The "Squeal Rule" and a Minor's Right to Privacy

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NOTES

THE "SQUEAL RULE" AND A MINOR'S RIGHT TO PRIVACY

A little more than one decade ago, Congress passed the Family Planning Services and Population Research Act of 1970 ("Title X"),\(^1\) as an amendment to the Public Health Service Act.\(^2\) Title X provides federal funding for the establishment of voluntary family planning clinics.\(^3\) One of the purposes underlying Title X is "to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services."\(^4\) Contraceptive drugs and devices are commonly provided to adolescents as well as to adults as part of these family planning services.\(^5\) In 1981, Congress enacted an amendment to Title X\(^6\) to encourage the participation of the family of a person utilizing the services of a federally-funded voluntary family planning clinic.\(^7\)

The 1981 amendment to Title X has been the source of recent controversy. Following its passage, the Department of Health and Human Services ("HHS") promulgated several regulations pursuant to this amendment.\(^8\) The most controversial and publicized regulation,\(^9\) dubbed the "squeal rule" by its opponents,\(^10\) would have re-

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3. Title X establishes a program of federal financial assistance to public and private nonprofit entities for the provision of voluntary family planning services. Id.
4. Id. at § 300 note (1976).
5. See infra note 48 and accompanying text.
7. The amendment reads as follows:
   "To the extent practical, entities which receive grants or contracts under this subsection shall encourage family [sic] participation in projects assisted under this subsection." Id.
quired federally-funded family planning clinics to notify parents that their unemancipated minor child has procured prescription contraceptives from such a clinic. 11

The legality of the regulations was challenged in lawsuits brought around the country. In the two cases examined in this note, New York v. Schweiker 12 and Planned Parenthood Federation of America, Inc. v. Schweiker, 13 the plaintiffs claimed that the regulations were invalid because HHS lacked the statutory authority to mandate parental involvement and because the regulations contravened Congress’ intent, which was merely to encourage parental involvement. 14 The plaintiffs also asserted that the regulations violated a minor’s constitutionally protected right to privacy in connection with decisions affecting procreation. 15 On appeal, both federal courts held that the regulations were invalid, 16 and never reached the constitutional issue raised by the plaintiffs. 17

After examining the above two cases and the legislative history of Title X, 18 this note focuses on the constitutionality of a regulation or statute, properly promulgated by HHS, Congress, or a state legislature, that requires parents to give their consent or to be notified when their minor child has obtained prescription contraceptives. 19 This note posits that any such regulation or statute that requires parental consent or notification and that is objectively imposed upon all minors is unconstitutional. 20 All minors should be given the opportunity to utilize an alternative procedure to enable them to bypass a parental consent or notification requirement regarding their decision

11. See supra note 8. There is a specific exception to the notification regulation when a clinic director determines that such notification will cause the minor to be physically harmed by a parent or guardian. 42 C.F.R. § 59.5(a)(12)(i)(B) (1983).
The regulations were also challenged in Memphis Ass’n for Planned Parenthood v. Schweiker, Civil No. 83-2060 (W.D. Tenn. Feb. 24, 1983) (preliminary injunction granted).
17. New York v. Heckler, 719 F.2d at 1191; Planned Parenthood, 712 F.2d at 650.
18. See infra notes 23-86 and accompanying text.
19. See infra notes 95-205 and accompanying text.
20. See infra notes 206-21 and accompanying text.
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21. Id.

22. Id.

23. See infra notes 95-205 and accompanying text.

24. See infra notes 225-34 and accompanying text.

25. Id.

26. For a discussion of Title X, see infra text accompanying notes 38-48. These regulations have never been in effect and will not be enforced by HHS. Telephone interview with Lucy Eddinger, Technical Information Specialist of HHS (Apr. 17, 1984).


28. Id. The definition of “unemancipated minor” is “an individual who is age 17 or under and is not, with respect to factors other than age, [such as marriage or parenthood] emancipated under State law.” Id. § 59.5(a)(12)(i)(C) (1983).

HHS noted that commentators claim that 30 states and the District of Columbia have less stringent laws concerning the provision of family planning services to minors than the new rule, and “that 17 other States have granted physicians the ability to prescribe contraceptives to minors without parental consent or notification if deemed to be in the best interest of the

I. THE CHALLENGED REGULATIONS

The controversial regulations promulgated by HHS affecting Title X would have set forth several changes in the current operating regulations covering federally-funded family planning clinics. The most significant change was the addition of a parental notification requirement. Before a minor would be provided with a prescription contraceptive, she would have had to be told of the clinic's notification requirement. Following the minor's initial receipt of a prescription contraceptive, the clinic would have to “notify a parent or guardian . . . within 10 working days” that “prescription drugs or prescription devices” had been provided to their “unemancipated minor” child. Further, the clinic would have been required to verify

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“by certified mail (with restricted delivery and return receipt requested), or other similar form of documentation, that the notification ha[d] been received” by the parent or guardian. 29 A clinic was not to provide a minor with further prescription drugs or devices unless and until such verification was received. 30

Two additional regulations were promulgated along with the notification rule. One required federally-funded clinics “to comply with State laws requiring parental notification or consent to the provision of family planning services to persons who are unemancipated minors under state law.” 31 The other would have modified the definition of “low-income family” by revoking the requirement that clinics consider adolescents on the basis of their own financial resources for purposes of charging for services. 32 Consequently, a minor whose family income was above the minimum level for eligibility would have been precluded from receiving contraceptives at the lower, subsidized cost.

II. DISPOSITION OF THE CHALLENGES TO THE REGULATIONS

A. The Notification Regulation

Heckler, both affirmed lower court opinions holding that the notification regulation was invalid. In reviewing the challenges to the three regulations, the circuit court in Planned Parenthood analyzed the historical background of Title X, and decided it was the relevant place to start an inquiry in determining whether the regulations were valid. This section will trace the factors considered by the circuit courts in these two cases.

1. Legislative History.—By 1970, Congress recognized that improvements in and expansion of the availability of family planning services to all persons were necessary. Congress specifically focused its attention in these areas on the needs of the indigent population. A House Report states that “[a]vailable evidence indicates that most couples in the United States want about three children, but that low-income families have more.” The House members believed that poorer families have more children mainly because of the high cost of certain contraceptive methods which generally require frequent physical examinations and continuous medical supervision. To remedy this problem, Congress enacted Title X, which authorized the grant of federal funds to assist in the establishment and operation of voluntary family planning projects. Congress codified its purposes for enacting Title X, noting, among other reasons, that it was passed “to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services.”

37. 712 F.2d at 651-53. Both appellate courts stated, in essence, that the regulations cannot stand if they are found to be inconsistent with congressional intent or would serve to defeat the purpose of Title X. See New York v. Heckler, 719 F.2d at 1194; Planned Parenthood, 712 F.2d at 656.
39. Id. at 5070.
40. See id. at 5071. The inability of poorer women to obtain family planning services was described as a “form of discrimination, based on economic status” which resulted in “many unfortunate health, social and financial consequences for the individual family and the society.” Id. at 5074.
As of 1970, the date of passage of Title X, Congress had not specifically addressed the problem of unwanted teenage pregnancy. However, by 1975, Congress had become concerned with the fact that teenagers, among other groups, were not availing themselves of the services offered by family planning clinics. In an attempt to remedy this problem and others, Congress provided increased federal funding of educational programs under Title X. Finally, in 1978, Congress realized that the problem of unwanted teenage pregnancy had not dissipated, and therefore passed an amendment to Title X that specifically required federally-funded clinics to provide services to adolescents.

2. The Importance of Confidentiality.—In Planned Parenthood, the circuit court recognized "the crucial importance" of patient confidentiality. The court also pointed out Congress' awareness that this factor served to attract adolescents to federally-funded clinics. Of particular significance to the court was the fact that during consideration of the 1978 amendment specifically requiring federally-funded clinics to provide services to adolescents, a committee of the House of Representatives was faced with a proposed modification to the 1978 amendment which it declined to adopt. According to this proposal, before a family planning clinic could

44. The groups referred to were "teenagers, especially males, emotionally ill persons, and American Indians." S. REP. No. 29, 94th Cong., 1st Sess. 55, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 469, 517.

