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COMMENT

PARENTAL NOTIFICATION OF ABORTION AND MINORS' RIGHTS UNDER THE MONTANA CONSTITUTION

Matthew B. Hayhurst

Montanans generally mind their own business and do not wish to restrict other people in their freedoms unless the exercise of those freedoms interferes with other members of society. This is a rule that most of us learn in kindergarten and does not need to be supported by reference to fancy law review articles, exalted philosophers, or the hard to understand writing of some federal or state court.¹

I. INTRODUCTION

A woman's right to terminate her pregnancy is found within the "zones of privacy" protected by the United States Constitution.² This protection is not absolute, however, and depends significantly upon whether the woman seeking the abortion is an adult. Following the lead of numerous other states,³ the 1995 Montana Legislature passed legislation requiring minor women to notify their parents before obtaining an abortion.⁴ Shortly


Montana's parental notification law requires "actual notice to one parent or to
after its enactment, Montana's notification statute was challenged on federal constitutional grounds.\(^5\) In *Lambert v. Wicklund*,\(^6\) the United States Supreme Court upheld the constitutionality of the statute.\(^7\)

Laws passed by the state legislature must satisfy the minimal requirements of both federal and state constitutions.\(^8\) While the *Wicklund* decision addresses the validity of Montana's notification statute under the federal constitution, the statute remains untested at the state constitutional level. The Montana Constitution guarantees minors all fundamental rights unless specifically precluded by laws that are clearly shown to enhance minors' protection.\(^9\) Included among minors' fundamental rights is an expansive, textually-explicit guarantee of privacy.\(^10\) This Comment argues that Montana's parental notification law, which safeguards parental interests at the expense of minors' protection, unconstitutionally infringes upon the privacy rights of pregnant minors. By failing to satisfy the minimal requirements of the Montana Constitution, the legislation remains susceptible to constitutional attack at the state level. Part II of this Comment examines Montana's parental notification statute and the United State Supreme Court's reasons for upholding the legislation. Part III examines the historical development of minors' rights and the protection afforded to minors under both the United States and Montana Constitutions. After tracing this evolution, this part focuses on the unique treatment of minors' rights under the Montana Constitution and sets forth a framework for

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7. *See* id. at 1172.
8. *See* infra notes 44-46 and accompanying text.
9. *See* MONT. CONST. art. II, § 15; discussion infra Part III.B.
10. *See* MONT. CONST. art II, § 10; discussion infra Part IV.A.

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analyzing laws affecting these rights. By examining the practical and legal effects of parental notification, Part IV concludes that parental notification unconstitutionally infringes upon the privacy rights of minors.

II. *Lambert v. Wicklund* and Montana's Notification Statute

In 1974, the Montana Legislature enacted the Abortion Control Act, its initial attempt to specifically regulate minors' access to abortions. Under the threat of criminal penalties, this legislation compelled physicians to notify the parents of unmarried, minor women before performing an abortion. The Abortion Control Act initially formed the basis of the controversy in *Wicklund* and provided an opportunity for the Supreme Court to examine the constitutional parameters of parental notification and minors' rights.

A. Factual and Procedural History

In 1993, Dr. Susan Wicklund, after being threatened with enforcement of the Abortion Control Act, filed a civil rights action on behalf of herself, other health care providers throughout Montana and neighboring areas, and their patients. Dr. Wicklund challenged the constitutionality of the Abortion Control Act under the federal constitution, alleging that the statute's failure to provide an adequate procedure by which qualified minors could judicially bypass the notification requirement rendered it unconstitutional. The state stipulated to the statute's unconstitutionality, and the district court permanently enjoined its enforcement. This resolution, however, was short-lived.

In 1995, the Montana Legislature repealed the Abortion Control Act and passed the Parental Notice of Abortion Act. (the
Revised Act). Similar to its predecessor, the Revised Act prohibits a health care provider from performing an abortion upon an unmarried, minor woman unless the physician notifies her parents. In an attempt to avoid the problems faced by the Abortion Control Act, however, the Revised Act provides for a judicial bypass procedure by which minors may circumvent the notification requirement. Specifically, a pregnant minor who petitions the youth court may bypass the notification requirement in two instances: first, where the minor proves to the court that she is sufficiently mature to decide whether to have an abortion; or second, where the notification of a parent or guardian is not in the best interests of the petitioner.

16. See id. at 569. The 1995 Montana Legislature passed the Revised Act "in direct response" to the Federal District Court's order. Id. at 569. Now codified at MONT. CODE ANN. § 50-20-201 to -215 (1995), the Revised Act provides, in pertinent part: "A physician may not perform an abortion upon a minor or an incompetent person unless the physician has given at least 48 hours' actual notice to one parent or to the legal guardian of the pregnant minor or incompetent person of the physician's intention to perform the abortion." MONT. CODE ANN. § 50-20-204 (1995). In addition, MONT. CODE ANN. § 50-20-208 (1995) states: "Notice is not required under 50-20-204 or 50-20-205 if: (1) the attending physician certifies in the patient's medical record that a medical emergency exists and there is insufficient time to provide notice; (2) notice is waived, in writing, by the person entitled to notice; or (3) notice is waived under 50-20-212." Furthermore, MONT. CODE ANN. § 50-20-212 (1995) provides:

(2) (a) The minor or incompetent person may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf.

(3) Proceedings under this section are confidential and must ensure the anonymity of the petitioner. All proceedings under this section must be sealed. The petitioner may file the petition using a pseudonym or using the petitioner's initials. All documents related to the petition are confidential and are not available to the public. The proceedings on the petition must be given preference over other pending matters to the extent necessary to ensure that the court reaches a prompt decision. The court shall issue written findings of fact and conclusions of law and rule within 48 hours of the time that the petition is filed unless the time is extended at the request of the petitioner. If the court fails to rule within 48 hours and the time is not extended, the petition is granted and the notice requirement is waived.

(4) If the court finds by clear and convincing evidence that the petitioner is sufficiently mature to decide whether to have an abortion, the court shall issue an order authorizing the minor to consent to the performance of an abortion without the notification of a parent or guardian.

(5) The court shall issue an order authorizing the petitioner to consent to an abortion without notification of a parent or guardian if the court finds by clear and convincing evidence that: (b) the notification of a parent or guardian is not in the best interests of the petitioner.


guardian is not in the best interests of the petitioner.\(^{19}\)

Shortly after the 1995 session, Dr. Wicklund renewed her attack on the legislature's attempt to regulate minors' access to abortion services. Wicklund filed a supplemental complaint, challenging the validity of the Revised Act on various constitutional grounds.\(^{20}\) Wicklund contended that the newly-drafted judicial bypass provision did not comport with the constitutional requirements set forth in \textit{Bellotti v. Baird},\(^{21}\) the United States Supreme Court's seminal opinion regarding parental consent statutes.\(^{22}\) Under \textit{Bellotti}, a minor who demonstrates that the \textit{desired abortion} would be in her best interests must be given a judicial bypass.\(^{23}\) Wicklund alleged that Montana's bypass pro-


20. See Pl.'s Supp. Compl. at 2-3, 13-14, Lambert v. Wicklund, 117 S. Ct. 1169 (1997) (No. 93-92-BU-JFB). The supplemental complaint challenged the Revised Act on four grounds. See Memorandum and Order at 3, Lambert v. Wicklund, 117 S. Ct. 1169 (1997) (No. 93-92-BU-JFB) [hereinafter Order]. The first cause of action alleged that the Revised Act's judicial bypass procedure, which requires the service of a summons on a minor's parents, breached confidentiality by providing an effective notification of the minor's parents. See id. at 3-4. The second argument, which proved successful in both the federal district court and the Ninth Circuit Court of Appeals, alleged that the Revised Act's bypass provision allowing for a waiver if notification would not be in the minor's best interests, improperly narrowed the best interests requirement set forth by the United States Supreme Court. See id. at 4; see also infra notes 21-23 and accompanying text. The third argument centered on due process, asserting that the Revised Act's appellate procedure violated the Fourteenth Amendment to the United States Constitution. See Order at 4. The last cause of action alleged that the Revised Act's failure to require notice to the parent of the unmarried father of the child violated the equal protection clause of the Fourteenth Amendment. See id.

