Minors, Abortion, and the Marketplace of Ideas

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Ordinarily, state interactions with minors—in contexts including, but not limited to, education, criminal law, obscenity and violence—are shaped by a core guiding principle: namely that such interactions should be structured to properly supervise minors in a manner that is simultaneously consistent with their immaturity, yet designed to offer the type of guidance that will move them closer to the goal of full, participatory citizenship. Yet, in one notable context, the regulation of minors' access to abortion, the state has abandoned its typical approach. It has replaced the twin aims of supervision and guidance with a politically and

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ideologically charged set of regulations designed to discourage or promote abortion. This attitude is especially visible in the area of mandatory abortion-disclosure laws, which dictate that specific information be given to an abortion seeker prior to the procedure. This Article argues that such an approach makes children's abortion rights an outlier and is misguided. Instead, the state should act toward minors seeking abortion as it acts toward minors in other contexts. That means using regulations both to promote minors' exercise of their rights and to train minors for participation in a pluralistic and diverse society. Drawing on analogies to other areas of constitutional law involving the rights of children and young adults, this Article begins by identifying the state's overall attitude towards its interaction with minors and highlighting the existence of a unique approach to abortion—the fact that in abortion regulation, the state's role toward minors becomes politicized in a way that is atypical of state-minor interaction generally. It then suggests that one potential way of depoliticizing abortion disclosures is for the state to provide a more robust and ideologically diverse set of information to minors seeking abortions. Making a broader set of information available to minor abortion seekers promotes minors' autonomy and right to choose to have an abortion and would represent progress over the ideologically slanted status quo.

INTRODUCTION

Minors and adults are distinct from a constitutional perspective.[1] While minors nominally have many of the constitutional rights of adult citizens,[2] the rights of minors are neither exactly coextensive with nor

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[1] *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 635 (1979) [hereinafter *Bellotti II*] (explaining that the Court's "rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults. Indeed, our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults"); Parham v. J.R., 442 U.S. 584, 604 (1979) (establishing parents' authority over admission of a child to a psychiatric hospital). It is possible to think of children's rights as not coextensive with adults' rights "when, because of the character and importance of the child's underlying interest, the Court will not risk relying on the presumptions that the interests of the parents and the state are consistent with the child's interests." *See* Allison M. Brumley, *Parental Control of a Minor's Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333, 339 (1991).

[2] *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."); In re Gault, 387 U.S. 1, 13 (1967) (asserting "whatever may be their precise impact, neither the Fourteenth Amendment, nor the Bill of Rights, is for adults alone"); Troxel v. Granville, 530 U.S. 57, 88–89 (2000) (Stevens, J., dissenting) ("At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel."). The academic literature, too, has recognized this point. *See, e.g.*, Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L. J. 321, 338 (1996) ("The concept of rights also marks the minimum essential protections that all persons owe to each other in our society [and] children are humans, too.").

regulated in exactly the same manner as the rights of adults.[3] But, in most constitutional contexts, the differences between minors' rights and adults' rights center around two main themes. First, minors' constitutional rights can be subject to more state regulation than can adult rights.[4] The state is permitted to exert a greater degree of control and supervision over minor citizens and does so in areas ranging from education to access to obscene material. Second, that control and supervision has as its goal helping minors develop into, in the Supreme Court's words, "free and independent well-developed men and citizens."[5] Thus, state supervision of minors is not an exercise in authority for authority's sake, but rather is designed to assist minors in acquiring the skills and maturity needed to exercise their rights and responsibilities as citizens.

We observe this attitude toward the constitutional rights of minors in a variety of contexts. In schools, the state both closely supervises minors' activities and also promotes their development by, for example, ensuring the availability of potentially controversial educational material.[6] The attitudes of both the adult criminal justice system and the juvenile justice system emphasize minors' special capacity for growth and change alongside the state's role in assigning punishment and blame.[7] And the state regulates minors' access to obscene or violent material with an eye toward minors' growth into mature citizens and special concern for how obscenity or violence might shape minors' behavior as they grow into adulthood.[8]

This attitude toward state regulation of minors, however, is not universal. Indeed, there is one complete outlier among the current areas in which the state regulates minors' activities: abortion.[9] There, the

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[3] *See, e.g.*, Graham v. Florida, 560 U.S. 48, 74 (2010) (discussing "fundamental differences between juvenile and adult minds" and minors' unique "capacity for change and limited moral culpability"); Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) ("[C]hildren are constitutionally different from adults for purposes of sentencing."); Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 741 (2015) [hereinafter Buss, *Developmental Jurisprudence*] (describing the Supreme Court's approach toward minors as "consider[ing] the developmental differences between minors and adults and how such differences should be accounted for in doctrine"); Emily Buss, *Constitutional Fidelity through Children's Rights*, 2004 SUP. CT. REV. 355, 355 (2004) [hereinafter Buss, *Constitutional Fidelity*] (describing the Court as "routinely start[ing] with the specifics of adult rights and whittl[ing] down to children's").

[4] *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 638 (1968) ("[E]ven where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults[.]") (internal citation and quotation marks omitted).

[5] *See id.* at 640–41 (explaining that restrictions on minors' access to sexually explicit material derived from a concern from the state's desire to protect children "from abuses which might prevent their growth into free and independent well-developed men and citizens") (internal citation and quotation marks omitted).

[6] *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867–68 (1982) (holding that children's access to controversial books "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members"); *infra* Part I.A.

[7] *See infra* Part I.B.

[8] *See infra* Part I.C.

[9] While not essential to the core argument of this Article concerning the proper framing of minors'

ordinary story of dual emphasis on both supervision and development gives way. Instead, the state's regulation of minors' abortion rights emphasizes strict supervision, as minors must notify their parents of the decision to obtain an abortion or seek judicial bypass[10] and are subject to the same regulation as adult abortion seekers regarding mandatory disclosure laws and waiting periods.[11] The explanation for this difference in state-minor interactions is straightforward. Abortion, more so than other contexts, has becoming uniquely politicized in modern American society. That politicization manifests in a regulatory framework that reflects ideological preferences, rather than emphasizing the ordinary development-focused, growth-centric view of state-minor interactions.

This Article seeks to highlight the unique nature of abortion regulation among other forms of state-minor interaction and draws on this discussion to suggest that one way that states might be able to at least partially depoliticize abortion disclosures is by providing a more comprehensive set of information about abortion from across the ideological spectrum. In other words, this Article suggests that states depoliticize abortion disclosures by acting in the abortion context in the same way as they do in other areas involving regulation of minors, namely by focusing on the twin aims of supervision and nurturing guidance. Practically, that means supporting minors making an abortion decision by providing full and balanced information, rather than by filtering the information available to fit a particular ideological narrative.

The remainder of this Article proceeds in three Parts. Part I establishes the attitude typical of most forms of minor-state interaction under the constitution by looking at three core contexts that are representative of the ordinary types of state regulation. Part II provides a brief overview of relevant abortion jurisprudence. Part III sketches current abortion

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abortion rights, this Article does claim that the state's treatment of minors' abortion rights is unique. No other right that minors enjoy involves the same level of government supervision and authority without a corresponding emphasis on minors' development. One nearby area that shares some similarities with abortion is sex education. Some constitutional scholars have argued that children have a right to comprehensive sex education, including information about safe sex practices and gay sex. *See* Hazel Glenn Beh & Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk about Sex*, 15 COLUM. J. GENDER & L. 12 (2006). But, while the state does exert control over children's sex education, abortion remains unique. First, there is no parallel to judicial bypass or parental notification for children who experiment with sex of any kind (*i.e.*, children do not need to go before a judge who then determines that gay sex, for example, is in the child's "best interests"). Second, the consequences of sexual experimentation are different and less immutable than the consequences of the decision to bear or terminate a pregnancy. The state's supervision of abortion decision-making, then, involves at the same time a greater degree of oversight and higher (because more permanent) stakes.

[10] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 899 (1992) ("[A] state may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."); *Bellotti II*, 443 U.S. at 643–44 (establishing a "best interests" standard for judicial review of minors' abortion request); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1839 (describing judicial bypass proceedings as evidence of law's treating children "as empty vessels for adults to fill and reempty at will").

[11] *Casey*, 505 U.S. at 899.

regulations for minors and proposes one way to alter that status quo so as to better cohere with the constitutional principles adduced in Part I.

I. STATE RESPONSIBILITIES TOWARD MINORS: GUIDANCE AND DEVELOPMENT

To better understand the model that typically underlies the state's regulation of minors, it is useful to begin by looking to the state's role in education, criminal and juvenile justice, and minors' access to obscene and violent material. As demonstrated below, two main themes typify state-minor interactions: enhanced supervision and development-focused guidance. Minors are supervised more closely than adults. The state can regulate minors' lives and choices more closely than it can regulate the choice of adult citizens. But in addition to this enhanced regulation, there is also a special concern for minors' development. The state typically structures its regulation of minors so as to promote minors' growth toward full and mature citizenship in a complex, pluralistic society. While both of these state attitudes toward minors exist in different proportion depending on the area of regulation at issue,[12] the state consistently promotes each as a proper aspect of its role in regulating children and young adults.

A. Education

Education provides the clearest example of a context in which the state plays the twin roles of supervisor and guide. The state, through local school boards, necessarily exercises some constitutionally legitimate discretion in the administration of school business.[13] But that discretion has limits, especially when it runs up against other constitutional values.[14]

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[12] For example, as will be discussed in Parts I.A and I.B, *infra*, the State's attitude in juvenile justice settings emphasizes the possibility of minors' rehabilitation and development, but the systems as a whole also clearly involve a great deal of formal supervision of minor behavior and expression of state authority. In some school settings, however, the state has explicitly withdrawn its authority in order to promote student engagement with complicated ideas. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (explaining that student protest is important in part because it exposes other students to important political speech).

[13] As a plurality of the Court explained in *Pico*, "[W]e have necessarily recognized that the discretion of the states and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982). *See also* Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (explaining the State's "power to prescribe a curriculum for institutions which it supports" but warning against the risk of standardization at the hands of the State).

[14] *Pico*, 457 U.S. at 864.

In the school context, *Board of Education, Island Trees Union Free School District No. 26 v. Pico*[15] is instructive. In that case, the Court evaluated whether a school could censor the contents of its library.[16] The board of a New York school district had decided to remove books from the school library in order to "protect the children in our schools from . . . moral danger."[17] The Supreme Court held that such censorship was a violation of students' First Amendment "right to receive information and ideas," which is "an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution."[18] The plurality explained that "the right to receive ideas is a necessary predicate to the *recipient*'s meaningful exercise of his own rights" and that "such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[19] Additionally, the plurality quotes Justice Brennan's concurrence in *Lamont v. Postmaster General*[20] for the idea that "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[21] Justice Blackmun's concurrence in part in *Pico*, too, discusses the concept of the marketplace of ideas, which, he reasoned, applies with peculiar force in the classroom context.[22] Justice Blackmun stressed that, "the First Amendment therefore 'does not tolerate laws that cast a pall of orthodoxy over the classroom.'"[23]

All of this suggests that the state has a responsibility to minors in a number of important ways. First, and perhaps most clearly, the state should not be in the business of using its regulatory authority over minors to prescribe orthodoxy. Second, the state's role in administering the marketplace of ideas directly affects the "meaningful exercise" of associated constitutional rights—the marketplace of ideas exists to give context to the significance of the rights with which it is concerned.