45. Most adolescents exhibited ignorance of their reproductive systems. Planned Parenthood Federation of America, Inc. had reported to Congress that "less than 40 percent of single teenage women know the period of time during which they are likely to become pregnant, and 30 percent of teenage women are unaware of where they can obtain family planning services." S. REP. No. 102, 95th Cong., 1st Sess. 16, 17, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 549, 561 [hereinafter cited as S. REP. No. 102].

46. In 1977, Congress recommended that $2.5 million be appropriated to "expand efforts to provide educational and informational materials to these young people." Id. at 17, reprinted in 1977 U.S. CODE CONG. & AD. NEWS, at 561.

47. In 1978, Congress declared that "the problems of teenage pregnancy have become critical." H.R. REP. No. 1191, 95th Cong., 2d Sess. 31.

48. Public Health Service Act—Extension, Pub. L. No. 95-613, § 1(a)(1), 92 Stat. 3093 (codified at 42 U.S.C. § 300 (a) (Supp. V 1981)). The Senate reported that "[t]eenage pregnancy has become a significant health and social concern with one million teenagers between the ages of 15 and 19 becoming pregnant each year and 30,000 teenagers younger than 15 becoming pregnant each year." See S. REP. No. 102, supra note 45, at 17, reprinted in 1977 U.S. CODE CONG. & AD. NEWS, at 561.

49. Planned Parenthood, 712 F.2d at 659.

50. Id.

51. Id.

52. See infra note 58 and accompanying text.
provide prescription birth control drugs or devices to an unemancipated minor under sixteen years of age, it had to notify the parent or guardian of its intent to do so. Representative Volkmer, who sponsored the proposal, stressed the fact that it would not prevent a clinic from providing prescription birth control drugs or devices to minors, but merely would require that parents be informed that the clinic intended to provide such services.

Representative Rogers, in opposing the Volkmer amendment, stated:

[E]ach year . . . 1 million adolescent females . . . become pregnant . . . . If these young people are sexually active—and any amendment we pass will not change that—is it not better for them to have the proper information so that they could avoid pregnancies and avoid the need for an abortion? That is what this bill is trying to do.

He further commented that many adolescents simply would not come into the clinics if a discussion between adolescents and their parents concerning the adolescents' sexual activities were required, and also pointed out that the 1978 amendment would not prevent minors from obtaining nonprescriptive birth control devices from drugstores. Volkmer's proposed modification, requiring notification prior to dispensation, was rejected by the House committee by a vote of forty-five to ten.

The circuit court in Planned Parenthood concluded that, "Congress' obvious awareness of the administrative practice as to confidentiality as well as its failure to change this practice when

53. 124 CONG. REC. 37,044 (1978).
54. Id. Representative Volkmer stated:

The basic purpose is to uphold the rights of the parents just to know—just to know—what is happening concerning their children that are of tender age.

We are not talking about the 16- or 17- or 18- or 19-year-old-child; we are talking about the 11-year-old or the 12-year-old or the 13-year-old or the 14-year-old, or the 15-year-old child.

Id.
55. Id.
56. See id.
57. Id. This statement may have arisen from the Supreme Court's decision in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), where the Court struck down a blanket prohibition on the distribution of nonprescription contraceptives to minors. For further discussion of this decision, see infra text accompanying notes 97-118.

Representative Rogers also noted that teenagers would not receive proper instruction on the use of contraceptives purchased at drugstores and therefore, would remain exposed to the risk of an unwanted pregnancy. 124 CONG. REC. 37,044 (1978).
58. 124 CONG. REC. 37,044 (1978).
presented with the opportunity provide[d] sufficient support for the conclusion" that Congress intended to maintain confidentiality for adolescent patients.69

3. The Statutory Language.—The 1981 amendment to the Public Health Service Act is comprised of a single sentence: “To the extent practical, entities which receive grants or contracts under this subsection shall encourage family [sic] participation in projects assisted under this subsection.”60 The only public comments made by the legislature appear in a House Conference Report:

The conferees believe that, while family involvement is not mandated, it is important that families participate in the activities authorized by this title as much as possible. It is the intent of the Conferees that grantees will encourage participants in Title X programs to include their families in counseling and involve them in decisions about services.61

Construing the language of the amendment in conjunction with its legislative history and the legislative history of Title X, both appellate courts concluded that the amendment did not mandate family participation. The circuit court in New York v. Heckler explained that “Congress did not intend to require parental involvement but merely meant to encourage it; the encouragement is clearly to be directed at minors to involve their parents or guardians and it was not intended that grantees directly involve parents or guardians.”62 When HHS advanced the argument that the notice requirement does not mandate parental involvement, but rather only provides the opportunity for it, the circuit court in New York v. Heckler responded by expressly adopting the language of the lower court opinion—that such an argument makes a “distinction without a difference.”63

59. 712 F.2d at 660. Both federal district courts also recognized the significance of patient confidentiality. See New York v. Schweiker, 557 F. Supp. at 360 (“Congress . . . recognized that adolescents' fear of their parents learning or being told about their requests for contraceptive services constitutes a significant barrier to reaching adolescents.”) (citations omitted); Planned Parenthood Fed'n of America, Inc. v. Schweiker, 559 F. Supp. at 668 (“Congress made it clear that [clinics] treating adolescents were to respect their patient's confidentiality because a contrary rule would contravene the overriding congressional intent of arresting the epidemic of teenage pregnancies.”).


62. 719 F.2d at 1196 (citations omitted).

The defendant, HHS, argued in *Planned Parenthood* that the use of the word "shall" prior to the words "encourage family participation" in the amendment places a non-discretionary duty on federally funded clinics, and reasonably encompasses a parental notification requirement.\(^6\) The circuit court in *Planned Parenthood* found that although the word "shall" imposes a duty on grantees, the nature of that duty is defined by the word "encourage," a permissive and nonobligatory term,\(^6\) and that Congress could easily have used less ambiguous language had they intended to mandate parental involvement.\(^6\) Finally, in *Planned Parenthood*, the court found that the 1981 Conference Report was "a crystal-clear and unequivocal expression of congressional intent" supporting the view that Congress "most definitely did not intend to mandate family involvement."\(^6\)

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64. 712 F.2d at 656.
65. *Id.*
66. *Id.* (footnotes omitted).
67. *Id.* at 657 (emphasis in original).

Title X programs also provide "preventive health care for women of childbearing age." S. *Rep. No. 29*, *supra* note 44, at 517. Since Congress is cognizant of the fact that adult as well as minor women are participants in these programs, Congress' intent may be simply and reasonably interpreted as a desire to encourage the maintenance of the family unit in society in general. In addition to encouraging minors to consult, on their own initiative, with their parents, Congress may well have intended that married adult women be encouraged to consult with their spouses upon the provision of any of the many services available at these clinics, including contraceptive decisions.

At least one state legislature had sought a way to protect a husband's procreative rights. In 1979, the Florida legislature enacted an abortion statute that required, *inter alia*, that "if the woman is married, the husband shall be given notice of the proposed termination of pregnancy and an opportunity to consult with the wife concerning the procedure." *Fla. Stat. Ann.* § 390.001(4)(b) (West Supp. 1983). In *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981), on remand, 550 F. Supp. 1112 (S.D. Fla. 1982), the constitutionality of the statute was challenged. The court of appeals recognized that a valid state interest existed, and that it might be sufficiently compelling to justify the burden that the Florida legislature placed on a woman's abortion decision. The court stated that "[t]he state [has] a substantial interest in attempting to ensure that the state-created vehicle for procreation, marriage, not be abused through one spouse perpetually and secretly frustrating the other's desire for offspring." *Id.* at 485 (emphasis in original). The court did not discuss the potential life involved, and did not describe the husband's interest in relation to that potential life.

The court focused on the procreative rights of spouses, describing those rights as the desire to produce children. Therefore, although the statute in *Scheinberg* was addressed only to a woman's abortion decision, the same rationale may be applied to the contraception situation. Both abortion and contraception are effective means of preventing reproduction.

