Summaries of United States Supreme Court Cases Dealing With Parental Rights

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For the Alliance Defense Fund

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***Quilloin v. Walcott et vir*, 434 U.S. 246; 98 S. Ct. 549; 54 L. Ed. 2d 511; 1978 U.S. LEXIS 52 (1978)**(The Supreme Court of Georgia affirmed the decision of the trial court, which found that approval of the adoption of appellant father's son by appellee, the child's step-father, and denial of the father's petition for legitimation were in the best interests of the child. On writ of certiorari, the father appealed." 1978 U.S. LEXIS 52. "The Court affirmed the decision that upheld the approval of the adoption of the father's son by the child's stepfather and denied the father's petition for legitimation under the 'best interests of the child' standard." 1978 U.S. LEXIS 52. The Court noted that the father could acquire veto authority over the adoption by "legitimizing" the child as provided by state law, but the father attempted to legitimize, but not to obtain custody of, the child only after the adoption petition was filed.) 13

Bellotti, Attorney General of Massachusetts, et al. v. Baird et al., 443 U.S. 622; 99 S. Ct. 3035; 61 L. Ed. 2d 797; 1979 U.S. LEXIS 17 (1979)("Passage of Mass. Gen. Laws Ann. ch. 112, § 12S, which required minors to get parental consent for an abortion, prompted a constitutional challenge by a physician and others. The district court concluded that the statute was unconstitutional, and it reached the same conclusion on remand. On further appeal, the court affirmed, holding that because the consequences of denying a minor the right to make a decision regarding her pregnancy were grave, it was inappropriate to give a third-party absolute veto power over the decision. A restrictive statute such as § 12S would have to provide an alternative procedure to obtain consent for an abortion. Therefore, statutory provisions of § 12S that prohibited minors from obtaining judicial consent for an abortion without parental consultation and required parental notice of judicial proceedings brought by a minor to obtain an abortion imposed an undue burden upon the minor's right to seek an abortion. Additionally, a provision that allowed a judge to withhold consent from a minor deemed capable of making an informed and reasonable decision to have an abortion was unconstitutional." 1979 U.S. LEXIS 17.) 14

***Caban v. Mohammed et ux.*, 441 U.S. 380; 99 S. Ct. 1760; 60 L. Ed. 2d 297; 1979 U.S. LEXIS 92 (1979)**(Appellant father sought review of judgment by the Court of Appeals of New York affirming judgment granting appellees, mother and stepfather, adoption of appellant's children and challenged the constitutionality of N.Y. Dom. Rel. Law § 111, under which the children were adopted without appellant's consent. The Court found that the distinction in § 111 between unmarried mothers and unmarried fathers did not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children, and was not justified by an asserted fundamental difference between maternal and paternal relations. The Court reversed and held that the statute at issue violated the Equal Protection Clause.) 16

***Parham, Commissioner, Department of Human Resources of Georgia, et al. v. J. R. et al.*, 442 U.S. 584; 99 S. Ct. 2493; 61 L. Ed. 2d 101; 1979 U.S. LEXIS 130 (1979)**("Under Georgia law providing for the voluntary admission of children to state regional hospitals, admission begins with an application for hospitalization signed by a parent or guardian and, upon application, the superintendent of the hospital is authorized to admit temporarily any child for 'observation and diagnosis.' If after observation the superintendent finds 'evidence of mental illness' and that the child is 'suitable for treatment' in the hospital, the child may be admitted 'for such period and under such conditions as may be authorized by law.'" 1979 U.S. LEXIS 130 (SYLLABUS). The Court reversed the District Court and held that under Georgia law Georgia's medical factfinding processes were consistent with constitutional guarantees.) 17

***H. L. v. Matheson, Governor of Utah, et al.*, 450 U.S. 398; 101 S. Ct. 1164; 67 L. Ed. 2d 388; 1981 U.S. LEXIS 81; 49 U.S.L.W. 4255 (1981)**("A minor sought a declaration that Utah Code Ann. § 76-7-304(2), which required parents to be notified of abortions under certain circumstances, was unconstitutional and sought to prohibit the governor and the attorney general from enforcing it. The minor challenged § 76-7-304 as unconstitutional on its face. She contended § 76-7-304 was

overbroad as it could have been construed to apply to all unmarried minor girls, including those who were mature and emancipated. The Supreme Court found the lower court's judgment [which upheld the constitutionality of the statute] controlling insofar as the minor challenged a purported statutory exclusion of mature and emancipated minors. The Supreme Court stated that parents had an important guiding role to play in the upbringing of their children, which presumptively included counseling them on important decisions. As applied to immature and dependent minors, § 76-7-304 plainly served the important considerations of family integrity and protecting adolescents. The Supreme Court found the statute was reasonably calculated to protect minors in the minor's class by enhancing the potential for parental consultation concerning a decision that had potentially traumatic and permanent consequences." 1981 U.S. LEXIS 81 (Overview). The Supreme Court affirmed the judgment by the court.) 19

***Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18; 101 S. Ct. 2153; 68 L. Ed. 2d 640; 1981 U.S. LEXIS 107; 49 U.S.L.W. 4586 (1981)**(The state court granted respondent department's motion to terminate petitioner mother's parental rights. Mother was not represented by counsel. On the mother's appeal, the North Carolina Court of Appeals rejected petitioner's sole contention on appeal that because she was indigent, the Due Process Clause of the Fourteenth Amendment required the State to provide counsel for her. The North Carolina Supreme Court summarily denied discretionary review. On writ of certiorari, the mother appealed. The Court observed that there was a presumption against the right to appointed counsel when no potential deprivation of physical liberty existed. The Court affirmed the decision that due process did not require the state to appoint counsel to represent the mother in the proceeding to terminate her parental rights with respect to her infant son.) 21

***Santosky et al.v. Kramer, Commissioner, Ulster County Department of Social Services, et al.*, 455 U.S. 745; 102 S. Ct. 1388; 71 L. Ed. 2d 599; 1982 U.S. LEXIS 89; 50 U.S.L.W. 4333 (1982)**(The court granted certiorari to the Appellate Division, Supreme Court of New York, Third Judicial Department, which affirmed the permanent termination of petitioners' parental rights and rejected petitioners' assertion that the preponderance of the evidence standard in N.Y. Fam. Ct. Act § 622 was unconstitutional. The court held that the Due Process Clause of the Fourteenth Amendment demands that before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.) 22

***City of Akron v. Akron Center for Reproductive Health, Inc., et al.*, 462 U.S. 416; 103 S. Ct. 2481; 76 L. Ed. 2d 687; 1983 U.S. LEXIS 63; 51 U.S.L.W. 4767 (1983)**(Respondents, abortion clinic operators and a physician, brought an action against petitioners, city and officials, challenging Akron, Ohio, Ordinance No. 160-1978 (1978) that regulated abortions. The United States Court of Appeals for the Sixth Circuit upheld the hospitalization requirement and invalidated the provisions on parental consent, informed consent, waiting period, and disposal of fetal remains. All parties appealed. The Court, as to the parental notification provision, held that the State imposed an unconstitutional blanket provision requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor. The court affirmed the judgment of the Court of Appeals that invalidated those sections of the City of Akron's abortion ordinance that involved parental consent, informed consent, a 24-hour waiting period, and the disposal of fetal remains. The court reversed the City of Akron's requirement that all second-trimester abortions were to be performed in a hospital.) 23

***Lehr v. Robertson et al.*, 463 U.S. 248; 103 S. Ct. 2985; 77 L. Ed. 2d 614; 1983 U.S. LEXIS 92; 51 U.S.L.W. 5010 (1983)**(On writ of certiorari to the Court of Appeals of New York, appellant putative father sought review of an order affirming the dismissal of the father's paternity petition and entering an order of adoption in favor of appellees, mother and stepfather. The putative father

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***Meyer v. Nebraska*, 262 U.S. 390; 43 S. Ct. 625; 67 L. Ed. 1042; 1923 U.S. LEXIS 2655; 29 A.L.R. 1446, (1923)**

CASE SUMMARY

PROCEDURAL HISTORY: Appeal from the Nebraska Supreme Court, which affirmed conviction of teacher who violated statute that prohibited teaching of any modern language other than English to children who had not passed eighth grade.

OVERVIEW: Defendant, state of Nebraska, enacted a statute that prohibited the teaching of any modern language other than English to any child who had not completed the eighth grade. Plaintiff teacher was tried and convicted for teaching German to child who had not yet passed the eighth grade. The state supreme court affirmed the judgment. It declared the offense charged and established was "the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade," in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefore; and it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power.

The Supreme Court reversed, holding that the statute was arbitrary and unreasonable. The Court stated:

> without doubt, the liberty guaranteed by the fourteenth amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. * * *The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. * * * [E]ducation and acquisition of knowledge are matters of supreme importance that should be diligently promoted. * * * The Ordinance of 1787 declares, 'Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws. * * *
>
> "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution -- a desirable end cannot be promoted by prohibited means."

The court concluded that the statute as applied was arbitrary and without reasonable relation to any end within the competency of the State such as fostering a homogeneous people with American ideals prepared readily to understand current discussions of civic matters.

HOLDING: Supreme Court reversed and remanded the cause, holding that statute was arbitrary and

infringed on guarantee of liberty or plaintiff to teach and the right of parents to engage plaintiff to teach their children under the Fourteenth Amendment to the United States Constitution.

***Bartels v. State of Iowa.; Bohning v. State of Ohio.; Pohl v. State of Ohio.; Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and other states, et al. v. McKelvie et al., etc.*, 262 U.S. 404; 43 S. Ct. 628; 67 L. Ed. 1047; 1923 U.S. LEXIS 2656; 1 Ohio L. Abs. 628 (1923)**

CASE SUMMARY

PROCEDURAL HISTORY: Appeal from a judgment of the Supreme Court of Iowa, sustaining a conviction of a teacher for teaching German to pupils in a parochial school, below the eighth grade; (2) to like judgments of the Supreme Court of Ohio; (3) to a judgment of the Supreme Court of Nebraska reversing a decision of a trial court, and refusing an injunction, in a suit brought against state officials to prevent enforcement of a statute penalizing the teaching of foreign languages to young children in schools.

