

January 1991

## The Constitutionality of California's Parental Consent to Abortion Statute

Malena R. Calvin

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Constitutional Law Commons](#), and the [Family Law Commons](#)

---

### Recommended Citation

Malena R. Calvin, *The Constitutionality of California's Parental Consent to Abortion Statute*, 21 Golden Gate U. L. Rev. (1991).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol21/iss3/5>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

# THE CONSTITUTIONALITY OF CALIFORNIA'S PARENTAL CONSENT TO ABORTION STATUTE

Malena R. Calvin\*

“Who of us is mature enough for offspring before the offspring themselves arrive? The value of marriage is not that adults produce children but that children produce adults.”<sup>1</sup>

## I. INTRODUCTION

In 1973, the United States Supreme Court determined in *Roe v. Wade*<sup>2</sup> that the constitutional right to privacy included a woman's right to an abortion. Since *Roe*,<sup>3</sup> the issue of abortion has been at the center of debate and controversy. Recently, the abortion controversy has focused on the rights of minors to receive abortions. One aspect of this controversy is the ability of pregnant minors to receive abortions free from parental consent. The issue of parental consent to abortion has caused courts to balance conflicting policy considerations. On the one hand, courts want to promote family autonomy, while on the other hand, courts must consider the rights of minors.

The Supreme Court first addressed the rights of states to regulate abortions for minors in 1976 in *Planned Parenthood v.*

---

\* The author is currently practicing law with Proskauer Rose Goetz & Mendelsohn in Los Angeles. B. A. 1988, Howard University; J. D. 1991, Howard University School of Law. All matters of opinion contained in this article—legal and otherwise—are those of the author alone.

1. BARNES & NOBLE BOOK OF QUOTATIONS (R. Fitzhenry ed. 1986)(statement of Peter de Vries).

2. 410 U.S. 113 (1973).

3. *Id.*

*Danforth*.<sup>4</sup> Since *Danforth*, 56% of all states have enacted statutes which regulate a minor's ability to obtain an abortion.<sup>5</sup> Currently, 36% of all states have adopted statutes which require minors to obtain parental consent in order to procure an abortion,<sup>6</sup> while another 20% have adopted statutes which require parental notification.<sup>7</sup> California Health and Safety Code Section 25958 ("Section 25958") is one of many statutes which requires minors to obtain parental consent in order to receive an abortion.<sup>8</sup> Section 25958 provides that minors must obtain parental consent or the permission of the juvenile court before obtaining an abortion.<sup>9</sup> Although Section 25958 has not been considered by the Supreme Court, *Danforth* and its progeny indicate what states should consider when enacting such statutes and whether existing statutes should be deemed constitutional. Therefore, California's statute must be analyzed pursuant to the standards set forth by the Supreme Court. Although this analysis may determine the constitutionality of California's statute under federal law, California law presents a unique problem because of the express right to privacy found in California's state constitution.

---

4. 428 U.S. 52 (1976).

5. See *infra* notes 6-7.

6. See ALA. CODE §§ 26-21-1 to 26-21-8 (Supp. 1990); ALASKA STAT. § 18.16.010(3) (1987); ARIZ. REV. STAT. ANN. §§ 36-2152 to 36-2153 (Supp. 1990); CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1990); FLA. STAT. ANN. § 390.001(4) (West 1989); IND. CODE ANN. §§ 35-1-58.5-2.5 (West Supp. 1990); KY. REV. STAT. ANN. § 311.732 (Baldwin 1990); LA. REV. STAT. ANN. § 40.1299.35.5 (West Supp. 1990); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1990); MISS. CODE ANN. §§ 41-41-51 to 41-41-63 (Supp. 1990); MO. ANN. STAT. § 188.028 (Vernon Supp. 1990); N.D. CENT. CODE § 14.02.1-03.1 (1981); PA. STAT. ANN. tit. 18, § 3206 (Purdon Supp. 1990); R.I. GEN. LAWS § 23-4.7-6 (1989); S.C. CODE ANN. § 44-41-30 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 34-23A-7 (1990); WASH. REV. CODE ANN. § 9.02.070 (1990); WYO. STAT. § 35-6-118 (Supp. 1990).

7. See GA. CODE ANN. § 18-609(6) (1987); ME. REV. STAT. ANN. tit. 22, § 1597 (1980); MD. HEALTH-GEN. CODE ANN. § 20-103 (1990); MINN. STAT. ANN. § 144.343(2) (West 1989); MONT. CODE ANN. § 50-20-107 (1990); NEV. REV. STAT. ANN. § 442.255 (Michie 1986); OHIO REV. CODE ANN. § 2151.85 (Anderson Supp. 1988); TENN. CODE ANN. § 39-4-202(f) (1982); UTAH CODE ANN. § 76-7-304 (1990); W. VA. CODE § 16-2F-3 (1990). Notice statutes are not equivalent to consent statutes because notice statutes require only that the parents be informed of the abortion. Under a notice statute, the parents do not have any authority with respect to the minor's decision to have an abortion. See *H.L.V. Matheson*, 450 U.S. 398 (1981) (holding that statutes requiring a physician to notify, if possible, the parents of an unemancipated minor are not violative of the minor's constitutional rights). See also *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (holding that a statute which requires that both parents be notified as a condition to abortion is unconstitutional unless judicial bypass is provided).

8. CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1990). See CAL. CIV. CODE § 25 (West 1982) (a minor is any person under 18 years of age).

9. CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1990).

In order to determine the constitutionality of California's parental consent statute, this article will first discuss the implications of *Roe*. Second, this article will analyze United States Supreme Court decisions which have addressed parental consent statutes. Third, this paper will demonstrate that California's parental consent statute would be considered constitutional under the Supreme Court cases which have addressed such statutes. Fourth, this paper will consider the implications of California's state constitution. Based on this analysis, this paper will establish that despite a finding of constitutionality under federal law, California's parental consent statute appears to violate the express right to privacy found in the California Constitution.

## II. DISCUSSION

### A. THE IMPLICATIONS OF *ROE V. WADE*

*Roe* established the current abortion policy in the United States.<sup>10</sup> It involved a Texas statute which provided that the procurement of an abortion was a crime except when performed to save the life of the mother.<sup>11</sup> The plaintiff, a pregnant woman who wanted to terminate her pregnancy, challenged the statute on the ground that it violated her constitutional rights.<sup>12</sup> After considering various opposing views,<sup>13</sup> the Supreme Court held that the statute was unconstitutional because it violated a woman's right to privacy under the Fourteenth Amendment. The Court stated that the "right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>14</sup>

Although the Court held that a woman's constitutional

---

10. P. SHEERAN, *WOMEN, SOCIETY, THE STATE, AND ABORTION* 8 (1987).

11. *Roe*, 410 U.S. at 117. At the time *Roe* was decided, 60% of all states had adopted similar statutes. *Id.* at 118 n.2.

12. The plaintiff sought a declaratory judgment that the statute was unconstitutional and an injunction restraining the defendant from enforcing the statute. *Id.* at 120.

13. In reaching its decision, the Court considered the positions of several groups including the American Medical Association, the American Public Health Association, and the American Bar Association.

14. *Id.* at 153.

rights include the right to choose an abortion, the Court emphasized that this right is not unlimited.<sup>15</sup> The Court stated that "the privacy right involved . . . cannot be said to be absolute."<sup>16</sup> The right to choose an abortion "must be considered against important state interest in regulation."<sup>17</sup> The Court explained that fundamental rights may be regulated by the state if: (1) the regulation is justified by a compelling state interest;<sup>18</sup> and (2) if the regulation is narrowly drawn to express only the legitimate state interest that is involved.<sup>19</sup>

The Court recognized that the state may have a compelling interest in the health of the mother during her pregnancy. The Court, however, did not believe that this interest became compelling until the fetus could be considered a person. The Court concluded that the fetus did not become a person until the end of the first trimester of pregnancy. Prior to the end of the first trimester, "the fetus, at most, represent[ed] only the potentiality of life."<sup>20</sup> The Court stated that "[f]or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."<sup>21</sup>

In order to clarify its position with respect to the State's ability to regulate abortions, the Court set forth a model for states to follow. The model was based on the theory that a woman's pregnancy is divided into three stages. The model provided that: (1) For the stage prior to approximately the end of the first trimester, the woman, in consultation with her physician, could decide whether to have an abortion; (2) For the stage subsequent to the end of the first trimester, the State could regulate the abortion procedure in ways that reasonably related to

---

15. *Id.*

16. *Id.* at 154.

17. *Id.*

18. *Id.* at 155 (citing *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

19. *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 471, 485 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)).

20. *Id.* at 162.

21. *Id.* at 163.

the mother's health; and (3) For the stage subsequent to viability, the State could regulate the abortion procedure, except where the abortion is necessary for the preservation of the mother's life.<sup>22</sup>

Although the Court in *Roe* attempted to set forth a straightforward model "against which all burdensome abortion restrictions . . . were to be compared,"<sup>23</sup> *Roe* created tremendous controversy<sup>24</sup> and left many questions unanswered.<sup>25</sup> Two important questions that *Roe* did not address were whether and to what extent did the *Roe* model apply to minors.

After *Roe*, many states enacted statutes which limited a minor's ability to obtain an abortion. Some of these statutes required that a minor's parents be notified as a condition to abortion. Other statutes required parental consent. These statutes seemed to contradict *Roe* because they did not follow the model set forth in *Roe*. However, it was not until three years after *Roe* that the Supreme Court addressed the constitutionality of parental consent statutes.

## B. SUPREME COURT CASES WHICH ADDRESS STATUTES REQUIRING PARENTAL CONSENT TO ABORTION

The Supreme Court first addressed the constitutionality of a state's right to require a minor to obtain parental consent to abortion in *Planned Parenthood v. Danforth*.<sup>26</sup> *Danforth* in-

---

22. See Wardle, "Time Enough": *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881 (1989). (Wardle states that, "while *Webster* hardly constitutes a ringing endorsement of the *Roe* abortion privacy doctrine (unless the ring is a death knell), the hard core of that doctrine '[f]or today, at least, . . . stand[s] undisturbed.'" *Id.* at 907 (citing *Webster v. Reproductive Health Service*, 109 S. Ct. 3040, 3079 (1989)).

