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Seeking Remedies for LGBTQ Children from Destructive Parental Authority in the Era of Religious Freedom

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Seeking Remedies for LGBTQ Children from Destructive Parental Authority in the Era of Religious Freedom

Roy Abernathy*

Abstract

This Note explores the intersection of parents' rights, religious rights, state's rights, and children's rights. This Note analyzes the development of children's rights and how those rights may be applied to current state religious exemption policies that affect the health of LGBTQ children. This Note will argue that in the absence of direct federal legislation to stop the harm of LGBTQ children, four possible remedies may exist to protect LGBTQ children. These remedies include states asserting parens patriae authority, children asserting substantive due process claims, children utilizing partial emancipation statutes, or children utilizing mature minor exemptions, which provide a judicial bypass procedure. This Note posits that these remedies should be guaranteed for LGBTQ minors when life-altering or life-endangering choices are made by any parental figure or guardian.

* Candidate for J.D., May 2020, Washington and Lee University School of Law. Thank you to the LGBT Bar Association for inspiring this Note topic and to the various W&L professors who directed or edited aspects of the Note. Thank you to my parents, who have made both their faith and supporting their LGBTQ child a priority.

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I. Introduction

In October 2018, the *New York Times* published an article titled, "'Transgender' Could Be Defined Out of Existence Under Trump Administration."[1] That headline encapsulates one of the latest political attacks on the LGBTQ community. When the Supreme Court recognized same-sex marriage in *Obergefell v.*

1. *See* Erica L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html (last visited Mar. 6, 2020) (discussing the Trump administration's choice to define gender narrowly for application within federal programs under Title IX) [https://perma.cc/UD8K-UHH3].

Hodges,[2] the LGBTQ community rejoiced in victory.[3] However, that valuable progress toward LGBTQ equality carries with it the risk of victory blindness.[4] Since *Obergefell*, many states have enacted various pieces of legislation to curtail the rights of the LGBTQ community.[5] This Note specifically considers legislative action that harms LGBTQ children.

Religious Freedom Restoration Act bills allow discrimination against LGBTQ children in the name of religious freedom.[6] State bills have manifested in different ways to specifically affect LGBTQ youth, such as anti-all-comers policies in response to *Christian Legal Society v. Martinez*,[7] limited

2. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) ("These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

3. *See* MICHELANGELO SIGNORILE, IT'S NOT OVER: GETTING BEYOND TOLERANCE, DEFEATING HOMOPHOBIA, AND WINNING TRUE EQUALITY 180 (2016) ("It was a profound and celebratory moment, and at Pride Month parades across the country, many of us literally danced in the streets.").

4. *See id.* at 3 (describing victory blindness as a phenomenon which occurs after a social group gains important strides toward success and turns a blind eye to the continued discrimination occurring, illustrated by anti-LGBTQ movements post-*Obergefell* when LGBTQ individuals were paying less attention).

5. *See* Michael Gordon et al., *Understanding HB2: North Carolina's newest law solidifies state's role in defining discrimination*, THE CHARLOTTE OBSERVER (Mar. 26, 2016, 11:00 AM), https://www.charlotteobserver.com /news/politics-government/article68401147.html (updated Sept. 14, 2016) (last visited Mar. 16, 2020) (discussing North Carolina's bill reversing a Charlotte ordinance that protected various rights of LGBTQ individuals, including bathroom protections) [https://perma.cc/S2LV-KMMU].

6. *See* CATHRYN OAKLEY, HUMAN RIGHTS CAMPAIGN FOUND., DISREGARDING THE BEST INTEREST OF THE CHILD: LICENSES TO DISCRIMINATE IN CHILD WELFARE SERVICES 5–8 (2017) (discussing various state Religious Freedom Restoration Acts providing opportunities for child welfare service providers to discriminate against LGBTQ children).

7. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 696 (2010) (affirming the constitutionality of all-comers policies that require student organizations that receive financial support to not discriminate against new members); *see also* Kery Murakami, *Tying Grant Eligibility to Religious Freedom*, INSIDE HIGHER ED (Feb. 7, 2020), https://www.insidehighered.com/news/2020/02/07/colleges-worry-about-implications-religious-freedom-rule (last visited Mar. 6, 2020)

public forum bills,[8] and religious exemptions for child welfare service providers.[9]

Religious exemptions for child welfare service providers create an unfortunate opportunity for child welfare agencies to discriminate under the guise of religion.[10] Various states have privatized child welfare systems and private systems allow providers to create their own set of principles to govern their facilities.[11] During the latter half of the twentieth century, states have trended toward privatized child welfare.[12] Provider-created governing principles may include discriminatory policies allowed by religious exemptions, such as a prohibition on same-sex couples adopting children or forced conversion therapy and prohibition of hormone therapy for foster children.[13]

(discussing the current legal landscape for all-comers policies) [https://perma.cc/98Z4-NAUU].

8. *See* Ryan Wilson, *HRC & Equality FL Express Concern for Overly Broad Religious Expression Legislation in Florida*, HUMAN RTS. CAMPAIGN FOUND. (May 9, 2017), https://www.hrc.org/blog/hrc-equality-fl-express-concern-for-overly-broad-religious-expression-legis (last visited Mar. 16, 2020) (discussing broad state religious expression legislation that allows student speakers to make anti-LGBTQ statements at school events pursuant to personal religious beliefs) [https://perma.cc/SZ6M-LX96].

9. *See* OAKLEY, *supra* note 6, at 3 ("At the close of 2017, seven states have versions of license to discriminate in child welfare laws on the books—three of which were passed in 2017 and five of which were passed in the last three years.").

10. *See id.* ("Some providers of child welfare services, citing religious objections, have threatened to cease providing state-funded services if they are forced to serve same-sex couples or other potential parents seeking to adopt a child . . . .").

11. *See* PLANNING AND LEARNING TECH., INC. & THE UNIV. OF KY., LITERATURE REVIEW ON THE PRIVATIZATION OF CHILD WELFARE SERVICES 1 (2006) ("Privatization is a process where functions and responsibilities in whole or in part are shifted from government to the private sector. Privatization can take various forms including vouchers and public-private partnerships.").

12. *See id.* at 2 ("National surveys found that during the 1990s, between 50 percent to 80 percent of states had increased their reliance on contracted social services to cope with new constraints on public resources.").

13. *See* OAKLEY, *supra* note 6, at 3 ("[T]heir purpose is to enshrine discrimination into law by granting state contractors and grantees who provide taxpayer-funded child welfare services the ability to discriminate with

Religious exemptions for child welfare service providers cast a larger spotlight on general parental authority, which may be harmful to LGBTQ youth. LGBTQ children have, unfortunately, found themselves in the crosshairs of the battle over LGBTQ rights.[14] The safety of all LGBTQ children is threatened by religious exemptions, and the fight against religious exemptions has resulted in few successes.[15] The development of children's rights through direct legislation, substantive due process claims, partial emancipation, or mature minor exemptions will provide needed protection to LGBTQ children, to keep them from unnecessary harm.

This Note will consider how parental authority can be harmful for LGBTQ children within the child welfare system and more broadly. In general, parents have the right to make medical decisions on behalf of their children.[16] However, this right is limited if the decision is harmful.[17] Legal challenges may be necessary to remove discriminatory child welfare *policies*; this Note focuses on *remedies* for the LGBTQ children caught up in the child welfare system. Although the Note focuses on LGBTQ children in the child welfare system, the remedies discussed should translate to any LGBTQ children, even those facing harmful parental authority outside of the child welfare services context.

This Note will examine the development of children's rights and how those rights may be used to combat current religious

impunity in the provision of those services against qualified same-sex couples or LGBTQ individuals who want to adopt.").

14. *See id.* at 5 (describing various state laws that allow child welfare providers to discriminate in ways directly affecting LGBTQ children, including one allowing the providers to "refus[e] to accept a referral for placement services if the agency objects to the child or the likely placement of the child").

15. *See id.* at 8 (discussing the failure of discrimination-based challenges to the growth of religious freedom protection statutes).

16. *See* Douglas S. Diekema, *Parental Decision Making*, U. WASH., https://depts.washington.edu/bhdept/ethics-medicine/bioethics-topics/detail/72 (last visited Mar. 6, 2020) (describing the general freedom parents have to make medical decisions for their children) [https://perma.cc/7YKB-XU7J].

17. *See id.* ("Medical caretakers have an ethical and legal duty to advocate for the best interests of the child when parental decisions are potentially dangerous to the child's health, imprudent, neglectful, or abusive.").

exemption policies that target the health of LGBTQ children. The Note will argue that, in the absence of direct legislation, substantive due process claims, partial emancipation statutes, or mature minor exemptions that provide a judicial bypass procedure should be guaranteed for LGBTQ minors when life-altering or life-endangering choices are made by any parental figure or guardian. Part II begins with the historical background of children's rights and an overview of the constitutional development of parental rights in the United States. Part II considers *parens patriae* and the authority of the state, and provides examples of state revocation of parental rights. Part II concludes by discussing the independent rights of children and the elimination of the parent–state dichotomy of control over children. Part III analyzes risks and harms LGBTQ children experience. Part III then discusses current child welfare service laws that allow providers to discriminate against children on the basis of religious and moral objections. Finally, Part IV concludes by proposing four remedies to enhance children's rights for LGBTQ youth. These proposed remedies include state intervention under *parens patriae*, substantive due process claims, partial emancipation, and mature minor exemptions.

II. Historical Overview of the Contours of Children's Rights

A. Parental Rights over Children Throughout United States History

Children were considered the property of their parents or the state—common law chattel—throughout much of the United States' history.[18] Parents exercised control over their children, their commodity.[19] Historically, children had no rights at all.[20] At best, any rights afforded to children were secondary to

18. *See* Kevin Noble Maillard, *Rethinking Children As Property: The Transitive Family*, 32 CARDOZO L. REV. 225, 237 (2010) (discussing the historic view of children as parental property).

19. *See id.* (stating children were viewed as a commodity where ownership and dominion would be presumed).

20. *See id.* ("At common law, children were treated as chattel.").

parental authority and state control.[21] Debates about children's rights traditionally focused on parents as the property owner, and the state as the property giver.[22]

Children were viewed as an economic asset of their parents until the late eighteenth century.[23] Children worked for the economic well-being of their families, whether on a farm or a trade apprenticeship in the community.[24] Children's work was to financially benefit their parents, generally through the age of twenty-one.[25] The level of control exerted over children was reinforced by community and religious values, ensuring children were both maintained and controlled. [26]

In the early nineteenth century, the status of child labor began to change due to overall economic growth in society.[27] Children left home to work in factories at young ages.[28] Thus emerged the doctrine of emancipation: releasing a child from economic servitude to the family and releasing the parent from the responsibility of supporting the child.[29] *Respublica v.*

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21. *See id.* (recognizing that throughout the United States' history children had very few rights and those that were recognized would be considered less controlling than a parental property right).

22. *See id.* at 227 (discussing the child as owned by the parent or state when determining property claims).

23. *See* F. Raymond Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go*, L. & CONTEMP. PROBS., Summer, 1975, at 80 (discussing historical assumptions that adult economic roles applied equally to children).

24. *See id.* (stating no matter the field of work a child may be engaged with, either directly for a parent or for another master, the pay was provided to a parent or guardian).

25. *See id.* (discussing the economic control of children extended until the age of twenty-one).

26. *See id.* (highlighting community goals to keep children from becoming a public charge or a public nuisance which was the subject of "stubborn children" laws, the antecedent to minors in need of supervision jurisdiction).

27. *See id.* at 81 (recognizing the effect technological growth during the industrial era had on children utilized in the labor market).

28. *See id.* (discussing the young ages at which children would leave home to work in the factory setting).

29. *See id.* at 82 (highlighting the emergence of emancipation of children as a byproduct of children leaving home to work in factories).

Keppele[30] is an early example of courts considering limitations on parental rights to bind the child to work.[31] During this time, the age of maturity became flexible and child runaway laws were no longer enforced.[32] Although the colonial period recognized strict parental control, the early nineteenth century provided for early maturation of children and a rise in recognition of a child's right to seek emancipation.[33]

The close of the nineteenth century brought industrialization and the rise of the nuclear family.[34] The nuclear family emphasized a prolonged role for parents in the preparation of children.[35] Three major legal and political moves—the creation of the juvenile court system, enactment of child labor laws, and the development of compulsory education—expanded the realm of parental control and delayed economic roles for children.[36] Although these new institutions were generally motivated by economic interests, their development provided many initial protections and guarantees for children.[37]

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30. *See* Respublica v. Keppele, 2 U.S. 197, 199 (Pa. 1793) (concluding that overseers of minors do not have authority to bind minors to indentured servanthood).

31. *See id.* at 198 (providing that parental authority was limited by social customs, specifically applied as a limitation for parents to bind their children as a servant).

32. *See* Marks, *supra* note 23, at 83 (considering the young age many children were leaving home to seek work, a minor's right to depart from his parent's home was recognized and child neglect laws were not applied in these situations).

33. *See id.* at 85 (contrasting the differences in colonial era and mid-eighteenth century parental authority).

34. *See id.* at 86 (discussing the period of 1870–1920 as the industrial era when the nuclear family concept began to develop).

35. *See id.* (discussing value in parental identity shifting to parental ability to prepare children for success).

36. *See id.* at 86–88 (acknowledging the legislative development of the juvenile court system, child labor laws, and compulsory education provided greater parental authority over children even as the children grew older).

37. *See id.* at 87–88 (analyzing the economic motivations behind the establishment of child labor laws, the juvenile court system, and compulsory education).