OVERVIEW: Iowa, Ohio, and Nebraska each passed a statute making the teaching of German below the eighth grade a misdemeanor. Defendants were convicted in the Iowa and Ohio cases and the state supreme court upheld the convictions. Plaintiff in the Nebraska case sought an injunction enjoining enforcement of the Nebraska statute. The Nebraska supreme court considered the merits of the cause, upheld the statute, and refused an injunction.

HOLDING: The several judgments entered in these causes by the Supreme Courts of Iowa, Ohio and Nebraska, respectively, were reversed upon authority of *Meyer v. Nebraska*, 262 U.S. 390 decided the same day as this case.

***Pierce, Governor of Oregon, et al. v. Society of Sisters; Pierce, Governor of Oregon, et al. v. Hill Military Aacademy*, 268 U.S. 510; 45 S. Ct. 571; 69 L. Ed. 1070; 1925 U.S. LEXIS 589; 39 A.L.R. 468 (1925)**

CASE SUMMARY

PROCEDURAL HISTORY: "Appellant public officials challenged the United States District Court for the District of Oregon order, enjoining them from enforcing the Compulsory Education Act, 1922 Or. Laws § 5259, against appellees, private primary schools, in consolidated actions challenging the constitutionality of the Act under U.S. Const. amend. XIV. They asserted that, as corporations, appellees had no amend. XIV rights." 1925 U.S. LEXIS 589.

OVERVIEW: "Appellee private primary schools filed actions against appellant public officials, challenging the constitutionality of the Compulsory Education Act (Act), 1922 Or. Laws § 5259, under U.S. Const. amend. XIV and seeking to enjoin its enforcement. The act mandated that all children aged 8 to 16 years old with some listed exceptions attend public school. Failure of a parent to send such a child to a public school was a misdemeanor. Appellees asserted that their enrollments were declining as a result of the Act. The district court entered an order, enjoining appellants from enforcing the Act and appellants sought review in consolidated appeals." 1925 U.S. LEXIS 589.

The court said:

> "Under the doctrine of *Meyer v. Nebraska, 262 U.S. 390,* we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them

to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

"Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255; Western Turf Association v. Greenberg, 204 U.S. 359, 363.* But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. *Truax v. Raich, 239 U.S. 33; Truax v. Corrigan, 257 U.S. 312; Terrace v. Thompson, 263 U.S. 197.*"

"The Court ruled that the inevitable practical result of enforcing the Act was the destruction of appellees' primary schools and perhaps all other private primary schools for normal children within the state. The Act unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of their children. Although appellees were corporations, they could claim constitutional protection for their business and property. They sought protection against a present and real threat of injury from the arbitrary, unreasonable, and unlawful interference with their patrons and injunctive relief was proper." 1925 U.S. LEXIS 589.

HOLDING: The court affirmed the order enjoining appellant public officials from enforcing an act that required children to attend public schools in appellee private primary schools' actions contesting the constitutionality of the law. The legislation unreasonably interfered with parental rights and appellees' business interests. An injunction was an appropriate remedy to prevent the present threat of irreparable harm to appellees." 1925 U.S. LEXIS 589.

***Prince v. Massachusetts*, 321 U.S. 158; 64 S. Ct. 438; 88 L. Ed. 645; 1944 U.S. LEXIS 1328; 7 Lab. Cas. (CCH) P51, (1944)**

CASE SUMMARY

PROCEDURAL HISTORY: "Appellant sought review of the Superior Court of Massachusetts, Plymouth County, which convicted her, on trial de novo, for violating state child labor laws, under Mass. Gen. Laws ch. 149, § § 80, 81, for allowing her child to engage in [selling religious materials on the street while in her presence]." U.S. LEXIS 1328 (edited).

OVERVIEW: Appellant was convicted for violating state child labor laws, under Mass. Gen. Laws ch. 149, § § 80, 81 by allowing her child to accompany her onto the streets and sell (or give away) religious literature. She appealed from her conviction. She argued that § § 80, 81 contravened her freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttressed this foundation with a claim of parental right as secured by the due process clause of the Fourteenth Amendment. Cf. *Meyer v. Nebraska, 262 U.S. 390.* These guaranties, she contended, guarded her and her child. Two claimed liberties were at stake: the parent's liberty to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith the other, the child's freedom to observe these, among which is "the preaching of the gospel ... by public distribution of "Watchtower" and "Consolation," in conformity with the scripture. "The court noted that the state's authority over children's activities was broader than over like actions of adults. The court held that the state had the power to control the conduct of children with reference to street preaching. The court found that there were dangers in street preaching because that was not the primary purpose of the road. The court noted that parents could make martyrs out of themselves but not out of their children. The state had the right to protect the children against the dangers of preaching religion on the highway. The court also noted that the street was not the Jehovah's Witnesses' church because the public highways were not their religious property merely by their assertion. And there was no denial of equal protection in excluding their children from doing there what no other children may do. The court's ruling was restricted to the facts of the case." 1944 U.S. LEXIS 1328.

HOLDING: "The court affirmed appellant's conviction for violating state child labor laws for engaging her child in street preaching of their religion. The court held that the state had greater authority to control the acts of children, and in particular, to protect children against the dangers of preaching on a public road. The court held that equal protection was not violated because Jehovah's Witnesses could not claim that a public road was their church." 1944 U.S. LEXIS 1328.

MR. JUSTICE JACKSON, concurring: Mr. Justice Jackson stated:

> * * * "My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free -- as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds of sales and Bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution." 321 U.S at 177- 178.
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> "The Court in the *Murdock* case rejected this principle of separating immune religious activities from secular ones in declaring the disabilities which the Constitution imposed on local authorities. Instead, the Court now draws a line based on age that cuts across both true exercise of religion and auxiliary secular activities. I think this is not a correct principle for defining the activities immune from regulation on grounds of religion, and *Murdock* overrules the grounds on which I think affirmance should rest. I have no alternative but to dissent from the grounds of affirmance of a judgment which I think was rightly decided, and upon right grounds, by the Supreme Judicial Court of Massachusetts. *313 Mass. 223.*"

Id. at 178.

MR. JUSTICE ROBERTS and MR. JUSTICE FRANKFURTER join in this opinion.

MR. JUSTICE MURPHY, dissenting: The child was engaged in genuine religious activity with no expectation of profit, protected, as an adult is, by the First and Fourteenth Amendments. The state has the burden, which it has completely failed to sustain, of proving the existence of any grave or immediate danger to any interest which it may lawfully protect. It is claimed that such activity was likely to affect adversely the health, morals and welfare of the child. Jehovah's Witness children invariably make their distributions in groups subject at all times to adult or parental control, as was done in this case. The dangers are thus exceedingly remote, to say the least.

"No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. See Mulder and Comisky, "Jehovah's Witnesses Mold Constitutional Law," 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest

of the state is in grave danger."

321 U.S at 175-176.

***Everson v. Board of Education of the Township of Ewing et al.*, 330 U.S. 1; 67 S. Ct. 504; 91 L. Ed. 711; 1947 U.S. LEXIS 2959; 168 A.L.R. 1392 (1947)**

CASE SUMMARY

PROCEDURAL HISTORY: Appellant taxpayer challenged the right of defendant board of education to reimburse parents of parochial school students the money that they expended for bus transportation. The New Jersey Court of Errors and Appeals reversed an order ruling in favor of taxpayer and taxpayer appealed.

OVERVIEW: "Acting pursuant to a New Jersey statute, a township board of education (board) authorized reimbursement to parents of money that they expended for the bus transportation of their children to and from parochial schools." 1947 U.S. LEXIS 2959. "Appellant, in his capacity as a district taxpayer, filed suit in a state court challenging the right of the board to reimburse parents of parochial school students." *Id.* "Taxpayer contended that the statute and the resolution passed pursuant to it violated both the state and the federal constitutions." *Id.* Appellant argued that the statute authorized the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes in violation of the due process clause of the Fourteenth Amendment. Appellant also alleged that the statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith, allegedly a use of state power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states. "The court held that the First Amendment did not prohibit New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it paid the fares of pupils attending public schools." *Id.* "New Jersey could not hamper its citizens in the free exercise of their religion." *Id.* "Consequently, it could not exclude individuals because of their faith from receiving the benefits of public welfare legislation." *Id.* "The state legislation did no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.*

In addressing appellant's second contention above the Court pointed out that the statute was challenged as a law which respected an establishment of religion. The Court stated, "Whether this New Jersey law is one respecting an 'establishment of religion' requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. [I]t is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted." *Everson v. Board of Education of the Township of Ewing et al.*, 330 U.S. 1, 8 (1947).

After tracing some of this nation's history on the subject, the court concluded:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Id.* at 15-16 *citing Reynolds v. United States,* 98 U.S. 145, 164.

"We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power. See *Interstate Ry.* v. *Massachusetts*, Holmes, J., *supra* at 85, 88. New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." 330 U.S. 1at 16.

The First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them"

Id. at 18.

The court concluded:

"It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.*

"The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."

Id.

HOLDING: The court affirmed the judgment of the court of appeals.

MR. JUSTICE JACKSON, dissenting. * * * Mr. Justice Jackson stated that what the act in question actually does is give aid to public and Catholic schools but not to other church schools or private schools run for profit.

He concluded:

* * * Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them. *Pierce v. Society of Sisters, 268 U.S. 510.* Nor should I think that those who have done so well without this aid would want to see this separation between Church and State broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it. Indeed this Court has declared that "It is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard v. Filburn, 317 U.S. 111, 131.*

But in any event, the great purposes of the Constitution do not depend on the approval or convenience of those they restrain. I cannot read the history of the struggle to

> separate political from ecclesiastical affairs, well summarized in the opinion of MR. JUSTICE RUTLEDGE in which I generally concur, without a conviction that the Court today is unconsciously giving the clock's hands a backward turn.

