect children, born and unborn."[77] Capturing the interconnectedness of this dually oriented protectionism, the testimony of Representative Henry Hyde (R-IL) cuts to the chase:

> I think abortion is an evil thing because it kills a human life, an innocent human life. Why is it helping a young girl by assisting her to kill her unborn child and saddle her for the rest of her life with wondering what her first little baby looked like.[78]

Notably, this passage evokes the emergent "pro-woman/pro-life" anti-abortion frame which positions the "post-aborted" woman as the second victim of the abortion industry due to the immutable bond between a woman and her unborn child.[79]

Grounded in this idea that "abortion is inherently harmful to women," proponents of the CCPA doubled down on its particularly traumatic consequences for teens. The age-based magnification of the harms of abortion is perhaps most vividly captured by Brownback, and is thus worth quoting in full:

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[74] *Id.* at 15364.

[75] *Id.*

[76] *Child Custody Protection Act: Hearing on H.R. 3682 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong. 36 (1998) (statement of Rep. Ileana Ros-Lehtinen).

[77] 144 CONG. REC. 15387.

[78] *Id.* at 15386.

[79] For a detailed discussion and critique of the abortion-regret framing of the "pro-life" position, see J. SHOSHANNA EHRLICH & ALESHA E. DOAN, ABORTION REGRET: THE NEW ATTACK ON REPRODUCTIVE FREEDOM (2019); Terry Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851 (2009); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

> Abortion, I believe, is in a class by itself and is unlike any other medical procedure, for both strikingly emotional and physical reasons. There is no other surgery like it, where the object is to terminate a developing human life, and the emotional repercussions can be devastating. Women who have experienced abortion are haunted by the unspeakably weighty consequences of lost life and the deep emotional conflicts this produces. *Add to this terrible mix the factor of youthful vulnerability and you invite extreme emotional trauma. Also, abortion can have unique physical consequences—rendering a young girl physically traumatized and even infertile from a bungled operation*.[80]

In like manner, others relied upon the Supreme Court's language in *H.L. v. Matheson*[81] in which the Court declared that "the medical, emotional, and psychological consequences of an abortion are serious and can be lasting; *this is particularly so when the patient is immature*"[82] to make their case in support of the CCPA.

As the issue of harm was not directly addressed by the opponents of the CCPA, who essentially assumed that having control over one's reproduction is a positive good, it is important to recognize that, as discussed by Ehrlich and Doan, the origins of the "woman as victim" framing of the anti-abortion message is deeply religious in nature.[83] As David C. Reardon, the architect of the "pro-woman/pro-life" position, stresses, "from a natural law perspective, we can know in advance that abortion is inherently harmful to women. It is simply impossible to rip a child from the womb without tearing out a part of the woman herself."[84] Building outwards from this religious foundation, he thus argued that by centering the "enduring suffering of women who chose to terminate a pregnancy, the anti-abortion movement would be in a position to claim that it…was the true champion of the 'authentic rights' of women."[85]

Additionally, although a detailed discussion of the literature is beyond the scope of this Article, it is important to recognize that a substantial body of evidence-based studies has discredited the claim that women are the "second victims" of abortion. One study of women's reactions one week

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[80] 144 CONG. REC. 20060 (emphasis added).

[81] H.L. v. Matheson, 450 U.S. 398 (1981).

[82] *H.L.*, 450 U.S. at 410; *see e.g.*, 144 CONG. REC. 1445; *Child Custody Protection Act: Hearing on S. 1645 Before the Sen. Comm. on the Judiciary*, 105th Cong., 3, 7, 9, 54, 68 (1998) (statements of Sen. Abraham, Sen. DeWine, Rep. Ros-Lihtinen, W. David Hager, and the Federal Legis. Office of the Nat'l Right to Life Comm.).

[83] EHRLICH & DOAN, *supra* note 79, at 99-106.

[84] DAVID C. REARDON, MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION 5 (1996).

[85] EHRLICH & DOAN, *supra* note 79, at 101 (quoting REARDON, *supra* note 84, at ix (emphasis in original)).

after having an abortion found that "[t]he vast majority . . . reported . . . that having the procedure was the right decision for them."[86] The authors also stressed the importance of "disentangling emotions regarding an unwanted pregnancy from those regarding an abortion. Women felt more regret, sadness and anger about the pregnancy than about the abortion, and felt more relief and happiness about the abortion than about the pregnancy."[87] In a follow-up five-year longitudinal study of "667 women across 21 states," the authors found that "at all time points, relief was the most commonly felt emotion consistent with the body of literature on women's emotions in the short term after an abortion"[88] and that "the overwhelming majority of women felt that the abortion was the right decision for them[.]"[89]

Notably, when it comes to the post-abortion experiences of teens, as reported by the Committee on Adolescence of the American Academy of Pediatricians, most:

> [E]xpress satisfaction with their ultimate pregnancy decisions, provided they believe that the decisions were their own. No significant differences in the levels of later satisfaction with their decisions have been found between adolescents who choose abortion and those who bear children . . . almost all believe that they made the right choices for themselves. The key determinant of this expressed satisfaction is the sense of "ownership over the pregnancy decisions and the belief that their choices were not the result of coercion."[90]

Also challenging the "abortion is inherently harmful" trope, authors of a 2014 article in the *Journal of Adolescent Health* found that "in many respects, minors experience abortion similarly to adults. They anticipate feeling a range of emotions in response to having an abortion, and most feel prepared to cope with those emotions."[91] Notably, they also found that factors such as "feeling pressured by someone else to have an abortion" (with mothers being the most common source of pressure), and the internalization

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[86] Corinne H. Rocca, Katrina Kimport, Heather Gould & Diana G. Foster, *Women's Emotions One Week After Receiving or Being Denied an Abortion in the United States*, 45 PERSPS. ON SEXUAL AND REPROD. HEALTH 122, 127 (2013).

[87] *Id.* at 128.

[88] Corinne H. Rocca, Goleen Samari, Diana G. Foster, Heather Gould & Katrina Kimport, *Emotions and Decision Rightness Over Five Years Following an Abortion: An Examination of Decision Difficulty and Abortion Stigma*, 248 SOC. SCI. & MED. 1, 7 (2020).

[89] *Id.* at 8.

[90] Committee on Adolescence, *The Adolescent's Right to Confidential Care When Considering Abortion*, 139 AM. ACAD. OF PEDIATRICS 1, 6 (2017), https://publications.aap.org/pediatrics/article/139/2/e20163861/59961/The-Adolescent-s-Right-to-Confidential-Care-When?autologincheck=redirected#.

[91] Lauren Ralph, Heather Gould, Anne Baker & Diana Greene Foster, *The Role of Parents and Partners in Minors' Decisions to Have an Abortion and Anticipated Coping After Abortion*, 54 J. ADOLESCENT HEALTH 428, 432 (2014).

of abortion stigma were predictive of "[l]ow confidence in their decision, as well as anticipated poor coping."[92]

2. Opponents of the Child Custody Protection Act

Not surprisingly, lawmakers who opposed the CCPA had an entirely different view of it. Critically, their objections were anchored in a fierce commitment to protecting the abortion rights of teens.

a. Depriving Teens of the Right to Abortion

Opponents engaged in a powerful condemnation of the CCPA, which, in the words of Pelosi, they regarded as an "[a]ttempt by conservative Members of this House to deny reproductive choice to women."[93] Mincing no words in this regard, Representative Carolyn B. Maloney (D-NY) forcefully declared:

> I rise in opposition to this rule and to this bill, as I have risen in opposition to every other piece of legislation that has moved through this Congress which attacks abortion rights.
>
> This Congress is working to dismantle a woman's most hard-fought rights, the right of a safe, legal abortion. Procedure by procedure, obstruction after obstruction this antiwoman Congress is succeeding. This time *the targets are on our Nation's young people.*[94]

Matching the rhetorical weight of Smith's testimony that "the real purpose of the bill is to protect children, born and unborn,"[95] Representative Lloyd Doggett (D-TX) likewise laid bare the true intent of the CCPA, asserting that it "does not concern strengthening families, it concerns advancing an agenda of the most fanatical people with reference to this question of invading personal choice . . . [T]heir ultimate goal is to make [abortion] a criminal offence."[96]

In like manner, Representative Eleanor Holmes Norton (D-DC), stripped away the protectionist veneer claimed by proponents of the CCPA, arguing instead that the "real purpose of this bill is clear. It is yet another attempt to sacrifice women and girls, to drive back the right to choose by any means necessary, whatever the consequences."[97] Having come to Congress

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92 *Id.*

93 144 CONG. REC. E1381 (daily ed. July 15, 1998) (statement of Rep. Nancy Pelosi).

94 144 CONG. REC. 15364 (emphasis added).

95 *Id.* at 15387.

96 *Id.* at 15365.

97 *Id.* at 15386.

as a nationally recognized civil rights and feminist leader,[98] Norton lent an urgent and uniquely intersectional lens to the oppositional position. Stating that "what is particularly serious, as far as this Member is concerned, is who this bill is really aimed at. This bill chooses to go at the most vulnerable girls in this society . . . [who] are disproportionately girls of color . . . who are most likely to be without parents."[99]

Expressing her resentment, Norton thus charged that you "are hurting the people that I represent. You are hurting the people that the Black Caucus represents. You are hurting the people that Hispanic Caucus represents."[100]

Both Norton and Doggett also called out proponents of the CCPA for using teens as a strategic ploy to further their ultimate goal of criminalizing abortion through incremental steps. Norton thus warned:

> America ought to be on notice, these folks have lost, because the people have spoken on the right to choose, the people and the courts have spoken on the right to choose . . . They have adopted another strategy. They are trying to do incrementally to the right to choose what they have been unable to do through frontal attacks on the right to choose.[101]

This was a strategy that Norton stressed was being disproportionately borne by low-income teens of color.

b. Taking Off the Rose-Colored Glasses

Opponents of the CCPA agreed that in an ideal world, a pregnant teen would confide in a parent.[102] To this end, Representative Shelia Jackson-Lee (D-TX) remarked, "[a]ll of us would hope and advocate that every family in America be an Ozzie and Harriet family.[103] Two parents discussing issues with their children, sitting at the dinner table, having the family picnic, and the regular vacation."[104] And even if not quite living up to the "Ozzie and Harriet" ideal, Jackson-Lee stressed that the majority of teens were "fortunate enough to have loving and understanding parents," with whom they were able to discuss their pregnancy and abortion plans.[105]

However, Jackson-Lee admonished those who supported the CCPA: "[b]ut my friends we must open our eyes…although [this legislation] sounds

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[98] *Honoring D.C. Champion Congresswoman Eleanor Holmes Norton: Civil Rights Leader. Native Washingtonian. Advocate for D.C. Statehood*, ACLU (Oct. 19, 2021, 2:30 PM), https://www.acludc.org/en/news/honoring-dc-champion-congresswoman-eleanor-holmes-norton.

[99] 144 CONG. REC. 15386.

[100] *Id.* at 15387.

[101] *Id.* at 15386.

[102] *See generally id.*

[103] *Id.* at 15363.

[104] *Id.* at 15363.

[105] *Id.* at 15389.

pretty, [it] does not answer the question of reality,"[106] which for many teens includes family violence, neglect, and/or parental substance abuse disorder, which can make confidential communications about intimate matters nigh impossible.[107]

Again, informed by an intersectional approach, Norton added another critical dimension to the critique of the family values approach of the CCPA's proponents, arguing:

> You ought to define family the way the family has always been defined in America, and that is as an extended family.
>
> The family is not simply a two-parent family. A family is not a one-parent family. In my community, a parent may be mentors. It may be your cousin. Do not hurt those who have already been hurt by the disintegration of families, by the break-up of families.108

Opponents also stressed, as Maloney put it, that "[f]amily values simply cannot be legislated" and that, therefore, "Congress has no business making laws which force one family member to confide in another."[109] Speaking from his experience as a social worker who previously worked with children who had been "abused and neglected[,]"[110] Representative James C. Greenwood (R-PA) likewise refuted the idea that family closeness can be achieved through legislation, stating that "for those parents who simply will not talk with their children, these kinds of laws cannot make that bond. It would be nice if we could pass this law and suddenly that would engender discussions between parents and children, but that will not be the result."[111]

c. No Good Can Come of Jailing Grandma

Another major objection to the CCPA was that those most likely to be jailed would not, in fact, be older predatory males, but rather trusted adults such as grandmothers, aunts, older sisters and the like, to whom a teen could safely turn for help in accessing abortion care when unable to confide in a parent. As Representative Nita M. Lowey (D-NY) explained:

> I believe that those young women who cannot go to their parents should be encouraged to involve another responsible adult, a grandmother or an aunt . . . Unfortunately, this bill will impose criminal penalties on adults like grandmothers who come to the aid of their granddaughters…I am a

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106 *Id.* at 15363.

