AK LEGISLATURE FINANCE COMMITTEES FILES 2007-2008 3271 153

March 10, 2008

TO: State of Alaska Legislators

RE: HB 364

To all elected legislators of the State of Alaska,

I am in strong support of HB 364.

Failure to pass this legislation will damage and undermine family values in Alaska and abandon our teens to the morals of the world in general.

Thank you for standing strong and passing this necessary bill.

Sincerely,

Signature Abe Christenson

Name Abeahom Christenson

Address 3875 Geist Rd #E223

City/Zip Fairbanks AK 99709

Phone# 479-5579

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Signature Nancy-C Green

Name Nancy-C Green

Address 108 Wilderness Dr

City/Zip Fbks AK 99712

Phone# 9074556613

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Sincerely,

Signature David Tate

Name J. David Tate

Address 2377 Dawson Rd

City/Zip N. P. AK 99705

Phone# 488-2098

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Signature Jody Tate

Name Jody Tate

Address 2377 Dawson Rd

City/Zip U.P. AK 99705

Phone# 488-2098

3/10/08

March 10, 2008

Statement in Opposition to HB 364:
An Act Requiring Notice & Consent for an Abortion

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
P. O. Box 201844
Anchorage, AK 99520
(907) 258-0044
(907) 258-0288 (fax)
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RICHARD SEIFERT, Fairbanks

Honorable House Finance Committee Members:

On behalf of the ACLU of Alaska, a non-partisan organization with thousands of Alaskan members, we urge you to oppose HB364, a constitutionally-suspect bill that would require unmarried women under 17 years of age to obtain parental consent prior to obtaining a legal abortion.

HB364, if enacted as currently written, would directly contravene the legal precedent established just five months ago by the Alaska Supreme Court in State of Alaska v. Planned Parenthood of Alaska, et al., 171 P.3d 577 (Alaska 2007). In that case, the state Supreme Court reaffirmed that the right to privacy contained in the Alaska Constitution includes the fundamental right to reproductive choice, and that this right extends to minors as well as adults. The Court determined that the prior Parental Consent Act, which HB364 essentially mirrors, is unconstitutional because it impermissibly shifts the ultimate reproductive choice decision from the teen to the parent. As the Supreme Court concluded: The Parental Consent Act "does not represent the least restrictive means of achieving the State's asserted interests and therefore cannot be sustained. In reaching this decision, we go no further than the Alaska Constitution demands, and merely reaffirm that the State does not strike the proper constitutional balance between its own compelling interests and the fundamental rights of its citizens by adopting an unnecessarily restrictive statute." Id. at 585.

The ACLU of Alaska was one of the organizations involved in the successful constitutional challenge to the Parental Consent Act, and we believe that HB364 could be subject to a similar legal challenge for essentially the same reasons the prior Parental Consent Act was struck down – HB364 continues to impermissibly shift the reproductive choice away from the minor and this is not the least restrictive means of achieving the State's interest. Our opinion that HB364 is constitutionally suspect is consistent with that issued on February 27, 2008, by the Legislative Counsel for the Division of Legal and Research Services for the legislature, which should be contained in the record.

Our success in defending the constitutional rights of women to exercise reproductive choice in this state is well-established. See State of Alaska, et al.,

v. Planned Parenthood of Alaska, Inc., et al., 28 P.3d 904 (Alaska 2000)(successful constitutional challenge to administrative regulation denying Medicaid funding for medically necessary abortions); Valley Hospital Ass'n, Inc. v. Mat-Su Coalition for Choice, 948 P.2d 963 (Alaska 1997) (successful constitutional challenge to state law that would have allowed public and quasi-public hospitals to refuse to provide abortions); Planned Parenthood of Alaska v. State of Alaska, No. 3AN-97-6019 CIV (Alaska Superior Court 1998) (successful constitutional challenge to state law that would have banned so-called "partial birth" abortions).

Notwithstanding this litigation success, we believe that scarce public and private resources can be better spent if constitutionally-suspect legislation is not enacted in the first place. For these reasons, and because of the express constitutional problems contained in HB364, the ACLU of Alaska opposes this bill.

Sincerely,

Sharon K. Legenza
Interim Executive Director

cc: Rep. John Coghill

Kachemak Bay
family planning clinic

3959 Ben Walters Lane
Homer, Alaska 99603

Phone (907) 235-3436
Fax (907) 235-8346

March 10, 2008

To Whom It May Concern:
(This is a copy of my spoken testimony)

As an employee of Kachemak Bay Family Planning Clinic, I would like to go on record as opposing this bill and encourage you to do the same. Unfortunately, it would serve to allow the *opposite* of its intention, and *create* harm. I work with adolescents in Homer and surrounding areas in reproductive health care, and know, without a doubt, that this bill would create dangers for our young people.

Most often when a minor is facing an unplanned pregnancy, initially they are sure they can't speak with their families, but after working with them directly, encouraging and sometimes facilitating the conversation, families *do* become involved and supportive. So for these young people, the law would only serve to keep them *away* from the counseling, education and support they need to open the lines of communication, and *make* a healthy decision. A law is NOT necessary when support for adolescents is in place, and it serves only to be another hurdle to seeking supportive services.

And, for a very few others, getting permission from a parent greatly puts the adolescent in danger. I have seen teens who are making better decisions than a parent may be, who are likely to be kicked-out, threatened or beaten, and/or who have experienced physical or sexual abuse within their own family. Unfortunately an adolescent who has such experiences may find themselves more likely to face an unplanned pregnancy, and subsequently to have *huge* obstacles to overcome. A law such as is being proposed would further endanger those it's meant to assist.

I urge you to look beyond the surface of this bill—and realize that the actual outcome of such a move would be regressive—and increase violence and dysfunction for Alaskan youth and families.

Sincerely,

Michelle Wanecka
Executive Director, KBFPC

Dear Chairman;

I am testifying tonight on behalf of my family, my self, and my husband. My husband is a physician assistant and together we have 7 daughters. They range in age from 33 years down to 3 years.

We, too, trust our children.
We have the experience to trust that minors make immature decisions based on inexperience along with lack of foresight and knowledge. THEREFORE WE TRUST that our minor daughters still need us - our wisdom, experience, and knowledge

We trust that our children are not so different than we were at their age. How many here present hid something from our parents - even things we needed their help for- because we feared to face the consequences for our actions? THEREFORE WE TRUST that neither the state nor the medical profession should interfere with our right to know about, and guide the actions of, our children.

We trust that even our own beloved daughters can get into desperate situations.
One of my minor daughters became involved with what turned out to be a 50 something year old man on the internet. She successfully hid this from us for over a year. Luckily, it was discovered at her school. I was immediately called in to talk with the principal, the district safety officer, and my daughter. My husband and I were able to take immediate steps to protect our daughter, physically and mentally. Was she grateful for this outcome? Did she cooperate with her school and with us? No. She was angry with all of us for finding out and "interfering" in her life. Thankfully, with the laws and regulations on our side in this incident, WE FOUND OUT. What if she had become pregnant by such a man? (This leads to...)

We DO NOT trust that abortion providers, nor the general medical community, are able to take over our responsibilities as parents:
Planned Parenthood of Alaska (I believe in Juneau) showed itself willing to conceal sex between a minor girl and her adult abuser when a caller posing as a minor in just such a situation inquired if PP would have to tell on her. Worse, there are at least 3 or 4 lawsuits currently in the lower 48 against abortion providers (I think Planned Parenthood providers) involving actual cases of egregious sexual abuse of minors wherein the abortion providers aborted the pregnant girls, covered up the abusive relationship, and sent these girls right back into the arms of their abusers.

AND from an article appearing in the "Journal of American Physicians and Surgeons" by Angela Lanfranchi, MD, F.A.C.S. (a clinical assistant professor of surgery at the Robert Wood Johnson Medical School and a private practice specialist in breast surgery):

> Well-documented breast physiology accounts for the fact that oral contraceptives and abortion are risk factors for breast cancer. *There is an effort to suppress this information by federal agencies and those in academic medicine. (italics added)* (Spring 2008, p.15)

Finally, will the abortionist be there to notice any post procedural problems? Will the abortionist check for temperature, redness or swelling? Will the abortionist drop by and evaluate any discharge? Will the abortionist personally keep checking on my daughter to see if she had an ectopic pregnancy (and therefore risks her life because she thinks she's no longer pregnant)? Will the abortionist be sent the hospital bills incurred due to any complications?

WITHOUT THIS LAW we wouldn't know to look for all these symptoms. We would remain in ignorance, and our daughter would be needlessly endangered.

I must admit that it seems surreal for me to have to stand here and argue the obvious: ONLY parents have the right and ability to provide intimate and loving guidance for their minor daughters. We can only hope that all legislators of good will act to restore common sense and parental rights by passing HB 364 "Notice and Consent for a Minor's Abortion".

Dear Alaska Legislature,

As a mother of six children, I am a strong advocate of trust between child and parent. Parental notification is imperative for our state. Children need to be encouraged in every way to trust and rely on their parents and families, who love them and have value their best interests, instead of ill-informed peers or financially motivated clinic workers. Parents are responsible for the well-being of their children. How can I provide for the well-being of my children when I have been eliminated from the equation? Who cares more for my children? I can tell you that I have already made significant sacrifices for my children, and it has not been motivated by financial gain; and I will continue to make sacrifices for my children.

I remain highly suspicious of Planned Parenthood and their claims of motivation to protect my children. How can they be taken seriously when they would sever the bond of trust between parent and child simply so they can make money off the child during a time of crisis? Our Alaskan families deserve better than deceit and cover-ups. Our Alaskan families need to be encouraged to work through difficulties, such as an unplanned teen pregnancy, not try to sweep it under the proverbial carpet of keeping the parents in the dark and performing a major medical procedure, like an abortion. Such a deception will seriously damage the fabric of any family. Our Alaskan families deserve better, our teens deserve better.

Sincerely,

Susan Yanish
March 10, 2008
508 Monroe Street
Fairbanks, Alaska 99701
907-456-2488

D.A. and Frank McGilvary
924 Kellum St. Unit 206
Fairbanks, AK 99701-4374

IN SUPPORT of HB 364.

Let us not forget that the Parents are responsible for their minor children. We must not strip parents of their legal rights or responsibilities. **Alaska voted in favor of parental consent.** The will of the people has been heard. Please pass this bill.

ALASKAN LIVES AND FAMILIES will be positively strengthened by THE **PASSAGE OF HB364, the Alaska bill for Parental Consent before teens can obtain an abortion.**

If this bill is NOT passed, it stands to reason that at least some teens will be promiscuous and then obtain abortions without their parents even knowing they were pregnant. For a teen to keep a pregnancy from her parents, then hide an abortion, and subsequently possibly go through a severe personality change without her parents knowing '**Why**' is a sure recipe for disaster in that young life, and that of her torn family.

Planned Parenthood and pro-abortion supporters insist that they are worried about the few girls (approximately 2 each year) who come in without their parents. They are ashamed and embarrassed, perhaps afraid, to tell their parents that they got pregnant. This bill actually protects and gives these particular girls the legal help and protection they might need.. By seeking a judicial bypass or going to an Alaskan medical provider to seek help in getting one, these girls will be in contact with professionals, who can put them in contact with social workers. These girls will also go in front of the legal system. If they mention "abuse," or feel abused, the claims will be investigated. If proven, they and their families will get help. The judicial bypass process also protects teens whose parents are trying to force them to abort their babies, against their wills. Having an abortion can interfere in their life later.

Having an abortion is a proven risk factor. It can increase a mother's chances of inflicting future child abuse and neglect. Having an abortion makes these young women the worst of domestic abusers. They will have KILLED their own child. Women who didn't get help via the judicial bypass will then have an increased risk of perpetuating abuse. Not having sought help, and having the mental and emotional damage of Post Abortion Syndrome, these young women and their families could be destined to face a lifetime of emotional struggle and bondage, instead of living fruitful, free, and contributing lives.

Frank M. McGilvary

Dorothy S. McGilvary

March 10, 2008

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Sincerely,

Signature Anita L Bryan

Name Anita L. Bryan

Address P.O. Box 56822

City/Zip North Pole, AK 99705

Phone# 907-488-5293

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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3.10.08

MEMORANDUM February 27, 2008

SUBJECT: Parental Notice and Consent for an Abortion
(HB 364; Work Order No. 25-LS1406\C)

TO: Representative Lindsey Holmes
Attn: James Waldo

FROM: Jean M. Mischel KK for JMM
Legislative Counsel

You have asked whether HB 364, if enacted, may be found unconstitutional under the recent Alaska Supreme Court decision that invalidated the parental consent act in current law. HB 364 amends the current parental consent act, AS 18.16.010 - 18.16.035, to, among other things, add a parental notification provision and to create monthly reporting requirements. The bill retains but amends the judicial bypass procedure for a minor to obtain an abortion without parental notice or consent.

In my opinion, there is substantial reason to believe that a state court in Alaska would invalidate at least the consent requirements under HB 364 both on *res judicata* and on constitutional grounds.

The Alaska Supreme Court in *State v. Planned Parenthood*, 171 P.3d 577 (Alaska 2007) invalidated the parental consent act passed by the legislature in 1997 as a violation of a person's express constitutional right to privacy. Even though the court found the state's interest in protecting minors from their own immaturity and aiding parents in fulfilling their parental responsibilities to be compelling, the court weighed those interests against competing privacy and equal protection concerns and held that the least restrictive means for advancing that interest must be used. The court found that parental notification, not consent, was the least restrictive alternative.

While a parental consent requirement for a minor's abortion has been upheld under the federal constitution when a judicial by-pass procedure is included, other states in addition to Alaska have invalidated, under the states' constitutions, a similar parental consent requirement with judicial bypass procedure. Like the Alaska Supreme Court, the courts in those states based their decisions on the explicit privacy clauses in their state constitutions that offer broader protection than the federal constitution.[1]

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[1] For example, parental consent has been found unconstitutional by the Supreme Court of Florida under its state constitution *In re T.W., a minor*, 551 So.2d 1186 (Florida 1989).

DISCUSSION

HB 364 requires the consent of a parent, guardian, or custodian before the performance of an abortion for a minor unless the minor successfully petitions for court approval of the performance of the abortion without the consent of a parent, guardian, or custodian. The court process is known as a "judicial bypass" procedure. The procedure described in HB 364 is arguably more burdensome than that under the original statute being amended by the bill.

Parental consent for an abortion with a less detailed judicial bypass provision has been upheld by the United States Supreme Court under the federal constitution. *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476 (1983).

Interpreting the Alaska Constitution's more restrictive and express constitutional right to privacy, the Alaska Supreme Court in 2007 found, in *State v. Planned Parenthood,* that parental consent for an abortion, even with a judicial bypass procedure, violates a minor's fundamental right to privacy and reproductive choice by shifting the choice to her parents. While agreeing with the United States Supreme Court that parents have the

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The Florida court considered whether the parental consent requirement advanced maternal health or fetal health, protected the minor, or preserved the family unit. The Florida court held

> The challenged statute fails because it intrudes upon the privacy of the pregnant minor from conception to birth. Such a substantial invasion of a pregnant female's privacy by the state for the full term of the pregnancy is not necessary for the preservation of maternal health or the potentiality of life...[The] additional state interests -- protection of the immature minor and preservation of the family unit...[are not] sufficiently compelling under Florida law to override Florida's privacy amendment.

In contrast, parental consent/judicial by-pass procedures have been upheld in other states such as California even though that state's constitution also has greater privacy protections than the federal constitution. *American Academy of Pediatrics v. Lungren*, 940 P.2d 797(Cal. 1997). In the *Lungren* case, the California Supreme Court reversed earlier rulings by the California district court and the California Court of Appeal, which had both found the parental consent requirement to be unconstitutional. The pivotal point was whether the court was convinced that the evidence showed that the state had a compelling state interest that outweighed the minor's privacy interest. The Supreme Court of California found that minors' rights of privacy are more limited than adults' and concluded that the law being reviewed appropriately balanced the interest of parents in controlling their children's development and the state's interest in limiting parental control when it might harm a child.

"primary responsibility for children's well-being [and] a.e entitled to the support of laws designed to aid in the discharge of that responsibility"[2] the court also agreed with other United States Supreme Court precedent that "there exists a less burdensome and widely used means of actively involving parents in their minor children's abortion decisions: parental notification."[3]

Noting that the United States Supreme Court has recognized, in a different context, that "notice statutes are not equivalent to consent statutes because they do not give anyone a veto power over a minor's abortion decision,"[4] the Alaska court invalidated the parental consent act (PCA). The court explained:

> By prohibiting minors from terminating a pregnancy without the consent of their parents, the PCA bestows upon parents what has been described as a "veto power" over their minor children's abortion decisions. This "veto power" does not merely restrict minors' right to choose whether and when to have children, but effectively shift a portion of that right from minors to parents. In practice, under the PCA, it is no longer the pregnant minor who ultimately chooses to exercise her right to terminate her pregnancy, but that minor's parents.

Planned Parenthood, at 580.

The court found that the current judicial bypass procedure, containing a five day decision time frame and broad judicial discretion, did not "relieve a girl of the burden of parental consent" and its affect on her fundamental right to privacy. The court adopted the trial court's findings on that point that included (1) a built in delay that may be detrimental to the physical health of the minor, particularly in rural Alaska; and (2) an increase in other burdens faced by a minor seeking an abortion and the probability that the minor may not receive a safe and legal abortion. The court also found that "not all minors possess the wherewithal to embark upon a formal legal adjudication during a time of crisis."

