2002

Minor Rights: The Adolescent Abortion Cases

Martin Guggenheim
MINOR RIGHTS: THE ADOLESCENT
ABORTION CASES

Martin Guggenheim*

I. INTRODUCTION

There is an old saw that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.” Nonetheless, there was a time before the Supreme Court ever referred to children as having constitutional rights. This Article will focus on two Supreme Court decisions issued during a very limited time span (1976-79), in which the Court redefined the entire conception of children’s rights. What the Article will suggest is that the rule that emerged had a lot less to do with magic than with sleight-of-hand. Through an astonishing transformation, the Supreme Court used a construct of children’s constitutional “rights” to restrict the rights of children. By doing so, the Court decisively derailed an incipient children’s rights movement that had the potential to liberate children from the dominion of adults.

* © Martin Guggenheim; Professor of Clinical Law; Director, Clinical and Advocacy Programs, New York University School of Law. The Article was originally presented as the Sidney and Walter Siben Distinguished Professorship Lecture at Hofstra University School of Law on October 24, 2001. I want to thank Annette Appell and Randy Hertz who read an earlier draft of this Article and provided me with invaluable comments and Merry Jean Chan, N.Y.U. Class of 2003 for her excellent research assistance. I am also grateful for financial support from the Filomen D’Agostino and Max E. Greenberg Research Fund at New York University School of Law.

The two decisions that will be the central focus of analysis here are *Planned Parenthood v. Danforth* and *Bellotti v. Baird*. In these cases, the Court first wrote and then rewrote the rules governing a minor’s right to terminate a pregnancy. In the aggregate, the Supreme Court has addressed the subject of a pregnant minor’s rights a total of ten times since 1973 (the first time the Court held that a woman’s constitutional right of privacy encompasses a right to terminate a pregnancy). In *Danforth*, the Court considered for the first time the constitutionality of a state statute that contained a mandatory parental consent provision. The Court struck down that part of the statute that prohibited unmarried minors from procuring abortions during the first trimester of their pregnancies without a parent’s consent. Magisterially declaring that “[m]inors, as well as adults, are protected by the Constitution and

5. Since the Court decided *Roe v. Wade*, 410 U.S. 113 (1973), it has also decided the following cases: *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (per curiam) (upholding constitutionality of statute that required one-parent notification but allowed for judicial bypass when judge finds that notice would not serve child’s best interests); *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.) (upholding a statute requiring one parent’s consent for unwed minor’s abortion because of its bypass option permitting the minor to seek judicial consent based on a finding that the minor is mature or that abortion is in her best interests); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 508, 519-20 (1990) (deciding that there is no undue burden in requiring judicial bypass whereby the minor either could show maturity, that she is a victim of abuse, or that notice is not in her best interests); *Hodgson v. Minnesota*, 497 U.S. 417, 455 (1990) (holding that a two-parent notification requirement is constitutional as long as the minor has an option to seek judicial review); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 493 (1983) (upholding parental and judicial consent scheme which permitted unwed minors to obtain an abortion when judge determined that the minor was mature or that the abortion was in her best interests); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 (1983) (holding that a parental and judicial consent scheme for unwed minors which contained a blanket determination that all minors under the age of fifteen were too immature to make a decision and that abortion could never be in minor’s best interests in the absence of parental consent is unconstitutional), overruled in part by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.); *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (holding that a statute requiring a physician to notify the parent “if possible” of an unemancipated, immature minor when performing an abortion is facially constitutional); *Bellotti*, 443 U.S. at 647, 650 (plurality opinion) (holding that even when judicial bypass is available, a state law requiring parental notification in all cases is unconstitutional); *Bellotti v. Baird*, 428 U.S. 132, 146-47, 151 (1976) (abstaining from deciding the constitutionality of a statute restricting an unwed minor’s abortion and certifying questions to state supreme court to obtain authoritative construction of law); *Danforth*, 428 U.S. at 74 (holding that a state statute prohibiting unmarried minors from procuring abortions during the first trimester of their pregnancies without a parent’s consent is unconstitutional).

6. *See Bellotti*, 443 U.S. at 624 (plurality opinion) (noting that inquiry into this issue began in *Danforth*); *Danforth*, 428 U.S. at 72-75 (discussing parental consent requirement).
7. *See Danforth*, 428 U.S. at 75.
possess constitutional rights," eight members of the Court concluded that a state could not subject a minor’s choice to terminate her pregnancy to a parent’s absolute veto “without a sufficient justification for the restriction.”

Even though Danforth has never been overruled, I intend to demonstrate that current law does not afford minors a constitutional right to terminate a pregnancy. Ever since Danforth, commentators have attempted to develop a coherent theory of the constitutional rights of children by treating the adolescent abortion cases as if they advanced children’s constitutional rights. For the most part, these commentators have failed. But the failure did not stem from any deficit in reasoning. Rather, the fault lay with the underlying premise: that those cases do advance children’s constitutional rights. It is my contention that the abortion cases are not really about constitutional rights of children in the first place.

Much flows from this. If correct, this would require a substantial reappraisal of the broader tapestry of constitutional rights of children. The larger network of doctrine and constitutional theory lacks a consistency which in no small part is the consequence of classifying the abortion cases within the subject of constitutional rights. Ultimately, we will be able to identify a more coherent theory of children’s rights if we are able to categorize the abortion cases correctly.

How does one go about demonstrating that an entire line of Supreme Court decisions is not really about the constitutional rights of the claimants despite the Court’s explicit statements to the contrary? Part II will discuss Supreme Court decisions that establish the parameters of constitutional rights of children through the time that Danforth was decided. This review lays the foundation necessary to evaluate and situate the Danforth holding within this larger framework. Part III will

8. Id. at 74.
9. Id. at 75.
10. This is not an argument about whether minors should have such a right. The argument simply develops from the holdings of the Supreme Court on the subject of the constitutional rights of minors.
12. See Houlgate, supra note 2, at 84-85.
13. See Dolgin, supra note 11, at 412.
discuss and analyze the majority and dissenting opinions in Danforth. This Part will focus in particular on the views of the Supreme Court Justice who played the greatest role in shaping and defining the rights of pregnant minors: Justice Lewis A. Powell, Jr. This Part will then discuss and analyze the 1979 decision in Bellotti v. Baird and will show that Bellotti radically altered the meaning and significance of Danforth and effectively eviscerated whatever constitutional rights of privacy the earlier decision may have created. Part IV will discuss the implications of the minor abortion cases. First, it will demonstrate who really were the winners and losers in these cases. Next, this Part will take a careful look at the "rights" that pregnant minors actually possess under the holding in Bellotti. Finally, this Part will examine whether, and to what extent, the pregnant minor cases establish a precedent for children's constitutional rights in other areas of the law. Part V will offer an explanation for the minor abortion cases, suggesting that they are best understood as a conservative Court's efforts to create rules that allow pregnant minors to obtain abortions while ensuring that those rules will not be used to advance children's claims for greater constitutional rights in other areas of the law.

II. THE CONSTITUTIONAL RIGHTS OF CHILDREN GENERALLY: THE YEARS LEADING UP TO PLANNED PARENTHOOD V. DANFORTH

Supreme Court decisions on the constitutional rights of children come in a variety of forms. For sake of ease, through the mid-1970s when the adolescent abortion cases were first decided, we may divide the constitutional cases concerning children into three categories. The first involves conflicts between parents and the state. The second involves conflicts between children and the state. The third set, of which the abortion cases are paradigmatic, involves a clash between parents and children.

A. Clashes Between Parents and the State

Whether and to what extent these cases may even qualify as "children's rights" cases is beyond the focus of this Article. Whatever characterization these cases ultimately yield, however, it is impossible to discuss children's rights in the United States without considering these cases. This is because one cannot discuss constitutional rights of children without recognizing that children must be discussed in relational terms. Children go with adult caregivers (which, for these purposes, we will call "parents") almost by definition. Certainly, infants
are inherently dependent. Indeed, this is the starting point of all analyses of Joseph Goldstein, Anna Freud and Albert Solnit:

[T]o be a *child* is to be at risk, dependent, and without capacity or authority to decide free of parental control what is “best” for oneself. To be an *adult* is in law to be perceived as free to take risks, with the independent capacity and authority to decide what is “best” for oneself without regard to parental wishes. To be an *adult who is a parent* is therefore to be presumed by law to have the capacity, authority, and responsibility to determine and to do what is “good” for one’s children, what is “best” for the entire family.

At their deepest level, the cases in this category raise the most basic questions about the relationship of citizen and state because they necessarily involve some inquiry into “whose” child is being fought over when parents and the state clash. They unavoidably include an inquiry into whether children are in the first instance viewed as citizens entitled to protection by the state or as part of their parents’ family to be raised by them beyond the reaches of the state. Cases in this category have

15. GOLDSTEIN ET AL., supra note 14, at 7.
16. A wide range of explanations have been offered for the primacy of parental control in child rearing. These include the claim that basic to an adult’s autonomy and freedom to procreate is the right to raise children as parents see fit. See, e.g., Peggy Cooper Davis, Contested Images of Family Values: The Role of the State, 107 HARV. L. REV. 1348, 1371-73 (1994); David A.J. Richards, The Individual, the Family, and the Constitution: A Jurisprudential Perspective, 55 N.Y.U. L. REV. 1, 6-20, 28 (1980) (noting that child rearing “is one of the ways in which many people fulfill and express their deepest values about how life is to be lived. To this extent, one’s children are the test of one’s life and aspirations.”); see also PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 168, 226-49 (1997) (parental rights are “an aspect of human self-definition and moral choice” and the Fourteenth Amendment’s Due Process Clause was explicitly intended to protect Americans’ right to have, keep, and raise children free from state involvement as a direct reaction to these basic liberties of which slaves were deprived). Others see parental rights in political terms through which the family serves a public function of producing citizens with diverse values shaped by what their parents want rather than a more narrow, homogeneous vision of the state’s. See, e.g., William A. Galston, Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory, 40 WM. & MARY L. REV. 869, 901 (1999). Still others regard parental rights as akin to a trust given to them by the state with residual powers vested in the state to intervene when parents breach their duties to children. See, e.g., Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 VA. L. REV. 2401, 2401 (1995). They also include the claim that a parent’s right to raise children stems from outdated property rights which men once enjoyed under American law over wives and children. See Barbara Bennett Woodhouse, Who Owns the Child? Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1042 (1992). For a particularly thoughtful summary of these various views, and others, see Annette Appell, Virtual Mothers and the Meaning of Parenthood, 34 U. MICH. J.L. REFORM (forthcoming 2001) (manuscript at 27-37, on file with Author).
involved fights over who decides the shape of a child’s education, religion, custody (including foster care and termination of parental rights), and a myriad of other child rearing choices.

The constitutional parental right to control the details of a child’s upbringing has been recognized by the Supreme Court throughout the twentieth century as part of the substantive due process rights of Americans. It is a fundamental tenet of American constitutional law that parents enjoy the right to control the details of their children’s upbringing, and that families enjoy a right to familial privacy and liberty. In the words of the Supreme Court, “[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”

Although the Constitution does not expressly confer upon parents the right to rear their children without undue interference by the state, rights of this nature have been found implicit in a number of constitutional guarantees. The Court has located the freedom of parents and families against unnecessary state intrusion as within the Constitution’s protections of privacy, liberty, and personal integrity.

---

17. See, e.g., Yoder, 406 U.S. at 205, 234 (holding that a compulsory-attendance law is unconstitutional when applied to Amish families); Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925) (holding that parents cannot be required to send their child to public school); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (holding that a statute prohibiting the teaching of a foreign language to children who had yet to reach the eighth grade is unconstitutional).

18. See, e.g., Yoder, 406 U.S. at 208-09; Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (sustaining application of child labor laws to a child exercising her religious convictions).

19. See, e.g., Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 847 (1977) (upholding a procedure of removing foster children from their foster homes); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that parents are entitled to a hearing before their children are removed from their custody and that parents have substantive due process rights to the care and custody of their children).


22. See Yoder, 406 U.S. at 230-34; Pierce, 268 U.S. at 534-35; Meyer, 262 U.S. at 399.


24. See Santosky v. Kramer, 455 U.S. 745, 753 (1982) (“The absence of dispute concerning the fundamental nature of the parent-child bond reflect[s] this Court’s historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”); see also Stanley, 405 U.S. at 651.


26. See, e.g., Griswold, 381 U.S. at 485-86.
In *Meyer v. Nebraska,* the first significant parents’ rights case, the Supreme Court held that the liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments encompassed the right to marry, establish a home, and bring up children; a statute forbidding the teaching of the German language was invalidated as an impermissible infringement on the freedom of parents to have their children learn a foreign tongue if they wished. In dictum, the Court considered the practice, endorsed by Plato and others, of removing children from their homes for training by “official guardians” and concluded:

Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

Relying on *Meyer,* the Court two years later struck down an Oregon statute requiring children to attend public schools in *Pierce v. Society of Sisters.* The Justices found that this statute unduly interfered with the right of parents to select private or parochial schools for their children and that it lacked a “reasonable relation to [any] purpose within the competency of the State.” The Court wrote:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

In *Prince v. Massachusetts,* the Court asserted in dictum that “[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

---

27. See, e.g., *Santosky,* 455 U.S. at 753-54; *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 639-40 (1974); *Yoder,* 406 U.S. at 230-34; *Stanley,* 405 U.S. at 651; *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); *Pierce,* 268 U.S. at 534-35; *Meyer,* 262 U.S. at 399.
29. 262 U.S. 390 (1923).
30. See id. at 403.
31. *Id.* at 402.
33. *Id.* at 535.
34. *Id.*
preparation for obligations the state can neither supply nor hinder.” In 1972, the Court declared unconstitutional an Illinois dependency and neglect statute that deprived unmarried fathers of the care and custody of their natural children on the death of the mother without any showing of the father’s unfitness. The Court held that when the state seeks to disrupt the parent-child relationship, its justifications for doing so must satisfy an exacting standard of scrutiny because “[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.”

B. Clashes Between Children and the State

The second set of cases involves clashes between children and the state. These cases are less venerable; many of them were decided in the 1960s. They involve the Due Process Clause of the Fourteenth Amendment, particularly in juvenile delinquency proceedings and in the public schools. They also concern the First Amendment, along with the occasional Equal Protection case.

