10-1975

Bellotti v. Baird

Lewis F. Powell Jr.

Held for Planned Parenthood

[See back]

3 J/Ct invalidated Mass' statute requiring parents' consent to abortion by their minor [redacted] (under 18) daughter.

DISCUSS

Preliminary Memo

Summer List 15, Sheet 1

Note ([redacted]) DLP

No. 75-109

HUNERWADEL

V.

BAIRD

Appeal from D. Mass. (Aldrich & Freedman; Julian, dissenting)

Timely

Federal/Civil

Please see memo in No. 75-73, Bellotti v. Baird.

9/8/75

Eggeling

Preliminary Memo

Summer List 15, Sheet 1

No. 75-73

BELLOTTI (Atty Gen. of Massachusetts)	Appeal from D. Mass. (Aldrich & Freedman; Julian, dissenting)	Timely
V.		
BAIRD	Federal/Civil	

No. 75-109

HUNERWADEL	(same as above)	Timely
V.		
BAIRD	(same as above)	

1. SUMMARY: This is an appeal from a decision of a three-judge court declaring unconstitutional and enjoining the operation of a Massachusetts statute which requires unemancipated minors to

obtain the consent of both parents prior to seeking an abortion.

On June 30, 1971, the Massachusetts legislature passed "An Act to Protect Unborn Children and Maternal Health Within Constitutional Limits." A section of this law prohibits the performance of an abortion upon an unmarried woman without the consent of both parents, except in an emergency, and further provides judicial review in the event that the requisite parental consent could not be obtained. The pertinent part of the statute provides that

> "If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary."

The statute also provides criminal penalties for physicians who perform abortions although the requisite consent has not been obtained.

Prior to the effective date of this legislation appellees brought a class action in D. Mass. challenging the constitutionality of the consent provisions of the statute and seeking declaratory and injunctive relief. A preliminary injunction was issued, which prevented the statute from ever becoming effective. A three-judge court was convened to consider the merits of the constitutional challenge. After finding that at least some of the plaintiffs had standing to challenge the statute and that there

[illegible] jurisdiction, the court [illegible] that the statute infringed the [illegible] rights [illegible]. In this Court's decision in Roe v. Wade and Doe v. Bolton, [illegible] the court declared the consent provisions of the statute [illegible] "[illegible] and void," and permanently enjoined their enforcement.

[illegible] of the DC's analysis may be [illegible] by setting out appellants' view of the statute, which is essentially the same as that taken by Judge Julian in his dissent. In their view the statute's consent requirements are primarily intended to require that a minor confer with her parents before making a decision as momentous as that to have an abortion. The statute, it is claimed, thereby recognizes and protects the integrity of the family unit and helps to ensure that a pregnant minor will get the counseling and support of her family which is crucial in such a situation. It is further argued that the statute does no more than codify common law regarding a minor's inability to give informed consent to surgical procedures. Crucial to this position is the argument that the judicial review provision of the statute is designed to permit a determination that a minor's decision to have an abortion despite her parents' opposition constitutes informed consent. In Judge Julian's view the "good cause" described in the statute [illegible]

that:

> "If the state courts find that minor is mature enough to give an informed consent to the abortion and that she has been adequately informed about the nature of an abortion and its probable consequences to her, then we must assume that the courts will enter the necessary order permitting her to exercise her constitutional right to the abortion."

The majority, however, rejected this analysis of the statute. They rejected the contention that the provision merely codified common law concepts of informed consent, pointing out that requiring the consent of both parents is distinct from the accepted Massachusetts practice of requiring the consent of a parent for certain surgical procedures. The court was also persuaded by its view that the statute applied to all minors, not just those incapable of giving informed consent. (N.B., as support for this conclusion the court "found" that a substantial number of minors are capable of forging a valid consent, although it does not appear to have made any express finding with regards to the ability of the minor plaintiff and class representative, Mary Moe.)

The court rejected the contention that the judicial review provision was a test of ability to consent. Rather, the court, relying to some extent upon interpretations apparently offered in oral argument, somewhat cryptically holds:

> "Whatever may be accorded to the minor by allowing her judicial review 'for good cause shown,' we do not regard it as meaning that the court should reverse a refusal of consent it finds reasonably made in the parent's interests."