107 *See generally id.*

108 *Id.* at 15387.

109 *Id.* at 15364.

110 *Id.* at 15383.

111 *Id.* at 15383.

> grandmother of two, and I believe grandparents should be able to help their grandchildren without the risk of being thrown in jail.112

Lawmakers also zeroed in on the law's problematic overbreadth. Representative Danny K. Davis (D-IL) made clear that if, in fact, there was a need, as argued by supporters, "to protect young women from overreaching adults who may attempt to assist them, against their will, in traveling into other States where there is no requirement of parental notification or consent," he would "*be in support of this legislation*."[113] Critically, however, he stressed that "a closer look at the facts show young women in this Nation are not under attack from such ruthless adults . . . and in those cases where a parent is not involved, women turn to trusted relatives or family friends . . . Yet, this bill would criminalize the actions of these compassionate people."[114]

A critical concern was that the potential risk of sending a trusted adult to jail "threaten[ed] to isolate a young woman from friends, extended family, and other advisors who …will provide comfort, support and advice."[115] Deprived of this support, lawmakers warned that teens might resort to "unsafe, back-alley abortions" or travel to a clinic perhaps by "hitchhiking [or] being driven by another minor""[116] without the support or assistance of a trusted adult confidant.

d. The Limitations of the Judicial Bypass Option as an Alternative to Parental Involvement

In speaking out about the urgency of preventing interlopers from depriving parents of their "inherent right" to "counsel [their] child at their time of need,"[117] CCPA proponents typically ignored the reality that, as noted above, parents had already been "robbed" of this right by way of the constitutionally-mandated judicial bypass option. However, a few did identify the availability of the bypass as a preferred alternative to leaving the state for teens who could not involve their parents.

In response, a number of opponents emphasized the inadequacies of the bypass option (discussed further below). Encapsulating many of these concerns, Representative Nadler made clear that while:

> Proponents of this bill . . . wave around judicial bypass as a panacea . . . the bypass option of many parental consent laws has proven ineffective. Many local judges refuse to hold hearings or are widely known to be anti-choice

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112 *Id.* at 15374.

113 *Id.* at 15384 (emphasis added).

114 *Id.* at 15384.

115 *Id.* at 15383-84.

116 *Id.* at 15362, 15383.

117 144 CONG. REC. H5300 (daily ed. June 25, 1998) (statement of Rep. Ileana Ros-Lehtinen).

> and refuse to grant bypasses, despite rulings of the Supreme Court that they cannot withhold a bypass under certain conditions.[118]

Other identified concerns included that teens:

> [M]ay live in small communities where the judge may be a friend of the young woman's parents, a family member, or even the parent of a friend. Still others may live in regions where the relevant courts are not open in the evenings or on weekends, when minors could seek a bypass without missing school or arousing suspicion.119

Both the fear of being "intimidated by the courthouse . . . [and] by the process"[120] as well as having to "undergo the humiliation of revealing intimate details of their lives to a series of strangers in a formal legal process"[121] were also identified as reasons as to why a teen might be dissuaded from seeking judicial authorization for their abortion.

*C. Teens and Abortion Exceptionalism: The Precarity of Rights in the Pre-*Dobbs *Era*

Signaling the precarity of the abortion rights of teens prior to the Supreme Court's decision in *Dobbs*, both the *Bellotti* Court's judicial bypass "compromise" and the federal effort to thwart their interstate travel stand out as clear exemplars of "abortion exceptionalism," which, as Millar explains, "frames abortion as primarily a moral rather than a medical issue and as thus more complex, risky or specialized than it is."[122] By way of further elucidation, Joffe and Schroeder add that it reflects the "highly politicized and stigmatized status of abortion in American society."[123] Elaborating on the connection between abortion exceptionalism and stigma, Millar writes that she "see[s] abortion exceptionalism as a mode of stigma-in-action," that relies upon "[s]ocio-cultural norms, including those pertaining to binary gender norms."[124] Of critical importance in the present context, as identified by Borgmann, abortion exceptionalism results in "the tendency of

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118 144 CONG. REC. 15377.

119 H.R. REP No. 105-268, at 38-39 (1998).

120 144 CONG. REC. 15380.

121 H.R. REP. No. 105-268, at 38-39.

122 Erica Millar, *Abortion Stigma, Abortion Exceptionalism, and Medical Curricula*, 32 HEALTH SOCIO. REV. 261, 263 (2023).

123 Carole Joffe & Rosalyn Schroeder, *COVID-19, Health Care, and Abortion Exceptionalism in the United States*, 53 PERSPS. ON SEXUAL AND REPROD. HEALTH 5, 5-6 (2021).

124 Millar, *supra* note 122.

legislatures and courts to subject abortion to unique, and uniquely burdensome, rules[,]"[125] or to what Millar refers to as "over-regulation."[126]

While commendable for affirming that teens have a constitutional right to abortion, the *Bellotti* decision nonetheless stands as a paragon of abortion exceptionalism. To the point, although firmly avowing that "states have a *"special interest"* in encouraging an unmarried pregnant minor to seek the advice of a parent in *making the important decision whether or not to bear a child*,"[127] this interest is actualized through "unique and uniquely burdensome rules," *only* when the decision is to *not* bear a child.

Clearly exemplifying Millar's concept of abortion exceptionalism as a "mode of stigma in action," notwithstanding its prior outcome neutral statement regarding the value of encouraging teens to involve their parents when deciding if to have an abortion or carry to term, the Court goes on to stress that "parental consultation is *particularly desirable* with respect to the abortion decision" because it "raises moral and religious concerns" for some people.[128] At the same time, although recognizing that motherhood, particularly if unwanted, "may be exceptionally burdensome for a minor,"[129] the Court did not pause to consider whether the decision to carry to term likewise makes parental consultation particularly desirable.

Although the underlying pro-natalist rationale for singling out abortion is somewhat muted in *Bellotti*, the Court literally screams it a few years later in the case of *H.L. v. Matheson* to justify why abortion and not childbirth requires parental notification. As stated by the Court, and subsequently, as we have seen, relied upon by proponents of the CCPA, "the state's interests in full-term pregnancies are sufficiently different to justify the line drawn by the statutes. If the pregnant girl elects to carry her child to term the medical decisions . . . entail few–perhaps none of the *potentially grave emotional and psychological consequences* of the decision to abortion."[130] As this quote makes plain, abortion is clearly the wrong choice, thus requiring the intervention of the law as a deterring force.

Abortion exceptionalism is also the *raison d'etre* behind the CCPA. Notably, nowhere do its proponents stop to consider the possibility that, rather than secreting a teen across state lines for an abortion, the dreaded stranger might instead coerce her into motherhood and marriage to avoid

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[125] Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1074 (2014); *see also* Ian Vandelwalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1 (2012).

[126] Millar, *supra* note 122, at 3.

[127] Bellotti v. Baird, 443 U.S. 622, 639 (1979) (emphasis added).

[128] *Id.* at 640 (emphasis added).

[129] *Id.* at 642.

[130] H.L. v. Matheson, 450 U.S. 398, 412 (1981).

statutory rape charges.[131] Nor do they consider the possibility that unwanted parenthood might carry deep and lasting "emotional and psychological consequences," to say nothing of the host of other adverse life-altering consequences of being denied a wanted abortion.[132] Rather, they remain tightly focused on the ostensible harms of abortion to justify its "over-regulation," while leaving childbirth unburdened.

III. PARENTS OR THE COURT? CENTERING THE EXPERIENCE OF TEENS WHO CHOOSE ABORTION

To better understand what is at stake for teens in the post-*Dobbs* environment, this section begins with a general overview of state parental involvement laws, with a focus on the significant variability between them. Of note, this variability becomes even more significant in terms of abortion access when considered against the backdrop of where a state falls with respect to the restrictiveness or permissibility of its overall abortion laws. From here, we look at why some teens seek court authorization for an abortion in lieu of confiding in a parent despite, as discussed next, the formidable challenges and limitations of the bypass process.

A. A Snapshot of Parental Involvement Laws

The clear majority of states have enacted parental involvement laws.[133] Most require parental consent, with a significant minority requiring notice, and a handful requiring both

notice and consent.[134] Most only require that one parent give consent or receive notice, although a small number specify that both must be involved, and a handful of states permit the involvement of a grandparent or other adult relative in lieu of a parent.[135] Most states include limited

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131 For a discussion of forced marriage as a way to avoid statutory rape charges, see Fraidy Reiss, *Child Marriage in the United States: Prevalence and Implications*, 69 J. ADOLESCENT HEALTH S8 (2021); *see also* Erin K. Jackson, *Addressing the Inconsistency Between Statutory Rape Laws and Underage Marriage: Abolishing Early Marriage and Removing the Spousal Exemption to Statutory Rape*, 85 UMKC L. REV. 343 (2017).

132 Regarding the long-term consequences of being denied a wanted abortion, see DIANA GREENE FOSTER, THE TURNAWAY STUDY: THE COST OF DENYING WOMEN ACCESS TO ABORTION (2020). For a comprehensive list of articles generated by the study, see Diana Greene Foster, *Turnaway Study Annotated Bibliography*, ADVANCING NEW STANDARDS IN REPROD. HEALTH (Dec. 2020), https://www.ansirh.org/sites/default/files/2022-12/turnawaystudyannotatedbibliography122122.pdf.

133 *Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Sept. 1, 2023), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions; *see also* J. Shoshanna Ehrlich, in collaboration with ASPIRE Center for Sexual and Reproductive Health at the Planned Parenthood League of Massachusetts, *Report of the Minor Abortion Access and Research Project* (forthcoming Winter 2024) PLANNED PARENTHOOD LEAGUE OF MASS. [hereinafter Report].

134 Report, *supra* note 133.

135 *Id.*

exceptions to the involvement requirement, such as in cases of medical emergencies.[136]

At present, as required under *Bellotti*, teens in those states who cannot involve a parent, have the option of seeking court authorization for the abortion, with a few states also permitting health professionals to waive the parental involvement requirement in specified circumstances.[137] There is some variability between states in terms of what the laws actually require. Perhaps most significantly, while the overwhelming majority set the age of self-consent at eighteen (the age of majority), a handful of states allow teens to self-consent to abortion starting somewhere between the ages of fourteen and seventeen.[138] Some states also have greater procedural barriers than others. For example, some states do not have a venue requirement, while others limit venue to one or two designated counties.[139] This can be an important consideration as far as the preservation of confidentiality is concerned particularly for teens living in small towns or rural areas where the local judge may "be a friend of the minor's parents, a family member, or even the parent of a friend."[140] State laws also vary in terms of whether or not judges are required to rule on bypass petitions within a fixed number of days.[141] This variable is particularly significant in states that have adopted strict gestational age bans as a delay of even a few days may well place a teen outside of this limit. Notably in this regard, gestational limits are likely to be particularly burdensome for teens because of the inherent delays of the bypass process (discussed below) coupled with the fact that teens often do not realize they are pregnant until later than adults, typically due to considerations such as irregular periods or the lack of a "comprehensive understanding of how pregnancies occur."[142]

It is important to recognize the reality that the judicial bypass option is of little practical or legal significance in states with total abortion bans or with early gestational limits. In these instances, this alternative to parental involvement is but a cruel joke as the ability to seek court authorization for an abortion in the absence of real access is akin to reproductive coercion. Moreover, as developed below, with the demise of *Roe*, these laws may well be a moving target for anti-abortion lawmakers.