But more than that, the state's role toward minors in other areas of free speech and exchange of ideas has a decidedly developmental character that acknowledges the reality of an ideologically diverse society. While *Pico* is a First Amendment case, its reasoning extends beyond the free speech context to show a special concern for minors' development. The Court's treatment of the issues in *Pico* and concern with "prepar[ing]

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[15] 457 U.S. 853 (1982).
[16] *Id.* at 856–58.
[17] *Id.* at 857.
[18] *Id.* at 867.
[19] *Id.* at 867–68.
[20] 381 U.S. 301 (1965).
[21] *Id.* at 308.
[22] *Pico*, 457 U.S. at 877 (Blackmun, J., concurring in part).
[23] *Id.* (citation omitted).

students for active and effective participation in [a] pluralistic, often contentious society"[24] implies that the state's role in setting up a marketplace of ideas suitable for minors involves not just avoiding monolithic orthodoxy but actively curating pluralism.

The Court also grappled with both the state's authority over minors and the state's responsibility to expose minors to controversial ideas in *Tinker v. Des Moines Independent Community School District*.[25] The case arose when high-school students in Des Moines decided to wear black armbands to school to express disapproval for the Vietnam War.[26] The school moved to block the protest and suspended three students who wore armbands to school.[27] The Court determined that such discipline was a violation of the students' First Amendment right to free speech.[28] In reaching that decision, the Court was forced to grapple with the students' right to make a political statement and "the need for affirming the comprehensive authority of the states and of school officials . . . to prescribe and control conduct in the schools."[29]

Importantly, the Court's discussion in *Tinker* was not solely concerned with the interaction between the student-protestors and the school. Rather, the Court also found relevant the fact that the students' protests communicated an important ideological message to the students' fellow classmates.[30] The Court, quoting Justice Brennan, explained that, "'[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"[31] The Court continued:

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.[32]

The vision of the state in *Tinker*, then, as in *Pico*, involves both

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[24] *Id.* at 868.
[25] 393 U.S. 503 (1969).
[26] *Id.* at 504. Though, here too, at least one member of the Court appeared skeptical of the sincerity of the students' political convictions, implying that the students are merely mirroring their parents' views. *Id.* at 516 (Black, J., dissenting).
[27] *Id.*
[28] *Id.* at 514.
[29] *Id.* at 506–07.
[30] *Id.* at 512–13.
[31] *Id.* at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
[32] *Id.*

state authority over children in school but also a state responsibility to promote an environment in which students confront and exchange opinions about a variety of ideological views.

The roots of the idea that the state has a positive responsibility to foster diversity of view and in so doing prepare children for the realities of life in a pluralistic society run even deeper, to one of the first school speech cases to come before the Court. In *Meyer v. Nebraska*,[33] the Court struck down a Nebraska law forbidding teaching foreign languages to students before the eighth grade.[34] The stated purpose of the law was to promote American ideals and encourage a common English language, a goal of which the Court approved, at least superficially.[35] Writing for the Court, Justice McReynolds seemed to concede that understanding English is important to promote "civic development" and encourage minors' development into "citizens of the most useful type."[36] But the Court also worried about the homogenizing effects of the statute given America's diversity.[37] Justice McReynolds contrasted the Platonic ideal of a standardized citizenry with "both the letter and Spirit of the Constitution," which embraces a pluralistic reality.[38] It is therefore reasonable to read Justice McReynolds' anti-standardization argument in *Meyer* as once again underscoring that state authority over minors in education must go together with training for an ideologically diverse society through exposure to different ways of speaking or thinking.

Even in cases where the Court has promoted the state's authority over students, seemingly at the expense of student expression, the Court has recognized the values of pluralism and student engagement with diverse ideological views.[39] In *Hazelwood School District v. Kuhlmeier*,[40] the Court considered a First Amendment challenge brought by high school journalism students whose principal had censored portions of articles about students dealing with pregnancy and divorce.[41] The Court held that such censorship did not violate the First Amendment rights of students.[42] But while such a conclusion initially appears to elevate a school's disciplinary authority over student expression of ideas, the Court was careful to note that "[t]he question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student

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[33] Meyer v. Nebraska, 262 U.S. 390 (1923).
[34] *Id.* at 400.
[35] *Id.* at 398.
[36] *Id.* at 401.
[37] *Id.* at 401–03.
[38] *Id.* at 402.
[39] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
[40] 484 U.S. 260 (1988).
[41] *Id.* at 263–64.
[42] *Id.* at 263.

speech."[43] Thus, the Court saw it as significant that the student expression in *Hazelwood* could be "reasonably perceive[d] to bear the imprimatur of the school."[44] Consistent with this position, the Court repeatedly characterized the case as turning on the school's ability "to set high standards for the student speech that is disseminated under its auspices" and about the school "refus[ing] to sponsor" such speech.[45] Thus, *Hazelwood* is perhaps best read as affirming a school's authority to censor speech bearing its name, rather than as a general repudiation of students' rights to engage with complex or controversial ideas. Moreover, in dissent, Justice Brennan took time to affirm that "[p]ublic education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic" and warned against "converting our public schools into 'enclaves of totalitarianism.'"[46] The Justices on both sides of the *Hazelwood* decision, then, recognized a basic right of students to engage with ideological complexity and make clear that fostering and supervising that engagement is a central task of the educational system.

Although some may argue that the state's affirmative duty to protect and cultivate the marketplace of ideas for minors is unique in the context of education, where the state has claimed a great deal of responsibility for the training and upbringing of minor citizens, such an objection would mistake the state's role toward minors in the education context for an outlier. Recognition of the state's ability not only to assess minors' development, but to nurture it as well, extends beyond education to other areas of the law.[47]

B. Criminal and Juvenile Justice

The Supreme Court's treatment of minors in the adult criminal justice system provides a prominent example of the state's twin aims regarding children's rights extending beyond the school setting. In criminal law cases evaluating sentencing severity and procedural protections, the Court has taken into consideration the particular aspects of minority that suggest a need for either additional leniency or state sensitivity. What's more, the special considerations that inform the Court's and state's approach to the juvenile justice system are consistent with these themes.

First, consider how the Court has developed its Eighth Amendment jurisprudence in cases involving minors. When the Court in *Roper v.*

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[43] *Id.* at 271–72.
[44] *Id.* at 271.
[45] *Id.* at 271–72.
[46] *Id.* at 278–80 (Brennan, J., dissenting).
[47] *See generally* Buss, *Developmental Jurisprudence*, *supra* note 3, at 742–46.

Simmons[48] held the death penalty for juveniles to be unconstitutional, a significant part of the Court's reasoning focused on the fact "that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[49] This led the Court to conclude that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[50] The Court's analysis of minors in the death penalty context focuses on how these differences between minors and adults lead to diminished culpability for minors, and that as a result "the penological justifications for the death penalty apply to [minors] with lesser force than to adults."[51] But the Court's treatment of minors in the adult justice system does not consist only of this recognition of potentially diminished culpability—the Court elsewhere also describes the positive role that the law can play in shaping minors into productive citizens.[52]

This logic informed other Supreme Court rulings finding sentencing a minor to life without parole unconstitutional in many contexts. In *Graham v. Florida*,[53] the Court held that the Eighth Amendment prohibits a sentence of life without parole for juveniles who did not commit a homicide crime.[54] Justice Kennedy's majority opinion evaluated the potential penological justifications for a sentence of life without parole, which include rehabilitation.[55] Justice Kennedy described rehabilitative goals as applying with special force to minors, explaining that "juvenile offenders . . . are most in need of and receptive to rehabilitation[.]"[56] The Court then cited to an amicus brief written by a group of psychologists and neuroscientists explaining that rehabilitation is "highly effective" for minors and that "even the highest-risk youths can be treated effectively[.]"[57] In this way, the Court not only took account of the special malleability of children as contributing to an evaluation of their culpability, but also ruled so as to leverage that malleability to serve rehabilitative goals.

Two years after *Graham*, the Court extended this reasoning to strike down all mandatory life-without-parole sentences for juveniles in *Miller v. Alabama*.[58] There again, the Court took special notice of "a child's capacity for change" and shaped the law to more closely adhere to the

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[48] 543 U.S. 551 (2005).
[49] *Id.* at 570.
[50] *Id.*
[51] *Id.* at 571.
[52] Graham v. Florida, 560 U.S. 48, 74–75 (2010).
[53] 560 U.S. 48 (2010).
[54] *Id.* at 82.
[55] *Id.* at 74.
[56] *Id.*
[57] Brief of J. Lawrence Aber, et al. as Amici Curiae in Support of Petitioners at *28–*31, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412).
[58] 567 U.S. 460, 469 (2012).

"rehabilitative ideal."[59] The Court's analysis in these cases not only acknowledges and builds upon *Roper*'s concept of juvenile offenders' capacity for change, but also relies upon the notion that the law can be a force for positive developmental growth.[60] The Court explained that optimism concerning the possibility of rehabilitative change applies to minors with unique force and structured the law so as to provide even more support to minors given their special capacity for successful rehabilitation.[61]

The Court has also specifically found that a child's age is relevant to criminal procedure, including *Miranda* analysis.[62] *Miranda* warnings provide critical safeguards intended to "permit a full opportunity to exercise the privilege against self-incrimination[.]"[63] Thus, *Miranda* represents another instance of the state providing information or guidance to citizens in the hopes of a fuller and more authentic exercise of constitutional rights. And for children, *J.D.B v. North Carolina*[64] makes clear that this guidance applies even more strongly to minors interacting with the criminal justice system.[65] *J.D.B.* involved whether a minor was in police custody and so entitled to a *Miranda* warning.[66] The custody determination, the Court explained, involves an "objective inquiry" as to whether "a reasonable person would have felt he or she was at liberty to terminate the interrogation and leave."[67] But the Court held that determinations of custody must be sensitive to the age of the individual being questioned.[68] The Court in *J.D.B.* ruled that police must take care to ensure that minors receive proper Miranda warnings,[69] consistent with the ordinary, twin-aims approach to minors' rights. While *J.D.B.*'s reasoning is based on recognition of minors' vulnerability, the Court responded to that vulnerability by providing extra procedural safeguards promoting the full exercise of children's right against self-incrimination.[70] *J.D.B.* is thus consistent with the dual aims of state regulation of minors: responding to minors' vulnerability with both increased direct supervision and an eye toward growth and development.

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[59] *Id.* at 473 (citing *Graham*, 560 U.S. at 74) (internal quotation marks omitted).

[60] *Id.* at 472–75.

[61] *Id.* at 472 ("[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.").

[62] J.D.B. v. North Carolina, 564 U.S. 261, 264 (2011).

[63] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[64] J.D.B. v. North Carolina, 564 U.S. 261 (2011).

[65] *Id.* at 281 ("To hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.").

[66] *Id.* at 265–68.

