NOTES

PROTECTING THE ONE PERCENT: RELEVANT WOMEN, UNDUE BURDENS, AND UNWORKABLE JUDICIAL BYPASSES

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The purpose of this Note is to analyze one widely enacted category of abortion regulations—parental involvement laws—and the effect of such regulations on their targeted group—pregnant minors. According to the Supreme Court, abortion regulations are constitutional only if they satisfy the undue burden standard, as expressed in Planned Parenthood v. Casey. *By relying on the empirical evidence and reasoning the Court used to invalidate the spousal notification provision of the Pennsylvania statute at issue in* Casey*, this Note asserts that parental involvement laws, despite inclusion of bypass provisions, pose substantial obstacles for the group of women for whom the statutes are directly relevant. Because of the* Casey *Court's emphasis on the relevant group of women—"the one percent of women upon whom the statute operates"—the substantial obstacles produced by these parental involvement laws constitute an impermissible undue burden. Unlike scholars who find the laws onerous but have attempted to invalidate them on other grounds, this Note goes back to the basics, unraveling the undue burden standard and its requirements, to argue that parental involvement laws are unconstitutional under* Casey*'s undue burden standard, based on empirical evidence demonstrating the detrimental impact of such laws on affected minors, as well as the unworkability of judicial bypass provisions. This Note concludes by discussing alternative remedies to parental involvement statutes in light of minors' constitutional right to choose abortion and the state's legitimate interest in protecting immature minors.*

INTRODUCTION

January 22, 2013, marked the fortieth anniversary of *Roe v. Wade*, the landmark Supreme Court case responsible for legalizing abortion nationwide.[1] But despite a narrow Supreme Court majority consistently reaffirming *Roe*'s central holding,[2] the decision's soundness remains a

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1. 410 U.S. 113 (1973).

2. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) ("The sum of the precedential enquiry to this point shows *Roe*'s underpinnings unweakened in

critical question for Supreme Court nominees, presidential candidates, and campaigning legislators.[3] Abortion-related news and politics continue to dominate headlines, particularly in election years,[4] and for good reason: After the upswing of anti-abortion legislators seated in state governments following the 2010 midterm elections, states passed ninety-two abortion-restrictive laws in 2011, a record number for the years following *Roe*.[5]

In the four decades since *Roe*, numerous scholars have attempted to document the effects of abortion regulations and interrelated legal changes. One major difference today is that the standard used to evaluate abortion regulations is considerably more lenient than the strict scrutiny championed in *Roe v. Wade*.[6] In 1992, the Supreme Court used *Planned Parenthood v. Casey* to fashion an "undue burden" standard, unique to the privacy rights context, and designed to allow the state to create structural mechanisms in order to "express profound respect for the life of the unborn."[7] A proliferation of state-enacted abortion regula-

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any way affecting its central holding."). The Supreme Court has alternatively addressed the consequences of overruling *Roe*'s central holding from a public reliance perspective: "[W]hile the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed." Id. at 856.

3. See, e.g., Denis Steven Rutkus, Cong. Research Serv., R41300, Questioning Supreme Court Nominees About Their Views on Legal or Constitutional Issues: A Recurring Issue 8 (2010) (summarizing Ruth Bader Ginsburg's 1993 confirmation hearings, including questions regarding her views on abortion); Sen. John McCain: 'I Do Not Support *Roe v. Wade*,' FOXNews.com (Feb. 19, 2007), http://www.foxnews.com/story/2007/02/19/sen-john-mccain-do-not-support-roe-v-wade/ (on file with the *Columbia Law Review*) (quoting then-presidential candidate John McCain as saying, "'I do not support Roe versus Wade,'" and expressing his opinion it "'should be overturned'").

4. See, e.g., Melissa Jeltsen, Mitt Romney on Planned Parenthood: We Will 'Get Rid' of It, Huffington Post (Mar. 13, 2012, 9:39 PM), www.huffingtonpost.com/2012/03/13/mitt-romney-planned-parenthood_n_1343450.html (on file with the *Columbia Law Review*) (reporting presidential candidate's plan to "cut federal funding to Planned Parenthood because the organization provides abortion services").

5. E.g., Sarah Kliff, Exclusive: NARAL President Nancy Keenan to Step Down, Wash. Post: Wonkblog (May 10, 2012, 5:29 PM), www.washingtonpost.com/blogs/wonkblog/post/exclusive-naral-president-nancy-keenan-to-step-down/2012/05/10/gIQAn85PGU_blog.html (on file with the *Columbia Law Review*).

6. 410 U.S. at 154 (finding "regulation of the factors that govern the abortion decision" permissible where state's interests are "sufficiently compelling").

7. 505 U.S. at 877 (plurality opinion). The plurality explained:

> To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.

Id. at 878. For an earlier Supreme Court opinion representing this perspective, see Webster v. Reprod. Health Servs., 492 U.S. 490, 499–501 (1989), which upheld a Missouri law that declared the state's view to be life begins at conception. The law also prohibited

tions followed the *Casey* decision—between 1992 and 2005, states enacted 299 laws restricting abortion, a proportionally high number compared to the years 1985 to 1991, in which only sixty-eight restrictions were enacted.[8] But despite the intensity of regulation, abortion—at least de jure legalization of it—seems here to stay.[9]

Notwithstanding the proliferation of abortion regulations in the past few decades, almost a third of all women in the United States will have an abortion by the time they are forty-five.[10] Nonetheless, widespread support for abortion appears to be waning. According to a poll by Gallup, 2012 marks an all-time low of "pro-choice" Americans, with only forty-one percent of respondents self-identifying with the label.[11] Nancy Keenan, former president of NARAL Pro-Choice America, similarly describes an "intensity gap" on abortion among millennials[12]—fifty-one percent of anti-abortion voters under thirty consider abortion a "very important" voting issue while only twenty-six percent of millennial abortion-rights supporters think similarly.[13] Abortion rights advocates attribute this discrepancy in passion to a difference in generational battles: "When you're fighting to hold onto something, rather than get something, it gets less intense."[14] But the underlying legal battle for reproductive freedom has

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the use of public funds or facilities for performing or encouraging a woman to abort and proscribed abortions after twenty weeks unless a test confirmed nonviability of the fetus.

8. E.g., Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, Preserving the Core of *Roe*: Reflections on *Planned Parenthood v. Casey*, 18 Yale J.L. & Feminism 317, 319 n.8 (2006) (citing Memorandum from Elizabeth Nash, Pub. Policy Assoc., Alan Guttmacher Inst. (Apr. 26, 2006)); see also Carol Sanger, About Abortion: The Complications of the Category, 54 Ariz. L. Rev. 849, 852 (2012) ("Since the development of a robust pro-life movement following the Supreme Court's 1973 decision in *Roe v. Wade*, abortion has become the most regulated medical procedure in the United States." (footnote omitted)).

9. See, e.g., *Casey*, 505 U.S. at 845–46 ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe* v. *Wade* should be retained and once again reaffirmed."); see also Memorandum from James Bopp, Jr. & Richard E. Coleson, Attorneys at Law, on Pro-Life Strategy Issues 2 (Aug. 7, 2007) [hereinafter Pro-Life Strategy Memo] (on file with the *Columbia Law Review*) ("[P]rospects for [reversing *Roe*] now or in the near future are nonexistent in light of current political realities.").

10. E.g., Guttmacher Inst., State Facts About Abortion: Texas 1 (2011), available at http://www.guttmacher.org/pubs/sfaa/pdf/texas.pdf (on file with the *Columbia Law Review*). Pregnancy, anticipated or not, is of particular relevance to young adults and minors. See, e.g., Mary M. Aruda et al., Early Pregnancy in Adolescents: Diagnosis, Assessment, Options Counseling, and Referral, 24 J. Pediatric Health Care 4, 4 (2010) ("Current estimates are that one third of teens become pregnant by age 20 years . . . .").

11. Lydia Saad, "Pro-Choice" Americans at Record-Low 41%, Gallup Politics (May 23, 2012), www.gallup.com/poll/154838/Pro-Choice-Americans-Record-Low.aspx (on file with the *Columbia Law Review*).

12. NARAL Pro-Choice America considers this group (millennials) to comprise the generation of Americans born between 1980 and 1991. Kliff, supra note 5.

13. Id.

14. Id. (quoting Stephanie Schriock, president of EMILY's List, an organization geared toward electing women who support abortion rights to public office).

changed.[15] With record numbers of abortion regulations enacted in the last two years, the critical question for the millennial generation should be whether abortion's de jure legal status translates into practical availability for those seeking it.[16]

The purpose of this Note is to analyze one widely enacted category of abortion regulations—parental involvement laws—and the effect of such regulations on their targeted group—pregnant minors. According to a plurality of the Supreme Court, abortion-restrictive laws are constitutional only if they satisfy the undue burden standard, as laid out in *Planned Parenthood v. Casey*.[17] By relying on the empirical evidence and reasoning the Court used to invalidate the spousal notification provision of the Pennsylvania statute at issue in *Casey*, this Note asserts that parental involvement laws—despite inclusion of bypass provisions—pose substantial obstacles for the group of young women for whom the statutes are directly relevant.[18] Because of *Casey*'s emphasis on the relevant group of women—"the one percent of women upon whom the statute operates"[19]—the substantial obstacles produced by these parental involvement laws constitute an impermissible undue burden. Unlike numerous scholars who find parental involvement laws onerous but have attempted to invalidate them on other grounds,[20] this Note goes back to

15. Cf. Pro-Life Strategy Memo, supra note 9, at 5–6 (recognizing prolife movement's "early defeats in Congress and the federal courts" and advocating for incremental efforts to regulate and reduce abortions over absolutist views solely committed to overturning *Roe*).

16. See, e.g., Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control, 317 F.3d 357, 371–72 (4th Cir. 2002) (King, J., dissenting) (noting "micromanaging everything from elevator safety to countertop varnish to the location of janitors' closets" has, more often than not, "made abortions effectively unavailable, if not technically illegal"); NARAL Pro-Choice Am. et al., Who Decides?: The Status of Women's Reproductive Rights in the United States 32 (22d ed. 2013) ("87 percent of U.S. counties have no abortion provider[.]").

17. 505 U.S. 833, 874 (1992) (plurality opinion).

18. In *Casey*, Justice O'Connor emphasized, "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Id. at 894 (majority opinion). Thus, the relevant group for the spousal notification provision struck down in *Casey* was "married women seeking abortions who d[id] not wish to notify their husbands of their intentions and who d[id] not qualify for one of the statutory exceptions to the notice requirement." Id. at 895. By extension, the relevant group, in regard to parental involvement laws, is composed of minors wishing to exclude their parents from the abortion decision but not qualifying for one of the statutory exceptions to the parental involvement requirement. See infra Part I.C.2 (describing statutory exceptions to parental involvement laws).

19. *Casey*, 505 U.S. at 894.

20. See, e.g., Catherine Grevers Schmidt, Note, Where Privacy Fails: Equal Protection and the Abortion Rights of Minors, 68 N.Y.U. L. Rev. 597, 619–38 (1993) (applying feminist rethinking of equal protection doctrine to parental notice and consent laws); Rachel Weissmann, Note, What "Choice" Do They Have?: Protecting Pregnant Minors' Reproductive Rights Using State Constitutions, 1999 Ann. Surv. Am. L. 129, 146–55 (analyzing victorious challenges to state parental involvement laws in states with explicit right to privacy provisions in state constitutions).

the basics, unraveling the undue burden standard and its requirements, to argue that these laws are unconstitutional under *Casey*'s undue burden standard, based on empirical evidence demonstrating the detrimental impact of such laws on the relevant group of affected minors.

This Note proceeds in three parts. Part I describes the constitutional basis for a woman's right to reproductive freedom, focusing on current abortion jurisprudence under *Planned Parenthood v. Casey*. By extending adult women's constitutional rights to minors, this Part assesses the proliferation of parental involvement statutes following *Casey*. Part II compares the evidence used in *Casey* to invalidate Pennsylvania's spousal notification provision to studies demonstrating the obstacles produced by parental involvement statutes for minors seeking abortions. Accepting scholarship criticizing the workability of judicial bypass alternatives, this Part then argues that such "unworkability" results in the imposition of substantial obstacles on a minor's right to choose to terminate her pregnancy. Abiding by the Supreme Court's abortion framework, this Part maintains that these substantial obstacles amount to an undue burden on the statutorily relevant group of women, and are thus unconstitutional. Part III discusses alternative remedies to parental involvement statutes in light of minors' constitutional right to choose abortion and the state's legitimate interest in protecting immature minors.

I. CONSTITUTIONAL UNDERPINNINGS: RIGHT TO ABORTION AND PARENTAL INVOLVEMENT

The Fourteenth Amendment's Due Process Clause declares that no state shall "deprive any person of life, liberty, or property, without due process of law."[21] Relying on the substantive component of the Due Process Clause,[22] the Supreme Court has interpreted the Constitution to protect a "realm of personal liberty which the government may not enter."[23] Furthermore, a long line of Supreme Court precedent has emphasized the role of this constitutionally assured realm of liberty in protecting the fundamental right to privacy, which guarantees the freedom of choice in personal matters, such as marriage and family life.[24] In

21. U.S. Const. amend. XIV, § 1.

22. The controversy underlying the Due Process Clause's protection of substantive liberties is beyond the scope of this Note. It is enough to recognize that this substantive component has long been used to protect against government interference with liberties not enumerated in the Constitution. See, e.g., Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) ("[T]he constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception . . . .").

23. *Casey*, 505 U.S. at 847.

24. See Roe v. Wade, 410 U.S. 113, 164 (1973) (holding Constitution protects woman's right to choose to terminate her pregnancy prior to viability); Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (finding law prohibiting distribution of contraceptives to unmarried individuals violates equal protection); Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding prohibition of interracial marriage violates Due Process Clause); Griswold v.

regard to reproductive freedom, the cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[25]

In 1973, the seminal case *Roe v. Wade* established that the Constitution protects a woman's right to choose to terminate her pregnancy prior to fetal viability.[26] Under *Roe*, the government cannot constitutionally proscribe abortion prior to viability nor regulate the procedure unless such regulations withstand strict scrutiny analysis.[27] The decision also established the much-discussed trimester framework for state regulation of abortion,[28] a framework later found to be overly protective of a woman's right to choose and insufficiently protective of the state's interest in potential life.[29] Because contemporary abortion regulations are evaluated under *Casey*'s undue burden standard,[30] it is necessary to describe the opinion both as it was written in 1992 and as it is understood today. This Part first discusses the undue burden framework as used in *Casey* to simultaneously invalidate Pennsylvania's spousal notification provision and yet uphold the state's waiting period, informed consent, parental consent, and reporting regulations. It then proceeds to analyze the subsequent proliferation of one particular type of restriction upheld in *Casey*—parental involvement statutes—throughout the country.

