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The Undue Burden:

Parental Notification Requirements for Publicly Funded Contraception

Stephanie Bornstein†

INTRODUCTION

In 1998, with virtually no media coverage, the House of Representatives passed the Parental Notification Act of 1998 (the Act),¹ a bill that for the first time would require public clinics to notify the parents of teenagers before providing them with contraception. The Act would amend Title X of the Public Health Service Act (Title X),² which has provided the majority of federal funding to family planning agencies and clinics, including health departments, hospitals, and Planned Parenthood branches, since its passage in 1970.³ The amendment would require all Title X organizations to provide written notice to parents of any minor seeking contraception unless the minor has obtained a court's permission to bypass parental notification.⁴ The Act would also require Title X organizations to inform all minors about the benefits of abstinence and the dangers of being coerced into sexual acts, and would require the organizations to comply with all state laws on reporting of child sexual abuse and statutory rape.⁵ After the House passed the Act but before the Act went on to the Senate or became law, its sponsors, fearing a presidential veto,

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1. H.R. 4721, 105th Cong. (1998).
2. 42 U.S.C. § 300 et seq. (1998).
3. See Alan Guttmacher Institute, *Issues in Brief: The U.S. Family Planning Program Faces Challenges and Change* (1998) (visited Jan. 27, 2000) <<http://www.agi-usa.org/pubs/ib3.html>>. While Title X was the original source of federal funding for contraceptive services, there are currently several other sources of federal funding, including Title XX and Title IVA. See *infra* note 15.
4. See Parental Notification Act of 1998, H.R. 4721, 105th Cong. (1998).
5. See *id.*

tabled the bill for the remainder of the legislative session, with the intention of raising such a bill in the future.⁶

One year later, in the fall of 1999, sponsors of the 1998 Act again proposed an amendment to Title X requiring parental notification for minors to obtain contraception, yet dropped their proposal in exchange for support for another bill that increased funding for abstinence education by fifty million dollars.⁷ This abstinence education bill was approved by the House Appropriations Committee with no objections.⁸ One commentator suggests that this compromise came, in part, in response to pressure from House Republican leaders to avoid attaching "contentious social issue riders" to spending bills in order to "highlight spending differences" between Republicans and President Clinton in the year 2000.⁹ Yet instead of "fret[ing] about an amendment he could not offer," one sponsor of the unsuccessful 1998 Act claims he "took a constructive approach . . . focus[ing] on abstinence promotion," noting that "[i]f you can't make progress in one area, you can make progress in another."¹⁰ Because a parental notification requirement for contraception has gained increasing congressional support in each of the last three years, it is possible that next year or shortly thereafter, a bill similar to the 1998 Parental Notification Act will pass through the Senate and, barring presidential veto, become law.¹¹

This article starts from the assumption that a parental notification requirement for publicly funded contraception would have a devastating impact on sexually active minors, greatly increasing their risk of unwanted pregnancy, as well as HIV infection and other sexually transmitted diseases. Depending on the particular statute, parental notification requires the minor to prove that one or both parents or guardians were informed before the minor can receive family planning services, while parental consent requires that one or both parents agree to allow the minor to obtain services.¹² Despite this difference, "the mere threat of un-

6. See Steve Stanek, *House OKs Notification of Parents Bill; Its Thin Margin Won't Defeat Veto*, CHI. TRIB., Oct. 10, 1998, at 5.

7. See Joan Lowy, *Abstinence Programs to Receive Federal Aid*, DESERET NEWS, Oct. 18, 1999, at A6; *Teenage Pregnancy Reduction Act of 1999*, H.R. 1636, 106th Cong. (1999); *Health Care Assurance Act of 1999*, S. 24, 106th Cong. § 406, (1999); S. 1458, 106th Cong. (1999).

8. See Lowy, *supra* note 7.

9. See *Abortion Foes Express Few Regrets Over Rider Strategy*, NAT'L J.'S CONGRESS DAILY, NOV. 16, 1999.

10. *Id.* (quoting Representative Ernest Istook (R-Okla.)).

11. See Stanek, *supra* note 6.

12. See, e.g., MASS. GEN. LAWS ANN. ch. 112, § 12s (West 1999); MONT. CODE ANN. § 50-20-204 (1999); OHIO REV. CODE ANN. § 2919.12(B)(1) (Banks-Baldwin 1999). Courts seem to believe that there is a significant difference in the burden that this imposes on a minor. See, e.g., *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 511 (1990) (noting the "greater intrusiveness of consent statutes"); *H.L. v. Matheson*, 450 U.S. 398 at 411 n.17 (1981) (stating that "notice statutes are not equivalent to consent statutes because [notice statutes] do not give anyone a veto power"). Family planning advocates suggest, however, that the practical reality of a notification requirement can be as burdensome on a minor as a consent requirement because of the chilling

welcome parental involvement in the minor's contraceptive decision is likely to have a significant deterrent effect on a minor's use of Title X clinics."¹³ Many factors affect a minor's choice to involve her parents in her reproductive decisionmaking;¹⁴ nevertheless, conditioning contraceptive options upon parental involvement would have the greatest impact on minority and low-income teenage women, who are more likely to get their contraception from publicly funded clinics than their more affluent counterparts. Studies show that each year, Title X funds provide services for over four million people "who would otherwise be unable to afford family planning," and that Title X clients are "predominantly young and poor."¹⁵ Title X-funded clinics are the only providers of family planning

effect whenever a minor must involve her parents in her reproductive decision. See Brenda D. Hofman, *The Squeal Rule: Statutory Resolution and Constitutional Implications—Burdening the Minor's Rights of Privacy*, 1984 DUKE L. J. 1325, 1343-44 (discussing the difference between parental notification and parental consent requirements, and noting that "because contraception implies a continuing pattern of activity which may be subject to parental restriction beyond the initial visit to the clinic, notification in the context of contraception more closely resembles the kind of deterrence to parental approval that consent provisions mandate"); see also Stanley K. Henshaw, *The Impact of Requirements for Parental Consent on Minors' Abortions in Mississippi*, 27 FAM. PLAN. PERSP. 120, 122 (1995) (comparing respective effects on state teenage abortion statistics of a Mississippi consent statute and a Minnesota notification statute, including increased out-of-state and second-trimester abortions).

13. Hofman, *supra* note 12, at 1342. In her discussion, Hofman notes that "[a]ccording to the courts, statistical evidence and logic indicated that such intrusive notification requirements [for contraception] would deter adolescents from using Title X clinics," and that

[m]ost adolescents denied confidential access to Title X services would be unable to obtain adequate contraceptive care from alternative sources because of the prohibitively high cost of obtaining prescription contraceptives from a private physician[] and because nonprescription contraceptives which may be obtained relatively inexpensively from a drugstore are, as a practical matter, 'significantly less effective than prescription contraceptives.'

Id. at 1332-33, 1332-33 n.46-48 (citations omitted). Hofman also cites a 1980 study on the deterrent effects of requiring parental notification for contraception, supporting the notion that such deterrence would result not in abstinence but in less effective contraceptive methods:

When 1211 teenagers were surveyed concerning their likely reaction to such mandatory notification requirements, 23% responded that they would stop attending the clinics. . . . When 641,000 sexually active teenagers were asked what alternatives they would resort to if effective contraceptives became unavailable, 87,000 said they would 'switch to nonprescription methods, including withdrawal and rhythm, which have been shown to have relatively high failure rates,' and another 26,000 said that they would continue to be sexually active without using any method.

Id. at 1357 (citing Aida Torres et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284, 287, 290, 291 (1980)).