Thus, the [illegible] [illegible] the statute as giving parents a 'veto' over their children's decision to seek an abortion. As the court [illegible] [illegible] that "[illegible] can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age," it held that this statutory veto purported to extend to parents rights [illegible] parity with those of their children and was therefore facially unconstitutional. The court expressly rejected the reasoning and result of Planned Parenthood v. Danforth, [illegible] Mo., an appeal from which is on the list for the first conference, No. 74-1151.

Appeals from this decision have been docketed both by the Attorney General of Massachusetts and by Jane Hunerwadel, who was permitted to intervene in the DC as the representative of Massachusetts parents having unmarried minor daughters who are, or who might become, pregnant.

4. CONTENTIONS: Appts share three contentions: that the statute is not unconstitutional, [illegible] that the DC should have joined the parents of the minor plaintiff, Mary Moe, in the litigation; and that the DC should have appointed a guardian ad litem for Moe. Appt Hunerwadel adds the contention that the DC should have certified the question of proper construction of the statute to the Massachusetts Supreme Judicial Court, rather than deciding for itself the meaning and application of the judicial review provision.

4. DISCUSSION: Apnts' contention that a guardian ad litem should have been appointed seems effectively answered by the DC's finding that Moe was sufficiently competent not to need such assistance and that her counsel adequately represented her interests. Apnts quibble with this, but present purely factual disagreements.

The contention that Moe's parents should have been joined in the litigation would also seem somewhat answered by the DC's findings as to her competence. There is another argument, accepted by Judge Julian, that adjudication of the statute's constitutionality without joining the parents deprived them of their rights without due process of law. This is an interesting argument, but if the gravamen of the statute's asserted unconstitutionality is some "chilling effect" caused by the necessity of consulting with one's parents prior to obtaining an abortion, this due process claim may be no different than the basic question on the merits. Note that if the parents had been joined, and had indicated their consent to the proposed abortion, there might arise a complex question of whether Moe had standing to challenge the statute.

Apnt Hunerwadel's certification point is based upon Lehman Bros. v. Schein, 416 U.S. 386 (1974). That case discussed the advisability of certification in the context of deciding state

law questions which arise in diversity actions, however, and does not seem directly applicable to the problem presented here. Moreover, there is no indication that a request for certification was ever presented to the DC. Nevertheless, in view of the evident confusion as to the interpretation of the statute (neither construction below seems entirely persuasive to me), this might have been an appropriate instance for abstention (with or without certification) until a state court has construed the judicial review portion of the statute.

On the merits the case is difficult and appears to warrant plenary consideration, perhaps as a companion case with Planned Parenthood, supra, should probable jurisdiction be noted there.

As a procedural matter, it may be worth noting that the DC expressly reserved decision as to whether plaintiff apee Baird, an abortion advocate and director of apee Parents Aid Society, had the requisite standing to maintain this action. Query whether Baird is properly a party to the instant appeal?

There is no response.

9/8/75 Eggeling Op of DC in JS appx.

Conference 11-14-75

Court USDC, D. Mass.

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 75-73
(Vide 75-109)

FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL., Appellants

vs.

WILLIAM BAIRD, ET AL.

7/12/75 Appeal filed.

Note
&
Set with
Planned Parent-
hood

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.				✓	&	set								
Powell, J.			Hold											
Blackmun, J.			Hold											
Marshall, J.				✓	&	set								
White, J.				✓	&	set								
Stewart, J.			Hold											
Brennan, J.							✓							
Douglas, J.														
Burger, Ch. J.		Note & set with Planned Parenthood												

Conference 11-14-75

Court USDC, D. Mass.

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 75-109
(Vide 75-73)

JANE HUNERWADEL, ETC., Appellant

vs.

WILLIAM BAIRD, ET AL.

7/18/75 Appeal filed.

Vote
&
~~Set~~ Consolidate
with 75-73 -
and both
to be set
with Planned
Parenthood

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.									Same vote as 75-73					
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

PJ/gg 3-22-76

BOBTAIL MEMORANDUM

TO: Justice Powell

FROM: Phil Jordan DATE: March 22, 1976

No. 75-73 & No. 75-109 Bonerwadel v. Baird, and Bellotti v. Baird

I write this short memo to set out a couple of points relevant to the Massachusetts parental consent statute that are not involved in the Missouri case. This memo assumes familiarity with pages 13-18 of my Planned Parenthood memorandum from last summer.