Id. at 27-28.

MR. JUSTICE FRANKFURTER joins in this opinion.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE BURTON agree, dissenting. These justices stated that "The Court of Errors and Appeals of New Jersey, reversing the Supreme Court's decision, *132 N. J. L. 98, 39 A. 2d 75,* has held the Ewing board's action not in contravention of the state constitution or statutes or of the Federal Constitution. *133 N. J. L. 350, 44 A. 2d 333.* We have to consider only whether this ruling accords with the prohibition of the First Amendment implied in the due process clause of the Fourteenth." *Id.* at 31.

They further asserted that the first amendment forbids any law respecting an establishment of religion:

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.

Id. at 31-32.

They further traced the history that led up to the First Amendment--a history which proves, they assert, that the "Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises." 330 U.S. 1at 41.

They say that "[T]oday, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function." *Id.* at 44.

They concluded that New Jersey's action furnished support for religion by use of the taxing power, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own. *Id.*

They pointed out:

> "There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8. n44 The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. *Id.*, Par. 7, 8. n45 Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. *Id.*, Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. *Ibid.* The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. *Id.*, Par. 11."

Id. at 53-54.

They concluded:

> "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. See Johnson, The Legal Status of Church-State Relationships in the United States (1934); Thayer, Religion in Public Education (1947); Note *(1941) 50 Yale L. J. 917.* In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other."
>
> The judgment should be reversed.

Id. at 63.

Wisconsin v. Yoder et al., 406 U.S. 205; 92 S. Ct. 1526; 32 L. Ed. 2d 15; 1972 U.S. LEXIS 144 (1972)

CASE SUMMARY

PROCEDURAL HISTORY: "The Court granted certiorari to the Supreme Court of Wisconsin, which held that respondents' convictions for violating Wisconsin's compulsory school attendance law were invalid under U.S. Const. amend. I's guaranty of protection for the free exercise of religious expression." 1972 U.S. LEXIS 144.

OVERVIEW: "Petitioner, the State of Wisconsin, challenged the state supreme court's decision reversing respondents' convictions for violating the state's compulsory public school attendance law." *Id.* Failure to abide by the law subjected the parent to misdemeanor punishment of fine and/ imprisonment. "Respondents practiced the Amish and Mennonite religions, and argued that sending their children to public school after the eighth grade violated their religious beliefs and threatened their religious way of life." *Id.* "On writ of certiorari, the court found that respondents' fundamental religious belief that they should remain 'aloof from the world' had permeated their way of life for 300 years, and was endangered by the state's enforcement of its public education laws." *Id.* "Although neutral on its face, Wisconsin's compulsory school attendance law unduly burdened the Free Exercise Clause of U.S. Const. amend. I." *Id.* The children, Frieda Yoder, aged 15, Barbara Miller, aged 15, and Vernon Yutzy, aged 14, were all graduates of the eighth grade of public school.

The opinion stated:

> "Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society."

Wisconsin v. Yoder et al., 406 U.S. 205, 210-211 (1972).

The Amish did not object to sending their children to public school below the eighth grade because the children did learn the "three Rs,"and learned "to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They viewed such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period." *Id.* at 212. They did not view public education after the eighth grade in the same manner.

"The record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Id.* at 216. The effect of the compulsory education law on the Amish community was sever and inescapable. *Id.* at 218.

Respondents educated their children at home in practical pursuits after eighth grade, and prepared them to become functioning adults within their communities, which sufficiently served the state's interest in producing good citizens.

The Court stated:

> "Indeed it seems clear that if the State is empowered, as *parens patriae*, to "save" a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

Id. at 232.

HOLDING: "The Court affirmed, deciding that Wisconsin's compulsory school attendance law unduly burdened the Free Exercise Clause of the First Amendment by forcing Amish parents to send their children to public school after the eighth grade, which violated core Amish religious beliefs requiring them to remain 'aloof from the world.'" 1972 U.S. LEXIS 144.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring. Mr. Justice Stewart merely pointed out "that this record simply does not present the interesting and important issue discussed in Part II of the dissenting opinion of MR. JUSTICE DOUGLAS. With this observation, I join the opinion and the judgment of the Court.: *Id.* at 237.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, concurring. MR. JUSTICE WHITE wrote, "I join the opinion and judgment of the Court because I cannot say that the State's interest in requiring two more years of compulsory education in the ninth and tenth grades outweighs the importance of the concededly sincere Amish religious practice to the survival of that sect." *Id.* at 238.

MR. JUSTICE DOUGLAS, dissenting in part. MR. JUSTICE WHITE felt that the children also had a religious freedom right to take part in the decision as to whether to continue their public school education beyond the eighth grade.

***Stanley v. Illinois*, 405 U.S. 645; 92 S. Ct. 1208; 31 L. Ed. 2d 551; 1972 U.S. LEXIS 70 (1972)**

CASE SUMMARY

PROCEDURAL HISTORY: "Plaintiff, unwed father, filed a petition for writ of certiorari to the Supreme Court of Illinois to challenge its holding that plaintiff could be separated from his children in a dependency proceeding on the single fact that he was not married to the children's dead mother. He claimed that his

equal protections rights, under U.S. Const. amend. XI., were violated when he was denied a hearing on his parental fitness." 1972 U.S. LEXIS 70.

OVERVIEW: "In a dependency proceeding by the state, the children of plaintiff unwed father were declared wards of the state." 1972 U.S. LEXIS 70. "Plaintiff appealed from the order, claiming that he had never been shown to be an unfit parent and that he had been deprived of equal protection of the laws guaranteed by U.S. Const. amend. XIV." *Id.* The state persisted in its claim that unmarried fathers are presumed unfit even though married fathers--whether divorced, widowed or separated--and unwed mothers the presumption that they are fit to raise their children. *Stanley v. Illinois*, 405 U.S. 645, 647. "The State of Illinois assumed custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing and proof of neglect." *Id.* at 658. The children of unmarried fathers, however, are declared dependent children without a hearing on parental fitness and without proof of neglect. *Id.* "The state supreme court held that plaintiff could properly be separated from his children upon proof of the single fact that he and the children's dead mother had not been married. Plaintiff filed a petition for writ of certiorari." 1972 U.S. LEXIS 70. "The court granted certiorari and reversed, finding that the state's interest in caring for plaintiff's children was de minimis if plaintiff was shown to be a fit father." 1972 U.S. LEXIS 70. "The Court held that plaintiff was denied equal protection of the law because all parents were constitutionally entitled to a hearing on their fitness before their children were removed from their custody." 1972 U.S. LEXIS 70. "Thus, plaintiff, as an unwed father, was also entitled to a hearing." 1972 U.S. LEXIS 70.

HOLDING: "The Court granted plaintiff's, unwed father, petition for certiorari and reversed the state supreme court's holding that plaintiff could be separated from his children in a dependency proceeding on the single fact that he was not married to the children's dead mother." 1972 U.S. LEXIS 70. "The court held that all parents were constitutionally entitled to a hearing on their fitness before their children were removed from their custody." 1972 U.S. LEXIS 70.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN concurs, dissenting. Since no equal protection issue was raised in the state courts, this court may not decide the case on that grounds. Nor were any due process arguments raised before this court.

***Planned Parenthood of Central Missouri et al. v. Danforth, Attorney General of Missoure, et al.*, 428 U.S. 52; 96 S. Ct. 2831; 49 L. Ed. 2d 788; 1976 U.S. LEXIS 13 (1976)**

CASE SUMMARY

PROCEDURAL HISTORY: "Plaintiff family planning organization challenged the United States District Court for the Eastern District of Missouri's decision to uphold part of Missouri House Committee Substitute for House Bill No. 1211 (act) as constitutional and denying injunctive relief against the act's application and enforcement. Defendant attorney general cross-appealed from the district court's judgment holding part of the act unconstitutional." 1976 LEXIS 13.

OVERVIEW: In 1974, after *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973) were decided, Missouri passed a bill, House Bill No. 1211 (act), which imposed control and regulation of abortions in Missouri. Plaintiffs, Planned Parenthood of Central Missouri and two doctors, Plaintiffs sought declaratory relief and also sought to enjoin enforcement of the Act on the ground, among others, that certain of its provisions deprived them and their patients of various constitutional rights. 428 U.S. at 57.

The provisions of the act challenged were:

> "§ 2, defining the term "viability"; § 3 (2), requiring from the woman, prior to submitting to abortion during the first 12 weeks of pregnancy, a certification in writing that she consents to the procedure and "that her consent is informed and freely given and is not the result of coercion"; § 3 (3), requiring, for the same period, "the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother"; § 3 (4), requiring, for the same

period, "the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother"; § 6 (1), requiring the physician to exercise professional care "to preserve the life and health of the fetus" and, failing such, deeming him guilty of manslaughter and making him liable in an action for damages; § 7, declaring an infant, who survives "an attempted abortion which was not performed to save the life or health of the mother," to be "an abandoned ward of the state under the jurisdiction of the juvenile court," and depriving the mother, and also the father if he consented to the abortion, of parental rights; § 9, the legislative finding that the method of abortion known as saline amniocentesis "is deleterious to maternal health," and prohibiting that method after the first 12 weeks of pregnancy; and § § 10 and 11, imposing reporting and maintenance of record requirements for health facilities and for physicians who perform abortions.

Id. at 58-59.

The Court held that:

"the definition of viability in the act did not circumvent limitations on state regulation of abortion and was constitutional, that the state could not require the consent of a woman's spouse as a condition for abortion but could require the woman's written consent to assure the awareness of her decision, that the state could not impose a blanket condition requiring the consent to abortion for minors during the first 12 weeks of pregnancy, and that the state's proscription against saline amniocentesis after 12 weeks of pregnancy as an abortion method did not withstand constitutional challenge."