Connecticut, 381 U.S. 479, 485–86 (1965) (declaring Connecticut state law prohibiting use and distribution of contraceptives unconstitutional).

25. *Eisenstadt*, 405 U.S. at 453 (emphasis omitted).

26. 410 U.S. 113. Justice Blackmun, writing for the majority, defined fetal viability according to medical and scientific standards as "the interim point [between conception and live birth] at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id. at 160 (footnote omitted) (citing Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965); L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971)).

27. Id. at 155 (reiterating where "'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling state interest,'" and "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake").

28. In-depth discussion of *Roe*'s trimester framework is outside the scope of this Note; however, a brief summary helps shed light on the impact of its dismissal. Under *Roe*, during the first trimester, the state could not prohibit abortion and could only regulate the procedure as it did any other medical procedure. Throughout the second trimester, the state was able to regulate abortion in ways aimed at protecting maternal health, and only in the third semester (postviability) was the state able to proscribe abortion, except when necessary to preserve the life or health of the mother. See id. at 163–64 (protecting state's interest in maternal health but refusing to give credence to state's interest in potential life of fetus).

29. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (plurality opinion) (creating undue burden standard in effort to reconcile "State's interest with the woman's constitutionally protected liberty").

30. See infra Part I.A.1 (looking in depth at requirements of undue burden standard).

A. *Current Abortion Jurisprudence:* Planned Parenthood v. Casey

The Pennsylvania Abortion Control Act of 1982, at issue in *Planned Parenthood v. Casey*, regulated abortions by: (1) mandating a twenty-four-hour waiting period;[31] (2) requiring physicians to inform women of the availability of information on the fetus;[32] (3) requiring parental consent for minors' abortions;[33] (4) creating requirements for abortion providers with respect to reporting and recordkeeping;[34] and (5) requiring spousal notification for married women seeking abortions.[35] Even before it reached the Supreme Court, the case was controversial, with the district court finding all five provisions of the statute unconstitutional.[36] On appeal, the Court of Appeals for the Third Circuit reversed, upholding all of the regulations apart from the spousal notification provision.[37]

Justice O'Connor, writing for a plurality of the Supreme Court, opened her opinion disparaging the volatile state of the nation's abortion jurisprudence: "Liberty finds no refuge in a jurisprudence of doubt."[38] Aiming to provide assurance to generations of women accustomed to legalized abortion,[39] Justice O'Connor quickly followed her acknowledgement of doubt with a reaffirmation of *Roe*'s "essential holding."[40] Perhaps more interesting and consequential than the upheld portions of the *Roe* opinion are the aspects of *Roe* found to be outside of the prior Court's central holding—the trimester framework,[41] the use of

31. 1989 Pa. Laws 593.

32. Id.

33. Id. at 594.

34. Id. at 600–01.

35. Id. at 596.

36. Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1377–96 (E.D. Pa. 1990), aff'd in part, rev'd in part, 947 F.2d 682 (3d Cir. 1991), aff'd in part, rev'd in part, 505 U.S. 833 (1992). The District Court opinion first found the statute unconstitutional because of its health exception alone but then proceeded to examine each provision at issue in more detail.

37. 947 F.2d at 719.

38. 505 U.S. at 844.

39. Id. at 856 ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.").

40. Id. at 846. The Court actually breaks *Roe*'s "essential holding" into three parts: (1) a woman's right to have an abortion previability without undue interference from the state; (2) the state's power to restrict abortion postviability; and (3) the state's legitimate interests in protecting the health of the woman and the life of the fetus. Id. But see, e.g., Adam Clymer, The Supreme Court; Top Lawmakers Vow to Push Abortion-Rights Bill, N.Y. Times (June 30, 1992), http://www.nytimes.com/1992/06/30/us/the-supreme-court-top-lawmakers-vow-to-push-abortion-rights-bill.html (on file with the *Columbia Law Review*) ("'The Supreme Court [in *Casey*] didn't kill Roe v. Wade. It gave the states permission to strangle it to death with red tape.'" (quoting Rep. Bill Green)).

41. *Casey*, 505 U.S. at 873 (plurality opinion) ("The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life . . . .").

strict scrutiny to evaluate abortion regulations previability,[42] and the prohibition on state encouragement of childbirth.[43] Relying on prior Supreme Court dicta describing the concept of an "undue burden,"[44] Justice O'Connor proceeded to replace *Roe*'s almost complete rejection of state intervention in the first trimester with a new undue burden standard in an effort to provide consistency and preserve a greater number of state abortion regulations.[45] Ultimately, the *Casey* plurality was determined to preserve the soundness of *Roe v. Wade*, while simultaneously reworking and reevaluating the last two decades of abortion precedent. By substituting the more lenient undue burden standard for *Roe*'s "rigid" trimester framework,[46] *Casey* effectively overturned prior Supreme Court precedent invalidating twenty-four-hour waiting periods and informed consent provisions as unconstitutional.[47]

1. Casey*'s Undue Burden Standard.* — The plurality described the newly minted undue burden standard as "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[48] But what does the undue burden analysis actually entail?

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42. See id. at 874 ("The fact that a law . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.").

43. Id. at 872 ("Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . .").

44. See, e.g., Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 519–20 (1990) (Kennedy, J.) (upholding constitutionality of Ohio abortion statute requiring parental notification because statute did "not impose an undue . . . burden on a minor seeking an abortion"); Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 640 (1979) (plurality opinion) (examining whether parental consent "unduly burden[s]" minor's right to abortion in determining constitutionality of statute).

45. *Casey*, 505 U.S. at 874 (plurality opinion) ("Only where state regulation imposes an *undue burden* on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." (emphasis added)); see also Erwin Chemerinsky, Constitutional Law: Principles and Policies 854 (4th ed. 2011) (noting more favorable shift in *Casey* Court's opinion of state involvement in abortion decision).

46. *Casey*, 505 U.S. at 873 (plurality opinion) (rejecting "rigid trimester framework" because of its failure to allow "[m]easures aimed at ensuring that a woman's choice contemplates the consequences for the fetus").

47. See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 760 (1986) (invalidating Pennsylvania law requiring women be given seven different kinds of information at least twenty-four hours before consenting to abortion because statute was motivated by desire to discourage women from having abortions), overruled by *Casey*, 505 U.S. 833; City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 449–50 (1983) (invalidating "unreasonable" and "inflexible" ordinance provisions requiring physician to obtain woman's informed consent prior to abortion and mandating twenty-four-hour waiting period), overruled by *Casey*, 505 U.S. 833. Scholars describe the shift from *Akron* and *Thornburgh* to *Casey* as a "reflect[ion] [of] the Court's abandoning the position that the state may not regulate abortions in a way to encourage childbirth." Chemerinsky, supra note 45, at 854.

48. *Casey*, 505 U.S. at 876 (plurality opinion).

According to Justice O'Connor, "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus."[49] Thus, the undue burden/substantial obstacle test evaluates both regulations enacted with the *purpose* of producing an obstacle on a woman's right to choose and regulations that have the *effect* of producing such an obstacle.[50] However, by explicitly endorsing the state's ability to "express profound respect for the life of the unborn,"[51] *Casey* appears to have preemptively weakened future undue burden challenges claiming a violation of the purpose prong of the undue burden test. Indeed, the remainder of the plurality opinion analyzes the severity of the burdens produced by the abortion regulations at issue, in place of any consideration of the state legislature's purpose in enacting the regulations.[52]

The Supreme Court ultimately held all of Pennsylvania's challenged abortion provisions constitutional under the undue burden standard, with one exception—the spousal notification requirement. According to the Court, the spousal notification provision "d[id] not merely make abortions a little more difficult or expensive to obtain; for many women, it w[ould] impose a *substantial* obstacle."[53] In other words, the regulation was likely to prevent a "significant number of women from obtaining an abortion."[54] Despite relying heavily on the empirical evidence and factual record developed at the district court level to invalidate Pennsylvania's spousal notification provision, the Supreme Court disagreed with the lower court that any of the other provisions produced similarly severe

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49. Id. at 877 (emphasis added).

50. See id. at 920 (Stevens, J., concurring in part and dissenting in part) ("A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification."); see also Sandra Lynne Tholen & Lisa Baird, Note, Con Law Is as Con Law Does: A Survey of *Planned Parenthood v. Casey* in the State and Federal Courts, 28 Loy. L.A. L. Rev. 971, 989 (1995) ("An illegitimate state purpose is as much a substantial obstacle to the right to decide as an absolute ban on previability abortions, and thus both will constitute an undue burden.").

51. *Casey*, 505 U.S. at 877 (plurality opinion) (clarifying right at stake as "woman's right to make the ultimate decision, not a right to be insulated from all others in doing so").

52. In dissent, Justice Scalia points out the inherent confusion in the plurality opinion's reliance on an undue burden standard and concludes, "[I]t appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence." Id. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part); see also Chemerinsky, supra note 45, at 850 (suggesting *Casey* Court "implied that an undue burden exists only if a court concludes that a regulation will prevent women from receiving an abortion"). But see Tholen & Baird, supra note 50, at 989 n.113 (suggesting proof of illegitimate state purpose through use of legislative history would satisfy undue burden test if such illegitimate purpose was found).

53. *Casey*, 505 U.S. at 893–94 (emphasis added).

54. Id. at 893.

restrictions on the right to choose. And, in doing so, it dismissed posited concerns, such as a slight increase in cost,[55] as insufficiently burdensome to be held unconstitutional.[56]

2. *Facial Constitutional Challenges Under* Casey. — Justifying the Court's decision to strike down the spousal notification provision, Justice O'Connor explained that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[57] This notion is in opposition to the traditional standard used in evaluating facial constitutional challenges, wherein a plaintiff must prove there exists "no set of circumstances" in which the statute operates constitutionally.[58] Under *Casey*, "a statute need not be unconstitutional in all circumstances to be rendered facially invalid; it need only pose a substantial obstacle in a large percentage of the cases in which it is *relevant*."[59] Such a modified facial challenge standard has the

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55. See id. at 901 (plurality opinion) ("While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.").

56. This conclusion is perhaps surprising considering prior Supreme Court precedent invalidating similar regulations and the fact that the district court found that "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be 'particularly burdensome.'" Id. at 886 (quoting Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990), aff'd in part, rev'd in part, 947 F.2d 682 (3d Cir. 1991), aff'd in part, rev'd in part, 505 U.S. 833); see also id. at 885 (explicitly finding prior invalidation of parallel requirement in *Akron* to be wrong). Numerous scholars have pointed out the apparent discrepancy in upholding such a burdensome regulation while invalidating the spousal notification provision. See, e.g., Chemerinsky, supra note 45, at 852 (discussing Court's decision to uphold twenty-four-hour waiting period and commenting "[i]t is unclear why the Court felt that this was not enough to meet the undue burden test"); see also Ruth Colker, Abortion and Violence, 1 Wm. & Mary J. Women & L. 93, 95 (1994) (concluding, in striking down spousal consent provision and upholding other regulations, Court was systematically biased toward protecting upper-middle-class white women). However, the discrepancy may amount to something as simple as a difference in language at the district-court level. The *Casey* plurality acknowledged that the twenty-four-hour waiting period had the effect of "'increasing the cost and risk of delay of abortions'" but followed with the failure of the district court to find that such "delays amount[ed] to substantial obstacles." *Casey*, 505 U.S. at 886 (plurality opinion) (quoting *Casey*, 744 F. Supp. at 1378). In fact, "the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it." Id. at 887. Perhaps current abortion jurisprudence would look different had the lower court anticipated the Supreme Court's complete reliance on an undue burden/substantial obstacle framework.

57. *Casey*, 505 U.S. at 894; see also Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring) (clarifying facial challenges would be sustained against abortion restrictions even if restrictions could be constitutionally applied to some women but not to others).

58. United States v. Salerno, 481 U.S. 739, 745 (1987) (striking down facial challenge to federal Bail Reform Act on grounds challenged procedures could be constitutionally applied to *some* persons charged with crimes).

59. Tholen & Baird, supra note 50, at 973 (emphasis added) (footnote omitted); see also John Christopher Ford, Note, The *Casey* Standard for Evaluating Facial Attacks on Abortion Statutes, 95 Mich. L. Rev. 1443, 1446 (1997) ("This test shows much less defer-

potential to substantially lower the bar for facial constitutional challenges by showing much less deference to state-enacted laws than the "no set of circumstances" test applied in other contexts.[60] And although five Justices endorsed this new facial challenge standard,[61] the *Casey* dissent and subsequent judicial opinions have caused scholars to be skeptical of the amount of alteration actually supported and posited by the Supreme Court.[62]

Despite this skepticism, two aspects of the legal arena surrounding abortion regulation tend to support *Casey*'s modified standard for facial challenges. First, the Court has more explicitly and less controversially altered other procedural safeguards in the abortion context. For example, while the mootness doctrine generally requires an "actual controversy [to] exist at all stages of federal court proceedings," the Supreme Court has found that challenges to state laws regulating abortion are paradigmatic examples of "wrongs capable of repetition yet evading review"—a categorical exception to the controversy requirement.[63] Because pregnancy and gestation are inherently shorter than the time required by litigation, without this exception there would be very few successful abortion regulation challenges.[64] Second, legislatively enacted provisions have also recognized the unique nature of the reproductive context. The most relevant example of this is the fact that most states allow minors to give effective consent for medical health services for the "prevention, diagno-

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ence to statutes than the no-set-of-circumstances test. Instead of having to prove the unconstitutionality of *every* conceivable application of a statute, the *Casey* plaintiffs only needed to show that a 'large fraction' of applications would infringe on constitutional rights . . . .").

60. See Ford, supra note 59, at 1446 (explaining abortion context is unique and providing example of how statute "declaring all abortions illegal" would be constitutional under strict *Salerno* test "because the law could be applied constitutionally to a woman who is eight months pregnant").

61. See *Casey*, 505 U.S. at 894–95 (O'Connor, J., joined by Blackmun, Stevens, Kennedy & Souter, JJ.).

62. See, e.g., Tholen & Baird, supra note 50, at 995 ("Given the lack of support by other members of the Court . . . it appears that the facial challenge standard may have been modified in theory, but perhaps not in fact—at least not in application."). For in-depth analyses of this facial challenge debate, see generally Ruth Burdick, Note, The *Casey* Undue Burden Standard: Problems Predicted and Encountered, and the Split over the *Salerno* Test, 23 Hastings Const. L.Q. 825 (1996) (predicting lower courts would follow *Casey* and shift from *Salerno* test to undue burden standard); Skye Gabel, Note, *Casey* "Versus" *Salerno*: Determining an Appropriate Standard for Evaluating the Facial Constitutionality of Abortion Statutes, 19 Cardozo L. Rev. 1825 (1998) (concluding undue burden standard must be followed in abortion context).