On remand, the District Court for the Southern District of Florida held the statute unconstitutional, finding "that the Florida Legislature could *not* have reasonably concluded . . . that the abortion procedure . . . poses a greater than *de minimis* risk to a married woman’s future ability to bear children . . .," and therefore, the state interest was not sufficiently compelling to justify the burden placed on the woman's abortion decision. 550 F. Supp. at 1123 (emphasis
4. **Title XX of the Public Health Service Act.**—In both appeals, the defendant, HHS, articulated an argument it had not previously advanced in the district courts. Title XX, enacted as part of the same legislative package as the Title X amendment, establishes a new grant program for demonstration projects to provide services and to conduct research concerning adolescent sexuality and pregnancy. Title XX expressly mandates parental notification and consent. HHS posited, in essence, that Congress' approval of parental notification in one context supports the presumption that its use is also intended in a related context.

In *Planned Parenthood*, the circuit court rejected that position, finding that it completely ignored the significant difference in the nature of the two programs. The court described Title X as the federal government's largest family planning program, "designed to serve the family planning needs of all persons in need of such services." Title XX, in contrast, "is a limited and experimental program; . . . with a special emphasis on serving the needs of already pregnant adolescents and the prevention of adolescent sexual relations . . ." The court concluded that "[i]t would therefore be both illogical and contrary to legislative intent to . . . 'import' the strong family involvement component of Title XX into Title X."

The circuit court in *New York v. Heckler* declined to discuss this argument since the circuit court in *Planned Parenthood* had already dealt extensively with it. Thus, both appellate courts refused to find that the express notification requirement in Title XX would support an implication of the same requirement in Title X.

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70. *Id.*
71. *Id.* § 300z-5(a)(22)(A)(i).
73. *Id.*
74. *Id.*
75. *Id.* (emphasis in original) (citations omitted).
76. *Id.* at 662 (footnote omitted).
77. *New York v. Heckler*, 719 F.2d at 1197. Nonetheless, the court offered "two observations." *Id.* First, that the specific inclusion of a parental notification and consent requirement in Title XX and its absence in Title X, makes it obvious that "Congress knew how to require parental notice and consent when that was its intention." *Id.* Second, the court pointed out the different natures and sizes of the two programs and stated "[i]logic would suggest that the explicit requirement of a demonstration project not be read by implication into a mainstream program." *Id.*
B. The Compliance With State Law Regulation

In Planned Parenthood, the circuit court found that the regulation requiring federally-funded clinics to comply with state law concerning parental notification or consent was "an invalid delegation of authority to the states."\(^7\) The circuit court in New York v. Heckler found that, unlike the Planned Parenthood case, there was no nationwide class of plaintiffs.\(^7\) Thus, none of the plaintiffs could be injured by this regulation, as neither New York State nor any of its bordering states, has such a law.\(^8\)

C. The Regulation Redefining "Low-Income Family"

Both appellate courts invalidated the regulation which would have redefined "low-income family" so that federally-funded family planning clinics would have been required to charge adolescents for services on the basis of their families' resources rather than their own resources.\(^8\) Such a requirement was deemed by both courts to constitute a de facto notice requirement because adolescents would be forced to obtain financial information from their parents to determine their own eligibility.\(^8\) Furthermore, if a minor's parents did not meet the eligibility requirements, and if the minor had no funds of her own, she would be subjected to a de facto consent requirement—by withholding funds, parents could prevent adolescents from receiving contraceptive services at Title X clinics.\(^8\)

III. The Constitutionality of a Notification Rule

As has been previously discussed, the challenged regulations which comprise the "squeal rule" were invalidated due to a lack of statutory authority to mandate parental notification when a minor seeks prescription contraceptives from a federally-funded clinic. However, the issue which remains open after these decisions is whether a parental consent or notification rule, properly promulgated pursuant to adequate statutory authority, could withstand a constitutional attack. The issue is examined in the remainder of this note.

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78. 712 F.2d at 663.
79. 719 F.2d at 1196. However, it should be noted that the district court in Planned Parenthood had specifically denied the defendants' motion for nationwide class certification. 559 F. Supp. at 669.
80. 719 F.2d at 1196.
81. New York v. Heckler, 719 F.2d at 1197; Planned Parenthood, 712 F.2d at 664.
82. New York v. Heckler, 719 F.2d at 1197; Planned Parenthood, 712 F.2d at 664.
83. See Planned Parenthood, 712 F.2d at 664.
through an analysis of several Supreme Court decisions dealing with the privacy rights of adults and minors regarding procreative decisions, which the Court has deemed constitutionally protected. This note concludes that, based upon these precedents, a parental consent or notification rule, if objectively imposed upon all minors, should be struck down as unconstitutional.

A. A Minor's Constitutional Right to Privacy In Connection With Decisions Affecting Procreation

The Supreme Court has recognized that the right to use contraceptive devices is a constitutionally protected fundamental right. The Court has found that this right extends not only to married persons, but to unmarried persons as well. In extending the right to single persons, the Court held, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."  

The Supreme Court thus settled the question of the constitutionality of an adult's right to use contraceptive devices to prevent pregnancy, but had, until 1973, left open a major issue—the right to obtain an abortion. In 1973, the Court decided Roe v. Wade, which established the right of a woman to choose whether or not to have an abortion, deeming it a fundamental right, protected by the guarantee of personal privacy.  

84. See Griswold v. Connecticut, 381 U.S. 479 (1965) (a majority of the justices believed that a constitutional right of marital privacy exists and that a statute prohibiting the use of contraceptives within that relationship constitutes an undue burden on that right).  
85. Id.  
86. In Eisenstadt v. Baird, 405 U.S. 438, 443 (1972), the Court held that the state statutes in question, "viewed as a prohibition on contraception per se, violate[d] the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment," since married and single persons were treated differently without sufficient justification. Id. at 454-55.  
87. Id. at 453 (emphasis in original) (citations omitted).  
89. Id. at 153-54. The right to choose whether to have an abortion is, however, a limited one. The woman is completely free from all state regulation over the abortion decision only during the first trimester of pregnancy. Id. at 164. This decision has received significant commentary and criticism. See, e.g., Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 SUP. CT. REV. 159; Heymann & Barzelay, The Forest and the Trees: Roe v. Wade and its Critics, 53 B.U.L. REV. 765 (1973); Regan, Rewriting Roe v. Wade, 77 MICH. L. REV. 1569 (1979). Following the Court's decision in Roe, federal legislation was proposed which would have established that human life begins at the moment of conception.
In reaching the determination that a right to an abortion is fundamental, the Court in *Roe* weighed the competing interests of the woman, the state, and the potential life.\(^90\) During the first trimester of pregnancy, the Court found the woman's interest outweighed the state's interests in protecting the health of the mother and protecting the prenatal life.\(^91\) The Court viewed "[t]he detriment that the State would impose upon the pregnant woman by denying this choice altogether."\(^92\) to be too harmful and, therefore, the state's interests were insufficient to override the woman's interests during the first trimester of pregnancy.\(^93\)

The fundamental right of a woman to choose to have an abortion is not limited to adults. When states attempted to impose a parental consent provision on minors who sought abortions,\(^94\) the Supreme Court, in *Planned Parenthood v. Danforth*,\(^85\) vehemently declared that since states lacked the constitutional right to prohibit abortions during the first trimester of pregnancy under *Roe*, they had no "constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."\(^98\)

Such legislation would have vitiated the *Roe* decision. For a discussion of this proposed bill, see Note, *The Human Life Bill: Personhood Revisited, or Congress Takes Aim at Roe v. Wade*, 10 Hofstra L. Rev. 1269 (1982).

\(^90\) 410 U.S. at 155-64.
\(^91\) Id. at 163-65.
\(^92\) Id. at 153. The Court described the detriment to the woman: Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

\(^93\) Id. at 162-63.
\(^94\) See, e.g., Mo. Ann. Stat. § 188.020(4) (Vernon 1975) (requiring written consent of a parent or person in *locus parentis* for abortion for unmarried women under the age of 18 unless physician certifies that abortion is necessary to preserve the life of the mother) (struck down as unconstitutional in Planned Parenthood v. Danforth, 428 U.S. 52 (1976)), repealed by Mo. Ann. Stat. § 188.028 (Vernon 1983) (currently requiring parental consent only if the minor is unemancipated, not deemed capable of self-consent or not granted consent by court order).

