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Robert W. Lucas

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In *Roe v. Wade*, the United States Supreme Court concluded that the right to privacy guaranteed the right of a woman to obtain an abortion. Since this landmark decision by the Court, the right of a woman to obtain an abortion free from government interference has produced controversy. One aspect of the abortion controversy is the ability of pregnant minors to receive abortions free from parental and governmental interference. Some states require parental consent before a minor may obtain an abortion. Other states require prior parental notification. These efforts to restrict the rights of minors to obtain

2. *Roe* and the companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), are the landmark cases on abortion handed down by the United States Supreme Court. These cases establish that a woman has a fundamental right to make an abortion decision, without interference by the state, during the first trimester of pregnancy. *Roe*, 410 U.S. at 162-64. Additionally, prior to the point in time when the fetus becomes viable, the state may only place reasonable regulations on the abortion procedure. *Id.* at 163. Only after the point in time when the fetus becomes viable does the state have a compelling state interest in the preservation of the life of the fetus. *Id.* at 163.
an abortion have met with varying degrees of success when challenged in the courts.\

Under Assembly Bill 2274 (A.B. 2274), a pregnant minor in California must obtain parental consent or permission of the juvenile court before obtaining an abortion. The passage of A.B. 2274, however, raises three constitutional issues. First, the parental consent statute may violate the federal constitutional right to privacy. Second, A.B. 2274 may unduly burden the constitutionally protected rights of mature, informed minors and of those minors for whom an abortion is in their best interest. Third, the California legislation may violate the express right to privacy found in the California Constitution.

This comment will discuss the constitutional ramifications of A.B. 2274 under both the United States and California Constitutions. Initially, this comment will review United States Supreme Court decisions addressing the rights of states to regulate abortion for minors. Next, this comment will examine the purposes and the statutory language of A.B. 2274. After exploring the background of A.B. 2274, the constitutionality of the California legislation under the United States Constitution will be examined. In this section, A.B. 2274 will be analyzed to determine whether the legislation violates the federal right to privacy. Next, this section will analyze whether A.B. 2274 unduly burdens the constitutionally protected rights of mature and informed minors or minors whose best interests warrant an abortion. Finally, this comment will analyze the California legislation under the California Constitution. This comment will conclude that the California parental consent statute violates both the United States and the California Constitutions.

8. See infra notes 78-121 and accompanying text.
9. See infra notes 122-71 and accompanying text.
10. See infra notes 172-211 and accompanying text.
11. See infra notes 17-52 and accompanying text.
12. See infra notes 53-68 and accompanying text.
13. See infra notes 78-171 and accompanying text.
14. See infra notes 78-121 and accompanying text.
15. See infra notes 122-71 and accompanying text.
16. See infra notes 172-211 and accompanying text.
BACKGROUND OF A.B. 2274

A. United States Supreme Court Decisions Regulating Abortion

Prior to 1973, women could obtain an abortion in California only if a physician determined that the pregnancy created a substantial risk of impairing the prospective mental or physical health of the mother, or the pregnancy resulted from rape or incest. In 1973, the United States Supreme Court ruled in Roe v. Wade that the fundamental right to privacy protected by the United States Constitution included the right of a woman to seek an abortion during the first trimester of pregnancy. The Roe Court found unconstitutional a provision in the Texas Penal Code that made a crime of procuring or attempting an abortion except for the purpose of saving the life of the mother. By invalidating this statute, the Roe Court proclaimed that the fundamental right to privacy is broad enough to encompass a decision by a woman to terminate her pregnancy.

The United States Supreme Court first addressed the right of a minor to have an abortion in Planned Parenthood v. Danforth. Danforth involved a challenge to a Missouri statute that required an unemancipated minor to have the written consent of a parent or guardian before obtaining an abortion. The Court first recognized

20. Id. at 164. See id. at 117 n.1 (quoting TEXAS PENAL CODE art. 1191-1194, 1196, recodified as TEXAS REV. CIV. STAT. ANN. art. 4512.1-4512.4, 4512.6 (Vernon 1984)) (then existing statutes that made procuring or attempting an abortion a crime unless the purpose of the abortion was to save the life of the mother).
21. Roe, 410 U.S. at 153. See U.S. CONST. amend. XIV, 1. While the United States Constitution does not expressly provide a right to privacy, the right to privacy has long been recognized based on the concept of personal liberty expressed in the fourteenth amendment. Roe, 410 U.S. at 152. See also CAL. CONST. art. I, § 1 (containing an express inalienable right to privacy).
23. Danforth, 428 U.S. at 72-75. See Act of June 14, 1974, § 3(4), 1974 Mo. Laws 809, 810. The statute required "the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother." Id.
that the right to privacy discussed in *Roe* extended to minors as well as to adults. 24 Nevertheless, the *Danforth* Court affirmed that the states have a somewhat broader authority to regulate the activities of minors as opposed to the activities of adults. 25 The *Danforth* Court concluded that no significant state interest could justify a blanket provision requiring parental consent before the minor could terminate her pregnancy. 26 As a result, the *Danforth* Court held the Missouri provision unconstitutional. 27

The United States Supreme Court further commented on the rights of minors to obtain abortions free from governmental interference in *Bellotti v. Baird (Bellotti II).* 28 The Supreme Court in *Bellotti II* reviewed a Massachusetts statute that required consent of the minor and both her parents before she could obtain an abortion. 29 Regardless of the minor’s maturity, if one or both of her parents refused consent, the minor could seek a judicial order showing that the best interest of the minor warranted the abortion. 30 According to the *Bellotti II* Court, the constitutional right to privacy and the unique nature of the abortion decision required a state to act with particular sensitivity when trying to foster parental involvement. 31 The Supreme Court, however, split on how to balance the right to privacy of the minor

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24. *Danforth*, 428 U.S. at 74. The Court noted that constitutional rights do not mature and become "magical" only upon reaching the state-defined age of majority. *Id.*

25. *Id.*

26. *Id.* at 74-75. The *Danforth* Court noted that a state does not possess the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the physician-patient decision to terminate the pregnancy of the patient, no matter what reason existed for withholding consent. *Id.* at 74.

27. See *id.* at 75. Any independent interest the parent may have in the abortion decision of the minor is no more weighty than the right of privacy of the competent minor who is mature enough to get pregnant. *Id.*


29. *Bellotti II*, 443 U.S. at 651. See 1974 Mass. Acts ch. 706, at 713. The statute provided in part the following:

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

*Id.* sec. 1, at 713.

30. *Id.*

against the interest of the state in encouraging parental involvement. In a plurality decision, the Supreme Court concluded that a state requiring parental consent must also provide an alternative procedure for the minor to seek authorization for the abortion. The concurring opinion, however, while agreeing that the Massachusetts statute violated the constitutional right to privacy of pregnant minors, disagreed as to the soundness of an alternative procedure.

The United States Supreme Court continued to delineate the ability of minors to seek an abortion without parental involvement in *H. L. v. Matheson*. *Matheson* involved a Utah statute that required a physician to notify, if possible, the parents or guardian of a minor seeking an abortion. The *Matheson* Court, in dicta, reaffirmed the *Bellotti II* conclusion that a state may not constitutionally legislate a blanket unreviewable parental veto power over the ability of a minor to receive an abortion. The Supreme Court in *Matheson* held that a statute requiring mere parental notice does not violate the constitutional rights of an immature, dependent minor. Specifically, the *Matheson* Court held that requiring parental notice is constitutional when the minor is living with and dependent upon her parents, is not emancipated by marriage or otherwise, and has made no claim or showing as to her maturity or relations with her parents.