By the early twentieth century, the trend toward children having an independent status slowed.[38] Compulsory education laws turned schools into social institutions that would prepare children for their adult lives.[39] The time frame for adult preparation expanded, a phenomenon unique to the modern era.[40]

B. Constitutional Foundations for the Fundamental Right of Parents to Control the Upbringing of Their Children

1. The Origin of Constitutional Parental Rights and Seminal Cases Relating to Such Rights

Throughout the early twentieth century, the effects of industrialization and the nuclear family led to powerful parental authority.[41] The Supreme Court responded by guaranteeing a constitutional right for parents to raise their children free from government intervention in *Meyer v. Nebraska*[42] and *Pierce v. Society of Sisters*[43] in the 1920s.[44]

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38. *See id.* at 88 (concluding that the shift away from economic roles for adolescents eroded the right to emancipation that had developed in the eighteenth century for adolescents).

39. *See id.* ("[T]hey sought to designate the school as the social institution other than the family that would formally prepare him for life.").

40. *See id.* ("With the passage of child labor legislation, the prolongation of childhood was facilitated. Henceforward, adult economic roles would be out of reach of adolescents, and adolescence would be more clearly defined as a formal and dependent period of life.").

41. *See id.* at 86 (analyzing how the limitations due to child labor laws and compulsory school attendance force youth to obey parents with no practical alternative).

42. *See* Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (concluding Nebraska law restricting foreign language classes violated the Fourteenth Amendment).

43. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (concluding that Oregon's Compulsory Education Act unreasonably interferes with parental rights).

44. *See id.* at 535 ("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 prepare him for additional obligations."); *see also Meyer*, 262 U.S. at 403 ("We are constrained to conclude that the statute as applied is arbitrary

These cases struck down compulsory education laws, which had become universal in the United States.[45] The fundamental rights of parents in U.S. law, specifically parental discretion in child rearing, were established in the context of ensuring adequate education.[46] "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."[47] *Pierce* discusses the state's relinquishment of total rights over children and the state's grant of those rights to the parent.[48] This transferal of rights provides parents the liberty to act on behalf of their children and have no fear of legislative interference with their parental rights without a competent state purpose.[49]

The Supreme Court advanced the concept of fundamental parental rights through a substantive due process analysis under the Fourteenth Amendment.[50] The fundamental parental rights established in *Meyer* and *Pierce* have been upheld throughout the twentieth and twenty-first centuries.[51] The Court has repeatedly acknowledged the primacy of the role of

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and without reasonable relation to any end within the competency of the State.").

45. *See* Marks, *supra* note 23, at 88 (stating in 1890 twenty-nine states had adopted compulsory education laws, extending to every state by 1918).

46. *See Pierce*, 268 U.S. at 531–33 (challenging the Oregon Compulsory Education Act requiring public education for children age eight to sixteen if adequate alternatives are available).

47. *Id.* at 535.

48. *See id.* at 534–35 (discussing the right of States to provide public education and the distinct right of parents to direct the child's education).

49. *See id.* at 535 ("[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.").

50. *See* C.P. Dominic Ayotte, Troxel v. Granville: *Parental Power to Determine Associational Interests of Children*, 52 BAYLOR L. REV. 997, 1003 (2000) (recognizing a fundamental liberty interest protected by the Fourteenth Amendment granted through various Supreme Court holdings).

51. *Cf. id.* (discussing the seminal cases *Meyer* and *Pierce*, as well as providing citations to other cases that have defined the contours of parental rights).

parents in the upbringing of their children.[52] "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."[53]

Government authorities may not break up families without a showing of parental unfitness and consideration of the best interest of the child.[54] Parents may decide on a course of action that is not agreeable to their children or has inherent risk.[55] Children and parents maintain an interest in continuing their natural relationship.[56] The best interest of the child standard does not always govern parents' custody because as long as minimal requirements of child care are met, the interest of the child may be subordinated to other interests.[57] Notably, *Troxel*

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52. *See* Ayotte, *supra* note 50, at 1003 ("The primacy of the individual—that is, a parent or parents—in all matters of childrearing has been alluded to repeatedly.").

53. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (citing Wisconsin v. Yoder, 406 US. 205, 231–33 (1972); Stanley v. Illinois, 405 U.S. 645, 651–52 (1972); Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923)).

54. *See id.* (describing the importance of the family unit and the child's best interest test). The Court stated:

> We have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.

Id. (citations omitted).

55. *See* Parham v. J.R., 442 U.S. 584, 603 (1979) ("Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.").

56. *See* Santosky v. Kramer, 455 U.S. 745, 760 (1982) ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

57. *See* Reno v. Flores, 507 U.S. 292, 304 (1993) (noting the best interest of the child test is not always the legal standard). The court stated:

> "[T]he best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: so long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.

Id.

v. Granville[58] found that a parent's choice to limit third-party visitation was a valid exercise of parental authority.[59] *Troxel* explicitly recognized a fundamental parental right based on the history of parental interest in raising children within the Fourteenth Amendment's Due Process Clause.[60] The parental authority to make decisions regarding care, custody, and control of children is thoroughly rooted in constitutional jurisprudence.[61]

2. The Coupling of the Right to Parent and the Right to Freely Exercise Religion

Claims for parental rights often coincide with religious freedom. The First Amendment establishes the right to the free exercise of religion.[62] In *Reynolds v. United States*,[63] the Court ruled that the Free Exercise Clause protects religious *beliefs* against regulation.[64] However, the Free Exercise Clause does not protect *actions* based on religious beliefs from regulation, if the regulation is neutral on its face.[65] The Court in *Reynolds*

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58. *See* Troxel v. Granville, 530 U.S. 57, 75 (2000) (concluding that a Washington state law allowing third parties to petition for visitation over parental objections was an unconstitutional infringement on parental rights).

59. *See id.* at 67–69 (disagreeing with a Washington state statute allowing a judge to give no deference to a parent's estimation of her child's best interest).

60. *See id.* at 65 ("The 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.").

61. *See id.* (discussing the fundamental nature and jurisprudential history of the right to control the upbringing of one's child).

62. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

63. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) (concluding that a law banning polygamy did not infringe upon the Free Exercise Clause of the First Amendment).

64. *See id.* at 165–66 (describing polygamy as an unconstitutional unprotected religious action rather than a constitutionally protected religious belief).

65. *See id.* at 166 (arguing polygamy had always been "an offense against society" and therefore not an action protected under the First Amendment and punishable by statute if it is broadly applied).

ensured that religious beliefs could not become superior to the law of the land.[66]

In *Employment Division, Department of Human Resources of Oregon v. Smith*,[67] the Court returned to and relied upon the *Reynolds* standard.[68] Before that decision, Supreme Court jurisprudence had begun to suggest that a plaintiff's case regarding religious actions may be successful under a Free Exercise Clause exemption.[69] In *Employment Division*, the Court restored the distinction between religious belief and religious action, finding religious-based actions are not protected under a generally neutral law.[70] Under *Employment*

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66. *See id.* at 167 ("To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

67. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882 (1990) (holding the *Reynolds* standard was appropriate, thus Oregon is not prohibited under the Free Exercise Clause from maintaining facially neutral laws regulating actions), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Cutter v. Wilkinson, 544 U.S. 709, 714–15 (2005).

68. *See Smith*, 494 U.S. at 882 (finding the *Reynolds* standard to provide the appropriate distinction between protecting religious belief and religiously motivated action).

69. *See* Walz v. Tax Comm'n of New York, 397 U.S. 664, 716 (1970) (Douglas, J., dissenting) (suggesting that a regulation neutral on its face will still run afoul of the Establishment Clause if it unduly burdens the free exercise of religion); *see also* Steven H. Aden & Lee J. Strang, *When A "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 579 (2003) ("On Oregon's appeal, the claimants likely felt confident that the Court's prior free exercise jurisprudence in the area of unemployment compensation would lead to affirmance.").

70. *See Smith*, 494 U.S. at 882 (addressing that religious based actions may be regulated by the government if the regulation is neutral). The Court stated:

> Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious conviction, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children

Division, religious-based actions are only protected if the hybrid rights exception is applicable.[71] The hybrid rights exception requires that a free exercise claim be coupled with another constitutional protection, such as parental rights, before the court strikes down a neutral and generally applicable law.[72]

The hybrid rights exception was short-lived. It was preempted three years later by the Religious Freedom Restoration Act (hereinafter "RFRA").[73] The Court's abandonment of the compelling state interest test in favor of a rule allowing restrictions as long as the restrictions were not targeted at a specific religious group was unpopular.[74] An unexpected bipartisan alliance, which included both prominent Christian religious organizations and the American Civil Liberties Union, developed to implement RFRA, which passed with a vote of ninety-seven to three in the Senate.[75]

> in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls.

Id.

71. *See* Aden & Strang, *supra* note 69, at 580 (stating the Free Exercise Clause absolutely protects religious beliefs and actions prohibited solely because of religious motivation, but only protects against generally applicable laws if another constitutional protection was involved).

72. *See id.* ("The Court synthesized its prior free exercise jurisprudence, stating that past cases that had required exemptions from neutral, generally applicable laws presented 'hybrid situation[s]' where there was a free exercise claim connected with a 'communicative activity or parental right.'") (citations omitted).

73. *See* Cutter v. Wilkinson, 544 U.S. 709, 714–15 (2005) (stating that the Religious Freedom Restoration Act was implemented in response to the *Dep't of Human Res. of Oregon* decision); *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–2000bb-4 (1993) (stating the exact requirements by which the "Government may substantially burden a person's exercise of religion").

74. *See* Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), https://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html (last visited Mar. 17, 2020) (discussing the immediate actions of "an unusual coalition of liberal, conservative and religious groups that had pressed for the new law" which was viewed as "the most significant piece of legislation dealing with our religious liberty in a generation") [https://perma.cc/83ZJ-Y53D].

75. *See id.* (expressing the almost unanimous support as the House passed the Act by a voice vote with no objections).

Even though the original RFRA was a bipartisan effort with good intentions,[76] after it was passed, the Free Exercise Clause began to be weaponized.[77] Statutorily protected religious freedom exemptions allowing discrimination against LGBTQ children have resulted.[78] RFRA created the opportunity for broad religious freedom exemption laws that discriminate against LGBTQ individuals, without the hybrid rights framework and *Reynolds* standard.[79]

Even before RFRA, the Supreme Court had affirmed parental rights in the context of religious claims in *Wisconsin v.*

76. *See id.* (describing the support that the RFRA's enactment enjoyed across the political spectrum).

77. *See* Adam Sonfield, *In Bad Faith: How Conservatives Are Weaponizing "Religious Liberty" to Allow Institutions to Discriminate*, 21 GUTTMACHER POL'Y REV. 23, 23 (2018) ("Social conservatives have fought for extensive religious and moral exemptions for health care, educational, social service and other institutions."); *see also Who is Weaponizing Religious Liberty?*, PEOPLE FOR THE AM. WAY, http://www.pfaw.org/report/who-is-weaponizing-religious-liberty/ (last visited Mar. 17, 2020) (discussing the over one-hundred anti-equality bills targeting LGBTQ people in various state legislatures, described as protecting religious freedom) [https://perma.cc/J89W-EWZB].

78. *Compare* Sonfield, *supra* note 77 (providing various reasons for the original bill such as protecting minority religious groups from government interests such as mandatory autopsies or zoning laws affecting places of worship), *with* Oakley, *supra* note 6, at 3 (discussing the broad expansion of religious freedom exemptions tailored specifically against the interests of LGBTQ individuals).

79. *See, e.g.*, Brian Miller, *The Age of* RFRA, FORBES (Nov. 16, 2018, 3:46 PM), https://www.forbes.com/sites/briankmiller/2018/11/16/the-age-of-rfra/#7f3e7da877ba (last visited Mar. 8, 2020) (discussing the use of the RFRA to apply state laws that discriminate against LGBTQ individuals) [https://perma.cc/RB26-VJJV]; TEX. HUM. RES. CODE ANN. § 45.005(a) (West 2018) ("A child welfare services provider may not be required to provide any service that conflicts with the provider's sincerely held religious beliefs."); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1727–28 (2018) (analyzing whether store owners may refuse service to LGBTQ individuals when claiming religious freedom exemptions and violations of First Amendment protections); Wilson, *supra* note 8 (discussing a broad state religious expression law allowing student speakers to make anti-LGBTQ statements at school events pursuant to personal religious beliefs).

Yoder.[80] *Yoder* considered the nexus of a religious exemption under the Free Exercise Clause and the parental right to determine a child's upbringing.[81] Wisconsin's compulsory school attendance policy required children to attend public or private school until the age of sixteen.[82] Members of the Old Order Amish religion declined to send their children to school after the eighth grade.[83] The parents objected to formal education after eighth grade based on their sincerely held religious beliefs.[84]

Yoder, consistent with *Pierce*, recognized the interest of a state to provide universal education.[85] However, when a statute impinges on fundamental rights such as religious freedom and parental rights, the state must show an interest "of sufficient magnitude to override the interest claiming protection under the free exercise clause."[86] The Court concluded that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."[87] Therefore, interests with significant

80. *See* Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972) (concluding Wisconsin's compulsory education law violated the First Amendment rights of the Amish).

81. *See id.* at 233–34 ("[T]he power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.").

82. *See id.* at 207 n.2 (citing Wisconsin's compulsory school attendance law, Wis. Stat. § 118.15, which required parents to send children between the age of seven and sixteen to attend school regularly unless the child had legal excuse or had graduated).

83. *Id.* at 207.

84. *See id.* at 210 (stating the Old Order Amish communities believe in a fundamental salvation that requires community separate from worldly influence and values).

85. *See id.* at 213 ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.") (citations omitted).

86. *See id.* at 214 (discussing *Pierce* as an example where if parents are meeting the obligations of education the right to direct the educational upbringing of children will be left in the hands of the parents).

87. *See id.* at 215 (arguing only interests of the most importance can overcome claims to the free exercise of religion, which a state's interest in education will not always overcome).

magnitude, such as the rights of parents alongside religious rights, may outweigh the interests of the state.[88] Parental rights coupled with claims of religious freedom provide a more compelling argument against state regulation of children.

