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PARENTAL RIGHTS AND ABORTION AFTER DOBBS

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HIGHLIGHTS:

- The Supreme Court has long recognized parents' fundamental constitutional right to direct their children's upbringing.
- Overruling *Roe v. Wade* means no federal abortion right exists to compromise this parental right.
- This parental right takes precedence over state constitutional protection for abortion rights and laws giving judges broad authority to bypass parents.

INTRODUCTION:

> *"Under long-established precedent, parents—not the State—have primary authority with respect to 'the upbringing and education of children.' The right protected by these precedents includes the right not to be shut out of participation in decisions regarding their children's…health."*[1]

The deep philosophical and legal roots of the fundamental right of parents to direct the care and upbringing of their children were planted well before the United States was born. In a "long line of cases"[2] over more than a century, the Supreme Court has held that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[3] The "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[4]

[1] Mirabelli v. Bonta, 146 S.Ct. 797, 803 (2026), quoting Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
[2] Washington v. Glucksberg, 521 U.S. 702, 720 (1997). *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Santosky v. Kramer, 455 U.S. 745 (1982).
[3] *Glucksberg*, 521 U.S. at 720. *See also* Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion) ("In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").
[4] *Yoder*, 406 U.S. at 232. *See also Troxel*, 530 U.S. at 66.

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The Supreme Court interrupted that tradition in 1973 by creating, in *Roe v. Wade*,[5] a right to abortion that, while supposedly also grounded in the Fourteenth Amendment, lacked *any* roots in American history or tradition. What it did have was a Supreme Court majority's conviction that, for the first time in our nation's history, a medical procedure should be a constitutional right[6] and that abortion should be much more freely available, including for minors, than the American people had ever allowed.

Roe and its progeny disrupted states' constitutional authority to regulate both medicine in general and abortion in particular, a power the states had exercised for the previous 150 years. Parental and abortion rights collided head-on in a series of cases involving state laws requiring parental notification or consent before a minor can obtain an abortion. While states may require some level of parental involvement in their child's abortion decision, the Supreme Court said, judges must be able to bypass parents altogether and authorize an abortion without their knowledge and even against their wishes.

In *Dobbs v. Jackson Women's Health Organization*,[7] the Supreme Court in 2022 overruled *Roe* and *Planned Parenthood v. Casey*,[8] its 1992 decision perpetuating the right to abortion, removing it as a constitutional competitor to parents' right to direct their children's upbringing. The parental right, however, remains in limbo with multiple state constitutions, either through amendment or interpretation, purporting to protect the abortion right. The constitutional validity of the parental bypass procedures enacted under *Roe*'s regime has thus not yet been finally adjudicated. This *Legal Report* examines parents' right to direct their children's care and upbringing before *Roe v. Wade*, while *Roe* was the controlling precedent, and since its demise.

Parental Rights Before *Roe v. Wade*

As noted above, the Supreme Court has held for more than a century that the Fourteenth Amendment protects the right of parents to direct the care and upbringing of their children. Designating this right as "fundamental" was more than rhetorical; it signaled the Court's recognition that this right is "deeply rooted in this Nation's history and tradition."[9] It is, in fact, "perhaps the oldest of the fundamental liberty interests recognized by the [Supreme] Court,"[10] with a centuries-old foundation in the common law.

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[5] 410 U.S. 113 (1973).
[6] *See* CLARKE D. FORSYTHE, ABUSE OF DISCRETION 10 (2013).
[7] 597 U.S. 215 (2022).
[8] 505 U.S. 833 (1992).
[9] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 231 (2022). *See also* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).
[10] Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion).

Common Law. Common law is "developed by judges,"[11] who establish and apply the legal principles they use to decide cases. *Stare decisis*, or following previous decisions,[12] is a central feature of common law judging because previous decisions actually constitute the law that judges use. The common law has for centuries recognized parents' responsibility and authority to direct the care and upbringing of their children.

In his work *Summa Theologica*, Thomas Aquinas wrote in the 13th century that "it would be contrary to natural justice, if a child…were to be taken away from its parents' custody, or anything done to it against its parents' wish."[13] John Locke, "whose views directly and greatly influenced the Declaration of Independence of the United States, the Bill of Rights, and the Constitution,"[14] emphasized the same principle four centuries later, arguing that parental childrearing authority precedes and is independent of political authority.[15] Locke insisted that "all parents [are], by the law of nature, under an obligation to preserve, nourish, and educate the children they [have] begotten."[16]

Locke also influenced Sir William Blackstone, "acclaimed as the prime influence for the Declaration of Independence, the United States Constitution, the reception of common law in America, and the development of American legal education."[17] Blackstone was "one of the political philosophers whose writings…were 'most familiar to the Framers.'"[18] He, too, wrote of parents' common-law duty to provide for the maintenance, protection, and education of their children.[19]

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[11] Antonin Scalia, Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, THE TANNER LECTURES ON HUMAN VALUES, March 8, 1995, at 80, https://tannerlectures.org/wp-content/uploads/2024/07/scalia97.pdf. *See also* Gamble v. United States, 587 U.S. 678,713 (2019) (Thomas, J., concurring) ("in a common-law legal system…courts systematically develop[] the law through judicial decisions apart from written law.").

[12] *See generally* Thomas Jipping and Zack Smith, Stare Decisis 101, Heritage Found. Legal Mem. No.277, Feb. 3, 2021.

[13] THOMAS AQUINAS, SUMMA THEOLOGIAE, II–II, q. 10, a. 12. *See also* Melissa Moschella, Parental Rights: A Foundational Account, HERITAGE FOUND. BACKGROUNDER No. 3568 (Dec. 9, 2020), at 4, https://www.heritage.org/sites/default/files/2020-12/BG3568.pdf.

[14] DAVID STEWART & H. GENE BLOCKER, THE FUNDAMENTALS OF PHILOSOPHY 472 (1987). *See also* RAYMOND G. GETTELL, HISTORY OF POLITICAL THOUGHT 227 (1927).

[15] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, Ch. VI, § 71 (1689). *See also* Moschella, *supra* note 15, at 4.

[16] LOCKE, *supra* note 17, Ch. VI, § 56.

[17] Dennis Nolan, Sir William Blackstone and the New Republic, 6 POL. SCI. REV. 283, 283 (Fall 1976).

[18] Sessions v. Dimaya, 584 U.S. 148, 217 (2018) (Thomas, J., dissenting), *quoting* Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power Over Foreign Affairs, 111 YALE L.J. 231, 253 (2001)). Blackstone's *Commentaries on the Laws of England* is the second-most cited work by America's founders. *See* Joseph Griffith, William Blackstone: Forgotten Inspiration for the American Founding, June 18, 2025, https://ashbrook.org/viewpoint/william-blackstone-a-forgotten-inspiration-for-the-american-founding/.

[19] BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Book 1, Ch. 16, https://avalon.law.yale.edu/18th_century/blackstone_bk1ch16.asp.

As Locke had, Professor Melissa Moschella explains that the parental right to direct the upbringing of their children is a "pre-political" right in the sense that it is "normatively prior to and independent of political authority and positive law."[20] This means that parental authority is "both *original* – not derived in any way from political authority or positive law – and *primary* (while state authority over children is secondary and subsidiary to that of parents)."[21] It flows from the source recognized by Aquinas, Locke, and Blackstone, namely, the parents' "moral obligation to care for their children by, among other things, making decisions about how best to promote their flourishing."[22]

Constitutional Law. In contrast to common law, which is made by judges in the course of deciding cases, civil law is made by the people and their elected representatives and put in writing. In a 1995 lecture, Justice Antonin Scalia explained that there is "no such thing as [federal] common law. Every issue of law I resolve as a federal judge is an interpretation of text - the text of a regulation, or of a statute, or of the Constitution."[23] Similarly, Justice Clarence Thomas has described the judicial task as "interpret[ing] and apply[ing] written law to the facts of particular cases."[24]

The role and power of judges in a civil law system are thus more constrained than their common law counterparts.[25] Judges in the two systems "look to different sources of law" when deciding cases[26] and while, as noted above, *stare decisis* is itself a component of common-law decision making, civil law judges use it as a means to the end of properly interpreting and applying written law. Nonetheless, the Constitution's Framers drew from the English common law system some of the principles that they put in writing. The 1215 Magna Carta, for example, established the right to due process and trial by a jury of one's peers.[27] The 1689 English Bill of Rights prohibited cruel and unusual punishment and protected the right to bear arms.[28] The Framers codified these rights in the Second, Fifth, Sixth, and Eighth Amendments to the Constitution.