The first point is that Massachusetts, in an excellent brief by the Attorney General, argues that its statute comports with the concern I expressed in my earlier memo, namely, that the child have the right to make the abortion decision if she is mature enough to make it. There is one great difference between my analysis and the way the Massachusetts statute supposedly works: I would allow the decision as to maturity to be made initially by the doctor, whereas Massachusetts involves the parents at the initial stage. Massachusetts contends that initial decision-making responsibility as to any medical procedure has always been with the parents at common law, and that this abortion statute simply adopts that procedure. I am not sure that is correct - it seems to me that common law

allowed the doctor to proceed at his risk if he thought the minor was mature, with the knowledge that he might have to defend against an assault or a battery suit later. I frankly do not know for sure which view of the common law is correct - it would be good to question counsel about this at oral argument.

Even if Massachusetts is correct that pre-treatment clearance always has to be obtained at common law, there is an important consideration that counsels against that requirement in the case of an abortion. Pregnancy is likely to bring the child and her parents into conflict as no other medical condition could do; therefore, even though the normal procedure would be to seek parental permission first, the abortion context may be a place for an exception. Note, in this regard, that the right the girl is exercising is her right of privacy, and that connotes some right to keep the whole thing "under wraps," so to speak. Just as Roe contemplated the decision's being made between the adult woman and her doctor, so might the decision as to whether a child is sufficiently mature best be made by the doctor.

Again assuming the correctness of Massachusetts' view about parental consent always being necessary, the question arises whether the two-parent requirement of this statute is stricter than the normal common law rule. The Attorney General contends that it is not, but the DC majority stated that the common

law rule requires consent of only one parent. See Juris. Stat. A-13. If the DC is correct, the statute pretty clearly falls as a discrimination against the abortion decision.

Another question that must be answered before Massachusetts' argument could be accepted is what the statutory phrase "for good cause shown" means. The DC read it as not empowering a state court to override the parents' veto should the court find that the child was mature enough to make her own decision or that her best interests would be served by an abortion. Massachusetts, however, contends that the only right in the parents is to exercise their more mature judgment in the child's best interests, and that the state court can override their veto upon a finding of maturity or in order to serve the child's best interests. If the Court is inclined to accept Massachusetts' argument in general - that there should be an attempt to get parental consent first, with resort to the courts if that fails - then the Court must send the case back with directions to ask the Massachusetts Supreme Court what "for good cause shown" means. Although I am not a procedural buff in these matters, I presume the Court could indicate that the statute will stand should that phrase be interpreted to allow overriding the parents' decision if that is required by the child's best interests.

I believe Massachusetts' statute, interpreted as the Attorney General does in his brief, represents the best that a State possibly could do in trying to draft a statute allowing for

parental input into the decision but still providing an "escape hatch" of judicial hearing should the parents refuse consent. My inclination remains, however, as it was last summer, to place upon the doctor the burden of deciding whether a particular minor is sufficiently mature to give informed consent for the abortion. I cannot forget the practicalities: if a girl has to go to her parents and try to get their consent before she can have a legal abortion, she will tend to seek illegal abortions to avoid confronting her parents - and that means more danger to her. When all is said and done, I cannot see any reasoned justification for requiring parental consent instead of leaving the judgment as to maturity to the attending physician.

Jump Point

Phil

75-73 BELLOTTI v. BAIRD
75-109 HUNERWADEL v. BAIRD

Argued 3/23/76

Mass. statute requires doctor to obtain consent of both parents & unmarried minor to an abortion. 3 J/ct invalidated statute.

If one or both parents withholds consent, the issue may be resolved by the court.

Statute applies only to unmarried minors.

(Ev. shows that normally there is little consultation bet. doctor & minor)

Rosenfeld (Asst A/G - West)

3 J/Ct construed statute as ~~requiring~~ conferring rights on parents but might not be related to welfare of child: e.g. withholding consent to punish child.

Emphasizes jud. review provisions.

Two common law presumptions will be applied by court in determining whether "cause" is shown:

1. Knowing consent.
2. child's best interest.

Statute does not address procedure. But AG says no notice need be given parents

Statute doesn't change com. law of mens.

Riley (for Intervenors - supports State)

Lucas (for [redacted])

Statute doesn't mention health of [redacted] minor; parents given absolute vote.

No. 75-73, BELLOTTI v. BAIRD — Conf. 3/26/76

Vacate on Abstension

75-109 HUNERWADEL v. BAIRD 8-1

The Chief Justice Passed

Could sustain a properly drawn consent statute.

x x x

After discussion, CJ agreed to Vacate on Abstension

xxxxxxxx Stevens, J.

