

NOTE**MATURE MINORS, MEDICAL CHOICE, AND THE
CONSTITUTIONAL RIGHT TO MARTYRDOM***Josh Burk**

INTRODUCTION

CONTROVERSIAL medical decisions frequently implicate religious viewpoints. The religious prerogatives of children, parents, and judges often conflict.¹ Who, then, should decide? For years, this question has been relegated to the authority of the individual states, but this state-based system has produced inconsistent results. One court will find the government's *parens patriae* interest paramount and force medical treatment on a disagreeing youth,² while the same state's legislature will exempt parents from child abuse statutes for attempting to "pray away" their child's sickness.³ The legal standard thus looks different from state to state and from scenario to scenario.

The Supreme Court of the United States has been reticent about the child's right to make a decision outside the bounds of her parents' or the states' wishes. The Court, however, has provided a clear exemption for mature minors in the case of abortion.⁴ Through the Due Process Clause

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¹ For an overview of the competing interests involved in medical decision making for minors, see generally Robert Bennett, Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis, 62 Va. L. Rev. 285 (1976).

² "[T]he state in its capacity as provider of protection to those unable to care for themselves." *Parens patriae*, Black's Law Dictionary (9th ed. 2009).

³ Compare, e.g., Ga. Code Ann. §§ 49-5-40(a)(3), 49-5-180(5) (2013) (providing an exemption from child abuse statute for parents who treat a child's illness with prayer), with *Novak v. Cobb Cty.-Kennestone Hosp. Auth.*, 849 F. Supp. 1559, 1575 (N.D. Ga. 1994) (recognizing that the courts can order medical treatment of minors and that there may be "no religious exemptions from these orders" (citation omitted)).

⁴ See *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

of the Fourteenth Amendment, a minor is guaranteed a hearing outside the bounds of her parents' influence—and the judge must accept the minor's decision if the court determines that she is mature. Perhaps this same procedural safeguard should be extended to other minors, specifically minors with religious objections to certain treatments. In the past, the Court has conceded that the First Amendment applies to minors to a limited degree, but its limits regarding medical consent have yet to be delineated.⁵

The Due Process Clause protects citizens from unwanted intrusions in their bodily integrity.⁶ A citizen's liberty interests in physical freedom and self-determination often trump the state's interest in her welfare—that is, if she has already reached the age of majority.⁷ An eighteen-year-old is vested with all the rights of a U.S. citizen, including the right to decide how to use her own body, but a seventeen-year-old who is a single day shy of her eighteenth birthday lacks these equivalent rights. Bright-line age limits may be efficient and appropriate in many contexts, like drinking or voting laws, but in medical situations that have much higher personal stakes, such bright-line rules seem less appropriate.

Some states have created a mature minor exemption for medical consent purposes, which allows a minor the opportunity to make the ultimate decision in her medical treatment. If the minor fully comprehends the consequences of her decision and makes her choice free of coercion or peer pressure, she is given the authority to choose or refuse treatment. As the Supreme Court recently expanded a juvenile's constitutional rights under the Eighth Amendment,⁸ the time may be ripe for the Court to recognize a federal right of minors to make choices about their medical treatment based on their faith values. If minors have a due process right to their bodily integrity and the First Amendment has been held to protect them, then the freedom of a minor to consent to or refuse medical treatment because of her religious beliefs may be constitutionally demanded as a hybrid right.⁹ This Note will argue that a federal mature

⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁶ *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

⁷ *Id.* at 287 (O'Connor, J., concurring).

⁸ *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (limiting application of the death penalty to individuals over the age of eighteen).

⁹ The Supreme Court carved out a "hybrid situation" in which free exercise coupled with another right (specifically parental rights) had the power to trump legislation that would hinder free exercise. See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881–82 (1990). This Note hopes to build upon the hybrid rights concept by defining the mature

minor exemption that provides a procedural judicial hearing or bypass procedure¹⁰ should be a constitutional guarantee provided by the interplay between the Religion Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.¹¹

A mature minor exemption may create some unpalatable results. For instance, a mature seventeen-year-old may decide to forego a blood transfusion based on her religious beliefs, and this may lead to a medically unnecessary and untimely demise. This result is uncomfortable, but despite the discomfort, it may still be constitutionally required. If the Free Exercise Clause has force, and that force applies to minors, third parties may be constitutionally prohibited from intervening in a situation as personal and important as one's own body and health. The ability to make such choices is the bedrock of the American ideal of life, liberty, and the pursuit of happiness.¹² A woman who is seventeen years and 364-days-old should get the same opportunity to prove that she is mature enough to make a personal decision affecting her own body that a person a single day older would be able to make automatically—or that would be otherwise offered in the context of abortion. Due to the nature of medical decision making and the time requirements of the bypass system proposed, this Note will only suggest incorporating a constitutional mature minor right as it applies to non-emergency medical care and will leave outside the Note's purview emergency scenarios where a minor lacks the ability, time, or information to reflect appropriately on a momentous medical choice. This does not carve out life-and-death scenarios from a mature minor's bypass right, but just those circumstances in which the decisional timeframe would make a judicial bypass system impractical.

As a descriptive caveat, this Note will often use the term "consent" to include both refusal and affirmative consent. Although there are clear differences between choosing to undergo a procedure and choosing to

minor exemption in a legal sphere in which a child's due process rights and religious rights bolster one another.

¹⁰ For a discussion of what a judicial bypass proceeding could look like, see *infra* Section II.A.

¹¹ A mature minor bypass solution may fall directly in line with the guarantees of the Establishment and Free Exercise Clauses by allowing minors to make their own choices based on their religious beliefs. The government avoids giving its imprimatur to the harmful religious beliefs of parents, while at the same time still allowing young believers the freedom to practice their chosen religion as they see fit.

¹² The Declaration of Independence para. 2 (U.S. 1776).

forego one, both are equally illustrative of a juvenile's right to self-determination. Especially in the context of the Free Exercise Clause, one's religion may demand either, so both should fall within the scope of a judicial bypass system. As one commentator has said: "From a competence perspective, this distinction between consent and refusal is not a meaningful one: the ability to consent should encompass the ability to refuse, as it does for adults."¹³

Part I will lay out the landscape of a minor's rights by outlining her constitutional protections under the First and Fourteenth Amendments and by providing an overview of the mature minor exemption as defined by some states. Part II will provide a framework for a potential constitutionally guaranteed mature minor bypass right. Part III will discuss the potential competing interests involved in the debate about mature minor autonomy and religious exemptions generally. This Note is indebted to the breadth of scholarship that has come before it,¹⁴ yet attempts to advance the discussion further by incorporating recent developments of modern Supreme Court jurisprudence and by proposing a novel (albeit simple) solution to a problem that has plagued the discussion for decades: Make an already established judicial bypass system available to religious minors who want to exercise their rights of bodily self-determination.

¹³ Jennifer L. Rosato, *Let's Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 *DePaul L. Rev.* 769, 779 (2002).

¹⁴ See, e.g., B. Jessie Hill, *Medical Decision Making by and on Behalf of Adolescents: Reconsidering First Principles*, 15 *J. Health Care L. & Pol'y* 37 (2012) (laying out a comprehensive framework of rights without proposing a solution for the dilemma); 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 (2006) (advocating for the inquiry of a minor's religious integrity, but stopping short of a constitutional demand); Molly J. Walker Wilson, *Legal and Psychological Considerations in Adolescents' End-of-Life Choices*, 109 *Nw. U. L. Rev. Online* 203 (2015) (suggesting the use of a mediator to help a mature minor effectuate her wishes); Note, *Children as Believers: Minors' Free Exercise Rights and the Psychology of Religious Development*, 115 *Harv. L. Rev.* 2205 (2002) [hereinafter *Children as Believers*] (providing an overview of a minor's free exercise rights); Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 *Fordham L. Rev.* 2075 (1996) (suggesting a rebuttable presumption of maturity for older minors based exclusively in the privacy right).

I. THE LEGAL RIGHTS OF A MINOR

As this Part will demonstrate, children under the age of the majority have been given various constitutional rights by the Supreme Court—even though their parents or guardians retain plenary control of their upbringing. This Part will look at the constitutional provisions implicated by a mature minor bypass right and show the history and current jurisprudence of juvenile rights under the First and Fourteenth Amendments. This Part will also examine the history of the mature minor exemption as a discrete opportunity for a minor to make a medical decision outside the bounds of both parental and state authorities.

