WHO DECIDES: WHAT THE CONSTITUTION SAYS ABOUT PARENTAL AUTHORITY AND THE RIGHTS OF MINOR CHILDREN TO SEEK GENDER TRANSITION TREATMENT

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INTRODUCTION

> *When I was a child, I spoke like a child, I thought like a child, I reasoned like a child; when I became a man, I gave up childish ways*.[1]

On December 1, 2020, the Canadian actor, Elliot Page, formerly known as Ellen Page, came out via social media as transgender.[2] Page joined a growing class of celebrities and non-celebrities who identify as transgender.[3] Page stated in an interview that, beginning around the age of nine, she "wanted to be a boy."[4] Page's story is not unique to those who have struggled with their identity and sought a change.

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1 1 *Corinthians* 13:11 (Revised Standard Version, Catholic Edition). The United States Supreme Court has said:

> [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Troxel v. Granville, 530 U.S. 57, 68-69 (2000) (O'Connor, J., plurality opinion).

2 Sharareh Drury, *'Umbrella Academy' and 'Juno' Star Elliot Page Comes Out as Transgender, Non-Binary*, THE HOLLYWOOD REPORTER (Dec. 1, 2020, 10:08 AM), https://www.hollywoodreporter.com/lifestyle/lifestyle-news/elliot-page-formerly-known-as-ellen-page-comes-out-as-transgender-non-binary-4098757/. "Transgender" is defined as "relating to or being a person whose gender identity differs from the sex of the person had or was identified as having at birth." *Transgender*, MERRIAM-WEBSTER (11th ed. 2003).

3 Most notably, such a class includes Bruce Jenner, now Caitlyn Jenner, a famed Olympian; Chasity Bono, now Chaz Bono, the child of musicians Sonny and Cher Bono; and Laverne Cox of the Netflix series *Orange is the New Black*. *See* RYAN T. ANDERSON, WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT (2018).

4 Katy Steinmetz, *Elliot Page Is Ready for this Moment*, TIME (Mar. 16, 2021, 2:55 PM EDT), https://time.com/5947032/elliot-page-2/ ("[A]round age 9, [Page] was finally allowed to cut [her] hair short. 'I felt like a boy,' Page says. 'I wanted to be a boy. I would ask my mom if I could be someday.' Growing up in Halifax, Nova Scotia, Page visualized [her]self as a boy in imaginary

For nearly a decade, the number of individuals identifying as transgender has slowly increased.[5] As of 2016, there are more than 1.4 million transgender persons in the United States.[6] Moreover, one study has found that young people between the ages of eighteen and twenty-four are more likely to identify as transgender than older age groups.[7] The moment in which individuals "find" themselves has been labeled the "transgender moment."[8]

Such a moment now serves as a clarion call to minors.[9] Transgender advocates[10] argue that minor children ought to be able to make their own decisions regarding transition.[11] Advocates further argue that such a choice should be permitted without parental consent.[12] The minor child's transgender moment has the potential to drastically erode the traditional understanding of parental rights. What individuals such as Elliot Page,[13] Caitlyn Jenner,[14] and Laverne Cox[15] all have in common is that they were adults when they transitioned, not children.[16] This article asserts that children are mentally incapable of understanding the full effect of transition and the consequences of gender transition treatment and surgery.[17]

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games, freed from the discomfort of how other people saw [her]: as a girl. After the haircut, strangers finally started perceiving [her] the way [s]he saw [her]self, and it felt both right and exciting.").

5 ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (2016), https://williamsinstitute.law.ucla.edu/ publications/trans-adults-united-states/.

6 *Id.*

7 *Id.* at 5 ("Lower percentages of older adults identify as transgender, with 0.6% of adults age 25 to 64 and 0.5% of adults age 65 or older identifying as transgender.").

8 *See* Brandon Griggs, *America's Transgender Moment*, CNN (June 1, 2015, 3:06 PM EDT), https://www.cnn.com/2015/04/23/living/transgender-moment-jenner-feat; Sonali Kohli & Quartz, *Pop Culture's Transgender Moment: Why Online TV Is Leading the Way*, THE ATLANTIC (Sept. 26, 2014), https://www.theatlantic.com/entertainment/archive/2014/09/why-online-streaming-wins-with-transgender-portrayals/380822/; *see also* Rebecca Juro, *Bruce Jenner and America's Transgender Moment*, MSNBC (Apr. 25, 2015, 9:53 AM CDT), https://www.msnbc.com/msnbc/bruce-jenner-and-americas-transgender-moment-msna582056; John W. Kennedy, *The Transgender Moment*, CHRISTIANITY TODAY (Feb. 12, 2008), https://www.christianitytoday.com/ct/2008/february/25.54.html.

9 *See* Griggs, *supra* note 8; Kohli & Quartz, *supra* note 8.

10 The leading transgender rights group is The National Center for Transgender Equality. *See About Us*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://transequality.org/about (last visited Mar. 17, 2022).

11 Maura Priest, *Transgender Children and the Right to Transition: Medical Ethics when Parents Mean Well but Cause Harm*, 19 AM. J. BIOETHICS 45 (2019).

12 *Id.*

13 Steinmetz, *supra* note 4.

14 Juro, *supra* note 8.

15 Kennedy, *supra* note 8.

16 *See* Griggs, *supra* note 8; Kohli & Quartz, *supra* note 8; *see also* Juro, *supra* note 8; Kennedy, *supra* note 8.

17 A working definition for "gender transition treatment" is best summed up as follows:

> [T]he process in which a person goes from identifying with and living as a gender that corresponds to his or her biological sex to identifying with and living as a gender

As such, this article argues that the Constitution does not contemplate nor grant any rights to minor children. While this article contends that minors do not have any express rights under the Constitution to make decisions regarding their upbringing, common law principles do empower and support the proposition that parental rights to control and direct the upbringing of minor children are implicitly granted by the Constitution and under common law.[18] It is further argued, that parental rights are not tantamount to some inexorable command, but may be limited by the state when the state's interest is patently sufficient.[19]

Part I traces the common law understanding of parental rights. At issue here is the extent parents were historically empowered to control and direct the upbringing of their minor children. Furthermore, Part I also examines the precedent of the Supreme Court relating to paternal authority and the rights of minors. Namely, this section analyzes the two leading cases on the subject: *Meyer v. Nebraska*[20] and *Pierce v. Society of Sisters*.[21] Following an examination of the relevant precedent, Part II considers the role and applicability of the judicial bypass and the Mature Minor Doctrine against the traditional understanding of the duties and obligations of the parent as well as the child through the natural law perspective. Part III addresses the proper level of scrutiny that should be afforded to minor children who seek to transition *with* parental consent. The primary intervention of Part III is to inquire as to whether parental consent should be the sole requirement and obstacle to the minor child's transition or whether the government has sufficient interest to limit the role of parental authority in cases of transgender transition treatment. The first question, here, is whether a court could countermand parental consent and deny the transition of the minor child. The second question that will be addressed is what standard of review such a denial be afforded.

> different from his or her biological sex, and may involve social, legal, or physical changes . . . . "Gender transition procedures" means any medical or surgical service, including without limitation physician's services, inpatient and outpatient hospital services, or prescribed drugs related to gender transition that seeks to: (i) Alter or remove physical or anatomical characteristics or features that are typical for the individual's biological sex; or (ii) Instill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex, including without limitation medical services that provide puberty-blocking drugs, cross-sex hormones, or other mechanisms to promote the development of feminizing or masculinizing features in the opposite biological sex, or genital or nongenital gender reassignment surgery performed for the purpose of assisting an individual with a gender transition.
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> Brandt v. Rutledge, F. Supp. 3d 882, 887 (E.D. Ark. 2021) (citation omitted).

18 *See* discussion *infra* Part I.

19 The cases below illuminate the struggles concerning parental authority and the obligations of the State. *See* cases discussed *infra* Part I. B. At bottom, the author contends that, while parents maintain authority over their children, such authority, however broad, may be limited by the State.

20 Meyer v. Nebraska, 262 U.S. 390 (1923).

21 Pierce v. Soc'y of Sisters of the Holy Name of Jesus and Mary, 268 U.S. 510 (1925).

I. TRACING PARENTAL AUTHORITY: THE ENGLISH COMMON LAW

To fully apprehend the basis of parental authority, one must first appreciate the historical basis and traditions from which these "rights" flow. Namely, the focus of this section is on the Commentaries of William Blackstone and the laws of England. Accordingly, this examination of Blackstone's observations will illuminate the underlying principles which begot the notion of parental "rights" as it was understood at common law and presently reflected in the American legal system.[22] Secondarily, the natural law theory thus employed not only bolsters the traditional understanding of parental authority and duty, but also provides a keen insight for understanding human flourishing.[23]

A. A Brief History of Common Law Parental Authority

For Blackstone, the relationship between parent and child was one that was strongly considered to be the "most universal relation in nature."[24] Pursuant to the Civil and Common law traditions, the law,[25] and society by extension, recognized two types of children:[26] legitimate[27] and illegitimate.[28] Of the two classifications, the law granted similar but distinct rights to the

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22 Establishing the authority of parents, *Meyer v. Nebraska* and *Pierce v. Society of Sisters* reflect the traditions detailed by Blackstone. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 446 (St. George Tucker ed., Augustus M. Kelley 1969) (1803).