\(^95\) 428 U.S. 52 (1976).
\(^96\) Id. at 74. However, a minor's right to an abortion is not an unqualified right. For a
Just as a state may not absolutely prohibit abortions for minors, nor delegate that authority to anyone else, a state lacks the constitutional right to prohibit a minor's access to contraceptives absolutely. In *Carey v. Population Services International*, the constitutionality of a New York statute was challenged. The statute prohibited, among other things, the distribution (e.g., through sales by a drugstore) of nonprescription contraceptives to persons under the age of sixteen. In striking down that part of the statute, a plurality of the Supreme Court concluded: "Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed." This statement and the rationale employed by the plurality precludes the conclusion that the decision hinged purely on the nonprescriptive nature of certain contraceptives.

In deciding *Carey*, the plurality first repeated the proposition it had originally announced with such clarity in the case of *In re Gault*: "[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." At the same time, however, the plurality restated a position that has been firmly entrenched in American jurisprudence: "[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults." The plurality then explicitly held, for the first time, that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults." Although that right had never before been so clearly expressed, it was the underlying rationale supporting the Court's decision in *Danforth* one year earlier.

Having recognized the privacy right of a minor as constitutionally protected, the Court was bound by its own precedent, i.e., where

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further discussion, see infra notes 120-200 and accompanying text.

98. Id. at 694 (This part of the Court's opinion, written by Justice Brennan, was joined by Justices Stewart, Marshall and Blackmun. Justices White, Powell and Stevens concurred in the result).
99. Id. at 692 (quoting *In re Gault*, 387 U.S. 1, 13 (1967)).
100. Id. (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).
101. Id. at 693.
102. In *Danforth*, the Court said: "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor . . . ." 428 U.S. at 75 (emphasis added).
a statute impinges on a constitutionally protected fundamental right, the Court applies strict scrutiny in determining the validity of the statute. Under a strict scrutiny standard of review, a court must find that a “compelling state interest” exists to uphold the validity of the statute in question. However, because the constitutionally protected right at issue in Carey was that of a minor, the plurality subjected the statute to a lower level of scrutiny and required the state to show only that the statute “serve[d] ‘any significant state interest . . . that is not present in the case of an adult.’ ” In so doing, the plurality recognized the two major principles relevant to minors: they are entitled to the rights and privileges guaranteed by the Bill of Rights, but they are also subject to greater control by the state than are adults.

In Carey, New York State’s asserted interest was that if minors could freely obtain contraceptives, there would be an increase in sexual activity among adolescents. This result, according to New York State, would be in violation of its policy to discourage such behavior. The plurality pointed out that such an argument would justify a ban on abortion for minors and unmarried women, as well as a ban on access to contraceptives for unmarried persons, since the sexual activity of unmarried persons is also against the public policy of many states. New York’s asserted interest was therefore dismissed as untenable, since “[i]t would be plainly unreasonable to assume that [the State] has prescribed pregnancy and the birth of an

103. See, e.g., Roe, 410 U.S. 113.
104. “Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.” Roe, 410 U.S. at 155 (citations omitted).
105. The Carey plurality labelled the test an “apparently less rigorous [one] than the ‘compelling state interest’ test applied to restrictions on the privacy rights of adults.” 431 U.S. at 693 n.15.
106. Id. at 693 (quoting Danforth, 428 U.S. at 75).
108. Carey, 431 U.S. at 693 n.15. The plurality also noted that “the right of privacy implicated here is ‘the interest in independence in making certain kinds of important decisions’, Whalen v. Roe, 429 U.S. 589, 599-600 (1977), and the law has generally regarded minors as having a lesser capability for making important decisions.” Id. (citations omitted).
109. Id. at 694.
110. Id. The plurality declined to decide whether a state policy to discourage sexual activity of minors is constitutionally permissible, and simply declared that their “decision proceed[ed] on the assumption that the Constitution does not bar state regulation of the sexual behavior of minors.” Id. at 694 n.17.
111. See id. at 694.
unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication." 112

The plurality then employed what may be described as a "means-end" test to the statute. They first examined the goal sought to be achieved by the state through the statute (the "end"), and then questioned whether the method utilized to reach that goal, i.e., the statute (the "means"), would reasonably relate to the achievement of that goal. 113 The plurality found it extremely doubtful that limiting a minor's free access to contraceptives would in fact discourage early sexual activity. 114 The plurality did not justify its decision with the studies cited by the appellees, Population Services International, which, in fact, supported the plurality's findings. 115 Rather, their finding rested on the failure of the state to demonstrate, beyond its "bare assertion," 116 that the burden imposed on the exercise of a fundamental right was a rational means of accomplishing their goal. 117

Although the decision in Carey was limited by its facts to the availability of nonprescription forms of contraceptives to minors, the decision cannot fairly be read so narrowly. The plurality's basic premise was that an absolute ban on the distribution of contraceptives of any type to minors could not withstand constitutional scrutiny because access to such material is essential to exercise a fundamental right—"the right to privacy in connection with decisions affecting procreation." 118

B. Constitutional Limitations on a Minor's Right to Privacy in Connection with Decisions Affecting Procreation

1. Mature-Immature Minor Distinction—When Parental Con-

112. Id. at 695 (quoting Eisenstadt v. Baird, 405 U.S. 438, 448 (1972)).
113. Id. at 693-99. See, e.g., Roe, 410 U.S. at 163, where the Court said "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health" from and after the end of the first trimester of pregnancy—the point at which the state's interest in the health of the mother becomes compelling. (emphasis added).
114. Carey, 431 U.S. at 695.
115. Id. at 696. The appellees had cited "a considerable body of evidence and opinion indicating that there is no such deterrent effect." Id. at 695 & n.19. The plurality did take judicial notice "that with or without access to contraceptives, the incidence of sexual activity among minors is high, and the consequences of such activity are frequently devastating." Id. at 696 & n.21.
116. Id. at 696.
117. Id.
118. Id. at 693.
sent is Required.—A minor's right to decide whether or not to undergo an abortion and her concomitant right of access to contraceptives are indisputable. However, a minor's right to make the abortion decision is not an unqualified one. In *Bellotti v. Baird (Bellotti II)*, the Supreme Court held that state statutes requiring parental consent for minors seeking abortions are constitutionally permissible as long as the statute provides "an alternative procedure whereby authorization for the abortion can be obtained."

In *Bellotti II*, the constitutionality of a Massachusetts abortion statute was challenged. The statute required a single, pregnant woman under the age of eighteen to obtain the consent of both her parents when seeking an abortion. If one or both parents refused to give their consent, the minor could then seek authorization for the abortion in a judicial proceeding, where she would be required to

119. See supra notes 84-118 and accompanying text.
120. 443 U.S. 622 (1979). The decision of the plurality, written by Justice Powell, was joined by Chief Justice Burger, and Justices Stewart and Rehnquist.

Four justices concurred in the judgment, but specifically declined to join that part of Justice Powell's opinion which outlined a mature-immature minor distinction since the Court's opinion "address[ed] the constitutionality of an abortion statute that Massachusetts has not enacted." 443 U.S. at 656 (Stevens, J., concurring). In a footnote, Justice Stevens found a certain irony in [Justice Powell's] suggestion that a statute that is intended to vindicate 'the special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child,' see ante, at 639, need not require notice to the parents of the minor's intended decision.

*Id.* at n.4 (Stevens, J., concurring).

Justice White dissented. *Id.* at 656-57.

For further discussion of the mature-immature minor distinction, see infra notes 134-44 and accompanying text.

121. *Id.* at 643 (footnote omitted).

122. The Massachusetts statute was originally challenged and invalidated in Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975). The case was then appealed to the Supreme Court, 423 U.S. 982 (1975), where the district court's judgment was vacated. The Court ordered the district court to certify questions to the Supreme Judicial Court of Massachusetts because the state statute could be construed in such a way as to "avoid or substantially modify the federal constitutional challenge to the statute." *Bellotti v. Baird*, 428 U.S. 132, 148 (1976) (*Bellotti I*).