A. *The Constitutional Bypass Right*

In 1976, the Supreme Court first recognized the right of minors to exhibit self-determination in healthcare choices through a judicial bypass system for abortion decisions. In *Planned Parenthood of Central Missouri v. Danforth*, two physicians brought suit against an abortion law that required a woman under the age of eighteen to receive a blanket approval from her parents or guardians before the procedure could be performed.¹⁵ Although the State argued that the regulation was in line with other restrictions for children like firearms, alcohol, cigarettes, compulsory education, and child labor, the Supreme Court declared that an absolute prohibition to perform an abortion without the consent of a parent was unconstitutional.¹⁶ The opinion quotes the dissent of the lower court in saying that the minor should be “entitled to the same right of self-determination now explicitly accorded to adult women, provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician.”¹⁷ The Court also recognized the constitutional protections afforded to minors generally: “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”¹⁸

¹⁵ 428 U.S. 52, 56, 58 (1976).

¹⁶ *Id.* at 72, 74.

¹⁷ *Id.* at 73–74 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 392 F. Supp. 1362, 1376 (E.D. Mo. 1975) (Webster, J., dissenting)).

¹⁸ *Id.* at 74.

A few years later, the Court expanded this view of a minor's self-determination in the context of hospital confinement. In *Parham v. J. R.*, a class action lawsuit was brought against a state law that allowed parents and guardians to voluntarily commit minors under their care to hospital confinement.¹⁹ Two plaintiffs, J.L. and J.R., who were committed by parents and Georgia's Department of Family and Children Services respectively, challenged the due process application of this law.²⁰ In reviewing the case, the Supreme Court once again affirmed a minor's due process rights: "[S]ome kind of inquiry should be made by a 'neutral factfinder'" before a minor is committed to confinement.²¹ Although the Court determined that an actual judicial hearing was not demanded by the Fourteenth Amendment,²² the Court insisted that every child receive "an adequate, independent diagnosis of his emotional condition and need for confinement under the standards announced earlier in this opinion."²³ That is because the Due Process Clause of the Fourteenth Amendment requires that a neutral fact finder be able to inquire into at least some of the medical decisions affecting minors, and in the case of abortion, defer to the minor's choice if she is found to be mature.²⁴

B. The First Amendment as Applied to Minors

The First Amendment of the United States Constitution protects the freedom of religion and reads in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²⁵ The Supreme Court has incorporated the First Amendment, including the Religion Clauses, to apply to the states.²⁶ Although sometimes providing an exemption to a law for the "free exercise" of religion could be construed as an implicit establishment or imprimatur of religion, the Supreme Court has made clear that "there is room for play in the joints between' the Free Exercise and Establishment Clauses, al-

¹⁹ 442 U.S. 584, 590–91 (1979).

²⁰ *Id.* at 589–90.

²¹ *Id.* at 606.

²² *Id.* at 607 ("It is not necessary that the deciding physician conduct a formal or quasi-formal hearing.").

²³ *Id.* at 617.

²⁴ *Id.* at 606; *Danforth*, 428 U.S. at 75.

²⁵ U.S. Const. amend. I.

²⁶ *Everson v. Bd. of Educ.*, 330 U.S. 1, 5 (1947) ("[S]tate power to support church schools [would be] contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.").

lowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.”²⁷

As the Court noted in *Danforth*, the Constitution applies to juveniles. The First Amendment, in relation to free speech rights, was incorporated as applied to minors in *Tinker v. Des Moines Independent Community School District*.²⁸ In this case, John Tinker wore a black armband to school in protest of the Vietnam War.²⁹ The Court’s opinion explicitly affirmed the principle that minors should be afforded constitutional rights.³⁰ The Court declared: “Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. . . . This provision [of the Constitution] means what it says.”³¹ Later, the Court expressly extended the free exercise protections of the First Amendment to minors in the school context in *Good News Club v. Milford Central School*.³² Schools have a special significance in the life of a child, as the actions of teachers often have the implicit imprimatur of the government; thus, religious protections are very important. One could argue that these free exercise protections only take effect in the school context and do not implicate other areas of a minor’s life like medical consent. But, this bifurcation seems like a strained interpretation of Supreme Court precedent set forth in *Parham*.³³ Moreover, in effectuating a minor’s own self-determination, courts are free

²⁷ *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)).

²⁸ 393 U.S. 503, 506 (1969).

²⁹ *Id.* at 504.

³⁰ *Id.* at 506 (“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and *students*.” (emphasis added)). This holding relied on an earlier case that gave constitutional protections for children to refuse to salute to the flag. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

³¹ *Tinker*, 393 U.S. at 513.

³² 533 U.S. 98, 121 (2001) (Scalia, J., concurring) (stating that the right for children to have a Christian club “is *protected* by the Free Speech and Free Exercise Clauses”).

³³ As Justice Stewart said in his concurring opinion:

I realize, of course, that a parent’s decision to commit his child to a state mental institution results in a far greater loss of liberty than does his decision to have an appendectomy performed upon the child in a state hospital. But if, contrary to my belief, this factual difference rises to the level of a constitutional difference, then I believe that the objective checks upon the parents’ commitment decision . . . are more than constitutionally sufficient.

Parham, 533 U.S. at 624 (Stewart, J., concurring in judgment).

from the implicit coercive pressure of the government inherent in the school context.³⁴

Applying the First Amendment's free exercise provisions to minors through a bypass system raises the question: If a minor is capable of making reasonable medical choices as defined by Court precedent, is she also capable of having fully formed religious beliefs?³⁵ The answer is yes. Scholars have posited that religious development arises in much the same way as cognitive development—maturing equally alongside each other.³⁶ In fact, a minor's religious belief system may mature faster than his cognitive development in obtaining religious philosophies “much more similar to adults.”³⁷ “[E]ven relatively young children can have personally meaningful religious beliefs that, from a cognitive perspective, do not differ dramatically from those of adults.”³⁸ Thus, a sixteen-year-old religious adherent is likely to have a belief system that could be considered as equally mature as that of an adult counterpart. In discussing the ability of religious minors to make medical choices, Professor Jonathan F. Will suggests that the inquiry into religious integrity and cognitive ability should be done concurrently.³⁹ Although scholars debate how or when a minor may develop a mature religious belief, there is no doubt that a minor is capable of adopting and making central to her life a religious faith.⁴⁰

³⁴ *Good News Club*, 533 U.S. at 115 (“[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” (quoting *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (internal quotation marks omitted))).

³⁵ According to a 2013 Harris Poll, seventy-four percent of Americans believe in God and fifty-eight percent believe in Hell. Larry Shannon-Missal, *Americans' Belief in God, Miracles and Heaven Declines*, *The Harris Poll* (Dec. 16, 2013), http://www.theharrispoll.com/heath-and-life/Americans_Belief_in_God_Miracles_and_Heaven_Declines.html [https://perma.cc/FN96-Q7NE].

³⁶ Drawing from the “stage theory” of psychologist Jean Piaget, scholars believe that children may obtain the final stage of cognitive ability around age eleven, which would enable them a full ability to claim a religious identity. See *Children as Believers*, *supra* note 14, at 2222.

³⁷ *Id.* at 2223.

³⁸ *Id.* at 2226.

³⁹ Will, *supra* note 14, at 294, 297 (“[W]hen adolescents attempt to refuse life-saving or life-sustaining medical treatment based upon religious beliefs, where death is the expected outcome, a very high level of competence, marked by a showing of religious integrity, is required.”).

⁴⁰ See *id.* at 293–97 (discussing various theories of religious development); see also *Jesus Camp* (A&E Indie Films 2006) (demonstrating anecdotal evidence of sincere religious faith in children). As discussed in Part II, *infra*, the judicial bypass system will effectually allow

A minor's ability to make adult-like decisions, coupled with her ability to hold adult-like religious convictions, leads to the possibility that a bright-line rule regarding medical consent is constitutionally insufficient.⁴¹ This unclear legal realm has led state courts to find widely disparate results in similar cases regarding a mature minor's right to choose her own treatment.

C. A History of the Mature Minor Exemption

At the founding of the American legal system, children were treated like property, and thus, were given no rights at all, much less religious ones.⁴² Although ownership in human persons no longer comports with our modern conceptions of liberty and dignity (and rightly so), the legal underpinnings of parental rights stem from parenthood as a property claim given by the state to parents over their children.⁴³ Many historical debates of children's rights focus on the relationship and bargaining power of these two entities: the property owner (parents) and the property giver (state). The rights of minors, as distinct from their guardians, have been a development unique to the modern era.

The concept of decisional rights in the medical context is also a relatively modern issue. Hospitalization and diagnostic technologies that presented a religious conflict did not come to the fore of American culture until the mid-twentieth century.⁴⁴ The advance of secularism with the advance of medical technology in the late nineteenth and early twen-

judges the opportunity to determine if a minor's religious beliefs are in fact her own or merely a coerced reflection of her community or family.