3. Yoder *and the Implied Limits on Parental Rights*

Even as the conception of children as property gave way to more specific parental rights that would be constitutionally protected by the Fourteenth Amendment, these parental rights had limitations. *Yoder* states that the rights of parents will not be absolute, and may give way to concerns over the health and safety of the child.[89] Additionally, parental rights will be overcome by significant social burdens, such as the state's burden to educate future generations to become productive members of society.[90] Both the concurring and dissenting opinions in *Yoder* provide insight about concerns that amount to significant social burdens.

Justice White's concurrence analyzed the state interest in providing education and concluded that education is the most important function of the state.[91] The state's interest is to nurture and develop potential within children to prepare them for a productive life.[92] It is possible that many Amish children wish to continue living a simple rural life; however, some

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88. *See id.* (analyzing the Old Order Amish claims to the free exercise of religion as an interest supreme to state regulated education).

89. *See id.* at 233–34 (providing a two-part evaluation where parental rights may be limited; first, if parental decisions jeopardize the health and safety of the child, and second, if potentially significant social burdens exist).

90. *See id.* (suggesting adequate education for children to become self-supporting responsible citizens is a significant social burden, but the Amish had not jeopardized this burden).

91. *See id.* at 239 (White, J., concurring) ("Today, education is perhaps the most important function of state and local governments." (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954))).

92. *See id.* at 240 (discussing the varied state interests that are met through compulsory education such as increasing tolerance, strengthening sensibility, and developing strengths in creativity and problem-solving).

children abandon the Amish faith.[93] These children may wish to eventually hold various other occupations and need to be adequately prepared, instead of limited, by their parents' choices.[94] Justice White considered the case close, but concluded Wisconsin did not meet the burden to show forgoing one or two additional years of school would be intellectually limiting for children and thus did not hinder the legitimate state interest in preparing children for future vocations.[95]

Justice Douglas dissented in the *Yoder* decision, writing that the decision to remove the child from school should not be the parent's choice alone.[96] Justice Douglas critiqued the majority for assuming that the only two interests at stake were those of the parents and those of the state.[97] Justice Douglas stated "the parents [were] seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children."[98] When a child is mature enough to have potentially conflicting religious beliefs, not considering those beliefs would be an invasion of the child's rights.[99] Justice Douglas suggested that litigation may often be the best method for a child to express conflicting desires with a parent.[100] "It is the future of

93. *See id.* (citing testimony that many young Amish voluntarily leave the faith and need to be prepared for fields outside of traditional opportunities of the Amish).

94. *See id.* (recognizing the state's legitimate interest in preparing children for a variety of options of future interests regardless of current lifestyle).

95. *See id.* (suggesting the case may have turned out differently if the parent's claim of religious belief effected more than the final two years of required education).

96. *See id.* at 242 (Douglas, J. dissenting) ("Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.").

97. *See id.* at 241 ("The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other.").

98. *Id.*

99. *See id.* (discussing disagreement with the majority that the only interests at stake are those of the Amish parents and the state when the children are all of a high school age).

100. *See id.* at 242 ("As the child has no other effective forum, it is in this litigation that his rights should be considered.").

the student, not the future of the parents, that is imperiled by today's decision."[101] If a child's education is halted, her entire future life may be stunted.[102] The concurrence and dissent were cautioning against the parent–state dichotomy of control over children when children's futures and desires should be considered.

Yoder is considered the paradigmatic hybrid rights case.[103] The Christian Rights movement relies on the ruling in *Yoder* as a coupling of religious rights and parental rights to further religious protection arguments.[104] In *Yoder*, the Amish parents were removing their children from schools; however, in many modern claims of parental and religious rights, parents seek exemptions from certain aspects of the curriculum while maintaining the child's presence in the school.[105] Multiple circuits have rejected parental challenges to curriculum based on religious beliefs, specifically regarding sex-related LGBTQ

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101. *Id.* at 245.

102. *See id.* at 245–46 ("If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.").

103. *See* Douglas Nejaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J. L. & GENDER 303, 355 (2009) ("The 1972 case of Wisconsin v. Yoder, which Justice Scalia cited in Smith for the 'hybrid' rights concept, has come to signify the paradigmatic 'hybrid' rights case.") (citations omitted).

104. *See id.* at 356 (discussing different viewpoints on the applicability of *Yoder*).

105. *See id.* (discussing inherent differences in asking to be disengaged from society instead of demanding continued membership, but on the terms of individual parents).

inclusive programming.[106] However, courts have applied the hybrid rights concept in a confused manner.[107]

The constitutionally based fundamental right of parents to decide the upbringing and education of their children is well established through case law.[108] Parental rights are often coupled with free exercise of religion claims, which creates a hybrid right exception as Scalia discussed.[109] However, even when parental rights and religious rights are coupled, a claim to assert the rights may still be limited.[110] The following two sections consider when the State retains a *parens patriae* right to limit parents authority and when children's rights should be considered paramount to those of the parent.

C. The State as Parens Patriae *Retains an Interest in the Protection of Children*

1. The "Best Interest of the Child" Test and a State's Power to Retain Control

Prince v. Massachusetts[111] argues the right of the state to control children goes beyond the right of the state to control

106. *See* Brown v. Hot, Sexy and Safer Prod., Inc., 68 F.3d 525, 534 (1st Cir. 1995) (rejecting parental challenges to mandatory AIDS education for students); *see also* Leebaert v. Harrington, 332 F.3d 134, 141 (2d Cir. 2003) (rejecting a heightened scrutiny approach for administering curriculum for all children); Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005) (rejecting a parental challenge to information administered to students regarding issues of sex).

107. *See* Nejaime, *supra* note 103, at 357 ("Some Courts have refused to apply the 'hybrid rights concept . . . . Others have applied it with such a rigorous standard that concept does no independent work.").

108. *See* discussion *supra* Part II.B.1 (discussing the constitutional framing of the fundamental right to discretion in parenting choices).

109. *See* discussion *supra* Part II.B.2 (discussing the coupling of parents' rights and religious rights to form a hybrid rights claim).

110. *See* discussion *supra* Part II.B.3 (discussing the concurrence and dissent in *Yoder*, which begin to limit the breadth of parental and religious rights when coupled).

111. *See* Prince v. Massachusetts, 321 U.S. 158, 166–67 (1994) (concluded the government has broad authority as *parens patriae* to protect the interests of children).

adults.[112] In *Prince*, a nine-year-old child was found selling magazines in violation of a child labor law.[113] The Court recognized the State's *parens patriae* authority as paramount to a parent's right to discretion in the upbringing of his or her children.[114] The Court reasoned, "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."[115] Further, "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[116] Parents do not have unlimited rights in child-rearing.[117] "The power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[118]

Parens patriae exists as a doctrine for the government to act as a provider of protection for those who are unable to protect themselves.[119] A state maintains constitutional control over children if their physical or mental health is at risk.[120] *Parens patriae* authority is broad and allows aspects of family life to be

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112. *See id.* at 168 ("The state's authority over children's activities is broader than over like actions of adults.").

113. *See id.* at 159–60 (discussing Betty M. Simmons, a nine-year-old girl, who was found to have violated Massachusetts' child labor laws regarding selling magazines in a public place).

114. *See id.* at 166 ("And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control . . . .") (emphasis added).

115. *Id.* at 170.

116. *Id.* at 166–67 (citing People v. Pierson, 176 N.Y. 201, 210–11 (1903)).

117. *See id.* at 170 (discussing the power of the state to control the conduct of children).

118. Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972) (citations omitted).

119. *Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

120. *See* Parham v. J.R., 442 U.S. 584, 603 (1979) ("[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.").

regulated.[121] *Parens patriae* authority is not appropriate simply because the state is well intentioned and the parent makes a decision involving some level of risk.[122]

Parental rights and religious rights have limits; therefore, the state as *parens patriae* may restrict the parent's control.[123] The concept of *parens patriae* justifies state intervention in family matters to protect minors.[124] Natural parents do not have a clearly established right to unlimited exercise of religious belief as it impacts their children.[125] Other guardians, such as foster parents, enjoy even fewer constitutional protections than natural parents.[126] Parents must clearly show an established right to exercise religious beliefs if those religious beliefs are the basis for potentially harmful decisions about how a child will be raised.[127]

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121. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) ("[T]he family is not beyond regulation.").

122. *See Parham*, 422 U.S. at 603 ("Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.").

123. *See* Margaret Ryznar & Chai Park, *The Proper Guardians of Foster Children's Educational Interests*, 42 LOY. U. CHI. L.J. 147, 154 (2010) ("Specifically, neither rights of religion nor rights of parenthood are beyond limitation . . . .").

124. *See id.* at 153 ("Importantly, while parents have a right to raise their children free from state intervention, children have a countervailing right to protection from abuse and neglect.") (citations omitted).

125. *See* Backlund v. Barnhart, 778 F.2d 1386, 1389 (9th Cir. 1985) ("First, even natural parents have no clearly established right to unlimited exercise of religious beliefs on their children . . . ." (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944))).

126. *See id.* ("Second, foster parents do not enjoy the same constitutional protections that natural parents do." (citing Kyees v. Cty. Dep't of Pub. Welfare, 600 F.2d 693, 698 (7th Cir. 1979); Drummond v. Fulton Cty. Dep't of Family & Children's Serv., 563 F.2d 1200, 1206–07 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978); Sherrard v. Owens, 484 F. Supp. 728, 740–41 (W.D. Mich. 1980), *aff'd*, 644 F.2d 542 (6th Cir.) (per curiam), *cert. denied*, 454 U.S. 828 (1981); Brown v. Cty. of San Joaquin, 601 F. Supp. 653, 665 (E.D.Cal.1985))).

127. *See id.* ("To survive summary judgment, the Backlunds must show that they, as foster parents, had a clearly established right to exercise their religious beliefs about punishment on a foster child.").

2. Blood Transfusions: An Example of Parents' Rights vs. Parens Patriae

Case law regarding blood transfusions provides an example of parental and religious rights in direct contrast with *parens patriae*. The Jehovah's Witness belief system requires an abstention from blood transfusions to respect God as the only provider of life.[128] *Jehovah's Witnesses in State of Washington v. King County Hospital Unit No. 1*[129] was a class action lawsuit by the Jehovah's Witness church of the State of Washington to enjoin blood transfusions to any children in the church as a violation of the church's constitutional rights.[130] The claims before the court involved ten individual cases where children of Jehovah's Witnesses were eventually given blood transfusions over the objection of the children's parents.[131] The children were removed by court order from the custody of their parents, who refused blood transfusions on religious grounds.[132] The children were declared wards of the state, which allowed the state to

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128. *See Why Don't Jehovah's Witnesses Accept Blood Transfusions?*, JEHOVAH'S WITNESSES, http://www.jw.org/en/jehovahs-witnesses/faq/jehovahs-witnesses-why-no-blood-transfusions/ (last visited Mar. 1, 2019) (discussing Jehovah's Witnesses belief religious biblically based belief to abstain from using blood and common misconceptions surrounding said belief) [https://perma.cc/2D5G-ZC8M].

129. *See* Jehovah's Witnesses in Wash. v. King Cty. Hosp. Unit No. 1, 278 F. Supp. 488, 504 (W.D. Wash. 1967), *aff'd* per curiam, 390 U.S. 598 (1968) (holding that the family is not beyond regulation even when claiming religious liberty).

130. *See id.* at 491 (stating the various Jehovah's Witnesses groups and individuals participating in the class action seeking a declaration of the plaintiff's right to refuse blood transfusions and to enjoin the defendants, including all medical doctors in the state, Superior Court judges, and Juvenile Court employees from administering blood transfusions).

131. *See id.* at 502 (discussing dismissals of certain defendants and plaintiffs, focusing in the issues of the case to ten children who were given blood transfusions on state order).

132. *See id.* at 500 (recognizing the procedure of the Juvenile Court Law allowing superior court judges and juvenile court employees to obtain custody over children for the purpose of blood transfusions).

authorize blood transfusions under Juvenile Court Law.[133] The Juvenile Court Law in Washington required a finding that the child was "grossly and willfully neglected as to medical care necessary for his well-being."[134] Court orders were obtained despite express objection of the parents and attempts by the parents to provide a written release discharging any and all liability due to the parents' refusal to accept a blood transfusion.[135]

The Jehovah's Witnesses alleged the defendant's actions violated the parents' First Amendment rights to free exercise of religion and freedom of association.[136] Additionally, the Jehovah's Witnesses alleged that the state's actions violated the implied right of family privacy provided via the Ninth and Fourteenth Amendments.[137] The Jehovah's Witnesses stated no basis for *parens patriae* existed because parental discretion was exercised in good faith in disagreement with medical professionals about the desired treatment.[138] The Jehovah's Witnesses argued the actions by the judiciary and medical professionals suggested that religion and family privacy were not protected for members of the Jehovah's Witness faith.[139] The

133. *See id.* (discussing how the court order operates by making a child the ward of the court for the individual purpose of authorizing a blood transfusion if the doctor deems the transfusion medically necessary).

134. WASH. REV. CODE § 13.04.010(12) (repealed 1978); *id.* § 13.04.095 (repealed 1978).

135. *See* Jehovah's Witnesses in Wash. v. King Cty. Hosp. Unit No. 1, 278 F. Supp. 488, 500 (W.D. Wash. 1967) (stating the parent's attempts to provide alternatives to exculpate the medical staff from liability resulting from express opposition to blood transfusions).

136. *See id.* (stating the plaintiff's claim for a violation of the First Amendment based on the inability for the Jehovah's Witnesses to freely associate together without prejudice from similar issues and to freely practice the religious practice of abstaining from blood transfusions).

137. *See id.* at 501 (stating the plaintiff's claim for a violation of the Ninth and Fourteenth Amendment based on the inability to utilize parental discretion in decision regarding a child's upbringing).

138. *See id.* (recognizing the Jehovah's Witnesses claim that *parens patriae* is inapplicable to the current case because parental discretion in good faith allows for disagreement in the best method to raise the child).