63. Chemerinsky, supra note 45, at 114, 119–20.

64. See Roe v. Wade, 410 U.S. 113, 125 (1973) (recognizing "gestation period is so short that the pregnancy will come to term before the usual appellate process is complete" and thus, "[p]regnancy provides a classic justification for a conclusion of nonmootness").

sis and treatment" of sexually related diseases and pregnancy.[65] Thus, this Note operates under the premise that the abortion context is unique, and that the *Casey* Court did in fact knowingly modify the facial challenge standard so as to require a showing of unconstitutional, and thus impermissible, substantial obstacles on the *relevant* group of women.

B. *The Constitutionality of Parental Involvement Statutes*

It is well established that, like adults, minors benefit from a constitutionally protected zone of privacy, free from undue state interference: "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[66] This guarantee of liberty extends to a minor's reproductive decisions, as well as to the right to choose to terminate her pregnancy.[67] However, courts—both inside and outside the abortion context—have consistently maintained that the constitutional rights of minors do not mirror those of adults due to discrepancies in maturity, vulnerability, and parental authority.[68] Thus, while all abortion provisions applicable to adult women are also applicable to minors, minor females, in a majority of states, are subjected to the additional requirement of parental involvement in the abortion decision.[69] And although such regulations

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65. E.g., N.C. Gen. Stat. § 90-21.5 (2011). North Carolina—as well as other states mandating parental involvement in a minor's abortion decision—makes explicit that such "effective consent" provisions do not apply in the abortion context. Id.

66. In re Gault, 387 U.S. 1, 13 (1967) (applying Fourteenth Amendment's Due Process Clause to children in juvenile delinquency proceedings); see also *Bellotti II*, 443 U.S. 622, 633 (1979) (plurality opinion) ("A child, merely on account of his minority, is not beyond the protection of the Constitution."); Ingraham v. Wright, 430 U.S. 651, 674 (1977) (implicating constitutionally protected liberty interest in physical punishment of schoolchildren). But see Hodgson v. Minnesota, 497 U.S. 417, 444–45 (1990) (Stevens, J., joined by O'Connor, J.) (acknowledging state's "strong and legitimate interest in the welfare of its young citizens, . . . which justifies state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or entering military service" (footnote omitted) (citations omitted)).

67. Cf. Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (plurality opinion) ("Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed.").

68. See *Bellotti II*, 443 U.S. at 634 (plurality opinion) (recognizing three justifications for unequal constitutional treatment of minors and adults—"the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing").

69. See Guttmacher Inst., State Policies in Brief: Parental Involvement in Minors' Abortions 1 (2013) [hereinafter Guttmacher Inst., State Policies], available at http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf (on file with the *Columbia Law Review*) (noting "39 states require parental involvement in a minor's decision to have an abortion"). Additional regulations can be particularly problematic for minors as "unwanted motherhood may be exceptionally burdensome for [them]" due to their lack of "probable education, employment skills, financial resources, and emotional maturity." *Bellotti II*, 443 U.S. at 642 (plurality opinion).

must be evaluated under the substantial obstacle test set forth in *Casey*, the constitutional standard for parental involvement provisions[70] stems from cases decided only a few years after *Roe v. Wade*.[71]

1. *Bypass Provisions Required.* — In *Bellotti II*, the Supreme Court invalidated a Massachusetts law preventing an unmarried woman under the age of eighteen from receiving an abortion unless both of her parents granted consent or, in the event they refused, a court authorized the abortion for "good cause."[72] The Court reaffirmed that parents have a constitutional right to control the upbringing of their children,[73] and further found that the state has a legitimate interest in promoting and encouraging a "'pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a

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70. In this section, "parental involvement" encompasses both parental *consent* and parental *notification* requirements unless explicitly distinguished. Ultimately, combining the two types of regulations does not affect the analysis due to similar requirements for each and the fact that, perhaps counterintuitively, consent has not proven to be more burdensome than notification. For example, after Arkansas converted the state's parental notification statute to a parental consent law in an effort to impose a more restrictive regulation, there was no change, pre- and postenactment, of the state's adolescent abortion rate. Ted Joyce attributes this observed lack of change to the lack of change in minors' expectations of parental reactions. See Ted Joyce, Parental Consent for Abortion and the Judicial Bypass Option in Arkansas: Effects and Correlates, 42 Persp. on Sexual & Reprod. Health 168, 168–69, 172 (2010) (questioning assumption that "parental consent laws have a greater influence than notification requirements on the reproductive outcomes of minors" and finding no decrease in abortion rate after Arkansas's conversion from notification to consent).

71. See *Bellotti II*, 443 U.S. at 643–44 (plurality opinion) (requiring parental consent statutes to include "alternative procedure[s] whereby authorization for the abortion can be obtained"); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (holding state could not authorize absolute parental veto over minor's decision to terminate pregnancy). Furthermore, the *Casey* plurality explicitly recognized the "settled" nature of parental involvement statutes: "The only argument made by petitioners . . . *to which our prior decisions do not speak* is the contention that the parental consent requirement is invalid because it requires *informed* parental consent." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 899 (1992) (plurality opinion) (emphases added). The idea that the *Casey* plurality may have treated Pennsylvania's parental consent provision more deferentially due to its view that adolescent abortion jurisprudence was settled prior to 1992 is critical to an argument both supporting the Court's undue burden standard and disagreeing with the parental consent provision's apparent validity. For more on this, see infra note 142 and accompanying text. The fact that parental involvement statutes are much more prevalent today than they were in 1992 may also serve as support for an argument to reevaluate pervasive parental involvement requirements. See Michael J. New, Analyzing the Effect of Anti-Abortion U.S. State Legislation in the Post-*Casey* Era, 11 St. Pol. & Pol'y Q. 28, 29 (2001) ("In 1992, only twenty states were enforcing parental involvement laws. By 2005, thirty-four states were enforcing these laws."(citations omitted)).

72. *Bellotti II*, 443 U.S. at 625 (plurality opinion).

73. Id. at 637–39; see also, e.g., Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (describing parental role as right and duty to "nurture [the child] and direct his destiny").

child.'"[74] However, due to the time-sensitive nature of the abortion decision,[75] the Supreme Court held that the state cannot constitutionally grant an absolute veto to a third party, even to the minor's parents.[76]

Therefore, to counteract the blanket veto power given to a pregnant minor's parents under most parental consent laws, *Bellotti II* requires states to provide "an alternative procedure whereby authorization for the abortion can be obtained."[77] The opinion, which continues to be quoted at length in determining the sufficiency of bypass provisions, outlines the minimum requirements of an alternative procedure to parental consent:

> [I]f the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.
>
> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made 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.[78]

Ultimately, *Bellotti II* attempted to satisfy both the pregnant minor's right to choose an abortion, free from any type of arbitrary veto,[79] and the state's legitimate interest in protecting immature minors by mandat-

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74. *Bellotti II*, 443 U.S. at 641 (plurality opinion) (quoting *Danforth*, 428 U.S. at 91 (Stewart, J., concurring)).

75. The Court clarified that the characteristic distinguishing the pregnant minor's options from other decisions requiring parental consent, e.g., underage marriage, is an accelerated timeline. See id. at 642 ("A pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy."); see also supra notes 63–64 and accompanying text (discussing procedural mechanisms in place to counteract problems with short duration of pregnancy).

76. *Bellotti II*, 443 U.S. at 643 (plurality opinion).

77. Id. (footnote omitted). Despite the subsequent proliferation of judicial bypass provisions, it is interesting to note the *Bellotti II* Court did not mandate that a judicial hearing be the alternative procedure used. In fact, the plurality spoke favorably of "procedures and a forum less formal than those associated with a court of general jurisdiction." Id. at 643 n.22.

78. Id. at 643–44 (footnotes omitted).

79. As used here, "arbitrary" refers to the standards outlined in *Bellotti II*, including factors to take into consideration when determining the soundness of a minor's decision to procure an abortion without her parents' consent. *Bellotti II*—in addition to subsequent judicial bypass opinions—frames these factors as an inquiry into the minor's maturity and ability to assess the ramifications of her decision. See supra notes 77–78 and accompanying text (describing safeguards necessary in bypass provisions to prevent "arbitrary" third-party veto).

ing a neutral, third-party determination of the minor's decision to procure an abortion.[80]

2. *Subsequent Parental Involvement Cases.* — Differentiating between parental *notification* and parental *consent*, the Supreme Court in *H.L. v. Matheson* upheld a Utah law requiring a physician to notify the parents or guardian of the pregnant minor prior to performing an abortion because the Utah statute gave "neither parents nor judges a veto power over the minor's abortion decision."[81] The Court again credited parents with the right to control the upbringing of their children and the state with the right to express a legitimate interest in ensuring that a pregnant minor's parents play a role in the abortion decision. Furthermore, the fact that the notice requirement might "inhibit some minors from seeking abortions [wa]s not a valid basis to void the statute."[82]

Subsequent cases appear to universally uphold parental involvement laws so long as a sufficient bypass provision—as measured by *Bellotti II*—is also included in the statute.[83] However, reinforcing apparently settled parental involvement jurisprudence, the most recent Supreme Court case regarding a parental involvement statute was not concerned with the sufficiency of the bypass procedure. Instead, in *Ayotte v. Planned Parenthood of Northern New England*, the issue was the 2003 New

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80. See *Bellotti II*, 443 U.S. at 643 n.23 (plurality opinion) (requiring "opportunity for case-by-case evaluations of the maturity of pregnant minors" in order to evade blanket parental vetoes). Alternatively, Martin Guggenheim argues that *Bellotti II*'s approval of judicial bypass results in as arbitrary a decision as a blanket parental veto, if not more: "[W]hen the question before the finder of fact is one so inherently empty as determining in a few minutes the degree of a scared, pregnant minor's 'maturity,' in abortion proceedings there is the likelihood whatever legal determination reached by the court is arbitrary—almost utterly without meaning." Martin Guggenheim, Minor Rights: The Adolescent Abortion Cases, 30 Hofstra L. Rev. 589, 633 (2002); see also infra Part II.C (discussing "unworkability" of judicial bypass alternatives).

81. 450 U.S. 398, 411 (1981).

82. Id. at 413.

83. See, e.g., Lambert v. Wicklund, 520 U.S. 292, 297–98 (1997) (per curiam) (reversing lower court's invalidation of parental notification requirement after finding "judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification is* in her best interests"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 899 (1992) (plurality opinion) (upholding parental consent requirement with inclusion of judicial bypass alternative); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 522 (1990) (Stevens, J., concurring in part and concurring in the judgment) (reserving question of whether one-parent notification statutes require bypass alternative); Hodgson v. Minnesota, 497 U.S. 417, 497 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part) (preserving constitutionality of two-parent notice requirement so long as mechanism for judicial bypass exists); Planned Parenthood Ass'n of Kan. City v. Ashcroft, 462 U.S. 476, 491–94 (1983) (Powell, J., joined by Burger, C.J.) (upholding parental consent procedure providing for judicial bypass as outlined in *Bellotti II*); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 441–42 (1983) (finding city ordinance requiring minors to obtain parental consent unconstitutional due to lack of adequate bypass alternative), overruled by *Casey*, 505 U.S. 833.

Hampshire Abortion Act, which failed to "explicitly permit a physician to perform an abortion in a medical emergency without parental notification."[84] Recognizing that "[o]nly a few applications of New Hampshire's parental notification statute would present a constitutional problem," the Court refrained from invalidating the law wholesale and instead prohibited only "the statute's [few] unconstitutional application[s]."[85]

C. *Parental Involvement Statutes in Practice*

As of September 1, 2013, thirty-nine states have active, enforceable statutes requiring parental involvement in a minor's decision to have an abortion.[86] Of these states, twenty-one require parental consent only,[87] thirteen require parental notification only,[88] and five require both parental consent and notification.[89] Although most parental involvement laws differ slightly, they contain common language and provisions, allowing for broad categorization of the regulations. For ease of analysis, this section categorizes involvement requirements as[90]: (1) dual parent consent;[91] (2) dual parent notification;[92] (3) single parent consent and

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84. 546 U.S. 320, 324 (2006).

85. Id. at 331; see also infra note 105 (describing Court's assumption states will enact constitutional medical and health exceptions to parental involvement requirements and thus failing to use lack of exception or to apply modified facial challenge standard to invalidate laws explicitly lacking such exceptions wholesale).

86. Guttmacher Inst., State Policies, supra note 69, at 1.

87. California, Montana, and New Mexico are not included in this statistic despite enactment of parental consent statutes due to the fact that they have been enjoined—permanently in California and New Mexico and temporarily in Montana—by court order. Id. at 1–2.

88. Nevada and New Jersey also have parental notification statutes, but both are permanently enjoined by court order. Id.

89. Id. at 1. While a requirement of parental notification *and* consent may seem redundant, it actually refers to the requirement that the physician deliver written notice of the pending abortion along with a request for the parent to return written consent for the procedure. Compare Okla. Stat. Ann. tit. 63, § 1-740.2 (West 2013) (clarifying physician's legal duty to secure proof of identification and written informed consent following delivery of notification and request for such consent), with Ariz. Rev. Stat. Ann. § 36-2152(A) (2012) (requiring notarized parental consent but failing to specify or require physician-delivered notification and consent request).

90. These categories represent a spectrum of regulation, from regulations most intrusive on a minor's right to privacy (category one) to least intrusive (category five). However, as discussed earlier, studies analyzing the effects of notification and consent have seen little difference in the two requirements, and for purposes of later sections, consent and notification will be combined under parental involvement generally when analyzing the constitutionality of parental involvement statutes. Supra note 70 (describing scholarship comparing notification and consent).

91. Kansas, Mississippi, and North Dakota require both parents to consent prior to the abortion procedure. Guttmacher Inst., State Policies, supra note 69, at 2 tbl.

92. Only Minnesota requires both parents to be notified of their daughter's intent to procure an abortion. Id. It is interesting to note, however, that Justice Stevens found this type of notification requirement unconstitutionally burdensome in his dissent in *Hodgson*

notification;[93] (4) single parent consent;[94] and (5) single parent notification.[95] Parental involvement statutes mandating dual parent notification or consent are clearly more burdensome on a pregnant minor's constitutional right to terminate her pregnancy than single parent involvement requirements.[96] Enhancing this burden, eight states require *notarized* parental consent, with Kansas enforcing the most stringent of these provisions by mandating dual parent consent *and* notarization of such consent.[97]

Casey reaffirmed Supreme Court precedent, holding that "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, *provided that* there is an adequate judicial bypass procedure."[98] The following sections discuss the corresponding proliferation of judicial bypass alternatives, as well as the limited number of statutory exceptions to parental involvement.