Vacate on Abstension

On merits, state has an interest in assuring parental guidance to minors.

Must interpret these statutes in light of specific case before us. Can't construe a statute in light of the many unusual examples that can be dreamed to show inequities of statute.

Brennan, J. Affirm { Or Reverse on Abstension

If we reach merits, would affirm. Right under Roe is absolute.

But this case was started before statute became effective. Could reverse for failing to abstain.

As to merits, right of Mother is absolute regardless of age. No consent required. WJB does not want to give any guidance.

Stewart, J. Reverse on Abstension

AG's suggested reading of statute could make it valid. Only purpose of consent procedure is to verify "informed consent." Then would be compatible with majority vote in Planned Parenthood sustaining requirement of Mother's consent.

Basic issue is nature of the judicial proceedings.

White, J.

Reverse

Don't need any help from state court to sustain statute. It is OK on the face.

Marshall, J.

Vacate on Abstension

Agree with Potter

Blackmun, J. Vacate on Abstension

Different from Neb. statute

Powell, J. Vacate on Abstension so Mass Ct. will construe statute

If no majority for Abstension, I'd Reverse — accepting the AG's construction

The worst of recent from viewpoint of pregnant minors is to have no statute, as common law would then apply

Rehnquist, J. Vacate on Abstension

DC neither abstained

75-73

Abstension
may form voir

Common law recognition of incapacity of minors: contracts, torts
Statutory provisions: marriage, vote, rape

Common law rule of "informed consent"

Most statute attempts to accomodate various interests.

* In absence of a statute, doctors will be reluctant to perform abortions or remove. Common law rule of battery will apply in full force.

In a good opinion, J. Blackmun holds that the Mass. statute is susceptible of A G's (appellant's) view that statute gives no absolute veto right to parents, & therefore abstension to allow state court interpretation is appropriate.

The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 6/7/76

No. 75-73 - Bellotti v. Baird
No. 75-109 - Hunerwadel v. Baird

Recirculated: _____

See reference to Planned Parenthood on pgs. 9, 15, 17. (Says No. statute gives parents a "veto" power.)

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, a three-judge District Court for the District of Massachusetts enjoined the operation of certain provisions of a 1974 Massachusetts statute that govern the type of consent required before an abortion may be performed on an unmarried woman under the age of 18. In so acting, the court denied by implication a motion by appellants that the court abstain from deciding the issue pending authoritative construction of the statute by the Supreme Judicial Court of Massachusetts. We hold that the court should have abstained, and we vacate the judgment and remand the case for certification of relevant issues of state law to the Supreme Judicial Court, and for abstention pending the decision of that tribunal.

I

On August 2, 1974, The General Court of Massachusetts (the Legislature), over the Governor's veto, enacted legislation entitled "An Act to protect unborn children and maternal health within present constitutional limits." The Act, Stat. 1974, c. 706, § 1, amended Mass Gen. Laws Ann., c. 112 (Professions and Occupations), by adding §§ 12H through 12R.[1/] Section 12P provides:

"Section 12P.

"(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.

"(2) 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.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R."

All non-emergency abortions are made subject to the provisions of § 12P by § 12N.[2/] Violations of § 12N are punishable under § 12Q by a fine of not less than $100 nor more than $2000.[3/] Section 12R provides that the Attorney General or any person whose consent is required may petition the superior court for an order enjoining the performance of any abortion.[4/]

II

On October 30, 1974, one day prior to the effective date of the Act,[5/] plaintiffs, who are appellees here, filed this action in the United States District Court for the District of Massachusetts, asserting jurisdiction under 28 U.S.C. §§ 1343(3), 1331, and 2201, and 42 U.S.C. § 1983, and claiming that § 12P violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They sought injunctive and declaratory relief, and requested the empaneling of a 3-judge court pursuant to 28 U.S.C. §§ 2281 and 2284.

On October 31, the single district judge issued an order temporarily restraining the enforcement of the parental consent requirement of § 12P, and accepting the request for a three-judge

[illegible] Revised Brief 2.

The plaintiffs, and the classes they purport to represent, are:

Dr. William Baird, a citizen of New York;

the Parents Aid Society, Inc., a New York not-for-profit corporation, Baird is president of the corporation and a director and chief counselor of the center at which patients will be seen for the purpose of providing, inter alia, abortion and counseling services; Baird and Parents Aid claim to represent all abortion centers and their physician-operators in Massachusetts who, as a regular and recurring basis, deal with pregnant minors. App. 18, 43.

