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A woman's fundamental right to choose to have an abortion is rooted in the right of privacy. A raging controversy comprised of

1. Roe v. Wade, 410 U.S. 113 (1973). In Roe, the Court held that a woman's right to choose to have an abortion is a fundamental right. Id. at 153. Justice Blackmun, writing for the majority, noted that although the Constitution does not expressly mention the right of privacy, extensive precedent existed where the Court had sufficiently established and articulated this right. Id. at 152. He stated that this right was found "in at least the roots of privacy in the First Amendment . . . in the penumbras of The Bill of Rights . . . in the Ninth Amendment . . . or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." Id. The Court stated that its past decisions had extended the right of privacy to marriage, procreation, contraception, family relationships, childbearing, and education. Id.

The Roe Court determined that this right should be extended to "encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153. It held that when a woman cannot choose whether or not to terminate a pregnancy, the state is imposing a clear detriment. Id. It stated that because a woman in this situation must often endure severe mental anguish and the social stigma of being an unwed mother, the woman, together with her doctor, should be able to make the inherently private decision as to whether the pregnancy should be terminated. Id. Thus, the Court concluded that a pregnant woman has a fundamental right to control her body during the first trimester. Id. at 164.

Moreover, it stated that because this was a fundamental right, state attempts to regulate abortions must be subject to a strict-scrutiny standard of review. Id. at 155. Thus, during the first trimester of the pregnancy, the state must show that its regulation is narrowly drawn to further a compelling state interest. Id. at 155-56.

The Roe decision has been criticized on many fronts for establishing a right that is not expressly enumerated in the Constitution. See, e.g., Roe, 410 U.S. 113, 173 (Rehnquist, J., dissenting). Justice Rehnquist accused the Roe majority of usurping a legislative function, stating that the majority's opinion "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." Id. at 174.; Thornburgh v. Am. College of Obstetricians and Gynecologists, 106 S.Ct. 2169, 2193 (1986) (White, J., dissenting). Justice White has consistently dissented from the post-Roe decisions. In Thornburgh, Justice White stated that "[a] reader of the Constitution might be surprised . . . for the text obviously contains no references to abortion, nor indeed, to pregnancy or reproduction generally . . . it is highly doubtful that the authors of any of the provisions of the Constitution believed that they were giving protection to abortion." Id. at 2193.

The right of privacy depicted in Roe does, however, logically extend from the Court's earlier decisions. As early as 1890, Warren and Brandeis examined the right of privacy. Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). In this innovative law review article, Warren and Brandeis explored the inherent "right to enjoy life—the right to be let alone." Id. at 193. Although the authors did not find this right specifically enumerated in the Constitution, they maintained that
clashing interests and fervent moral and legal opposition arose when the United States Supreme Court articulated this constitutional right.\(^2\) Subsequent legislative action imposed numerous impedi-

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the right to personal integrity was inherent in natural law. \textit{Id.} at 195.

This difficult-to-define right of privacy appeared in Supreme Court cases during the 1920s. In \textit{Meyer v. Nebraska}, the Court struck down a state law which prohibited the teaching of foreign languages to young children. 262 U.S. 390 (1923). The Court held that “liberty” as used in the fourteenth amendment, included many important rights, including the rights of parents to control the upbringing of their children. \textit{Id.} at 394. Two years later, the Court again struck down a state statute which interfered with this personal right of liberty. \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925). In \textit{Pierce}, the Court held that a state statute requiring children to attend public schools was unconstitutional. \textit{Id.} The Court held that the state could not impede the “liberty of parents and guardians to direct the upbringing and education of children under their control.” \textit{Id.} at 517.

Forty years after \textit{Pierce}, the Court enunciated the right of privacy in \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965). In \textit{Griswold}, the Court struck down a statute which made the use of contraceptives a criminal offense. \textit{Id.} at 479. This statute also made the act of counseling married couples about contraceptives a criminal offense. \textit{Id.} The executive and medical directors of the local Planned Parenthood Association were convicted of counseling married persons in contraceptive use. \textit{Id.} Justice Douglas, writing for the majority, held that several of the Bill of Rights’ guarantees protect privacy interests and create a “penumbra,” i.e., a zone of privacy. \textit{Id.} at 514. The Court concluded by stating that “[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.” \textit{Id.} Although the Court could not find this right of privacy specifically enumerated in the Bill of Rights, it maintained that it was an inherent, natural right in a free society. \textit{Id.} Thus, it echoed Warren and Brandeis’ assertion that this right encompassed the “right to be let alone.” \textit{Id.} at 211 (Douglas, J., concurring).

The Court further extended the right of privacy in \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972). In \textit{Eisenstadt}, the Court struck down a state statute which allowed contraceptives to be distributed only by doctors and pharmacists, and only to married persons. \textit{Id.} The Court stated that “[i]f the right to privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” \textit{Id.} at 543.

