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Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach

Robert B. Keiter*

I. INTRODUCTION

The relationship between parents and their children, and the respective rights of each, has recently received considerable attention.1 It is not surprising that the judiciary, including the Supreme Court, has become enmeshed in the thorny dilemmas arising from the often competing claims of family members to the protection of state laws and the Constitution.2 Judicial and legislative extension of the principle of individual

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autonomy to children\(^3\) has eroded the tradition of parental control and responsibility for children that is broadly reflected in a variety of state laws and reinforced by venerable Supreme Court precedent.\(^4\) Family strife, consequently, is no longer confined to the home, and the courts have increasingly found themselves the unlikely arbiter in reconciling the divergent rights claimed by children and their parents which threaten conflict within the family.

Absent parental abuse or neglect, the judiciary has traditionally limited its involvement in the parent-child relationship.\(^5\) The Supreme Court's recent extension of constitutional protection to children as individuals,\(^6\) and its subsequent recognition of their right to privacy,\(^7\) has, however, assured the Court of the eventual task of reconciling the rights and interests asserted by children in actual or potential conflict with those of their parents. The claimed right of a child to privacy in individual matters inevitably clashes with the longstanding parental right of authority in directing the child's life, including involvement in sensitive and intimate matters affecting the youngster.

The dilemma has presented itself in the judicial forum

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4. For instance, most states by statute or court decision provide that parents are responsible for their children. See, e.g., Porter v. Powell, 79 Iowa 151, 44 N.W. 285 (1890); CAL. CIV. CODE §§ 196, 196a (West 1980). See also 1 W. BLACKSTONE, COMMENTARIES* 447; G. CLARK, DOMESTIC RELATIONS §§ 38, 43 (1954). Constitutional support for the principle of parental authority is generally traced to two cases decided in the 1920s. See Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). See also text accompanying notes 163-75 infra.

5. See Geiser, The Rights of Children, 28 HASTINGS L. J. 1027, 1032 (1977); Hafen, supra note 1, at 629.


when children or their representatives have challenged on constitutional grounds state legislative schemes recognizing and reinforcing seemingly traditional parental child rearing prerogatives. The first of these cases to command the Supreme Court's attention was Planned Parenthood v. Danforth, a 1976 case that raised the question of the constitutionality of a Missouri law requiring parental consent before a minor child could obtain an abortion. The asserted privacy interest advanced on behalf of pregnant minors was clear in view of the Court's Roe v. Wade decision; on the other hand, the parental interest in matters affecting the child was equally evident, resting ultimately on fifty-year-old constitutional doctrine establishing parental responsibility in child rearing matters. One year later, in Carey v. Population Services International, the Court reviewed the constitutionality of a New York statute prohibiting the distribution of nonhazardous contraceptive devices to minors. During the 1979 term, the Court, in Bellotti v. Baird, returned to the question of parental consent as a prerequisite to a minor's abortion, and also in that year the Court addressed the issue of parents' rights to commit their children to state mental institutions in Parham v. J.R. Most recently, in H.L. v. Matheson, the Court addressed the validity of a Utah statute requiring prior parental notification in the case of a minor seeking an abortion. The voting alliances and numerous opinions generated by these controversies reveal the difficulty faced by the Court in applying constitutional principles, recently evolved under due process doctrine, to the family. Although

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8. The states, not the federal government, have traditionally assumed responsibility for regulating family and domestic relations, relying upon their police power and their parens patriae authority. See DeSylva v. Ballentine, 351 U.S. 570, 580 (1956); Developments, supra note 1, at 1198.
13. 443 U.S. 622 (1979). This Bellotti decision actually represented the second time that the Court had rendered a decision in litigation questioning the constitutionality of a 1974 Massachusetts abortion statute. The Court had previously remanded the case to the district court. Bellotti v. Baird, 428 U.S. 132 (1976). For a full description of the Bellotti v. Baird litigation history, see note 78 infra.
16. For instance, in Bellotti v. Baird, 443 U.S. 622 (1979), Justice Powell authored the Court's plurality opinion in which Chief Justice Burger and Justices Stewart and Rehnquist joined. Justice Rehnquist also separately concurred,
the Court has sought to accommodate the competing interests of parent and child, its various prevailing opinions present inconsistent rationales, and thus provide inadequate guidance for handling future controversies in this area. Furthermore, the Court may have unduly polarized the family unit into competing factions and undervalued a critical interest—the preservation of family stability and harmony.

Judging from the Court's frequent opportunities to resolve the constitutional problems posed by parental consent or notification statutes in areas infringing upon a child's privacy interests, and judging from the incidence of similar litigation in the lower courts, the states will very likely continue to reinforce legislatively the parental role. The litigation itself indicates that children will increasingly resort to the courts to challenge state-enforced parental involvement that intrudes upon the right to privacy they claim in sensitive and critical areas of their own lives. Although the Court may not be particularly well suited as an institution to resolve these delicate matters, it has spawned the controversy by recognizing that children possess constitutional rights. Thus far it has not avoided the difficult issues which have ensued. It is appropriate, therefore, to examine the Court's involvement in this area with a goal of articulating an analytical framework which might successfully reconcile the competing interests and be capable of broad application.

This Article summarizes the doctrinal development of the constitutional right of privacy, and attempts to describe the current dimensions of that right as it relates to individual autonomy and to children. Central to this undertaking is a critical examination of the Bellotti, Matheson, and Parham decisions expressing his willingness to reconsider in its entirety the question of a minor's abortion rights. Id. at 651-52 (Rehnquist, J., concurring). Justices Brennan, Marshall, and Blackmun joined Justice Stevens in a separate concurring opinion. Id. at 652 (Stevens, J., concurring in the judgment). Justice White dissented. Id. at 656 (White, J., dissenting). See also H.L. v. Matheson, 450 U.S. 398 (1981) (four separate opinions with three Justices concurring and three Justices dissenting); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (six separate opinions with three Justices concurring in the result and two Justices dissenting).

17. See cases cited in text accompanying notes 9-15 supra.
and their historic predecessors. Then, since present dilemmas in this area evolve from state efforts to regulate the behavior of children through legislative support for parental authority, the Article examines the constitutional underpinnings of the parental responsibility doctrine, and also reviews other bases for state legislative authority over family matters. Finally, the Article proposes that an interest analysis is a viable approach for constitutional review of state legislative efforts affecting parent-child relations in which the potential for conflict is evident given the child's claim of privacy.

II. PRIVACY AND THE CHILD

Substantive due process as a constitutional concept is not new. The Court, however, has recently resurrected doctrines, discredited with the demise of the *Lochner* era,\(^{20}\) to infuse the fourteenth amendment with newfound significance.\(^{21}\) Despite criticism that it has manufactured constitutional rights,\(^{22}\) the Court appears firmly committed to its present course of drawing upon tradition and consensus to extract from the due process clause the dimensions of an individual right to privacy.\(^{23}\) The Court has characterized this individual privacy right as a fundamental right entitled to strict judicial protection.\(^{24}\) By adopting this characterization, the Court has engrafted equal protection principles onto the due process clause to provide a standard for measuring both the importance of state interests underlying statutory provisions infringing upon an individual's privacy and the narrowness of the means chosen to implement

\(^{20}\) See *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* invalidated a state statute limiting the number of hours a baker could work as an arbitrary and unnecessary interference with the liberty to contract. *Id.* at 64. The notion that the Court could impose its own ideas on a state's economic policy was later repudiated. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 537 (1934).


\(^{23}\) See Ely, *Foreward: On Discovering Fundamental Values*, 82 HARV. L. REV. 1, 10, 39, 43 (1973); *Developments, supra* note 1, at 1177-83. For the purposes of consistency and brevity, this Article adopts the Court's label and refers to those fundamental rights which the Court has recognized and accorded extraordinary constitutional protection under the due process clause as the right of privacy. See text accompanying notes 26-47 infra.

those interests.25

A. PRIVACY GENERALLY

Contemporary recognition of a right to privacy is generally traced to the Court's *Griswold v. Connecticut*26 decision which invalidated a Connecticut statute prohibiting the use of contraceptives by married couples.27 Although the majority Justices offered several different theories for the origin of the individual right implicated in *Griswold*,28 all agreed on the basic principle that the Constitution accords a right of privacy to married couples making childbearing decisions, which Connecticut could not infringe through its sweeping prohibition on the use of contraceptives.29 The Court could have limited *Griswold* to its facts, but subsequently made it clear in *Eisenstadt v. Baird*30 that the right of privacy extended beyond the marital relationship to single adults who sought access to nonhazardous contraceptives. The Court based its decision in *Eisenstadt* on the equal protection clause and invalidated a Massachusetts law limiting a single adult's access to contraceptives by broadly asserting that "[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."31 One year later, in *Roe v. Wade*, seven members of the Court found a fundamental right of privacy in the due process clause when an adult woman sought to abort an unwanted pregnancy.32 They proceeded to extend that right to protect a pregnant woman's abortion decision against any state restric-

27. The Court had alluded to the right of privacy in prior decisions, but it had not stated the concept with as much clarity as it did in the *Griswold* decision. See *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
28. Justice Douglas in his opinion for the Court found the right of privacy grounded in the penumbra of rights surrounding the Bill of Rights. 381 U.S. at 484. Justice Goldberg relied upon the ninth and fourteenth amendments as the source of the right of privacy. *Id.* at 487 (Goldberg, J., concurring). Justices Harlan and White found the right of privacy in the fourteenth amendment due process clause. *Id.* at 500 (Harlan, J., concurring in the judgment); *id.* at 502 (White, J., concurring in the judgment).
29. 381 U.S. at 485, 486 (Goldberg, J., concurring); *id.* at 500 (Harlan, J., concurring in the judgment); *id.* at 502 (White, J., concurring in the judgment).
31. *Id.* at 453.
tions during the first trimester of her pregnancy, and to protect her against any state regulation unrelated to her health during the ensuing trimester. The *Roe* decision recognized that, at least to some extent, individual decisions concerning marriage, procreation, contraception, family relationships, child rearing, and education implicated fundamental privacy rights. *Roe* also made it clear that once state legislative action infringed on a fundamental right, the infringement would withstand constitutional scrutiny only if the state could demonstrate that a compelling interest supported the legislative scheme and that the means chosen for the accomplishment of those objectives were the narrowest possible. Precedent from parallel developments in equal protection law indicates that when courts apply this strict judicial scrutiny to legislative action, they inevitably invalidate the statute.

Since *Roe v. Wade*, the Court has elaborated on the doctrine of privacy, but it has been reluctant to expand the concept to embrace any notion of unbounded personal autonomy. Most of the claims before the Court have involved matters concerning familial relationships, sexual privacy, or abortion, and the Court has carefully examined precedent and societal

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33. *Id.* at 163.
34. *Id.* at 152-53.
35. *Id.* at 155.
tradition to identify the asserted privacy interest. In *Whalen v. Roe*, however, the Court unanimously endorsed Justice Stevens's abstract formulation of the privacy interest allegedly infringed by New York's computerized record keeping scheme for prescriptions of legal, dangerous drugs. He stated that the privacy right included both an "individual interest in avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of important decisions." This formulation of the privacy right suggests its extension beyond the relatively narrow class of interests previously found to be protected. It remains unclear, however, exactly which "personal matters" or "important decisions" implicate fundamental rights. It is probably correct to conclude that the interests previously identified by the Court—childbearing, contraception, marriage, child rearing, and related matters—fall within these categories. But *Whalen* seems to extend these categories to cover individual privacy in sensitive medical treatment matters and their disclosure. Despite the willingness of all of the Justices to join Justice Stevens's *Whalen* opinion and its privacy formula, the Court's subsequent decisions have not extended the scope of the privacy right beyond the traditionally recognized privacy realms. For example, in *Doe v. Commonwealth's Attorney*, which involved a homosexual's challenge to Virginia's criminal sodomy statute, the Court summarily af-

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42. 429 U.S. 589 (1977).
43. Id. at 599.
44. Id. at 599-600.
45. See L. Tribe, supra note 41, at 886.
46. See, e.g., Bellotti v. Baird, 443 U.S. 622 (1979); Zablocki v. Redhail, 434 U.S. 374 (1978). It is likely, however, that the Court will soon confront a non-traditional privacy claim arising from mental patients' litigation asserting a liberty interest in the right of bodily privacy in order to prevent the state from administering antipsychotic medication to them without procedural due process protections. See Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), cert. granted, 101 S. Ct. 1972 (1981).
firmed a lower court decision denying constitutional protection to his nontraditional privacy claim.

The Court, therefore, has chosen to rely upon traditional values to confine the scope of privacy to a generally narrow class of activities widely accepted as aspects of individual liberty under our constitutional scheme. The Court has carefully limited Whalen’s broader formulation of these interests to the facts of that case and to those interests already recognized in prior decisions.

B. CHILDREN AND PRIVACY—EARLY CASES

The Supreme Court’s extension of privacy rights to children has been a relatively recent development. The Court’s 1967 In re Gault decision is generally regarded as the landmark case in establishing the principle that constitutional protection extends to children as well as to adults. Specifically, the Court held that due process entitles children to basic procedural protections in juvenile delinquency proceedings. In McKeiver v. Pennsylvania, however, the Court signalled its reluctance to extend to children charged with delinquency the full gamut of individual constitutional protections available to adults charged with criminal violations by refusing to find a right to a jury trial in juvenile proceedings. But in Tinker v. Des Moines Independent Community School District the Court found that the first amendment protected school children’s right to free speech and prohibited their suspension from school simply because the children took a then unpopular position and declared their opposition to the Viet Nam War. A characteristic of these decisions is the Court’s apparent willingness to extend some constitutional protection to children, qualified by a constant reminder that the rights available to children are not commensurate with those available to adults.

49. These protections include notice, the right to counsel, the right to confront and to cross-examine witnesses, and the privilege against self-incrimination. Id. at 31-57. Subsequent cases extended additional constitutional safeguards to juveniles in delinquency proceedings, including the beyond a reasonable doubt standard of guilt, In re Winship, 397 U.S. 358 (1970), and the prohibition against double jeopardy, Breed v. Jones, 421 U.S. 519 (1975).
50. 403 U.S. 528 (1971).
in similar situations. Another common feature of these cases is that the parent has supported the child in asserting a claim to constitutional protection against an allegedly overreaching state.