1976 U.S. LEXIS 13.

As to the husband's rights, the Court said:

"It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the 'interest of the state in protecting the mutuality of decisions vital to the marriage relationship.' *392 F. Supp., at 1370.*

"We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. Cf. *Roe v. Wade, 410 U.S., at 153.*"

428 U.S. at 71.

A to parental consent, the Court said:

"We agree with appellants and with the courts whose decisions have just been cited that the State may not impose a blanket provision, such as § 3(4), requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a

third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.See, *e.g., Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); In re Gault, 387 U.S. 1 (1967).* The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. *Prince v. Massachusetts, 321 U.S., at 170; Ginsberg v. New York, 390 U.S. 629 (1968).* It remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult.

"One suggested interest is the safeguarding of the family unit and of parental authority. *392 F. Supp., at 1370.* It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."

Id. at 74-75.

In *Roe,* the Court held that a woman's right to terminate her pregnancy must be weighed against important state interests. 428 U.S. at 61, *citing Roe* at 154.

This outline will now summarize only portions of the decision which dealt with parental rights. The family planning organization brought a class action against the Missouri Attorney General and St. Louis Circuit Attorney, challenging the application and enforcement of House Committee Substitute for House Bill No. 1211 (act), which imposed control and regulation of abortions in Missouri. The district court upheld sections of the act as constitutional and denied the organization's request for injunctive relief but found other parts of the act unconstitutional and enjoined their enforcement. On appeal, the court affirmed in part and reversed in part.

HOLDING: The court affirmed in part, reversed in part, and remanded the district court's decision holding part of the state abortion regulation law unconstitutional.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL joins, concurring. (This only looks at the parental rights issues as addressed by this concurrence). MR. JUSTICE STEWART agreed "with the court "that since 'it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy... the balance weighs in her favor.'"428 U.S. at 90.

As to the parental consent issue, MR. JUSTICE thought it "clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion." *Id.*

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part. (This only looks at the parental rights issues as addressed by this concurrence--dissent). Neither the United States Constitution nor *Roe,* give to the mother a greater right to choose an abortion that to the father. The state should be allowed to make the decision on that issue.

He believed that the state "is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and [Missouri seeks to achieve this goal by requiring parental consultation and consent." *Id.* at 95.

MR. JUSTICE STEVENS, concurring in part and dissenting in part. (This only looks at the parental rights issues as addressed by this concurrence--dissent). MR. JUSTICE STEVENS felt the parental consent

portion of the Act was consistent with *Roe,* and that the State's interest in the welfare of its young citizens is sufficient, in my judgment, to support the parental-consent requirement.

***Bellotti, Attorney General of Massachusetts, et al. v. Baird et al.*, 428 U.S. 132; 96 S. Ct. 2857; 49 L. Ed. 2d 844; 1976 U.S. LEXIS 81 (1976)**

CASE SUMMARY

PROCEDURAL HISTORY: Appellant attorney general challenged the order of the U.S. District Court for the District of Massachusetts which enjoined the operation of a Massachusetts law which governed the consent required before an abortion could be performed on an unmarried woman under the age of 18. The District court denied appellant's motion to abstain pending authoritative construction by the Supreme Judicial Court of Massachusetts.

OVERVIEW: A 1974 Massachusetts law governed the consent, including parental consent, required before an abortion could be performed on an unmarried woman under the age of 18. The law required consent of both parents or one parent if one parent had died or deserted. Should the parent(s) refuse consent, the law allowed a judge to give consent over the wishes of the child's parent(s). violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Appellees filed suit in district court seeking injunctive and declaratory relief to enjoin operation of the law, and the Massachusetts attorney general brought a motion for the district court to abstain pending authoritative construction by the Supreme Judicial Court of Massachusetts. The district court enjoined operation of the statute. The Court held that "abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" 428 U.S. at 146-147. The Court stated, "We do not accept appellees' assertion that the Supreme Judicial Court of Massachusetts inevitably will interpret the statute so as to create a 'parental veto,' require the superior court to act other than in the best interests of the minor, or impose undue burdens upon a minor capable of giving an informed consent." *Id.* at 147. The Court vacated the judgment and remanded the case for certification of relevant issues of state law to the Supreme Judicial Court, and for abstention pending the decision of that tribunal. The Court held that the district court should have abstained pending construction of the statute; abstention was appropriate where an unconstrued state statute was susceptible of a construction by the state judiciary which might have avoided in whole or in part the necessity for federal constitutional adjudication, or at least materially changed the nature of the problem.

HOLDING: The Court held that the district court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of the statute and the procedure it imposed and remanded to that court for proceedings consistent with the Court's opinion.

***Quilloin v. Walcott et vir*, 434 U.S. 246; 98 S. Ct. 549; 54 L. Ed. 2d 511; 1978 U.S. LEXIS 52 (1978)**

CASE SUMMARY

PROCEDURAL HISTORY: "The Supreme Court of Georgia affirmed the decision of the trial court, which found that approval of the adoption of appellant father's son by appellee, the child's step-father, and denial of the father's petition for legitimation were in the best interests of the child. On writ of certiorari, the father appealed." 1978 U.S. LEXIS 52.

OVERVIEW: The "Syllabus recorded in 1978 U.S. LEXIS 52 gives the following accurate summary:

> "Under Georgia law no adoption of a child born in wedlock is permitted without the consent of each living parent (including divorced or separated parents) who has not voluntarily surrendered rights in the child or been adjudicated an unfit parent. In contrast,

§ § 74-403 (3) and 74-203 of the Georgia Code provide that only the mother's consent is required for the adoption of an illegitimate child. However, the father may acquire veto authority over the adoption if he has legitimated the child pursuant to § 74-103 of the Code. These provisions were applied to deny appellant, the father of an illegitimate child, authority to prevent the adoption of the child by the husband of the child's mother. Until the adoption petition was filed, appellant had not attempted to legitimate the child, who had always been in the mother's custody and was then living with the mother and her husband, appellees. In opposing the adoption appellant, seeking to legitimate the child but not to secure custody, claimed that § § 74-203 and 74-403 (3), as applied to his case, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial court, granting the adoption on the ground that it was in the "best interests of the child" and that legitimation by appellant was not, rejected appellant's constitutional claims, and the Georgia Supreme Court affirmed [finding that the father's due process rights were not violated by the State's application of a "best interests of the child" standard in determining whether to approve the proposed adoption. The court also thought that the State did not violate the father's equal protection rights by giving him less veto authority than a married father because he never actually had the responsibility of custody of his child, as a married father would have had].

(bracketed additions to the syllabus excerpt are mine).

HOLDING: "The Court affirmed the decision that upheld the approval of the adoption of the father's son by the child's stepfather and denied the father's petition for legitimation under the 'best interests of the child' standard."

Bellotti, Attorney General of Massachusetts, et al. v. Baird et al., 443 U.S. 622; 99 S. Ct. 3035; 61 L. Ed. 2d 797; 1979 U.S. LEXIS 17 (1979)

CASE SUMMARY

PROCEDURAL HISTORY: "In an action brought by appellee physician, the United States District Court for the District of Massachusetts held unconstitutional Mass. Gen. Laws Ann. ch. 112, § 12S. On remand, the district court certified several questions to the state supreme court before again declaring that the statute requiring parental consent for abortions was unconstitutional. The state appealed." 1979 U.S. LEXIS 17

OVERVIEW: Mass. Gen. Laws Ann. ch. 112, § 12S provides in part:

"If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other **[*626]** person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files."

Bellotti, Attorney General of Massachusetts, et al. v. Baird et al., 443 U.S. 622, 625-626 (1979).

The district court concluded that the statute was unconstitutional.
Subsequently, the Supreme Court vacated the District Court's judgment, *Bellotti v. Baird, 428 U.S.*

132, holding that the District Court should have abstained and certified to the Massachusetts Supreme Judicial Court appropriate questions concerning the meaning of the statute. On remand, the District Court certified several questions to the Supreme Judicial Court. Among the questions certified by the District Court on remand was whether the statute permits any minors -- mature or immature -- to obtain judicial consent to an abortion without any parental consultation whatsoever. The Supreme Judicial Court answered that, in general, it does not; that consent must be obtained for every nonemergency abortion unless no parent is available; and that an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion. Another question certified was whether, if the superior court finds that the minor is capable of making, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, the court may refuse its consent on a finding that a parent's, or its own, contrary decision is a better one. The Supreme Judicial Court answered in the affirmative. Following the Supreme Judicial Court's judgment, the District Court again declared the statute unconstitutional and enjoined its enforcement. *Id.* at 629-631.

"Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for "concern, ... sympathy, and ... paternal attention." *Id.*at 635, *citing McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion). Also, states have held that the rights of children to make important decisions which can bring about serious consequences. *Id.* Further, the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." *Id.*at 637.

"In § 12S, Massachusetts has attempted to reconcile the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy as established by *Roe v. Wade, 410 U.S. 113 (1973),* and *Doe v. Bolton, 410 U.S. 179 (1973),* with the special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child. *Id.*at 639."

"The Court On further appeal, the court affirmed, holding that because the consequences of denying a minor the right to make a decision regarding her pregnancy were grave, it was inappropriate to give a third-party absolute veto power over the decision." 1979 U.S. LEXIS 17. "A restrictive statute such as § 12S would have to provide an alternative procedure to obtain consent for an abortion." *Id.* "Therefore, statutory provisions of § 12S that prohibited minors from obtaining judicial consent for an abortion without parental consultation and required parental notice of judicial proceedings brought by a minor to obtain an abortion imposed an undue burden upon the minor's right to seek an abortion." *Id.* "Additionally, a provision that allowed a judge to withhold consent from a minor deemed capable of making an informed and reasonable decision to have an abortion was unconstitutional." *Id.*

HOLDING: The district court's judgment invalidating the abortion statute was affirmed.