21. 443 U.S. 622 (1979) (plurality opinion). The \textit{Bellotti} court ruled that while state statutes may require parental consent before a minor may obtain an abortion, the state must provide a "judicial bypass" procedure that allows "qualified" minors to circumvent the requirement. Id. at 640-43. Specifically, parental consent laws must enable the minor to bypass the consent requirement if she shows either:

1. that she is mature enough and well informed enough to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or
2. that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Id. at 643-44.

22. There is a distinction between parental consent and notification statutes. Parental consent statutes, as the name suggests, require explicit parental permission before the physician may perform the desired abortion. Parental notification statutes, such as the Revised Act, require that parents receive "actual notice" of the desired abortion. See MONT. CODE ANN. § 50-20-204 (1995). I believe that the practical effects of the different statutes are, however, similar. See infra Part IV.B.

23. See Bellotti, 443 U.S. at 643-44.
vision, which allows a minor to circumvent the notice requirement when parental notification would not be in the minor’s best interests, abridged a minor’s right to a bypass when the desired abortion would be in her best interests. By focusing on the effects of parental notification and not the propriety of the desired abortion, Wicklund contended that Montana’s bypass provision impermissibly narrowed the focus of the best interests inquiry.

Persuaded by Wicklund’s argument, the federal district court found that the Revised Act created an undue burden on a minor’s right to privacy. Relying primarily on the minimum requirements for a judicial bypass set forth in *Bellotti*, the district court stated:

The Montana judicial bypass statute does not conform with the *Bellotti* standards, impermissibly narrows the scope of the “best interests” inquiry, and places an undue burden upon the right of a minor who is able to show that the abortion is in her best interests, to obtain an abortion without parental involvement. It is therefore unconstitutional.

Because the Revised Act’s judicial bypass placed an undue burden on the minor seeking the abortion, the district court struck down the Revised Act as unconstitutional and permanently enjoined its enforcement. The state appealed.

The Ninth Circuit Court of Appeals affirmed the district court’s holding, noting that “[t]he Supreme Court has left open the question of whether or not a judicial bypass to a parental notification provision (such as the one at issue here) is constitutionally required.” To answer this question, the Ninth Circuit found guidance in its own jurisprudence. Relying on *Glick v. McKay*, the court scrutinized the Revised Act’s judicial bypass procedure. In *Glick*, the Ninth Circuit considered the constitutionality of Nevada’s parental notification statute. Like Montana’s Revised Act, Nevada’s statute allowed a pregnant minor to circumvent the notice requirement if she could show that parental notification would not be in her best interests.
Focusing on the difference between Nevada's statute and the Bellotti requirement that a minor may bypass notification if she can show that the desired abortion would be in her best interests, the Glick court stated:

Rather than requiring the reviewing court to consider the minor's "best interests" generally, the Nevada statute requires the consideration of "best interests" only with respect to the possible consequences of parental notification. The best interests of a minor female in obtaining an abortion may encompass far more than her interests in not notifying a parent of the abortion decision. Furthermore, in Bellotti, the court expressly stated, "if, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement."

Thus, the Glick court concluded that the Nevada statute was unconstitutional because it "impermissibly constricted the meaning of 'best interests'..." Finding Montana's bypass procedure "for all practical purposes, identical to the Nevada provision," the Ninth Circuit struck down the Revised Act.

B. The Holding

Relying on Ohio v. Akron Center for Reproductive Health (Akron II), the United States Supreme Court reversed. In Akron II, the Court found that Ohio's parental notification statute, which contained a judicial bypass procedure allowing a court to waive the notification requirement if parental notification was not in the minor's best interests, satisfied the Bellotti requirements and did not unconstitutionally burden a minor's right to an abortion. Dismissing Wicklund's attempts to distinguish Akron II, the Court stated:

Based entirely on Glick, the Ninth Circuit in this case affirmed the District Court's ruling that the Montana statute is unconstitutional. This decision simply cannot be squared with our decision in Akron II. The Ohio parental notification statute at issue there was indistinguishable in any relevant way from

Id. 32. Id. at 439 (quoting Bellotti v. Baird, 443 U.S. 622, 648 (1979)).
      33. Id. at 442.
      34. Wicklund v. Salvagni, 93 F.3d 567, 572 (9th Cir. 1996).
      37. See id.
the Montana statute at issue here. Both allow for judicial bypass if the minor shows that parental notification is not in her best interests. We asked in Akron II whether this met the Bellotti requirement that the minor be allowed to show that ‘the desired abortion would be in her best interests.’ We expressly held that it did. Thus, the Montana statute meets this requirement too. In concluding otherwise, the Ninth Circuit was mistaken.\(^3\)

Therefore, the Court reversed the Ninth Circuit and upheld the constitutionality of the Revised Act.\(^3\)

III. CONSTITUTIONAL PARAMETERS OF A MINOR’S RIGHT TO AN ABORTION

When a woman becomes pregnant, she faces a myriad of questions that directly affect her ethical, moral, political, and philosophical beliefs.\(^4\) For a pregnant minor, however, the issues that accompany pregnancy are compounded. In addition to the problems confronting adult women, pregnant minors may face special, often age-specific problems of financial insecurity, uncertain familial reaction, societal stigma, and immaturity.

The topic of pregnancy often leads to a discussion of a woman’s right to an abortion and the complex and conflicting interests implicated in such a decision. While persons may disagree about the propriety of abortion, an adult woman’s right to an abortion is constitutionally protected\(^4\) and has been since

38. Id. at 1171-72 (citations omitted).
39. See id. at 1172.
40. The Supreme Court addressed these concerns in Planned Parenthood v. Casey, where it stated:

Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted.

41. See id. at 853. Writing for the majority in the Supreme Court’s most recent discussion of the abortion issue, Justices O’Connor, Kennedy, and Souter reaffirmed a woman’s right to an abortion as originally set forth in Roe v. Wade, while specifically acknowledging the differences of opinion regarding the issue:

As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of
the Supreme Court’s landmark decision in Roe v. Wade.42 While an adult woman’s right to abortion is fundamental, a more controversial question is whether a minor’s right to an abortion should be accorded equal constitutional protection. Our nation’s highest court has answered in the negative, allowing states to restrict minors’ access to abortion within certain limitations: “We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”43

While the Revised Act satisfies the requirements of the United States Constitution, laws passed by the state legislature must satisfy the requirements of both federal and state constitutions.44

In Montana we have repeatedly recognized that the state constitution provides protection of rights separate from the protection afforded by the federal constitution. Because the federal constitution establishes the floor and not the apex of constitutional rights, state action may violate our Montana Constitution, but not violate any federal constitutional guarantee.45

Moreover, the Montana Supreme Court is “not compelled to march lock-step with the pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution.”46 By affording special protection to minors’ rights, the Montana Constitution attempts to ameliorate the inequality between the protection of the rights of adults and

42. 410 U.S. 113 (1973).
43. Bellotti v. Baird, 443 U.S. 622, 634 (1979); see also infra notes 139-42 and accompanying text.
44. See, e.g., Buckman v. Montana Deaconess Hosp., 224 Mont. 318, 324, 730 P.2d 380, 384 (1986); State v. Johnson, 221 Mont. 503, 513-14, 719 P.2d 1248, 1254-55 (1986); see also In re T.W., 551 So. 2d 1186, 1190 (Fla. 1989) (holding that “[t]o be held constitutional, the instant [parental consent] statute must pass muster under both the federal and state constitutions”).
45. Buckman, 224 Mont. at 324, 730 P.2d at 384.
minors that exists under federal law. While the Wicklund court upheld the constitutionality of the Revised Act, the Court's focus was limited to minors' rights under the federal constitution. The Court's analysis did not address the constitutionality of the Revised Act under the state constitution. Such an inquiry is necessary to determine whether the Revised Act violates the rights guaranteed to minors under the Montana Constitution.