139. *See id.* (recognizing the Jehovah's Witnesses believe their lives and religion were intruded upon by the government's actions).

Jehovah's Witnesses believed a spiritual duty existed for a father to ensure no family member received a blood transfusion.[140] Accordingly, even though predominant medical opinion suggested that blood transfusions were both safe and necessary, the Jehovah's Witnesses sought alternative means of treatment.[141]

The district court initially deciding the case in Washington relied on the Supreme Court's decision in *Prince.*[142] The court reasoned that parents are not free to make martyrs of their children.[143] The court concluded that neither religious nor parental rights are limitless and the state may act in the best interest of a child through *parens patriae* when necessary.[144] The court reiterated that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[145] The juvenile court decision was upheld as constitutional.[146] Other courts have followed the same logic for issues regarding Jehovah's Witnesses and blood transfusion cases.[147] *King*

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140. *See id.* (discussing the Jehovah's Witness spiritual belief requiring a father to intervene to stop any blood transfusions that would be administered to a member of his family).

141. *See id.* at 502 (discussing the existence of other alternative treatments and of the alternatives available blood transfusions are often considered necessary and among the safest options).

142. *See id.* at 504 (recognizing *Prince v. Massachusetts* has a substantially similar argument and will be considered controlling) (citations omitted).

143. *See id.* (discussing the parental right to martyr oneself, but the limitation to make a child a martyr before reaching a legal age of discretion to make their own choice).

144. *See id.* (stating that neither constitutional right, parental privacy or freedom of religion, provide limitless discretion to individuals where the State may not exert controlling authority).

145. *See id.* (comparing the relevant example of vaccination where State authority trumped the parental and religious protections) (citing People v. Pierson, 176 N.Y. 201, 210–11 (1903)).

146. *See id.* at 505 (determining the state does have *parens patriae* authority to direct children).

147. *See, e.g.*, People *ex rel.* Wallace v. Labrenz, 104 N.E.2d 769, 774 (1952) (arguing the case at hand provides a more compelling scenario for state intervention).

County Hospital provides that limitations on freedom of religion and the fundamental right to parental control may be necessary to protect minors through *parens patriae.*[148]

D. Glimmers of Children's Rights and the Elimination of the Parent–State Dichotomy of Control

1. Danforth *and* Bellotti *Provide a Road Map for Children's Rights and Autonomy of Choice Through Mature Minor Exemptions*

Since the 1960s, an expansion of children's rights has occurred.[149] Minors— those under the age of majority—have been given various constitutional rights through Supreme Court decisions.[150] In *Planned Parenthood of Central Missouri v. Danforth*,[151] physicians brought a suit challenging an abortion law, which required a woman under the age of eighteen to receive consent from a parent before the procedure could be performed.[152] The Court concluded that a female under the age

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> The recent *Prince* decision reinforces that conclusion. The court there held that a state, acting to safeguard the general interest in the well-being of its youth, could prohibit a Jehovah's Witness child from distributing religious pamphlets on the street even though the child was accompanied by her adult guardian. Obviously, the facts before us present a far stronger case for State intervention.

Id. (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

148. *See* Jehovah's Witnesses in Wash. v. King Cty. Hosp. Unit No. 1, 278 F. Supp. 488, 504 (W.D. Wash. 1967) (stating that neither constitutional rights, parental privacy, nor freedom of religion, provide limitless discretion to individuals where the State may not exert controlling authority).

149. *See* THOMAS A. JACOBS, 1 CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS § 1:3 (2018) (providing an overview of late twentieth century developments in children's rights).

150. *See id.* § 1:4 (discussing five Supreme Court cases that vastly expanded the rights of minors including juvenile justice rights and freedom of speech rights).

151. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976) (holding a state could not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy).

152. *See id.* at 72 (discussing Section 3(4) of House Committee Substitute for House Bill No. 1211 which required unmarried women under the age of

of majority should be given the same right of self-determination of body given to an adult female, if the female under the age of majority was sufficiently mature to understand and make an intelligent decision.[153] The Court recognized an absolute bar on abortions, without parental consent, was unconstitutional.[154] The Court further stated rights provided by the Constitution were not magically attained when a minor reaches the age of majority because minors, similar to adults, are protected under the Constitution.[155] Danforth recognized this mature-minor doctrine—even if it did not name the doctrine as such—which allowed minors to make decisions about their healthcare if the minor could articulate mature reasoning for the decision.[156] A significant state interest, regarding child protection, could be found to give the State authority to condition a minor's abortion on the consent of a parent, but none were provided.[157] The Court carefully emphasized the invalidity of the statute was due to the blanket provision and did not suggest every minor may give

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eighteen to obtain written consent by either a parent or a person in loco parentis).

153. *See id.* at 75 (suggesting a consent provision for a person other than the minor female to sign and her physician will violate *Roe*) (citing Roe v. Wade, 410 U.S. 113, 163 (1973)).

154. *See id.* at 74 ("[T]he State does not have constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding consent.").

155. *See id.* ("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.") (citations omitted).

156. *See Mature-Minor Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A rule holding that an adolescent, though not having reached the age of majority, may make decisions about his or her health and welfare if the adolescent demonstrates an ability to articulate reasoned preferences on those matters.").

157. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976) (determining that providing absolute parental authority to veto the decision to have an abortion will not, with certainty, protect the state interest in safeguarding the family unit).

consent, without parental supervision, for termination of the pregnancy.[158]

Children's rights have further expanded by allowing minors to consent to treatment of sexually transmitted diseases and mental health conditions without parental consent via mature minor protections.[159] States have varying limitations on minors consenting to medical services.[160] For example, all fifty states allow minors to obtain medical treatment for sexually transmitted diseases without parental consent and twenty-six states allow contraceptive services without parental consent, but only two states allow abortion without any form of parental consent or notice required.[161] Various states have statutorily created an exemption for mature minors regarding medical decisions if the minor can fully comprehend the consequences of the medical decision and prove maturity.[162] However, the numerous exceptions to the age of majority both between states

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158. *See id.* (distinguishing the nature of the absolute veto power of any parent for their child's abortion decision is unconstitutional, not that any child can provide consent for termination of their pregnancy).

159. *See* Josh Burk, Note, *Mature Minors, Medical Choice, and the Constitutional Right to Martyrdom*, 102 VA. L. REV. 1355, 1366 (2016) ("In the wake of *Griswold v. Connecticut*, states began to write legislation that allowed minors to consent to the treatment of sexually-transmitted diseases without parental consent. Some states, like Illinois, predated *Griswold* in granting medial consent rights to pregnant minors.") (citations omitted).

160. *See An Overview of Consent to Reproductive Health Services by Young People*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law (last updated Apr. 1, 2020) (last visited Apr. 4, 2019) (providing a fifty state survey of medical services available to minors without parental consent) [https://perma.cc/6USE-TFWD].

161. *See id.* (discussing the number of states that offer specific types of medical services to minors without parental consent).

162. *See* Burk, *supra* note 159, at 1356 (stating the foundational requirements for a mature minor exemption).

> 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.

Id.

and within states, suggests a categorical age of majority is inadequate to meet current social needs.[163]

In *Bellotti v. Baird*,[164] the Supreme Court found parental consent laws do not obstruct the rights of the minor if judicial consent is available to circumvent the parents'.[165] To obtain a judicial bypass of parental consent, the maturity test of *Danforth* is applied.[166] Alternatively, a court may employ a test to show judicial bypass of parental consent is in the minor's best interest.[167] Judicial bypasses have been substantially criticized because no distinct test of maturity exists.[168] Without a legal test, the extremely subjective idea of maturity is left completely to judicial discretion.[169] Various criteria have been used to evaluate a minor's maturity including age, academic performance, intellectual capacity, future plans, and ability to handle finances.[170] A general consensus exists that a minor is mature to make a decision in a medical context if the minor can

163. *See id.* at 1385 (arguing the many exceptions and contours of mature minor exemptions suggests the age of majority has become inadequate for determining all rights of children).

164. *See* Bellotti v. Baird, 443 U.S. 622, 647 (1979) (concluding every minor must have the opportunity to go directly to a court without first notifying parents when seeking an abortion).

165. *See id.* (stating parental consent and notification laws are valid as long as a meaningful judicial bypass process exists for minors).

166. *See id.* at 643–44 (applying the same procedural factors as *Danforth* entitling a pregnant minor to make a showing of maturity).

167. *See id.* (applying the alternative test of *Danforth* for the minor to show an abortion is in her best interest even in the absence of a showing of maturity).

168. *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, 313 (2007) ("The 'maturity' requirement of judicial bypass procedures should be dismissed entirely; its application is biased and unworkable. Measuring maturity is a subjective inquiry evidenced by the fact that even developmental psychologist disagree on which factors correctly measure a minor's maturity.").

169. *See id.* at 322 ("[J]udges have been forced to develop their own set of criteria for evaluating maturity since the Supreme Court has never provided a specific standard.").

170. *See id.* (acknowledging various criteria that has been used to evaluate a maturity standard such as academic performance and personal finances).

fully discuss the medical procedure, including the risks, and is choosing the procedure free of various external pressures.[171]

2. Emancipation from Parents Through Statutes and Common Law

In addition to a mature minor test to obtain a judicial bypass, many states have emancipation laws.[172] Emancipation is the act of a parent surrendering all rights, obligations, and duties related to the care of a child.[173] Emancipation ends both the parent's right to control the child's upbringing and the child's right to parental support.[174] Although LGBTQ children may wish to become free from non-affirming parental control, the desire to be free from parental support, especially financial support, does not necessarily follow.

The doctrine of emancipation emerged at the turn of the twentieth century when many children began working in factories.[175] Emancipation began as a common law doctrine and remains a common law doctrine in eighteen states.[176] From the 1960s until now, thirty-two states have enacted emancipation statutes that vary widely in requirements.[177] The statutes may offer a broad "best interest of the minor" test or provide specific

171. *See* Burk, *supra* note 159, at 1356 (stating the foundational requirements for a mature minor exemption).

172. *See* Lauren C. Barnett, *Having Their Cake and Eating It Too? Post-Emancipation Child Support as A Valid Judicial Option*, 80 U. CHI. L. REV. 1799, 1805 (2013) (discussing the existence of emancipation statutes in a majority of states even though the substantive requirements vary widely).

173. *Emancipation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

174. *See* Barnett, *supra* note 172, at 1800 (discussing the traditional notion of divergence for emancipation and child support, if emancipation is granted child support is denied).

175. *See* Marks, *supra* note 23, at 81 (highlighting the emergence of emancipation of children as a byproduct of children leaving home to work in factories).

176. *See* Barnett, *supra* note 172, at 1803 (stating that eighteen states still rely on common law interpretation of emancipation).

177. *See id.* (discussing the explosion of emancipation statutes in the 1960s, which then continued through 2009 when the most recent emancipation statute was enacted).

criteria to implement a "best interest of the minor" test.[178] Regardless of specific provisions, all statutes allow emancipation only if it will be in the minor's best interest.[179]

Historically, the family law concepts of emancipation and child support were divergent.[180] A finding of emancipation would relinquish any claim a child had for parental support.[181] Often emancipation has been based upon a child's financial independence, releasing parents of financially independent children from financial responsibilities.[182] Recently courts have begun granting partial emancipation, allowing children to assert rights normally provided upon complete emancipation, but continuing to enforce parental obligations.[183]

Partial emancipation provides that a child is free for only a specific purpose or from part of the parent's control.[184] *Diamond v. Diamond*[185] was the first case in which partial emancipation through an emancipation statute was recognized.[186] Jhette Diamond left her mother's home at age thirteen due to domestic

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178. *See id.* (discussing emancipation as a confused doctrine because the codification of emancipation has led to great divergence in statutory requirements).

179. *See id.* at 1818 (stating that allow state emancipation statutes vary widely they almost always demand that emancipation is within the minor's best interest).

180. *See id.* at 1800 (discussing emancipation as severing a parent child relationship and child support creating a bond in the parent child relationship).

181. *See id.* at 1802 (stating that emancipation typically severs the relationship between parent and child which ends all rights and obligations of the parents).

182. *See id.* at 1810 (acknowledging many states, regardless of whether an emancipation statute is codified, provide emancipation as an element that will end child support requirements).

183. *See id.* (recognizing common law allowed for partial emancipation that enabled children to retain an enforcement right of parental obligations).

184. *Emancipation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

185. *See* Diamond v. Diamond, 283 P.3d 260, 272 (N.M. 2012) (concluding that Diamond was entitled to statutory partial emancipation while continuing to receive financial support from her parent).

186. *See* Barnett, *supra* note 172, at 1840 (stating *Diamond* was the first instance of a court statutorily recognizing partial emancipation).

violence and substance abuse.[187] Diamond was living with a foster family and worked for multiple years at a local restaurant.[188] Diamond requested the emancipation order preserve her mother's obligation of financial support.[189] The District Court of New Mexico ordered Diamond emancipated but allowed her to retain the right to support from her mother, which the Supreme Court of New Mexico affirmed.[190]

Emancipation is automatically triggered when a child reaches the age of majority.[191] Some courts have disregarded the presumption of automatic emancipation by ordering child support to continue through undergraduate education.[192] The concept is contentious, with some states finding statutes requiring child support beyond the age of majority unconstitutional.[193] Mandatory parental support through college and past the age of majority reinforces both the strength of partial emancipation and the failure of age of majority laws.[194]

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187. *See Diamond*, 283 P.3d at 261 (providing the rational for why Diamond had to leave home to improve her living situation).

188. *See id.* (stating Diamond had lived with multiple families since age thirteen yet maintained a job as server at a local restaurant and high grade point average in high school).

189. *See id.* (discussing Diamond's situation was a classic case for emancipation as Diamond had began managing her own finances and had no intention of returning to her mother's home, but she requested to retain the ability to seek financial support from her mother).