14. Cf. Robert Wm. Blum et al., *Factors Associated with the Use of Court Bypass for Minors to Obtain Abortions*, 22 FAM. PLAN. PERSP. 158, 160 (1990) (noting, under a Minnesota abortion law requiring two-parent notification, the many factors, including age and economic status, influencing a teen's decision not to notify one or both parents and instead use the judicial bypass option.)
15. Planned Parenthood Federation of America, *Fact Sheet, America's Family Planning Program: Title X* (visited Jan. 26, 2000) <http://www.plannedparenthood.org/library/FAMILY_PLANNINGISSUES/TitleX_fact.html>. I do not mean to conflate Title X funding with all federal funding for contraception. Indeed, while Title X was the original source of federal funding for adolescent contraceptive services, in recent years numerous federal laws have created other sources of funding, including Title XX and Title IVA. For a description of these, see generally LEIGHTON KU, HENRY J. KAISER FAMILY FOUNDATION, URBAN INST. AND CHILD TRENDS, INC., FINANCING FAMILY PLANNING SERVICES: PUBLICLY SUPPORTED FAMILY PLANNING IN THE UNITED

services for approximately 80% of the women who use them.¹⁶ A teenage woman who is sexually active but does not use contraceptives has a 90% chance of becoming pregnant within one year of such activity,¹⁷ and low-income teens “account for 73% of women aged 15-19 who get pregnant, even though they make up only 38% of all women in that age group.”¹⁸

Most notably, as Title X applies to teenagers, studies showed that 1,815,370 women in the United States aged thirteen to nineteen were served by publicly funded contraception in one year,¹⁹ and that publicly funded family planning services are estimated to prevent 385,800 unintended pregnancies to teenage women between the ages of fifteen and nineteen annually, that would otherwise result in 154,700 births and 183,300 abortions.²⁰ A full analysis of the impact of a parental notification requirement for publicly funded contraception is beyond the scope of this article. Assuming that the results of such a requirement are not desirable, this article focuses on a legal analysis of the likelihood that such a requirement may pass through the legislature and be upheld by the courts in the future.

The House of Representatives’ passage of the Parental Notification Act of 1998 was a symbol of the change that has occurred in the legislative and judicial vision of adolescent privacy rights since the passage of Title X in 1970. When viewed broadly, the path to the 1998 Act began twenty years ago, in 1978, when a similar parental notification amendment was proposed and defeated in the House as clearly contrary to the original congressional intent behind Title X—preventing teenage pregnancy.²¹ A few years later, in 1981, Congress passed an amendment to Title X, directing funded entities to “encourage family participation” in the services they provided,²² which the Department of Health and Human Services (“HHS”) attempted to interpret as authorizing the imposition of a parental notification requirement. Known as the “squeal rule” by its op-

STATES (1993). I contend, however, that if a parental notification requirement could be upheld for Title X funding, all other sources of federal funding for contraception would be susceptible to the same analysis and requirements.

16. See *Fact Sheet, America's Family Planning Program*, *supra* note 15 (citing Lisa Kaeser et al., *Title X at 25: Balancing National Family Planning Needs with State Flexibility*, Alan Guttmacher Institute (1996)).
17. See Alan Guttmacher Institute, *Facts in Brief, Teen Sex and Pregnancy* (visited Jan. 1, 2000) <<http://www.agi-usa.org/pubs/ib5.html>> (citation omitted).
18. Alan Guttmacher Institute, *Issues in Brief, Teenage Pregnancy and the Welfare Reform Debate* (visited Jan. 27, 2000) <<http://www.agi-usa.org/pubs/ib5.html>>.
19. See Alan Guttmacher Institute, *Issues in Brief, Contraception Counts: State-by-State Information* (last modified Aug. 1999) <<http://www.agi-usa.org/pubs/ib22.html>>.
20. See Planned Parenthood Federation of America, *supra* note 15 (citing Jacqueline Forrest & Renee Samara, *Impact of Publicly Funded Contraceptive Services on Unintended Pregnancies and Implications for Medicaid Expenditures*, 28 FAM. PLAN. PERSP. 188 (1996)).
21. See 124 CONG. REC. H37,044 (1978); *Planned Parenthood v. Schweiker*, 559 F. Supp. 658, 668 (D.C. Dist. 1983) (noting how confidentiality is essential to the success of family planning clinics).
22. See 42 U.S.C. § 300(a) (1998), Hist. & Stat. Note 1981.

ponents, this HHS interpretive regulation mandating parental notification was struck down by the federal courts as similarly contravening the congressional intent behind Title X.²³

As the courts recognized, while Congress agreed that reducing teenage pregnancy was an important end of Title X,²⁴ the disagreement over the means to that end became apparent in the wake of these early battles over parental notification for contraception. In the 1970s, largely due to a perceived "epidemic" of teenage pregnancy, Congress passed and expanded Title X to provide lower-income women and adolescents access to contraception.²⁵ In the late 1970s and early 1980s a tension developed between the liberal means for reducing teenage pregnancy—providing access to contraception and information—and the conservative means to the same end—encouraging abstinence and parental involvement.²⁶ This tension resulted in a confused dual governmental strategy to reduce teenage pregnancy in the 1980s: the legislature attempted both to provide teens access to contraception and to involve parents in their children's sexual decisions; the court attempted to balance the privacy rights of minors with the authoritarian interests of parents and the state.²⁷ Then, throughout the 1990s, the conservative strategy of reducing teenage sexual activity by involving parents gained preeminence, as evidenced by legislative and judicial movements toward increasing parental involvement in teenage pregnancy and abortion.²⁸

In addition to specific laws relating to contraception and abortion for minors, during the mid-1980s, conservatives began a separate and parallel legal approach also designed to reduce teenage pregnancy by reducing teenage sexual activity: criminalizing consensual adolescent sexual behavior through the laws governing child abuse and statutory rape.²⁹ State governments attempted to treat consensual sexual activity among young adolescents as child sexual abuse, regardless of the age of the sexual partner or the voluntariness of the behavior.³⁰ Then, in the 1990s, state

23. See *Planned Parenthood v. Heckler*, 712 F.2d 650, 656-63 (D.C. Cir. 1983); *New York v. Heckler*, 719 F.2d 1191, 1196-97 (2d Cir. 1983); Patricia Olah, *The "Squeal Rule" and a Minor's Right to Privacy*, 12 HOFSTRA L. REV. 497, 497-98 (1984).

24. See *supra* note 21 and accompanying text; *infra* Part I.C.

25. See KRISTIN LUKER, *DUBIOUS CONCEPTIONS, THE POLITICS OF TEENAGE PREGNANCY* 59-64, 81 (1996); H.R. REP. NO. 91-1472, Pub. L. No. 91-572 (1970), reprinted in 1970 U.S.C.C.A.N. 5068.

26. See LUKER, *supra* note 25, at 76; Megan Weinstein, *The Teenage Pregnancy "Problem": Welfare Reform and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 13 BERKELEY WOMEN'S L.J. 117, 121 (1998).

27. See FRANKLIN E. ZMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* vii-viii, 7-8 (1982); Linda Himmelfarb, *The "Squeal Rule" Revisited, Doe v. Blum*, 51 BROOK. L. REV. 704, 705 (1985); Shelby Hargrave Cook, *The Unresolved Crisis: The Federal Government's Search for an Adolescent Pregnancy Policy*, 49, 88-91, 111-12 (1986) (unpublished dissertation, University of Maryland, 1986) (on file at Univ. Microfilms Int'l, Ann Arbor, MI).

28. See *infra* Part II.

29. See *infra* Part III.

30. See, e.g., *Planned Parenthood v. Van de Kamp*, 226 Cal. Rptr. 361, 363 (Ct. App. 1986) (discussing the Attorney General's opinion that California's Child Abuse Reporting law should apply

prosecutors dusted off statutory rape laws that had become all but obsolete and increased the prosecution of statutory rape in an attempt to reduce unwed teenage pregnancy and welfare dependence, while simultaneously increasing paternal child support.³¹

With its provisions for both parental notification and enforced compliance with state child sexual abuse and rape reporting laws, the Parental Notification Act of 1998 represents the culmination and merger of these two conservative strategies. As this article will argue, nearly two decades after Congress rejected a parental notification amendment to Title X and the courts struck down the HHS “squeal rule,” the sponsors of the 1998 Act are attempting to pass a parental notification amendment to Title X that will succeed in Congress while satisfying the concerns of federal courts. Given the shift in the legislative vision of how to reduce teenage pregnancy and twenty years of court precedent increasingly restricting minors’ independent access to abortion, if Congress were to pass an amendment to Title X similar to the 1998 Act, such an amendment would likely be upheld in the courts. The sponsors of the Act shaped its statutory language to mirror the numerous Supreme Court opinions upholding parental consent laws for abortion, crafting a model for a future parental notification requirement that would likely survive constitutional challenge.³²

This article will analyze the possibility that a parental notification requirement for minors seeking publicly funded contraception may soon become a reality. Part I of this article will explore the history of Title X and some of its amendments, the HHS interpretive “squeal rule,” and the federal courts’ rejection of the HHS rule based on the congressional intent behind Title X. Part II will focus on the Parental Notification Act of 1998 and its likelihood for success against a constitutional challenge, based on an analysis of precedent on parental consent requirements for contraception and abortion. Finally, Part III will discuss the change in the legislative and judicial vision of adolescent privacy rights over time, from a more expansive notion of adolescents as individuals with rights to a more restrictive notion of adolescents as children subject to their parents’ rights. The article will conclude by touching upon some other recent trends that reveal this narrowing view of minors’ privacy rights, including an increase in statutory rape prosecution during the last decade.

to all sexual activity, even if voluntary, while ultimately holding that the law did not impose such a requirement).