23 LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 230 (2019).

24 BLACKSTONE, *supra* note 22.

25 *Id.*

26 It should be noted that, at common law, persons were considered to be a minor if they were under the age of twenty-one. *See* 16 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 262 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1900) ("By the common law the age of majority is fixed at twenty-one years for both sexes, and, in the absence of any statute to the contrary, every person under that age, whether male or female, is an infant.").

27 BLACKSTONE, *supra* note 22, at 446 ("A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. '*Pater est quem nuptiae demonstrant*' [the nuptials show who is the father], is the rule of the civil law; and this holds with the civilians, whether the nuptials happen before, or after, the birth of the child.").

28 *Id.* ("With us in England the rule is narrowed, for the nuptials must be precedent to the birth; of which more will be said when we come to consider the case of bastardy."). An illegitimate child is one that is born out of lawful matrimony. *Id.* at 454-59 (describing who is an illegitimate child, also known as a bastard, their ability to become legitimate based on parental action, and the duties a parent owes to a bastard child). This article will not draw nor address the distinctions of legitimacy. Here, all children will be presumed to have equal status when compared. While common law did distinguish between legitimate and illegitimate children, current jurisprudence has effectively nullified the differences; thus, the duty of the parents to provide for the maintenance, protection and education of their children extends to both classifications of children. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Clark v. Jeter, 486 U.S. 456 (1988).

parents.[29] Inquiring into the relationship between parent and child, Blackstone focused on three connected considerations: "[t]he legal duties of parents to their legitimate children . . . [t]heir power over them [and] . . . [t]he duties of such children to their parents."[30]

At common law, an individual under the age of twenty-one was considered to be lacking in experience and reason, and, therefore, still subject to his father's authority:

> The legal power of a father, for a mother, as such, is entitled to no power, but only to reverence and respect; the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children.[31]

While the duties of parents at common law amalgamates with the principles of natural law, this section is chiefly concerned with the common law understanding of the aforementioned duties.[32] Regarding a parent's legal duty, common law required three particulars:[33] maintenance,[34] protection,[35] and education.[36] American law, then, rightly presumes that children lack the

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29 BLACKSTONE, *supra* note 22, at 446-59.

30 *See id.* at 446.

31 *Id.* at 453; *see also* Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Parental Custody*, 99 COLUM. L. REV. 1344, 1344-45 (1999).

32 For further development of the natural law analysis of the duties of parents, see discussion *infra* Part II.

33 BLACKSTONE, *supra* note 22, at 446 ("[F]irst, the duties of parents to legitimate children: which principally consist in three particulars; their maintenance, their protection, and their education.").

34 *Id.* ("[The] duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Pufendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents.").

35 *Id.* ("[Protection] is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defense of the persons of his children: nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating the afterwards, died; it was not held to be murder, but manslaughter merely. Such indulgence does the law show to the frailty of human nature, and the workings of parental affection.").

36 *Id.* ("[The] last duty of parents to their children is that of giving them an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For, as Pufendorf very well observes, it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child, by bringing him into the world; if he afterwards entirely

requisite capacity to make critical reasoned decisions and thus necessitates adult direction.[37] Our law, as it was similarly reflected at common law, granted broad authority to parents over their children.[38]

B. Supreme Court Precedents

Virtually every introductory constitutional law course will attempt to tackle the landmark parental rights case *Meyer v. Nebraska*.[39] In *Meyer*, the state legislature of Nebraska passed a law prohibiting all teaching instruction to be conducted solely in English.[40] Thereafter, Mr. Meyer, a German teacher in a Lutheran school, was tried and convicted of violating the abovementioned statute.[41] Nebraska argued the statute sought to promote

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neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself.").

37 Erik M. Zimmerman, Note, *Defending the Parental Right to Direct Education: Meyer and Pierce as Bulwarks Against State Indoctrination*, 17 REGENTS U. L. REV. 311, 315 (2005); Schall v. Martin, 467 U.S. 253, 265 (1984). "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*." *Schall*, 467 U.S. at 265. "Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified." *Id.* at 265 n.15 (quoting People *ex rel.* Wayburn v. Schupf, 350 N.E.2d 906, 908-09 (N.Y. 1976)). "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." Parham v. J.R., 442 U.S. 584, 602 (1979).

38 Zimmerman, *supra* note 37, at 314 n.22; *Parham*, 442 U.S. at 602 ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726, 769 (1978) (Brennan, J., dissenting) ("[There is a] time-honored right of a parent to raise his child as he sees fit—a right this Court has consistently been vigilant to protect."); Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977) ("[T]he institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); Gordon v. Bd. of Educ., 178 P.2d 488, 498 (Cal. Dist. Ct. App. 1947) (White, J., concurring) ("Under our system of government the family is the foundation of the social order, it does not spring from the state but the state springs from the family."); Sch. Bd. Dist. No. 18, Garvin Co. v. Thompson, 103 P. 578, 581 (Okla. 1909) ("Under our form of government, and at common law, the home is considered the keystone of the governmental structure.").

39 Meyer v. Nebraska, 262 U.S. 390 (1923).

40 *Id.* at 397. The Nebraska law in dispute provided: "No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language." Act of Apr. 9, 1919, ch. 249, § 1, 1919 Neb. Sess. Laws (repealed 1923).

41 *Meyer*, 262 U.S. at 396-97. The Court summarized the case's history as follows:

> Plaintiff in error was tried and convicted in the district court for Hamilton county, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained and successfully

"civic development"[42] and did not carry the purpose of proscribing all languages.[43] However, the Court determined the state exceeded the bounds of its authority.[44] The issue before the Court was whether such a law violated the Fourteenth Amendment.[45] Finding that the Nebraskan law was a violation of the Fourteenth Amendment, the majority broaden constitutional liberty to include the rights of parents to direct the upbringing of their children:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.[46]

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passed the eighth grade. The information is based upon "[a]n act relating to the teaching of foreign languages in the state of Nebraska."

Id.

42 *Id.* at 401. The Court summarized Nebraska's stated purpose for the law as follows:

> It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and "that the English language should be and become the mother tongue of all children reared in this state." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

Id.

43 *Id.* at 400-01 ("The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The [s]upreme [c]ourt of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act.' Latin, Greek, [and] Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban.").

44 *Id.* at 402. In reaching this decision, the Court stated:

> The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

Id.

45 *Id.* at 399.

46 *Id.*

Although the Court opined on the "natural dut[ies] of parents," the majority also left open a door wherein the state may, with sufficient interests and justification, limit the broad authority of parents.[47] At bottom, the fundamental question regarding state power ought to be centered on the reasonableness of the relationship, rather than authority alone.[48]

Similarly, in *Pierce v. Society of Sisters*,[49] the Court was again tasked with defining the relationship between the state and a parent's rights. There, the primary issue before the Court was whether a law requiring children between eight and sixteen years of age to attend public school conflicted with the Due Process Clause of the Fourteenth Amendment.[50]

Applying *Meyer*, the Supreme Court affirmed the district court's decision[51] finding that the law was volitive of the Fourteenth Amendment:

> [W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights

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47 *Meyer*, 262 U.S. at 399-400 ("The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."); *see also* Lawton v. Steele, 152 U.S. 133, 137 (1894) ("To justify the state in thus interposing its authority in behalf of the public, it must appear-First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Thus, an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace, and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the state against any expense for the support of the persons named for four years thereafter, was held by this court to be indefensible as an exercise of the police power, and to be void as interfering with the right of congress to regulate commerce with foreign nations.").

48 This notion is more fully explored in this article's section on scrutiny. *See* discussion *infra* Part III. A.

49 Pierce v. Soc'y of Sisters of the Holy Name of Jesus and Mary, 268 U.S. 510 (1925).

50 *Id.* at 530. The Court described the Oregon law at issue as follows:

> The challenged act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him "to a public school for the period of time a public school shall be held during the current year" in the district where the child resides; and failure so to do is declared a misdemeanor.

Id.; *see also* Zimmerman, *supra* note 37, at 324. In his Note, Erik M. Zimmerman describes the Oregon statute at issue in *Pierce*:

> *Pierce* arose in the same context of post-War nativism as *Meyer*. *Pierce* involved a challenge to an Oregon statute enacted by public initiative that created a system of compulsory public education. The law required all children between eight and sixteen years of age to attend public school, with exceptions for children that were disabled, had completed the eighth grade, or lived too far from the nearest public school.

Zimmerman, *supra* note 37, at 324.

51 Soc'y of Sisters of the Holy Name of Jesus and Mary v. Pierce, 296 F. 928, 937-38 (D. Or. 1924).

> guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[52]

The *Pierce* decision further bolstered the rights of parents to control the education of their children.[53] Further still, Professor David Fisher asserts that while the state has an interest in regulating the functionality of schools, they may not dictate the duties of parents with respect to education.[54] Yet, in spite of Fisher's claim, one year prior to *Pierce* in *Bartels v. Iowa*[55] a minority of justices contended—albeit in dissent—that even within the zone of education, a law regulating English only instruction, in the appropriate circumstance, would not run afoul of the liberty interests surrounding parental rights.[56]

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52 *Id.* at 534-35.