---

36. Id. at 166. Prince nevertheless held that the state could limit this freedom to the extent necessary to protect children from serious hazards to their physical well-being. See id. The Court sustained the conviction of a minor’s guardian for violating a child labor law by permitting the child to sell evangelical newspapers pursuant to the missionary tenets of the child’s and guardian’s religion. See id. at 170. “Parents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children . . . .” Id. at 170.


38. Id. at 651 (second alteration in original) (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

“The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one’s children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘[r]ights far more precious . . . than property rights.’ ‘It 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.’ The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.”

Id. at 651 (alteration and omission in original) (citations omitted).


Perhaps the most well-known children's rights case, and the one widely regarded as igniting the subject, is *In re Gault*,
387 U.S. 1 (1967). The Court was given its first opportunity to determine what, if any, procedural constraints the Constitution placed on state officials in juvenile delinquency proceedings. The Court refused to take for granted that juvenile delinquency trials should precisely mirror their adult criminal counterparts. Instead, the majority wished to find a jurisprudential basis for affording the essential protections of the adult criminal process while preserving the rehabilitative goals, confidentiality, and other benevolent features of the juvenile court process. To effect these results, the *Gault* majority decreed that juveniles would enjoy those constitutional rights—but only those rights—necessary to implement the Due Process Clause's guarantee of "fundamental fairness." The Court addressed four specific rights at issue in the case before it: the privilege against self-incrimination and the rights to counsel, fair notice of the charges, and to confront and cross-examine adverse witnesses. The Court concluded that these rights are so fundamental to a system of justice, that they are required in juvenile delinquency prosecutions. The Court left for another day, and other cases, the task of further fleshing out its vision of the core elements of a fundamentally fair justice process.

Three years later, in *In re Winship*, the Court revisited the subject, addressing the question whether a juvenile may be convicted of a delinquency offense based only on a preponderance of the evidence rather than the usual adult criminal standard of proof beyond a reasonable doubt. The Court ruled that in juvenile delinquency cases, as

---


43. 387 U.S. 1 (1967). Many years earlier, the Court held that when persons under eighteen are prosecuted in the adult criminal justice system, they retain basic constitutional rights in those proceedings. *See, e.g.*, Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962); Haley v. Ohio, 332 U.S. 596, 601 (1948).


45. *See id.* at 30.

46. *See id.* at 21.

47. *See id.* at 30-31, 31 n.48.

48. *See id.* at 29.

49. *See id.* at 32-34 (notice); *id.* at 36, 41 (counsel); *id.* at 49-50, 55 (self-incrimination); *id.* at 56-57 (confrontation and cross-examination).

50. *See id.* at 13, 31 n.48.


52. *See id.* at 359.
in criminal cases, the Due Process Clause requires a standard of proof beyond a reasonable doubt.\textsuperscript{53}

The calculus of fundamental fairness produced a very different result, however, in *McKeiver v. Pennsylvania*\textsuperscript{54} in the very next Term. In arguing for a constitutional right to a jury trial, the juvenile appellants emphasized that the fact-finding stage of a juvenile delinquency case, as reshaped by *Gault* and *Winship*, mirrored the adult criminal trial in virtually all respects except the right to a jury.\textsuperscript{55} The Court ruled that the Constitution is not offended when juvenile delinquency cases are tried without juries (despite the Sixth Amendment).\textsuperscript{56} Finally, in 1975, the Court held that juveniles are protected against double jeopardy when prosecuted as delinquents.\textsuperscript{57}

Outside of the criminal justice arena, the Supreme Court has insisted upon imposing constitutional restraints on government even when children are directly involved in the government action. So, for example, in *West Virginia School Board of Education v. Barnette*,\textsuperscript{58} the Court held that the First Amendment prohibits state officials from forcing citizens to speak, even when those officials are school teachers and the citizens are children required to pledge allegiance to the flag.\textsuperscript{59} And, in *Brown v. Board of Education*,\textsuperscript{60} the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits states from operating formally segregated schools.\textsuperscript{61}

Between the time of *Gault* and the Court’s decision in *Danforth*, the Court decided a number of other important cases bearing on the constitutional rights of children outside of the juvenile delinquency context. In *Ginsberg v. New York*,\textsuperscript{62} the Court held that it is constitutional for states to restrict access of nonobscene sexually explicit materials to

\begin{itemize}
\item \textsuperscript{53} See id. at 368.
\item \textsuperscript{54} 403 U.S. 528 (1971).
\item \textsuperscript{55} See id. at 541. Other than the jury trial right, the primary differences between juvenile delinquency and adult criminal procedure, concern the pretrial and post-trial stages of a case: juveniles generally lack the right to bail pending trial and are subject to shorter sentences upon conviction than adult criminal defendants. See generally RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT § 4.15, at 86-88 (1991) (noting that the use of bail in juvenile court has been rejected in the majority of jurisdictions while bail is allowed in adult proceedings); id. § 38.03, at 870-74 (discussing the dispositional alternatives and the judge’s discretion in a juvenile proceeding).
\item \textsuperscript{56} See *McKeiver*, 403 U.S. at 545.
\item \textsuperscript{57} See *Breed v. Jones*, 421 U.S. 519, 541 (1975).
\item \textsuperscript{58} 319 U.S. 624 (1943).
\item \textsuperscript{59} See id. at 642.
\item \textsuperscript{60} 347 U.S. 483 (1954).
\item \textsuperscript{61} See id. at 495.
\item \textsuperscript{62} 390 U.S. 629 (1968).
\end{itemize}
persons under seventeen. There were two principal rationales for this decision. First, and most importantly, the Court ruled that children are materially different from adults for certain First Amendment purposes, because they are not yet fully formed, mature people. Justice Stewart's famous concurrence in the case best captures this sentiment: "[A] State may permissibly determine that, at 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." The second justification was that the restriction was a form of providing support for parents to assist them in deciding whether and when to permit their children access to these materials. The Court was quick to point out that the challenged statutes did not prevent parents from giving these materials to their children; it merely barred the children from purchasing them directly.

The Court also decided three cases involving children and public schools between the Gault decision in 1967 and Danforth in 1976. In Tinker v. Des Moines Independent Community School District, the Court held that children in public school retain First Amendment rights to engage in nondisruptive political speech. In Goss v. Lopez, the Court held that school officials must comply with the rudiments of procedural due process before suspending a student from public school. Finally, in Ingraham v. Wright, the Court held that corporal punishment of public school children, over the objection of the children and their parents, did not violate the Constitution. In Part III, we will return to these three decisions and explore them in somewhat greater depth when we review the particular views of Justice Powell.

C. Clashes Between Children and Parents

As remarkable as it may seem, prior to the abortion cases themselves, the Supreme Court never decided a case involving a known conflict between a parent and child. In all of the cases already discussed

63. See id. at 643.
64. Id. at 649-50 (Stewart, J., concurring) (footnote omitted).
65. See id. at 639.
66. See id.
68. See id. at 514.
70. See id. at 582.
72. See id. at 683.
73. See infra Part III.B.
involving clashes between parents and the state, the views of the children were either irrelevant to the decision or, although potentially relevant, presumed to be in accord with the parents'. The one opportunity the Court had to address a potential conflict between the parent's and child's preferences was Wisconsin v. Yoder. In that case, the Court held that an Amish parent could not be convicted for refusing to send his 15-year-old daughter to school when he chose to keep her at home to work on the farm and cement the values of the Amish community. Justice Douglas's well-known dissent objected to ceding this awesome power to the parent to withdraw his child from school, with the concomitant impact such a withdrawal would have on the life's prospects for the child, without ascertaining the child's wishes on the subject. For Justice Douglas, if the child wished not to be in school, he would have concurred in the judgment declaring the compulsory education requirement unconstitutional as applied to her. But, if the child would rather be in school, Justice Douglas would not have permitted the father to withdraw her from school. No other Justice joined his opinion. Writing for the Court, Chief Justice Burger held that because the record was silent on the child's views, the Court would presume that the child is aligned with her father. He went on to add that if there were an actual conflict between father and child recognizing a child's claim to attend school over the parent's objection, this "would give rise to grave questions of religious freedom comparable to those raised here and those presented in Pierce v. Society of Sisters."

This completes this brief discussion of the pertinent constitutional cases concerning children prior to Danforth. Although this discussion has not included all cases, nor discussed any of them in great depth, it provides sufficient background to move on to the abortion cases themselves.

---

74. See, e.g., Ingraham, 430 U.S. at 663 (mentioning that some states require approval or notification of a child's parents before infliction of punishment but no state requires approval by the child).
76. See id. at 218, 234.
77. Id. at 241-49 (Douglas, J., dissenting in part) (arguing that the child's right to decide her own education ought to prevail over a contrary parental view).
78. See id. at 244-46 (Douglas, J., dissenting in part).
79. See id. at 243 (Douglas, J., dissenting in part).
80. See id. at 245 (Douglas, J., dissenting in part).
81. See id. at 231. "The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary." Id. (footnote omitted).
82. Id. at 231-32 (citation omitted).
III. THE EVOLUTION FROM PLANNED PARENTHOOD V. DANFORTH TO BELLOTTI V. BAIRD

A. Planned Parenthood v. Danforth

The holding in Planned Parenthood v. Danforth is simple enough: The Court declared unconstitutional that part of a Missouri statute that prohibited unmarried minors from obtaining abortions during the first trimester of their pregnancies without a parent's consent. Five members of the Court determined that a state could not subject a minor's choice to terminate her pregnancy to a parent's absolute veto "without a sufficient justification for the restriction." The opinion for the Court was written by Justice Blackmun. However, only Justices Brennan and Marshall fully joined his opinion. Justices Stewart and Powell concurred separately in an opinion written by Justice Stewart. There were four dissenting votes—Chief Justice Burger and Justices White, Rehnquist, and Stevens.

One of the most striking aspects of the Court's decision is that its holding was reached with virtually no constitutional analysis. This may be because of the structure of the case itself. Danforth reviewed Missouri's complicated abortion statute, which contained a myriad of restrictions on a woman's right to terminate a pregnancy, including a requirement for a married adult to obtain consent of her spouse and a requirement for an unmarried minor to obtain the consent of her parent. It may be that Justice Blackmun devoted so much of the decision to explaining why the spousal consent provision was unconstitutional that he failed to appreciate the deep constitutional issues implicit in striking down a parental consent requirement. Or it may be that he chose not to say very much on the subject because of the inherent difficulty of reconciling minors' constitutional rights with the vast body of law granting parents the authority to make child rearing decisions. But whatever the reason, Justice Blackmun quickly—one might say, 

84. See id. at 74, 75.
85. Id. at 75.
86. See id. at 55.
87. See id. at 54.
88. See id. at 89 (Stewart, J., concurring).
89. See id. at 92 (White, J., concurring in part and dissenting in part); id. at 101 (Stevens, J., concurring in part and dissenting in part).
90. See id. at 55-84.
91. See id. at 58-59.
92. See id. at 69-72.
facilely—reached the conclusion that “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.” 93 The Court’s entire analysis is reduced to a single sentence: “Just 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 . . . .” 94

This is nothing short of astonishing. The Court declared Missouri’s law requiring parental consent before a minor could obtain a nonemergency abortion unconstitutional because it constituted a “delegation” from the state to parents which the state does not possess in the first place. 95 But it should be immediately apparent that the delegation theory is unsound. To begin with, by emphasizing that the Missouri Legislature delegated a power it did not possess in the first place, the Court ignored the codifying function of the statute at issue. At common law and throughout American history, parents have always had the authority to decide all important decisions for their children, including medical decisions, even without any benefit of a statute. 96 Certainly, this was the case in Missouri. 97

On the other hand, modern theorists like to remind us that the entire relationship of citizen and state is created by the state since nothing about our laws exists beyond the reach of our legal system to change. 98 Under this reasoning, proof that parental rights were part of the common

93. Id. at 74. “The fault with [the statute] is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor’s termination of her pregnancy . . . .” Id. at 75.
94. Id. at 74.
95. See id. I use the word “delegate” here as a substitute for the Court’s phrase “the State does not have the constitutional authority to give.” Id.
96. See infra note 97.
97. See, e.g., Morrison v. State, 252 S.W.2d 97, 102 (Mo. Ct. App. 1952) (holding that general parental authority to deny medical treatment of minor child may only be overridden to protect child from grave harm); see also Mo. Ann. STAT. § 431.061(1) (West 1992) (authorizing an unmarried minor’s parents to consent to surgical or medical treatment for the minor); id. § 431.063 (noting that the usual requirement of consent to perform surgical or medical treatment for minor is implied where an emergency exists with “emergency” defined “as a situation wherein . . . delay occasioned by an attempt to obtain a consent would reasonably jeopardize the life, health or limb of the person affected”). Both of these statutes were enacted in 1971 before the decision in Roe v. Wade, 410 U.S. 113 (1973). See Mo. Ann. STAT. §§ 431.061, 431.063.
law does not by itself negate the delegation claim. But now the delegation claim is focused on common law principles and asserts that the state may not, by any means, authorize parents to exercise control over their pregnant daughter's ability to obtain an abortion. To the extent we can agree that even common law rules constitute a form of delegation of power by the state, it cannot be forgotten that, until Danforth, courts understood that parental rights theory, even when protected without benefit of any statute, was based on the Constitution itself. A rule based on the Constitution cannot so easily violate the Constitution. To the extent a parent's right to authorize medical treatment for his or her minor child is a manifestation of a power which the Constitution reserves to the people, the delegation claim makes no sense. Regrettably, however, the Danforth Court failed to offer anything more than its bottom-line conclusion that the statute was unconstitutional. The decision does not explain why parents may not have this authority.

As the earlier discussion has already shown, a parent's right to raise children and to live within a family unit free from government oversight and intervention has formed the nucleus of bedrock constitutional doctrine in the United States for most of the twentieth century. Although the formal justifications for vesting parents with this power have changed from the Lochner era when the principles were first established, the constitutional rights of parents survived that era and have been endorsed by the Supreme Court ever since as within the liberty rights protected by the Due Process Clause of the Fourteenth Amendment. Professor Woodhouse has suggested that the original

100. Cf. Danforth, 428 U.S. at 60 (noting that the substantive right to terminate a pregnancy may be said to "be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people").
101. See id. at 74-75.
102. See supra notes 21-38 and accompanying text.
103. Justice Kennedy recently had the opportunity to observe that had Meyer and Pierce been decided in recent times, they "may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion." Troxel v. Granville, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting). Their formulation and subsequent interpretation have been quite different, of course; and they long have been interpreted to have found in the Fourteenth Amendment concepts of liberty, an independent right of the parent in the "'custody, care and nurture of the child,' free from state intervention." Id. at 95 (Kennedy, J., dissenting) (citation omitted); see also Poe v. Ullman, 367 U.S. 497, 543-44 (1961) (Harlan, J., dissenting): I do not think it was wrong to put those decisions [Meyer and Pierce] on "the right of the individual to ... establish a home and bring up children," or on the basis that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." ... [E]ven though today those decisions would
bases for the support of parental rights that have become enshrined in the Constitution are no longer palatable to modern defenders of family rights. Instead, they are today defended as supporting "intellectual liberty and family integrity, when placed in the context of their times, they are revealed as closely linked" to "an integral part of the resistance by conservatives to a large range of programs such as mandatory free public schooling, restriction of child labor, and maternal and infant health programs supported by progressives and populists."  