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136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 S. REP. NO. 105-268, at 38 (1988).

141 Report, *supra* note 133.

142 Hannah Lantos, Emma Pliskin, Elizabeth Wildsmith & Jennifer Manlove, *State-level Abortion Restrictions Will Negatively Impact Teens and Children*, CHILD TRENDS (Oct. 19, 2022), https://www.childtrends.org/blog/state-level-abortion-restrictions-will-negatively-impact-teens-and-children.

B. Why Some Teens Seek Court Authorization for an Abortion Rather Than Involving a Parent

Studies dating back to the early 1990s have consistently found that the majority of teens who choose to terminate a pregnancy involve one or both parents, regardless of whether or not they are living in a state with a parental involvement law.[143] Not surprisingly, a critical determinant of disclosure is whether or not there is "a history of warmth, rapport, and involvement of parents in past problem-solving"[144] As Hasslebacher, Dekleva, Tristan & Gilliam found in their study, "[o]verall, close relationships and anticipated support were *strong motivating factors* for parental involvement."[145]

Of those teens who do not involve a parent, the majority turn to a trusted adult, such as a cousin, aunt, sibling, or grandparent for support.[146] Echoing Representative Norton's above assertion that "[y]ou ought to define family the way the family has always been defined in America, and that is as an extended family[,]" the American Academy of Pediatrics likewise stresses that the:

> [I]mportance of parent surrogates and extended families is significant when assessing the impact of attempts to legislate family communication. Most notification [and consent] clauses are restricted to traditional definitions of biological parents or legal guardians and fail to address the complexity and diversity of modern family structures and adult support.[147]

This is a particularly salient concern post-*Dobbs* as teens who cannot turn to their parents are likely to become more reliant on trusted adults to help them navigate increasingly complex barriers to abortion care, which in many instances will necessitate out-of-state travel. However, as exemplified by Idaho's below-discussed 2023 abortion trafficking law, anti-abortion

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[143] Kate Coleman-Minahan, Amanda Jean Stevenson, Emily Obront & Susan Hays, *Adolescents Obtaining Abortion Without Parental Consent: Their Reasons and Experiences of Social Support*, 52 PERSPS. ON SEXUAL AND REPROD. HEALTH 15 (2020); Ralph, Gould, Baker & Greene Foster, *supra* note 91, at 432; Lee A. Hasselbacher, Anna Dekleva, Sigrid Tristan & Melissa L. Gilliam, *Factors Influencing Parental Involvement Among Minors Seeking an Abortion: A Qualitative Study*, 104 AM. J. PUB. HEALTH 2207, 2210 (2014); Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSPS. 196, 206 (1992).

[144] Committee on Adolescence, *supra* note 90, at 4; Hasselbacher, Dekleva, Tristan & Gilliam, *supra* note 143, at 2208-09; Hyman Rodman, *Should Parental Involvement Be Required for Minors' Abortions?*, 40 FAM. RELS. 155, 157 (1991).

[145] Hasselbacher, Dekleva, Tristan & Gilliam, *supra* note 143, at 2209 (emphasis added).

[146] Coleman-Minehan, Stevenson, Obront & Hays, *supra* note 143, at 18; Committee on Adolescence, *supra* note 90, at 4; Susan Hatters Friedman, Todd Hendrix, Jessica Haberman & Abhishek Jain, *Judicial Bypass of Parental Consent for Abortion: Characteristics of Pregnant Minor "Jane Doe's"*, 203 J. NERVOUS & MENTAL DISEASE 401 (2015); J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61, 98 (2003).

[147] Committee on Adolescence, *supra* note 90, at 4.

lawmakers in abortion-hostile states may well pick up where proponents of the CCPA left off, thus further burdening access unless exemptions from criminality are built into the law for a pool of trusted adults. However, this is unlikely given the express parental rights focus of travel ban measures.

Studies have also been quite consistent with respect to some of the common reasons why teens choose not to involve a parent. Not surprisingly, high up on the list is the fear of serious reprisal, including physical abuse or being evicted from the family home.[148] Although it might be easy to dismiss the legitimacy of this concern based on the assumption that most teens will cavalierly report that their parents would "kill" them upon learning they are pregnant, in fact, research has shown that fear of a serious adverse reaction is typically grounded in a history of parental mistreatment.[149] For instance, in the case of *Hodgson v. Minnesota,*[150] the Court recognized that many minors "'live in fear of violence by family members [and] many of them are, in fact, victims of rape, incest, neglect and abuse,'"[151] thus clearly tethering the fear of harm as a reason for non-disclosure to an existing history of parental maltreatment. Similarly, in the study I conducted of teens in Massachusetts who chose to go through the judicial bypass process rather than involve their parent, those who identified fear of a serious adverse reaction as a reason for non-disclosure, had all experienced "harsh parental treatment," including regular beatings, being spat upon and called a whore, and being kicked out of the house, while none of the teens who stated they had a good relationship with their parents identified parental harm as a reason for non-disclosure.[152] Augmenting the risk of harm, as reported by the Committee on Adolescence of the American Academy of Pediatrics, "[r]esearch on abusive and dysfunctional families shows that violence is at its worst during a family member's pregnancy and during the adolescence of the family's children."[153] Perhaps somewhat counterintuitively, what I characterize as "family preservation" is another salient reason for non-

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[148] *Id.* at 4; Coleman-Minahan, Stevenson, Obront & Hays, *supra* note 143, at 18; Ehrlich, *supra* note 146*,* at 121-22; Robert Wm. Blum, Michael D. Resnick & Trisha Stark, *Factors Associated with the Use of Court Bypass by Minors to Obtain Abortions*, 22 FAM. PLAN. PERSPS. 158, 162 (1990).

[149] Ehrlich, supra note 146, at 120.

[150] Hodgson v. Minnesota, 497 U.S. 417 (1990).

[151] *Hodgson*, 497 U.S. at 439 (quoting Hodgson v. Minnesota, 648 F. Supp. 756, 768 (1986)).

[152] J. SHOSHANNA EHRLICH, WHO DECIDES? THE ABORTION RIGHTS OF TEENS 116-20 (2006).

[153] Committee on Adolescence, *supra* note 90, at 4.

disclosure. This theme encompasses two strands–protection of the parent-child bond[154] and concern for a precarious or overburdened family system.[155]

When it comes to protecting the parent-child relationship, a driving consideration is that disclosure would result in profound parental disappointment or judgement, particularly in the context of high parental expectations, resulting in a long-term, if not permanent, negative impact on the relationship. This was an important consideration for many of the teens I interviewed, and they gave voice to it with an aching poignancy. For example, one young woman explained that:

> I'm the oldest kid on both sides of the family. All the grandkids, all the cousins look up to me, and everyone depends on me–you're the eldest, you're doing so good in school, you're gonna go to college, and you're going to do this or that, without messing up with dudes.[156]

Another feared that her mother would lose respect for her upon learning she was sexually active, explaining that "she would have been disgusted . . . I feel that she would look at me different; she would think of me different…she has this assumption like I'm too smart to make a mistake because I'm in the National Honor Society and going to college . . . She would think I was irresponsible about everything."[157] She noted that her mom's reaction would have been different if she had been raped because then the pregnancy would not have been her "fault."[158]

Also under the rubric of "family preservation" is the stated desire by some teens to protect their already-stressed parents from being overwhelmed by the additional worry that learning of their pregnancy and abortion plans would likely cause.[159] Some of the teens I interviewed indicated that they might have turned to their parents at a different moment in time when they were under less pressure but were clear that the timing was not right. For example, one teen explained that "I just didn't think it was the right time because my dad . . . just got laid off because of a corporate merger, and since then he hasn't had a job . . . They're kind of tight with money right now."[160] Another heartbreakingly explained that her dad was an alcoholic and manic-depressive, and that the springtime, which was when she found out she was

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154 Ehrlich, *supra* note 146, at 120-22; Committee on Adolescence, *supra* note 90, at 4; Coleman-Minahan, Stevenson, Obront & Hays, *supra* note 143, at 18; Hasselbacher, Dekleva, Tristan & Gilliam, supra note 143, at 2209; Henshaw & Kost, *supra* note 143, at 202-03.

155 Ehrlich, *supra* note 146, at 122-23; Committee on Adolescence, *supra* note 90, at 4; Henshaw & Kost, *supra* note 143, at 203.

156 Ehrlich, *supra* note 146, at 12. Note that the names are pseudonyms chosen by the minors.

157 *Id.* at 120-21.

158 *Id.*

159 Henshaw and Kost, *supra* note 143, at 203.

160 Ehrlich, *supra* note 146, at 122.

pregnant, was "his time to try and commit suicide, and . . . I didn't want to add to any of his problems."[161]

What is striking about the family preservation rationale is that, rather than representing failed relationships or a callous lack of regard for their parents, non-disclosure in this context may well signal a teen's motivation to keep their abortion decision private based on a "desire to prevent harm and safeguard existing familial patterns."[162] As Coleman-Minehan, Stevenson, Obront & Hays found in a recent study, non-disclosure may well be rooted in a teen's wish to protect "their well-beings, and those of their loved ones, as well as their parental relationships."[163]

Coleman-Minahan and co-authors also identify abortion stigma as a reason why teens may avoid parental disclosure. Relying on Erving Goffman's theory of stigma, they explain that "people associated with 'deviant' behaviors or identities must conceal their stigmatized identity in order to avoid discrimination."[164] In the present context, stigma is closely linked with the breach of binary gender norms, including the centrality of motherhood in women's lives in keeping with their assumed "naturally caring and nurturing" identities.[165] Of particular concern to the authors is that "secrecy resulting from anticipated abortion stigma may be associated with 'thought suppression' and intrusive thoughts, both of which have been associated with emotional distress following an abortion."[166] Clearly, as states continue to ban or greatly restrict abortion in the wake of *Dobbs*, anticipated abortion stigma is likely to play an ever-growing role in a teen's decisional calculus regarding the risks of parental disclosure.

C. Stigma, Delays, and Fear: Navigating the Challenges of the Judicial Bypass Process

As we have seen, in accordance with *Bellotti*, states with parental involvement laws are constitutionally required to provide a judicial bypass as an alternative to this involvement (as discussed below, post-*Dobbs*, this may no longer be the case). However, as developed in this section, turning to the courts around such an intimate decision, often–as the *Hodgson* Court recognized based upon the testimony of judges who heard bypass petitions–"produce[s] fear, tension, anxiety and shame."[167]

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161 *Id*. at 136.

162 *Id.* at 123.

163 Coleman-Minahan, Stevenson, Obront & Hays, *supra* note 143, at 18.

164 *Id.* at 15.

165 *Id.*

166 *Id.* at 20.

167 Hodgson v. Minnesota, 497 U.S. 417, 441 (1990).

Before turning to the challenges of the judicial bypass process, I want to make two important points that will set the stage for the below section on the post-*Dobbs* abortion rights of teens. First, I firmly believe that teens should be permitted to self-consent to an abortion as they are able to do when it comes to childbirth, and argued below, is well-supported by the law with regard to the consent rights of teens. That being said, this is an approach that only the most abortion-protective states might be willing to consider as they seek to shore up and extend protections for the abortion right. Accordingly, despite, as developed here, the deeply problematic nature of requiring teens who cannot involve their parents to seek judicial authorization for an abortion, it nonetheless remains a critical bulwark against the risk of a parental veto of their teen's abortion decision.