1. *Bypass Procedures.* — Of the thirty-nine states with parental involvement laws, thirty-eight have laws that include at least one alternative process for minors seeking an abortion.[99] While all thirty-eight states with alternative procedures include a judicial bypass provision,[100] the guidelines for these judicial hearings vary. For example, five states require judges to use specific criteria when deciding whether to waive the parental involvement requirement,[101] and thirteen states allowing for judicial bypass require judges to use a heightened "clear and convincing evi-

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v. Minnesota. 497 U.S. 417, 457 (1990) (Stevens, J., dissenting) (finding two-parent consent requirement unconstitutionally burdensome both for minors living in one-parent households and their custodial parents).

93. Oklahoma, Texas, Utah, Virginia, and Wyoming require both parental consent and parental notification. Guttmacher Inst., State Policies, supra note 69, at 2 tbl.

94. Alabama, Arizona, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, Nebraska, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Wisconsin all require single parent consent prior to the abortion procedure. Id.

95. Alaska, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Maryland, Montana, New Hampshire, South Dakota, and West Virginia require single parent notification. Id.

96. See, e.g., *Hodgson*, 497 U.S. at 454 (noting unreasonableness of two-parent consent provision based on fact that "[i]n virtually every State, the consent of one parent is enough to obtain a driver's license . . . [and] submit to any medical or surgical procedure other than an abortion"). The Supreme Court therefore requires dual parent consent or notification statutes to include exceptions for single parent households. Id. at 450–55.

97. The other seven states requiring notarized consent are Arizona, Arkansas, Louisiana, Nebraska, Oklahoma, Texas, and Virginia—four in category four and three in category three. Guttmacher Inst., State Policies, supra note 69, at 1–2 & tbl.

98. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 899 (1992) (plurality opinion) (emphasis added).

99. Maryland requires parental notification and does not provide for a judicial bypass procedure, but does allow specified health professionals to waive parental involvement in limited circumstances. Guttmacher Inst., State Policies, supra note 69, at 1–2 & tbl.

100. Id. at 1.

101. Arizona, Florida, Kansas, Kentucky, and Ohio have statutes specifying criteria judges must use when determining maturity. Id. at 1–2 & tbl.

dence" standard when determining whether a minor is sufficiently mature or if it is in her best interest to bypass the parental involvement requirement.[102] Seven states also "permit a minor to obtain an abortion if a grandparent or other adult relative is involved in the decision."[103] Under *Bellotti II*, all judicial bypass provisions must explicitly assure expeditious bypass procedures and confidentiality for minors filing bypass petitions.[104]

2. *Statutory Exceptions to Parental Involvement.* — Of the thirty-nine states requiring parental involvement, thirty-six allow a minor to obtain an abortion without notifying her parents in the case of a medical emergency,[105] and sixteen states allow a minor to bypass parental involvement in cases of abuse, assault, incest, or neglect.[106] The drawback to such "abuse" exceptions is that they commonly require reporting the sexual conduct or abuse to the proper law enforcement officials.[107] And, as

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102. Arizona, Colorado, Florida, Idaho, Kansas, Louisiana, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, and Wyoming all require this heightened evidentiary standard. Id.

103. Id. at 1.

104. *Bellotti II*, 443 U.S. 622, 643–44 (1979) (plurality opinion); see also supra Part I.B.1 (outlining bypass requirements).

105. Maryland, Missouri, and Ohio do not include explicit medical emergency exceptions in their parental involvement statutes. See Guttmacher Inst., State Policies, supra note 69, at 1–2 & tbl. However, this is not to say that courts would invalidate the laws wholesale. Even when parental involvement statutes include medical emergency exceptions, "medical emergency" tends to be defined fairly narrowly, and thus courts have generally inferred broader definitions than those specified in the statute. Alternatively, some courts have held such medical exceptions are impermissibly narrow. See, e.g., Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 930 (9th Cir. 2004) (finding Idaho parental consent statute's medical provision, which defined emergency necessitating immediate abortion as condition that is "sudden and unexpected" or abnormal, as unconstitutionally narrow). For an example of the typical, narrowly written medical exception, see Ariz. Rev. Stat. Ann. § 36-2152(H)(2) (2012), which contains the following language:

> Parental consent or judicial authorization is not required under this section if . . . the pregnant minor has a condition that so complicates her medical condition as to necessitate the immediate abortion of her pregnancy *to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.*

Id. (emphasis added).

106. Guttmacher Inst., State Policies, supra note 69, at 1. For example, Arizona's parental consent statute waives the parental involvement requirement if "[t]he pregnant minor certifies to the attending physician that the pregnancy resulted from sexual conduct . . . by the minor's parent, stepparent, uncle, grandparent, sibling, adoptive parent, legal guardian or foster parent or by a person who lives in the same household with the minor and the minor's mother." § 36-2152(H)(1). The Arizona statute also protects a physician's liability in a broader sense if "the pregnancy resulted from the criminal conduct of the parent or guardian." § 36-2152(J). This broader "abuse" exception is limited to situations where parents are attempting to sue the physician by bringing a civil action for an abortion procedure obtained without their consent. Id.

107. See, e.g., § 36-2152(H)(1) ("The physician performing the abortion shall report the sexual conduct with a minor to the proper law enforcement officials . . . and shall pre-

Planned Parenthood v. Casey identified, such reporting requirements often prevent women (and minors) in these contexts from utilizing statutory abuse exceptions for the same reasons that domestic violence and abuse are systematically underreported—fear of retaliation from the abuser or unwillingness to be separated from the family.[108]

Statutory exceptions to parental involvement laws are critical to an undue burden analysis because they aid in narrowing the relevant group of women.[109] For example, the spousal notification provision in Pennsylvania's Abortion Control Act was struck down in *Casey* despite apparently lenient exceptions to the notification requirement[110] because the exceptions failed to apply to married women fearing retaliation in the form of psychological or financial abuse.[111] Notably, there are fewer common exceptions to parental involvement laws discussed above than those deemed insufficient in Pennsylvania's spousal notification provision, and the exceptions similarly fail to include pregnant minors fearing parental retaliation in any form other than physical or sexual abuse.

II. UNDUE BURDENS: SPOUSAL NOTIFICATION VERSUS PARENTAL CONSENT

Despite upholding most of the abortion regulations included in Pennsylvania's Abortion Control Act, *Casey* left open the possibility that the upheld provisions would prove to be unconstitutional in *effect*,[112] with sufficient empirical evidence.[113] In fashioning the undue burden stand-

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serve and forward a sample of the fetal tissue to these officials for use in a criminal investigation.").

108. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 889–90 (1992) (finding it "highly unlikely" abused spouse would be willing to report abuse to authorities); see also Pauline Quirion, Why Attorneys Should Routinely Screen Clients for Domestic Violence, Bos. B.J., Sept.–Oct. 1998, at 12, 13 (discussing frequent underreporting of domestic violence due to "embarrass[ment] or fear that disclosure will lead to retaliation by the abuser, financial hardship or personal stigma"); infra notes 161–167 and accompanying text (describing potential deterrence effect of reporting requirements for minors to whom abuse exceptions would apply).

109. See supra note 18 and accompanying text (describing *Casey* Court's use of relevant group of women, rather than total number of women, in undue burden analysis).

110. See *Casey*, 505 U.S. at 887 (listing exceptions). These exceptions to spousal notification consisted of a signed statement certifying that: (1) the husband was not the father; (2) the husband could not be located; (3) the pregnancy was the result of spousal sexual assault which the wife had reported; or (4) the pregnant woman believed that notifying her husband would cause him or someone else to inflict bodily injury upon her. 1989 Pa. Laws 596.

111. See infra notes 118–131 and accompanying text (discussing inadequacy of statutory exceptions to spousal notification provision).

112. See supra note 50 and accompanying text (describing purpose and effect prongs of undue burden test).

113. See, e.g., *Casey*, 505 U.S. at 884–85 (plurality opinion) ("Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden.").

ard, the Supreme Court directed lower courts to rely on a well-developed factual record in determining the substantiality of statutorily created obstacles interfering with a woman's right to choose.[114] However, as explained in this Part, the factual record used to invalidate Pennsylvania's spousal notification provision was lengthy and detailed, and lower courts, instead of recreating time-consuming empirical findings, have, for the most part, simply upheld "*Casey* look-alike statutes" without investigating their impact on the relevant group of women.[115]

In order to establish the requisite level of empirical evidence necessary to invalidate an abortion regulation as unconstitutional under *Casey*'s undue burden framework, this Part begins by analyzing the evidence cited and used by Justice O'Connor to strike down Pennsylvania's spousal notification provision in *Casey*. By comparing this evidence to subsequent studies on adolescent abortion and family violence, this Part proceeds to argue that despite popular approval,[116] parental notification provisions produce substantial obstacles for the group of women for whom they are relevant.[117] The next section looks closely at *Casey*'s spousal notification analysis in order to further elucidate the requirements and burdens of proof embedded in the substantial obstacle test and used to evaluate abortion regulations.

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114. See, e.g., id. at 885 (relying on record below in determining extent of health risk created by delays due to informed consent requirement). One year later, Justice O'Connor reiterated the importance of relying on the factual record when determining whether a regulation created an undue burden for a significant number of women. See Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring).

115. See, e.g., Tholen & Baird, supra note 50, at 1022–23 (analyzing state and federal applications of *Casey*'s undue burden test and concluding lower courts fail to apply test as intended by refusing to consider factual findings presented by plaintiffs on effects of state laws). For an example of the rare district court decision attempting to apply the undue burden test as described in *Casey*, see Planned Parenthood of Southern Arizona v. Neely, 804 F. Supp. 1210, 1216–18 (D. Ariz. 1992), which used the undue burden test to determine whether the judicial bypass mechanism in Arizona's parental consent provision was constitutionally sufficient.

116. E.g., Lydia Saad, Common State Abortion Restrictions Spark Mixed Reviews, Gallup Politics (July 25, 2011), http://www.gallup.com/poll/148631/common-state-abortion-restrictions-spark-mixed-reviews.aspx (on file with the *Columbia Law Review*) (finding seventy-one percent approval rating of "law requiring women under 18 to get parental consent for any abortion").

117. Used extensively throughout this section, the term "relevant group" refers to the group of women upon whom the statute operates, i.e., the women who will be directly affected by enforcement of the abortion regulation. See *Casey*, 505 U.S. at 894 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."); see also supra note 18 (describing this idea more thoroughly).

A. *Spousal Notification Provision as Unconstitutional*

In striking down Pennsylvania's spousal notification provision, Justice O'Connor began by reviewing the district court's findings of fact regarding the potential effects of the statute on married women in general. Initially noting trial court testimony that "'[t]he vast majority of women consult their husbands prior to deciding to terminate their pregnancy,'"[118] the opinion attempted to narrow the group of *relevant* women to include only those who would not ordinarily discuss their decision to seek an abortion with their husbands.[119] By assuming the notification requirement would not be an issue in healthy marriages,[120] the Court redefined the traditional standard used to evaluate facial constitutional challenges,[121] choosing to focus solely on the group of women directly affected by the abortion regulation, as opposed to pregnant women generally.

In regard to unhealthy marriages, the district court found that at least two million families in the United States experience familial abuse,[122] with married women "'of all class levels'"[123] dying as "'victims of battering.'"[124] Moreover, pregnant women and their families are at an even greater risk of experiencing abuse, as the "'[m]ere notification of pregnancy is frequently a flashpoint for battering and violence within the family.'"[125] And because "'[s]ecrecy typically shrouds abusive families,'"[126] the sexual assault exception to notification was inadequate because it

118. *Casey*, 505 U.S. at 888 (quoting Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1360 (E.D. Pa. 1990), aff'd in part, rev'd in part, 947 F.2d 682 (3d Cir. 1991), aff'd in part, rev'd in part, 505 U.S. 833).

119. Id. at 894; see also supra note 18 (describing relevant group of women).

120. See infra notes 136–139 and accompanying text (discussing Court's description of "unhealthy" marriages as dysfunctional, abusive, or not conducive to normally productive communication and support).

121. See United States v. Salerno, 481 U.S. 739, 745 (1987) (discussing traditional "no set of circumstances" test for facial constitutional challenges); supra Part I.A.2 (analyzing difference in standards).

122. *Casey*, 505 U.S. at 888 ("'This figure, however, is a conservative one that substantially understates (because battering is usually not reported until it reaches life-threatening proportions) the actual number of families affected by domestic violence. In fact, researchers estimate that one of every two women will be battered at some time in their life. . . .'" (alteration in *Casey*, 505 U.S. 833) (quoting *Casey*, 744 F. Supp. at 1361)).

123. Id. at 889 ("'Women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered. . . .'" (alteration in *Casey*, 505 U.S. 833) (quoting *Casey*, 744 F. Supp. at 1361)).

124. Id. ("'Married women, victims of battering, have been killed . . . throughout the United States . . . .'" (alteration in *Casey*, 505 U.S. 833) (quoting *Casey*, 744 F. Supp. at 1361)).

125. Id. (quoting *Casey*, 744 F. Supp. at 1361).

126. Id. (quoting *Casey*, 744 F. Supp. at 1361).

only relieved the spousal notification requirement if the battered wife reported the assault to a law enforcement agency.[127]

In looking at the remaining statutory exceptions to the notification requirement,[128] the Supreme Court focused on the "bodily injury" exception, which relieved a woman of notifying her husband of a planned abortion in the event she "ha[d] reason to believe that the furnishing of notice to her spouse [wa]s likely to result in the infliction of bodily injury."[129] However, this exception failed to cover a myriad of situations, some of which were recognized by the Court:

> The 'bodily injury' exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive [her] of necessary monies for herself or her children.[130]

Not only did the "bodily injury" exception fail to cover a significant number of devastating situations for a married woman legally compelled to notify her husband of her desire to obtain an abortion, the remainder of the exceptions failed to account for a number of legitimate reasons a wife may have for choosing not to notify her husband. Such reasons include "'the imminent failure of the marriage, or the husband's absolute opposition to the abortion,'"[131] among others.

Justice O'Connor concluded her summary of the district court's findings by citing additional studies on the prevalence of domestic violence, including a summary of recent research in the field published by

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127. See 1989 Pa. Laws 596 (excusing spousal notification requirement for pregnancies resulting from "spousal sexual assault[,] . . . which has been reported to a law enforcement agency"); see also *Casey*, 505 U.S. at 893 ("If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government . . . ."); Hodgson v. Minnesota, 497 U.S. 417, 439 n.25 (1990) ("'It is impossible to accurately assess the magnitude of the problem of family violence . . . because members of dysfunctional families are characteristically secretive about such matters . . . .'" (quoting Hodgson v. Minnesota, 648 F. Supp. 756, 768–69 (D. Minn. 1986), rev'd, 853 F.2d 1452 (8th Cir. 1988), aff'd, 497 U.S. 417)).

128. See 1989 Pa. Laws 596 (containing exceptions to spousal notification provision if spouse is not father, spouse cannot be located, pregnancy is result of spousal sexual assault and has been reported to law enforcement agency, or there is reason to believe notification will result in bodily injury).