Summarizing its cases, the Court in 1982 said that "[t]he absence of dispute [concerning the fundamental nature of the parent-child bond] reflect[s] this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."  

Even more recently, in 2000, Justice Kennedy wrote: "As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment."  

Justice Blackmun got it exactly backwards even to regard parental rights as something the state gave to parents. Under any reasoning, these are not rights "delegated" to parents by the state. Instead, they are rights which parents possess as bulwarks against the exercise of state power. The most problematic facet of Justice Blackmun's logic, however, remains to be discussed. What ultimately proves the delegation claim to be false is the reason parents have rights to raise children. The Court declared the statute illegal because the state may not give parents power 

probably have gone by reference to the concepts of freedom of expression and conscience assured against state action by the Fourteenth Amendment, concepts that are derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief. For it is the purposes of those guarantees and not their text, the reasons for their statement by the Framers and not the statement itself, which have led to their present status in the compendious notion of "liberty" embraced in the Fourteenth Amendment.  

\textit{Id. (Harlan, J., dissenting)} (first omission in original) (citations omitted).


105. \textit{Id.} at 27, 28-29.


107. \textit{Troxel}, 530 U.S. at 95 (Kennedy, J., dissenting).
that the state itself does not have in the first place. But this is precisely what parental freedom is all about: the exercise of child rearing authority that the state does not have. That parents are free to train their children in a particular religion is the other side of the coin of American constitutional principles that the state may not prefer one religion over another. Can it plausibly be claimed that the state “delegated” the power to parents to teach children religion? It is difficult to appreciate what is gained by describing the law in this way. The child rearing right reserved to parents is quintessentially one not given to them by the state. But, even assuming the validity of framing the claim in this manner, would this delegation be illegal on the theory that the state may not teach children religion? To ask the question is to answer it. Under the most fundamental of American constitutional principles, parents may do that which the state may not. This is the ineluctable implication of the well-known precept 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.”

The votes of Justices Stewart and Powell were necessary to achieve the majority in Danforth. They concurred separately in an opinion written by Justice Stewart. Justice Stewart’s concurrence emphasized that the “primary constitutional deficiency” of the parental consent requirement is “its imposition of an absolute limitation on the minor’s right to obtain an abortion.” Quite different from Justice Blackmun’s majority opinion, Justice Stewart emphasized that minors “may be ill-equipped” to decide for themselves whether to terminate a pregnancy and that he has “little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision

---

108. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976) (stating that because the state does not have the authority to regulate abortion during the first stage, it cannot delegate that authority to anyone else).
112. See Danforth, 428 U.S. at 54.
113. See id. at 89 (Stewart, J., concurring).
114. Id. at 90 (Stewart, J., concurring).
whether or not to bear a child. As a consequence, Justice Stewart went on record stressing:

[A] materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.

Justice White vigorously dissented in an opinion which was joined by Chief Justice Burger and Justice Rehnquist. In his view, the Missouri statute was constitutional because:

Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here.

Finally, Justice Stevens separately dissented from striking the parental consent requirement. In Justice Stevens's view, Missouri was properly protecting the welfare of minors by requiring parental consent. As he saw it:

A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision.

115. Id. at 91 (Stewart, J., concurring).
116. Id. at 90-91 (Stewart, J., concurring) (footnote omitted). Justice Powell relied upon these principles three years later when he wrote the Bellotti plurality opinion. See Bellotti, 443 U.S. at 639-51 (plurality opinion).
117. See Danforth, 428 U.S. at 92 (White, J., dissenting).
118. Id. at 95 (White, J., dissenting) (footnote omitted).
119. See id. at 101 (Stevens, J., concurring in part and dissenting in part).
120. See id. at 105 (Stevens, J., concurring in part and dissenting in part).
121. Id. at 104 (Stevens, J., concurring in part and dissenting in part).
He went on to criticize Justice Blackmun’s unarticulated assumption “that the capacity to conceive a child and the judgment of the physician are the only constitutionally permissible yardsticks for determining whether a young woman can independently make the abortion decision.”

None of this means, nor is it my purpose to demonstrate, that the Court was wrong to hold that the Constitution is violated when parents have the power to prevent their pregnant minors from terminating an unwanted pregnancy. Indeed, I do not wish to make a normative argument on the subject at all. It would be one thing if \textit{Danforth} proved to accomplish more than divest parents of their authority to make important decisions for their pregnant children. But, as we shall see, it turns out that \textit{Danforth} did not free pregnant minors from an adult’s guardianship and liberate them to the category of individuals responsible to decide for themselves whether to terminate their pregnancy. With this in mind, all I hope to have demonstrated thus far is that the Court’s reasoning in \textit{Danforth} is deeply flawed and unsatisfactory. Instead, the holding and the reasoning were, in effect, merged.

Whether or not \textit{Danforth}’s reasoning is sound, the holding unquestionably appeared at the time to signal a new era of constitutional rights for young people. Certainly the significance of according to minors a constitutional right of privacy that trumps parental authority was potentially monumental. But, it turns out, \textit{Danforth} does not begin to tell the full story of pregnant minor rights. In this fuller story, it eventually becomes clear that the majority view in \textit{Danforth} came to be replaced by a very different view on children’s rights. This fuller story is really the story of the principal architect of the Supreme Court decision that proved to be the demise of \textit{Danforth}: Justice Powell’s 1979 plurality decision in \textit{Bellotti} v. \textit{Baird}. To tell this story, it is useful to review Justice Powell’s known views on children’s rights as expressed through his authored decisions as a Justice up to the time he wrote his \textit{Bellotti} opinion.

\textbf{B. Justice Powell’s Views on Children’s Rights Generally}

Justice Powell joined the Court in 1972. A small but significant number of cases concerning children were decided by the Court between

\begin{itemize}
  \item \textsuperscript{122} \textit{Id.} at 105 (Stevens, J., concurring in part and dissenting in part).
  \item \textsuperscript{123} See \textit{infra} notes 263-65 and accompanying text.
  \item \textsuperscript{124} 443 U.S. 622 (1979) (plurality opinion).
  \item \textsuperscript{125} See \textsc{John N. Jacob}, \textsc{The Lewis F. Powell, Jr. Papers: A Guide} 8 (1997).
\end{itemize}
Fortunately, for our purposes, Justice Powell was given the opportunity to write the Court’s opinion in several of these 1972 and 1979. The category of cases “concerning children” is necessarily vague. For present purposes, it is not essential that this grouping be exact, only that it includes all of Justice Powell’s opinions that speak directly to the relationship of children, parents and the state. There are three categories of cases that this phrase captures. The first category consists of challenges to various schemes that treat differently children born out-of-wedlock and children born of marriages, including the so-called “rights of unwed fathers.” See, e.g., Caban v. Mohammed, 441 U.S. 380, 394 (1979) (holding that the Equal Protection Clause of the Fourteenth Amendment was violated by the sex-based distinction between unmarried mothers and unmarried fathers in New York law that authorized unwed mothers, but not unwed fathers, to block the adoption of their child); Lalli v. Lalli, 439 U.S. 259, 275-76 (1978) (plurality opinion) (holding that the New York statute that imposed a requirement that a filiation order be obtained during the father’s lifetime in order for out-of-wedlock children to inherit from their fathers did not violate the Equal Protection Clause); Fiallo v. Bell, 430 U.S. 787, 799-800 (1977) (determining that the Immigration and Nationality Act which has the effect of excluding the relationship between an illegitimate child and his natural father, as opposed to his natural mother, from the special preference immigration status accorded a “child” or “parent” of a United States citizen or lawful permanent resident is constitutional); Trimble v. Gordon, 430 U.S. 762, 775-76 (1977) (stating that the provision of the Illinois statute that allowed children born out-of-wedlock to inherit by intestate succession only from their mothers denied the children equal protection); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173-76 (1972) (finding that the state’s workmen’s compensation statute’s denial of equal recovery rights to dependent unacknowledged illegitimates violates the Equal Protection Clause).

The second category consists of cases concerning schools, including “student rights,” “teacher’s rights,” “parent’s rights” and “others” containing Religion Clause challenges to funding schemes involving nonpublic schools and racial discrimination. See, e.g., Ambach v. Norwich, 441 U.S. 68, 80-81 (1979) (holding that a New York statute requiring citizenship for public school teachers bears a rational relationship to a legitimate state interest and is, therefore, constitutional); Wolman v. Walter, 433 U.S. 229, 255 (1977) (holding that the use of public funds for purchases in private schools of instructional materials and equipment for the students and for transportation for field trips was unconstitutional); Ingraham v. Wright, 430 U.S. 651, 682-83 (1977) (stating that the Cruel and Unusual Punishment Clause of the Eighth Amendment did not apply to disciplinary corporal punishment in public schools and the “Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools”); Goss v. Lopez, 419 U.S. 565, 584 (1975) (holding that the Due Process Clause of the Fourteenth Amendment requires notice and some kind of a hearing before suspending public school students; Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973) (determining that New York’s various aid formulae to private schools had the primary effect of advancing religion and therefore offended the Establishment Clause); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 246-47 (1973) (Powell, J., concurring in part and dissenting in part) (stating that the law has long recognized the parental duty to nurture, support, and provide for the welfare of the children, including their education); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) (finding that Texas’s unequal school financing scheme was not unconstitutional even if it resulted in poor school districts receiving a poorer quality education because “where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages”).

The third and final category of cases is a small, but important, “miscellaneous” category. See, e.g., Carey v. Population Servs., Int’l, 431 U.S. 678, 690-91 (1977) (holding that the New York statute making it illegal to give contraceptives to minors is unconstitutional); Moore v. City of E. Cleveland, 431 U.S. 494, 504-06 (1977) (plurality opinion) (stating that the zoning ordinance prohibiting grandmother from raising two nephews from different parents is unconstitutional as unlawful infringement on families’ liberty); Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976) (finding that the statute requiring the written consent of one parent or person in loco parentis
cases and saw fit to write separate concurrences or dissents in others. Through a careful reading of these opinions, we are able to know a fair amount about his views on the relationship of children to parents and the state by the time he wrote the plurality opinion in Bellotti. For present purposes, however, it will suffice to look at those opinions in which Justice Powell wrote directly on his views of children’s rights and the place of children in the constitutional framework of rights.

One lesson that becomes clear is that Justice Powell insisted on strict enforcement of the constitutional norm of equal protection of the laws prohibiting states from treating children differently from other children unless the differential treatment survived exacting scrutiny by federal courts. This is an important guidepost for many of his opinions from 1972 to 1979 concerning children. For Justice Powell, it was easy to reach the (universally accepted) conclusion that children are “persons” within the meaning of those protected against unequal protection of the laws by the Fourteenth Amendment. Thus, he saw it as well within the power of the Court to strike as unconstitutional statutes that barred dependent, unacknowledged children born out-of-wedlock from recovering statutory death benefits while allowing acknowledged children to receive them. This was also at the heart of

of unmarried woman under the age of eighteen years for nonemergency abortion is unconstitutional); Erznoznik v. City of Jacksonville, 422 U.S. 205, 217-18 (1975) (holding that a city ordinance that prohibited showing films containing nudity by a drive-in movie theater when its screen was visible from a public street or place was unconstitutionally overbroad).

127. See cases cited supra note 126. Justice Powell took part in the plurality or majority opinion in all cases except the following: Wolman, 433 U.S. at 262 (Powell, J., concurring in part and dissenting in part); Carey, 431 U.S. at 703 (Powell, J., concurring in part and concurring in judgment); Danforth, 428 U.S. at 89 (Stewart, J., joined by Powell, J., concurring); Goss, 419 U.S. at 584 (Powell, J., dissenting); Keyes, 413 U.S. at 217 (Powell, J., concurring in part and dissenting in part).

128. This is not to say that Justice Powell treated age as a suspect classification. He did not. Indeed, as will be shown, he was very comfortable treating children as different from adults. See infra notes 227-32 and accompanying text.

129. See Danforth, 428 U.S. at 74 (stating that “[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights”); see also In re Gault, 387 U.S. 1, 13 (1967) (finding that “whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone”).

130. See Weber, 406 U.S. at 169-70. Justice Powell stated:

So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate children all lived in the home of the deceased and were equally dependent upon him for maintenance and support.

Id. (footnote omitted); see also Trimble, 430 U.S. at 776. In Trimble, the Court held that a state law permitting children born out-of-wedlock to inherit via intestate succession only from their mothers,
his reasoning in insisting that de facto school segregation violated the Fourteenth Amendment just as much as de jure segregation. 131

Justice Powell was quite firm in his protection of family integrity when the state attempted to disrupt a successful ongoing family in the absence of any claim of parental unfitness or juvenile waywardness. 132 In Moore v. City of East Cleveland, 133 Justice Powell displayed a willingness to invoke substantive due process as the express basis upon which he protected an extended family’s constitutional right to remain together in face of a zoning ordinance which required them to move out of the community. 134 He authored the plurality opinion which was joined by Justices Brennan, Marshall and Blackmun over very strong dissents by Chief Justice Burger, and Justices Stewart, White and Rehnquist. 135

He began his opinion in Moore by distinguishing between regulations in ordinary land use contexts and regulations of the family. 136 When an ordinance involves regulation of the family, he wrote, “the usual judicial deference to the legislature is inappropriate.” 137 For Justice Powell, “unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment’s Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.” 138

Justice Powell’s opinion was particularly sensitive to the claim that he may be creating a constitutional right based on his own values, rather than enforcing an unenumerated right that is within constitutional protection. 139 Particularly in light of Justice White’s challenge in dissent in contrast to children who were born to married parents and could be intestate takers from both mother and father, violated the Equal Protection Clause. See id.