53 *Pierce*, 268 U.S. at 534-35.

54 David Fisher, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399, 422 (1997); *see also* Zimmerman, *supra* note 37, at 325 ("While recognizing that states have a valid interest in overseeing the functioning of schools, the Court held that the State has no authority to usurp the role of parents as the primary educator of children under a system of government that protects individual liberty.").

55 Bartels v. Iowa, 262 U.S. 404 (1923).

56 *Id.* at 412 (Holmes, J., dissenting in part). In his dissent, Justice Holmes wrote:

> We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one. The only question is whether the means adopted deprive teachers of the liberty secured to them by the Fourteenth Amendment. It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this, but I cannot bring my mind to believe that, in some circumstances, and circumstances existing, it is said, in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the state where a child would hear only Polish or French or German spoken at home, I am not prepared to say that it is unreasonable to provide that, in his early years, he shall hear and speak only English at school. But, if it is reasonable, it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." I think I appreciate the objection to the law, but it appears to me to present a question upon which men reasonably might differ, and therefore I am unable to say that the Constitution of the United States prevents the experiment's being tried.

Id.

The Supreme Court has, through its subsequent line of cases, essentially forestalled the intrusion of the state regarding a parent's rights to direct the education of their children.[57] Much of the early jurisprudence supporting parental rights flowed from cases involving education.[58] Education, then, was the Court's vehicle to explain the general rights of parents. Notwithstanding the emphasis on education, the aforementioned cases should be used to understand the general and broad principles concerning the rights of parents over their children. With respect to hormone and sex altering practices, the relevant issue is not one of education. Indeed, for one to proffer such a claim, one would be hard-pressed to support it as a matter respecting a parent's right to control the education of their child. The relevant issue, then, is one of public health and safety. One public health concern is the negative consequences of delaying puberty to physical development and reproduction.[59] Those individuals may have underdeveloped reproductive organs or organs that lack any practical reproductive function.[60] In short, the public health concern is one felt by the individual and the community at large. Secondarily, is the question of scrutiny and relationship. To press the point further, notably absent in each of the aforementioned cases is the rights of the *child* to decide.[61] Such an absence should leave one to conclude, rather reasonably, that the law, as originally understood, did not endow child with rights *per se*.[62]

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57 Zimmerman, *supra* note 37, at 326 n.76; *e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213-14, 233 (1972) (recognizing the "right of parents to provide an equivalent education in a privately operated system," the right "of parents to direct the religious upbringing of their children," the "interest of parents in directing the rearing of their offspring," the "traditional interest of parents with respect to the religious upbringing of their children," and a duty to prepare the child for "'additional obligations"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (recognizing the right "to conceive and to raise one's children" and the "integrity of the family unit"); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (recognizing the "right to educate a child in a school of the parents' choice" and the "right to educate one's children as one chooses"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing "parent's authority to provide religious with secular schooling").

58 *See* cases cited *supra* note 57.

59 Jia Zhu & Yee-Ming Chan, *Adult Consequences of Self-Limited Delayed Puberty*, PEDIATRICS, June 2017, at 1, 1 ("In particular, height and bone mineral density have been shown to be compromised in some studies of adults with a history of delayed puberty.").

60 *Id.*

61 The above referenced cases do not address the prospect of minor children possessing rights independent of their parents' authority. *See generally* cases discussed *supra* Part I. B.

62 Brown v. Ent. Merchs. Ass'n., 564 U.S. 786, 823 (2011) (J. Thomas, dissenting) ("Part of the father's absolute power was the right and duty 'to fill his children's minds with knowledge and . . . make them apply their knowledge in right action.' Puritans thought children were 'innately sinful and that parents' primary task was to suppress their children's natural depravity.'") (citations omitted) (first quoting E. MORGAN, THE PURITAN FAMILY 97 (rev. ed.1966); then quoting S. MINTZ & S. KELLOGG, DOMESTIC REVOLUTIONS 2 (1988)). While Justice Thomas' dissent is focused primarily on the First Amendment, his apt application of the original public meaning of children's rights may be appropriately compared to a child's right to sex altering treatment and the justified denial of such. *See id.*

While the Supreme Court has made clear the law's position regarding parental rights and authority, the same splintered ruling that infected the holdings of *Meyer*,[63] *Pierce*,[64] and *Bartels*[65] continued to divide the Court more than seventy years later.[66] More specifically, the Court, even in dictum,[67] appears to be hesitant—or even reluctant—to find that the Constitution grants parents unfettered rights over their children notwithstanding common law traditions.[68] In *Troxel v. Granville*,[69] the Court furthered the ever-broad authority of a parent over their children by striking down a Washington state statute that permitted "'[a]ny person' to petition for visitation rights 'at any time' and authorizes state superior courts to grant such rights whenever visitation may serve a child's best interest."[70] In finding the law at issue violated the Fourteenth Amendment, the Court reaffirmed the authority of a parent over their children.[71] At the foundation of her plurality opinion, Justice O'Connor relied upon the cardinal rule embedded in *Prince v. Massachusetts*, that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[72]

However, I point to *Troxel*[73] not to opine on the continued expansion of parental authority, but rather, such is illustrative of the division regarding the rights of parents. Although much of the reluctance to parental authority is likely placed in dictum, such a placement should not be ignored or written off as the losing side. Often, what once was dictum can become the majority position after a period of time.[74] Because of the nature of time and dictum, the matter of youth transition treatment and broad parental authority presents a complex and uneven path. Thus, I narrow my analysis of *Troxel*[75] to the seemingly divergent and yet related opinions of Justices Scalia and Thomas.

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63 Meyer v. Nebraska, 262 U.S. 390 (1923).

64 Pierce v. Soc'y of Sisters of the Holy Name of Jesus and Mary, 268 U.S. 510 (1925).

65 Bartels v. Iowa, 262 U.S. 404 (1923).

66 *See* Troxel v. Granville, 530 U.S. 57 (2000); *Brown*, 564 U.S. at 823.

67 *Bartels*, 262 U.S. 404 (Holmes, J., dissenting).

68 *Id.*; *see* quotation *supra* note 56.

69 *Troxel*, 530 U.S. 57.

70 *Id.*

71 *Id.* at 65.

72 *Id.* at 65-66 ("[I]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

73 *Id.*

74 Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990) ("A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.").

75 *Troxel*, 530 U.S. 57.

I make a single claim: *Troxel*[76] could just as easily be used to substantiate and justify limits on parental authority with regard to youth gender transition treatment as it was instrumental is espousing the limits of the state.

Justice Scalia contends that because the rights of parents are unenumerated and absent in the text of the Constitution, the rights of parents appear artificial and lacking in proper Constitutional tethering.[77] In short, Justice Scalia is arguing for the separation of powers, a doctrine long embedded in our constitutional scheme.[78] Pressing further, Justice Scalia, wholly unpersuaded by the plurality, tacitly implied *Meyer* and *Pierce* ought to be overruled.[79] At bottom, Justice Scalia asserts that the state may impose

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[76] *Id.*

[77] *Id.* at 91-92 (Scalia, J., dissenting) In his dissent, Justice Scalia wrote, in part:

> In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming anyone of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Id.

[78] *Id.* at 90 n.10 ("[T]he instinct against overregularizing decisions about personal relations is sustained on firmer ground than mere tradition. It flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve."); *see also* F. Lee Francis, *Remembering Congress and the Separation-of-Powers: The Case Against 'Judicial Updating' of Title VII of the Civil Rights Act of 1964*, J. RACE, GENDER, & POVERTY, May 4, 2021, at 1, 1-2 ("At common law, the prevailing notion held that 'nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.' The founding generation profoundly understood the necessity of the republican form of government and that its absence, our government would cease. . . . Good policy may indeed be necessary to preserve the rights of a few and where good law is required such should originate from the lawmakers. In our system, the role of a judge is to merely 'say what the law is.'").

[79] *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) ("Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since been repudiated. The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.").

limits on the rights of parents in relation to their children as the Constitution fails to address the nature of parental authority.[80]

Consider the following scenario: State X, in an effort to "save" children, passes a law that would deny minors from accessing all transition treatment including, but not limited to, puberty blockers and surgery. The law also criminalizes any medical professional who attempts to recommend or engage in the proscribed treatments. Furthermore, the law also inhibits a parent's authority to consent to the forbidden treatment due to the minor's lack of capacity.[81] Under the framework employed by Justice Scalia, the law would be upheld.[82] Thus, should a state deny access to gender transition treatment to minor children and, at the same time, forbid a parent to consent to such treatment, Justice Scalia would find in favor of the state's denial and sustain the law. To test the point further, a more interesting question is whether Justice Scalia would also uphold a law that required medical professionals to provide gender altering treatment if an evaluation was made that the procedure was in the best interest of the child. Justice Scalia's dissent in *Troxel* does not elicit an easy answer.[83] The answer could depend on the level of state regulation. On its face, Justice Scalia's dissent could be interpreted as validating the law, even over the protests of parents. However, in the alternative, the state's regulation of the intimate relationship of parent and child could be persuasive. If the matter presented a question of procedural unfairness or whether the rights of parents constitute a "liberty" interest for purposes of procedural due process—a question not addressed by the Court in *Troxel*.[84]

Turning now to Justice Thomas's approach, I argue that he believes the grant of parental authority may be sourced back to common law traditions.[85] Skeptical of the Court's due process jurisprudence, Justice Thomas, by not directly addressing the merits of the issue, may not be open to extending the

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80 David M. Wagner, *Thomas v. Scalia on the Constitutional Rights of Parents: Privileges and Immunities, or Just "Spinach"?*, 24 REGENT U. L. REV 49 (2011).