In 1976, the Court was confronted for the first time with the issue of whether to extend constitutional protection to children when there is no parental support for the claim and parental opposition might be expected. In Planned Parenthood v. Danforth, a Missouri statute assertedly breached the children's right to privacy by requiring parental consent before an unmarried pregnant minor could obtain an abortion. In holding that the state could not delegate the authority to decide whether a minor should abort her pregnancy to a third party, even her parents, the Court recognized that minors could claim privacy rights similar to those available to adults under the due process clause, at least when abortion was the issue. Although the

53. See McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("The Court has refrained, in the cases heretofore decided from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding."). See also Bellotti v. Baird, 443 U.S. 622, 634 (1979).

54. See, e.g., Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 504 (1969) (three suspended school children initiated the litigation through their parents).

55. 428 U.S. 52, 57-58 (1976). On the same day the Court decided Planned Parenthood, it disposed of the appeal in Bellotti v. Baird, 428 U.S. 132 (1976), a Massachusetts case raising constitutional questions regarding a minor's right to an abortion, by remanding it to the federal district court for certification of questions to the state supreme court. See note 78 infra, for a comprehensive history of the Bellotti litigation.

56. Justices Brennan, Marshall, Stewart, and Powell joined Justice Blackmun's majority opinion. Justices Stewart and Powell, however, separately concurred in an opinion by Justice Stewart, expressing their view that the Missouri statute's constitutional inadequacy was its absolute requirement of parental consent, but that a statute which encouraged parental consultation in the case of a minor seeking an abortion was permissible. 428 U.S. at 90-91 (Stewart, J., concurring). Justice Stewart's conclusion that a minor child seeking an abortion through an abortion clinic was unlikely to receive very thorough or satisfactory counseling from the clinic's medical staff seemed critical to this conclusion. Id. at 901 n.2. See the decision in the companion case of Bellotti v. Baird, 428 U.S. 132, 147 (1976). Chief Justice Burger and Justices White and Rehnquist dissented from the Court's parental consent holding, arguing that the states had traditionally sought to protect minor children from improvident decisions through parental consent requirements. 428 U.S. at 92, 95 (White, J., concurring in part and dissenting in part). Justice Stevens also dissented from the Court's parental consent holding, asserting that a state legislature may reasonably conclude that the importance of the abortion decision justified a requirement of parental consent on the presumption that most parents are primarily interested in their child's welfare. Id. at 101, 103-04 (Stevens, J., concurring in part and dissenting in part).

57. 428 U.S. at 74-75. While holding that the Constitution entitled minors to some degree of privacy protection, Justice Blackmun also recognized that the
Court recognized that the state enjoyed greater latitude in legislatively controlling the activities of children, it rejected Missouri's contention that the consent provision strengthened family bonds and reinforced parental authority. The Court could find no connection between Missouri's asserted interests and the consent provision; to the contrary, the Court anticipated that the consent provision would likely undermine familial harmony. Planned Parenthood thus provided constitutional protection for children under substantive due process principles, and it signalled the importance which the Court attached to the privacy right in the case of abortion. Furthermore, in Planned Parenthood the Court permitted a third party, not a parent, to assert a constitutional claim on a child's behalf, thereby assuring future litigation to vindicate unpopular children's rights, notwithstanding parental objection. The four separate opinions in Planned Parenthood, including four dissents from the parental consent holding, did not clearly resolve, however, the question of the extent to which the state could involve parents in a child's abortion decision. Nor did it definitively establish the scope of a child's privacy rights or the applicable scrutiny under which to test legislation implicating these rights.

One term later, in Carey v. Population Services International, the Court ruled on the constitutionality of a New York statute that broadly restricted the distribution of nonprescription contraceptives, and specifically prohibited their distribution to minors under the age of sixteen. The Court granted third party standing to the organizational plaintiff, a commercial distributor of contraceptive devices, to litigate the various claims, including those advanced on behalf of minors under age sixteen. Justice Brennan, writing for a plurality, concluded
that the New York scheme implicated the privacy right of minors.\footnote{431 U.S. at 693.} He cited \textit{Planned Parenthood} for the proposition that a minor could claim a right of privacy in decisions affecting procreation, and, analogizing to the abortion question presented there, he found the issue foreclosed in favor of the minor's claim.\footnote{\textit{Id.} at 693-94.} Justice Brennan suggested that heightened judicial scrutiny was the appropriate standard to apply in testing the challenged statute.\footnote{\textit{Id.} at 693.} He specifically rejected application of the more stringent compelling state interest standard, which would govern a similar situation involving an adult, because of the state's greater latitude in regulating the conduct of children and the presumed diminished capacity of children to make important decisions.\footnote{\textit{Id.} at 693 n.15.} Justice Brennan could find no substantial state interest in health or safety promoted by the New York statute, particularly because the Court in \textit{Planned Parenthood} had found that these interests were insubstantial when balanced against a minor's right to an abortion.\footnote{\textit{Id.} at 694.} Responding to the state's only other proffered objective—discouraging sexual promiscuity among the young—he found that the statute prescribed arbitrary and irrational means for the accomplishment of this goal.\footnote{\textit{Id.} at 696.} There was no evidence that the proscription on the distribution of contraceptives achieved this goal, and it actually portended severe and unwarranted punishment in the form of unwanted pregnancies.\footnote{\textit{Id.} at 695.}

Three Justices, who otherwise concurred in the \textit{Carey} holding, criticized the plurality's conclusion that heightened judicial scrutiny was the applicable standard for measuring the state's interests in regulating a minor's access to contraceptive devices. Justices White, Powell, and Stevens, writing separately, suggested that any scrutiny exceeding the traditional rational basis standard was inappropriate for cases involving his opinion for the Court. Justices Stevens, Powell, and White agreed with the Court's judgment, but they objected to Justice Brennan's treatment of the constitutional question posed by New York's restriction on the distribution of contraceptives to minors, and each filed a separate concurring opinion. Chief Justice Burger and Justice Rehnquist dissented.

\footnote{\textit{Id.} at 693 n.15.}
CHILDREN AND PARENTS

minors. In his lengthy concurrence, Justice Powell argued that the courts traditionally had granted considerable authority to the state in legislating with respect to children, given the state's interest in guarding their welfare and assuring their growth into free and independent citizens. Justice Powell felt that the appropriate standard for judging the law's constitutionality as applied to minors was whether it rationally served valid state interests. He noted that since New York had granted females aged 14 to 16 the right to marry, the state evidently presumed that they were mature enough to make decisions concerning sex and procreation. Hence, the challenged statute unconstitutionally infringed upon their privacy rights. More significantly, he found that the statute also infringed upon parental child rearing rights and that the asserted state interests failed to justify this interference with the important parental responsibility of providing guidance to children on sexual matters. Indeed, Justice Powell's dictum indicated approval of state legislation that promoted parental responsibility over the private lives of children by suggesting that a state requirement of parental consultation before a minor might engage in sexual activities or secure an abortion would be constitutionally permissible. Although Justice Powell agreed that the New York statute was invalid, his opinion reflected a fundamental philosophical difference between him and the plurality in reconciling the potentially competing claims of children and their parents to the protection of the Constitution when children face important decisions about sex and childbearing.

Justices White and Stevens, in their own concurrences, were similarly unable to find that the state's prohibition against a minor's access to contraceptives implicated the minor's constitutional right to privacy. Both agreed that any claim that mi-

71. Id. at 705-07 (Powell, J., concurring).
In addition to striking down the New York statutory ban on the distribution of contraceptives to minors, the Court in Carey also invalidated the portion of the statute prohibiting the distribution of nonmedical contraceptives to adults except through licensed pharmacists. Id. at 686-91. Justice Powell also disagreed with this aspect of the decision, objecting to what he perceived as the unwarranted extension of the Court's prior privacy decisions to embrace a fundamental right to sexual freedom, which subjected state regulation in this area to review under the compelling state interest standard. Id. at 703-05 (Powell, J., concurring).
72. Id. at 707.
73. Id. at 707-08.
74. Id. at 708-10.
75. Id. at 709-10.
nors possessed a constitutional right to use contraceptives over the objection of their parents and the state was "frivolous." 76 They agreed with Justice Brennan, however, that the means New York had chosen to accomplish its goal of deterring youthful promiscuity were irrational, and, therefore, under traditional due process doctrine the legislation failed to satisfy the rational basis constitutional standard. 77

C. *Bellotti v. Baird*

The Court's recent decision in *Bellotti v. Baird* 78 is its most comprehensive attempt to define the scope of a minor's privacy right in making an abortion decision. The plaintiff in *Bellotti* questioned the constitutionality of a Massachusetts statute that required parental consent before a minor could obtain an abortion, and provided for judicial review of a parental decision to deny permission. 79 Justice Powell, writing for a plurality of four Justices which included Justice Rehnquist, 80 delivered the Court's opinion upholding the district court's determination

76. *Id.* at 703 (White, J., concurring); *id.* at 713 (Stevens, J., concurring).
77. *Id.* at 702 (White, J., concurring); *id.* at 715 (Stevens, J., concurring).
78. 443 U.S. 622 (1979).

The *Bellotti* litigation has a lengthy history. A three-judge federal court initially invalidated the statute. 393 F. Supp. 847 (D. Mass. 1975). On appeal, the United States Supreme Court concluded that the district court should have abstained and certified questions concerning interpretation of the statute to the Supreme Judicial Court of Massachusetts in an effort to avoid a decision on the constitutional issues. 428 U.S. 132 (1976). On remand, the district court certified questions to the Supreme Judicial Court of Massachusetts. 443 U.S. 622, 629 n.9 (1979). The Supreme Judicial Court proceeded to interpret the statute, in part, as requiring a minor to first seek parental consent in all cases in which she sought an abortion, while permitting judicial review of a parental refusal based upon the "best interests of the minor" standard without regard to her maturity or her independent decision making capacity. 371 Mass. 741, 360 N.E. 2d 288 (1977). After reviewing the newly interpreted law, the district court again invalidated it on constitutional grounds, 450 F. Supp. 997 (D. Mass. 1978), and the second appeal to the United States Supreme Court ensued.

79. 443 U.S. at 134-35.
80. Joining Justice Powell's plurality opinion for the Court were Chief Justice Burger and Justices Stewart and Rehnquist. Justice White dissented and reiterated his view that parental involvement in a minor child's abortion decision was constitutionally permissible. 443 U.S. at 656. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 94 (1976) (White, J., dissenting). Justice Rehnquist's decision to cast his vote with the plurality is significant, because his separate concurrence indicates his basic dissatisfaction with the Court's holding:

At such time as this Court is willing to reconsider its earlier decision in *Planned Parenthood* . . . in which I joined the opinion of Mr. Justice White, dissenting in part, I shall be more than willing to participate in that task. But unless and until that time comes, literally thousands of judges cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court.

443 U.S. at 651-52 (Rehnquist, J., concurring).
that the statute unconstitutionally restricted the abortion rights of minors.

Justice Powell, acknowledging that the Constitution protects children as individuals, asserted that the Court could not uncritically extend to minors the constitutional guarantees available to adults; rather, the Court would apply constitutional principles "with sensitivity and flexibility to the special needs of parents and children."81 Relying upon the Court's previous decisions concerning children, Justice Powell advanced three reasons in support of the proposition that only limited constitutional protection was available to minors: their vulnerability; their inability to reach important decisions in a mature, reflective manner; and the critical role of their parents in child rearing.82 He concluded that the state should support parents and others responsible for children through laws designed to assist them in fulfilling their responsibilities,83 which typically include parental notification and consent requirements governing a child's important decisions. Justice Powell, however, distinguished a minor's abortion decision from other important decisions she might face during her childhood, because an abortion requires prompt action before it becomes too late to abort, and it portends severe and grave long-term consequences.84 Drawing upon the Planned Parenthood principle that a possibly arbitrary third-party veto is unacceptable in the abortion context, he concluded that, rather than seek parental consent for an abortion, a pregnant minor could request consent from a court or a designated administrative official.85 The court would decide whether the minor was sufficiently mature and capable of reaching an independent decision on the matter; if so, she could seek an abortion without further judicial or parental involvement.86 If she lacked the capacity to make this important decision, the court would determine whether an abortion would be in her best interest.87 Using the best interests standard, the court could authorize the abortion without parental involvement, it could require parental consultation, or it could deny

81. Id. at 634 (Powell, J., concurring).
82. Id.
83. Id. at 639.
84. Id. at 642-43.
85. Id. at 643. Notably, Justice Powell did not seem to envision the alternative judicial or administrative proceeding as requiring a formal, adversarial proceeding. Id. at 643 n.22.
86. Id. at 647.
87. Id. at 647-48.
the minor's request for an abortion. The proceedings would be prompt and anonymous, and the minor could obtain an expedited appeal of an adverse decision.

Applying his proposed scheme to the Massachusetts statute, Justice Powell discerned two deficiencies which placed an undue burden upon a minor's abortion right. First, the statute required initial parental consultation before a minor could seek judicial relief entitling her to an abortion. Justice Powell recognized that parents might exert considerable pressure on a minor, effectively preventing her from requesting consent from a court, particularly if her parents held strong views against abortion. He concluded that the Constitution required direct access to the courts notwithstanding the recognized parental interest in the matter and the state's interest in a familial rather than judicial resolution of the question. Second, the statute permitted a court to make an independent determination of the minor's best interests regardless of her competency to reach a mature decision concerning an abortion. This provision unduly burdened the right of a mature minor to seek an abortion, because the rationale for heightened governmental solicitude for her as a minor was no longer relevant in view of her maturity.

Three Justices joined Justice Steven's separate concurring opinion in which he objected to the advisory nature of the plurality's opinion. Justice Stevens concluded that the Court's earlier decisions in Roe v. Wade and Planned Parenthood v. Danforth effectively resolved the questions presented by Bellotti. He argued that the unambiguous conclusion in Planned Parenthood, that the Constitution precluded the possibility of a third-party veto over a woman's abortion decision, controlled Bellotti, because the statute provided for either a possible parental or judicial veto of a minor's abortion decision regardless of her maturity or competence. Finding the Whalen v. Roe two-pronged privacy formulation fully applicable to the privacy interests involved in a minor's abortion decision, Justice

88. Id. at 648.
89. Id. at 644.
90. Id. at 646.
91. Id. at 648.
92. Id. at 650.
93. Id. at 652, 656 n.4 (Stevens, J., concurring). Justices Brennan, Marshall, and Blackmun joined Justice Stevens.
94. Id. at 652-53.
95. Id. at 654.
96. See note 43-44 supra and accompanying text.
Stevens stated: "It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties." Justice Stevens further criticized the plurality for erecting additional hurdles for the minor seeking an abortion—the necessity of securing access to a court and then the prospect of facing a judge who lacked standards to guide his or her decision. Significantly, Justice Stevens asserted that the question of whether a state statute providing for parental notification of a minor's abortion decision without a veto provision was constitutional remained unanswered.