23. L. WARDLE, *THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES* xii (1981).

24. Since *Roe*, it is estimated that approximately 19 million legal abortions have been performed in the United States. Between 1973 and 1982, the number of abortions performed more than doubled from 744,6000 to 1,557,900. P. SHEERAN, *supra* note 10, at 14.

25. L. WARDLE, *supra* note 23, at xiii (stating that since *Roe*, "more than 150 reported opinions dealing with substantive abortion issues have been rendered by the federal courts, including more than 100 reported district court opinions, 45 recorded court of appeals decisions, and a dozen additional Supreme Court opinions." *Id.*).

26. 428 U.S. 52 (1975).

volved a Missouri statute which set forth, *inter alia*,<sup>27</sup> a parental consent provision which required unmarried minors to obtain parental consent as a condition to abortion, unless the abortion was certified by a physician as necessary in order to preserve the life of the mother.<sup>28</sup> Thus, in the absence of parental consent or life threatening circumstances, an unmarried minor would be denied an abortion.

The appellants challenged the statute on the ground that the result “[i]s the ultimate supremacy of the parents’ desires over those of the minor child, the pregnant patient.”<sup>29</sup> The appellees, on the other hand, contended that “a State’s permitting a child to obtain an abortion without the counsel of an adult ‘who has responsibility or concern for the child would constitute an irresponsible abdication of the State’s duty to protect the welfare of minors.’ ”<sup>30</sup> The district court reasoned that the State had a compelling interest “in safeguarding the authority of the family relationship.”<sup>31</sup> On that basis, it upheld the constitutionality of the parental consent provision. On direct appeal, the Supreme Court reversed the district court’s determination. In reaching its decision, the Court reasoned that the Missouri statute was a “blanket” provision amounting to an absolute veto power “over the decision of the physician and his patient to terminate the patient’s pregnancy.”<sup>32</sup> The Court declared the statute to be unconstitutional on the grounds that “the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto” over such a decision.<sup>33</sup>

In reaching its decision the Court reaffirmed prior Supreme Court decisions defining the constitutional rights of minors. “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.

---

27. The Missouri statute also defined viability, required women to submit written certification of consent prior to an abortion, required spousal consent, prohibited saline amniocentesis, required physicians to maintain records and reports on abortions, and imposed an additional standard of care on physicians to preserve the life of the fetus. *Id.* at 58.

28. *Id.* at 72.

29. *Id.* at 73 (quoting Brief for Appellants at 93).

30. *Id.* at 72-73 (quoting Brief for Appellee Danforth at 42).

31. *Id.* at 73 (quoting *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1370 (E.D. Mo. 1975)).

32. *Id.* at 74.

33. *Id.*

Minors, as well as adults, are protected by the Constitution and possess constitutional rights."<sup>34</sup> Nevertheless, neither the constitutional rights of minors nor adults are unlimited.<sup>35</sup> Furthermore, "the State has somewhat broader authority to regulate the activities of children than adults."<sup>36</sup> The standard for restricting the constitutional rights of adult women to seek and obtain an abortion is set forth in *Roe*.<sup>37</sup> An adult woman's right to choose an abortion can be limited if supported by a *compelling state interest*.<sup>38</sup> However, because of the State's "broader authority" over the activities of minors,<sup>39</sup> the Court in *Danforth* applied a lower level of scrutiny to determine whether a minor's constitutional right to choose an abortion was violated by the parental consent requirement. The State was not required to demonstrate the compelling state interest which is required to support a restriction of the constitutional rights of adults. Instead, the State had to show a *significant state interest* in conditioning a minor's right to choose an abortion on the consent of a parent.

One interest proposed as being sufficient to justify limitations on a minor woman's right to obtain an abortion was the State's interest in safeguarding the family unit and parental authority.<sup>40</sup> The Court found that the statute did not serve those

---

34. *Id.* (citing *Breed v. Jones*, 421 U.S. 519 (1975)(protections against double jeopardy apply to juvenile court proceedings); *Goss v. Lopez*, 419 U.S. 565 (1975)(school disciplinary proceedings must respect due process); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)(protected the freedom of speech of school children); *In re Gault*, 387 U.S. 1 (1967) (juveniles being tried in juvenile court proceedings have a right to many of the procedural protections of due process)). In *Danforth*, the Court operates under the assumption that the constitutional right to privacy, which includes the right to choose an abortion, extends to minors. However, the Court never addresses this issue nor provides any support for this assumption.

35. See *Roe*, 410 U.S. at 154. The Court in *Danforth* stated that "[*Roe*] emphatically rejected . . . the proffered argument that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Danforth*, 428 U.S. at 60 (citing *Roe*, 410 U.S. at 153).

36. *Danforth*, 428 U.S. at 74 (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); *Ginsberg v. New York*, 390 U.S. 629 (1968)).