81 Ryan Saavedra, *Arkansas Passes 'Save Adolescents from Experimentation Act' to Ban Trans Surgery, Puberty Blockers For Minors*, THE DAILY WIRE (Mar. 30, 2021), https://www.dailywire.com/news/arkansas-passes-save-adolescents-from-experimentation-act-to-ban-trans-surgery-puberty-blockers-for-minors.

82 *Troxel*, 530 U.S. at 91-92 (Scalia, J., dissenting); *see* quotation *supra* note 77.

83 *Troxel*, 530 U.S. at 92; *see* quotation *supra* note 79.

84 *Troxel*, 530 U.S. at 92 ("Whether parental rights constitute a 'liberty' interest for purposes of procedural due process is a somewhat different question not implicated here.").

85 Brown v. Ent. Merchs. Ass'n., 564 U.S. 786, 834-35 (2011) (Thomas, J., dissenting) ("The history clearly shows a founding generation that believed parents to have complete authority over their minor children and expected parents to direct the development of those children. The Puritan tradition in New England laid the foundation of American parental authority and duty. In the decades leading up to and following the Revolution, the conception of the child's mind evolved but the duty and authority of parents remained. Indeed, society paid closer attention to potential influences on children than before.") (citations omitted).

doctrine.[86] Because Justice Thomas finds foundation for the authority begetting the rights of parents, he also suggests that a state's compelling interest, if sufficient, could overrule a parent's decision.[87] Thus, a sufficient state interest or an inconsistent and hollow due process claim would leave open the possibility that these opposing opinions could one day merge.[88] Harkening back to the previous scenario, if, fictitiously speaking, aggrieved Plaintiff Parent claimed a Fourteenth Amendment injury to the State X law denying his child access to transition treatment, Justice Thomas would likely vote to uphold the law arguing the state met it's burden of showing a compelling interest provided it can show a strong connection to the regulation of public health.[89] In short, the case for parent rights in the realm of transition treatment remain highly volatile as what may appear as a clear case supporting parental authority, could swiftly turn into one of its greatest limits.

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[86] *Troxel*, 530 U.S. at 80 (Thomas, J., concurring) ("I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.").

[87] For more elaboration on the appropriate standard of review, see *infra* Part III.; *Troxel*, 530 U.S. at 80 (Thomas, J., concurring) ("I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest-to say nothing of a compelling one-in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.").

[88] *See Brown*, 564 U.S. at 834-35 (Thomas, J., dissenting); quotation *supra* note 85; *see also Troxel*, 530 U.S. at 80 n.* ("This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause."). Here, Justice Thomas is seemingly implying, however discretely, that rather than the Due Process Clause, such a matter may be best analyzed under the Privileges and Immunities Clause of the U.S. Constitution. *Id.*

[89] *See* Box v. Planned Parenthood, 139 S. Ct. 1780 (2019). In this case, the Indiana state legislature passed a law prohibiting "an abortion provider to perform an abortion in Indiana when the provider knows that the mother is seeking the abortion solely because of the child's race, sex, diagnosis of Down syndrome, disability, or related characteristics." *Id.* at 1783 (Thomas, J., concurring); *see also* Sex Selective and Disability Abortion Ban, IND. CODE § 16-34-4-1 (2016). In his concurrence, Justice Thomas explained that preventing abortion from being a "tool of modern-day eugenics" would be one justification for the state to overcome strict scrutiny. *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring). In his concurrence, Justice Thomas elaborated on this concept by stating:

> The law requires that the mother be advised of this restriction and given information about financial assistance and adoption alternatives, but it imposes liability only on the provider. Each of the immutable characteristics protected by this law can be known relatively early in a pregnancy, and the law prevents them from becoming the sole criterion for deciding whether the child will live or die. Put differently, this law and other laws like it promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics.

Id. (citation omitted).

II. NATURAL LAW THEORY AND A MINOR'S RIGHTS

The central question this paper raises is not whether adults should be denied transition treatments, but whether such treatments should be provided to minor children. Indeed, the calls to grant minors access to body and sex altering treatments are ever growing.[90] Here, I make three points. First, I contend that the mature minor doctrine is in direct conflict with the traditional and the long-held teachings of natural law. Next, and perhaps most critical, the mature minor doctrine has the potential to be wholly unrestrained and in time could be limitless; thus, effectively erasing the distinctions and differences that set reasonable adults apart from unreasonable children. Lastly, I assert that permitting a judicial bypass for transition treatment directly contradicts the state's obligatory deference to parents when abuse or neglect is not at issue.[91]

A. The Encumbered Self

For one to fully apprehend the first point made here, one must undertake to appreciate the basics of the natural law. Relying primarily on the foundations of Thomas Aquinas and Aristotle, the groundwork from which the natural law perspective may be best understood is addressed below.

At its base, the natural law is not a product of human invention; rather it flows through, inherently so, man as granted by God.[92] Indeed, natural law is even reflected in our founding documents.[93] Natural law, then, sets an

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90 *See* Federica Vergani, Comment, *Why Transgender Children Should Have the Right to Block their Own Puberty with Court Authorization*, 13 FIU L. REV. 903 (2019); *see also* Emily Ikuta, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent Under the Mature Minor Doctrine*, 25 S. CAL. INTERDISC. L.J. 179 (2016).

91 I present here a critical point and distinction. It is not contradictory to say, on the one hand, that parents should have complete authority over their children so long as such does not give way to abuse or neglect, while at the same time, when a parent, pursuant to their natural authority, denies their child, for example, transition treatment, the state's authority must cease. However, it is entirely different when the state grants, to a minor child, the exact thing a parent, acting absent abuse or neglect, rightly denies. In such a case, the state has unduly overruled the parent and has shirked its obligation to protect the health and safety of its constituency. While the argument may be made that a parent's denial of such treatment may itself be considered abuse, such a claim should fail because our law does not grant to minors complete rights and autonomy under our constitutional scheme. In fact, a parent consenting to the transition of a minor child could lose their custodial rights. *See* Smith v. Smith, No. 05 JE 42, 2007 WL 901599 (Ohio Ct. App. Mar. 23, 2007).

92 STRANG, *supra* note 23, at 241 ("Natural law is the body of non-human-posited norms that identifies which actions are, and are not, conducive to human flourishing. One may think of natural law as containing the 'external' guides to human flourishing. They are external because the natural law norms are not chosen by individual humans or a community of humans.").

93 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the

obligatory floor whereby humans must not fall below.[94] As Professor Craig A. Boyd explains, natural law traditions were necessary to advance the individual toward virtue.[95] For Aquinas, one's ability to be virtuous is grounded in one's ability to reason.[96] As Boyd explains, "all the acts of virtue fall under the generic heading of natural law, since they are prescribed by reason in the sense that reason directs us to 'better ourselves.'"[97]

However, the elephant requiring redressing is thus: how does one possess a mind to reason? For Boyd, it is our relationships that begets our understanding of the natural law—reason and virtue:

> As human beings we are neither born virtuous, nor are we born with innate ideas of natural law. Family, church, society, and other institutions mediate the primary precepts of the natural law to us. Our knowledge of natural law is in potency until someone or something awakens and develops it in us. But an understanding of natural law is but the first step on the way to moral goodness. We are creatures who are potentially virtuous and the natural law, like the DNA of a plant, directs us to the virtues. That is, the virtues complete what the natural law starts.[98]

The natural law essentially declares that humans are not born as blank slates.[99] What Boyd alludes to, but do not directly elucidate, is the notion of the encumbered self. For Professor Michael J. Sandel, the notion of the encumbered self is one that proclaims the individual is born already tethered to relationships, a family, and moral obligations:

> To identify any set of characteristics as *my* aims, ambitions, desires, and so on, is always to imply some subject 'me' standing behind them, and the shape of this 'me' must be given prior to any of the ends or attributes I bear. As Rawls writes, 'even a dominant end must be chosen from among

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laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.").

94 CRAIG A. BOYD, A SHARED MORALITY: A NARRATIVE DEFENSE OF NATURAL LAW ETHICS 241 (2007) ("The natural law prescribes minimal obligations that all humans must have.").

95 *Id.* ("[N]atural law not only includes our minimalist obligations to others in order to create and sustain a peaceful community, but also purses virtue and knowing the truth about God.").

96 *Id.* ("Since the rational soul is the proper form of the human, there is thus in every human a natural inclination to act according to reason; and this is to act according to virtue.").