In 1983, the United States Supreme Court continued to develop the parameters of the rights of a state to regulate the abortion decisions of minors. In *City of Akron v. Akron Center for Reproductive Health*, the Supreme Court struck down a local ordinance that did not expressly create an alternative procedure to allow the minor to

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32. See id. at 651 n.32 (defending the use of the alternative procedure enumerated in the plurality opinion).

33. See id. at 625 (the plurality included Justices Powell, Burger, Stewart, and Rehnquist).

34. Id. at 643. The procedure must ensure that the provision requiring parental consent does not amount to an "absolute and possibly arbitrary veto." Id. at 644.

35. See id. at 652 (Stevens, J., concurring) (the concurring Justices included Stevens, Brennan, Marshall, and Blackmun).

36. Id. at 656 n.4 (Stevens, J., concurring).


38. *Matheson*, 450 U.S. at 414. The Utah statute requires a physician to "notify, if possible, the parents or guardian of a woman upon whom the abortion is to be performed, if she is a minor." *Id.* at 413.


40. Id. The *Matheson* Court distinguished the Utah statute from parental consent statutes on the basis that notice requirements did not functionally give parents a veto power. *Id.* at 411 n.17.

41. Id. at 407, 413.

42. 462 U.S. 416 (1983).
avoid a parental veto. The Court concluded that the Ohio court proceedings available to the minor to petition for waiver of parental consent could not reasonably be construed to create an opportunity for a case-by-case evaluation of the maturity of pregnant minors. Furthermore, the Court ruled that the municipal ordinance failed to provide minors the opportunity to avoid hostile parents by demonstrating maturity.

In Planned Parenthood Association v. Ashcroft, the Court reviewed a Missouri parental consent statute that requires the juvenile court to examine evidence on the emotional development, maturity, intellect, and understanding of the minor for purposes of granting or denying her petition for permission to obtain an abortion absent parental consent. The Ashcroft Court held that a juvenile court deciding whether the minor could obtain an abortion could not deny a petition for good cause without first finding that the minor was not mature enough to make a decision regarding abortion. The Ashcroft Court was aware that if the Missouri statute allowed the juvenile court discretion in denying permission to a minor for any “good cause,” the statute would violate the principles that the United States Supreme Court had set forth. Before exercising any option, however, the juvenile court had to receive evidence on “the emotional development,
maturity, intellect, and understanding of the minor.” Consequently, the Ashcroft Court determined that the Missouri statute was constitutional.

Thus, states may regulate the ability of a minor to obtain an abortion. The difficulty, however, arises in determining what degree of state regulation the United States Supreme Court will find unconstitutional. Because no definite set of statutory guidelines has emerged, states have taken different approaches to drafting such statutes. As a result, the validity of A.B. 2274 remains in question until the issue is judicially resolved.

B. Legislative Purposes of A.B. 2274

The California Legislature enacted A.B. 2274 for the primary purpose of protecting the well-being of minors by encouraging minors to discuss the decision of whether to terminate their pregnancies with their parents. According to the legislature, there are several reasons why California needs a statute to achieve this goal. First, the legislature found that abortions may create serious and long-lasting medical, emotional, and psychological consequences for the minor. Immature minors are particularly susceptible to these consequences. Additionally, the legislature noted that no logical relation exists between the capacity to become pregnant and the capacity for exercising mature judgment concerning the wisdom of the abortion. The legislature stated that minors often lack the ability to make informed choices and to consider both the immediate and long-range consequences of their actions. Furthermore, parents ordinarily possess information

50. Id. See 1979 Mo. Laws 376 (enacting Mo. REV. STAT. § 188.028 2(3)) (providing that the juvenile court must receive evidence on the emotional development, maturity, intellect, and understanding of the minor).
51. Ashcroft, 462 U.S. at 493.
52. See supra notes 3-4 (various state statutes that require either parental notification or parental consent).
53. See 1987 Cal. Stat. ch. 1237, sec. 1, at ___ (while the legislative findings do not explicitly provide this purpose, the general meaning derived from the findings make clear that this is the goal of the legislature).
54. Id. (stating findings of the legislature upon enactment of A.B. 2274).
55. Id. See also H. L. v. Matheson, 450 U.S. 398, 411 (1981) (stating that abortion may create serious and long-lasting medical, emotional, and psychological consequences for the minor).
56. 1987 Cal. Stat. ch. 1237, sec. 1 at ___.
57. Id. See also Matheson, 450 U.S. at 408 (stating that no logical relationship exists between exercising mature judgment and the capacity to become pregnant).
58. 1987 Cal. Stat. ch. 1237, sec. 1, at ___. See also Bellotti v. Baird, 443 U.S. 622, 640 (1979) (stating that minors often lack the ability to make fully informed choices that consider both the immediate and long-range consequences of their actions).
that allows a physician to exercise sound medical judgment when treating a minor child.\textsuperscript{59} Parents who are aware that their minor daughter has received an abortion may better ensure that their daughter obtains adequate post-abortion care.\textsuperscript{60} Thus, the California Legislature enacted A.B. 2274 to address these concerns.

C. The Statutory Language of A.B. 2274

The California Legislature passed A.B. 2274 to regulate the ability of a pregnant minor to obtain an abortion without parental or judicial guidance. A.B. 2274 prohibits an unemancipated\textsuperscript{61} minor\textsuperscript{62} from receiving an abortion unless the minor and one parent gives written consent for the abortion.\textsuperscript{63} If the parent refuses consent or if the minor elects not to seek parental consent, A.B. 2274 enables a minor to bypass the parental consent requirement by petitioning the juvenile court\textsuperscript{64} for an order authorizing the minor to receive the abortion.\textsuperscript{65} The court must authorize the abortion if the assenting minor possesses sufficient maturity and information to make the decision.\textsuperscript{66} Even if

\textsuperscript{59} 1987 Cal. Stat. ch. 1237, sec. 1, at _____. \textit{See also} Matheson, 450 U.S. at 405 (stating that parents ordinarily possess information that allows a physician to exercise sound medical judgment when treating a minor child).
\textsuperscript{60} 1987 Cal. Stat. ch. 1237, sec. 1, at _____.
\textsuperscript{61} \textit{See} Cal. Civ. Code \textsection 62 (West 1982). A minor must have married, been on active duty in the armed forces, or obtain a court declaration in order to be emancipated. \textit{Id. See also id.} \textsection 64 (specifying the procedure to obtain a court declaration of emancipation).
\textsuperscript{62} \textit{See id.} \textsection 25 (a minor is anyone under 18 years of age).
\textsuperscript{64} If a minor chooses to petition, the court must assist the minor or person designated by the minor in preparing the required petition and notices. \textit{Cal. Health \& Safety Code} \textsection 25958(b) (West Supp. 1988). The petition must specify the reasons of the minor for the request. \textit{Id.}
\textsuperscript{65} \textit{Id.} The court must ensure that the identity of the minor is kept confidential. Confidentiality may be accomplished by filing the petition using only the initials of the minor or a pseudonym. The minor may participate in the juvenile court proceedings on her own behalf, and the court may appoint a guardian ad litem for the minor. Furthermore, the court must advise the minor of her right to request court appointed counsel. In addition, the hearing must be set within three days from the filing of the petition. \textit{Id.} No fees or costs incurred in connection with the procedures required by A.B. 2274 will be chargeable to the minor, the parents of the minor, or the legal guardian of the minor. \textit{Id.} \textsection 25958(e).
\textsuperscript{66} \textit{Id.} \textsection 25958(c)(1). \textit{See generally} Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476,
the adolescent does not possess sufficient maturity and information, the court must grant the petition without parental consent or notification if the best interests of the minor warrant the abortion.\(^6\) If the best interests of the minor do not warrant the abortion the court must deny the petition.\(^6\)

**Constitutional Challenges to A.B. 2274**

Several constitutional questions are raised by A.B. 2274. The first challenge to A.B. 2274 is under the federal constitutional right to privacy.\(^6\) While several states require parental consent for a minor to obtain an abortion,\(^7\) no state statute has been worded similarly to the California parental consent statute. The California Legislature has attempted to create a statute based upon United States Supreme Court precedent.