An historical examination of the development of minors' rights is necessary to understand the level of protection attached to juvenile rights as well as the extent to which minors' rights are equated with adult rights to an abortion. As one scholar recently noted, "One cannot adequately understand the present or future of any controversy without knowing its history." The following discussion examines the historical development of minors' rights, the special protection afforded these rights by the Montana Constitution, and the Montana Supreme Court's interpretation of this protection. When faced with a constitutional challenge of the Revised Act under the Montana Constitution, the court should make a similar examination in order to accurately assess the constitutionality of parental notification.

A. Early Development of Minors' Rights

From the beginning of our nation's history until the 1950s, American courts resisted acknowledgment of minors' constitutional rights. Despite their contribution to the welfare of the family, children were perceived as chattels in the eyes of the legal system. Until the middle of the twentieth century, minors possessed no fundamental rights to free speech, due process, or privacy.

47. See infra Part III.B.
49. As the parties in Wicklund neither briefed nor argued the constitutionality of the Act on state grounds, the scope of the opinion is justifiably limited to the issues addressed.
50. 1 JENNI PARRISH, ABORTION LAW IN THE UNITED STATES xi (1995).
51. See generally Secrest, supra note 3, at 692-93.
52. See Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 ARIZ. L. REV. 11, 35-36 (1994). Fitzgerald describes the historical relationship between father and child as a "support for services exchange," whereby "[c]hildren owed their fathers their labor and any income they earned in exchange for their father's support of them in the household. . . . The support for services exchange was no contract between voluntary parties, . . . but rather manifested the parent's ownership of the child." Id. at 36 (footnotes omitted).
53. See Robert B. Keitee, Privacy, Children, and Their Parents: Reflections On
However, like the rights of others in historically disadvantaged groups, the rights of minors began to swell as changes swept the Supreme Court during the civil rights era. In 1954, the Supreme Court applied the Fourteenth Amendment to minors in an effort to end segregation among school children. In 1967, the Court recognized that minors were persons under the United States Constitution. Acknowledging high school students' First Amendment rights to wear armbands in protest of the war effort in Vietnam, the Court in 1969 stated that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.”

The changes continued into the next decade. By the early 1970s, America’s youth were exercising their newly-discovered rights with unprecedented freedom. Thus, in addition to the sweeping cultural changes affecting minors, the delegates who met in 1972 to draft the Montana Constitution faced a fluctuating, progressive body of jurisprudence.

B. Minors’ Rights Under Montana Law

Although the Montana Constitution underwent a complete revision in 1972, the framers were not entirely dissatisfied with the efforts of their historical predecessors at Bannack. The


54. See generally Secrest, supra note 3, at 692-93.

55. See Fitagerald, supra note 52, at 22 n.55 (citing Brown v. Board of Educ., 347 U.S. 483 (1954)).

56. See id. at 22 (citing In re Gault, 387 U.S. 1 (1967) (guaranteeing due process guaranteed to minors in juvenile proceedings)).


58. See generally Secrest, supra note 3, at 692-93.

59. In 1864, President Lincoln signed the Organic Act, which created the Montana Territory and named Sidney Edgerton as Montana's first territorial governor. See JAMES McCLELLAN HAMILTON, FROM WILDERNESS TO STATEHOOD: A HISTORY OF MONTANA 1805-1900 277-79 (1957). The city of Bannack, the territorial capitol, hosted Montana's first territorial legislative session in December of the same year. See id. at 279-80. In addition to creating a common school system, providing for a tax structure, and allocating funds for the development of territorial transportation, the legislators also set out to draft Montana's first laws:

The members of the first legislative assembly were men of ability and undoubted integrity. The Territory, being without laws other than the Organic Act and the laws of Congress which were applicable, presented the twenty
goal of the Bill of Rights Committee,\textsuperscript{60} which penned the proposed Declaration of Rights for the Montana Constitution, was to retain traditional rights of citizens while simultaneously "meet[ing] the changing circumstances of contemporary life."\textsuperscript{61} Accordingly, the delegation proposed constitutional protection in certain areas in which the prior constitution remained silent:

The first of these is a relatively new area, the rights of persons under the age of majority. There has been considerable activity in this field, mainly concerned with the procedural rights accorded young people in juvenile courts. But the increased court and statutory activity has not changed the fact that there are not even broad outlines of types of rights young people possess. Young persons are not guaranteed even the procedural rights which are deemed fundamental to a person accused of a criminal act.\textsuperscript{62}

Rick Applegate, the research analyst for the Bill of Rights Committee, reached various conclusions about the status of the law in the area of minors' rights.\textsuperscript{63} First, he discovered that the law was not only conflicting, but also enigmatic: "[f]or almost every court decision granting a specific right to a student or a minor, there is another decision denying him the same right."\textsuperscript{64}

\textsuperscript{60} The eleven members of the Bill of Rights Committee consisted of the following persons: Wade J. Dahood (Chairman), Chet Blaylock (Vice Chairman), Bob Campbell, Dorothy Eck, Donald R. Foster, R. S. "Bob" Hanson, George H. James, Rachell K. Mansfield, Lyle R. Monroe, Marshall Murray, and Veronica Sullivan. See Montana Constitutional Convention Bill of Rights Committee Proposal (1972), reprinted in II MONTANA CONSTITUTIONAL CONVENTION 659 (1972) [hereinafter CONSTITUTIONAL CONVENTION].

\textsuperscript{61} Id. at 618.

\textsuperscript{62} Rick Applegate, Montana Constitutional Convention Study No. 10, Bill of Rights, at 12 (1972).

\textsuperscript{63} See id. at 301-05.

\textsuperscript{64} Id. at 301 (quoting JEAN STROUSE, UP AGAINST THE LAW xi (1970)).
Second, he recognized the law's presumption of a minor's need for "special" treatment within the context of the juvenile justice system. While the special status of minors was intended to promote a flexible and personalized approach within the judicial system, Applegate discovered that the true effects had been quite different, resulting in impersonal, arbitrary, and paradoxical treatment of minors' rights. Nonetheless, he noted the United States Supreme Court's trend of moving toward more protection of minors' rights. Finally, he considered the rights of parents to guide the lives of their children, concluding that "the issue is 'how the limits of adult control may be drawn so as not to infringe on the child's right to grow in freedom in accordance with the spirit of civil liberties embodied in the Constitution.'"

Persuaded by Applegate's conclusions and unsettled by "the fact that young people have not been held to possess basic civil rights," the Bill of Rights Committee proposed a provision in the Declaration of Rights intended to equalize minor and adult rights. The provision, which expressly grants minors all fundamental rights contained in Montana's constitution, permits the infringement of minors' rights only "by laws designed and operating to enhance the protection for such persons." This constitutional provision, which was ratified almost verbatim by the Constitutional Convention, reads: "The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons." As stated by its drafters, the purpose of the provision is "to recognize that persons under the age of majority have the same protections from governmental and majoritarian abuses as do adults. In such cas-

65. Id.
66. See id. at 301-03. Applegate noted:
   This difficulty—that minors have fewer constitutional rights than adults—is especially difficult to understand when it is noted that they [minors] are liable for punishment for many more offenses than are adults: disobedience, running away from home, staying out late, associating with persons deemed "undesirable," being late for school, wearing their hair long or wearing armbands, publishing opinions critical of administrators and so on.
   Id. at 302 (citing Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)).
67. See id. at 303-04.
68. Id. at 305 (quoting White House Conference on Children, Report to the President 351 (1970)).
69. CONSTITUTIONAL CONVENTION, supra note 60, at 635.
70. Id.
71. MONT. CONST. art. II, § 15 (emphasis added).
es where the protection of the special status of minors demands it, exceptions can be made on clear showing that such protection is being enhanced."