In many respects the Bellotti opinion may have produced more questions than it resolved in its attempt to reconcile the competing interests. Although this is not surprising in view of the delicate inquiry undertaken by the Court, it is nevertheless troubling, because the Court will likely face similar issues in which children and their parents disagree over matters significantly affecting the child's life and which raise a child's claim for constitutional protection. It is notable that the plurality never directly addressed the nature or scope of the child's privacy right. By simply relying upon the abortion right recognized in Roe v. Wade, the plurality seemed unwilling to extend constitutional privacy protection to minors outside the context of abortion. Yet its conclusion about the significance of the abortion decision belies this narrow interpretation: "In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." The plurality seemed to recognize the possibility that nonabortion decisions confronting a minor may be

97. 443 U.S. at 655 (Stevens, J., concurring).
98. Id.
99. Id. at 654 n.1. In his dissent, Justice White stated: "Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision." Id. at 657 (White, J., dissenting).
100. Justice Powell's statement that "[t]he abortion decision differs in important ways from other decisions that may be made during minority" suggests his unwillingness to extend privacy rights to minors beyond this limited situation. Id. at 642 (Powell, J., concurring). The views expressed by Justice Powell in his concurring opinion in Carey v. Population Services International further support this conclusion. 431 U.S. 678, 703 (1977) (Powell, J., concurring). First, he asserted that the Griswold-Roe line of cases did not support the extension of privacy principles to all aspects of state regulation implicating sexual freedom. Id. at 705. Second, he pointed out that the state had considerable latitude in regulating children because of their presumed diminished capacity. Id.
101. 443 U.S. at 642.
sufficiently important, presumably in view of a critical time element or potentially severe consequences, to warrant constitutional privacy protection. If the Court intended to provide this degree of flexibility in its holding, we are left to speculate about which nonabortion decisions the Court intends to protect. It is reasonable to conclude that privacy protection for minors’ nonabortion decisions will not extend beyond those decisions traditionally given protection for adults. Of course, if the status of youth aggravates either the factor of timeliness or grave consequences, the Court might logically extend privacy protection to areas in which similar protection is unavailable to adults.

The failure of the plurality to address directly the degree of constitutional protection provided to the minors’ recognized privacy interests when they face an abortion decision is more troublesome. The Court avoided application of the traditional “ends-means” formula in testing the extent of the state’s interest against the invaded right. The explicit balancing which Justice Powell engaged in as he sought to apply constitutional principles “with sensitivity and flexibility in view of the special needs of parents and children” suggests an alternative approach to handling the constitutional privacy claims of children. Rather than measuring the state interests reflected in the Massachusetts statute against the standards of strict or intermediate scrutiny, as the Court had done in Planned Parenthood and Carey, Justice Powell simply balanced the minor’s interest against those of the state, including its vindication of parental prerogatives in child rearing. Although balancing is not inappropriate in constitutional jurisprudence, it is a clear departure from the Court’s earlier efforts in this area, and it provides the lower courts with only limited

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102. See note 84 supra and accompanying text.
103. Professor Wald lists the following decisions which might confront a child and which courts might regard as sufficiently important to embrace within constitutional privacy protection in order to assure autonomy to a child in resolving the question: whether to have an abortion; to receive drug, alcohol, or medical care; to go to a certain school or to participate in religious exercises; to use contraceptives; or to enter a mental hospital. Wald, Children’s Rights: A Framework for Analysis, 12 U. CAL. D. L. REV. 255, 272-73 (1979). In each case the decision would seem to involve important matters for the child and, given the child’s youthfulness, to require a prompt resolution of the matter. See note 235 infra.
D. **H.L. v. Matheson**

Notwithstanding Justice Powell's efforts in *Bellotti*, the Court's recent decision in *H.L. v. Matheson*\(^\text{105}\) reveals that the Court has not yet definitively resolved the question of whether parents can participate in their child's abortion decision when they do not possess a veto right. *Matheson* involved a child's privacy challenge to a Utah statute requiring parental notification in advance of the performance of an abortion on a minor.\(^\text{106}\)

The controversy generated four opinions from the Court; however, Chief Justice Burger managed to command a rather tenuous majority for his narrow holding, which sustained the Utah legislation.\(^\text{107}\)

Chief Justice Burger rejected the plaintiff's overbreadth argument by carefully excluding from the Court's consideration those situations which involved emancipated minors, demonstrably mature minors, minors facing emergency medical situations, and minors confronting a hostile home situation.\(^\text{108}\)

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106. The Utah statute provided, in part: “To enable the physician to exercise his best medical judgment [in considering a possible abortion], he shall ... [n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor.” *Utah Code Ann.* § 76-7-304(2) (1965). The Utah Supreme Court sustained the constitutionality of the statute in *H.L. v. Matheson*, 604 P.2d 907 (Utah 1980).
107. Justices Stewart, White, Rehnquist, and Stevens joined Chief Justice Burger's majority opinion. Justice Powell separately concurred, and Justice Stewart joined him. 450 U.S. at 413 (Powell, J., concurring). It may be significant that Justice Stewart joined in Justice Powell's concurrence, because Justice Powell seemed to object to the Court's articulation of the privacy test. See text accompanying notes 114-16 infra. Without Justice Stewart's support, the Court's opinion would become a plurality opinion, like the preceding *Planned Parenthood, Carey*, and *Bellotti* decisions. Justice Stevens also separately concurred. *Id.* at 420 (Stevens, J., concurring). Justices Marshall, Brennan, and Blackmun dissented. *Id.* at 425 (Marshall, J., dissenting).
108. 450 U.S. 405-07. The Court specifically found that the plaintiff failed to allege in her original class action complaint that she was either emancipated or mature, and it therefore concluded that she lacked standing to argue the interests of emancipated or mature minors even through an overbreadth argument. *Id.* at 405-06. Likewise, the Court found she could not argue the interests of minors confronted with an emergency medical situation or a hostile home environment. *Id.* at 407 n.14.

By the time the Court heard the *Matheson* case, a federal district court in Utah had ruled that section 76-7-304(2) was inapplicable to emancipated minors. *L.R. v. Hansen*, Civil No. C-80-0078 (D. Utah Feb. 8, 1980). The Supreme Court also asserted that the statute could be construed to exclude the other
Although the Chief Justice recognized that the Constitution protected a mature minor's abortion decision against third-party veto, he declined to accord blanket constitutional privacy protection to minors in plaintiff's position. He found that two state interests supported the parental notification requirement: the necessity to protect an immature minor against an improvident decision regarding abortion; and the reinforcement of the parental role in child rearing matters. Chief Justice Burger variously characterized these interests as "important" or "significant," suggesting that he intended to apply a heightened level of scrutiny to the statute. The Chief Justice's analysis of Utah's chosen means, however, is somewhat confusing and apparently less rigorous. At one point he referred to the notification requirement as "reasonably calculated to protect minors," but he later described the statute as "narrowly drawn." And the Chief Justice finally stated that "[t]he Constitution does not compel a State to fine-tune its statutes so as to encourage or facilitate abortions."

Justice Powell separately concurred and reiterated his position in Bellotti that a mature minor or a minor whose best interests would not be served by parental notification might claim constitutional protection against a state notification mandate. In this case he agreed with Chief Justice Burger that the plaintiff lacked standing to raise these issues. He asserted, however, that in resolving abortion issues involving minors, courts must weigh the various interests of the child, the parent,

 groups whose claims the Court refused to acknowledge because the plaintiff lacked standing. 450 U.S. at 405-07.
109. Id. at 409-10.
110. The Court concluded that the statute served "the important considerations of family integrity and protecting adolescents." Id. at 411. It also asserted that the statute served a "significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician." Id.
111. Id. at 412.
112. Id. at 413. The Court's choice of words in describing the "means" of parental notification adopted by the Utah legislature is significant because the Court has regularly used a reasonableness standard in measuring means when it has purported to apply traditional due process analysis; however, it has used the narrow means test when it has applied heightened due process scrutiny. See G. GUNThEr, supra note 1, at 540-44. Compare Williamson v. Lee Optical Co., 348 U.S. 483, 489-91 (1953) with Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).
113. 450 U.S. at 413. The Court's assertion that this situation does not require statutory fine tuning is inconsistent with any degree of heightened judicial scrutiny. See G. GUNThEr, supra note 1, at 670-78.
114. 450 U.S. at 413-14 (Powell, J., concurring). Justice Stewart, a member of the majority, joined Justice Powell's concurring opinion.
and the state to ensure flexibility and to avoid rigidity in constitutional doctrine. Given his willingness to carefully weigh the various interests, Justice Powell's position contrasts with the majority's position suggesting considerable deference to state legislative judgments. The potential breadth which courts might attribute to the majority's language apparently concerned him.

Justice Stevens also separately concurred in the result, expressing his view that the parental notification requirement was constitutional as applied to the plaintiff and as applied to emancipated or mature minors seeking an abortion. Justice Stevens concluded that the state interests asserted by Utah were fundamental and substantial when compared to the minimal impact which the notification requirement had on a minor's constitutional rights in this area. Justice Stevens specifically recognized the state's interest in ensuring that a young woman receives guidance and consultation in resolving an issue as important as the abortion decision. Regarding parental notification as the means to facilitate this consultation and to encourage parent-child communication, Justice Stevens argued that parents generally act in their children's best interests.

Thus, in reaching the broader issues raised by the Matheson appeal, Justice Stevens indicated his willingness to defer to the judgment of the Utah legislature and its conjectural assumptions about the impact of the notification requirements on parent-child relations and the integrity of the family.

In his dissent, Justice Marshall contended that it was appropriate to examine carefully the interests of the child and the state affected by the legislative notification requirement. In his view the notification requirement presented a substantial obstacle to the privacy right involved in a minor's decision to seek an abortion—minors confronted by the prospect of notifying a nonsupportive family may forego the abortion decision or seek

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116. 450 U.S. at 421-23 (Stevens, J., concurring).
117. Id. at 423-24 n.1. See also Parham v. J.R., 442 U.S. 584, 603 (1979). Justice Stevens also addressed the issue of whether the Utah statute applied to a mature minor and, if so, the possible impact notification of her parents might have on her abortion right, by arguing that a minor who was mature enough to decide to have an abortion very likely was also mature enough to resist contrary parental pressure. 450 U.S. at 425 n.2 (Stevens J., concurring).
118. Justice Steven's statement that "a state legislature may rationally decide" seems to indicate an adoption of traditional due process analysis. Id. at 423-24 n.1. See G. GUNTHER, supra note 1, at 540-44.
an illegal abortion.\textsuperscript{119} He felt that this possibility impermissibly intruded upon the child's privacy, compelling disclosure of important personal matters and possibly undermining her ability to obtain an abortion.\textsuperscript{120}

To sustain this burden upon a minor's privacy right, Justice Marshall argued that Utah had to establish that the legislation served "significant" state interests, and that the statutory scheme represented means "closely tailored" to achieve those interests.\textsuperscript{121} He could find nothing in the notification requirement to support Utah's argument that the statute facilitated the transfer of medical or other information between a child's parents and her physician, because the statute did not impose a requirement to transfer this information.\textsuperscript{122} He also rejected Utah's argument that the statute encouraged parent-child consultation, since there was no requirement of timeliness attached to the notification.\textsuperscript{123} Because notification applied regardless of the existing parent-child relationship, Justice Marshall concluded that it was overbroad as a chosen means to assure consultation. Acknowledging that parental involvement in a minor's abortion decision was desirable if realistically compatible with the existing home situation, Justice Marshall noted that many families would not present a supportive environment to a daughter confronting an abortion decision.\textsuperscript{124} He discounted Utah's argument that the notice requirement reinforced parental authority and family integrity, reasoning that a state-imposed notice requirement would not alone alter or improve a deteriorated home situation, nor the emotional or psychological bonds existing between family members.\textsuperscript{125} The state-mandated notice, he argued, impermissibly inserted the state into private family matters contrary to the rationale underlying parental authority,\textsuperscript{126} particularly because the statute

\textsuperscript{119} \textit{450 U.S.} at 437-41 (Marshall, J., dissenting).
\textsuperscript{120} \textit{Id.} at 437-38.
\textsuperscript{121} \textit{Id.} at 441-42.
\textsuperscript{122} \textit{Id.} at 442-43.
\textsuperscript{123} \textit{Id.} at 446-47.
\textsuperscript{124} \textit{Id.} at 437.
\textsuperscript{125} \textit{Id.} at 437 n.22. Although recognizing that most minors facing an abortion decision ideally would consult with their parents, Justice Marshall emphasized that such consultation must ultimately depend upon the emotional attachments within the family itself, and not upon state-mandated legal obligations.
\textsuperscript{126} \textit{Id.} at 447-54. Justice Marshall argued that the rationale of the Supreme Court's parental authority cases, see notes 163-74 \textit{infra} and accompanying text, precluded unjustified state intrusion, such as that mandated by Utah, into the family's privacy. He also pointed out that the Court had never held that paren-
applied to all minors, including those who were mature and emancipated. Consequently, the notice requirement did not facilitate traditional parental child rearing responsibilities.

Instead of using the opportunity presented in Matheson to clarify important questions regarding the extent and degree of constitutional protection available to minors facing critical choices in matters of extreme importance and sensitivity, the Court further confused constitutional jurisprudence in this area. As in its Bellotti decision, the Court made no effort to define the scope of a minor's privacy right. The Court's decision to uphold the challenged legislation again indicates that it is unlikely to expand privacy protection for a child faced with a parental notification requirement much beyond the abortion right.127 Even with the previously recognized abortion right at issue, the majority failed to articulate explicitly the applicable standard of review. In part, the Chief Justice's opinion seemed to apply a heightened scrutiny standard of review, but his conclusion that the states need not "fine-tune" their abortion statutes contradicts such an approach. Justice Marshall's dissenting opinion demonstrates the majority's misapplication of a heightened scrutiny standard of review.128 In addition, although he accepted the narrowness of the Court's holding, Justice Powell, author of Bellotti, separately concurred, and restated his belief that the courts must flexibly weigh the interests of the child and the state against each other to resolve the constitutional question. Justice Powell's separate opinion would appear to reflect his concern that the majority had selected a different standard of review than that enunciated in Bellotti. The Chief Justice's Matheson opinion certainly relies more upon an ends-means approach to the issue than upon a balancing rationale. With Justice Stewart, a member of the majority, joining Justice Powell in his concurrence, it is possible that the Chief Justice's approach might lack majority support in future cases. Despite repeated efforts to define constitutional authority was absolute, and that the Court had previously denied legal protection to parental authority. See Prince v. Massachusetts, 321 U.S. 158 (1944).