⁴¹ When a mature minor is faced with the choice between a potentially ineffective medical treatment and his eternal wellbeing, he will inevitably face a grand deal of salvific angst. Regardless of any normative perspective between physical pain and spiritual damnation, the minor will inevitably experience some sort of decisional anguish. The mature minor exemption seeks to let that choice be his alone. As one commentator posed the essential question: "Do I follow my religion to the peril of my liberty, or do I follow the law to the peril of my eternal soul?" Colin M. Murphy, Concerning Their Hearts and Minds: *State of Oregon v. Beagley*, Faith-Healing, and a Suggestion for Meaningful Free Exercise Exemptions, 46 *Gonz. L. Rev.* 147, 148 (2011).

⁴² Kevin Noble Maillard, Rethinking Children as Property: The Transitive Family, 32 *Cardozo L. Rev.* 225, 237 (2010) ("At common law, children were treated as chattel.").

⁴³ For a historical perspective of this concept, see *id.* at 231–42.

⁴⁴ Charles E. Rosenberg, And Heal the Sick: The Hospital and the Patient in the 19th Century America, 10 *J. Soc. Hist.* 428, 439 (1977) (saying that the modern hospital did not become the predominant medical treatment venue until after societal changes in the early twentieth century).

tieth centuries changed how religion and medicine interacted. As science brought explanations for illnesses, it achieved a “rising status . . . in the hierarchy of American values.”⁴⁵ As medicine became more secular and scientific, so did views of American culture.⁴⁶ It would have seemed perfectly acceptable in 1850 for a child to forego medical treatment in hopes that prayer and faith would be enough.⁴⁷ Just a half-century later, this reliance on faith became a source of cultural conflict.

In 1903, a contentious case came before the New York courts. The father of a girl with pneumonia declined to seek medical care, believing that religion could heal his child.⁴⁸ The trial court found the father guilty of violating Section 288 of the Penal Code, which required parents to “furnish medical attendance by a qualified doctor.”⁴⁹ Caught in the crux of a culture shift, the appellate court reversed the decision. Writing for the majority, Judge Bartlett declared that “ordinary household nursing by the members of the family” could be enough to satisfy the law and found it error that the parent be required to give “such medicines as the science of the age would say would be proper that a child in its condition should have.”⁵⁰ The New York Court of Appeals subsequently reversed the intermediate court’s decision.⁵¹ After discussing the faith-healing traditions of former millennia, the court looked to the modern advances of medicine and surgery. The court looked specifically to the first medical licensure law of 1880, which showed a legislative intent to prevent

⁴⁵ Charles E. Rosenberg, *No Other Gods: On Science and American Social Thought* 6 (rev. and expanded ed. 1997).

⁴⁶ *Id.* at 10 (“Indeed, it is probably fair to say that the use of disease as a sanction in enforcing behavioral norms is almost universal and that the speculative etiologies which justify such social usage are always consistent with a culture’s most fundamental patterns of belief.”).

⁴⁷ Doctors shared a consistent viewpoint with the uneducated layperson that saw no inconsistency with rationalistic explanations of treatments and traditional spiritual values: “If drugs failed, it expressed merely the ultimate power of God, but no reason to question the truth of either system of belief.” Charles E. Rosenberg, *The Therapeutic Revolution: Medicine, Meaning, and Social Change in Nineteenth-Century America*, 20 *Persp. Biology & Med.* 485, 493 (1977).

⁴⁸ *People v. Pierson (Pierson I)*, 81 N.Y.S. 214, 218 (N.Y. App. Div. 1903).

⁴⁹ *Id.* at 215. New York was the first state to adopt legal protections against modern conceptions of child abuse, first using a writ of habeas corpus to remove an abused child from her guardians in 1874. See John E.B. Myers, *A Short History of Child Protection in America*, 42 *Fam. L.Q.* 449, 449–51 (2008).

⁵⁰ *Pierson I*, 81 N.Y.S. at 215–16.

⁵¹ *People v. Pierson (Pierson II)*, 68 N.E. 243, 247 (N.Y. 1903).

quasi-medical professionals from practicing medicine.⁵² New York's highest court affirmed the parents' religious beliefs while still requiring its citizens to obey the law: "We place no limitation upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the Legislature."⁵³

Even during this transition period, a nascent version of the mature minor exemption began to emerge. In 1906, a father brought a lawsuit against two doctors for medical malpractice after the death of his seventeen-year-old son.⁵⁴ The minor was afflicted with a tumor on his left ear, and he went to the doctor without the accompaniment of his father to consult about the possibility of removal.⁵⁵ The youth returned home after the consultation and later revisited the doctor for the surgery, without his father to give approval. During the procedure, the boy died. When the father tried to sue under the theory that he had never given consent, the court said, "[w]e think it would be altogether too harsh a rule to say that that under the circumstances . . . the defendants should be held liable because they did not obtain the consent of the father to the administration of the anæsthetic."⁵⁶ Because the "young fellow almost grown into manhood" had traveled back and forth to his home after several consultations, the court felt that he had implicitly consented.⁵⁷ The maturity that the deceased minor had exhibited in making all the surgical and travel arrangements illustrated a maturity consistent with adulthood. Although this case did not implicate religion, it does cast a shadow on the bright-line rule of medical consent belonging exclusively to parents or guardians for those under the age of majority.

In 1955, New York courts again faced the mature minor consent issue in the context of religious beliefs.⁵⁸ A fourteen-year-old with a cleft palate refused to have corrective surgery. While not endorsing an "established religion," he believed that "the forces of the universe" would heal him without surgery.⁵⁹ When the county health department petitioned to force the surgery, the Children's Court denied the request. The judge

⁵² Id. at 246.

⁵³ Id. at 247.

⁵⁴ *Bakker v. Welsh*, 108 N.W. 94, 95 (Mich. 1906).

⁵⁵ Id.

⁵⁶ Id. at 96.

⁵⁷ Id.

⁵⁸ *In re Seiferth*, 127 N.E.2d 820, 821 (N.Y. 1955).

⁵⁹ Id. at 822.

took it upon himself to ensure the minor's maturity by describing the medical procedures to the minor, showing him pictures of other children who had undergone the remedial surgery, and even introducing the minor to other children who had the surgery performed. The minor was given time and opportunity to ask questions, and yet he still showed that he had no desire for the surgery on his own right. Because the surgery was not medically necessary and could be completed successfully later in life, the judge allowed the juvenile to make his own choice.⁶⁰

In the wake of *Griswold v. Connecticut*,⁶¹ states began to write legislation that allowed minors to consent to the treatment of sexually-transmitted diseases without parental consent.⁶² Some states, like Illinois, predated *Griswold* in granting medical consent rights to pregnant minors.⁶³ Congress then followed this in 1970 by passing Title X of the Public Health Service Act,⁶⁴ which provided family planning services to anyone—including minors.⁶⁵ Minors also gained statutory rights to consent to other health services like mental health treatment without parental consent in certain circumstances.⁶⁶ Although these advances were mostly universal, from the 1970s until the present, courts in various states have had contradictory results regarding a mature minor's right to medical autonomy based on religious views.⁶⁷

The treatment of blood transfusions represents a historical lightning rod in the area of medical consent for minors. The controversy mostly arises from the belief system of the Jehovah's Witness faith, whose adherents abstain from taking blood transfusions "out of respect for [God]

⁶⁰ Id. at 823.

⁶¹ 381 U.S. 479 (1965).

⁶² See, e.g., 1969 Ark. Acts 278–79; 1969 Wash. Sess. Laws 1164–65.

⁶³ 1961 Ill. Laws 3417; see also Christine M. Hanisco, Note, Acknowledging the Hypocrisy: Granting Minors the Right to Choose Their Medical Treatment, 16 N.Y.L. Sch. J. Hum. Rts. 899, 902 (2000) (discussing the development of legal rights for minors in other contexts).

⁶⁴ 42 U.S.C. § 6A (2012).

⁶⁵ Jessica R. Arons, Note, Misconceived Laws: The Irrationality of Parental Involvement Requirements for Contraception, 41 Wm. & Mary L. Rev. 1093, 1098 (2000).

⁶⁶ See, e.g., 1970 Pa. Laws 19. But see 1974 Mich. Pub. Acts 911, 960.