2. \textit{See}, e.g., \textit{Akron}, 462 U.S. 416, 466 (O’Connor, J., dissenting). In \textit{Akron}, Justice O’Connor criticized the majority for employing a trimester approach when determining the applicable standard of review. \textit{Id.} Instead, Justice O’Connor proposed an “undue burden” test for determining whether a statute unconstitutionally infringed upon a woman’s right to choose to have an abortion. \textit{Id.} If the statute does not impose an undue burden then the appropriate standard of review is the rational relation test, i.e., minimal scrutiny. \textit{Id.} at 463-64. Thus, the statute must have some rational relationship to promoting a legitimate legislative purpose. \textit{Id.} If the statute does create an undue burden, then Justice O’Connor proposed that the Court employ a strict scrutiny standard of review. \textit{Id.} Justice O’Connor contended that “[t]he Roe framework, then is clearly on a collision course with itself.” \textit{Id.} at 458.

See also \textit{Hilgers, New Perspectives On Human Abortion} (1981) (author asserts that the Roe decision is based on an exceptionally shaky framework); \textit{Regan, Rewriting Roe v. Wade}, 77 Mich. L. Rev. 1569 (1979) In this article, Professor Regan proposes an alternative rationale for striking abortion statutes, maintaining that the Roe Court could have effectively used the “Good Samaritan” approach in analyzing \textit{Roe}. \textit{Id.} Generally, his thesis is that the law imposes no duty on one individual to aid another. \textit{Id.} He analogizes the fetus to a person in distress, and the pregnant woman as the bystander who is under no duty to rescue. \textit{Id.} at 1577. In the alternative, Regan proposes a “self defense” argument. \textit{Id.} at 1611. He states that “[w]e can view the woman who secures an abortion as merely resisting the fetus’ unjustified attack on her body. \textit{Id.; Note, The Supreme Court, 1982 Term}, 97 Harv. L. Rev. 78, n.3
ments which crippled the exercise of this fundamental right. In Zbaraz v. Hartigan, the Court of Appeals for the Seventh Circuit struck down legislation which typified this statutory genre. It held that a mandatory twenty-four hour waiting period after parental notification unconstitutionally burdened a minor's abortion choice.

The plaintiffs filed a class action challenging the constitutionality of the Illinois Parental Abortion Act ("Act"). This Act imposed a legal burden on physicians who intended to perform abortions on unemancipated minors. It required a physician to notify both of the minor's parents or her legal guardian at least twenty-four hours before performing the procedure. The only exceptions to this requirement were if both parents accompanied their daughter.


Even some abortion supporters felt uncomfortable with the Roe decision. Constitutional scholar, John Hart Ely, described this issue, stating that some of us who fought for the right to abortion did so with a divided spirit. We have always felt that the decision to abort was a human tragedy to be accepted only because an unwanted pregnancy was even more tragic . . . Abortion is too much like infanticide on the one hand, and too much like contraception on the other, to leave one comfortable with any answer; and the moral issue it poses is as fiendish as any philosopher's hypothetical.


13. Id.

14. Id. at 1539.

15. The plaintiffs, David Zbaraz, M.D., and Allan G. Charles, M.D., filed a class action on behalf of themselves and all Illinois physicians performing or desiring to perform abortions. Id. They also filed a class action on behalf of their minor patients who desired abortions. Id.

The named defendants in this action were: Neil F. Hartigan, in his official capacity as Attorney General of the State of Illinois, his agents and successors, and Richard M. Daley, in his official capacity as State's Attorney for Cook County, Illinois, and his agents and successors. Id.


9. The Parental Notice Abortion Act provides that [n]o person shall perform an abortion upon an unemancipated minor . . . unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman . . . of his intention to perform an abortion or unless he or his agent has received a written statement or oral communication by another physician hereinafter called the "referring physician," certifying that the referring physician or his agent has given such notice.

10. Id.
to the abortion facility or if they signed notarized consent statements.\textsuperscript{11}

The United States District Court for the Northern District of Illinois held that the twenty-four hour waiting period imposed an unconstitutional burden on a young woman's abortion decision.\textsuperscript{12} It stated that this provision would create scheduling delays and would often require the pregnant minor to make additional trips to the abortion facility.\textsuperscript{13} Thus, the court granted the plaintiffs' motion for summary judgment and permanently enjoined enforcement of the Act.\textsuperscript{14}

On appeal, the Court of Appeals for the Seventh Circuit addressed the issue of whether the waiting period was constitutional.\textsuperscript{15} Affirming the lower court's decision, the \textit{Zbaraz} court concluded that the waiting period was far more burdensome than a mere parental notification requirement.\textsuperscript{16} Standing alone, the parental notification requirement sufficiently advanced the state's goal of promoting parental consultation.\textsuperscript{17} Furthermore, the court concluded that the two exceptions to the twenty-four hour waiting period did not cure the constitutionally-infirm provision.\textsuperscript{18} The court, however, held that the Act's other provisions\textsuperscript{19} could be severed from the waiting period.\textsuperscript{20} Therefore, it vacated the district court's holding that the entire Act was unconstitutional.\textsuperscript{21} The court enjoined enforcement of the Act until the Illinois Supreme Court promulgated

\textsuperscript{11} Id. Actual notice to both parents could be waived under two additional circumstances. Actual notice was defined as “the giving of notice directly, in person or by telephone.” \textit{Id.} § 2(c). First, a physician could perform an abortion without parental notification if a medical emergency arose which “so complicat[ed] the pregnancy as to require an immediate abortion.” \textit{Id.} § 6. Second, if the father of the fetus was also the pregnant minor's father, only the minor's mother need be notified. \textit{Id.} § 7.