190. *See id.* ("[D]eclaring Daughter 'an emancipated minor in all respects, except that she shall retain the right to support from [Mother] . . . . '").

191. *See* Barnett, *supra* note 172, at 1800 (stating emancipation occurs automatically when a child reaches the age of majority, gets married, or joins the military).

192. *See id.* at 1827 (discussing how state courts have ignored the age of majority giving automatic emancipation by requiring divorced parents to continue to pay child support for secondary education expenses).

193. *See, e.g.*, Curtis v. Kline, 666 A.2d 265, 270 (Pa. Super. Ct. 1995) (concluding a Pennsylvania statute requiring parental support beyond the age of majority for post-secondary education was unconstitutional).

194. *See* Barnett, *supra* note 172, at 1827 (arguing a strict interpretation of emancipation would undermine the ability of a court to require child support beyond the age of majority).

The parent–state dichotomy of control has often left children without legal rights.[195] The rights of all children are important, but the rights of LGBTQ children are particularly important because LGBTQ children face additional mental, emotional, and physical health concerns.[196] The parental rights recognized under the Fourteenth Amendment and the religious freedom exemptions recognized under the Free Exercise Clause of the First Amendment can diminish the ability to protect children from harmful parental decisions.[197] The state acting as *parens patriae*, mature minor exemptions, and emancipation offer the few, imperfect pathways for LGBTQ children to escape destructive parental authority.

III. Harm to LGBTQ Children and How the Child Welfare System Allows for Further Harm

A. Harm to LGBTQ Children Generally

LGBTQ youth endure discrimination, harassment, and abuse due to their actual or perceived identities.[198] Some youth run away and enter foster care seeking refuge from their non-affirming biological parents.[199] However, the foster care system does not always provide a safe environment, and some LGBTQ youth may feel safer on the streets.[200] Five to ten

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195. *See* discussion *supra* Part II.A (discussing the historical context for parental and state control of children).

196. *See* discussion *infra* Part III.A (discussing the various increase suicide risks for LGBTQ individuals).

197. *See* discussion *supra* Part II.B (highlighting examples of harmful parental decisions).

198. *See* Larisa Maxwell, *Fostering Care For All: Towards Meaningful Legislation to Protect LGBTQ Youth in Foster* Care, 1 TEX. A&M L. REV. 209, 211 (2013) (stating LGBTQ face a myriad of negative actions within the foster care system due to sexual preference and gender identity).

199. *See id.* (noting LGBTQ youth leave biological families and enter into the state foster system to find safer homes).

200. *See id.* (noting LGBTQ youth end up homeless after escaping unsafe home environments created by both biological parents and foster parents).

percent of youth in foster care identify as LGBTQ.[201] About 400,000 children are in foster care each year, [202] which suggests 20,000–40,000 are LGBTQ youth who may face discrimination, harassment, and abuse.

Suicide is the second highest cause of death in the United States for people ages ten to twenty-four.[203] Children in the LGBTQ community face higher rates of suicide and suicidal ideation.[204] LGBTQ children experience serious suicidal ideation at nearly three times the rate of heterosexual youths.[205] LGBTQ children attempt suicide at nearly five times the rate of heterosexual youths.[206] LGBTQ children living with neutral families (neither particularly affirming or non-affirming) attempt suicide at two times the rate of LGBTQ youth in highly affirming families.[207]

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201. *See* COLLEEN SULLIVAN ET AL., YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ADOLESCENTS IN FOSTER CARE 11 (2001) (stating the total percentage of likely LGBTQ youth in the foster care system).

202. *See Foster Care*, CHILD TRENDS (May 24, 2018), https://www.childtrends.org/indicators/foster-care (last visited Feb. 4, 2020) (providing a numerical figure for the number of LGBTQ youth in foster care across the United States that are possibly receiving inadequate services) [https://perma.cc/76W5-EL54].

203. *See* MELONIE HERON, CTRS. FOR DISEASE CONTROL & PREVENTION, DEATHS: LEADING CAUSES FOR 2016 10 (2018) (providing the Centers for Disease Control and Prevention annual report on statistical analysis of leading causes of death for all age groups).

204. *See Facts About Suicide*, THE TREVOR PROJECT, https://www.thetrevorproject.org/resources/preventing-suicide/facts-about-suicide/#sm.000195zxu4jkcfrrwjr28clp2ptb2 (last visited Feb. 6, 2020) (providing compilation of statistics regarding suicide and LGBTQ suicide) [https://perma.cc/TH5E-RL9M].

205. *See* LAURA KANN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL IDENTITY, SEX OF SEXUAL CONTACTS, AND HEALTH-RELATED BEHAVIORS AMONG STUDENTS IN GRADES 9–12—UNITED STATES AND SELECTED SITES, 2015 19 (2016) (comparing the rates of serious contemplation of suicide by gay, lesbian, or bisexual students to heterosexual students).

206. *See id.* at 20 (comparing the rates of attempted suicide of gay, lesbian, or bisexual students to heterosexual students).

207. *See* Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 4, 208 (2010) ("[T]he prevalence of suicide attempts among

The prevalence of attempted suicide is highest for the transgender community.[208] A medical consensus exists that attempting to stop an individual from being transgender is both ineffective and harmful.[209] Forty percent of transgender adults have attempted suicide.[210] The transgender community's suicide rate is nine times higher than the overall rate of suicide within the United States.[211] Ninety percent of transgender individuals who attempt suicide do so before the age of twenty-five, which highlights the prevalence of attempted suicide for transgender children.[212] Thirty percent of transgender individuals have experienced homelessness, and for those who have attempted to access a homeless shelter, seventy percent reported abuse.[213] The rates for transgender individuals experiencing homelessness, experiencing serious psychological distress, and attempting suicide all increase by

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participants who reported high levels of family acceptance was nearly half (30.9% versus 56.8%) the rate of those who reported family acceptance.").

208. *See Facts About Suicide*, *supra* note 204 (comparing various LGBTQ community statistics on attempted suicide).

209. *See* SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 108 (2016), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF (acknowledging the general agreement among medical professionals that attempts to convert transgender individuals to the sex assigned at birth is psychologically harmful for transgender individuals) [https://perma.cc/WX63-5AFD].

210. *Id.* at 114.

211. *See id.* (highlighting the stark rate increase in attempted suicide for the transgender community over the 4.6 percent attempted suicide rate of the total United States population).

212. *See id.* at 115 (providing that one-third of participants reported their first suicide attempt was before the age of thirteen, thirty-nine percent reported their first suicide attempt was between the age of fourteen and seventeen, and twenty percent reported their first suicide attempt was between eighteen and twenty-four).

213. *See id.* at 176 (highlighting both the rate which transgender individuals experience homelessness and the high rate of harassment within homeless shelters leaving many homeless transgender individuals without options).

almost twenty percent when delineated between affirming families and non-affirming families.[214]

Various medical and psychiatric organizations have acknowledged the importance of providing affirming care to LGBTQ individuals.[215] The American Medical Association (hereinafter "AMA") supports health insurance coverage of treatment for gender dysphoria.[216] The AMA directly opposes reparative or conversion therapy based upon an assumption that homosexuality is a mental disorder.[217] The American Psychiatric Association (hereinafter "APA") has recognized the benefits of gender-affirming treatment and discourages barriers to gender transition treatment.[218] Additionally, the APA

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214. *See id.* at 8 (analyzing that homelessness, psychological distress, and attempted suicide rates are all higher within non-affirming families compared with families who affirm transgender status).

215. *See* LAMBDA LEGAL, PROFESSIONAL ORGANIZATION STATEMENTS SUPPORTING TRANSGENDER PEOPLE IN HEALTH CARE, https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_trans-professional-statements_09-18-2018.pdf (last updated Sept. 17, 2018) (last visited Mar. 6, 2020) (providing statements by professional organizations in the medical and psychiatric fields in support of transgender services) [https://perma.cc/27H5-4N3C]; *see also Policy and Position Statements on Conversion Therapy*, HUMAN RTS. CAMPAIGN, https://www.hrc.org/resources/policy-and-position-statements-on-conversion-therapy (last visited Mar. 6, 2020) (providing statements by professional organizations in the medical and psychiatric fields in opposition to conversion therapy treatments) [https://perma.cc/JZ9N-6KKT].

216. *See Resolution H-185.950: Removing Financial Barriers to Care for Transgender Patients*, AM. MED. ASS'N (2016), https://policysearch.ama-assn.org/policyfinder/detail/H-185.950?uri=%2FAMADoc%2FHOD.xml-0-1128.xml (last visited Mar. 6, 2020) (stating support for public and private health insurance coverage of gender dysphoria) [https://perma.cc/DS5W-S8YH].

217. *See Resolution H-160.991: Health Care Needs of Lesbian, Gay, Bisexual, Transgender and Queer Populations*, AM. MED. ASS'N (2018), https://policysearch.ama-assn.org/policyfinder/detail/H-160.991?uri=%2FAMADoc%2FHOD.xml-0-805.xml (last visited Mar. 6, 2020) (recognizing the need for the LGBTQ community to receive adequate healthcare by committing to medical educational programs in support of the LGBTQ community) [https://perma.cc/74GS-GAU5].

218. *See Position Statement on Access to Care for Transgender and Gender Diverse Individuals*, AM. PSYCHIATRIC ASS'N (July 2018), https://www.psychiatry.org/home/policy-finder (last visited Mar. 6, 2020) (stating the

supports laws protecting gender diversity.[219] The APA has stated psychotherapeutic techniques to convert homosexuals is based on scientifically questionable theories with no substantiated research.[220] Other organizations such as the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, and the American Academy of Pediatrics have made similar statements opposing laws discriminating against transgender individuals and opposing the use of conversion therapy due to the mental affect that patients would likely experience.[221]

B. Child Welfare Legislation Creates Religious Exemptions that Allow Harm to LGBTQ Children

Parental rights, religious rights, and rights of minors are competing rights. The tensions between them become more problematic when the state, through the child welfare system, is acting as parent. Currently no branch of the federal government provides clear guidance on the breadth of religious exemptions for child welfare providers.[222]

APA official action in recognition of appropriate medical treatment for gender diverse individuals) [https://perma.cc/5XB7-UDYQ].

219. *See Position Statement on Discrimination Against Transgender and Gender Diverse Individuals*, AM. PSYCHIATRIC ASS'N (July 2018), https://www.psychiatry.org/home/policy-finder (last visited Mar. 6, 2020) (stating the APA official action in opposition to all gender discrimination as transgender individuals have no impairment in any abilities based on their gender identity) [https://perma.cc/CC5B-CW26].

220. *See Position Statement on Conversion Therapy and LGBTQ Patients*, AM. PSYCHIATRIC ASS'N (Dec. 2018), https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-Conversion-Therapy.pdf) (last visited Mar. 6, 2020) (stating the APA official action in opposition to any practice attempting to change an individual's sexual orientation as attempts to change sexual orientation are harmful) [https://perma.cc/2YCZ-JVXV].

221. *See* sources cited *supra* note 215 (citing various medical and psychiatric organizations that have policy statements about LGBTQ terminology).

222. *See* Oakley, *supra* note 6, at 9 (noting Congress has been unable to pass overarching legislation either allowing or prohibiting discrimination under religious exemptions and the Supreme Court has not conclusively determined the constitutionality of state action with religious exemptions).

Congressional legislation has been introduced both to expand the availability of religious exemptions for child welfare providers and to limit religious exemptions in order to protect LGBTQ individuals from discrimination.[223] The Child Welfare Provider Inclusion Act[224] and the First Amendment Defense Act,[225] although unsuccessful, would have allowed discrimination against LGBTQ individuals through religious exemptions.[226]

Yet to succeed in Congress, the Every Child Deserves a Family Act[227] and Equality Act[228] would prohibit welfare service providers from discriminating against children or parents in various family services.[229] The Every Child Deserves a Family Act would disallow both discrimination against prospective foster parents and prospective foster children based on sexual

223. *See id.* at 10 (noting various members of Congress have attempted to expand religious exemptions infringing upon LGBTQ rights and others have attempted to expand equal protection for LGBTQ rights to supersede religious exemption claims).

224. *See* Child Welfare Provider Inclusion Act, H.R. 1881, S. 811, 115th Cong. § 3(a) (2017) (stating adverse action may not be taken against child welfare service providers who act in accordance with sincerely held religious beliefs).

225. *See* First Amendment Defense Act, S. 2525, 115th Cong. § 3(a) (2017) (stating the federal government may not take action against a person acting in accordance with sincerely held religious belief or moral conviction).

226. *See* Oakley, *supra* note 6, at 10 (noting the negative ramifications of the Child Welfare Provider Inclusion Act and the First Amendment Defense Act).

227. *See* Every Child Deserves a Family Act, H.R. 2640, S. 1303, 115th Cong. § 3(a)(A)(1) (2017) (prohibiting any child welfare service entity receiving federal assistance from denying services on the basis of sexual orientation or gender identity).

228. *See* Equality Act, H.R. 2282, S. 1006, 115th Cong. (2017) (extending recognized class protections to sex, sexual orientation, and gender identity).

229. *See* Oakley, *supra* note 6, at 10 (noting the protections provided in the Every Child Deserves a Family Act and the Equality Act).

orientation, gender identity, and marital status.[230] The bill has been proposed and failed multiple times since 2009.[231]

A handful of states have created religious exemption laws of varying powers, because both Congress and the Supreme Court have been silent regarding the constitutionality of religious exemptions allowing discrimination against LGBTQ individuals.[232] At the close of 2017, North Dakota, South Dakota, Texas, Alabama, Mississippi, Michigan, and Virginia had enacted laws allowing child welfare providers to discriminate under religious exemptions in the provision of child welfare services.[233] Originally, these bills focused on refusing to place a child with same-sex parents, with whom the agency had a religious or moral objection.[234] Broader discriminatory bills have surfaced however, allowing discrimination in more services and against children themselves. Tennessee recently became the latest state to allow child welfare agencies to operate under religious exemptions, even if this jeopardizes the best interests of the child.[235] As of January 2020, the Human Rights Watch recognizes nine states—Kansas, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Virginia—that

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230. *See* Maxwell, *supra* note 198, at 221 (stating the specific discriminatory actions prohibited by the Every Child Deserves a Family Act).