On remand, the district court certified nine questions to the Supreme Judicial Court, which were answered in Baird v. Attorney General, 371 Mass. 741, 360 N.E.2d 288 (1977).


123. 443 U.S. at 643.
124. *Id.*
show that the abortion would be in her best interests. The judge could not consider parental objections in making his determination, no deference was required to be given to a minor's ability to make an informed and reasonable decision regarding the desired abortion, and the minor's parents were to be notified of the judicial proceedings. The statute was struck down by the Supreme Court not because it required parental notice and consent per se, but because the manner in which the requirement was imposed constituted an undue burden on a minor's right to seek an abortion.

The Bellotti II decision reflects a balancing of the competing interests involved: those of the state and the parents versus that of the minor. The Court recognized the unique status of minors under the law and the special role of the family in American society. Three reasons were posited as justification for "the conclusion that the constitutional rights of children cannot be equated with those of adults: [1] the peculiar vulnerability of children; [2] their inability to make critical decisions in an informed, mature manner; [3] a state has a legitimate interest in protecting the child from making rash, uninformed decisions which could result in "potentially serious consequences," id. at 635 (footnote omitted), as well as a valid interest in maintaining the integrity of the family unit. See id. at 637-39 (citations & footnotes omitted). See also Note, Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, 88 HARV. L. REV. 1001, 1013-16 (1975).

The parents' interest is in the opportunity and ability to fulfill their "guiding role . . . in the upbringing of their children," Bellotti II, 443 U.S. at 637, which "implies a substantial measure of authority [and control] over [their] children," id. at 638, and "[i]t is the duty to prepare the child for 'additional obligations' [which] must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." Id. at 634-35 (quoting Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)).

The minors' interest is "a constitutional right to seek an abortion." Bellotti II, 443 U.S. at 642. The interest of the minor stems from the same interest as that of adults—the right of privacy—"to be free from unwarranted governmental intrusion into . . . the decision whether [or not] to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (citation & footnote omitted).
and [3] the importance of the parental role in child rearing.” The Court placed its greatest emphasis on the last two reasons. The Court’s decision pointed out that “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” The Bellotti II Court then focused on the parents’ role of guidance regarding the upbringing of their children. The Court restated a proposition first expressed more than fifty years ago: “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.”

These two concepts—lack of capacity, and the importance of parental authority and control—serve to support the conclusion that “parental notice and consent are qualifications that typically may be imposed by the State on a minor’s right to make important decisions.” The Court viewed the abortion decision as one in which a state could find parental consultation “particularly desirable.” Thus, parental consent and notification requirements per se are not susceptible to constitutional challenges when imposed on a minor’s procreation decisions.

The Bellotti II Court then turned to the validity of the manner in which the Massachusetts statute burdened a minor’s right to seek an abortion. The peculiar nature of the abortion decision was discussed in the opinion at length and was found to be very different from other important decisions a minor may face. The Court

133. Id. at 634.
134. Id. at 635 (footnote omitted). The Court discussed its decision in Ginsberg v. New York, 390 U.S. 629 (1968), finding it illustrative of its concern over a child's lack of full capacity for individual choice. Bellotti II, 443 U.S. at 636. In Ginsberg, the Court upheld a criminal obscenity statute which prohibited the sale of material defined to be obscene on the basis of its appeal to minors under the age of 17, even though it would not be defined as obscene with regard to adults, thus establishing the constitutionality of a variable standard of obscenity. See Ginsberg, 390 U.S. at 638.
135. 443 U.S. at 637 (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)).
136. Id. at 640.
137. Id. The Court referred to the “profound moral and religious concerns” which the abortion decision may raise for some people. Id. (footnote omitted).
138. Id. at 642.
noted that the right to marry is a constitutionally protected right, but that states have routinely required parental consent for minors who seek to exercise that right. However, when parents refuse to give their consent in that situation, the minor is simply required to wait; he or she may still exercise the right to marry at a later time. Conversely, a pregnant minor cannot preserve the right to abort for too long, for that right will expire by the end of the first trimester of pregnancy. More importantly, however, was “the potentially severe detriment facing a pregnant woman” and the fact that “unwanted motherhood may be exceptionally burdensome for a minor.” Therefore, although a state may require a parental consent provision for minors seeking abortions, it must also give recognition to the unique nature of the abortion decision. The plurality in Bellotti described the form such recognition must take—the minor must be given the opportunity to utilize an alternative procedure by which she may obtain authorization for the abortion. Such procedures must be available to every minor in the first instance, i.e., where the pregnant minor chooses to bypass her parents, or cannot obtain their consent, she is entitled to seek authorization for her abortion from a court. She may not be required to show that she

140. See, e.g., Fla. Stat. Ann. § 741.0405(1) (West Supp. 1983) (requiring a minor under age 18, but at least age 16, who wishes to marry, to obtain the written consent of his or her parents unless both are deceased or the minor has been married previously); Mich. Comp. Laws Ann. § 551.103(3)(1) (West Supp. 1983) (requiring a minor under age 18, but at least age 16, who wishes to marry to obtain the written consent of one parent if living).
141. Bellotti II, 443 U.S. at 642.
142. The Court, when discussing the inability of minors to avoid options that could be detrimental to them, noted:
[A]t least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice. . . . It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.
Id. at 636 n.13 (quoting Ginsberg v. New York, 390 U.S. 629, 649-50 (1968)) (Stewart, J., concurring) (footnotes omitted).
143. See id. at 642; supra notes 88-93 and accompanying text.
144. 443 U.S. at 642 (citing Roe, 410 U.S. at 153). See supra note 92.
145. Id. at 643.
146. Id. at 647. The plurality clarified the meaning of “alternative procedure” to include not only judicial proceedings, but possibly adjudication in a juvenile court, or by an administrative agency or officer. Id. at 643 n.22.
has consulted with or sought the consent of her parents, and the state may not require that the parents be informed of her intent to go to court.\textsuperscript{147} To require initial attempts at securing parental consent or parental notification of the minor's intent to seek judicial authorization would be, in many instances, tantamount to permitting parents to obstruct or prevent their daughter's abortion and her access to court.\textsuperscript{148} This the state may not do, as it effectively amounts to the "absolute, and possibly arbitrary, veto" which was struck down in \textit{Planned Parenthood v. Danforth}.\textsuperscript{149}

Once a minor elects to utilize the alternative procedure she must be entitled to show either: "(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests."\textsuperscript{150} If she meets her burden of satisfying the court of her maturity and awareness to make an intelligent, independent decision, the court must allow her to do so.\textsuperscript{151} If, however, she fails to meet her burden of showing sufficient competence to act independently, she must then be permitted to show the court that an abortion would be in her best interests.\textsuperscript{152} If the immature minor can so satisfy the court, the abortion must be authorized.\textsuperscript{153} If she cannot make such a showing, the court may refuse to permit the abortion.\textsuperscript{154} The plurality clearly specified that if a court was unpersuaded that an abortion would be in the immature minor's best interests, it could require parental consultation if it believed that to be in the minor's best interests.\textsuperscript{155} Therefore, the court could defer its decision until court-initiated parental consultation had occurred,\textsuperscript{156} "[b]ut this is the full extent to which parental involvement may be required."\textsuperscript{157}

The plurality recognized the problems inherent in determining maturity, yet believed in the necessity of case-by-case evaluations of

\textsuperscript{147} Id. at 647.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 643 (quoting \textit{Danforth}, 428 U.S. 52, 74 (1976)).
\textsuperscript{150} Id. at 643-44 (footnote omitted).
\textsuperscript{151} Id. at 647.
\textsuperscript{152} Id. at 647-48.
\textsuperscript{153} Id. at 648.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. (footnote omitted).
the maturity of pregnant minors. Bellotti II sets out a constitutional requirement that mature and immature minors be distinguished and treated differently when a state seeks to impose a parental consent requirement on minors seeking abortions. The plurality referred to the "unique character" of the constitutional right as the justification for the requirement of an alternative procedure for authorization, as well as the justification for the mature-immature minor distinction made within the ambit of that alternative process.