128. Regarding the majority's assertion that the statute promotes state health interests by facilitating the transfer of medical information about the child from her parents to the doctor, 450 U.S. at 411, Justice Marshall correctly used a "narrow means" analysis to point out that the statute imposed no obligation to transfer this information. Id. at 444 (Marshall, J., dissenting).
tional review standards for legislation affecting the rights of
children, it is possible to conclude that none of the proffered
analyses, including the confusing Matheson rationale, has the
allegiance of a majority of the Justices.

E. Parham v. J.R.

In Parham v. J.R.,129 the Court again confronted constitu-
tional claims asserted on behalf of children who challenged a
state statute that accorded their parents virtually unrestrained
authority to commit them to state mental institutions. The chil-
dren argued that due process entitled them to procedural pro-
tections before commitment. Speaking through Chief Justice
Burger, the Court tested Georgia's statutory commitment
scheme against well recognized due process precepts. This in-
volved weighing three interlocking factors: the private interest
affected by official action; the state's interest, including possible
fiscal and administrative burdens; and the value of additional
protections in avoiding an erroneous decision.130 Notwithstand-
ing the claim that procedural due process entitled the affected
children to adversarial judicial hearings,131 the Court concluded
that Georgia's commitment procedures, which provided for re-
view of parents' commitment decisions by hospital physicians,
were constitutionally adequate.132 Although the Court recog-
nized that the hospitalization decision implicated a child's con-
stitutionally protected liberty interests, it felt that deference to
parental authority, rather than formal confrontation between
parent and child in a courtroom atmosphere, was appropriate
in view of the long established principle that parents generally
act in their child's best interests.133 In an apparent reference to
the state's parens patriae role,134 the Court further asserted

129. 442 U.S. 584 (1979). Chief Justice Burger authored the Court's opinion,
in which Justices White, Blackmun, Powell, and Rehnquist joined. Justice
Stewart separately concurred. Id. at 621 (Stewart, J., concurring). Justices
Brennan, Marshall, and Stevens concurred in part and dissented in part in an
opinion by Justice Brennan. Id. at 625 (Brennan, J., concurring in part and dis-
senting in part).

130. Id. at 599-600. See Smith v. Organization of Foster Families, 431 U.S.

131. 442 U.S. at 603.

132. Id. at 620.

133. Id. at 603. The Court relied upon several previous decisions that recog-
nized that parents retain broad authority over their children. Wisconsin v.
Yoder, 406 U.S. 205, 213 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944);
390, 400 (1923). For further discussion of these decisions, see text accompa-
nying notes 163-75 infra.

134. See note 214 infra and accompanying text.
that most children, even adolescents, lacked the wisdom to make many important decisions, including those concerning medical care.\textsuperscript{135} Additionally, Chief Justice Burger questioned the institutional competence of state officials and courts, those customarily involved in adversarial commitment proceedings, to review parental decisions.\textsuperscript{136}

Nevertheless, the Chief Justice concluded that minimal due process requirements compelled some degree of governmental oversight. He felt that the Georgia statutory provision, which required independent review of the child's commitment by state hospital authorities, supplied this oversight function and thereby served to check potentially improper parental decisions.\textsuperscript{137} This provision also provided a basis for distinguishing the Court's earlier \textit{Planned Parenthood} decision. The Chief Justice argued that in \textit{Planned Parenthood} the challenged statute had provided for an absolute parental veto over the child's abortion decision, whereas the Georgia provision, providing for physician review, did not permit unbridled parental authority over the mental commitment decision.\textsuperscript{138} In the final analysis, the Court placed the burden of the decision upon the state's physician who would independently decide whether or not the state mental institution should admit the child upon his or her parents' request. Although this independent evaluation did not fully recognize the claims advanced on behalf of the children, it still suggests that the Court accorded enough constitutional significance to the children's interests to curtail the scope of parental authority by injecting the state, albeit marginally, into the commitment decision.

Justice Brennan, writing in partial dissent for himself and Justices Marshall and Stevens, advocated a more restrictive view of the deference which the Court should accord a parental commitment decision, arguing that due process required full post admission adversarial hearings. In Justice Brennan's

\textsuperscript{135} 442 U.S. at 603.
\textsuperscript{136} Id. at 604.
\textsuperscript{137} Id. at 607, 613. The Court also held that due process required a periodic review by the hospital medical staff of the minor patient's condition to determine whether continued institutionalization was necessary. \textit{Id.}
\textsuperscript{138} Id. at 604. Justice Stewart, in his concurrence, argued for virtual total governmental deference to a parent's decisions concerning hospitalization for his or her child. \textit{Id.} at 621-25 (Stewart, J., concurring). He also distinguished \textit{Planned Parenthood}, because that case involved a minor's "personal substantive constitutional right," the right to decide upon an abortion, whereas \textit{Parham} did not implicate any similar substantive constitutional right available to children. \textit{Id.} at 623 n.6.
opinion, the Court's decision in Planned Parenthood fully controlled; he equated the child's interest in avoiding a wrongful commitment initiated by the child's parents with that of a child facing a pregnancy compelled by parental veto of her abortion decision.\footnote{139} Moreover, he was unwilling to characterize a parent's commitment decision as "routine" and thus entitled to constitutional protection, because the decision itself signalled the collapse of a harmonious family relationship.\footnote{140} In contrast to Planned Parenthood in which the Court postulated the likelihood of familial conflict, he felt that Parham represented the reality of that conflict which undermined any presumption that the parents' actions were in the child's best interests.\footnote{141} Striking a different balance than the majority, Justice Brennan concluded that the child's interests outweighed any parental claim that traditional child rearing prerogatives deserved deference, and he thus required substantial due process safeguards.\footnote{142}

The Parham decision, although it did not involve a child's privacy claim, posed underlying constitutional questions concerning the parent-child relationship in the context of familial disharmony similar to those raised in Bellotti and Matheson and their predecessors. It is appropriate, therefore, to compare Parham with these cases. Justice Brennan correctly recognized in Parham that the parental decision to institutionalize one of the family members indicated the likelihood of family discord, whereas conflict was simply a possibility in the abortion cases. Nevertheless, the Court was willing to defer considerably to the parental decision in Parham, while it virtually foreclosed parental decision making in Bellotti.\footnote{143} To distinguish the cases on the basis of the constitutional right affected by the state statute\footnote{144} suggests that the Court gives considera-
ble significance to a minor's privacy rights, at least those implicated in the abortion decision. Moreover, the Court did not entirely defer to parental authority in any of the cases. The Court, therefore, does not appear to subscribe to the principle of absolute parental authority in managing critically important matters in the child's life. 145

One other similarity in the two decisions is significant. In both *Parham* and *Bellotti* the Court interposed an authority from outside the family to review the ultimate decision. The Court in *Parham* required that a state hospital physician review the parental decision to commit the child. Because hospitalization essentially involved a medical determination, the Court believed that a medical professional, rather than a judge, should oversee the decision. 146 The Court in *Bellotti* requires, in the absence of parental involvement, a judge or other administrative official to review the child's critical decision to abort. 147 Because the abortion decision, like the institutionalization decision, is primarily a medical one, 148 it is difficult to understand the Court's rationale for involving judicial officials, rather than medical professionals, in the abortion decision making process. The standards which exist in the civil commitment context to provide guidance to a judicial official 149 are at

146. 442 U.S. at 613.
147. 443 U.S. at 643.
148. In the abortion context, the Court has recognized that the decision is principally a medical one. In *Roe v. Wade* it stated that "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." 410 U.S. 113, 166 (1973). See also *Doe v. Bolton*, 410 U.S. 179, 192 (1973). Various medical and scientific studies also support the proposition that important medical considerations are critical to the abortion decision. For women between the ages of 15 and 19, the risk of death posed by pregnancy and childbearing is more than nine times greater than the mortality rate associated with legal abortion during the first trimester of pregnancy or the use of contraceptives. Tietze, *New Estimates of Mortality Associated with Fertility Control*, 9 FAM. PLAN. PERSPECTIVES 74 (1977). Also, greater risks of mortality and prematurity, as well as physical and intellectual defects, are present with infants born to teenage mothers than with infants born to older mothers. Menken, *The Health and Social Consequences of Teenage Childbearing*, 4 FAM. PLAN. PERSPECTIVES 45 (1972). But see *H.L. v. Matheson*, 450 U.S. 398, 411 (1981) ("The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature."); *id.* at 423 (Stevens, J., concurring); *Planned Parenthood v. Danforth*, 428 U.S. 52, 103 (1976) (Stevens, J., dissenting).

In the institutionalization context, the Court has consistently emphasized the medical character of the commitment decision. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 607-08 (1979); *Addington v. Texas*, 441 U.S. 418, 429 (1979).

149. Although state civil commitment standards vary widely, many state statutes require a court to determine whether individuals are mentally ill and
least as clear as the nebulous "best interests" standard the Court set forth without elaboration in \textit{Bellotti}.$^{150}$ Although subjective factors may enter into the judge's final resolution of the abortion question, they may also arise in a physician's commitment decision.$^{151}$ This argument suggests that once the Court determined that the Constitution forbids mandatory parental consent in the abortion context, it should have simply deferred to the physician-patient decision.$^{152}$ This result would subject both the abortion and commitment decisions to medical review, and the minor would not be cut adrift without any adult guidance.

The answer to the different result in each case apparently lies in Justice Powell's footnote in \textit{Bellotti} characterizing the operating procedures of an abortion clinic.$^{153}$ Ironically, this description closely parallels accounts of the psychiatric evaluation procedures generally employed by a state mental institution when it admits a patient.$^{154}$ Finally, Justice Powell's further concern in \textit{Bellotti} about the inability of a minor to select effectively between ethical and unethical abortion clinics belittles the professional standards governing licensed physicians and the state's role in overseeing such clinics.$^{155}$

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$^{150}$ The Court in \textit{Bellotti} did not offer any elaboration upon its "best interests" standard. Courts and commentators have criticized this standard as a serious inadequacy of the decision. \textit{Bellotti} v. \textit{Baird}, 443 U.S. 622, 655-56 (1979) (Stevens, J., concurring).

$^{151}$ See 442 U.S. at 628-29 (Brennan, J., concurring in part and dissenting in part).

$^{152}$ See Poe v. \textit{Gerstein}, 517 F.2d 787, 793 (5th Cir. 1975), aff'd mem. sub nom. Gerstein v. \textit{Coe}, 428 U.S. 901 (1976). ("[I]f a minor consults a physician in order to decide whether to have an abortion, the physician is in a position to counsel the minor as to the physical—and perhaps mental—consequences of her decision."). See also \textit{Wynn} v. \textit{Carey}, 582 F.2d 1375, 1387 n.22 (7th Cir. 1978).

$^{153}$ 443 U.S. at 641 n.21 (quoting Planned Parenthood v. \textit{Danforth}, 428 U.S. 52, 91-92 n.2 (1976) (Stewart, J., concurring)).


$^{155}$ The Court has recognized that it can expect physicians to proceed with professional integrity in handling abortion cases. \textit{Doe} v. \textit{Bolton}, 410 U.S. 179,
In recognizing and attempting to resolve the issues presented in Bellotti, Matheson, and Parham with the likelihood of underlying familial disharmony present in each case, the Court seems sensitive to the need to minimize that conflict. In Bellotti, because of the likelihood of a parental veto or strong parental pressure on the child making an abortion decision, either of which could lead to discord, the Court held that the alternative avenue of judicial approval without parental involvement must be available. In Matheson, although the Court gave constitutional sanction to the principle of parental notification preceding a minor child's abortion, the Court specifically avoided extending the holding to those situations in which family hostility could be anticipated. Similarly, by not engraving an adversarial hearing onto the commitment process, the Court in Parham hoped to avoid aggravating preexisting family tensions or creating further problems. It is reasonable to argue, therefore, that the interest of family harmony and integrity may represent the Court's guiding principle in resolving the constitutional claims presented in these cases. By not explicitly recognizing that fact, the Court has missed the opportunity to clarify much of the confusion in this area and to enunciate workable principles to guide courts in similar future cases.

III. PARENTS AND THE STATE

Once a court recognizes a constitutional claim asserted by a child seeking privacy in his or her decision making, it must examine the importance of countervailing state interests advanced in support of statutory restrictions upon the child's freedom of choice.156 Although the Court's standard of review remains uncertain in view of the conflicting analyses presented in Carey, Bellotti, and Matheson, the Court will clearly weigh the minor child's constitutional claim against the state's interests.157 The state generally has legislative authority pursuant to its police power to assure public health, safety, welfare, and

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195-200 (1973). See also id. at 208 (Burger, C.J., concurring). When a physician acts unprofessionally, review by the medical licensing organization is available. Id. at 199-200. Additionally, the Court has indicated that states can adopt standards for licensing facilities where abortions are performed. Id. at 194-95. See also Gary - Nw. Ind. Women's Servs., Inc. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980), aff'd mem. sub nom. Gary - Nw. Ind. Women's Servs. v. Orr, 101 S. Ct. 2012 (1981).


157. See Developments, supra note 1, at 1193-95.
Acting under its public welfare power, the state may mandate parental involvement in a minor child's important decisions in order to achieve health, safety, or morality objectives. The state has an additional interest through its parens patriae power in assuring the welfare of children. This interest can justify state intervention into the family to protect children who might be particularly vulnerable or unable to care for themselves. In the case of children asserting autonomy from their parents by challenging a statutory mandate requiring parental involvement, the state may allege one or more of these interests in support of the statute. Therefore, in view of the complex individual, familial, and societal interests implicated in such a controversy, it is necessary to evaluate carefully the state's interests, and the premises underlying them, before deciding whether an aspect of a child's life is constitutionally protected against legislative interference.

A. PARENTAL AUTHORITY AND THE FAMILY

The courts have broadly construed the welfare component of the police power, and hence this component is relied upon as authority for much of the state legislative activity regulating family matters. This legislation generally reflects the state's deference to parents and their decisions in child rearing matters, thereby reflecting long-standing constitutional doctrine and common law tradition. State reluctance to interfere unduly in the family relationship, through legislation or other means, is consistent with constitutional jurisprudence recognizing the principle of familial privacy. Despite this strong emphasis upon parental and familial autonomy, the state may properly limit parental authority and intervene in family affairs when the welfare of a child is at issue.