Coleman-Minahan and co-authors reported that teens going through the bypass process in Texas experienced the process as both emotionally traumatic and humiliating, with some describing "'fight or flight' physical responses at the hearing, including stuttering, shaking, sweating, nausea, and pallor."[168] This fear was often linked directly to the possibility that authorization for the abortion would be denied.[169]

In similar fashion, the teens I interviewed experienced the court process as a "high stakes test they had to pass. Terrified of failing and being forced into motherhood . . . [t]hey felt anonymous and resentful that a stranger held such power over their lives . . . ."[170] As one teen poignantly put it:

> [T]he big issue is that I am pregnant. And that's what I am crying about yet all we talk about is what I am going to have to do to have an abortion…then you have to add in . . . what if I go and try and do this and they say no. What am I supposed to do?[171]

Capturing her anxiety, another teen explained that, "[t]he whole time waiting, I was just nervous. I was thinking, what happens if I don't get it consent? What am I going to do now?"[172] In a similar vein, testimony in the *Hodgson* case revealed that teens "talk about feeling that they don't belong in the court system, that they are ashamed, embarrassed and somehow that they are being punished for the situation they are in."[173]

Zeroing in on the theme of punishment, Carol Sanger writes that "bypass hearings serve less to evaluate the quality of a young woman's

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168 Kate Coleman-Minahan, Amanda Jean Stevenson, Emily Obront & Susan Hays, *Young Women's Experiences Obtaining Judicial Bypass for Abortion in Texas*, 64 J. ADOLESCENT HEALTH 20, 23 (2019).

169 *Id.* at 22.

170 Ehrlich, *supra* note 146, at 145.

171 *Id.* at 143.

172 *Id.* at 132.

173 Hodgson v. Minnesota, 497 U.S. 417, 442 (1990).

decision than to punish her for making it."[174] Elaborating, she argues that the "hearings cause and are intended to cause great distress to vulnerable young women who are already experiencing the predicaments of unwanted pregnancy…[they] are the price young women are expected to pay for seeking an abortion and for having sex, and for doing both without owning up to their parents."[175]

Another crucial concern is that the court process can result in delays. In a recent Massachusetts study, Janiak and her co-authors found that "minors who sought judicial bypass experienced statistically and clinically significant delays…thereby potentially increasing medical risks" noting that "advancing gestational age increases the risk for procedural complications among minors in particular" as well as "constraining the clinical options open to teens."[176] More specifically with regard to clinical options, they found that the minors in their cohort "who received judicial bypass were significantly more likely to lose the option of a medication abortion, as they waited for their abortion care which is often a 'strong preference' for some patients, compared with those with parental consent," noting that medication abortion is often a "strong preference" for some patients.[177] Critically, the study found parental involvement laws had a disparate impact on "minors who identify as racial or ethnic minorities, and are of low socioeconomic status" as they are more likely than other teens to seek judicial authorization for an abortion,[178] thus further compounding existing disparities in access to reproductive health care.

IV. THE ABORTION RIGHTS OF TEENS IN THE POST-*DOBBS* ERA

As noted in the Introduction, in the wake of *Dobbs*, in addition to having to negotiate the limits on abortion that apply generally to anyone seeking to terminate a pregnancy, the rights of teens may be further circumscribed by age-specific measures. In this section, we focus on two areas of potential vulnerability–namely, the risk to the continued constitutionally-protected status of the judicial bypass alternative and the continued availability of cross-border abortion travel.

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

[175] *Id.* at 477; *see also*, Coleman-Minahan, Stevenson, Obront & Hays, *supra* note 168, at 21, 23-24.

[176] Elizabeth Janiak, Isabel R. Fulcher, Alischer A. Cottrill, Nicole Tantoco, Ashley H. Mason, Jennifer Fortin, Jamie Sabino & Alisa B. Goldberg, *Massachusetts' Parental Consent Law and Procedural Timing Among Adolescents Undergoing Abortion*, 133 OBSTETRICS & GYNECOLOGY 978, 983-84 (2019).

[177] *Id.* at 984.

[178] *Id.* at 982.

A. The Erosion of the Impermissible Delegation Theory

As we have seen, the *Danforth* and *Bellotti* decisions made clear that states lacked the constitutional authority to delegate an "absolute, and possibly arbitrary veto power" over a minor's abortion decision to their parents since they were prohibited from exercising this authority pursuant to the "strictures" of *Roe*.[179] This non-delegation theory was anchored in the foundational conclusion that, as the *Danforth* Court put it, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights," including the right to abortion.[180] Given that *Dobbs* returns "authority to regulate abortion"[181] to the states–which includes the power to enact statutory bans–does this mean that states are now free to delegate veto power to parents?

Unfortunately, I think the answer is probably yes–that *Dobbs* transmutes what was deemed an impermissible delegation of state power into a permissible one based upon the devolution of regulatory authority over abortion to the states.[182] Put slightly differently, *Dobbs* may well constitute parents as the lawful delegees of state veto power over abortion, thus potentially enabling states to impose parental involvement mandates without an accompanying bypass option.[183]

Of course, the salient question then becomes: what happens to teens who cannot turn to their parents–are they destined to themselves become parents by way of a coercive legal fiat? This section takes up that crucial

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[179] Bellotti v. Baird, 443 U.S. 622 (1979) (quoting Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)).

[180] *Danforth*, 428 U.S. at 74; *Bellotti*, 443 U.S. at 633 (quoting *Danforth*, 428 U.S. at 74).

[181] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[182] In this regard, it should be noted that a number of states have found the right to terminate a pregnancy is protected by their state constitutions, and courts have relied on these constitutional protections to strike down parental involvement laws. In some instances, they have relied on the protected right of privacy. *See, e,g.*, State v. Planned Parenthood of Alaska, 171 P.3d 577 (Alaska 2007); N. Fla. Women's Health & Counseling Servs. v. State, 866 So. 2d 612 (Fla. 2003); Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997). In other cases, courts have relied on their state constitution's equal protection clause based on the differential treatment of minors seeking to terminate a pregnancy and those planning to continue a pregnancy–who are able to consent to all medical, hospital and surgical care related to a pregnancy under virtually all state laws. *See, e.g.*, Planned Parenthood of the Great Northwest v. State, 375 P.3d 1122 (Alaska 2016); Planned Parenthood of Cent. New Jersey v. Farmer, 762 A.2d 620 (N.J. 1999) (which also reference privacy rights).

[183] This supposition appears to be supported by the Seventh Circuit Court of Appeals' recent decision in *Planned Parenthood v. Box* vacating the preliminary injunction against the "parental notice requirement in the judicial bypass procedure" of the Indiana Code (Ord., 1-2, Jul. 27, 2022, BL-84) following remand by the Supreme Court for reconsideration in light of *Dobbs* (Ord. to Vacate and Remand, 1, Jul. 2, 2020, BL-57). *See* Planned Parenthood of Indiana & Ky., Inc. v. Box, 949 F.3d 997 (7th Cir. 2019); Box v. Planned Parenthood of Ind. & Ky., 142 S. Ct. 2893 (2022); Box v. Planned Parenthood of Ind. & Ky., 141 S. Ct. 187 (2020).

question and argues that the medical self-consent rights of teens together with the broad consent rights that pregnant and parenting teens possess offer a firm doctrinal basis from which to argue that they should likewise be entitled to make their own abortion decisions. To this end, starting with a brief discussion of the Court's recognition of youth as rights-bearing juridical persons, we consider the broad swath of consent rights that teens possess outside of the abortion context.

Before proceeding, it should be noted that it may seem somewhat paradoxical to argue for the loosening of restrictions for teens given the post-*Dobbs* drive towards hyper-restriction. However, as exemplified by the growing number of states that have pushed back against this tide

through the enactment of abortion-protective statutes, including shield laws (discussed below)[184] and executive orders,[185] it is equally clear that a powerful centrifugal force has been unleashed in an effort to protect essential rights of bodily integrity and control. Thus, the time may well be ripe for abortion-protective states to move away from the "over-regulation" of teens that is the hallmark of abortion exceptionalism. In this regard, it should be noted that in 2021, Illinois became the first state in the nation to repeal its parental involvement law as a countermeasure,

as the Governor explained, to combat "efforts to restrict abortion in other states and at the federal level."[186] Equally important, this swath of consent rights can be marshalled in opposition to efforts by anti-abortion lawmakers to push for the elimination of the bypass option by highlighting the incongruity and harms of vesting parents with coercive authority over their child's reproductive future.

B. Avoiding Parenthood by Fiat: Extending the Consent Rights of Teens to the Abortion Decision

As we have seen, the required bypass alternative to parental involvement has been secured by the federally protected right to abortion. Assuming for the sake of discussion that, as suggested above, it has been untethered from this mooring by *Dobbs*, anti-abortion activists are likely to push for the institution of parental involvement mandates without this escape

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[184] Nicole Nixon, Scott Maucione, Rick Pluta, Bente Birkeland, Mawa Iqbal, Dirk VanderHart, Dana Ferguson & Molly Ingram, *A Year Since Dobbs, These are the Many Ways States are Protecting Abortion*, NPR (June 23, 2023, 9:48 AM), https://www.npr.org/2023/06/23/1183646356/dobbs-roe-abortion-protections-illinois-maryland-michigan-colorado-minnesota.

[185] Mollie Fairbanks, *How Governors Used Executive Orders to Protect Abortion in a Post-Roe United States*, GUTTMACHER INST. (July 20, 2023), https://www.guttmacher.org/2023/07/governors-eo-analysis-appendix-table.

[186] Sarah Burnett, *Illinois Governor Repeals Law Requiring Parental Notification of Abortion*, PBS (Dec. 17, 2021, 7:02 PM), https://www.pbs.org/newshour/politics/illinois-governor-repeals-parental-notification-of-abortion.

hatch. As noted above, notwithstanding the pervasive limitations and burdens of the judicial bypass process, it nonetheless stands as a critical safeguard that protects teens from the cascade of harms that can ensue from mandated parental involvement, including abuse and the fracturing of the parent-child relationship, and, of course, the imposition of parenthood by way of fiat. Accordingly, the recognition that teens already possess substantial consent rights, particularly in the domain of "sensitive" decisions, based on a number of supporting rationales, can be effectively marshalled against efforts that subject them to the risk of becoming parents against their will. Moreover, as abortion-protective states continue to shore up and extend protections to safeguard access, the time may well be ripe for them to recognize both the concrete and the stigmatizing harms of subjecting the abortion decision of teens to "unique, and uniquely burdensome, rules."[187]

1. Recognizing Teens as Constitutional Persons

It is a well-accepted truism that parents have the legal authority to make medical and other life-shaping decisions on behalf of their minor children. This rule is supported by two foundational and mutually supportive justifications, which we previously encountered in the above discussion of the *Bellotti* decision; namely, the right of parents to direct the upbringing of their children[188] in combination with the presumed decisional incapacity of minors.[189] These justifications work hand-in-glove to rationalize, as again the *Bellotti* Court explains, "legal restrictions on minors, especially those supportive of the parental role, [which] may be important to the child's chance for the full growth and maturity that make eventual participation in a society free and meaningful."[190]

In the 1960s, as the children's rights movement took hold, this decidedly parental-rights view of the legal relationship between parent and child came under increasing attack as an archaic holdover of the hierarchal patriarchal family unit that subsumed the identity of children within a unified holism.[191] As reformers argued, **"**[b]y denying children legal personhood and standing we refuse to entertain and hear their claims. We thus continue to

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187 Borgmann, *supra* note 125; Vandelwalker, *supra* note 125.

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

189 *Id.* at 640.

190 *Id.* at 638-39.

191 *See generally*, Dolgin, *supra* note 19; *see also* J. Shoshanna Ehrlich, *Too Young for Marriage, but Not for Abortion: Keeping Teens in the "Driver's Seat of Their Lives" Through the Intended Purpose Approach to the Shifting of Age Boundaries*, 45 HARV. J.L. GENDER 125, 143-47 (2022); Huntington & Scott, *supra* note 19, at 1379-97.

exclude children from redress for injustice just as historically we excluded white women and people of color."[192]

Starting with the landmark 1999 case of *Tinker v. Des Moines*,[193] the law has moved in the direction of granting children legal personhood. It was here, in upholding the First Amendment rights of high school students who had been suspended for wearing black armbands in protest of the Vietnam War, that the Court first recognized that students are "persons under our Constitution…[who] are possessed of fundamental rights which the State must respect."[194] Notably, however, for present purposes, *Tinker* did not involve a conflict between the protesting children and their parents who, in fact, supported the "wearing of black armbands during the holiday season" as a way for the students to "publicize their objections to the hostilities in Vietnam."[195]

The possibility that the interests of minors and their parents might diverge was first raised by Justice Douglas in his well-recognized partial dissent in *Wisconsin v. Yoder*,[196] which involved a successful challenge by Amish parents to their conviction on freedom of religion grounds for refusing to send their children to school after the eighth grade in violation of the mandatory school-attendance-law age of sixteen.[197] Justice Douglas rebuked his colleagues for framing the conflict as being between the rights of parents to "[direct] the rearing of their offspring" and the "power of a State . . . to impose reasonable regulations for the control and duration of basic education,"[198] without any consideration of what the school-age children themselves might have wanted. Taking aim at the heart of the historic construction of the unified family in which parents were presumed to speak for their children, Douglas argued that:

> [W]here the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views . . . And, if an Amish child wishes to attend high school, and is mature enough to have that desire respected, the state may well be able to override the parents' religiously motivated objections.[199]

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[192] Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 16 (1994).