\textsuperscript{12} \textit{Zbaraz} v. Hartigan, 584 F. Supp. 1452 (N.D. Ill. 1984).

\textsuperscript{13} \textit{Id.} at 1458.

\textsuperscript{14} \textit{Id.} at 1464. The District Court held that the waiting period and other provisions of the Act could not be severed. \textit{Id.} To do so, would leave “little remaining to sever which would have any operative significance.” \textit{Id.} Therefore, it struck down the entire Act.

\textsuperscript{15} \textit{Zbaraz}, 763 F.2d at 1539.

\textsuperscript{16} \textit{Id.} at 1538.

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.} at 1539. \textit{ILL. REV. STAT.} ch. 38, § 81-65 7(a) provides that [w]hen the parties to whom notice must be given pursuant to Section 4 of this Act have already been notified and those parties accompany the minor or incompetent to the place where the abortion is to be performed, or submit notarized statements indicating that they have been notified, the requirements of Section 4 of this Act shall not apply.

\textsuperscript{19} 763 F.2d at 1545. The court severed the words “at least 24 hours” from the § 4 of the statute. \textit{Id.} See supra note 9. Thus, while the court struck the waiting period, it did not alter the notice requirement. Additionally, the court struck § 7. See supra note 18.

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.}
rules which would render these provisions constitutional.\textsuperscript{22}

The court initially discussed the recent United States Supreme Court decision in \textit{City of Akron v. Akron Center for Reproductive Health}.\textsuperscript{23} In Akron, the Court struck down an ordinance that imposed a twenty-four hour waiting period on a woman who had already rendered informed written consent to an abortion.\textsuperscript{24} While the Akron ordinance applied to both adults and minors, the Supreme Court did not specifically rule on the constitutionality of waiting periods imposed only on minors.\textsuperscript{25}

The \textit{Zbaraz} court noted that the Supreme Court has held, however, that states have a "significant" interest in regulating minors' activities because of their presumed inability to make informed decisions.\textsuperscript{26} This significant interest is not present when an adult

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\item \textsuperscript{22} It enjoined enforcement of the Act until the Illinois Supreme Court enacted expeditious and confidential rules which assured that a mature minor, or an immature minor whose best interests would not be served by parental notification, could bypass this requirement. \textit{Id.} The court remanded the case to the district court for a determination of the constitutionality of these rules after they were enacted. \textit{Id.}
\item \textsuperscript{23} 462 U.S. 416 (1983). In Akron, the Supreme Court struck down several provisions of a city ordinance which regulated abortions. \textit{Id.} It struck down a provision which imposed a twenty-four hour waiting period. \textit{Id.} The Court stated that "this arbitrary and inflexible waiting period" unduly burdened the pregnant woman from exercising her constitutional right to terminate her pregnancy. \textit{Id.} at 451.
\item Additionally, the Court stated that the "critical factor is whether [the pregnant woman] obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." \textit{Id.} at 448.
\item The Akron Court noted the severe criticism the \textit{Roe} decision had evoked. \textit{Id.} at 419. Nevertheless, the Court expressly reaffirmed the \textit{Roe} decision, stating that the "doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." \textit{Id.} at 420.
\item The Akron ordinance provided that "[n]o physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman ... ha[s] signed the consent form ... and the physician so certifies in writing that such time has elapsed." \textit{Id.} at 424 n.6.
\item The Supreme Court has, however, upheld parental notification statutes, as long as an exception exists for mature minors or immature minors whose best interests would not be served by parental notification. \textit{E.g.,} Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird (\textit{Bellotti II}), 443 U.S. 622 (1979).
\item \textit{Zbaraz}, 763 F.2d at 1536. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) (an absolute parental consent requirement unconstitutional; legislation that intrudes upon a minor's right of privacy is valid only if it advances a "significant state interest ... that is not present in the case of an adult"). See also \textit{Carey} v. Population Servs. Int'l., 431 U.S 678 (1976). In \textit{Carey}, Justice Brennan writing for the Court, stated that [t]his test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults ... Such lesser scrutiny is appropriate both because of the State's greater latitude to regulate the conduct of children, and because the right of privacy implicated here is "the interest in making certain kinds of important decisions," and the law has generally regarded minors as having a lesser capability for making important decisions. \textit{Id.} at 678 n.15.
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\textit{See infra} note 57 for a discussion of the Supreme Court's unclear and conflicting
woman chooses to have an abortion.\textsuperscript{27} Thus, the Zbaraz court cautioned that the Akron holding might not extend to minors.\textsuperscript{28} While it acknowledged that this possibility existed, the court asserted that case law in the abortion area strongly suggests that the Supreme Court's aversion to waiting periods also extends to minors.\textsuperscript{29}