C. In re C.H.: The Meaning of Montana’s Constitutional Provision on Minors’ Rights

The Montana Supreme Court has had few opportunities to thoroughly interpret the minors’ rights provision of the Montana Constitution. In In re C.H., however, the court underwent a comprehensive examination of the constitutional provision and set forth a framework for analyzing laws affecting minors’ rights. Specifically, when the right of a minor is contested under the Montana Constitution, the court applies a four-part test: (1) analyze the nature of the minor’s right affected by the disputed legislation; (2) determine whether the legislation infringes on that right; (3) if an infringement is found, balance the right that has been invaded against the rights of the minor that are allegedly enhanced by the legislation; and finally (4) determine whether the invasion is justified by a sufficiently compelling state interest.

1. The Holding of In Re C.H.

In In re C.H., the court was asked to decide whether a court-ordered, forty-five day detention in a reform school, which was authorized under the Montana Youth Court Act, violated the minor’s rights under the Montana Constitution. The court be-

72. CONSTITUTIONAL CONVENTION, supra note 60, at 636.
75. See id. at 197-204, 683 P.2d at 938-41.
76. See id.
77. The minor alleged that the forty-five day detention violated the due process, equal protection, and cruel and unusual punishment provisions of the federal and state constitutions. See id. at 187, 683 P.2d at 933. Although federal constitutional issues were raised, the court based its holding on state constitutional grounds, declaring: "because the United States Supreme Court has not ruled on the issue of whether a juvenile's physical liberty is a fundamental right, subject to constitutional protection and strict scrutiny equal protection analysis, we look to the 1972 Constitution of the State of Montana." Id. at 201, 683 P.2d at 940.
gan its inquiry by considering the nature and extent of the rights affected by the forty-five day detention. After examining the preamble and portions of the Declaration of Rights, the C.H. court held that the constitutional right at issue—physical liberty—was a fundamental right of the minor under the Montana Constitution. Next, the court examined whether the disputed law infringed on the minor's right at issue. Not surprisingly, the C.H. court found that the forty-five day detention invaded the minor's right to physical liberty. The court then focused on the final and most important issue: "Having addressed the nature of the right affected and the extent to which it was affected, our next step is to determine whether there is a compelling state interest sufficient to warrant such an infringement."

In order to determine whether a state interest justified the invasion of the minor's right, the court performed a balancing test. Referring to the Montana Constitution's provision on minors' rights, the court stated that "[i]n contrast to the federal constitution, the Montana Constitution specifically compares the rights of children with those of adults." Acknowledging that "the State's interest in protecting children may conflict with their fundamental rights," the C.H. court concluded that under the Montana Constitution the proper analysis was to balance the minor's right at stake against the rights of the minor which are allegedly enhanced by the disputed law. Thus, the court weighed a minor's fundamental right to physical liberty against "her right to be supervised, cared for and rehabilitated." According to the supreme court, this analysis "is precisely what the drafters of the 1972 Montana Constitution had in mind when they explicitly recognized that persons under 18 years of age would enjoy the same fundamental rights as adults, unless exceptions were made for their own protection."

Ultimately, the court searched for and found a pair of "legiti-

78. Prior to examining the nature of the right affected, the court determined that the minor's classification as a delinquent youth did not constitute a suspect class for equal protection purposes. See id. at 198, 683 P.2d at 938 ("When a statute is challenged on equal protection grounds, the first step is to identify the classes involved and determine whether the classes are similarly situated.").

79. See id. at 201, 683 P.2d at 940.

80. See id.

81. See id.

82. Id. at 201-02, 683 P.2d at 940.

83. Id. at 202, 683 P.2d at 940.

84. Id. at 202, 683 P.2d at 940.

85. Id.

86. Id.
mate, compelling state purposes” aimed at enhancing the protection of minors. The court specifically found that the disputed law served “(1) to rehabilitate youthful offenders by providing for their care, protection and wholesome mental development before they become adult criminals, and (2) to substitute a program of supervision, care and rehabilitation and remove the element of retribution from a youth who has violated the law.” Accordingly, the court justified the infringement of the youth’s liberty interest and upheld the validity of the disputed legislation.

2. The Effect of In re C.H.: Scrutiny of Laws Affecting Minors’ Rights

In addition to supplying a four-step constitutional framework for analyzing minors’ rights, In re C.H. sheds considerable light on the scrutiny to which invasions of minors’ fundamental rights—including abortion—are subjected. First, under Montana’s constitution, the rights of minors are compared to adult rights. With the specific exception that certain laws clearly shown to enhance minors’ protection may abridge minors’ rights, Montana’s youth possess the same fundamental rights as do adults. Second, because “the State’s interest in protecting children may conflict with their fundamental rights,” the Montana Constitution demands a balancing of interests when minors’ rights are at stake. The balance, however, does not occur between the minor’s rights and the rights of her parent. Rather, in the case of an abortion notification statute, the proper inquiry focuses exclusively on the opposing interests of the minor woman and requires a balance between the minor’s fundamental right of privacy and the “legitimate, compelling state purposes” aimed at enhancing the protection of the minor. Consequently, the infringement of a minor’s fundamental right is subjected to strict scrutiny, the highest level of constitutional protection, and to

87. Id.
88. Id. While these interests arguably enhance the protection of minors, I believe they are primarily aimed at enhancing the protection of the state’s interest in controlling delinquent minors. Indeed, the C.H. court noted that delinquent youth typically have a “need for stronger and wiser authority than has been exercised by the parents . . . .” Id. at 203-04, 683 P.2d at 941 (quoting In re Geary, 172 Mont. 204, 209, 562 P.2d 821, 824 (1977)).
89. See id. at 204, 683 P.2d at 941.
90. See id. at 202, 683 P.2d at 940.
91. See id. at 203, 683 P.2d at 941.
92. Id. at 202, 683 P.2d at 940.
93. Id. at 202-03, 683 P.2d at 940-41.
94. See generally, Wadsworth v. State, 275 Mont. 287, 302, 911 P.2d 1165,
an additional requirement that the competing state interest be clearly shown to enhance the protection of the minor.\footnote{95}

In \textit{In re C.H.}, the Montana Supreme Court recognized the special protection granted to minors under the state constitution. By paralleling adult and minor rights, subjecting laws affecting a minor's fundamental rights to strict scrutiny, and balancing the minor's autonomy with a state interest shown to enhance her protection, the supreme court gave minors' rights the special protection that exemplifies Montana's attempt to enhance and safeguard the protection of its youth.

\section*{IV. Minors' Rights and Parental Notification of Abortion}

While the \textit{Wicklund} Court found the Revised Act valid under the federal constitution, the legislation remains untested at the state level. To pass muster under the Montana Constitution, the Revised Act must survive scrutiny under the four-step constitutional framework articulated in \textit{In re C.H.}\footnote{96} Specifically, the court will need to: (1) determine the nature of the right affected by parental notification; (2) examine whether the Revised Act infringes upon that right; (3) balance the right invaded by parental notification against the rights of the minor that are allegedly enhanced by the Revised Act; and (4) determine whether a compelling state interest justifies the infringement.\footnote{97} This analysis requires an examination of the practical and legal effects of parental notification to determine whether the Revised Act enhances the protection of the minors, or whether the intent and effect lay elsewhere.

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1173-74 (1996). The court stated:
\begin{quote}
The most stringent standard [of constitutional review], strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right or discriminates against a suspect class. . . . Strict scrutiny of a legislative act requires the government to show a compelling state interest for its action. When the government intrudes upon a fundamental right, any compelling state interest for doing so must be closely tailored to effectuate only that compelling state interest.
\end{quote}
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\footnote{95} See \textit{C.H.}, 210 Mont. at 202-03, 683 P.2d at 940.

\footnote{96} See \textit{supra} Part III.C.2.

\footnote{97} See \textit{supra} Part III.C.2.
A. The Nature of the Right Affected by Parental Notification

The first step of analysis requires an inquiry into the nature of the right affected by the Revised Act. Since Roe v. Wade,\(^98\) it has been well-accepted that interference with a woman’s decision to have an abortion evokes her right to privacy.\(^99\) With respect to the interference of a minor’s abortion decision caused by parental notification, it is important to specify the nature of the minor’s privacy right. At its core, parental notification requires a woman to divulge the most personal of information to her parents.