[67] *J.D.B.*, 564 U.S. at 270.

[68] *Id.* at 271–72.

[69] *Id.*

[70] *See id.* at 280-281.

The above examples involve the Court's judgments on issues where minors interact with the adult criminal legal system. The same general conclusions also apply, perhaps with even greater force, to juvenile justice systems. Recognition that the state's goals for juvenile offenders are particularly concerned with guiding minors toward productive citizenship is a concept that has deep roots in legal and academic conceptions of juvenile justice.[71] The Court recognized as much in *In re Gault*,[72] when it described the history of juvenile courts:

> The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial. . . . The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.[73]

Indeed, *Gault*'s extension of due process rights to minors was necessary because the background assumption had been that the state would naturally look to do what was in the child's interest and the child "was not under arrest or on trial."[74] While *Gault* teaches that denial of procedural rights for that reason was practically naïve, the animating spirit of juvenile criminal law can still be thought of as rehabilitative.[75]

Today, the states themselves also endorse the notion that their juvenile justice systems are meant to rehabilitate children toward

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[71] *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141–44 (1998) ("The rehabilitative approach of the traditional juvenile court presumed that state intervention could have either negative or positive effects on youthful offenders, and it emphasized the importance of preserving the future prospects of young offenders."). *See also* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 115 (1909) (citing with approval discussion of the juvenile courts in the House of Commons calling for juvenile courts to "be agencies for the rescue as well as the punishment of children").

[72] 387 U.S. 1 (1967).

[73] *Gault*, 387 U.S. at 15–16.

[74] *See id.*

[75] *But see* Scott & Grisso, *supra* note 71, at 147–53 (noting a trend toward "tough on crime" approaches toward juveniles and noting statistical reviews indicating that juveniles charged with serious offenses are convicted at rates and sentenced to terms similar to those of adults).

productive citizenship. Recent surveys of state juvenile court purpose clauses reveal solid consensus on this point.[76] As of 2016, forty-eight states define the purpose of their juvenile justice system in statutes through introductory "Purpose Clauses" as part of the statutory text.[77] The most common type of purpose clause, used by 29 states, emphasizes what the Justice Department ("DOJ") calls "Balanced and Restorative Justice," which the National Juvenile Defender Center ("NJDC") describes as promoting "three primary interests: public safety, the juvenile's accountability, and the juvenile's own development of competencies to become productive community members."[78] Moreover, some states use even stronger language. The DOJ characterizes five states as following a "Developmental Approach" in their purpose statutes, seeking to use "evidence-based practices" and "other research or data to assist the juvenile justice system[.]"[79] As Professor Josh Gupta-Kagan describes, summarizing the DOJ and NJDC surveys, "[a]nalyzing the purpose clauses of states juvenile codes, the DOJ found only six states that it categorized as emphasizing public protection and accountability for children over rehabilitation. The vast majority emphasized a balance between those goals and rehabilitation—if not a tilt toward the latter."[80]

Statutes that explicitly state the purpose of the juvenile justice system force the drafters of those statutes to think carefully about the goals of such a system and any special concerns that come when the state disciplines minors. As the examples discussed above make clear, juvenile justice is especially focused on rehabilitation as compared to adult criminal justice. That special focus is consistent with a general attitude toward minors that emphasizes their potential for growth and the state's role in assisting that growth through law.

C. Obscenity and Violence

Another way to see that the state's commitment to guidance and development of minors' capacities is not unique to the school setting is to consider minors' First Amendment rights in other areas. For example, the Court has had occasion to consider how the state may control minors'

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[76] *See Statistical Briefing Book: Juvenile Justice System Structure & Process*, DOJ OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION (Mar. 27, 2018), https://www.ojjdp.gov/ojstatbb/structure_process/qa04205.asp [https://perma.cc/DAN7-JLWM]; *Juvenile Justice Purpose Clauses - Multi-Jurisdiction Survey*, NATIONAL JUVENILE DEFENDER CENTER, http://njdc.info/practice-policy-resources/state-profiles/multi-jurisdiction-data/ [https://perma.cc/C5SG-Q3CU] (last visited Feb. 5, 2020).

[77] DOJ OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 76.

[78] NATIONAL JUVENILE DEFENDER CENTER, *supra* note 76.

[79] DOJ OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 76.

[80] Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 800–01 (2018).

access to obscene or violent material.[81] Even though such cases do not involve the state's authority to administer public education, the general approach of the decisions remains the same. Even outside of schools, state regulation of minors' First Amendment rights involves a balance of both control and guidance.

In *Ginsberg v. New York*,[82] the Court's holding relied on both of these state roles.[83] Focusing on the state's ability to supervise minors, the Court in *Ginsberg* upheld a New York law prohibiting the sale of items that "appeal[ed] to the prurient, shameful or morbid interests of minors," even if such material would have been acceptable for adult consumption.[84] Because the material was sexual in nature, the Court justified additional state encroachment on minors' interests in speech as compared to adults.[85] *Ginsberg* is thus consistent with the theme of additional state supervision of minors' consumption of speech. But the restriction on access to certain material upheld in *Ginsberg* should not be read to apply to other, non-obscene forms of communication. Indeed, the *Ginsberg* Court explicitly tied the restriction of minors' access to sexual material to a proper state concern "to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'"[86] Here too, then, the state's more stringent supervision of minors' speech rights is bound up with a concern for its role in guiding minors toward productive citizenship.

The Court revisited the logic of *Ginsberg* in *Brown v. Entertainment Merchants Association*.[87] That case involved a California law that restricted the sale of violent video games to minors.[88] The Court invalidated the law under the First Amendment, distinguishing the case from *Ginsberg* because, as Justice Scalia explained, the California law at issue did not take existing standards of obscenity or violence as applied to adults and narrow them for minors.[89] While the law in *Ginsberg* had merely made the standard for obscenity more exacting as applied to minors, the Court held that the law in *Brown* did not perform such a "narrowing function."[90] Justice Scalia explained that the state may appropriately "adjust the boundaries of an existing category of unprotected speech to

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[81] *See, e.g.*, Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 804–05 (2011) (holding that a California law prohibiting the sale or rental of "violent video games" to minors was invalid under the First Amendment because California could not demonstrate that the law passed strict scrutiny); Ginsberg v. New York, 390 U.S. 629, 635 (1968) (holding that "obscenity is not within the area of protected speech or press").

[82] 390 U.S. 629 (1968).

[83] *Id.* at 646.

[84] *Id.*

[85] *Id.* at 641 (holding that "obscenity is not protected expression").

[86] *Id.* at 640–41 (quoting Prince v. Massachusetts, 321 U.S. 158, 165 (1944)).

[87] 564 U.S. 786, 793–94 (2011).

[88] *Id.* at 788–89.

[89] *Id.* at 808–10.

[90] *Id.* at 810.

ensure that a definition designed for adults is not uncritically applied to children," but the state may not "create a wholly new category of content-based regulation[.]"[91]

Applied to the abortion-related disclosures at issue in this Article, Justice Scalia's reasoning in *Brown* would seem to allow for state regulation of abortion speech that serves to adjust disclosure requirements to take account of minor abortion seekers' unique position. That means that the state could legitimately acknowledge that minors require special consideration and guidance, consistent with the state's treatment of minors in other contexts, without creating a "wholly new" category of speech regulation. The sort of special regulation of abortion disclosures made to minors that this Article envisions would not fall on the wrong side of the *Brown/Ginsberg* divide. States would be required to adjust the boundaries of adult disclosure laws when applying them to minors by providing more and ideologically diverse information to minor abortion seekers than is provided to adults. And such adjustment, as the Court's analysis in *Ginsberg* demonstrates, should be made with an eye both toward supervision and fostering growth.

In sum, looking at these three contexts[92] (education, criminal and juvenile justice, and violence and obscenity) where the rights of minors and the authority of the state come into contact reveals that the Court has required the state to follow a reasonable and consistent approach to minors' rights: state guidance usually goes hand in hand with state oversight of minors, and both aspects of this dual role characterize that state's typical approach toward minor citizens. Schools and education involve not just the exercise of supervisory control, but also encouragement toward full citizenship. The criminal and juvenile justice systems represent not only the state's authority over minors but the hope that the law can encourage training toward productive civic engagement. But in the abortion context, as will be detailed below,[93] judicial bypass and the current regulatory regime represent only the state's authority. Concern for minors also implies that the state should provide guidance toward robust exercise of constitutional rights. The current mix of abortion regulations as applied to minors falls short of this ideal. With regard to disclosure laws specifically, the status quo of limited mandatory disclosures, which have the practical effect of chilling the exercise of abortion rights, do not

[91] *Id.* at 794.

[92] One can imagine further examples consistent with this general theme that reach beyond the three contexts examined in this Article. Custody law, for example, often involves judicial application of a "best interests of the child" standard in which judges supervise custody arrangements (consistent with state oversight of minors) to promote the child's development and well-being (consistent with an emphasis on growth and maturation). *See, e.g.*, Donald K. Sherman, *Child Custody and Visitation*, 6 GEO. J. GENDER & L. 691, 697–701 (2005).

[93] *See infra* Part II.

promote full engagement with the plural landscape of abortion views. In order to fulfill its constitutional role, the state has a duty to provide minors seeking abortions with more diverse materials representing a full range of views about abortion. The exact same vulnerability that justifies the institution of judicial bypass also implies this further state obligation.

Other scholars have argued that the Court's jurisprudence implies a right of minors more generally to receive information.[94] This right might be thought to apply to situations where children want access to information to which their parents object, including information about religious choices or sexual education.[95] Indeed, some have argued that the Constitution should be understood to guarantee a general right to a basic level of sexual education for minors.[96] This Article takes no particular position on these more general claims, but instead makes a more conservative claim about access to information in a particular, politically charged arena. As such, this Article urges that the general themes in the state's regulation of minors described above are not currently being applied in the abortion context. Rather than getting tangled in the political thicket that surrounds abortion regulation, the Court could instead view abortion regulation of minors as an issue of the rights and duties that exist between the state and minor citizens, rather than as a question about abortion rights generally. The thesis of this Article is that regulation of minors' abortion rights considered as a child rights and development issue, rather than as a politicized abortion issue, would represent progress over the status quo. But before one can evaluate what abortion regulation would look like if it was brought into conformity with the rest of children's rights jurisprudence, it is necessary to understand where the law is currently and how it got there. The next Part thus briefly describes the status quo in abortion disclosure law and the decisions of the Supreme Court that brought it about.

II. A HISTORY OF ABORTION DECISIONS

Modern abortion jurisprudence generally begins with the Supreme Court's recognition of a constitutional right to abortion in Roe v. Wade.97 Roe dealt with a challenge to criminal abortion laws in Texas and held that such statutes unconstitutionally impinge on women's98

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[94] *See* Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 225 (1999) ("The thesis of this article is that minors possess autonomous liberty interests that cannot be exercised meaningfully without access to information conveying a variety of viewpoints.").

[95] *Id.* at 226.

[96] *See* Kelly E. Mannion, *Steubenville and Beyond: The Constitutional Case for Comprehensive Sex Education*, 20 CARDOZO J.L. & GENDER 307, 314 (2014).