Although the abortion decision is unique in the sense that it "cannot be postponed, or it will be made by default," the alternative procedure remedy with its concomitant mature-immature minor distinction should not be limited to the abortion context. The right to seek an abortion is encompassed within the more general right of privacy in connection with decisions affecting procreation. The contraceptive decision is also encompassed within that more general right, and may also be described as one of the "few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."

Under the constitutional analysis employed by the Supreme Court in Carey v. Population Services International, Planned Parenthood v. Danforth, and Bellotti II, any absolute parental consent requirement for access to any form of contraceptive method by minors cannot withstand a constitutional attack. In Carey v. Pop-

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158. Id. at 643-44 n.23.
159. Id. at 650.
160. See id. at 643 (citation omitted).
161. Id. at 650.
162. Id. at 643.
163. See generally Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (blanket prohibition by a state on the distribution of nonprescription contraceptives to minors is unconstitutional); Roe v. Wade, 410 U.S. 113 (1973) (right of a woman to choose whether to have an abortion is constitutionally protected); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of unmarried persons to use contraceptive devices is constitutionally protected); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married persons to use contraceptive devices is constitutionally protected).
165. Bellotti II, 443 U.S. at 642 (addressing the abortion decision).
uation Services International, a plurality of the Court struck down state-imposed prohibitions on the distribution of nonprescription contraceptives to minors. In Planned Parenthood v. Danforth, the Court struck down state-imposed prohibitions on, and absolute parental consent requirements for, abortions for minors. In Bellotti II, a plurality of the Court established an alternative procedure encompassing a mature-immature minor distinction for obtaining authorization for an abortion in statutes which require parental consent for a minor's abortion. Consequently, any absolute parental consent requirement for access to any form of contraceptive method by minors should a fortiori also be foreclosed.

2. Mature-Immature Minor Distinction—When Parental Notification is Required.—Parental notification requirements may typically be imposed on a minor's right to make important decisions. The Supreme Court recognized this in dictum in Bellotti II, and was specifically confronted with the issue in the abortion context in H.L. v. Matheson, where a Utah statute regulating abortion was challenged. The Utah statute provided in pertinent part:

To enable the physician to exercise his best medical judgment [when considering an abortion], he shall:

(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
   (a) Her physical, emotional and psychological health and safety,
   (b) Her age,
   (c) Her familial situation.
   
(2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor.

At the time the action was commenced the appellant was unmarried, fifteen years of age, and was living with and dependent upon her parents for support. She had sought an abortion, but the physician with whom she consulted had refused to perform the operation in

169. See supra notes 97-118 and accompanying text.
170. See supra notes 94-96 and accompanying text.
171. See supra notes 120-67 and accompanying text.
172. 443 U.S. at 640.
175. 450 U.S. at 400-01.
light of the statute's parental notification requirement.\textsuperscript{176}

In upholding the validity of the Utah statute, the Court stated that its holding in \textit{Danforth} did "not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."\textsuperscript{177} \textit{Bellotti II} was easily distinguished by the fact that it dealt with a class of concededly mature pregnant minors,\textsuperscript{178} whereas the appellant in \textit{Matheson} had failed to make a showing of maturity.\textsuperscript{179} The Court rearticulated the propositions that minors lack the capacity to make informed judgments, and that parents have an important guiding role in the upbringing of their children.\textsuperscript{180}

Focusing on the class of immature, dependent minors, the \textit{Matheson} Court found that Utah's statute plainly served the important state interests of preserving family integrity, protecting immature and dependent minors,\textsuperscript{181} and providing an opportunity for parents to supply essential medical and other information to a physician.\textsuperscript{182} Thus, the Utah statute, found to be narrowly drawn to protect only those interests,\textsuperscript{183} was upheld as constitutional.\textsuperscript{184}

The appellant's arguments were dismissed rather perfunctorily. First, the \textit{Matheson} Court found the appellant's argument that the statute must itemize the information to be supplied by parents was not supported by logic, experience, or any prior Supreme Court decisions.\textsuperscript{185} Next, the Court dealt with the appellant's equal protection claim. The appellant had argued that because Utah law does not

\begin{footnotes}
\item[176] \textit{Id.} at 400. Violation of the statute would be a misdemeanor, punishable by imprisonment for up to one year or a fine of up to $1,000. \textit{See Utah Code Ann.} §§ 76-7-314(3), 76-3-204(1), 76-3-301(3) (1978).
\item[177] 450 U.S. at 408 (quoting \textit{Danforth}, 428 U.S. at 75).
\item[178] The Court's statement in \textit{Danforth} has no effect on an abortion regulation which requires only parental notification since, by definition, the restriction simply mandates parental involvement in the minor's decision-making process. The minor's ultimate decision, even if adverse to her parents' wishes or beliefs, will be determinative.
\item[179] \textit{Id.}
\item[179] \textit{Id.} at 406. The Court therefore held that the appellant lacked standing to challenge the statute as overbroad—applying to all unmarried minor adolescents, regardless of their maturity. \textit{Id.} at 405-06.
\item[180] \textit{Id.} at 409-10 (citations omitted).
\item[181] \textit{Id.} at 411 (footnotes omitted).
\item[182] \textit{Id.} The Court explained that "[p]arents [could] provide medical and psychological data, [could] refer the physician to other sources of medical history, such as family physicians, and [could] authorize family physicians to give relevant data." \textit{Id. See supra} notes 103-06 and accompanying text.
\item[183] 450 U.S. at 413.
\item[184] \textit{Id.}
\item[185] \textit{Id.} at 412.
\end{footnotes}
require parental notification when a pregnant minor carrying her pregnancy to term seeks and obtains related medical care of her own volition, Utah was treating pregnant minors who choose to abort less favorably than those who choose to have their children.\textsuperscript{188} In calling a “state’s interests in full-term pregnancies . . . sufficiently different,”\textsuperscript{187} the Court found justification for the state’s unequal treatment of the two classes of pregnant minors.\textsuperscript{188} When the appellant pointed to the inhibitory effect of the statute on minors desiring abortions, the Court stated that such a claim was not a valid basis upon which to void the statute.\textsuperscript{189}

The decision in Matheson was explicitly limited by the Court to the class of immature minors, living with and dependent upon their parents, who have made no showing as to their relations with their parents.\textsuperscript{190} The appellant had sought to represent a class consisting of unmarried minor women suffering unwanted pregnancies and who were prevented from obtaining abortions due to their physicians’ refusal to violate the Utah statute.\textsuperscript{191} The Supreme Court refused to rule on the appellant’s argument that the statute was overbroad because it could be construed to apply to all unmarried pregnant minors, including mature and emancipated minors.\textsuperscript{192}

The Court, in applying the doctrine of justiciability,\textsuperscript{193} found the appellant lacked the requisite standing\textsuperscript{194} to advance the overbreadth argument because she had failed to show that she (or any

\textsuperscript{186} Id. See Utah Code Ann. § 78-14-5(4)(f) (1978) (permitting any female to give her consent “to any health care not prohibited by law . . . in connection with her pregnancy or childbirth.”).

\textsuperscript{187} 450 U.S. at 412.

\textsuperscript{188} Id. The Court said the “medical decisions [made in the full term pregnancy context] entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.” Id. at 412-13 (emphasis in original).

\textsuperscript{189} Id. at 413.

\textsuperscript{190} Id. at 407, 413.

\textsuperscript{191} Id. at 401.

\textsuperscript{192} Id. at 405-06.

\textsuperscript{193} See id. at 406-07.

“Justiciability is the term of art employed to give expression to [the] dual limitation” of those questions which are “presented in an adversary context” and to the “role assigned to the judiciary . . . to assure that the federal courts will not intrude into areas committed to the other branches of government.” Flast v. Cohen, 392 U.S. 83, 95 (1968).

\textsuperscript{194} 450 U.S. at 406.