The clear distinction between common and civil law started breaking down around the turn of the 20th century when the Supreme Court began using the Fourteenth Amendment, which prohibits states from depriving any person of life, liberty, or property without due process, in a new way. Rather than staying focused on process,

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[20] Melissa Moschella, Defending the Fundamental Rights of Parents: A Response to Recent Attacks, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 402 (2023).
[21] *Id.* at 403.
[22] *Id. See also* Moschella, *supra* note 15.
[23] Scalia, *supra* note 13, at 88. *See also* Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
[24] Gamble v. United States, 587 U.S. 678, 717 (2019) (Thomas, J., concurring).
[25] *See id.* (federal judges "operate in a system of written law in which courts need not – and generally cannot – articulate the law in the first instance.").
[26] *See id.* at 716.
[27] *See* Dave Roos, How Did Magna Carta Influence the U.S. Constitution?, Aug. 7, 2025, https://www.history.com/articles/magna-carta-influence-us-constitution-bill-of-rights.
[28] *See* Thomas T. Lewis, English Bill of Rights, EBSCO Knowledge Advantage (2022), https://www.ebsco.com/research-starters/law/english-bill-rights.

as the constitutional text does, the Supreme Court began giving substantive meaning to the word "liberty." This approach, called "substantive due process,"[29] results in courts recognizing substantive rights that do not actually appear in the Constitution's text.

Engaging in substantive due process amounts to "common-law courts [acting] in a civil law system,"[30] challenging the Framers' belief that the Constitution, as a written expression of the people's will,[31] should be "a rule for the government of *courts,* as well as of the legislature."[32] Even liberal scholars acknowledge, as Berkeley Law School Dean Erwin Chemerinsky writes, that "[t]here is no concept in American law that is more elusive and more controversial than substantive due process."[33]

The Supreme Court has conceded that "[s]ubstantive due process has at times been a treacherous field"[34] and called for "the utmost care whenever we are asked to break new ground."[35] Without limiting principles, "substantive due process is often wielded to 'disastrous ends'" that harm the democratic process and American self-government.[36] Attempting to create at least some boundaries for substantive due process, the Court has held that qualifying for fundamental substantive status requires that an unenumerated right meet two criteria: It must be "objectively, deeply rooted in this Nation's history and tradition…and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[37] A

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[29] The Supreme Court first created a substantive due process "right of the citizen to contract" in Allgeyer v. Louisiana, 165 U.S. 578, 588 (1897). The Court held that this right is among "th[ose] which are covered by the word 'liberty,' as contained in the Fourteenth Amendment." *Id.* at 590. Similarly, in Lochner v. New York, 198 U.S. 45 (1905), the Court held that a law limiting the number of hours bakers could work violated the "general right to make a contract in relation to his business [that] is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." *Id.* at 53. The Supreme Court brought this period of economic substantive due process to an end in 1937. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[30] Scalia, *supra* note 13.

[31] *See* VanHome's Lessee v. Dorrance, 2 U.S. 304, 308 (1795) ("The Constitution is fixed and certain; it contains the permanent will of the people, and is the supreme law of the land").

[32] Marbury v. Madison, 5 U.S. 137, 180 (1803) (emphasis in original).

[33] Erwin Chemerinsky, Substantive Due Process, 15 TOURO L. REV. 1501, 1501 (1999).

[34] Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

[35] Washington v. Glucksberg, 521 U.S. 702, 720 (2000). *See also* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (the Court has "reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended.").

[36] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 335–36 (Thomas, J., concurring), *citing* Gamble v. United States, 587 U.S. 678, 717 (2019) (Thomas, J., concurring).

[37] *Glucksberg*, 521 U.S. at 720-21 (internal citations omitted). Justice Thomas has argued that "'substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution.'" Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 331(2023) (Thomas, J., concurring), *quoting* Johnson v. United States, 576 U.S. 591, 607-08 (2015) (Thomas, J., concurring in judgment). *See also* McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in judgment) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.").

government infringement on such a fundamental right must survive "strict scrutiny," the most rigorous standard in American constitutional law, by being "narrowly tailored to serve a compelling state interest."[38]

The parental right to direct the care and upbringing of their children emerged in this way. In 1923, the Supreme Court held in *Meyer v. Nebraska*[39] that "liberty" in the Fourteenth Amendment includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[40] In *Meyer* and, two years later, in *Pierce v. Society of Sisters*,[41] the Court affirmed that these privileges include "the liberty of parents and guardians to direct the upbringing and education of children under their control."[42] Significantly, at the time of the Founding, the "end of education" was about more than gaining factual knowledge about certain subjects, rather it included inculcating "private and civic virtue."[43]

Echoing Locke and Moschella, the Supreme Court has observed that some freedoms, including those related to the family, are "older than the Bill of Rights,"[44] having their source "not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'"[45] While substantive due process remains controversial as an interpretive method, the right of parents to direct the care and upbringing of their children arguably meets the Supreme Court's standard for recognition better than any other unenumerated right.

One more point regarding the scope of this parental right is important for the following discussion. The fact that parents exercise the right to direct their children's upbringing, as do individuals exercising other rights, by making specific decisions or taking particular actions does not mean that the right itself is limited only to such circumstances. This argument is an attempt to minimize or limit the parental right's scope.

In *Wisconsin v. Yoder*,[46] for example, the Supreme Court held that a state law requiring school attendance until age 16 violated the First Amendment right to exercise religion by members of the Old Order Amish faith. Some have seized on

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[38] Reno v. Flores, 507 U.S. 292, 302 (1993). *See also Glucksberg*, 521 U.S. at 721.
[39] 262 U.S. 390 (1923).
[40] *Id.* at 399. *See also* Robert A. Sedler, From Blackstone's Common Law Duty of Parents to Educate Their Children to a Constitutional Right of Parents to Control the Education of Their Children, FOR. PUB. POL'Y (2006), https://files.eric.ed.gov/fulltext/EJ1098491.pdf (parents' common law duty was codified in state laws and became the basis for an unenumerated Fourteenth Amendment right of parents to direct the upbringing and care of their children.).
[41] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
[42] *Id.* at 534-35.
[43] Brief of Advancing American Freedom et al. in Support of Applicants in *Mirabelli v. Bonta*, No.25A810 (2026), at 7 (internal citations omitted).
[44] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
[45] Smith v. Org. of Foster Families, 471 U.S. 816, 845 (1977), *quoting* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).
[46] 406 U.S. 205 (1972).

language in *Yoder* referring to "the traditional interest of parents with respect to the *religious upbringing* of their children"[47] to suggest that the parental right is confined to that context. The Supreme Court, however, has rejected the idea that parents' right to direct their children's upbringing is so limited.

In *Mahmoud v. Taylor*,[48] parents from several different religious backgrounds challenged a public school policy requiring young children to participate, without their parents' knowledge, in instruction utilizing controversial materials regarding gender and sexuality. The school district argued that *Yoder* did not apply because it recognized only a narrow parental right limited to religious instruction. The Supreme Court held instead that *Yoder* "embodies a principle of general applicability."[49]

In *Mirabelli v. Bonta*,[50] parents challenged a California law excluding them from public schools' efforts to socially transition students' gender without their parents' knowledge. The district court issued a permanent injunction, concluding that it violated the parents' right to direct their children's upbringing, but the U.S. Court of Appeals for the Ninth Circuit stayed that injunction. The Supreme Court vacated the stay, allowing the injunction to take effect, noting that, just as the school district had tried to limit *Yoder* in *Mahmoud*, the Ninth Circuit had "brushed aside *Mahmoud v. Taylor*…as a 'narrow decision focused on uniquely coercive "curriculum requirements."'"[51] The Court again rejected this crabbed view of the parental right.

Parental Rights Under *Roe v. Wade*

Objectively, the Supreme Court's newly created abortion right should not have been a serious competitor to the longstanding right of parents to direct the care and upbringing of their children. The Supreme Court, after all, created the abortion right against the backdrop of what came before and, by 1973, the parental right had been grounded for centuries in the common law, explicitly recognized for decades in constitutional law, and given the highest "fundamental" status. Logically, therefore, the abortion right should have had to conform to the parental right, not vice versa.