Of all the decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when, and how one’s body is to become the vehicle for another human being’s creation; second, when and how—this time there is no question of “whether”—one’s body is to terminate its organic life.\(^100\)

The question, therefore, is whether Montana protects its minors against mandatory disclosure of profound and intimate information. In a state where minding one’s own business is a rule that “most of us learn in kindergarten,”\(^101\) it may come as little surprise to find that such a right not only exists, but also enjoys specific constitutional protection that “is more substantial than that inferred from the Federal Constitution.”\(^102\)

With few other states in its company,\(^103\) the Montana Constitutional Convention drafted a textually-explicit privacy right by declaring that “[t]he right of individual privacy is essential to

\(^98\) 410 U.S. 113 (1973).


\(^100\) In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1337-38 (2d ed. 1988)).

\(^101\) Gryczan, supra note 1, at 11.


\(^103\) Ten state constitutions contain explicit privacy provisions. See Wright, supra note 2, at 903 (citing ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; ILL. CONST. art. I, §§ 6, 12; HAW. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7). It is noteworthy, however, that only Florida and California have interpreted their constitutions’ privacy provisions to provide specifically for abortion protection. See id. (citing In re T.W., 551 So. 2d 1186 (Fla. 1989) (holding that Florida’s parental consent statute unconstitutionally infringed on a minor woman’s privacy right under the state constitution); Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981) (striking down a statute withholding state medical benefits to poor women desiring an abortion as an invasion of California’s textual privacy provision).
the well-being of a free society and shall not be infringed without
the showing of a compelling state interest.\textsuperscript{104} This constitution-
al provision creates and protects an expansive privacy right that
encompasses both personal liberty\textsuperscript{105} and "the ability to control
access to information about oneself."\textsuperscript{106} Minors, who are "afford-
ed the same protection against majoritarian abuses as are
adults,"\textsuperscript{107} enjoy this broad and inalienable right of privacy un-
less specifically precluded by a law clearly shown to enhance
their protection.\textsuperscript{108} By subjecting "the most profound and inti-
mate" decision to parental scrutiny, parental notification affects
a fundamental right that courts afford "every protection avail-
able under th[e] most stringent standard of judicial review."\textsuperscript{109}

\section*{B. The Infringement of Parental Notification}

Montana's treatment of the privacy right assists in deter-
mining whether parental notification constitutes an infringement
of a minor's privacy. The Montana Supreme Court has articulat-
ed a two-part test that must be met before constitutional privacy
protection will safeguard personal information.\textsuperscript{110} First, the
party seeking protection must subjectively expect that the infor-
mation will remain private.\textsuperscript{111} Second, society must recognize
the party's expectation of privacy as reasonable.\textsuperscript{112} This test
will determine whether the right to privacy applies to a minor's

\textsuperscript{104} MONT. CONST. art. II, § 10.
(holding that Montana's constitutional right of privacy protects a resident's "decision
to drink whatever type of potable water they choose within their home. . . . [But]
the right to pipe in and have available the type of water they choose . . . does not
involve the kind of individual autonomy or freedom 'from unwarranted governmental
intrusion into matters so fundamentally affecting a person. . . . ' necessary to invoke
constitutional protection").
\textsuperscript{106} Montana Human Rights Div., 199 Mont. at 440, 649 P.2d at 1287 (citing
State v. Hyem, 193 Mont. 51, 630 P.2d 202 (1981)); see generally, Larry M. Elison &
Deborah E. Elison, Comments on Government Censorship & Secrecy, 55 MONT. L.
REV. 175 (1994) (examining constitutional protection of privacy and the right to
know).
\textsuperscript{107} CONSTITUTIONAL CONVENTION, supra note 60, at 636.
\textsuperscript{108} See supra Part III.B; MONT. CONST. art. II, § 15.
\textsuperscript{109} David Gorman, Comment, Rights in Collision: The Individual Right of Pri-
\textsuperscript{110} See Montana Human Rights Div., 199 Mont. at 442, 549 P.2d at 1287 (citing
Katz v. United States, 389 U.S. 347 (1967)); see generally, Elison, supra note
106, at 195 n. 102.
\textsuperscript{111} See Montana Human Rights Div., 199 Mont. at 442, 549 P.2d at 1287 (citing
Katz v. United States, 389 U.S. 347 (1967)).
\textsuperscript{112} See id.
decision to undergo an abortion.

The first part of the test is easily met. While subjective expectations of privacy may vary from person to person, a minor facing parental notification has chosen not to voluntarily involve her parents in a profoundly personal decision. The desired parental exclusion, in and of itself, demonstrates her subjective expectation, or at least hope, that the desired abortion will remain private. This hope, however unrealistic, is sufficient to satisfy the first prong of the test.

The second part of the test requires that society be willing to recognize the minor's expectation of privacy as reasonable.\(^\text{113}\) The Montana Supreme Court, perhaps drawing from the lessons learned in kindergarten, has exhibited a willingness to recognize subjective expectations of privacy as reasonable.\(^\text{114}\) Generally, whether protection attaches depends on whether the information is "damaging" to the individual asserting the right.\(^\text{115}\) When the information is not "entirely free" of references to drug, alcohol, health or family problems,\(^\text{116}\) sexual activity,\(^\text{117}\) or professional criticism,\(^\text{118}\) the court has invoked Montana's privacy protection to prevent forced disclosure. The information disclosed through parental notification, which exposes "the most profound and intimate" decision a young woman makes about her body, undeniably contains the type of damaging information that the constitution and the courts are designed to protect. Society's willingness to shield personal information from forced disclosure, coupled with a pregnant minor's subjective expectation of privacy, places a minor's abortion decision within the broad purview of Montana's constitutionally guaranteed privacy protection.\(^\text{119}\)

Although the two-part test demands privacy protection for a minor's desired abortion, an examination of the varying and

\(^{113}\) See id.

\(^{114}\) See, e.g., Belth v. Bennett, 227 Mont. 341, 740 P.2d 638 (1987) (protecting insurance company's right of privacy shielding previously-released financial statements of insurance company from public access).

\(^{115}\) Montana Human Rights Div., 199 Mont. at 442, 649 P.2d at 1287; see generally, Elison, supra note 106, at 192-95 (examining case law interpreting the right to know under the Montana Constitution).

\(^{116}\) Id.


\(^{118}\) See Flesh v. Board of Trustees, 241 Mont. 158, 786 P.2d 4 (1990) (protecting a grievance complaint filed against school administrator from disclosure under privacy provision). But see Great Falls Tribune Co. v. Cascade County Sheriff, 238 Mont. 103, 775 P.2d 1267 (1989) (subjecting the identity of law enforcement officers disciplined for excessive use of force to public disclosure).

\(^{119}\) See supra notes 103-08 and accompanying text.
practical effects of notification on the modern family reveals further avenues of infringement. Simply put, the effects of parental notification on the personal privacy of a pregnant minor seeking an abortion depend, at least in part, on the nature of her family unit. In some circumstances, parental notification facilitates fruitful discourse between parent and daughter regarding a profound and intimate personal decision with potential long-term effects. This is not to say, however, that a minor who receives valuable parental guidance as a result of notification has suffered no invasion of her privacy rights. Indeed, “[p]rivacy has been defined as the ability to control access to information about oneself.”

Regardless of her parents’ ultimate reaction to the information, the right of privacy belongs to the minor and forced disclosure of an otherwise private medical procedure invades this right.

When parental notification has its desired effects, the temptation exists to justify the means with the end. However, to assume that all parents will react reasonably (or even civilly) when confronted with the knowledge that their daughter is sexually active, pregnant, and seeking an abortion ignores the realities of the modern family.

Not every pregnant adolescent has parents out of the comforting and idyllic world of a Norman Rockwell painting. Indeed, anyone familiar with the dependency cases heard in this state’s juvenile courts understands that many pregnant adolescents have no competent and caring parent to consult, and that for them parental consultation is not an option.