97 *Id.*

98 *Id.* at 242.

99 DANIEL M. NELSON, THE PRIORITY OF PRUDENCE: VIRTUE AND NATURAL LAW IN THOMAS AQUINAS AND THE IMPLICATIONS FOR MODERN ETHICS 120 (1992) ("We have a natural aptitude for virtue and even a natural inclination to act virtuously or reasonably, such that we are not blank slates but have a created disposition, not entirely destroyed by the fall, to virtue and reason.").

> numerous possibilities. And before an end can be chosen, there must be a self around to choose it.[100]

For Sandel, viewing "the self as choosing subject prior to its chosen ends"[101] is a great fallacy in so far as it creates an artificial distance between the individual and their community:

> One consequences of this distance is to put the self *itself* beyond the reach of its experience, to make it invulnerable, to secure its identity once and for all. [. . .] No role or commitment could define me so completely that I could not understand myself without it. No project could be so essential that turning away from it would call into question the person I am.[102]

Individuals, according to Sandel, are not mere *tabula rasa.*[103] Thus, because we are born into a family, with a membership from which natural law—virtue and reason—are developed, we are not and cannot be born of a state.[104]

Accordingly, I argue that the family exist to encumber individuals. That is to say families are not a mere means of producing individuals, but necessary for the development of human beings.[105] Such a point best captured by Professor James V. Mullaney:

> The family does not exist merely to generate children—promiscuity would achieve that. The family exists to beget human beings: to give children not life, merely, but a specifically human life, a civilized life-intellectual, moral, spiritual, emotional, esthetic, social; life having depth, breadth and restraint.

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100 Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 86 (1984).

101 Richard Dagger, *The Sandelian Republic and the Encumbered Self*, 61 REV. POL. 181, 185 (1999) ("Sandel . . . argue[s] that this view of the self as choosing subject prior to its chosen ends is both wrong and pernicious. It is wrong because its conception of the self as static and isolated is at odds with our self-knowledge, and it is pernicious because the distance it puts between self and world forecloses important personal and political possibilities.").

102 Sandel, *supra* note 100, at 86.

103 This Latin term, meaning "a blank slate," has been connected to John Locke's theory that the mind is a blank slate to be filled by experiences. *See* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Roger Woolhouse ed., Penguin Books 1997) (1690).

104 Gordon v. Bd. of Educ., 178 P.2d 488, 498 (Cal. Dist. Ct. App. 1947) (White, J., concurring) ("Under our system of government the family is the foundation of the social order, it does not spring from the state but the state springs from the family."); *see also* Pierce v. Soc'y of Sisters of the Holy Name of Jesus and Mary, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

105 STRANG, *supra* note 23, at 240 ("[H]umans are all born with the capacity for virtue. However, we need education and training to enable us to actualize virtue. For some, the guidance of parents is enough to lead them to virtue. For others, something more is needed. That something may include effective societal intervention to prevent the individual from harming himself and/or other, and to help the individual continue his advancement toward his virtue.").

> Put the matter another way. Those who are responsible for the being of the child are responsible also for his well-being.[106]

Both the common law and natural law traditions instruct the parent to develop civilized children. As such, the presumption, as explained above, is that children lack the ability merely by themselves.[107]

B. The Judicial Bypass as a Remedy for Transgendered Youths

The judicial bypass framework was first developed by the Supreme Court in *Bellotti v. Baird*.[108] There, the Court, struck down a Massachusetts statute that required a minor to obtain parental or judicial consent prior to receiving an abortion.[109] In the end, the Court found that a minor should have access to an abortion provided at least one of two elements are met: "(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."[110]

The Court was clear to note that a parental consent requirement is not, on its own, unconstitutionally burdensome and not uncommon in our constitutional scheme to protect the interests of minors.[111] Moreover, the

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106 James V. Mullaney, *The Natural Law, the Family and Education*, 24 FORDHAM L. REV. 102, 107 (1955).

107 *Id.* at 109.

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

109 *Id.* at 625. The Court quoted the following statutory language:

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

Id. (quoting MASS. GEN. LAWS ch. 112, § 12S (1979) (repealed 2020)).

110 *Id.* at 643-44.

111 *Id.* at 649. The Court considered implications of an abortion beyond the pregnant minor's interest, stating:

> We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment. At least when the parents are together and the pregnant minor is living at home, both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of a daughter. Consent and

Court also acknowledged that the consenting role of the parent is not only consistent with individual liberty, but consent may also be understood to foster the minor's "growth and maturity."[112]

Yet, notwithstanding the Court's clear language in *Baird*, proponents of transgender youth transition—without parental consent—argue that the bypass framework should be extended beyond the narrow abortion context.[113] The glaring difference between the comparison on hormone transition treatment and abortion is that one has been protected and upheld by the Supreme Court as a fundamental right,[114] and the other is a decision which could be fulfilled upon adulthood.[115] The judicial bypass framework is simply not applicable to the matter of transgender youth transition treatment as the Supreme Court has not identified such to be a protected fundamental right under the Constitution, unlike an abortion.[116]

Federica Vergani and other advocates of the bypass framework suggest a similar method which should be applied to transgender transition matters.[117] Even under this framework, minors are still very unlikely to obtain transition treatments.

The first prong of the Vergani bypass framework requires the assent of the treating physician.[118] At this, Vergani rightly concludes that a minor of

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> involvement by parents in important decisions by minors long have been recognized as protective of their immaturity.

Id.

112 *Id.* at 638-39 ("Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.").

113 Vergani, *supra* note 90, at 919 ("[A] transgender minor should be able to take hormone blockers before puberty without parental consent because the decision is inherently an individual one that should be made independently. Thus, minors should not be denied the ability to begin puberty suppressing treatments when their parents refuse to consent.").

114 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

115 *Baird*, 443 U.S. at 642. The Court acknowledged that the right of a minor to obtain an abortion is different from the right to marry, explaining that the decision to marry may simply be postponed whereas a pregnancy is time limited:

> The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.

Id. As such, in this context, the right to marry and alter one's sex is quite similar. The minor can simply wait until adulthood.

116 *See Casey*, 505 U.S. 833.

117 Vergani, *supra* note 90, at 919 ("[The *Baird*] test could be modified and applied to an adolescent seeking authorization from a court to take puberty blockers without having to provide parental notice or consent.").

118 *Id.* at 919-22.

nine years would lack the showing of maturity to obtain treatment on his own.[119] What is more, scientists have also observed that the bypass framework would be an insufficient remedy for the transgender minor.[120] Vergani presumptively finds that the physician's approval would be enough to satisfy the first prong.[121] By misreading *Parham*,[122] upon which Vergani heavily relies, she fails to see that a court would likely not defer to a physician, if his finding is contrary to the will of the parent, when the matter is not one of commitment, but gender transition treatment.[123]

Confident the second prong for her bypass framework would produce a successful result for the transitioning minor, I argue that her analysis is flawed.[124] To support her position, Vergani makes three arguments:

> [First], [a]llowing a minor to begin taking puberty blockers without parental consent is in their best interests because the effects of hormone treatments are reversible and have no known negative consequences. [. . .] Puberty blockers are also in the child's best interests because they buy the child time while the child determines if they truly want to transition[; and] . . . allowing children to utilize a judicial bypass procedure to access puberty blockers is in their best interests because of the negative and dangerous effects of delaying transition.[125]

Applying *Baird*,[126] as noted above, a court is likely to deny treatment as not in the minor's best interest for three reasons. First, merely because something is potentially reversible does not make such less harmful or lacking in consequence. For example, a vasectomy, while reversible, may

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119 *Id.* at 920 ("[I]t may be difficult to show that a minor is well enough informed to make this decision independently of their parents' wishes.").

120 Katherine Romero & Rebecca Reingold, *Advancing Adolescent Capacity to Consent to Transgender-Related Health Care in Colombia and the USA*, 21 REPROD. HEALTH MATTERS 186, 191 (2013) ("A judicial bypass provision, moreover, is likely [to] be particularly burdensome for many transgender adolescents, given the fact that their health care needs can involve a complex series of interventions.").

121 Vergani, *supra* note 90, at 921 ("[I]n the case where the physician, after the extensive assessments required under the transgender medical guidelines, approves of the child's hormone blocker treatment, the minor should be allowed to begin the treatment with the court's approval.").

122 Parham v. J.R., 442 U.S. 584, 604 (1979).

123 *Id.* ("[W]e conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply.").

124 Vergani, *supra* note 90, at 922 ("[E]ven if the minor is not able to meet the first criterion of the bypass procedure set out in *Bellotti v. Baird*, the minor undoubtedly meets the second criterion. The second criterion states that even if the child is not able to make the decision independently, she may still get authorization if the desired procedure would be in her best interests.").

125 *Id.* at 922-25.

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

carry a low chance of producing viable sperm upon reversal.[127] Moreover, the harm in delaying puberty could result in decreased bone density or underdeveloped sexual organs.[128] The consequential harm to minors listed above could likely lead a court to find that the treatment should be delayed until the minor reaches adulthood.