Additionally, the court noted that a minor's constitutional rights equaled those of an adult's.\textsuperscript{30} The court observed that state regulations which burden an adult woman's right to have an abortion impose an identical burden on a minor's exercise of this right.\textsuperscript{31} The state, however, can impose laws on a pregnant minor that it cannot impose on a pregnant adult.\textsuperscript{32} The rationale for this disparate treatment stems from the presumption that minors, unlike adults, cannot make informed and mature decisions.\textsuperscript{33}

Thus, the Zbaraz court concluded that the state does have a significant interest in furthering parental consultation in a minor's abortion decision.\textsuperscript{34} It observed that a parental notification statute was a legitimate method of promoting this interest.\textsuperscript{35} While a notification statute could survive constitutional scrutiny, a notification statute combined with a waiting period was unconstitutional.\textsuperscript{36} In support of this conclusion, the court cited a "plethora" of cases in which waiting periods had been struck down.\textsuperscript{37} These waiting peri-
ods were consistently voided because they imposed a "substantial and direct" burden on a woman's exercise of her fundamental right to choose to have an abortion. The court listed several burdensome consequences that a mandatory waiting period creates. Finally, the court concluded that these burdens were present regardless of whether the woman was above or below the age of majority.

The court reasoned that because a waiting period directly and substantially burdens the exercise of a fundamental right, it must survive the strict-scrutiny standard of review. Although the court noted that the state had a significant interest in promoting parental consultation, the burden which the waiting period imposed clearly outweighed this interest. The parental notification requirement, standing alone, sufficiently promoted this state interest without creating an unconstitutional burden. Thus, the waiting period must fail because it was not narrowly tailored to further the state's as-

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38. Zbaraz, 763 F.2d at 1536-7 (quoting Women's Medical Center of Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1146: Although a mere twenty-four hour delay by itself may not increase the risk of an abortion to a statistically significant degree . . . the mandatory wait may combine with other scheduling factors such as doctor availability, work commitments, or sick leave availability, to increase the actual waiting period to a week or more . . . [I]t is uncontested that delays of a week or more do indeed increase the risk of abortion to a statistically significant degree . . . Furthermore, a delay of even twenty-four hours may push a woman into the second trimester, thus requiring that the operation be performed in a hospital, and significantly increasing the procedure's cost, inconvenience, and, of course, risk.

39. See supra notes 37 and 38 and accompanying text for a discussion of these burdens.

40. Zbaraz, 763 F.2d at 1537.

41. Id. The court stated that because the waiting period imposed a burden on a women's right to choose to terminate her pregnancy, the regulation must be "narrowly drawn to further a compelling [state] interest." Id. (citing Charles v. Carey, 627 F.2d at 785). In effect, the court stated that because the state was burdening a fundamental right, the strict-scrutiny standard of review must be employed, even within the context of a minor's abortion decision. This is significant because the court had previously noted that the state has more control over a minor than over an adult. See supra note 26 and infra note 57 and accompanying text for a discussion of standard of review.

42. Id. at 1537.

43. Id. at 1538. The court cited Pearson, 716 F.2d at 1132, where it had stated that "notification itself in most cases should lead to parental consultation without the state's additional help because minors are particularly susceptible to parental wishes."
serted interest. 44

The Zbaraz court next addressed the state’s alternative argument that the waiting period was constitutional because it provided two exceptions. 45 The court reasoned that these exceptions, instead of alleviating the burden, only served to increase it three-fold. 46 The court explained that if both parents were forced to accompany their daughter to the abortion facility, or in the alternative, to sign notarized consent statements, three people would be forced to coordinate their schedules. 47 Moreover, the court reasoned that these exceptions would not save the waiting period provision because the Act failed to distinguish between minors whose parents object to the abortion from those whose parents have already rendered their consent. 48 The court stated that this failure contradicted its clear and unequivocal holding in Planned Parenthood of Indiana v. Pearson, 49 where it had struck down a similar waiting period. In Pearson, the court had held that an abortion could not be delayed once a minor’s parents were notified. 50 Thus, the Zbaraz court rejected the state’s arguments that the exceptions were viable alternatives. 51 The court characterized these alternatives as mere pretenses, masquerading as exceptions, which did not repair the constitutionally-defective waiting period. 52

The Zbaraz court’s rejection of the state-imposed waiting period was correct for three reasons. First, the court’s extension of the Akron holding to encompass a minor’s abortion decision is logically sound. Second, the court properly applied a strict-scrutiny standard of review to evaluate the waiting period. Finally, the court properly rejected the state’s argument that the two exceptions to the waiting period mitigated its harsh effect.