[97] 410 U.S. 113 (1973).

[98] The cases and this article refer generally to abortion seekers as "women," though it is worth

right to privacy under the Fourteenth Amendment.99 But despite this holding, the Roe court was also quick to acknowledge the contested, morally and philosophically fraught status of abortion rights. Indeed, the second paragraph of Justice Blackmun's opinion in Roe begins: "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires."100 That acknowledgement has proven prescient. For far from settling the matter of abortion's status under the Constitution, Roe prompted a series of regulations and corresponding legal challenges that would define the contours of the general right to terminate a pregnancy that Roe acknowledged.

A. Minors and Abortion

The right to an abortion is a right of privacy secured by the Fourteenth Amendment.[101] Less than a decade before ruling in *Roe*, the Court considered how the Fourteenth Amendment applies to minors. *In re Gault* examined the procedural safeguards that the Constitution guarantees to minors in the juvenile justice system.[102] There, the Court declared, "neither the Fourteenth Amendment nor Bill of Rights is for adults alone."[103] But while children also have access to the protections of the Constitution, children have not historically been treated as bearing Constitutional rights equal to those of adults. Instead, the Court has taken an "adult-minus" approach, "routinely start[ing] with the specifics of adult rights and whittl[ing] down to children's."[104]

Minors' abortion rights fit this general model. Children have a constitutional right to obtain an abortion, but that right can be subject to greater regulation by the state than can adult abortion rights. Perhaps most prominently, the state can require minors to either notify or obtain the consent of a parent in order to obtain an abortion, so long as the state also provides for an alternative procedure called "judicial bypass," allowing an alternative government decision-maker to authorize abortions

clarifying that people who do not identify as women, trans-men, for example, may also require abortion care. Use of the term "women" in this Article mirrors the Supreme Court's language but is not meant to ignore other categories of abortion seekers.

99 *Roe*, 410 U.S. at 152–53 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

100 *Id.* at 116.

101 *Id.* at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

102 *In re Gault*, 387 U.S. 1 (1967).

103 *Id.* at 13.

104 Buss, *Constitutional Fidelity*, *supra* note 3, at 355.

for minors confidentially.[105] Shortly after *Roe*, the Court decided two cases that continue to serve as the foundation for evaluating minors' rights to abortion.

In *Planned Parenthood of Central Missouri v. Danforth*[106] the Court analyzed a Missouri statute that included, among other restrictions, a requirement that unmarried minors obtain the written consent of a parent to have an abortion (with an exception for procedures necessary to save the life of the mother).[107] Missouri reasoned that such requirements for minors were appropriate given a unique state interest in the protection of minors and the general principle that the state "may subject minors to more stringent limitations than are permissible with respect to adults[.]"[108] Moreover, the state argued, a parental consent requirement was consistent with the Court's recognition of parental rights in other areas.[109]

The Court in *Danforth* struck down the blanket provision of the Missouri law that required parental consent for all abortions.[110] In so doing, it emphasized something akin to the "adult-minus" framework, explaining that while "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," nevertheless "[t]he Court indeed, however, has long recognized that the state has somewhat broader authority to regulate the activities of children than of adults."[111] Given the potential for stronger state regulation of minor's abortion decisions, the Court then analyzed whether "any significant state interest" justified provision for a parental veto.[112] The Court reasoned 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," and thus concluded that an absolute parental veto was inappropriate.[113] But, while the Court held that parents may not wield absolute veto power over a minor's abortion decision, the Court was also careful to note that limiting a parent's veto power did not imply that "every minor, regardless of age or maturity, may give effective consent

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[105] *See infra* notes 126–33 and accompanying text.

[106] 428 U.S. 52 (1976).

[107] *Id.* at 72.

[108] *Id.* (characterizing the State's argument). The Court notes the State's citation to *Prince*, in support of the proposition that the State may interfere to a greater degree with the rights of minors than with those of adults.

[109] *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (concerning parents' discretion in educational choices); Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (concerning discretion in religious matters); Wisconsin v. Yoder, 406 U.S. 205 (1972) (concerning religiously based objections to continued education).

[110] *Danforth*, 428 U.S. at 74–75

[111] *Id.* (citing Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

[112] *Id.* at 75.

[113] *Id.*

for the termination of her pregnancy."[114]

The Court's reasoning in *Bellotti v. Baird*[115] (known as *Bellotti II*) supplements this analysis. In *Bellotti II*, the Court reviewed a decision of the Massachusetts Supreme Judicial Court that had struck down a state statute requiring parental or judicial consent for every nonemergency abortion sought by a minor, that minors must generally first seek parental consent before seeking judicial consent, and that parents must be given notice of judicial proceedings brought by a minor child to obtain such judicial consent.[116] The Supreme Court affirmed, holding both statutory requirements unconstitutional.[117] First, the Court held that, for minors who are mature enough to independently consent to an abortion, requiring those minors to consult with their parents prior to making the decision constitutes an undue burden to the minors' exercise of abortion rights.[118] As such, the Court required that "every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents."[119] Second, the Court held that a statute permitting a judge to overrule the wishes of a mature and informed minor was unconstitutionally restrictive.[120] As the Court explained, "if the minor . . . has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently."[121]

That said, the Court's endorsement of minors' individual abortion rights in *Bellotti II* is not full-throated. The Court acknowledged a state interest in promoting decision making within the family unit, especially given the general constitutional presumption that parents act in their children's best interests.[122] It also acknowledged other instances in which a minor must "wait until the age of majority before being permitted to exercise legal rights independently."[123] But, the Court explained, the exercise of abortion rights has a "unique character" because the decision carries a level of urgency and finality not common to other large life decisions that minors face.[124] Ultimately, the unique character of abortion requires that there be avenues available for a minor seeking to exercise her right to choose, but countervailing state interests also justify the sort

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[114] *Id.*

[115] *Bellotti II*, 443 U.S. 622 (1979).

[116] *Id.* at 629–31.

[117] *Id.* at 646–49. But the Court did uphold the statutory requirement that minors obtain consent from both parents, rather than getting only a single parent's consent. *Id.* at 648–49.

[118] *Id.* at 647.

[119] *Id.*

[120] *Id.* at 649–50.

[121] *Id.* at 650.

[122] *Id.* at 648. *See also* Parham v. J.R, 442 U.S. 584, 602 (1979) ("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. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

[123] *Bellotti II*, 443 U.S. at 650.

[124] *Id.*

of state oversight that the *Bellotti II* Court envisioned.

Danforth and *Bellotti II* set out the broad approach to evaluating minors' abortion rights under the Constitution. The Court's characterization of the judicial bypass requirement in *Bellotti II* consistently emphasizes the relevance of both the minor's maturity and knowledge. In describing the general requirement for a judicial bypass procedure to allow a minor to obtain an abortion independent of her parents' consent, the Court said:

> A pregnant minor is entitled in such a proceeding to show either: 1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or 2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.[125]

Much rests on how these terms are understood. Indeed, data from the Centers for Disease Control show that individuals under the age of 19 accounted for about one-eighth of all abortions in the United states in 2012.[126] And, as the Court acknowledged in *Bellotti II*, "[n]ot only is it difficult to define, let alone determine, maturity, but also the fact that a minor may be very much an adult in some respects does not mean that his or her need and opportunity for growth under parental guidance and discipline have ended."[127]

These interpretive difficulties remain with the courts today. Thirty-seven states have some form of parental notice or consent laws on the books, though six of these are under permanent injunction.[128] Additionally, some states have laws specifically instructing judges on how to evaluate the maturity and best interests of minors seeking abortions.[129] But, despite these attempts to provide guidance, the landscape of judicial bypass proceedings and the reasoning of judges engaged in bypass

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[125] *Id.* at 643–44 (emphasis added).

[126] Karen Pazol et al., *Abortion Surveillance – United States 2012*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (November 27, 2015), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6410a1.htm [https://perma.cc/FMT4-QMKA]. While the relevant statistic would be the percentage of abortions obtained by those under 18, the CDC provides only an under-19 age category. *Id.*

[127] *Bellotti II*, 443 U.S. at 643 n.23.

[128] *An Overview of Abortion Laws*, GUTTMACHER INSTITUTE, (Feb. 1, 2020), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/4A7B-E8QD].

[129] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152(B) (2014); KAN. STAT. ANN. § 65-6705(e)(1) (West 2008); KY. REV. STAT. ANN. § 311.732(3) (West 2011); *see also*, Wendy-Adele Humphry, *Two-Stepping Around a Minor's Constitutional Right to Abortion* 38 CARDOZO L. REV. 1769, 1785–88 (June, 2017).

determinations remain subject to broad exercises of discretion.[130] In one infamous example, an Alabama judge refused to grant judicial bypass because, "Petitioner's action in becoming pregnant in light of sex education in the schools and the extreme amount of publicity about teen pregnancy is indicative that she has not acted in a mature and well informed [*sic*] manner."[131]

While the current state of judicial bypass law may be muddled in particular cases, *Bellotti II* clearly creates a general system of supervision of minors' abortion decisions, either by their parents or by the state. That supervision proceeds from the basic premise that the state has a larger role to play in guiding the choices of minors than it has in affecting the choices of adults.

B. Abortion and Required Disclosures

The difficulty of drawing clear lines around minors' abortion rights increases as the Court considers not just abortion in isolation but how abortion rights interacts with other rights, such as the freedom of speech. What's more, the free-speech concerns surrounding abortion involve not only abortion seekers' access to information but physicians' interests in their conversations with patients. The leading case is *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[132] The Supreme Court in *Casey* considered a Pennsylvania statute[133] that, among other requirements, regulated informed consent in the abortion context by mandating that women receive certain information at least 24 hours prior to the procedure and requiring that minors seeking an abortion obtain informed consent from at least one parent.[134]

The opinion of the Court in *Casey* reaffirmed the "central principle of *Roe v. Wade*" of "the woman's right to terminate her pregnancy before viability."[135] But, again in Casey, the Court acknowledged that abortion remains a highly contested and unsettled area in the law.[136] Furthermore, the *Casey* Court acknowledged "that the state has a legitimate interest in

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[130] *See* Humphry, *supra* note 129, at 1787 n.117 (collecting examples).

[131] In the Matter of Anonymous, a minor, 684 So.2d 1337, 1338 (Ala. Civ. App. 1996) (reversing the trial court's judgment and finding the minor sufficiently mature and well informed to decide to have an abortion without parental consent).

[132] 505 U.S. 833 (1992).

[133] The Pennsylvania Abortion Control Act of 1982, 18 PA. CONS. STAT. §§ 3203–3220 (1990).

[134] *Casey*, 505 U.S. at 844.

[135] *Id.* at 871.