HB 364 retains parental consent as a prerequisite to obtaining an abortion. The bill also retains a judicial bypass procedure but shortens the time period from five to three days and adds evidentiary standards for victims of sexual assault or other abuse, among other things. The bill does not, in my opinion, alter the applicability of Supreme Court precedent that already invalidated parental consent including a more permissive, though slightly longer, bypass procedure as a violation of the right to privacy.

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[2] Quoting *Bellotti v. Baird*, 443 U.S. 622, 639 (1979).

[3] Quoting *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 511(1990)

[4] *Id.*

Additional issues not yet resolved by the Supreme Court may also be raised in a challenge to HB 364 and, since the bill treats minors differently and affects rural residents and abuse victims differently, an equal protection challenge may also be successful. Another, and less obvious, issue presented is whether a court would uphold HB 364's express restriction on who attempts to notify the parent of a minor's request for an abortion. In the context of obtaining informed consent, our courts have frowned upon limiting a physician's usual practice by requiring the physician, not a staff member, to provide the notification.

One final potentially unconstitutional provision in this bill deserves mention. The bill, at sec. 2, modifies the term "medical emergency" for purposes of a defense to prosecution of a physician under the parental consent act that is very restrictive. The delay in providing an abortion must create a serious risk of causing a minor's medical condition to be medically unstable that is itself caused by a substantial and irreversible impairment of a major bodily function. In other words, the new exception not only requires a permanent and substantial impairment to the minor but a medical instability. I am not aware of any other state in which such a restrictive definition of medical emergency exists and may not survive constitutional scrutiny under our express constitutional protections.

If I may be of further assistance, please advise.

JMM:med
08-140.med

3/10/08

Notice: This opinion is subject to correction before publication in the PACIFIC REPORTER. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, e-mail corrections@appellate.courts.state.ak.us.

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant/ Cross-Appellee, v. PLANNED PARENTHOOD OF ALASKA and JAN WHITEFIELD, M.D., Appellees/ Cross-Appellants.	Supreme Court Nos. S-11365/11386 Superior Court No. 3AN-97-06014 CI OPINION No. 6184 - November 2, 2007

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Sen K. Tan, Judge.

Appearances: Kevin G. Clarkson, Brena, Bell & Clarkson, P.C., Anchorage, for Appellant and Cross-Appellee. Janet Crepps, Center for Reproductive Rights, Simpsonville, South Carolina, and Suzanne Novak, Center for Reproductive Rights, New York, New York, for Appellees and Cross-Appellants, and Jeffrey M. Feldman, Feldman & Orlansky, Anchorage, for Appellees and Cross-Appellants, and Cooperating Attorney for the Alaska Civil Liberties Union. Paul Benjamin Linton, Northbrook, Illinois, and Robert Flint, Hartig, Rhodes, Hoge & Lekisch, Anchorage, for Amicus Curiae Alaska State Legislature. Kenneth C. Kirk, Kenneth Kirk & Associates, Anchorage, for Amicus Curiae Family Research Council. Wayne Anthony Ross, Ross & Miner, Anchorage, for Amicus Curiae Americans United for Life.

Geoffrey G. Currall, Keene & Currall, Ketchikan, for Amicus Curiae Liberty Legal Institute. Sara Trent, Anchorage, Cooperating Attorney for the Alaska Civil Liberties Union, and Kent A. Yalowitz, Arnold & Porter LLP, New York, New York, for Amicus Curiae Alaska Chapter of the American Academy of Pediatrics. Erica A. Green and Deborah Kovsky-Apap, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, D.C., and Christine Schleuss, Friedman Rubin & White, Anchorage, for Amici Curiae American College of Obstetricians and Gynecologists, Society of Adolescent Medicine, and Physicians for Reproductive Choice and Health. Janell Hafner, Reges & Boone, LLC, Juneau, and Stacey I. Young, Women's Law Project, Pittsburgh, Pennsylvania, for Amici Curiae National Association of Social Workers Alaska Chapter, Alaska Women's Lobby, Alaska Pro-Choice Coalition, National Center for Youth Law, Juvenile Law Center, and Jane's Due Process. Debra J. Brandwein, Foster Pepper Rubini & Reeves LLC, Anchorage, for Amicus Curiae Northwest Women's Law Center.

Before: Bryner, Chief Justice, Matthews, Eastaugh, Fabe, and Carpeneti, Justices.

FABE, Justice.
CARPENETI, Justice, with whom Matthews, Justice, joins, dissenting.

I. INTRODUCTION

From time to time, we are called upon to decide constitutional cases that touch upon the most contentious moral, ethical, and political issues of our day. In deciding such cases, we are ever mindful of the unique role we play in our democratic system of government. We are not legislators, policy makers, or pundits charged with making law or assessing the wisdom of legislative enactments. We are not philosophers, ethicists, or theologians, and "cannot aspire to answer" fundamental moral questions or

resolve societal debates.[1] We are focused only on upholding the constitution and laws of the State of Alaska.

Today, we are once again called upon to decide a case that implicates the controversial issue of abortion; more specifically, we are called upon to decide whether the Parental Consent Act impermissibly infringes upon a minor's fundamental right to privacy when deciding whether to terminate a pregnancy. We decide today that the State has an undeniably compelling interest in protecting the health of minors and in fostering family involvement in a minor's decisions regarding her pregnancy. And contrary to the arguments of Planned Parenthood, we determine that the constitution permits a statutory scheme which ensures that parents are notified so that they can be engaged in their daughters' important decisions in these matters. But we ultimately conclude that the Act does not strike the proper constitutional balance between the State's compelling interests and a minor's fundamental right to privacy.

This is the second time that this case has been before us, and we earlier held that the privacy clause of the Alaska Constitution extends to minors as well as adults and that the State may restrict a minor's privacy right "only when necessary to further a compelling state interest and only if no less restrictive means exist to advance that interest."[2] The State's asserted interest in protecting a minor from her own immaturity by encouraging parental involvement in her decision-making process is undoubtedly compelling. But by prohibiting a minor from obtaining an abortion without parental consent, the Act effectively shifts that minor's fundamental right to choose if and when

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[1] *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska*, 28 P.3d 904, 906 (Alaska 2001) (noting that we do not decide "philosophical questions about abortion which we, as a court of law, cannot aspire to answer").

[2] *State v. Planned Parenthood of Alaska*, 35 P.3d 30 (Alaska 2001) (*Planned Parenthood I*).

to have a child from the minor to her parents. There exists a less burdensome and widely used means of actively involving parents in their minor children's abortion decisions: parental notification.[3] The United States Supreme Court has recognized, in a different context, that "notice statutes are not equivalent to consent statutes because they do not give anyone a veto power over a minor's abortion decision."[4] And many states currently employ this less restrictive approach. Because the State has failed to establish that the greater intrusiveness of a statutory scheme that requires parental consent, rather than parental notification, is necessary to achieve its compelling interests, the Parental Consent Act does not represent the least restrictive means of achieving the State's interests and therefore cannot be sustained.

II. FACTS AND PROCEEDINGS

In 1997 the Alaska Legislature passed the Alaska Parental Consent Act (PCA).[5] The PCA prohibits doctors from performing an abortion on an "unmarried, unemancipated woman under 17 years of age" without parental consent or judicial authorization.[6] The Act subjects doctors who knowingly perform abortions on minors without the required consent or judicial authorization to criminal prosecution.[7] The

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[3] *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 511 (1990) (citing *H.L. v. Matheson*, 450 U.S. 398, 411 n.17 (1981)).

[4] *Id.*

[5] Ch.14, §§ 1-10, SLA 1997.

[6] AS 18.16.010(a)(3); AS 18.16.020.

[7] AS 18.16.010(c). The Act provides the doctor with an affirmative defense to prosecution and civil liability where compliance with the Act was not possible "because an immediate threat of serious risk to the life or physical health of the pregnant minor from the continuation of the pregnancy created a medical emergency necessitating (continued...)

parental consent requirement can be met through written consent from a parent, guardian, or custodian of the minor.[8] The Act also includes a judicial bypass procedure whereby a minor may file a complaint in superior court and obtain judicial authorization to terminate a pregnancy if she can establish by clear and convincing evidence either that she is "sufficiently mature and well enough informed to decide intelligently whether to have an abortion" or that being required to obtain parental consent would not be in her best interests.[9] If the court fails to hold a hearing within five business days after the complaint is filed, the court's inaction is considered a constructive order authorizing the minor to consent to terminate the pregnancy.[10]

On July 25, 1997, Planned Parenthood, Drs. Jan Whitefield and Robert Klem, and ten unidentified Jane Does filed a complaint in superior court seeking declaratory and injunctive relief. The complaint alleged that the PCA violates state constitutional rights to privacy, equal protection, and due process. On January 7, 1998, the plaintiffs filed a motion for summary judgment. The superior court granted that motion, concluding that the PCA violates the equal protection clause of the Alaska Constitution. The superior court also concluded that the privacy clause of the Alaska Constitution protects minors as well as adults. However, in light of its equal protection

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[7](...continued)
the immediate performance or inducement of an abortion." AS 18.16.010(g). We note that the superior court interpreted this statutory language as "broad enough" to "contain[] an appropriate medical emergency exception."

[8] AS 18.16.020(1).

[9] AS 18.16.030.

[10] AS 18.16.030(c). Similar time limits apply to this court's consideration of a minor's appeal from a denied petition. AS 18.16.030(j).

ruling, the superior court did not decide whether the PCA violates the Alaska Constitution's privacy clause.

The State appealed, and on November 16, 2001, we issued our decision in *Planned Parenthood I*.[11] In that case, we concluded that the privacy clause of the Alaska Constitution extends to minors as well as adults and that the State may constrain a pregnant minor's privacy right "only when necessary to further a compelling state interest and only if no less restrictive means exist to advance that interest."[12] We also reversed the grant of summary judgment and remanded the case for an evidentiary hearing to determine whether the PCA actually furthers compelling state interests using the least restrictive means available.[13]

On October 4, 2002, prior to the evidentiary hearing on remand, the plaintiffs again moved for summary judgment, this time arguing that the PCA violates the constitution by failing to exclude abortions performed in medical emergencies. On January 2, 2003, the superior court denied the motion for summary judgment.

From January 6 to January 24, 2003, the superior court held a bench trial to hear evidence regarding the constitutionality of the PCA. On October 13, 2003, the superior court issued a decision on remand holding that the PCA is unconstitutional because it fails to further compelling state interests using the least restrictive means available. On January 7, 2004, the superior court entered judgment declaring that the PCA was unconstitutional under the equal protection and privacy clauses of the Alaska Constitution and enjoining the State from enforcing the Act.

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[11] 35 P.3d 30 (Alaska 2001).

[12] *Id.* at 41.

[13] *Id.* at 46.

The State now appeals the superior court's judgment. The plaintiffs cross-appeal the superior court's denial of their motion seeking summary judgment based on the absence of a medical emergency exception.

III. STANDARD OF REVIEW

We review the superior court's factual determinations for clear error.[14] We review constitutional questions de novo, adopting the most persuasive rule of law in light of precedent, reason, and policy.[15] We uphold a statute against a facial constitutional challenge if "despite any occasional problems it might create in its application to specific cases, [the statute] has a plainly legitimate sweep."[16]

IV. DISCUSSION

Under our case law, we begin our analysis in cases such as the one at hand by measuring the weight and depth of the individual right at stake so as to determine the proper level of scrutiny with which to review the challenged legislation.[17] If this individual right proves to be fundamental, we mus then review the challenged legislation strictly, allowing the law to survive only if the State can establish that it advances a compelling state interest using the least restrictive means available.[18] In cases involving the right to privacy, the precise degree to which the challenged legislation must actually further a compelling state interest and represent the least restrictive alternative is

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14 *Grimm v. Wagoner*, 77 P.3d 423, 427 (Alaska 2003).

15 *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004).

16 *Id.* at 260 n.14.

17 *Ravin v. State*, 537 P.2d 494, 497 (Alaska 1975).

18 *Planned Parenthood I*, 35 P.3d at 41.

determined, at least in part, by the relative weight of the competing rights and interests.[19] As we have previously explained, "the rights to privacy and liberty are neither absolute nor comprehensive . . . [and] their limits depend on a balance of interests."[20]

A. The Individual Right at Stake Is Fundamental.

The plaintiffs assert that the PCA burdens minors' fundamental right to privacy under article I, section 22 of the Alaska Constitution.[21] This section of the constitution maintains that "[t]he right of the people to privacy is recognized and shall not be infringed." As we have previously explained, the primary purpose of this section is to protect Alaskans' "personal privacy and dignity against unwarranted intrusions by the State."[22] Because this right to privacy is explicit, its protections are necessarily more robust and "broader in scope" than those of the implied federal right to privacy.[23]

Included within the broad scope of the Alaska Constitution's privacy clause is the fundamental right to reproductive choice. As we have stated in the past, "few

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[19] *Cf. Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

[20] *Id.*

[21] Because we conclude that the PCA violates the right to privacy under the Alaska Constitution, we need not address the plaintiffs' arguments that the Act also violates the equal protection clause or that the superior court erred in interpreting the Act to include a medical emergency exception.

[22] *Luedtke v. Nabors Alaska Drilling Inc.*, 768 P.2d 1123, 1129 (Alaska 1989) (quoting *Woods & Rhode, Inc. v. State, Dep't of Labor*, 565 P.2d 138, 148 (Alaska 1977)).

[23] *See Ravin*, 537 P.2d at 514-15 (Boochever, J., concurring) (reasoning that "[s]ince the citizens of Alaska . . . enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution").

things are more personal than a woman's control of her body, including the choice of whether and when to have children," and that choice is therefore necessarily protected by the right to privacy.[24] Of course, our original decision concerning the fundamental right to reproductive choice specifically addressed only the privacy interests of adult women, but because the "uniquely personal physical, psychological, and economic implications of the abortion decision . . . are in no way peculiar to adult women,"[25] its reasoning was and continues to be as applicable to minors as adults.[26] Thus, in *Planned Parenthood I*, we explicitly extended the fundamental reproductive rights guaranteed by the privacy clause to minors.[27]

In the case at hand, the PCA requires minors to secure either the consent of their parent or judicial authorization before they may exercise their uniquely personal reproductive freedoms. This requirement no doubt places a burden on minors' fundamental right to privacy. As such, the PCA must be subjected to strict scrutiny and can only survive review if it advances a compelling state interest using the least restrictive means of achieving that interest.[28]

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[24] *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968 (Alaska 1997) (internal quotations omitted).

[25] *Planned Parenthood I*, 35 P.3d at 40 (internal quotations omitted).

[26] *Id.* (noting that "[d]eciding whether to terminate a pregnancy is at least as difficult, and the consequences of such decisions are at least as profound, for minors as for adults").

[27] *Id.*

[28] The dissent appears to liken a minor's decision of whether to terminate a pregnancy to decisions about attending school field trips, joining sports teams, viewing "R"-rated movies, and lifting weights at the gym. But this analogy overlooks the fundamental autonomy at stake in an adolescent's control over her own body. And in (continued...)

B. The State's Asserted Interests Are Compelling.

The State asserts that the PCA works, on the most generalized level, to advance two interrelated interests: protecting minors from their own immaturity and aiding parents in fulfilling their parental responsibilities.[29] We agree with the State that these are compelling interests.

Although the Alaska Constitution extends the right to privacy in equal measure to both minors and adults, it is not blind to the unique vulnerabilities and needs that accompany minority. As we noted in *Planned Parenthood I*, state interests that are inapplicable to adults may sometimes be compelling with regard to minors.[30] And this is certainly the case with regard to the State's asserted interest in protecting minors from their own immaturity. Lacking in "experience, perspective, and judgment," minors often do not possess the capacity to make informed, mature decisions, and are therefore susceptible to a host of pitfalls and dangers unknown in adult life.[31] As we have recognized in the past, the State has a special, indeed compelling, interest in the health,

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[28](...continued)
other important ways, a minor's decision to terminate a pregnancy is wholly unlike these decisions — the immediacy of the need to address the situation, coupled with the lasting and profound consequences of the decision, make it utterly unlike the day-to-day decisions mentioned by the dissent.

[29] More specifically, the State asserts that the PCA aims to (1) ensure that minors make an informed decision on whether to terminate a pregnancy; (2) protect minors from their own immaturity; (3) protect minors' physical and psychological health; (4) protect minors from sexual abuse; and (5) strengthen the parent-child relationship.

[30] 35 P.3d at 41 (quoting *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 819 (Cal. 1997)) (stating that a "statute's relationship to minors properly is employed in the constitutional calculus in determining whether an asserted state purpose or interest is 'compelling' ").

[31] *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

safety, and welfare of its minor citizens and may properly take affirmative steps to safeguard minors from their own immaturity.[32]

Insofar as and to the same extent that the State has an interest in protecting minors, so too does it have an interest in aiding parents to fulfill their parental responsibilities. A minor child "is not [a] mere creature of the state,"[33] and the "affirmative process of teaching, guiding, and inspiring"[34] a minor child is, in large part, "beyond the competence of impersonal political institutions."[35] Parents, therefore, have an "important 'guiding role' to play in the upbringing of their children."[36] Indeed, it is the right and duty, privilege and burden, of all parents to involve themselves in their children's lives; to provide their children with emotional, physical, and material support; and to instill in their children "moral standards, religious beliefs, and elements of good citizenship."[37] We thus echo the United States Supreme Court's statement that, "[u]nder the Constitution, the State can 'properly conclude that parents . . . who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid [in the] discharge of that responsibility.' "[38]

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[32] *See, e.g., Planned Parenthood I*, 35 P.3d at 40 (noting that "we have long emphasized the State's special interest in protecting the health and welfare of children").

[33] *Bellotti*, 443 U.S. at 637 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

[34] *Id.* at 638.