129. Id.

130. *Casey*, 505 U.S. at 888 (alteration in *Casey*, 505 U.S. 833) (quoting *Casey*, 744 F. Supp. at 1360) (internal quotation marks omitted).

131. Id. (quoting *Casey*, 744 F. Supp. at 1360). The Court included health concerns as another legitimate reason a woman might choose to not notify her husband. Id.

the American Medical Association (AMA).[132] It is interesting to note that the studies and professional organizations cited by the Court do not, for the most part, consider the effects of spousal notification of *abortion* on domestic violence. Rather, the studies document spousal abuse and domestic violence generally, or reflect on the effect of *pregnancy* on such abuse.[133]

Ultimately the *Casey* Court found the spousal notification requirement to be "likely to prevent a significant number of women from obtaining an abortion."[134] Indeed, "for many women, it will impose a substantial obstacle."[135] Because this is one of very few instances where the Supreme Court has found an abortion regulation to constitute an impermissible undue burden since the enactment of the undue burden standard, it is worth reiterating the *Casey* Court's methodology in invalidating the spousal notification statute. First, the Court narrowed its focus to include only the relevant group of women: "In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child."[136] Thus, the analysis centered on dysfunctional marriages, including the "millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands."[137] Because women fearing devastating psychological abuse—including "verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends"[138]—were not exempt from Pennsylvania's notification requirement, they, along with other women not falling within one of the statutory exceptions, made up the relevant group of women. And because compelled spousal notification was likely to preclude a significant number of women *in that relevant group* from obtaining an abortion, the provision was found to be unconstitutional.[139] In light of this framework, the next section analyzes the substantial obstacles produced by parental involvement requirements and their effects on the relevant group of minors.

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132. Id. at 891–92.

133. See id. at 891–92 ("The limited research that has been conducted with respect to notifying one's husband about an abortion, although involving samples too small to be representative, also supports the District Court's findings of fact.").

134. Id. at 893.

135. Id. at 893–94.

136. Id. at 892–93.

137. Id. at 893.

138. Id.

139. Id. at 898 (holding spousal notification provision unconstitutional).

B. *Reconsidering the Constitutionality of Parental Consent Provisions Under* Casey

At the outset, it is important to recognize that the *Casey* plurality upheld Pennsylvania's parental consent provision as constitutional. In nine sentences, the Court dismissed the provisional challenge and the lower court's findings of fact, relying on legal precedent to uphold the adolescent abortion regulation.[140] While Justices and legal scholars attribute the discrepancy in the depth of treatment of the parental consent and spousal notification provisions to differences in policy judgments and the purposes of the two laws,[141] this Note argues that current empirical evidence calls into question the Court's prior refusal to find parental consent provisions unduly burdensome for pregnant minors.[142]

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140. See id. at 899 (plurality opinion) ("Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."). But see Tholen & Baird, supra note 50, at 1022–23 (suggesting courts applying undue burden standard generally fail to consider newly discovered or analyzed empirical evidence due to their tendency to simply uphold "*Casey* look-alike statutes"). Although Tholen and Baird are commenting on *subsequent* application of the undue burden standard, it is arguable the *Casey* Court considered evidence contradicting the posited purposes and benefits of parental involvement laws less seriously simply because the laws' constitutionality had been previously, and firmly, established. See supra note 71 (discussing settled nature of adolescent abortion jurisprudence).

141. See *Casey*, 505 U.S. at 965 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("[W]hile striking down the spousal *notice* regulation, the [plurality upheld] a parental *consent* restriction . . . . The [plurality] . . . draws this distinction based on a policy judgment that parents will have the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives."); Tholen & Baird, supra note 50, at 987 (comparing spousal notification and parental consent laws and suggesting difference in treatment stems from laws' different purposes). But see infra Part II.B.3 (providing examples of situations where parents act in opposition to pregnant daughter's best interests). Assuming the state has legitimate interests in protecting immature minors and encouraging familial communication (assumptions that may be proven untrue), evidence demonstrating the substantial obstacles imposed by parental involvement laws must be stronger and more directly relevant than that used to strike down the spousal consent provision. But see Hodgson v. Minnesota, 497 U.S. 417, 452 (1990) (arguing against state interest in encouraging familial communication because "state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all" (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944))). This being noted, the Supreme Court has also recognized that "unwanted motherhood may be exceptionally burdensome for a minor." *Bellotti II*, 443 U.S. 622, 642 (1979) (plurality opinion). Perhaps the enhanced burden of pregnancy and child rearing for a minor mitigates the increased validity of the state's interests in these situations.

142. It is important to recognize that invalidating parental involvement statutes requires overturning Supreme Court precedent in opposition to the rule of stare decisis. In upholding *Roe v. Wade*, the *Casey* Court itself relied on the fact that the "Constitution requires . . . continuity over time" and that "respect for precedent is . . . indispensable." *Casey*, 505 U.S. at 854. However, the Court left open the possibility that "a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed." Id. In the case of parental

The *Casey* Court declared Pennsylvania's spousal notification provision unconstitutional,[143] not because it imposed an undue burden on a majority of all women of reproductive age, but because it amounted to a substantial obstacle for the *relevant* group of women,[144] i.e., "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement."[145] Therefore, if evidence can substantiate that "in a large fraction of cases in which [an abortion regulation] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," the regulation will be found to produce an impermissible undue burden and thus be unconstitutional.[146] In regard to parental involvement statutes, the targeted group of women consists of minors seeking abortions who do not wish to notify their parents of their intentions and who do not qualify for one of the statutory exceptions to parental involvement.[147]

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involvement requirements, this Part relies on the argument that precedent must be overturned when facts have so changed or have *come to be seen so differently* that such precedent can no longer be applied or justified. See Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412–13 (1932) (Brandeis, J., dissenting) (discussing propriety of using "facts newly ascertained" to argue against prior precedent), overruled on other grounds by Helvering v. Mountain Producers Co., 303 U.S. 376 (1938), and Helvering v. Bankline Oil Co., 303 U.S. 362 (1938).

143. While the preceding sections differentiate between parental *notification* and parental *consent* statutes, this section is mainly concerned with parental *consent* provisions. This is not due to an assumption that consent is unduly burdensome while notification is not, but rather that parental consent was the restriction at issue in *Planned Parenthood v. Casey*. In fact, scholarship shows that notification and consent provisions do not practically amount to different obstacles—both act as comparable deterrents for a pregnant minor desiring to procure an abortion without involving her parents. See Joyce, supra note 70, at 169 (questioning inconsistent results of studies attempting to demonstrate different effects of parental notification and parental consent requirements).

144. See supra note 18 and accompanying text (discussing relevant group of women analysis).

145. *Casey*, 505 U.S. at 895.

146. Id.

147. There are two major hurdles to analogizing spousal notification and parental consent. First, the Supreme Court did not find the state to have a legitimate interest sufficient to enact the spousal notification provision, whereas prior Court precedent has accepted that the state has legitimate interests in securing the "welfare of its young citizens," protecting parents' interest in "controlling the education and upbringing of their children," and "ensuring that the minor's [abortion] decision is knowing and intelligent." Hodgson v. Minnesota, 497 U.S. 417, 444–48 (1990) (plurality opinion). The second hurdle considers whether "girls" can be categorized as "women." This Note asserts that girls are women. Even if minors do not receive full protection under the Constitution in other matters, immaturity in the context of reproductive decisions is moot. Once a minor becomes pregnant, her constitutional rights should be elevated to those of pregnant adults because both groups of women potentially face lifelong consequences for the decision they make—semantics alone cannot allow the Supreme Court to escape the undue burden framework for pregnant minors. See Carol Sanger, Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law, 18 Colum. J. Gender & L. 409, 415 (2009) [hereinafter Sanger, Decisional Dignity] (recognizing "women, even young women, understand

The starting point for this section is Justice Blackmun's opinion concurring in part and dissenting in part in *Planned Parenthood v. Casey*.[148] While lamenting the plurality's dismissal of the trimester framework, Blackmun remained optimistic throughout his opinion that the upheld provisions simply lacked the proper evidence to be found unconstitutional.[149] At one point he described the evidence presented to invalidate the spousal notification provision as categorical—expert testimony, empirical studies, and common sense.[150] The following sections mirror Justice Blackmun's reasoning, presenting child abuse statistics and reports produced by the AMA, American Psychological Association (APA), and other professional organizations as expert testimony, studies documenting the effects of parental involvement laws on adolescent abortion rates and well-being as empirical proof, and academic articles arguing the negative effects of compelling familial communication as common sense.

1. *Expert Testimony.* — The district court hearing *Casey* relied on expert testimony to introduce both statistics on domestic violence and evidence regarding the opinions of well-known professional organizations.[151] While domestic violence statistics referencing familial abuse apply to adolescents as well as married women,[152] there are additional, child-specific statistics on abuse[153]:

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very well what an abortion is"). This is not to say that encouraging minors to discuss their decision with and seek counsel from adults is wrong or unconstitutional, but perhaps mandating consent is, at least for some minors. Thus, in this section, pregnant minors will be considered a group of *women* just as married women in abusive marriages were considered a group of women in *Planned Parenthood v. Casey*.

148. See *Casey*, 505 U.S. at 922–23 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (simultaneously expressing relief and anxiety regarding state of contemporary abortion jurisprudence and its future).

149. Id. at 926 ("I am pleased that the joint opinion has not ruled out the possibility that these [currently upheld] regulations may be shown to impose an unconstitutional burden. The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it."). Justice Blackmun further assured the parties of the possibility of future invalidation: "I am confident that in the future evidence will be produced to show that 'in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion.'" Id. (alterations in original) (quoting id. at 895 (majority opinion)).

150. Id. at 925.

151. Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1360–62 (E.D. Pa. 1990), aff'd in part, rev'd in part, 947 F.2d 682 (3d Cir. 1991), aff'd in part, rev'd in part, 505 U.S. 833.

152. See *Casey*, 505 U.S. at 888 (noting *family* violence occurs in at least two million American families); see also id. at 889 (recognizing "'pregnancy is frequently a flashpoint for battering and violence within the *family*'" (emphasis added) (quoting *Casey*, 744 F. Supp. at 1361)). While it is easy to infer that family violence statistics also apply to children, the *Casey* Court acknowledged this cross-applicability explicitly: "In families where wifebeating takes place, . . . child abuse is often present as well." Id. at 891; see also *Hodgson*, 497 U.S. at 439 n.25 ("'[M]inors are particularly reluctant to reveal violence or

> Each year there are approximately 1,003,600 cases of child neglect and 675,000 cases of child abuse, resulting in the deaths of 1100 children. Yearly, almost 160,000 children receive serious injuries as a result of maltreatment. These injuries include loss of consciousness, arrested breathing, broken bones, third degree burns, schooling loss, and loss of special education services. Additionally, 952,600 children sustain moderate injuries or impairments. These include bruises, depression, and emotional distress that lasts at least forty-eight hours.[154]

Although it did not specifically cite them in *Casey*, the Supreme Court has previously recognized statistics demonstrating the effects of family violence on children—particularly family violence feared by children living in dysfunctional homes.[155] And similar to its acknowledgment of spousal abuse statistics showing the tendency for heightened abuse after notification of pregnancy,[156] the Supreme Court has also accepted "uncontradicted testimony" that "notice of a daughter's pregnancy 'would absolutely enrage [a batterer]. . . . The sexual jealousy, his dislike of his daughter going out with anybody else, would make him very angry and would probably create severe abuse as well as long-term communication difficulties.'"[157]

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abuse in their families.'" (quoting Hodgson v. Minnesota, 648 F. Supp. 756, 769 (D. Minn. 1986), rev'd, 853 F.2d 1452 (8th Cir. 1988), aff'd, 497 U.S. 417)).

153. These statistics become even more persuasive in light of the fact that the district court opinion (and thus, the Supreme Court) did not consider child-specific abuse statistics. Instead, the district court focused on the burdens of *informed* parental consent, as that was the primary provisional issue raised by the *Casey* plaintiffs. See *Casey*, 744 F. Supp. at 1355–58 (analyzing burdens produced by informed parental consent); see also supra note 71 (discussing settled nature of adolescent abortion jurisprudence).

154. Raymond C. O'Brien, An Analysis of Realistic Due Process Rights of Children Versus Parents, 26 Conn. L. Rev. 1209, 1234 (1994) (footnotes omitted). More recent statistics show that an estimated 1,570 children died from abuse and neglect in the United States in 2011. National Statistics on Child Abuse, Nat'l Children's Alliance, http://www.nationalchildrensalliance.org/NCANationalStatistics (on file with the *Columbia Law Review*) (last visited Nov. 15, 2013). And of the approximately 681,000 children characterized as "victims of maltreatment," about ten percent (or 68,100 children) were sexually abused. Id. Moreover, more than "78%of [sic] reported child fatalities as a result of abuse and neglect were caused by one or more of the child victim's parents." Id.

155. See, e.g., *Hodgson*, 497 U.S. at 439 n.25 ("'Many minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence.'" (quoting *Hodgson*, 648 F. Supp. at 768)); see also supra note 152 (documenting *Casey* Court's recognition of potential for child abuse).

156. Supra note 152 (documenting *Casey* Court's recognition of link between discovery of abuse and pregnancy).

157. *Hodgson*, 497 U.S. at 451 n.36 (alteration in *Hodgson*) (quoting one of plaintiff's expert's trial testimony). Such a scenario is not unlikely given the prevalence of sexual abuse of minors. See Nat'l Children's Alliance, supra note 154 (reporting 197,902 children—of the 287,000 served by National Children's Advocacy Centers around the country—reported sexual abuse in 2012). Moreover, of the 262,000 alleged offenders investigated for child abuse in 2012, "85,699 were a parent or step-parent of the [minor] victim." Id.

In addition to statistics evidencing widespread child abuse, in recent years a significant number of well-respected professional organizations have put forth official statements discrediting stringent parental involvement requirements as part of a minor's abortion decision.[158] Notably, the APA has asserted that three arguments relied upon for allowing state regulation of minors' abortion decisions—a minor's particular vulnerability, the need to offset a minor's incompetence, and promoting family integrity[159]—are not supported by psychological research.[160] Not only does "[n]o evidence exist[] that legislation mandating parental involvement against the adolescent's wishes has any added benefit in improving productive family communication," evidence alternatively tends to show that "such legislation may have an adverse impact on some families."[161] This is not to say that *encouraging* parental involvement is not beneficial. The American Academy of Pediatrics encourages minors to "involve their parents and other trusted adults in decisions regarding pregnancy termination," a sentiment which is shared by the American College of Obstetricians and Gynecologists, the AMA, the American Public Health Association (APHA), and others.[162] However, these same professional health organizations publicly advise against physicians *compelling* minors to involve their parents before deciding whether to undergo an abortion.[163] Such compulsion can be counterproductive, particularly in situations where fear of nonconfidentiality breeds "a strong disincentive to seeking care."[164] Professional medical organizations thus almost unanimously support the encouragement of familial communication[165] for the same reasons states institute parental involve-

158. See, e.g., Ctr. for Adolescent Health & the Law, Policy Compendium on Confidential Health Services for Adolescents 63 (Madlyn C. Morreale et al. eds., 2d ed. 2005) [hereinafter Policy Compendium], available at http://www.cahl.org/PDFs/Policy Compendium/PolicyCompendium.pdf (on file with the *Columbia Law Review*) ("Genuine concern for the best interests of minors argues strongly against mandatory parental consent and notification laws.").