[136] *See id.* at 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. . . . Our obligation is to define the liberty of all, not to mandate our own moral code.").

promoting the life or potential life of the unborn," an interest that the Court stressed does not contradict the right of the woman to terminate her pregnancy.[137]

This recognized state interest in potential life, perhaps coupled with the unsettled character of the abortion debate, creates room for some state regulation of abortion, as the Court in *Casey* explained. The Court in *Casey* upheld state regulation that was aimed at providing women with the information needed to make an informed choice about abortion, and the Court clarified that "[o]nly where state regulation imposes an undue burden on a woman's ability to make [the abortion] decision does the power of the state reach into the heart of the liberty protected by the Due Process Clause."[138]

The Court's efforts in *Casey* reflected an attempt to allow some state regulation of abortion by balancing the woman's right to terminate her pregnancy and the state's interest in potential fetal life. A natural fault line in the tension between those two interests involves government attempts to require disclaimers, provide information, or otherwise regulate abortion seekers' informed consent to the procedure. As the government attempts to require or control the speech of physicians caring for pregnant women, it provokes a multi-faceted constitutional analysis. Indeed, the *Casey* Court recognized a long line of cases involving such regulation.

The first case to consider the intersection of state regulation of abortion, abortion rights of women, and physician speech was *City of Akron v. Akron Center for Reproductive Health*.[139] At issue in the case was a municipal statute that required, among other things, the physician performing the abortion "to inform his patient that 'the unborn child is a human life from the moment of conception,'" as well as to provide other information about the anatomy and viability of the fetus and the possible side effects of an abortion.[140] The statute also mandated that physicians had to deliver this information to women personally, rather than allowing women to receive the information from counselors or social workers.[141] The Court in *Akron* was forced to consider whether such speech impermissibly infringed on a woman's right to have an abortion and how the professional responsibilities of physicians affect their own free-speech rights.[142]

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[137] *Id.* at 870 (citing *Roe v. Wade*, 410 U.S. 113, 163 (1973)).
[138] *Id.* at 874.
[139] 462 U.S. 416 (1983).
[140] *Id.* at 444.
[141] *Id.*
[142] *Id.* at 444, 449.

The Court considered the Ohio law's requirements separately, finding both unconstitutional. First, with regard to the requirement that a physician inform a pregnant woman that "the unborn child is a human life from the moment of conception," the Court found that the disclosure "attempts to extend the state's interest in ensuring 'informed consent' beyond permissible limits" because "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."[143] Such a holding recognizes that it is possible for the state to craft informed consent requirements where the information provided attempts to guide woman toward a particular decision by emphasizing some aspects of the abortion decision and downplaying others. *Akron* thus established that judges could review informed consent or mandatory disclosure requirements to see if their purportedly medical messages strayed too far into protected ideological territory.

The Court in *Akron* also struck down the part of the statute requiring that physicians personally deliver the information that the city had deemed necessary to informed consent.[144] The Court explained that physicians must retain some degree of "discretion and 'medical judgment'" as they care for patients and also emphasized the substance of informed consent over its form: "The [s]tate's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it."[145] The Court held that, because abortion is a "medical procedure," there is naturally a role for physicians to exercise "medical judgement encompass[ing] both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion."[146] This pragmatic approach further emphasized that the state's interests in potential life and in ensuring that abortion decisions are made with sufficient information and consideration did not allow the state to use informed consent requirements as a persuasive instrument, nor did those interests allow the state to intrude too far into the professional judgment of physicians.[147]

The holding of *Thornburgh v. American College of Obstetricians and Gynecologists*[148] rests upon similar logic. There, the Court considered a Pennsylvania statute that required physicians to describe particular fetal characteristics at different stages of development, that women

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[143] *Id.* at 444.

[144] *Id.* at 449.

[145] 462 U.S. 416, 447 (1983).

[146] *Id.* at 427 (internal quotation marks and citations omitted).

[147] *See also* Birth Control Ctrs., Inc. v. Reizen, 743 F.2d, 352, 361 (6th Cir. 1984) ("*Akron* teaches that during the first trimester of pregnancy the State may impose only regulations that have '*no significant impact* on the woman's exercise of her right [to abort],' and even these '*minor* regulations . . . may not interfere with physician-patient consultation or with the woman's choice between abortion and childbirth.'").

[148] 476 U.S. 747 (1986).

receive printed materials with the names of agencies that served to provide alternatives to abortion, information about financial assistance and the financial responsibilities of fathers, and that women be informed of "detrimental physical and psychological effects" associated with abortion.[149] Like the statute in *Akron*, the statute at issue in *Thornburgh* also attempted to use informed consent requirements to persuade women not to have abortions. The Court explained that, "[t]his type of compelled information is the antithesis of informed consent" and that close examination of the statutes "reveals the anti-abortion character of the statute and its real purpose."[150] These decisions created a discernible task for lower courts analyzing a law compelling specific disclosures about abortion: scrutinize informed-consent statutes to determine whether the information required is truly in the service of considered decision making or is a veiled effort to persuade or inflame.[151]

That status quo was upset, however, by the Court's treatment of informed consent in *Casey*. Switching tacks, and explicitly overruling *Akron* and *Thornburgh* in the process, the Court now asked whether the information provided to women was "truthful and not misleading."[152] If it was, the Court in Casey held, then the required disclosure passed constitutional muster. This reasoning represents an important shift away from attempting to analyze, as in *Akron* and *Thornburgh*, whether the effect of the information on pregnant women was inflammatory or an impermissible effort to persuade them not to have an abortion. Indeed, the Court in *Casey* focused not on the woman's decisional autonomy, but the state's interest:

> To the extent *Akron* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled. This is clear even on the very terms of *Akron* and *Thornburgh*. Those decisions . . . recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth.[153]

Importantly, *Casey* also appeared to take an expansive view of what constitutes a "health risk" relevant to a woman's medical decision making. First, and perhaps uncontroversially, the *Casey* Court explained that

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[149] *Id.* at 762–64.

[150] *Id.* at 764.

[151] *See id.* at 762 n.10 for a description of lower appellate courts performing this task for fetal description laws.

[152] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

[153] *Id.*

"psychological well-being" is a facet of health, allowing for disclosure of a range of information about the potential psychological effects of abortion.[154] But also, "consequences to the fetus" count as relevant health effects of abortion, "even when those consequences have no direct relation to [the pregnant woman's] health."[155] To support that conclusion, the Court analogized to a patient undergoing a kidney transplant and reasoned that part of a patient's decision whether or not to go through with the transplant and receive a kidney is an understanding of the effects of donating a kidney on the donor, even where those effects do not directly impact the kidney recipient.[156] Similarly, the Court reasoned, it might be relevant to a woman deciding whether to have an abortion how exactly the procedure would affect the fetus. While the analysis in *Akron* and *Thornburgh* would have suggested that the Court interrogate the motives behind the disclosure requirements and whether they attempt to persuade women, *Casey* carved out a new, wide area of protection for state-mandated disclosures of factual information related to a broad set of health considerations.[157]

Casey also acknowledged the potential free speech interests of physicians who may not want to provide the information required by the government and whose relationship with patients might be thought to have some special, protected status. But physicians' First Amendment interests here are also bound up in women's right to privacy and to choose to have an abortion, as well as the state's recognized authority to regulate the practice of medicine. The Court's analysis thus struggles to isolate physicians' speech interests from their relation to women's abortion rights in this context. First, the *Casey* Court acknowledged that a "straightjacket" of required information that physicians must provide without exception is too restrictive, "interfer[ing] with a constitutional right of privacy between a pregnant woman and her physician."[158] But the Court here used the language of exception, explaining that a doctor, in her professional judgment, might find some set of circumstances in which a particular disclosure is inappropriate. In the ordinary range of doctor-patient interactions, however, the Court's logic implies that women would receive the state's preferred information. Moreover, the state may place some limitations on the doctor's interactions with her patients because the practice of medicine is subject to "reasonable

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[154] *Id.*

[155] *Id.*

[156] *Id.* at 882–83.

[157] *See also id.* at 884–85. This section includes the Court's treatment of a requirement that physicians, rather than other professionals deliver the State's message to women. While *Akron* had invalidated a similar requirement by reasoning that the message was more important than the messenger, and so the particular identity of the person delivering the message ought not to matter for the State's purposes, the *Casey* court upheld the requirement because there was no evidence that it amounted to a "substantial obstacle to a woman seeking an abortion" and thus was not "an undue burden." *Id.*

[158] *Id.* at 883.

licensing and regulation by the state." When the doctor is performing her role as a health professional, then, rather than speaking as a concerned citizen, the state has more latitude to regulate her speech.[159] The *Casey* court clearly acknowledged that physicians have some First Amendment interest not to be compelled to speak to patients in particular ways, but that interest is qualified by the state's interest in regulating the practice of medicine.

C. Modern Approaches to Abortion Speech

In *Casey*'s wake, several states currently require extensive disclosures and mandate counseling for women seeking abortions. Eighteen states mandate that pregnant women receive some form of counseling prior to abortion.[160] Among these are five states that require disclosure about a purported link between abortion and breast cancer, despite little to no medical evidence supporting such a linkage.[161] Other states require counseling about psychological risks of abortion and about the ability of a fetus to feel pain.[162] Twelve states either require women to view a fetal ultrasound prior to an abortion or require doctors to offer such an opportunity.[163]

Generally, since *Casey*, litigation challenging informed counseling laws has been largely unsuccessful.[164] For example, *Planned Parenthood Minnesota v. Rounds*[165] rejected a facial challenge to a Minnesota counseling law requiring doctors to inform a woman that her fetus is a "living human being" and to inform her that she has a protected "relationship" with the fetus because the disclosure was found not to cause an undue burden in all cases.[166] While some district courts have enjoined counseling laws,[167] courts tend to permit extensive counseling requirements as

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[159] *Cf.* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (allowing more extensive regulation of public employees' speech where that speech is made pursuant to official duties rather than as a citizen).

[160] GUTTMACHER INSTITUTE, *An Overview of Abortion Laws*, *supra* note 128.

[161] *See* Ian Vandewalker, *Abortion and Informed Consent: How biased counseling laws mandate violations of medical ethics*, 19 MICH. J. GENDER & L. 1, 19 n.90 (2012).

[162] *See An Overview of Abortion Laws*, GUTTMACHER INSTITUTE, *supra* note 128.

[163] *Requirements for Ultrasound*, GUTTMACHER INSTITUTE, (Feb. 1, 2020) https://www.guttmacher.org/state-policy/explore/requirements-ultrasound [https://perma.cc/DX6A-5F2G].

[164] *See* Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 115 (2008) (describing undue burden analysis and concluding that courts generally uphold informed consent laws).

[165] 653 F.3d 662 (8th Cir. 2011), *vacated in part on reh'g en banc*, 662 F.3d 1072 (8th Cir. 2011), *rev'd in part on reh'g en banc*, 686 F.3d 889 (8th Cir. 2012).

[166] *Id.* at 668.