131. See Keyes, 413 U.S. at 247-48 (Powell, J., concurring in part and dissenting in part).
132. See infra notes 133-41 and accompanying text.
133. 431 U.S. 494 (1977) (plurality opinion).
134. See id. at 501 (plurality opinion).
135. See id. at 521 (Burger, C.J., dissenting); id. at 531 (Stewart, J., dissenting); id. at 541 (White, J., dissenting).
136. See id. at 495-96. Two precedents stood in the way of striking the East Cleveland ordinance and needed to be distinguished in order to reach the outcome reached by the plurality. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the Court upheld a zoning ordinance imposing limits on the types of groups of unrelated individuals that could occupy a single dwelling unit. See id. at 2, 7. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court held that land-use regulations violate the Due Process Clause only if they are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” Id. at 395.
137. Moore, 431 U.S. at 499 (plurality opinion). He then went on to cite the long line of cases supporting this principle. See id. (plurality opinion).
138. Id. at 501 (plurality opinion).
139. See id. at 502 (plurality opinion).
to the plurality’s use of substantive due process, Justice Powell felt the need to defend both the ruling and the process by which he reached it. As a result, the opinion is especially self-reflective about constitutional interpretation and provided Justice Powell with an opportunity to explain why the family is properly protected by the Constitution against state encroachment. In a famous passage, Justice Powell explained that the Court’s “decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we

140. See id. at 501-02 (plurality opinion). In an illuminating passage, Justice Powell strove to justify his use of substantive due process to protect the Moore family’s constitutional right to remain a family unit despite lacking any textual support in the Constitution. He relied on some of Justice Harlan’s dissent in Poe v. Ullman when he stated that:

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint."

...[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Id. at 501-02 (plurality opinion) (citations and footnote omitted) (alteration and omission in original) (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)). Justice Powell continued in his own words:

Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

Id. at 502 (plurality opinion) (footnote omitted).
inculcate and pass down many of our most cherished values, moral and cultural.\(^{141}\)

Cases involving the operation of the public school and some miscellaneous cases involving children in relation to sex-related health care and the First Amendment provided Justice Powell with the chance to express his views on the rights of children that bear more directly on the issues in the abortion cases. Of these cases, the few that focused on the public schools perhaps best reveal his deeper thoughts on the relationship of children’s rights when exercised in the context of their disagreeing with their parent’s or teacher’s views on what is the best decision for them. Two cases fall within this category: *Goss v. Lopez\(^{142}\)* and *Ingraham v. Wright.\(^{143}\)*

In *Goss*, the Court held that under the Due Process Clause of the Fourteenth Amendment, public school officials could not expel students from school without first providing some kind of hearing and an opportunity to be heard.\(^{144}\) Justice White wrote the opinion for the Court.\(^{145}\) The record in *Goss* amply demonstrated that students were suspended from schools many times for alleged violations of rules without providing them with any chance to show they did nothing wrong.\(^{146}\) The decision was relatively straightforward and continued the expansion of procedural due process requiring some kind of hearing whenever state officials deprived someone of “property” based on alleged behavior of the individual.\(^{147}\) In Justice White’s words, “[h]aving chosen to extend the right to an education to people of appellees’ class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.”\(^{148}\)

However obvious the reasoning in *Goss* was to some, it triggered a vigorous dissent from Justice Powell.\(^{149}\) The Court’s willingness to enter into the subject of discipline in the public schools was of very recent origin. The only case before *Goss* in which the Court had done so was its

\(^{141}\) *Id.* at 503-04 (plurality opinion) (footnote omitted).

\(^{142}\) 419 U.S. 565 (1975).

\(^{143}\) 430 U.S. 651 (1977).

\(^{144}\) *See Goss*, 419 U.S. at 582-83.

\(^{145}\) *See id.* at 567.

\(^{146}\) *See id.* at 584.


\(^{148}\) *Goss*, 419 U.S. at 574. Justice White’s reasoning continued: “[i]t is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.” *Id.* at 575.

\(^{149}\) *See id.* at 584-600 (Powell, J., dissenting).
1969 decision in *Tinker v. Des Moines Independent Community School District.* Justice Powell made clear that he believed the Court took a wrong turn in *Tinker* when it saw fit to second-guess school officials charged with the responsibility of educating and training students to be obedient. Justice Powell objected to federal courts exercising authority to review and overrule school authorities. For him, “school authorities must have broad discretionary authority in the daily operation of public schools.” These views were not driven by his sense of federalism so much as they reflected his deeper notion that children need to be disciplined for their own good. He particularly emphasized

> the long history of our law, recognizing that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office. Until today, and except in the special context of the First Amendment issue in *Tinker*, the educational rights of children and teenagers in the elementary and secondary schools have not been analogized to the rights of adults or to those accorded college students.

For Justice Powell, “a student’s interest in education is not infringed by a suspension within the limited period prescribed by Ohio law.”

Justice Powell expressed his view that limiting educational authorities in their power to impose discipline would harm children’s true interests: “One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life.” He was explicitly concerned with what he perceived to be a breakdown in the social fabric through which the traditional authorities shaped children into law-abiding adults:

> In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so
formalized as to invite a challenge to the teacher’s authority—an invitation which rebellious or even merely spirited teenagers are likely to accept. 158

Justice Powell’s opinion most closely resembles what is perhaps the strongest condemnation of the children’s rights movement by a Supreme Court Justice—Justice Black’s stinging dissent in *Tinker*. 159 No Justice joined Justice Black’s dissent when he issued it; Justice Powell is the only member of the Court since to have embraced it. 160 For Justice Powell, as for Justice Black, “‘[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.’” 161 He ended his *Goss* dissent by quoting Justice Black’s famous fear that *Tinker* would usher in “‘an entirely new era in which the power to control pupils by the elected “officials of state supported public schools” . . . is in ultimate effect transferred to the Supreme Court.’” 162 Justice Powell expressed his view that Justice Black’s “‘prophecy is now being fulfilled. . . . One can only speculate as to the extent to which public education will be disrupted by giving every schoolchild the power to contest in court any decision made by his teacher which arguably infringes the state-conferring right to education.’” 163 He wrote:

> Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life.” 164

Two years later, Justice Powell had the opportunity to stress the values that are reflected in his *Goss* dissent when he authored the Court’s opinion in *Ingraham v. Wright*. 165 In that case, both parents and children objected to the use of corporal punishment by school teachers

---

158. *Id.* (Powell, J., dissenting) (footnote omitted).
160. See *id.* at 515 (Black, J., dissenting); see also *Goss*, 419 U.S. at 593 (Powell, J., dissenting).
161. *Goss*, 419 U.S. at 593 (Powell, J., dissenting) (quoting *Tinker*, 393 U.S. at 524 (Black, J., dissenting)).
162. *Id.* at 600 n.22 (Powell, J., dissenting) (quoting *Tinker*, 393 U.S. at 515 (Black, J., dissenting)).
163. *Id.* (Powell, J., dissenting).
164. *Id.* at 593 (Powell, J., dissenting).
and officials in public school. Although in other cases Justice Powell revealed a keen interest in protecting the family from state intrusion before there is a reason to question the caretaking qualities of the parents, he had no problem ceding to state officials full authority to discipline children when these officials are in a child rearing function. Writing for the Court, Justice Powell upheld the use of corporal punishment even when parents would prohibit its use as applied to their children:

Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary “for the proper education of the child and for the maintenance of group discipline.”

His views in Goss and Ingraham fit together very well. The opinion reflects Justice Powell’s view that children need firm discipline if they are to be well-served by their caretakers. A state should be given wide latitude when in a quasi-parental function, he reasoned, because children do best when raised by strict disciplinarians.

Apart from the public school arena, Justice Powell expressed his views on children’s rights in a variety of other contexts, including circumstances under which the state may restrict children’s access to sexually explicit, nonobscene materials and various situations bearing directly on children and sex.

166. See id. at 653.
168. See Ingraham, 430 U.S. at 662.
169. Id. (citation and footnote omitted).
170. See id. at 681-82.
171. See id. Consider Justice Powell’s views concerning a child’s right to be free from being hit by their teachers:

Because it is rooted in history, the child’s liberty interest in avoiding corporal punishment while in the care of public school authorities is subject to historical limitations. Under the common law, an invasion of personal security gave rise to a right to recover damages in a subsequent judicial proceeding. But the right of recovery was qualified by the concept of justification. Thus, there could be no recovery against a teacher who gave only “moderate correction” to a child. To the extent that the force used was reasonable in light of its purpose, it was not wrongful, but rather “justifiable or lawful.”

Id. at 655-76 (citations omitted).
In *Erznoznik v. City of Jacksonville*, the Court struck as unconstitutionally overbroad an “ordinance that prohibit[ed] showing films containing nudity by a drive-in movie theater when its screen [was] visible from a public street or place.” Justice Powell made clear that he comfortably joined those Justices who permit “more stringent controls on communicative materials available to youths than on those available to adults.” Although he added the familiar language that “minors are entitled to a significant measure of First Amendment protection and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them,” he stressed that “[t]he First Amendment rights of minors are not ‘co-extensive with those of adults,’” and made clear that determining “whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor” in the degree to which they may be denied ordinary First Amendment freedoms.

Last are two cases bearing directly on regulations concerning sex and minors. Both are obviously highly pertinent to a study of Justice Powell’s views that would shape his decision in *Bellotti*. The first case is *Planned Parenthood v. Danforth* itself. Justice Powell did not write separately in *Danforth*. Although he voted to strike the statute as unconstitutional, he distanced himself from those members of the Court who appeared willing to liberate children to decide whether to terminate their pregnancy on their own by joining Justice Stewart’s concurrence which emphasized that the “primary constitutional deficiency” of the parental consent requirement is “its imposition of an absolute limitation on the minor’s right to obtain an abortion.” Unlike Justice Blackmun’s majority opinion, the concurrence goes on to stress:

> The Court’s opinion today in *Bellotti v. Baird* suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but

---

175. *Id.* at 206-12.
176. *Id.* at 212 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)).
177. *Id.* at 212-13 (citations omitted).
178. *Id.* at 214 n.11 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring)). “[A] State may permissibly determine that, at 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.” *Id.* (quoting *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring)).
179. *Id.* at 214 n.11.
180. *See id.*
182. *Id.* at 90 (Stewart, J., concurring).
providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.

There can be little doubt that the state furthers a constitutionally permissible end by encouraging an unmarried 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.183

Finally, in Carey v. Population Services International,184 Justice Powell wrote separately to distance himself from the plurality opinion that struck as unconstitutional a New York statute that prohibited the sale or distribution of contraceptives to persons under sixteen years of age.185 The plurality opinion, written by Justice Brennan, and joined by Justices Stewart, Marshall and Blackmun, expressed the view that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."186 But Justice Powell, disavowing the plurality's notions, considered the principal defect in the law to be its overbreadth because it applied even to married minors under the age of sixteen.187 In Justice Powell's view, once the state sanctions a marriage of a person of any age, the marital relationship is entitled to a zone of

183. Id. at 90-91 (Stewart, J., concurring) (citations and footnote omitted).
184. 431 U.S. 678 (1977) (plurality opinion).
185. See id. at 703 (Powell, J., concurring in part and concurring in the judgment).
186. Id. at 693 (plurality opinion). Justices White and Stevens also voted to strike the statute but on very different grounds from the plurality. Justice White expressly joined Justice Stevens's famous declaration: "I would describe as "frivolous" appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State." Id. at 702-03 (White, J., concurring in part and concurring in the result) (quoting id. at 713 (Stevens, J., concurring in part and concurring in the judgment)). Nonetheless, Justice White concurred that the challenged statute was unconstitutional because "the State has not demonstrated that the prohibition against distribution of contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justification for the restriction." Id. at 702 (White, J., concurring in part and concurring in the result). Justice Stevens voted to strike the statute because it was an arbitrary exercise of state power which he characterized as a form of propaganda. See id. at 715 (Stevens, J., concurring in part and concurring in the judgment). He condemned the law as being as foolish as one in which "a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets." Id. (Stevens, J., concurring in part and concurring in the judgment).
187. See id. at 707-08 (Powell, J., concurring in part and concurring in the judgment).
constitutionally protected privacy that includes the right to use contraceptives if the couple so chooses. A second reason he concluded the statute is unconstitutional is that it prohibited parents from distributing contraceptives to their children. But he would have none of the plurality’s ideas about children’s rights to engage in sex or to enjoy heightened scrutiny of state regulations over children’s sexually-related behavior. For Justice Powell, it is self-evident that it is permissible to treat children differently from adults because they are less mature than adults. Because young people generally “lack the maturity and understanding necessary to make decisions concerning marriage and sexual relationships,” state regulations limiting a young person’s freedom in the area of procreation need only rationally further the state’s valid interests of child protection. Justice Powell considered it constitutionally significant that “[p]articipation in sexual intercourse at an early age may have both physical and psychological consequences.”

---

188. See id. (Powell, J., concurring in part and concurring in the judgment).
189. See id. at 708 (Powell, J., concurring in part and concurring in the judgment).
190. See id. at 705 (Powell, J., concurring in part and concurring in the judgment). “There is also no justification for subjecting restrictions on the sexual activity of the young to heightened judicial review. Under our prior cases, the States have broad latitude to legislate with respect to adolescents.” Id. (Powell, J., concurring in part and concurring in the judgment).
191. Id. at 706 (Powell, J., concurring in part and concurring in the judgment). He also quoted with approval Justice Stevens’s concurring and dissenting opinion in Danforth:

“Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant.”

Id. at 706 n.1 (Powell, J., concurring in part and concurring in the judgment) (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part)).
192. Id. (Powell, J., concurring in part and concurring in the judgment).
193. See id. at 707 (Powell, J., concurring in part and concurring in the judgment).
194. Id. at 709 (Powell, J., concurring in part and concurring in the judgment). Among these consequences are:
As a result, in his view the state “should have substantial latitude in regulating the distribution of contraceptives to minors.”

The sum of Justice Powell’s opinions reveal how deeply he believed that strong discipline of children is an important state goal and that children are disserved when liberated to make important choices for themselves. Of all the Justices who voted to free minors from their parent’s control when seeking an abortion, Justice Powell has been the most consistent voice in opposition to the core idea that a minor has fundamental liberty rights to make decisions for herself.

We are now ready to examine Justice Powell’s plurality opinion in Bellotti v. Baird. We should be prepared to understand Justice Powell as someone who strongly tends to protect parental prerogatives to make child rearing decisions, and particularly looks with askance at state efforts to overrule parents or interfere in their child rearing capacity and, especially, who is loathe to liberate children to make important decisions for themselves.