[193] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[194] *Id.* at 511.

[195] *Id.* at 504.

[196] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[197] *Id.* at 207.

[198] *Id.* at 213.

[199] *Id.* at 242.

Read together, *Tinker*, in tandem with Douglas's partial dissent in *Yoder*, is manifest in the *Bellotti* Court's construction of the bypass option, which as we saw, represented the Court's effort to:

> [R]econcile the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy as established by Roe . . . with the special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child.[200]

The important takeaway here is that, while *Dobbs* eviscerated the constitutional right to abortion, nothing in the decision suggests that minors *qua* minors are no longer rights-bearing persons with protected constitutional rights as first delineated in *Tinker* and subsequently affirmed in both *Danforth* and *Bellotti*. Accordingly, while we can no longer count on the federal Constitution to protect the right of minors to bypass their parents, *Dobbs does not have any bearing* on the modern constitutional understanding of teens as rights-bearing persons.

2. Medical Self-Consent Rights

We now turn to a consideration of the medical decision-making rights of teens. Taken as a whole, these exceptions to the overarching parental consent rule which serve to transfer decisional authority from parents to minors carve out considerable space in which teens are entrusted with decisional autonomy.[201] As developed, these exceptions are supported by several different rationales, which, when taken as a whole, make clear that parents are not always the preferred decision-makers for their children–a recognition that can be tapped into to support the positioning of abortion within this space.

a. Treatment Based Exceptions

The majority of states have enacted laws that enable minors to self-consent to delineated types of medical care, such as sexually transmitted infection ("STIs") testing and treatment, contraceptive services, mental health care, and drug and alcohol treatment.[202] Some of these laws set a

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[200] Bellotti v. Baird, 443 U.S. 622 (1979).

[201] Two other exceptions–emergency care and medical neglect–also limit the decision-making authority of parents; however, they will not be discussed here, as they operate in favor of third parties, rather than minors themselves. *See* J. Shoshanna Ehrlich, *Minors as Medical Decision Makers: The Pretextual Reasoning of the Court in the Abortion Cases*, 7 MICH. J. GENDER & L. 65, 73-75 (2000).

[202] *See generally*, *An Overview of Consent to Reproductive Health Services by Young People*, GUTTMACHER INST. (Aug. 30, 2023), https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law [https://perma.cc/M92B-NAPQ]; Marianne Sharko, Rachael Jameson, Jessica S. Ancker,

minimum age for some of types of care–typically twelve or fourteen–below which a minor cannot self-consent to these services, and some permit, although do not require, parental notification.[203]

These kinds of treatment exceptions generally apply to what can be categorized as "sensitive" types of medical care and embody the recognition that if required to involve their parents, a young person might delay or avoid seeking needed treatment altogether.[204] Often framed as public health measures aimed at, for example, preventing the spread of STIs, or curbing teen pregnancy rates,[205] these laws have attracted little controversy, particularly since they typically exclude abortion care.

By recognizing the importance of giving young people control over sensitive medical decisions, these laws implicitly recognize that the interests of parents and children may diverge, and that parental involvement may inhibit the timely provision of needed medical care. Notably, focused on activities that are generally more associated with adulthood than childhood, they suggest an awareness:

> [T]hat intergenerational conflicts may arise as children approach adolescence and begin to assert their autonomy . . . By entrusting minors with the authority to manage these sensitive and significant aspects of their lives, these laws, although not directly premised on considerations of maturity or independence, nonetheless acknowledge the ability of minors to respond to the changing realities of their lives at moments in time when their parents may not be able to do so.[206]

In short, they quietly recognize "the reality of family conflict and unsettle deeply-held notions of parents as the most appropriate decision-makers for their children."[207]

b. Emancipation

Self-consent rights may also devolve from parents to a teen based on their status as fully- or partially emancipated persons. The common law of emancipation, also referred to as judicial emancipation, was developed

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Lisa Krams, Emily C. Webber & S. Trent Rosenbloom, *State-by-State Variability in Adolescent Privacy Laws*, 149 PEDIATRICS 1 (2022).

[203] *An Overview of Consent to Reproductive Health Services by Young People*, *supra* note 202. Of course, permitting notification defeats the underlying purpose of these laws, as some teens may not seek treatment if they know their parents might find out about it.

[204] Ehrlich, *supra* note 201, at 79.

[205] Kimberly M. Mutcherson, *Whose Body is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL'Y 251, 269 (2005); Jennifer L. Rosato, *Let's Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 DEPAUL U. L. REV. 769, 777 (2002).

[206] *An Overview of Consent to Reproductive Health Services by Young People*, *supra* note 202, at 78.

[207] *Id.* at 78.

mainly as a way by which parents could relinquish their control over a minor child who was living independently and fully self-supported in exchange for the child "relieving them of their financial obligations."[208] Effectively now a legal adult, an emancipated teen has the authority to consent to their own health care.[209]

While the common law of emancipation evolved primarily as a parent-centered doctrine, most states now have a teen-centered emancipation statute that allows a minor to petition a court in order to, as Carol Sanger puts it, "function as adults in the central avenues of daily life without parental consent, notification, or participation," including in the realm of medical decision making.[210] Statutory emancipation generally requires a determination that a young person is living separate and apart from their parents and is financially independent of them, with many also requiring a finding that emancipation is in their best interest.[211]

In addition, most states have enacted "medical emancipation laws." These enable designated categories of young people to self-consent to their own medical care based upon their status, most commonly marriage, serving in the armed forces, and parenthood (parenting teens are discussed in greater detail below). Here, actual proof of independence through a court proceeding is not required as the minor's status is deemed incompatible with parental control.[212] Lastly, a number of states simply allow minors to self-consent to their own health care upon reaching a threshold age.[213]

The law of emancipation recognizes that minors may be sufficiently independent of their parents to warrant a reconfiguration of the legal relationship between them in favor of transferring complete or partial decision-making authority over "central avenues of daily life" from parent to child. Accordingly, as with the minor treatment statutes, this exception carves out an important exception to the general parental consent rule based on the implicit understanding that the separate and autonomous identity of

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208 Sanford N. Katz, William A. Schroeder & Lawrence R. Sidman, *Emancipating Our Children–Coming of Legal Age in America*, 7 FAM. L. Q. 211, 215-19 (1973). Additional criteria include, whether the child owns a major commodity, and is fully responsible for their own debts. *Id.* at 218. *See also* Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239, 245 (1992).

209 ABIGAIL ENGLISH, LINDSAY BASS, ALISON DAME BOYLE & FELICIA ESHRAGH, CTR. FOR ADOLESCENT HEALTH & L., STATE MINOR CONSENT LAWS: A SUMMARY (3d ed. 2010).

210 Sanger and Willemsen, *supra* note 208, at 259. As Sanger makes clear, emancipated teens are not "completely adults," as they remain subject to certain age-based laws, such as those pertaining to school attendance and the purchase of alcohol. *Id.* at 260.

211 ENGLISH, BASS, BOYLE & ESHRAGH, *supra* note 209, at 3.

212 Ehrlich, *supra* note 201, at 77.

213 *Id.*

the emancipated minor puts them in the best position to make appropriate medical decisions for themselves.

c. The "Mature Minor" Rule

The "mature minor" rule is another doctrinally significant exception to the parental consent requirement.[214] Although a handful of states have codified this rule, it has mainly developed as a common law doctrine that, when distilled to its core, enables physicians to provide care to minors based upon their consent alone if determined mature enough to give informed consent to the proposed treatment.[215] As set out with more particularity in the Restatement of Torts, minors are deemed able to give effective consent when they are "capable of appreciating the nature, extent, and potential consequences of the conduct consented to, even if the parent, guardian, or other person responsible does not consent to the conduct."[216]

In contrast to the law of emancipation, which, as we saw, is based upon objective indicators of independence, the "mature minor" rule is premised upon a determination of actual cognitive capacity. As Mutcherson writes, "the application of the mature minor doctrine, in allowing for individualized assessment of a young person's decision-making capacity, is based 'on a rejection of the presumption of minors' incompetency and the underlying assumption that minors as a class lack decision-making capacity.'"[217] Building on this premise, it implicitly recognizes that "minority is not an indistinguishable phase stretching from infancy to young adulthood, and that the allocation of authority between parents and children must account for the increasing capacities of children as they move through adolescence."[218]

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[214] For a detailed analysis of how "judicial bypass fits easily into the common-law traditions of the mature minor doctrine and the right to bodily autonomy," see Jessica Quinter and Caroline Markowitz, *Judicial Bypass and Parental Rights After* Dobbs, 132 YALE L.J. 1908 (2023).

[215] For further discussion, see Sydni Katz, *A Minor's Right to Die with Dignity: The Ultimate Act of Love, Compassion, Mercy, and Civil Liberty*, 48 CAL. W. INT'L L.J. 219 (2018); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 B.Y.U. L. REV. 1055 (2010); Mary Irene Slonina, *State v. Physicians et al.: Legal Standards Guiding the Mature Minor Doctrine and the Bioethical Judgment of Pediatricians in Life-Sustaining Medical Treatment*, 17 HEALTH MATRIX: J.L.-MED. 181 (2007).

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

[217] Mutcherson, *supra* note 205, at 269 (quoting U.S. CONG., OFFICE OF TECH. ASSESSMENT, *Adolescent Health-Volume III: Cross-Cutting Issues in the Delivery of Health and Related Services*, *Consent and Confidentiality in Adolescent Health Care Decisionmaking*, OTA-H-467 123, 127 (Washington, D.C.: U.S. Government Printing Office, June 1991)) (available at: https://ota.fas.org/reports/9104.pdf).

[218] Ehrlich, *supra* note 201, at 79.

3. Pregnant and Parenting Teens

It is here in the discussion of the consent rights of pregnant and parenting teens that abortion exceptionalism again makes its presence strongly felt due to the starkly different treatment of teens who choose to abort compared to those who opt to carry to term and then parent. As we have seen, although the *Bellotti* Court declared that states have a "special interest" in "encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child,"[219] that interest is only actualized when the decision is to *not* bear a child. Only then does a teen's presumed "inability to make critical decisions in an informed, mature manner"[220] in tandem with the "parents' claim to authority in their own household to direct the rearing of their children"[221] combine to ostensibly justify the imposition of third-party adult involvement requirements while simultaneously leaving teens unencumbered when the decision is to instead embrace parenthood.

The absurdity of tethering adult involvement mandates to a teen's intended pregnancy outcome is clearly illustrated by the following hypothetical. Assume that Miranda, age sixteen, is facing an unintended pregnancy. As is often the case for anyone in this situation, regardless of age, Miranda is not certain what she wants to do and is considering her options. After thinking about it over the weekend, on Monday she decides that she is ready for parenthood. She begins to plan accordingly and schedules her first appointment for prenatal care. Since her parents are very religious and would be devastated to learn she is sexually active, Miranda decides to conceal her pregnancy from them for as long as she possibly can. However, after further deliberation, Miranda realizes she is not yet ready for parenthood, as she cannot give a child the life she would want for it. She accordingly cancels her prenatal appointment and calls the local reproductive health clinic to make an appointment for an abortion and is stunned to learn that, unlike her decision to become a mother, she cannot effectuate her decision *not* to become one without either the consent of a parent or the permission of a judge.