231. *See id.* at 221 (citing the various representatives who introduced the act across a span of years, all failing to even have the bill make it out of committee).

232. *See* Oakley, *supra* note 6, at 5–8 (discussing the various versions of state bills that have passed allowing child welfare service providers to deny services based on sincerely held religious beliefs).

233. *See id.* at 5 ("At the close of 2017, seven states have versions of license to discriminate in child welfare laws on the books—three of which were passed in 2017 and five of which were passed in the last three years.").

234. *See id.* at 5 (stating the broadest swath of discriminatory child welfare bills target same-sex parents by disallowing adoption services based on religious exemptions).

235. *See* Ryan Thoreson, *New Tennessee Law Deepens Discrimination Against LGBT People*, HUMAN RTS. WATCH (Jan. 28, 2020, 1:42 PM), https://www.hrw.org/news/2020/01/28/new-tennessee-law-deepens-discrimination-against-lgbt-people (last visited Mar. 7, 2020) (discussing the Tennessee religious freedom exemption, which was signed by the governor on January 24th) [https://perma.cc/6V9J-7LGM].

allow for taxpayer-funded child welfare agencies to use religious exemptions to discriminate against LGBTQ individuals.[236]

Specifically, Texas and Mississippi have very expansive statutes.[237] The Protection of Rights of Conscience for Child Welfare Service Providers Act in Texas allows agencies to refuse children services to which the agency objects based on religious beliefs.[238] The provisions allow a child welfare agency in Texas to deny children in their care mental health services, contraceptives, and hormone therapy.[239] Mississippi's Protecting Freedom of Conscience from Government Discrimination Act[240] similarly allows for the denial of medical treatment (such as hormone therapy) if the agency has a religious objection.[241] Most of the mentioned states provide a

236. *See id.* (noting the various states who have child welfare agency religious exemption laws currently enacted).

237. *See* Oakley, *supra* note 6, at 5 (noting Mississippi, Texas, and South Dakota have the broadest religious exemption protections).

238. *See* TEX. HUM. RES. CODE ANN. § 45.005 (West 2019) (stating child welfare service providers will be protected if actions are taken based on sincerely held religious beliefs).

239. *See* Oakley, *supra* note 6, at 8 (stating the broad negative implications Texas' expansive statute will have). The author stated:

> Among other things, that means a state has its hands tied—it cannot cancel the contract or refuse to give the agency a contract in the future—if the agency refuses to provide children in their care with necessary medical services (like hormone therapy, contraceptives, or affirming mental health care) or even if the agency forces children in their care, justified by the agency's religious belief, to dangerous and abusive practices such as so-called "conversion therapy."

Id.

240. *See* MISS. CODE ANN. § 11-62-5 (2016) (stating the state government will not take action against a religious organization acting wholly or partially on the basis of the organizations beliefs).

241. *See id.* (describing the broad circumstances that child welfare providers may seek religious exemptions). The statute reads:

> (3) The state government shall not take any discriminatory action against a religious organization that advertises, provides or facilitates adoption or foster care, wholly or partially on the basis that such organization has provided or declined to provide any adoption or foster care service, or related service, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3. (4) The state government

general religious exemption to the provision of services, but the Mississippi statute allows agencies to deny LGBTQ individuals related services by explicitly mentioning "surgeries related to sex reassignment or gender identity transitioning[.]"[242]

These states have enacted legislation that puts LGBTQ children in non-affirming situations, which increases their risk of committing suicide.[243] Further, these statutes conflict with both the American Psychiatric Association and American Medical Association's positions on LGBTQ individuals.[244] Because of increased likelihood of harm for LGBTQ children when they are in non-affirming situations, it is important to find a pathway for LGBTQ children to escape destructive parental authority, especially in the context of discriminatory child welfare agencies.

IV. Remedies for LGBTQ Children to Seek Protections When Parental Actions Are Harmful

The parent–state dichotomy of control coupled with the harm LGBTQ children endure in non-affirming homes highlights the need to locate legal remedies for LGBTQ children. The state acting as *parens patriae* or enacting protective legislation or children asserting substantive due process claims, mature minor exemptions, or partial emancipation offer a few,

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> shall not take any discriminatory action against a person wholly or partially on the basis that the person declines to participate in the provision of treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services based upon a sincerely held religious belief or moral conviction described in Section 11-62-3.

Id.

242. *Id.*

243. *See* discussion *supra* Part III.A (discussing the statistically higher likelihood of suicide and suicide ideation in non-affirming homes for LGBTQ children).

244. *See* discussion *supra* Part III.A (discussing various medical and psychiatric organization's positions on conversion therapy and gender nonconformity).

imperfect pathways for LGBTQ children to escape destructive parental authority.

A. States Should Utilize Parens Patriae *Authority or Enact Legislation as a Protective Remedy for LGBTQ Children*

The example of the Jehovah's Witnesses and blood transfusion is similar to discrimination of LGBTQ children because each situation presents a conflict between parental rights, religious rights, and the rights of minors.[245] In *King County Hospital*, the parental refusal to accept a blood transfusion on behalf of the child was invalid because parents are not allowed to make martyrs of their children, regardless of parental rights and religious freedom claims.[246] The right of the child to bodily autonomy was determined to be superior to claims of parental and religious rights.[247] When LGBTQ children endure living with non-affirming families, they experience harm. When parents make medical decisions directly affecting the health of their LGBTQ children, those children deserve protection.[248] When parents take direct medical actions, the state as *parens patriae* should protect LGBTQ children's right to bodily autonomy.

The state is often hesitant to enforce *parens patriae* because of its respect for the inner sanctum of the family.[249] States such as Mississippi and Texas, where religious exemption statutes

245. *See* discussion *supra* Part II.C.2 (discussing the confluence of parental rights, religious rights, and children's rights in *Jehovah's Witnesses in State of Washington v. King County Hospital Unit No. 1*).

246. Jehovah's Witnesses in State of Wash. v. King County Hosp. Unit No. 1, 278 F. Supp. 488, 504 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968) (discussing the parental right to martyr oneself, but the limitation to make a child a martyr before reaching a legal age of discretion to make their own choice) (citations omitted).

247. *See id.* (stating that neither constitutional right, parental privacy or freedom of religion, provide limitless discretion to individuals where the State may not exert controlling authority).

248. *See* discussion *supra* Part III.A (discussing increased suicide rates due to LGBTQ children living with non-affirming families).

249. *See* discussion *supra* Part II.C.2 (discussing the courts apprehension in interfering in family life).

already exist in the context of foster care provision, are unlikely to exert *parens patriae* authority to protect LGBTQ children.

Similar to the situation in *Yoder*, parental rights often become intertwined with claims of religious freedom.[250] The religious decisions of parents can conflict with both the interests of their children and the interests of the state.[251] For example, Mississippi courts have noted the preemptory nature of state's *parens patriae* interest for medical treatment of minors.[252] Mississippi does not allow a parent to claim a religious exemption in an effort to not vaccinate their child.[253] However, the state legislature allows for foster parents with sincerely held religious beliefs to deny medical services related to transitioning status[254] and to exempt those foster parents from government action.[255]

States are considered the laboratories for experimentation, particularly for the regulation of family law matters.[256] Take, as an example, California. The Foster Care Nondiscrimination

250. *See* Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972) ("[T]he power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.").

251. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1994) ("And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control . . . .").

252. *See* Brown v. Stone, 378 So. 2d 218, 222 (1979) (adopting the notion *parens patriae* authority requires the state to order medical treatment to save the lives of a child via Prince in deciding that *no* religious exception can be allowed for parents to not vaccinate their children) (citations omitted).

253. *See id.* ("[A] person's right to exhibit religious freedom ceases where it overlaps and transgresses the rights of others.").

254. *See* MISS. CODE ANN. § 11-62-5 (2016) (stating the state government will not take action against a religious organization acting wholly or partially on the basis of the organizations beliefs).

255. *See id.* (noting government action is disallowed when child welfare service providers are denying medical services and mental health treatment on the basis of religious beliefs).

256. *See* Maxwell, *supra* note 198, at 225 (recognizing family law matters to be generally be a state concern and not a federal concern).

Act[257] went into effect in California on January 1, 2004.[258] The Foster Care Nondiscrimination Act was the first of its kind with broad class designations for "actual or perceived" sexual orientation and gender identity and protections against discrimination and harassment.[259] Unfortunately, the Foster Care Nondiscrimination Act lacks an enforcement mechanism, leaving parties confused on how the statute will be applied.[260] States should consider the protected parties, prohibited mistreatment, specific definitions, clear enforcement mechanisms, and provisions for assistance while designing protections for LGBTQ children.[261]

All states should immediately begin attempting to enact similar statutes. However, it is extremely unlikely all states will begin to enact broad expansive protections for LGBTQ youth, either in the foster system or more generally. Although state authority is a plausible avenue for protecting LGBTQ children, nationwide state action through local legislation or by state intervention as *parens patriae* is unlikely, especially in states that have adopted child welfare service religious exemptions.

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257. *See* CAL. WELF. & INST. CODE § 16501.31 (West 2018) (providing broad protections for various classes, but specifically for sexual orientation and gender identity).

258. *See id.* (recognizing both actual and perceived protected class, including sex and gender). The statute reads:

> [T]he rights of a foster child to have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.

Id.

259. *See* Maxwell, *supra* note 198, at 220 (addressing the merits of the Foster Care Nondiscrimination Act).

260. *See id.* ("Parties may also have difficulty determining the most appropriate way to seek remedies.").

261. *See id.* at 225 (discussing the relevant concerns States should consider implementing effective protections for LGBTQ youth in the foster care system).

B. LGBTQ Children in the Child Welfare System Harmed by Parental Action Hold a Valid Substantive Due Process Claim Under the Fourteenth Amendment

The Constitution's Due Process Clauses, found in the Fifth and Fourteenth Amendments, were originally understood to be procedural and not substantive.[262] In *Allgeyer v. Louisiana*,[263] the Supreme Court reasoned that in order to be substantive in nature, the Due Process Clauses require a deprivation of life, liberty, or property.[264] To claim a substantive due process violation, the preliminary requirements of jurisdiction, justiciability, and harm by a governmental actor must be met.[265] The standards of jurisdiction and justiciability (standing, mootness, ripeness) require individual analysis and thus will not be considered in this Note.[266]

1. LGBTQ Children in the Child Welfare System Are Harmed by Parental Action via Governmental Action

A substantive due process claim requires that harm be caused by government action.[267] Foster systems, whether public

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262. *See* Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 625–26 (1992) (noting that substantive due process did not conceptually exist prior to 1890).

263. *See* Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (concluding a substantive due process violation can occur when there has been a deprivation of life, liberty, or property).

264. *See id.* ("[W]e think the statute is a violation of the fourteenth amendment of the federal constitution, in that it deprives the defendants of their liberty without due process of law.").

265. *See* Galloway, *supra* note 262, at 628 (reviewing the preliminary procedure for evaluating substantive due process claims).

266. Various factual scenarios will lead to different analysis under considerations of jurisdiction and justiciability. These standards would likely be met in the context of children within the foster system who are harmed by their foster parents' decisions.

267. *See* Galloway, *supra* note 262, at 629 ("Deprivations of life, liberty, or property inflicted by a person acting in a purely private capacity need not comply with the due process clauses.").

or private in nature, act in concurrence with the government.[268] Public child welfare systems administered by states meet the government action requirement, even though the actions LGBTQ children would challenge are actions made by individual foster parents.[269] Foster parents in the public child welfare system are acting on behalf of the state to provide a home and an upbringing for children who have become wards of the state. The simple act of providing a non-affirming home can be harmful, but more egregious behavior such as the denial of medical treatment or an attempt to use conversion therapy makes the harm direct and actionable.[270]

Privatized child welfare systems have a more attenuated connection to state action. The various exceptions to the state action doctrine are the compulsion, nexus, entanglement, and public function tests, which all generally analyze whether a state requires, encourages, or is significantly involved in private conduct.[271] The case history questioning whether private action will be deemed state action is inconsistent.[272] Historically, the

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268. *See* Sacha M. Coupet, *The Subtlety of State Action in Privatized Child Welfare Services*, 11 CHAP. L. REV. 85, 126 (2007) (arguing as the child welfare system becomes more privatized the acts of private child welfare providers should be considered governmental acts).

269. *See id.* at 111 (noting state agencies are constitutional accountable for any harms that occur to children in the custody of the state).

270. *See* discussion *supra* Part III.A (discussing the statistically higher likelihood of suicide and suicide ideation in non-affirming homes for LGBTQ children).

271. *See* Coupet, *supra* note 268, at 107 (discussing the various tests used to make exceptions to the state action doctrine). The test the article considers were:

> [T]he "compulsion" test, exploring the manner in which the state has exercised any affirmative conduct compelling the conduct complained of, (2) the 'nexus' test, examining the degree of state involvement in private conduct, and (3) the 'public function' test, which looks substantively to the nature of the function performed to assess its public versus private identity.

Id.

272. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting) (acknowledging the cases which consider private action as possibly a governmental action are not consistent and the courts have used a variety of tests and standards).

public function test has been most often applied to the child welfare system.[273]

Within the private child welfare system, the state action of legally removing and formally placing children in the welfare system must occur.[274] The power to greatly benefit or detrimentally hurt children lies in the unique authority to break apart the family as a fundamental societal unit.[275] Further, the most common model for public–private welfare partnerships is contracting out child welfare services to private providers that will continue to be financed by the government.[276] Beginning in the 1960s, amendments to the Social Security Act allowed federal money to fund private, non-profit social service agencies creating public–private child welfare partnerships.[277] More recent amendments to the Social Security Act have enabled continued maintenance payments to for-profit and nonprofit private child welfare providers for services, which led some states, such as Kansas and Florida, to completely privatize their child welfare system.[278]

The public function test has been construed broadly and narrowly by the Supreme Court.[279] The more narrow

273. *See* Coupet, *supra* note 268, at 108 (noting the public welfare system gave way to public-private partnerships in the 1960s).