Based on her parent’s religious, moral, and political beliefs, a minor may feel that notifying her parents will lead to irreparable family harm, ostracism, or abuse. This fear may prevent a minor from exercising her right to a clinical abortion, or worse, may lead to self-induced abortion.

121. See infra notes 134-38 and accompanying text.
123. In an article entitled “Abortion Would Have Hurt Mom and Dad,” Mark Patinkin of the PROVINCE JOURNAL relays the story of 17-year-old Becky Bell who died as a result of an infection caused by a “botched abortion” using “a coat hanger or a knitting needle.” Hearing on House Bill 482, House Judiciary Committee, ex. 21 (Feb. 14, 1995) [hereinafter House Hearing]. Patinkin writes:
Becky Bell died from a botched abortion as a direct result of Indiana’s so-called “parental consent” law. Not wanting to “disappoint” her parents by
While the Revised Act contemplates notification and not consent, it fails to consider the power imbalance inherent in parent-child relationships. A minor's limited resources, whether financial or otherwise, limit her autonomy while increasing parental influence and control over decision-making. The state explicitly recognizes this power imbalance and the potential for parents to restrain or dominate their daughter's reproductive decision through financial deprivation or "by force, threat of force, or deprivation of food and shelter." However, minors' protection against parental coercion is limited. The Revised Act only prevents parents from coercing a minor to undergo an abortion, and no analogous protection is given to a minor's decision not to carry a child to term. Although the legislature has chosen to selectively protect a minor's reproductive choice, a parent's ability to coerce a minor into unprepared or unwilling motherhood should not be ignored. In such a situation, when parental notification subjects a minor's abortion decision to financial or physical influence, the resulting infringement of the minor's right of privacy is clear.

While these circumstances may not accurately represent the typical reaction of Montana's parents to news of their daughter's desired abortion, the true effects of legally mandated parental notification and the realities of contemporary Montana family life cannot be ignored. Evidence suggests, for example, that most Montana minors voluntarily seek parental involvement when seeking an abortion, and only fail to do so when family instability, parental illness, or potential abuse are at issue.

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telling them of her dilemma, Becky's only legal choices were to sneak across the state line to Kentucky for a safe, legal abortion or to beg an anti-choice judge to grant her a waiver. She never made it to Kentucky, dying of a massive septic infection from the botched abortion.

Id.


125. The Revised Act provides:
A parent, a guardian, or any other person may not coerce a minor to have an abortion. If a minor is denied financial support by the minor's parents, guardian, or custodian because of the minor's refusal to have an abortion, the minor must be considered an emancipated minor for the purposes of eligibility for public assistance benefits. The public assistance benefits may not be used to obtain an abortion.


126. See House Hearing, supra note 123, ex. 15 (written testimony of Devon Hartman, RNCNP, on behalf of Intermountain Planned Parenthood, stating that "[o]f the 144 women age 17 and younger that we saw for abortions in 1994, 136 had
While the purpose of a carefully drafted bypass provision is to deal with just such circumstances, Montana's demographics present potential problems for expedient judicial bypass. Like many states, the Montana court system faces overcrowded dockets, limited judicial resources, and pressure to streamline clogged judicial arteries. These problems may be compounded in rural regions of the state, where part-time judicial personnel and the lack of geographic proximity impede access to the courts. Just as courts should not overlook the diverse philosophical, political, and religious backgrounds of Montana's citizens, they should not ignore the realities and limitations of the state's judicial system.

Parental notification, whether viewed idealistically or with open eyes and an understanding of present day family realities, infringes on a minor's right to privacy. This conclusion holds firm regardless of the ultimate parental reaction to notification. Accordingly, to defend the Revised Act, the state must be prepared to make the difficult demonstration that parental notification, while infringing minors' privacy rights, is justified because of its enhancing effects on the protection of minors.

C. Enhancing the Protection of Minors v. Protecting Parental Rights

The Montana Constitution requires that laws affecting minors' fundamental rights "enhance the protection of such persons." The third stage of inquiry, therefore, is whether paren-
tal notification enhances minors' protection. Pursuant to In re C.H.,\(^\text{129}\) the court must balance the minor's fundamental privacy right against the rights of the minor that are allegedly enhanced by the Revised Act.\(^\text{130}\)

On its face, the Revised Act balances competing interests. The drafters' addition of a "very broad" judicial bypass provision\(^\text{131}\) indicates an attempt, although not specifically articulated, to balance a pregnant minor's right to privacy against her parent's right to know. In effect, the legislature seems to have sought to protect the parent's right to be informed of the daughter's intended abortion at the expense of the daughter's interest in keeping such a procedure private. However, under the Montana Constitution, the proper inquiry is to balance the pregnant minor's rights at stake against her rights which are allegedly enhanced by the law.\(^\text{132}\) This inadvertent balancing act ignores the constitutional requirement that parental notification must clearly be shown to enhance the protection of minors, not adults.\(^\text{133}\)

Fortunately, a court confronting this balancing test need not speculate about the intended effects of parental notification. Representative Duane Grimes, the primary sponsor of the Revised Act, spoke in terms of a multi-purpose legislation aimed at protecting the sanctity of the traditional family structure.\(^\text{134}\) Grimes stated further that a parent's ultimate financial responsibility for the actions of his or her daughter entitles the parent to


\(^{130}\)See id. at 203, 683 P.2d at 941; supra note 93 and accompanying text.

\(^{131}\)Hearing on House Bill 482, Senate Judiciary Committee, at 18 (Mar. 16, 1995) [hereinafter Senate Hearing].

\(^{132}\)See supra note 93 and accompanying text.

\(^{133}\)See CONSTITUTIONAL CONVENTION, supra note 60, at 636 ("[P]ersons under the age of majority have the same protections from governmental and majoritarian abuses as do adults. In such cases where the protection of the special status of minors demands it, exceptions can be made on clear showing that such protection is being enhanced.").

\(^{134}\)Representative Grimes articulated the purpose of the Revised Act as fourfold: (1) to acknowledge the traditional rights of parents to guide the lives of their children; (2) to ensure that parents have knowledge of an upcoming surgical procedure and to provide parents with the opportunity to provide important medical information to their children's physicians; (3) to encourage pregnant minors to discuss important decisions, such as the choice to abort, with their parents; and (4) to reduce teenage pregnancy and abortion rates by increasing minors' responsibility. See House Hearing, supra note 123, at 5-11; Senate Hearing, supra note 131, at 9-10, 18. In support of the legislation, Representative Grimes also mentioned the bill's utility regarding the acquisition of statistical data concerning abortions. See House Hearing, supra note 123, at 8.
notification of an intention to undergo an abortion. Although numerous individuals and institutions voiced their opinions regarding the propriety of parental notification and its potential effects on the rights of pregnant minors, the legislature adopted Representative Grimes' rationale and enumerated six "findings" that justify parental notification:

(a) immature minors often lack the ability to make fully informed choices that take into account both immediate and long-range consequences; (b) the medical, emotional, and psychological consequences of abortion are sometimes serious and can be lasting, particularly when the patient is immature; (c) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related; (d) parents ordinarily possess information essential to a physician in the exercise of the physician's best medical judgment concerning the minor; (e) parents who are aware that their minor daughter has had an abortion may better ensure that the daughter receives adequate medical care after the abortion; and (f) parental consultation is usually desirable and in the best interests of the minor.

Perhaps foreseeing a constitutional attack, the legislature precisely articulated the purpose of the Revised Act:

[T]o further the important and compelling state interests of: (a) protecting minors against their own immaturity; (b) fostering family unity and preserving the family as a viable social unit; (c) protecting the constitutional rights of parents to rear children who are members of their household; and (d) reducing

135. See House Hearing, supra note 123, at 28.
136. See id. at 7. The following persons testified in support of House Bill 482: Sharon Hoff, Montana Catholic Conference; Georgia Branscome; Charles Lorentzen; Linda Lindsay; Arlette Randash, Eagle Forum; Richard Tappe, Montana Right to Life; Tammy Peterson; and, Laurie Koutnik, Montana Christian Coalition. See id. at 5-6.