159. See, e.g., supra note 141 (discussing state interests regarding minor abortion regulation).

160. E.g., Gary B. Melton & Anita J. Pliner, Adolescent Abortion: A Psycholegal Analysis, *in* Am. Psychological Ass'n, Adolescent Abortion: Psychological and Legal Issues 1, 16–23 (Gary B. Melton ed., 1986).

161. Policy Compendium, supra note 158, at 63.

162. Id. at 62–68. Most of these organizations further assert that the encouragement of minors to consult with parents, family members, or other trusted adults is particularly critical for very young (and presumably less mature) adolescents. Id.

163. See, e.g., id. (describing medical and psychological consequences of mandatory parental notification); Council on Ethical and Judicial Affairs, Am. Med. Ass'n, Code of Medical Ethics 5 (2006–2007 ed. 2006) ("The patient, even an adolescent, generally must decide whether, on balance, parental involvement is advisable. Accordingly, minors should ultimately be allowed to decide whether parent involvement is appropriate.").

164. Policy Compendium, supra note 158, at 63.

165. For a spectrum of the strength of support of such encouragement, compare id. at 61 (citing American Academy of Pediatrics, joined by American Academy of Family Physicians, among others, as concluding "potential health risks to adolescents . . . are so

ment mandates,[166] but simultaneously, and unanimously, reject the soundness of mandatory parental involvement laws aimed at conforming familial discourse to an unattainable state standard or ideal.[167]

Due to the health risks associated with pregnancy and childbirth, the mortality rate for teenagers who carry their pregnancies to term is five times higher than for those who have abortions.[168] Similarly concerned with health risks faced by pregnant teenagers, the National Academy of Science opposes parental involvement statutes specifically because they result in delayed procedures and heightened medical risks for pregnant minors.[169] In sum, the national consensus of professional associations almost universally finds parental involvement statutes not only detrimental to familial integrity and communication, but also medically dangerous for pregnant adolescents more willing to delay the abortion procedure or carry their pregnancy to term than to obtain parental consent for an abortion.

2. *Empirical Evidence.* — While the ramifications of parental involvement laws are undeniably difficult to assess,[170] numerous scholars have attempted to study and formulate conclusions on the effects of such laws. At the outset, it is interesting to note that there exists no widely accepted study documenting "standard" effects of parental involvement statutes on abortion or pregnancy rates.[171] But neither was such a study used in *Casey* to demonstrate the effect of spousal notification on abortion rates. Rather, the Court *inferred* that the notification requirement would unduly burden a significant number of married women from studies document-

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compelling that legal barriers and deference to parent involvement should not stand in the way of needed health care"), with id. at 62 ("Adolescents should be encouraged to include their parents in a full discussion of her options. The pediatrician should explain how parental involvement can be helpful . . . .").

166. See supra note 141 (discussing state interests in minor abortion regulation).

167. Policy Compendium, supra note 158, at 62–68.

168. Melton & Pliner, supra note 160, at 16.

169. Reprod. Freedom Project, ACLU, Parental Notice Laws: Their Catastrophic Impact on Teenagers' Right to Abortion 14–15 (1986).

170. See generally Amanda Dennis et al., Guttmacher Inst., The Impact of Laws Requiring Parental Involvement for Abortion: A Literature Review 6–9 (2009), available at www.guttmacher.org/pubs/ParentalInvolvementLaws.pdf (on file with the *Columbia Law Review*) (noting methodological challenges inherent in studies evaluating parental involvement laws).

171. Cf., e.g., James L. Rogers & Amy M. Miller, Inner-City Birth Rates Following Enactment of the Minnesota Parental Notification Law, 17 Law & Hum. Behav. 27, 37–38 (1993) (disputing claim that increase in birth rate of minors in Minneapolis is related to enactment of parental notice law); see also Rebecca M. Blank, Christine C. George & Rebecca A. London, State Abortion Rates: The Impact of Policies, Providers, Politics, Demographics, and Economic Environment, 15 J. Health Econ. 513, 513–33 (1996) (analyzing state abortion rates of women aged fifteen to forty-four from 1974 to 1988 and finding no statistically significant association with parental involvement laws). But see Dennis et al., supra note 170, at 10–11 (criticizing Blank, George and London study for including all women, instead of only minors, because change in abortion rate among minors would need to be drastic to be statistically significant in sample of all women).

ing domestic violence. And unlike the data used by the *Casey* Court to establish the prevalence of domestic violence and the likelihood of such violence interfering with a married woman's right to choose to terminate her pregnancy, the majority of studies cited here tend to *directly* assess the effects and burdens of parental involvement laws on minors.

One of the most widely documented effects of parental involvement laws is an increase in second trimester abortions among adolescents subjected to parental involvement requirements.[172] For example, one study focusing on minor and adult abortion rates subsequent to the enactment of Mississippi's parental consent law found a nineteen percent increase in the ratio of minors to adults who obtained an abortion after a twelve-week gestation period.[173] The APHA attributes this increase in late-term abortions, at least in part, to pregnant seventeen-year-olds postponing the abortion procedure until their eighteenth birthday, "sometimes pushing the procedure into the second or third term" in an effort to evade parental involvement requirements.[174] Not only are second trimester abortions more dangerous than first trimester abortions,[175] they also become increasingly less available as the pregnancy progresses due to the ability of states to proscribe abortion subsequent to viability.[176] Evidence of this consequence can be found in the University of California, San Francisco's ongoing "Turnaway Study," which recruited women from thirty abortion clinics across the United States to compare the characteristics of women unable to obtain wanted abortions due to presenting at the clinic just beyond the gestational limit ("Turnaways"), to those able to go through with the abortion procedure.[177] Notably, the only signifi-

172. See Schmidt, supra note 20, at 604 n.51 (citing Nat'l Women's Law Ctr., Mandatory Parental Consent and Notification Laws 2 (1991)) (reporting Missouri and Minnesota statistics showing second trimester abortions increased significantly after enactment of parental involvement laws); see also Policy Compendium, supra note 158, at 63 ("The documented impact of parental consent laws is to reduce minors' access to *early* legal abortion." (emphasis added)).

173. Stanley K. Henshaw, Research Note, The Impact of Requirements for Parental Consent on Minors' Abortions in Mississippi, 27 Fam. Plan. Persp. 120, 120–22 (1995).

174. Ensuring Minors' Access to Confidential Abortion Services, Am. Pub. Health Ass'n (Nov. 1, 2011), http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1415 (on file with the *Columbia Law Review*).

175. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1344 (E.D. Pa. 1990) ("Beyond eight weeks gestation, the risk of complications (by approximately 30%) and mortality increase (by approximately 50%) with each additional week of gestation."), aff'd in part, rev'd in part, 947 F.2d 682 (3d Cir. 1991), aff'd in part, rev'd in part, 505 U.S. 833 (1992).

176. See *Casey*, 505 U.S. at 860 (reaffirming "validity of *Roe*'s central holding[] that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions").

177. For a summary of methods used and general study results, see Ushma D. Upadhyay et al., Research and Practice, Denial of Abortion Because of Provider Gestational Age Limits in the United States, Am. J. Pub. Health (forthcoming 2014) (manuscript at e1–e5), available at http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301378 (on file with the *Columbia Law Review*).

cant sociodemographic difference seen between abortion control subjects and Turnaways was that Turnaways were more likely to be seventeen years old or younger.[178] While this study did not restrict its analysis to states with active parental involvement statutes, it provides significant support for the idea that *any* delay in abortion provision to minors has the potential to not only substantially burden, but worse, to effectively eliminate a minor's ability to exercise her constitutional right to choose to terminate her pregnancy.[179]

Another large and academically supported effect of parental involvement requirements is the increase in out-of-state travel by pregnant minors in an effort to undergo an abortion while avoiding compliance with parental involvement laws.[180] For example, Virginia Cartoof and Lorraine Klerman analyzed Massachusetts's abortion rate and found a forty-three percent drop in in-state abortions obtained by minors in the twenty months following implementation of a parental consent law in 1981.[181] Unsurprisingly, they observed a corresponding increase in the number of minors traveling to neighboring states for abortions free from parental involvement.[182] Although health risks attributed to forced out-of-state travel are less obvious and less easily documented than those stemming from second trimester abortions, the increase in out-of-state travel as a way to counteract mandated parental participation serves as a critical rebuttal to abortion regulation advocates, who rely on faulty empirical studies "documenting" decreased abortion rates following enactment of parental involvement provisions to uphold the validity and utility of parental notification or consent requirements.[183]

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178. Id. at e4 tbl.1 (showing higher proportion of fifteen- to seventeen-year-olds among Turnaways (26.4%) than near-limit abortion patients (16.8%)).

179. This is an important observation due to the line of academic criticism suggesting the undue burden test requires that the right to choose abortion be effectively *eliminated* for the relevant group of women in order to find that the challenged regulation imposes an impermissibly substantial obstacle. See supra note 52 and accompanying text (documenting judicial and academic opinions to this effect).

180. See, e.g., Dennis et al., supra note 170, at 1 ("The clearest documented impact of parental involvement laws is an increase in the number of minors traveling outside their home states to obtain abortion services in states that do not mandate parental involvement or that have less restrictive laws.").

181. Virginia G. Cartoof & Lorraine V. Klerman, Research Article, Parental Consent for Abortion: Impact of the Massachusetts Law, 76 Am. J. Pub. Health 397, 398 (1986).

182. Id. (reporting 130% increase of minors obtaining out-of-state abortions in month following implementation of parental consent law).

183. See Silvie Colman, Theodore J. Joyce & Robert Kaestner, Methodological Issues in the Evaluation of Parental Involvement Laws: Evidence from Texas 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 12608, 2006), available at http://www.nber.org/papers/w12608 (on file with the *Columbia Law Review*) (documenting failure of multiple studies to account for interstate travel and finding such studies "will overstate the decline in abortions among minors").

Much like statistics relating to spousal notification,[184] empirical surveys have found that a majority of adolescent girls voluntarily choose to involve their parents in the abortion decision.[185] This is unsurprising in healthy, well-functioning families. Parental involvement requirements, therefore, are only directly relevant for minors living outside of the "typical" healthy family. And in fact, studies have demonstrated exceedingly negative consequences—including physical abuse and expulsion from the family home—in situations where a minor's parents discover an unplanned pregnancy without being voluntarily told by their pregnant daughter.[186] For example, Stanley Henshaw and Kathryn Kost found that fifty-eight percent of surveyed minors reported adverse consequences after their parents discovered the pregnancy against the pregnant minor's will.[187] Furthermore, "a minimum of 6% of these minors appear to have suffered relatively harmful consequences," leading Henshaw and Kost to conclude that a majority of minors accurately predict parental reactions to pregnancy notification.[188]

3. *Common Sense.* — Parental involvement laws are enacted under the assumption that parents will consider only their daughters' best interests when confronted with an unplanned adolescent pregnancy.[189] But courts and legal scholars, relying on factual evidence as well as common

184. See supra notes 118–119 and accompanying text (citing prevalence of voluntary spousal notification).

185. See, e.g., Stanley K. Henshaw & Kathryn Kost, Parental Involvement in Minors' Abortion Decisions, 24 Fam. Plan. Persp. 196, 197, 206 (1992) (surveying 1,519 minors undergoing abortions and finding "only 39% of the minors having an abortion did so without the knowledge of either parent" and, of these, "only 2% were younger than 15"); Laurie S. Zabin et al., To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents' Communication with Parents and Parent Surrogates, 24 Fam. Plan. Persp. 148, 148 (1992) (studying 334 black, urban teenagers seeking pregnancy tests at two Baltimore clinics and finding ninety-one percent of patients with positive test results "consulted a parent or parent surrogate before deciding what to do about the pregnancy").

186. Henshaw & Kost, supra note 185, at 204 & tbl.7 (finding majority of minors whose parents found out about pregnancy without being voluntarily told by pregnant daughter reported adverse consequences, including "physical violence in home," being forced to leave home, or negatively affecting parents' health).

187. Id. at 207.

188. Id. The authors also note that "if all parents had been informed when their minor daughter became pregnant, serious problems would have resulted in perhaps 6% of the families who are at present unaware of the daughter's abortion." Id.; see also Zabin et al., supra note 185, at 151 (concluding ninety-five percent of pregnant minors surveyed consulted adult before receiving abortion and finding, in terms of parental notification, "most important correlate of the respondent's having discussed the upcoming pregnancy test with her mother was the mother's presence in the home").

189. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 965 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (acknowledging plurality's "policy judgment that parents will have the best interests of their children at heart"); Schmidt, supra note 20, at 603–04 (recognizing law assumes parents act in best interests of daughter even if not always the case). But see, e.g., infra notes 195–199 and accompanying text (citing specific situations where parents have not acted in pregnant daughter's best interests).

sense,[190] recognize that this is not the case in all families.[191] Not only do parents deny consent for a myriad of reasons, separate from whatever may be in the best interests of their daughters, "[s]ome parents may subject their daughters to financial or psychological pressure or even to physical abuse upon learning of the pregnancy."[192] Although statutory exceptions to parental involvement laws may alleviate the potential of *physical* abuse as a consequence of notification,[193] they do not protect minors from financial deprivation or psychological abuse—two examples used in *Casey* to demonstrate potential impermissible consequences following compelled spousal notification.[194]

While academic inferences and empirical studies reveal the range of negative parental reactions to notification of an adolescent daughter's unplanned pregnancy, legal precedent provides concrete examples of these reactions. Namely, cases show that consequences of parental notification can span from familial disruption to physical abuse, not to mention the "mere" denial of consent. Specific examples of these consequences include denial of parental consent for religious reasons,[195] denial of consent as a punishment for the daughter's sexual activity,[196] disruption of the familial unit,[197] possible physical abuse postnotifica-

190. This subsection title is modeled after Justice Blackmun's dissent in *Casey*, see supra notes 148–150 and accompanying text, and refers more to inferences based on academic scholarship, empirical research, and legal precedent than the popular meaning of "common sense."

191. See, e.g., Schmidt, supra note 20, at 603–04 (citing reasons for parental opposition to abortion, including personal religious or moral scruples and view that pregnancy serves as punishment for sexual activity).