The extreme illogic of this approach is that it treats the decisional capacity of teens and the importance of parental involvement as contingent and temporal factors in the decision-making calculus based solely on the intended pregnancy outcome. This incongruity is further underscored by the fact that, as expressly recognized by the *Bellotti* Court, "having a child brings with it *adult legal responsibility*, for parenthood, like attainment of the age

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219 Bellotti v. Baird, 443 U.S. 622, 639 (1979).

220 *Id.* at 634.

221 *Id.* at 638.

of majority, is one of the traditional criteria for the termination of the legal disabilities of minority."[222] Accordingly, on Monday, Miranda was permitted to launch herself into the legal world of adulthood, or perhaps more accurately semi-adulthood, without any decisional oversight; however, as soon as she decided she was not ready for the responsibilities of parenthood, she was deemed incompetent and in urgent need of parental oversight and, if not possible, court intervention. Of course, as we have seen, this over-regulation that subjects abortion to "unique, and uniquely burdensome, rules"[223] is the hallmark of abortion exceptionalism's stigmatizing work.

The vast majority of states also permit pregnant teens to self-consent to prenatal care and then to medical care for both themselves and their child.[224] In the absence of an express statute, minor parents still have the authority to consent to health care for their children based on the fact that, as Fershee writes, "they have the same fundamental constitutional right to parent as anyone else [a]nd [t]here is no Supreme Court precedent, nor state law, that curtails the right of an adolescent to parent his or her child."[225] They are also most likely to be able to consent to health care for themselves even in the absence of a statute based on an exception to the parental consent rule such as maturity or their status as an emancipated minor.

4. Respecting the Reproductive Self-Determination of Teens: The Cumulative Weight of the Minor Consent Rules

Although it would be an overstatement to claim that, when considered as a whole, the exceptions swallow the general rule that parents have the authority to make medical decisions on behalf of their minor children, it is not an overreach to say that they knock a gaping hole in it. Critically, in so doing, they destabilize the rule's grounding rationale that this allocation of authority is necessary due to the twin pillars of teen decisional incapacity and

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[222] *Id.* at 642. However, as both Manian and Fershee argue, while this may be true in terms of a formal grant of legal rights, the reality on the ground is that teen parents are subject to "a unique set of limitations that jeopardize [their] ability . . . to raise their children in safe and stable environments. Ehrlich, *supra* note 191, at 172. Specifically, Manian stresses that teen parents are "generally more likely to come into contact with the child welfare system than adult parents," where they are evaluated under the pall of "[m]ultiple vectors of discrimination, including gender race, and class, [which] intersect with age-based concerns." Manian, *supra* note 37 at 162-64. Fershee zeros in on age-based legal limitations that survive becoming a parent, such as the common law rule barring teens from entering into binding contracts, which, she argues, directly undermine their "abilities to parent," and to "build a stable home for their children." Fershee, *supra* note 37, at 453-54.

[223] Borgmann, *supra* note 125.

[224] Regarding the right to consent to prenatal care, see *Minors' Access to Prenatal Care*, GUTTMACHER INST. (Aug. 30, 2023), https://www.guttmacher.org/state-policy/explore/minors-access-prenatal-care. Regarding the right to consent to medical care for one's child, see *An Overview of Consent to Reproductive Health Services by Young People*, *supra* note 202.

[225] Fershee, *supra* note 37, at 431.

parental rights. Rather, whether it is on account of a teen's maturity or independence, or the concern that parental involvement will delay needed medical care, the law unquestionably recognizes that the interests of parents and their teen children are not always aligned, and that a teen may well be better positioned to make a range of important decisions for themselves based on the exigencies of their own life circumstances.

That this is the case is further buttressed by the wholly unwarranted distinction the law makes regarding decisional rights based solely upon a teen's intended pregnancy outcome. Decisional capacity and the advisability of parental involvement are not ephemera that vanish and reappear each time a pregnant teen reassesses their options–but this is the direct consequence of a legal schema that is deeply rooted in abortion exceptionalism. Deeply stigmatizing abortion, the Court has stressed that particularly for teens, the abortion decision is saturated with "profound moral and religious concerns,"[226] and carries "potentially traumatic and permanent consequences"[227] for those who fail to properly account for the "origins of the other human life that lie within the embryo"[228] by rejecting life.

However, the well-established space that the law has carved out for autonomous teen decision-making offers a promising mooring to which self-consent rights for abortion can be securely tethered, particularly in abortion-protective jurisdictions. Alternatively, at a minimum, it offers a strong counter-position to anti-abortion lawmakers who seek to eliminate the bypass alternative to parental involvement by refuting the assumption that the overturning of *Roe* leaves teens without a doctrinal basis for claiming a right to reproductive self-determination. Notably, as we have seen, the exceptions to the parental consent rule are suffused with a deep-seated recognition that in some situations, young people are better positioned than their parents to determine their fate.

Further buttressing this position, the *Bellotti* Court itself recognized that unwanted parenthood is likely to be "exceptionally burdensome" for teens based on their "probable education, employment skills, financial resources, and emotional maturity."[229] This underlying assumption has been borne out by a body of evidence making clear that, while "teen motherhood is no longer regarded as a 'universally negative' experience, it nonetheless remains 'associated with a higher risk of negative outcomes for the young mother and her children'"[230]–risks that are magnified for low-income teens of color due

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226 Bellotti v. Baird, 443 U.S. 622, 640 (1979).

227 H.L. v. Matheson, 450 U.S. 398, 412 (1981).

228 Ohio v. Akron Center for Reprod. Health, 407 U.S. 502, 520 (1990).

229 *Bellotti*, 443 U.S. at 642.

230 Ehrlich, *supra* note 191, at 157 (quoting Lee A. Savio Beers & Ruth E. Hollo, *Approaching the Adolescent-Headed Family: A Review of Teen Parenting*, 216 CURRENT PROBS. IN PEDIATRIC

to racialized disparities in birth outcomes and structural inequalities.[231] Furthermore, although not specifically focused on teens, the groundbreaking *Turnaway Study* provides a comprehensive analysis of the adverse consequences of being denied a wanted abortion as compared to the outcomes for those who have been able to access a wanted abortion.[232] Critically, the study found that abortion denial results in a wide-ranging net of harms, including, but not limited to, economic hardships, long-term physical health problems, and poorer maternal bonding.[233]

In short, as recognized by the *Bellotti* Court, parenthood by fiat carries with it the risk of "grave and indelible" consequences.[234] However, these adverse consequences can be avoided by leveling the playing field when it comes to reproductive self-determination so that the abortion decision is liberated from the weight of exceptionalism and enfolded into the generous and variegated space within which teens are empowered as decision-makers.

However, in this regard, it should be recognized, as has been recently reported in the media, that even in liberal-leaning jurisdictions "parental involvement is one of the most controversial issues surrounding abortion today."[235] Notably, as Kiki Council, an attorney from Colorado, an abortion-protective state according to the Guttmacher Institute,[236] who represents teens in judicial bypass hearings, pointed out in an *Intercept* interview, "'[h]istorically, every single time there's been any sort of ballot initiative to restrict abortion rights, it has failed. . . The only, only ballot initiative restricting abortion access that has passed in Colorado in its entire history . . . is parental involvement.'"[237]

Notably in this regard–as noted above–Illinois repealed its parental involvement law in 2021, and as Representative Anna Moeller explained in an interview with the *Intercept*, there undoubtedly were challenges:

ADOLESCENT HEALTH CARE 216, 217 (2009)). For further discussion, see Ehrlich, *supra* note 191, at 154-57.

231 Sheryl L. Coley, Tracy R. Nichols, Kelly L. Rulison, Robert E. Aronson, Shelly L. Brown-Jeffy & Sharon D. Morrison, *Race, Socioeconomic Status, and Age: Exploring Intersections in Preterm Birth Disparities Among Teen Mothers*, 2015 INT'L J. POPULATION RSCH. 1, 1 (2015).

232 *See generally* Greene Foster, *supra* note 132.

233 These and other adverse consequences are addressed in the more than fifty peer-reviewed papers generated by the study. *Id.* For a general overview of the study and its results, see *id.*

234 Bellotti v. Baird, 443 U.S. 622, 642.

235 Sara Sirota, *Teenagers Already Face Extra Barriers to Abortion Care. It's About to Get Worse*, INTERCEPT (June 19, 2022, 8:00 AM), https://theintercept.com/2022/06/19/abortion-minors-parents-roe/#:~:text=Minors%20already%20face%20disadvantages%20by,an%20administrator%20calling%20their%20parents.

236 *Interactive Map: US Abortion Policies and Access After Roe*, *supra* note 4.

237 Sirota, *supra* note 235.

> 'I think the reflexive position is, parents should know when their child is facing an unwanted pregnancy and that they would want them to go to them for help, and of course we want that for anybody who's in that situation . . . Unfortunately, there are young people out there who don't have that, and so it takes a longer conversation to explain that.'[238]

Buttressing this view, Ziegler writes:

> [P]arental-involvement laws have always enjoyed broad public support–including from some Americans who support abortion rights. In the 1980s and 90s, when these laws were spreading across the country, many who supported parental-involvement laws viewed them as almost unrelated to any attack on abortion: They were simply commonsense protections of parental authority.[239]

And so, as Moeller indicates, the conversations may well need to be longer to bring even abortion-supportive lawmakers around to seeing the harms of forced-parental-involvement requirements for abortion. In this regard, identification of the degree to which teens have been freed from parental oversight when it comes to the making of a host of medical decisions coupled with the deeply stigmatizing and burdensome impact of the over-regulation of the abortion decision–as compared to the decision to bear a child–clearly illuminates that parental involvement laws are at their core anti-abortion measures.

V. RESTRICTIONS ON CROSS-BORDER ABORTION TRAVEL BY TEENS

The second significant type of *age-specific* abortion restrictions that are likely to gain traction in the post-*Roe* era are those targeting cross-border abortion travel by teens. Of course, travel restrictions are not, by their nature, inherently age-based; however, as Mary Ziegler writes, targeting teens "is an old strategy, one that helped anti-abortion groups revoke the right to abortion. The movement learned a key lesson from the decades-long struggle to undo *Roe*: It's easiest to start with minors."[240]

This strategy reflects the fact that teens, as Ellie Shilling, a Louisiana attorney who represents teens in judicial bypass cases, explains, are "low hanging fruit[;] [they're] the most vulnerable, people with the least power."[241]

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238 *Id.*

239 Mary Ziegler, *Abortion Restrictions Targeted at Minors Never End There*, ATLANTIC (Apr. 28, 2023), https://www.theatlantic.com/ideas/archive/2023/04/idaho-abortion-trafficking-law-criminalizing-minors/673877.

240 *Id.*

241 *A Judge Allowed a Louisiana Teen to Get an Abortion. So Her Mom Sued the State*, REWIRE NEWS GRP. (Nov. 9, 2021, 8:35 AM), https://rewirenewsgroup.com/2021/11/09/a-judge-allowed-a-louisiana-teen-to-get-an-abortion-so-her-mom-sued-the-state.

In a similar vein, Rosann Mariappuram, the now former executive director of Jane's Due Process, a non-profit organization dedicated to helping "young people in Texas navigate parental consent laws and abortion bans"[242] stresses that minors are an easy target because "they are often vulnerable in the sense that they can't vote, [and] they often don't have voices at the legislature."[243] Mariappuram adds that the substantial "shame associated with getting pregnant if you're under 18" also makes it easier to go after them.[244]

As noted above, there is nothing intrinsically age-based when it comes to efforts to restrict cross-border abortion travel. In fact, as Cohen, Donley & Rebouché stress in their seminal article, *The New Abortion Battleground*, the overturning of *Roe* has unleashed a "novel world of complicated interjurisdictional legal conflicts over abortion."[245] Accordingly, before zeroing in on Idaho's abortion trafficking law, which is the focus of this section, we take a quick look at this brave new world.