Second, the abortion right created in *Roe* lacked any of the parental right's constitutional or historical pedigree. There had already been, as Justice Samuel Alito described in *Dobbs*, an "unbroken tradition of prohibiting abortion on pain of criminal punishment [that] persisted from the earliest days of the common law until 1973."[52] Abortion had been a crime for centuries under English common law, Blackstone writing in 1775 that abortion was "by the ancient law homicide or manslaughter."[53] An

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[47] *Id.* at 214 (emphasis added). *See also* Espinoza v. Montana Dept. of Revenue, 591 U.S. 464, 486 (2020).
[48] 606 U.S. 522 (2025).
[49] *Id.* at 558.
[50] 146 S.Ct. 797 (2026).
[51] *Id.* at 802 (internal citations omitted).
[52] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 250 (2022).
[53] *Id.* at 243.

abortion right had been as absent from the common law as a parental right had been part of it. In America, local legislatures began prohibiting abortion shortly after the turn of the eighteenth century[54] and by 1868, when the Fourteenth Amendment was ratified, "three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime….Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910."[55]

Justice Harry Blackmun, writing for the majority in *Roe*, did not claim that either common or civil law had ever recognized a *right* to abortion because he could not; no such right had ever existed. Instead, Blackmun assembled a rambling narrative regarding what he claimed was "the history of abortion,"[56] an account that extensive scholarship has since thoroughly exposed as a "radically revisionist history."[57] Even the legal team challenging the Texas abortion law in *Roe* thought that the primary basis for Blackmun's narrative, two articles by a leading abortion advocate,[58] "sometimes strained credibility."[59]

Third, while the Supreme Court had consistently grounded the parental right in the Fourteenth Amendment's Due Process Clause, Blackmun seemed unconcerned about the abortion right's constitutional connection. In theory, it was subsumed within a broader "right of privacy," which itself does not appear in the Constitution's text and lacks even a consistently recognized connection to that text. "In varying contexts," Blackmun wrote, "the Court or individual Justices have, indeed, found at least the roots of that [privacy] right" in individual provisions of the Bill of Rights, "the

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[54] *See, e.g.*, Dennis J. Horan & Thomas J. Marzen, Abortion and Midwifery: A Footnote in Legal History, in NEW PERSPECTIVES ON HUMAN ABORTION 200 (1981).
[55] *Dobbs*, 597 U.S. at 248-49.
[56] Roe v. Wade, 410 U.S. 113, 129 (1973).
[57] Stephen G. Gilles, Roe's Life-or-Health Exception: Self-Defense of Relative-Safety, 85 NOTRE DAME L. REV. 525, 541 (2010). When the Supreme Court overruled *Roe* in 2022, Justice Samuel Alito explained that "its survey of history ranged from the constitutionally irrelevant (*e.g.*, its discussion of abortion in antiquity) to the plainly incorrect (*e.g.*, its assertion that abortion was probably never a crime under the common law) [and] catalog[ed] a wealth of other information having no bearing on the meaning of the Constitution." *Dobbs*, 597 U.S. at 225-26.
[58] He relied almost exclusively on two articles by Cyril Means, at the time General Counsel of the National Association for the Repeal of Abortion Laws. *See* Cyril Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality, 14 N.Y. L.F. 411 (1968); Cyril Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Ashes of a Fourteenth-Century Common-Law Liberty? 17 N.Y. L.F. 335 (1971). Blackmun cited these articles more than any other source.
[59] *See* Justin Buckley Dyer, Constitutional Confusion: Slavery, Abortion, and Substantive Constitutional Analysis, 76 AM. J. ECON. & SOC. 33, 60 (2017). James Mohr, who authored a well-known history of abortion in America, also viewed Means' work as more advocacy than legitimate scholarship, believing that "Means…was less than convincing on several points" and his conclusions were "open to serious questions." JAMES MOHR, ABORTION IN AMERICA: THE ORIGIN AND EVOLUTION OF NATIONAL POLICY, 1800–1900 29–30 (1978). These articles have long since been "discredited." Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 252 (2022).

penumbras of the Bill of Rights" as a whole, the Ninth Amendment, or the Fourteenth Amendment's Due Process Clause.[60]

Fourth, courts have long recognized that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[61] They do not have fully developed decision-making capabilities, and "by definition, are not assumed to have the capacity to take care of themselves."[62] A "lack of maturity and an underdeveloped sense of responsibility…often result in impetuous and ill-considered actions and decisions."[63] The Supreme Court has affirmed that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. [Therefore], parents can and must make those judgments."[64]

Finally, only a few years before *Roe*, the Supreme Court reaffirmed that states can "accord minors…a more restricted right than that assured to adults."[65] This was true even though that case, *Ginsberg v. New York*, involved the enumerated First Amendment right to free speech. This established principle, combined with minors' inability to make sound judgments on significant issues and the parental right to control their children's care and upbringing, counseled a clear distinction between the right of an adult woman and that of a minor girl to choose to have an abortion.

Individually, and especially in combination, such factors outlined an abortion right for minors, if one existed at all, that was much more limited than that of adult women. States should certainly have been able to ensure that parents could exercise the same right to direct their children's care and upbringing that they could in other contexts. The Supreme Court, however, had other plans. In *Roe*, the Court simply asserted that its previously unmoored, free-floating "right of personal privacy," whatever its constitutional connection, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[66]

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[60] *Roe*, 410 U.S. at 152.
[61] *Id. See also* Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in result).
[62] Schall v. Martin, 467 U.S. 253, 265 (1984). *See also* Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage"); Roper v. Simmons, 543 U.S. 551, 569 (2005) ("juveniles are more vulnerable or susceptible to negative includes and outside pressures, including peer pressure").
[63] Johnson v. Texas, 509 U.S. 350, 367 (1993).
[64] Parham v. J. R., 442 U.S. 584, 603 (1979). *See also id.* at 602 (the "law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions"); Miller v. Alabama, 567 U.S. 460, 471 (2012), *quoting Roper*, 543 U.S. at 570. The notion of a child's traits as "less fixed" is borne out by data from a recent Dutch study that followed 2,700 adolescents for 15 years and revealed that by the age of 25, only 4 percent of the study's participants expressed any feelings of gender incongruity or dysphoria. See Pien Rawee et al., Development of Gender Non-Contentedness During Adolescence and Early Adulthood, ARCH. SEXUAL BEH. (Feb. 27, 2024), https://doi.org/10.1007/s10508-024-02817-5.
[65] *Ginsberg*, 390 U.S. at 637.
[66] Roe v. Wade, 410 U.S. 113, 153 (1973).

The Supreme Court's Parental Involvement Cases

In a dozen cases that began soon after *Roe*, the Court not only assumed, without ever establishing, that this abortion right belonged in equal measure to minors, but that, for them, it was strong enough to virtually negate the longstanding fundamental parental right to control their care and upbringing. The first several cases challenging laws requiring parental involvement in their children's abortion resulted in decisions that established a pattern for those that followed.

- First, when it acknowledged any real parental interest at all, the Supreme Court downgraded what had been a fundamental right, deeply rooted in the common law, to something far less substantive that is granted and defined by the state.

- Second, the Court re-purposed precedents, such as *Meyer* or *Pierce*, that established the parental right to instead support the abortion right.

- Third, the Court created arbitrary distinctions, such as between "mature" and "immature" minors, that further cabined any permissible requirement of parental involvement.

Following this pattern, the Supreme Court virtually neutralized the parental right, focusing almost exclusively on whether, and how, it believed minors should be able to access abortion. Reviewing these parental involvement decisions and the elements of the Supreme Court's effort to neutralize the parental right is important because, as discussed below, state supreme courts may try to replicate the result with their state constitutions.

Planned Parenthood v. Danforth.[67] In *Danforth*, decided just three years after *Roe*, the Court found unconstitutional a parental consent requirement for an unmarried minor to obtain an abortion during the first trimester. Writing for the majority as he had in *Roe*, Blackmun never acknowledged any parental right at all, using a single passing reference to *Meyer*, *Pierce*, and *Yoder* to refer only to undefined "parental *discretion*."[68] From this, the Court held that "[a]ny independent *interest* the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the *right* of privacy of the competent minor mature enough to have become pregnant."[69] The Court asserted, but made no attempt to even explain, let alone establish or justify, this critical conclusion

It is not difficult to see why. Acknowledging that parents have a fundamental right to direct their children's upbringing would have required grappling with the Court's recent holding in *Yoder* that "only those interests of the highest order and those not

[67] 428 U.S. 52 (1976).
[68] *Id.* at 73 (emphasis added).
[69] *Id.* at 75 (emphasis added).

otherwise served can overbalance legitimate claims to" such rights.[70] The parental right, the Court said then, is so significant that even "paramount responsibilit[ies]" at the "very apex of the function of a State"[71] may be insufficient to overcome it. How is a minor having an abortion without the knowledge, let alone guidance, of her parents such an interest "of the highest order"?