The Zbaraz opinion is best understood from an evolutionary perspective. In Roe v. Wade, 53 the Supreme Court extended the right of privacy to encompass a woman’s abortion decision. 54 Although the Court mentioned that problems could arise in a minor’s situation, it expressly reserved inquiry for a future time. 55 The

44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
49. 716 F.2d 1127, 1143.
50. Id.
51. Zbaraz, 763 F.2d at 1539.
52. Id.
53. 410 U.S. 113. See supra note 1 and accompanying text for a discussion of Roe.
54. Id.
55. Id. at 165 n.67. The Roe Court noted the existence of statutes which required written spousal and parental consent when a pregnant female under the age of
Court's subsequent decisions, however, have narrowed and qualified this fundamental right. This progressively-constricted view is especially apparent within the context of a minor's abortion decision. The Supreme Court decisions which have examined a minor's right to reproductive autonomy are unclear and inconsistent. As a result, eighteen sought to have an abortion. Id. It expressly stated that "[w]e need not now decide whether provisions of this kind are constitutional." Id. E.g., Harris v. McRae, 448 U.S. 297 (1980). In Harris, the Court in a 5-4 decision, upheld the Hyde Amendment, which prohibited Medicaid funding for medically-necessary abortions. Id. The sharply-divided Court stated that this legislation placed no obstacle in the pregnant woman's path, and stated that it was rationally-related to the state's legitimate goal of promoting childbirth. Id. at 324.

56. The Supreme Court has been less than uniform in its rationale in this area. Instead of clearly defining the scope of a woman's fundamental right to have an abortion, post-Roe decisions have only served to complicate the issue. As a result, the lower courts are left to pick and choose from sometimes contradictory and unclear language and precedent.

Three years after Roe, the Court examined a minor's right to have an abortion free from state intrusion in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). In Danforth, the Court concluded that although minors possess constitutional rights, their interests must be balanced against competing state and parental interests. Id. at 75. Thus, it held that where state regulations interfere with a minor's privacy rights, an intermediate standard of review should be employed. Id. at 74. It stated that while the state had asserted a significant interest, the chosen means did not achieve those ends. Id. at 75. The Danforth Court employed a strict-scrutiny analysis on the means. It concluded that parental interests do not outweigh the privacy interests of their pregnant minor daughter. Id. Thus, while the Court stated that it was using a lesser standard of scrutiny, it actually employed the strict-scrutiny standard of review.

The next year, the Court again confronted the issue of a minor's reproductive autonomy in Carey v. Population Services Int., 431 U.S. 678 (1977). In the plurality opinion, Justice Brennan reaffirmed Danforth's holding that a state infringement on a minor's privacy right is subject to a less stringent standard of scrutiny than where an adult's privacy rights are intruded upon. Id. He stated that the right of privacy involved here, concerned the "interest in independence in many kinds of decisions." Id. at 678 n.15 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)). Justice Brennan continued, stating that the law traditionally has viewed children as less capable than adults of making informed decisions. Id. at 692. Although Justice Brennan stated that this intermediate standard of review should be used when evaluating a minor's privacy rights, he strictly scrutinized the statute at issue. Id. at 695-96. Implicit in his analysis was that the inherent principles enunciated in previous privacy decisions extended to minors. Thus, as in Danforth, the Carey Court stated that it was employing a different level of scrutiny than it actually used.

In the Court's next case concerning a minor's abortion decision, a sharply-divided court retreated from the Danforth and Carey rationale. Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979). In Bellotti II, the plurality refused to extend the Roe doctrine to women under the age of eighteen, emphasizing that a child's interests must be balanced against those of her parents. Id. at 637. It noted, however, the unique decision a pregnant woman under the age of majority faces when compared with other decisions that can be postponed until adulthood, and the serious consequences of the abortion decision. Id. at 642. Additionally, the court elaborated upon the standard of review to be employed when examining legislation which intrudes upon a minor's abortion decision. Id. at 647. The Bellotti II Court stated that the legislated means must not "unduly burden" the minor's right to have an abortion. Id. The Court struck down an absolute parental notification requirement because it would impose an undue burden on minors whose parents vehemently opposed abortion. Id. It reasoned that minors who live with their parents are subject to their par-
a uniform rationale has failed to emerge in this area. The Court's own discord, combined with the fact that the right of privacy is a newly-recognized right, has further confused this complex subject. Thus, the Zbaraz court had a rather fragile constitutional framework upon which to base its decision.

Nevertheless, the Zbaraz opinion is a logical extension of the rationale set forth in Akron. In Akron, the Supreme Court struck down a mandatory waiting period because it did not further the state's asserted interest in protecting maternal health. Further, the thefts' wishes and control. Id. In effect, the Court equated notice with consent. The Bellotti II Court held that a parental notification statute served the state's purpose as long as it provided an exception for mature minors or immature minors whose best interests would not be served by parental involvement. Id. The Court strictly scrutinized the legislative means employed and adopted a least restrictive alternative standard.

Two years later, in H.L. v. Matheson, 450 U.S. 398 (1981), the Court rejected a challenge to a parental notification statute. Id. The once again divided Court rejected the plaintiff's claim, holding that she did not have standing to bring the suit. Id. The Matheson Court's analysis signals a dramatic retreat from the "undue burden" test articulated in Bellotti II. Chief Justice Burger, writing for the Court, employed a rational-relation test when evaluating the parental notification statute. Id. at 413. Maintaining that the state had a legitimate interest in protecting potential life, he stated that a notification requirement furthered this interest. Id. at 411. Moreover, he stated that if parental notification burdened the minor's abortion decision, it was unfortunate, because the "Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions." Id. at 413.