274. *See id.* at 102 ("[T]he fact that children may only be legally removed and formally placed in the child welfare system through a court order renders this conduct arguably the least ambiguous form of state action.").

275. *See id.* (considering the monopoly of power the state retains to place children, which leads to private welfare placement of children that may be completely unaccountable).

276. *See id.* at 95 (acknowledging the predominant method of public-private partnerships within child welfare provision utilize a method of State's contracting out foster children to private welfare providers).

277. *See id.* at 94 (noting the philosophical shift of the Reagan administration toward private solutions to social problems which diminished governmental presence in child welfare services and gave rise to the public-private partnerships).

278. *See id.* at 95 (acknowledging the continued move toward the privatization of the child welfare system based on changes to the Social Security Act).

279. *Compare* Marsh v. Alabama, 326 U.S. 501, 503 (1946) (suggesting if an entity is the functional equivalent of a government entity then it is in fact a government entity), *with* Jackson v. Metro. Edison Co., 419 U.S. 345, 357

construction of the public function test is more often used.[280] In *Deshaney v. Winnebago County Department of Social Services*,[281] the Court concluded that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume responsibility for his safety and general well-being."[282] A *Deshaney* footnote provided the framework for a state's affirmative duty to safeguard children in their custody against harm.[283] Under the logic of *Deshaney*, the state must safeguard LGBTQ children against potentially harmful situations. However, it remains an open question if this fully extends to privately contracted child welfare service providers.[284] Although privatized child welfare systems may not be considered joint government and private party action,[285] the government action requirement can still be met if the conduct is a public function.[286]

(1974) (suggesting the required nexus is present only if the powers are the exclusive prerogative of the State).

280. *See* Coupet, *supra* note 268, at 110 (discussing the inconsistent standard for the public function test, but acknowledging a narrow approach is often used).

281. *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 201–03 (1989) (noting the State's exercise of removal power gives rise to an affirmative duty to protect).

282. *Id.* at 199–200.

283. *See id.* at 201 n.9 ("Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."); Coupet, *supra* note 268, at 111, ("[P]ost-*DeShaney* cases make clear that constitutional accountability by state agencies may follow for harms suffered by children in state custody . . . .").

284. *See* Coupet, *supra* note 268, at 111 ("[I]t remains unclear and inconsistent as a matter of common law under what circumstances constitutional accountability will extend to the private providers with whom state agencies now increasingly contract for services.").

285. *See id.* at 88 ("Privatization is a rather amorphous and ill-defined term, as there are a variety of ways in which public-private partnerships have developed and expanded to deliver public services.").

286. *See* Galloway, *supra* note 262, at 630 (discussing options to fulfill the government action requirement if the action is taken directly by or jointly with

Unfortunately, LGBTQ children seeking protection from biological parents will be unable to assert a substantive due process claim. Even if these children maintain a deprivation of life and liberty related to bodily autonomy, no governmental action is present. If a child is not in the welfare system and thus unable to assert a substantive due process claim, a state should have the duty to assert its *parens patriae* authority to protect LGBTQ children from harmful parental action, as discussed in the prior section.

2. Requirements for a Substantive Due Process Claim and the Infringement of Life, Liberty, and Property

After meeting the preliminary requirements, a substantive due process claim must succeed on the merits. The Court has developed a two-part test requiring first, that the government action has affected a due-process interest, and second, that the action was sufficiently adverse to constitute a deprivation.[287] The Supreme Court has interpreted the due process interests—life, liberty, and property—broadly.[288] Both the interests in life and liberty are implicated when LGBTQ children are living in non-affirming homes, specifically when parents authorize harmful action such as conversion therapy or the withdrawal of hormone therapy.[289] Similarly, parental medical decisions that increase the chance LGBTQ children will attempt suicide should be considered an injury depriving LGBTQ children of due process protections.[290]

The final, most important step of the substantive due process analysis is deciding whether the challenged

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the government, such as conduct that is traditionally reserved for the government as a public function).

287. *See id.* (highlighting the conceptual framework for evaluating substantive due process claims).

288. *See id.* at 631 ("Given the inclusive definition of liberty and property, the protected interest requirement does not play a major role in substantive due process analysis.").

289. *See* discussion *supra* Part III.A (discussing various harms endured by LGBTQ children who live in non-affirming homes).

290. *See* discussion *supra* Part III.A (discussing suicide rates for LGBTQ children and how parent actions may affect those rates).

governmental action infringes a fundamental right, which determines the level of scrutiny.[291] If a fundamental right has been infringed, the statute under consideration will be subject to strict scrutiny and thus presumed unconstitutional.[292] If a fundamental right of bodily autonomy for children existed, any infringement would have to be narrowly tailored to justify a compelling government interest.[293]

The Court has considered various frameworks when defining a fundamental right, but two essential frameworks, "implicit in the concept of ordered liberty"[294] and "deeply rooted in this Nation's history and tradition,"[295] have developed.[296] Fundamental rights may not be easily infringed upon by the state and require a statute to have a compelling government interest and to be narrowly tailored at advancing the interest.[297]

Government deprivations not related to fundamental rights are only subject to rational review.[298] Rational review analysis

291. *See* Galloway, *supra* note 262, at 631 (acknowledging the varying level of scrutiny applied to a substantive due process challenged based on the type of right that has been infringed upon).

292. *See id.* at 638 ("When intensified scrutiny applies, the government action that harmed claimant is presumed to be unconstitutional and respondent has the burden to prove that the government action is supported by substantial justification.").

293. *See id.* ("[T]he conduct was undertaken for a purpose that is legitimate and compelling (very important) and the conduct comprises a substantially effective method for achieving that purpose.").

294. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969) (stating enumerated rights "found to be implicit in the concept of ordered liberty" are valid claims against the states through the Fourteenth Amendment).

295. *See* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (recognizing historical teachings and basic values of society as appropriate limits on substantive due process claims).

296. *See* Ayotte, *supra* note 50, at 1001 (discussing the two major frameworks unenumerated fundamental rights are considered under, ordered liberty and rooted in history).

297. *See* Galloway, *supra* note 262, at 638 ("[T]he conduct was undertaken for a purpose that is legitimate and compelling (very important) and the conduct comprises a substantially effective method for achieving that purpose.").

298. *See id.* at 643 (describing infringements that do not violate fundamental rights as only requiring a rationality review).

simply asks if the statute is supported by a conceivable purpose and arguably furthers the purpose.[299] The government action is presumed constitutional.[300] The system is predictable: statutes evaluated under rational review are almost always upheld and statutes evaluated under strict scrutiny are almost always struck down.[301] Finding an unenumerated fundamental right to bodily autonomy requiring strict scrutiny is essential to protecting LGBTQ children.

3. A Fundamental Right to Bodily Autonomy Extended to Children Exists

This Note has considered the history and development of children's rights, the concepts of emancipation and mature minor tests, case law putting limitations on parental rights (especially when potential harm for the child was present or medical decisions were made), and the idea that the right to bodily autonomy is not magically bestowed upon "adults" at the age of maturity. This Note posits that a right to bodily autonomy exists for mature minors. This right to bodily autonomy should undoubtedly protect LGBTQ children from governmental action that is medical in nature and endangers the mental and physical well-being of children.[302]

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299. *See id.* (acknowledging rational review as the least searching means of scrutiny).

300. *See id.* at 643–44 ("If rationality review applies, the government action is presumed to be constitutional, and claimant has the burden of proving that the deprivation is not even an arguably rational method for furthering any conceivable valid governmental interest.").

301. *See* Matthew Grothouse, *Implicit in The Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1021, 1057 (2016) (suggesting the tiered scrutiny framework of substantive due process has a determinative analytical framework, which makes the issue over fundamental rights the crux of the framework).

302. This Note does not argue for equal protection for LGBTQ children on the basis of their LGBTQ identity. Equal protection claims for LGBTQ individuals have received rational basis review and not been granted a heightened level of scrutiny. *See* Romer v. Evans, 517 U.S. 620, 631–33 (1996) (using rational basis review to invalidate an initiative that allowed discrimination on the basis of sexual orientation).

As stated previously, unenumerated fundamental rights are protected by the Constitution when the fundamental rights are implicit to ordered liberty or rooted in history.[303] Ordered liberty and deeply rooted historical tradition are the two paramount substantive due process considerations; however, these considerations do not act as a simply applied two-prong test.[304] Often substantive due process considerations are based on a totality of the circumstances and other competing considerations, such as evolving national values.[305]

The approach based on deeply rooted national history is designed to confine judicial scrutiny to historical circumstances that remain outside of the subjective scope of political and policy preferences.[306] The judicial exercise of locating a deeply rooted historical basis has vacillated between considering recent history and ancient history, often in an outcome-determinative analysis lacking objectivity.[307] Substantive children's rights may lack an ancient historical basis,[308] but within the United

303. *See* Grothouse, *supra* note 301, at 1059 (stating the approach to substantive due process respects history and tradition in guiding the inquiry, but those notions do not set an outer boundary in which the past alone could rule the present notions of liberty).

304. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66 (2006) (noting that the theory of historical tradition and the theory of ordered liberty have dominated substantive due process considerations, but that substantive due process considerations are controversial and a doctrine in disarray).

305. *See id.* at 66–69 (suggesting various considerations are applied to substantive due process, often outcome determinative, which has led to other emerging theories such as the theory of evolving national values).

306. *See* Grothouse*,* supra note 301, at 1059 ("This approach recognizes that judicial nullification of democratically-passed laws must not turn on the political preferences or policy judgements of nine (and possibly five) unelected and unaccountable Justices.").

307. *See* Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 332 (2013) ("Originalist judges approach the theory eclectically, drawing on useful historical or textual evidence to support a desired conclusion."). *Compare* Roe v. Wade, 410 U.S. 113, 130 (1973) (tracing abortion history to the ancient Persian, Greek, and Roman empires), *with* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (recognizing recent history of changing ideals and norms, which recognize same-sex relationships).

308. *See* discussion *supra* Part II.A. (discussing historical concept of children as property and lacking any rights).

States' history, children have enjoyed fluctuating levels of rights, especially in regards to personal autonomy.[309]

Ordered liberty recognizes fundamental rights based upon issues of self-determination and personal autonomy.[310] The ordered liberty theory, in conjunction with the theory of historical tradition, of fundamental rights has provided for the right to use contraceptives,[311] the right to terminate a pregnancy,[312] the right to refuse medical treatment,[313] the right to engage in consensual sodomy,[314] the right to marry a person of a different race,[315] and the right to marry a person of the same-sex.[316] Although the establishment of each of those rights considered both ordered liberty and historical tradition, all had highly contested theories of historical tradition.[317] As the Court

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309. *See* discussion *supra* Part II.D.2. (discussing the expansion of minor's emancipation to provide autonomy in employment and contractual abilities).

310. *See* Grothouse, *supra* note 301, at 1060–61 ("Such 'privacy rights' and 'liberty interests' embrace all conduct essential to an individual's self-determination . . . .") (citations omitted).

311. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) (recognizing personal decisions relating to contraception are protected within the interests of liberty under the Due Process Clause).

312. *See* Roe v. Wade, 410 U.S. 113, 158 (1973) (recognizing the right of women to make decisions affecting their future, including abortions under the Due Process Clause).

313. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (recognizing a right to refuse medical treatment within the Fourteenth Amendment's Due Process Clause's liberty interest).

314. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (recognizing homosexual consensual sexual relationships as a choice central to personal dignity and autonomy that would be protected by the Fourteenth Amendment).

315. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing the right to marry a person of a different race is within the framework of the Fourteenth Amendment's Due Process Clause).

316. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (recognizing to deny same-sex couples the right to seek marriage diminishes their personhood, thus the right for same-sex couples to marry is within the Due Process Clause's guarantee of liberty).

317. *See* Grothouse, *supra* note 301, at 1062 (stating a substantive due process right can be found even when a deeply rooted history is not present); *see also* cases compared in footnote 307 (suggesting the historical tradition

considered the concept of ordered liberty in *Obergefell*, various factors such as autonomy, agency, and the sanctity of personal decisions were considered.[318] The *Obergefell* opinion began, "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[319] Establishing a fundamental right for children to have bodily autonomy, when the child is a mature minor, may be a large step jurisprudentially, but appears to be a logical step forward, given the case law regarding both blood transfusions and abortions for minors.[320]

Competing fundamental rights exist, however, within the suggested right to bodily autonomy for children framework. As previously acknowledged, both the enumerated right to freely exercise religion and the unenumerated right of parental authority are competing rights and could be used as possible compelling state justifications for limiting children's bodily autonomy.[321] Therefore, a hierarchy of fundamental rights is necessary to provide a framework for application of children's fundamental rights, which makes the analysis more complex and unreliable. Unfortunately, the Supreme Court chose not to address the similar conflict of individual rights in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[322] by

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framework is outcome determinative and may use recent versus ancient history or specific versus broad contexts).

318. *See Obergefell*, 135 S. Ct. at 2594–97 (recognizing to deny same-sex couples the right to seek marriage diminishes their personhood and dignity by creating stigma that limits liberty in personal autonomy); *see also* Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017) (expanding the perceived limitation of liberty in Obergefell to include same-sex parental recognition).

319. *Obergefell*, 135 S. Ct. at 2593.

320. *See* discussion *supra* Part II.C.2–D.1 (providing legal background for children utilizing a right to bodily autonomy in the context of blood transfusions and abortions).

321. *See* discussion *supra* Part II.B.2 (discussing the coupling of religious rights and parental rights to compete with children's rights).