⁶⁷ Other areas of medical consent continue to be part of the debate as well, like AIDS testing for minors. See Janine P. Felsman, Eliminating Parental Consent and Notification for Adolescent HIV Testing: A Legitimate Statutory Response to the AIDS Epidemic, 5 J.L. & Pol'y 339, 341–43 (1996).

as the Giver of life.”⁶⁸ The seminal case in this area is *Jehovah’s Witnesses in the State of Washington v. King County Hospital Unit No. 1*, which was affirmed in a one-sentence per curiam opinion by the Supreme Court.⁶⁹ In *King County Hospital*, the members of the Jehovah’s Witness church in Washington brought a class action lawsuit to enjoin the administering of blood transfusions to their children as a violation of their constitutional rights.⁷⁰ Forcing a transfusion, according to plaintiffs, could “mean permanent spiritual harm to both the child and parent or adult.”⁷¹ The district court disagreed with the plaintiffs and found the law withstood constitutional scrutiny.⁷² This case sets the constitutional boundaries for blood transfusion law regarding parental consent for minors under the First Amendment and “when a parent, upon religious grounds or because of his views as to medical treatment, refuses to consent to blood transfusions for his minor child where the attending physician has determined blood transfusions are medically necessary.”⁷³ The Supreme Court, however, has not weighed in on the religious choice of a mature minor. Decisions relating to the consent of a mature minor have varied widely across state lines.

State courts have split in the situation of nonemergency, life-and-death situations that involve a mature minor. *In re E.G.* concerned a seventeen-year-old girl who refused blood transfusions that were necessary to prevent her from dying of leukemia.⁷⁴ The minor’s doctor discussed the treatment with her and confirmed “her maturity and the sincerity of her beliefs.”⁷⁵ The court looked to several Illinois statutes that provided minors autonomy in certain medical situations, the “sliding scale of maturity” used in the criminal context, and the constitutional safeguards already provided to minors to conclude that “no ‘bright line’ age restriction of 18 is tenable in restricting the rights of mature minors, whether the rights be based on constitutional or other grounds.”⁷⁶ Basing

⁶⁸ Why Don’t Jehovah’s Witnesses Accept Blood Transfusions?, JW.org, <http://www.jw.org/en/jehovahs-witnesses/faq/jehovahs-witnesses-why-no-blood-transfusions/> [https://perma.cc/8EL7-74X3].

⁶⁹ 278 F. Supp. 488 (W.D. Wash. 1967), aff’d per curiam, 390 U.S. 598 (1968).

⁷⁰ Id. at 491.

⁷¹ Id. at 502.

⁷² Id. at 508.

⁷³ Id. at 507.

⁷⁴ *In re E.G.*, 549 N.E.2d 322, 323 (Ill. 1989).

⁷⁵ Id.

⁷⁶ Id. at 325–26.

its reasoning in a state common law right, the court found in favor of the minor without addressing the religious issue.⁷⁷

A New York court, although amenable to the possibility of a mature minor exemption, required a minor to undergo blood transfusions in conflict with his religious beliefs in the case of *In re Application of Long Island Jewish Medical Center*.⁷⁸ This case featured a religious minor who was a few days shy of turning eighteen and came into the emergency room with malignant cancer and an immediate need for a blood transfusion. Even though the court “recommended that the legislature or the appellate courts take a hard look at the ‘mature minor’ doctrine and make it either statutory or decisional law in New York State,” the court found such an exemption inappropriate for this specific case.⁷⁹

A few years later in 1994, a federal district court in Georgia upheld a court-ordered blood transfusion for a sixteen-year-old minor.⁸⁰ The juvenile was in an automobile accident but was alert, and he informed the ambulance and hospital staff of his desire not to receive a blood transfusion.⁸¹ After performing a surgery without the use of a blood transfusion, the patient’s condition worsened to a point that the doctors believed a blood transfusion would be necessary and received a court order to do so. In reviewing this decision, the district court stated that “Georgia does not recognize the right of a ‘mature minor’ to refuse unwanted medical care.”⁸²

Blood transfusions are not the only cases in which a mature minor exemption is implicated, but they do illustrate the inconsistent jurisprudence regarding the ability of a mature minor to consent to her own healthcare.⁸³ The diametrically opposed legal regimes across state lines make this controversy worthy of further Supreme Court consideration.

⁷⁷ Id. at 328 (“Because we find that a mature minor may exercise a common law right to consent to or refuse medical care, we decline to address the constitutional [religion] issue.”).

⁷⁸ 557 N.Y.S.2d 239, 243 (N.Y. Sup. Ct. 1990).

⁷⁹ Id.

⁸⁰ *Novak v. Cobb Cty.-Kennestone Hosp. Auth.*, 849 F. Supp. 1559 (N.D. Ga. 1994).

⁸¹ Id. at 1563.

⁸² Id. at 1576.

⁸³ See, for example, *Cardwell v. Bechtol*, 724 S.W.2d 739, 741–42 (Tenn. 1987), a medical malpractice liability suit over a procedure that a seventeen-year-old consented to, which implicated the mature minor exemption.

II. THE POTENTIAL FOR A RELIGIOUS BYPASS RIGHT

As illustrated in Part I, physicians in many states, through court orders, are overriding the choices made by mature minors based on their faith convictions. Why should a third party decide the best interest of a mature minor when the individual—having reached mature cognitive capacity—has chosen otherwise for herself? This paternalism is criticized by Professor B. Jessie Hill: “In suggesting that children have a ‘right’ to a ‘normal’ life, for example, courts are inevitably imposing a vision of what constitutes ‘normal,’ and implicitly deciding that the state is entitled to determine and impose such normalcy.”⁸⁴ How can a judge consider “what constitutes a ‘normal’ life” without placing some subjective normative judgment on the child and her autonomous decisions?⁸⁵ For the liberty interest of the child to remain intact, the courts should respect the religiously motivated choices of minors who medical professionals have determined possess the capabilities to make their own choices. A judge’s preferring a patient’s own religious decisions should not give rise to an Establishment Clause violation; preferring a secular perspective over a chosen belief system may unduly label a certain religious perspective invalid contrary to the Clause.⁸⁶

In his essay “The Child’s Right to an Open Future,” Professor Joel Feinberg proposes an open-future concept that would prevent a minor’s guardian from permitting any action that might foreclose certain possibilities in the future.⁸⁷ Although Feinberg sees “no sharp line”⁸⁸ between maturity and immaturity, “in nearly all cases, critical life-decisions will have been made irreversibly for a person well before he reaches the age of full discretion when he should be expected, in a free society, to make them himself.”⁸⁹ This concept has been at the heart of many judicial

⁸⁴ B. Jessie Hill, *Whose Body? Whose Soul? Medical Decision-Making on Behalf of Children and the Free Exercise Clause Before and After Employment Division v. Smith*, 32 *Cardozo L. Rev.* 1857, 1870 (2011) (footnote omitted).

⁸⁵ *Id.* at 1868.

⁸⁶ *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring) (saying “there is nothing unconstitutional in a State’s favoring religion generally”).

⁸⁷ Joel Feinberg, *The Child’s Right to an Open Future*, in *Whose Child? Children’s Rights, Parental Authority, and State Power* 124, 127 (William Aiken & Hugh LaFollette eds., 1980) (saying that “the child is *potentially* that adult, and it is that adult who is the person whose autonomy must be protected now (in advance.)”).

⁸⁸ *Id.* at 148 (saying ages are “really only useful abstractions from a continuous process of development every phase of which differs only in degree from that preceding it”).

⁸⁹ *Id.* at 132–33.

opinions.⁹⁰ In her critique of Feinberg's open-future concept, Professor Dena Davis argues that a requirement to keep some options open inherently forecloses other options.⁹¹ While some medical decisions may open some possibilities for religious minors, they can at the same time "foreclose one possible future: as a content member of [their religious] community."⁹² Sometimes, when a state requires a child to keep her options open, it is dictating its own views of how to define the good life.⁹³ Yes, a blood transfusion or a corrective surgery may enhance the minor's physical vitality or appearance, but at what cost? The state may very well be condemning a minor to a lifetime of salvific angst or alienation from her community of preference.⁹⁴ An open future for a mature minor should not require her to forego her "salvation" or her community membership in the hopes that she will eventually choose the "more open" views of the secular world. An open future allows the mature minor the freedom to choose the future of her preference, even if normatively undesirable.

A. *The Contours of a Religious Bypass Right*

A judicial bypass system for religious consent of medical treatment for mature minors could look very similar to the current system for abortion.⁹⁵ A minor would simply submit a form to the court requesting a hearing, and that form would include information regarding the minor's rights.⁹⁶ These petitions should be prioritized—in Mississippi a similar abortion petition must be heard within seventy-two hours.⁹⁷ The minor should have a chance to demonstrate her maturity, and in the absence of

⁹⁰ See *In re Sampson*, 317 N.Y.S.2d 641, 652–59 (N.Y. Fam. Ct. 1970), for a discussion of courts choosing between medical choices and ensuring a child has a "normal" life.

⁹¹ Dena S. Davis, *The Child's Right to an Open Future: Yoder and Beyond*, 26 *Cap. U. L. Rev.* 93, 96 (1997).