The following persons testified against the adoption of House Bill 482: Kate Cholewa, Montana Women's Lobby; Devon Hartman, OB-GYN Nurse Practitioner, Intermountain Planned Parenthood; Beth Sherman; Elisa Fraser, Montana Affiliate of National Abortion and Reproductive Rights Action Group (NARAL); Brenna Dorrance; Mary Skjelset, Chris Schweitzer; Scott Crichton, American Civil Liberties Union (ACLU); National Women's Law Center; Geoffrey Birnbaum, Missoula Youth Homes; and, Deborah Frandsen, Planned Parenthood of Missoula. See id. at 6-8.

It is noteworthy that the only minors to publicly state their views—Brenna Dorrance, Beth Sherman, Chris Schweitzer, and Mary Skjelset—voiced their opposition to the bill. These women argued that the proposal was idealistic, posed health hazards for minors and their children, violated their privacy rights, and ignored the realities of the abusive household. See id. at 7.

teenage pregnancy and unnecessary abortion.\textsuperscript{138}

Under \textit{In re C.H.}, laws that protect a minor's right to "be supervised, cared for and rehabilitated" enhance the minor's protection and justify infringement of his or her fundamental rights.\textsuperscript{139} Similarly, the Revised Act's legislatively dictated interests appear to further the welfare of Montana's youth. The question is whether parental notification actually enhances a pregnant minor's protection by safeguarding her "right" to be protected against a potentially dangerous and emotional medical procedure, her "right" to have her parents provide medical information to her physician, and her "right" to be guarded against her own immaturity.

Unquestionably, parents play an integral part in the well-being of a child and the right of parents to guide their children's lives must be considered.\textsuperscript{140} In \textit{Bellotti v. Baird},\textsuperscript{141} the United States Supreme Court's landmark parental consent decision, these parental interests carried considerable weight:

[D]eeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children . . . . Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.\textsuperscript{142}

Moreover, the Montana Supreme Court has acknowledged the "particular vulnerability" of children and the importance of the parental role in child rearing.\textsuperscript{143} Thus, while parental notification invades a minor's right to privacy, the infringement arguably is justified by the enhanced protection stemming from pa-

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140. While not binding on an inquiry under the Montana Constitution, the United States Supreme Court stated that "the importance of the parental role in child rearing" is one of three reasons "justifying the conclusion that the constitutional rights of children cannot be equated to those of adults." \textit{Bellotti v. Baird}, 443 U.S. 622, 634 (1979). The other reasons include the "peculiar vulnerability of children [and] their inability to make critical decisions in an informed, mature manner." \textit{Id.}
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143. \textit{C.H.}, 210 Mont. at 203, 683 P.2d at 941.
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However, examining substance over form leads to an alternative conclusion: the rights that are allegedly enhanced by parental notification do not belong entirely to the minor. More accurately, these so-called rights are primarily parental interests couched in terms of minors' rights. Just as a minor's "right" to be rehabilitated, cared for, and supervised, as articulated in *In re C.H.*, primarily enhances the protection of the state's interest in controlling delinquent youths, parental notification primarily enhances parental rights to control the lives of their daughters. For example, a minor's "right" to have her parents provide medical information to the attending physician equally protects the parents' right to communicate with their daughter's physician and learn about her current physical condition. Likewise, a minor's "right" to be protected against a potentially dangerous and emotional medical procedure and the legislatively-declared "right" to be protected against her own immaturity do not provide clear protection of a minor's interests; rather these "rights" safeguard parental interests in guiding their daughter's lives. The Montana Constitution requires the court to balance the minor's fundamental privacy right against the rights of the minor that are allegedly enhanced by the Revised Act. Thus, irrespective of the importance of these parental interests, parental guidance should not be protected at the expense of minors' autonomy.

In addition to enhancing parental interests rather than minors' rights, the time delay caused by parental notification has potentially disastrous effects on a minor's ultimate right to an abortion. Even the most expedient bypass or the most fruitful parent-daughter discourse comes at the expense of time, which has always been a decisive factor in the abortion dilemma. In *Roe v. Wade*, the United States Supreme Court articulated

144. See supra note 88 and accompanying text.
145. In his closing remarks before the Senate Judiciary Committee, Representative Grimes emphasized the purpose of House Bill 482: "this bill is for the parents. It will recognize the traditional rights of parents to direct the rearing of their minor children." *Senate Hearing, supra* note 131, at 18.
146. See supra note 93 and accompanying text.
a trimester system of analysis, whereby a woman's freedom to terminate her pregnancy depended on fetal development. Specifically, the Court held that a woman's abortion right was most compelling in the first trimester, was diminished during the second, and was subject to proscription in the third. While the Supreme Court recently modified this framework in Planned Parenthood v. Casey, fetal viability continues to determine the level of permitted state interference with a woman's abortion right.

Similar to Roe, Casey recognizes that the state's power to regulate abortion increases with the development of the fetus. As the fetus approaches viability, the state may bar abortion altogether except when continued pregnancy will expose the woman to serious health risks. Indeed, "[a]n abortion may not be performed within the state of Montana after viability of the fetus, unless in appropriate medical judgment, the abortion is necessary to preserve the life or health of the mother." Thus, the inevitable time delay created through the notification process and parent-daughter discourse may ultimately result in the state having an almost absolute veto of the desired abortion. This veto-causing effect, coupled with the medical dangers associated with delays in the abortion process, does little to enhance the

149. See id. at 162-64.
150. See id.
152. See id. at 870 (stating that "the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy"). In spite of the advances of medical technology that determine the point of fetal viability, the Court reaffirmed the "central holding" of Roe:

[Viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of Roe, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since Roe was decided. . . .

153. See Casey, 505 U.S. at 846 (confirming "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health").
155. In a 1988 joint policy statement, the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the Organization for Obstetric, Gynecological and Neonatal Nurses, and the National Medical Association urged that:
protection of pregnant minors and their fundamental rights.

The negative aspects of parental notification impede the effectuation of the state's true purpose. The focus on parental interests and the detrimental impact of time delay during the notification process shift the focus away from creating a proper balance between minors' privacy interests and laws enhancing minors' rights. This balancing requirement "is precisely what the drafters of the 1972 Montana Constitution had in mind when they explicitly recognized that persons under 18 years of age would enjoy the same fundamental rights as adults, unless exceptions were made for their own protection." In the final analysis, parental interests disguised as minors' rights fail to provide a "clear showing that... [the minor's] protection is being enhanced.”

D. The Search for a Compelling State Interest

The last step of analysis is to determine whether a compelling state interest justifies infringement of a pregnant minor's privacy right. The Revised Act specifically states that the purpose of parental notification is "to further the important and compelling state interests of: (a) protecting minors against their own immaturity; (b) fostering family unity and preserving the family as a viable social unit; (c) protecting the constitutional rights of parents to rear children who are members of their household; and (d) reducing teenage pregnancy and unnecessary abortion." Irrespective of the legislature's classification of these interests as "important and compelling," these interests are insufficient to counterbalance the infringement of a pregnant minor's fundamental, textually explicit privacy right.

While the four state interests enumerated in the Revised Act appear to encompass diverse societal goals, the first three share a common denominator: the displacement of minors' autonomy in favor of parental control. The existence of this common element

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[The adolescent have an opportunity for examination and counseling apart from parents, and the same confidentiality be preserved between the adolescent patient and the provider as between the parent/adult and the provider. . . . Ultimately, the health risks to the adolescents are so impelling that legal barriers and deference to parental involvement should not stand in the way of needed health care.

House Hearing, supra note 123, ex. 16.
156. In re C.H., 210 Mont. at 203, 683 P.2d at 941.
157. CONSTITUTIONAL CONVENTION, supra note 60, at 636.