37. *Roe*, 410 U.S. 113.

38. *Id.* at 155 (citing *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

39. *Danforth*, 425 U.S. at 75 (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); *Ginsberg v. New York*, 390 U.S. 629 (1968)).

40. *Danforth*, 428 U.S. at 75. The district court held that the State's interest in safeguarding the family unit and parental authority has a "*compelling basis* for allowing



interests. First, "providing a parent with absolute power to overrule a determination, made by the physician and his [or her] minor patient, to terminate the patient's pregnancy" will not strengthen the family unit.<sup>41</sup> Second, parental authority and control is not enhanced by a parent's veto power "where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."<sup>42</sup> Permitting parents to override the young woman's decision would only worsen the situation. Thus, while the State may have had a significant interest in safeguarding the family unit and parental authority, it failed to show how the blanket parental consent requirement, which granted the parent an absolute veto power over the pregnant minor's decision, promoted those interests. In the final analysis, the Court refused to allow the interests of the parents to outweigh those of the minor by stating that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."<sup>43</sup>

In *Bellotti v. Baird*,<sup>44</sup> ("*Bellotti (II)*") the Court reaffirmed the position taken by *Danforth* and concluded that where a State enacts a parental consent statute, the State must also provide an alternative proceeding for minors who do not want parental involvement. The Court found that an alternative proceeding would avoid the harshness of an absolute veto power as discussed in *Danforth* and strike a balance between the minor's right to privacy and the interests of the State in protecting minors. Thus, the Court in *Bellotti (II)* had to determine what type of procedure should be afforded to minors who wish to exercise their right to choose an abortion free from parental consent.

The Court held that the alternative proceeding must meet the following guidelines. The minor must be entitled to show:

---

regulation of a minor's freedom to consent to an abortion." *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1370 (E.D. Mo. 1975)(emphasis added).

41. *Danforth*, 428 U.S. at 75.

42. *Id.*

43. *Id.*

44. 443 U.S. 622 (1979). The Supreme Court first heard *Bellotti* in 1976. See *Bellotti v. Baird*, 428 U.S. 132 (1976). The case was argued at the same time as the *Danforth* case, but *Bellotti (I)* was remanded and reached the Supreme Court again in 1979.

“(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.”<sup>45</sup> In addition, the required proceeding “must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.”<sup>46</sup>

The Court noted that a refusal to allow a minor the right to participate in the decision to have an abortion could have “grave and indelible” consequences.<sup>47</sup> Unlike a decision to marry, which may be postponed by a minor until she reaches the age of majority, the Court stated that a pregnant minor cannot postpone her decision to have an abortion. Though a minor should be allowed to participate in the decision making process, the Court recognized that there could be instances in which an abortion may not be in the best interest of the minor. Therefore, the Court concluded that the possibility of situations in which a decision to have an abortion would be detrimental to the minor justified a requirement that the minor obtain either parental or judicial authorization for an abortion.

The *Bellotti (II)* Court recognized that such a proceeding would place additional burdens on minors than those placed on adults who choose abortions. Such a distinction, as noted in *Danforth*, indicates that the privacy rights of minors may be treated differently than those of adults. However, the Court justified the added burden by distinguishing the constitutional rights of minors from those of adults on three grounds: “[1] the peculiar vulnerability of children; [2] their inability to make critical decisions in an informed, mature manner; and [3] the importance of the parental role in child rearing.”<sup>48</sup> The Court stated that “[d]uring the formative years of childhood and ado-

---

45. *Id.* at 643-44.

46. *Id.* at 644. The judicial bypass procedure in *Bellotti (II)* was held unconstitutional because the statute required that a parent must be given notice of any judicial proceedings brought by the minor to obtain the abortion. The Court held that this requirement would impose an undue burden on minors. *Id.* at 646-47.

47. *Id.* at 642.

48. *Id.* at 634.

lescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”<sup>49</sup> Therefore, because many minors are unable to make crucial decisions, the Court concluded that “[s]tates validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences.”<sup>50</sup>

The Court applied the requirements set forth in *Bellotti (II)* to invalidate a judicial bypass procedure in *Akron v. Akron Center for Reproductive Health, Inc.*<sup>51</sup> This case involved a city ordinance “prohibiting a physician from performing an abortion on a minor pregnant woman under the age of 15 [sic] unless he obtains ‘the informed written consent of one of her parents or her legal guardian’ or unless the minor obtains ‘an order . . . that the abortion be performed or induced.’”<sup>52</sup> The Court stated that the statute required “both the minor’s informed consent and either parental consent or a court order.”<sup>53</sup> The Court held that the effects of the ordinance were inconsistent with the principles of *Bellotti (II)* where the Court indicated that the purpose of a judicial bypass proceeding was to provide a substitute for parental consent. The Court determined that the ordinance did not provide a sufficient proceeding in which the minor could avoid a parental veto. Pursuant to the ordinance, the minor would be denied an opportunity to demonstrate her maturity. In effect, the ordinance presumes that all minors under the age of fifteen are too immature to make an abortion decision and that an abortion would never be in the best interest of the minor without parental approval.