A.B. 2274 may unduly burden the constitutional rights of those minors who are mature and informed or for whom an abortion is in their best interest.\(^7\) The constitutionality of A.B. 2274 may be challenged if the statute is predicated upon the existence of a specific set of facts which no longer exist.\(^7\) The underlying facts and assumptions of A.B. 2274 may not be valid. Consequently, A.B. 2274 may unduly burden the rights of those minors who are mature and informed or for whom an abortion would be in their best interest.\(^7\)

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69. See U.S. CONST. amend. XIV, § 1 (a person may not be deprived of life, liberty or property without due process of law).

70. See supra note 3 (providing a list of states with parental consent statutes).

71. See infra notes 122-71 and accompanying text.


A final challenge to the validity of A.B. 2274 may arise under the California Constitution. Unlike the United States Constitution, the California Constitution guarantees citizens an express right to privacy. The California Supreme Court has interpreted this right to privacy to encompass a broad range of activities. Additionally, the California Constitution guarantees the right to privacy to "all persons," a phrase that includes minors. Consequently, the right to privacy under the California Constitution may protect minors as well as adults seeking an abortion free from state interference.

A. Challenges to A.B. 2274 Under the United States Constitution

1. Right to Privacy

The right to privacy guaranteed by the United States Constitution is a right implied from the federal charter. The right to privacy was first articulated in Griswold v. Connecticut. The Griswold Court drew the substance of the right of privacy from a number of the guarantees in the Bill of Rights. As a result of the enunciation of the right to privacy, Griswold held unconstitutional a statute prohibiting the use of contraceptives by married couples.

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74. CAL. CONST. art. I, § 1.
76. Id. at 278, 226 Cal. Rptr. at 379.
77. See infra notes 198-212 and accompanying text.
78. See Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Douglas suggested that the right of married couples to use contraceptives was found in a penumbra of rights guaranteed in various parts of the Constitution, including the fourth amendment. Id. at 485-86. See generally Clark, Constitutional Sources of the Penumbral Right to Privacy, 19 VILL. L. REV. 833 (1974) (discussing the development of the penumbral theory of the right to privacy).
79. 381 U.S. 479 (1965).
80. Griswold, 381 U.S at 479-486.
81. Id. at 485-86. See Eisenstadt v. Baird, 405 U.S. 438 (1972). In Eisenstadt, the United States Supreme Court expanded Griswold to include unmarried as well as married couples. Id. at 454-55. Eisenstadt involved a Massachusetts statute that prohibited the distribution of contraceptives and information to unmarried persons. Id. at 440-42. Although the Eisenstadt Court noted that in Griswold the right to privacy inhered in the marital relationship, the Supreme Court explained that the marital couple is not an independent entity with a mind and heart of its own. Rather, the association is one of two individuals each with a separate intellectual and emotional makeup. Thus, the Eisenstadt Court concluded that the right to privacy allowed the individual, married or single, to be free from unwarranted governmental intrusion so fundamentally affecting a person as the decision whether to bear children. Id. at 453-54. Consequently, the Eisenstadt Court struck down the Massachusetts statute and expanded the right to privacy
a. Parameters of the Federal Right to Privacy

*Roe v. Wade* brought abortion within the protection of the right of privacy by holding that the right to privacy "was broad enough to encompass the woman's decision whether or not to terminate her pregnancy." The *Roe* Court, however, stated that the right of privacy was not an absolute right. Under *Roe*, any statute that burdens a fundamental right will be upheld if the statute passes a "compelling state interest" test. In order to meet the compelling state interest test, the statute must be narrowly drawn to reflect "only the legitimate state interest at stake."

The United States Supreme Court has also held that procreation decisions of both minors and adults are protected. Thus, the logical conclusion from *Roe* is that state regulation of the decision of the minor to terminate her pregnancy can be justified only by a compelling state interest and only if the regulation is narrowly drawn. This conclusion is further supported by the fact that the *Roe* Court based the right to an abortion on the right to privacy of the individual, not to include unmarried as well as married couples. *Id.* at 454-55. In reaching their conclusion, the *Eisenstadt* Court quoted the concurrence of Justice Jackson in *Railway Express Agency v. New York*, 336 U.S. 106 (1949):

"[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."

*Eisenstadt*, 405 U.S. at 454 (quoting *Railway Express Agency*, 336 U.S. at 112-13 (Jackson, J., concurring)).

82. 410 U.S. 113 (1973).
84. *Id.* at 154-55.
85. *Id.* at 155.
86. *Id.*
87. *See Carev v. Population Services Int'l*, 431 U.S. 678, 693-94 (1977) (neither the state nor the parents of the minor may prevent the distribution of contraceptives to minors because the overriding right to privacy in connection with decisions affecting procreation extends to minors as well as adults). *See also* *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) ("A child, merely on account of his minority, is not beyond the protection of the Constitution."); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *In re Gault*, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). *See generally* *Note, The Minor's Right of Privacy: Limitations on State Action after Danforth and Carey*, 77 COLUM. L. REV. 1216, 1220 n.28 (1977) (providing a survey of the Supreme Court's "ad hoc adjudication" of the various constitutional rights extended to minors).
merely the right to privacy of an adult. According to the Roe Court, the ability of an individual to make an autonomous decision comprised the very nature of the privacy right.

Planned Parenthood v. Danforth, however, distinguished between the extent of the right to privacy for adults and the right to privacy for minors. In Danforth, the Court stated, "Minors, as well as adults, are protected by the Constitution and possess constitutional rights. The Court indeed, however, long has recognized that the state has somewhat broader authority to regulate the activities of children than of adults." Moreover, the Bellotti II Court was in accord with the Danforth Court by refusing to apply the compelling state interest test to state statutes infringing on the right to privacy of minors. More recently, the United States Supreme Court affirmed the approach taken in Bellotti II and Danforth in City of Akron v. Akron Center for Reproductive Health. Consequently, restrictions on the federal constitutional privacy rights of minors will be upheld if the restrictions serve any "significant state interest . . . not present in the case of an adult."

90. Roe, 410 U.S. at 152-56. See Eisenstadt v. Baird, 405 U.S. 438 (1972). The Eisenstadt Court stated that if the right to privacy has any meaning, the right must encompass the right of each individual to remain free from unwarranted governmental intrusion. Id. at 454. See also Warren & Brandeis, 4 Harv. L. Rev. 193 (1980) (the right to privacy is consistently referred to as individual in nature). In essence, the United States Supreme Court in Roe and Eisenstadt was merely echoing Justice Brandeis who described "the right to be let alone" as "the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis expressed a view of politics expounded by John Stuart Mill:

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we don't deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

93. See Bellotti v. Baird, 443 U.S. 622 (1978). Justice Powell, writing for the plurality, recognized the constitutional rights of minors are not on a level equal with those of adults for three reasons. Id. at 634. Those reasons included "the peculiar vulnerability of children; their inability to make critical decisions in an informed and mature manner; and the importance of the parental role in child rearing." Id.
b. Application of the Standard to A.B. 2274

Under A.B. 2274, the articulated interest of the state is to encourage parental involvement in the abortion decisions of their adolescent daughters.96 "Any independent interest"97 that the parent might possess, however, does not outweigh the privacy rights of the minor in the abortion context.98 The burden of demonstrating a connection between the regulation and the asserted state policy is on the state.99 Neither a bare assertion that the burden is connected to a significant state policy,100 nor sentiment or folklore,101 will satisfy this burden.102 The California Legislature attempts to satisfy the burden by basing the language of A.B. 2274 upon the language found in Bellotti II.103 In Bellotti II, a plurality suggested that the Court would uphold a statute as constitutional if the state provided, in addition to parental consent, an alternative procedure for the minor to obtain an abortion.104 The Bellotti II plurality also required the completion of the proceeding with anonymity for the minor and with sufficient expedition to provide an effective opportunity for an abortion.105

The Carey Court stated:

Such lesser scrutiny is appropriate both because of the State's greater latitude to regulate the conduct of children, . . . and because the right of privacy implicated here is "the interest in independence in making certain kinds of important decisions," . . . and the law has generally regarded minors as having a lesser capability for making important decisions.