31. See Weinstein, *supra* note 26, at 124, 127, 136-39.

32. See *infra* Part II.B.

I. PAST EFFORTS: TITLE X AND THE "SQUEAL RULE"

A. Early History of Title X: Legislating Access to Contraception for Minors

1. Congressional Intent Behind Title X, 1970-1978

In 1970, Congress amended the Public Health Service Act of 1944 by adding Title X, a subchapter entitled Population Research and Voluntary Family Planning Programs.³³ The congressional purpose behind Title X was, in part, to "make comprehensive voluntary family planning services readily available to *all persons* desiring such services" and to "make readily available information on family planning."³⁴ Title X established federal grants to public or nonprofit organizations to provide family planning services and information to the public, particularly lower-income women and families.³⁵ The law was designed to enhance significantly "the provision of services to all those who want them but cannot afford them."³⁶ While the statute did not specifically mention serving adolescents, programs funded by Title X became a major provider of family planning services for teens. In 1970, the year the statute was passed, approximately 380,000 adolescent girls visited Title X clinics.³⁷ In fact, as the courts later found, because of the statute's broad and all-inclusive language, "Title X grantees . . . served the teenage population from the inception of the program."³⁸

By the mid 1970s, politicians and policymakers believed there was a full-fledged and steadily growing "epidemic" of teenage sexual activity and pregnancy.³⁹ This belief was attributable in part to a 1976 report by the Alan Guttmacher Institute, a reproductive policy research organization, which estimated that in the United States, eleven of the twenty-one million teenagers between the ages of fifteen and nineteen, and 1.6 of the eight million thirteen and fourteen year-olds had engaged in sexual inter-

33. See Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 1970 U.S.C.C.A.N. 5068; see also 42 U.S.C. §300 (1998).

34. H.R. REP. No. 91-1472, Pub. L. No. 91-572 (1970), reprinted in 1970 U.S.C.C.A.N. 5075-76 (emphasis added).

35. See Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 1970 U.S.C.C.A.N. 5069-70; see also 42 U.S.C. §300(a) (1998).

36. H.R. REP. No. 91-1472, Pub. L. No. 91-572 (1970), reprinted in 1970 U.S.C.C.A.N. 5075.

37. See Cook, *supra* note 27, at 9-10 (citing Alan Guttmacher Institute, *Data Files from National Reporting System for Family Planning Services*, NCHS AND AGI SURVEYS OF FAMILY PLANNING AGENCIES (1970)).

38. *Planned Parenthood v. Heckler*, 712 F.2d. 650, 652 (D.C. Cir. 1983).

39. See LUKER, *supra* note 25, at 60-64, 72, 81; see also Cook, *supra* note 27, at 10-12, 17-21, 36.

course.⁴⁰ This sexual activity resulted in an estimated one million pregnancies among fifteen to nineteen year-olds, and 30,000 pregnancies among girls under fifteen annually.⁴¹ While there had not been a significant jump in the rate of teenage sexual activity or teenage pregnancy, many policymakers found the mere quantification of existing statistics shocking.⁴² Patterns of teenage pregnancy among Caucasian teens had begun to mirror those of minority teens,⁴³ a reality which also may have served to catch the attention of politicians.

In addition to quantifying the scope of the problem, the Guttmacher report demonstrated the crucial role that Title X played in providing contraceptive services to teenagers. By 1975, the number of teenagers served by family planning clinics had grown to 1.1 million annually,⁴⁴ teenagers comprised thirty percent of Title X clinics' caseload nationally,⁴⁵ and Title X clinics had become the largest provider of health services to teens in the United States.⁴⁶ Yet the report also revealed that six years after the creation of Title X, "[t]hree in 10 teens said access to contraceptives was a 'major problem,'" and one of the main reasons teenagers gave for not using contraception was that "contraceptives were not available when they needed them."⁴⁷

In 1978, Congress clarified its intention to provide family planning services to adolescents under Title X by amending the law to include specifically "services for adolescents" among the "broad range of . . . family planning methods and services" its projects offered.⁴⁸ In addition to the plain language of the statutory amendment, the Senate Report on refinancing and amending Title X revealed Congress' intent to serve adolescents, stating that Title X clinics had been "particularly effective in meeting the needs of . . . young persons under 20 years of age."⁴⁹ The Senate Report also reflects an understanding of the importance of the

40. See ALAN GUTTMACHER INSTITUTE, 11 MILLION TEENAGERS, WHAT CAN BE DONE ABOUT THE EPIDEMIC OF ADOLESCENT PREGNANCIES IN THE UNITED STATES 9-10 (1976) [hereinafter GUTTMACHER, 11 MILLION TEENAGERS].

41. See *id.* at 10.

42. See LUKER, *supra* note 25, at 81; see also JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 96-100 (2nd ed. 1995).

43. The Guttmacher report reflects this attitude:

Adolescent sexual activity has been traditionally portrayed as principally affecting minorities and the poor; but recent evidence suggests that teenagers from higher income and nonminority groups are now beginning sexual intercourse at earlier ages, leading to higher rates of sexual activity and greater risk of unwanted pregnancy for teenagers generally.

GUTTMACHER, 11 MILLION TEENAGERS, *supra* note 40, at 9.

44. See *id.* at 44; Cook, *supra* note 27, at 20 (citing Alan Guttmacher Institute, *Final Report to the Office of Population Affairs* (1976)).

45. See GUTTMACHER, 11 MILLION TEENAGERS, *supra* note 40, at 44.

46. See *id.*

47. *Id.* at 30.

48. See 42 U.S.C. § 300(a), Hist. & Stat. Note 1978.

49. S. REP. NO. 95-102, Pub. L. No. 95-83, at 26 (1977), 1977 U.S.C.C.A.N. 549, 570.

confidentiality of contraceptive services to teenagers, stating that federal agencies should recognize the preference of "the teenage target group" for using Title X-funded clinics as its source of contraceptive information and services, attributable in part to "the greater degree of teenage confidence in the confidentiality which can be assured by a family planning clinic."⁵⁰

The Congressional Record of debate on the 1978 amendment similarly reflects these intentions. In presenting the bill to the Senate, Senator Alan Cranston (D-Calif.), Chairman of the Subcommittee on Child and Human Development, expressed concern over the unmet need of "an estimated 2 million sexually active teenagers who do not have ready access to preventive family planning services."⁵¹ As Senator Cranston explained, among the major goals of the amendment, was "to place new emphasis on the provision of family planning services to sexually active adolescents."⁵² In addition, because of the great success of Title X clinics in reaching teens, Senator Cranston believed "common-sense dictates that these clinics should form the cornerstone of Federal programs to assist sexually active adolescents to avoid unwanted pregnancies."⁵³ With the adoption of this amendment, the liberal strategy of reducing teenage pregnancy through increasing teens' access to contraception and information was set firmly in place.

2. The 1978 Adolescent Health Services and Pregnancy Prevention and Care Act

In addition to passing an amendment specifying the provision of family planning services to adolescents within Title X itself, in the same year Congress agreed to add a separate, additional title to the Public Health Service Act, focusing entirely on adolescent pregnancies.⁵⁴ This legislation, entitled the Adolescent Health Services and Pregnancy Prevention and Care Act (AHSPPCA), was sponsored by Senator Edward Kennedy (D-Mass.),⁵⁵ and further implemented liberal strategies of contraceptive access and information through various projects focused on serving pregnant teens.⁵⁶ Among the purposes of the AHSPPCA was "to expand and improve the availability of, and access to, needed comprehen-

50. *Id.* See also Cook, *supra* note 27, at 27-28.

51. 124 CONG. REC. S16,446 (1978). See also Heckler, 712 F.2d at 652 (providing background information concerning Congress' desire to satisfy the family planning needs of sexually active teenagers).

52. 124 CONG. REC. S16,447 (1978).

53. *Id.*

54. See Adolescent Health Services Pregnancy Prevention and Care Act, Pub. L. No. 95-626, § 601(a)(7), 1978 U.S.C.A.N. (92 Stat.) 3595.