The second prong of Vergani's test emphasizes that delaying puberty is in the best interest of the child.[129] However, such a statement is lacking in foundation. With regard to both puberty blockers and cross-sex transition treatment, courts have repeatedly found that such treatments are not in the best interest of the minor child.[130] Furthermore, courts have also denied custody to parents who subject their children to transition treatments.[131] In *Smith*, an Ohio trial court transferred custody of a minor from the care of his mother to his father in post-dissolution proceedings.[132] On appeal, the court affirmed to change of custody in favor of Appellee.[133] Failing to overcome a series of rebuttable presumptions about the rights of parents over their children, the court affirmed the decision of the trial court reallocating custody, after noting that Appellant Mother may have been forcing her son to become a girl.[134]

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127 Kristen Meier, *Vasovasostomy and Vasoepididymostomy Treatment & Management*, MEDSCAPE (Nov. 22, 2021), https://emedicine.medscape.com/article/452831-treatment (explaining that this procedure produces sperm in ejaculate 58-85% of the time and yields widely varying pregnancy rates from 11-56%).

128 Priyanka Boghani, *When Transgender Kids Transition, Medical Risks Are Both Known and Unknown*, PBS (June 30, 2015), https://www.pbs.org/wgbh/frontline/article/when-transgender-kids-transition-medical-risks-are-both-known-and-unknown/.

129 Vergani, *supra* note 90, at 922; *see supra* text accompanying note 125.

130 *Id*.

131 *See* Smith v. Smith, No. 05 JE 42, 2007 WL 901599, at *1 (Ohio Ct. App. Mar. 23, 2007). Judge Waite summarized the case background as follows:

> Appellant Victoria Smith is appealing the judgment of the Jefferson County Court of Common Pleas, transferring custody of her children to their father in post-dissolution proceedings. The case revolves around the parties' older son, now twelve years old, who has exhibited signs from a very early age that he wanted to be treated as a girl. In 2001, Appellant was designated as the child's residential parent as part of the dissolution. While the child was in her care, she supported and encouraged him in his belief that he is a girl. She allowed him to wear girl's clothing, to go by the name Christine, to participate in transgender support groups, and to be generally treated as a girl.

Id.

132 *Id*. at *12.

133 *Id*. at *1. Judge Waite summarized the procedural history of the case as follows:

> In the judgment entry Appellant was ordered: to stop any treatment or counseling for gender disorder; to stop the child from attending transgender support groups; to stop addressing the boy as Christine or any other female name; and to stop allowing or encouraging him to wear girl's clothing. Appellant was also ordered to return to Toronto, Ohio, and to re-enroll the boys in school there. The court absolutely prohibited the parties from treating or counseling the boy for gender identity disorder . . . throughout the pendency of the dispute.

Id.

134 *Id*. at *11. Judge Waite summarized the trial court's findings as follows:

As for the third prong, Vergani argues that a delay in transition treatment would produce "negative and dangerous effects" for the minor.[135] Again, such an assumption has not been reflected in the jurisprudence of courts nor in the findings of science.[136] In fact, the case establishing the judicial bypass procedure clearly distinguished between the timeliness and weight of an abortion, and the minuteness of other wishes.[137] On the matter of delay, such an argument is deficient in both reason and substance.

To press the point further, were the Court to extend *Baird*[138] to rights not considered fundamental, such would, in effect, bombard and undeservedly strain judicial resources. In effect, such a decision would open the floodgates to make the judicial department the arbiter of every allowance increase demand, missed curfew, and refusal to eat spinach.

C. The Mature Minor Doctrine

The other avenue proposed by advocates of transgender youth transition treatment is the mature minor doctrine.[139] Under this doctrine, "minors who are able to understand the nature and consequences of the medical treatment offered are considered mature enough to consent to or refuse the

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> Although a trial court starts with the presumption that the current residential parent is acting in the best interests of the child, this presumption is rebuttable by any evidence, not necessarily evidence that the residential parent is harming the child. What the trial court is required to find is that the harm in changing custody is outweighed by the advantages of changing custody. The trial court clearly made this finding. The trial court determined that Appellant's older son needed to be in an environment where he could be treated like a boy and allowed to develop as a boy, so that he could make a more informed decision about his gender at a later point in life. The court interviewed the boy *in camera*, and did not sense anything particularly feminine about him. The court found that the boy had little interest in being a girl other than in his desire to wear girl's clothing. The court observed that the child acted like a girl only when he was around his mother, and seemed to have no trouble behaving like a typical boy when he was with his father. The court concluded that Appellant may be forcing her son to become a girl. The court decided that by making Appellee the residential parent, the child would be permitted to find out if he was only acting like a girl to please his mother, or if he really was a transgender child. Thus, the trial court conducted the analysis that it was required to do and relied on substantial rebuttal evidence to overcome the presumption of retaining the current residential parent.

Id. (citation omitted).

135 Vergani, *supra* note 90, at 921; *see* quotation *supra* note 121.

136 Bellotti v. Baird, 443 U.S. 622, 649 (1979); *see* quotation *supra* note 111.

137 *Baird*, 443 U.S. at 649; *see* quotation *supra* note 111.

138 *Baird*, 443 U.S. 622.

139 Ikuta, *supra* note 90, at 182 ("[The mature minor doctrine] is the best option by which transgender adolescents can obtain treatment for their gender dysphoria. Courts should apply the mature minor doctrine when determining whether a transgender adolescent should have access to puberty blocking treatment in the absence of parental consent.").

treatment."[140] In addressing this doctrine, there are two main points. First, the mature minor doctrine is in direct conflict with the precepts of the natural law and the traditional understanding of a minor's ability to reason. Natural law traditions recognize not only a parent's authority over his child, but the child's lack of judgment and inchoate ability to reason.[141] As such, there is no sense in opining upon the notion further. Second, the application of the doctrine is potentially limitless and run the risk of blurring or erasing entirely the protections of minor children as well as eliminating the distinction between adult and child.

At common law the Rule of Sevens was oft-referenced in matters relating to the capacity of minors.[142] However, this narrow exception should not be understood to completely eliminate parental involvement nor shall it be used to neutralize the specter of the parental veto.[143] Yet, what is clear is that the United States has not only been reticent in carving out exceptions for minors; courts have rarely applied this doctrine.[144] When it has, inconsistency has been an utterly common pollutant in the court's reasoning.[145]

Before turning to the last of the two points in this section, it is necessary to address the framework proffered by advocates in relation to the mature minor doctrine.[146] Advocates contend that in applying the mature minor doctrine, courts should first assess the "minor's individual circumstances, the effectiveness of treatment, and the consequences of denying access to treatment." [147] Prong one of this framework, while insufficient on its face,

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140 Garry S. Sigman & Carolyn O'Connor, *Exploration for Physicians of the Mature Minor Doctrine*, 119 J. PEDIATRICS 520, 521 (1991).

141 Letter from John Adams to James Sullivan (May 26, 1776) (on file at https://www.masshist.org/publications/adams-papers/index.php/view/ADMS-06-04-02-0091).

142 Cardwell v. Bechtol, 724 S.W.2d 739, 744 (Tenn. 1987) ("[R]ecognition that minors achieve varying degrees of maturity and responsibility (capacity) has been part of the common law for well over a century. The rule of capacity has sometimes been known as the Rule of Sevens: under the age of seven, no capacity; between seven and fourteen, a rebuttable presumption of no capacity; between fourteen and twenty-one, a rebuttable presumption of capacity.").

143 *Id.* at 745 ("Adoption of the mature minor exception to the common law rule is by no means a general license to treat minors without parental consent and its application is dependent on the facts of each case.").

144 Ikuta, *supra* note 90, at 182 ("[T]he mature minor doctrine has not been clearly or consistently applied in the United States.").

145 *Id.*

146 *Id.* ("[The mature minor doctrine] is the best option by which transgender adolescents can obtain treatment for their gender dysphoria. Courts should apply the mature minor doctrine when determining whether a transgender adolescent should have access to puberty blocking treatment in the absence of parental consent.").

147 *Id.* ("In applying the mature minor doctrine, courts should take into consideration the minor's individual circumstances, the effectiveness of treatment, and the consequences of denying access to treatment.");
see also Jonathan F. Will, *My God my Choice: The Mature Minor Doctrine and Adolescent Refusal of Life-Saving or Sustaining Medical Treatment Based upon Religious Beliefs*, 22 J. CONTEMP. HEALTH L. & POL'Y 233, 255 (2006) ("Statutory exceptions to the general rule that minors cannot make decisions for themselves commonly fall into one of two categories: (1)

would serve to aid in the denial of the treatment sought. Consider the following hypothetical. An unemancipated and unemployed minor, age fourteen, living with and under the care of his parents, declares to the parents that he is transgender and now wishes to identify as a girl. Additionally, the minor request of parents to consent to his transition treatment, including hormones. The parents deny his request and the child petitions the court and urges the court to consider the mature minor doctrine.