In the Supreme Court's most recent abortion case, Thornburgh v. Am. College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986), the Court was once again sharply-divided. In the 5-4 decision, the plurality upheld the Roe decision. Id.

Chief Justice Burger dissented from the Court's opinion, stating:

The Court's opinion today is but the most recent indication of the distance traveled since Roe. Perhaps the most important road marker was the Court's holding in Planned Parenthood of Missouri v. Danforth . . . Parents, not judges and social workers, have the inherent right and responsibility to advise their children in matters of this sensitivity and consequence. Can one imagine a surgeon performing an amputation or even an appendectomy on a 14-year-old girl without the consent of a parent or guardian except in an emergency situation? . . . If Danforth and today's holding really mean what they seem to say, I agree we should reexamine Roe.

Id. at 2191-2. (Burger, C.J., dissenting).

The only consistent feature of this line of cases is that they are inconsistent. They indicate that the Supreme Court has failed to articulate a level of scrutiny and comprehensive rationale for the lower courts to follow when examining the issue of a minor's reproductive rights.

Unfortunately, Thornburgh does little to clarify the confusing abortion issue. Although the Court reaffirmed Roe, the Thornburgh plurality was unable to articulate a comprehensive rationale. Additionally, Justice O'Connor's dissent may even further complicate this area of law. She states that "the Court appears to adopt as its new test a per se rule under which any regulation touching on abortion must be invalidated if it poses 'an unacceptable danger of deterring the exercise of that right.'" Thornburgh, 106 S.Ct at 2214 (O'Connor, J., dissenting).
Zbaraz decision is also consistent with a multitude of cases which uniformly rejected waiting periods because of the burdens they impose on pregnant women seeking to exercise their fundamental right to choose to have an abortion. Moreover, the court's rejection of the waiting period as an unconstitutional burden, echoes the Supreme Court's mandate in Bellotti v. Baird. In Bellotti, the Court expressly stated that the legislative means could not “unduly burden” a minor's abortion decision. The Court struck down a rigid parental notification requirement because it would unduly burden a pregnant minor whose parents vigorously opposed abortion. Unfortunately, the Bellotti Court did not fully define the scope of an undue burden.

In effect, the Zbaraz court synthesized these decisions and developed a very simple premise: a burden is a burden, whether it is imposed on a sixteen-year old girl or on a thirty-five year old wo-

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we convinced that the State's legitimate concern that a woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course. The decision whether to proceed with an abortion is one as to which it is important to "affor[d] the physician adequate discretion in the exercise of his medical judgment."

Id. (quoting Colautti v. Franklin, 439 U.S. 379, 387 (1979)).

60. See supra note 37 for a discussion of instances where waiting periods were struck down. Additionally, in Pearson, 716 F.2d 1127, the Seventh Circuit had recently struck down a waiting period following parental notification. The Illinois General Assembly passed the Act a little over two months after the court declared such a waiting period unconstitutional. The court decided Pearson on August 26, 1983. The General Assembly passed the Act on November 2, 1983. Thus, the legislature probably had knowledge of the Act's unconstitutionality when it passed it.

61. 443 U.S. 622 (1979). See also supra note 57 and accompanying text for a discussion of Bellotti II.

62. Bellotti II, 443 U.S. at 640. See supra note 57 for a discussion of Bellotti II.

63. Bellotti II, 443 U.S. at 647.

64. The Bellotti II Court appeared to utilize its own empirical assumptions about what constituted an undue burden. While it correctly struck down the Massachusetts statute because it required parental involvement in all situations, regardless of the minor's maturity or best interests, the Court did not delineate the contours of an undue burden. Id. at 651.

See Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006 (1st Cir. 1981). In this case, the court attempted to elucidate the contours of an undue burden within the context of the abortion decision. Id. at 1014. The court enumerated the criteria which would burden this decision stating “[w]e need not consider whether an extremely brief bar alone might be a de minimis burden, for the mandatory waiting period here imposes substantial ancillary burdens on a woman's right to have an abortion.” Id. The court stated that a waiting period imposed an undue burden because it could prolong the effectuation of the exercise of a fundamental right and “[t]his effect would exacerbate each of the obstacles above—both the absolute bar and the ancillary burdens—and render them even greater impediments.” Id. Thus, the court concluded that the waiting period was a state-created burden that impaired a fundamental right. Id.

Although the court elaborated much more thoroughly about what constitutes an undue burden than the Bellotti II Court did, it is important to note the subjective nature of this test. See id. at 1015.
The law automatically presumes that a woman is capable of making important decisions upon her attaining the magical age of majority. Because she has not reached this age, however, does not mean that she suffers less than an adult woman when confronted with identical obstacles. Several courts have expressly stated that a pregnant minor would find these burdens more problematic than an adult woman would. Thus, the Zbaraz court's conclusion that a waiting period creates a direct and substantial burden on a pregnant woman, irrespective of her age, is logically valid.