55. See LUKER, *supra* note 25, at 72-75.

56. See Cook, *supra* note 27, at 29-36.

sive community services which assist in preventing unwanted initial and repeat pregnancies among adolescents.”⁵⁷

However, the AHSPPCA was a compromise among legislators,⁵⁸ and, as such, indicates the beginning of conservative strategies to reduce teenage pregnancy by discouraging sexual activity through parental involvement. The projects established by the AHSPPCA limited services available to nonpregnant adolescents to “counseling and referral”⁵⁹—an attempt to reduce the provision of contraceptives—but with “supplemental services where such services are not adequate or not available . . . which are essential to the care of pregnant adolescents and to the prevention of adolescent pregnancy.”⁶⁰ In addition, for the projects to receive grant money, they were required to ensure that minors seeking services were “encouraged, whenever feasible, to consult with their parents with respect to such services.”⁶¹ This clause was part of the AHSPPCA, not Title X, and it sought to encourage, not mandate, pregnant teens to involve their parents in services. Notably, however, with this clause, Congress expressly raised the idea of involving parents in family planning legislation, in direct contrast to Congress’ previous recognition in its 1978 expansion of Title X that family planning services required confidentiality to be effective for teens.⁶²

B. Later History of Title X: Mandating Parental Involvement

1. The 1978 Volkmer Amendment

Also in the same year, a more overt attempt to implement conservative strategies of parental involvement within Title X itself began developing in Congress. While Congress amended Title X to extend to adolescents specifically and passed the AHSPPCA, Representative Harold Volkmer (D-Mo.) unsuccessfully proposed the first parental notification amendment to Title X.⁶³ As proposed, the Volkmer Amendment would have added a new subsection to Title X, mandating that no organization or project that directly or indirectly received Title X funds could provide

57. Adolescent Health Services Pregnancy Prevention and Care Act, Pub. L. No. 95-626, § 601(b)(1), 1978 U.S.C.C.A.N. (92 Stat.) 3595.

58. See Cook, *supra* note 27, at 29-36.

59. Adolescent Health Services Pregnancy Prevention and Care Act, Pub. L. No. 95-626, §§ 602(4)(B), 604(a)(3), 1978 U.S.C.C.A.N. (92 Stat.) 3596-97.

60. *Id.*

61. Adolescent Health Services Pregnancy Prevention and Care Act, Pub. L. No. 95-626, § 606(a)(21), 1978 U.S.C.C.A.N. (92 Stat.) 3600.

62. See *supra* note 50 and accompanying text.

63. See 124 CONG. REC. H37,044 (1978); *Planned Parenthood v. Heckler*, 712 F.2d 650, 660 (D.C.Cir. 1983) (describing the House debate over the Volkmer Amendment).

prescription contraceptive drugs or devices to "an unemancipated *child* under the age of 16" without first notifying the parent or guardian "of such child."⁶⁴ In presenting his amendment to Congress, Representative Volkmer argued from a parents' rights perspective, claiming that "a parent does have a constitutional right to be notified; that a parent, as the head of a family, is an underlying part of our society and our structure."⁶⁵ Moreover, he argued, parents' rights are "firmly established in the traditions and laws of this Nation," and were "being invaded by . . . family planning."⁶⁶ Instead of viewing Title X as protecting and promoting the rights of adolescents to procreative privacy, Volkmer characterized Title X as a threat to the authoritative power of parents.

The majority of Congress disagreed. Fearing that mandated parental notification would not bolster parental guidance and authority but instead deter adolescents from going to the clinics at all, resulting in more teenage pregnancies and soaring welfare costs,⁶⁷ Congress rejected the amendment by a wide margin.⁶⁸

2. The 1981 Adolescent Family Life Act

While the Volkmer Amendment ultimately failed, three years later conservative strategies began to take hold of the legislature when the House passed a bill that replaced Senator Kennedy's 1978 Adolescent Health Services and Pregnancy Prevention and Care Act.⁶⁹ Entitled the Adolescent Family Life Act (AFLA), the legislation revised the terms of Kennedy's teenage pregnancy projects to mandate parental involvement, involve religious groups, discourage abortion, and encourage adoption and abstinence.⁷⁰ Known to its opponents as the "Chastity Act," the controversial act passed through Congress as part of a compromise that if Democrats supported it, Republicans would support other, more broad family planning initiatives.⁷¹ This compromise and the success of the AFLA in Congress marked the beginning of the rise of conservative strategies to reduce teenage pregnancy, fostered by newly elected President Ronald Reagan.⁷²

The text of the AFLA reveals a major step toward increasing parental involvement in federal family planning programs by mandating paren-

64. 124 CONG. REC. H37,044 (1978) (emphasis added).

65. *Id.*

66. *Id.*

67. *See, e.g.*, 124 CONG. REC. H37, 044 (1978) (statement of Representative Paul D. Rogers (D-Fla.)).

68. *See* 124 CONG. REC. H37,044 (1978) (vote of 45 to 10).

69. *See* LUKER, *supra* note 25, at 78.

70. *See* 1 FEDERAL ABORTION POLITICS: A DOCUMENTARY HISTORY, CONGRESSIONAL ACTION pt. 1, 149 (Neal Devins with Wendy L. Watson, eds., 1995) [hereinafter CONGRESSIONAL ACTION].

71. *See id.*

72. *See* LUKER, *supra* note 25, at 77-78.

tal involvement in a teenage pregnancy project, thus opening the door to the possibility of establishing similar mandates in other family planning programs in the future. Like the AHSPPCA it revised, the AFLA was an experimental program for pregnant teens and did not govern general contraceptive services to all teens.⁷³ Yet, unlike the AHSPPCA, the AFLA established a mandatory parental notification requirement within a federally funded family planning program.⁷⁴ In its findings and purposes, the AFLA states that “since the family is the basic social unit in which the values and attitudes of adolescents concerning sexuality and pregnancy are formed, programs designed to deal with issues of sexuality and pregnancy will be successful to the extent that such programs encourage and sustain the role of the family.”⁷⁵ To receive grants under the AFLA, projects were required to describe how they would “involve families of adolescents in a manner which will maximize the role of the family in the solution of problems relating to the parenthood or pregnancy of the adolescent,” as well as involve religious and private sector organizations.⁷⁶

The AFLA’s parental notification requirement was more binding than the AHSPPCA’s strong encouragement to involve parents: project grantees were required to “notify the parents or guardians of any unemancipated minor requesting services . . . and . . . obtain the permission of such parents or guardians,” unless the minor proved she was the victim of incest, that notifying her parents would result in physical injury, or that her parents were “attempting to compel [her] to have an abortion.”⁷⁷ Ironically, conservatives claimed that where parents were not physically or sexually abusive, their input was essential to all family planning services for teens, except when a particular teen’s parents encouraged abortion, in which case parental input was not required because it was seen as a threat to family structure.⁷⁸

Instead of the parents’ rights perspective of the Volkmer Amendment, the sponsors of the AFLA argued more subtly that religion and parental involvement would reduce teenage pregnancy, and that the family unit was undermined when adolescents were allowed to make family planning decisions by themselves. The House Report on the AFLA contended that the freedom given to “sexually precocious young people” under the AHSPPCA may have increased rates of abortion and teenage pregnancy,

73. See Adolescent Family Life Act, Pub. L. No. 97-35, §§ 2002(a)(2)(A)–(B), (a)(7)–(8), 95 Stat. 580-581 (1981), reprinted in CONGRESSIONAL ACTION, *supra* note 70, at 256-58.

74. See *id.* at §§ 2006(a)(22)(A)–(C), 95 Stat. 587-88 (1981), reprinted in CONGRESSIONAL ACTION, *supra* note 70, at 263-264.

75. *Id.* at § 2001(a)(10)(A), 95 Stat. 579 (1981), reprinted in CONGRESSIONAL ACTION, *supra* note 70, at 255.

76. See *id.* at §§ 2006(a)(21)(A)–(B), 95 Stat. 587 (1981), reprinted in CONGRESSIONAL ACTION, *supra* note 70, at 263.

77. See *id.* at §§ 2006(a)(22)(A)–(C), 95 Stat. 587-88 (1981), reprinted in CONGRESSIONAL ACTION, *supra* note 70, at 263-264.