The Supreme Court would decide a dozen cases involving laws requiring parental involvement without ever addressing this or other critical questions. If fundamental *enumerated* rights such as freedom of speech are more limited for minors, how could their *unenumerated* right to abortion be necessarily coincident with that of adults? Why is abortion an exception to the general rule that adolescents cannot make sound judgments concerning many decisions, including their need for medical care or treatment and that, therefore, "parents can and must make those judgments"?

In *Danforth*, Blackmun sidestepped such weighty questions altogether. Instead, he simply asserted that the parental consent requirement at issue in *Danforth* did not have a "sufficient justification"[72] without offering any measure or criteria leading to this conclusion or suggesting why the Constitution compelled this result. NYU Law Professor Martin Guggenheim examined the Supreme Court's adolescent abortion decisions and observed that "[o]ne of the most striking aspects of the Court's decision [in *Danforth*] is that its holding was reached with virtually no constitutional analysis."[73] As noted above, "[a]t common law and throughout American history, parents have always had the authority to decide all important decisions for their children, including medical decisions, even without any benefit of a statute."[74] The Court's opposite suggestion in *Danforth*, Guggenheim concluded, "is nothing short of astonishing."[75]

Bellotti v. Baird. In this case, decided together with *Danforth*, a three-judge U.S. District Court found unconstitutional a Massachusetts parental consent law that required minors to seek parental consent before an abortion but allowed a judge to

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[70] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
[71] *Id.* at 213.
[72] *Danforth*, 428 U.S. at 75.
[73] Martin Guggenheim, Minor Rights: The Adolescent Abortion Cases, 30 HOFSTRA L. REV. 589, 601 (2002).
[74] *Id.* at 602.
[75] *Id. See also id.* at 604 ("Justice Blackmun got it exactly backwards even to regard the parental right as something the state gives to parents at all. Under any reasoning, these are not rights 'delegated' to parents by the state. Instead, they are rights which parents possess as bulwarks against the exercise of state power."); Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The absence of dispute [concerning the fundamental nature of the parent-child bond] reflect[s] this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); Troxel v. Granville, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting) ("the custodial parent has a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment.").

order an abortion "for good cause shown" if one or both of the parents refused to consent.[76] The Supreme Court affirmed the judgment below and held that states must provide an alternative procedure to compelling a minor to seek the consent of her parents prior to obtaining an abortion. While *Danforth* ignored the parental right, the district court in *Bellotti* openly questioned whether it existed at all. "[*E*]*ven if* it should be found that parents *may have* rights of a Constitutional dimension vis-a-vis their child that are separate from the child's, we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected."[77] As the Supreme Court had repeatedly held, of course, parents certainly do have such rights "that are separate from the child's" and the Court did not provide any justification for disregarding those binding precedents. Nor did it explain why "the present area" was significant or why, in that area, "the individual rights of the minor outweigh the rights of the parents."

Four justices at least acknowledged what the majority in *Danforth* and *Bellotti* ignored, that "the constitutional rights of minors cannot be equated with those of adults"[78] and that minors "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[79] In addition, they noted that, "deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children."[80] Those principles, well-grounded in multiple lines of Supreme Court precedent, clearly pointed toward vindicating the parental right.

These same four justices, however, failed to go where their own observations inexorably pointed. While parental consent may be required for "other choices facing a minor," they opined, "the unique nature and consequences of the abortion decision make it appropriate" to require "an alternative procedure whereby authorization for the abortion can be obtained."[81] These justices made no attempt even to identify the "nature and consequences" they found dispositive or explain why they mandated that an "alternative procedure" be provided that can bypass parents.

The nature and consequences of the abortion decision are, indeed, unique, but in ways that counsel *more* parental involvement, not *less*. Even in *Roe*, for example, the Supreme Court conceded that the presence of the unborn child makes abortion "inherently different"[82] from other privacy rights.[83] Justice Samuel Alito would make this point more directly in *Dobbs*:

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[76] Bellotti v. Baird, 428 U.S. 132, 135 (1976).
[77] Baird v. Bellotti, 393 F.Supp. 847, 857 (D. Mass. 1975) (three-judge panel) (emphasis added).
[78] Bellotti v. Baird, 443 U.S. 622, 634 (opinion of Powell, J.).
[79] *Id.* at 635.
[80] *Id.* at 638.
[81] *Id.* at 643 (1979). This alternative procedure would allow a minor to demonstrate that she is "mature enough and well enough informed to make her abortion decision…independently of her parents' wishes [or that] the desired abortion would be in her best interest." *Id.* at 643-44.
[82] Roe v. Wade, 410 U.S. 113, 159 (1973).
[83] *See also* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 257 (2022).

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion is different because it destroys what *Roe* termed "potential life" and what the law challenged in this case calls an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion.[84]

In *Bellotti*, the Supreme Court held that, to be constitutional, a parental involvement requirement must be accompanied by a judicial process that can bypass parents altogether.[85] Judicial authorization may be granted if a pregnant minor demonstrates either "(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests."[86] Further, the bypass proceeding must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained."[87]

H.L. v. Matheson.[88] While *Danforth* and *Bellotti* involved statutes requiring parental consent, this case challenged a Utah statute requiring notice to parents, "if possible," before an unemancipated, dependent minor could obtain an abortion. While the Court upheld this notice requirement, it characterized parents as having not a constitutional right, but a mere "'guiding role',"[89] in their own children's upbringing. The Court described this role in purely functional terms, allowing parents "to supply essential medical and other information to a physician."[90]

The Supreme Court also added a new element to the already confused analysis of parental involvement statutes. In *Bellotti*, the Court held that a judicial determination that a minor is mature could negate a parental consent requirement. In *Matheson*, the Court suggested that even parental notice could not be required for "mature" minors. Despite this distinction's obvious importance, the Court neither attempted to connect these categories to the Constitution nor offered any guidance for determining maturity, leaving this entirely to the subjective discretion of judges.

Akron v. Akron Center for Reproductive Health.[91] *Danforth*, *Bellotti*, and *Matheson* established the first element of the pattern in these parental involvement cases by downgrading the fundamental right of parents to control their children's care and upbringing to mere functional discretion granted and defined by the state. The Supreme Court's 1983 decision in *Akron*, which invalidated a parental consent

[84] *Id.*
[85] *Bellotti*, 443 U.S. at 643 (1979).
[86] *Id.* at 643-44.
[87] *Id.*
[88] 450 U.S. 398 (1981).
[89] *Id.* at 411, quoting *Bellotti*, 443 U.S. at 637.
[90] *Id.*
[91] 462 U.S. 416, 427 (1983).

requirement for minors under the age of 15, provided the next element. Remarkably, the Court took the precedents establishing the parental right and re-directed them to instead support what would neutralize that same right.

Recall the Supreme Court's holding in *Meyer* that the Fourteenth Amendment protects "those privileges *long recognized at common law* as essential to the orderly pursuit of happiness by free men"[92] and its holding in *Pierce* that these privileges include "the liberty of parents and guardians to direct the upbringing and education of children under their control."[93] In *Akron*, however, the Supreme Court pointed those same precedents in a very different direction. Detaching *Meyer* and *Pierce* from their factual context, the Court lumped them together with others, including *Roe v. Wade* itself, for the vague proposition that the Constitution protects "an individual's 'freedom of personal choice in matters of marriage and family life'"[94] including abortion.

This was a stunning jurisprudential transformation. Acknowledging precedents such as *Meyer*, *Pierce*, *Prince*, or *Yoder* for their actual holdings or applications would mean the parental right would limit the abortion right. Instead, when the Court cited them at all, it claimed that these parental right precedents instead supported the right of minors to obtain an abortion without their parents' knowledge or consent. When overruling *Roe* and *Casey* four decades after *Akron*, the Court rejected this distorted analysis which, "at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like."[95]

Hodgson v. Minnesota.[96] This case challenged a state law requiring a minimum of 48 hours' notice to both parents for a minor to obtain an abortion. The Court invalidated this requirement and introduced yet another way of compromising the fundamental right of parents to direct their children's care and upbringing. "[B]iological parentage,"[97] the Court said, creates only "'*an opportunity*…to develop a relationship with his offspring.'"[98] The "assumption of personal, financial, or custodial responsibility *may* give the natural parent a stake in the relationship with the child rising to the level of a liberty interest."[99] The Court never explained how a centuries-old common law and constitutional parental right suddenly became nothing more than an opportunity defined, as well as granted or withheld, by the state. It did not suggest how judges should assess "personal, financial, or custodial responsibilit[ies]" to determine whether they are sufficient to "give the natural parent a stake in the relationship with the child" or just what that "stake" would be. Nor did the Court define its passing reference to a "natural" parent or address the obvious implication

[92] Meyer v. Nebraska, 262, U.S. 390, 399 (1923).
[93] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).
[94] *Akron*, 462 U.S. at 427, quoting Roe v. Wade, 410 U.S. 113, 169 (1973).
[95] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 257 (2022).
[96] 497 U.S. 417 (1990).
[97] *Id.* at 446.
[98] *Id.*, quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983) (emphasis added).
[99] *Id.* (emphasis added).

that adoptive parents might lack even these weak, limited, and insubstantial interests.