[167] *See, e.g.*, Planned Parenthood of Minn. v. Daugaard, 799 F. Supp. 2d 1048, 1063 (D.S.D. 2011).

well as laws requiring disclosure of specific medical information.[168] But not all challenges to laws ostensibly grounded in informed consent have been unsuccessful. In one notable case, the Fourth Circuit struck down a North Carolina statute that required physicians to perform a sonogram on anyone seeking an abortion, to display the image within view of the person seeking the abortion, and then to describe the fetus in detail.[169] The Fourth Circuit struck down the law as impermissibly interfering with physicians' free-speech rights in excess of the ordinary "regulation of the medical profession" contemplated under *Casey*, holding that "[t]his compelled speech . . . is ideological in intent and in kind" and "extend[s] well beyond [the means] ordinarily employed to effectuate [the state's] undeniable interests in ensuring informed consent and in protecting the sanctity of life in all its phases."[170] But the Fourth Circuit's analysis focused on the proper boundaries of government regulation of physician speech, rather than grounding its analysis principally in the rights of abortion seekers to any information or consideration under *Casey*'s undue burden standard.[171] Moreover, the focus on the ideological intent of the sonogram requirements harkens back to the *Akron/Thornburgh* approach of judicial scrutiny of the purposes of informed consent laws. *Casey* severely limited courts' ability to conduct that sort of motivational inquiry, and only egregious cases—like the North Carolina law at issue in *Stuart*—fail the *Casey* test.

Additionally, while the analysis in *Stuart* focuses on physicians' rights to communicate freely with their patients, it is also possible to emphasize the corresponding rights of patients seeking information about abortion. That conflux of constitutional interests is part of what makes *Casey* so difficult to untangle. Part of the analysis clearly sounds in concerns about the state "commandeer[ing] the doctor-patient relationship," but there is also a straightforward concern about whether abortion seekers can adequately exercise their right to terminate a pregnancy free from undue burdens.[172] This Article's argument focuses mainly on the latter interest. That is, when minors are involved, this Article argues that state concern for abortion seekers' ability to exercise their rights and engage with the diversity of views surrounding abortion implies that the state should take a proactive role in providing information to minor abortion seekers. That argument puts minors' abortion rights front and center, rather than suggesting that the physician-patient relationship requires such disclosures as physicians treat their minor patients. To be sure,

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[168] For an example of the latter, *see* Karlin v. Foust, 188 F.3d 466, 492–93 (7th Cir. 1999) (analyzing a law requiring doctors give women the option to listen to the fetal heartbeat). Further analysis of challenges to both counseling and disclosure requirements can be found in Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1336 n.209 (2013).

[169] Stuart v. Camnitz, 774 F.3d 238, 242–43 (2014).

[170] *Id.* at 242.

[171] *See id.* at 249.

[172] *Id.* at 253.

physicians still have an important interest in their communications with minor abortion seekers, but the state's affirmative duty, this Article argues, flows from a concern with guiding minors toward a fuller exercise of their rights.

The Supreme Court, too, has struggled to trace with precision the various contours of constitutional interests at play in this area. Recently, the Supreme Court had occasion to consider a different type of abortion-related disclosure. *National Institute of Family and Life Advocates, dba NIFLA, v. Becerra*[173] involved a challenge to a California law called the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the Reproductive FACT Act),[174] which required disclosures from both licensed and unlicensed medical clinics providing pregnancy-related services. Crisis Pregnancy Centers (CPCs), which are often religiously affiliated and seek to persuade women not to have abortions, in California challenged the law as violating their First Amendment rights.[175] Both licensed and unlicensed CPCs objected to the law on free speech grounds, arguing that the Reproductive FACT Act compelled speech on an issue of moral and political concern that ran counter to the centers' issue advocacy mission.[176] A law compelling speech on an issue of sociomoral concern, the CPCs argued, is content-based and thus deserves strict scrutiny.[177]

The Act operated in two parts. First, the Act applied to "licensed covered facilit[ies]" in California.[178] These are facilities licensed by the state and that meet at least two of six criteria regarding the types of services offered at the facility.[179] The Act required these licensed CPCs to disseminate a notice stating:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].[180]

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[173] 138 S. Ct. 2361 (2018) ("*NIFLA*").

[174] CAL. HEALTH & SAFETY CODE §§ 123470–123473.

[175] *NIFLA*, 138 S. Ct. at 2368.

[176] *See* Brief for Petitioners at *20–*38, Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (No 16-1140).

[177] *Id.*

[178] CAL. HEALTH & SAFETY CODE § 123471(a).

[179] *Id.* (outlining the six criteria are: "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients.").

[180] *Id.* § 123472 (a)(1).

The Act required this notice to be either posted in a conspicuous public place in 22-point type, distributed personally to clients in at least 14-point type, or digitally distributed to clients at the time of their arrival at a facility.[181]

Second, the Act also required disclosures of "unlicensed facilities" not licensed by the state and without a licensed medical provider on staff so long as the facility also performed certain pregnancy-related services.[182] With respect to these facilities, the Act required the facilities to disseminate a notice stating, "This facility is not licensed as a medical facility by the state of California and has no licensed medical provider who provides or directly supervises the provision of services."[183] That message had to be disseminated "to clients on site and in any print and digital advertising materials including Internet Web Sites" in a "clear and conspicuous" method, including at least 48-point type for physical postings.[184]

The Supreme Court agreed with the CPCs and held that the FACT Act was likely unconstitutional.[185] Such a result is perhaps surprising, because the *Casey* Court seemed to signal a more permissive review of mandatory disclosure requirements as compared with *Akron* and *Thornburgh*.[186] Justice Breyer made this point in his dissent in *NIFLA*, contrasting the adoption-related disclosure at issue in *Casey* with the facts of *NIFLA*.[187] He pointed out the difficulty in coming up with a line of reasoning that can effectively "distinguish between information about adoption [(as in *Casey*)] and information about abortion in this context."[188]

The tension was not lost on the Court, and Justice Thomas's majority opinion attempted to explain how disclosures regarding the availability of abortion services can be unconstitutional when other sorts of mandated disclosures have been upheld under *Casey*. Justice Thomas explained that content-based compelled speech is ordinarily subject to

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[181] *Id.* § 123472 (a)(2).

[182] *Id.* § 123471 (b) (stating the relevant criteria are: "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility offers pregnancy testing or pregnancy diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients.").

[183] *Id.* § 123472 (b)(1).

[184] *Id.* § 123472 (b).

[185] *NIFLA*, 138 S. Ct. at 2378.

[186] Indeed, one of Justice Breyer's chief arguments in dissent was that the majority's scrutiny of the Act was more similar to the searching review of *Akron* and *Thornburgh* than to the more permissive inquiry of *Casey*. *See id.* at 2383–85 (Breyer, J., dissenting) (distinguishing *Akron*'s characterization of an informed consent law as a "poorly disguised elemen[t] of discouragement for the abortion decision" with *Casey*'s concern for "whether [regulations] imposed an 'undue burden' upon women seeking abortion").

[187] *Id.* at 2385 (Breyer, J., dissenting).

[188] *Id.*

strict scrutiny unless an exception to that general rule applies.[189] *Casey* supplies one such exception and allows for "regulations of professional conduct that incidentally burden speech."[190] And, while acknowledging that the disclosure laws in *Casey* required doctors to provide specific information to pregnant women, just as the Reproductive FACT Act did, Justice Thomas emphasized that the disclosures in *Casey* "regulated speech only 'as part of the *practice* of medicine, subject to reasonable licensing and regulation by the state.'"[191] By contrast, Justice Thomas characterized the Reproductive FACT Act as "not an informed-consent requirement or any other regulation of professional conduct" and as "not facilitat[ing] informed consent to a medical procedure."[192]

But if the disclosures at issue in *NIFLA* were not medical informed consent requirements, then how exactly, in the Court's mind, should we think about them? The Court provides guidance in the next section of its opinion, discussing "the dangers associated with content-based regulations of speech."[193] In particular, the Court described at some length the particular dangers of content-based regulation of medical speech, given that medicine and public health are fields "where information can save lives."[194] Moreover, the Court explained, "when the government polices the content of professional speech it can fail to 'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'"[195]

Justice Thomas also cited approvingly to two sources that would seem to indicate that the disclosures at issue in *NIFLA* were believed to fall on the wrong side of the purported divide between medically relevant disclosure and impermissible ideology.[196] First, Justice Thomas cited to *Wollschlaeger v. Governor of Florida*,[197] an Eleventh Circuit case analyzing a Florida law called the Firearms Owners' Privacy Act,[198] which prohibited physicians from asking patients about firearms in patients'

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[189] *Id.* at 2372.
[190] *Id.* at 2373.
[191] *Id.* (emphasis in opinion).
[192] *Id.*
[193] *Id.* at 2374.
[194] *Id.* (citation omitted).
[195] *Id.* (citation omitted).
[196] Note, however, that in other areas of its First Amendment jurisprudence the Court has stressed that there is no constitutional difference between facts and opinions. For example, in *Riley v. National Federation of the Blind*, the Court explained that "for First Amendment purposes, a distinction cannot be drawn between compelled statements of opinion and, as here, compelled statements of 'fact,' since either form of compulsion burdens protected speech." 487 U.S. 781, 782 (1988). The Court has not applied that principle to compelled disclosures in the abortion context, however, given *Casey*'s "truthful and not misleading" test. Similarly, the Court in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* held that a professional could be compelled to make disclosures that were "purely factual and uncontroversial" without running afoul of the First Amendment. 471 U.S. 626, 651 (1985). The *NIFLA* court's distinction between medical fact and ideology is thus consistent with a set of exceptions to the general First Amendment principle disfavoring such distinctions.
[197] 848 F.3d 1293 (11th Cir. 2017).
[198] FLA. STAT. §§ 790.338, 456.072, 395.1055, & 381.026.

homes and providing safety and childproofing information to gun owners. The Eleventh Circuit struck down the act as unconstitutional under the First Amendment,[199] with Judge William Pryor writing a concurrence. It is Judge Pryor's concurrence to which Justice Thomas cited in *NIFLA*.[200] Judge Pryor's opinion emphasizes the First Amendment values at play in the case, viewing the safety disclosures as ideologically loaded. He writes that "[t]he power of the state must not be used to 'drive certain ideas or viewpoints from the marketplace,' even if a majority of the people might like to see a particular idea defeated."[201] Judge Pryor also emphasized "[t]he need to prevent the government from picking ideological winners and losers . . . in medicine[.]"[202] When Justice Thomas cited to *Wollschlaeger* in support of the proposition that "'[d]octors help patients make deeply personal decisions, and their candor is crucial,'" he was invoking Judge Pryor's notion that medical speech must be free of ideological government regulation.[203]

Second, Justice Thomas cited to a law review article from 1994 that details historical examples of "governments . . . overtly politiciz[ing] the practice of medicine[.]"[204] While Justice Thomas relied on the article's list of historical examples of troubling government entanglement with medicine, the article goes on to propose a test for constitutional analysis of compelled physician speech.[205] Indeed, in the article Professor Paula Berg criticizes the Court's reasoning in *Casey* as failing to "distinguish adequately between regulations that facilitate patient consent by increasing the availability of medical information, and those that undermine it by turning physicians into instruments of state propaganda."[206] Berg continues, "An adequate constitutional theory of government regulations that compels physician speech must provide courts with a means of distinguishing measures that bring medical decision making into conformity with the state's viewpoint from those that facilitate the full disclosure of relevant, factual medical information."[207] While the particulars of Berg's test are not directly relevant to this Article, what is clear is that she, like

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[199] *Wollschlaeger*, 848 F.3d at 1323.