The courts have given explicit constitutional recognition to the concept that parents are principally responsible for the care and supervision of their children. The Court first recognized and protected this parental right as an aspect of liberty


159. See Prince v. Massachusetts, 321 U.S. 158, 168 (1944); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398-99 (1937).


162. See R. Mnookin, CHILD, FAMILY AND STATE 495-96 (1978); Developments, supra note 1, at 1214.
under the fourteenth amendment in *Meyer v. Nebraska.* In *Meyer,* the Court invalidated a Nebraska statute limiting the teaching of foreign languages, partially because it interfered with the right of parents to control the education of their children. Two years later, in *Pierce v. Society of Sisters,* the Court invalidated an Oregon law requiring that parents educate their children in the public schools. A unanimous Court relied upon *Meyer* to conclude that the Constitution protected the parents' right to "direct the upbringing and education of children under their control." *Meyer* and *Pierce* survived the Court's post-Lochner retreatment of due process principles, and the Court has subsequently relied upon them to recognize, under the due process clause, the parental right to raise children free from state interference. In *Prince v. Massachusetts,* the Court stated 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 preparation for obligations the state can neither supply nor hinder." More recently, in *Wisconsin v. Yoder,* the Court accepted the first and fourteenth amendment arguments of Amish parents prosecuted under a state compulsory school attendance statute when they refused to send their children to public school because of their religious convictions. The Court concluded that the Amish parents' traditional prerogatives in raising their children, combined with their claim to religious freedom, implicated fundamental rights. The Court thus required the state to justify its position by more than the mere reasonable relationship standard, which the state was unable to do. Finally, in *Stanley v. Illinois,* the Court upheld an unmarried father's claim to constitutional protection against a state statute that summarily denied his claim to the custody of his children upon their mother's death by characterizing his right as a parent to raise his children as "essential" and among the "basic civil rights of

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163. 262 U.S. 390 (1923).
164. Id. at 401.
165. 268 U.S. 510 (1925).
166. Id. at 534-35.
168. Id. at 166. *See also* Ginsberg v. New York, 390 U.S. 629, 639 (1968).
170. Id. at 219.
171. Id. at 233.
172. 405 U.S. 645 (1972).
man." It is apparent that the Court includes the right of parents to control and direct the upbringing of their children among those fundamental rights embraced within the due process clause, and thereby entitled to extraordinary judicial protection.

While establishing the constitutional rights of parents to direct and supervise their children, the Court has recognized that the state is a poor substitute for parents in raising children. In the early Meyer decision, Justice McReynolds explicitly rejected the notion of state-supervised child rearing as inconsistent with the philosophical underpinnings of the American constitutional scheme and Western cultural tradition. More recently in Parham v. J.R., Chief Justice Burger reiterated this view by concluding 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 the American tradition." The Court has expressed particular concern that state intervention into parental child rearing prerogatives will inevitably lead to the standardization of children—a result repugnant to the Western tradition of individualism. Moreover, the state's impersonal institutions have proven to be rather insensitive and inept in responding to the psychological and other needs of children entrusted to its care.

The Court has also made it clear that the due process

173. Id. at 651 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923) and Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

174. But see Lassiter v. Department of Social Servs., 101 S. Ct. 2153 (1981). While recognizing the parental interest as "commanding" and "extremely important," the Court held in Lassiter that the fourteenth amendment did not require a state to provide counsel for an indigent parent facing a state-initiated action for termination of parental rights. Id. at 2160, 2162. The Court distinguished between criminal cases in which individuals were entitled to representation by counsel because they faced loss of physical liberty, and termination of parental rights cases which did not involve the same liberty interests. Id. at 2158-59. The result in Lassiter suggests that the Court does not value the parental interest so highly that countervailing state interests cannot overcome the parental right, even when that interest might be lost.

175. 262 U.S. 390, 401-02 (1923).


178. See Before the Best Interests, supra note 19, at 13 ("By its intrusion [into the family] the state may make a bad situation worse; indeed, it may turn a tolerable or even a good situation into a bad one."). See also Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 STAN. L. REV. 985, 992 (1975).
clause protects family privacy against unjustified state interference. In *Prince v. Massachusetts*,\(^{179}\) for example, the Court relied upon the *Meyer* and *Pierce* decisions to recognize a "private realm of family life which the state cannot enter."\(^{180}\) And in *Moore v. City of East Cleveland*,\(^{181}\) the Court reiterated its commitment to family privacy, and declared unconstitutional an overly intrusive local zoning ordinance forbidding certain related individuals from residing together as a family. The Court's repeated observation that the state is inherently ill-suited to assume child rearing responsibilities further reinforces the notion of family privacy. Thus, it is reasonable to treat the concept of family privacy as a constitutional limitation on the power of the state to insert itself into the internal dynamics of the family.

The Court has additionally extended constitutional due process protection to the interests of individual family members in the maintenance of the family as an institution. In *Moore*, the Court held that family membership was within the cluster of traditional values constitutionally recognized as privacy interests.\(^{182}\) The Court invalidated a city zoning ordinance limiting the number of family members who could live together in a single dwelling, and precluded Mrs. Moore from sharing her apartment with her two grandchildren who were cousins, not brothers. Applying substantive due process concepts, Justice Powell, in his plurality opinion, discerned a strong commitment to the institution of the family in the nation's history and tradition.\(^{183}\) He further found that American tradition supported a broader concept of the family than that recognized in East Cleveland's zoning ordinance.\(^{184}\) The Court, therefore,

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180. *Id.* at 166.
182. *Id.* at 499.
183. "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* at 503-04.
184. *But see* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977). In *Smith*, the Court suggested that families founded upon neither a blood relationship nor marriage were distinguishable for constitutional due process purposes from those based upon such a relationship. *Id.* at 842-47. Although *Smith* involved a procedural due process challenge, the Court's analysis of foster parents' "liberty" interest in their relationship with their foster children included a review of the *Meyer-Pierce* line of cases and indicated that the degree of constitutional protection afforded the foster relationship was minimal. The Court distinguished *Moore*, because that case involved a biological family relationship, whereas the foster family was a state-created entity which necessarily affected the ongoing rights of the natural parents to their children. *Id.* *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)
would protect the family as an entity, at least in traditional familial relationships, from state incursions that could not withstand careful judicial scrutiny. Although the Court purported to vindicate Mrs. Moore's individual right to freedom in personal choices involving family matters, a critical factor in the Court's analysis plainly was the historical significance it accorded the family as a unit, and its reluctance to defer to broadly drawn legislative judgments which unduly infringed upon the family's autonomy. The Court in Moore, therefore, recognized not only the importance of the family unit to the parents in fulfilling their child rearing interests, but also its importance to children in realizing their growth and development toward adulthood. In this sense, the Moore Court directly acknowledged the family as an independent institution and the interests of both parent and child in the family structure, and only tangentially acknowledged parental prerogatives in child rearing.

Because Meyer, Pierce, and their progeny generally involved cases in which the parents and child joined against the state's intrusion into their relationship, the Court was able to avoid inquiry into the complex issue of the parent-child relationship. When the interests of parent and child collide, however, it is not clear that the constitutional principles underlying these decisions necessarily support legislative reinforcement of parental child rearing prerogatives. Three distinct, yet interrelated, constitutional principles emerge from the Court's holdings to limit the state's authority under its police power to regulate family matters—parental authority in child rearing, family privacy, and family institutional integrity. These principles are neither synonymous nor necessarily harmonious with each other. This becomes particularly evident when each

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185. 431 U.S. at 499.
186. See Before the Best Interests, supra note 19, at 13; Hafen, supra note 1, at 651.
187. See Note, The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey, 77 Colum. L. Rev. 1216, 1224 (1977); Developments, supra note 1, at 1219 n.137.
189. See Poe v. Gerstein, 517 F.2d 787, 794 (5th Cir. 1975), aff'd mem. sub nom. Gerstein v. Coe, 428 U.S. 901 (1976) (holding that the importance of the intrafamilial relationship and family privacy outweighed the state interest in parental authority when a statute granted parents a veto over their child's
principle is individually evaluated as the basis for a state legislative decision requiring parental involvement in situations implicating children's constitutional privacy interests. The concept of parental authority certainly serves as a legitimate state interest underlying a legislative decision to reinforce the parental role.190 The concept of family privacy, however, suggests that state intrusion into the family in any guise, even to support the parental role, is undesirable.191 The principle of family institutional integrity, which recognizes the fundamental importance of the family unit to all members, also mitigates against any form of state legislative interference that might jeopardize the family as a unit.192 Therefore, when the state legislatively chooses to reinforce parental authority in real or potential parent-child conflict situations, it may be overlooking or disregarding other important interests, each with venerable constitutional status in its own right.193

It is also important to note that neither the principle of parental authority nor that of family privacy is absolute.194 When parents either abuse or neglect a child, or reach potentially life-threatening decisions which may seriously impair a child's well-being, the state may intervene into the privacy of the family to assure the child's welfare.195 The rationale for this authority is that children as a class are particularly vulnerable and lack the ability to protect themselves. Necessarily, substantive and procedural constitutional doctrine narrowly con-
fines this power. The practical limitation imposed by the state's inability to fulfill adequately the parental role further restricts the state's interventionist efforts. Nevertheless, since the state has an interest in the welfare of the child that can justify intrusion into the family and parental decisions, the state's authority can temper the principle of parental authority in order to assure the child's well-being.

B. HEALTH AND SAFETY

The Court has generally recognized that state attainment of the police power objectives of public health or safety is sufficiently important to override competing constitutional claims of individual citizens. Indeed, the Court has characterized the achievement of health or safety objectives as a "compelling state interest." As long as a state chooses narrowly drawn means to accomplish a health or safety goal, the courts will usually find that it is operating within its sphere of constitutional authority, even if the legislative choice invades a fundamental interest, such as a privacy right. Given the less rigorous judicial review applicable when such legislation involves a minor child's privacy rights, the Court's rationale in H.L. v. Matheson suggests that the Court may defer to any arguably tenable health justification that it can infer from a parental notification requirement. Despite the dissent's argument that the Utah statute imposed no requirement upon parents to supply medical information when their daughter has chosen an abortion, the majority still concluded that the notification requirements furthered a state health objective by insuring that her doctor had access to medical information before performing an abortion. Nevertheless, when health or safety concerns


197. See Bellotti v. Baird, 443 U.S. 622, 638 (1979); Before the Best Interests, supra note 19, at 12.

198. See, e.g., Roe v. Wade, 410 U.S. 113, 150, 154, 163 (1973). It also is important to note that the Court has signalled that it will carefully look at the actual purpose of the legislation, rather than simply accept any proffered post hoc rationalization. See Schweiker v. Wilson, 450 U.S. 221, 242-45 (1981) (Powell, J., dissenting); Craig v. Boren, 429 U.S. 190, 199 n.7 (1976). See also Gunther, supra note 36, at 46.


prompt state legislation, the principle of deference to parental decision making is not absolute. If a parental decision might seriously jeopardize the child's health or welfare, the state retains the authority to override parental wishes in order to protect individual children.\textsuperscript{201} The state also retains the power to override parental decisions to protect the health or safety of the general public.\textsuperscript{202}

In pursuing health or safety goals, the state may eliminate parental involvement in a child's important personal decisions. For example, various state statutes have authorized minors to secure medical or professional assistance for matters such as drug addiction, psychiatric problems, or contraceptive information without first obtaining parental consent.\textsuperscript{203} Explicit in such a statutory scheme is a legislative judgment that the minor child's individual interests, as well as societal interests, in anonymously obtaining assistance are sufficiently important to override the parental interest in prior consultation or involvement.\textsuperscript{204} Implicit in this judgment is the realization that familial discord may accompany revelation of a child's problems to his or her parents, and may ultimately prevent the child from receiving assistance.\textsuperscript{205} If the legislature has reasonably concluded that parental consent or notification requirements may frustrate legitimate health or safety goals, it seems appropriate for the courts to reject contrary parental constitutional claims and to defer to the balance achieved by the legislature in weighing the competing interests of parent and child.\textsuperscript{206}


\textsuperscript{202} See, e.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding state police power as basis for compulsory vaccination statute). See also Bennett, supra note 201, at 294.


\textsuperscript{204} See Wynn v. Carey, 582 F.2d 1375, 1388 (7th Cir. 1978).


\textsuperscript{206} Deference to the legislature's choice is appropriate in this instance because an individual privacy interest could be asserted on behalf of the child, and the state's decision not to require parental involvement furthers the interests of family privacy and integrity. See Section IV infra. Moreover, there is
though state health and safety purposes involving children usually dictate governmental deference to parental responsibility for their children's care, the state may, consistent with constitutional principles, override adverse parental decisions, or even provide for essential services to minors without prior parental consultation.

C. Morality

The Supreme Court has not yet agreed upon the importance which it should ascribe to the state's public morality interest under its police power in the face of a challenge that morality-directed legislation infringes upon a privacy interest. Individual Justices have suggested that state enforcement of morality objectives, particularly through criminal laws regulating sexual conduct, is constitutionally valid, notwithstanding conflicting privacy claims asserted on behalf of the affected individual.207 These assertions, however, may reflect more upon the nature of the privacy claim advanced than upon the strength of the state's interest.208 Given the Court's carefully limited approach to the privacy realm, its reluctance to question a plethora of state criminal laws regulating individual moral behavior is not surprising. The Court is clearly far from embracing any notion of unbridled personal liberty even if individual conduct does not affect others. As a consequence, legislation designed to assure youthful morality will likely withstand any challenge based upon the claim that the state's interest is not sufficient to support infringement of a privacy right.209 Additionally, such legislation usually commands pa-
rental support, because it probably reinforces traditional moral values consistent with those held by the majority of parents.\footnote{210}

When considering morality-directed legislation which has implicated privacy interests, the Court has carefully examined the rationality of the means chosen by a state to accomplish its objectives. For example, in \textit{Eisenstadt v. Baird} the Court could perceive no rational connection between the state's interest in discouraging extramarital sexual activity and its proscription against the sale of contraceptives to unmarried persons.\footnote{211} Similarly, in \textit{Carey v. Population Services International} the Court held that New York's decision to discourage sexual activity among teenagers by forbidding them access to nonhazardous contraceptives was irrational, because it portended the possibility of pregnancy as punishment for youthful sexual activity.\footnote{212} When parental notification or consent statutes constitute the means selected by the state to accomplish a morality objective, the Court should, therefore, carefully assess the reasonableness of such a requirement even if individual Justices, as in the \textit{Carey} case, are unwilling to find that it implicates a child's privacy right. Although prior notification or consent statutes might appear to be reasonable means to assure parental participation in a minor's moral decisions, such requirements also implicate additional considerations of family privacy and integrity.\footnote{213} Thus, it is not appropriate for the Court simply to defer to legislative judgments regulating the moral conduct of children through parental involvement statutes without assuring itself that the legislation actually furthers the interests of the parent and child without unnecessarily undermining the family. This inquiry is consistent with a careful review of the chosen legislative means and the presumptions underlying them.