These, then, were the essential elements of the Supreme Court's plan for neutralizing the fundamental right of parents to direct their children's care and upbringing in the abortion context. The Court's subsequent parental involvement cases followed the same pattern, either ignoring the Supreme Court's parental right precedents altogether[100] or using them instead to support the abortion right. The Court implemented its fictional abortion right through a contrived bypass procedure[101] that arbitrarily distinguished between parental consent and notification as well as the involvement of one versus two parents,[102] and gave judges virtually unlimited power over what had once been deemed a fundamental parental right.

Parental Rights After *Dobbs*

Today, 39 states have laws requiring some degree of parental involvement in a minor child's abortion decision: 23 require consent (20 of one parent, three of both); nine require notification of one parent; and seven require both consent and notification (six of one parent, one of both).[103] Of these 39 states, 38 provide for a judge to

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[100] *See, e.g.*, Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990); Lambert v. Wicklund, 520 U.S. 292 (1997). In Carey v. Population Services, 431 U.S. 678 (1977), the Supreme Court found unconstitutional a New York statute prohibiting the sale or distribution of contraceptives by "any person" to minors under the age of 16. As in *Danforth*, the Court never acknowledged the parental right to direct the care and upbringing of children and four justices would actually have extended to contraception *Danforth*'s erroneous reasoning that the state grants parental discretion and, therefore, may decide how to restrict it.

[101] *Compare Ashcroft*, 462 U.S. 476 (upholding a one-parent consent law for having a sufficient judicial bypass process), *with Akron v. Akron Ctr. for Reprod. Health, Inc*, 462 U.S. 416 (1983) (striking down a one-parent consent law because the judicial bypass option did not meet *Bellotti*s standards).

[102] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 946–47 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

[103] Ala. Code §§ 26-21-1 to -8 (2014); Alaska Stat. § 18.16.020 (2022), *enjoined by Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122 (Alaska 2016); Ariz. Rev. Stat. Ann. § 36-2152 (2021); Ark. Code Ann. §§ 20-16-801 to -817 (2015); Colo. Rev. Stat. §§ 13-22-701 to -708 (2018); Del. Code Ann. tit. 24 §§ 1780 to 1789B (1995); Ga. Code Ann. §§ 15-11-680 to -688 (2013); Fla. Stat. § 390.01114 (2020); Idaho Code § 18-609A (2015); Ind. Code § 16-34-2-4 (2022); Iowa Code §§ 135L.1 to .8 (2023); Kan. Stat. Ann. § 65-6705 (2014); Ky. Rev. Stat. Ann. § 311.732 (2022); La. Stat. Ann. § 40:1061.14 (2022); Md. Code Ann., Health-Gen. § 20-103 (2022); Mass. Gen. Laws ch. 112 § 12R (2021); Mich. Comp. Laws §§ 722.901 to .908 (1991); Minn. Stat. § 144.343 (2020) *enjoined by Doe v. Minnesota*, No. 62-CV-19-3868 (Minn. Dist. Ct. July 11, 2022); Miss. Code Ann. §§ 41-41-51 to -63 (1986); Mo. Rev. Stat. § 188.028 (2019); Mont. Code Ann. §§ 50-20-501 to -511 (2013), *enjoined by Planned Parenthood of Mont. v. State*, 554 P.3d 153 (Mont. 2024); Neb. Rev. Stat. §§ 71-6901 to -6911 (2011); Nev. Rev. Stat. § 442.255 (1985); N.H. Rev. Stat. Ann. §§ 132:32 to :36 (2012); N.J. Stat. Ann. §§ 9:17A-1.1 to .12 (1999), *enjoined by Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000); N.C. Gen. Stat. §§ 90-21.6 to .10 (2023); N.D. Cent. Code §§ 14-02.1-03 to -03.1 (2023); Ohio Rev. Code § 2919.121 (2012); Okla. Stat tit. 63, §§ 1-740 to -740.6 (2022); Okla. Stat. tit. 63, §§ 1-744 to -744.6 (2013) 18 Pa. Cons. Stat. § 3206 (1992); R.I. Gen. Laws § 23-4.7-6 (1982); S.C. Code Ann. §§ 44-41-31 to -37 (1990); S.D. Codified Laws § 34-23A-7 (2005); Tenn. Code Ann. §§ 37-10-301 to -308 (1988); Tex. Fam. Code §§ 33.001 to .014 (2017) and Tex. Occ. Code § 164.052(a)(19) (2023); Utah Code Ann. §§ 76-7-304 to -304.5 (2023); Va. Code Ann. § 16.1-241(W) (2024); W. Va. Code §§ 16-2F-1 to -9 (2017); Wis. Stat. § 48.375 (2022).

authorize bypassing parents (one for a maturity showing, two for a best interest finding, and the remaining 35 for either) and one allows abortion providers to bypass parents for either reason. While the parental involvement laws would exist without *Roe v. Wade*, current parental bypass provisions did not exist prior to *Roe* and consistently follow the Supreme Court's requirements in *Bellotti v. Baird*.

In *Dobbs*, however, the Court conceded that this abortion right never actually existed. *Roe v. Wade*, the Court held, "was 'egregiously wrong' on the day it was decided"[104] and, therefore, never provided a legitimate basis for all that followed, including such "damaging consequences"[105] as the degradation of the parental right to control the care and upbringing of children. Overruling *Roe* and *Casey*, therefore, left intact all that the Supreme Court had otherwise held regarding this parental right.

Significantly, while attempting to neutralize the parental right in the abortion context, the Supreme Court was strengthening it elsewhere. Its decision in *Troxel v. Granville*[106] is instructive. A Washington state statute permitted "[a]ny person" to petition a superior court for visitation rights "at any time" and authorized the court to grant such rights whenever "visitation may serve the best interest of the child."[107] The Washington Supreme Court held that this statute interfered with "the fundamental right of parents to rear their children"[108] by giving judges unconstrained authority to completely displace parents' view of what is in their children's best interest.

The U.S. Supreme Court voted 6-3 to affirm the Washington Supreme Court's judgment. Joined by three colleagues, Justice Sandra Day O'Connor explained in her plurality opinion why the "breathtakingly broad" statute unconstitutionally infringed the "fundamental right of parents to make decisions concerning the care, custody, and control of their children."[109] A visitation petition by "any person" automatically placed the matter "solely in the hands of the judge" and "a parent's decision that visitation would not be in the child's best interest is accorded no deference."[110] The outcome is, therefore, "based solely on the judge's determination of the child's best interests"[111] without any necessary regard for the parents' views or wishes. The parental right may have been labeled "fundamental" but, under this statute, it could be entirely set aside by nothing more than a judge's "mere disagreement."[112]

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[104] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 269, *quoting* Ramos v. Louisiana, 590 U.S. 83, 121 (2020) (Kavanaugh., J., concurring in part).
[105] *Id.* at 231.
[106] 530 U.S. 57 (2000) (plurality opinion).
[107] *Id.* at 60.
[108] *Id.* at 63.
[109] *Id.* at 66.
[110] *Id.* at 67.
[111] *Id.*
[112] *Id.* at 68.

Roe v. Wade and its parental involvement progeny had given judges the same unfettered discretion to authorize abortions for minors "based solely on [their] determination of the child's best interest." They were not required to give any deference to parents' wishes, but could prevent them from even knowing that their child was aborting their grandchild. Overruling *Roe* removed this aberration so that, at least in theory, the parental right has the same force and resonance in the abortion context as in any other. In practice, however, *Roe*'s "damaging consequences" linger with state laws that condition parental involvement on judicial permission.

In *Dobbs*, the Supreme Court held that because "procuring an abortion is not a fundamental constitutional right," abortion restrictions have a "'strong presumption of validity'…[and] must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[113] As this analysis has explained, as a fundamental right, directing the care and upbringing of children requires "interests of the highest order and those not otherwise served [to] overbalance legitimate claims to" that right.[114] This more than suffices to justify, with only narrow compelling exceptions, state laws requiring parental involvement in their children's abortion decision.