C. The Bellotti Decision

In a companion case decided the same day as Danforth, the Court considered a challenge to a Massachusetts statute that also required parental consent for a minor to undergo an abortion. It was not clear whether Massachusetts’ parental consent requirement was absolute or whether a minor had an opportunity to obtain a judicially authorized abortion in the absence of parental consent. Consequently, in Bellotti v. Baird, the Supreme Court abstained and certified questions to the Supreme Judicial Court of Massachusetts for authoritative interpretation.
of state law issues central to a ruling on the statute’s constitutionality under the Federal Constitution.\(^{201}\)

In 1979, the case returned to the U.S. Supreme Court.\(^{202}\) As construed by the state high court, the statute retained a parental consent requirement like the one struck down in *Danforth*, but this was supplemented by extraordinary new powers granted to judges. Under the Massachusetts law, pregnant minors were permitted to seek judicial authorization to terminate a pregnancy after unsuccessfully seeking permission from both parents.\(^{203}\) Judges were instructed to approve the abortion if they determined that the abortion would be in the minor’s best interests.\(^{204}\) Eight Justices agreed that the Massachusetts statute as construed by the Supreme Judicial Court could not be sustained under *Danforth* because the law merely transferred to the judge the identical power to deny a minor an abortion that the *Danforth* Court voided when exercised by a parent.\(^{205}\) Although minors were given an option in Massachusetts not available to them in Missouri, the Massachusetts law required judges to disapprove an abortion if they believed it would not serve the child’s best interests.\(^{206}\)

The Court declared the law unconstitutional in two plurality opinions, each of which was joined by four Justices.\(^{207}\) The first of these opinions, written by Justice Powell and announcing the judgment of the Court, was joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist.\(^{208}\) The second opinion was written by Justice Stevens and was joined by Justices Brennan, Marshall, and Blackmun.\(^{209}\) The second opinion would have declared the statute unconstitutional without much ceremony because “no minor in Massachusetts, no matter how mature and capable of informed decisionmaking, may receive an abortion without the consent of either both her parents or a superior court judge. In every instance, the minor’s decision to secure an abortion is subject to

\(^{201}\) See id. at 151.


\(^{203}\) See id. at 625 (plurality opinion).

\(^{204}\) See id. at 630 (plurality opinion).

\(^{205}\) See id. at 651 (plurality opinion). One of these eight, then-Justice Rehnquist, explicitly recognized that the Massachusetts statute could not survive *Danforth*. See id. at 651-52 (Rehnquist, J., concurring). Justice Rehnquist made clear that he would be happy to overrule *Danforth*, but that, until a majority of the Court was willing to reconsider *Danforth*, he would help fashion rules that regulate the field. See id. (Rehnquist, J., concurring). Only Justice White believed that the Massachusetts law could survive constitutional challenge in light of *Danforth*. See id. at 656-57 (White, J., dissenting).

\(^{206}\) See id. at 654 (Stevens, J., concurring in the judgment).

\(^{207}\) See id. at 623-24 (plurality opinion).

\(^{208}\) See id. at 623 (plurality opinion).

\(^{209}\) See id. at 624 (plurality opinion).
THE ADOLESCENT ABORTION CASES

an absolute third-party veto." However, Justice Powell chose a very different route. Although Justice Powell's opinion did not overrule *Danforth*, it rendered *Danforth* effectively meaningless as constitutional precedent for minors. He accomplished this by informing states that they may compel minors to seek judicial approval so long as judges are authorized to approve the abortion if they find the minor to be "mature." For Justice Powell, this proved to be the key that was lacking in the Massachusetts statute before the Court in *Bellotti*.

The significant difference between the result of Justice Powell's opinion and the result that would have been achieved merely by striking the law as unconstitutional is that his opinion refused to liberate pregnant minors to obtain abortions when they wanted one. Justice Stevens accused Justice Powell of issuing an advisory opinion. Justice Powell defended his choice to issue his opinion (without disputing that it was answering hypothetical questions not presented in the case) as simply an "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." Eventually, the statute he advised states to enact was upheld by a majority of the Court.

210. *Id.* at 653-54 (Stevens, J., concurring in the judgment) (footnote omitted).
211. See *id.* at 650 (plurality opinion).
212. See *id.* (plurality opinion).
213. See *id.* at 650-51 (plurality opinion).
214. See *id.* at 654 (Stevens, J., concurring in the judgment).
215. See *id.* at 656 n.4 (Stevens, J., concurring in the judgment).
216. 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.

*Id.* (Stevens, J., concurring in the judgment).
217. Since 1979, the Court has consistently approved judicial bypass procedures—provided they authorize a judge to approve the abortion procedure without parental consent upon a determination that the minor was sufficiently mature to make the abortion decision, or that the abortion was in her best interests. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 899 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) (reaffirming "that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure"). Although the *Bellotti* criteria for waiver provisions were upheld by a majority of the Court only in 1990 in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510-14 (1990), in 1983, the Court upheld a Missouri parental consent statute that contained a judicial bypass provision. See Planned Parenthood v. Ashcroft, 462 U.S. 476, 493 (1983); see also Lambert v. Winchlund, 520 U.S. 292, 298 (1997) (per curiam); *Casey*, 505 U.S. at 899 (joint opinion of O'Connor, Kennedy & Souter, JJ.); *Hodgson v. Minnesota*, 497 U.S. 417, 455 (1990) (Stevens, J., dissenting); *City of Akron v. Akron Ctr. for Reprod. Health*, Inc., 462 U.S. 416, 441-42 (1983),
Justice Powell's decision is, perhaps, as oddly structured as issuing an advisory opinion is unusual. The first half of the opinion summarized various aspects of the law on the rights of children. Justice Powell observed first, citing In re Gault, that "the Fourteenth Amendment ... [is not] ... for adults alone." He added, quite properly, that "[t]his observation ... 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." Then he continued by stressing that the family is "the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural.'" He concluded this brief overview of the law by summarizing the reasons children do not possess the same constitutional rights as 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.

... 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."

After this summary of children's rights, his opinion focused on the role of the family and parents in raising children. His opinion stressed that:

> 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


218. See Bellotti, 443 U.S. at 633-39 (plurality opinion).

219. Id. at 633 (plurality opinion) (footnote omitted).

220. Id. (plurality opinion). Quoting Justice Frankfurter in a 1963 decision, he noted that "'[c]hildren 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 of a State's duty towards children.'" Id. at 633-34 (plurality opinion) (quoting May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)).

221. Id. at 634 (plurality opinion) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion)).

222. Id. at 634-35 (plurality opinion) (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971)).
important decisions by minors. But an additional and more important justification for state deference to parental control over children is that . . . [the] affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.\(^{223}\)

He emphasized that the state cannot ordinarily play the role of raising children.\(^{224}\) In his words, it is “beyond the competence of impersonal political institutions” because “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.”\(^{225}\) For this reason, Justice Powell reminded the reader that our society relies heavily on parents, observing that “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.”\(^{226}\)

Finally, Justice Powell turned to the case before the Court. He began this part of his opinion by stressing that the Court had already held in *Danforth* (and he made no attempt to revisit the propriety of the holding, considering it stare decisis) “that a State could not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy.”\(^{227}\) In careful wording, he wrote that “[t]he question before us—in light of what we have said in prior cases—is whether [the challenged statute] provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion.”\(^ {228}\)

Justice Powell concluded that a parental notice and consent requirement is permissible because “[a]s 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

\(^{223}\) *Id.* at 637-38 (plurality opinion) (citations omitted).

\(^{224}\) *See id.* at 638 (plurality opinion).

\(^{225}\) *Id.* (plurality opinion).

\(^{226}\) *Id.* (plurality opinion). He went on to say that “[l]egal restrictions on minors . . . may be important to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.” *Id.* at 638-39. He completed this discussion by citing Bruce C. Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights,”* 1976 BYU L. REV. 605. *See id.* at 639 n.17 (plurality opinion). Professor Hafen is one of the strongest voices against children’s rights who stresses that both children and society are well-served by keeping control over them. *See Hafen, supra,* at 658. He ends by citing *Ginsberg v. New York,* 390 U.S. 629 (1968): “[P]arents 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.” *Bellotti,* 443 U.S. at 639 (plurality opinion) (alteration in original) (quoting *Ginsberg,* 390 U.S. at 639).

\(^{227}\) *Bellotti,* 443 U.S. at 639 (plurality opinion).

\(^{228}\) *Id.* at 640 (plurality opinion).
determine that parental consultation often is desirable and in the best interest of the minor." 229 Indeed, he quoted from Justice Stewart’s Danforth concurrence (which he had joined):

"There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried 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 . . . . 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." 230

After this, he returned to the subject of a child’s constitutional rights, with the observation that “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.” 231 Stressing the importance of the abortion decision to a pregnant minor, he observed “considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor . . . . In sum, there are few situations in which denying a minor the right to make an important decision will have consequence so grave and indelible.” 232

Although Justice Powell declared that “the unique nature and consequences of the abortion decision [render it] inappropriate ‘to give a third party an absolute, and possibly arbitrary, veto over the decision,’” 233 this is really only his explanation for Danforth’s rule that parents may not arbitrarily veto their child’s decision to terminate her pregnancy. It turns out that the only “third party” to which Justice Powell was referring is the parent. 234

229. Id. (plurality opinion).
230. Id. at 640-41 (plurality opinion) (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 91 (1976) (Stewart, J., concurring)). He also emphasized how unlikely it is that a minor will obtain meaningful counseling at an abortion clinic where “[c]ounseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques . . . . and [t]he physician has no prior contact with the minor . . . .” Id. at 641 n.21 (plurality opinion) (quoting Danforth, 428 U.S. at 74).
231. Id. at 642 (plurality opinion). One of the differences between this decision and many others is that this decision cannot be postponed or even preserved for long. See id.
232. Id. (plurality opinion) (quoting Danforth, 428 U.S. at 74).
233. Id. at 643 (plurality opinion).
234. Because Justice Powell chose to rely on Danforth’s rule that parents may not be authorized to veto their child’s decision to terminate her pregnancy as settled law, he did not bother to explain the rationale of the holding. Not a word can be found in his opinion that even attempts to justify the rule that parents should be denied their theretofore presumptive, almost sacrosanct, right.
Justice Powell next stressed that "an abortion may not be the best choice for the minor."\footnote{Id. at 642 (plurality opinion).} For this reason, he was searching to find a parental surrogate who can review the child's desire to terminate a pregnancy and exercise a "veto" over her decision.\footnote{See id. at 643 (plurality opinion).} The key for Justice Powell was to find someone who would wield this authority in a nonarbitrary way.\footnote{See id. (plurality opinion).} In the final portion of his opinion, he identified this third party as the judge.\footnote{See id. at 647-48 (plurality opinion).}

A recasting of Justice Powell's reasoning in the form of a sequence of arguments helps to highlight the circumlocution of the opinion. His argument in the analytical portion of his opinion is made in the following order: (1) children have constitutional rights;\footnote{See id. at 633 (plurality opinion).} (2) ordinarily parents make all important decisions for their children because children are too immature to make decisions for themselves;\footnote{See id. at 637-38 (plurality opinion).} (3) the abortion decision is distinctive because it cannot be postponed;\footnote{See id. at 643 (plurality opinion).} (4) for this reason a child's choice to abort cannot be arbitrarily denied;\footnote{See id. (plurality opinion).} (5) parents are not permitted to deny their children an abortion "arbitrarily";\footnote{See id. at 647 (plurality opinion).} (6) pregnant minors, like children generally, will not necessarily elect the option that best serves their interests;\footnote{See id. (plurality opinion).} (7) and therefore when states want the minor's abortion decision to be authorized by someone other than a minor, it must give this power to the state, not the parent.\footnote{See id. at 647-48 (plurality opinion).}

This is a strange, convoluted order of argumentation. By beginning his discussion about the constitutional rights of children, the case has come to be seen as vindicating children's rights. But the holding does no such thing.

The reasoning that logically undergirds the \textit{Bellotti} plurality provides a strikingly different perspective: (1) children presumptively do not have constitutional rights to make important life decisions for themselves because they are too immature; (2) ordinarily we rely on parents to make decisions for their children; (3) when it comes to the abortion decision, however, it is impermissible to rely on parents to authorize their children to terminate a pregnancy (perhaps for the simple
reason that Danforth so dictates); (4) and therefore the state is empowered to authorize children to terminate their pregnancy.

This more straight-forward reasoning reveals the degree to which Justice Powell’s plurality opinion fails to advance children’s rights. This result will not surprise readers familiar with Justice Powell’s general views on children’s rights. It should become even less surprising when we account for the Justices who saw fit to join his opinion. Justice Powell’s plurality was comprised of two Justices who dissented in Danforth (Chief Justice Burger and Justice Rehnquist) and Justice Stewart (who, along with Justice Powell, concurred separately in Danforth).246

The first of these Justices, Chief Justice Burger, could never be mistaken for a children’s rights advocate. He dissented in In re Winship,247 preferring that accused delinquents be subject to incarceration based on a preponderance of evidence.248 He joined the majority in McKeiver v. Pennsylvania,249 denying accused juvenile delinquents the right to trial by jury.250 He dissented in Goss v. Lopez,251 and would have allowed students to be suspended from school based on alleged infractions without providing them an opportunity to be heard.252 He joined the majority in Ingraham v. Wright,253 voting to uphold the practice of students being corporally punished in public schools.254 Most importantly, he dissented in Danforth v. Planned Parenthood itself and fully joined Justice White’s dissenting opinion.255 He also authored the Court’s opinion in Parham v. J.R.,256 (decided a mere twelve days before Bellotti) which upheld the institutionalization of children in hospitals without providing them with an opportunity for judicial review of their detainment.257

Justice Stewart has hardly a better record on children’s rights. He dissented both in Gault and Winship.258 He voted with the Court in

---

246. See Planned Parenthood v. Danforth, 428 U.S. 52, 89 (1976) (Stewart, J., concurring); id. at 92 (White, J., concurring in part and dissenting in part).
248. See id. at 376 (Burger, C.J., dissenting).
249. 403 U.S. 528, 530 (1971).
250. See id. at 545.
252. See id. at 585-86 (Powell, J., joined by Burger, C.J., dissenting).
254. See id. at 676.
257. See id. at 613.
McKeiver, and voted with the majority in Ingraham. His separate concurrence in Danforth (which was joined by Justice Powell) clearly indicates that he and Justice Powell all along were unwilling to give children anything other than the entitlement to petition a judge for the right to terminate an unwanted pregnancy. Finally, Justice Rehnquist, a dissenter in and outspoken critic of Danforth, acknowledged in Bellotti itself that he continued to view Danforth as incorrectly decided, even as he strategically joined the Powell opinion to deny Justice Stevens the chance to announce the judgment for the Court by issuing his four-person plurality opinion.