The Court again applied the standards set forth in *Bellotti (II)* in *Planned Parenthood Association v. Ashcroft*.<sup>54</sup> However, in *Ashcroft*, the Court upheld a Missouri statute that required that a minor obtain parental or judicial consent to an abortion.<sup>55</sup> The Court stated that because the “legal standards with respect

---

49. *Id.* at 635.

50. *Id.*

51. 462 U.S. 416 (1983).

52. *Id.* at 439 (citing Akron Codified Ordinances § 1870.05(B)).

53. *Id.* at 439.

54. 462 U.S. 476 (1983).

55. *Id.* at 481.

to parental-consent requirements are not in dispute,"<sup>56</sup> the issue in *Ashcroft* is one of statutory construction under *Bellotti (II)*. The statute required the Court to consider evidence regarding "the emotional development, maturity, intellect and understanding of the minor,"<sup>57</sup> as well as any other evidence that would be "useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor."<sup>58</sup> The Court held that the statute was constitutional under *Bellotti (II)* because the statute provided an alternative proceeding in which the minor could avoid an absolute veto and avoid parental involvement.

The Court also upheld the parental notification and consent statute in *Ohio v. Akron Center for Reproductive Health*.<sup>59</sup> The statute required the minor to file a complaint in the juvenile court stating, among other things, that "she has sufficient maturity and information to make an intelligent decision whether to have an abortion without . . . notice, or that one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her, or that notice is not in her best interest."<sup>60</sup> The minor would be required to prove that she possessed sufficient maturity by clear and convincing evidence, and a guardian ad litem and an attorney would be appointed by the court to represent the minor and to protect her anonymity.

The statute further required that the juvenile court hold the hearing as soon as possible, but not later than the fifth business day after the complaint is filed. The failure to render a decision immediately after the hearing would result in constructive authorization for the minor to obtain an abortion.

The Court upheld the Ohio statute because it satisfied the requirements of *Bellotti (II)*.<sup>61</sup> First, the statute permitted the

56. *Id.* at 490

57. *Id.* at 479, n.4 (citing MO. REV. STAT. § 188.028 2(3)).

58. *Id.*

59. 110 S. Ct. 2972 (1990).

60. *Id.* at 2977. The minor must also state in the complaint: "(1) that she is pregnant; (2) that she is unmarried, under 18 years of age, and unemancipated; (3) that she desires to have an abortion without notifying one of her parents; . . . and (4) that she has or has not retained an attorney." *Id.*

61. Several justices dissented in *Ohio v. Akron*. Justice Blackmun, with whom Jus-

## 602 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 21:591

minor to show that she possessed sufficient maturity to make the decision. Second, where the minor was unable to demonstrate sufficient maturity, the statute allowed the minor to show that the abortion was in her best interest. Third, the procedure was required to be conducted in a manner that would assure the minor's anonymity. Finally, the bypass procedure would be conducted expeditiously or, more specifically, within five business days after the complaint was filed.

*Ohio v. Akron* indicates that since *Bellotti (II)*, the requirements for determining the constitutionality of parental consent statutes are clear. A statute must permit the minor to demonstrate her maturity or show an abortion is in her best interests. Therefore, parental consent statutes must be analyzed on a case-by-case basis under the requirements set forth in *Bellotti (II)*.

The Supreme Court cases that have considered the issue of parental consent statutes have indicated that under the federal constitution a minor's right to privacy is more narrowly interpreted than that of adults. Although adult women must adhere to the trimester guidelines set forth in *Roe*, minors who seek abortions may, constitutionally, have the additional burden of seeking parental or judicial consent.

### C. CALIFORNIA'S PARENTAL CONSENT PROVISION PURSUANT TO THE SUPREME COURT CASES

Although "[a]ny attempt to analyze the constitutionality of parental consent statutes is difficult because of the intensely personal, conflicting constitutional interest involved,"<sup>62</sup> California Health and Safety Code Section 25958 ("Section 25958")<sup>63</sup>

---

tice Brennan and Justice Marshall joined, stated in the dissent that "[t]he challenged provisions of the Ohio statute [were] merely 'poorly disguised elements of discouragement for the abortion decision.'" *Id.* at 2985 (citing *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 763 (1986)).

62. L. WARDLE, *supra* note 23, at 162.

63. California Health & Safety Code § 25958 states that:

- (a) Except in a medical emergency requiring immediate medical action, no abortion shall be performed upon an unemancipated minor unless she first has given her written consent to the abortion and also has obtained the written consent of one of her parents or legal guardian.
- (b) If one or both of an unemancipated, pregnant minor's par-

presents relatively little difficulty in analysis under the Su-

---

ents or her guardian refuse to consent to the performance of an abortion, or if the minor elects not to seek the consent of one or both of her parents or her guardian, an unemancipated pregnant minor may file a petition with the juvenile court. If, pursuant to this subdivision, a minor seeks a petition, the court shall assist the minor or person designated by the minor in preparing the petition and notices required pursuant to this section. The petition shall set forth with specificity the minor's reasons for the request. The court shall ensure that the minor's identity is confidential. The minor may file the petition using only her initials or a pseudonym. An unemancipated pregnant minor may participate in the proceedings in juvenile court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel upon request. The hearing shall be set within three days of the filing of the petition. A notice shall be given to the minor of the date, time, and place of the hearing on the petition.