⁹² *Id.*

⁹³ *Id.* at 96–97; see also Claudia Mills, *The Child's Right to an Open Future?*, 34 *J. Soc. Phil.* 499, 502 (2003) (using the example of "shopping" for religion and arguing that this "shopping" often leads to no religion because the experience of religion cannot occur in the "hour-long stretches" of experimentation).

⁹⁴ Davis, *supra* note 91, at 100 (discussing how failure to practice some traditions can result in the inability to fully interact in one's ethnic community).

⁹⁵ For a description of the abortion petition process, see Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 *Colum. J. Gender & L.* 409, 424–26 (2009).

⁹⁶ *Id.* at 425.

⁹⁷ *Id.* at 428–29.

such a determination, show that her choice would be in her best interest.⁹⁸ The judge then would have the final say.⁹⁹ Although maturity should be determined on a case-by-case basis,¹⁰⁰ courts could have some potential guidelines in a manner similar to the trimester guidelines given in *Roe v. Wade*.¹⁰¹ A workable system could create a rebuttable presumption that minors fifteen years old and younger are too immature to make substantial healthcare decisions, sixteen-year-olds require a thorough investigation into maturity, and seventeen-year-olds have a rebuttable presumption of maturity.¹⁰² Due to the nature of a medical situation, a doctor's expert opinion of treatment options will already be on hand for the judge to examine, and the more severe the diagnosis, the more deference the judge should give to medical professionals. The judge must also make a sincere inquiry into the minor's maturity by examining factors like "academic performance, intellectual capacity, participation in extracurricular activities at school, plans for the future, and the ability to handle her own finances."¹⁰³ The general consensus among scholars and courts finds a minor capable of a mature decision if she is able to fully discuss the medical procedure, understand the risks, and has the ability to make a choice without undue peer or parental pressure.¹⁰⁴ There are many opinions about the proper judicial standard used to define maturity;¹⁰⁵ the standard of proof for such determinations has varied

⁹⁸ This directly mirrors the process outlined by the Supreme Court in *Bellotti v. Baird*, 443 U.S. 622, 647–48 (1979) (plurality opinion).

⁹⁹ *Id.* at 648.

¹⁰⁰ See *id.* at 643 n.23.

¹⁰¹ 410 U.S. 113, 164–65 (1973).

¹⁰² For a similar proposal regarding the abortion context, see Anna C. Bonny, Parental Consent and Notification Laws in the Abortion Context: Rejecting the "Maturity" Standard in Judicial Bypass Proceedings, 11 U.C. Davis J. Juv. L. & Pol'y 311, 323–24 (2007).

¹⁰³ *Id.* at 322 (footnotes omitted).

¹⁰⁴ See, e.g., LaDonna DiCamillo, Comment, Caught Between the Clauses and the Branches: When Parents Deny Their Children Nonemergency Medical Treatment for Religious Reasons, 19 J. Juv. L. U. La Verne C.L. 123, 138 (1998); see also Emily Buss, What Does Frieda Yoder Believe?, 2 U. Pa. J. Const. L. 53, 67–70 (1999) (discussing the difficulty of determining whether the testimony of Frieda Yoder, who testified in *Wisconsin v. Yoder*, was reliably free of parental or community pressure).

¹⁰⁵ See DiCamillo, *supra* note 104, at 138; see also Priscilla Alderson, Competent Children? Minors' Consent to Health Care Treatment and Research, 65 Soc. Sci. & Med. 2272, 2278 (2007) (describing four standards and three models of competence); Anthony W. Austin, Note, Medical Decisions and Children: How Much Voice Should Children Have in Their Medical Care?, 49 Ariz. L. Rev. 143, 152–55 (2007) (discussing several theories of psychological development and competence).

depending on the court adjudicating the elements of informed consent.¹⁰⁶ Because every case would be different, no single factor or set of factors should be considered dispositive to finding maturity. Another important and vital part of the inquiry should include a question as to whether the faith exemption claimed by the juvenile does, in fact, belong to the minor herself and is not the byproduct of a coercive or domineering faith community.¹⁰⁷

A bypass system will not only help a mature minor get an appropriate hearing, it will also help expedite her opportunity to assert her legal rights. In the current legal atmosphere, a mature minor may not get a chance for a full hearing until it is too late: Either the appeal becomes moot because the treatment has already occurred, or she will age out of the system before getting a chance to challenge the medical decision.

In 1999, the Appeals Court of Massachusetts reviewed a court order for a seventeen-year-old Jehovah's Witness church member that required a blood transfusion if the situation became so dire that one was necessary.¹⁰⁸ The youth lacerated her spleen while snowboarding, and a judge ordered that the treatment be done (if necessary) without inquiring into the minor's maturity, citing the best interests of the minor along with "the State's interest in the preservation of life and protection of the welfare of a minor."¹⁰⁹ The appeals court found the judge in error for not making a "determination as to [the minor's] maturity to make an informed choice," but by the time the court system decided that she deserved a full hearing, the seventeen-year-old had already been released from the hospital, never requiring the transfusion.¹¹⁰

¹⁰⁶ For example, should a minor have to prove her maturity by a preponderance of evidence or is a clear and convincing standard better? For a discussion of standards used to determine patient competency and burden of proof, see Austin, *supra* note 105, at 160–65.

¹⁰⁷ Although the "sincerity test" regarding religion has gone out of fashion in modern Supreme Court jurisprudence, some scholars have posited that a heightened sincerity requirement exists for juveniles in the medical consent context. Compare Ben Adams & Cynthia Barmore, Questioning Sincerity: The Role of the Courts after *Hobby Lobby*, 67 *Stan. L. Rev. Online* 59, 59 (2014) (noting that sincerity did not play a role in *Burwell v. Hobby Lobby Stores*), with Will, *supra* note 14, at 297–99 (arguing that the Supreme Court is hesitant to question the sincerity of an adult's belief due to a presumption of competence, but readily questions the sincerity of minors because of a presumption of incompetence).

¹⁰⁸ *In re Rena*, 705 N.E.2d 1155, 1156 (Mass. App. Ct. 1999).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1157.

Much like the abortion context, medical consent for mature minors occurs in a world much faster paced than the current legal system.¹¹¹ A bypass regime would allow for a full inquiry into a minor's maturity level without having to wait for the full workings of an appeals process. This would be especially useful if the minor's wishes conflicted with those of her parents. Although many minors share the faith of their parents or guardians, one could foreseeably predict a scenario in which a minor converts to a religion opposite of her parents and may need a judicial decision to effectuate her desired treatment options that are contrary to the religious views of her parents.

With all these competing interests at play, who wins in a bypass regime? Ideally, the child would get to effectuate her own autonomy, but that would depend on the scenario.¹¹² As a starting point, a religious eighteen-year-old can make whatever religiously based medical decision about her body she chooses, regardless of its rationality or her own sincerity. This exemplifies the current legal regime. In the proposed bypass system, a seventeen-year-old minor (or younger minor with similar cognitive development) would get to make her own religiously based choice if a judge can find that her decision is mature and that her faith is sincere. Her decision would be dispositive whether or not her parents agree with it.¹¹³ When the minor is determined to be incapable of making a mature choice, the decision of the parents should prevail as long as their decision remains within the constitutional confines established by *Prince v Massachusetts*.¹¹⁴ If the parents are incapable of making a rational decision on behalf of their child, the state's *parens patriae* role takes control—leaving the ultimate decision with the judge. Although this system does vest the final authority in the hands of government actors, it gives deference first to the minor and then to her parents. With the right of bodily integrity such a central and private right, such deference should be required.

¹¹¹ Both Sandra Cano and Norma McCorvey, the plaintiffs in *Doe v. Bolton* and *Roe v. Wade* respectively, carried their pregnancies to term before their cases ever reached the Supreme Court. Susan Frelich Appleton, *Reproduction and Regret*, 23 *Yale J.L. & Feminism* 255, 263 (2011).

¹¹² Sincere gratitude is owed to Professor Micah Schwartzman for suggesting mapping out the various scenarios in this Note.

¹¹³ Case law relating to situations where the religious identities of parents and minors conflict is inconclusive as to whether courts generally provide deference to one or the other. See Will, *supra* note 14, at 284–89.

¹¹⁴ 321 U.S. 158 (1944). For a full discussion of *Prince v. Massachusetts*, see *infra* Part III.