State Constitutional Protection of Abortion

Each state has its own constitution and, in every state but Delaware, the voters must approve constitutional amendments proposed either by the legislature or citizen petition.[115] Three states require a supermajority to amend their state constitution,[116] and the rest require a simple majority. Anticipating that the Supreme Court would overrule *Roe v. Wade*, abortion advocates began promoting state constitutional amendments to explicitly protect abortion. Voters started doing so in the 2022 election.

[113] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 300-01 (2022), quoting Heller v. Doe, 509 U.S. 312, 319 (1993).
[114] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
[115] *See generally* John Dinan, Constitutional Amendment Processes in the 50 States, July 24, 2023, https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states ("Every state but Delaware requires legislature-crafted amendments to be approved by voters. Amendments in Delaware take effect once they are approved by a two-thirds legislative vote in consecutive sessions.").
[116] *Id.* (two-thirds in New Hampshire, three-fifths in Florida, and 55 percent Colorado).

The constitutions of Arizona,[117] Colorado,[118] and Montana[119] now have provisions protecting a "right to abortion" while those of Michigan,[120] California,[121] Vermont,[122] Ohio,[123] Maryland,[124] and Missouri[125] protect an even broader right to "reproductive freedom" or "reproductive autonomy." These provisions apply to a "person" or an "individual," eliminating any distinction between adults and minors, and treat this right as fundamental, requiring that any restriction be the "least restrictive means" to achieve a "compelling state interest" or purpose.[126]

In ten states with constitutions that lack an explicit abortion or reproductive rights provision, the highest court has interpreted other constitutional provisions regarding due process,[127] equal protection,[128] a right to privacy[129] or personal autonomy,[130] or a right to make health care decisions[131] as doing so. In this way, state courts have upheld a parental notification requirement in Illinois and a parental consent requirement in Mississippi[132] but struck down parental notification laws in Alaska,

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[117] Ariz. Const., art. II, §8.1 ("Every individual has a fundamental right to abortion…before fetal viability").
[118] Colo. Const., art. II, §32.
[119] Mont. Const., art. II, §32 ("There is a right to make and carry out decisions about one's own pregnancy, including the right to abortion.").
[120] Mich. Const., art. I, §28.
[121] Cal. Const., art. I, §1.1.
[122] Vt. Const., ch. I, art. 22.
[123] Ohio Const., art. I, §22.
[124] Md. Const., Decl. of Rights, art. 48.
[125] Mo. Const., art. I, §36.1.
[126] *See, e.g.*, Ariz. Const., art. II, §8-1.1(A)(1); Mich. Const., art. I, §28(1). The New York constitution protects abortion in a different way, providing that person, institution, governmental state or the state may discriminate against the "pregnancy outcomes, and reproductive healthcare and autonomy" of a "person". N.Y. Const. art. I, § 11. Like other states with constitutional protection for abortion, New York does not distinguish between adults and minors.
[127] *See, e.g.*, Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745 (Ill. 2013); Moe v. Sect'y of Adm. & Finance, 417 N.E.2d 387 (Mass. 1981); Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 653–54 (Miss. 1998); Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 774 (S.C. 2023), *abrogated by* Planned Parenthood S. Atl. v. State, 892 S.E.2d 121, 131 (S.C. 2023); Washington v. Koome, 530 P.2d 260, 263 (Wash. 1975). In *Koome*, the Washington Supreme Court analyzed state due process requirements in lockstep with *Roe*'s analysis of the Fourteenth Amendment. 530 P.2d at 266. Accordingly, the *Dobbs* decision's overturn of *Roe* unsettled the *Koome* decision. Likewise, a Mississippi chancery court has called into question whether the *Fordice* decision is still good law. Jackson Women's Health Org. v. Dobbs, No. 25CH1:22-cv-739, slip op. at 6 (Miss. Ch. Ct. July 5, 2022) ("Since *Roe* and *Casey* are no longer the law of the land . . . it is more than doubtful that the Mississippi Supreme Court will continue to uphold *Fordice*.").
[128] *Koome*, 530 P.2d at 909–10.
[129] *See, e.g.*, Valley Hosp. Ass'n v. Mat-Su Coalition, 948 P.2d 963 (Alaska 1997); Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).Before voters added an explicit constitutional provision protecting the right to "reproductive freedom," the California Supreme Court interpreted the state constitution to protect a right to abortion. People v. Belous, 458 P.2d 194 (Cal. 1969). Similarly, the Montana Supreme Court had interpreted the state constitution's privacy provision to cover abortion. Armstrong v. State, 989 P.2d 364 (Mont. 1999).
[130] *See, e.g.*, Hodes & Nauser v. Schmidt, 44 P.3d 461 (Kansas 2019).
[131] *See, e.g.*, State v. Johnson, 2026 WL 34906 (Wyo. 2026).
[132] *Hope Clinic for Women*, 991 N.E.2d 745; *Fordice*, 716 So. 2d 645.

Minnesota, and New Jersey, as well as parental consent laws in California, Montana, and Washington.[133] Courts in these states will likely conclude that their constitutions require judicial authority to bypass parents. Abortion advocates will no doubt hope that, at least in these states, this will once again neutralize the parental right and remove parents as potential obstacles to minors obtaining abortions. That hope may be misplaced.

Roe v. Wade pitted two federal constitutional rights against each other. For the reasons discussed above, the parental right should have taken precedence over the abortion right from the start. With *Roe* overruled, the conflict is now between the U.S. and state constitutions. Under the Supremacy Clause, however, the U.S. Constitution is the "supreme Law of the Land…any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[134] This means that, like statutes, state constitutional provisions must be consistent with the U.S. Constitution, including the fundamental right of parents to direct their children's care and upbringing.

The Supreme Court has, in fact, found that state constitutional provisions violated the U.S. Constitution.

- California voters in 1964 amended their state constitution to prohibit the state or any local government from limiting the right of any person "to sell, lease or rent," or decline to do so, "to such person or persons as he, in his absolute discretion, chooses."[135] In *Reitman v. Mulkey*,[136] the Supreme Court held that this constitutional provision violated the Fourteenth Amendment's Equal Protection Clause.[137]

- Colorado voters in 1992 amended their constitution to prohibit the state or any local government from granting any "minority status, quota preferences, protected status or claim of discrimination" on the basis of "homosexual, lesbian, or bisexual orientation."[138] In *Romer v. Evans*,[139] the Supreme Court held that this provision also violated the Fourteenth Amendment's Equal Protection Clause.

- The Montana Constitution has a longstanding provision prohibiting "any direct or indirect appropriation or payment from any public fund or monies…for any

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[133] *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122 (Alaska 2016); *Doe v. Minnesota*, No. 62-CV-19-3868 (Minn. Dist. Ct. July 11, 2022); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997); *Planned Parenthood of Mont. v. State*, 554 P.3d 153 (Mont. 2024); *Koome*, 530 P.2d 260.
[134] U.S. Const., art. VI, cl.2.
[135] Reitman v. Mulkey, 387 U.S. 369, 371 (1967).
[136] 387 U.S. 369 (1967).
[137] *Id.* at 381.
[138] Romer v. Evans, 517 U.S. 620, 624 (1996).
[139] 517 U.S. 620 (1996).

> sectarian purpose" or to aid any religious institution.[140] The state revenue department interpreted this to prohibit parents from using tuition-assistance tax credits for education at religious schools. The Supreme Court held that this violated the First Amendment's Free Exercise Clause[141]

During the 1960s, scholars began speculating about how the U.S. Constitution might be interpreted to protect abortion rights,[142] and the Supreme Court adopted some of those arguments in *Roe v. Wade*.[143] As concern grew that the Supreme Court might overrule *Roe*, scholars turned their attention to state constitutions, developing theories and arguments that might be used in state court.[144] But while state constitutions may exceed the protection for certain rights granted by the U.S. Constitution, they may not provide less. This means that state constitutions may not, explicitly or by interpretation, undermine the fundamental right of parents to direct their children's upbringing protected by the Fourteenth Amendment.

Asserting Parental Rights in Litigation

Dobbs recognized that the U.S Constitution does not protect a right to obtain an abortion and returned the abortion issue to the people and their elected representatives.[145] In doing so, the parental right that the Supreme Court had previously held is protected by the Fourteenth Amendment no longer must compete against the abortion right for federal constitutional protection. Still, the statutory provisions that allow judges to bypass parents, mandated by the Supreme Court's parental involvement decisions, remain, and abortion advocates may claim separate support for them in state constitutions. Nonetheless, overruling *Roe* has opened the door for parents' fundamental right to care for their minor daughters to again take its proper place. Two decisions, from Florida and Montana, are examples of how the parental right might be raised in litigation and how state courts might respond.