Revisiting Danforth through the lens of the Bellotti holding, it becomes clear that Danforth is not, after all, a children’s rights case. Ordinarily, transferring power over a child from one’s parents to the state is the antithesis of recognizing rights in children. With hindsight, we can recognize that the net result of Danforth is a denial of constitutional rights to parents, not a granting of constitutional rights to children. In Danforth, parents lost their previously recognized rights to decide all nonemergency medical decisions for their unemancipated children. But, for children, guardianship was merely transferred from their parents to the state.

IV. THE IMPLICATIONS OF THE MINOR ABORTION CASES

With the benefit of hindsight, we may now see that the constitutional rights of minors in the area of privacy reached a zenith in the years 1976 and 1977. The combination of the 1976 Danforth decision and the 1977 decision in Carey v. Population Services International, had the potential to rewrite the rules concerning children’s rights. For better or worse, a powerful retrenchment set in shortly thereafter from which the children’s rights movement has not recovered.

263. As Justice Stevens wrote in his plurality opinion in Bellotti, under Justice Powell’s rule “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.” Id. at 655 (Stevens, J., concurring in the judgment).
264. See Danforth, 428 U.S. at 74.
265. See supra note 263.
As we have seen, Danforth declared that pregnant minors have a constitutional right to privacy that barred their parents from vetoing their decision to terminate a pregnancy.\textsuperscript{267} Carey seemed to go even further in declaring unconstitutional a New York statute that prohibited the sale or distribution of contraceptives to persons under sixteen years of age.\textsuperscript{268} However, the section of Justice Brennan's opinion for the Court which announced that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults,"\textsuperscript{269} only garnered three other votes—a plurality.\textsuperscript{270} These words did not attract a fifth vote and there has never been majority sentiment on the Court for the notion that children have constitutional rights to procreational privacy.

Although three other Justices concurred in Carey striking the statute, their reasoning deserves careful attention because it so well captures the important distinction between the unconstitutionality of a statute which affects children (but is unconstitutional for reasons other than the rights of children) and the constitutional rights of children themselves.\textsuperscript{271} These Justices expressly rejected the claim that minors under sixteen have a constitutional right to privacy in the area of procreation.\textsuperscript{272} We have already seen that Justice Powell considered the statute to be overbroad because it applied even to married minors and because it prohibited even parents from distributing contraceptives to their minor children.\textsuperscript{273}

Justices White and Stevens also voted to strike the statute on very different grounds from the plurality.\textsuperscript{274} Justice White expressly joined Justice Stevens's famous declaration: "I would describe as 'frivolous' appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State."\textsuperscript{275} Nonetheless, Justice White concurred that the challenged statute was unconstitutional because "the State has not demonstrated that the prohibition against distribution of

\textsuperscript{267} See Danforth, 428 U.S. at 74.
\textsuperscript{268} See Carey, 431 U.S. at 681-82.
\textsuperscript{269} Id. at 693 (plurality opinion).
\textsuperscript{270} Justices Stewart, Marshall, and Blackmun joined the plurality opinion. See id. at 680.
\textsuperscript{271} Justices White, Powell, and Stevens also voted to strike the statute. See id.
\textsuperscript{272} See id. at 702-03 (White, J., concurring in part and concurring in the result); id. at 713 (Stevens, J., concurring in part and concurring in the judgment).
\textsuperscript{273} See id. at 707 (Powell, J., concurring in part and concurring in the judgment).
\textsuperscript{274} See id. at 702 (White, J., concurring in part and concurring in the result); id. at 712 (Stevens, J., concurring in part and concurring in the judgment).
\textsuperscript{275} Id. at 702-03 (White, J., concurring in part and concurring in the result) (quoting id. at 713 (Stevens, J., concurring in part and concurring in the judgment)).
contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justification for the restriction. Justice Stevens voted to strike the statute because it was an arbitrary exercise of state power which he characterized as a form of propaganda. He condemned the law for being as foolish as one in which "a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets."

By 1979, in Bellotti v. Baird, the conservatives on the Court built a coalition whose purpose was to deny children constitutional rights to privacy. But, given the diverse views of the Justices, the particular compromise reached in Bellotti is very odd, indeed. Based on the combination of voting in Danforth and Bellotti, three Justices would give children adult-like constitutional rights of privacy, at least in the area of reproductive freedom; six would not. Of these six, however, four were content to leave children under the protection and guidance of their parents. Only two—Justices Stewart and Powell—while agreeing with the conservatives that children should remain under the control of adults—preferred state judges over parents as the protectors of children. But through strategic voting, these two dominated the final result in which children’s custody was shifted from their parents to the state.

276. Id. at 702 (White, J., concurring in part and concurring in the result).
277. See id. at 715 (Stevens, J., concurring in part and concurring in the judgment).
278. Id. (Stevens, J., concurring in part and concurring in the judgment). Justice Powell also disavowed the plurality’s notion that children have a constitutional right to privacy, but regarded the principal defect in New York’s law to be its overbreadth because it applied even to married minors under the age of sixteen. See id. at 707 (Powell, J., concurring in part and concurring in the judgment). In Justice Powell’s view, once the state sanctions a marriage of a person of any age, the marital relationship is entitled to a zone of constitutionally protected privacy that includes the right to use contraceptives if the couple so chooses. See id. at 707-08 (Powell, J., concurring in part and concurring in the judgment). A second reason he concluded the statute was unconstitutional is that it prohibited parents from distributing contraceptives to their children. See id. at 708 (Powell, J., concurring in part and concurring in the judgment).
281. Chief Justice Burger and Justices White, Rehnquist, and Stevens. See id. at 95, 102.
282. See id. at 74.
283. Of the Justices who dissented in Danforth, only Justice Stevens took the position that, given Danforth’s rule that parents may not veto a minor’s decision to terminate a pregnancy, state judges are also barred from doing so. See Bellotti v. Baird, 443 U.S. 622, 656 (1979) (Stevens, J., concurring in the judgment).
A. Reconceiving the Minor Abortion Cases as Clashes Between Parents and the State

In retrospect, it is apparent that the adolescent abortion cases are not really about children’s rights. They represent, instead, a titanic fight between adults over the control of children. In this fight, the state defeated parents. But in telling the story of the dispute, Justice Powell worked a small miracle in spinning a yarn about children’s rights.

In order for Justice Powell’s opinion to make even modest sense in constitutional terms, he would have had to reach the startling conclusion that pregnant minors were oppressed by their parents. Of course, he concluded no such thing. Nonetheless, having characterized the clash of rights raised by the case as being between minors and their parents, his opinion appeared to be a victory for children’s rights over parental prerogative. Indeed, his opinion did more than merely divest parents of the power to prevent their children from terminating a pregnancy; the opinion held that it is unconstitutional even to require minors to consult or notify their parents in the first place. In the plurality’s words, “every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents.”

It is highly telling, however, that Justice Powell’s opinion contains nothing that can be said to implement the Danforth holding. To demonstrate this, we need only consider what the simple result of implementing Danforth should have been. Danforth held that the constitutional infirmity of a statute requiring parental consent for a minor’s abortion was that parents are prohibited from exercising a “possibly arbitrary[] veto.” Accordingly, the obvious rule that follows from this would be to require the child first to ask her parent and then permit the minor to go to court if the parent fails to consent in a timely fashion. Moreover, once before the court, the proper question would be whether the parent’s decision was “arbitrary.” The logic of the Danforth ruling not only would leave parents with the power to exercise their parental authority in the first instance; the reviewing court would have to apply a presumption that the parent’s decision was not arbitrary, with the child carrying the burden to show otherwise.

---

284. See id. at 647 (plurality opinion).
285. Id. (plurality opinion). Of course, a judge may determine that the minor must inform her parents on a case-by-case basis. See id. at 648 (plurality opinion).
286. Id. at 643 (plurality opinion).
287. How could it be otherwise without repudiating fifty years of constitutional law? Under Justice Powell’s reasoning, how can it follow that just because a parent may exercise a possibly arbitrary decision, she is deprived of the right to exercise a nonarbitrary one?
Even if Justice Powell did not require a presumption of parental correctness, surely he would insist that parents be given a chance to participate in the judicial review and, at a minimum, to explain their reasons for opposing the abortion. Nothing in *Danforth* even hints that a parent’s “nonarbitrary” refusal to consent to her child’s abortion is unconstitutional. How, following *Danforth*’s reasoning, could the law do more than authorize judges to supervene a parental decision provided the court concludes that parental decision ought not be upheld for whatever reason?

Moreover, when we reconsider the *Danforth* reasoning that led to striking the Missouri law, the *Bellotti* result becomes utterly insupportable. *Danforth*, it will be recalled, held that Missouri’s parental consent law was unconstitutional because the state may not delegate a power it does not have in the first place.\(^{288}\) Yet, startlingly, the *Bellotti* plurality declared three years later that the state has this power after all.\(^{289}\) At the least, the *Bellotti* plurality would say, the state has the power to veto a child’s request to have an abortion.\(^{290}\) Although the state may not exercise the veto power in an arbitrary fashion, the Missouri law never afforded parents an arbitrary veto power either. The Missouri statute merely authorized parents to grant or withhold consent.\(^{291}\) That is the precise power the *Bellotti* plurality assigned to the state.\(^{292}\)

For this result even to begin to make constitutional sense, Justice Powell would have had to conclude that what differentiates judges from parents is the inevitable objectivity of a judicial officer.\(^{293}\) Here the reasoning must be that judges are neutral and detached, like magistrates issuing search warrants, but that parents (like police officers?) may be too close to the situation to possess the appropriate perspective. But can anyone seriously believe that the requirement of parental consent for an abortion exposes a minor to the risk of arbitrary exercise of power but


\(^{289}\) See *Bellotti*, 443 U.S. at 643 (plurality opinion).

\(^{290}\) See *id.* at 647 (plurality opinion).

\(^{291}\) See *Danforth*, 428 U.S. at 58.

\(^{292}\) See *Bellotti*, 443 U.S. at 647 (plurality opinion).

\(^{293}\) One searches in vain for even a sentence by Justice Powell about what elevates judges over parents as better fit or more logically empowered to grant or deny a pregnant minor’s request to terminate her pregnancy. The closest Justice Powell comes to even discussing the topic is his quotation from the Supreme Judicial Court’s opinion authoritatively interpreting the statute that judges “must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor’s best interests.” *Id.* at 644 (plurality opinion) (quoting Baird v. Attorney Gen., 360 N.E.2d 288, 293 (Mass. 1977)). Stunningly, parents were divested of their constitutional rights—not really because of the child’s rights—but because parents are not as well suited as judges to make the correct decision for their children.
the requirement of a judge's consent does not? The next section addresses this and related questions.

**B. Court Procedures in the Bypass Process**

The discerning reader might object that I still have not made the case that the abortion decisions do not recognize the constitutional rights of minors. Pursuant to these decisions, it can be said that minors have a right to petition a court to gain permission to terminate a pregnancy. Moreover, courts are obliged to give permission based on clearly defined standards established by the Supreme Court. Why aren't these procedures, combined with the substantive rules they incorporate, examples of constitutional rights of minors?

To answer this, we need to shift our focus to the role of the judge in these cases. Once before the court, the minor's "rights" turn out to be considerably less than is immediately apparent. All that the abortion cases establish as a matter of federal constitutional law is that, in those states that see fit to so command, a pregnant minor may be forced to appear before an agent of the state to plead her entitlement to terminate her pregnancy. If she is not mature, she has no right in any sense to an abortion. In such circumstances, the state will authorize the abortion

294. As Professor Burt asks, did Justice Powell:

[A]ssume that parents are "possibly arbitrary" but that judges or other state officials are not? That judges can discern a child's maturity or best interests while her parents cannot? That judges' possible arbitrariness can be constrained, while parents' cannot, by the crystalline clarity of the 'maturity' and 'best interests' standard that he posits?


295. *See, e.g.*, Bellotti, 443 U.S. at 644 (plurality opinion).

296. *See id.* at 647-48 (plurality opinion).

297. Many states have seen fit not to employ the complicated judicial bypass procedures which the Supreme Court has upheld. *See Scott, supra* note 11, at 572 n.97 (citing a number of states which enacted laws expressly deeming pregnant minors adults for purposes of deciding whether or not to carry a fetus to term). Because this Article is strictly limited to an inquiry of federal constitutional rights of children, it will not address the few (and growing) state cases that rely on state constitutions to find constitutional rights of minors. *See, e.g.*, Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 800 (Cal. 1997) (striking California's law because it offended the minor's right to state constitution's right to privacy); Planned Parenthood v. Farmer, 762 A.2d 620, 621 (N.J. 2000) (striking, on equal protection grounds, New Jersey's judicial bypass statute because it impermissibly treats different classes of young women—those who seek an abortion and those who seek medical and/or surgical care related to pregnancy and childbirth).

298. The judge is authorized to veto the abortion unless he or she is "persuaded by the minor that she is mature or that the abortion would be in her best interests." *Bellotti*, 443 U.S. at 648 (plurality opinion).