Id. at 693 n.15 (citations omitted).


97. Danforth, 428 U.S. at 75.

98. Id. In striking a spousal consent requirement, the Danforth Court reasoned:

The obvious fact is that when the wife and the husband disagree on [the abortion] decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.

Id. at 71. Such an analysis is applicable to A.B. 2274 for the minor must bear the child and the responsibility of raising that child. The Danforth Court itself noted that "much of what has been said with respect to the [spousal consent provision] applies with equal force" to the parental consent requirement. Id. at 74.


100. Carey, 431 U.S. at 696.


104. Bellotti, 443 U.S. at 643.

105. Id. at 644.
In a concurring opinion, however, an equal number of justices criticized the constitutionality of such a scheme.\textsuperscript{106} Those justices argued that the Court should not render an advisory opinion on the constitutionality of such a scheme.\textsuperscript{107} An actual statute, rather than a mere outline of a potential statute, may present questions other than those addressed in the plurality decision.\textsuperscript{108} A.B. 2274 which affects pregnant minors seeking abortions may raise such questions.

Since \textit{Bellotti II}, however, the Supreme Court has applied the standards set out by the \textit{Bellotti II} plurality.\textsuperscript{109} Thus, a statute requiring parental consent before a minor may obtain an abortion must also provide an alternative procedure.\textsuperscript{110} Four members of the current Supreme Court, however, continue to adhere to the concurring opinion in \textit{Bellotti II}.\textsuperscript{111} In the Ashcroft dissent, these justices noted that the judicial consent requirements laid out by the \textit{Bellotti II} plurality were not necessary to the case and did not command a majority.\textsuperscript{112} Furthermore, the dissent continued to adhere to the view that any judicial consent statute would suffer from the same flaw the \textit{Danforth} Court identified: it would give a third party an absolute veto over the decision of the physician and his patient.\textsuperscript{113}

A.B. 2274, however, is a scrupulous attempt by the California Legislature to conform with the various opinions of the United States Supreme Court.\textsuperscript{114} By providing the minor with a judicial alternative to the parental consent requirement,\textsuperscript{115} expeditious petition\textsuperscript{116} and appellate review procedures,\textsuperscript{117} and assuring the confidentiality of the

\begin{thebibliography}{99}
\item \textsuperscript{106} The Justices included Stevens, Brennan, Marshall, and Blackmun. \textit{Bellotti II} 443 U.S. at 652 (Stevens, J., concurring).
\item \textsuperscript{107} Id. at 656 n.4 (Stevens, J., concurring).
\item \textsuperscript{108} Id. Justice Stevens wrote, "That irony makes me wonder whether any legislature concerned with parental consultation, would, in the absence of today's advisory opinion, have enacted a statute comparable to one my Brethren have discussed." Id.
\item \textsuperscript{109} See Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 490-91 (1983) (stating that the relevant legal standards with respect to abortion are not in dispute); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 439-40 (1983) (requiring the state to provide an alternative procedure).
\item \textsuperscript{110} See supra notes 104-05 and accompanying text (discussing the requirements of the \textit{Bellotti II} plurality).
\item \textsuperscript{111} See \textit{Ashcroft}, 462 U.S. at 494 (the Justices include Brennan, Marshall, Blackmun, and Stevens).
\item \textsuperscript{112} Id. at 504 (Blackmun, J., dissenting).
\item \textsuperscript{113} Id.
\item \textsuperscript{114} \textit{See Review of Selected 1987 California Legislation}, 19 PAC. L.J. 646, 647-50 (1988) (suggesting that A.B. 2274 has complied with guidelines the United States Supreme Court has enumerated).
\item \textsuperscript{115} See \textit{CAL. HEALTH & SAFETY CODE} § 25958(b) (West Supp. 1988).
\item \textsuperscript{116} See id. § 25958(b), (c)(2).
\item \textsuperscript{117} See id. § 25958(d). \textit{But see} American College of Obstetricians v. Thornburgh, 656 F.
identity of the minor. A.B. 2274 appears to meet the standards set out by the *Bellotti II* plurality. Furthermore, A.B. 2274 contains procedural safeguards lacking in unconstitutional abortion statutes of other states. Safeguards provided in A.B. 2274 are a provision for appointment of counsel to assist the minor in preparing the petition, and the absence of a provision requiring a waiting period after judicial consent is obtained.

2. Undue Burden on Constitutionally Protected Pregnant Minors

Even if A.B. 2274 passes initial constitutional scrutiny, A.B. 2274 may unconstitutionally burden the rights of mature, informed minors and those minors for whom an abortion is in their best interest. In

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118. See *CAL. HEALTH & SAFETY CODE* § 25958(b) (West Supp. 1988). The minor may file the petition using only her initials or a pseudonym. *Id.* See *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 491 n.16 (1983) (confidentiality assured by statutory requirement allowing minor to use her initials on petition).

119. Compare *City of Akron v Akron Center for Reproductive Health*, 462 U.S. 416, 439-42 (1983) (holding statute unconstitutional where the petition of the minor could still be denied after the court found the minor mature enough to make the abortion decision on her own and the statute impermissibly required a 24-hour waiting period after the consent of the minor before the abortion could be performed) and *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1134-39 (7th Cir. 1983) (holding Indiana statute unconstitutional based on failure to provide for expeditious appellate review of adverse decisions, and appointed counsel) with *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. at 490-93 (upholding as constitutional a Missouri abortion statute which provides that the court could not deny the petition of a minor if the minor shows that she is mature enough to make the decision on her own and provides minor with expedient appellate review) and *CAL. HEALTH & SAFETY CODE* § 25958 (West Supp. 1988) (allowing the minor to receive the abortion if a determination is made that the minor is mature and sufficiently informed, and also providing for an appeals process).


United States v. Carolene Products Co.,\textsuperscript{123} the United States Supreme Court stated:

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.\textsuperscript{124}

In Hodgson v. State of Minnesota,\textsuperscript{125} the district court concluded from Carolene Products that if a court could properly inquire into whether a change has occurred in the factual basis upon which the constitutionality of a statute depends, then surely a judicial inquiry into the existence of a particular state of facts assumed by the legislature, but never demonstrated, was also proper.\textsuperscript{126} As a result, the district court in Hodgson made findings to determine whether the Minnesota parental notification statute unduly burdened the constitutional rights of minors.\textsuperscript{127}

An inquiry into whether a statute is constitutional as applied allows an attack upon the assumptions underlying the statute.\textsuperscript{128} Thus, the assumption implicit in A.B. 2274, that an appropriate alternative bypass procedure would serve the state interest in protecting pregnant minors without unduly burdening the constitutional rights of mature, informed minors or minors for whom an abortion is in their best interests, may be challenged. Therefore, even if A.B. 2274 complies with the requirements in the Bellotti II plurality, the California legis-
lation may be unconstitutional because the alternative procedure places an undue burden on such minors.

a. Psychological Implications of A.B. 2274 on Minors

Under A.B. 2274, if a mature and informed minor or a minor whose best interests warrant an abortion cannot obtain parental consent or does not wish to obtain parental consent, that minor must seek judicial authorization for the performance of the abortion. According to the findings in Hodgson, the experience of going to court for judicial authorization produces fear and tension in many minors. Those minors who seek judicial authorization are apprehensive about facing an authority figure who holds the power to veto their decision to proceed with the abortion. Furthermore, despite the confidentiality of the proceedings required under the Minnesota statute, the district court in Hodgson found many minors resented having to reveal intimate details of their personal and family lives to the strangers involved in the judicial proceeding. Finally, the district court in Hodgson found that those minors who sought the judicial authorization were left feeling guilty and ashamed about their lifestyles and their decision to terminate the pregnancy.