MR. JUSTICE REHNQUIST, concurring. Mr. Justice Rehnquist wrote: "I concur, but until the court is willing to reconsider its decision in *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976),* in which I joined MR. JUSTICE WHITE, dissenting in part, our courts must follow the guidelines of a fragmented court." *Bellotti* at 651-652.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, concurring in the judgment. In *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976), the Court invalidated provisions of a state statute requiring consent of the husband of a married woman or one parent of a pregnant minor. The statute in this case also allows a judge, without guidance, to consent before a pregnant minor can get an abortion. MR. JUSTICE STEVENS agreed with MR. JUSTICE POWELL "that the District Court's judgment should be affirmed. Because his opinion goes further, however, and addresses the constitutionality of an abortion statute that Massachusetts has not enacted, I decline to join his opinion." *Bellotti* at 656.

MR. JUSTICE WHITE, dissenting. MR. JUSTICE WHITE wrote:

> "I dissented in *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 94-95 (1976),* on the issue of the validity of requiring the consent of a parent when an

unmarried woman under 18 years of age seeks an abortion. I continue to have the views I expressed there and also agree with much of what MR. JUSTICE STEVENS said in dissent in that case. *Id., at 101-105.* I would not, therefore, strike down this Massachusetts law.

"But even if a parental consent requirement of the kind involved in *Danforth* must be deemed invalid, that does not condemn the Massachusetts law, which, when the parents object, authorizes a judge to permit an abortion if he concludes that an abortion is in the best interests of the child. Going beyond *Danforth*, the Court now holds it unconstitutional for a State to require that in all cases parents receive notice that their daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the "best interests" of the child to undergo the surgery. Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.

"With all due respect, I dissent."

Caban v. Mohammed et ux., 441 U.S. 380; 99 S. Ct. 1760; 60 L. Ed. 2d 297; 1979 U.S. LEXIS 92 (1979)

CASE SUMMARY

PROCEDURAL HISTORY: Appellees, mother and step-father of appellant father's children, sought review of judgment by the Court of Appeals of New York affirming judgment granting appellees, mother and stepfather, adoption of appellant's children and challenged the constitutionality of N.Y. Dom. Rel. Law § 111, under which the children were adopted without appellant's consent.

OVERVIEW: Appellant and appellee mother lived together out of wedlock and had two children. Appellant supported the children along with appellee mother. He lived with them as their father until he separated from their mother. They separated and appellee mother married appellee step-father. Appellees petitioned to adopt the children and appellant cross-petitioned. The Surrogate granted appellees' petition under § 111 of the New York Domestic Relations Law, which permits an unwed mother, but not an unwed father, to block the adoption of their child simply by withholding her consent. The New York Supreme Court, Appellate Division, affirmed, holding the the constitutional challenge to § 111 was foreclosed by a prior decision. The Supreme Court held that since gender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause and since the distinction in § 111 between unmarried mothers and unmarried fathers bore no substantial relation to some important state interest § 111 violated the Equal Protection Clause.

HOLDING: The Court reversed and held that the statute at issue violated the Equal Protection Clause as the distinction it invariably made between the rights of unmarried mothers and the rights of unmarried fathers had not been shown to be substantially related to an important state interest.

MR. JUSTICE STEWART, dissenting. MR. JUSTICE STEWART would have held the statute constitutionally firm for reasons related to the best interests of an illegitimate child.

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting. MR. JUSTICE STEVENS wrote, "The state interest in facilitating adoption in appropriate cases is strong -- perhaps even 'compelling.'" *Caban v. Mohammed et ux.*, 441 U.S. 380, 402 (1979). He then described differences between unwed mothers and unwed fathers that justify a rule that gives the mother of the newborn infant the exclusive right to consent to its adoption.

***Parham, Commissioner, Department of Human Resources of Georgia, et al. v. J. R. et al.*, 442 U.S. 584; 99 S. Ct. 2493; 61 L. Ed. 2d 101; 1979 U.S. LEXIS 130 (1979)**

CASE SUMMARY

PROCEDURAL HISTORY: Appeal from District Court decision holding that Georgia's statutory scheme providing for admission of children to state mental hospitals violated the United States Constitution because it did not adequately protect children's due process rights, and that due process included at least the right, after appropriate notice, to an adversary-type hearing before an impartial tribunal.

OVERVIEW: "Appellees, children being treated in a Georgia state mental hospital, instituted in Federal District Court a class action against Georgia mental health officials, seeking a declaratory judgment that Georgia's procedures for voluntary commitment of children under the age of 18 to state mental hospitals violated the Due Process Clause of the Fourteenth Amendment, and requested an injunction against their future enforcement. Under Georgia law providing for the voluntary admission of children to state regional hospitals, admission begins with an application for hospitalization signed by a parent or guardian and, upon application, the superintendent of the hospital is authorized to admit temporarily any child for 'observation and diagnosis.' If after observation the superintendent finds 'evidence of mental illness' and that the child is 'suitable for treatment' in the hospital, the child may be admitted 'for such period and under such conditions as may be authorized by law.' Under Georgia's mental health statute, any child who has been hospitalized for more than five days may be discharged at the request of a parent or guardian, and the hospital superintendent, even without a request for discharge, has an affirmative duty to release any child '"who has recovered from his mental illness or who has sufficiently improved that the superintendent determines that hospitalization of the patient is no longer desirable.' The District Court held that Georgia's statutory scheme was unconstitutional because it failed to protect adequately the appellees' due process rights and that the process due included at least the right after notice to an adversary-type hearing before an impartial tribunal." 1979 U.S. LEXIS 130 (SYLLABUS).

The question presented in this appeal is what process is constitutionally due a minor child whose parents or guardian seek state administered institutional mental health care for the child and specifically whether an adversary proceeding is required prior to or after the commitment.

The holdings of the court included the following:

> (a) "Testing challenged state procedures under a due process claim requires a balancing of (i) the private interest that will be affected by the official action; (ii) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (iii) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Cf. *Mathews v. Eldridge, 424 U.S. 319, 335; Smith v. Organization of Foster Families, 431 U.S. 816, 848-849.* Pp. 599-600. 1979." U.S. LEXIS 130 (SYLLABUS).
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> (b) "Notwithstanding a child's liberty interest in not being confined unnecessarily for medical treatment, and assuming that a person has a protectible interest in not being erroneously labeled as mentally ill, parents -- who have traditional interests in and responsibility for the upbringing of their child -- retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse. However, the child's rights and the nature of the commitment decision are such that parents do not always have absolute discretion to institutionalize a child; they retain plenary authority to seek such care for their children, subject to an independent medical judgment. Cf. *Pierce v. Society of Sisters, 268 U.S. 510; Wisconsin v. Yoder, 406 U.S. 205; Prince v. Massachusetts, 321 U.S. 158; Meyer v. Nebraska, 262 U.S. 390. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52,* distinguished. Pp. 600-604." 1979 U.S. LEXIS 130 (SYLLABUS).
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> The Court wrote:

> "We cannot assume that the result in *Meyer v. Nebraska, supra,* and *Pierce v. Society of Sisters, supra,* would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child. See generally Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, *86 Yale L.J. 645, 664-668 (1977);* Bennett, Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis, *62 Va. L. Rev. 285, 308 (1976).* Neither state officials nor federal courts are equipped to review such parental decisions."

442 U.S. at 603-604.

(c) "The State has significant interests in confining the use of costly mental health facilities to cases of genuine need, in not imposing unnecessary procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance, and in allocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming preadmission procedures. Pp. 604-606." U.S. LEXIS 130 (SYLLABUS).

(d) "The risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a "neutral factfinder" to determine whether the statutory requirements for admission are satisfied, see *Goldberg v. Kelly, 397 U.S. 254, 271; Morrissey v. Brewer, 408 U.S. 471, 489,* and to probe the child's background. The decisionmaker must have the authority to refuse to admit any child who does not satisfy the medical standards for admission. The need for continuing commitment must be reviewed periodically. Pp. 606-607." U.S. LEXIS 130 (SYLLABUS).

(e) "Due process does not require that the neutral factfinder be law trained or a judicial or administrative officer; nor is it necessary that the admitting physician conduct a formal or quasi-formal adversary hearing or that the hearing be conducted by someone other than the admitting physician. While the medical decisionmaking process may not be error free, nevertheless the independent medical decisionmaking process, which includes a thorough psychiatric investigation followed by additional periodic review of a child's condition will identify children who should not be admitted; risks of error will not be significantly reduced by a more formal, judicial-type hearing. Pp. 607-613." U.S. LEXIS 130 (SYLLABUS).

(f) "Georgia's practices, as described in the record, comport with minimum due process requirements. The state statute envisions a careful diagnostic medical inquiry to be conducted by the admitting physician at each regional hospital. Georgia's procedures are not "arbitrary" in the sense that a single physician or other professional has the "unbridled discretion" to commit a child to a regional hospital. While Georgia's general administrative and statutory scheme for the voluntary commitment of children is not unconstitutional, the District Court, on remand, may consider any individual claims that the initial admissions of particular children did not meet due process standards, and may also consider whether the various hospitals' procedures for periodic review of their patients' need for institutional care are sufficient to justify *continuing* a voluntary commitment. Pp. 613-617." U.S. LEXIS 130 (SYLLABUS).

(g) "The differences between the situation where the child is a ward of the State of Georgia and the State requests his admission to a state mental hospital, and the situation where the child's natural parents request his admission, do not justify requiring different procedures at the time of the child's initial admission to the hospital. Pp. 617-620." U.S. LEXIS 130 (SYLLABUS).

HOLDING: The District Court erred in holding unconstitutional the State's procedures for admitting a child for treatment to a state mental hospital, since on the record in this case, Georgia's medical factfinding processes are consistent with constitutional guarantees.

MR. JUSTICE STEWART, concurring in the judgment. "For centuries it has been a canon of the common law that parents speak for their minor children. (*citing* several excellent authorities) So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it. *Meyer v. Nebraska, 262 U.S. 390; Pierce v. Society of Sisters, 268 U.S. 510.* n2 In ironic contrast, the District Court in this case has said that the Constitution *requires* the State of Georgia to *disregard* this established principle. I cannot agree." 442 U.S. at 621 .