78. See *id.*

while "strik[ing] at the family, the basic unit in society."⁷⁹ Because the reporting committee believed that many societal forces "come between the parent and child on issues involving morality, values and interpersonal relationship,"⁸⁰ it recommended the AFLA revisions to the AHSPPCA to ensure formal involvement of parents in services provided to teens.⁸¹ While Congress did not go as far as claiming that parents' rights were trammled by the procreative privacy of adolescents, it laid the groundwork for such an argument by "recogniz[ing] the natural and legitimate interest that parents have in providing their children with education and care in the area of human sexuality."⁸²

3. The 1981 Family Participation Amendment and the HHS "Squeal Rule"

In the same year that Congress replaced the AHSPPCA with the AFLA, it also infused the language of Title X itself with the notion of parental involvement. Congress passed an amendment to Title X that added the requirement that, "[t]o the extent practical," recipients of grants "shall encourage family participation" in family planning services.⁸³ While, again, this amendment did not mandate parental involvement for minors receiving services under Title X, with this amendment Congress expanded the notion of parental involvement in family planning decisions beyond the experimental projects of the AFLA and AHSPPCA, to Title X itself. This intention is reflected in the Senate Report that accompanied the amendment, which stated that "while family involvement is not mandated, it is important that families participate in the activities authorized by this title as much as possible."⁸⁴ The Report also stated that it was "the intent of the Conferees" that Title X recipients encourage clients "to include their families in counseling and involve them in decisions."⁸⁵

After Congress amended Title X to "encourage family participation,"⁸⁶ the Reagan administration's Department of Health and Human

79. S. REP. NO. 97-161, at 7 (1981), *reprinted in CONGRESSIONAL ACTION*, *supra* note 70, at 275.

80. *Id.* at 8, *reprinted in CONGRESSIONAL ACTION*, *supra* note 70, at 276.

81. *See id.* at 9, *reprinted in CONGRESSIONAL ACTION*, *supra* note 70, at 277.

82. *Id.* The AFLA was challenged by civil rights and women's groups as an impermissible government establishment of religion in violation of the First Amendment Establishment Clause. The Supreme Court, in *Bowen v. Kendrick*, 487 U.S. 589 (1988), upheld the facial constitutionality of the law by a 5 to 4 vote, but remanded for the question of constitutionality as applied. The parties ultimately settled before this issue was decided. *See CONGRESSIONAL ACTION*, *supra* note 70, at 249-250.

83. *See* 42 U.S.C. § 300(a) (1998).

84. S. REP. NO. 97-208 at 799 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 1161. *See also* *Planned Parenthood v. Heckler*, 712 F.2d 650, 657 (D.C.Cir. 1983) (holding that Congress' intent was to encourage, rather than to require, family involvement).

85. S. REP. NO. 97-208, at 799 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1161.

86. *Requirements Applicable to Projects for Family Planning Services*, 47 Fed. Reg. 7699 (1981) (to be codified at 42 C.F.R. pt. 59) (proposed Dec. 21, 1981).

Services (HHS) seized the opportunity to expand conservative strategies regarding Title X by issuing regulations that interpreted the new amendment to mandate parental notification for minors seeking contraception.⁸⁷ The HHS regulations, known collectively by opponents as the “squeal rule,”⁸⁸ stated that when a Title X clinic initially provided prescription drugs or devices to an unemancipated minor, it was required to “notify the minor’s parents or guardian that they were provided within 10 working days following their provision . . . [and] verify that the notification was received.”⁸⁹ If a clinic was unable to verify that a teen’s parents received notification, it was prohibited from providing prescription contraceptive drugs or devices to that teen.⁹⁰ Mirroring the language newly applied to pregnancy projects under the AFLA, the regulations exempted a minor from notification if “the project director determines that such notification will result in physical harm to the minor by the parents or guardian,” or where the clinic provided prescription drugs to treat a sexually transmitted disease.⁹¹ In addition, every Title X clinic was required to keep records on the parental notifications, verifications, and any exemptions to the rule it made and why, which the Secretary could request to review at any time.⁹² The regulations also provided that, in addition to federal guidelines, if a state law required parental notification or consent, Title X clinics must comply with all such laws.⁹³

In justifying these interpretive regulations, HHS was more explicit in its belief in the rationale of parents’ rights, previously articulated by Representative Volkmer, than Congress had been in explaining the parental notification requirement it included in the AFLA. As the introduction to the HHS regulations explained, “[p]articularly where prescription drugs or . . . devices are being considered, parents have a direct and legitimate concern in participating in a decision that may have long-term health consequences for the adolescent.”⁹⁴ Further, in promulgating regulations that required parents to be notified after, instead of before, a minor receives

87. *See id.* at 7699-7701; LUKER, *supra* note 25, at 77-79.

88. *See* LUKER, *supra* note 25, at 78.

89. Requirements Applicable to Projects for Family Planning Services, 47 Fed. Reg. 7699, 7701 (1982) (to be codified at 42 C.F.R. pt. 59) (proposed Dec. 21, 1981).

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.* The HHS regulations also included a provision that this article will not address, which redefined the income eligibility for receiving Title X services so that a minor’s income was determined from both her and her parents’ resources, where it had previously been calculated from her resources alone. Thus while the majority of minors had been eligible for federally funded services under Title X, this amendment disqualified any minor whose *parents* earned more than the maximum income eligible for Title X-funded services. The Secretary of HHS justified this provision because the previous eligibility calculation “indirectly discourage[d] family involvement in the receipt of services by certain minors,” and was, therefore, “inconsistent” with the new amendment encouraging family participation. *See id.* at 7700.

94. *Id.* at 7699-7700.

contraception, HHS reasoned that it "establishes a reasonable balance between competing concerns" of adolescents and their parents.⁹⁵ Yet in reality, this "reasonable" balance still privileged parental interests over adolescent privacy rights by ignoring the chilling effect of a parental notification requirement on adolescents, who would likely be deterred from seeking contraception if their parents would be involved at any time. Finally, in regards to the provision that Title X clinics must comply with state laws of parental notification, HHS explained that so reconciling state and federal law was appropriate because "[t]raditionally, this has been an area which States, in their role as *parens patriae*, have regulated."⁹⁶

C. Early Federal Court Decisions: The Preeminence of Congressional Intent

The federal courts' first pronouncement regarding a parental notification requirement for minors to obtain contraception came in response to the HHS regulations. In *Planned Parenthood v. Schweiker*,⁹⁷ the District Court for the District of Columbia held that Title X recipients and minors seeking contraception would suffer irreparable injury as a result of the regulations.⁹⁸ Finding that the statutory language of the 1981 amendment provided "no grant of authority by Congress that reasonably contemplates the [HHS] regulations,"⁹⁹ the court granted summary judgment in favor of the plaintiffs, enjoining enforcement of the regulations that were "invalid as clearly in excess of statutory authority."¹⁰⁰

On appeal, in *Planned Parenthood v. Heckler*,¹⁰¹ the U.S. Court of Appeals for the D.C. Circuit agreed, holding that its own careful analysis of Title X and the Act's legislative history "make[] it clear that these regulations not only violate Congress' specific intent as to the issue of parental notification, but also undermine the fundamental purposes of the Title X program."¹⁰² First, the court addressed the notification and verification requirements imposed upon Title X grantees who provided contraception to unemancipated minors.¹⁰³ The court focused on the issue of congressional intent to impose such a federal regulation, highlighting the "permissive and non-obligatory" nature of the language in the 1981 fam-

95. *Id.* at 7700.

96. *Id.*

97. 559 F. Supp. 658 (1983).

98. *See id.* at 666.

99. *Id.* at 667.

100. *Id.* at 670.

101. 712 F.2d 650 (D.C.Cir. 1983). The name of the case changed because, in 1980, Margaret Heckler replaced Richard Schweiker as the Secretary of HHS.

102. *Id.* at 656.