(c) At the hearing on a minor's petition brought pursuant to subdivision (b) for the authorization of an abortion, the court shall consider all evidence duly presented, and order either of the following:

(1) If the court finds that the minor is sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, and that the minor has, on that basis, consented thereto, the court shall grant the petition.

(2) If the court finds that the minor is not sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, the court shall then consider whether performance of the abortion would be in the best interest of the minor. In the event that the court finds that the performance of the abortion would be in the minor's best interest, the court shall grant the petition ordering the performance of the abortion without consent of, or notice to, the parents or guardian. In the event that the court finds that the performance of the abortion is not in the best interest of the minor, the court shall deny the petition.

Judgment shall be entered within one court day of submission of the matter.

(d) The minor may appeal the judgment of the juvenile court by filing a written notice of appeal at any time after the entry of the judgment. . . .

(e) No fees or costs incurred in connection with the procedures required by this section shall be chargeable to the minor or her parents . . . .

(f) It is a misdemeanor, punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the county jail of up to 30 days, or both, for any person to knowingly perform an abortion on an unmarried or unemancipated minor without complying with the requirements of this section.

CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1989).

preme Court cases because California's parental consent statute strictly adheres to the guidelines set forth in *Danforth* and its progeny. Consistent with *Danforth*, California's statute does not impose an absolute veto power which may be exercised by someone other than the pregnant minor and her physician. The statute provides that if the minor's parents refuse to grant their consent, the minor may file a petition with the juvenile court for a hearing on whether she may avoid the parental consent requirement. The statute states that "[i]f one or both of an unemancipated, pregnant minor's parents . . . refuse to consent to the performance of an abortion, . . . an unemancipated pregnant minor may file a petition with the juvenile court."<sup>64</sup> By providing the minor with an alternative proceeding, California has satisfied the requirements of *Danforth* because no one has an absolute veto power over the minor's abortion decision.

However, the sufficiency of California's judicial bypass procedure must be examined under the requirements set forth in *Bellotti (II)*. First, as noted earlier, *Bellotti (II)* requires that the minor have an opportunity to demonstrate that she is mature enough to decide independently to have an abortion. California's statute provides that if the court finds that the minor is mature and informed enough to make the decision on her own, the petition for an abortion shall be granted.<sup>65</sup> By providing the minor with an opportunity to demonstrate her maturity to obtain an abortion without parental consent, the first requirement is met.

Second, *Bellotti (II)* requires that the statute protect the rights of those minors who would be unable to demonstrate sufficient maturity. Section 25958 satisfies this requirement because it provides that if the court finds that the minor is not mature enough to make the decision on her own, the court will consider whether an abortion would be in her best interest.

Third, *Bellotti (II)* requires that the proceeding ensure the minor's anonymity. Section 25958 states that the minor may file the petition using only her initials or a pseudonym. Fourth, the judicial procedure under Section 25958 would satisfy the re-

---

64. *Id.* at § 25958(b).

65. *Id.*

quirement that the proceeding be conducted expeditiously because the statute states that the hearing will be set within three days from the date the petition is filed.

Similar to the provision in *Ohio v. Akron*, under Section 25958, the minor may be appointed an attorney to represent her during the proceeding. In addition, the California statute provides that the court will assist the minor in preparing the necessary petitions.

Although Section 25958 satisfies *Bellotti II*, two fundamental questions should also be addressed when evaluating the constitutionality of parental consent statutes: (1) whether the state has a significant interest in requiring parental consent; and (2) whether the parental consent statute will likely enhance any significant state interest.<sup>66</sup>

Based on California's legislative history, California enacted Section 25958 because California had an interest in protecting minors. The California legislature found that:

[1] the medical, emotional, and psychological consequences of an abortion are serious and can be lasting, particularly when the patient is an immature minor; [2] the capacity to become pregnant and the capacity for exercising mature judgment concerning the wisdom of an abortion are not logically related; [3] minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences of their actions; [4] parents ordinarily possess information essential to a physician's exercise of his or her best medical judgment concerning a minor child; and [5] parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention subsequent to her abortion.<sup>67</sup>

Each of California's legislative findings addresses some type of concern for the welfare of the minor. These findings suggest

---

66. L. WARDLE, *supra* note 23, at 169.

67. Historical Note, Cal. Civ. Code § 34.5 (West Supp. 1990)(quoting Section 1, Stats. 1987, c. 1237).



that California enacted its parental consent statute because it had an interest in protecting minors from their own immaturity. As one authority states, “[l]ittle discussion is needed to illustrate that the state interest in protecting minors against their own immaturity is a significant state interest.”<sup>68</sup> Courts have repeatedly recognized that a state has a significant interest in protecting minors.<sup>69</sup>

California’s parental consent statute is also likely to further the State’s interest in protecting minors. The purpose of California’s parental consent statute is to protect minors from decisions based on immaturity and lack of experience. Therefore, by requiring parental involvement, the State is assured of adult participation in the decision process. The statute assumes, however, that the adult is capable of offering mature guidance to the minor. Because Section 25958 strictly complies with the Supreme Court cases and because California has a legitimate interest in protecting minors, it is likely that California’s statute would be upheld under federal law.