[35] *Id.*

[36] *H.L. v. Matheson*, 450 U.S. 398, 410 (1981).

[37] *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

[38] *Bellotti*, 443 U.S. at 639 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (continued...)

C. The PCA Is Not the Least Restrictive Means of Achieving the State's Compelling Interests.

Having identified and weighed the rights and interests at stake, we now turn to the task of assessing whether the PCA advances the State's compelling interests using the least restrictive means available.

We recognize that the legislature has made a serious effort to narrowly tailor the scope of the PCA by exempting seventeen-year-olds and other categories of pregnant minors from the Act's ban. It is true that the PCA is less restrictive than many other state statutes in terms of the scope of its coverage. But scope is only one of the important criteria that determine the extent to which a parental involvement law restricts minors' privacy rights. The method by which the statute involves parents is also central to determining whether the Act's provisions constitute the least restrictive means of pursuing the State's ends.

By prohibiting minors from terminating a pregnancy without the consent of their parents, the PCA bestows upon parents what has been described as a "veto power" over their minor children's abortion decisions.[39] This "veto power" does not merely restrict minors' right to choose whether and when to have children, but effectively shifts a portion of that right from minors to parents. In practice, under the PCA, it is no longer the pregnant minor who ultimately chooses to exercise her right to terminate her pregnancy, but that minor's parents. And it is this shifting of the locus of choice — this relocation of a fundamental right from minors to parents — that is constitutionally suspect. For a review of statutory schemes enacted around the nation reveals a widely

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[38](...continued)
(1968)).

[39] *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 511 (1990) (citing *Matheson*, 450 U.S. at 511 n.17).

used legislative alternative that does not shift a minor's right to choose: parental notification.

Currently, fifteen states have parental notification statutes in place.[40] Although the precise details of these statutes vary, they all prohibit minors from terminating a pregnancy until their parents have been notified and afforded an appropriate period of time to actively involve themselves in their minor children's decision-making processes.[41] Stated another way, these statutes seek to involve parents, not by giving them "veto power," but by giving them notice and time to consult with and guide their daughters through this important decision. As such, although parental notification statutes undoubtedly burden the privacy rights of minors, they do not go so far as to shift a portion of those rights to parents.

Of course, as the dissent emphasizes, the PCA does include a judicial bypass procedure through which some minors may effectively regain the right to reproductive choice by obtaining judicial authorization to forgo parental consent.[42] The

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[40] COLO. REV. STATE ANN. § 12-37.5-101 to 107; DEL. CODE ANN. Tit. 24, §§ 1780-1789(B); FLA. STAT. § 390.01114; Ga. Code Ann. § 15-11-110 to 114; ILL. COMP. STAT. 70/1-99; IOWA CODE § 135L.3; KAN. STAT. ANN. §§ 65-6701 to 6709; MD. CODE ANN., HEALTH-GEN. § 20-103; MINN. STAT. § 144.343; MONT. CODE ANN. §§ 50-20-201 to 215; NEB. REV. STAT. §§ 71-6901 to 6908; NEV. REV. STAT. 442.255; NJ STAT. ANN. § 9:17A-1.1 to 1.12; S.D. CODIFIED LAWS § 34-23A-7; W. VA. CODE §§ 16-2F-1 to 9.

[41] *See, e.g.*, GA. CODE ANN. § 15-11-112(a) (prohibiting physicians from performing an abortion on a minor unless the physicians give either "24 hours' actual notice, in person or by telephone, to a parent or guardian" or twenty-four hours' written notice, which is deemed delivered forty-eight hours after mailing); IOWA CODE § 135L.3(1) (prohibiting physicians from performing an abortion on a minor "until at least forty-eight hours' prior notification is provided to a parent of the pregnant minor").

[42] AS 18.16.030(e)–(f) provides that a minor may bypass the PCA's parental (continued...)

State argues that "judicial bypass is the means by which a girl can *relieve herself of the burden of parental consent.*" (Emphasis in original.) But the State and its supporting amici fail to effectively rebut the trial court's express findings to the contrary. According to the superior court's findings, the PCA's bypass procedures build in delay that may prove "detrimental to the physical health of the minor," particularly for minors in rural Alaska who "already face logistical obstacles to obtaining an abortion." The trial court found that judicial bypass procedures "will increase these problems, delay the abortion, and increase the probability that the minor may not be able to receive a safe and legal abortion." The State has not expressly challenged as "clearly erroneous" the superior court's findings on this point but dismisses these concerns, arguing that "[r]ural Alaskan girls will pursue bypass on the same trip to the same urban location where they must go to obtain their procedures." But not all minors possess the wherewithal to embark upon a formal legal adjudication during a time of crisis.

Moreover, the inclusion of this judicial bypass procedure does not reduce the restrictiveness of the PCA relative to a parental notification statute. Every state to enact a parental notification regime has opted to include either a judicial bypass procedure similar to the PCA's procedure or an even more permissive bypass

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[42](...continued)
consent requirement if a court determines by clear and convincing evidence that she is sufficiently mature and well enough informed to decide whether to have an abortion or that parental consent would not be in her best interests.

procedure.[43] As such, the PCA's inclusion of a judicial bypass procedure does not set the PCA apart from or reduce its intrusiveness relative to parental notification statutes.

Ultimately, because the PCA shifts the right to reproductive choice to minors' parents, we must conclude that the PCA is, all else being held equal, more restrictive than a parental notification statute. The State has failed to establish that the "greater intrusiveness of consent statutes" is in any way necessary to advance its compelling interests. In fact, in its briefing before us, the State has not focused on the PCA's benefits as flowing directly from the parental "veto power"; instead, it has consistently suggested that the PCA's benefits flow from increased parental communication and involvement in the decision-making process. According to the State, the PCA protects minors from their own immaturity by increasing "adult supervision"; it protects the physical, emotional, and psychological health of minors, "[p]articularly in the post-abortion context, [by increasing] parental participation . . . for the purposes of monitoring . . . risks"; it ensures that minors give informed consent to the abortion procedure by making it more likely that they will receive "counsel that a doctor cannot give, advice, adapted to her unique family situation, that covers the moral, social and religious aspects of the abortion decision"; it protects minors from sexual abuse since "once appr[]ised of a young girl's pregnancy, parents . . . will ask who impregnated her and will report any sexual abuse"; and it strengthens the parent-child relationship by

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[43] *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 20-103(c)(1) (providing that a physician may perform an abortion without notice to a parent or guardian if, "in the professional judgment of the physician[,] . . . [n]otification would not be in the best interest of the minor"); W. VA. CODE § 16-2F-3(c) (providing that parental notification may be "waived by a physician, other than the physician who is to perform the abortion, if such other physician finds that the minor is mature enough to make the abortion decision independently or that notification would not be in the minor's best interest").

"increas[ing] parental involvement," "parental consultation," and open and honest communication.

These expressed legislative goals — increased parental communication, involvement, and protection — are no less likely to accompany parental notification than the parental "veto power." The dissent suggests that where a minor forgoes judicial bypass, parental consent guarantees "a conversation." But it guarantees no more than a one-way conversation and "allows parents to refuse to consent not only where their judgment is better informed and considered than that of their daughter, but also where it is colored by personal religious belief, whim, or even hostility to her best interests."[44]

Notification statutes protect minors "by enhancing the potential for parental consultation concerning a [minor's] decision."[45] In fact, to the extent that parents who do not possess a "veto power" over their minor children's abortion decision have a greater incentive to engage in a constructive and ongoing conversation with their minor children about the important medical, philosophical, and moral issues surrounding abortion, a notification requirement may actually better serve the State's compelling interests.

In sum then, the PCA does not represent the least restrictive means of achieving the State's asserted interests and therefore cannot be sustained. In reaching this decision, we go no further than the Alaska Constitution demands, and merely

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[44] *State v. Koome*, 530 P.2d 260 (Wash. 1975) (holding that parental consent statute violates state constitutional right to privacy); *see also Am. Acad. of Pediatrics v. Lundgren*, 940 P.2d 797, 816 (Cal. 1997) (holding that parental consent law "intrude[s] upon" a pregnant minor's "protected privacy interest under the California Constitution").

[45] *Matheson*, 450 U.S. at 412; *see also Planned Parenthood Ass'n of the Atlanta Area, Inc. v. Miller*, 934 F.2d 1462, 1472-74 (11th Cir. 1991) (holding that Georgia's notification statute furthered the state's interest in "protecting immature minors" and promoting parental input).

reaffirm that the State does not strike the proper constitutional balance between its own compelling interests and the fundamental rights of its citizens by adopting an unnecessarily restrictive statute.

V. CONCLUSION

For the reasons detailed above, we AFFIRM the superior court's decision striking down the Parental Consent Act as a violation of the Alaska Constitution's right to privacy.

CARPENETI, Justice, with whom MATTHEWS, Justice, joins, dissenting.

In 1997, faced with competing interests of the highest constitutional level — an underage pregnant girl's constitutional right to privacy in deciding whether to terminate her pregnancy, her parents' constitutional right (and duty) to protect her best interests, and the state's compelling interests in protecting children against their own immaturity — the Alaska Legislature carefully crafted the Alaska Parental Consent Act in an effort to recognize and protect all of these interests. That law is fully consistent with United States Supreme Court precedent, yet today's opinion strikes it down. Because this court's rejection of the legislature's thoughtful balance is inconsistent with our own case law and unnecessarily dismissive of the legislature's role in expressing the will of the people, I respectfully dissent.

I. The Constitutional Framework

Before looking at the Parental Consent Act in detail to determine how it balances the strong competing interests involved, it is helpful to consider the analytical framework used by courts in deciding constitutional challenges of the kind involved in this case. In a series of cases, we have established a three-step process. We have first looked to the nature and extent of the individual right that is claimed. If we determine that the right is fundamental, we then examine whether the state's interest in burdening the individual right is compelling. If the state's interest is compelling, we look to make certain that there is a sufficiently close fit between the goals of the legislation and the means adopted by the state to reach those goals.

The individual right claimed in this case is the fundamental right of an unmarried pregnant minor to privacy in her decision whether to terminate her pregnancy. The compelling interest claimed by the state is multi-faceted, including protecting minors from their own immaturity (by recognizing the parents' right (and duty) to guide their

children's upbringing) and protecting the health of minors. If both the individual right is fundamental and the state's interest is compelling, the court must decide whether the law is tailored closely enough to achieve its intended purpose.

II. The Alaska Parental Consent Act

The hallmark of the Alaska Parental Consent Act (PCA or the Act) is the remarkable length to which the legislature went in order to accommodate all of the various, and at times competing, interests that are involved when an unmarried teenage (or pre-teen) girl is faced with pregnancy.[1] In recognition of the primary role that parents are normally expected to play in the upbringing of their children, and in recognition of the fact that children are generally not considered competent to consent to medical procedures, the Act requires the consent of a parent in order for the child to undergo an abortion.[2] In recognition of the fact that divulging her pregnancy to her parents may in some instances be unnecessary or inappropriate — because the minor is sufficiently mature and intelligent to decide the question on her own or because her parent or parents have engaged in physical, sexual, or emotional abuse against her (or because obtaining their consent is otherwise not in the child's best interests) — the Act provides for a

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[1] In drafting the Alaska Parental Consent Act, the legislature appears to have tracked carefully the requirements for parental consent and parental notification laws set out by the United States Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Planned Parenthood Ass'n. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976), *partially overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

[2] AS 18.16.020(1).

confidential and speedy "judicial bypass" procedure in which a judge decides whether the minor is competent to decide for herself.[3]

The legislature engrafted multiple exceptions to the scope of the Act in an effort to create a law that was specifically targeted, to the greatest extent possible, at the population of underage pregnant girls who would be in greatest need of adult guidance in reaching the decision whether to terminate pregnancy. First, the legislature exempted from the scope of the Act all seventeen-year-old girls.[4] The importance of this exemption can hardly be overstated. Studies consistently show that nearly half of all underage abortions are obtained by girls who have reached the age of seventeen.[5] Moreover, only one state consent law exempts seventeen-year-olds from its scope,[6] and only one state notification law does so.[7] This exception also identifies the population of teenage girls most likely competent, by virtue of maturity and experience, to make the decision regarding abortion without adult assistance, and allows them to do so.

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[3] AS 18.16.020(2). In the event that the court fails to act, such failure will be considered to be judicial authorization for the abortion. AS 18.16.020(3).

[4] AS 18.16.020.

[5] Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 Family Planning Perspectives, Sept/Oct. 1992 at Table 1. *See also* Letter from Susan K. Steeg, General Counsel, Texas Department of Health (May 26, 2004) (stating that of the 3654 minor women who obtained an abortion in Texas in 2002, 1694 or forty-six percent of them were age seventeen); Aida Torres, Jacqueline Darroch Forrest & Susan Eisman, *Telling Parents: Clinic Policies and Adolescent's Use of Family Planning and Abortion Services*, 12 Family Planning Perspectives, Nov/Dec 1980, 284, 287 (forty-four percent of the 1170 unmarried minor abortion patients surveyed were seventeen years old).

[6] S.C. CODE ANN. § 44-41-10(m) (2006).

[7] DEL. CODE ANN. tit. 24 § 1782(6) (2007).

Second, the legislature exempted from the scope of the Act four additional classes of minors. Each exemption shows that the legislature was attempting to shape a law that would be applied only to those pregnant girls who would most be in need of adult help. Accordingly, the law does not apply to married minors,[8] to minors who have been legally emancipated,[9] to minors who have entered the armed services of the United States,[10] and to minors who have become employed and self-subsisting.[11]

Third, in an apparent effort to make certain that the Act would not have coverage over any other underage pregnant girls who were capable of making the decision on their own, the legislature included a catch-all exception to the Act: any who had "otherwise become independent from the care and control of [her] parent, guardian, or custodian."[12]

The legislature next created a judicial bypass procedure to cover those cases of underage pregnancy not covered by these exceptions. The judicial bypass procedure is designed to be confidential, speedy, cost-free to the child, and easy to use. The court system is directed to prepare forms for use by the child[13] without charge[14] and have them available at every court location in the state: superior court, district court, and

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8 AS 18.16.020.

9 *Id.* and AS 18.16.090(2)(C).

10 AS 18.16.020, .090(2)(A).

11 AS 18.16.020, .090(2)(B).

12 AS 18.16.020, .090(2)(D).

13 AS 18.16.030(l).

14 *Id.*

magistrate.[15] Counsel shall immediately be made available without charge to any minor who seeks judicial bypass[16] and the forms shall contain this notification.[17] There are no filing fees to be charged[18] and no court costs assessed[19] against the child.

The proceedings surrounding judicial bypass are strictly confidential: Courts are instructed to conduct all proceedings so as to preserve the anonymity of the child.[20] Moreover, the Act specifically directs the court that it "may not notify the parents, guardian, or custodian" of the child that she is pregnant or seeks an abortion.[21] All papers and records pertaining to the matter "shall be kept confidential and are not public records" under Alaska law.[22]

In deference to the need for speedy resolution of the consent question in cases where an abortion is sought, the Act provides for extremely short timelines. The court is directed to set the hearing "at the earliest possible time" and in any event not more than five business days after the complaint is filed.[23] The court is directed to enter

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[15] AS 18.16.030(n).

[16] AS 18.16.030(d). The only exception is that if the child already has counsel. *Id.*

[17] AS 18.16.030(n)(3).

[18] AS 18.16.030(n)(1).

[19] AS 18.16.030(n)(2).

[20] AS 18.16.030(k).

[21] AS 18.16.030(h).

[22] AS 18.16.030(k).

[23] AS 18.16.030(c).

judgment "immediately after the hearing is ended."[24] If the hearing is not held by the fifth day after the case is filed, that failure will be considered to be a constructive authorization by the court for the child to consent to an abortion.[25] Similarly short deadlines apply to an appeal.[26]

As to the substance of the inquiry that the judge must make, it is straightforward and simple: The court determines whether the child is sufficiently mature and informed to make the decision to have an abortion.[27] (In those cases where the minor has alleged abuse by her parent or guardian, the court determines whether such abuse has occurred.[28]) If the child is sufficiently mature to make the decision (or if abuse has occurred and an abortion is in the minor's best interest), the court authorizes her to consent to an abortion; if she is not sufficiently mature to decide on her own or if there has not been abuse, the case is dismissed.[29]

In sum, the Alaska Parental Consent Act appears to be the product of a concerted effort to make certain that those pregnant girls who are sufficiently mature to make the decision to obtain an abortion on their own are allowed to do so while those who are not sufficiently mature either obtain a parent's consent or, in the case of parental abuse, a judicial determination that the procedure is in their best interest.

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24 *Id.*

25 *Id.*

26 AS 18.16.030(j). *See also* Alaska R. App. P. 220.

27 AS 18.16.030(e).

28 AS 18.16.030(f).

29 AS 18.16.030(e), (f).

III. Analysis

Application of the three-part test for constitutionality (set out above in the discussion of the constitutional framework) has tended in this case to focus on the third part of the test: whether the means chosen by the legislature are sufficiently narrowly tailored to the goals of the legislation. I agree that this inquiry is the most difficult in this case. But I also believe that failure to focus carefully on the nature of the interests involved can lead to a failure to assess correctly the success of the legislature's effort to tailor the legislation to meet its goals. For this reason, I turn now to each step of the test for constitutionality.

A. The Individual Right — To Exercise Autonomy in the Control of One's Body, and in the Choice to Bear a Child — Is Fundamental.