Prong one presents three separate analyses. First, one must examine the individual's circumstances. Under this scenario, the child is fully reliant on the parent. The child does not work and has no income. In the case of puberty blockers, specifically, medical research recommends that such treatment be administered prior to age twelve in boys.[148] As such, the minor would have missed the opportunity for puberty blockers. Assuming, *in arguendo*, that the minor was of age to receive puberty blockers, the minor would still struggle to overcome the test insofar as his development may be stymied or hindered due to the treatment.[149] An alternative treatment, then, would be hormonal treatment which is not recommended prior to age sixteen.[150] Lastly, while the facts above to not clarify the family economic position or income, the cost of these treatments could count as a factor adverse to the grant of treatment.[151] Therefore, due to the age of the minor, the available treatment, and the cost, the minor would not overcome this test.[152]

Next, we turn to the second test of prong one, the effectiveness of the treatment. Here, the use of puberty blockers carries a great risk of uncertainty. Scientists simply do not know enough about the use of these treatments and their impact on the development of minors.[153] Because of these unknown

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status exceptions and (2) treatment exceptions. Status exceptions serve to emancipate minors for the purpose of medical decision-making. In other words, legal autonomy is extended to certain older minors 'based on their individual or social circumstances.'").

148 Boghani, *supra* note 128 ("The Endocrine Society's guidelines suggest starting puberty blockers for transgender children when they hit a stage of development known as Tanner stage 2—usually around 10 or 11 years old for a girl and 11 or 12 years old for a boy.").

149 *Id.* ("We do know that there is some decrease in bone density during treatment with pubertal suppression.").

150 *Id.* ("The same guidelines suggest giving cross sex hormones—estrogen for transgender girls and testosterone for transgender boys—at age 16.").

151 Amy C. Tishelman et al., *Serving Transgender Youth: Challenges Dilemmas, and Clinical Examples*, 46 PRO. PSYCH.: RSCH AND PRAC. 37, 40 (2015) ("These are administered in the form of subcutaneous implants in the upper arm, which last two to three years, or monthly injections. These treatments are not routinely covered by health insurance in the United States and may range in cost from $120 to over $1,000 per month.").

152 I should note here that I address more fully the effects of the treatment on development in Part III. *See* discussion *infra* Part III. Furthermore, it should be noted that this analysis could also be applied to a minor of age seeking puberty blockers.

153 Boghani, *supra* note 128 ("[T]here isn't enough research on . . . whether someone who was on puberty blockers will regain all their bone strength, or if they might be at risk for osteoporosis in the future. Another area where doctors say there isn't enough research is the impact that suppressing puberty has on brain development.").

effects of puberty blockers, this factor could be analyzed in either direction. However, this factor could weigh in favor of denial with respect to cross-sex hormonal treatment.[154]

The third factor of prong one is likely the most difficult for the minor to overcome—the consequences of the denial. Strong factors favoring treatment include, the risks and severity of bullying, and the mental health of the minor. However, the most devastating weighing in favor of the denial is fact that the minor could simply obtain the treatment upon the age of eighteen. More simply, unlike abortion, a time sensitive matter, and more similar teenage marriage, cross-sex hormonal treatment is not time sensitive and can be postponed.[155]

Failing to overcome the burden of the first prong, a court, deciding the issue of treatment, would likely not go on to the second prong.[156] Thus, to do so here would only equate to an exercise in futility as much of the second prong would harken back to the capacity and maturity analysis akin to the majority's reasoning in *Roper v. Simmons*[157] which held minors may not be subjected to the death penalty.[158] Here, the Court's discussion of a minor's maturity and capacity is of note and could provide insight to how a court would likely analyze the second prong under *Baird*.[159] To support the extension of the Eighth Amendment right against cruel and unusual punishment, the Court identified three primary differences between minors and adults: maturity, vulnerability, and knowledge.[160] Under *Roper*, the

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154 *Id.* ("The physical changes that hormones bring about are irreversible, making the decision more weighty than taking puberty blockers. Some of the known side effects of hormones include things that might sound familiar: acne and changes in mood. Patients are also warned that they may be at higher risk for heart disease or diabetes later in life. The risk of blood clots increases for those who start estrogen. And the risk for cancer is an unknown, but it is included in the warnings doctors give their patients. Another potential dilemma facing transgender children, their families and their doctors is this: Taking cross hormones can reduce fertility.").

155 Bellotti v. Baird, 443 U.S. 622, 638-39 (1979); quotation *supra* note 112.

156 *Id.* at 638-39 (explaining that the second prong requires that "courts . . . determine the minor's maturity and capacity to consent by analyzing the following characteristics that influence adolescent decision making: peer pressure, impulsivity of the minor, and incompleteness of the minor's character").

157 Roper v. Simmons, 543 U.S. 551 (2005).

158 *Id.* at 568 ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

159 *Baird*, 443 U.S. 622.

160 *Roper*, 543 U.S. at 569-70 ("[There are] [t]hree general differences between juveniles under 18 and adults . . . . '[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' . . . [J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . The third broad difference is 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.").

Court makes especially clear that children lack many necessary traits to support a claim of considered judgment, or reason.[161]

In a 2020 decision, the High Court in London ruled that minors—under the age of sixteen—cannot consent to treatments relating to their transition.[162] In *Bell*, the sole issue in the case was "the circumstances in which a child or young person may be competent to give valid consent to treatment in law and the process by which consent to the treatment is obtained."[163] While the London court's authority is not binding, such may be highly instructive on matters relating to transgender transition treatment. After a lengthy analysis, the court found that children under the age of sixteen could not, alone, give consent to treatment:

> A child under [sixteen] may only consent to the use of medication intended to suppress puberty where he or she is competent to understand the nature of the treatment. That includes an understanding of the immediate and long-term consequences of the treatment, the limited evidence available as to its efficacy or purpose, the fact that the vast majority of patients proceed to the use of cross-sex hormones, and its potential life changing consequences for a child. There will be enormous difficulties in a child under [sixteen] understanding and weighing up this information and deciding whether to consent to the use of puberty blocking medication. It is highly unlikely that a child aged [thirteen] or under would be competent to give consent to the administration of puberty blockers. It is doubtful that a child aged [fourteen] or [fifteen] could understand and weigh the long-term risks and consequences of the administration of puberty blockers.[164]

What the court makes clear in *Bell*, is that the condition of minority requires greater safeguards with regards to radical medical treatment.[165] Such safeguards should include, but not be limited to parental consent and judicial approval. Children must be protected, and, at times, such may mean protection from themselves.[166]

Of the second point, I argue that the application of the doctrine is potentially limitless and run the risk of blurring or erasing entirely the protections of minor children as well as eliminate the distinction between

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161 *Id.*

162 *See* Bell v. The Tavistock and Portman NHS Found. Tr. [2020] EWHC (Admin) 3274 (Eng.).

163 *Id.*

164 *Id.*

165 *Id.*

166 The Bell court went on to explain that, while children over sixteen possess the presumptive capacity to consent, additional safeguards are still in place to protect the minor; *see Id.* ¶ 152 ("In respect of young persons aged 16 and over, the legal position is that there is a presumption that they have the ability to consent to medical treatment. Given the long-term consequences of the clinical interventions at issue in this case, and given that the treatment is as yet innovative and experimental, we recognize [sic] that clinicians may well regard these as cases where the authorisation [sic] of the court should be sought prior to commencing the clinical treatment.").

adult and child.[167] To extend the rights of minors to act independently of third parties, including parents and courts, would more than breakdown the natural authority of parents, but will place the minor in a greater danger.[168] It has been well documented that adolescents face heightened emotional difficulties distinct from adults.[169] Further still, research has also shown a direct relationship between the heightened emotional state of minors and resulting suicides.[170] What the evidence suggests is that minors and adults reach conclusions differently, and of those decisions, minors are more likely to be victims of suicide.[171] This information is relevant to understand the consequential effects of permitting minors to access gender transition treatment. Simply put, when a minor decides to transition at an early age, without the capacity to fully comprehend the gravity of their decision, they could be placed at a higher risk for suicide when they're unable to reverse the procedure, reproduce, or have properly functioning sexual organs.[172] In short, it is a parent's duty, both morally and legally, to protect their issue, and it is the obligation of the state to do so when parents fail.

III. DETERMINING THE APPROPRIATE STANDARD OF REVIEW

As I write this article, several states have entertained or passed laws limiting transgender youth access to puberty blockers, surgery, and other hormonal transition treatment.[173] Many of these laws also include criminal

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167 Michael Hayes, *The Mature Minor Doctrine: Can Minors Unilaterally refuse Medical Treatment*?, 66 U. KAN. L. REV. 685, 708-09 (2018) ("When a mature minor's decision is given priority over that of the parent, a breakdown of moral authority occurs. . . . [U]nemancipated minors are, by definition, under the care and custody of those with moral authority to make decisions on their behalf for their good and the good of the family; these decisions are supposed to help guide the minor to develop the virtue, character, and practical reason that he may currently lack. This lack of practical reason, broadly construed, is reflected by minors' tendency to engage in riskier behaviors—and the proximity to suicide in refusal-of-treatment cases should not be ignored. Permitting a minor's autonomous decision to override this parental authority effectively undercuts its entire purpose and function.").

168 Bellotti v. Baird, 443 U.S. 622, 638-39 (1979); quotation *supra* note 112.

169 Jessica A. Penkower, *The Potential Right of Chronically Ill Adolescents to Refuse Life-Saving Medical Treatment—Fatal Misuse of the Mature Minor Doctrine*, 45 DEPAUL L. REV. 1165, 1192-1203 (1996).