129. See supra notes 61-68 and accompanying text (describing the requirements of A.B. 2274).
131. Id. In testimony before the district court in Hodgson, the Honorable Gerald Martin stated that in his experience of hearing parental notification proceedings that he did not “perceive any useful public purpose to what [he was] doing in those cases” and found the court experience difficult for minors. Id. at 766. Judge Martin testified: “I think they find [the judicial proceeding] a very nerve-wracking [sic] experience.” Id. Furthermore the Honorable William Sweeney testified: “[T]he level of apprehension that I have seen contrasted with even the orders for protection, which is a very intense situation, very volatile, and the custody questions, is that the level of apprehension is twice what I normally see in court... You see all the typical things that you would see with somebody under incredible amount of stress, answering monosyllabically, tone of voice, shaky, wringing of hands, you know, one young lady had her—her hands were turning blue and it was warm in my office.” Id.
132. See CAL. HEALTH & SAFETY CODE § 25958(b) (West Supp. 1988) (A.B. 2274 also requires that the minor have confidentiality when seeking judicial authorization). See supra text accompanying notes 61-68 (describing the requirements of A.B. 2274).
134. Id. Judge Paul Garrity, who adjudicated the same bypass petitions while a judge in Massachusetts testified in the Hodgson proceeding: “[The judicial proceeding] just gives these kids a rough time. I can’t think [the proceeding] accomplishes a darn thing. I think [the requirement of judicial authorization] basically erects another barrier to abortion.” Id. at 766. Furthermore, Judge Garrity believed that going to court was “absolutely” traumatic for minors. Id.
The difficulty in choosing the correct course of action grows even more enormous because of the impersonal judicial proceeding required by A.B. 2274.135 A juvenile court unfamiliar with the complex and evolving psychological makeup of the minor will undoubtedly have difficulty reaching the correct decision.136 Reaching a correct decision grows even more difficult, if not impossible, in a formal judicial setting where routine procedures necessarily become the norm.137 Because an impersonal judicial determination cannot adequately protect the complex dynamics of the abortion decision, A.B. 2274 unduly burdens mature and informed minors or minors for whom an abortion is in their best interest because these minors have the constitutional right to make the abortion decision in consultation with their physicians.

In addition, the abortion decision involves more than merely the conscious recognition and appraisal of the risks involved.138 Each individual makes a personal, moral judgment in determining what significance, if any, should be placed upon the fetus.139 The courts have recognized the presence of these moral issues in the abortion decision.140 By requiring minors to seek judicial authorization, A.B. 2274 unduly burdens those minors whose constitutional right to privacy allows them to make the moral determination to have an abortion without requiring them to justify their decision.141

135. See infra note 160 and accompanying text (discussing the formality of the courtroom).
136. See infra notes 169-71 and accompanying text (discussing the lack of an uniform development rate in minors).
137. See infra notes 158-60 and accompanying text (suggesting that procedures in the court become routine).
139. Critique, supra note 138, at 1903.
140. See Maher v. Roe, 432 U.S. 464, 480 (1977) (noting that abortion surgery differed significantly from other surgical procedures); Planned Parenthood v. Danforth, 428 U.S. 52, 103 (1976) (Stevens, J., concurring and dissenting) (arguing that the most significant consequences of the abortion decision were not medical in character); Ballard v. Anderson, 4 Cal. 3d 873, 885, 484 P.2d 1345, 1353-54, 95 Cal. Rptr. 1, 9-10 (1971) (Sullivan, J., dissenting) (distinguishing abortions from other surgical and medical procedures undertaken in the course of pregnancy).
141. See Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986). The district court found that many minors were angry and resentful at having to justify their decisions to complete strangers. Id. at 763.
Furthermore, A.B. 2274 adds to the burden of those mature and informed minors and those minors for whom an abortion is in their best interest who wish to make an independent abortion decision. For these minors who must seek judicial rather than parental consent under A.B. 2274, the possible continuation of the pregnancy if the petitioning court does not grant authorization and the resulting exposure to parents is often an unthinkable alternative. If exposure to the parents is unthinkable, the pregnant minor has the choice of seeking an illegal abortion or carrying the child to term on her own. Without the assurance of parental support, the sheer cost of maternal delivery services, as compared to an abortion, will weigh heavily against a choice for delivery by the young unmarried woman who is uninsured and cannot qualify for medicaid coverage. In addition, lack of shelter outside the home is also an important consideration when making the abortion decision. While many states, in explicit recognition of the lack of freedom of choice between abortion and birth, are providing maternity shelter and care to minors, these institutional homes may have long waiting lists, may be too expensive, and may not provide the long-term shelter that is needed. Consequently, A.B. 2274 unduly burdens the constitutional rights of mature and informed minors or minors for whom an abortion is in their best interest, because the possibility exists that the minor may be denied the right to receive an abortion and must carry the pregnancy to term on her own.

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142. See Sacramento Bee, Nov. 24, 1987, at A4, col. 5. California Medical Association President Frederick Armstrong stated:

Contrary to what [A.B. 2274's] supporters argue, the law will not open up lines of communication between a pregnant teenager and her parents. Where there is trust and confidence between parents and teenagers, there is already communication. If there is not, an unwanted pregnancy is a particularly poor way to begin.

Id.


144. Id. at 59.


146. House Hearings, supra note 143, at 59.

147. See Bonavoglia, Kathy's Day In Court, Ms., April 1988, at 46. In a test case of the Alabama parental consent statute, the trial judge denied the request of "Kathy" to receive an abortion because she was not mature enough, and the abortion was not in her best interest despite the fact that Kathy had been working full-time, and her alcoholic stepfather abused her mother and herself. Id. at 48. The Alabama Court of Civil Appeal, however, overturned the trial court in a scathing decision:

The trial judge in this case abused his discretion by denying the minor's request....
If the mature, informed minor or a minor whose best interests warrant an abortion elects to seek parental consent rather than pursue judicial authorization, her constitutional rights may nevertheless be unduly burdened. A.B. 2274 assumes that parents can and do identify the course of action corresponding to the best interests of their children. In a perfect situation, the abortion decision would involve a counseling role for parents. This counseling would help the minor to reach the correct and most suitable decision and would presumably protect the physical and psychological well being of the pregnant adolescent. Uncertainty, however, exists as to the value of parental involvement under the best of circumstances since nothing in the consent statute ensures correct parental decision-making. Consequently, irrespective of whether the mature, informed minor or the minor whose best interests warrant an abortion seeks parental consent or a judicial order, A.B. 2274 does not guarantee that the minor will receive the psychological guidance that she needs to make a correct decision.