\footnote{210}{Cf. Ginsberg v. New York, 390 U.S. 629, 639 (1968) (parents are entitled to the support of state laws in carrying out their responsibilities).}

\footnote{211}{405 U.S. at 450-52.}

\footnote{212}{431 U.S. at 694-99. \textit{But see} Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (Court upheld a California statutory rape law making the activity of men a crime but not that of women, despite a claim of sex discrimination, by concluding that men and women are not similarly situated with respect to pregnancy and its attendant risks).}

\footnote{213}{See text accompanying notes 187-93 \textit{supra}.}
D. PARENS PATRIAE

The parens patriae authority provides a legal basis for the state to protect those citizens who lack the capacity to care for themselves. The predicate for parens patriae state intervention is the presumption that certain classes of citizens, such as children or the mentally handicapped, are particularly vulnerable to exploitation and lack the ability to care adequately for themselves. Legislation giving parens patriae authority to the state generally sanctions state intervention into the lives of these citizens when they face threatening circumstances; the state effectively assumes a caretaking responsibility for the individual's welfare.

The state has placed the major responsibility for children with their parents—a decision which is consistent with Western cultural tradition, constitutional principles, and widely accepted child rearing doctrines. But the law has also long recognized that the vulnerability of children entitles them to special protection. The state thus retains the power to intervene in the parent-child relationship when abuse, neglect, or irreparable family discord seriously impair the child's welfare. Since, upon intervention, the state assumes the parent's responsibilities, its intrusion is only justified under extremely exigent circumstances. Indeed, numerous commentators have argued that the state should virtually avoid all intervention on the grounds that an uninterrupted relationship between parent and child is the best environment for a child's growth and development. Societal interests of stability and continuity are assured if the family remains viable, and the parents remain principally responsible for the child.

214. See generally Developments in the Law—Civil Commitment of the Mentally Ill, supra note 149, at 1207-22; Comment, State Intrusions into Family Affairs: Justifications and Limitations, 26 STAN L. REV. 1383, 1391 (1974).


216. See Developments, supra note 1, at 1315. See also In re Snyder, 85 Wash. 2d 182, 532 P.2d 278 (1974); Wald, supra note 103, at 278 n.92.

217. The state has available less intrusive means to intervene in the parent-child relationship than the termination of parental custody. For instance, the state may assume a supervisory role over the family with the child remaining in the home, or it may provide counseling services. Dickens, Legal Responses to Child Abuse, 12 FAM. L. Q. 1, 23 (1978). See generally Lowry, The Judge v. The Social Worker: Can Arbitrary Decisionmaking be Tempered by the Courts?, 52 N.Y.U. L. REV. 1033 (1977).

218. Before the Best Interests, supra note 19, at 3-14; Watson, supra note 1, at 667-68.
Since the assumption of youthful incapacity is a fundamental predicate for parens patriae legislation regulating the family, and since a similar assumption also underlies police power legislation regulating parent-child relations, judicial developments in the parens patriae area deserve some attention. Such analysis will provide a useful analogy for evaluating claims of parental authority. The landmark In re Gault decision directly challenged and largely discredited many of the uncritically accepted presumptions regarding the state's parens patriae role in the juvenile justice system. Until Gault, courts widely believed that the government's primary role as the beneficent protector of wayward youths, assuring that their best interests were served through thoughtful state intervention into their lives, warranted the state's maintenance of a procedurally flexible juvenile justice system. The courts occasionally recognized that this system might involve judicial commitment to an institution, but they presumed that these training school experiences were therapeutic encounters with helpful adult counselors. The Court in Gault realized, however, that despite the lofty purposes presumed to flow from the state's parens patriae role, the reality of the juvenile justice system was more closely akin to that of a penal system. The asserted altruistic purposes were mostly unsupported by the hard realities of juvenile incarceration. The Court consequently held that due process required procedural regularity in state delinquency proceedings, notwithstanding the state's ostensible purpose of assisting and redirecting the child.

Following the Gault decision, courts critically began to scrutinize other aspects of state activity based upon the parens patriae power. Rejecting state claims of well intentioned motives, courts ruled that constitutional requirements limited drastic state intervention, such as neglect or civil commitment proceedings, which disrupted the lives of children and their families. Some courts interpreted the Gault aftermath as largely discrediting the parens patriae power as a basis for

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219. 387 U.S. 1, 16-17 (1967).
221. 387 U.S. at 17-18.
state action.\textsuperscript{223} These interpretations proved premature; the Supreme Court has reaffirmed the continuing vitality of parens patriae in several recent cases.\textsuperscript{224} Nevertheless, \textit{Gault} and its progeny reminded the states that although the parens patriae power remained a legitimate basis for state action, constitutional requirements circumscribed its scope. These requirements mandate judicial inquiry into underlying assumptions concerning the state's role with respect to children and other incapacitated individuals. As a result, substantive and procedural constitutional requirements have limited state intervention based on its parens patriae power into the family setting and the lives of children. Simple assertions of state intentions to assist a child are an inadequate justification for such intervention. These limitations on state intervention have reaffirmed and perhaps strengthened the traditional notion that parents are primarily responsible for their children.

To recognize, however, that notions of parental authority and family privacy carefully circumscribe the state's parens patriae power does not mean that parental decisions in child-rearing matters require blind deference and support in the law on the assumption that they either promote children's interests or strengthen the social fabric. The evolution of the parens patriae doctrine demonstrates the fallacy of such presumptions. Despite state willingness to reinforce parental decision making rights through devices such as parental consent and notification statutes, any underlying assumptions concerning protection of children and their best interests may not conform with reality. Additionally, a child's constitutional claim to individual rights underscores the necessity of critically examining the interests involved in the parent-child relationship. These considerations compel a careful assessment of the interests of the child and the parent and of their interests in family privacy and integrity.

Although a variety of state interests may support legislation circumscribing a minor child's privacy through mandatory parental involvement requirements, these interests will often collide with each other. Whenever notification or consent requirements mandate parental involvement, conflict between the parent and child portending severe disruption of the family


is likely. Although such legislation may augment parental authority, it does not advance the additional interests of family privacy and harmony. As a result, while a child may legitimately claim some degree of constitutional protection, state reinforcement of parental authority as a principal legislative goal may not adequately justify the individual and familial discord which it is likely to generate. And similar to the state’s presumptions about the parens patriae power, state reliance upon presumptions of youthful incapacity and vulnerability may also prove unfounded. On the other hand, when important health or safety goals underlie a legislative judgment, and a requirement of parental involvement clearly promotes them, the state’s goal may withstand a contrary claim by a child. Invalidation of any such state legislation, however, ultimately depends upon the Court’s willingness to scrutinize carefully the affected interests. This scrutiny requires some framework for judicial review.

IV. BALANCING THE INTERESTS

Using due process principles, the Court has taken two distinctly different approaches to resolving minors’ claims to constitutional privacy protection. In *Carey v. Population Services International*, Justice Brennan, in his plurality opinion, applied traditional due process jurisprudence and asserted that intermediate scrutiny required the state to demonstrate an important interest along with narrowly tailored means in order to overcome a child’s privacy right. In a similar manner, the Court in *H.L. v. Matheson* used an ends-means due process analysis, although apparently at a reduced level of scrutiny. On the other hand, Justice Powell in *Bellotti v. Baird*, also writing for a plurality, adopted an alternative balancing approach and argued that the Court must delicately and sensitively weigh the interests of the child against the countervailing interests of the state and, by necessity, those of the parents. Although both approaches involve balancing the child’s interests against those of the state, the *Bellotti* formulation, advocating judicial sensitivity in assessing all of the affected interests, represents a flexible approach to accommodating the conflicting rights of the parent and child, but only if courts are also willing to examine critically legislative presumptions underlying the

225. See notes 61-70 supra and accompanying text.
226. See notes 105-13 supra and accompanying text.
227. See notes 78-92 supra and accompanying text.
statutory policies.228

It is this Article's position that meticulous and careful application of a Bellotti-type balancing analysis is the preferable approach to resolving a minor's constitutional privacy claim.229 This approach avoids the risk of unduly rigidified constitutional doctrine in this difficult area. If the interests are clearly specified and valued, this approach should provide sufficient guidance to lower courts in resolving similar claims. A further inquiry, however, into the nature of the interests held by the child, the parents, and the state, and the degree to which they conflict or harmonize with each other, is critical to the application of this approach. This section proposes a balancing analysis which properly appraises each of these interests.

A. THE CHILD'S INTEREST

An examination of the child's interests requires an initial determination of whether to recognize a constitutional privacy right. Although the Court has delineated the basic parameters of the privacy right for adults, it has not done so for minors. Only in the case of abortion has a majority explicitly recognized that a minor may assert a constitutional privacy claim.230 The Court in Carey suggests that a privacy right may exist with respect to a minor's decisions regarding the use of contraceptives, but it is questionable whether this view could command a majority of the Court.231 In any event, recognition of a minor's


It is fair to argue that the suggested balancing approach with a careful examination of underlying presumptions is equivalent to the heightened means scrutiny advocated by Justice Brennan in Carey. Given the Court's two-tier formulation of ends-means scrutiny in the equal protection area, a balancing approach, however, seems to create some additional flexibility which is not necessarily evident when the Court applies heightened or traditional scrutiny. See Developments, supra note 1, at 1198-97.

229. In arguing that the Bellotti formulation represents the most workable approach to the constitutional issue posed in a parent-child conflict involving the minor child's privacy rights, this Article does not take the position that the Bellotti result was correct. On the contrary, the Bellotti requirement of judicial involvement seems unwarranted and unworkable unless the minor child's abortion decision seriously threatens her welfare. See notes 267-72 infra and accompanying text.


privacy right to make childbearing decisions is consistent with privacy claims upheld on behalf of adults and involves no extension of existing privacy doctrine.\textsuperscript{232} The Court does not, however, regard a child's privacy rights as coextensive with those of an adult.

The test articulated by Justice Stevens in \textit{Whalen v. Roe},\textsuperscript{233} combined with the concerns of Justice Powell in \textit{Bellotti v. Baird},\textsuperscript{234} offers a useful model for measuring the extent of a child's privacy right, as well as a workable formulation of it for balancing purposes. Under this approach a court would determine a child's privacy right based on whether he or she confronts a fundamental and critically important matter which threatens grave and enduring consequences, necessitating prompt decision making and action. The essential features of this privacy formulation are the seriousness of the matter facing the child, its potential consequences, and the importance of timeliness in resolving it. Under this interpretation, a privacy right would assure children autonomy in reaching and implementing their decisions as well as protection against disclosure to others, including their parents. Although this formulation may be criticized as too broad, the Court could easily confine it within the parameters of privacy available to adults. As defined, privacy would clearly not apply to the myriad of daily matters faced by a child, such as bedtime or curfew, dating, drinking, or smoking habits. Instead, it would properly implicate matters such as childbearing and vital medical treatment decisions which the courts have traditionally regarded as within the ambit of privacy for adults.\textsuperscript{235} This approach would


\textsuperscript{233}\textit{See notes 42-45 supra} and accompanying text.

\textsuperscript{234}\textit{See notes 81-89 supra} and accompanying text.

\textsuperscript{235} Privacy claims by a minor concerning decisions involving sterilization, marriage, and school or church attendance are somewhat more troublesome. A sterilization decision is similar to an abortion or contraception decision—it involves childbearing considerations, and the child can effectively conceal the decision from parents or others. Although important long-term consequences obviously flow from a minor's sterilization decision, it is not clear that timeliness is a critical factor in the decision unless the child would experience serious physical or psychological harm. A minor might be able to postpone the sterilization decision until he or she has reached the age of majority, and thereby not immediately face the prospect of permanently and dramatically altering his or her life. \textit{But see Note, Sexual Privacy: Access of a Minor to Con-}
enable the courts on a case by case basis to identify matters which are fundamentally important for a child and thereby warrant constitutional scrutiny, much as the doctrine of privacy has evolved in other contexts.

In addition to their interest in individual privacy, children have an interest in family privacy. One aspect of constitutional doctrine established by the Court in the *Meyer-Pierce* line of cases is the interest of the family in avoiding unnecessary state intervention into its affairs.236 Both as an individual and as a member of the family, a child certainly has a substantial interest in avoiding unjustified state intrusion into the family domain. Such state intrusion may threaten not only the child's individual privacy interest, but also the integrity and stability of the family as an institution.237

traceptives, Abortion, and Sterilization Without Parental Consent, 12 U. RICH. L. REV. 221, 238-44 (1977). Even if the Court placed sterilization decisions within the ambit of constitutional privacy protection for a minor, he or she would most likely consult with a physician before reaching a final decision, following a procedure similar to that followed before an abortion or other critical medical treatment decisions. See text accompanying notes 146-55 supra.

Although a marriage decision also implicates a right which the Court has recognized as fundamental in the case of an adult, *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967), it is not a decision a minor ordinarily must make promptly. See *Bellotti v. Baird*, 443 U.S. 622, 642 (1979). Furthermore, it is unlikely that the child could avoid parental knowledge of the decision; therefore, concern over disruption of the parent-child relationship through disclosure is not as great in this context as in the abortion or medical treatment context. And it is evident that the marriage itself would effectively terminate, or at least substantially alter, the immediate parent-child relationship. Thus, the interest analysis proposed in this Article is not directly applicable to this situation. Nevertheless, if the interests of child, parent, and state were balanced, it is not clear that the importance of the decision to the child would outweigh other parental interests. See Note, The Constitutionality of Parental Consent Requirements in Minor Marriages, 12 U. CAL. D. L. REV. 301 (1979).

Similarly, when the question is whether the court should accord privacy protection to assure a child's autonomy in deciding which school or church to attend, the court can anticipate parental knowledge of the matter and its consequent effect on the family, thus obviating the need for application of the interest analysis presented in this Article. It can be argued, however, that these decisions have fundamental long-term importance for the child and, if the child does not reach them with some dispatch, they could have a lasting effect on the child's development. Although the interest analysis would not directly apply, the importance of the matter to the child could justify a result which recognized autonomy for the child in these matters if the court balanced his or her interests against those of the parents and the state. See Developments, supra note 1, at 1382. See also *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part).