The individual right involved in this case is the right to privacy. While that right is often associated with the maintenance of secrecy or confidentiality with regard to one's affairs (and that is present to some extent in this case), the gravamen of the individual's concerns in this case is the right to exercise autonomy in the control of one's body. In *Valley Hospital Association v. Mat-Su Coalition for Choice*,[30] we relied on the need for a woman to have "control of her body, and the choice whether or when to bear children,"[31] in determining that "reproductive rights are fundamental, and that they are encompassed within the right to privacy."[32]

But it is important to remember that *Valley Hospital* concerned the rights of adult women. Today's opinion relies on the court's statement in its earlier decision

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[30] 948 P.2d 963 (Alaska 1997).

[31] *Id.* at 968.

[32] *Id.* at 969.

in this case that "minors and adults start from the same constitutional footing,"[33] but it does not meet the promise of that earlier opinion fully to take into account the fact that the persons to whom the statute in this case is directed are children. In holding that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority,"[34] the court's earlier opinion in this case hastened to add:

> Of course this does not mean that evidence of the "peculiar vulnerability of children [and] their inability to make critical decisions in an informed, mature manner" has no place in determining whether the parental consent or judicial authorization act is constitutional. To the contrary, we have long emphasized the state's special interest in protecting the health and welfare of children.[35]

The opinion then explained how this "peculiar vulnerability" of children was to be taken into account in the constitutional analysis: "[A] statute's relationship to minors properly is employed in the constitutional calculus in determining whether an asserted state purpose or interest is 'compelling.' "[36] Indeed, in support of its conclusion that minors enjoy a constitutional right to privacy similar to that of adults, this court quoted Justice

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[33] Opinion at 7; *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 41 (Alaska 2001) (*Planned Parenthood I*).

[34] 35 P.3d at 40 (quoting *Planned Parenthood of Cent. Mo. v Danforth*, 428 U.S. 52, 74 (1976)).

[35] 35 P.3d at 40 (footnote omitted).

[36] *Id.* at 41 (quoting *American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 819 (Cal. 1997)).

Marshall's dissent in *H.L. v. Matheson*[37] that, rather than saying the minor's privacy right is somehow less fundamental than an adult's, "the more sensible view is that state interests inapplicable to adults may justify burdening the minor's right."[38] But when the court looks to the state's and parents' interests in this case, it treats them in conclusory fashion. A fuller exposition is warranted.

B. The State's Interests — To Protect Children from Their Own Immaturity and To Protect Parents' Rights and Duties To Raise Their Children — Are Compelling.

Despite the promise of *Planned Parenthood I* to take into account the fact that children are involved during step two of the constitutional analysis — the step that asks "whether an asserted state purpose or interest is 'compelling' " — the court today quickly passes over this step.

The court's cursory discussion of the nature of the state's compelling interests at stake in this case is inconsistent with our case law on the right to privacy; moreover, it deprives the court's later means-to-ends analysis of any context. Let us consider each of these failings in turn.

In *Sampson v. State*,[39] a privacy-based challenge to Alaska law precluding physician-assisted suicide, we set out the importance of carefully examining the nature of the competing interests involved. In upholding the ban on physician-assisted suicide, we said:

> This court has often emphasized the importance of personal autonomy under our constitution. Yet we have also recognized that

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37 450 U.S. 398 (1981).

38 *Id.* at 441 n.32.

39 31 P.3d 88 (Alaska 2001).

> the rights to privacy and liberty are neither absolute nor comprehensive — that their limits depend on a balance of interests. The nature of the balance varies with the importance of the rights actually infringed.[40]

Because the nature of the balance varies with the importance of the rights involved and because in the context of the case before us now — pregnant children who are considering abortion — there are important rights on both sides of the equation, including the rights of parents to guide their children, it is particularly important that the court look closely at the nature of the state's interests in the legislation.

The court's failure to look closely at the nature of the state's and parents' interests leaves its constitutional "balance" one-sided. Because the court has not fully and accurately set out the nature of society's compelling interest in the protection of children and of parents' right and duty to raise their children, it is impossible to accurately gauge how close the law comes to meeting its objectives. As a detailed look at the state's interest shows, it is multi-faceted and is served in many ways by Alaska's Parental Consent Law. It consists of at least two[41] separate aspects.

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[40] 31 P.3d at 91 (footnotes omitted).

[41] The superior court actually identified six compelling state interests in its opinion. They were as follows: (1) "State has a compelling interest in protecting minors from their own immaturity." (2) "State has a compelling interest in protecting the physical, emotional, and psychological health of minors." (3) "State has a compelling interest in ensuring that doctors obtain informed consent from their minor patients contemplating pregnancy related decisions." (4) "State has a compelling interest in protecting minors from sexual abuse . . . ." (5) "The court finds that the state does have many interests, some of them compelling, in fostering and protecting the family structure . . . ." (6) "This court finds that protecting rights to a civil action is a compelling state interest."

First, society has longstanding and pervasive interests in protecting children from their own immaturity. The United States Supreme Court has repeatedly recognized society's interest in protecting children from their own immaturity. In *Hodgson v. Minnesota*,[42] the Court held: "The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."[43] The Court noted that "[t]hat interest, which justifies state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or entering military service, extends also to the minor's decision to terminate her pregnancy."[44] In *Stanford v. Kentucky*,[45] Justice Brennan noted:

> [M]inors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and

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[42] 497 U.S. 417 (1990).

[43] *Id.* at 444.

[44] *Id.* at 444-45. *See also Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 490-91 (1983) ("A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial."); *Parham v. J. R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 102-04 (1976) (Stevens, J., concurring and dissenting) (minors may not make enforceable bargains, work, or travel where they please, attend exhibitions of constitutionally-protected adult motion pictures, marry, etc.); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (holding that fourteen-year-old's criminal confession made without advice of adult violated due process because of child's inherent lack of maturity).

[45] 492 U.S. 361 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005).

> consider desirable for full participation in the rights and duties of modern life.
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> . . . Adolescents "are more vulnerable, more impulsive, and less self-disciplined than adults," and are without the same "capacity to control their conduct and to think in long-range terms."[46]

State courts too have long recognized that children require protection from their own immaturity. Pennsylvania, for example, has noted that the state's strong interest in protecting younger minors from the sexual aggressiveness of minors over sixteen is based on the immaturity and poor judgment of younger minors.[47] Similarly, Florida upheld a law prohibiting consensual sexual contact between minors sixteen and older and those under thirteen because the state had a compelling interest in "protecting twelve-year-olds from older teenagers and from their own immaturity in choosing to participate in harmful activity."[48]

As Justice Matthews set out in his dissent in our earlier consideration of this case, *Planned Parenthood I*:

> Children's freedoms have long been constrained in ways that would not be permissible for adults. Constraints on children are imposed in order to protect them, and

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[46] *Id.* at 395 (Brennan, J., dissenting) (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978)).

[47] *Commonwealth v. Albert*, 758 A.2d 1149, 1154 (Pa. 2000).

[48] *J.A.S. v. State*, 705 So. 2d 1381, 1386 (Fla. 1998). *See also In re E.G.*, 549 N.E.2d 322, 327 (Ill. 1989) (holding that court should distinguish mature minors from immature minors for purpose of determining right to refuse medical treatment because 'the State has a *parens patriae* power to protect those incompetent to protect themselves").

> sometimes society as a whole, from the consequences of their immaturity. Thus children may not exercise the fundamental right to vote. They generally may not make contracts or smoke cigarettes or drink alcoholic beverages or consent to sexual intercourse. Without a parent's consent they may not become licensed drivers or get married or obtain general medical or dental treatment. Alaska's parental consent/judicial bypass act is in the tradition of these constraints on children's freedoms. . . . The act is designed to ensure that each child makes a decision that is best for her.[49]

The notion that parental consent laws further the state interest of protecting minors from their immaturity is neither novel nor surprising. As a matter of law society demands much of parents; it is expected that they will assist their children in making proper decisions until those children reach adulthood. Parents of teenagers and younger children are familiar with the ubiquitous "permission slips" which must be signed before their children may go on a school field trip; and parental permission is routinely required before minors may join a sports team, before an under-seventeen minor may view an "R"-rated movie, and before a minor may even lift weights at the local gym.[50] Parental

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[49] 35 P.3d at 46-47.

[50] Today's Opinion mistakenly asserts that the dissent "appears to liken a minor's decision of whether to terminate a pregnancy to decisions about attending school field trips, joining sports teams, viewing "R"-rated movies, and lifting weights at the gym" and argues that the decision to terminate a pregnancy is wholly unlike these decisions. (Opinion 10, n.28) The Opinion misses the point entirely: Of course permission-slip decisions do not have the "lasting and profound consequences" (Opinion 10, n.28) of the abortion decision, and yet the law imposes the necessity of parental consent upon them. If society deems parental consent critical in such lesser matters, (continued...)

involvement in the everyday decisions of their children enables parents to continue to help their children develop, even as the children grow older and more independent. The rights and obligations of parents to remain involved is intricately bound up with the rights of children to receive guidance and to be protected from their own immaturity. Courts have long recognized these interests: "[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[51]

For an immature pregnant minor, parental involvement is at least as important in the difficult decision concerning abortion as it is in the "permission slip" activities mentioned in the last paragraph. In *Ohio v. Akron Center for Reproductive Health* (*Akron II*),[52] a case concerning a parental notification requirement, the United States Supreme Court held that the requirement furthered the state's interest in helping minors to make more mature decisions.[53] Some minors may hesitate to seek parental advice if not required to by law because they are young and afraid. In those cases where a pregnant minor has been abused or fears an improper parental response, the PCA carves out a judicial bypass procedure whereby the minor may avoid all parental notification.

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[50](...continued)
should not the parents play a similar role when the consequence to the child are so vastly greater? And in arguing that "fundamental autonomy [is] at stake in an adolescent's control over her own body," (Opinion 10, n.28) the Opinion ignores that parental consent is required for virtually every other medical procedure involving a child. *See Hodgson v. Minnesota*, 497 U.S. 417, 423 (1990) (recognizing "the common-law requirement of parental consent for any medical procedure performed on minors.")

[51] *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[52] 497 U.S. 502 (1990).

[53] *Id.* at 519.

However, it is improper for this court to assume that harmful parental responses will be a likely or typical response for the minors compelled to seek parental consent under the PCA. As Justice Kennedy noted in *Akron II*, "[i]t is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature."[54] Indeed, to prohibit states from ensuring that in most cases young women receive guidance from a parent when making this decision would "deny all dignity to the family."[55] Similarly, Justice Stevens noted that it is reasonable for a state legislature to conclude that "most parents will be primarily interested in the welfare of their children," making the imposition of a consent requirement an "appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and implement a correct decision."[56] Because pregnant minors in Alaska will normally benefit from the involvement of a parent in one of the most critical decisions they can ever make, the PCA furthers the state interests of protecting minors from their immaturity and preserving the rights of parents to raise their children.

The PCA seeks to protect a second compelling interest in abortion cases involving children. In addition to society's interest in protecting children from their own immaturity, we have long held that parents have a fundamental right in the raising of their children. In *S.O. v. W.S.*,[57] we noted that when the state seeks to terminate the parent-child relationship, the result may be the involuntary deprivation of "the

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[54] *Id.* at 520.

[55] *Id.*

[56] *Planned Parenthood v. Danforth*, 428 U.S. 52, 104 (1976) (Stevens, J., concurring).

[57] 643 P.2d 997 (Alaska 1982).

fundamental natural right of parents to nurture and direct the destiny of their children."[58] *S.O.* relied on and quoted *Turner v. Pannick*,[59] in which Justice Dimond, in commenting on this fundamental right of parents to nurture and direct the upbringing of their children, stated: "This is a truth which one discovers by reason, and has the status of knowledge rather than mere opinion."[60] He noted that "[the family] forms the basic unit of our society" and is "one of the oldest institutions known to mankind."[61]

In sum, the norm in American, and Alaskan, life and law is that parents are a child's first and most important resource for assistance in decision-making. For that reason, the state's interest in protecting children from the consequences of their own immaturity, and in so doing protecting the health of its children, and its interest in supporting parents' right and duty to guide the upbringing of their children is particularly compelling.

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58 *Id.* at 1006.

59 540 P.2d 1051 (Alaska 1975).

60 *Id.* at 1055 (Dimond, J., concurring).

61 *Id.* at 1055-56.

C. The Fit Between the State's Interests and the Means Adopted To Reach Them Are Sufficiently Close To Pass Constitutional Muster.

We now reach the third part of the constitutional analysis. In order to survive constitutional scrutiny, the PCA must be narrowly tailored in meeting the state's interests. Because the child's privacy interests are fundamental, there must be no less restrictive alternative available to the state.[62] As the following shows, the PCA is narrowly tailored to its goals. In addition, the alternatives discussed by the superior court and today's opinion are either more restrictive than the PCA or ineffective at meeting the state's interests, or both.

1. The PCA is narrowly tailored.

Before embarking on this analysis, however, it is important to address the majority's assertion that "the PCA bestows upon parents what has been described as a 'veto power' over their minor children's abortion decisions."[63] Indeed, the claim that the PCA gives parents a "veto power" runs throughout today's Opinion,[64] and this supposed "veto power" may fairly be seen as the fundamental weakness of the PCA in the court's view. But the claim is false as it applies to minors who are sufficiently mature to make the decision, and it relies on quotation of the United States Supreme Court taken out of context. The claim is false because a pregnant minor faced with the abortion decision may decide to obtain an abortion without parental consent by using the judicial bypass

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[62] *Planned Parenthood I*, 35 P.3d 30, 41 (Alaska 2001).

[63] Opinion 12, quoting *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 511 (1990).

[64] *See, e.g.*, Opinion at 4 ("the Act effectively shifts that minor's fundamental right to choose if and when to have a child from the minor to the parents"); 4 ("veto power"); 12 (same); 13 (same); 15 ("the PCA shifts the right to reproductive choice to minors' parents"); 16 ("veto power").

procedure.[65] The quotation is taken out of context because the case it comes from, *Ohio v. Akron Center for Reproductive Health*, restated the Supreme Court's clearly established precedent "that, in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a State must provide some sort of bypass procedure if it elects to require parental consent."[66] Thus, today's Opinion's repeated assertions that the PCA gives parents a veto power over their child's abortion decision is simply not true as applied to children who are sufficiently mature to make the decision. And its implication that the United States Supreme Court would regard the PCA as giving parents a "veto power" is equally wrong: Because the PCA does provide a bypass procedure, the Act — in the language of the Supreme Court — "prevent[s]" the parent from holding veto power.

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[65] *See* AS 18.16.030. The judge in a bypass case must decide whether the child is "sufficiently mature and well enough informed to decide intelligently whether to have an abortion." If she is, the court issues an order authorizing her to consent to the procedure "without the consent of a parent, guardian, or custodian." AS 18.16.030(e). (If she is not, the court dismisses the case. *Id.* Presumably, a child found to be insufficiently mature to make such a decision should not make it.)

[66] 497 U.S. at 510-11 (emphasis added). Moreover, although the reference in today's Opinion to the use of "veto power" in the United States Supreme Court's opinions in *H.L. v. Matheson* and *Ohio v. Akron Center* is technically accurate (in the sense that the term appears in both opinions), it is also misleading. *Ohio v. Akron Center*, when it referred to *Matheson*, simply established that notice statutes are not equivalent to consent statutes for the purpose of constitutional analysis. Neither *Matheson* nor *Akron Center* directly addressed what types of bypass procedures are capable of curing the constitutionally fatal "veto power" found in consent statutes without bypass procedures. Instead, both *Matheson* and *Akron Center* dealt solely with the constitutionality of parental notification statutes.

The Parental Consent Act is very narrowly drawn to achieve its compelling state interests. To begin, as noted above, the PCA excludes all seventeen-year-olds.[67] We have seen that the exclusion of seventeen-year-olds is particularly noteworthy because almost half of minor abortions are performed on seventeen-year-old minors,[68] and thus by excluding seventeen-year-olds the legislature almost halved the pool to which the PCA applies. We have also seen that this narrowing of the minors covered by the Act is not arbitrary, but instead is tailored to eliminate those least likely to need the legislation: the most mature of the pregnant minors.

The use of age as a proxy for maturity is fundamental to our legal system and social culture. As the Supreme Court recently noted in *Roper v. Simmons*,[69] the difference in maturity levels between adults and children is evidenced by both common sense and science:

> [A]s any parent knows and as the scientific and sociological studies . . . tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. . . . Even the normal 16-year-old customarily lacks the maturity of an adult. . . . [A]dolescents are overrepresented statistically in virtually every category of reckless behavior. In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from

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67 AS 18.16.020.

68 *See supra* note 5.

69 543 U.S. 551 (2005).

> voting, serving on juries, or marrying without parental consent.[70]

Age distinctions are not made with an expectation that they perfectly track maturity.[71] All minors under age eighteen are prohibited from voting not because it is unfathomable that a seventeen-year-old is capable of responsibly exercising the right to vote, nor is the prohibition based upon the assumption that all adults vote responsibly. Rather, the legal system accepts lack of perfection in meeting the state's interests in order to create a feasible, more convenient, and less intrusive system of governance. As Justice Holmes noted in *Louisville Gas & Electric Co. v. Coleman*:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the

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[70] *Id.* at 569 (internal quotations and citations omitted).

[71] *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 104-05 (1976) (Stevens, J., concurring and dissenting) ("In all . . . situations [where state legislation seeks to protect minors from the consequences of decisions they are not prepared to make] chronological age has been the basis for imposition of a restraint on the minor's freedom of choice even though it is perfectly obvious that such a yardstick is imprecise and perhaps even unjust in particular cases.").