Only a governmental deprivation of liberty invokes the due process clause of the United States Constitution. It is assumed that the parents who seek commitment of their children are acting in the best interests of their children, a rebuttable presumption. Some parents may be unfit and therefore may not be acting in the best interest of the child, but an unfit parent can be stripped of his parental authority under laws dealing with neglect and abuse of children. "[W]hen a state legislature makes a reasonable definition of the age of minority, and creates a rebuttable presumption that in invoking the statutory procedures for voluntary commitment a parent is acting in the best interests of his minor child, * * * the Fourteenth Amendment is [not] violated." *Id.* at 625.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, concurring in part and dissenting in part. MR. JUSTICE BRENNAN disagreed "with the Court's decision to pretermit questions concerning the postadmission procedures due Georgia's institutionalized juveniles," and would have held that that "the Georgia statute is unconstitutional in that it fails to accord preconfinement hearings to juvenile wards of the State committed by the State acting *in loco parentis*." *Id.*

MR. JUSTICE BRENNAN proceeded to examine "Rights of children (1) committed to mental institutions, (2) committed by their parents, and (3) committed by their state guardians." *Id.* at 630-639.

Children incarcerated in public mental institutions are constitutionally entitled to some champion who can speak on their behalf and who stands ready to oppose a wrongful commitment. *Id.* at 638. "[F]airness demands that children abandoned by their supposed protectors to the rigors of institutional confinement be given the help of some separate voice." *Id.* at 639.

H. L. v. Matheson, Governor of Utah, et al., 450 U.S. 398; 101 S. Ct. 1164; 67 L. Ed. 2d 388; 1981 U.S. LEXIS 81; 49 U.S.L.W. 4255 (1981)

CASE SUMMARY

PROCEDURAL HISTORY: Appellant minor filed an action against appellees, a governor and an attorney general asserting a Utah statute requiring parental notification of a minor's desire to get an abortion was unconstitutional. The Supreme Court of Utah unanimously upheld the abortion statute, Utah Code Ann. § 76-7-304 (1978). Appellant sought review.

OVERVIEW: A physician advised a minor (appellant) that an abortion was in her best medical interest, but refused to perform an abortion until he notified her parents. Utah law made it a misdemeanor not to so notify the parents, if possible. Appellant instituted a suit in state court seeking a declaration that the statute requiring parents to be notified of abortions under certain circumstances is unconstitutional on its face and an injunction against its enforcement. The minor challenged § 76-7-304 as unconstitutional on its face. She contended that the statute was overbroad as it could have been construed to apply to all unmarried minor girls, including those who were mature and emancipated.

First, since there was no evidence to suggest that the appellant was mature and emancipated, the Court held she had no standing to contest the statute on that grounds. Controlling state caselaw holds that the statute does not apply to emancipated minors.

The court then addressed the remaining issue--the facial constitutionality of a statute requiring a physician to give notice to parents, "if possible," prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her

relations with her parents. 450 U.S. 407-413.

The court held:

> (1) "Although we have held that a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion, a statute setting out a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent minor." *Id.* at 409. "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. *Id.* at 410. "In addition, 'constitutional 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.' *Ginsberg v. New York, 390 U.S. 629, 639 (1968).* In *Quilloin v. Walcott, 434 U.S. 246 (1978),* the Court expanded on this theme:
>
> 'We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.' See, *e. g., Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972); Stanley v. Illinois, [405 U.S. 645 (1972)]; Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923).* 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Id.*, at 255, quoting *Prince v. Massachusetts, 321 U.S. 158, 166 (1944)." Id.*

The Supreme Court found the lower court's judgment controlling insofar as the minor challenged a purported statutory exclusion of mature and emancipated minors. The Supreme Court stated:

> "The Utah statute gives neither parents nor judges a veto power over the minor's abortion decision. As applied to immature and dependent minors, the statute plainly serves the important considerations of family integrity and protecting adolescents. In addition, as applied to that class, the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. n20 An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data."

Id. at 399-400.

"The Supreme Court found the statute was reasonably calculated to protect minors in the minor's class by enhancing the potential for parental consultation concerning a decision that had potentially traumatic and permanent consequences." 1981 U.S. LEXIS 81.

HOLDING: The Supreme Court affirmed the judgment by the court.

JUSTICE POWELL, with whom JUSTICE STEWART joins, concurring. JUSTICE POWELL agreed with the Court that Utah Code Ann. § 76-7-304 (2) (1978) does not unconstitutionally burden this appellant's right to an abortion. 450 U.S. at 414. He joined the opinion of the Court on the understanding that it leaves open the question whether § 76-7-304 (2) unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification. *Id.* He wrote to make clear that he continued to entertain the views on this question stated in his opinion in *Bellotti II. Id.*

He agreed that, under the facts of the case, the statute was not an unconstitutional infringement on appellant's right to an abortion.

JUSTICE STEVENS, concurring in the judgment. Since this was a class action in which the appellant represents all unmarried "'minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so' because of their physicians' insistence on complying with § 76-7-304 (2)" of the Utah JUSTICE STEVENS felt the Court had a duty to answer the broader question decided by the Utah Supreme Court, a question which the Court did not reach, and stated that he was unable to join the opinion of the Court. *Id.* at 420-421. He concluded, "Because my view in this case, as in *Danforth*, is that the State's interest in protecting a young pregnant woman from the consequences of an incorrect abortion decision is sufficient to justify the parental-notice requirement, I agree that the decision of the Utah Supreme Court should be affirmed." *Id.* at 408.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting. JUSTICE MARSHALL believed that even if the complaint were defective, the majority's legal analysis was incorrect and it yielded an improper disposition here. More important, he could not agree with the majority's view of the complaint, or its standing analysis. He therefore would reverse the judgment of the Supreme Court of Utah.

***Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18; 101 S. Ct. 2153; 68 L. Ed. 2d 640; 1981 U.S. LEXIS 107; 49 U.S.L.W. 4586 (1981)**

CASE SUMMARY

PROCEDURAL HISTORY: The state court granted respondent department's motion to terminate petitioner mother's parental rights. Mother was not represented by counsel. On the mother's appeal, the North Carolina Court of Appeals rejected petitioner's sole contention on appeal that because she was indigent, the Due Process Clause of the Fourteenth Amendment required the State to provide counsel for her. The North Carolina Supreme Court summarily denied discretionary review. On writ of certiorari, the mother appealed.

OVERVIEW: A North Carolina court adjudicated a mother's infant son to be a neglected child and placed in the custody of the department of social services. A year later the mother was incarcerated for a murder conviction. Petitioner, Durham County Department of Social Services, petitioned the court to terminate her parental rights. The court declined to appoint her an attorney stating that she had had ample time to hire an attorney. She did not inform the court that she was indigent. After a hearing at which she represented herself, the court terminated her parental rights. Although the mother had an attorney to represent her in the criminal appeal, she did not inform her lawyer about the termination of parental rights proceeding.

"On appeal, the mother contended that due process required the State to appoint counsel for her because she was indigent. The Court observed that there was a presumption against the right to appointed counsel when no potential deprivation of physical liberty existed. In analyzing the Mathews v. Eldridge factors, the Court found that the parents' interests could overcome the presumption against the right to appointed counsel in appropriate cases. The Court concluded that the decision of whether due process required the appointment of counsel for indigent parents in termination of parental proceedings was left to the trial court in the first instance. In the instant case, the Court held that the state trial court committed no error by failing to appoint counsel for the mother." 1981 U.S. LEXIS 107.

HOLDING: The Court affirmed the decision that due process did not require the state to appoint counsel to represent the mother in the proceeding to terminate her parental rights with respect to her infant son.

CHIEF JUSTICE BURGER, concurring. CHIEF JUSTICE BURGER joined the Court's opinion and add only a few words to correct a misconception by the dissenters. The purpose of the termination proceeding at issue here was to protect the best interests of the child and was not "punitive." "Given the record in this case, which involves the parental rights of a mother under lengthy sentence for murder who showed little interest in her son, the writ might well have been a "candidate" for dismissal as improvidently granted.." 452 U.S. at 34.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting. JUSTICE BLACKMUN dissented because he believed that the unique importance of a parent's interest in the care and custody of his or her child cannot constitutionally be extinguished through formal judicial proceedings without the benefit of counsel.

JUSTICE STEVENS, dissenting. JUSTICE STEVENS states that the *Mathews v. Eldridge, 424 U.S. 319* test involved property rights. "Meeting the court on its own terms, JUSTICE BLACKMUN demonstrates that the *Mathews* v. *Eldridge* analysis requires the appointment of counsel in this type of case. I agree with his conclusion, but I would take one further step." 425 U.S. at 59.

He concluded:

> "Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless."

Id.

***Santosky et al.v. Kramer, Commissioner, Ulster County Department of Social Services, et al.*, 455 U.S. 745; 102 S. Ct. 1388; 71 L. Ed. 2d 599; 1982 U.S. LEXIS 89; 50 U.S.L.W. 4333 (1982)**

CASE SUMMARY

PROCEDURAL HISTORY: The court granted certiorari to the Appellate Division, Supreme Court of New York, Third Judicial Department, which affirmed the permanent termination of petitioners' parental rights and rejected petitioners' assertion that the preponderance of the evidence standard in N.Y. Fam. Ct. Act § 622 was unconstitutional.

OVERVIEW: "Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is 'permanently neglected.'" 455 U.S. at 747. "The New York Family Court Act § 622 (McKinney 1975 and Supp. 1981-1982) (Fam. Ct. Act) requires that only a 'fair preponderance of the evidence' support that finding." *Id.* After incidents reflecting parental neglect, respondent removed petitioners' biological children from petitioners' home. Petitioners' parental rights were later terminated. The court of appeals rejected petitioners' argument that the "fair preponderance of the evidence" standard in N.Y. Fam. Ct. Act. § 622 was unconstitutional.