“Standing is an aspect of justiciability,” Flast v. Cohen, 392 U.S. 83, 98 (1968), the “gist” of which “is whether the party seeking relief has ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’” Id. at 99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
member of her class) was mature or emancipated. The Court strictly applied the standing rules in Matheson for three reasons: First, the Utah Federal District Court had previously held that the statute did not apply to emancipated minors, and if it were applied to that class, it would be unconstitutional. Second, although the statute had never been examined by any court regarding its applicability to mature minors, the Court would not assume that if challenged, it would “not be construed also to exempt [that class].” Finally, there was no reason to assume that in an emergency situation a pregnant minor would be treated differently than a pregnant adult. Therefore, since the statute could ultimately be construed by the Utah courts in a way which might avoid federal constitutional adjudication, or in a way that could materially change the issue, the Court refused to consider the constitutionality of the statute as applied to mature and emancipated minors, or to those minors who had shown that in light of their relations with their families, the notice requirement would not serve their best interests.

IV. THE CONSTITUTIONAL QUESTION

The constitutionality of a parental consent or notification requirement regarding prescription contraceptives, imposed on mature minors or minors whose best interests would not be served thereby, still remains unanswered by the Supreme Court. When a court is

195. 450 U.S. at 406. “The trial court found that appellant ‘is unmarried, fifteen years of age, resides at home and is a dependent of her parents.’ That affords an insufficient basis for a finding that she is either mature or emancipated.” Id. Under Harris v. McRae, 448 U.S. 297, 320 (1980), she therefore lacks “the personal stake in the controversy needed to confer standing to advance the overbreadth argument.” Id.

196. Id. (citing L.R. v. Hansen, Civil No. C-80-0078J (Feb. 8, 1980), and further holding that since the case had not been appealed, it was controlling in the State of Utah).

197. Id.

198. Id. at 406-07 (footnote omitted). The Court noted that the Utah Supreme Court “took pains to say that time is of the essence in an abortion decision.” Id. at 407 n.14.

199. Id. at 407.

200. See id. The Supreme Court stated:

   Members of the particular class now before us in this case [unemancipated minors, living at home and dependent on their parents, who have made no showing as to their maturity or their relations with their parents] have no constitutional right to notify a court in lieu of notifying their parents. . . . This case does not require us to decide in what circumstances a state must provide alternatives to parental notification.

   Id. at 412 n.22 (citation omitted).

201. See City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2498 (1983), where the Court cited Matheson, 450 U.S. at 398, parenthetically, as “refusing to decide whether parental notice statute [regarding abortion] would be constitutional as ap-
confronted with this issue, it should follow the direction indicated in
the Supreme Court’s past decisions and enunciated policies and es-

tablish the alternative procedure with its concomitant mature-

immature minor distinction with regard to parental consent and noti-

fication regulations regarding prescription contraceptives.202

The status of children’s rights has progressed from virtual ob-
scurity203 to constitutional recognition and protection.204 As the Su-

plied to mature minors.” (footnote omitted). The Court later cited to both a concurring and
dissenting opinion in Matheson for the proposition that a parental notification requirement “in
the case of a mature minor seeking an abortion would be unconstitutional.” Akron, 103 S. Ct.
at 2499 n.31 (citing Matheson, 450 U.S. at 420 (Powell, J., concurring)); id. at 428 n.3 (Mar-
shall, J., dissenting). The Court in Akron was referring to Akron’s ordinance which required
that a minor’s parents be notified once the petition seeking judicial consent for her abortion
has been filed, regardless of whether the minor is ultimately deemed to be mature or not. See
Akron, 103 S. Ct. at 2499.

The Akron abortion ordinance also contained a parental notification requirement for all
minors under the age of 18 (unless a court with jurisdiction over the minor ordered the abor-
tion). That part of the ordinance was upheld by the Sixth Circuit Court of Appeals, 651 F.2d
1198, 1206 (1981), but was not challenged in the Supreme Court. 103 S. Ct. at 2497 n.29.

202. Although the Court’s alternative procedure and mature-immature minor distinc-
tion, established in Bellotti II, 443 U.S. 622 (1979), was supported by only four Justices, see
supra note 131, the longevity of the requirement for the alternative procedure and mature-
immature minor distinction may not be as precarious as it appears. In City of Akron v. Akron
Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983), a majority of the Court (6-3)
drew on a city abortion ordinance which required, *inter alia*, a minor under the age of 15
to obtain informed written consent from one of her parents, or a court order permitting the
abortion to be performed. See Akron, Ohio, Codified Ordinances ch. 1870, § 1870.05(B)
(1978), cited in Akron, 103 S. Ct. at 2488 n.4. The Court found that the ordinance did not
“create expressly the alternative procedure required by Bellotti II.” Id. at 2498. The city
sought to invoke the Ohio statute governing juvenile proceedings as a means of an alterna-
tive procedure. According to the Court, that was inadequate because that statute does not ex-
pressly refer to minor’s abortions nor does it suggest “that the Ohio Juvenile Court has author-
ity to inquire into a minor’s maturity or emancipation.” Id.

The portion of the majority opinion in Akron discussing this section of the ordinance cited
Bellotti II, 443 U.S. at 643-44 and Danforth, 428 U.S. at 74, and stated:

The Bellotti II plurality cautioned, however, that the State must provide an alterna-
tive procedure whereby a pregnant minor may demonstrate that she is sufficiently
mature to make the abortion decision herself or that, despite her immaturity, an
abortion would be in her best interests. Under these decisions, it is clear that Akron
may not make a blanket determination that *all* minors under the age of 15 are too
immature to make this decision or that an abortion never may be in the minor’s best
interests without parental approval.

103 S. Ct. at 2497-98 (emphasis in original) (citation omitted). Thus, the alternative proce-
dure and mature-immature minor distinction, although adopted by only four members of the
Court in Bellotti II, has since gained approval by a majority of the Court in Akron.

203. See Kent v. United States, 383 U.S. 541 (1966). In Kent, the Supreme Court con-
sidered the requirements for a valid waiver of the exclusive jurisdiction of the Juvenile Court
of the District of Columbia so that a juvenile could be tried in the adult criminal court of the
district. The Court, in discussing the juvenile court system, remarked that “[t]here is evidence
. . . that there may be grounds for concern that the child receives the worst of both worlds:
hume Court itself recognizes, children are citizens of the United States and, as such, are entitled to the same protections afforded adults under the Constitution. However, the Supreme Court has been adamant in protecting children from their own inexperience and ignorance. When confronted with a minor's fundamental, constitutionally protected right to choose to have an abortion, a right which requires some degree of capacity to exercise, the Court has declined to establish absolute age parameters. Instead, it has chosen to require that regulations imposing on or restricting a minor's exercise of this fundamental right includes an ad hoc determination of each minor's maturity level.

Contrary to the opinions of some commentators, the maturity level determination, difficult as it may be to apply, is the most suitable choice existing between the all-or-nothing alternatives. It seems that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Id. at 556.

204. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977) (corporal punishment of schoolchildren invokes the application of procedural due process); Breed v. Jones, 421 U.S. 519 (1975) (the double jeopardy clause prohibits prosecuting a juvenile as an adult after an adjudicatory finding in a juvenile court that he had violated a criminal statute); Goss v. Lopez, 419 U.S. 565 (1975) (children may not be deprived of their property interest in education without due process); In re Winship, 397 U.S. 358 (1970) (children can be found guilty only upon the constitutional safeguard of proof beyond a reasonable doubt in a delinquency proceeding); In re Gault, 387 U.S. 1 (1967) (minors involved in juvenile delinquency proceedings are entitled to the constitutional safeguards of adequate notice, the assistance of counsel, the opportunity to confront their accusers, and the privilege against self-incrimination).

205. "[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In re Gault, 387 U.S. 1, 13 (1967).

206. See supra note 134 and accompanying text.

207. See supra note 150 and accompanying text. The Court, in City of Akron v. Akron Center for Reproductive Health, Inc., held, in striking down the consent requirements of the ordinance, that "we do not think that the Akron ordinance, as applied in Ohio juvenile proceedings, is reasonably susceptible of being construed to create an 'opportunity for case-by-case evaluations of the maturity of pregnant minors.'" 103 S. Ct. 2481, 2498-99 (1983) (quoting Bellotti II, 443 U.S. at 643 n.23 (plurality opinion)).