#### D. THE IMPLICATIONS OF THE EXPRESS RIGHT TO PRIVACY CONTAINED IN CALIFORNIA’S STATE CONSTITUTION

Although California’s parental consent statute would likely be upheld under federal law, Section 25958 seems to violate California state law. Unlike federal law, which distinguishes the rights of minors from those of adults, California does not distinguish among the rights of its citizens. The California Constitution contains an express right to privacy provision that applies equally to all California residents. Thus, because the rights of minors may not be distinguished from those of adults in California, a minor may not have additional burdens placed upon her decision to have an abortion than those placed on an adult woman.<sup>70</sup>

---

68. L. WARDLE, *supra* note 23, at 170.

69. *Danforth*, 428 U.S. 52.

70. Two law journal arguments have been written regarding the constitutionality of California’s parental consent statute. Both authors concluded that Section 25958 violated the California Constitution. See Comment, *Aborting the Rights of Minors? Questioning the Constitutionality of California’s Parental Consent Statute* 19 Pac. L.J. 1487 (1988)(concluding that California’s parental consent statute violates both the United States and the California Constitutions); Comment, *Eroding Roe: The Politics and Con-*

The right to privacy guaranteed under the California Constitution has been more broadly interpreted than the federal right to privacy. Article I, Section 1 provides that “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoining and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and *privacy*.”<sup>71</sup>

California courts have emphasized that “the rights defined [in the California Constitution] are not mirror images of their federal counterparts.”<sup>72</sup> Based on the concept of federalism, “the California Constitution is, and always has been, a document of independent force.”<sup>73</sup> The “rights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution.”<sup>74</sup> As a result, California courts should be “informed but untrammled by the United States Supreme Court’s reading of parallel federal provisions.”<sup>75</sup> Accordingly, California state courts may declare a state statute unconstitutional under state law, notwithstanding the fact that the statute would be upheld under federal law.

In this instance, California’s parental consent statute appears to be unconstitutional under the California Constitution for two reasons: (1) California’s right to privacy does not distinguish between the rights of adults and minors;<sup>76</sup> and (2) in California, the appropriate standard to determine the constitutionality of the parental consent statute should be a compelling state interest, which the State is unlikely to demonstrate.

---

*stitutionality of California’s Parental Consent Abortion Statute* 20 Pac. L.J. 1167 (1989).

71. Cal. Const. Art. I, §1 (West 1983)(emphasis added).

72. *American Academy of Pediatrics v. Van de Kamp*, 214 Cal. App. 3d 831, 839, 263 Cal. Rptr. 46, 49 (1989)(citing *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 261, 625 P.2d 779, 1099, 172 Cal. Rptr. 866 (1981)).

73. *People v. Brisendine*, 13 Cal. 3d 528, 549-50, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975).

74. Cal. Const. Art. I, § 24 (West 1983).

75. *American Academy of Pediatrics*, 214 Cal. App. 3d 831, 839, 263 Cal. Rptr. 46, 49 (1989)(citing *Allen v. Superior Court*, 18 Cal. 3d 520, 525, 557 P.2d 65, 134 Cal. Rptr. 774 (1976)).

76. The express right to privacy clause was added in 1972 when California voters passed an amendment to the state constitution to guarantee the right to privacy to all California citizens.

California law has long recognized that the right to privacy extends to the decision whether to undergo childbirth.<sup>77</sup> This right to privacy, which includes the right to choose an abortion, makes no distinction between the rights of minors and those of adults.<sup>78</sup> The California privacy provision expressly applies to "all people" which includes minors.

Several California court decisions reflect that the general concepts of privacy under the California Constitution readily apply to minors.<sup>79</sup> These courts have held that minors may bring a tort action for invasion of privacy,<sup>80</sup> enjoy a state constitutional privacy right against unreasonable searches and seizures,<sup>81</sup> and have a similar right against school officials standing in loco parentis.<sup>82</sup>

In *American Academy of Pediatrics v. Van De Kamp*,<sup>83</sup> the California court stated that the rights of minors may not be distinguished from those of adults in California and that the state must still show a compelling state interest where privacy rights are burdened.<sup>84</sup> In *American Academy of Pediatrics*, the court expressed doubt with respect to the constitutionality of a parental consent statute in California. The plaintiff contended that California's parental consent statute was unconstitutional under the California Constitution. The court considered whether the superior court had abused its discretion by granting a preliminary injunction preventing the implementation of California's parental consent to abortion statute.

Although the court did not rule on the merits of the case, one of the factors in determining whether the lower court abused its discretion was whether the plaintiff was likely to succeed on the merits. Thus, the court discussed the merits of the

---

77. 214 Cal. App. 3d at 842, 263 Cal. Rptr. at 51.