> Legislature must be accepted unless we can say
> that it is very wide of any reasonable mark.[72]

The Alaska Court of Appeals similarly noted in *Allam v. State*[73] that "[s]tatutes [that set the age for possession of tobacco, possession of alcohol, age of consent for sexual intercourse, etc.,] and the social policy decisions that underlie them, are within the province of the legislature. There is no legal requirement that the same age of majority apply to all activities and circumstances."[74] By exempting seventeen-year-olds from the PCA, the legislature appropriately tailored the legislation to affect the less mature population of pregnant minors.

Significantly, this narrowing of the PCA based on age also makes it less restrictive than every other parental consent law but one[75] and less restrictive than all but one of the notification laws in effect in other states because all the rest apply to seventeen-year-olds,[76] as discussed in more detail below.

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72 277 U.S. 32, 41 (1928) (Holmes, J., dissenting).

73 830 P.2d 435 (Alaska App. 1992).

74 *Id.* at 438.

75 *See* S.C. CODE ANN. § 44-41-10(m) (also defining minors as "under the age of seventeen").

76 Delaware appears to be the only exception among "notification" states. DEL. CODE ANN. tit. 24, § 1782(6) (requiring notification for those under age sixteen). *But cf.* KAN. STAT. ANN. § 65-6701(f) (2006); MD. CODE ANN., HEALTH-GEN. § 20-103 (2005); MINN. STAT. § 144.343 (2005); MONT. CODE ANN. § 50-20-203(6) (2005); NEB. REV. STAT. § 71-6901(5) (2006); NEV. REV. STAT. § 442.255 (2005); S.D. CODIFIED LAWS § 34-23A-7 (2006); TEX. FAM. CODE ANN. § 33.002 (2007); W. VA. CODE § 16-2F-2 (2007).

As noted, the legislature further tailored the PCA by excluding four additional categories of minors: legally emancipated minors,[77] married minors,[78] minors living independently,[79] and minors who are members of the armed services.[80] These are hallmarks of maturity in our society. By excluding identifiably mature minors age sixteen and under, the legislature went a long way towards assuring that the legislation would not be over-inclusive. Furthermore, in these respects the PCA is less restrictive than every other state's notification laws that do not contain these exceptions.[81]

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[77] AS 18.16.020 (applying the statute only to minors known to be "unmarried. . .and unemancipated"). The majority opinion notes that a minor must prove by clear and convincing evidence that she is sufficiently mature in order to obtain a judicial bypass, while the standard of proof for legal emancipation is a preponderance of the evidence. Because any minor who has established legal emancipation is already exempted from the scope of the PCA, however, the PCA is not over-broad on this account. Furthermore, it is logical that a minor who cannot prove that she is globally ready to be free from parental supervision may nonetheless be mature on the specific issue of the decision to terminate her pregnancy. This discrepancy in what must be proven negates an easy comparison regarding the burden of proof that a minor must satisfy.

[78] *Id.*

[79] AS 18.16.090(2)(B). By its express terms the PCA provides a much broader interpretation of the term "unemancipated" than Alaska's formal emancipation statute, AS 09.55.590. The term is defined in AS 18.16.090(2):

> "unemancipated" means that a woman who is unmarried and under 17 years of age has not done any of the following:
> (A) entered the armed services of the United States;
> (B) become employed and self-subsisting;
> (C) been emancipated under AS 09.55.590; or
> (D) otherwise become independent from the care and control of the woman's parent, guardian, or custodian.

[80] AS 18.16.090(2)(A).

[81] MD. CODE ANN., HEALTH-GEN. § 20-103 (no exception for emancipated (continued...)

The final narrowing of the PCA is derived from the judicial bypass procedure. Although neither the superior court nor this court's majority analyze the bypass procedure under the least restrictive means test, the judicial bypass significantly narrows the effect of the law because it provides a way for mature minors who are not otherwise statutorily exempted to obtain an abortion without parental consent. As Justice Matthews recognized in *Planned Parenthood I*, the judicial bypass procedure satisfies all the criteria established by the United States Supreme Court in *Bellotti v. Baird*.[82] Indeed, the judicial bypass process was meticulously crafted with the minor's need for confidentiality and an expedited decision incorporated into the system. The PCA errs on the side of granting the judicial bypass whenever delay is threatened: If the superior court fails to provide a hearing within five business days of a minor filing the petition, the delay operates as an automatic finding in the minor's favor, resulting in a constructive waiver of the consent requirement. Similarly, if the minor loses in the superior court and the hearing on appeal is delayed more than five days after the docketing of the appeal, a constructive order must issue authorizing the minor to undergo the abortion.[83]

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[81](...continued)
minors); KAN. STAT. ANN. § 65-6705 (2006) (no exception for unemancipated minors living independently); MINN. STAT. § 144.343 (same); MONT. CODE ANN. §§ 50-20-201 to 215 (same); NEB. REV. STAT. §§ 71-6901 to 6908 (same); S.D. CODIFIED LAWS § 34-23A-7 (same); TEX. FAM. CODE ANN. §§ 33.001 to 011 (same); W. VA. CODE §§ 16-2F-1 to 9 (same).

[82] 35 P.3d at 51-52 (Matthews, C.J., dissenting) (citing to *Bellotti*, 443 U.S. 622 (1979)) (noting that (1) proceedings must except minor from any parental consent requirements if minor can establish she is mature enough to make abortion decision, or that requiring consent is not in her best interests and (2) proceedings must be completed with anonymity and sufficient expedition).

[83] AS 18.16.030(j).

2. The PCA is the least restrictive means to achieve the state's compelling interests.

The PCA not only furthers a compelling state interest in a manner narrowly tailored and in compliance with the federal constitution, but it is also the least restrictive means of doing so. The least restrictive means test is properly a difficult burden for the state to meet, as it protects fundamental rights against unnecessary state intrusion. However, it is not an impossible standard for the state to meet. A mere showing that the state might have taken less restrictive action, say, by enacting a notification statute instead, is not sufficient to defeat legislation absent a determination that the less restrictive action would effectively achieve the state's compelling interests. Indeed, the least restrictive action that a state may take in every case is not to legislate at all.

In *Treacy v. Municipality of Anchorage*,[84] in upholding the constitutionality of an Anchorage curfew law imposed on minors under age eighteen, we found proposed "less restrictive" alternatives to be unavailing because they were not effective in meeting the municipality's compelling interests.[85] Alternatives to the PCA which are less restrictive are therefore not bars to the constitutionality of the legislation unless such alternatives are effective in meeting the state's compelling interests.

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84 91 P.3d 252 (Alaska 2004).

85 *Id.* at 267.

Today's opinion repeatedly proffers the alternative of parental notification rather than parental consent, (an approach followed by only fifteen state legislatures[86] in comparison to the twenty-six state legislatures[87] that have adopted consent statutes[88]).

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[86] COLO. REV. STAT. ANN. §§ 12-37.5-101 to 107 (West 2007); DEL. CODE ANN. tit. 24, §§ 1780 to 1789B; FLA. STAT. § 390.01114 (West 2007); GA. CODE ANN. §§ 15-11-110 to 118 (West 2007); 750 ILL. COMP. STAT.ANN. 70/1 to 99 (West 2007); IOWA CODE ANN. § 135L.3 (West 2007); KAN. STAT. ANN. §§ 65-6701 to 6709; MD. CODE ANN., HEALTH-GEN. § 20-103; MINN. STAT. § 144.343; MONT. CODE ANN. §§50-20-201 to 215; NEB. REV. STAT. §§ 71-6901 to 6908; NEV. REV. STAT. 442.255; N.J. STAT. ANN. § 9:17A-1.1 to 1.12 (West 2007); S.D. CODIFIED LAWS § 34-23A-7; W. VA. CODE §§ 16-2F-1 to 9 (2006). Oklahoma, Texas, and Utah, not counted here, require both notification and consent . OKLA. STAT. ANN. tit . 63, § 1-740.2 (WEST 2006); TEX. FAM. CODE ANN. §§ 33.001 to .011; TEX. OCC. CODE ANN. § 164.052(a)(19); UTAH CODE ANN. §§ 76-7-304, 76-7-304.5 (West 2006).

[87] ALA. CODE §§ 26-21-1 to 8 (1992); ARIZ. REV. STAT. ANN. § 36-2152 (2006); ARK. CODE ANN. §§ 20-16-801 to 810 (West 2006); CAL. HEALTH & SAFETY CODE § 123450 (West 2007); IDAHO CODE ANN. § 18-609A (West 2007); IND. CODE § 16-34-2-4 (West 2006); KY. REV. STAT. ANN. §§ 311.720, 311.732 (West 2006); LA. STAT. ANN. § 40:1299.35.5 (2006); ME. REV. STAT. ANN. tit. 22, § 1597-A (2006); MASS. GEN. LAWS ch. 112, § 12S (2004); MICH. COMP. LAWS ANN. §§ 722.901 to 722.909 (West 2006); MISS. CODE ANN. § 41-41-53 (West 2006); MO. ANN. STAT. § 188.028 (West 2006); N.C. GEN. STAT. ANN. §§ 90-21.6 to 90.21.10 (West 2006); N.D. CENT. CODE § 14-02.1 to 03.1 (2005); OHIO REV. CODE ANN. § 2919.121 (West 2006); OKLA. STAT. ANN. tit. 63, § 1-740.2 (West 2006); 18 PA. CONS. STAT. ANN. § 3206 (West 2006); R.I. GEN. LAWS § 23-4.7-6 (2006); S.C. CODE ANN. § 44-41-31 (2006); TENN. CODE ANN. §§ 37-10-301 to 308 (2005); TEX. FAM. CODE ANN. §§ 33.001 to .011; TEX. OCC. CODE ANN. § 164.052(a)(19); UTAH CODE ANN. §§ 76-7-304, 76-7-304.5; VA. CODE ANN. § 16.1-241(V) (West 2006); WIS. STAT. ANN. § 48.375 (West 2005); WYO. STAT. ANN. § 35-6-118 (2006).

[88] Three states, Oklahoma, Texas, and Utah, have adopted both consent and notification statutes.

But every one of these parental notification statutes that lacks exceptions for seventeen-year-olds and other mature minors is more restrictive than Alaska's PCA.[89] More importantly, such parental notification statutes fail to achieve the same goals as consent laws, as discussed below.

The majority enthusiastically adopts the notion that a notice statute is less restrictive than the PCA because it does not give parents a "veto power." But as shown above, the PCA does not create a veto power because it includes a judicial bypass provision. Moreover, the United States Supreme Court has upheld a parental consent statute containing a judicial bypass procedure but fewer statutory exceptions than those included in Alaska's PCA.[90] Indeed, as Justice Matthews noted in *Planned Parenthood I*, "[c]urrently it appears that all members of the United States Supreme Court believe that a judicial authorization procedure that meets the conditions of the second *Bellotti* case" — as the PCA does — "is constitutional."[91] In *Akron II*, which today's opinion cites to support its conclusion that notice statutes are less restrictive than consent statutes, the Court limited its distinction between consent and notification statutes to the central requirement that "in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a State must provide some sort of bypass

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[89] *See Treacy*, 91 P.3d at 267.

[90] *See Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 493-94 (1983).

[91] 35 P.3d at 51 (Matthews, J., dissenting). It should be noted that since those words were written, Chief Justice John Roberts and Justice Samuel Alito have replaced Chief Justice William Rehnquist and Justice Sandra Day O'Connor.

procedure if it elects to require parental consent."[92] The PCA provides such a procedure: judicial bypass.

Indeed, notification laws may present the worst case scenario by posing all the risks of privacy infringements of a consent/bypass statute with fewer of its mitigating effects. What could be further from the productive and supportive conversation that a consent statute aims to produce than the cold reality of parents receiving (perhaps after the abortion) a note in the mail informing them of their daughter's pregnancy and decision to abort? It is certainly reasonable for a legislature to conclude that consent statutes are more likely to foster actual conversations and parental involvement rather than the one-way, limited flow of information called for in notification statutes. Thus, the existence of notification statutes in a minority of states should not lead to invalidation of Alaska's consent statute unless it is clear that a notification statute would further the state's compelling interests.

3. The legislature could reasonably conclude that "parental notification" statues are not effective in protecting a pregnant girl against her own immaturity or in protecting her parents' right and duty to aid in her upbringing.

Despite today's Opinion's rosy assertion that "all [notification statutes] prohibit minors from terminating a pregnancy until their parents have been notified and afforded an appropriate period of time to actively involve themselves in their minor children's decision-making processes,"[93] it is truly questionable whether many notification statutes accomplish anything in the way of meaningful parental notification. Many do not even require that a parent be notified.

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[92] 497 U.S. 502, 510-11 (1990).

[93] Opinion 13.

Thus, Delaware, identified by the majority opinion as a "notification" state, allows notification of a licensed mental health professional to substitute for parental notification.[94] Maryland, ostensibly another "notification" state, allows the physician performing the abortion to dispense with notification to the child's parent if in the physician's judgment the child is mature and capable of giving informed consent or if notification would not be in her best interests.[95] West Virginia, another "notification" state, allows the physician performing the abortion to dispense with notification if another doctor finds the child mature enough to make the decision for herself or that notification would not be in her best interests.[96] In all states the "waiting period" is so short that in many instances it will be largely meaningless.[97] Can it really be said that a requirement that written notification be sent to a child's parent, along with the presumption that "notice is effective upon mailing" and no waiting period (*e.g.*, Maryland[98]) or a twenty-four hour waiting period (*e.g.*, West Virginia with actual notice[99]) or even a forty-eight hour waiting period (*e.g.*, West Virginia with constructive

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[94] DEL. CODE. ANN. tit. 24 § 1783(a).

[95] MD. CODE. ANN. HEALTH-GEN. § 20-103(c)(1)(ii), (iii).

[96] W. VA. CODE § 16-2F-3(c).

[97] The waiting periods range between twenty-four hours (Delaware, West Virginia (twenty-four hours after actual notice), Georgia, Kansas, and Utah) and forty-eight hours (West Virginia (forty-eight hours after mailing notice), Iowa, Colorado, Illinois, Minnesota, Nebraska, South Dakota, Texas, Montana).

[98] MD. CODE. ANN. HEALTH-GEN. § 20-103.

[99] W. VA. CODE. § 16-2F-3(a).

notice[100]), would in any way further the state's interest in protecting the child against her immaturity and lack of judgment or protect the parents' role in helping to raise their child? It often will be, in truth, little more than a note sent into the night.

The court asserts that the state's compelling interests (it refers to them only as "legislative goals") "are no less likely to accompany parental notification than parental 'veto power.' "[101] Of course, as we have seen, there is no veto power in the PCA. But more importantly, only wishful thinking supports that conclusion. How can a statute that does not even require that parents be notified — as in Delaware, which allows notification of a mental health professional — "enhance the potential for parental consultation"? Or a statute that deems notice to be effective upon mailing and requires no waiting period or only a twenty-four hour waiting period? The court optimistically talks of "giving [parents] notice and time to consult with and guide their daughters through this important decision,"[102] but this is not what notification statutes do. The longest waiting period in any current notification statute — measured from the time of mailing of the notice — is seventy-two hours.[103] Most are substantially shorter.[104] Under these circumstances, to conclude, as today's Opinion does, that a notification statute provides a better chance than a consent statute that parents will "engage in a constructive

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100 *Id.*

101 Opinion 16.

102 *Id.* at 13.

103 *See* GA. CODE ANN. § 15-11-112(a) (written notice deemed delivered forty-eight hours after mailing; abortion may be performed twenty-fours hours after).

104 *See, e.g.*, DEL. CODE ANN. tit. 24 § 1783; GA. CODE ANN. § 112(a)(1)(B); UTAH CODE ANN. § 76-7-304(3); W. VA. CODE ANN. § 16-25-3(a) (all requiring a waiting period of only twenty-four hours).

and ongoing conversation with their minor children about the important medical, philosophical, and moral issues surrounding abortion"[105] is truly wishful thinking. At least under a consent statute, where the child opts not to seek judicial bypass, there must be a conversation. Under a notification statute, where the child opts not to seek judicial bypass, there is only a mailing. There is little reason to believe that notification statutes are effective in protecting minors from their own immaturity or effective in protecting parents' rights (and duties) to help their children negotiate the difficult path to adulthood.

We should heed our admonition in *Treacy*: In analyzing the argument that a legislative solution is not the "least restrictive" one, courts must take care to require the challenger to demonstrate that the supposedly less restrictive alternative is actually effective in protecting the state's (and parents') compelling interests. The court today fails to show that a notification statute "will achieve the State's compelling interests." This is because, as we have seen, notification laws are ineffective in so many ways in protecting children from their immaturity and in protecting parents' rights and obligations to guide their children's upbringing. And today's opinion declines even to say whether a parental notification approach would be constitutional.

IV. Conclusion

The Alaska Legislature carefully balanced the constitutional right of an underage pregnant girl to privacy and the state's compelling interests in protecting children against their own immaturity and protecting parents' constitutional right (and duty) to guide their children to maturity. Because the PCA is the least restrictive alternative which will effectively advance the state's compelling interests while protecting the child's constitutional right, we should hold that the superior court erred in invalidating it. I respectfully dissent.

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[105] Opinion 16.

U.S. Supreme Court

3/10/02

BELLOTTI v. BAIRD, 443 U.S. 622 (1979)

443 U.S. 622

BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. v. BAIRD ET AL. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
No. 78-329.

Argued February 27, 1979.
Decided July 2, 1979.*

[Footnote *] Together with No. 78-330, Hunerwadel v. Baird et al., also on appeal from the same court.