B. The Supreme Court's Potential Role

The current Court continues to expand the rights of minors under the Constitution, as they did in the 2005 case *Roper v. Simmons*.¹¹⁵ In an opinion by Justice Kennedy, the Court held that, because minors are protected by both the Eighth and Fourteenth Amendments, they could not be sentenced to capital punishment.¹¹⁶ The defendant in *Roper* was a seventeen-year-old juvenile when he was accused of committing murder, and after being tried as an adult, was sentenced to death.¹¹⁷ The defendant appealed, asserting his Eighth Amendment right and citing a previous case that prohibited the execution of a mentally handicapped person,¹¹⁸ and argued by analogy that it should apply to juveniles as well.¹¹⁹

The Court looked at the national consensus of laws prohibiting the death penalty for juveniles.¹²⁰ A large swath of states outlawed the procedure.¹²¹ The Court also looked to scientific studies that showed that the “lack of maturity and an underdeveloped sense of responsibility” in minors “result[ed] in impetuous and ill-considered actions and decisions.”¹²² The Court also noted the juvenile’s ability to be influenced by peer pressure and that the personalities of juveniles were not completely established.¹²³ As Justice Kennedy noted: “Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”¹²⁴ Because minors possessed diminished psychological culpability, the goals of the death penalty (retribution and deterrence) were subsequently diminished.¹²⁵ The Court also noted the difference between an immature lack of judgment and the mature decision to harm another, but found that distinction

¹¹⁵ 543 U.S. 551 (2005).

¹¹⁶ *Id.* at 578.

¹¹⁷ *Id.* at 557–58.

¹¹⁸ See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹¹⁹ *Roper*, 543 U.S. at 559.

¹²⁰ *Id.* at 564.

¹²¹ Even the Kentucky governor had commuted a juvenile’s death sentence to life imprisonment saying “[w]e ought not be executing people who, legally, were children.” *Id.* at 565 (internal quotation marks and citation omitted).

¹²² *Id.* at 569 (internal quotation marks omitted) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

¹²³ *Id.* at 569–70.

¹²⁴ *Id.* at 570.

¹²⁵ *Id.* at 571.

difficult for an “expert psychologist[,]” and therefore inappropriate as a question for lay jurors.¹²⁶

There is obvious tension between the *Roper* decision and the potential for a mature minor to be given a judicial bypass hearing for her medical decisions. Although the Court took a major step in incorporating the Eighth Amendment to minors in the context of the death penalty, at first blush *Roper* seems to be taking a far step back in providing rights for a minor to make mature decisions. Indeed, the principal dissent in *Roper* reflected this concern, noting that “at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case.”¹²⁷

According to psychologist Laurence Steinberg, the apparent inconsistency between the Court’s stance on the maturity of a minor considering abortion options and a minor committing a crime is not an inconsistency at all.¹²⁸ Both of these decisions were supported by the American Psychological Association (“APA”), and for some, these contrary opinions brought into question the credibility of the psychological studies as “advocacy masquerading as research.”¹²⁹ Steinberg, with four other researchers, studied the psychological and cognitive abilities of mature minors and discovered a marked difference between an adolescent’s ability to cognitively make informed decisions and the ability of an adolescent to practice impulse control or resist peer pressure: “Unlike adolescents’ decisions to commit crimes, which are usually rash and made in the presence of peers, adolescents’ decisions about terminating a pregnancy can be made in an unhurried fashion and in consultation with adults.”¹³⁰

The researchers emphasized the fact that a majority of minors considering an abortion were required by state law to undergo a waiting period

¹²⁶ Id. at 573.

¹²⁷ Id. at 588 (O’Connor, J., dissenting).

¹²⁸ Laurence Steinberg et al., Are Adolescents Less Mature Than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,” 64 Am. Psychologist 583, 583 (2009). Other scholars have interpreted the *Roper* decision to open the door to juvenile autonomy in the medical consent context. See, e.g., Maureen Carroll, Transgender Youth, Adolescent Decisionmaking, and *Roper v. Simmons*, 56 UCLA L. Rev. 725, 741 (2009) (“A careful, context-specific application of the Court’s reasoning indicates that, rather than creating barriers for transgender youth seeking access to hormones, the view of adolescence expressed in *Roper* supports a presumption in favor of respecting a medical provider’s decision to provide hormone treatment to a minor without parental consent.”).

¹²⁹ Steinberg et al., supra note 128, at 585.

¹³⁰ Id. at 586.

and consultation with medical staff, whereas criminal decisions were mostly impulsive.¹³¹ Their research found that cognitive maturity hits its pinnacle around age fifteen, while psychosocial development (including impulsivity, thrill-seeking, and susceptibility to peer pressure) does not reach peak levels until the midtwenties.¹³² This research is significant because the Court has long relied on scientific studies, like this one, to determine the substantive rights of minors.¹³³ As the APA's general counsel Nathalie Gilfoyle said, "[w]hen [the] APA weighs in on something, we believe the courts are listening."¹³⁴

The work of Professor Jennifer L. Rosato has done much to advance the idea that "some adolescents achieve the requisite capacity before they reach the age of maturity" in the medical decision-making context.¹³⁵ Her work calls into question the presumption of a minor's incapacity to make medical decisions by looking at further studies of adolescent development.¹³⁶ Studies have shown that juveniles as young as fourteen can have decision-making abilities on par with their eighteen-year-old counterparts.¹³⁷ While the studies of juvenile justice and minors in the healthcare context share similar factors, they are "qualitatively different" because psychosocial factors become more relevant when determining culpability, and decisional capability plays a larger role in the medical context.¹³⁸ Even with psychosocial factors like impulsiveness and a cavalier perception of risk taken into account in the youth developmental studies, Professor Rosato still determines that "the balance of interests in the health care context weighs in favor of giving adolescents greater decision-making power."¹³⁹ The possibility of undue parental influence may be a psychosocial factor that implicates the juvenile justice studies, but this influence should be detectable in a judicial hearing to determine a minor's capability to make a mature choice and should not subvert the findings of the court that the minor is otherwise mature.¹⁴⁰

¹³¹ *Id.*

¹³² *Id.* at 590–91.

¹³³ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954).

¹³⁴ Rebecca A. Clay, *Psychology's Voice is Heard*, 41 *Monitor on Psychol.* 22, 22 (2010) (internal quotation marks omitted), <http://www.apa.org/monitor/2010/07-08/voice.aspx> [<https://perma.cc/L59R-GRMS>].

¹³⁵ Rosato, *supra* note 13, at 782.

¹³⁶ *Id.* at 783.

¹³⁷ *Id.* at 785 n.106.

¹³⁸ *Id.* at 788–89.

¹³⁹ *Id.* at 786, 788.

¹⁴⁰ See *id.* at 786.

Beyond the data that differentiate juvenile justice culpability from the healthcare decisional capability, the current Court seems poised to expand the rights granted under the Free Exercise Clause of the First Amendment generally. In the politically charged *Burwell v. Hobby Lobby Stores*, the Court expanded the right of free exercise under the Religious Freedom and Restoration Act (“RFRA”)¹⁴¹ to a closely held corporation.¹⁴² As Justice Kennedy declared, “free exercise is essential in preserving [a person’s] own dignity and in striving for a self-definition shaped by [her] religious precepts.”¹⁴³ The issue in *Hobby Lobby* was the contraceptive mandate in the Affordable Care Act’s health coverage regime. This seems like a relatively small burden upon one’s religious practice, as compared to one’s very own bodily integrity. If the Free Exercise Clause through RFRA protects a multimillion dollar corporation from paying a de minimis amount toward contraceptives based on religious principles, then how much greater is the weight of a seventeen-year-old minor to choose how to treat her own body based on her personal faith convictions?

In *Holt v. Hobbs*, which found its footing in the federal Religious Land Use and Imprisoned Persons Act (“RLUIPA”),¹⁴⁴ the Court expressed a similar sentiment about religion which may further indicate a leaning toward a broader view of religious freedoms.¹⁴⁵ A unanimous Court agreed that a prisoner who practiced Islam should not be restricted from having a religiously-mandated beard. While there was disagreement on the Court in *Hobby Lobby*, all nine Justices agreed that free exercise rights are important in cases that “would not detrimentally affect others who do not share petitioner’s belief.”¹⁴⁶ This would be the case with the mature minor exemption.

III. THE POTENTIAL OBJECTIONS

Since the founding of the United States, “the freedom to put a chosen faith (if any) into practice” has been a paramount right of citizens of this nation.¹⁴⁷ The Supreme Court has also recognized a fundamental right

¹⁴¹ 42 U.S.C. § 21B (2012).

¹⁴² 134 S. Ct. 2751, 2775 (2014).

¹⁴³ Id. at 2785 (Kennedy, J., concurring).

¹⁴⁴ 42 U.S.C. § 21C (2012).

¹⁴⁵ 135 S. Ct. 853, 859 (2015).

¹⁴⁶ Id. at 867 (Ginsburg, J., concurring).