103. *See id.* at 654-61.

ily participation amendment.¹⁰⁴ The court also looked to the Committee Report for the legislative history of the amendment, which stated clearly that “family involvement is not mandated,” but only encouraged as much as possible.¹⁰⁵ The court found this to be a “crystal-clear and unequivocal expression of congressional intent” that “Congress most definitely did not intend to mandate family involvement.”¹⁰⁶ The court also cited the House rejection of the 1978 Volkmer Amendment,¹⁰⁷ and held that the proposed construction of the 1981 amendment by HHS undermined the original congressional purpose behind Title X.¹⁰⁸

Next, the court considered the HHS regulation that Title X grantees must comply with any state parental notification or consent requirements for minors seeking contraception.¹⁰⁹ The Court found this to be “an invalid delegation of authority to the states” because, “[i]n the absence of Congress’ express authorization to HHS to in turn empower the states to set eligibility criteria,” the Supremacy Clause of the U.S. Constitution forbids allowing states to add their own conflicting requirements to federal programs.¹¹⁰ The court affirmed the District Court’s injunction, and struck down the regulations as exceeding the bounds of statutory authority and contravening congressional intent.¹¹¹ Shortly thereafter, in *New York v. Heckler*,¹¹² the Second Circuit reached a similar conclusion, permanently enjoining the 1981 HHS parental notification regulation as invalid for similarly situated plaintiffs in New York state.¹¹³

For several years after striking down the HHS regulations, federal courts invalidated state laws requiring parental notification for minors to obtain contraception from Title X-funded clinics based on the logic of *Planned Parenthood v. Heckler*: a parental notification law contravened the congressional intent behind Title X, and the Supremacy Clause dictated that states could not impose their own requirements on federal programs.¹¹⁴ In 1983, in *Planned Parenthood Association of Utah v. Matheson*,¹¹⁵ the District Court for the Central Division of Utah held that a Utah parental notification law “would do major damage to the fed-

104. *See id.* at 656.

105. *See id.* at 657 (quoting Conference Committee Report).

106. *Id.* at 657.

107. *See id.* at 660.

108. *See id.* at 661.

109. *See id.* at 663-64.

110. *See id.* at 663.

111. *See id.* at 665.

112. 719 F.2d 1191 (2d. Cir. 1983) (affirming *New York v. Schweiker*, 557 F. Supp. 354 (1983)).

113. *See id.* Note, however, that the Second Circuit did not enjoin the HHS regulation that enforced compliance with state parental consent laws. As neither New York nor neighboring states had a parental notification requirement, the court held that the plaintiffs had no standing to challenge this provision. *See id.* at 1196.

114. *See Planned Parenthood v. Heckler*, 712 F.2d at 657, 661, 663-64.

115. 582 F. Supp. 1001 (1983).

eral interests created by Title X by preventing Title X grantees from providing confidential services to eligible minors on request."¹¹⁶ Moreover, the court held that when there is a conflict between federal legislative intent behind a federal program and state legislative desires, "the Supremacy Clause dictates that the federal law prevail."¹¹⁷ Likewise, in 1985, in *Does v. Utah State Department of Health*,¹¹⁸ the Tenth Circuit upheld an injunction against a state health department, preventing it from enforcing a parental consent requirement passed in the state as an impermissible additional requirement on federal Title X funds.

In each of these cases, the court based its decision on its understanding of the congressional intent behind Title X. In *Planned Parenthood v. Heckler* and *New York v. Heckler*, the major issue was whether Congress intended to mandate parental involvement and whether it delegated such power to the Secretary of HHS.¹¹⁹ In *Planned Parenthood Association of Utah v. Matheson* and *Does v. Utah*, the federal courts began to address the larger constitutional issues raised by any parental notification requirement for minors to obtain contraception.¹²⁰ Yet because the state requirements involved in these two cases posed additional state regulations on a federally funded program, the decisive factor remained the congressional intent behind Title X.¹²¹ Based primarily on the belief that Congress did not intend to impose a parental notification requirement on minors' access to contraceptive services funded by Title X, the courts struck down the HHS regulations and the Utah state law, leaving the larger question of the constitutionality of such a burden on the minors' reproductive privacy rights unresolved.¹²²

II. PRESENT EFFORTS: THE PARENTAL NOTIFICATION ACT OF 1998

A. The Growing Support for and Provisions of the Act

The movement to legislate a parental notification requirement for Title X clinics that provide contraception to minors was revived in 1996, when sponsors of the 1998 Parental Notification Act proposed a similar

116. *Id.* at 1006. The court also discussed constitutional challenges to a parental notification requirement that are discussed *infra* Part II.B.2.

117. *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. at 1006.

118. 776 F.2d 253 (10th Cir. 1985).

119. *See supra* notes 102-112 and accompanying text.

120. *See infra* Part II.B.2.

121. *See Does v. Utah*, 776 F.2d at 254; *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. at 1006.

122. *See Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. at 1009.

provision.¹²³ In 1996, the proposed amendment did not pass through its committee.¹²⁴ In 1997, sponsors again proposed a parental notification amendment to Title X.¹²⁵ This time, the amendment passed through its congressional committee, but was defeated in the House of Representatives.¹²⁶ In February of 1998, the provisions of the Act were raised in two separate bills, and then ultimately combined into the Parental Notification Act in October of 1998.¹²⁷ After overcoming a challenge from a compromise bill that would have required abstinence counseling and more rigorous reporting of sexual abuse and statutory rape, but would not have mandated parental notification,¹²⁸ the Parental Notification Act of 1998 succeeded in passing through the House of Representatives.¹²⁹

After this 1998 victory, fearing a presidential veto, its sponsors set the Act aside.¹³⁰ Still, they “expect[ed] the bill to surface again [the] next year in some form, with more support.”¹³¹ Noting that the bill “gets more support each time it comes up,” the spokesman for one of the bill’s sponsors stated in a press release that, in 1999, sponsors would “start from the perspective that we had a House vote and it passed.”¹³² In 1999, another attempt to pass a parental notification requirement for contraception was dropped in exchange for a fifty million dollar increase in abstinence education funding, yet supporters of such a requirement show no signs of abandoning their efforts in the future.¹³³

Because a future parental notification requirement for publicly funded contraception would likely contain provisions similar to those of the Parental Notification Act of 1998, it is useful to analyze the constitutionality of the provisions of the 1998 Act. As it was originally drafted, the Act contains four major provisions¹³⁴ that borrow language from successful efforts to mandate parental notification for abortion, and from welfare reform laws.¹³⁵ First, the Act holds that no entity receiving Title

123. See Stanek, *supra* note 6.

124. See *id.*

125. See *id.*

126. See *id.*

127. See *id.*

128. See *Politics & Policy Title X: Controversial Contraceptive Provision Passes*, AMERICAN POLITICAL NETWORK, AMERICAN HEALTH LINE, Oct. 9, 1998, at 5.

129. See Stanek, *supra* note 6.

130. See *id.*

131. *Id.*

132. *Id.* (citing spokesman for Representative Donald Manzullo (R-Ill.)).

133. See *supra* notes 7-11, 21 and accompanying text. Whether a parental notification requirement like the 1998 Act passes and becomes law is a political question that depends upon future elections (i.e., which party wins a congressional majority and the presidency in the year 2000). Nevertheless, this article reveals a trend toward increasing parental involvement in minors’ reproductive decisions, which will likely result in a parental notification requirement for federally funded contraception at some point in the near future.

134. See H.R. 4721, 105th Cong. (1998) (visited Apr. 10, 2000) <<http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.4721:>>.

135. See *infra* note 148 and accompanying text.

X funds "shall be exempt from any State law" that requires "notification or . . . reporting of child abuse, child molestation, sexual abuse, rape or incest."¹³⁶ Second, the Act holds that no Title X funds will be provided to any family planning project if any of its providers "knowingly provides contraceptive drugs or devices to a minor," unless the provider gives "actual written notice" to a parent or guardian of the minor five business days prior to providing contraception, unless the minor is emancipated under state law, provides written consent of a parent or guardian, or a court has determined that the minor may receive contraception.¹³⁷ Third, the Act requires that Title X-funded family planning projects "expressly inform" all minors seeking their services "that abstinence is the only certain way" to avoid pregnancy, sexually transmitted diseases, and HIV.¹³⁸ The Act also mandates training clinic counselors to encourage minors to abstain from and "avoid being coerced into" sexual activity and to involve their parents in contraceptive decisions.¹³⁹ Finally, the Act authorizes the Secretary of HHS to develop and distribute training protocols for counselors, including those specific to younger teens and empowers the Secretary to "prescribe such regulations as may be necessary to effectuate" the Act.¹⁴⁰

B. Probable Court Analysis of the Act

1. Congressional Intent

If a parental notification requirement like the 1998 Act were to pass through Congress and become law, the reasoning upon which courts had based their rejection of past parental notification requirements for contraception would no longer exist. The courts would be faced with a significant change to the original congressional intent behind Title X, and it was this intent to expand access to family planning that served as the basis for the courts' decisions to strike down the HHS interpretation of the 1981 family participation amendment in *Planned Parenthood v. Heckler* and *New York v. Heckler*. In its 1983 ruling in *Planned Parenthood v. Heckler*, the D.C. Circuit Court stated that "[i]n the absence of a clearly expressed intent to the contrary, [it would] not construe the 1981 amendment in a manner which would undermine Congress' broad purposes for enacting Title X in the first place."¹⁴¹ These broad purposes included reducing

136. H.R. 4721, 105th Cong. (1998) (visited Apr. 10, 2000) <<http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.4721>>.