In sum, A.B. 2274 makes the choices of mature and informed minors and minors whose best interests warrant an abortion more difficult. First, these minors can seek parental consent. Second, these minors can seek a judicial determination that may deny the abortion. This possibility can leave the minor with an embarrassing and un-
wanted pregnancy. Third, these minors can seek an illegal abortion that does not require third party consent, but has documented health and safety risks,\(^{153}\) or carry the pregnancy to term. Because A.B. 2274 requires mature and informed minors and minors whose best interests warrant an abortion to make these difficult choices, the legislation unduly burdens these minors when they seek to exercise their constitutional right to an abortion.

b. Difficulty in Applying the Mature Minor Standard in a Judicial Setting

A mature minor seeking judicial authorization may still be unduly burdened if the court applies an inconsistent and unfair mature and informed minor standard.\(^{154}\) Without a carefully delineated framework, the mature and informed minor standard allows judges to make arbitrary and perhaps capricious decisions.\(^{155}\) A.B. 2274 provides no guidelines for determining whether a minor is mature, informed, and capable of making the abortion decision.\(^{156}\) In addition, the United States Supreme Court has failed to provide standards to guide such a determination.\(^{157}\) Judges must rule on the right of a minor to obtain


\(^{154}\) See CAL. HEALTH & SAFETY CODE § 25958(o)(1) (West Supp. 1988). The "mature and informed minor standard" is as follows: "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." Id.

\(^{155}\) See Note, Judicial Consent to Abort: Assessing a Minor's Maturity, 54 GEO. WASH. L. REV. 90, 100 n.60 (1985). Abuse of discretion in the maturity determination parallels the problems that occur in the determination of the competency of a witness. Id. See Rosche v. McCoy, 397 Pa. 615, 156 A.2d 307 (1959). In Rosche, for example, a trial judge inappropriately sought to determine the competency of a seven-year-old child to testify by asking the child about the child's belief in God, religious affiliation, and whether the child understood what God did to people when they lied. Id. at 622 n.2, 156 A.2d at 311 n.2. Questions such as those presented in Rosche could not have elicited information useful for determining the competence of the child to testify. See Note, supra, at 100 n.60. The questions merely concerned the personal feelings of the judge regarding the prerequisites of competence. Rosche, 397 Pa. at 624, 156 A.2d at 312. Even in such a relatively benign context, the personal values and biases of judges can influence their determination. In the abortion context, society does not benefit from allowing the disastrous consequences of such biases into the decision making process. Note, supra, at 100 n.60.

\(^{156}\) Compare CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1988) (no evidence relating to physical and psychological evidence is required) with MO. ANN. STAT. § 188.028 (Vernon Supp. 1988) (the Missouri statute requires the taking in of evidence relating to the emotional development, maturity, intellect, and understanding of the minor).

an abortion even though they are not familiar with the intimate behavioral aspects of the minor. In light of the pressure on judges to clear their clogged dockets and keep the judicial process moving, they are unlikely to expend the needed time to acquire familiarity with the intricacies of the teenager and her predicament. In addition, judges perform this assessment in the artificial, imposing and formal context of the courtroom, thereby increasing the likelihood of a distorted determination.

Courts may not treat minors equally in similar situations if the general guidelines for determining maturity permit excessive judicial discretion. In order to ensure legitimacy in the decision making process, the rules and principles of law should specify the appropriate exercise of judicial discretion. Under the mature and informed minor standard delineated in A.B. 2274, a court can furnish an assessment without specifying the facts appropriate and relevant to the determination. Thus, the mature and informed minor standard amounts to judicial discretion unbound by legal principles. Assurance of a fair

158. See Note, supra note 155, at 98. The intimate aspects of the minor include her personality, maturational and developmental history, medical background, family dynamics, emotional needs, abilities, experiences, and interests. Id. See also Grisso & Vierling, Minor's Consent to Treatment: A Developmental Perspective, 9 Prof. Psychology 412 (1978). In order for a judge to acquire intimate knowledge of the pregnant teenager petitioning the court, the judge must review files and reports, consult with relevant medical and counseling professionals, and spend time with the minor. Id. at 424.


160. Note, supra note 155, at 99. See also Bellotti v. Baird, 443 U.S. 622, 643 n.22 (suggesting that procedures and forums that are less formal than a judicial proceeding may be more beneficial).

161. Note, supra note 155, at 99. See Comment, The Validity of Parental Consent Statutes After Planned Parenthood, 54 U. Det. J. Urb. L. 127, 160 (1976). Standardless discretion does not further any state purpose in any context, especially when that discretion involves passing upon the validity of a fundamental right. Id. See also Yick Wo v. Hopkins, 118 U.S. 356 (1886). The Yick Wo Court wrote: [T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolera ble in any country where freedom prevails, as being the essence of slavery itself. Id. at 370.

162. See K. Davis, Discretionary Justice: A Preliminary Inquiry 3-26 (1969) (suggesting that discretion is not indulgence of whim on the part of the judge, but rather is based on facts and guided by the spirit and principles of law).


164. Note, supra note 155, at 99 n.57.
determination for the pregnant adolescent, therefore, becomes impos-
sible when such an arbitrary standard applies.\textsuperscript{165}

The assurance of equal and consistent treatment in the maturity
determination process grows further complicated by the subconscious
inferences a judge may draw from the composure, apparent analytical
ability, appearance, or proficiency of the adolescent in articulating her
reasoning and conclusions.\textsuperscript{166} The values, prejudices, and reactions of
the judge to the dress, manner, and communication skills of the minor
may cause the feelings and beliefs of the judge to obscure factors
more relevant to the assessment.\textsuperscript{167} Consequently, no matter how
valiantly a judge tries to avoid the superficial aspects of the manner
and demeanor of the teenager, these factors may unduly and una-
voidably influence the determination of maturity by the judge.\textsuperscript{168}

The fact that children do not develop at the same rate becomes
another complicating factor in determining the maturity and infor-
mation an adolescent possesses. An enormous range of individual
differences exist in the rate of growth, development, and psychological
maturity of adolescents even if the adolescents belong to the same
social and cultural group.\textsuperscript{169} Moreover, even if the petitioning court
were to use objective standards, such as age or physical attributes, an
adequate assessment of the capacity of the minor to rationally consider
and comprehend the effects of aborting or continuing a pregnancy is
not guaranteed.\textsuperscript{170} As a result, the use of subjective areas of inquiry
permit a more appropriate determination of maturity. These inquiries,
however, require more time and contact with the pregnant teenager
than a judge can reasonably devote.\textsuperscript{171} Therefore, in everyday practice,
no guarantee exists that the petitioning minor will obtain an adequate
determination of her maturity.

Thus, the interest California has in providing guidance for a minor
seeking an abortion does not outweigh the burden placed on minors

\begin{thebibliography}{171}
\bibitem{165} Id.
\bibitem{166} Id. at 99. A great variety of actions that cannot be categorized into generalized patterns
of behavior exist as adolescents move from childhood to adulthood. Furthermore, adults react
to adolescents in terms of their own personalities and in terms of how well they know the
\bibitem{167} Lindley, \textit{From Family Law to all Law . . . Ruling Without Bias}, 24 Judges' J. 18, 20
(1985).
\bibitem{168} Note, \textit{supra} note 155, at 99 n.58.
\bibitem{169} D. Kriech, R. Crutchfield, & N. Livson, \textit{Elements of Psychology} 66-68, 739-40
(1969). See H. Rodman, S. Lewis, & S. Griffith, \textit{The Sexual Rights of Adolescents:
Competency, Vulnerability, and Parental Control} 158 (1984) ("The potential for competence
and responsibility among teenagers is clearly not uniform across all areas of behavior").
\bibitem{170} Note, \textit{supra} note 155, at 100.
\bibitem{171} Id. at 101 n.62.
\end{thebibliography}
that are mature and informed or for whom an abortion is in their best interest. Therefore, the California parental consent statute is unconstitutional under the United States Constitution.