299. *See id.* (plurality opinion).
only if a judge believes the procedure will serve the minor’s best interests.\footnote{See id. (plurality opinion). Moreover, the judge is empowered by the Bellotti plurality opinion to require that a minor consult with her parents if the judge “concludes that her best interests would be served thereby.” Id. (plurality opinion). Having allowed minors the chance to attempt to bypass her parents’ involvement altogether by going directly to court if the minor so chooses, Justice Powell ruled that the Massachusetts requirement of obtaining consent of both parents is constitutional. See id. at 649 (plurality opinion). Because “[t]he abortion decision has implications far broader than those associated with most other kinds of medical treatment” and because “[c]onsent and involvement by parents in important decisions by minors long have been recognized as protective of their immaturity,” so long as “every pregnant minor is entitled in the first instance to go directly to the court . . . the general rule with respect to parental consent does not unduly burden the constitutional right.” Id. (plurality opinion).}

Even if she is mature, strictly speaking she has no right to decide for herself to terminate the abortion until a judge declares her to be mature.\footnote{See id. at 647-48 (plurality opinion). There is neither any presumption that the pregnant minor is mature, nor that an abortion is in her best interests. See id. (plurality opinion). If there were such a presumption, the law would be radically different. This different law would permit minors to engage with physicians to perform desired medical procedures so long as the physician independently ascertains that the minor is sufficiently mature to understand the nature of the procedure and the attendant risks. When a physician is unable to conclude that the minor is mature, then the minor would be required to go to court to seek a judge’s determination. Under this imagined rule, one could say that mature minors have a right to terminate a pregnancy because mature minors would not be burdened in the first instance when invoking their right. But under the Bellotti rule, all minors, including mature minors, are burdened to petition a court to prove by a preponderance of evidence that they are mature. See id. (plurality opinion). Thus, the only “right” of a minor is to ask a court to deem the minor eligible to consent on her own.} This is anything but a small distinction. In any legal proceeding, there is the potential for disjunction between the “real facts” and the findings by a court or jury. However, when the question before the finder of fact is one so inherently empty as determining in a few minutes the degree of a scared, pregnant minor’s “maturity,” in abortion proceedings there is the likelihood whatever legal determination reached by the court is arbitrary—almost utterly without meaning.\footnote{In his concurrence, Justice Stevens stated:

[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 with privacy interests underlying the constitutional protection afforded to her decision. Id. at 655-56 (Stevens, J., concurring in the judgment).}

Consider how easily a judge may rule the minor is not mature. There are no standards in the law; nor can there be. Elizabeth Scott recently described how a Utah judge, obviously hostile to minors having the right to terminate an abortion, claimed to be faithfully applying the maturity test in concluding that a seventeen-year-old “good student” was
not mature because "she lived at home, engaged in sexual activity
without contraceptives, sought counsel from friends rather than family
members or church officials, and failed to recognize the long-term
consequences of abortion." For this judge, all minors who would use
the bypass procedure are by definition immature. Remarkably, one could
just as easily reach the opposite conclusion and reason that every time a
minor seeks an abortion, a judge must grant it. In Robert Mnookin’s
words: "[H]ow could the judge determine that it is in the interest of a
minor to give birth to a child if she is too immature even to decide to
have an abortion?" This is the expected consequence when courts are
empowered to determine an inherently empty question. Professor
Mnookin brilliantly demonstrated more than twenty-five years ago the
vacuity of standards when judges decide matters based on a child’s "best
interests." Mnookin’s trenchant dissection of the best interests
standard as a mode of adjudication is highly pertinent here.

Citing Lon Fuller, Mnookin identified the special qualities of these
proceedings. First, judges are expected to make "‘person-oriented,’ not
‘act-oriented,’ determinations." Second, the judge must make his or
her determination not on the basis of past acts and facts, but on a
prediction of future events. This means, in turn, that precedent is
almost never helpful to the decisionmaker in deciding the matter before
him or her and that the scope of appellate review becomes "extremely
limited." As a consequence, the judge’s "discretion is very wide
indeed."

Even more importantly, however, Mnookin stresses, again citing
Fuller, that when a judge decides a matter based on the best interests of
the child, she is

“not applying law or legal rules at all, but is exercising administrative
discretion which by its nature cannot be rule-bound. The statutory
admonitions to decide the question . . . so as to advance the welfare of
the child is as remote from being a rule of law as an instruction to the

303. Scott, supra note 11, at 574 n.110 (discussing H.B. v. Wilkenson, 639 F. Supp. 952, 955-
56 (D. Utah 1986)).
304. ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND
PUBLIC POLICY 263 (1985).
305. Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of
306. Id. at 250 (quoting LON FULLER, INTERACTION BETWEEN LAW AND ITS SOCIAL CONTEXT
8 (1971)).
307. See id. at 251.
308. See id. at 253-54.
309. Id. at 254.
manager of a state-owned factory that he should follow the principle of maximizing output at the least cost to the state.\textsuperscript{310}

Among the problems with this kind of adjudication, Mnookin emphasizes an inescapable fundamental problem. He asks, "[w]hat set of values should a judge use to determine what is in a child’s best interests?"\textsuperscript{311} Should best interests be viewed from a long-term or short-term perspective. . . . Should the judge ask himself what decision will make the child happiest in the next year? Or at thirty? Or at seventy? Should the judge decide by thinking about what decision the child as an adult looking back would have wanted made? . . .

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself.\textsuperscript{312}

We may reasonably substitute the term “maturity” for “best interests” and Professors Fuller and Mnookin’s critiques of the judge’s role remain just as apt.\textsuperscript{313}

The ultimate decision by the judge whether or not to consent to the minor’s abortion procedure is virtually no substantive right at all. In the adolescent abortion cases, minors gained only a procedural right not much more substantial than an alien’s right to petition the Attorney General to suspend deportation, which Justice Scalia recently characterized as “‘an act of grace’ which is accorded pursuant to her ‘unfettered discretion.’”\textsuperscript{314} This point is not mitigated by the evidence that almost all petitions are granted.\textsuperscript{315} My point is that any judge on any given day could conclude both that the pregnant minor appearing in court is not mature and that the abortion is not in her best interests. In such circumstances, that minor does not have any right to terminate her

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{310} Id. at 255 (alteration in original) (quoting FULLER, supra note 306, at 11).
\item \textsuperscript{311} Id. at 260.
\item \textsuperscript{312} Id.
\item \textsuperscript{313} As Justice Marshall noted in his opinion in \textit{Hodgson v. Minnesota}, 497 U.S. 417 (1990), “[i]t is difficult to conceive of any reason, aside from a judge’s personal opposition to abortion, that would justify a finding that an immature woman’s best interests would be served by forcing her to endure pregnancy and childbirth against her will.” Id. at 475 (Marshall, J., concurring in part and dissenting in part).
\item \textsuperscript{315} See infra note 378. To the contrary, that all the petitions are granted demonstrates the hidden public health issues that really drive this subject. See \textit{infra} note 378 and accompanying text.
\end{enumerate}
\end{footnotesize}
pregnancy, whether or not the judge’s rulings are correct or even reasonable. 316

This is not to say minors gained nothing from the abortion decisions. Precisely speaking, the “right” pregnant minors gained from the abortion decisions is an option to seek approval from one of two adults. This is not insignificant. Before Danforth, minors were obliged to seek permission from their parents to terminate an unwanted pregnancy. 317 After Bellotti, minors have a choice to seek permission from their parents or a judge. 318 To this extent, minors gained something. At the same time, the Powell plurality opinion effortlessly pronounced that a child’s constitutional right is violated when a parent exercises a veto of the minor’s decision to terminate a pregnancy, yet advanced when a judge is the adult who refuses the abortion. 319 By characterizing this process as a minor’s constitutional right, we denigrate the meaning of constitutional rights themselves.

C. Adolescents Do Not Have a Constitutional Right to Privacy

As is well known, the right to terminate a pregnancy is best understood as a component (or manifestation) of the broader constitutional right to privacy and autonomy. 320 If someone does not possess the broader constitutional right to privacy and autonomy of which the right to terminate an unwanted pregnancy is a subset, then one cannot possess the constitutional right to terminate a pregnancy.

The first case to hold that pregnant women have a constitutional right to abort a nonviable fetus was Roe v. Wade. 321 As important (and controversial) as the decision was, however, all recognize that the case is part of a larger body of law which established the constitutional right to privacy. 322 When the general right was first articulated by Justice Harlan in his famous dissent in Poe v. Ullman, 323 the right was expressly grounded in the right of privacy. 324 As Justice Harlan expressed it:

---

316. She will, of course, possess a right to appeal. But now we are drifting ever further from a right to terminate an unwanted pregnancy to a right to seek judicial review of a trial level determination on the pregnant minor’s maturity and best interests.
319. See id. at 649 (plurality opinion).
321. See id. at 153.
322. See id.
324. See id. at 548 (Harlan, J., dissenting).
This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints ... 325

By the time of *Griswold v. Connecticut*, 326 Justice Douglas found the right to be protected by the penumbra of rights located in the First, Third, Fourth, Fifth, and Ninth Amendments. 327

In 1972, Justice Brennan, writing for the Court in *Eisenstadt v. Baird*, 328 was able to enlarge the right from *Griswold*’s marital privacy to one of self-expression, intimacy, privacy, and autonomy. 329 Thus, under *Eisenstadt*, adults have the right to engage in sex with partners of their choice and to use contraceptives if they so desire. 330 However controversial *Roe v. Wade* 331 was, the controversy was over the application of the privacy right to terminating a pregnancy (with the consequence of an individual’s right adversely affecting another’s potential life). 332 In 1992, in *Planned Parenthood v. Casey*, 333 Justices O’Connor, Souter, and Kennedy articulated a woman’s right to an abortion as part of “the heart of liberty . . . to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” 334

---

325. Id. at 543 (Harlan, J., dissenting).
326. 381 U.S. 479 (1965).
327. See id. at 484. Laurence Tribe recently observed the slight difference between the means used by Justice Harlan and Justice Douglas to identify privacy rights protected by the Fourteenth Amendment. See Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 170 (1999). Comparing Justice Douglas’s majority opinion in *Griswold* with Justice Harlan’s dissent in *Poe*, Professor Tribe observed that Justice Douglas:

[U]sed essentially the same type of analysis—although he spoke there in the more passive language of discerning the shadows cast by the distinct points marked out by the Bill of Rights, rather than in the more active language of drawing the lines needed to connect those points so as to define a coherent picture.

Id.

329. See id. at 453.
330. See id. at 443.
334. Id. at 851 (joint opinion of O’Connor, Kennedy & Souter, JJ.).
Cases involving the privacy rights of adults always stand for more than the particular holding involved, even as the holding itself is vitally important. But the opposite proves true in the field of children's rights. *Danforth* turns out not to be any kind of statement about privacy. It is, instead, a holding about a minor's right to terminate an abortion. A minor's right to terminate an abortion is not a subcategory of the greater right to privacy. It is an end in itself. Whereas adult women have a constitutional right to privacy which encompasses the right to decide whether to terminate a pregnancy, but not the constitutional right to an abortion as such, if we were to take seriously the Court's declaration that the adolescent abortion cases are about a pregnant minor's constitutional rights, we would quickly reach the startling conclusion that pregnant adolescents—unlike all other persons—have a constitutional right to an abortion, but not to privacy or autonomy.

Under American law, children are not autonomous agents empowered to make significant decisions in their lives. Instead, they "are always in someone's custody." They are obliged to attend the church their parents elect for them (or not attend any house of worship, if that is their parent's preference). They are obliged to attend the school their parents select. They even are obliged to withdraw from school and return to the parent's farm to complete their religious and communal study if that is their parents' choice and if the state otherwise permits the parents to exercise that choice.

This was not merely the law before the adolescent pregnant minor cases reached the Supreme Court; it remains the law today. If pregnant minors had a constitutionally recognized right to privacy, of which the right to terminate an abortion were merely an example, the entire law of children's rights—both for boys and girls—would be radically different.

336. Although a version of this phrase was first used in a Supreme Court decision in *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982), as the basis for deciding that children in foster care are not in the kind of "custody" that fits the meaning of the federal habeas corpus statute, see id. at 510-11, and relied upon two years later in *Schall v. Martin*, 467 U.S. 253 (1984), as the rationale for concluding that a child's liberty interest in avoiding pretrial jail is less than an adult's, see id. at 265, the true origins of the concept derives from the *Bellotti* plurality opinion.
337. Children may be prohibited by state law from exercising tasks that adults certainly have a constitutional right to exercise, even if the child believes it is her duty to undertake the task at the risk of "'everlasting destruction at Armageddon.'" *Prince v. Massachusetts*, 321 U.S. 158, 163 (1944).
from the one we have today. I dare say it would be unrecognizable. What might we expect to find if the abortion cases truly created constitutional rights for adolescents? For one thing, we would expect boys also to enjoy constitutional rights to privacy. But the abortion line of cases has proven to be unavailing in enlarging any rights of adolescent boys. (This is really a right for pregnant minors only.) In addition, these cases do not apply even to adolescent girls outside of the abortion context itself. (It is not really a constitutional right to privacy.) In this instance, at least, the sum is dramatically smaller than the parts.

V. WHAT’S REALLY GOING ON?

When a Supreme Court opinion, particularly one written by a Justice as able as Justice Powell, is so devoid of analysis, we can reasonably conclude it is a subterfuge for something else. That is precisely what the Bellotti plurality opinion is. The abortion cases are simply a use of state power to reorder society, shifting power over children from parents to judges when it serves an instrumental value wholly apart from a child’s rights. Justice Powell’s Bellotti opinion ensured that pregnant minors were returned to the fold of an adult’s firm custody. For those minors who, for whatever reason, choose not to seek parental consent, a new adult was vested with the power over them. This new adult is the judge.

It is most telling that Bellotti was decided in the same Term as Parham v. J.R. In Parham, children challenged, on procedural due process grounds, the constitutionality of a statute that allowed a parent to commit his or her child to a psychiatric institution for “observation and diagnosis” over the child’s objection. The statute also authorized a child’s indefinite commitment when the attending physician certified that the child requires hospitalization. As applied to adults, the statute would certainly be unconstitutional. Unless an adult consented to such commitment, a patient may not be kept in a psychiatric hospital over

341. It is difficult to overstate the incongruity of a rule that was created in the name of advancing a minor’s right to privacy which forces minors to file a lawsuit and appear before a judge to plead for the privilege to terminate an unwanted pregnancy.
343. See id. at 643 (plurality opinion).
344. See id. at 643-44 (plurality opinion).
346. See id. at 587, 591.
347. See id. at 590-91.
exception by court order. In Parham, however, the child was considered a “voluntary patient” because the child’s commitment was based on the parent’s consent. Placing one’s child in a psychiatric hospital over the child’s objection is an extraordinary exercise of parental power, effecting a “massive curtailment of liberty.” Moreover, the exercise of this power directly implicated a constitutional right of children which the Supreme Court already had held children possess—the right to avoid loss of physical liberty.

Nonetheless, the Supreme Court upheld parental power in Parham, reasoning that because parents usually make good child rearing choices, their right to raise their children should not be interfered with lightly. The Court also reasoned that because the parental decision was subject to review by the attending physician, doctors were able to protect children from wrongful institutionalization.