[200] *NIFLA*, 138 S. Ct. at 2374.

[201] *Wollschlaeger*, 848 F.3d at 1327 (Pryor, J., concurring).

[202] *Id.* at 1328.

[203] *See NIFLA*, 138 S. Ct. at 2374.

[204] *NIFLA*, 138 S. Ct. at 2374-75, citing Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201 (1994). Fear of the government using compelled disclosures to promote favored ideology also features prominently in Justice Kennedy's short concurrence in *NIFLA*. *See NIFLA*, 138 S. Ct. at 2378–79 (Kennedy, J., concurring) ("This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these.").

[205] Berg, *supra* note 204, at 260–61.

[206] *Id.* at 259.

[207] *Id.* at 260.

Justice Thomas in *NIFLA*, is concerned with sorting ideological disclosures from "factual medical information."

Similarly, this Article's primary purpose is not to argue that Justice Thomas gets the line-drawing exercise in *NIFLA* wrong. There are serious doubts that the distinction between medical fact and ideology is a tenable one, or that Justice Thomas correctly identifies on which side of that divide the Reproductive FACT Act's compelled disclosures fall. After all, both required disclosures about adoption and the disclosures about the availability of state-sponsored abortion services at issue in *NIFLA* invite the woman's consideration of alternative courses of action. That information is ideological—part of the choice confronting a woman faced with those alternatives will involve grappling with the set of social and moral ideas surrounding abortion. As Justice Breyer asked, "If a state can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?"[208] To require either disclosure is to invite engagement with abortion as more than simply a medical decision. In Justice Breyer's words, both disclosures "involve[] health, differing moral values, and differing points of view."[209] But even if Justice Breyer is correct in his analysis of the particular disclosure in *NIFLA*, his dissent does not reject the medical/ideological distinction altogether.[210] Perhaps Justice Breyer would draw the line between permissibly and impermissibly ideological content differently than Justice Thomas did, but it is enough for this Article's argument that the distinction continues to have salience in the regulation of adult abortion-related speech.

These concerns about the specific reasoning in *NIFLA* aside, the more general point is that the Court clearly recognizes and judges on the basis of the distinction between medical fact and medically adjacent value. The invocation of the "marketplace of ideas"[211] and the notion that "the people lose when the government is the one deciding which ideas should prevail"[212] provides the clearest sense of the contrast being drawn by Justice Thomas, and it relies on something like a distinction between facts and values. According to the logic of *NIFLA*, informed-consent regulations like those in *Casey* should be thought of as narrowly relating to the facts surrounding a specific medical procedure, an abortion. But the disclosures at issue in *NIFLA*, Justice Thomas suggests, apply to the broader debate of ideas surrounding abortion and its social and moral

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[208] *NIFLA*, 138 S. Ct. at 2385 (Breyer, J., dissenting).

[209] *Id.* at 2383.

[210] *See id.* at 2388 (explaining that abortion involves "not only professional medical matters, but also views based on deeply held religious and moral beliefs about the nature of the practice").

[211] *Id.* at 2366, 2374.

[212] *Id.* at 2375.

character. While the state can interfere with speech narrowly relating to medically relevant facts, *NIFLA* suggests it has no business regulating ideas, even if those ideas relate to medical issues.

The Court's ruling in *NIFLA* raises a host of questions yet to be resolved surrounding regulation of abortion-related speech. How are courts to determine whether government-mandated speech is narrow enough to be considered merely providing relevant information to ensure informed consent or intrudes on the "marketplace of ideas"? When does speech about medicine cease to be narrowly concerned with medical fact and cross the line into the realm of protected, contested moral or social issues? Resolution of these issues is beyond the scope of this Article, but the Court's decision in *NIFLA* not only raises new questions but also creates friction with existing Supreme Court jurisprudence. Even accepting the Court's concern for the marketplace of ideas surrounding abortion at face value, not all citizens seeking abortions are considered full participants in that marketplace. The Court's reasoning in *NIFLA* is, for this reason, particularly difficult to apply to abortion-related speech made to minors.

III. DEPOLITICIZING ABORTION DISCLOSURES

Taking stock of the existing landscape of abortion jurisprudence, one wonders how the *NIFLA* court's analysis fits within the broader landscape of abortion rights. In particular, the *NIFLA* Court's reasoning revives, at least in part, the consideration of whether a particular mandatory disclosure is unconstitutionally ideological. While the *Casey* standard still provides protection to disclosures that facilitate informed consent to a specific procedure, the Court is clearly willing to interrogate the ideological motivations behind other, less procedure-specific regulations. But, setting aside the line-drawing problems involved in defining those two zones of government regulation, the zone of impermissible ideology that the Court identifies in *NIFLA* decidedly is a permissible part of a court's assessment of whether a minor can access an abortion without her parent's consent. Consider again the standard used in judicial bypass proceedings as develop in *Bellotti II*: "A pregnant minor is entitled in such a proceeding to show . . . : 1) that she is *mature enough* and *well enough informed* to make her abortion decision."[213] The Court's language suggests two separate inquiries when assessing a minor's decision making: one assessing maturity and the second assessing whether the minor is well informed. What's more, these two inquiries map well onto the distinctions drawn by Justice Thomas in *NIFLA*.[214] Perhaps the Court is not

[213] *Bellotti II*, 443 U.S. at 643 (emphasis added).
[214] *See supra* notes 72–76 and accompanying text.

interested only in whether the minor has access to the relevant medical facts ("well enough informed"), but also whether she is capable of considered judgment within the more general realm of ideas surrounding abortion ("mature enough").[215] As applied to minors, then, the line that *NIFLA* draws between permissible and impermissible realms of government intervention in abortion-related speech cannot hold. The Court's bypass jurisprudence directs judges in bypass proceedings to assess minors' maturity and, if minors are found not to be mature, to decide what is in minors' best interests. But a primary virtue of the bypass procedure is that it offers a process whereby the court could actually assist youth in gathering information and developing the capacity for mature judgment. This suggests room for a special information-providing role, beyond the narrow category of informed-consent disclosures, which mirrors the state's role in assisting young people to develop a capacity for mature decision making in other contexts. While the government may not intrude into the adult marketplace of abortion ideas, it clearly may (and does) supervise minors in that arena.

Abortion disclosure laws have taken on an undeniably political valence. Unable to attack abortion rights head-on by directly challenging *Roe* and its progeny, states politically opposed to abortion access have instead sought to construct practical barriers to abortion access. Required disclosures that emphasize the potential negative side effects of abortion represent one such barrier. But such regulation is not a one-way political street. Indeed, the *NIFLA* case arguably represents California's attempt to use required disclosures from the opposite political perspective—highlighting the availability of abortion services sponsored by the state. Rather than allow the political disputes surrounding abortion to play out in the form of required disclosure laws passed in state legislatures throughout the country, the Court should instead depoliticize the abortion disclosure debate by applying a different analytical lens when considering such laws as applied to minors. Rather than determine whether the disclosures have met the minimum requirements of the First Amendment, the Court could instead analyze disclosures as a part of the state's responsibilities to minors. As Part I explained, that analysis suggests that abortion disclosures should be crafted to guide and encourage minors in the exercise of their rights, rather than allowed to remain a subject of political contestation.

Consistent with this suggestion, this Part lays out the status quo of abortion regulation in the states and teases out some potential implications of the alternative approach sketched above.

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[215] *See* Baird, 443 U.S. at 643–44.

A. Practical Realities

How do the largely theoretical constitutional considerations described in Part I compare to the realities facing minors seeking abortions on the ground? The answer, by and large, is "not favorably." As mentioned earlier, 34 states require counseling prior to an abortion, 29 of those mandate that specific information be given to women, and 27 states impose a post-counseling waiting period before an abortion can take place.[216] Review of the specific disclosures and requirements paints a sobering picture. Many disclosures, though perhaps meeting *Casey*'s "truthful and not misleading" standard, appear clearly designed to discourage abortion. Generally, they include disclosures about risks of infertility, depression and other psychological consequences, and breast cancer as potential side effects of abortion, despite questionable medical evidence.[217] States have also increasingly begun to require disclosures regarding potential fetal pain associated with abortion.[218] But, these sorts of informed consent disclosures attempt to claim legitimacy as relevant, "truthful and not misleading" medical information under *Casey*. In terms of the analytical distinctions drawn in *NIFLA*, these sorts of disclosures purport to be relevant medical fact necessary to informed consent, rather than crossing over into the ideologically laden marketplace of abortion ideas. Of course, the cumulative effect of supposedly purely "factual" disclosures such as these calls into question the attempt to draw a clean line between the world of informed consent and the broader world of ideas. Surely these disclosures, taken as a whole, might be thought to influence more than just a woman's factual understanding of the abortion procedure.

Even independent of these sorts of concerns, however, there are other requirements associated with abortion that are more blatantly value-laden. Mandatory waiting periods provide one useful example. Upon signing into law Utah's waiting period bill,[219] mandating that a woman wait 72-hours before an abortion, Utah Governor Gary Herbert explained that the law "allows a woman facing such a decision [as abortion] time to fully weigh her options, as well as the implications of the decision."[220] The Supreme Court, in *Akron* recognized that waiting periods were meant to require "careful consideration of the abortion decision" concluding that "if a woman, after appropriate counseling, is prepared to

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[216] *Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE (Feb. 1, 2020), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion [https://perma.cc/JWY8-UBZU].

[217] *See* Vandewalker, *supra* note 161, at 13–19.

[218] *See id.* at 21–22; *See also* MO. REV. STAT. §188.027(1)(5) (2011) for a specific example.

[219] UTAH CODE ANN. § 76-7-305(2)(a) (1953).

[220] *See* Vandewalker, *supra* note 161, at 32 (citing Robert Gehrke, *Guv Signs Bill Requiring 72-Hour Wait for Abortions*, SALT LAKE TRIB., (Mar. 20, 2012), https://archive.sltrib.com/article.php?id=53758618&itype=CMSID [https://perma.cc/SD9Y-PYEV].).

give her informed consent and proceed with the abortion, a state may not demand that she delay effectuation of that decision."[221] Lawmakers' own statements about waiting period laws and the *Akron* court's analysis thus reveal that such laws are about more than careful consideration of medical fact. They are meant to encourage reflection about the full "implications" of the abortion decision, which includes consideration of the moral and social values that go into to that decision.

While waiting periods perhaps can only encourage ideological reflection by implication, some states have also taken the further step of including straightforwardly ideological statements in required disclosures to women seeking abortions. This can be as subtle as referring to the fetus only as an "unborn child" in state materials,[222] requiring disclosures of agencies "which offer alternatives to abortion with a special section listing adoption services and [a] list [of] providers of free ultrasound services,"[223] and statements alluding to the fetus's personhood, undoubtedly a controversial position.[224] Again, while one can surely disagree about whether courts have gotten the line-drawing exercise correct in particular cases, this Article seeks only to establish that these supposed medical "facts" are ideologically loaded. Indeed, much of informed consent legislation seems designed to push the fact/value distinction to its limits. But even accepting that such disclosures are probably best thought of as existing on a spectrum, it is enough for this Article's purposes that many involve a healthy dose of value-laden language. And, if we accept the Court's understanding of minors as especially impressionable, then these sorts of suggestive disclosures likely affect minors with particular force.