¹⁴⁷ Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 1.

for parents to have autonomy in child rearing,¹⁴⁸ and many states have provided parental accommodations for laws that might interfere with a parent's religious practices.¹⁴⁹ The religious rights of parents, however, can at times conflict with the rights of their children. Courts and legislatures have tried to balance the fundamental rights provided to parents with the individual rights of children, yet the reconciliation of these opposing interests is often problematic—specifically when the parents' rights conflict with the rights of the minor or those of the state.

A. *The Constitutional Rights of Parents*

The Supreme Court guaranteed the plenary rights of parents to make child-rearing decisions in the watershed substantive due process case *Meyer v. Nebraska*, in which the Court found unconstitutional a Nebraska law that forbade a minor to be taught a foreign language in a public or private school.¹⁵⁰ Although the offending party of this law was a parochial school that taught biblical stories in German, the Court did not implicate the First Amendment, but rather the right guaranteed in the Fourteenth Amendment to “establish a home and bring up children.”¹⁵¹ The Supreme Court reaffirmed this parental right just two years later when invalidating an Oregon law that forbade private education.¹⁵² Citing *Meyer*, the Court said that the statute “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”¹⁵³

Notably, the Court carved out an exception to these parental rights in terms of forcing religious practices onto children. In *Prince v. Massachusetts*, a nine-year-old girl, with her guardian, was caught selling *Watchtower* magazines pursuant to their Jehovah's Witness faith and in

¹⁴⁸ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (saying “personal choice in matters of family life is a fundamental liberty interest”).

¹⁴⁹ See Linda L. Lane, *The Parental Rights Movement*, 69 U. Colo. L. Rev. 825, 833 (1998). No legislative exemptions are required by the federal Constitution to a “generally applicable” law. See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990). Legislative religious accommodations are “permissible,” but the existence and contours of these accommodations are often a source of debate. See Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 687 (1992).

¹⁵⁰ 262 U.S. 390, 403 (1923).

¹⁵¹ *Id.* at 399.

¹⁵² *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–36 (1925).

¹⁵³ *Id.* at 534–35.

violation of a Massachusetts child labor law.¹⁵⁴ In contrast to her parent's fundamental right of bringing up a child as she pleased, the Supreme Court found the interest of "the State as *parens patriae*" paramount and upheld the violation of the labor law despite the religious motivation of the action.¹⁵⁵ Although the Court recognized the right of the guardian to sell the magazines, the Court noted that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."¹⁵⁶ In an often-cited quotation, the Court emphasized the State's ability to regulate parenting in such a way: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."¹⁵⁷ Therefore, adults are allowed to make martyr-like choices, but they cannot force those choices onto their children.

The Supreme Court has also established parental authority over education as a guarantee of the Free Exercise Clause of the First Amendment. In *Wisconsin v. Yoder*, Amish parents in Wisconsin were convicted for violating a state compulsory school attendance law after refusing to send their children to school beyond eighth grade for religious reasons.¹⁵⁸ The Amish parents believed that sending their children to high school would "endanger their own salvation and that of their children."¹⁵⁹ The Court found that the Religion Clauses were designed to trump "other interests of admittedly high social importance" such as universal education, and "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."¹⁶⁰ The majority opinion recognized the "possible competing interests of parents, children, and the State" without making any determination about this competing relationship beyond the case at hand.¹⁶¹ The Court did, however, comment on the hierarchy of the parent-state relationship in terms of religious upbringing:

¹⁵⁴ 321 U.S. 158, 161–63 (1944).

¹⁵⁵ *Id.* at 166.

¹⁵⁶ *Id.* at 170.

¹⁵⁷ *Id.*

¹⁵⁸ 406 U.S. 205, 207–08 (1972).

¹⁵⁹ *Id.* at 209.

¹⁶⁰ *Id.* at 214–15.

¹⁶¹ *Id.* at 231.

[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a “reasonable relation to some purpose within the competency of the State” is required to sustain the validity of the State’s requirement under the First Amendment. To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that the parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.¹⁶²

Thus, the parent’s fundamental right to bring up a child combined with a free exercise claim creates a cognizable claim to counter the state’s interest in a child’s upbringing.¹⁶³ There is an implication in *Prince* that a child—before reaching the age of majority—may not have the legal capacity to make herself a martyr.¹⁶⁴ The *Yoder* Court, however, does not do a searching inquiry into the desires of the juveniles involved, and Justice Douglas’s dissent suggests that the Court errs by not considering the religious views of the child as dispositive.¹⁶⁵ *Yoder* specifically cabins *Prince* to occasions in which there exists a “substantial threat to public safety, peace or order,”¹⁶⁶ and expressly states that a parent’s ability to raise a child is limited under *Prince* when “it appears that parental decisions will jeopardize the health or safety of the child.”¹⁶⁷ It is important to note that, in the abortion cases after *Yoder*, the Court said that a judicial bypass system is consistent with the Court’s precedent on constitutional parental rights.¹⁶⁸

The plenary rights of a parent to raise her child without interference has a strong advocate in Professor Martin Guggenheim, who “has earned a national reputation as an expert in children’s rights.”¹⁶⁹ As an advocate

¹⁶² Id. at 233–34.

¹⁶³ This holding did not undermine the State’s power to protect children from harmful materials like obscene literature. See *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a ban that prohibited the sale of obscene materials to minors).

¹⁶⁴ 321 U.S. at 166–67.

¹⁶⁵ *Yoder*, 406 U.S. at 241 (Douglas, J., dissenting).

¹⁶⁶ Id. at 230 (majority opinion) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)) (internal quotation marks omitted).

¹⁶⁷ Id. at 234.

¹⁶⁸ *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion) (“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.”).

¹⁶⁹ Kelly Browe Olson, Book Review, 44 *Fam. Ct. Rev.* 330, 330 (2006) (reviewing Martin Guggenheim, *What’s Wrong With Children’s Rights* (2005)).

for children, Guggenheim found his “fiercest disagreements were with others also wearing the mantle of children’s rights advocate.”¹⁷⁰ Guggenheim finds that children’s rights claims based on the constitutional guarantee of equal protection are “incomplete or doomed.”¹⁷¹ He calls the “effort to gain rights for children that adults have” intrusive to parental rights and against constitutional principles.¹⁷²

On the other side of the spectrum, some advocates argue for the primacy of a child’s right when they conflict with those of her parent. Notably, Professor James G. Dwyer advocates a rights model that establishes a “parental privilege” that “would not give parents themselves any legal claims against state efforts to restrict [a child’s] behavior or decision-making authority.”¹⁷³ Dwyer sees children’s rights as a safeguard to individual autonomy that would protect children when parental religious decisions would otherwise injure the best interest of the child.¹⁷⁴ A parental privilege approach would allow parents to “engage in the types of behavior[s] normally associated with child-rearing,” yet keep them from having any “legal claims” against their children.¹⁷⁵ Thus, a parent could provide food and housing for a child, but they would not be able to assert a claim against any state restriction.¹⁷⁶ In these circumstances, Dwyer sees a need for “equality” between adults and children.¹⁷⁷ Some scholars have also advocated for a lawyer who represents a child to forego the “best interests model” in favor of a model that favors the child’s “express wishes.”¹⁷⁸ In noting the power of affirming a child client’s choices, Professor Katherine Hunt Federle stated:

Empowerment rights thus offer the possibility of improving children’s experiences by recognizing and remedying their powerlessness. There is a fundamental difference, however, between respecting chil-

¹⁷⁰ Martin Guggenheim, *What’s Wrong with Children’s Rights* x (2005).

¹⁷¹ *Id.* at 11.

¹⁷² *Id.* at 18. At least one commentator has suggested that Professor Guggenheim’s views fail to recognize that the progressive steps made by child-advocates have helped ensure better parenting and better protections for children. See Olson, *supra* note 169, at 333.

¹⁷³ James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 *Calif. L. Rev.* 1371, 1375–76 (1994).

¹⁷⁴ *Id.* at 1377 n.16.

¹⁷⁵ *Id.* at 1375–76.

¹⁷⁶ *Id.*

¹⁷⁷ See James G. Dwyer, *Equality Between Adults and Children: Its Meaning, Implications, and Opposition*, 2013 *Mich. St. L. Rev.* 1007, 1007–10.

¹⁷⁸ Katherine Hunt Federle, *Children’s Rights and the Need for Protection*, 34 *Fam. L.Q.* 421, 427 (2000).

dren because they are powerful and protecting children because they are vulnerable. The latter approach actually disadvantages children; certainly, there is evidence to suggest that when we try to act on behalf of children, our efforts seldom have neutral consequences and, more frequently, may actually cause greater harm.¹⁷⁹

When a minor's express interests are given a voice, the child has more buy-in to the final result, even if adverse to her choice.¹⁸⁰ Although there may be an irreconcilable conflict at times between the rights of a child and the rights of her parents, a mature minor bypass system seems to sidestep the greatest concerns of the parents' rights advocate in that religious exemptions to medical consent laws are often in line with the beliefs of the parents—and at the same time validate the views of the child-advocate by effectuating a choice desired by the child herself. In a regime that allowed for the mature minor bypass procedure, a parent would still retain plenary rights to rear her child, while the child would be able to effectuate her own decisions about her body when she is mature enough to make such a choice.