192. Id. at 603 (footnotes omitted); see also Nicole Phillis, When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality, 17 Mich. J. Gender & L. 271, 288 (2011) (listing risks incurred by minors compelled to involve parents in abortion decision as "physical reprimand," "financial ostracization," "psychological abuse and intimidation," and "actual intervention by a parent to prevent . . . abortion").

193. See supra notes 106–108 and accompanying text (describing abuse exception found in fifteen states' parental involvement statutes but noting lack of utility due to stringent reporting requirements).

194. See supra note 130 and accompanying text (providing list of consequences not covered by Pennsylvania's "bodily injury" exception to spousal notification requirement).

195. See, e.g., In re Diane, 318 A.2d 629, 630 (Del. Ch. 1974) (discussing father who withdrew consent to daughter's abortion after consulting with priest); State v. Koome, 530 P.2d 260, 265 (Wash. 1975) (en banc) (recognizing parents may prioritize religious beliefs over daughter's best interests in deciding between consent and nonconsent).

196. See, e.g., Baird v. Bellotti (*Bellotti I*), 450 F. Supp. 997, 1001 (D. Mass. 1978) (accepting evidence showing some parents might demand unwanted marriage or continuance of pregnancy as punishment), aff'd, 443 U.S. 622 (1979); *Koome*, 530 P.2d at 265 (noting father opposed daughter's abortion because carrying pregnancy to term would discourage further sexual activity).

197. See, e.g., H.L. v. Matheson, 450 U.S. 398, 438 n.24 (1981) (Marshall, J., dissenting) (referencing case in which minor did not want to notify parents of pregnancy because sister had been kicked out of house after admitting similar circumstances); Women's Cmty. Health Ctr., Inc. v. Cohen, 477 F. Supp. 542, 548 (D. Me. 1979) (citing expert's opinion parents may pressure minor, causing emotional distress and disrupting family

tion,[198] and practically preventing the daughter from getting to an abortion provider.[199] In *Bellotti II*, the Court attempted to alleviate the ramifications of these punishing parental vetoes by requiring that parental involvement statutes include a bypass provision to allow the minor to circumvent her parents if needed.[200] However, as the next section demonstrates, the most commonly enacted form of bypass provision—judicial bypass hearings—has the potential to unduly burden the same group of minors harmed by parental involvement statutes.

C. *Unworkable Judicial Bypass Provisions*

Judicial bypass provisions create additional obstacles for a pregnant minor who seeks an abortion but is unwilling, or unable, to inform her parents. These obstacles are a result of the lack of objective legal standards, practical issues in the bypass system, and the inherently intimidating nature of judicial hearings.

1. *Lack of Legal Standards.* — Justice Marshall found the judicial bypass procedure "unconstitutional because it effectively gives a judge 'an absolute veto over the decision of the physician and his patient.'"[201] In a similar vein, Martin Guggenheim describes the judicial bypass procedure as arbitrary:

> All that the abortion cases establish . . . is that . . . a pregnant minor may be forced to appear before an agent of the state to plead her entitlement to terminate her pregnancy. If she is not mature, she has no right in any sense to an abortion. . . .
>
> Even if she is mature, strictly speaking she has no right to decide for herself to terminate the abortion until a judge declares her to be mature. . . .
>
> Consider how easily a judge may rule the minor is not mature. There are no standards in the law; nor can there be. . . .[202]

Like Guggenheim's critique, much of the legal criticism directed toward judicial bypass provisions focuses on the vagueness of the statu-

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harmony); Reprod. Freedom Project, supra note 169, at 8 (explaining some parents refuse to speak to daughter after learning about pregnancy).

198. See, e.g., *Bellotti I*, 450 F. Supp. at 1001 (recognizing some parents would physically abuse daughter seeking abortion); Reprod. Freedom Project, supra note 169, at 16 (suggesting statutory exceptions for physical abuse are rarely used due to requirement government authorities be notified of abuse first); see also Policy Compendium, supra note 158, at 62–68 (citing fear of nonconfidentiality as primary reason adolescents fail to act in best interest of their health).

199. See, e.g., *Bellotti II*, 443 U.S. at 647 (plurality opinion) (accepting minors would be vulnerable to parents' attempts to physically prevent them from obtaining abortion).

200. Id. at 643; see also supra Part I.B.1 (outlining bypass requirements).

201. See Hodgson v. Minnesota, 497 U.S. 417, 473 (1990) (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting Planned Parenthood Ass'n of Kan. City v. Ashcroft, 462 U.S. 476, 504 (1983)).

202. Guggenheim, supra note 80, at 632–33 (footnotes omitted).

tory provisions, which, on the whole, direct the judge to authorize an abortion if he determines either that the pregnant minor is mature or that an abortion would be in her best interests.[203] But what standards should the judge use in ruling on a minor's maturity level or her best interests? Furthermore, "how c[an] the judge determine that it is in the interest of a minor to give birth to a child if she is too immature even to decide to have an abortion?"[204] And consider, for example, a judge morally or religiously opposed to abortion. In determining the best interests of a pregnant minor, such a judge may never comprehend a situation in which an abortion would serve a minor's interests better than carrying her pregnancy to term.[205] How is one to refute such a finding when faced with the "inherently empty question"[206] of an adolescent's maturity? The lack of legal standards inherent in a subjective maturity evaluation has led to a number of indiscriminate outcomes,[207] further supporting the assertion that judicial bypass determinations are perhaps facially objective, but biased in practice.[208]

2. *Practical Obstacles.* — A number of scholars oppose judicial bypass provisions based on their "unworkability" as alternatives to parental involvement. This unworkability stems from two characteristics common to state bypass frameworks—insufficient court preparation and the possibil-

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203. See, e.g., Ariz. Rev. Stat. Ann. § 36-2152(B) (2012) ("A judge . . . shall . . . authorize a physician to perform the abortion if the judge determines that the pregnant minor is mature and capable of giving informed consent . . . [or if] the pregnant minor is not mature . . . [and] an abortion . . . would be in her best interests . . . ."); see also supra Part I.B.1 (outlining bypass requirements).

204. Robert H. Mnookin, *Bellotti v. Baird*: A Hard Case, *in* Robert H. Mnookin, In the Interest of Children: Advocacy, Law Reform, and Public Policy 149, 263 (1985) [hereinafter Mnookin, Interest]. Mnookin makes a compelling argument regarding the range of potential values the judge could use to determine a minor's best interests: "There remains the question whether best interests should be viewed from a long-term or short-term perspective. The conditions that will make the child happiest in the next year? Or at forty? Or at seventy?" Robert H. Mnookin, Defining the Questions, *in* Mnookin, Interest, supra, at 15, 18.

205. See Cruel Laws: Lawmakers, Texans Must Oppose Harmful Abortion Bill, Hous. Chron., Mar. 23, 1999, at 18A ("Some judges flat oppose abortion and will rule accordingly, again ignoring the well being of pregnant teens.").

206. Guggenheim, supra note 80, at 634.

207. See, e.g., Cleveland Surgi-Center, Inc. v. Jones, 2 F.3d 686, 689 (6th Cir. 1993) (recounting instance where lower court denied minor's petition "on the grounds that her failure to file a paternity action against the father of her three-month-old son demonstrated a lack of maturity"); In re Anonymous, 684 So. 2d 1337, 1338 (Ala. Civ. App. 1996) (per curiam) (describing trial court's denial of petition on basis petitioner became "pregnant in light of sex education in the schools" as "pretextual"); In re Anonymous, 678 So. 2d 783, 784 (Ala. Civ. App. 1996) (per curiam) (finding lower court's denial of bypass petition—on basis minor's mother knew of pregnancy but refused to consent to abortion for religious reasons—"irrelevant" and "wholly improper").

208. See Sanger, Decisional Dignity, supra note 147, at 435 (comparing judicial bypass to "old southern literacy tests designed to keep black citizens from registering to vote"); see also Guggenheim, supra note 80, at 633–35 (summarizing scholarship addressing faults in judicial determination of minor's maturity or best interests).

ity of forum exclusion. The preparedness of courts to handle bypass petitions has been studied most thoroughly by Helena Silverstein.[209] By making inquiries under the guise of a pregnant teenager, Silverstein found that many state courts provide misleading or unhelpful information when questioned on the bypass procedure, leading her to conclude that a substantial number of courts are "inadequately acquainted with their responsibilities."[210]

Minors attempting to secure a signed bypass petition are faced with the additional possibility of forum exclusion—a judge's refusal "to grant or even to hear bypass cases at all."[211] These substance-based judicial recusals not only discredit the legal system,[212] they also substantially decrease a minor's practical access to the courts.[213] Furthermore, scholars speculate that in single judge counties or the event of a sufficient threshold of collective recusals, judicial recusal may itself amount to an impermissibly substantial obstacle, making the broader parental involvement statute unconstitutional for lack of a realistic or reliable bypass alternative.[214] Technically, *Bellotti II*'s requirement that statutory bypass

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209. E.g., Helena Silverstein, Girls on the Stand: How Courts Fail Pregnant Minors (2007). For example, Silverstein discovered that "[o]f the 222 county courts charged with handling bypass petitions in [three states], 100 demonstrated substantial or complete ignorance about the bypass system or, worse, expressed considerable doubt about its existence." Id. at 53.

210. Id. at 52; see, e.g., id. ("[Forty] percent of Alabama courts, just over 45 percent of Tennessee courts, and a whopping 73 percent of Pennsylvania courts proved inadequately acquainted with their responsibilities under the law."); Helena Silverstein, Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act, 24 Law & Soc. Inquiry 73, 74 (1999) (examining "extent to which county courts [were] prepared to handle the judicial bypass option" and finding judicial consent framework not sufficiently in place to protect minors' constitutional rights due to courts giving misleading or unhelpful information).

211. Sanger, Decisional Dignity, supra note 147, at 420; see also Adam Liptak, On Moral Grounds, Some Judges Are Opting Out of Abortion Cases, N.Y. Times (Sept. 4, 2005), http://www.nytimes.com/2005/09/04/national/04recuse.html (on file with the *Columbia Law Review*) (reporting instances of judges refusing to hear bypass cases for moral reasons).

212. See Sanger, Decisional Dignity, supra note 147, at 420 (asserting forum exclusion discredits legal system through "arbitrariness of access").

213. See, e.g., Hodgson v. Minnesota, 497 U.S. 417, 440 (1990) (noting in Minnesota "a number of counties are served by judges who are unwilling to hear bypass petitions"); Patricia Donovan, Judging Teenagers: How Minors Fare when They Seek Court-Authorized Abortions, 15 Fam. Plan. Persp. 259, 259 (1983) (finding scarcity of judges willing to hear petitions severely limits access to judicial bypass in Massachusetts).

214. See, e.g., Lauren Treadwell, Note, Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals, 58 Hastings L.J. 869, 889 (2007) (noting trend of conservative judges recusing themselves from bypass procedures and suggesting sufficient threshold of collective recusals could evolve into substantial obstacle or undue burden for minor seeking abortion). As a potential solution to single-judge or hyperconservative counties, some scholars suggest abortion regulations be judged under a geographically constrained undue burden analysis, considering the fact that a substantial obstacle in one state may not pose the same

provisions be sufficiently expeditious so as not to hinder a minor's ability to undergo an abortion[215] should serve to protect against the use of bypass hearings in counties where they are, or become, practically unavailable. However, state statutes generally only specify durational requirements according to the time of *filing*,[216] and thus provide no protection in the event the system truly does become unworkable, and the pregnant minor is unable to even file her bypass petition. Importantly, the practical burdens discussed—lack of court and judge availability—fail to account for the inherent obstacles an underage adolescent faces in getting to the courthouse and explaining prolonged absences from school or home.[217]

3. *"Process as Punishment."* — Ambiguous legal standards and potential unworkability aside, filed bypass petitions are almost always approved.[218] While there may still be a valid argument that judicial bypass remains unconstitutional because of the few petitions denied, Carol Sanger alternatively asserts that it is the demands of the bypass hearing process itself which amount to the impermissible burden on a minor's right to choose abortion: "[I]t is less a hearing's outcome—whether a girl's petition is granted or denied—than the consequences for her by virtue of her participation in the process that is the problem."[219] This "process as punishment"[220] perspective is commonly shared by professionals directly involved in the bypass hearings. For example, in *Hodgson v. Minnesota*, the Supreme Court considered testimony emphasizing the failure of judges accustomed to presiding over bypass hearings

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burden on a comparable group of women in another state. See, e.g., Colker, supra note 56, at 111–12 (arguing mandatory waiting periods impose prohibitive financial costs amounting to significant burden for much of Mississippi's population where twenty-five percent of population lives below national poverty line); Tholen & Baird, supra note 50, at 1021 (suggesting state-specific conditions render regulations more or less burdensome and using example of few abortion providers spread over large geographic distances in states like Utah, North Dakota, and Mississippi).

215. *Bellotti II*, 443 U.S. 622, 643–44 (1979) (plurality opinion).

216. See, e.g., Ariz. Rev. Stat. Ann. § 36-2152(F) (2012) ("The court shall hold the hearing and shall issue a ruling within forty-eight hours . . . after the petition is *filed*." (emphasis added)).

217. See, e.g., Sanger, Decisional Dignity, supra note 147, at 439 (describing young women's difficulty in getting to court and citing, as example, bypass petitioners hitchhiking "40 miles over the course of four hours to get to the hearing on time").

218. See, e.g., *Hodgson*, 497 U.S. at 441 (finding out of 3,573 judicial bypass petitions filed in Minnesota courts from 1981 to 1986, all but fifteen were granted); Sanger, Decisional Dignity, supra note 147, at 419 (acknowledging "almost all petitions . . . filed are approved").

219. Sanger, Decisional Dignity, supra note 147, at 419.

220. The idea that a legal process may entail its own "punishment" regardless of outcome may be most closely associated with Malcolm Feeley. See Malcolm M. Feeley, The Process Is the Punishment: Handling Cases in a Lower Criminal Court 30–31 (paperback ed. 1992) ("[T]he process is itself the punishment. The time, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the . . . sentence.").

to identify any "positive effects of the law."[221] Likewise, public defenders, guardians ad litem, and physicians similarly involved in the bypass process generally characterize the hearings as stressful, embarrassing, and not achieving much good.[222]

By comparing the legal harm inflicted by the "formal interrogation of pregnant minors in court" to the harm recognized by Malcolm Feeley in the criminal trial context, Sanger posits that judicial bypass hearings serve as a form of punishment for sexually irresponsible teenagers,[223] rather than as a guard against potentially arbitrary parental vetoes. Often the hearings humiliate minors by forcing them to "testify before strangers regarding the most private matters in [their] life," including their sexual history, personal relationships, and intimate family details.[224] Furthermore, judicial bypass provisions, as formal court hearings before a judge, are intimidating as well as humiliating.[225] In fact, Justice Powell, in *Bellotti II*, intimated as much when he explicitly endorsed the use of "procedures and a forum less formal than those associated with a court of general jurisdiction."[226] Finally, judicial bypass hearings have an even greater likelihood of humiliating and intimidating the exact group of pregnant adolescents they were originally designed to protect; minor women whose family situations render them unwilling to notify their parents of an abortion are likely the same group of women for whom access to the courts is the most difficult. They are the group of women intimidated before even stepping into the courtroom because they could not simply ask their parents for a ride to the courthouse. They are the group of women constantly pondering excuses for being away from home for a noticeable period of time.[227] And they are the group of women for whom testifying about their "atypical" home life will likely be the most traumatic.[228]

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221. 497 U.S. at 441 (finding, of judges who adjudicated over ninety percent of 3,573 bypass petitions filed in Minnesota courts in five-year period, "none . . . identified any positive effects of the law").