The Supreme Court noted that:

> "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." * * *
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> The Court considered the factors identified in *Mathews v. Eldridge, 424 U.S. 319, 335 (1976)*--the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. See *452 U.S., at 27-31; id., at 37-48* (first dissenting

opinion). But see *id., at 59-60* (STEVENS, J., dissenting)--to determine whether a particular standard of proof in a particular proceeding satisfies due process.

Where only property is at stake, the standard of proof has been set at "a preponderance." In a criminal proceeding where liberty is at stake, the highest standard of "beyond a reasonable doubt" has been set. "This Court has mandated an intermediate standard of proof -- 'clear and convincing evidence' -- when the individual interests at stake in a state proceeding are both 'particularly important' and "more substantial than mere loss of money."

Id. at 753-756.

The court concluded before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence. A "clear and convincing evidence" standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. Determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts. *Id.* at 768-770.

HOLDING: The court held that the Due Process Clause of the Fourteenth Amendment demands that before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting. The majority intruded into an area that should have been left to the states, as it has always been. The Fourteenth Amendment requires that the states treat their citizens in a fundamentally fair manner. The majority ignored that the whole of New York's scheme did so. JUSTICE REHNQUIST argued that New York has enacted a comprehensive plan to aid marginal parents in regaining the custody of their child.

He feared that fixing the standard of proof as a matter of federal constitutional law will only lead to further federal-court intervention in state schemes. *Id.* at 619.

After describing the entire New York scheme of dealing with marginal parents before their parental rights could be removed and concluded that New York law was not fundamentally unfair.

***City of Akron v. Akron Center for Reproductive Health, Inc., et al.*, 462 U.S. 416; 103 S. Ct. 2481; 76 L. Ed. 2d 687; 1983 U.S. LEXIS 63; 51 U.S.L.W. 4767 (1983)**

CASE SUMMARY

PROCEDURAL HISTORY: Respondents, abortion clinic operators and a physician, brought an action against petitioners, city and officials, challenging Akron, Ohio, Ordinance No. 160-1978 (1978) that regulated abortions. The United States Court of Appeals for the Sixth Circuit upheld the hospitalization requirement and invalidated the provisions on parental consent, informed consent, waiting period, and disposal of fetal remains. All parties appealed.

OVERVIEW: ***1983 U.S. LEXIS 63*** provides a good overview of the entire case:

"Abortion clinic operators, physician, and parents asserted that the ordinance violated a woman's right to privacy. The city and city officials argued that the ordinance placed reasonable restraints on a woman's right to an abortion. The court concluded that (1) the second-trimester hospitalization requirement significantly limited a woman's ability to obtain an abortion; (2) medical knowledge did not support the hospitalization requirement; (3) the parental consent ordinance did not create an opportunity for the required case-by-case evaluation of the maturity of pregnant minors; (4) the city attempted to extend the state's interest in ensuring informed consent beyond permissible

limits by requiring information intended to persuade a woman not to have an abortion and intruding upon the discretion of the physician; (5) consent was still informed even of the information was not conveyed by the physician; (6) the city failed to demonstrate that any legitimate state interest was furthered by the arbitrary and inflexible waiting period; and (7) the disposal provision failed to give a physician fair notice of what constituted forbidden conduct."

[In accordance with the scope of this assignment, I will only give a more detailed summary of the parental rights issues involved in this case.]

Section 1870.05 sets forth requirements for notification of and consent by parents before abortions may be performed on unmarried minors. Section 1870.05 NOTICE AND CONSENTprovides:

"(A) No physician shall perform or indice an abortion upon an unmarrried pregnant woman under the age of 18 years without first having given at lest twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion, or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least seventy-two (72) hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one of the parents or guardian, computed from the time of mailing, unless the abortion is ordered by a court having jurisdiction over such minor pregnant woman.

"(B) No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter, and

"(1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or

"(2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced."

The Court has held that "the State may not impose a blanket provision ... requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor. 462 U.S. at 439. "In *Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II)*, a majority of the Court indicated that a State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. See *id., at 640-642* (plurality opinion for four Justices); *id., at 656-657* (WHITE, J., dissenting) (expressing approval of absolute parental or judicial consent requirement). See also *Danforth, supra, at 102-105* (STEVENS, J., concurring in part and dissenting in part)." *Id.* "The *Bellotti II* plurality cautioned, however, that the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests. *443 U.S., at 643-644." Id.* at 439-440. "Under these decisions, it is clear that Akron may not make a blanket determination that *all* minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval." *Id.* at 440.

The Court did not think that the Akron ordinance, as applied in Ohio juvenile proceedings, was reasonably susceptible of being construed to create an "opportunity for case-by-case evaluations of the maturity of pregnant minors" and therefore affirmed the Court of Appeals' judgment that § 1870.05(B) was unconstitutional. *Id.* at 441-442.

HOLDING: The court affirmed the judgment of the Court of Appeals that invalidated those sections of the City of Akron's abortion ordinance that involved parental consent, informed consent, a 24-hour waiting period, and the disposal of fetal remains. The court reversed the City of Akron's requirement that all second-trimester abortions were to be performed in a hospital.

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting. "Irrespective of what we may believe is wise or prudent policy in this difficult area, 'the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws

because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'' *Plyler v. Doe, 457 U.S. 202, 242 (1982)* (BURGER, C. J., dissenting)." *Id.* at 453. (I will now address only the parental notification issue)

As to the parental consent issue, the dissent stated:

> "Assuming, *arguendo*, that the Court is correct in holding that a parental notification requirement would be unconstitutional as applied to mature minors, I see no reason to assume that the Akron ordinance and the State Juvenile Court statute compel state judges to notify the parents of a mature minor if such notification was contrary to the minor's best interests. Further, there is no reason to believe that the state courts would construe the consent requirement to impose any type of parental or judicial veto on the abortion decisions of mature minors. In light of the Court's complete lack of knowledge about how the Akron ordinance will operate, and how the Akron ordinance and the State Juvenile Court statute interact, our 'scrupulous regard for the rightful independence of state governments' counsels against 'unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system.' *Harrison v. NAACP, supra, at 176* (quoting *Matthews v. Rodgers, 284 U.S. 521, 525 (1932)).*"

462 U.S. at 469-470.

The majority opinion commented on the dissenting opinion:

> "There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*. That case was considered with special care. It was first argued during the 1971 Term, and reargued -- with extensive briefing -- the following Term. The decision was joined by THE CHIEF JUSTICE and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. See *Connecticut v. Menillo, 423 U.S. 9 (1975); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Harris v. McRae, 448 U.S. 297 (1980); H. L.* v. *Matheson, 450 U.S. 398 (1981).*
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> "Today, however, the dissenting opinion rejects the basic premise of *Roe* and its progeny. The dissent stops short of arguing flatly that *Roe* should be overruled. Rather, it adopts reasoning that, for all practical purposes, would accomplish precisely that result. The dissent states that "[even] assuming that there is a fundamental right to terminate pregnancy in some situations," the State's compelling interests in maternal health and potential human life "are present *throughout* pregnancy." *Post*, at 459 (emphasis in original). The existence of these compelling interests turns out to be largely unnecessary, however, for the dissent does not think that even one of the numerous abortion regulations at issue imposes a sufficient burden on the "limited" fundamental right, *post*, at 465, n. 10, to require heightened scrutiny. Indeed, the dissent asserts that, regardless of cost, "[a] health regulation, such as the hospitalization requirement, simply does not rise to the level of 'official interference' with the abortion decision." *Post*, at 467 (quoting *Harris v. McRae, supra, at 328* (WHITE, J., concurring)). The dissent therefore would hold that a requirement that all abortions be performed in an acute-care, general hospital does not impose an unacceptable burden on the abortion decision. It requires no great familiarity with the cost and limited availability of such hospitals to appreciate that the effect of the dissent's views would be to drive the performance of many abortions back underground free of effective regulation and often without the attendance of a physician.
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> "In sum, it appears that the dissent would uphold virtually any abortion regulation under a rational-basis test. It also appears that even where heightened scrutiny

is deemed appropriate, the dissent would uphold virtually any abortion-inhibiting regulation because of the State's interest in preserving potential human life. See *post*, at 474 (arguing that a 24-hour waiting period is justified in part because the abortion decision "has grave consequences for the fetus"). This analysis is wholly incompatible with the existence of the fundamental right recognized in *Roe* v. *Wade*."

462 U.S. at 420 n1.

Lehr v. Robertson et al., *463 U.S. 248; 103 S. Ct. 2985; 77 L. Ed. 2d 614; 1983 U.S. LEXIS 92; 51 U.S.L.W. 5010* (1983)

CASE SUMMARY

PROCEDURAL HISTORY: On writ of certiorari to the Court of Appeals of New York, appellant putative father sought review of an order affirming the dismissal of the father's paternity petition and entering an order of adoption in favor of appellees, mother and stepfather. The putative father claimed a right to notice and an opportunity to be heard pursuant to the due process and equal protection clauses of the Fourteenth Amendment, U.S. Const. amend. XIV. The New York Court of Appeals held that the putative father was not denied a right to notice and an opportunity to be heard.

OVERVIEW: The appellant putative father lived with the mother before the birth of a daughter, who was born out of wedlock. He never offered to marry the mother or supported the child in any way, and he did not list his name in the State of New York's "putative father registry," which would have triggered notice to him of pending adoption proceedings. The mother remarried and she and the stepfather (appellees) initiated adoption proceedings. After the adoption proceedings were initiated, appellant filed a paternity petition. Appellant's attorney sought a stay of the adoption proceeding pending the determination of the paternity action, but by that time the Family Court had entered the adoption order. Appellant filed a petition to vacate the adoption order on the ground that it was obtained in violation of his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Ulster County Family Court denied the petition, and both the Appellate Division of the New York Supreme Court and the New York Court of Appeals affirmed.