The state is thus already firmly entrenched in the ideological terrain surrounding abortion, the *NIFLA* Court's analysis notwithstanding. The state clearly has, through disclosure laws, waiting periods, and judicial bypass proceedings involving assessments of maturity and best interests, involved itself in the regulation of the ideological battles that surround abortion and values that affect abortion decisions. Those regulations might imply one thing when they involve adult women presumed to be savvy consumers of information in a contested marketplace of ideas. For those women, slanted as the ideological playing field in some states may be, there is at least the presumption that they will be sophisticated enough to sort among the set of ideas that the state appears to favor and to seek out and weigh alternative perspectives. But for minors, who are still

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[221] City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 450–51 (1983).

[222] *See* KAN. STAT. ANN. § 65-6709(d) (2011).

[223] *Id.* at § 65-6709(b)(2). The law at issue in *Casey* also required doctors to provide women with materials explaining medical assistance available for adoption and listing specific agencies that would provide adoption services or other abortion alternatives. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881 (1992).

[224] *See* S.D. CODIFIED LAWS § 34-23A010.1(1)(b) (2011) (requiring disclosure that "the abortion will terminate the life of a whole, separate, unique, living human being"); *See also* Vandewalker, *supra* note 161, at 26–28 (collecting other examples of ideological disclosures).

being trained and brought up to engage effectively in a pluralistic and contested ideological marketplace, a similar presumption does not attach. The state's response, in other areas of the law, has been to guide minors toward effective consumption of ideas by curating a marketplace of diverse and credible opinions. Here too then, at least as applied to minors, the state has a duty to ensure that the information the minors receive about abortion services, ideological as well as medical, reflects a full and appropriately pluralistic view of an abortion seeker's choices.

B. Implications

When the state involves itself in the ideological landscape surrounding minors' rights of speech and press, that involvement implies responsibilities to ensure that a variety of competing ideas are accessible in a forum free from state censorship. When the state involves itself in the training and correction of minors through both the adult criminal and juvenile justice systems, that involvement also proceeds from the assumption that the law can guide minors toward mature and law-abiding citizenship. Applying this well-developed and widely adopted approach to the state's relationship with minors to the question of abortion suggests that regulation of minors' abortion access should change in meaningful ways. First, these lessons do not imply that minors can simply be subject to more disclosure requirements or longer waiting periods, an approach of simple increased regulation. That sort of unreflective ratcheting up of the degree of regulation to which minors are subject would do little to fulfill the state's guiding role. Rather, the cases suggest that the state has an affirmative duty to ensure that disclosures about abortions made to minors are not only truthful, but also ideologically balanced. The state should ensure that minors have access to information from a variety of perspectives about the abortion decision. That would include information from pro-choice advocates about the legal and practical realities of obtaining an abortion[225] as well as information from pro-life groups who seek to make a compelling case for parenthood or adoption. And importantly, given the current state of abortion-related disclosures described above, the practical effect of the state acting on a duty to represent an ideologically diverse set of views in its disclosures to minors is likely to be that minors receive more pro-choice material than they currently do. Because most abortion disclosures currently appear clearly designed to discourage abortion, a state duty to curate an ideologically pluralistic set of materials would move disclosures to minors in the direction of pro-choice advocates simply because a move to neutral from the existing anti-abortion bias would count as progress for abortion-rights

[225] *See, e.g.*, *Judicial Bypass for Abortion*, JANE'S DUE PROCESS (last visited Jan. 21, 2020), https://janesdueprocess.org/services/judicial-bypass/ [https://perma.cc/QCA8-XB66].

advocates.

Considering just how the state could do more to encourage minors' engagement with abortion ideas also forces a reckoning with the administrability issues of such a proposal. After all, this Article argues that the state should provide minors with information representing the diversity of views that surround abortion, and surely there will be difficulties determining where that information comes from and which views the state has a duty to represent. In other words, a system in which every unique argument for or against abortion had to be included in the state's assembled information and made available to minors might become unworkable. Not only would that represent a huge amount of information, but it might actually make the marketplace of ideas so crowded as to be ineffective. Practically, that might mean that the state will need to play some curating role—selecting information representative of a range of views about the merits of abortion, parenthood, or adoption but pared down into some digestible form that can actually be of use to minors. In order to ensure that perspectives are fairly represented, the state could work with leading groups (NARAL, Planned Parenthood, Whole Woman's Health, National Pro-Life Alliance, Care Net, etc.) to curate offerings that represent a range of views. Though the state would perhaps practically have to enforce word limits on information and some limits on which groups can contribute information that must be provided to minors,[226] it seems clearly possible to craft a set of disclosures dealing with moral and social ideas about abortion that come from a meaningful variety of perspectives.[227]

But even if the prospect of the state actively deciding which views to present to minors is a bridge too far, even making accessible a full, noncurated collection of the range of substantive views about abortion

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[226] Perhaps a system in which the government awarded grants to particular groups to create this type of material could lead to a more limited set of participating organizations.

[227] Note that the type of affirmative neutrality envisioned here is distinct from the neutrality required in, for example, the context of Title X and federal funding for family planning services. *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 3070–71 (Sept. 28, 2018).

The Supreme Court has held that, in terms of Title X funding, the government is free to promote the decision to carry a child to term over the decision to have an abortion by allocating funds to support its goal. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

But, after the Court's decision in *Rust*, appropriations statutes authorizing Title X have included a so-called "Nondirective Mandate" requiring that counseling in a program funded under Title X "shall be nondirective" as between abortion and carrying a pregnancy to term. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Title II, 132 Stat. 2891, 3070–71 (Sept. 28, 2018).

This was reflected in the implementing regulations until this year, when the Trump administration reversed course and required that Title X programs shall "[n]ot provide, promote, refer for, or support abortion as a method of family planning." 42 C.F.R. § 59.5(a)(5) (current as of May 3, 2019).

Those regulations are the subject of ongoing lawsuits. *See, e.g.*, Washington v. Azar, 376 F. Supp. 3d 1119 (E.D. Wash. 2019).

likely represents progress. Even if the state took no role in actively curating or editing the materials to be made available to minors, we might expect that the market would find a way to sort among the information and promote those resources that are the most useful. That is, market forces independent of the state's active involvement may well lead to the same sort of filtering effect, in which the most useful sources find their way to public (or at least minor abortion seekers') consciousness. The state would then need only to maintain and provide access to the marketplace, either by physically or digitally maintaining the full range of materials that minors could access when seeking abortion information.

A second potential stumbling block for this Article's proposal is how the state's potential provision of abortion ideas interacts with parental rights. Parents have constitutionally recognized authority over their children in a variety of ways. The Court in *Wisconsin v. Yoder*[228] affirmed parents' "traditional interest . . . with respect to the religious upbringing of their children, so long as they . . . 'prepare (them) for additional obligations.'"[229] *Troxel v. Granville*,[230] too, explains the Court's "recogni[tion of] the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[231] The state's potential involvement in the ideological terrain surrounding abortion presses issues of parental autonomy. It is one thing for the Court to say that, in circumstances where a minor has maturely determined she wants an abortion, she can get one without her parents' consent; but it is perhaps another thing to say that the state has an affirmative duty to expose a minor who thinks she wants an abortion to a range of values about abortion independent of her parents' consent.

A couple of considerations may mitigate these concerns. First, *Troxel*'s discussion of parental rights to control the upbringing of children includes a citation to *Prince* describing the right as necessary for "preparation for obligations the state can neither supply nor hinder."[232] This section of *Prince* describes a "private realm of family life which the state cannot enter," but in the very next sentence acknowledges that "the family itself is not beyond regulation in the public interest."[233] Clearly, then, parental rights are part of the equation, but so too is the public interest in preparing young people for effective citizenship, including the meaningful exercise of abortion rights. *Yoder*'s talk of preparation "for additional obligations"[234] also might be thought to involve these sorts of

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[228] 406 U.S. 205 (1972).

[229] *Id.* at 214 (citing Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 535 (1925)).

[230] 530 U.S. 57 (2000).

[231] *Id.* at 66 (collecting cases).

[232] *Id.* at 65–66 (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

[233] *Prince*, 321 U.S. at 166.

[234] *Yoder*, 406 U.S. at 214.

concerns. The Court in *Yoder* clarified this phrase to "include the inculcation of moral standards, religious beliefs, and elements of good citizenship" by parents; but the Court went on to explain that parental rights "may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child."[235] In terms of this Article's proposal, the state's action would be related to the medical health of a minor and leave room for parents to promote their own ideological vision of abortion to their children.

Moreover, when analyzing parents' religious authority over their children in *Yoder*, the Court considered it significant that secondary schooling fundamentally threatened core Amish beliefs.[236] As the Court explained, "The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[237] Central to the Court's analysis was the concern that "formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs," which involved "almost 300 years of consistent practice and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life[.]"[238] But perhaps here the state's providing minors with access to abortion-related ideas does not raise similarly "severe" and "inescapable" concerns. That is, it is not clear that the mere availability of material, even when sponsored by the state, "inescapably" threatens the way of life of any particular religious community—the state-provided material envisioned by this Article is intended to acknowledge the complexity of the issue, not to decide it. Parents of course would remain free to talk to their children about religious ideas and to advocate for their own religiously inspired views about abortion and sexuality. The concern in *Yoder* was that mere exposure to secondary education could pose an existential threat to the Amish way of life. But the mere availability of an alternative perspective on abortion may not pose any similar existential threat to any particular community whose very way of life depends on shielding minors from even the knowledge of alternative views about abortion's moral and social implications. And it is not obvious that the state's providing ideologically balanced materials to minors seeking abortions impermissibly curtails parents' attempt to raise their children to mirror their own preferred values. After all, this Article's proposal calls for the state provision of a range of materials meant to be non-directive—the proposal thus attempts not to inculcate any particular set of moral standards in violation of *Yoder*'s recognition of parents' special authority in that regard. While this Article's proposal must clearly grapple with

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[235] *Yoder*, 406 U.S. at 234.
[236] *Id.* at 217–19.
[237] *Id.* at 218.
[238] *Id.* at 219.

parental rights, then, it is not clear that in the final analysis those rights will be implicated in the sorts of ways that the Court has historically found disqualifying of state regulation.

CONCLUSION

Currently, disclosure requirements that emphasize facts meant to discourage abortion or that include overtly anti-abortion messaging amount to a form of state-sponsored censorship. These are state-sponsored message to minors encountering a complex ideological issue that do vanishingly little to encourage minors to consider their options and meaningfully exercise their rights. This is inconsistent with the state's special concern for minors and does a disservice to minors' constitutional rights. Such one-sided disclosures are also inconsistent with the stated goals of judicial bypass proceedings to promote mature consideration of abortion. The state claims concern for minors' maturity but fails in its duty to promote that maturity in an ideological marketplace that represents the true scope of perspectives that might inform a minor's right to choose an abortion.