137. *See id.*

138. *See id.*

139. *See id.*

140. *Id.*

141. *Planned Parenthood v. Heckler*, 712 F.2d 650, 661 (D.C.Cir. 1983) (emphasis added).

teenage pregnancy, which the court found Congress intended to achieve by providing teens access to information and contraception in a confidential manner.¹⁴² Yet with a successful amendment to Title X, clearly expressing Congress' desire to mandate, rather than merely encourage, parental involvement for minors seeking contraception, the courts could no longer reason that such a rule contravened congressional intent.

Indeed, the passage of a mandatory parental notification requirement similar to the 1998 Act would constitute a clear amendment to the congressional intent behind Title X, thereby superseding any claim that the law should be invalidated due to a conflict with congressional intent. As the Supreme Court has held, "[i]t is a well-established principle of statutory construction that . . . a statute should be interpreted according to its plain language."¹⁴³ While "[t]he meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction,"¹⁴⁴ the Court has held that a "change of [statutory] language is some evidence of a change of purpose."¹⁴⁵ Since shortly after the creation of Title X in 1970, Congress has actively discussed whether to mandate parental involvement in minors' ability to obtain contraception under Title X.¹⁴⁶ After rejecting the 1978 Volkmer Amendment, adding the 1981 family participation amendment, and witnessing the courts' rejection of the HHS "squeal rule," the passage of a parental notification amendment to Title X would necessarily represent a clear change in Congress' thinking on this issue.¹⁴⁷ Thus, were a bill similar to the Parental Notification Act of 1998 to succeed in passing through the Senate and obtain approval from the President, courts would be compelled to find that such an act indicates a new congressional intent behind Title X.

2. Constitutional Challenges

While a challenge to a parental notification requirement like the 1998 Act may be unsuccessful on grounds of contravening congressional intent, such a requirement could be challenged on constitutional grounds for imposing an undue burden on a minor's right to privacy in procreative decisions. The Supreme Court has not addressed this issue as it relates to a minor's right to obtain contraception, yet it has handed down a number of decisions in the analogous context of a minor's right to obtain an abor-

142. *See id.* at 660.

143. *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980).

144. *United States v. Dickerson*, 310 U.S. 554, 561-62 (1940) (citations and footnotes omitted). *See also* *McElroy v. United States*, 455 U.S. 642, 650 n.14 (1982).

145. *Johnson v. United States*, 225 U.S. 405, 415 (1912). *See also* *McElroy*, 455 U.S. at 650 n.14.

146. *See supra* Part I.A.

147. *See supra* Part I.B.

tion.¹⁴⁸ From these decisions, the Court has established parameters within which Congress could likely create a constitutionally permissible parental notification requirement for contraception. A close reading of the text of the Parental Notification Act of 1998 indicates just this: the sponsors of the Act have carefully crafted a parental notification requirement for contraception that falls within constitutionally appropriate parameters in the analogous context of abortion. Thus, because of the way the Act is written, requiring parental notification rather than consent, an exemption for emancipated minors, and a judicial bypass option for minors to obtain contraception without notifying their parents, a similarly constructed parental notification requirement for contraception would likely withstand constitutional challenge.

The Supreme Court has not, itself, addressed a minor's right to privacy in the context of contraception, yet one federal court did address this question—the District Court for the Central Division of Utah in *Planned Parenthood Association of Utah v. Matheson*.¹⁴⁹ Here, based on the Supremacy Clause, the court struck down a Utah state law requiring parental notification for minors to obtain contraception under Title X, as an impermissible state-imposed requirement on a federal program.¹⁵⁰ While ultimately decided on the basis of federal congressional intent, *Matheson* presents the only consideration by a federal court of the larger constitutional questions raised by a parental notification requirement for contraception. The Utah state law in question imposed a blanket requirement on Title X organizations, mandating parental notification for all minors seeking contraceptives without exception,¹⁵¹ which Planned Parenthood challenged as “unconstitutionally overbroad.”¹⁵² After analyzing and analogizing prior Supreme Court cases on abortion, the court held

148. See, e.g., *Lambert v. Wicklund*, 520 U.S. 292 (1997) (declaring judicial bypass provision allowing waiver of notice requirement, if notice not in minor's best interest, was sufficient to protect minor's right to abortion); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (upholding Pennsylvania's parental consent provision as it did not impose an undue burden and was therefore valid); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (finding that Minnesota's requirement that both parents be notified of minor's abortion decision was unconstitutional, but that provision requiring parental notification unless minor obtains judicial bypass was constitutional); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) [hereinafter *Akron I*] (holding in part that judicial bypass procedure complied with Fourteenth Amendment and that state could require physician to give parental notice before performing abortion); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding Utah law providing that, where possible, physician should notify parents of minor seeking an abortion before exercising her medical judgment of whether to perform the abortion); *Bellotti v. Baird*, 443 U.S. 622 (1979) [hereinafter *Bellotti II*] (holding that Massachusetts' requirement that minor seeking an abortion obtain parental consent or judicial approval following notification to her parents unconstitutionally burdened the minor's right to seek an abortion); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding in part that a state's blanket parental consent requirement for minors was unconstitutional).

149. 582 F. Supp. 1001 (Cent. D. Utah 1983).

150. See *supra* notes 114-117 and accompanying text.

151. *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. at 1002, n.1 (citing UTAH CODE ANN. § 76-7-325 (1983)).

152. *Id.* at 1007.

that “the state may not impose a blanket parental notification requirement on minors seeking to exercise their constitutionally protected right to decide whether to bear or to beget a child by using contraceptives.”¹⁵³ Thus, the court concluded that because the Utah law “fail[ed] to provide a procedure whereby a mature minor or a minor who can demonstrate that his or her best interests are contrary to parental notification can obtain contraceptives confidentially,” the no-exception parental notification rule was likely unconstitutional.¹⁵⁴

While the Supreme Court has not addressed a parental notification requirement for contraception, it began to address issues of reproductive privacy and minors’ access to abortion thirty-five years ago. The Supreme Court first identified a right to privacy that included contraceptive decisions in the 1965 case *Griswold v. Connecticut*.¹⁵⁵ In *Griswold*, the Court held that there was a “zone of privacy created by several fundamental constitutional guarantees” that made it unconstitutional for the state to prohibit a married couple from using contraception or a doctor from assisting in such use.¹⁵⁶ Then, in 1972, in *Eisenstadt v. Baird*,¹⁵⁷ the Court extended this right of privacy to single people as well, based on the equal protection notion that a married couple was made up of two separate individuals, each bearing a right to privacy.¹⁵⁸

As the court explained in *Planned Parenthood Association of Utah v. Matheson*, a review of the relevant Supreme Court cases prior to 1983 shows a substantial, but not unlimited, right to reproductive privacy for minors.¹⁵⁹ In 1976, the Court first addressed the application of the right to privacy to minors, in a challenge to a parental consent requirement for abortion in *Planned Parenthood of Central Missouri v. Danforth*.¹⁶⁰ In *Danforth*, the Supreme Court held that a similar right of privacy extends to minors, however “the [s]tate has somewhat broader authority to regulate the activities of children than of adults.”¹⁶¹ The Court held that there must be a “significant state interest . . . not present in the case of an adult” to justify state burdens on the privacy right of minors.¹⁶² The Court struck down the Missouri law absolutely requiring one parent’s consent for an unmarried woman under the age of eighteen to obtain an abor-

153. *Id.* at 1009.

154. *See id.*

155. 381 U.S. 479 (1965).

156. *See id.* at 485; *see also* *Planned Parenthood Ass’n of Utah v. Matheson*, 582 F. Supp. at 1007.

157. 405 U.S. 438 (1972).

158. *See id.* at 453-54; *Planned Parenthood Ass’n of Utah v. Matheson*, 582 F. Supp. at 1007.