Because the court concluded that a waiting period would paralyze a minor's exercise of her right to choose to have an abortion, it properly applied a strict-scrutiny means analysis combined with a balancing test to analyze the statutory provision. Initially, the court noted that the Supreme Court subjected a minor's privacy rights to a lesser degree of scrutiny and that the state had a significant interest in promoting parental consultation. The court then accurately concluded that a minor's right to choose to have an abortion outweighs this state interest.

The court's analysis, however, failed to weigh the parents' interests. This omission is especially glaring because past legal analyses have painstakingly evaluated parental rights. Historically, the courts have accorded parents substantial autonomy in the rearing of their children. The Zbaraz court's silence on this issue does not alter the decision's final result. Thus, this failure to discuss the par-

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65. Zbaraz, 763 F.2d at 1537. The court articulated this premise in one short sentence, stating that "[t]his burden is the same for minors as for adults." Id.
66. The Bellotti II Court noted this factor. 443 U.S. at 642. The Court discussed the pregnant minor's unique situation. Id. An abortion decision, unlike most decisions, cannot be postponed until the age of majority. See supra note 57 for a discussion of Bellotti II. See also Buchanan, The Constitution and the Anomaly of the Pregnant Teenager, 24 Ariz. L. Rev. 553, 555 (1982)(discussing the unique status of a pregnant woman under the age of majority).
67. See, e.g., Bellotti II, 443 U.S. at 642. In Bellotti II, the Court stated that the detriments faced by a teenage pregnant female are not "mitigated by her minority." Id. at 642. The Court continued, noting "[i]ndeed considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." Id.
68. Zbaraz, 763 F.2d at 1537.
69. Id.
70. Id.
71. See, e.g., Parham v. J.R., 442 U.S. 584 (1979) (parent's right to commit a minor child to a mental institution upheld); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents' challenge to compulsory school attendance law upheld); Ginsberg v. New York, 390 U.S. 629 (1968)(parents are ultimately responsible for custody and care of their children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (statute requiring parents to send children to public schools held unconstitutional); Meyer v. Nebraska, 262 U.S. 390 (1923) (law prohibiting teaching of foreign languages to children struck down). See also Keiter, Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach, 66 Minn. L. Rev. 459 (1982).
72. See supra note 71 for a list of cases that upheld parental rights.
The court's analysis on the legislative means, however, is logically sound. The court equated parental notification with parental involvement. Parental involvement, as distinguished from parental consent, is the state's legitimate and ultimate interest. It concluded that parental notification alone, without the waiting period, effectively accomplishes the purpose of protecting this concern. This assertion logically flows from past Supreme Court language which states that parents wield considerable power and influence over children living in their home. This recurring assumption appears valid. Once a pregnant teenager's parents learn of her condition, they will almost certainly interact with their daughter.

The state, however, cannot and should not control the quality of this consultation. In Zbaraz, the state contended that the twenty-four hour waiting period would provide meaningful notice. The court did not address this argument. The state's argument appears facially plausible because theoretically, under a mere notification requirement, the doctor could notify the parents and then immediately perform the abortion. If such a situation occurred, it would defeat the state's goal of promoting parental consultation.
before the abortion decision. The court should have addressed this issue because it was the state's most persuasive argument. The Supreme Court, however, has offered very little guidance on this point. Rather, it has generated more confusion than clarity. This absence of clear direction probably explains why the Zbaraz court remained silent on this matter.

Finally, the court properly rejected the state's alternative argument that the two exceptions to the waiting period mitigated its harsh effect. It accurately concluded that if both parents were forced to accompany their daughter to the abortion facility, or to sign notarized consent statements, the burden would increase threefold. The court keenly perceived that scheduling the activities of three people, the pregnant daughter and her two parents, would encumber the minor's right even more than the unconstitutional waiting period would.

83. See infra note 84 for a discussion of the Supreme Court's inconsistency in the abortion area.
84. See H.L. v. Matheson, 450 U.S. 398 (1981). In Matheson, Chief Justice Burger writing for the plurality, stated that the fact that a waiting period did not accompany the parental notification statute as a means of facilitating consultation, did not void the statute because "time is likely to be of the essence in an abortion decision." Id. at 412. Based on the rest of the Chief Justice's opinion, however, it is evident that Burger used this time-factor rationale as a means of upholding the parental notification requirement. Conversely, based on his apparent apathy over burdening the minor's abortion right, he might have just as easily upheld a waiting period on the grounds that it served to provide meaningful notice. See supra note 57 for a discussion of Matheson.

The Court's decision in Matheson evoked a powerful dissent from Justice Marshall. Matheson, 450 U.S. at 425-54. Initially stating that the Court should employ a strict-scrutiny standard of review, Justice Marshall analyzed the parental notification statute under this test and concluded that it was unconstitutional. Id. at 436. What is particularly relevant in the context of Zbaraz, however, is that during his means analysis, Justice Marshall criticized the statute because it "imposed no requirement that the notice be sufficiently timely to permit any discussion between the pregnant minor and the parents." Id. at 446.