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becomes clear by examining the method by which the Revised Act implements each state interest. First, the Revised Act protects minors against their own immaturity by placing the abortion decision in the hands of the parent. This shifting of power protects parental authority at the expense of minors' freedom to make an independent decision. Second, the Revised Act fosters family unity and preserves the family as a viable social unit by exposing the abortion decision to family debate. By subjecting an otherwise private decision to parental scrutiny, forced disclosure increases parental control and compromises minors' autonomy. Third, the state's interest in safeguarding the constitutional rights of parents to rear children necessarily involves the protection of parental control. Indeed, the notion of "rearing" is based upon foundations of parental know-how, guidance, and authority. The question, therefore, is whether the state has a compelling interest in protecting parental authority.

The importance of parental guidance has been recognized in Montana. In at least one context, "[t]he right of the natural parents to care and custody of their children . . . is a fundamental liberty interest." However, unlike Montana's privacy provision, such interests do not enjoy explicit protection in the constitution. Moreover, parental guidance is selectively applied by the legislature. With the exception of abortion, Montana permits a pregnant minor to consent to various medical procedures involving her pregnancy and reproductive health without parental approval. Thus, a pregnant minor may self-consent to the delivery of her child and may make all health care decisions affecting her child after birth, including adoption, without pa-

159. The term "rear" means "to bring up (a person) by fostering, nourishing, and instructing . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1891 (1976).
161. MONT. CODE ANN. § 41-1-402(1)(c) (1995) provides:
The consent to the provision of medical or surgical care or services by a hospital, public clinic or to the performance of medical or surgical care or services by a physician licensed to practice medicine in this state may be given by a minor who professes or is found . . . . to be pregnant . . . . This self-consent only applies to the prevention, diagnosis, and treatment of those conditions specified in this subsection. The self-consent in the case of pregnancy . . . also obliges the health professional, if he accepts the responsibility for treatment, to counsel the minor by himself or by referral to another health care professional for counseling.
162. "A minor who has had a child may give effective consent to health service for his child." MONT. CODE ANN. § 41-1-402(2) (1995).
163. "A parent who is a minor shall have the right to relinquish his or her child
rental notification or approval. By excepting these procedures from parental involvement, the state selectively applies its interest in allowing parents to guide their children to the context of abortion. The Montana Constitution specifically grants minors "the same protections from governmental and majoritarian abuses" enjoyed by adults.\textsuperscript{164} The Florida Supreme Court, working without the aid of an explicit minors' rights provision, found such inconsistent protection of minors insufficiently compelling to justify infringement of minors' privacy interests.\textsuperscript{165} To allow a selectively applied state interest to justify invasion of a minor's fundamental privacy right is to ignore the intended effect of Montana's minors' rights provision.

The final state interest, reducing teenage pregnancy and unnecessary abortion, is not clearly compelling. In light of "the tradition of the state of Montana to protect every human life, whether unborn or aged,"\textsuperscript{166} this interest presumably is aimed in large part at protecting both the health of the mother and the life of the fetus.\textsuperscript{167} As noted in \textit{Roe v. Wade},\textsuperscript{168} the interest in protecting the welfare of the mother does not become compelling until the risks associated with abortion outweigh the risks of

\begin{footnotes}
\item[165] See In re T.W., 551 So. 2d 1186, 1194-95 (Fla. 1989). Like Montana, Florida law allowed minors to self consent to "any medical procedure involving her pregnancy or her existing child—no matter how dire the possible circumstances—except abortion." \textit{Id.} at 1185. The Florida Supreme Court conceded that the state's interests in protecting minors and preserving the unity of the family were "worthy objectives." \textit{Id.} However, the court concluded that Florida does not recognize these two interests as being sufficiently compelling to justify a parental consent requirement where procedures other than abortion are concerned. . . . [W]e are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned. \textit{Id.} Thus, the court refused to justify the infringement of the minor's privacy on the ground of a selectively applied state interest. \textit{See id. at 1195-96.}
\item[166] MONT. CODE ANN. § 50-20-102 (1995); \textit{see also} MONT. CODE ANN. § 41-1-103 (1995) ("[a] child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth"); Strzelczyk v. Jett, 264 Mont. 153, 870 P.2d 730 (1994) (certifying that Montana's wrongful death statute allows for a cause of action on behalf of a stillborn fetus).
\item[167] The balance between fetal life and the health of the mother is evident from the exceptions to Montana's abortion laws. \textit{See, e.g.,} MONT. CODE ANN. § 50-20-109(1)(c) (1995) (permitting post-viability abortion if "the abortion is necessary to preserve the life or health of the mother"); MONT. CODE ANN. § 50-20-209(1) (1995) (waiving parental notification if "a medical emergency exists and there is insufficient time to provide notice").
\item[168] 410 U.S. 113 (1973).
\end{footnotes}
childbirth. This point in time changes as medical advances continue to reduce the risks associated with abortion. Thus, if the state’s interest in reducing abortion hinges upon protecting the health of the pregnant minor, requiring parental notification at all stages of pregnancy fails to effectively further this interest and casts doubt on whether parental notification is narrowly tailored to meet the state’s objective.

The protection of the fetus raises somewhat different concerns. Here, the court must weigh the mother’s rights against the rights of the developing fetus. Relying on Roe, the Florida Supreme Court in In re T.W. found that the state’s interest in protecting fetal life depended on viability. Upon viability, “society becomes capable of sustaining the fetus, and its interest in preserving its potential for life thus becomes compelling.” Prior to that point, however, the state’s interest in protecting the fetus is less than compelling because the mother and the fetus are “so inextricably intertwined that their interests can be said to coincide.” Thus, the T.W. court found the invasion of privacy unnecessary for the preservation of the fetus.

The Florida court’s decision was based on Roe’s trimester system, a framework modified by the Supreme Court in Planned Parenthood v. Casey. Under Roe’s “elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy.” The Casey Court both reaffirmed Roe’s essential holding and constructed an analytical framework

169. See id. at 163 (“With respect to the State’s important and legitimate interest in the health of the mother, the ‘compelling’ point . . . is at approximately the end of the first trimester. This is so because . . . until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth.”).
170. See In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989) (“Due to technological developments in second-trimester abortion procedures, the point at which abortions are safer than childbirth may have been extended into the second trimester.”) (citing City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 429 n.11 (1983)).
171. See id. at 1193-94.
172. Id. The United States Supreme Court has stated that: [T]he concept of viability, as we noted in Roe, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.
173. In re T.W., 551 So. 2d at 1193.
174. See id.
175. 505 U.S. 833 (1992); see supra notes 148-53 and accompanying text.
176. Casey, 505 U.S. at 872.

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allowing for more state intervention in the abortion decision.  

What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Thus, under current federal law, the ultimate question is whether the Revised Act imposes an undue burden on the exercise of minors' abortion rights.

While the legislature has voiced its intent "to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation," courts should review this question with care. Montana courts, which are free to diverge from federal precedent, should examine this question from a practical perspective, taking into account Montana's unique familial, societal, and geographic conditions. In a state where privacy is especially coveted and minors' rights enjoy special protection, courts should carefully scrutinize any state interest allegedly justifying the invasion of fundamental rights.

V. CONCLUSION

The Montana Constitution, unlike its federal counterpart, guarantees minors all fundamental rights unless precluded by laws that clearly enhance their protection. This special constitutional provision affords minors special, not limited, protection of their rights. Parental notification, irrespective of its constitutionality under the federal constitution, impermissibly abridges a pregnant minor's inalienable right to privacy under the Montana Constitution. Montana's parental notification law fortifies parental control at the expense of minors' rights and fails to ade-

177. See id. at 845-46.
178. Id. at 877-78 (citation omitted).
180. See supra notes 44-46 and accompanying text.
181. See supra Part IV.B.
quately enhance the protection of pregnant minors. Moreover, it does not further a compelling state interest capable of withstand- ing strict scrutiny analysis.

When facing a constitutional challenge under the Montana Constitution, the court should acknowledge practical and legal effects of parental notification and strike down the legislation. This result would effectuate the intent of the constitutional drafters and place the abortion decision where it belongs: in the hands of the young woman and her physician.