3. Mary Moe I, II, III, and IV, four minors under the age of 18, pregnant at the time of the filing of the suit, and residing in Massachusetts. Each alleged that she wished to terminate her pregnancy and did not wish to inform either of her parents. [illegible] Id., at 9-18, 36-42. The Moes claimed to represent all pregnant minors capable of, and willing to give,

informed consent to an abortion, but who decline to seek the consent of both parents, as required by § 12P. Id., at 13, 43.

4. Gerald Zupnick, M.D., a physician licensed to practice in Massachusetts. He is the medical director of the center operated by Parents Aid. He claims to represent all physicians in Massachusetts who, without parental consent, see minor patients seeking abortions. Ibid.

The defendants in this action, who are the appellants in No. 75-73 and who are hereinafter referred to as the appellants, are the Attorney General of Massachusetts and the district attorneys of all the counties in the Commonwealth.

Appellant in No. 75-[illegible] (hereinafter referred to as the intervenor-appellant) is Jane Hunegswofel, a resident and citizen of Massachusetts, and parent of an unmarried minor female of child-bearing age. Intervenor was permitted by the District Court to intervene as a defendant on behalf of herself and all others similarly situated.[6/] Record Doc. 8.

On November 13, appellants filed a "Motion to dismiss and/or for summary judgment," arguing, inter alia, that the District Court "should abstain from deciding any issue in this case." Record Doc. 4, p. 2. In their memorandum in support of that motion, appellants, in addition to other arguments, urged that § 12F, particularly in view of its judicial review provision, was susceptible of a construction by state courts that would avoid or modify any alleged federal constitutional questions. Record Doc. 5, p. 12. They cited Railroad Comm'n. v. Pullman Co., 312 U.S. 496 (1941), and Lake Carriers' Ass'n. v. MacMullan, 406 U.S. 498, 511-512 (1972), for the proposition that where an unconstrued state statute is susceptible to a constitutional construction, a federal court should refrain from deciding a constitutional challenge to the statute until a definitive state construction has been obtained.

The District Court held hearings on the motion for a preliminary injunction; these were later merged into the trial on the merits. It received testimony from various experts and from parties to the case, including Mary Moe I. On April 28, 1975, the three-judge District Court, by a divided vote, handed down a decision holding § 12P unconstitutional and void. 393 F. Supp. 847 (Mass. 1975). An order was entered declaring § 12P (and such other portions of the chapter [112] insofar as they make specific reference thereto) void, and enjoining the defendants from enforcing them. App. 45-46; Appellants' Brief, Addendum A-33, A-34.

The majority held, *inter alia*, that appellees Mary Moe I, Doctor Zupnick, and Parents Aid had standing to challenge the operation of the statute, individually and as representatives of their proposed classes, *id.*, at 853-855,[9/] and that the intervenor-appellant had standing to represent the interests of parents of unmarried minor women of childbearing age, *id.*, at 849-850. It found that a substantial number of females under the age of 18 are capable of forming a valid consent, and viewed the overall question as whether the State can be permitted to restrict the free exercise of that consent, to the extent that it has endeavored to do so. *Id.*, at 856.

In regard to the meaning of § 12P, the majority made the following comments:

"1. The statute does not purport to require simply that parents be notified and given an opportunity to communicate with the minor, her chosen physician, or others. We mention this obvious fact because of the persistence of defendants and intervenors in arguing that the legislature could properly enact such a statute. Whether it could is not before us, and there is no reason for us considering it.

"2. The statute does not exclude those capable of forming an intelligent consent, but applies to all minors. The statute's provision calling for the minor's own consent recognizes that at least some minors can consent, but the minor's consent must be supplemented in every case, either by the consent of both parents, or by a court order.

. . .

"4. The statute does not purport simply to provide a check on the validity of the minor's consent and the wisdom of her decision from the standpoint of her interests alone. Rather, it recognizes and provides rights to both parents, independent of, and hence potentially at variance with, her own personal interests. 395 F. Supp., at 855.

'The dissent is seemingly of the opinion that a reviewing Superior Court Judge would consider only the interests of the minor. We find no room in the statute for so limited an interpretation.' Id., at 856 n. 17.

"The parents not only must be consulted, they are given a veto. Id., at 857.