B. Arguments Against Religious Accommodations

Those who disagree with religious accommodations generally may also oppose the mature minor bypass system.¹⁸¹ Professor Marci Hamilton, a notable religious accommodations opponent, advocates eliminating religious accommodations for parents to rear their children outside the general laws.¹⁸² In defining religious freedom, she creates a “no-harm” principle as inspired by Thomas Jefferson’s statement that “[t]he legitimate powers of government extend to such acts only as are injurious to others.”¹⁸³ In examining various cases of neglect or abuse, from female circumcision to untreated diabetes, she argues that “parents do not have an unfettered right to act in ways that harm their children, even if they

¹⁷⁹ *Id.* at 438.

¹⁸⁰ *Id.* at 439–40 (“[T]he child herself may be more likely to express satisfaction with the outcome of the case because she will feel empowered by her participation in the process.”).

¹⁸¹ This Section is not intended to be an exhaustive review of accommodations literature, but rather a general representation of some major viewpoints. For a full discussion of the accommodation debate, see Douglas Laycock, *The Religious Exemption Debate*, 11 *Rutgers J.L. & Religion* 139 (2009).

¹⁸² See Marci A. Hamilton, *God vs. The Gavel: The Perils of Extreme Religious Liberty* 33, 60–64 (rev. 2d ed. 2014).

¹⁸³ *Id.* at 16 (internal quotation marks omitted).

are acting on religious beliefs.”¹⁸⁴ The right of the child reigns supreme in Hamilton’s perspective, and the no-harm principle “has become an insuperable barrier for the claim that the Constitution can or should place religious believers above the law.”¹⁸⁵

Professor Robin West also advocates against religious accommodations generally, calling religious exemptions “exit rights”—an opportunity for religious individuals to remove themselves from the general requirements of the population.¹⁸⁶ These exit rights have externalities on others, like children losing their “right to an education or protection” if their parents invoke their constitutional exit right for alternative education.¹⁸⁷ In her view, accommodations “come with costs to our national community, not the least of which is that they undermine the aspirations of the civil society from which exit is sought.”¹⁸⁸

On the other side, some scholars see the need for religious accommodations as both permitted and demanded by the constitution.¹⁸⁹ The scholarship by Professor Michael McConnell has “changed the terms of [the] debate” regarding accommodations and still carries weight today.¹⁹⁰ For McConnell, an accommodation should “remov[e] a burden on, or facilitate[e] the exercise of, a person’s or an institution’s religion.”¹⁹¹ McConnell argues that accommodation requires that law facilitate the religious decisions of the individual and that it should avoid “formal neutrality” that disregards religious concerns in favor of secular ones.¹⁹² A regime of religious accommodation would serve “to protect adherents of minority religions” often misunderstood by the majoritarian whole and would “prevent[] needless injury to the religious consciences” of people otherwise unprotected.¹⁹³

Although these are only a few of the voices in the debate regarding free exercise, they do highlight what seem to be contradictory views.

¹⁸⁴ *Id.* at 62–63, 67.

¹⁸⁵ *Id.* at 312.

¹⁸⁶ Robin West, Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract, in *The Rise of Corporate Religious Liberty* 399, 402–04 (Micah Schwartzman et al. eds., 2016).

¹⁸⁷ *Id.* at 403.

¹⁸⁸ *Id.*

¹⁸⁹ See Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 *Harv. J.L. & Gender* 1, 5–8 (2015) (describing the viewpoint of Professor Michael McConnell).

¹⁹⁰ *Id.* at 7.

¹⁹¹ McConnell, *supra* note 149, at 686.

¹⁹² *Id.* at 689.

¹⁹³ *Id.* at 693.

This Note contends, however, that a mature minor bypass system for healthcare decisions may represent a unique place of overlap for these opposing viewpoints. For the religious accommodationist, an exemption for minors to assert their religious beliefs in the context of their own healthcare seems like a clear win. For scholars like Hamilton, allowing a minor to independently make a choice to undergo or forego medical treatment seems completely consonant with the “no-harm principle” as there would be little third-party harm from a minor making a self-determined healthcare choice.¹⁹⁴ The liberty interest in self-determination also seems in accord with West’s concept of a “right[] to enter” which guarantees “participation in those institutions of civil society.”¹⁹⁵ When minors make their own healthcare decisions, they get the chance to “participate in all aspects of our social, civic, and constitutional identity.”¹⁹⁶

A related question is whether a judge effectuating the religious views of a minor, would, in effect, be creating an “excessive entanglement” of religion and government that runs contrary to the Establishment Clause of the Constitution.¹⁹⁷ As Justice Ginsburg noted in *Burwell v. Hobby Lobby Stores*, “courts are not to question where an individual ‘draws the line’ in defining which practices run afoul of her religious beliefs.”¹⁹⁸ Would a judge allowing a minor to make a religious choice inherently be tantamount to the government giving its imprimatur to a specific religious faith or dogma? As long as the judge’s decision is based solely on the cognitive abilities of the minor and not on the rationality, truthfulness, or wisdom of the belief system, the government would effectually wash its hands of any affirmations or rejections of the quality of the religious doctrine. Instead, it would be promoting the individual’s choice of religious dogma. The current system, by contrast, does provide significant judicial override for religious beliefs of minors that run contrary to the mainstream sentiments. The bypass system should remove the normative and paternal religious influence that judges currently possess and put the power back into the hands of the individual. Rather than entan-

¹⁹⁴ Hamilton, *supra* note 182, at 16, 312–13.

¹⁹⁵ West, *supra* note 186, at 413.

¹⁹⁶ *Id.* at 417.

¹⁹⁷ See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); see generally *id.* (outlining the Court’s “excessive entanglement doctrine” under the Establishment Clause).

¹⁹⁸ 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting) (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715 (1981)).

gling religion more with government, a bypass system should seek to do the reverse.¹⁹⁹

CONCLUSION

Although the controversy over the right of a mature minor to consent to medical treatment has existed for more than a century, the debate continues to make headlines. In January 2015, a seventeen-year-old girl had to wait for the Connecticut Supreme Court to weigh in on whether she should be allowed to refuse chemotherapy.²⁰⁰ After the state stripped her mother of parental rights because she affirmed her daughter's autonomous decision to refuse treatment, the court determined that the minor was neglected and would be forced to undergo chemotherapy.²⁰¹ This case may not implicate religious freedoms, but it does illustrate that the interests at stake are current and vital. The Connecticut court found the seventeen-year-old too immature to make a rational decision, and their main evidence was the fact that she ran away from home in order to evade her court-ordered chemotherapy. As one commentator noted, "[i]t seems that the only thing that would have counted as dispositive evidence of [the minor's] maturity, of her capacity to withhold consent, was a willingness to grant it."²⁰²

The Supreme Court is primed to recognize a constitutionally derived mature minor exemption through the text of the religion clauses of the First Amendment. It is apt to rely heavily on the psychological findings that provide a foundation for a minor's capability of making informed consent, and the Court has done much recently to indicate further expansion of religious freedoms. In the wake of *Holt v. Hobbs* and *Burwell v. Hobby Lobby Stores*, the Court seems poised to broaden the scope of religious exemptions generally and *Roper v. Simmons* suggests a tendency

¹⁹⁹ Although it may be difficult for some judicial officials to completely disentangle cognitive ability from the occasionally irrational dogmas of some less popular religious beliefs, this system has the potential to be more evenhanded when it comes to minority religious communities.

²⁰⁰ Will Wilkinson, Medical Consent: Cassandra's Catch-22, *The Economist* (Jan. 14, 2015, 2:57 PM), <http://www.economist.com/blogs/democracyinamerica/2015/01/medical-consent> [<https://perma.cc/78Y4-2FL2>].

²⁰¹ *Id.*

²⁰² *Id.*

to broaden the rights of minors specifically.²⁰³ The multitude of states with unclear jurisprudence on the issue of religious consent by minors proves a need for a clear federal guidepost that guarantees a judicial bypass system to ensure that mature minors with sincere religious objections to treatment have an opportunity to let their voices be heard.

²⁰³ At the writing of this Note, the Supreme Court had a vacancy left by the passing of Justice Scalia. Whether the Court will continue to take an expansive view of religious freedom remains undetermined.