236. See text accompanying notes 163-74 supra.

A child also has an interest in receiving guidance, assistance, and support when confronted with important personal matters. Parental assistance in these situations is certainly the norm, and it is consistent with the traditionally exercised and constitutionally recognized role of the parent.\textsuperscript{238} From the child's perspective, parental guidance throughout childhood may be critical in assuring that the child develops into a mature, capable adult.\textsuperscript{239} Without parental support and guidance, the child may lack adequate insight and strength to confront responsibly and to resolve satisfactorily a personal matter as important as whether or not to bear a child. Although alternative sources of guidance or decision making authority may be available to the child, it is far from certain that they can provide the same degree of sensitivity, insight, or concern to the resolution of the matter that a parent would likely offer. Commentators have condemned the notion that the government should intervene as a decision maker for the child or as a substitute for the parents in these circumstances.\textsuperscript{240}

To recognize that state intervention or professional consultation in lieu of parental consultation are not necessarily satisfactory alternatives is not to suggest, however, that parental authority must prevail. Children's need for parental guidance largely depends on the extent of their maturity and ability to care independently for themselves.\textsuperscript{241} The nature of most constitutional privacy claims asserted by children, which generally involve claims of independence in reaching decisions concerning sexual activity, contraception, and abortion, usually means that older and somewhat more sophisticated adolescents are the claimants. Thus, frequently it is a mature or relatively mature adolescent who is asserting an independent decision mak-

\textsuperscript{238} See Bellotti v. Baird, 443 U.S. 622, 637-39 (1979); Garvey, \textit{supra} note 1, at 821.

\textsuperscript{239} See Bellotti v. Baird, 443 U.S. 622, 638-39; Hafen, \textit{supra} note 1, at 657.

\textsuperscript{240} See \textit{Before the Best Interests}, \textit{supra} note 19, at 13; Watson, \textit{supra} note 1, at 669.

\textsuperscript{241} The age at which children can reliably and capably make informed decisions in an adult manner has not yet been established. Recent research indicates that children over the age of 15 are as capable as adults at making medical and psychological treatment decisions, while children under age 11 do not generally provide adult-like reasons for their decisions. Children between the ages of 11 to 14 seem to differ individually in terms of their ability to decide these matters. See Grisso & Vierling, \textit{Minors' Consent to Treatment: A Developmental Perspective}, 9 \textit{Professional Psych.} 412 (1978); Melton, \textit{Psychological Issues in Juveniles' Competency to Waive Their Rights}, 10 \textit{J. Clinical Child Psych.} 59 (1981). Other research supports the conclusion that most children achieve an adult's ability to reach important decisions between the ages of 12 and 14. See, \textit{e.g.}, J. \textit{Piaget, The Moral Judgment of the Child} (1932).
ing claim. In this case, the argument that parental consultation or involvement furthers the child's interests loses much of its persuasive force. Even then, however, parental assistance can be critical in helping the child through the difficult decision and in supporting the child afterwards. The support, warmth, and concern of a parent can certainly be as important to the mature child as to the immature child, and most parents willingly fulfill this role. The facilitation and encouragement of parent-child interchange in these circumstances furthers the state's interest in promoting the child's welfare.

Parental involvement, however, presupposes familial harmony and stability between parent and child. This premise, unfortunately, does not reliably or accurately reflect actual parent-child relationships, which all too frequently exist or emerge when a teenager faces the difficult decisions arising from sexual activity.\textsuperscript{242} If discord and distrust characterize the family relationship between parent and child, it is unlikely that the child will receive much concerned, sensitive guidance from his or her parents. The parents' own interests or moral values are likely to influence their counseling or decision making, perhaps in a manner clearly detrimental to the child.\textsuperscript{243} Thus, when a mature minor, or a minor confronted with a hostile, unstable family environment, advances a privacy claim, the child's interests will not necessarily involve parental participation in the matter.

B. THE PARENTAL INTEREST

Our cultural history and constitutional tradition greatly value the parental interest in a child.\textsuperscript{244} Since its decision in \textit{Meyer v. Nebraska}, the Court has firmly established as constitutional doctrine that parents, not the state, are principally responsible for raising and educating their children.\textsuperscript{245} The \textit{Meyer} principle has evolved into a fundamental right entitled to stringent due process protection as an aspect of the privacy doctrine.\textsuperscript{246} No comprehensive definition of this parental right

\textsuperscript{244} See generally Hafen, \textit{supra} note 1.
children and parents

has emerged. Instead, the Court seems content to allow the
parameters of the concept to emerge case by case. But the paren
tal child rearing right is not absolute. It is subject to state
regulation in narrowly drawn circumstances.247 Paramount
rights of the child can also overcome conflicting parental
interests.248

The parental role in raising a child initially involves the
parent in nurturing and protecting, and later in guiding and ed-
ucating the child toward the ultimate goal of the child's inde-
pendence and assumption of the responsibilities of adultho
don.249 In fulfilling this role, parents usually derive satis-
faction from sharing their beliefs and values with the child and
in observing the child's absorption of them into his or her own
set of values.250 This satisfaction and the fact of having pro-
duced offspring will often contribute to an adult's sense of im-
mortality. Moreover, the love and companionship shared
between parent and child can be a source of happiness and satis-
faction.251 Sharing and participating in a child's growth and
development can generate a deep sense of satisfaction and a
feeling of importance in the parent. Without further catalogu-
ning all of the aspects of parenthood, it is reasonable to conclude
that considerable personal and psychological satisfactions,
many intangible, accrue to individuals who assume the paren-
tal role. Parents clearly have a substantial interest in realizing
some or all of these benefits of parenthood.

The parental interest also embraces the notion of parental
responsibility for the child during the period of childhood. In a
sense this responsibility naturally evolves out of childhood it-
self, because children, particularly during their infancy and
younger years, are unable to care adequately for themselves.

101 S. Ct. 2153, 2161-62 (1981) (state interests supersede parental interests to
the extent that the Constitution does not require appointment of counsel for an
indigent parent facing termination of parental rights proceedings).
249. The parent-child relationship is an evolutionary one—one that changes
as the child grows and matures into a capable individual. Thus, the individual
interests of the parent and child can be expected to shift over the course of
time. For a more extensive treatment of the parental role and interests in child
rearing, see J. Goldstein, A. Freund & A. Solnit, Beyond the Best Interests
of the Child 9-28 (1973); Hafen, supra note 1, at 613-30; Watson, supra note 1,
at 662-67.
250. See Watson, supra note 1, at 663-66; Developments, supra note 1, at
1353.
251. See Watson, supra note 1, at 663-66; Developments, supra note 1, at
1353-54.
Although it might be argued that the degree of parental responsibility recedes as the child matures and is better able to care for himself or herself, the law recognizes a continuing parental responsibility and a corresponding liability until the child reaches adulthood or is otherwise emancipated. As a quid pro quo to these responsibilities of parenthood, parents have authority over their children. Recognition of parental authority is also consistent with the guidance and educational functions of parenthood. Thus, because parents are responsible for their children, they have an interest in governmental recognition and support of their authority in raising their children.

C. THE FAMILY INTEREST

In articulating the potentially conflicting interests of child and parent, it becomes apparent that the structure of their relationship as reflected in the family unit is important in avoiding or resolving individual problems. Just as the Court has ascribed constitutional rights to individual family members, it has recognized that the family itself is an institution entitled to due process protection. In *Moore v. City of East Cleveland*, the Court recognized the importance of the family unit to its individual members, parent and child alike, and the need to minimize state intrusion into the unit. In the family, the interests of parent and child coalesce as they interact. The family nurtures and directs the child as he or she matures, and the child relies on family members, primarily parents, but also siblings and others, for affection, guidance, and support. Since they are principally responsible for the family, parents retain considerable authority over the family. But because the family supports and enhances the mutual interests of both child and parent, the family as a unit is critical to assuring maintenance of the reciprocal relationships and, thus, the fulfillment of the individual interests of each member.

Since the family relationship is important to child and parent, rupture of that relationship is likely to be detrimental to the interests of both. With the bonds of the family broken, a

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254. See notes 179-86 *supra* and accompanying text.

255. See notes 181-86 *supra* and accompanying text.

256. See generally *Before the Best Interests*, *supra* note 19, at 3-14.
CHILDREN AND PARENTS

If a child is unable to turn to the parents as a source of guidance and support in confronting difficult matters. When a child has broken away from his or her parents, the parents will similarly find themselves unable to offer assistance despite their best intentions. Whether the ruptured relationship is the result of the child's recalcitrance, parental overreaching, or both, a nonfunctioning family institution frustrates at least to some extent the interests of the parent and child. Rupture may also lead to a substantial likelihood of state intrusion into the family.

The state has an interest in establishing threshold standards defining a child's legal competence as part of its larger scheme of legal relationships among citizens. But blind adherence to these somewhat arbitrary standards for the purpose of defining the constitutional rights of parent and child proves unsatisfactory, because they do not accommodate the variety of relationships and internal dynamics found in family patterns. Indeed, state involvement in the parent-child relation-

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257. A nonfunctioning family institution is one in which parent-child interaction no longer occurs in any meaningful fashion. This does not include a family unit in which some degree of friction or tension between the parent and child exists, because this type of relationship is not atypical of families with adolescent children. See R. Lerner & G. Spanier, Adolescent Development 55 (1980); D. Rogers, Adolescents & Youth, 225 (4th ed. 1981).

258. Statutes governing the emancipation of children reflect the arbitrariness of state standards. Prior to 1971, when the states ratified the twenty-sixth amendment lowering the voting age to eighteen, five states specified that females achieved adulthood at age eighteen, while males achieved it at age twenty-one. See Katz, Schroeder & Sidman, Emancipating Our Children—Coming of Legal Age in America, 7 Fam. L. Q. 211, 213 n.16 (1973). Since the passage of the twenty-sixth amendment, all states have lowered their age of majority to either eighteen or nineteen, with no disparity between males and females. See Stanton v. Stanton, 421 U.S. 7 (1975). Some states, however, continue to distinguish between adolescents by age for various purposes. Compare Miss. Code Ann. § 93-19-13 (1980) (minor 18 years old may contract in matters affecting personal property) with Miss. Code Ann. § 93-1-5(b) (1973) (minor must be over 21 years old to marry without parental or judicial consent).

259. No two families operate precisely alike. Not only does the degree of authority exercised by parents over their children, particularly adolescents, vary widely, M. Berzonsky, Adolescent Development 304-16 (1981), but also the degree of autonomy sought by children as they mature, as well as the extent of parental acquiescence, differs considerably among families. Likewise, many adolescents are sufficiently mature well before the age of majority to care adequately for themselves, while others are dependent upon their parents well beyond the age of legal emancipation. D. Rogers, supra note 257, at 225. Thus, despite legal presumptions establishing arbitrary age emancipation standards, the reality of many family relationships conflicts with such blanket standards. But see H.L. v. Matheson, 450 U.S. 398, 424-25 (1981) (Stevens, J., concurring) (asserting that state-mandated parental notification requirements based upon the child's age in the case of a minor child seeking an abortion are constitutionally permissible regardless of the minor's maturity or emancipation status,
ship through mandatory parental consent or notification requirements endangers the interests of individual family members and of the family itself. State intervention of this nature may undermine whatever rapport exists between parent and child, and may finally rupture an already tenuous relationship. This is ultimately inconsistent with the interests of both parent and child, and with the state’s primary interest in assuring and maintaining a relatively harmonious, stable, and ongoing family environment.\(^{260}\) In this setting parent-child consultation can be expected to ensue naturally, thus providing the child with parental assistance in critical decisions facing the child. But when the necessary rapport is missing to encourage this shared dialogue and decision making, state-mandated parental involvement will accomplish little other than to guarantee the final rupture.\(^{261}\)

On the other hand, state neutrality on the issue of parental consent or notification in matters affecting a child’s privacy rights prevents unnecessary state intrusion into family affairs. It enables family members to resolve matters themselves in a fashion consistent with their ongoing relationship, past experience, and perceived interests. Although this may occasionally mean that a child will choose to avoid parental involvement in an important matter, the child will not face the prospect of disrupting the family by confrontation with his or her parents. Likewise, the child who is mature enough to resolve the matter independently does not face the prospect of undue parental pressure or overreaching which may, in the child’s mind, detrimentally affect the decision or unnecessarily strain the family

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\(^{260}\) Even though such a requirement is imprecise or unjust in individual cases). It is precisely this sort of gross overgeneralization and the resulting inequities that a careful balancing analysis can avoid in the case of a minor asserting a legitimate privacy claim. When a statute implicates an interest as important as a privacy right, it is appropriate for the courts to examine the presumptions underlying arbitrary age guidelines. See generally Tribe, supra note 206, at 8.

\(^{261}\) It has been argued that parent-child confrontation over the issue of a minor child’s pregnancy is desirable in order to assure family continuity and to enable parents and children to explore their individual and collective problems. Watson, supra note 1, at 670. In many instances, however, this confrontation is likely to destroy the family unit, which both Professor Watson and this author highly value. Professor Watson recognizes this and argues that a minor child who is prepared to assume adult status should be entitled to avoid parental disclosure of her pregnancy and abortion decision. Id. There will be instances, however, when disclosure would dislocate family relationships to the ultimate disadvantage of the child who otherwise needs and benefits from the family. In this situation the child also should be able to avoid disclosure. Such an approach would most likely assure family continuity, in one form or another, more consistently than the Watson approach.
relationship. After resolving the matter, the child can anticipate remaining within the family and securing the benefits of that relationship. Diminishing the prospect of conflict or confrontation reinforces the stability of the family and assures its availability as a source of support for the child. A long-term result of this approach is that the state can expect to strengthen the family institution and to enhance the family's role in child rearing.

State neutrality on the question of parental involvement in a child's important personal decisions affecting areas of privacy does not mean that parent-child consultation and resolution of critical matters facing the child is inappropriate. On the contrary, consultation is preferable, because it enables the child to request assistance from the parents, and it involves the parent in intimate aspects of the child's life. But the state should not mandate this involvement at the possible expense of the family itself, or at the child's expense in terms of the severe future consequences. A more flexible state statutory approach that encourages rather than compels parental involvement presents a feasible solution which can accommodate the various interests of child and parent. Such an approach is also consistent with the flexibility generally inherent in domestic relations statutes that have successfully accommodated conflicting familial interests.