Doe v. Uthmeier. Constitutional developments regarding parental and abortion rights in Florida have been strikingly similar to those on the federal level. The Florida Supreme Court held in 1974 that the Florida Constitution's protection for the "the right to enjoy and defend life and liberty [and] to pursue happiness"[146] includes parents' "fundamental right to make decisions concerning the care, custody, and

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[140] Mont. Const., art. X, § 6(1).
[141] Espinoza v. Montana Dept. of Revenue, 591 U.S. 464 (2020).
[142] *See, e.g.*, Roy Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. REV. 730 (1968).
[143] *See supra* notes 60-61 and accompanying text.
[144] *See, e.g.*, Kimberly A. Chaput, Abortion Rights Under State Constitutions: Fighting the Abortion War in the State Courts, 70 OR. L. REV. 593, 593 (1991); Linda J. Wharton, Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions, 15 WM. & MARY J. WOMEN & L. 469 (2009); Dawn Johnson, State Court Protections of Reproductive Rights: The Past, the Perils, and the Promise, 29 COLUM. J. GENDER & L. 41(2015).
[145] Dobbs v. Jackson Women's health Organization, 597 U.S. 215, 292 (2022).
[146] Fla. Const., art. I, § 2.

control of their children."[147] Then it held in 1989 that the constitution's protection for the "right to be let alone"[148] included a right to abortion.[149] Finally, in 2024, the court overruled that abortion precedent,[150] leaving the previously established parental right unobstructed.[151]

Like many states, Florida[152] requires written parental consent for a minor to obtain an abortion during the six weeks that it is legal in the state.[153] Another statute, a holdover from when *Roe v. Wade* was the controlling precedent, authorizes a judicial waiver of this consent requirement if a judge finds, "by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy"[154] or that notifying a parents is "not in the best interest of the [minor]."[155]

In *Doe v. Uthmeier*,[156] a lower state court denied a minor's request to have an abortion without her parents' knowledge or consent. On appeal, the Attorney General of Florida intervened as a party and argued that "Florida's process for maturity and best-interest waivers conflicts with the constitutional rights of pregnant minors' parents."[157] In his brief, as we do in this paper, the Attorney General described the "rich common-law tradition of empowering parents to order their children's affairs"[158] as well as the Supreme Court's parental rights precedents, including its holding that "this parental right is implicated in the context of a child's 'need for medical care or treatment.'"[159]

The Florida Court of Appeals held that the parental bypass statute violated a parent's right "to be informed and to make medical decisions, including abortion decisions,

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[147] Grissom v. Dade County, 293 So.2d 59, 62 (Fla. 1974).
[148] Fla. Const., art. I, § 23.
[149] In re T.W., 551 So.2d 1186 (Fla. 1989).
[150] Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So.3d 67 (Fla. 2024).
[151] To be sure, the Florida Supreme Court has interpreted the state constitution regarding the abortion right and the parental right that are difficult to reconcile. It held in 1974 that the constitution's protection for the "the right to enjoy and defend life and liberty, to pursue happiness," Fla. Const., art I, § 2, includes parents' "fundamental right to make decisions concerning the care, custody, and control of their children." Grissom v. Dade County, 293 So.2d 59, 62 (Fla. 1974). *See also* D.M.T. v. T.M.H., 129 So.3d 320, 335-36 (Fla. 2013). Then it held in 1989 that the constitution's protection for the "right to be let alone," Fla. Const., art. I, § 23, included a right to abortion. In re T.W., 551 So.2d 1186 (Fla. 1989). While it did overrule the latter interpretation in 2024, Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So.3d 67 (Fla. 2024), courts in other states may have to contend with precedents that similarly appear to work against each other.
[152] From 1868 to 1972, Florida law prohibited abortion of "a quick child…unless necessary to preserve the life of the mother." Shortly after the Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), holding that "the Constitution does not confer a right to abortion,"
[153] Fla. Stat. §390.01114(4)-(5) (2025).
[154] *Id.* at §390.01114(6)(c).
[155] *Id.* at §390.01114(6)(d).
[156] 407 So.3d 1281 (Fla. Ct. App. 2025).
[157] *Id.* at 1289.
[158] *Id.*
[159] *Id.*, quoting Parham v. J.R., 442 U.S. 584, 603 (1979).

for his or her child."[160] Responding to the minor's assertion that her "state and federal constitutional rights to obtain an abortion" require such judicial waiver procedures, the court concluded that "[w]hatever asserted constitutional abortion rights may have justified Florida's judicial-waiver regime in the past unequivocally have been repudiated by both the U.S. Supreme Court and the Florida Supreme Court."[161] Finally, "even if [the Florida Constitution] requires the judicial-waiver process that the Legislature has enacted…any such requirement must yield to the Fourteenth Amendment's demands."[162]

Planned Parenthood v. State.[163] The parental right could also be raised when a state defends a parental involvement statute itself rather than its application. In this case, even though Montana's parental consent statute included a judicial waiver provision,[164] Planned Parenthood challenged the statute itself under the state constitution's protection of "[t]he right of individual privacy."[165] The Montana Supreme Court held in 1999 that this includes "a woman's right of procreative autonomy."[166]

The court first extended this right to minors,[167] citing the separate constitutional guarantee that the "rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons."[168] The court found the statute unconstitutional by treating the parental right in the same manner as the U.S. Supreme Court had in its earlier parental involvement cases.

The court reconfigured both the parental right and the state's interest. The parents' "fundamental rights in the custody, care, and control of their children"[169] became a simple "right to parent."[170] The court then reframed the state's interest from protecting the parental right as the U.S. Supreme Court had long recognized it to the

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[160] *Id.* at 1291.
[161] *Id.* at 1290. The court certified to the Florida Supreme Court this "question of great public importance": "Do the maturity and best-interest judicial waiver procedures [in Florida statute] comport with the rights of the pregnant minor petitioner's parent(s) under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?" *Id.* at 1290-91.
[162] *Id.* at 1291.
[163] 554 P.3d 153 (Mont. 2024).
[164] *Id.* at 162.
[165] Mont. Const., art. 2, § 10.
[166] Armstrong v. State, 989 P.2d 364, 370 (Mont. 1999). Just three months after *Planned Parenthood v. State*, Montana voters amended their state constitution, which now provides: "There is a right to make and carry out decisions about one's own pregnancy, including the right to abortion. This right shall not be denied or burdened unless justified by a compelling government interest achieved by the least restrictive means." Mont. Const., art. 2, § 36(1).
[167] Planned Parenthood of Montana v. State, 554 P.3d 153, 158 (Mont. 2024).
[168] Mont. Const., art. 2, § 15.
[169] *Armstrong*, 989 P.3d at 171.
[170] *Id.* Even worse, the court characterized "any parental right that exists within this framework [as] a right to parent free from state interference, not a right to enlist the state's powers to gain greater control over a child or to make it more difficult for a minor to exercise their fundamental rights." *Id.*

"promotion of healthy families."[171] Changing these essential elements allowed the court to sidestep the Supreme Court's parental rights precedents, the requirements of strict scrutiny, and the U.S. Constitution's Supremacy Clause and to substitute its own subjective opinion about these matters.

The U.S. Supreme Court has held, however, that strict scrutiny analysis must be based on the interest that the state has actually asserted, not a substitute that the court creates to facilitate its preferred outcome.[172] Here, Montana described its interest, using the Supreme Court's description of the parental right, as protecting their "fundamental right to direct the care, custody, and control of their children."[173] *That* interest would carry with it the fact that "our society and [the Supreme] Court's jurisprudence have always presumed [parents] to be the preferred and primary custodians of their minor children."[174]

Even on the Montana Supreme Court's terms, however, generalizations regarding parenting and "healthy families" should still have carried the presumption that, as the U.S. Supreme Court has repeatedly held, parents "act in the best interests of their children."[175] In other words, there should be at least a rebuttable presumption in favor of parents' views about parenting and healthy families. Instead, the court based its conclusion solely on its own subjective opinion without, of course, explaining why the state constitution necessarily compelled that the court's view take precedence over the parents'.

Properly applying the parental right that the Supreme Court has actually recognized and conducting a legitimate strict scrutiny analysis of the interest that the state has actually asserted, a court should find unconstitutional provisions that give judges unconstrained authority to bypass parents. Even if a state supreme court holds that the state constitution requires such bypass procedures, they would likely fail strict scrutiny analysis under the Fourteenth Amendment.

Vindicating parents' right to direct their children's upbringing easily meets the first requirement of strict scrutiny. It is indeed a compelling state interest; this is why the Supreme Court's parental involvement decisions, and state court decisions such as *Planned Parenthood v. Montana*, barely, if at all, attempt to address it as such.