A. The Indeterminate Legal Status of Cross-Border Abortion Travel

Prior to *Dobbs*, with, as we have seen, the notable exception of preventing "evasion" of parental involvement laws, states had little investment in policing their borders to prevent residents from seeking abortion care elsewhere, because, for example, an out-of-state clinic was closer, or another state had fewer restrictions. Critically, this lack of investment in pursuing residents beyond state borders reflected the fact that under *Roe* and *Casey*, states were without the constitutional authority to enact pre-viability bans on abortion. In short, there was a national floor beneath which no state could fall. That being said, it is critical to recognize that while this certainly was a legal truism, particularly after the *Casey* Court's adoption of the undue burden standard decision,[246] states had considerable latitude to enact highly restrictive laws, which, in some instances, could amount to *de facto* bans, particularly for marginalized populations.[247]

In eliminating the existing federal constitutional floor undergirding the abortion right, *Dobbs* has dramatically changed the stakes of cross-border abortion travel as geo-political boundaries between states can determine if

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[242] *Our Work*, JANE'S DUE PROCESS, http://janesdueprocess.org/about (last visited Nov. 28, 2023).

[243] Alisa Chang, Jonaki Mehta & Sarah Handel, *With Roe Set to Fall, Minors Seeking Abortion Have Few Choices Left*, NPR (June 8, 2022, 4:38 PM), https://www.npr.org/2022/06/08/1103785044/with-roe-set-to-fall-minors-seeking-abortion-have-few-choices-left.

[244] *Id.*

[245] Cohen, Donley & Rebouché, *supra* note 16, at 4.

[246] Planned Parenthood v. Casey, 505 U.S. 833, 873-79 (1992).

[247] *See generally* DAVID S. COHEN & CAROLE JOFFE, OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA (2021).

abortion services are readily available or have been completely eviscerated. In turn, this raises the thorny question of whether abortion-restrictive states have the authority to extend the reach of their laws beyond their borders to deter their residents from seeking abortions in jurisdictions where it is legal. Pulling in the opposite direction, the question is whether abortion-protective states have the authority to enact what are known as shield laws, which, "at their core . . . seek to protect abortion providers, helpers, and seekers in states where abortion remains legal from attacks taken by anti-abortion state actors."[248] Although these laws vary from state to state, among other provisions, they typically:

> - Prohibit state agencies from assisting in investigating, subpoenaing, or extraditing an individual to a state where abortion is banned.
> - Ensure medical professionals do not face any punishment from licensing boards for providing abortion care that is legal in one state but banned in another.
> - Protect patient medical information and data from investigators in other states. Some measures extend these protections to patients who travel from a state where abortion is restricted in order to access care.[249]

As Cohen and his co-authors stress, "[w]ithout well-established doctrine or case law as guideposts," the answer to the question as to whether states can enforce their laws beyond their borders is anything but clear.[250] Underscoring the "profound confusion" that will certainly ensue in light of the post-*Dobbs* reality that "advocates on both sides of the abortion controversy will not stop at state borders in their efforts to apply their policies as broadly as possible,"[251] they point out that:

> A small cohort of scholars have attempted to parse these issues in the past, and they fall largely into three different camps: those who believe that extraterritorial application of abortion law would violate various provisions of the Constitution; those who believe it would not; and those who believe that it would raise complicated and unanswered issues of constitutional law

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[248] David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Shield Laws*, 2 NEW ENG. J. MEDICINE EVIDENCE 1, 2 (2023).

[249] Elizabeth Nash & Isabel Guarnieri, *Eight Ways State Policy Makers Can Protect and Expand Abortion Rights and Access in 2023*, GUTTMACHER INST. (Jan. 12, 2023), https://www.guttmacher.org/2023/01/eight-ways-state-policymakers-can-protect-and-expand-abortion-rights-and-access-2023.

[250] Cohen, Donley & Rebouché, *supra* note 16, at 34.

[251] *Id.* at 4.

> that would throw the Court into bitter disputes about foundational issues of federalism.[252]

And while the authors write that they find the first camp "more convincing both doctrinally and normatively," they fear that those who ascribe to the view that interjurisdictional conflicts will raise "complicated and unanswered issues," is most predictive of what lies ahead due in large part to the fact that the law in this regard is "notoriously underdeveloped."[253]

B. Targeting Cross-Border Travel by Teens: Idaho's Criminal Abortion Trafficking Law

It is against this backdrop of "complicated and unanswered issues," that we turn our focus to Idaho's first-in-the-nation ban on so-called abortion trafficking. However, before actually doing so, it behooves us to recognize that this is not the first "successful" example of an effort to control the reproductive bodies of teens, through what Hill refers to as the "geography of abortion provision through the management of spaces, places, and borders."[254]

In 2017, Scott Lloyd, a fierce anti-abortion zealot who was appointed by Trump to direct the Office of Refugee Resettlement ("ORR") (the agency responsible for the "care and custody" of unaccompanied minors), refused to allow teens in federal immigration custody to leave the shelters where they were housed to obtain an abortion, even after they had received judicial authorization for the procedure in accordance with Texas law.[255] Seeking to justify this policy of containment, Lloyd insisted that he had a moral obligation to prevent ORR from participating in "killing a human being in our care" thus rendering ORR a "place of violence," rather than a refuge.[256]

By literally barring these teens from moving from point A to point B to obtain an abortion, Lloyd's stay-in-place edict effectively operated as a travel ban. Moored in his fierce life commitments, the government was thus able, as Hill writes, to "assert arbitrary authority over [their] reproductive choices and bodily integrity simply by virtue of [their] geographic situation–[their]

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[252] *Id.* at 34. (internal citations omitted). A detailed discussion of these three camps is well beyond the scope of this Article and has been covered in brilliant detail. *See* Cohen, Donley & Rebouché *supra* note 16, at 34-42. *See also* Paul S. Berman, Roey Goldstein & Sophie Leff, *Conflicts of Law and the Abortion War Between the States*, 172 U. PA. L. REV. (forthcoming 2024).

[253] Cohen, Donley & Rebouché, *supra* note 16, at 37.

[254] Hill, *supra* note 51, at 1083.

[255] *See generally* Lori Brown, J. Shoshanna Ehrlich & Nicole M. Guidotti-Hernández, *No Refuge(es) Here: Jane Doe and the Contested Right to 'Abortion on Demand'*, 31 FEMINIST LEGAL STUD. (2023); J. Shoshanna Ehrlich, *The Body as Borderland: The Abortion (Non)Rights of Unaccompanied Teens in Federal Immigration in the Trump-Pence Era*, 28 UCLA J. OF GENDER AND L. 47 (2021).

[256] Note to File from Scott Lloyd, Dir., Off. of Refugee Resettlement (Dec. 17, 2017).

physical presence within ORR custody–which itself was a result of [their] having crossed a national boundary."[257]

Ultimately, as the direct result of a legal challenge brought by the ACLU Reproductive Freedom Project, Lloyd lifted this travel ban,[258] thus ending his regime of managing "spaces, places, and borders"[259] as a vehicle for depriving unaccompanied minors of access to abortion. And while this is a very particularized instance of a spatial limitation on the abortion right, it is a stark example of minors being "low hanging fruit" when it comes to abortion restrictions due to their being "the most vulnerable[] people with the least power,"[260] which, of course, is particularly true when it comes to unaccompanied minors being held in federal immigration custody.

So, it is worth keeping in mind that although Idaho's abortion trafficking law to which we now turn is the first to criminalize abortion travel, it is not the first instance of control being exercised over the reproductive choices of minors based upon their geographical location. And with the overturning of *Roe*, it certainly will not be the last as the "management of spaces, places, and borders"[261] assumes central importance with the collapse of the *Roe* floor.

On April 6, 2023, after being passed by an "overwhelming" margin in both the house and senate, Idaho Governor Brad Little, signed the state's abortion trafficking law into effect.[262]

It is based on the National Right to Life Committee's ("NRLC") model legislation,[263] which was drafted by their general counsel, James Bopp, to ready states for a "post-*Roe* nation that builds on the substantial experience the right-to-life movement has had in protecting unborn lives through pro-life legislation."[264] In main part, it declares that any adult who, "with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor," assists the minor to "procure an abortion" or to obtain "an abortion-inducing drug" by "recruiting, harboring, or transporting the pregnant minor *within the state* commits the crime of abortion (see below

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257 Hill, *supra* note 51, at 1095-94.

258 Ehrlich, *supra* note 255, at 86.

259 Hill, *supra* note 51, at 1083.

260 *A Judge Allowed a Louisiana Teen to Get an Abortion. So Her Mom Sued the State*, *supra* note 241.

261 Hill, *supra* note 51, at 1083.

262 Ruth Brown, '*Abortion trafficking' Bill Signed, Despite Washington Governor's Plea*, IDAHO REPORTS (Apr. 5, 2023), https://blog.idahoreports.idahoptv.org/2023/04/05/abortion-trafficking-bill-signed-despite-washington-governors-plea/#:~:text=H%20242%20overwhelmingly%20passed%20both,the%20life%20of%20the%20mother.

263 Memorandum from James Bopp Jr., NRLC General Counsel, Courtney Turner Milbank & Joseph D. Maughon to National Right to Life Committee (June 15, 2022).

264 *Id.*

regarding the "within this state" proviso).[265] Convicted "traffickers" are subject to "imprisonment in the state prison for no less than two (2) years and no more than five (5) years."[266]

Proponents of the bill stressed many of the same themes as those raised by supporters of the CCPA. Tracking the focus on parents, House sponsor, Representative Barbara Erhardt, flatly declared it "'a parental rights bill[,]'"[267] which "gives us the tools to go after those who would subvert a parent's right to be able to make those decisions in conjunction with their child."[268] Reinforcing the primacy of parental rights, in the Q & A portion of the report of the Senate State Affairs Committee–which held a hearing on the proposed law in March of 2023–in response to the question "*What if a girl is afraid to tell her parents*?" the utterly dismissive answer is that "[m]any underage girls may be afraid or ashamed to tell their parents they are pregnant, but *parents still have the right* to help their children in such difficult circumstances."[269] According to the report, the only acceptable exception is in cases of parental abuse, in which instance, the proper role for "trusted adults" is to help the minor "escape an abusive home. A secret abortion is not the answer."[270] Not surprisingly, there is no discussion of what happens after she makes her escape or of why secreting a teen out of the parental home is acceptable but assisting them to obtain an abortion is not. Certainly, surreptitiously helping a teen to escape an abusive home is no less subversive of parental rights than ensuring that abusive parents do not force their child to carry an unwanted pregnancy to term.

Also, in keeping with the CCPA, supporters stressed that the law was necessary in order to protect underage victims from predatory older partners. Again, an operative assumption was that these men "may be strongly incentivized to obtain an abortion for [their] underage partner, and doing so

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265 *Idaho Governor Signs Ban on 'Abortion Trafficking'*, NPR (last updated Apr. 6, 2023, 1:48 PM), https://www.pbs.org/newshour/politics/idaho-governor-signs-ban-on-abortion-trafficking. The law contains a separate civil provision that allows "Any female upon whom an abortion has been attempted or performed, the father of the preborn child, a grandparent of the preborn child, a sibling of the preborn child, or an aunt or uncle of the preborn child" to may maintain an action for damages of not less than $20,000 against the medical professional who performed the abortion. H.R. 242, 67th Leg., 1st Reg. Sess. (Idaho 2023).

266 Idaho H.R. 242.

267 Steve Kirch, *Idaho Abortion Trafficking Bill is Heading to the Senate to be Amended*, KMVT 11 (Mar. 28, 2023, 5:35 AM), https://www.kmvt.com/2023/03/28/idaho-abortion-trafficking-bill-is-heading-senate-be-amended.

268 Sharon Bernstein, *Idaho Bill Would Ban Minors from Travel for Abortions Without Parental Consent*, REUTERS (Mar. 31, 2023, 6:32 PM), https://www.reuters.com/world/us/idaho-bill-would-ban-minors-travel-abortions-without-parental-consent-2023-03-31.

269 *Hearing on H.R. 242 Before the State Senate Aff. Comm.,* 2023 Leg., 67th Sess. (Idaho 2023) (State Senate Aff. Comm. Minutes).