The contrast between Bellotti and Parham could hardly be greater. Parham empowered parents to place their children in institutions without requiring judicial review in the face of evidence that “more than half of the State’s institutionalized children were not in need of confinement if other forms of care were made available or used.” Bellotti disempowered parents from providing consent to permit their child to terminate her pregnancy in the absence of any evidence that parents had misused their power. Parham chose to rely on doctors, even though they “often lead to erroneous commitments since psychiatrists tend to err on the side of medical caution and therefore hospitalize patients for whom other dispositions would be more beneficial.” Bellotti rejected reliance on doctors as a check on the appropriateness of the desired procedure. Parham rejected the children’s claim to a right to judicial review despite clear precedence that children, like adults, have a constitutional liberty interest against institutionalization. Bellotti claimed to rely on a minor’s constitutional

349. See Addington, 441 U.S. at 427.
350. See Parham, 442 U.S. at 589.
351. Id. at 622 (Stewart, J., concurring) (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)).
352. See In re Gault, 387 U.S. 1, 12 (1967).
353. See Parham, 442 U.S. at 603-04.
354. See id. at 604-05.
355. Id. at 629 (Brennan, J., concurring in part and dissenting in part).
357. Parham, 442 U.S. at 629 (Brennan, J., concurring in part and dissenting in part).
358. See Bellotti, 443 U.S. at 641 n.21 (plurality opinion).
359. See Parham, 442 U.S. at 613.
right to privacy, though the Court had never before found they had such a right and has never since relied on the alleged right as precedent for any additional constitutional rights. Finally, in Parham, decided twelve days before Bellotti, the Court piously declared that "[t]he statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." In Bellotti, the Court refused to apply any presumption that a parent acts in her child's best interests when making important child rearing decisions.

Surely, none of this makes sense if viewed simply through the lens of the constitutional rights of children. But these cases, and the broader category of children's constitutional rights, become coherent when considered in terms of public health and sound social policy. Simply stated, the Bellotti rule only makes sense in public policy terms.

The rule that pregnant children need not seek their parents' permission to obtain an abortion is based on the concern that many children will not want to tell their parents and therefore will not do so, whatever the law requires. This, in turn, will lead to unacceptable results: either children will not tell their parents and not be able to terminate their pregnancies until it is too late to do so; or they will not

360. See Bellotti, 443 U.S. at 655-56 (Stevens, J., concurring in the judgment).
361. Parham, 442 U.S. at 603.
362. See Bellotti, 443 U.S. at 642-43 (plurality opinion).
363. The Court clearly recognizes the public health policy issues involving adolescent pregnancies. See Michael M. v. Superior Court, 450 U.S. 464, 470-71 (1981) (plurality opinion): At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the last two decades, have significant social, medical, and economic consequences for both the mother and her child, and the State. . . . [I]f those children who are born, their illegitimacy makes them likely candidates to become wards of the State.

Id. (plurality opinion) (footnotes omitted).

In Michael M., a plurality of the Court specifically noted that "[t]he risk of maternal death is 60% higher for a teenager under the age of 15 than for a women [sic] in her early twenties. The risk is 13% higher for 15-to-19-year-olds. The statistics further show that most teenage mothers drop out of school and face a bleak economic future." Id. at 471 n.4; see also Carey v. Population Servs. Int'l, 431 U.S. 678 (1977):

"[T]eenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out of school with the accompanying impairment of educational opportunities, and other dislocations [including] forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion."

Id. at 696 n.21 (second alteration in original) (quoting Note, Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, 88 HARV. L. REV. 1001, 1010 (1975) (footnotes omitted)).

Politics has placed the Court at the center of the adolescent pregnant minor conundrum.\footnote{365}{As Professor Dolgin has written:

\textit{[T]he Court’s construction of the judicial bypass option, freeing girls from parental authority, but imposing on them the heavy burden of petitioning and appearing before a judicial tribunal, can be attributed to the politics of abortion—here to an interest in balancing support for the right to abortion with circumscribed support for that right.}} Because of the polarization in the political process over the extremely contentious issue of abortion, that process has failed to yield a satisfactory answer in public health terms. In other areas than abortion—treatment for sexually transmitted diseases or drug or alcohol addiction, for example—the American political process has achieved sensible public health rules as they affect minors without resort to the Constitution or the Supreme Court. For more than thirty years, legislatures have seen the wisdom of enacting laws in every state which permit children ready access to treatment without any requirement of parental consent or even notice.\footnote{366}{See Martin Guggenheim & Alan Sussman, \textit{The Rights of Young People} 207 & app. D (1985).}

The reason states have been able to develop coherent and sound public health rules in these areas is because there is no counter-lobby to maximizing the treatment of addicted minors or minors infected with sexually transmitted diseases. In these areas, legislatures are aware that treating minors is the only appropriate result. As Franklin Zimring has pointed out: “legislation dealing with venereal disease and drug and alcohol abuse is really state guidance of adolescents rather than any recognition of autonomy. In public policy terms, there is only one right answer to the question of whether alcoholism, drug misuse, or venereal disease should be treated rather than ignored.”\footnote{367}{Franklin E. Zimring, \textit{The Changing Legal World of Adolescence} 64 (1982).}

These issues have avoided the political focus that abortion has had, and these laws were passed, even though many of the arguments in favor of parental notice requirements for abortion are equally as powerful when applied to children who require treatment for sexually transmitted diseases.\footnote{368}{There is an important distinction between consent and notice requirements here. Though there is a real choice to be made concerning whether to terminate a pregnancy or carry the fetus to term, there is no real choice whether to treat a child who has contracted a sexually transmitted disease. For this reason, the arguments in favor of parental consent requirements for abortion may be more powerful than for the treatment of sexually transmitted diseases. This is especially true}
For better or worse, it simply is not currently possible in the United States to rely on the political process to satisfactorily resolve the deeply contentious abortion issue. Because of intensive lobbying by anti-abortion groups, many state legislatures have spent much of the past thirty years enacting laws specifically designed to make it difficult for women of any age to obtain an abortion. As a result, the political process has come to rely on the Supreme Court to bail out the legislatures when they have not gotten right the public health choices of Americans. The same legislatures that have succumbed to the pressure to create barriers to adult women having abortions have done so for minors as well.

The abortion cases can only be properly understood as a public health challenge which the Court has accepted. Through them, the Court has been willing to write the rules under which pregnant minors may terminate their pregnancies. Opponents of abortion have succeeded in many state legislatures in enacting laws restricting a woman's right to terminate a pregnancy which the Supreme Court may not overturn except by invoking the Constitution. The choices facing the Court when hearing challenges to statutes interfering with a minor’s opportunity to terminate a pregnancy are few and unappealing. On the one hand, the choice to uphold laws that require parental consent before a nonemergency abortion may be performed on an unemancipated minor—though quite coherent in terms of the Constitution—is unacceptable on public health grounds. On the other hand, by relying on the Constitution as the basis for striking statutes that require parental consent, the Court created incoherent doctrine in constitutional terms, however sensible its rules are in public health terms.

when the treatment for sexually transmitted diseases is relatively safe and there are not many treatments to choose from. Professor Zimring is right not only that parents really have no choice about whether to consent to their child being treated for a sexually transmitted disease, they have very little choice even about what type of treatment to provide. See id. at 64-65. But, whatever arguments support parental notice requirements in the abortion context certainly have equal force when it comes to treatment for sexually transmitted diseases or addiction.

369. Legislators who do not really believe in creating roadblocks for pregnant women are nonetheless able to do so in the knowledge that the Supreme Court will strike down the more Draconian blocks (since the substantive standard for evaluating the legality of any block is whether it imposes an “undue burden” on the pregnant woman’s right to obtain an abortion). See Planned Parenthood v. Casey, 505 U.S. 833, 876-77 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.).

370. See Scott, supra note 11, at 569 n.86.

371. See id. at 575-76: “It may be that, under these circumstances, the Court deems the creation of an intermediate category to be the only viable solution. Perhaps the endorsement of the by-pass hearing reflects a view that the classification decision can be better resolved by courts than in the politically-charged legislative arena.” Id. at 576.

372. Professor Dolgin has called this field “bafflingly contradictory.” Dolgin, supra note 11, at 412.
In *Parham v. J.R.*, the Court could comfortably rely on physicians to review parental choice because the Court understood that if physicians erred, it would be on the side of admitting children into mental hospitals. The political consequences of that error-proneness on the medical profession's part were quite tolerable. But in *Bellotti*, it was not politically acceptable to trust doctors because the doctors who perform abortions in the United States are already a self-selected group of physicians who believe in choice. Here the concern is that the doctors would "rubber stamp" the minor's decision to have an abortion. This concern is made explicitly by Justice Stewart in his concurring opinion in *Danforth* which was joined by Justice Powell. Though "rubber stamping" by judges is politically acceptable, rubber stamping by physicians was not. Such a result would have seemed to the American public to be tantamount to ceding the authority to the minor to decide for herself whether to terminate an abortion. There is a deep relationship between why this perceived result is so antithetical to many Americans and why adolescents do not really have a constitutional right to an abortion today.

What is ultimately most problematic about the current parental involvement statutes is that they are a dishonest approach to this problem. One could certainly argue that if all bypass hearings end with rubber stamp consent, advocating too loudly to change this system could only result in a worse system for minors. On the other hand, one is

---

375. See id. at 642 (plurality opinion).
377. Professor Dolgin goes even further and shows how outrageous it is for the Court to turn a blind eye to unequivocal evidence of harm inflicted on minors as a result of the judicial bypass requirement. See Dolgin, *supra* note 11, at 413. Her explanation, like mine, is that a majority of the Court will not tolerate a result that frees pregnant minors from the shackles of childhood. See id. at 417. Professor Dolgin's accounting for this is that the Court is unwilling to "threaten sacred images of childhood through which society struggles to satisfy its deep nostalgia for tradition." Id. at 416.
378. There is considerable evidence that virtually all pregnant minors who seek resort to the judicial process are able to obtain an abortion. See *Scott*, *supra* note 11, at 574 (citing *MNOOKIN*, *supra* note 304, at 239-40).

Between 1981 and 1983, ninety percent of the 1300 petitioning minors in Massachusetts courts were deemed "mature." In the rest (with one exception), abortion without parental consent was determined to be in the minors' best interest. That sole exception went to a neighboring state. "Every pregnant minor who has sought judicial authorization for an abortion has secured an abortion." *Id.* at 574 n.111 (citations omitted) (quoting *MNOOKIN*, *supra* note 304, at 239). Similarly, evidence presented in federal litigation in the late 1980s showed that fifteen out of 3573 applications for abortions by minors in Minnesota were denied. See *Hodgson v. Minnesota*, 497 U.S. 417, 441 (1990).
chilled to read reports of judges who harassed pregnant minors in their courtrooms, forced them to go to anti-abortion clinics prior to granting a hearing, and assigned anti-abortion lawyers to represent them in court.379 One writer reports of an Alabama judge who appointed a guardian ad litem to a fetus in order to “assure that the fetus had ‘an opportunity to have a voice, even a vicarious one, in the decision making.’”380 In addition, there are real costs imposed on pregnant minors who appear before judges. It can be extremely traumatic to minors. “‘You see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands...one young lady had her—her hands were turning blue and it was warm in my office.’”381 But the current system is a masked one in which a majority of the Court very likely prefer that pregnant minors who would want to terminate their pregnancies do so.382 They are barred from saying this out loud (and may not even admit it to themselves). But their actions speak louder than anything.

The trap in which the Justices find themselves is easily stated. They are unable to announce a rule that minors have the identical right as adults to terminate a pregnancy. An adult woman’s right to have an abortion stems from her Fourteenth Amendment privacy rights.383 But the Court will not tolerate the conclusion that young women have significant privacy rights. At the same time, the Court is unable to strike a statute limiting a pregnant minor’s opportunity to secure an abortion without talking in terms of the Constitution and constitutional rights of minors.

380. Id. at 7 (quoting Montgomery, Ala. Juvenile Judge Mark Anderson).
382. I recognize this explanation is the opposite of the one commonly given. Many commentators suggest that the Court is antagonistic to minors obtaining abortions. Certainly this is true for Chief Justice Rehnquist and Justices Scalia and Thomas. But I do not believe it is true for anyone else on the Court. Nor do I believe there were ever five members of the Court who were opposed to pregnant minors obtaining abortions when they want them. In particular, I believe the votes of Justices Stewart and Powell, which were needed in Danforth to obtain a majority to strike the Missouri law, merely reflected these Justices’ common sense understanding that requiring parental consent as a precondition to a child obtaining an abortion will result in too many teenagers becoming parents before they are prepared and before they want to do so. I believe that Justices Stiewart and Powell’s common sense views continue in Justices O’Connor and Kennedy. Because of their votes, combined with the votes of Justices Stevens, Souter, Ginsberg, and Breyer, there remains sufficient votes to keep the legacy of Danforth alive.
Part of what is so remarkable about all of this is how successful the Court has been in promoting the notion that the abortion cases are about a child’s rights. Just as amazingly, Justice Powell was able to place in the state’s hands the power to veto a minor’s choice to terminate a pregnancy as the means of vindicating the minor’s rights. Having first divested parents of a right they enjoyed through a line of Supreme Court cases stretching over fifty years, the Court endowed the state with it.

VI. CONCLUSION

The adolescent abortion cases are deeply incoherent in terms of parental rights, abortion rights generally (which are about privacy, not abortion in itself), and abortion rights specifically (because the bypass procedures should surely be recognized as creating “undue burdens” on the constitutional right to privacy).

The public health consequences of not liberating children from parental consent requirements would be an increase in unwanted teenage mothers (unwanted both by the mothers themselves and by society because of the manifold associated costs). But, the dilemma for the Court was that it was unable—with any degree of consistency with broader principles of constitutional law—to liberate minors and give them the privacy right to choose abortion. Not only would such a result be inconsistent with precedent, it would also belie the real difference between adults and children which the Justices (and the law itself) regard as fundamental. Hence, the unfortunate compromise of a bypass with no standards.

The upshot of this dramatic shift was that parents were the ultimate losers in the minor abortion cases. Children (in the first instance, pregnant girls) ended up in a different place than they began before Danforth, not precisely either winners or losers, but hardly in the heady world of constitutional rights. The state was the definitive winner in that it gained control over the lives of adolescents. The Supreme Court has systematically given judges the power to exercise moral convictions about abortion, even to the point of imposing those views onto pregnant minors. To do so in the name of “advancing the constitutional rights of children” is nothing less than perverse. The yawning chasm between rhetoric and reality betrays the glaring flaw at the core of the modern jurisprudence of children’s rights.

385. See id. at 635 (plurality opinion).