222. Id. at 441 n.29.

223. Sanger, Decisional Dignity, supra note 147, at 418; see also Feeley, supra note 220, at 3 (describing "chaotic and consuming" lower criminal courts with "officials communicat[ing] in a verbal shorthand wholly unintelligible to accused and accuser alike" and making "arbitrary decisions, sending one person to jail and freeing the next").

224. Sanger, Decisional Dignity, supra note 147, at 444–45.

225. See, e.g., id. at 444 ("[I]t is important to stress the distinctly legal character of the bypass enterprise. The hearings are a form of legal process that take place in a place of law and carry the formal indicia of law . . . ."); see also id. at 445 (contrasting bypass judge's ability to ask pregnant minor humiliating questions with Federal Rules of Evidence's prohibition of witness and victim questioning on sexual history or sexual disposition).

226. *Bellotti II*, 443 U.S. 622, 643 n.22 (1979) (plurality opinion).

227. See supra note 217 and accompanying text (discussing difficulty in getting to courthouse).

228. See Sanger, Decisional Dignity, supra note 147, at 447–48 (summarizing humiliating testimony given by bypass petitioners, including explanations that "they were

III. IF NOT JUDGES, THEN WHO?

"In an ideal world, all young women faced with an unplanned pregnancy would be able to turn to their parents for support and guidance."[229] And in reality, as discussed above, a majority of minors *do* consult their parents or "parent surrogates" when deciding whether to terminate an unplanned pregnancy.[230] Furthermore, studies documenting the negative consequences resulting from situations where a minor's parents learn of a planned abortion without being voluntarily told demonstrate that minors, in general, are accurate predictors of parental reactions.[231] Coupled with inherently problematic and unworkable judicial bypass alternatives, the prevalence of organic parental involvement argues against the imposition of its legal compulsion. This argument is reinforced, almost unanimously, by professional health organizations that support the encouragement of familial discourse, yet discourage mandated communication.[232] Because judicial bypass hearings fail to remedy the unconstitutional application of parental involvement requirements to the relevant group of minor women,[233] this Part argues that alternative forms of parental bypass would better serve a minor's constitutional right to undergo an abortion, and, simultaneously, the state's legitimate interest in protecting immature minors.[234]

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impregnated by their own fathers, had a prior abortion, had intercourse with more than one man, and experienced family violence" (footnotes omitted)).

229. J. Shoshanna Ehrlich, Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents, 18 Berkeley Women's L.J. 61, 66 (2003).

230. See supra note 185 and accompanying text (citing studies to this effect).

231. See supra note 188 and accompanying text (finding potential for serious problems if *all* parents are informed when minor daughter becomes pregnant). Zabin et al. argue, in a similar vein, that "the characteristics that fostered communication [between a pregnant minor and her parents] were long-standing characteristics of the relationship between the young woman and her mother . . . not characteristics that could be modified by legislative or court actions." Zabin et al., supra note 185, at 154.

232. See supra notes 161–169 and accompanying text (finding compelled parental involvement results in delay of medical care and increased health risks).

233. See supra Part II.C.3 (demonstrating punishing nature of judicial hearings, particularly for minors unable to involve parents in abortion decision).

234. This Part only considers the state's interest in protecting minors from their own immaturity for a number of reasons. First, the idea that children are not afforded constitutional protection equivalent to adults is firmly established in constitutional history. See supra notes 66–71 and accompanying text (discussing abbreviated nature of minors' right to constitutional protection). Second, the other two commonly asserted state interests—encouraging familial discourse and protecting potential life—are less directly applicable due to the fact that the medical community has largely discredited the notion that the state can, or should, interfere with familial integrity, see supra notes 158–169 and accompanying text, and state interests relating to the protection of potential life apply to all women equally. Thus, the state interest in fetal life fails to justify any type of additional burden imposed on minor women. Finally, parents' right to control the upbringing of their children is infringed whether or not the bypass provision allows for a judicial hearing

A. *Physicians: Possibility for Bias*

In *Bellotti II*, the Supreme Court explicitly left room for alternative forms of parental bypass procedures: "We do not suggest, however, that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer."[235] While a juvenile court would clearly be less intimidating than the average state court due to its expertise and familiarity in dealing with minors, it is arguable that the same impermissible burdens evident in the current judicial bypass system would persist at the juvenile court level. Juvenile court judges would still make subjective maturity evaluations,[236] conservative courthouses would still be inclined to deny, or unwilling to hear, bypass petitions,[237] and minor women, unwilling to involve their parents, would still be compelled to navigate the complicated judicial framework alone.[238] And although similar concerns exist in regard to administrative proceedings, such administrative rulings may be even more problematic in regard to political responsiveness, particularly in the case of politically appointed agency officials.[239]

One possible solution to the unconstitutionality of parental involvement statutes is to return the abortion decision to "the medical judgment of the pregnant [minor's] attending physician."[240] After all, who is in a better position (apart from the pregnant minor) to more fully comprehend the ramifications of the abortion decision than a doctor? Recognizing the value of a physician's medical judgment, as well as the guaranteed confidentiality accompanying most medical decisions, many states currently have laws authorizing minors to evade common law requirements of parental consent for medical procedures involving the treatment of "'pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse.'"[241] Furthermore, deferring to the

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or some alternative form of consent. See supra Part II.C.3 (acknowledging, despite punishing nature of process, almost all filed bypass petitions are granted).

235. *Bellotti II*, 443 U.S. 622, 643 n.22 (1979) (plurality opinion).

236. See supra Part II.C.1 (describing bypass evaluation standards as subjective).

237. See supra notes 211–214 and accompanying text (discussing unwillingness of some judges to even hear bypass petitions).

238. See supra Part II.C (characterizing difficulties in judicial bypass hearings as lack of legal standards, practical obstacles, and "punishment by process").

239. Cf. Teresa Stanton Collett, Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in a Minor's Abortion Decision, 52 Baylor L. Rev. 513, 521 n.32 (discussing testimony of Texas representative Ken Yarborough in debate on bill requiring preabortion parental notification and his "concern that experienced judges will decline to hear bypass cases from fear of political consequences").

240. Roe v. Wade, 410 U.S. 113, 164 (1973) (discussing appropriateness of leaving first trimester abortion decision to "medical judgment" of physician).

241. Hodgson v. Minnesota, 497 U.S. 417, 423 (1990) (quoting Minn. Stat. § 144.343(1) (1988)). These provisions generally contain an exception for abortion, and are typically used by abortion rights advocates to argue against the unequal treatment of the abortion procedure in terms of pregnancy-related conditions. See Maya Manian,

physician's judgment provides for a similar level of expertise commonly expected of administrative agencies, and thus, aligns with at least some of the *Bellotti II* Court's goals.

However, giving approval of a minor's decision to her attending physician may not be ideal in all situations. First, if the attending physician is solely an abortion provider, one can imagine anti-abortion arguments focused on the provider's supposed "bias" toward terminating the pregnancy. The reverse situation, in which the physician practices general medicine and is personally opposed to abortion, is similarly persuasive.[242] And, unfortunately, the problem in both scenarios is the potential for disproportional influence over the pregnant patient's decision, stemming from the doctor's position of authority, as well as the respect and deference already afforded physicians in most contexts. The increased cost imposed on abortion facilities, due to attending physicians taking time to assess the pregnant minor's maturity and preparedness prior to the abortion procedure, is another important factor to consider, particularly in light of the present scarcity of abortion providers in most counties across the country.[243]

B. *Minors: Too Immature?*

An alternative solution to the problems embedded in compelled parental involvement is to give the decision to the minor. Read broadly, this could mean equating minors' abortion rights with those of adult women, thereby completely eliminating any consideration of the state's interest in protecting "the peculiar vulnerability of children [due to] their inability to make critical decisions in an informed, mature manner."[244] Such a dramatic departure from current abortion jurisprudence could be tempered by taking into account research studying the comparable

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Functional Parenting and Dysfunctional Abortion Policy: Reforming Parental Involvement Legislation, 50 Fam. Ct. Rev. 241, 242 (2012) ("The popularity of legislation mandating parental involvement with abortion is quite striking, especially in contrast to the autonomy almost all states grant to minors who choose to carry a pregnancy to term."). But see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) ("Abortion is a unique act . . . fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist . . . .").

242. See Rickie Solinger, "A Complete Disaster": Abortion and the Politics of Hospital Abortion Committees, 1950–1970, 19 Feminist Stud. 241, 245–46 (1993) (discussing divergent opinions on therapeutic abortion in medical community after significant advances made pregnancy more manageable); see also Aruda et al., supra note 10, at 10 (recognizing some health professionals may "feel strongly that they cannot offer unbiased, non-directive counseling . . . because of their religious or personal values" and recommending such clinicians "defer working with newly pregnant adolescents").

243. See NARAL Pro-Choice Am. Found., supra note 16, at 32 (finding eighty-seven percent of U.S. counties do not have abortion provider).

244. *Bellotti II*, 443 U.S. 622, 634 (1979) (plurality opinion).

cognitive abilities of adolescents. For example, in studying the APA's apparent "flip-flop" in opinions on the psychological maturity of adolescents, Laurence Steinberg et al. found that "[b]y age 16, adolescents' general cognitive abilities are essentially indistinguishable from those of adults."[245] Thus, this approach would be particularly feasible in situations where the minor abortion statute differentiated between younger and older adolescents.[246] This is an interesting solution that would likely alleviate many of the substantial obstacles imposed by parental involvement requirements on mature minors, who are presumably able to both gauge their parents' probable reactions and evaluate the abortion decision for themselves. And in regard to immature minors, most studies confirm that the youngest adolescents continue to voluntarily involve their parents in the abortion decision.[247]

C. *A Compromise: Relying on Mature Minors, Medical Judgment, and the State*

A more balanced solution to mandatory parental involvement incorporates the preceding discussion and benefits of granting authority to both the physician and the pregnant minor. Consider, for example, a fifteen-year-old minor learning of an unplanned pregnancy and finding her way to a local abortion provider. Once the physician conducts a preliminary physical examination, he initiates an "options" conversation with the pregnant teenager.[248] This is not a counseling session, but merely a way of informing the patient of her various options or reiterating those of which she is already aware. Following the options conversation, the physician, conforming to medical community standards,[249] encourages the pregnant teenager to talk with her parents or other adult mentors. However, in the event the pregnant minor expresses hesitancy or legiti-

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245. Laurence Steinberg et al., Are Adolescents Less Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop," 64 Am. Psychologist 583, 592 (2009) (arguing adolescents can possess necessary skills to make informed choice regarding abortion but nevertheless are less mature than adults in other ways); see also Phillis, supra note 192, at 284 (arguing substantive due process rights should be different for mature and immature minors, as measured by age of consent).

246. Cf. Aruda et al., supra note 10, at 5 (describing "adolescence in three psychosocial stages: early adolescence (11–14 years), middle adolescence (15–17 years), and late adolescence (18–21 years)").

247. See, e.g., Henshaw & Kost, supra note 185, at 206 (finding only two percent of minors who failed to voluntarily include parents in abortion decision were younger than fifteen).

248. Medical students and doctors undergo multiple forms of "options" training, designed to induce a comforting, yet professional, atmosphere during conversations regarding difficult health decisions, such as terminating cancer treatment or learning of a terminal illness for the first time. See Aruda et al., supra note 10, at 9 (describing options counseling as requiring "clinicians to utilize neutral, factual information and non-directive statements when discussing options").

249. See supra notes 158–167 and accompanying text (summarizing policies put forth by medical community at large, which tend to approve encouragement of parental involvement in reproductive decisions but disapprove compelling it).

mate concern about notifying one or both of her parents, the physician is faced with the medical determination of whether he deems the minor sufficiently mature to proceed with the abortion procedure without discussing her decision with a trusted adult.[250] If he finds the patient adequately mature, the physician has the authority to bypass parental involvement and approve the procedure, maintaining confidentiality. However, if the physician is worried the patient is making too rash of a decision or is too young to comprehend the ramifications of that decision, he will provide her with a state-created list of neutral nonprofit organizations. Contacting at least one of the organizations is the responsibility of the minor, and a mechanism will be in place to convey the minor's investigation of that organization to the physician.

This solution presents a reconciliation of all three parties' interests. Parents can be comforted that their adolescent daughters will be encouraged to communicate with them in the event of an unplanned pregnancy. The state continues to play a role in abortion regulation by constructing a framework of nonprofit organizations, representing both viewpoints supporting abortion and those discouraging it. And, most importantly, the pregnant minor is assured continued control over her decision to terminate a pregnancy, though subject to mildly enhanced consultation requirements in addition to the standard medical conversation with her doctor.

CONCLUSION

Forty years ago, *Roe v. Wade* transformed women's role in society by unequivocally establishing their fundamental right to reproductive freedom. And just as unequivocally, *Planned Parenthood v. Casey* twenty years later transformed abortion jurisprudence, and constitutional law generally, by instituting the undue burden standard. However, the Supreme Court and subsequently, lower courts, have inadequately analyzed parental involvement statutes under *Casey*'s undue burden framework due to a failure to account for newly discovered empirical research and lower courts' tendency to uphold "*Casey* look-alike" abortion regulations. By holding the Supreme Court to the standard it elucidated in *Planned Parenthood v. Casey*, courts need to focus their analysis on the substantial obstacles produced by parental involvement requirements for the *relevant* group of women. As the Court stated, "The analysis does not end with

250. See Policy Compendium, supra note 158, at 68 ("When determination of maturity is necessary, that determination is best made by a knowledgeable health professional."). One of the most salient drawbacks to this approach is the continued reliance on a subjective "maturity" standard. However, when the inquiry is performed by a physician or other clinically trained personnel, it assumes the character of a "psychosocial assessment," by which the health practitioner "assess[es] the adolescent's emotional response, coping skills, and social resources." Aruda et al., supra note 10, at 8. Establishing a protocol guideline can be useful to "ensure a comprehensive assessment of a pregnant adolescent." Id.

the one percent of women upon whom the statute operates; it begins there."[251]

251. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992).