A Massachusetts statute requires parental consent before an abortion can be performed on an unmarried woman under the age of 18. If one or both parents refuse such consent, however, the abortion may be obtained by order of a judge of the superior court "for good cause shown." In appellees' class action challenging the constitutionality of the statute, a three-judge District Court held it unconstitutional. Subsequently, this Court vacated the District Court's judgment, Bellotti v. Baird, 428 U.S. 132, holding that the District Court should have abstained and certified to the Massachusetts Supreme Judicial Court appropriate questions concerning the meaning of the statute. On remand, the District Court certified several questions to the Supreme Judicial Court. Among the questions certified was whether the statute permits any minors - mature or immature - to obtain judicial consent to an abortion without any parental consultation whatsoever. The Supreme Judicial Court answered that, in general, it does not; that consent must be obtained for every nonemergency abortion unless no parent is available; and that an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion. Another question certified was whether, if the superior court finds that the minor is capable of making, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, the court may refuse its consent on a finding that a parent's, or its own, contrary decision is a better one. The Supreme Judicial Court answered in the affirmative. Following the Supreme Judicial Court's judgment, the District Court again declared the statute unconstitutional and enjoined its enforcement.

Held:

The judgment is affirmed. Pp. 633-651; 652-656.

450 F. Supp. 997, affirmed.

MR. JUSTICE POWELL, joined by MR. CHIEF JUSTICE BURGER, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST, concluded that:

1. There are three reasons justifying the conclusion that the constitutional [443 U.S. 622, 623] rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the guiding role of parents in the upbringing of their children. Pp. 633-639.

2. The abortion decision differs in important ways from other decisions facing minors, and the State is required to act with particular sensitivity when it legislates to foster parental involvement

in this matter. Pp. 639-642.

3. If a State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained. A pregnant minor is entitled in such a proceeding to show either that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes, or that even if she is not able to make this decision independently, the desired abortion would be in her best interests. Such a procedure must ensure that the provision requiring parental consent does not in fact amount to an impermissible "absolute, and possibly arbitrary, veto." Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74. Pp. 642-644.

4. The Massachusetts statute, as authoritatively interpreted by the Supreme Judicial Court, unduly burdens the right to seek an abortion. The statute falls short of constitutional standards in two respects. First, it permits judicial authorization for an abortion to be withheld from a minor who is found by the superior court to be mature and fully competent to make this decision independently. Second, it requires parental consultation or notification in every instance, whether or not in the pregnant minor's best interests, without affording her an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests. Pp. 644-651.

MR. JUSTICE STEVENS, joined by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concluded that the Massachusetts statute is unconstitutional because under the statute, as written and as construed by the Massachusetts Supreme Judicial Court, no minor, no matter how mature and capable of informed decisionmaking, may receive an abortion without the consent of either both parents or a superior court judge, thus making the minor's abortion decision subject in every instance to an absolute third-party veto. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, controlling. Pp. 652-656.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined. [443 U.S. 622, 624] REHNQUIST, J., filed a concurring opinion, post, p. 651. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, post, p. 652. WHITE, J., filed a dissenting opinion, post, p. 656.

Garrick F. Cole, Assistant Attorney General of Massachusetts, argued the cause for appellants in No. 78-329. With him on the briefs were Francis X. Bellotti, Attorney General, pro se, and Michael B. Meyer and Thomas R. Kiley, Assistant Attorneys General. Brian A. Riley argued the cause for appellant in No. 78-330. With him on the brief was Thomas P. Russell.

Joseph J. Balliro argued the cause for appellees in both cases. With him on the brief was Joan C. Schmidt. John H. Henn also argued the cause for appellees in both cases. With him on the brief were Scott C. Moricarty, Sandra L. Lynch, Loyd M. Starrett, and John Reinstein.Fn

Fn [443 U.S. 622, 624] Stuart D. Hubbell and Robert A. Destro filed a brief for the Catholic League for Religious and Civil Rights et al. as amici curiae urging reversal in No. 78-329. Eve W. Paul, Harriet F. Pilpel, and Sylvia A. Law filed a brief for the Planned Parenthood Federation of America, Inc., et al. as amici curiae urging affirmance in both cases. Briefs of amici curiae were filed by Victor G. Rosenblum, Dennis J. Horan, and John D. Gorby in both cases for Americans United for Life, Inc., et al.; and by George E. Reed and Patrick F. Geary in No. 78-329 for the United States Catholic Conference.

MR. JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST joined.

These appeals present a challenge to the constitutionality of a state statute regulating the access of minors to abortions. They require us to continue the inquiry we began in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), and Bellotti v. Baird, 428 U.S. 132 (1976). [443 U.S. 622, 625]

I

A

On August 2, 1974, the Legislature of the Commonwealth of Massachusetts passed, over the Governor's veto, an Act pertaining to abortions performed within the State. 1974 Mass. Acts, ch. 706. According to its title, the statute was intended to regulate abortions "within present constitutional limits." Shortly before the Act was to go into effect, the class action from which these appeals arise was commenced in the District Court[1] to enjoin, as unconstitutional, the provision of the Act now codified as Mass. Gen. Laws Ann., ch. 112, 12S (West Supp. 1979).[2]

Section 12S provides in part:

> "If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other [443 U.S. 622, 626] person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files."

Physicians performing abortions in the absence of the consent required by 12S are subject to injunctions and criminal penalties. See Mass. Gen. Laws Ann., ch. 112, 12Q, 12T, and 12U (West Supp. 1979).

A three-judge District Court was convened to hear the case pursuant to 28 U.S.C. 2281 (1970 ed.), repealed by Pub. L. 94-381, 1, 90 Stat. 1119.[3] Plaintiffs in the suit, appellees in both the cases before us now, were William Baird; Parents Aid Society, Inc. (Parents Aid), of which Baird is founder and director; Gerald Zupnick, M. D., who regularly performs abortions at the Parents Aid clinic; and an unmarried minor, identified by the pseudonym "Mary Moe," who, at the commencement of the suit, was pregnant, residing at home with her parents, and desirous of obtaining an abortion without informing them.[4]

Mary Moe was permitted to represent the "class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent [to abortion], and who do not wish to involve their parents." Baird v. Bellotti, 393 F. Supp. 847, 850 (Mass. 1975) (Baird I). Initially there was some confusion whether the rights of minors who wish abortions without parental involvement but who lack "adequate capacity" to give such consent also could be adjudicated in [443 U.S. 622, 627] the suit. The District Court ultimately determined that Dr. Zupnick was entitled to assert the rights of these minors. See Baird v. Bellotti, 450 F. Supp. 997, 1001, and n. 6 (Mass. 1978).[5]

Planned Parenthood League of Massachusetts and Crittenton Hastings House & Clinic, both organizations that provide counselling to pregnant adolescents, and Phillip Stubblefield, M. D. (intervenors),6 appeared as amici curiae on behalf of the plaintiffs. The District Court "accepted [this group] in a status something more than amici because of reservations about the adequacy of plaintiffs' representation [of the plaintiff classes in the suit]." Id., at 999 n. 3.

Defendants in the suit, appellants here in No. 78-329, were the Attorney General of Massachusetts and the District Attorneys of all counties in the State. Jane Hunerwadel was permitted to intervene as a defendant and representative of the class of Massachusetts parents having unmarried minor daughters who then were, or might become, pregnant. She and the class she represents are appellants in No. 78-330.7

Following three days of testimony, the District Court issued an opinion invalidating 12S. Baird I, supra. The court rejected appellees' argument that all minors capable of becoming pregnant also are capable of giving informed consent [443 U.S. 622, 628] to an abortion, or that it always is in the best interests of a minor who desires an abortion to have one. See 393 F. Supp., at 854. But the court was convinced that "a substantial number of females under the age of 18 are capable of forming a valid consent," id., at 855, and "that a significant number of [these] are unwilling to tell their parents." Id., at 853.

In its analysis of the relevant constitutional principles, the court stated that "there can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age." Id., at 855-856. The court found no justification for the parental consent limitation placed on that right by 12S, since it concluded that the statute was "cast not in terms of protecting the minor, . . . but in recognizing independent rights of parents." Id., at 856. The "independent" parental rights protected by 12S, as the court understood them, were wholly distinct from the best interests of the minor.8

B

Appellants sought review in this Court, and we noted probable jurisdiction. Bellotti v. Baird, 423 U.S. 982 (1975). After briefing and oral argument, it became apparent that 12S was susceptible of a construction that "would avoid or substantially modify the federal constitutional challenge to the statute." Bellotti v. Baird, 428 U.S. 132, 148 (1976) (Bellotti I). We therefore vacated the judgment of the District Court, concluding that it should have abstained and certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of 12S, pursuant to existing [443 U.S. 622, 629] procedure in that State. See Mass. Sup. Jud. Ct. Rule 3:21.

On remand, the District Court certified nine questions to the Supreme Judicial Court.9 These were answered in an [443 U.S. 622, 630] opinion styled Baird v. Attorney General, 371 Mass. 741, 360 N. E. 2d 288 (1977) (Attorney General). Among the more important aspects of 12S, as authoritatively construed by the Supreme Judicial Court, are the following:

1. In deciding whether to grant consent to their daughter's abortion, parents are required by 12S to consider exclusively what will serve her best interests. See id., at 746-747, 360 N. E. 2d, at 292-293.

2. The provision in 12S that judicial consent for an abortion shall be granted, parental objections notwithstanding, "for good cause shown" means that such consent shall be granted if found to be in the minor's best interests. The judge "must disregard all parental objections, and other considerations, which are not based exclusively" on that standard. Id., at 748, 360 N. E. 2d, at 293.

3. Even if the judge in a 12S proceeding finds "that the minor is capable of making, and has made, an

informed and reasonable decision to have an abortion," he is entitled to withhold consent "in circumstances where he determines that the best interests of the minor will not be served by an abortion." Ibid., 360 N. E. 2d, at 293.

4. As a general rule, a minor who desires an abortion may not obtain judicial consent without first seeking both parents' consent. Exceptions to the rule exist when a parent is not available or when the need for the abortion constitutes "`an emergency requiring immediate action.'"10 Id., at 750, 360 N. E. 2d, at 294. Unless a parent is not available, he must be notified of any judicial proceedings brought under 12S. Id., at 755-756, 360 N. E. 2d, at 297. [443 U.S. 622, 631]

5. The resolution of 12S cases and any appeals that follow can be expected to be prompt. The name of the minor and her parents may be held in confidence. If need be, the Supreme Judicial Court and the superior courts can promulgate rules or issue orders to ensure that such proceedings are handled expeditiously. Id., at 756-758, 360 N. E. 2d, at 297-298.

6. Massachusetts Gen. Laws Ann., ch. 112, 12F (west Supp. 1979), which provides, inter alia, that certain classes of minors may consent to most kinds of medical care without parental approval, does not apply to abortions, except as to minors who are married, widowed, or divorced. See 371 Mass., at 758-762, 360 N. E. 2d, at 298-300. Nor does the State's common-law "mature minor rule" create an exception to 12S. Id., at 749-750, 360 N. E. 2d, at 294. See n. 27, infra.

C

Following the judgment of the Supreme Judicial Court, appellees returned to the District Court and obtained a stay of the enforcement of 12S until its constitutionality could be determined. Baird v. Bellotti, 428 F. Supp. 854 (Mass. 1977) (Baird II). After permitting discovery by both sides, holding a pretrial conference, and conducting further hearings, the District Court again declared 12S unconstitutional and enjoined its enforcement. Baird v. Bellotti, 450 F. Supp. 997 (Mass. 1978) (Baird III). The court identified three particular aspects of the statute which, in its view, rendered it unconstitutional.

First, as construed by the Supreme Judicial Court, 12S requires parental notice in virtually every case where the parent is available. The court believed that the evidence warranted a finding "that many, perhaps a large majority of 17-year olds are capable of informed consent, as are a not insubstantial number of 16-year olds, and some even younger." Id., at 1001. In addition, the court concluded that it would not be in [443 U.S. 622, 632] the best interests of some "immature" minors - those incapable of giving informed consent - even to inform their parents of their intended abortions. Although the court declined to decide whether the burden of requiring a minor to take her parents to court was, per se, an impermissible burden on her right to seek an abortion, it concluded that Massachusetts could not constitutionally insist that parental permission be sought or notice given "in those cases where a court, if given free rein, would find that it was to the minor's best interests that one or both of her parents not be informed . . . ." Id., at 1002.

Second, the District Court held that 12S was defective in permitting a judge to veto the abortion decision of a minor found to be capable of giving informed consent. The court reasoned that upon a finding of maturity and informed consent, the State no longer was entitled to impose legal restrictions upon this decision. Id., at 1003. Given such a finding, the court could see "no reasonable basis" for distinguishing between a minor and an adult, and it therefore concluded that 12S was not only "an undue burden in the due process sense, [but] a discriminatory denial of equal protection [as well]." Id., at 1004.

Finally, the court decided that 12S suffered from what it termed "formal overbreadth," ibid., because the statute failed explicitly to inform parents that they must consider only the minor's best interests in deciding whether to grant consent. The court believed that, despite the Supreme Judicial Court's construction of 12S, parents naturally would infer from the statute that they were entitled to withhold consent for other, impermissible reasons. This was thought to create a "chilling effect" by enhancing the possibility that parental consent would be denied wrongfully and that the minor would have to proceed in court.

Having identified these flaws in 12S, the District Court considered whether it should engage in "judicial repair." Id., at 1005. It declined either to sever the statute or to give [443 U.S. 622, 633] it a construction different from that set out by the Supreme Judicial Court, as that tribunal arguably had invited it to do. See Attorney General, 371 Mass., at 745-746, 360 N. E. 2d, at 292. The District Court therefore adhered to its previous position, declaring 12S unconstitutional and permanently enjoining its enforcement.11 Appellants sought review in this Court a second time, and we again noted probable jurisdiction. 439 U.S. 925 (1978).

II

A child, merely on account of his minority, is not beyond the protection of the Constitution. As the Court said in In re Gault, 387 U.S. 1, 13 (1967), "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."12 This observation, of course, is but the beginning of the analysis. The Court long has recognized that the status of minors under the law is unique in many respects. As Mr. Justice Frankfurter aptly put it: "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination [443 U.S. 622, 634] of a State's duty towards children." May v. Anderson, 345 U.S. 528, 536 (1953) (concurring opinion). The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," Moore v. East Cleveland, 431 U.S. 494, 503-504 (1977) (plurality opinion), requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

A

The Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult. For example, the Court has held that the Fourteenth Amendment's guarantee against the deprivation of liberty without due process of law is applicable to children in juvenile delinquency proceedings. In re Gault, supra. In particular, minors involved in such proceedings are entitled to adequate notice, the assistance of counsel, and the opportunity to confront their accusers. They can be found guilty only upon proof beyond a reasonable doubt, and they may assert the privilege against compulsory self-incrimination. In re Winship, 397 U.S. 358 (1970); In re Gault, supra. See also Ingraham v. Wright, 430 U.S. 651, 674 (1977) (corporal punishment of schoolchildren implicates constitutionally protected liberty interest); cf. Breed v. Jones, 421 U.S. 519 (1975) (Double Jeopardy Clause prohibits prosecuting juvenile as an adult after an adjudicatory finding in juvenile court that he had violated a criminal statute). [443 U.S. 622, 635] Similarly, in Goss v. Lopez, 419 U.S. 565 (1975), the Court held that children may not be deprived of certain property interests without due process.

These rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults. Indeed, our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults. In order to preserve this separate avenue for dealing with minors, the Court has said that hearings in juvenile delinquency cases need not necessarily "'conform with all of the requirements of a criminal trial or even of the usual administrative hearing.'" In re Gault, supra, at 30, quoting Kent v. United States, 383 U.S. 541, 562 (1966). Thus, juveniles are not constitutionally entitled to trial by jury in delinquency adjudications. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for "concern, . . . sympathy, and . . . paternal attention." Id., at 550 (plurality opinion).

B

Second, the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.13 [443 U.S. 622, 636]

Ginsberg v. New York, 390 U.S. 629 (1968), illustrates well the Court's concern over the inability of children to make mature choices, as the First Amendment rights involved are clear examples of constitutionally protected freedoms of choice. At issue was a criminal conviction for selling sexually oriented magazines to a minor under the age of 17 in violation of a New York state law. It was conceded that the conviction could not have stood under the First Amendment if based upon a sale of the same material to an adult. Id., at 634. Notwithstanding the importance the Court always has attached to First Amendment rights, it concluded that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . .,'" id., at 638, quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944).14 The Court was convinced that the New York Legislature rationally could conclude that the sale to children of the magazines in question presented a danger against which they should be guarded. Ginsberg, supra, at 641. It therefore rejected the [443 U.S. 622, 637] argument that the New York law violated the constitutional rights of minors.15

C

Third, the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors.16 But an additional and more important justification for state deference to parental control over children is that "[t]he 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." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). "The duty to prepare the child for 'additional obligations' . . . [443 U.S. 622, 638] must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." Wisconsin v. Yoder, 406 U.S. 205, 233 (1972). This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.

We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is

something we expect the State not to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. Thus, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, supra, at 166 (emphasis added).

Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." Ginsberg v. New York, supra, at 639.

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual [443 U.S. 622, 639] participation in a free society meaningful and rewarding.17 Under the Constitution, the State can "properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." Ginsberg v. New York, 390 U.S., at 639.18

III

With these principles in mind, we consider the specific constitutional questions presented by these appeals. In 12S, Massachusetts has attempted to reconcile the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy as established by Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), with the special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child. As noted above, 12S was before us in Bellotti I, 428 U.S. 132 (1976), where we remanded the case for interpretation of its provisions by the Supreme Judicial Court of Massachusetts. We previously had held in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), that a State could not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy. Id., at 74. In [443 U.S. 622, 640] Bellotti I, supra, we recognized that 12S could be read as "fundamentally different from a statute that creates a 'parental veto,'" 428 U.S., at 145, thus "avoid[ing] or substantially modify[ing] the federal constitutional challenge to the statute." Id., at 148. The question before us - in light of what we have said in the prior cases - is whether 12S, as authoritatively interpreted by the Supreme Judicial Court, provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion. See id., at 147.