The majority observed that ' [N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.' In re Gault, 1967, 387

U.S. 1, 13," 393 F. Supp., at 856, and, accordingly, held that the state cannot control a minor's abortion in the first trimester any more than it can control that of an adult. Reemphasizing that "the statute is cast not in terms of protecting the minor . . . but in recognizing independent rights of parents," the majority concluded that "[t]he question comes, accordingly, do parents possess, apart from right to counsel and guide, competing rights of their own?" Ibid.

The majority found that in the instant situation, unlike others, the parents' interests often are adverse to those of the minor and, specifically rejecting the contrary result in Planned Parenthood of Central Mo. v. Danforth, 392 F. Supp. 1362 (ED Mo. 1975), see ante, p. _____, concluded:

> "But even if it should be found that parents may have rights of a Constitutional dimension vis-a-vis their child that are separate from the child's, we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected." 393 F. Supp., at 857.

The dissent argued that the parents of Mary Moe I, by not being informed of the action or joined as parties, "have been deprived

of their legal rights without due process of law," ibid, that the majority erred in refusing to appoint a guardian ad litem for Moe, and that it erred in finding that she had the capacity to give a valid and informed consent to an abortion. The dissent further argued that parents possess constitutionally cognizable rights in guiding the upbringing of their children, and that the statute is a proper exercise of state power in protection of those parental rights. Id., at 857-865.

Most important, however, the dissent's view of the statute differed markedly from the interpretation adopted by the majority. The dissent stated:

> "I find, therefore, no conceivable constitutional objection to legislation providing in the case of a pregnant minor an additional condition designed to make certain that she receive parental or judicial guidance and counseling before having the abortion. The requirement of consent of both parents [15/] ensures that both parents will provide counselling and guidance, each according to his or her best judgment. The statute expressly provides that the parents' refusal to consent is not final. The statute expressly gives the state courts the right to make a final determination. If the state courts find that the minor is mature enough to give an informed consent to the abortion and that she has been adequately informed about the nature of an abortion and its probable consequences to her, then we must assume that the courts will enter the

necessary order permitting her to exercise her constitutional right to the abortion." Id., at 864.

The indicated footnote reads:

"The majority speculate concerning possible interpretations of the 'for good cause shown' language. There is also some doubt whether the statute requires consent of one or both parents. The construction of the statute is a matter of state law. If the majority believe the only constitutional infirmities arise from their interpretation of the statute, the majority should certify questions of state law to the Supreme Judicial Court of Massachusetts pursuant to Rule 3:21 of that court in order to receive a definitive interpretation of the statute." Ibid.

Both appellants and intervenor-appellant appealed. We noted probable jurisdiction of each appeal and set the cases for oral argument with Planned Parenthood of Missouri v. Danforth, ante, and its companion cross appeal. 423 U.S. 952 (1975).

II

Appellants and intervenor-appellant attack the District Court's majority decision on a number of grounds. They argue, inter alia, and each in their or her own way, that § 12P properly preserves the primacy of the family unit by reinforcing the role of parents in fundamental decisions affecting family members; that the District Court erred in failing to join Moe's parents; that it abused its discretion by failing to appoint a guardian ad litem; and that it erred in finding the statute facially invalid when it was capable of a construction that would withstand constitutional analysis. The interpretation placed on the statute by appellants in this Court is of some importance and merits attention, for they are the officials charged with enforcement of the statute.[10/]

Appellants assert, first, that under the statute parental consent may not be refused on the basis of concerns exclusively of the parent. Indeed, "the 'competing' parental right consists exclusively of the right to assess independently, for their minor child, what will best serve that child's best interest . . . . [I]n operation, the parents' actual deliberation must range no further than would that of a pregnant adult making her own abortion decision." Brief for Appellants 23.

And the superior court's review will ensure that parental objection based upon other considerations will not operate to bar the minor's abortion. Id., at 22-23. See also Brief for Intervenor-appellant 26.

Second, appellants argue that the last paragraph of § 12P[11/] preserves the "mature minor" rule in Massachusetts, under which a child determined by a court to be capable of giving informed consent will be allowed to do so. Appellants argue that under this rule, a pregnant minor could file a complaint in superior court seeking authorization for an abortion, and, "[i]mportantly, such a complaint could be filed regardless of whether the parents had been consulted or had withheld their consent." Brief for Appellants 37-38 (emphasis in the original); Tr. of Oral Arg. 17. Appellants and the intervenor-appellant assert that the procedure employed would be structured so as to be speedy and nonburdensome, and would ensure anonymity. Brief for Appellants 38 n. 30; Tr. of Oral Arg. 24-26. See also Brief for Intervenor-appellant 26.