170 *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, SUICIDE: FACTS AT A GLANCE (2015), https://stacks.cdc.gov/view/cdc/34181; *see also* Ctrs. for Disease Control and Prevention, *Youth Risk Behavior Surveillance—United States, 2013*, SURVEILLANCE SUMMARIES, June 13, 2014, at 1, 4, https://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf.

171 *See* Jennifer Smith, *Lesley Stahl Defends CBS 60 Minutes Episode About Transgender People Rushing into Treatment then Regretting it*, DAILYMAIL.COM (May 27, 2021, 3:43 EDT), https://www.dailymail.co.uk/news/article-9621959/Lesley-Stahl-defends-CBS-60-Minutes-episode-transgender-teens-rushed-it.html.

172 Penkower, *supra* note 169, at 1192-1203.

173 Emily Bohatch, *SC Bill Would Block Doctors from Giving Gender Affirming Treatment to Transgender Youth*, THE STATE (Mar. 10, 2021, 2:23 PM), https://www.thestate.com/news/politics-government/article249829038.html.

charges for medical professional who aid a minor in procuring the proscribed treatment during their transition.[174] It should not be a surprise as more states pass similar restriction on transgender minors and doctors alike. Here, I contend that while these states are limiting parental authority by restricting a minor's access to transition treatment, the denial of such treatment, either through legislation or precedent, is in the best interest of the minor.[175] The key question here is what standard of review should be applied to limit parental authority.

A. Applying Strict Scrutiny Framework

As a threshold matter, it should be noted that the Constitution, as originally understood, makes no mention of judicial scrutiny requirements.[176] The first mention of such standards first appeared as a footnote.[177] What is more, the lack of guidance from the Supreme Court regarding the appropriate scrutiny level for matters related to parental authority have produced inconsistent applications.[178] Consequently, I argue that the proper level of scrutiny when overruling a parent's authority is strict scrutiny.[179]

Under the Supreme Court's jurisprudence, parental rights have repeatedly been framed as "fundamental."[180] Accordingly, rights deemed to

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174 *Id.*

175 Vergani, *supra* note 90, at 922-25; *see supra* text accompanying note 125.

176 Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) ("The Constitution does not prescribe tiers of scrutiny. The three basic tiers—'rational basis,' intermediate, and strict scrutiny—'are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.'").

177 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

178 Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 137 (2018) ("Due to the U.S. Supreme Court's lack of an articulated level of scrutiny, the lower courts have also been inconsistent when considering parental right cases."); *see also* Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozert After 20 Years*, 38 J.L. & EDUC. 83, 101-03 (2009). In his article, Eric A. DeGroff considers the lower court split regarding the appropriate scrutiny:

> In the absence of clear guidance from the Supreme Court, the lower federal and state courts inevitably have split on the matter. The Third and Sixth Circuit Courts of Appeals, as well as state courts in Washington, Ohio, Massachusetts and New York, have expressly classified parental interests as fundamental or have applied strict scrutiny in reviewing alleged violations. Other courts, including the Michigan Supreme Court, have explicitly stated that "parents do not have a constitutional right [to direct their children's education] requiring strict scrutiny." Somewhere in the middle, perhaps, is the Fifth Circuit Court of Appeals, which recently affirmed parental rights as fundamental but applied a rational basis test to the question of mandatory school uniforms. Similarly, the United States District Court for the District of New Hampshire appears to have employed a type of relaxed strict scrutiny in denying plaintiffs' right to have their children removed from activities in the public schools that offended their religion.

Id.

179 Bohatch, *supra* note 173.

180 Zimmerman, *supra* note 37, at 315; cases cited *supra* note 37.

be fundamental or essential have been subject to a strict scrutiny analysis.[181] Because the Court has reinforced the traditional and common law notion that parental rights are fundamental, the appropriate standard of review ought to be strict scrutiny.

After identifying the proper standard of review, the next issue is whether a state's action against a fundamental right—in this case, parental authority—can overcome the compelling interest requirement.[182]

B. Satisfying Compelling Interest

Here, I assert that a state's limit to parental authority could meeting the compelling interest test, and to support such a proposition, I further contend that permitting transgender youth transition treatment is tantamount to eugenical practices. Additionally, this move requires the clear elucidation of an important distinction: the fundamental right to be limited is parental authority, not reproductive rights. More simply, I am contending that parents who subject their children to gender transition treatments are, in effect, eugenicizing their minor children. This notion was clearly addressed by Australian Professor Sheila Jeffreys.[183]

Jeffreys' argument is clear: "the emerging practice of transgendering children should be seen as a form of gender eugenics which has similarities with the practice of sexual surgeries carried out as a result of eugenics ideas in the early twentieth century."[184] Focusing primarily on the practice in Australia, Jeffreys notes that transgender children as young as ten-years-old are granted access to various transition treatments.[185] While the early eugenics movement targeted Blacks, poor, and other classes with the aim to restricting reproduction, it is true that the direct aim of transgender transition treatment may not be to sterilize, but does so as a side effect of employing such treatment.[186] Pressing on, courts have made clear that children may not

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181 Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.").

182 *Id.*

183 Sheila Jeffreys, *The Transgendering of Children: Gender Eugenics*, 35 WOMEN'S STUDS. INT'L F. 384 (2012).

184 *Id.*

185 *Id.* at 384 ("[C]hildren as young as 10 in Australia, with the connivance of the Family Court, are being put on puberty delaying drugs as a result of being diagnosed with 'gender identity disorder,' with the expectation that they will be moved onto cross-sex hormones at 16 and receive surgery to amputate their sexual characteristics at 18.").

186 *Id.* at 391 ("The effects of the drug treatment and sexual surgeries that constitute the transgendering of children are such as to harm their reproductive rights, as well as their bodily integrity and future health. There are some differences between the sterilization that forms part of the practice of transgendering children today and the sexual surgeries of the earlier eugenic period. Eugenic sexual surgeries were regularly aimed at sterilization, rather than having sterilization as a side effect.").

be able to understand the long-term effects of this treatment or their decisions.[187] As such, parents have an obligation to protect and direct their children. Yet, the question remains, what is to be done about the parent who consents to such treatment?

To answer the above question, both *Box*[188] and *Smith*[189] are instructive. While the majority of the Court in *Box* did not reach the second question,[190] Justice Thomas's analysis identifies one consideration that could overcome the compelling interest requirement: "preventing [other methods] from becoming a tool of modern-day eugenics."[191] While Justice Thomas is directly addressing the matter of abortion,[192] the analysis is the same. A parent consenting to the transition treatment of his minor child, knowing the risks to fertility and organ development is, in effect, taking away another's ability to have children or to decide, with a sober mind, whether such is even desirable.[193] At bottom, the need to prevent uninformed sterilization and eugenics, presents the State, who has an obligation to protect children, a key to overcoming strict scrutiny.[194]

CONCLUSION

As this paper explains, both common and natural law makes clear that parents are to have complete authority over their issue. However, under our systems of laws, virtually no authority is ever unchecked or without restriction. As such, even the widely accepted authority of parents is not without bounds. It has been long established that states may amend a parent's authority in cases of abuse or neglect.[195] The case of the transgendering child

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187 Vergani, *supra* note 90, at 922-25; *see supra* text accompanying note 125; Roper v. Simmons, 543 U.S. 551, 568 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

188 Box v. Planned Parenthood, 139 S. Ct. 1780 (2019).

189 *See* Smith v. Smith, No. 05 JE 42, 2007 WL 901599, at *1 (Ohio Ct. App. Mar. 23, 2007); *see* quotation *supra* note 131.

190 *Box*, 139 S. Ct. at 1782 ("Our opinion likewise expresses no view on the merits of the second question presented, *i.e.*, whether Indiana may prohibit the knowing provision of sex-, race-, and disability- selective abortions by abortion providers.").

191 Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring); *see* quotation *supra* note 86.

192 *Id.*

193 Jeffreys, *supra*, note 183, at 384-93; *see* quotation *supra* note 183; *see also* STEPHANIE BRILL & RACHEL PEPPER, THE TRANSGENDER CHILD: A HANDBOOK FOR FAMILIES AND PROFESSIONALS (2008) (noting other serious effects of the transgendering of children, including birth defects which may occur in children born to "transmen taking testosterone prior to pregnancy").

194 *See Smith*, 2007 WL 901599, at *1; quotation *supra* note 133; *Box*, 139 S. Ct 1780; discussion *supra* note 89.

195 Vergani, *supra* note 90, at 919-22.

is no exception.[196] For when a parent fails to fulfill their responsibilities, the State is obliged to act according to the doctrine *parens patriae*.[197]

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196 *Id.* at 922-25 (2019); *see supra* text accompanying note 125.

197 *See* Elchanan G. Stern, *Parens Patriae and Parental Rights: When Should the State Override Parental Medical Decisions?*, 33 J.L. & HEALTH 79, 91 (2019) ("[Parens patriae] is the common law legal doctrine which gives the state the power to intervene when children, or those who can't take care of themselves, are being neglected.").