Appellees and intervenors contend that even as interpreted by the Supreme Judicial Court of Massachusetts 12S does unduly burden this right. They suggest, for example, that the mere requirement of parental notice constitutes such a burden. As stated in Part II above, however, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor.19 It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision - one that for some people raises profound moral and religious concerns.20 As MR. JUSTICE STEWART

wrote in concurrence in Planned Parenthood of Central Missouri v. Danforth, supra, at 91:

> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried [443 U.S. 622, 641] pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." (Footnote omitted.)21 [443 U.S. 622, 642]

But we are concerned here with a constitutional right to seek an abortion. The abortion decision differs in important ways from other decisions that may be made during minority. 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.

A

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

Moreover, the potentially severe detriment facing a pregnant woman, see Roe v. Wade, 410 U.S., at 153, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

Yet, an abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of [443 U.S. 622, 643] family, may be feasible and relevant to the minor's best interests. Nonetheless, the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.

For these reasons, as we held in Planned Parenthood of Central Missouri v. Danforth, 428 U.S., at 74, "the State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." Although, as stated in Part II, supra, such deference to parents may be permissible with respect to other choices facing a minor, the unique nature and consequences of the abortion decision make it inappropriate "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 the consent." 428 U.S., at 74. We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure22 whereby authorization for the abortion can be obtained.

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes;23 or [443 U.S. 622, 644] (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in Danforth. Ibid.

B

It is against these requirements that 12S must be tested. We observe initially that as authoritatively construed by the highest court of the State, the statute satisfies some of the concerns that require special treatment of a minor's abortion decision. It provides that if parental consent is refused, authorization may be "obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary." A superior court judge presiding over a 12S proceeding "must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests."24 Attorney General, [443 U.S. 622, 645] 371 Mass., at 748, 360 N. E. 2d, at 293. The Supreme Judicial Court also stated: "Prompt resolution of a [12S] proceeding may be expected. . . . The proceeding need not be brought in the minor's name and steps may be taken, by impoundment or otherwise, to preserve confidentiality as to the minor and her parents. . . . [W]e believe that an early hearing and decision on appeal from a judgment of a Superior Court judge may also be achieved." Id., at 757-758, 360 N. E. 2d, at 298. The court added that if these expectations were not met, either the superior court, in the exercise of its rulemaking power, or the Supreme Judicial Court would be willing to eliminate any undue burdens by rule or order. Ibid.25

Despite these safeguards, which avoid much of what was objectionable in the statute successfully challenged in Danforth, 12S falls short of constitutional standards in certain respects. We now consider these. [443 U.S. 622, 646]

(1)

Among the questions certified to the Supreme Judicial Court was whether 12S permits any minors - mature or immature - to obtain judicial consent to an abortion without any parental consultation whatsoever. See n. 9, supra. The state court answered that, in general, it does not. "[T]he consent required by [12S must] be obtained for every nonemergency abortion where the mother is less than eighteen years of age and unmarried." Attorney General, supra, at 750, 360 N. E. 2d, at 294. The text of 12S itself states an exception to this rule, making consent unnecessary from any parent who has "died or has deserted his or her family."26 The Supreme Judicial Court construed the statute as containing an additional exception: Consent need not be obtained "where no parent (or statutory substitute) is available." 371 Mass., at 750, 360 N. E. 2d, at 294. The court also ruled that an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion.27 Id., at 755-756, 360 N. E. 2d, at 297. [443 U.S. 622, 647]

We think that, construed in this manner, 12S would impose an undue burden upon the exercise by minors of the right to seek an abortion. As the District Court recognized, "there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court." Baird III, 450 F. Supp., at 1001. There is no reason to believe that this would be so in the majority of cases where consent is withheld. But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access

to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.

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 a court without first consulting or notifying her parents. 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 that an abortion nevertheless would be in her [443 U.S. 622, 648] best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

There is, however, an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision. Also, as we have observed above, parents naturally take an interest in the welfare of their children - an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents. These factors properly may be taken into account by a court called upon to determine whether an abortion in fact is in a minor's best interests. If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement. On the other hand, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required.28 For the reasons stated above, the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court.

(2)

Section 12S requires that both parents consent to a minor's abortion. The District Court found it to be "custom" to perform other medical and surgical procedures on minors with the consent of only one parent, and it concluded that "nothing about abortions . . . requires the minor's interest to be treated [443 U.S. 622, 649] differently." Baird I, 393 F. Supp., at 852. See Baird III, supra, at 1004 n. 9.

We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment. At least when the parents are together and the pregnant minor is living at home, both the father and mother have an interest - one normally supportive - in helping to determine the course that is in the best interests of a daughter. Consent and involvement by parents in important decisions by minors long have been recognized as protective of their immaturity. In the case of the abortion decision, for reasons we have stated, the focus of the parents' inquiry should be the best interests of their daughter. As every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation, or consent, the general rule with respect to parental consent does not unduly burden the constitutional right. Moreover, where the pregnant minor goes to her parents and consent is denied, she still must have recourse to a prompt judicial determination of her maturity or best interests.29

(3)

Another of the questions certified by the District Court to the Supreme Judicial Court was the following: "If the superior court finds that the minor is capable [of making], and has, in fact, made and adhered to,

an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision [443 U.S. 622, 650] is a better one?" Attorney General, 371 Mass., at 747 n. 5, 360 N. E. 2d, at 293 n. 5. To this the state court answered:

> "[W]e do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact." Id., at 748, 360 N. E. 2d, at 293.

The Supreme Judicial Court's statement reflects the general rule that a State may require a minor to wait until the age of majority before being permitted to exercise legal rights independently. See n. 23, supra. But we are concerned here with the exercise of a constitutional right of unique character. See supra, at 642-643. As stated above, if the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently. We therefore agree with the District Court that 12S cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.30 [443 U.S. 622, 651]

IV

Although it satisfies constitutional standards in large part, 12S falls short of them in two respects: First, it permits judicial authorization for an abortion to be withheld from a minor who is found by the superior court to be mature and fully competent to make this decision independently. Second, it requires parental consultation or notificatio.. in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.31 Accordingly, we affirm the judgment of the District Court insofar as it invalidates this statute and enjoins its enforcement.32

Affirmed.

Footnotes

[Footnote 1] The court promptly issued a restraining order which remained in effect until its decision on the merits. Subsequent stays of enforcement were issued during the complex course of this litigation, with the result that Mass. Gen. Laws Ann., ch. 112, 12S (West Supp. 1979), never has been enforced by Massachusetts.

[Footnote 2] As originally enacted, 12S was designated as 12P of chapter 112. In 1977, the provision was renumbered as 12S, and the numbering of subdivisions within the section was eliminated. No changes of substance were made. We shall refer to the section as 12S throughout this opinion.

[Footnote 3] The proceedings before the court and the substance of its opinion are described in detail in Bellotti v. Baird, 428 U.S. 132, 136-143 (1976).

[Footnote 4] Three other minors in similar circumstances were named in the complaint, but the complaint

was dismissed as to them for want of proof of standing. That decision has not been challenged on appeal.

[Footnote 5] Appellants argue that these "immature" minors never were before the District Court and that the court's remedy should have been tailored to grant relief only to the class of "mature" minors. It is apparent from the District Court's opinions, however, that it considered the constitutionality of 12S as applied to all pregnant minors who might be affected by it. We accept that the rights of this entire category of minors properly were subject to adjudication.

[Footnote 6] In 1978, the District Court permitted postjudgment intervention by these parties, who now appear jointly before this Court as intervenor-appellees.

[Footnote 7] As their positions are closely aligned, if not identical, appellants in Nos. 78-329 and 78-330 are hereinafter referred to collectively as appellants.

[Footnote 8] One member of the three-judge court dissented, arguing that the decision of the majority to allow Mary Moe to proceed in the case without notice to her parents denied them their parental rights without due process of law, and that 12S was consistent with the decisions of this Court recognizing the propriety of parental control over the conduct of children. See 393 F. Supp., at 857-865.

[Footnote 9] The nine questions certified by the District Court, with footnotes omitted, are as follows: "1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent? "a) Is the parent to consider 'exclusively . . . what will serve the child's best interest'? "b) If the parent is not limited to considering exclusively the minor's best interests, can the parent take into consideration the 'long-term consequences to the family and her parents' marriage relationship'? "c) Other? "2. What standard or standards is the superior court to apply? "a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests? "b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one? "c) Other? "3. Does the Massachusetts law permit a minor (a) 'capable of giving informed consent,' or (b) 'incapable of giving informed consent,' 'to obtain [a court] order without parental consultation'? "4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a), without prior notification to the parents, and (b), without subsequent notification? "5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, [12S] which will expedite the application, hearing and decision phases of the superior court proceeding provided thereunder? Appeal? "6. To what degree do the standards and procedures set forth in c. 112, 12F (Stat. 1975, c. 564), authorizing minors to give consent to medical and dental care in specified circumstances, parallel the grounds and procedures for showing good cause under c. 112, [12S]? "7. May a minor, upon a showing of indigency, have court-appointed counsel? "8. Is it a defense to his criminal prosecution if a physician performs an abortion solely with the minor's own, valid, consent, that he reasonably, [443 U.S. 622, 630] and in good faith, though erroneously, believed that she was eighteen or more years old or had been married? "9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?"

[Footnote 10] Section 12S itself dispenses with the need for the consent of any parent who "has died or has deserted his or her family."

[Footnote 11] The dissenting judge agreed that the State could not permit a judge to override the decision of a minor found to be mature and capable of giving informed consent to an abortion. He disagreed with the remainder of the court's conclusions: the best-interests limitation on the withholding of parental

consent in the Supreme Judicial Court's opinion, he argued, must be treated as if part of the statutory language itself; and he read the evidentiary record as proving that only rarely would a pregnant minor's interests be disserved by consulting with her parents about a desired abortion. He also noted the value to a judge in a 12S proceeding of having the parents before him as a source of evidence as to the minor's maturity and what course would serve her best interests. See Baird III, 450 F. Supp., at 1006-1020.

[Footnote 12] Similarly, the Court said in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976): "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."

[Footnote 13] As MR. JUSTICE STEWART wrote of the exercise by minors of the First Amendment rights that "secur[e] . . . the liberty of each man to [443 U.S. 622, 636] decide for himself what he will read and to what he will listen," Ginsberg v. New York, 390 U.S. 629, 649 (1968) (concurring in result): "[A]t least in some precisely delineated areas, a child - like someone in a captive audience - is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights - the right to marry, for example, or the right to vote - deprivations that would be constitutionally intolerable for adults." Id., at 649-650 (footnotes omitted).

[Footnote 14] In Prince an adult had permitted a child in her custody to sell religious literature on a public street in violation of a state child-labor statute. The child had been permitted to engage in this activity upon her own sincere request. 321 U.S., at 162. In upholding the adult's conviction under the statute, we found that "the interests of society to protect the welfare of children" and to give them "opportunities for growth into free and independent well-developed men and citizens," id., at 165, permitted the State to enforce its statute, which "[c]oncededly . . . would be invalid," id., at 167, if made applicable to adults.

[Footnote 15] Although the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), illustrates that it may not arbitrarily deprive them of their freedom of action altogether. The Court held in Tinker that a schoolchild's First Amendment freedom of expression entitled him, contrary to school policy, to attend school wearing a black armband as a silent protest against American involvement in the hostilities in Vietnam. The Court acknowledged that the State was permitted to prohibit conduct otherwise shielded by the Constitution that "for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Id., at 513. It upheld the First Amendment right of the schoolchildren in that case, however, not only because it found no evidence in the record that their wearing of black armbands threatened any substantial interference with the proper objectives of the school district, but also because it appeared that the challenged policy was intended primarily to stifle any debate whatsoever - even nondisruptive discussions - on important political and moral issues. See id., at 510.

[Footnote 16] See, e. g., Mass. Gen. Laws Ann., ch. 207 7, 24, 25, 33, 33A (West 1958 and Supp. 1979) (parental consent required for marriage of person under 18); Mass. Gen. Laws Ann., ch. 119, 55A (West Supp. 1979) (waiver of counsel by minor in juvenile delinquency proceedings must be made through parent or guardian).

[Footnote 17] See Hafen, Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Children to Their "Rights," 1976 B. Y. U. L. Rev. 605.

[Footnote 18] The Court's opinions discussed in the text above - Pierce, Yoder, Prince, and Ginsberg - all have contributed to a line of decisions suggesting the existence of a constitutional parental right against undue, adverse interference by the State. See also Smith v. Organization of Foster Families, 431 U.S. 816, 842-844 (1977); Carey v. Population Services International, 431 U.S. 678, 708 (1977) (opinion of POWELL, J.); Moore v. East Cleveland, 431 U.S. 494 (1977) (plurality opinion); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Cf. Parham v. J. R., 442 U.S. 584 (1979); id., at 621 (STEWART, J., concurring in result).

[Footnote 19] In Planned Parenthood of Central Missouri v. Danforth, 428 U.S., at 75, "[w]e emphasize [d] that our holding . . . [did] not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."

[Footnote 20] The expert testimony at the hearings in the District Court uniformly was to the effect that parental involvement in a minor's abortion decision, if compassionate and supportive, was highly desirable. The findings of the court reflect this consensus. See Baird I, 393 F. Supp., at 853.

[Footnote 21] MR. JUSTICE STEWART'S concurring opinion in Danforth underscored the need for parental involvement in minors' abortion decisions by describing the procedures followed at the clinic operated by the Parents Aid Society and Dr. Gerald Zupnick: "The counseling . . . occurs entirely on the day the abortion is to be performed . . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . . The physician takes no part in this counseling process . . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques . . . . "The abortion itself takes five to seven minutes . . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician . . . may be performing abortions on many other adults and minors . . . . On busy days patients are scheduled in separate groups, consisting usually of five patients . . . . After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room . . . ." 428 U.S., at 91-92, n. 2, quoting Brief for Appellants in Bellotti I, O. T. 1975, No. 75-73, pp. 43-44. In Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), we emphasized the importance of the role of the attending physician. Those cases involved adult women presumably capable of selecting and obtaining a competent physician. In this case, however, we are concerned only with minors who, according to the record, may range in age from children of 12 years to 17-year-old teenagers. Even the latter are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical.

[Footnote 22] As 12S provides for involvement of the state superior court in minors' abortion decisions, we discuss the alternative procedure described in the text in terms of judicial proceedings. We do not suggest, however, that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.

[Footnote 23] The nature of both the State's interest in fostering parental authority and the problem of determining "maturity" makes clear why the State generally may resort to objective, though inevitably arbitrary, criteria such as age limits, marital status, or membership in the Armed Forces for lifting some or all of the legal disabilities of minority. Not only is it difficult to [443 U.S. 622, 644] define, let alone determine, maturity, but also the fact that a minor may be very much an adult in some respects does not mean that his or her need and opportunity for growth under parental guidance and discipline have ended. As discussed in the text, however, the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.

[Footnote 24] The Supreme Judicial Court held that 12S imposed this standard on the superior court in large part because it construed the statute as containing the same restriction on parents. See supra, at 630. The court concluded that the judge should not be entitled "to exercise his authority on a standard broader than that to which a parent must adhere." Attorney General, 371 Mass., at 748, 360 N. E. 2d, at 293. Intervenors argue that, assuming state-supported parental involvement in the minor's abortion decision is permissible, the State may not endorse [443 U.S. 622, 645] the withholding of parental consent for any reason not believed to be in the minor's best interests. They agree with the District Court that, even though 12S was construed by the highest state court to impose this restriction, the statute is flawed because the restriction is not apparent on its face. Intervenors thus concur in the District Court's assumption that the statute will encourage parents to withhold consent for impermissible reasons. See Baird III, 450 F. Supp., at 1004-1005; Baird II, 428 F. Supp. 854, 855-856 (Mass. 1977). There is no basis for this assertion. As a general rule, the interpretation of a state statute by the State's highest court "is as though written into the ordinance itself," Poulos v. New Hampshire, 345 U.S. 395, 402 (1953), and we are obliged to view the restriction on the parental-consent requirement "as if [12S] had been so amended by the [Massachusetts] legislature." Winters v. New York, 333 U.S. 507, 514 (1948).

[Footnote 25] Intervenors take issue with the Supreme Judicial Court's assurances that judicial proceedings will provide the necessary confidentiality, lack of procedural burden, and speed of resolution. In the absence of any evidence as to the operation of judicial proceedings under 12S - and there is none, since appellees successfully sought to enjoin Massachusetts from putting it into effect - we must assume that the Supreme Judicial Court's judgment is correct.

[Footnote 26] The statute also provides that "[i]f both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

[Footnote 27] This reading of the statute requires parental consultation and consent more strictly than appellants themselves previously believed was necessary. In their first argument before this Court, and again before the Supreme Judicial Court, appellants argued that 12S was not intended to abrogate Massachusetts' common-law "mature minor" rule as it applies to abortions. See 428 U.S., at 144. They also suggested that, under some circumstances, 12S might permit even immature minors to obtain judicial approval for an abortion without any parental consultation. See 428 U.S., at 145; Attorney General, supra, at 751, 360 N. E. 2d, at 294. The Supreme Judicial Court sketched the outlines of the mature minor rule that would apply in the absence of 12S: "The mature minor rule calls for an analysis of the nature of the operation, its likely benefit, and the capacity of the particular minor to understand fully what the medical procedure involves. . . . Judicial intervention is not required. If [443 U.S. 622, 647] judicial approval is obtained, however, the doctor is protected from a subsequent claim that the circumstances did not warrant his reliance on the mature minor rule, and, of course, the minor patient is afforded advance protection against a misapplication of the rule." Id., at 752, 360 N. E. 2d, at 295. "We conclude that, apart from statutory limitations which are constitutional, where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth." Id., at 754, 360 N. E. 2d, at 296. The Supreme Judicial Court held that the common-law mature minor rule was inapplicable to abortions because it had been legislatively superseded by 12S.