Parental-bypass statutes also fail the "narrowly tailored" requirement of strict scrutiny in multiple ways. First, they give judges unlimited authority to, on the basis only of their subjective opinion about vague criteria such as "best interest," completely supplant any parent's involvement. That is not tailored at all, let alone narrowly so. Second, they make no distinction between the fit parents who, as the

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[171] *Id.*
[172] *See, e.g.,* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735–36 (2007); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310–11 (2013).
[173] Planned Parenthood of Montana v. State, 554 P.3d 153,163 (Mont. 2024).
[174] Reno v. Flores, 507 U.S. 292, 310 (1993) (citing Parham v. J.R., 442 U.S. 584, 602–03 (1979)).
[175] Troxel v. Granville, 530 U.S. 57, 68 (2000).

Supreme Court has repeatedly recognized, are presumed to "act in the best interests of their children"[176] and those who might be unfit. Third, recent state constitutional provisions protecting the right of any "person" or "individual" to "reproductive freedom" eliminate any distinction between adults and minors, directly contradicting Supreme Court precedents recognizing that fundamental distinction, an important one inextricably tied to both the presumption mentioned above and the overall right of parents to direct their children's upbringing.

Asserting Parental Rights Through State Legislation

Overruling *Roe* and *Casey* and clarifying that the U.S. Constitution "does not confer a right to abortion"[177] removed it as an obstacle to asserting parental rights in litigation. In states that do not, explicitly or by interpretation, protect that right in their constitutions, *Doe v. Uthmeier* shows how the parental right can prevail over laws allowing judges to bypass parents. Where state constitutions do protect that right, *Planned Parenthood v. State* suggests that litigation may prove more challenging.

The Supreme Court's directive in *Dobbs* to "heed the Constitution and return the issue of abortion to the people's elected representatives"[178] opened another path for asserting the right of parents to direct their children's upbringing. American legislatures have long used their constitutional authority to protect human life and now have more freedom to do so while also supporting parents.

Parental Bill of Rights. One legislative option is, as Florida and 17 other states have done, enacting a *parental bill of rights*. Arizona's statute is typical, declaring that "[t]he liberty of parents to direct the upbringing, education, health care and mental health of their children is a fundamental right."[179] It requires that government infringements on this right be justified by a "compelling governmental interest…of the highest order [that is] narrowly tailored and is not otherwise served by a less restrictive means."[180] In 14 other states, courts have recognized the fundamental right of parents to direct their children's upbringing[181] and applied either strict scrutiny[182] or a presumption in favor of fit parents.[183]

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[176] Troxel v. Granville, 530 U.S. 57, 68 (2000).
[177] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 292 (2022).
[178] *Id.* at 232.
[179] Ariz. Rev. Stat. §1-601(A). *See also*, Ariz. Rev. Stat. § 1-601; Punsly v. Ho, 87 Ca.App.4th 1099 (2001); Nev. Rev. Stat. Ann. § 126.036; Code of Va. § 1-240-1; Wyoming Stat. § 14-2-206.
[180] *Id.* at §1-601(B). *See also* Kan. Stat. Ann. § 38-141.
[181] *See, e.g.*, Co. Rev. Stat. § 13-22-107(1)(a)(III); Spiker v. Spiker., 708 N.W.2d 347 (Iowa 2006).
[182] *See, e.g.*, Treacy v. Municipality of Anchorage, 91 P.3d 252 (Alaska 2004); Roth v. Weston, 789 A.2d (431) (Conn. 2002); Doe v. Doe, 172 P.3d 1067 (Hawaii 2007); In re R.C., 745 N.E.2d 1233 (Ill. 2001); Rideout v. Riedeau, 761 A.2d 291 (Maine 2000); Hamit v. Hamit, 715 N.W.2d 512 (Neb. 2006); Re R.A., 891 A.2d 564 (N.H. 2005); Moriarty v. Bradt, 827 A.2d 203 (N.J. 2003); Schmehl v. Wegelin, 927 A.2d 183 (Penn. 2007)
[183] *See, e.g.*, Graham v. Matheny, 346 S.W.3d 273 (Ark. 2009); In re Reese, 227 P.3d 900 (Colo.Ct.App. 2010); McDermott v. Dougherty, 869 A.2d 751 (Md. 2005); In re Welfare of C.S., 225 P.3d 953 (Wash., 2010); Barstad v./ Frazier, 348 N.W.2d 479 (Wis. 1984).

The recent addition, noted above, of state constitutional provisions protecting a broad right to "reproductive freedom" creates possible tension in states that also protect parental rights. Maryland courts, for example, presume that parents act in the best of their children and have held that this presumption can be overcome only by demonstrating that parents are unfit or in "exceptional circumstances."[184] But the Maryland Constitution now protects the "fundamental right to reproductive freedom" of "every person," which presumably includes minors, and requires that state action that even indirectly burdens this right meet the requirements of strict scrutiny.[185] Michigan law declares that "[i]t is the natural, fundamental right of parents and legal guardians to determine and direct the care…of their children."[186] At the same time, the Michigan Constitution now declares that "[e]very individual has a fundamental right to reproductive freedom.[187] This, too, presumably includes minors.

In these and other states, courts will no doubt be sorting out whether, or how, the parental and abortion rights protected by state law coexist. That said, state constitutional provisions and statutes must yield to the U.S. Constitution, which means that however state courts balance different state law authorities, the Fourteenth Amendment right of parents to direct their children's upbringing must prevail.

Repealing or Amending Parental Bypass Statutes. In *Dobbs*, the Supreme Court held that "rational-basis review" rather than strict scrutiny is the standard for state abortion regulations. Under this deferential standard, "[a] law regulating abortion…is entitled to a 'strong presumption of validity'"[188] and "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[189] This gives legislatures wide latitude to amend, or even repeal, the parental-exclusion provisions that the Supreme Court once said were necessary.[190]

States might, for example, tailor their procedures to further compelling policy objectives. Based on a presumption that fit parents make decisions in their children's best interest, a state could require evidence that a parent is unfit or has engaged in physical or sexual abuse against the minor before shifting decision-making authority from the parents to a judge.[191] In this way, the bypass proceeding would further the state's compelling interest in safeguarding the minor's safety, recognizing that the parents may be unfit to assist in a minor's decision while requiring supporting evidence, and possibly prompting a criminal investigation into the parents' alleged abuse.

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[184] McDermott v. Dougherty, 869 A.2d 751 (Md. 2005).
[185] Md. Const., Decl. of Rights, art. 48.
[186] Mich. Comp. Laws Ann. § 380.10.
[187] Mich. Const., art. I, §28.
[188] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 301 (2022) (internal citations omitted).
[189] *Id.*
[190] *See* Bellotti v. Baird, 443 U.S. 622, 643 (1979).
[191] *See*, *e.g.*, Ala. Code § 26-21-4(d)(4)(b).

States may also strengthen existing parental involvements laws, or enact new ones, in ways that the Supreme Court had not previously allowed. These could include requiring parental consent rather than simply notification or the approval of two parents rather than one. In reviewing their parental involvement laws, however, states should keep the medical exception that permits an abortion to proceed without parental involvement if the abortion is necessary to preserve the life of the mother.[192]

CONCLUSION:

For more than a century, the Supreme Court has recognized in constitutional law what was established in common law centuries earlier, namely, the fundamental right of parents to direct the care and upbringing of their children. This right is protected by the highest standard in American law, allowing government infringement only to further "interests of the highest order and those not otherwise served."[193] In *Roe v. Wade*, The Supreme Court created a right to abortion that had no comparable roots in American history or tradition and used it to virtually neutralize the parental right, giving judges virtually unconstrained authority to exclude parents from any role in their minor daughter's abortion decision.

Overruling *Roe v. Wade* left the fundamental parental right to direct their children's upbringing unobstructed and eliminated any countervailing federal constitutional justification for the parental-exclusion statutes enacted by *Roe*'s command. Abortion activists may claim that some state constitutions, either explicitly or by judicial interpretation, protect a right to abortion and, therefore, provide independent support for these parental exclusion policies. State constitutions and laws, however, must conform to the U.S. Constitution, including the Fourteenth Amendment right of parents to direct their children's upbringing. States now have opportunities to assert and defend this parental right through both litigation and legislation.

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[192] *See* Maura K. Quinlan & Paul Benjamin Linton, *Medically Necessary Abortions After* Dobbs*: What, If Anything, Has Changed?*, 39 Notre Dame J.L. Ethics & Pub. Pol'y 87, 90 (2025) ("And it is generally agreed that, under the *Dobbs* rational basis test, States must permit abortion when it is necessary to preserve the life of the mother.").

[193] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).