322. *See* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1727–28 (2018) (analyzing whether store owners may refuse service to LGBTQ individuals when claiming religious freedom exemptions and violations of First Amendment protections).

remanding it the lower court without addressing the scope or allowable application of religious exemptions.[323] Although the Supreme Court's recognizing a fundamental right to bodily autonomy for children would provide an immediate remedy for children in the foster care system, a fundamental right would not protect all children from destructive parental authority and is likely not the most efficient route to provide effective remedy for LGBTQ children harmed by parental actions.

C. Partial Emancipation: An Inapplicable Dream or Possible Reality to Protect LGBTQ Children's Choices

Partial emancipation with continued child support ensures that the "best interest of the minor" and financial security are maintained, which are generally a state's goals.[324] Some statutes state that a capability of financial independence is all that is necessary to obtain partial emancipation, not that financial independence must already have been realized.[325] The idea that parental rights and obligations must sever uniformly has already been questioned through child custody statutes.[326] If parental rights and obligations are considered completely intertwined, decisions made in the best interest of the child may become impossible.[327]

The explosion of emancipation statutes starting in the 1960s has been influenced by the changing circumstances in

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323. *See id.* at 1732 ("The outcome of cases like this in other circumstance must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities . . . .").

324. *See* Barnett, *supra* note 172, at 1819 (addressing that promoting the minor's best interest and financial soundness of policy are the state's priority goals).

325. *See id.* at 1820 (asserting that some statutes and *Diamond* suggest managing financial affairs refers to the capability to manage affairs not current ability to be self-supportive).

326. *See id.* at 1821 (comparing to child custody where parental rights of visitation and control are severed, but parental obligations of support remain).

327. *See id.* at 1822 (stating the goal of terminating parental rights to protect the child and continuing parental obligations to protect the child are not mutually exclusive).

parent-child relationships in the United States.[328] Children are growing up faster with societal and technological changes.[329] The stereotypical nuclear family has become more uncommon as fewer people get married and divorce rates grow.[330] Modern family constructs have necessitated the liberalization of family law concepts.[331] Strict application of emancipation is experiencing *cessante ratione legis cessat et ipsas lex*.[332] Moving forward, when courts consider emancipation, the main issue should be the purpose for which the minor seeks emancipation.[333]

The notion that emancipation and child support are mutually exclusive is still commonly held with partial emancipation viewed skeptically.[334] Most courts view the inability of children to be financially self-supportive as dispositive in an emancipation decision because parental support is still necessary.[335] The ability for a child to emancipate while still receiving child support is considered double-dipping.[336] Although parental authority to make harmful decisions for LGBTQ children is problematic, this Note

328. *See id.* at 1829 (emphasizing changing familial and societal dynamics as the cause for the growth in emancipation issues).

329. *See id.* (addressing technological shifts, starting from the post-World War II era, as a major factor for children maturing at a younger age).

330. *See id.* at 1830 (analyzing the shift in familial composition such as the birth rate for unmarried women going from five percent in 1958 to forty percent in 2011).

331. *See id.* at 1831 (discussing various areas of family law that have evolved and molded to the current needs of families such as the dissolution of fault-based divorce).

332. *See id.* at 1834 (suggesting that as the original reason for emancipation has ceased, the law itself will also cease if it does not modernize).

333. *See id.* at 1835 (suggesting a primary inquiry for future issues surrounding emancipation).

334. *See id.* at 1811 (acknowledging a majority view that emancipation and child support will not be granted together).

335. *See id.* at 1813 (confirming emancipation cases form a historic pattern of either granting emancipation or granting child support, but not affirming a need for both).

336. *See id.* at 1811 (discussing criticism of partial emancipation as "having their cake and eating it" when children are granted both emancipation and child support).

does not purport to suggest LGBTQ children should become financially independent to be able to obtain bodily autonomy. LGBTQ children are already more likely to become homeless and to lack financial support structures.[337] Therefore, requiring LGBTQ children to obtain financial independence for emancipation to be able to make self-affirming choices is unrealistic. Partial emancipation may apply in similar ways as the judicial bypass, where for a specific decision a minor will need to be partially emancipated to make that decision in their best interest.

D. A Mature Minor Exemption and Procedural Judicial Bypass: The Logical Path Forward

The Supreme Court has suggested the interests of a mature minor shall be considered in the context of an abortion.[338] The Fourteenth Amendment Due Process Clause guarantees a minor a hearing before a judge who must accept the minor's decision if the minor is determined to be mature.[339]

When an LGBTQ eighteen-year-old, legally an adult, can stop her parent's attempt to force medically harmful decisions such as conversion therapy or withdrawal of hormone therapy treatment, but an LGBTQ seventeen-year-old, legally a minor but days shy of turning eighteen, lacks authority over her bodily autonomy regarding similar medically harmful decisions, the legal procedures determining maturity become questionable. Although bright-line age requirements have a place in the legal context, potentially harmful medical decisions implicating bodily autonomy is not a time where age requirements appear

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337. *See* James, *supra* note 209, at 176 (highlighting both the rate which transgender individuals experience homelessness and the high rate of harassment within homeless shelters leaving many homeless transgender individuals without options).

338. *See* discussion *supra* Part II.B.2 (discussing at length Planned Parenthood of Central Missouri v. Danforth, which established the mature minor exemption in the abortion context).

339. *See* Burk, *supra* note 159, at 1355–56 ("Through the Due Process Clause 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.").

to be protecting the interests of children or society.[340] In *Bellotti*, the Court determined that minors hold a due process right to bodily integrity in the abortion context.[341] A due process right to potentially life-altering treatment related to sexual orientation or gender identity should be similarly held to exist.

Mature minor exemptions vary in requirements and protections state by state;[342] therefore, a federal mature minor exemption providing for a judicial bypass procedure is necessary and should be guaranteed by the Due Process Clause of the Fourteenth Amendment. In the absence of a federal mature minor exemption, states should adopt a mature minor exemption that adequately protects minors' interests in all potentially harmful medical contexts.

In *Bellotti*, the Supreme Court provided a procedure for a judicial bypass system for abortions to be decided on a case-by-case basis.[343] A minor will be given an opportunity to demonstrate maturity before a court, and if she is not determined to be mature, she will have to demonstrate the choice is in her best interest.[344] A minor will submit a form to

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340. *See id.* at 1356 ("Bright-line age limits may be efficient and appropriate in many contexts, like drinking or voting laws, but in medial situations that have much higher personal stakes, such bright line rules seem less appropriate.").

341. *See* Bellotti v. Baird, 443 U.S. 622, 642 (1979) ("The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.").

342. *See* Burk, *supra* note 159, at 1363 ("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.").

343. *See Bellotti*, 443 U.S. at 647 ("We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to court without first consulting or notifying he parents.").

344. *See id.* at 647–48 (discussing the procedure and analysis the judge will afford the minor in determining maturity). The Court stated:

> If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show

request a hearing with the court, which should be prioritized with a short time frame.[345] The judge would then determine if the minor proved maturity or, at least, best interest.[346] The system should be designed with a rebuttable presumption that minors fifteen years old and younger are immature and those sixteen and older have a rebuttable presumption of maturity.[347] Factors such as academic performance, intellectual capacity, future plans, and an ability to handle personal finances are all factors that may contribute to a determination of maturity.[348] However, the most salient factor is the minor's ability to discuss the medical procedure, understand the risk, and make the choice without external pressures.[349] If the afore stated presumptions are adopted, the burden of proof should be a showing of clear and convincing evidence to overturn the presumption.[350]

Given the varied opinions on the judicial standard of maturity and the burden of proof to establish maturity, a federal mature minor exemption would provide helpful clarification for

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> that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion.

Id.

345. *See* Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 424–29 (2009) (discussing the general features of the minor's petition to the court which will focus on speed and anonymity).

346. *See id.* at 429–31 (discussing the standards and factors and judge will consider while evaluating the maturity and best interest standards).

347. *See* Bonny, *supra* note 168, at 323–24 (suggesting the various presumptions should be reputable because trial courts are at serious risk for bias and abuse).

348. *See id.* at 324 (discussing various factors that are often considered such as academic performance and financial stability but suggests a more specific approach by asking about knowledge of the procedure and ability to pay for the abortion).

349. *See* Burk, *supra* note 159, at 1371–72 (stating Courts have reached a general consensus that the ability to discuss the medical treatment, the risks of the treatment, and to be free of parental and peer pressures are the most important factors in determining maturity for minors).

350. *See id.* at 1371 (discussing various factors and standards that may be applicable).

states attempting to apply the exemption.[351] Mature minor exemption cases will all be fact specific; therefore, no factor should be dispositive.[352] However, states should adopt statutes to recognize the above procedures regarding timeliness, rebuttal presumptions, potential factors, and burden of proof to create a holistic approach to determine maturity. A mature minor judicial bypass may be the only way for a minor to assert her rights in the face of parental authority figures making medical decisions.[353] Mature minor judicial bypasses apply in other contexts, such as abortion.[354] The adoption of a procedural judicial bypass for mature minors enables the minor to effectuate claims to bodily autonomy when time is of the essence to ensure protection.[355]

The minor's decisions should be dispositive if the minor is determined to be mature, regardless of the parents' or judges' personal beliefs on whether the decision is the "right" decision.[356] If the minor is determined to be immature regarding the decision at hand, the minor can provide an argument for his or her best interests. After these steps, the judge may still limit the parent's conception of the child's best interest, if the decision is outside of the constitutional limits established by *Prince*.[357] If

351. *See id.* at 1371–72 ("There are many opinions about the proper judicial standard used to define maturity; the standard of proof for such determinations has varied depending on the court adjudicating the elements of informed consent.").

352. *See id.* at 1372 ("Because every case would be different, no single factor or set of factors should be considered dispositive to finding maturity.").

353. *See id.* ("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.").

354. *See* discussion *supra* Part II.D.1 (analyzing the mature minor judicial bypass system provided in *Danforth*).

355. *See* Burk, *supra* note 159, at 1373 ("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.").

356. *See id.* at 1384–85 ("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.").

357. *See id.* at 1373 ("When the minor is determined to be incapable of making a mature choice, the decision of the parents should prevail as long as

the parent's decision is seen as a decision that "martyrs the child," the judge through the state's *parens patriae* authority will make the ultimate decision. If a parent's decision regarding the medical treatment of an LGBTQ minor directly increases the chance of suicide, the judge will need to exert *parens patriae* authority in a mature minor exemption hearing.[358] Although the mature minor judicial bypass is not an easy path for LGBTQ children, especially given each individual judges' autonomy, this is the remedy that is the most logical outgrowth of the current children's rights framework.

V. Conclusion

This Note argues that the state has authority to exert *parens patriae* authority when parents threaten their child's health and safety regarding LGBTQ status. This is similar to exertions of *parens patriae* to protect children in the blood transfusion and vaccination context.[359] A child's mental and physical health is directly threatened in non-affirming households. When parents require LGBTQ children to endure conversion therapy treatment or stop ongoing hormone therapy, harm to LGBTQ children occurs.[360] Although the state could exert the authority against any parent, when foster parents, acting on behalf of the state, make non-affirming decisions in the upbringing of LGBTQ children, the state has a duty to exert *parens patriae* authority to defend the children.[361]

State statutory schemes, such as those in Texas and Mississippi, which provide authority for foster parents to act in

their decision remains within the constitutional confines established by *Prince v. Massachusetts*.") (citations omitted).

358. *See* discussion *supra* Part III.A (discussing the various increase suicide risks for LGBTQ individuals).

359. *See* discussion *supra* Part II.C.2 (emphasizing states have the option to exert *parens patriae* authority to protect any LGBTQ youth).

360. *See* discussion *supra* Part III.A (discussing the various increase suicide risks for LGBTQ individuals).

361. *See* discussion *supra* Part IV.A (highlighting the need for the states to exert *parens patriae* authority to protect LGBTQ youth within the foster care system).

potentially detrimental ways by seeking religious freedom protections are unconstitutional.[362] This Note further posits that children have a constitutionally protected substantive due process claim under the Fourteenth Amendment.[363] If the state is unwilling to recognize its duty to protect children from harm, children must be able to fight against harmful state action under a fundamental rights framework.

LGBTQ children living with biological parents would be unable to assert a substantive due process claim against the state through the Fourteenth Amendment.[364] The state is less likely to intervene in matters that occur within the inner sanctum of the family.[365] Therefore, LGBTQ youth living with non-affirming families may seek partial emancipation or a mature minor exemption for relevant decisions, specifically issues regarding medical bodily autonomy.[366] Partial emancipation and mature minor exemptions are recognized at varying levels among the states, which may limit broad applicability.[367] All states should be encouraged to enact protective partial emancipation or mature minor exemptions for LGBTQ children. Further, partial emancipation and mature minor exemptions require some level of maturity or independence of children, which will also limit broad applicability for protection of all LGBTQ children.

This Note suggests four potential solutions for LGBTQ children to seek redress from harmful parental action in the age of religious exemptions. However, each of the four remedies has obvious limitations and practicability issues. As the legal

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362. *See* discussion *supra* Part III.B (discussing the discriminatory religious exemptions that have been applied to child welfare services).

363. *See* discussion *supra* Part IV.B (discussing a minor's claim for a substantive due process right over bodily autonomy).

364. *See* discussion *supra* Part IV.B (discussing the limited applicability to the Due Process claim).

365. *See* discussion *supra* Part II.B.1 (discussing the privacy and autonomy of parents within the home).

366. *See* discussion *supra* Part IV.C.–IV.D (discussing mature minor exemptions and partial emancipations as possible remedies for LGBTQ youth).

367. *See* discussion *supra* Part IV.C–IV.D (discussing the limitations of mature minor exemptions and partial emancipations for LGBTQ youth seeking to assert their bodily autonomy).

framework for children's rights continues to develop, one of the remedies addressed may become a more concrete pathway for LGBTQ children to seek redress from destructive parental authority.