B. Right to Privacy Challenge Under the California Constitution

In addition to the right to privacy found under the United States Constitution, the California Constitution explicitly guarantees the right to privacy. Under California law, fundamental rights guaranteed by the California Constitution must be examined independently of the federal right. Consequently, A.B. 2274 must be evaluated in light of the rights guaranteed under the California Constitution.

1. Parameters of the California Right

Article I of the California Constitution sets forth the California Declaration of Rights. The first section of article I establishes certain inalienable rights. In 1972, the voters of California amended article I, section 1 to expressly include the right to privacy as an inalienable right.

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173. See Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). The California Supreme Court wrote:

[In the area of fundamental civil liberties which includes . . . all protections of the California Declaration of Rights—we sit . . . subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California Courts only when they provide no less individual protection than is guaranteed by California law.

Id. at 764, 557 P.2d at 950, 135 Cal. Rptr. at 366 (quoting People v. Longwill, 14 Cal. 3d 943, 951 n.4, 538 P.2d 753, 758 n.4, 123 Cal. Rptr. 297, 302 n.4 (1975)) (footnote added). The California Supreme Court has also stated that “[t]he incontrovertible conclusion is that the California Constitution is, and always has been, a document of independent force. Any other result would contradict not only the most fundamental principles of federalism but also the historic bases of state charters.” People v. Brisendine, 13 Cal. 3d 528, 549-50, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975).

174. CAl. CoNST. art. I.
175. CAl. CoNST. art. I, § 1.
176. See White v. Davis, 13 Cal. 3d 757, 773, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975) (discussing the adoption of the express right to privacy). Prior to the adoption of this amendment, however, California courts had found a state and federal constitutional right to privacy even though the right was not enumerated in either the California or United States Constitutions. In re Lifschutz, 2 Cal. 3d 415, 431-32, 467 P.2d 557, 567-68, 85 Cal. Rptr. 829,
The adoption of the amendment was intended to strengthen the right to privacy. The election brochure published by the state set out the principle objectives of the right to privacy. The election brochure argument stated: "The right to privacy is much more than 'unnecessary wordage.' It is fundamental to any free society. Privacy is not now guaranteed by our State Constitution. This simple amendment will extend various court decisions on privacy to insure protection of our basic rights." Since the adoption of the amendment, California courts have held that a broad range of interests are protected by the right of privacy.

While the right to privacy provided in the California Constitution is not absolute, any intervention must be justified by a compelling state interest. In defining the scope of the state interest, the decisions of the California Supreme Court in City of Santa Barbara v. Adamson and Committee to Defend Reproductive Rights v. Myers firmly establish that the California constitutional right to privacy protects
private activity from state interference. In **Adamson**, the appellant challenged a residential zoning ordinance that limited the number of unrelated people that could live in a house. The **Adamson** court applied the compelling state interest standard to conclude that the restrictions set out in the Santa Barbara ordinance did not satisfy a compelling interest so as to justify restricting unrelated persons from living together. Thus, the **Adamson** court extended the right to privacy found under the California Constitution beyond the similar right found under the United States Constitution.

**Myers** involved the right to public funding for abortions. The **Myers** court started from the premise that under article I, section 1 of the California Constitution all women in California possess a fundamental constitutional right to choose whether or not to bear a child. The **Myers** court used a three-part standard developed in *Bagley v. Washington Township Hospital District* in analyzing the statutory scheme that prohibited the use of Medi-Cal funds for receiving an abortion. First, the state must establish that the imposed conditions relate to the purpose of the legislation that confers the benefit or privilege. Second, the utility of the conditions imposed must manifestly outweigh any resulting impairment of constitutional

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The choice of household companions—of whether a person’s “intellectual and emotional needs” are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution.

*Id.* (quoted in **Adamson**, 27 Cal.3d at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3.
186. **Adamson**, 27 Cal. 3d at 131-34, 610 P.2d at 440-42, 164 Cal. Rptr. at 543-45.
187. Compare id. at 124, 610 P.2d at 436, 164 Cal. Rptr. at 539 (concluding that a zoning ordinance that restricted the number of unrelated people that could live in a house violated the right to privacy expressly granted in the California Constitution) with **Belle Terre**, 416 U.S. at 1 (holding that a similar ordinance did not violate the United States Constitution).
188. **Myers**, 29 Cal. 3d at 258-59, 625 P.2d at 782, 172 Cal. Rptr. at 869.
189. *Id.* at 262, 625 P.2d at 784, 172 Cal. Rptr. at 871. See People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (the California Supreme Court first recognized the existence of this constitutional right four years before the United States Supreme Court in *Roe v. Wade* acknowledged the existence of a comparable right under the United States Constitution).
190. 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).
191. **Myers**, 29 Cal. 3d at 265, 625 P.2d at 786, 172 Cal. Rptr. at 873.
192. *Id.; Bagley*, 65 Cal. 2d at 505-06, 421 P.2d at 414, 55 Cal. Rptr. at 406.
Finally, the state must establish that no less offensive alternatives are available to achieve the objective of the state. Using the threefold analysis, the Myers court held that the California Legislature could not deny Medi-Cal funding for abortions. In concluding, the Myers court stated:

By virtue of the explicit protection afforded an individual's inalienable right of privacy by Article I, section 1 of the California Constitution, however, the decision whether to bear a child or to have an abortion is so private and so intimate that each woman in this state . . . is guaranteed the constitutional right to make that decision as an individual, uncoerced by governmental intrusion. Because a woman's right to choose whether or not to bear a child is explicitly afforded this constitutional protection, in California the question of whether an individual woman should or should not terminate her pregnancy is not a matter that may be put to a vote of the Legislature.

2. Application of the California Standard to A.B. 2274

Although A.B. 2274 does not directly restrict public benefits, the threefold analysis developed in Bagley and Myers is helpful in determining the constitutional deficiencies of the parental consent statute under the California Constitution. Restrictions imposed on the right of a pregnant minor to seek an abortion free from government interference do not relate to the purposes of A.B. 2274. The rationale for requiring parental consent for an abortion by a minor is the desire to encourage parental involvement and counseling in the abortion decisions of minors. Although A.B. 2274 was enacted to provide this involvement, practicality suggests that this involvement may not result. For instance, clinical counselors who participated on a daily basis in the implementation of the parental notification law in Minnesota found that the abortion law, more than anything, disrupted

193. Myers, 29 Cal. 3d at 265, 625 P.2d at 786, 172 Cal. Rptr. at 873; Bagley, 65 Cal. 2d at 506, 421 P.2d at 415, 55 Cal. Rptr. at 407.
194. Myers, 29 Cal. 3d at 265-66, 625 P.2d at 786, 172 Cal. Rptr. at 873; Bagley, 65 Cal. 2d at 507, 421 P.2d at 415, 55 Cal. Rptr. at 407.
196. Id. at 284, 625 P.2d at 798, 172 Cal. Rptr. at 885.
197. See Myers, 29 Cal. 3d at 271-73, 625 P.2d at 790-91, 172 Cal. Rptr. at 877-78 (concluding that the restrictions imposed on the right of poor women to procreative choice did not relate to the purposes of the Medi-Cal program).
198. See supra text accompanying notes 53-60 (discussing the legislative purpose of A.B. 2274).
and harmed families. In addition, the Hodgson court noted that minors seeking judicial authorization to terminate their pregnancies without parental notification had already made their decisions and that court personnel imparted no information and provided no counseling in the course of the bypass proceeding. If a notification statute provides little in the way of counseling and familial communication, A.B. 2274 with the stronger requirement of consent will likely result in more strained involvement because the minor must not only tell her parents that she is seeking an abortion, but also must get their approval.