It would probably be fairly accurate to hypothesize that Justice Marshall would reject a waiting period in any abortion context because he would perceive it as burdening a fundamental right. Yet, both Justice Marshall and Chief Justice Burger each opened up a Pandora's box when each justified his conclusion by in Burger's instance, declaring that a waiting period was unnecessary because of the time factor, and in Marshall's instance, by stating that the means were not narrowly tailored because of the absence of a waiting period.

In short, Matheson, while not actually changing the law, only served to further confuse an already murky area of law. Instead, it typified Justice Rehnquist's language in Bellotti II, where he stated that "literally thousands of judges [will be] left with nothing more than the guidance offered by a truly fragmented holding of this Court." Bellotti v. Baird, 443 U.S. 622, 652 (Rehnquist, J., dissenting).

85. Zbaraz, 783 F.2d at 1538, 1539.
86. The court stated that "[t]he problems of scheduling, travel, and expense inherent in a waiting period will increase threefold if a minor's parents are required to accompany her to the abortion clinic or to make arrangements before a notary." Id.
87. Id.
The Zbaraz court, however, should have separately analyzed the notarized parental consent alternative. The plaintiffs asserted that this second alternative violated the minor's right of privacy because it publicly disclosed her abortion decision. The court should have discussed this aspect because, at first glance, the notarized consent alternative appears less burdensome than forcing the parents to accompany their daughter to the abortion facility. Nevertheless, despite this failure to critically detail this issue, the court properly concluded that both superficial alternatives merely burdened a pregnant minor's effectuation of her abortion decision and did not repair the constitutionally-infirm waiting period.

In conclusion, the Zbaraz court logically extended Akron's prohibition on waiting periods to a minor's abortion decision. Additionally, the court accurately employed a strict level of scrutiny on the state's means of achieving its interest in promoting parental consultation. Finally, the court perceptively concluded that the two exceptions to the unconstitutional waiting period were simply substitute obstructions. The court's threshold statement that the Supreme Court might uphold a waiting period when imposed on minors indicates that the lower courts have received conflicting and vague guidance from the Court. The Zbaraz court successfully brought order to this quagmire. Unfortunately, future courts will continue to

88. The plaintiffs argued that "the exceptions themselves raise serious constitutional questions." Brief for Appellees at 15, Zbaraz v. Hartigan, 763 F.2d 1532. Here, the plaintiffs echoed the District Court's assertion that the requirement of a notarized statement would infringe upon the minor's right of privacy. Id.

The District Court stated that this requirement would destroy the minor's right to anonymity. Zbaraz, 584 F. Supp. at 1461-1462. It noted that such a submission to a notary could in many small towns, be tantamount to publication of the information in the local newspaper. Id.

The defendants argued that this requirement would not infringe upon a minor's privacy rights because it did not require the notary to examine the contents of the statement. Brief for Appellant at 12, n.1, Zbaraz, 763 F.2d 1532. In response to this argument, the plaintiffs contended that "[t]his argument exalts legal technicality over reality... it is unlikely that many non-attorneys would presume that they could hide the contents of a document from a notary." Brief for Appellees at 16, n. 7, Zbaraz, 763 F.2d 1532.

89. The Zbaraz court stated:

Although the ordinance struck down in Akron applied to both adults and minors, the Supreme Court has not specifically addressed the applications of waiting periods only to minors or weighed the state's interest in promoting parental consultation with a minor who seeks to obtain an abortion against the burdens imposed on minors by a waiting period. The Akron Court also stated that, in view of the unique status of children under the law, states have a "significant" interest in certain abortion regulations aimed at protecting children which is not present when the state seeks to regulate adults. The holding in Akron, therefore, may not apply to minors.

Zbaraz, 763 F.2d at 1535.
grapple with this complex issue until the Supreme Court articulates an intelligible and cohesive framework.\footnote{90}

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90. The state has appealed Zbaraz to the United States Supreme Court. Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir.1985), appeal filed, 54 U.S.L.W. 3311 (U.S. Oct. 16, 1985) (No. 85-673). The Court should grant review and enumerate clear guidelines so that the lower courts can successfully deal with this complex issue. The recent Thornburgh plurality decision, however, clearly signals that it is unlikely that the Court will clarify the frustratingly inconsistent abortion issue in the near future. Thornburgh v. Am. College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986).

Addendum:

After this case note was written, the United States Supreme Court decided to review Zbaraz on the merits. Zbaraz, juris. postponed, 55 U.S.L.W. 3257 (U.S. Oct. 14, 1986). The Court will only address the issue of the constitutionality of the waiting period. The Court’s composition has changed since the Thornburgh decision. William Rehnquist is now Chief Justice, and conservative Justice Scalia is a new addition to the Court. While these changes will not drastically alter recent ideology or change the ultimate outcome of the decision, new language will probably appear. It will be interesting to note whether the Court clarifies the confused abortion issue, or whether the Court simply employs intellectual gymnastics and further clouds this issue.