262. But see H.L. v. Matheson, 450 U.S. 398, 425 n.2 (1981) (Stevens, J., concurring). Justice Stevens asserts that the mature or emancipated minor should be capable of withstanding whatever parental pressure might occur following their notification of her abortion decision. Id. Although this may be true, it ignores the important state interest in continued maintenance of the family unit. A mandatory parental notification statute in the case of a minor seeking an abortion will foster unnecessary family conflict, and it will very likely undermine the family structure and, ultimately, the interests of the family members.

263. Cf. Disanto & Podolski, supra note 228, at 210 (arguing that mandatory statutory means are not well suited for achieving the best interests of the child, and that courts should be prepared to create exceptions to such statutes or to void the entire statute).

D. THE STATE’S INTEREST

To argue that state intrusion into the parent-child relationship, when the child might legitimately maintain a privacy claim, is counterproductive in furthering the interests of both parent and child in the family relationship, is not to assert that the state should never intervene between parent and child. Courts have consistently recognized that state health and safety objectives are sufficiently compelling to justify intervention in certain circumstances. When the state purports to protect legislatively the health or safety of children by mandating parental involvement in areas affecting the child’s privacy, the courts should require the state to demonstrate that parental disclosure is essential to its legislative objective. This requirement is consistent with an overall balancing approach, because even health and safety statutes can strain the individual relationships of family members and the family itself. Absent a clear counterbalancing benefit to the child, state-mandated disclosure should trigger the same interest analysis that would be triggered if the state had simply sought to reinforce parental authority.

The state may also have a sufficiently strong interest to justify intervention in those situations in which an immature minor claims constitutional privacy protection to preclude parental involvement in an important personal matter. Relying principally upon a parens patriae rationale, the state can assert an interest in protecting the immature child from the consequences of a decision which the child is purportedly incapable of reaching in a mature, rational manner. To accomplish its objective, the state might conclude that the matter requires parental consultation. Of course, this intervention poses the same danger to the family relationship as it has for a mature minor, particularly if the child faces a hostile family environment. It was this concern in Bellotti which led Justice Powell

265. See notes 198-206 supra and accompanying text.
266. See H.L. v. Matheson, 450 U.S. 398, 442-45 (1981) (Marshall, J., dissenting). Justice Marshall convincingly refutes the majority’s argument that parental notification of a minor’s abortion decision serves state health concerns by demonstrating that the statute does not require parents to transmit pertinent health information about the child to the treating physician. It is notable that the majority in Matheson seemingly excluded the emergency abortion situation from the parental notification requirement. 450 U.S. at 407 n.14. The exclusion suggests that courts should not blindly defer to a purported legislative health goal implemented through a parental involvement requirement, but that they should recognize exceptions to mandatory notification or consent requirements. See Disanto & Podolski, supra note 228, at 210.
to require the alternative avenue of judicial review and approval in the case of an immature minor seeking an abortion.\(^2\)

A host of administrative problems, however, accompany the \textit{Bellotti} scheme.\(^2\) And in the case of abortion and other medically related decisions affecting a minor's privacy rights, it overlooks the important role played by the child's physician. Notably, the Court was willing to defer to medical judgment in \textit{Parham v. J.R.}, a case in which the child faced commitment to a mental health institution.\(^2\)

Compelling arguments support similar deference in abortion and related privacy contexts in the case of an immature child. Even for the immature child, there is no right or wrong abortion decision which the state can expect her to reach. The Court has required state neutrality on the morality of abortion;\(^2\) thus, highly subjective factors concerning immediate and long-term consequences which are unique to the child will dictate the decision. Given the extremely personal nature and consequences of the decision, it is doubtful that compelled parental or judicial involvement in the matter will substantially enlighten the child's decision, particularly when she has already received medical and possibly other consultation on the matter.\(^2\)

\(^{267}\) \textit{See} notes 86-89 \textit{supra} and accompanying text.

\(^{268}\) 443 U.S. at 655 (Stevens, J., concurring). \textit{See also} \textit{Wynn v. Carey}, 582 F.2d 1375, 1388-89 (7th Cir. 1978).

\(^{269}\) \textit{See} notes 129-38 \textit{supra} and accompanying text.

\(^{270}\) \textit{See} \textit{Bellotti v. Baird}, 443 U.S. 622, 655 (1979) (Stevens, J., concurring) ("It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."). Moreover, it should be noted that no one can compel either a mature or immature pregnant minor to submit to an abortion against her wishes. \textit{See} \textit{Planned Parenthood v. Danforth}, 428 U.S. 52, 73-74 (1976). \textit{But cf.} \textit{Maher v. Roe}, 432 U.S. 464 (1977) (state may deny funds for non-therapeutic abortions while funding childbirth medical services); \textit{Harris v. McRae}, 448 U.S. 297 (1980) (Congress can constitutionally refuse to fund therapeutic abortions even though it funds childbirth services through medicaid program).

\(^{271}\) The Court has held that "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." \textit{Roe v. Wade}, 410 U.S. 113, 165 (1973). Additionally, the Court has indicated that the physician's medical judgment in the abortion context should properly reflect consideration of the additional factors of the woman's physical, emotional, psychological, and familial situation. \textit{Doe v. Bolton}, 410 U.S. 179, 192 (1973). Thus, the minor child may reasonably expect to receive counseling on her abortion decision from the doctor or from others responsible for counseling pregnant patients at the hospital or clinic. \textit{See} \textit{Akron Center for Reproductive Health, Inc. v. City of Akron}, 479 F. Supp. 1172, 1181-82 (N.D. Ohio 1979); \textit{Note}, \textit{supra} note 187, at 1238-41. \textit{Cf.} \textit{Doe v. Irwin}, 615 F.2d 1162, 1163-64 (6th Cir. 1980), \textit{cert. denied}, 449 U.S. 829 (1981) (describing the counseling sessions at a state family planning center preliminary to the distri-
The Court's willingness to defer to medical judgment in the Parham case suggests an alternative solution which minimizes judicial involvement and its accompanying administrative difficulties, and reduces potential family discord resulting from compelled disclosure. The state should defer to the decision reached by the child and the child's physician, but the physician or another individual counseling the child should be able to invoke judicial review in those cases in which the decision seriously threatens the child's welfare. Such an approach is ultimately consistent with the state's parens patriae role, because its interest is in protecting the child's welfare, not in judging the quality of an abortion decision. This approach also adequately protects the immature child without unduly hampering a mature minor in the exercise of his or her privacy rights. In addition, nothing precludes the child, the physician, or the court, if its review is eventually invoked, from consultation with the parents if that is consistent with the immature child's best interests. By restricting the state's intrusion into the child's privacy, and into the family in the case of an immature minor, this approach reconciles the interests of the child, parents, and state in a manner consistent with the foregoing analysis and the principles of family autonomy and integrity.

The state's interest in intervention into the parent-child relationship, through consent or notification statutes regulating areas in which a child might claim privacy protection, seems more tenuous in those situations in which the state bases its involvement upon welfare or morality objectives. Although

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272. In this case, judicial review would closely resemble the review set forth in Bellotti. The court would have to assess whether the minor was competent to reach an individual decision and whether it served the child's best interest—matters with which the court should have some familiarity from its experience in custody, guardianship, and similar proceedings. One apparent advantage to this scheme over the Bellotti judicial alternative is that the doctor, a capable and sophisticated professional, is responsible for initiating judicial proceedings, rather than the child. A physician, or a social welfare agency if one is consulted, is in a better position to commence and to oversee litigation than the allegedly immature minor child. Cf. Wynn v. Carey, 582 F.2d 1375, 1388-89 (7th Cir. 1978) (minor can expect administrative difficulty if required to initiate litigation in order to secure an abortion).
state courts have broadly defined state power to legislate in these areas, the Supreme Court has carefully looked at the means chosen by the state to accomplish its objectives.\textsuperscript{273} Welfare or morality-based legislation compelling parental disclosure or consent rests upon the critical presumption that it will enhance the interests of both parent and child. But under careful analysis, this presumption often proves to be fallacious.\textsuperscript{274} For instance, disclosure to parents of a minor child's sexual activity or pregnancy may threaten the vital family relationship in a manner inconsistent with the interests of parent and child.\textsuperscript{275} Because balancing the interests of parent, child, and state requires sensitivity and care, legislation predicated upon erroneous generalizations concerning the individual or the family does not satisfy the constitutional standard. In situations touching upon the privacy interests of minors, therefore, the states must carefully draft legislation directed at accomplishing welfare or morality goals in order to avoid gross presumptions which may prove less than universally true.

E. Additional Considerations

Thus far the analysis has focused upon the interests of the child, the parents, the family, and the state; however, the Court has also indicated that in evaluating constitutional claims it gives consideration to the extent of the burden imposed upon the exercise of a constitutional right. This approach is reflected most clearly in the recent abortion funding decisions in which the Court concluded that the government's refusal to fund abortions for poor women was not an unconstitutional burden upon their exercise of a fundamental right.\textsuperscript{276} Justice Stevens in \textit{H.L. v. Matheson} similarly implied that in the abortion context a parental notification requirement represented a less substantial burden upon a pregnant minor's privacy right than a


\textsuperscript{274} See text accompanying notes 211-13 supra.


\textsuperscript{276} See Harris v. McRae, 448 U.S. 297, 315 (1980) (Congress has not unduly infringed fundamental right); Maher v. Roe, 432 U.S. 464, 473-74 (1977) (state does not directly infringe upon exercise of a fundamental right). Cf. Sosna v. Iowa, 419 U.S. 393, 406, 410 (1975) (state's one year residency requirement as prerequisite to divorce does not irretrievably foreclose divorce petitioner from relief she desires and thus does not infringe her fundamental right to travel).
parental consent requirement. Although this may suggest that a court should separately evaluate parental notification requirements and consent requirements for constitutional privacy purposes, such a result ignores the Court's assertion in *Whalen v. Roe* that the Constitution protects important individual matters from unjustifiable disclosure. Additionally, application of the suggested interest analysis is not dependent upon whether a consent or notification requirement invokes parental involvement. It is the existence of such involvement and its possible threat to family integrity which are important in weighing the respective interests. Therefore, regardless of whether the state becomes involved in the parent-child relationship through a notification or consent requirement, the court should balance the respective interests by using the analysis previously suggested.

Upon completion of the balancing process, the question remains whether the court should give a saving construction to a challenged parental consent or notification statute. Although courts might save unduly broad statutory prescriptions of parental involvement by creating exceptions for various classes of children, as the court impliedly did in the *Matheson* case, they should invalidate the entire statute in order to encourage the requisite legislative care in drafting. This recommendation is consistent with the value which the court has placed on the privacy right, even in the case of children. The analytical underpinnings of this approach can be traced to the first amendment overbreadth doctrine. An overbroad statute tends to chill speech in much the same manner as a parental involvement statue deters minors from exercising their privacy rights. Because of the practical problems a minor encounters merely to initiate litigation on a privacy issue, the courts should proceed to consider the merits of a facial constitutional challenge when the child has properly met basic justiciability requirements. Otherwise courts will be frustrated in their efforts to

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277. 450 U.S. at 421 (Stevens, J., concurring). See notes 116-18 supra and accompanying text.
279. The Court's ruling apparently excludes emancipated minors, demonstrably mature minors, minors facing an emergency medical situation, and minors with hostile home situations. 450 U.S. at 405-07.
281. This argument is consistent with overbreadth doctrine, since courts can expect minors, because of their inexperience, timidity, or lack of resources, frequently to be deterred from seeking judicial resolution of a privacy claim.
resolve definitively these important and most likely recurring privacy questions. Moreover, the suggested interest analysis does not vary significantly between classes of children, because the individual and family interests are likely to be relatively constant. The court, therefore, should be able to decide the constitutional questions presented in a facial statutory challenge without great difficulty.

V. CONCLUSION

The conclusion that emerges from the foregoing valuation and balancing of interests is that children should be entitled to claim a degree of constitutional protection under the privacy doctrine to assure them autonomy in their decision making, even from their parents. Although this conclusion departs from traditional social values recognizing parental control in all matters concerning their children, it finds limited support in the Supreme Court's recent decisions in the abortion area concerning pregnant minors and among various state statutory provisions extending limited autonomy to children in certain cases. When a minor child faces a critically important life choice with enduring consequences, either the child, the child's parents, or the state must ultimately resolve the matter. The dynamics of the family relationship will usually dictate a shared parent-child decision. When this is not possible, however, neither the parents nor the state seem any better qualified than the affected individual—the child—to reach the final decision unless, of course, the child is incapable of confronting the problem.

A constitutional privacy claim on behalf of a child arises only if the state has interjected itself, through legislation or other means, to restrict the child's freedom of action. Absent state involvement, intrafamily conflict does not rise to the level of a constitutional question; rather, individual family members must resolve their problems among themselves. But even when the state has legislatively mandated parental involvement through consent or notification requirements, the constitution only protects children's privacy when they must resolve vitally important personal matters involving serious and enduring consequences and requiring prompt resolution. A privacy right would assure a child's autonomy in reaching and imple-

Cf. G. Gunther, supra note 1, at 1187 (overbreadth is available in the first amendment context to protect third parties who are not courageous enough to initiate litigation on their own behalf).
menting decisions and in protecting those decisions against disclosure to others, including his or her parents.

Once the court recognizes a privacy right, it then must carefully assess the interests of child and parent individually and as family members, as well as any justifications for the legislation proffered by the state. Absent compelling state health or safety goals that only mandated parental involvement can accomplish, the interest of the child in privacy, coupled with the shared interests of parent and child in family privacy and integrity, should prevail over contrary parental authority concerns. Indeed, the Court has consistently recognized, although not as clearly or explicitly as it might have, the value of family integrity and harmony in instances when conflict has loomed between the parent and child. By properly recognizing the importance of this factor, it becomes clear that presumptions regarding youthful incapacity or parental benevolence are simply too crude a basis for legislative linedrawing, especially when the legislation affects the child's critical individual rights and the institutional integrity of the family. But the state need not face the prospect of individual determinations of a child's competency in each case, notwithstanding the Court's judicial review proposal in Bellotti. Since the essence of privacy is that the child's decision controls absent a clear threat to his or her welfare, state intervention is only justified under the parens patriae doctrine, and then only if the child's incapacity in decision making threatens his or her well-being. Unless these conditions are present, the balance suggested in this Article would preclude state-sanctioned parental or governmental intervention into the zone of privacy constitutionally extended to children.