[Footnote 28] Of course, if the minor consults with her parents voluntarily and they withhold consent, she is free to seek judicial authorization for the abortion immediately.

[Footnote 29] There will be cases where the pregnant minor has received approval of the abortion decision by one parent. In that event, the parent can support the daughter's request for a prompt judicial determination, and the parent's support should be given great, if not dispositive, weight.

[Footnote 30] Appellees and intervenors have argued that 12S violates the Equal Protection Clause of the Fourteenth Amendment. As we have concluded that the statute is constitutionally infirm for other reasons, there is no need to consider this question.

[Footnote 31] Section 12S evidently applies to all nonemergency abortions performed on minors, without regard to the period in pregnancy during which the procedure occurs. As the court below recognized, most abortions are performed during the early stages of pregnancy, before the end of the first trimester. See Baird III, 450 F. Supp., at 1001; Baird I, 393 F. Supp., at 853. This coincides approximately with the pre-viability period during which a pregnant woman's right to decide, in consultation with her physician, to have an abortion is most immune to state intervention. See Roe v. Wade, 410 U.S., at 164-165. The propriety of parental involvement in a minor's abortion decision does not diminish as the pregnancy progresses and legitimate concerns for the pregnant minor's health increase. Furthermore, the opportunity for direct access to court which we have described is adequate to safeguard throughout pregnancy the constitutionally protected interests of a minor in the abortion decision. Thus, although a significant number of abortions within the scope of 12S might be performed during the later stages of pregnancy, we do not believe a different analysis of the statute is required for them.

[Footnote 32] The opinion of MR. JUSTICE STEVENS, concurring in the judgment, joined by three Members of the Court, characterizes this opinion as "advisory" [443 U.S. 622, 652] and the questions it addresses as "hypothetical." Apparently, this is criticism of our attempt to provide some guidance as to how a State constitutionally may provide for adult involvement - either by parents or a state official such as a judge - in the abortion decisions of minors. In view of the importance of the issue raised, and the protracted litigation to which these parties already have been subjected, we think it would be irresponsible simply to invalidate 12S without stating our views as to the controlling principles. The statute before us today is the same one that was here in Bellotti I. The issues it presents were not then deemed "hypothetical." In a unanimous opinion, we remanded the case with directions that appropriate questions be certified to the Supreme Judicial Court of Massachusetts "concerning the meaning of [12S] and the procedure it imposes." 428 U.S., at 151. We directed that this be done because, as stated in the opinion, we thought the construction of 12S urged by appellants would "avoid or substantially modify the federal constitutional challenge to the statute." Id., at 148. The central feature of 12S was its provision that a state-court judge could make the ultimate decision, when necessary, as to the exercise by a minor of the right to an abortion. See id., at 145. We held that this "would be fundamentally different from a statute that creates a 'parental veto' [of the kind rejected in Danforth.]" Ibid. (footnote omitted). Thus, all Members of the Court agreed that providing for decisionmaking authority in a judge was not the kind of veto power held invalid in Danforth. The basic issues that were before us in Bellotti I remain in the case, sharpened by the construction of 12S by the Supreme Judicial Court.

MR. JUSTICE REHNQUIST, concurring.

I join the opinion of MR. JUSTICE POWELL and the judgment of the Court. At such time as this Court is willing to [443 U.S. 622, 652] reconsider its earlier decision in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), in which I joined the opinion of MR. JUSTICE WHITE, dissenting in part, I shall be more than willing to participate in that task. But unless and until that time comes, literally thousands of judges cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, concurring in the judgment.

In Roe v. Wade, 410 U.S. 113, the Court held that a woman's right to decide whether to terminate a pregnancy is [443 U.S. 622, 653] entitled to constitutional protection. In Planned Parenthood of Central

Missouri v. Danforth, 428 U.S. 52, 72-75, the Court held that a pregnant minor's right to make the abortion decision may not be conditioned on the consent of one parent. I am persuaded that these decisions require affirmance of the District Court's holding that the Massachusetts statute is unconstitutional.

The Massachusetts statute is, on its face, simple and straightforward. It provides that every woman under 18 who has not married must secure the consent of both her parents before receiving an abortion. "If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown." Mass. Gen. Laws Ann., ch. 112, 12S (West Supp. 1979).

Whatever confusion or uncertainty might have existed as to how this statute was to operate, see Bellotti v. Baird, 428 U.S. 132, has been eliminated by the authoritative construction of its provisions by the Massachusetts Supreme Judicial Court. See Baird v. Attorney General, 371 Mass. 741, 360 N. E. 2d 288 (1977). The statute was construed to require that every minor who wishes an abortion must first seek the consent of both parents, unless a parent is not available or unless the need for the abortion constitutes "'an emergency requiring immediate action.'" Id., at 750, 360 N. E. 2d, at 294. Both parents, so long as they are available, must also receive notice of judicial proceedings brought under the statute by the minor. In those proceedings, the task of the judge is to determine whether the best interests of the minor will be served by an abortion. The decision is his to make, even if he finds "that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion." Id., at 748, 360 N. E. 2d, at 293. Thus, no minor in Massachusetts, no matter how mature and capable of informed decisionmaking, may receive an abortion without the consent [443 U.S. 622, 654] of either both her parents or a superior court judge. In every instance, the minor's decision to secure an abortion is subject to an absolute third-party veto.1

In Planned Parenthood of Central Missouri v. Danforth, supra, this Court invalidated statutory provisions requiring the consent of the husband of a married woman and of one parent of a pregnant minor to an abortion. As to the spousal consent, the Court concluded that "we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right." 428 U.S., at 70. And as to the parental consent, the Court held that "[j]ust as with the requirement of consent from the spouse, so here, the State does not have the 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 the consent." Id., at 74. These holdings, I think, equally apply to the Massachusetts statute. The differences between the two statutes are few. Unlike the Missouri statute, Massachusetts requires the consent of both of the woman's parents. It does, of course, provide an alternative in the form of a suit initiated by the woman in superior court. But in that proceeding, the judge is afforded an absolute veto over the minor's decisions, based on his judgment of her best interests. In Massachusetts, then, as in Missouri, the State has imposed an "absolute limitation on the minor's right to obtain an abortion." id., at 90 (STEWART, J., concurring), applicable to every pregnant minor in the State who has not married. [443 U.S. 622, 655]

The provision of an absolute veto to a judge - or, potentially, to an appointed administrator2 - is to me particularly troubling. The constitutional right to make the abortion decision affords protection to both of the privacy interests recognized in this Court's cases: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (footnotes omitted). It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. In Massachusetts, however, every minor who cannot secure the consent of both her parents - which under Danforth cannot be an absolute prerequisite to an abortion - is required to secure the consent of the sovereign. As a practical matter, I

would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent.3 Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor - particularly when contrary to her own informed and reasonable decision - is fundamentally at odds [443 U.S. 622, 656] with privacy interests underlying the constitutional protection afforded to her decision.

In short, it seems to me that this litigation is governed by Danforth; to the extent this statute differs from that in Danforth, it is potentially even more restrictive of the constitutional right to decide whether or not to terminate a pregnancy. Because the statute has been once authoritatively construed by the Massachusetts Supreme Judicial Court, and because it is clear that the statute as written and construed is not constitutional, I agree with MR. JUSTICE POWELL that the District Court's judgment should be affirmed. Because his opinion goes further, however, and addresses the constitutionality of an abortion statute that Massachusetts has not enacted, I decline to join his opinion.4

[Footnote 1] By affording such a veto, the Massachusetts statute does far more than simply provide for notice to the parents. See post, at 657 (WHITE, J., dissenting). Neither Danforth nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto.

[Footnote 2] See ante, at 643 n. 22.

[Footnote 3] A minor may secure the assistance of counsel in filing and prosecuting her suit, but that is not guaranteed. The Massachusetts Supreme Judicial Court in response to the question whether a minor, upon a showing of indigency, may have court-appointed counsel, "construe[d] the statutes of the Commonwealth to authorize the appointment of counsel or a guardian ad litem for an indigent minor at public expense, if necessary, if the judge, in his discretion, concludes that the best interests of the minor would be served by such an appointment." Baird v. Attorney General, 371 Mass. 741, 764, 360 N. E. 2d 288, 301 (1977) (emphasis added).

[Footnote 4] Until and unless Massachusetts or another State enacts a less restrictive statutory scheme, this Court has no occasion to render an advisory opinion on the constitutionality of such a scheme. A real statute - rather than a mere outline of a possible statute - and a real case or controversy may well present questions that appear quite different from the hypothetical questions MR. JUSTICE POWELL has elected to address. Indeed, there is a certain irony in his suggestion that a statute that is intended to vindicate "the special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child," see ante, at 639, need not require notice to the parents of the minor's intended decision. That irony makes me wonder whether any legislature concerned with parental consultation would, in the absence of today's advisory opinion, have enacted a statute comparable to the one my Brethren have discussed.

MR. JUSTICE WHITE, dissenting.

I was in dissent in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 94-95 (1976), on the issue of the validity of requiring the consent of a parent when an unmarried woman under 18 years of age seeks an abortion. I continue to have the views I expressed there and also agree with much of what MR. JUSTICE STEVENS said in dissent in that [443 U.S. 622, 657] case. Id., at 101-105. I would not, therefore, strike down this Massachusetts law.

But even if a parental consent requirement of the kind involved in Danforth must be deemed invalid, that does not condemn the Massachusetts law, which, when the parents object, authorizes a judge to permit an abortion if he concludes that an abortion is in the best interests of the child. Going beyond Danforth, the Court now holds it unconstitutional for a State to require that in all cases parents receive notice that their daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the "best interests" of the child to undergo the surgery. Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.

With all due respect, I dissent. [443 U.S. 622, 658]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Public Health and Science

Provision of Abortion-Related Services in Family Planning Services Projects

AGENCY: Office of Population Affairs, OPHS, DHHS.

ACTION: Notice.

SUMMARY: This notice informs the public of the interpretations relating to the statutory requirement that no funds appropriated under Title X of the Public Health Service Act be used in programs in which abortion is a method of family planning.

FOR FURTHER INFORMATION CONTACT: Samuel S. Taylor, Office of Population Affairs, (301) 594–4001.

SUPPLEMENTARY INFORMATION: On February 5, 1993, the Department of Health and Human Services published in the **Federal Register** a notice of proposed rulemaking that proposed to revise the regulations at 42 CFR Part 59, Subpart A. Subpart A of Part 59 sets forth the program requirements applicable to grantees under section 1001 of the Public Health Service (PHS) Act, 42 U.S.C. 300, *et seq.* The notice of proposed rulemaking proposed to revise that subpart by readopting the program regulations as they existed prior to February 2, 1988. This action would have the effect of revoking the regulations published on February 2, 1988, commonly known as the "Gag Rule," which set forth standards for the compliance by such grantees with section 1008 of that Act, 42 U.S.C. 300a–6.

The February 5, 1993 notice of proposed rulemaking also proposed to reinstitute the pre-1988 policies and interpretations regarding compliance with section 1008. 58 FR 7464. As explained in the notice of proposed rulemaking, those policies and interpretations derived from previous opinions of the Department concerning section 1008. To promote more useful public comment in the rulemaking process, the Department subsequently made available a more detailed summary of the policies and interpretations and reopened the public comment period. 58 FR 34042 (June 23, 1993).

A number of public comments on the prior policies and interpretations were obtained during the reopened comment period, and the public comments received during both comment periods were generally focused on the prior policies and interpretations rather than on the proposed regulatory language. The Department has changed one paragraph of the regulations and has modified its prior interpretations in several particulars based in part on the public comment received. These modifications, and the grounds therefor, are described in the preamble to the final rules published on this date in the rules section of the Federal Register. The interpretations, as so modified, are set out in the summary statement below. The summary below is also reorganized from the summary statement made available for public comment, for purposes of clarification.

Accordingly, to provide guidance to grantees in order to promote uniform administration of the program and facilitate grantee compliance with the interpretations that are being reinstituted in conjunction with the final regulations adopted on this date, provided below is a summary of the program regulatory requirements and interpretations that relate to section 1008 of the PHS Act.

Program Policies Regarding the Title X National Family Planning Program and the Section 1008 Abortion Prohibition

Section 1008 of the Title X statute, 42 U.S.C. 300a–6, states: "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." This prohibition applies not only to the performance of abortion by a Title X project, but also to the conduct of certain abortion-related activities by the project. However, the prohibition does not apply to all the activities of a Title X grantee, but only to those within the Title X project. This statement summarizes the Department requirements and interpretations in existence prior to the imposition of the 1988 "Gag Rule" with regard to implementation of section 1008, as modified following the rulemaking of 1993.

1. General Principles

In general, section 1008 prohibits Title X programs from engaging in activities which promote or encourage abortion as a method of family planning. However, section 1008 does not prohibit the funding under Title X of activities which have only a possibility of encouraging or promoting abortion; rather, a more direct nexus is required. The general test is whether the immediate effect of the activity in question is to promote or encourage the use of abortion as a method of family planning. If the immediate effect of the activity in question is essentially neutral, then it is not prohibited by the statute. Thus, a Title X project may not provide services that directly facilitate the use of abortion as a method of family planning, such as providing transportation for an abortion, explaining and obtaining signed abortion consent forms from clients interested in abortions, negotiating a reduction in fees for an abortion, and scheduling or arranging for the performance of an abortion, promoting or advocating abortion within Title X program activities, or failing to preserve sufficient separation between Title X program activities and abortion-related activities.

2. Abortion Counseling and Referral

Under 42 CFR 59.5(a)(5), a Title X project must:

Not provide abortion as a method of family planning. A project must:

(i) Offer pregnant women the opportunity to be provided information and counseling regarding each of the following options:

(A) Prenatal care and delivery;

(B) Infant care, foster care, or adoption; and

(C) Pregnancy termination.

(ii) If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral on request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling.

However, there are limitations on what abortion counseling and referral is permissable under the statute. A Title X project may not provide pregnancy options counseling which promotes abortion or encourages persons to obtain abortion, although the project may provide patients with complete factual information about all medical options and the accompanying risks and benefits. While a Title X project may provide a referral for abortion, which may include providing a patient with the name, address, telephone number, and other relevant factual information (such as whether the provider accepts Medicaid, charges, etc.) about an abortion provider, the project may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient. Where a referral to another provider who might perform an abortion is medically indicated because of the patient's condition or the condition of the fetus (such as where the woman's life would be endangered), such a referral by a Title X project is not prohibited by section 1008 and is required by 42 CFR 59.5(b)(1). The limitations on referrals do not apply in cases in which a referral is made for medical indications.

3. Advocacy Activities

A Title X project may not promote or encourage the use of abortion as a method of family planning through advocacy activities such as providing speakers to debate in opposition to anti-abortion speakers, bringing legal action to liberalize statutes relating to abortion, or producing and/or showing films that encourage or promote a favorable attitude toward abortion as a method of family planning. Films that present only neutral, factual information about abortion are permissible. A Title X project may be a dues paying participant in a national abortion advocacy organization, so long as there are other legitimate program-related reasons for the affiliation (such as access to certain information or data useful to the Title X project). A Title X project may also discuss abortion as an available alternative when a family planning method fails in a discussion of relative risks of various methods of contraception.

4. Separation

Non-Title X abortion activities must be separate and distinct from Title X project activities. Where a grantee conducts abortion activities that are not part of the Title X project and would not be permissible if they were, the grantee must ensure that the Title X-supported project is separate and distinguishable from those other activities. What must be looked at is whether the abortion element in a program of family planning services is so large and so intimately related to all aspects of the program as to make it difficult or impossible to separate the eligible and non-eligible items of cost.

The Title X project is the set of activities the grantee agreed to perform in the relevant grant documents as a condition of receiving Title X funds. A grant applicant may include both project and nonproject activities in its grant application, and, so long as these are properly distinguished from each other and prohibited activities are not reflected in the amount of the total approved budget, no problem is created. Separation of Title X from abortion activities does not require separate grantees or even a separate health facility, but separate bookkeeping entries alone will not satisfy the spirit of the law. Mere technical allocation of funds, attributing federal dollars to non-abortion activities, is not a legally supportable avoidance of section 1008.

Certain kinds of shared facilities are permissible, so long as it is possible to distinguish between the Title X supported activities and non-Title X abortion-related activities: (a) A common waiting room is permissible, as long as the costs properly pro-rated; (b) common staff is permissible, so long as salaries are properly allocated and all abortion related activities of the staff members are performed in a program which is entirely separate from the Title X project; (c) a hospital offering abortions for family planning purposes and also housing a Title X project is permissible, as long as the abortion activities are sufficiently separate from the Title X project; and (d) maintenance of a single file system for abortion and family planning patients is permissible, so long as costs are properly allocated.

Whether a violation of section 1008 has occurred is determined by whether the prohibited activity is part of the funded project, not by whether it has been paid for by federal or non-federal funds. A grantee may demonstrate that prohibited abortion-related activities are not part of the Title X project by various means, including counseling and service protocols, intake and referral procedures, material review procedures, and other administrative procedures.

Dated: June 28, 2000.

Samuel S. Taylor,

Acting Director, Office of Population Affairs.

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