Finally, appellants argue that under § 12P, a judge of the superior court may permit an abortion without parental consent for a minor incapable of rendering informed consent, provided that there

is "good cause shown." Brief for Appellants 38. "Good cause" includes a showing that the abortion is in the minor's best interests. Id., at 39.

Mem. A/G's never MV statute

The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation. And, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read,

Would be fundamentally different from a statute that creates a 'parental veto.' [12]

Different from Planned Parenthood

Appellees, however, on their part, take an entirely different view of the statute. They argue that the statute creates a right to a parental veto, [13] that it creates an irrebutable presumption that a minor is incapable of informed consent, [14] and that the statute does not permit abortion without parental consent in the case of a mature minor or, in the case of a minor incapable of giving consent, where the parents are irrationally opposed to abortion. [15]

Appellees specifically object to abstention. Their objection is based upon their opinion that 'the statute gives to parents of minors an unbridled veto,' Brief for Appellees 49, and that once that veto is exercised, the minor has the burden of proving to the superior court judge that 'good cause' exists. Id. They view the 'good cause' hearing as forcing the judge to choose 'between the privacy rights of the young woman and the rights of the parents as established by the statute.' [16] Assuming that 'good cause' has a broader meaning, appellees argue that the hearing itself makes the statute unconstitutional, because of the burdens it imposes and the delay it entails. Id.

III

In deciding this case, we need go no further than the claim that the District Court should have abstained pending construction of the statute by the Massachusetts courts. As we have held on numerous occasions, 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." Harrison v. NAACP, 360 U.S. 167, 177 (1959). See also Colorado River Conservation District v. United States, ___ U.S. ___ [slip op. 12-13]. Carey v. Sugar, ___ U.S. ___ [slip op.]; Kusper v. Pontikes, 414 U.S. 51, 54-56 (1973); Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 510-511 (1972); Zwickler v. Koota, 389 U.S. 241, 249 (1967); Railroad Comm'n v. Pullman Co., supra.

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.

[In Planned Parenthood of Missouri v. Danforth, ante, we today strike down a statute that created a parental veto. [Slip op., at _____.] At the same time, however, we ruled that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion. In this case, we are concerned with a statute directed towards minors, as to whom there are unquestionably greater risks of inability to give an informed consent. Without holding that a requirement of a court hearing would not unduly burden the rights of a mature adult, cf. Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973), we think it clear that in the instant case adoption of appellants' interpretation would at least materially change the nature of the problem that appellants claim is presented. Harrison v. NAACP, 360 U.S., at 177.

Whether the Supreme Judicial Court will so interpret the statute, or whether it will interpret the statute to require consideration of factors not mentioned above, impose burdens more serious than those suggested, or create some unanticipated interference with the doctor-patient relationship, we cannot now determine.[16] Nor need we determine what factors are impermissible or at what point review of consent and good cause in the case of a minor becomes unduly burdensome. It is sufficient that the statute is susceptible to the interpretation offered by appellants, and we so find, and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute, as it clearly would. Indeed, in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented.

Appellees also raise, however, a claim of impermissible distinction between the consent procedures applicable to minors in the area of abortion, and the consent required in regard to other medical procedures. This issue has come to the fore through the advent of a Massachusetts statute, enacted subsequent to the decision of the District Court, dealing with consent by minors to medical procedures other than abortion and sterilization.[17] As we hold today in Planned Parenthood, however, not all distinction between abortion and other procedures is forbidden. Id., at __. Th

constitutionality of such distinction will depend upon its degree and the justification for it. The constitutional issue cannot now be defined, however, for the degree of distinction between the consent procedure for abortions and the consent procedure for other medical procedures cannot be established until the nature of the consent required for abortions is established. In these circumstances, the federal court should stay its hand to the same extent as in a challenge directly to the burdens created by the statute.

Finally, we note that the Supreme Judicial Court of Massachusetts has adopted a Rule of Court under which an issue of interpretation of Massachusetts law may be certified directly to that Court for prompt resolution. Mass. Rules of Court, Sup. Jud. Ct. Rule 3:21 (1970). This Court often has remarked that the equitable practice of abstention is limited by considerations of "the delay and expense to which application of the abstention doctrine inevitably gives rise." Lake Carriers' Assn. v. MacMullan, 406 U. S., at 509, quoting England v. Medical Examiners, 375 U. S. 411, 418 (1964). See Harris v. Pontiker, 414 U. S., at 54. As we have also noted, however, the availability of an adequate certification procedure [48] does, of course, in the long run

save time, energy, and resources and helps build a cooperative judicial federalism." Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974). This Court has utilized certification procedures in the past, as have courts of appeals, id., and [illegible] at 390 n. 6.