270 *Id.*

might even conceal statutory rape."[271] Not surprisingly, as with the CCPA, even assuming that sexual predation is a real problem, there is no support in the record for the conclusion that these men are abortion traffickers, although, of course, this is a very compelling rationale for why these kinds of laws are urgently needed. Testimony of opponents also echoed the arguments made by opponents of the CCPA. For example, Misty DelliCarpini-Tolman, State Director for Planned Parenthood, argued that the measure "was designed to inhibit young people from seeking abortion care and punish those who offer to help people in need. The policy would discourage young people from asking trusted adults for help and thus put them at risk."[272]

This law was enacted against the backdrop of Idaho's near-total ban on abortion, which, according to the Guttmacher Institute, is one of the strictest laws in the country.[273] As the report of the Senate State Affairs Committee makes clear, this defensive move was urgently needed since with most abortions "illegal in Idaho, the incentive to travel to another state for an abortion (where Idaho's parental consent laws don't apply) is greater."[274] Undoubtedly contributing to the anxiety of lawmakers, Idaho shares a long border with the states of Oregon and Washington, which the Guttmacher Institute has scored respectively as "most protective" and "protective," of abortion rights.[275] Moreover, Washington does not have a parental involvement law;[276] while in Oregon, teens fifteen and above can self-consent to an abortion.[277] Further adding to this sense of urgency, the report also

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[271] *Id.*

[272] *Id.* The minutes also report that:

> Over 400 emails were submitted in opposition to H 242 . . . The majority of them contained the phrases, "HB 242, the bill criminalizing helping minors get an abortion, is dangerous and irresponsible…. This bill would discourage young people in potentially risky situations from talking to trusted adults and seeking the help they need. I urge you to please vote NO on this terrible legislation."

Id. at 2.

[273] *Interactive Map: US Abortion Policies and Access After Roe - Idaho*, GUTTMACHER INST., https://states.guttmacher.org/policies/idaho/abortion-policies [https://perma.cc/F5S6-AL6A] (last visited Oct. 15, 2023).

[274] *Hearing on H.R. 242 Before the State Senate Aff. Comm.,* 2023 Leg., 67th Sess. (Idaho 2023) (State Senate Aff. Comm. Minutes).

[275] *Interactive Map: US Abortion Policies and Access After Roe - Oregon*, GUTTMACHER INST., https://states.guttmacher.org/policies/oregon/abortion-policies [https://perma.cc/B523-23RP] (last visited Oct. 15, 2023); *Interactive Map: US Abortion Policies and Access After Roe - Washington*, GUTTMACHER INST., https://states.guttmacher.org/policies/washington/abortion-policies [https://perma.cc/J825-AAF9] (last visited Oct. 15, 2023).

[276] *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.

[277] A teen under the age of fifteen must obtain parental consent unless the abortion provider determines that seeking their consent might either result in the abuse or neglect of the teen or is not in

stressed that "[u]nder current laws, there would be *no way to punish* an adult for taking an underage girl to Oregon for an abortion *with the intent to conceal the abortion from her parents*."[278]

Adding insult to injury, Oregon and Washington both have shield laws to protect those who receive, provide, and assist with the provision of legal abortion care from hostile actions by home-state actors. Reinforcing the strength of this commitment, in the wake of the *Dobbs* decision, the Governors of both states, together with the Governor of California, signed the "Multi-State Commitment to Reproductive Freedom," vowing that they would "not stand on the sidelines" as "emboldened" anti-abortion states sought to extend the reach of their law beyond their borders.[279] They thus committed themselves to work to protect those seeking and providing abortion services in their jurisdictions from extraterritorial attacks by hostile state actors.[280]

In a powerful expression of this commitment, two days before Idaho's Governor Little signed the abortion trafficking bill into law, Jay Inslee, Governor of Washington, sent him an e-mail letter voicing his opposition to the bill.[281] In addition to warning of the "grave dangers" of the law, in a powerful rebuke, Inslee proclaimed that:

> [R]egardless of your decision on this bill, we welcome Idaho's patients and health care providers with open arms in Washington . . . and will care for your residents in a manner consistent with their health care needs . . . We will protect our providers, and we will harbor and comfort your residents who seek health care services that are denied to them in Idaho.[282]

Given, as we have seen, that Idaho's trafficking law was clearly aimed at preventing teens from leaving the state to access abortion services in neighboring states with more liberal approaches, why then the puzzling language that takes aim at the "recruiting, harboring, or transporting the pregnant minor *within the state*[?]"[283] At first glance, this language suggests that the trafficking ban will be of little import since there is literally nowhere

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their best interest. Oregon State Bar, *2023 Oregon Legislation Highlights* (2023), https://www.osbar.org/_docs/lawimprove/2023LegislationHighlights.pdf.

[278] *Hearing on H.R. 242 Before the State Senate Aff. Comm.,* 2023 Leg., 67th Sess. (Idaho 2023) (State Senate Aff. Comm. Minutes).

[279] *Multi-State Commitment to Reproductive Freedom* (2022), https://www.gov.ca.gov/wp-content/uploads/2022/06/Multi-State-Commitment-to-Reproductive-Freedom_Final-1.pdf.

[280] *Id.* The document commits to a number of common shield law protections as discussed above. *See supra* Section C(I).

[281] E-mail from Jay Inslee, Governor of Washington to Brad Little, Governor of Idaho (Apr. 4, 2023) (available at: https://img.theepochtimes.com/assets/uploads/2023/04/06/id5176912-Governor_Little_FINAL.pdf).

[282] *Id.*

[283] IDAHO CODE § 18-623(1) (2023).

within the state to transport teens for an abortion.[284] However, given that the transportation ban extends to the internal Idaho borders with states where abortion is legal, the law effectively criminalizes leaving the state for an abortion, which, of course, requires in-state travel, while conveniently sidestepping the messy uncertainty inherent in, as discussed above, efforts to extend the reach of state laws into other jurisdictions.

As of the time of writing this article, the future of Idaho's abortion trafficking law remains uncertain. On July 22, 2023 "an individual and two organizations that seek to assist Idaho minors obtain reproductive health care that is lawful outside of Idaho–abortion, *which necessitates some form of travel within Idaho* to reach its borders"[285] filed a multi-count Complaint for Declaratory Judgement on the grounds that the trafficking statute was unconstitutionally vague, deprived them of the protected right to both intra and interstate travel and their first amendment rights "to associate freely with each other and with pregnant Idahoans, to provide information, and to engage in expressive conduct, including providing funding or practical support for pregnant Idahoans traveling to access out-of-state services that are legal where rendered, including abortion."[286]

In their Complaint, plaintiffs powerfully invoke many of the points raised in this Article about the harmful impacts of abortion exceptionalism in the context of the reproductive right of teens and then some. It stands as a powerful condemnation of what they refer to as Idaho's travel ban, and is well worth quoting here at length:

> Pregnancy, childbirth, and parenting significantly impact an individual's physical and mental health, finances, and personal relationships. The decision to impact one's health with a pregnancy or to become a parent is extremely personal and permanent. An intimate decision of this magnitude must be left to the individual to determine without governmental interference, regardless of age . . .[287]

> There are already great healthcare disparities for historically marginalized communities in anti-abortion states. These states tend to limit access to health care, lack choices for effective birth control, and have ineffective and

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[284] *Idaho Abortion Clinic Guide from Plan C Pills*, PLAN C, https://abortion-clinic.plancpills.org/idaho (last visited Oct. 15, 2023).

[285] Complaint for Declaratory Judgment, Matsumoto v. Labrador, No. 1:23-cv-00323 (D. Idaho, filed Jul. 11, 2023) [hereinafter "Complaint"] (emphasis added).

[286] *Id.* at 26. On September 12, 2023, the defendant Raul Labrador, in his capacity as attorney general for the state of Idaho, filed a Motion to Dismiss. The Court denied the Motion with regard to all counts with the exception of the claim for relief based upon the infringement of the right to intrastate travel. Memorandum Decision and Order Matsumoto v. Labrador, No. 1:23-cv-00323, 13-16 (Sept. 12, 2023) [hereinafter Memorandum Decision and Order].

[287] Complaint, *supra* note 285, at 11.

> inadequate sex education curriculum in schools. The Abortion Travel Ban will result in a disproportionately negative impact on persons in these same marginalized groups, who will likely have the hardest time traveling to neighboring states to terminate pregnancies and may struggle to raise children they otherwise would not have chosen to have.[288]

Giving voice to the powerful reality that was likewise articulated by opponents to the CCPA twenty-five years ago, the complaint stresses that "not all minors have a strong, trusting, or stable relationship with a parent or guardian . . . Without the ability to ask for help from their chosen trusted adult . . . minors will lose the right to make critical decisions about their health, bodies, and lives."[289]

At present, Idaho's trafficking law is subject to a pre-enforcement preliminary injunction on the grounds that it is both void for vagueness and infringes upon the plaintiffs' "First Amendment rights of speech and expression by preventing them from providing information, assistance, advocacy and monetary support to individuals seeking lawful reproductive options and has chilled Plaintiffs' ability to uphold their missions,"[290] and is thus an impermissible content-based regulation of protected speech and expression.[291] Drilling down a bit further, federal district court judge Debora K. Grasham elaborated that Idaho's trafficking statute interfered with the plaintiffs' protected right to express their "beliefs in bodily autonomy and reproductive choice, and their missions and messages communicating their support to those who seek reproductive options–such as survivors of abuse and minors."[292]

Although the ultimate fate of Idaho's trafficking law is yet to be determined, the plaintiffs' framing of their challenge to it and the court's receptiveness to their approach, particularly with respect to the First Amendment expressive conduct claim, offers an innovative constitutionally grounded response to the devastation wrought by *Dobbs*. Specifically, although the Fourteenth Amendment's Due Process and Equal Protection clauses are off the proverbial table as a source of the protected right to abortion (presumably for the foreseeable future) the use of alternative federal constitutional moorings for contextually tailored rights of access, such as the communication of information to teens as to how they can access cross-border abortion care, offers a much-needed ray of hope.

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288 *Id.* at 13.

289 *Id.*

290 Memorandum Decision and Order, *supra* note 286.

291 *Id.* at 44-45.

292 *Id.* at 47.

VI. CONCLUSION

A little more than a year out from the *Dobbs* decision, it is hard at times to fully take in the damage that has been done to the abortion rights of pregnant teens. Teens entered into the post-*Roe* era already on shaky legal grounds due to the Court's early embrace of pro-natalist thinking that stigmatized the abortion decision as inferior to the choice of becoming a parent, notwithstanding its recognition in *Bellotti* that unwanted motherhood was "exceptionally burdensome" for teens. Moreover, as exemplified by the ease with which Idaho's abortion trafficking measure was enacted into law on the coattails of a parental rights platform, it can be hard to hold onto hope that teens will continue to have any control over their pregnancy decisions, when termination is the intended outcome.

However, there are also some definite bright spots, including the enactment of shield laws by a growing number of abortion-protective states, and the shining success of Illinois with respect to its outright repeal of its parental involvement law. Moreover, as argued here, by calling out the extent to which abortion exceptionalism has resulted in the imposition of "unique and uniquely burdensome rules" on teens who choose abortion over parenthood in conjunction with the existence of an already well-established space within which teens possess consent rights independent of their parents, a strong argument can be made, at least in abortion-protective states, that abortion should be enfolded into this space. Elsewhere, this alternative source of doctrinal authority can be marshaled to oppose those who seek to vest parents with absolute power over their teen's abortion decision on the grounds that it holds the potential to cruelly consign them to parenthood against their will–an outcome that is out of step with the existing legal reality of adolescent decisional rights and in contravention of the literature on the enduring adverse consequences of being denied an abortion. In a similar vein, the deployment of the First Amendment to fight against travel bans, as is the case in Idaho, drives home the familiar adage that "necessity is the mother of invention."[293]

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[293] *Necessity is the Mother of Invention*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/necessity%20is%20the%20mother%20of%20invention (last visited Nov. 14, 2023).