Additionally, the utility of imposing restrictions on the right of a pregnant minor to receive an abortion does not clearly outweigh the resulting impairment of the fundamental and intimate constitutional right of procreative choice. In undertaking the balancing process, a court must realistically assess the importance of the state interest served by the restrictions and the degree to which the restrictions actually serve that interest. Additionally, the court must carefully evaluate the importance of the constitutional right at stake and determine the extent to which the ability of the individual to exercise that right is threatened or impaired, as a practical matter, by the specific statutory condition at issue. The constitutional choice directly implicated by A.B. 2274 is the right of the minor to choose whether to bear children. Closely related to this fundamental interest is the basic recognition that, for a woman, the constitutional right of choice is essential to her own ability to retain personal control over her own

199. See Hodgson v. Minnesota, 648 F. Supp. 756, 766-67 (D. Minn. 1986). Clinical counselor Paula Wendt concluded from her conversations with both parents and minors that the Minnesota parental notification law had not promoted family integrity or communication. Id. In addition, counselor Tina Welsh concluded that the law had not benefitted intra-family communication. Ms. Welsh believed that requiring a minor to tell either her parents or a judge about her pregnancy and the reasons why she wanted an abortion made no beneficial contribution to the decision of the minor. Id. at 767. California Medical Association President Frederick Armstrong agreed with these conclusions:

Contrary to what [A.B. 2274’s] supporters argue, the law will not open up lines of communication between a pregnant teenager and her parents. Where there is trust and confidence between parents and teenagers, there is already communication. If there is not, an unwanted pregnancy is a particularly poor way to begin.


201. See Myers, 29 Cal. 3d at 273-82, 625 P.2d at 791-97, 172 Cal. Rptr. at 878-84.

202. Id. at 273, 625 P.2d at 791, 172 Cal. Rptr. at 878.

203. Id. at 273-74, 625 P.2d at 791-92, 172 Cal. Rptr. at 878-79.

204. See People v. Belous, 71 Cal. 2d 954, 963, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969) ("The rights involved . . . are the woman's rights to life and to choose whether to bear children").
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body.205 The primary purpose of A.B. 2274, on the other hand, is to protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies.206 Because the constitutional rights at issue in A.B. 2274 are clearly among the most intimate and fundamental of all constitutional rights,207 A.B. 2274 will severely impair or totally deny the actual exercise of the fundamental and intimate constitutional right to procreative choice. While the state has an interest in protecting the welfare of minors, only the most compelling of interests could “manifestly outweigh” the significant impairment of the privacy rights of the minor that A.B. 2274 imposes. The state interest at stake, while important, is not sufficiently compelling.

Finally, the statutory scheme promulgated in A.B. 2274 does not serve the state interest in protecting the welfare of minors in a manner least offensive to the right of minors to procreative choice.208 If the parental consent statute is designed to promote the welfare of the minor, A.B. 2274 does not further a compelling state interest because less offensive alternatives could be employed to achieve the same objective. For instance, the state could require parental notification instead of parental consent. Putting aside any constitutional problems with a notification scheme, notification allows parental involvement in the abortion decision-making process while still allowing the minor to make the decision in consultation with her physician.209 Another

205. Myers, 29 Cal. 3d at 274, 625 P.2d at 792, 172 Cal. Rptr. at 879. Professor Tribe has observed:

[I]f a man is the involuntary source of a child—if he is forbidden, for example, to practice contraception—the violation of his personality is profound; the decision that one wants to engage in sexual intercourse but does not want to parent another human being may reflect the deepest of personal contributions. But if a woman is forced to bear a child—not simply to provide an ovum but to carry the child to term—the invasion is incalculably greater. . . . [I]t is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary.


206. See supra text accompanying notes 53-60 (discussing the legislative purpose of A.B. 2274).

207. Myers, 29 Cal. 3d at 275, 625 P.2d at 793, 172 Cal. Rptr. at 880.

208. See id. at 282-83, 625 P.2d at 797-98, 172 Cal. Rptr. at 884-85 (concluding that the abortion funding restrictions did not serve the state interest in providing medical care for indigents in a manner least offensive to the right of procreative choice).

209. See H. L. v. Matheson, 450 U.S. 398 (1981). While the Matheson Court recognized that parents have an important “guiding role” in the upbringing of their children that presumptively includes counseling them on important decisions, the Court also noted that the Utah parental notification statute gave neither parents nor judges a veto power over the abortion decision of the minor. Id. at 410-11. See also Bellotti v. Baird, 443 U.S. 622 (1979). The Supreme Court expressly refused to equate notice requirements with consent requirements. Id. at 640, 657. But see Dembitz, The Supreme Court and a Minor’s Abortion Decision, 80 Colum. L. R. 1251 (1980) (discussing the impropriety of parental notification requirements for a minor’s abortion decision).
method that the state could employ to assure that the welfare of
the minor is being protected is delegating the assessment of the maturity
and best interests of the minor to state trained and licensed medical
personnel.210 Indeed, the California Supreme Court, prior to the adop-
tion of A.B. 2274, held that a minor may obtain a therapeutic abortion
without parental consent if the minor can convince competent medical
authorities that she possesses the requisite maturity and can give
informed consent to the procedure.211 Thus, the consent requirement
of A.B. 2274 is not the least offensive alternative. Consequently, A.B.
2274 violates article I, section 1 of the California Constitution.

CONCLUSION

While every individual has a view on the right of a woman to obtain
an abortion, the morality of abortion is not a legal or constitutional
issue. Rather, the morality of abortion is a matter of philosophy,
ethics, and theology. Abortion is a subject upon which reasonable
people can, and do, adhere to vastly divergent convictions and prin-
ciples. This comment has attempted to refrain from questions of
morality and instead concentrate on the legal and constitutional issues
the California parental consent statute presents. This comment has
shown that A.B. 2274 raises several possible constitutional challenges.
A.B. 2274 may violate the federal constitutional rights of the minor
by impermissibly interfering with the right to privacy of the minor.
Even if the language of A.B. 2274 falls within the permissible guidelines
the United States Supreme Court has enunciated for abortions by
minors, A.B. 2274 may unduly burden the constitutionally protected
rights of mature and informed minors and of those minors for whom
an abortion is in their best interest. As a result, A.B. 2274 should be
declared unconstitutional under the United States Constitution.

Even if A.B. 2274 is upheld as constitutional under the United
States Constitution, the parental consent statute should be declared

210. See Note, supra note 155, at 116. The validity of a medical approach is supported by
the United States Supreme Court treatment of analogous problems, by the treatment of teenage
abortion by other courts, and by legal precedent. Id. at 113-15. See also G. HERRING, ERODING
ROE: THE POLITICS AND CONSTITUTIONALITY OF CALIFORNIA'S PARENTAL CONSENT
ABORTION STATUTE —(1988) (available at the University of the Pacific, McGeorge School of Law Library
as part of the Stauffer Fellowship Series) (suggesting that alternative legislation requiring social
worker involvement in the abortion determination would have been more appropriate).
211. Ballard v. Anderson, 4 Cal. 3d 873, 883, 484 P.2d 1345, 1352, 95 Cal. Rptr. 1, 8
(1971).
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invalid under the California Constitution. The citizens of California have an express right to privacy broader than the right to privacy found under the United States Constitution. Consequently, proponents of A.B. 2274 will have a stronger burden of demonstrating the existence of a compelling state interest in regulating the right of a minor to receive an abortion under the California Constitution. The proponents of A.B. 2274 should not be able to meet the burden of the compelling state interest test. Consequently, the California parental consent statute violates the right to privacy granted to each individual under the California Constitution.

Robert W. Lucas