The importance of speed in resolution of the instant case is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis. Further, in light of our disapproval of a "parental veto" today in Planned Parenthood, we must assume that the lower Massachusetts courts, if called upon to enforce the statute pending interpretation by the Supreme Judicial Court, will not impose this most serious barrier. Insofar as the issue thus ceases to become one of total denial of access and becomes one rather of relative burden, the cost of abstention is reduced and the desirability of that equitable remedy accordingly increased.

IV

We therefore hold that the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of § 12D and the procedure it imposes. In regard to the claim of impermissible confrontation due to the 1975 statute, we vacate and remand to the District Court for inquiry through an amended complaint, or perhaps by other means, we believe that it would not be inappropriate for the District Court, when any procedural requirement has been complied with, also to certify a question concerning the new statute, and the extent to which its procedures differ from the procedures that must be followed under § 12D.

The judgment of the District Court is vacated, and the case is remanded to that court for proceedings consistent with this opinion.

It is so ordered.

Sally - How'd Hun come to me?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 8, 1976

Re: 75-73 - Bellotti v. Baird
75-109 - Hunerwadel v. Baird

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 9, 1976

RE: No. 73-75 Bellotti v. Baird
No. 75-109 Hunerwadel v. Baird

Dear Harry:

I agree.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

June 9, 1976

No. 75-73 Bellotti v. Baird
No. 75-109 Hunerwadel v. Baird

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 10, 1976

Re: No. 75-73 -- Bellotti v. Baird
No. 75-109 -- Planned Parenthood v. Baird

Dear Harry:

Please join me.

Sincerely,

T. M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 11, 1976

Re: Nos. 75-73 and 75-100 - Bellotti and Hunerwadel v. Baird

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 9, 1976

Nos. 75-73 and 75-109
Bellotti v. Baird

Dear Harry,

It occurs to me that your characterization of Danforth at the top of page 17 of this opinion may turn out to be inaccurate. With that caveat, I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 14, 1976

Re: Nos. 75-73 and 75-109 - Bellotti v. Baird

Dear Harry:

Please join me in your circulation of June 10 in this case.

Sincerely,

Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 16, 1976

Re: (75-73 - Bellotti v. Baird
(75-109 - Hunerwadel v. Baird

Dear Harry:

I join your opinion dated June 15 remanding for abstention.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 21, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 75-73 - Bellotti v. Baird
No. 75-109 - Hunerwadel v. Baird

Everyone has now voted in this case. Potter, however, in his note of June 9, suggested that my "characterization of Danforth at the top of page 17 of this opinion may turn out to be inaccurate." I suppose a similar comment from him might have been made with respect to the references to Planned Parenthood on pages 15 and 19.

As I now canvas the votes in Planned Parenthood, and as I understand Potter's separate opinion which Lewis now has joined, there is a court with respect to the upholding of § 3(2) of the Missouri statute (the woman's consent) and a weakly structured court for the result with respect to § 3(4) (parental consent). This being so, it seems to me that the references to Planned Parenthood on pages 15, 17 and 19 of the Bellotti opinion are not incorrect. I therefore propose no changes in these references. If I am incorrect as to this, perhaps Potter or Lewis will so advise me.

H.A.B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 21, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 75-73 - Bellotti v. Baird
No. 75-109 - Hunerwadel v. Baird

Everyone has now voted in this case. Potter, however, in his note of June 9, suggested that my "characterization of Danforth at the top of page 17 of this opinion may turn out to be inaccurate." I suppose a similar comment from him might have been made with respect to the references to Planned Parenthood on pages 15 and 19.

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ok with me

H.A.B.

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
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Join HAB 6/16/76	agree 6/9/76	Join HAB 6/9/76	Join HAB 6/14/76	Join HAB 6/16/76	typed draft 6/3/76	Join HAB 6/9/76	Join HAB 6/11/76	Join HAB 6/8/76
					1st draft 6/10/76			
					2nd draft 6/15/76			
					75-73 Bellotti & Hunerwald v. Baird			