The Court first considered the nature of the interest in liberty for which appellant claims constitutional protection under the Fourteenth Amendment, and then turned to a discussion of the adequacy of the procedure that New York has provided for its protection.

As to the nature of the interest in liberty protected by the Fourteenth Amendment, the court stated:

> "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "[coming] forward to participate in the rearing of his child," *Caban, 441 U.S., at 392,* his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "[acts] as a father toward his children." *Id., at 389, n. 7.* But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[The] importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in '[promoting] a way of life' through the instruction of children ... as well as from the fact of blood relationship." * * *
>
> "If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. n18 If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."

463 U.S. at 261, 262.

The Supreme Court found that he never had any significant custodial, personal, or financial relationship with the child and that he waited two years to establish a legal tie. The Court held that the State

of New York adequately protected the putative father's inchoate interest in establishing a relationship with his daughter through the provision of laws authorizing formal marriage, through its statutory adoption scheme, and through the putative father registry. Further, it concluded that the equal protection clause did not prevent a state from according two parents different legal rights where one had a continuous custodial responsibility for the child, while the other never established a relationship. In that neither the due process clause or the equal protection clause was found to support the putative father's claims, the judgment of the New York Court of Appeals was affirmed.

HOLDING: The court affirmed the judgment of the New York Court of Appeals.

JUSTICE WHITE, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting. The issue, according to JUSTICE WHITE was: "[W]hether the State may, consistent with the Due Process Clause, deny notice and an opportunity to be heard in an adoption proceeding to a putative father when the State has actual notice of his existence, whereabouts, and interest in the child." 463 U.S. at 268.

The dissent gave additional facts showing that appellant did display an interest in the child, that the mother disappeared after the birth of the child and appellant diligently tried to find the child, that appellant finally found the child after the mother had remarried, tried to establish contact with the child, but the mother would not allow it, and that the mother and stepfather then initiated adoption proceedings.

The dissent then asserted that the majority's approach of determining a legitimate liberty interest had been rejected by the Court. JUSTICE WHITE maintained that the "'nature of the interest' at stake here is the interest that a natural parent has in his or her child, one that has long been recognized and accorded constitutional protection." 463 U.S. at 270.

JUSTICE WHITE further asserted that he "reject[ed] the peculiar notion that the only significance of the biological connection between father and child is that 'it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.' *Ante*, at 262. A 'mere biological relationship' is not as unimportant in determining the nature of liberty interests as the majority suggests." Whether Lehr's interest is entitled to constitutional protection entailed nothing more than a simple determination of the fact that the relationship exists. 463 U.S. at 272.

JUSTICE WHITE felt that the state should have had procedures requiring attempts to locate the biological father before finalizing an adoption, and the father should have been afforded due process and an opportunity to be heard. The procedures set up by state law denied appellant, whose identity and location were known, notice and hearing and such denial denied appellant rights guaranteed him by the Due Process Clause.

Michael H. et al. v. Gerald D., 491 U.S. 110; 109 S. Ct. 2333; 105 L. Ed. 2d 91; 1989 U.S. LEXIS 2977; 57 U.S.L.W. 4691 (1989)

CASE SUMMARY

PROCEDURAL HISTORY: "Petitioners appealed from an order of the Court of Appeal of California, Second Appellate District, granting summary judgment in favor of respondent in petitioner father's filiation action and petitioner child's cross-complaint seeking to maintain her filial relationship with respondent and petitioner father." 1989 U.S. LEXIS 2977.

OVERVIEW: "Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage. Cal. Evid. Code Ann. § 621 (West Supp. 1989)." 491 U.S. at 113. "The presumption of legitimacy may be rebutted only by the husband or wife, and then only in limited circumstances. *Ibid." Id.* "The instant appeal presents the claim that this presumption infringes upon the due process rights of a man who wishes to establish his paternity of a child born to the wife of another man, and the claim that it infringes upon the constitutional right of the child to maintain a relationship with her natural father." *Id.*

Carol D. and respondent Gerald D. were married. Mother had an adulterous relationship with petitioner father Michael H.. As a result petitioner Victoria D. was born. Respondent was listed as father on child's birth certificate and held child out to the world as his daughter. Blood tests showed a 98.07 percent

probability that petitioner was child's father. For a time, mother resided with petitioner, who held child out as his daughter. Mother subsequently moved and rebuffed father's attempts to visit child. Petitioner filed a filiation action to establish his paternity and right to visitation. Child filed a cross-complaint asserting that if she had more than one de facto father, she was entitled to maintain her filial relationship with both. Mother and respondent reconciled. On October 19, 1984, respondent Gerald D., who had intervened in the action, moved for summary judgment on the ground that under Cal. Evid. Code § 621 there were no triable issues of fact as to Victoria's paternity. and the superior court granted his motion for summary judgment against petitioner and child. 491 U.S. at 115. The California Court of Appeal affirmed. The California Supreme Court denied discretionary review. The Supreme Court affirmed.

HOLDING: "Summary judgment affirmed; petitioner father did not have a liberty interest traditionally protected by society that would give rise to substantive due process rights, and petitioner child's due process claim failed for the same reason; in addition, petitioner child's equal protection challenge did not survive rational relationship scrutiny." 1989 U.S. LEXIS 2977.

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY joins, concurring in part. JUSTICE O'CONNOR concurred in all but footnote 6 of Justice Scalia's opinion.

JUSTICE STEVENS, concurring in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

***Jenifer Troxel, et vir v. Tommie Granville*, 530 U.S. 57; 120 S. Ct. 2054; 147 L. Ed. 2d 49; 2000 U.S. LEXIS 3767; 68 U.S.L.W. 4458; 2000 Cal. Daily Op. Service 4345; 2000 Daily Journal DAR 5831; 2000 Colo. J. C.A.R. 3199; 13 Fla. L. Weekly Fed. S 365 (2000)**

PROCEDURAL HISTORY: On writ of certiorari to the Supreme Court of Washington; petitioners appealed the judgment of the state supreme court, reversing an order which granted their petition for visitation of the grandchildren, and holding that Wash. Rev. Code § 26.10.160(3) unconstitutionally interfered with the fundamental rights of parents to rear their children.

OVERVIEW: Brad Troxel and Tommie Granville had two daughters out of wedlock. Brad took the children to visit his parents while he was alive. He committed suicide, and thereafter Tommie Granville limited their visitation of the children to one short visit per month. "Washington Rev. Code § 26.10.160(3) permits 'any person' to petition for visitation rights 'at any time' and authorizes state superior courts to grant such rights whenever visitation may serve a child's best interest." 530 U.S. at 60. Petitioners Troxel petitioned a Washington Superior Court for the right to visit their grandchildren. Respondent mother opposed the petition. The case ultimately reached the Washington Supreme Court, which reversed the order of visitation entered by the superior court and holding that § 26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children. The court granted certiorari.

The Court stated:

> "The [Fourteenth Amendment] * * * includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' *521 U.S. at 720;* see also *Reno v. Flores, 507 U.S. 292, 301-302, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993).*
>
> "The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923),* we held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.' Two years later, in *Pierce*

> *v. Society of Sisters, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925),* we again held that the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.' We explained in *Pierce* that 'the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' *268 U.S. at 535.* We returned to the subject in *Prince v. Massachusetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944),* and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *321 U.S. at 166.*"

530 U.S. at 65.

The Court then referred to other Supreme Court caselaw dealing with parental rights and concluded that "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69. "The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See *Parham, supra, at 602.* In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters." *Id.* at 69-70.

The Court concluded, "Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the [facts of the case demonstrate] that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters." *Id.* at 72. The state superior court failed to accord the determination of respondent, a fit custodial parent, any material weight; announced a presumption in favor of grandparent visitation; and failed to accord significant weight to respondent's already having offered meaningful visitation to petitioners. The court concluded that the Due Process Clause of the United States Constitution did not permit a state to infringe on the fundamental right of parents to make childrearing decisions. Accordingly, the court held that Wash. Rev. Code § 26.10.160(3), as applied in this case, was unconstitutional.

HOLDING: Judgment affirmed; the visitation order in this case was an unconstitutional infringement on respondent's fundamental right to make decisions concerning the care, custody, and control of her two daughters.

JUSTICE SOUTER, concurring in the judgment. JUSTICE SOUTER stated that he would say no more than what the Washington Supreme Court said in invalidating its own statute. He wrote, " The issues that might well be presented by reviewing a decision addressing the specific application of the state statute by the trial court, *ante*, at 9-14, are not before us and do not call for turning any fresh furrows in the "treacherous field" of substantive due process. (*citing caselaw)*" 530 U.S. at 76-77.

JUSTICE THOMAS, concurring in the judgment. JUSTICE THOMAS wrote,

> "I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day. Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case."

Id. at 80..

JUSTICE STEVENS, dissenting. JUSTICE STEVENS agreed with JUSTICE SOUTER that the approach in the opinion is untenable. *Id.* at 81 He did not agree with [JUSTICE SOUTER'S] "conclusion that the State Supreme Court made a definitive construction of the visitation statute that necessitates the constitutional conclusion he would draw." *Id.* at 83.

He wrote, "I believe the Court should identify and correct the two flaws in the reasoning of the state court's majority opinion, and remand for further review of the trial court's disposition of this specific case." *Id.* at 84-85. He then explained how he believed the State Supreme Court erred in its federal constitutional analysis.

JUSTICE SCALIA, dissenting. JUSTICE SCALIA did not believe that judges had the power identify rights and use those identified rights (parental rights are not even mentioned by the Constitution, he notes) to overturn laws duly enacted by state legislatures.

JUSTICE KENNEDY, dissenting. JUSTICE KENNEDY wrote, "Given the error I see in the State Supreme Court's central conclusion that the best interests of the child standard is never appropriate in third-party visitation cases, that court should have the first opportunity to reconsider this case. I would remand the case to the state court for further proceedings." 530 U.S. at 94. Depending upon what that court would then hold, further review by the Court may or may not be warranted.