78. *Id.* at 844, 263 Cal. Rptr. at 53.

79. See *Planned Parenthood Affiliates v. Van de Kamp*, 181 Cal. App. 3d 245, 277, 226 Cal. Rptr. 361, 378 (1986).

80. *Vescovo v. New Way Enters.*, 60 Cal. App. 3d 582, 587-88, 130 Cal. Rptr. 86, 89 (1976).

81. *In re Scott K.*, 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671 (1979).

82. *In re William G.*, 40 Cal. 3d 550, 560-61, 709 P.2d, 1287, 1292-93, 221 Cal. Rptr. 118, 123-24.

83. 214 Cal. App. 3d 831, 263 Cal. Rptr. 46 (1989).

84. *Id.* at 844, 263 Cal. Rptr. at 53.

case and held that the lower court did not abuse its discretion in granting the injunction because the plaintiff was likely to succeed on the merits of the case.

In reaching its decision to grant the injunction, the court considered several of the plaintiff's arguments with respect to the unconstitutionality of a parental consent statute in California. The court stated that "California's Constitution . . . does not distinguish between the right of privacy of adults and children; it provides that the right of privacy is guaranteed to all persons."<sup>85</sup> Because the rights of minors are not distinguished from those of adults in California, the court stated that "the test remains whether the burden on the privacy right is justified by a compelling state interest."<sup>86</sup> The court rejected the argument that a lower level of scrutiny should be applied to minors.<sup>87</sup> The court recognized that federal courts may apply a lower level of scrutiny, but concluded that the federal courts reached this determination based on the way in which they interpreted the United States Constitution. Unlike the United States Constitution, California's Constitution has been interpreted differently.

The court stated that where a regulation will unequally affect the fundamental rights of persons, it must meet a three-part test.<sup>88</sup> First, the State must prove that the imposed conditions relate to the purpose of the legislation.<sup>89</sup> Second, the utility of the conditions must manifestly outweigh any resulting impairment of constitutional rights.<sup>90</sup> Third, the State must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn narrowly.<sup>91</sup>

California is likely to be able to show that the parental consent statute relates to the purpose of the legislation. As stated

---

85. *Id.*

86. *Id.*

87. *Id.* (citing *Rider v. Superior Court*, 199 Cal. App. 3d 278, 282-83, 244 Cal. Rptr. 770, 772-73 (1988)). In *Rider*, the court applied a compelling state interest test when considering the privacy rights of a fourteen year old alleged rape victim.

88. *American Academy of Pediatrics*, 214 Cal. App. 3d at 847, 263 Cal. Rptr. at 54. This three part test was established in *Bagley v. Washington Township Hospital Dist.*, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).

89. *American Academy of Pediatrics*, 214 Cal. App. 3d at 847, 263 Cal. Rptr. at 54.

90. *Id.*

91. *Id.*

earlier, the purpose of the legislation is to protect minors from their own immaturity. The statute relates to that purpose because the statute ensures adult involvement.

However, California may have greater difficulty showing that the usefulness or benefit of a parental consent requirement manifestly outweighs the impairment of a minor's right to choose an abortion. In *American Academy of Pediatrics*, there was evidence regarding the effect of an abortion and the effect of an inability to decide to procure an abortion. There was evidence that reducing the minor's ability to decide increased stress and depression and that most minors were frightened of court proceedings. Other significant evidence included that: some minors will choose to undergo illegal abortions rather than reveal their pregnancies to their parents or to a judge; many minors are correct in their assessment of the negative results that would occur from disclosure; many minors will delay their decisions because of difficulty in access to the court; and that most minors are aware of their medical histories and do not need the assistance of an adult.

After reviewing the evidence, the court stated that the three part test was largely a factual matter that they would not consider. The court concluded that an order issuing an injunction would not be reversed because "the superior court reasonably could have believed that there [was] a likelihood that the [State would] not meet their burden of proving at trial that the discrimination inherent in [the parental consent statute] is justifiable."<sup>92</sup> *American Academy of Pediatrics* indicates that at least one California court has considered the potential unconstitutionality of Section 25958.

### III. CONCLUSION

In summary, California courts are independently responsible for protecting the rights of its citizens.<sup>93</sup> This independent

---

92. *Id.* at 55.

93. *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 261, 625 P.2d 779, 783, 172 Cal. Rptr., 866, 870 (1981)(citing *People v. Brisendine*, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329).

responsibility is likely to have been the force that prompted California to adopt an express right to privacy clause. The decision to adopt an express right to privacy distinguishes California from federal law in two significant respects: (1) California citizens are afforded more protection because their right to privacy is interpreted more broadly; and (2) California has a greater obligation to its citizens when enacting legislation.

This greater obligation means that California, in many instances, is more limited in its ability to enact regulations, as seen in the case of parental consent statutes. Notwithstanding the fact that California's parental consent statute may be considered valid under the United States Constitution, California must hold itself to the higher standard which it has adopted under the California Constitution. This higher standard demands that minors be afforded the same degree of privacy as adults and that the same degree of scrutiny be applied in determining whether a minor's rights have been violated.