208. One commentator has opined:

The right to partial emancipation should not rest on satisfying, on a case-by-case basis, some body of wise persons that the particular child is "mature enough" to choose or that the particular child's choice is "right." To introduce such a subjective process for decision would be not to emancipate the child but rather to transfer to the state the parental control and responsibility for determining when to consult and abide by the child's choice.

just as abhorrent to allow all minors to make the abortion or contraception decision independently as it is to allow no minors to make such fundamental, personal choices themselves. Although the maturity or intellectual levels of adults differ from person to person, the law does not hinge the exercise of an adult's fundamental rights upon a court's determination of his or her particular capacity because the weight of the evidence tilts the presumption in a direction opposite to the presumption concerning children's capacity. The presumption of incapacity with regard to children is the basis for ad hoc maturity level determination requirements in the childbearing decisions of minors.209

The judicial recognition of that presumption signals the importance of the parental role in the upbringing of children. The child determined to be mature should be that child who has demonstrated her capacity to understand and appreciate the consequences of her decision. She would not require a wiser person to point out to her the ramifications of her choice, for she has already recognized and reflected upon them. On the other hand, that child who has failed to contemplate the consequences of her choice has effectively made no real choice at all.210 She is the child the law seeks to protect, and who deserves that protection. Since the state, an "impersonal political institution,"211 lacks the competence necessary to foster "particular ethical, religious, or political beliefs,"212 society relies on the child's parents to fulfill this important function.213 This, then, is the principle reflected in the law through parental consent and notification regulations. The purpose of the alternative procedure with its concomitant mature-immature minor distinction is to find the child who is in need of protection and to provide her with such protection. It also serves to protect the capable minor's right to decide from being arbitrarily usurped by the state or her parents.214

Under an abortion statute containing a parental consent requirement (which must include an alternative procedure for authorization215), the parents of the immature child, the court, or an agency

209. See supra text accompanying notes 133-37.
210. Cf. Bellotti II, 443 U.S. at 640 ("immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences").
211. Id. at 638.
212. Id.
213. Id. (citations omitted).
214. See id. at 643.
official will determine what choice is in the minor's best interest. Regardless of whether the parents or government officials make the ultimate decision, there is always the possibility that the decision might well be the "wrong" one for the child. However, whenever it is necessary to choose among alternatives, the potential for error always exists. The fact that an adult, as well as a child, may err does not justify permitting the child to decide, for the margin for adult error is significantly less than that of an immature minor. The possibility that parents or government officials may impose their moral or religious values on the child also fails to justify independent decision making by the immature minor. The "inculcation of moral standards [and] religious beliefs" has long been recognized as part of a parent's duty to his or her child,216 but will not be permitted to override the best interests of the child, which it is the objective government official's duty to protect.217

The rationale for applying the alternative procedure with its concomitant mature-immature minor distinction to minors in the abortion context applies with equal force in the prescription contraception context.218 Although a notification regulation technically allows the immature minor as well as the mature minor to make her own childbearing decision, notification inevitably results in parental involvement.219 Whether the parent chooses to participate in the decision making process of the minor or declines to participate, the parent has in fact become involved and has made a choice. Where the parent is an active participant in the process, the child's decision will be influenced. The degree of influence may, of course, vary from case to case. The problem arises when the influence exerted on the child is excessive and amounts to coercion or obstruction. The mature minor, who by definition is deemed to be on an intellectual par


217. Cf. *id.* at 648. The *Bellotti II* plurality pointed out that, in some circumstances, an immature minor's best interests may in fact be served by parental consultation, in which the adjudicating court may choose to participate, but also stated that "this is the full extent to which parental involvement may be required." *Id.* (footnote omitted).

218. In a concurring opinion in *Matheson*, Justice Powell stated:

If we were to accept appellant's claim that [Utah's statutory parental notification requirement] is *per se* an invalid burden on the asserted right of a minor to make the abortion decision, the circumstances which normally are relevant [age, maturity, mental and physical condition, the stability of the home and the relationship with parents] would . . . be immaterial.

450 U.S. at 419 (Powell, J., concurring).

with an adult for the purposes of certain decisions, cannot be constitutionally subjected to unreasonable interference by the state or her parents in her childbearing decision, and should therefore be excused from complying with the notification regulation. The minor deemed immature may also be subjected to obstructive influence by her parents and as in the consent context, the alternative procedure could serve to protect her best interests. Therefore, a parental consent or notification regulation regarding prescription contraceptives, to be constitutionally valid, should provide an alternative procedure whereby every minor may have the opportunity to show that she is mature and should, therefore, be excused from compliance. Further, if she cannot persuade the court or agency of her maturity, she should have the opportunity to demonstrate that parental consent or notification would not be in her best interests.

V. CONCLUSION

A parental consent or notification rule which would affect all minors seeking prescription forms of contraceptives, whether promulgated by a state, HHS, or Congress, should be struck down as a violation of a minor's constitutionally protected right to privacy in connection with decisions affecting procreation.

The Supreme Court has held that a state may neither prohibit abortions for minors, nor delegate that authority to anyone else. A plurality of the Court has also declared that a state may not prohibit absolutely a minor's access to nonprescription contraceptives. However, the minor's right to obtain an abortion is not an unqualified right. The Court has recognized the unique status of minors: All minors are not sufficiently developed intellectually or emotionally to make such significant and crucial decisions as whether or not to undergo an abortion. Thus, the "guiding role" of parents is maintained, where necessary, to protect the minor. Where

221. See supra notes 84-220 and accompanying text.
222. Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976); see supra notes 94-96 and accompanying text.
226. Id. at 640-41 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 91 (1976) (Stewart, J., concurring) (footnote omitted)).
that protection is not necessary, i.e., when the minor has demonstrated her capacity to understand and appreciate the consequences of her abortion decision, the Court has protected the minor's privacy right to make that decision from being usurped by the state or her parents.\footnote{227} The Court's mandate that consent regulations in the abortion context must contain an alternate procedure\footnote{228} has been applied to notification regulations in the abortion context to the degree that immature minors may be constitutionally subjected to such regulations.\footnote{229} Such a mandate should also be extended to parental consent and notification regulations in the prescription contraceptive context.

The practical reality is that the minor who is seeking contraceptives is already engaging in sexual relations, or anticipates engaging in such relations in the near future.\footnote{229} If this was not the case, a minor's decision of whether or not to use a contraceptive, or which type to use, would never arise. A parental consent or notification regulation for prescription methods of contraceptives will not deter adolescents from engaging in sexual relations, for nonprescription methods are available to them in drugstores around the country.\footnote{231} Thus, should a minor realize that there are more effective methods available (i.e., prescription forms of contraceptives), she should be permitted the same, uninhibited access to prescription forms of contraceptives that she already has to nonprescription forms. However, since there are actual, physical risks associated with the use of many prescription methods of contraceptives, the mature-immature minor distinction is necessary in this context. A minor who is neither cognizant of, nor fully understands and appreciates those risks, should be protected from her own ignorance.

Making the determination of a minor's maturity level is not unworkable. It is a feasible requirement because it is made in a precise, specifically delineated situation. The determination to be made does not encompass a decision regarding the morality or immorality of pre-marital sexual relations. It does not encompass a decision of the

\footnote{227} Id. at 643-44; City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2498-99 (1983).
\footnote{229} H.L. v. Matheson, 450 U.S. 398 (1981); see supra notes 173-200 and accompanying text.
\footnote{230} See supra text accompanying note 55.
\footnote{231} Carey v. Population Servs. Int'l, 431 U.S. 678, 693-94 (1977); see supra note 57 and accompanying text.
minor's overall maturity level. It focuses only on whether or not this minor has the ability to make an informed decision regarding the risks and benefits of a prescription form of contraception. The burden of proof is on the minor seeking the right to a private, independent choice. If the determination is made fairly and in good faith by the evaluator, then the system established by the Court will be feasible and will serve its purpose well.

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