159. *See* *Planned Parenthood v. Matheson*, 582 F. Supp. at 1007-08. For other analyses of relevant Supreme Court decisions prior to 1984, *see also* Olah, *supra* note 23, at 508-522; Himmelfarb, *supra* note 27, at 728-32; Hofman, *supra* note 12, at 1337-41, 1348-50.

160. 428 U.S. 52 (1976).

161. *Id.* at 74; *see also* *Planned Parenthood Ass’n of Utah v. Matheson*, 582 F. Supp. at 1007-1008.

162. *See Danforth*, 428 U.S. at 75; *see also* *Planned Parenthood Ass’n of Utah v. Matheson*, 582 F. Supp. at 1008.

tion (unless her life was at stake) because the provision gave "a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient" which was unconstitutional.¹⁶³ The Court required a mature minor to have an alternative to parental consent in order to obtain an abortion.¹⁶⁴

The Supreme Court next addressed minors' access to contraception in general in the 1977 case *Carey v. Population Services International*,¹⁶⁵ in which plaintiffs challenged a New York state law prohibiting the sale of over-the-counter contraceptives to anyone under 16 years of age.¹⁶⁶ The Court held that because the Constitution protects an individual's right to make childbearing decisions, strict scrutiny applies to laws restricting adults' access to contraception.¹⁶⁷ Because the state has greater power to regulate the conduct of minors, however, the Court held that the less stringent standard of "significant state interest" articulated in *Danforth* applies.¹⁶⁸ Yet then, relying on *Danforth*, the Court held that "[s]ince the [s]tate may not impose . . . a blanket requirement of parental consent . . . on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed."¹⁶⁹ Moreover, the Court did not believe that the state had proved its proffered justification for imposing such a burden upon a minor's right to contraception—that limiting access to contraception would reduce teenage sexual activity.¹⁷⁰

Yet while the Supreme Court held that an absolute, blanket provision against minors' independent access to abortion or contraception was unconstitutional, the Court also held that a minor did not have an absolute, unqualified right to make her own decisions regarding family planning.¹⁷¹ After *Carey*, the Court began to chip away at minors' rights to reproductive privacy by upholding properly designed parental consent requirements that allowed "mature" minors a judicial alternative to obtain an abortion without notifying their parents. In 1979, in *Bellotti v. Baird (Bellotti II)*,¹⁷² the Court again struck down a blanket parental consent requirement for minors seeking abortions, yet discussed at length the parameters within which a properly crafted parental consent requirement would be constitutional.¹⁷³ The Court explained that a parental consent

163. See *Danforth*, 428 U.S. at 74; see also *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. at 1008.

164. See *Danforth*, 428 U.S. at 74-75; see also, *Cook*, *supra* note 27, at 22.

165. 431 U.S. 678 (1977).

166. See *id.* at 681-82.

167. See *id.* at 688; see also *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. at 1007.

168. See *Carey*, 431 U.S. at 692-93.

169. *Id.* at 694.

170. See *id.* at 694-96.

171. See *Olah*, *supra* note 23, at 513.

172. 443 U.S. 622 (1979).

173. See *id.* at 643-44, 647-48.

requirement would be permissible if the state provided a judicial bypass option whereby without notifying her parents, a minor could prove she was either mature enough to make her own decision to have an abortion or that the abortion was in her best interests.¹⁷⁴ The Court did not strike down parental notification requirements for abortion *per se*, but limited its ruling to striking down this particular law, which required the consent of both parents or judicial bypass of which the parents were notified.¹⁷⁵ The Court found this too burdensome to the minor's privacy rights, functioning as the practical equivalent of the blanket notification rule struck down in *Danforth*.¹⁷⁶

The Court continued to narrow minors' privacy rights in the 1981 case *H.L. v. Matheson*,¹⁷⁷ in which the Court upheld a Utah law providing that, where possible, a physician should notify parents of a minor seeking an abortion before exercising his medical judgment whether to perform the abortion.¹⁷⁸ The Court distinguished *Bellotti II* and *Danforth* by claiming that Utah's law did not impose a blanket parental consent requirement as did the two laws previously struck down.¹⁷⁹ Instead, the Court held, the Utah law "[a]s applied to immature and dependent minors," was properly narrow to serve the state interests of "family integrity and protecting adolescents," and was upheld as explicitly limited to immature minors who lived with their parents.¹⁸⁰ The Court rearticulated this holding in *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*,¹⁸¹ by construing its decision in *H.L. v. Matheson* as "upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests."¹⁸²

During the 1990s, the Court further broadened its support of what it deemed to be properly crafted and constitutionally permissible parental consent requirements for abortion. In *Ohio v. Akron Center for Reproductive Health (Akron II)*,¹⁸³ the Supreme Court reversed the Sixth Circuit's ruling that an Ohio parental consent law was unconstitutional, and upheld a significantly more burdensome parental consent requirement for minors seeking abortions.¹⁸⁴ At issue was the constitutional adequacy of the judicial bypass procedure in the Ohio parental notification law, which

174. See *id.*; see also *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. 1001, 1008 (1983).

175. See *Belotti II*, 443 U.S. at 647-51.

176. See *Olah*, *supra* note 23, at 515-17.

177. 450 U.S. 398 (1981).

178. See *id.* at 413.

179. See *id.* at 407-12; see also *Olah*, *supra* note 23, at 519-20.

180. *H.L. v. Matheson*, 450 U.S. at 411, 413; *Olah*, *supra* note 23, at 520-21.

181. 462 U.S. 476 (1983).

182. *Id.* at 492 n.17; see also *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. at 1008, n.6.

183. 497 U.S. 502 (1990).

184. See *id.* at 506-07.

was more burdensome than any other bypass option previously considered by the Court.¹⁸⁵ To obtain court authorization for an abortion, the minor was required to file a complaint in juvenile court and obtain a guardian *ad litem* and an attorney for the proceeding.¹⁸⁶ She then had to prove maturity, a pattern of parental abuse, or, under the more difficult "clear and convincing evidence" standard, that an abortion was in her best interest.¹⁸⁷ Relying on the notion that "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality," the Court upheld the Ohio law regardless of these additional burdens.¹⁸⁸ In so doing, the Court found no constitutional significance in the fact that the Ohio law included the additional burdens of confidential rather than anonymous court proceedings,¹⁸⁹ the possibility that the process could take up to twenty-two days,¹⁹⁰ a heightened standard of proof required of the minor,¹⁹¹ pleading forms that required the minor to plead either maturity or best interest but not both,¹⁹² and allowing the physician performing the abortion to notify the minor's parents.¹⁹³ Moreover, the Court acknowledged the possibility that *no* judicial bypass proceedings may be required by the Constitution where a law requires parental notification rather than parental consent for a minor's abortion. Because the Ohio law included a judicial bypass option, however, the Court left this question unanswered.¹⁹⁴

The very same day, the Court allowed for additional burdens on a minor's access to abortion in its fragmented decision in *Hodgson v. Min-*

185. *See id.* at 524-42 (Blackmun, J., dissenting) (articulating the extreme constraints the Ohio law, which the plurality upheld, places upon judicial bypass—constraints which in effect negate the judicial bypass option's constitutional protection against mandatory parental involvement).

186. *See id.* at 508.

187. *See id.*

188. *See id.* at 514 (quoting *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 492 (1983)).

189. *See id.* at 512-13. A confidential proceeding requires the teenager seeking a judicial bypass to provide her name, which will be kept confidential by the court, while an anonymous proceeding allows the teen to withhold her identity completely. *See id.* at 512. As Justice Blackmun points out in his dissent, by allowing a judicial bypass option that is not anonymous, the Court makes a significant departure from *Bellotti II* and its prior limits on parental consent requirements. *See id.* at 530-31. "A minor, whose very purpose in going through a judicial bypass proceeding is to avoid notifying a hostile or abusive parent, would be most alarmed at signing her name and the name of her parent on the complaint form. . . . True anonymity is essential to an effective, meaningful bypass." *Id.* at 531 (Blackmun, J., dissenting).

190. *See id.* at 514.

191. *See id.* at 516. The Court found this unproblematic because the judicial bypass proceeding is an *ex parte* hearing, in which no one opposes the minor's testimony in Court. *See id.* Yet as Justice Blackmun points out in his dissent, the judge poses questions during the hearing and decides if the standards have been sufficiently met. *See id.* at 534-45 (Blackmun, J., dissenting). Raising the standard of proof requires that "[e]ven if the judge is satisfied that the minor is mature or that an abortion is in her best interest, the court may not authorize the procedure unless it additionally finds that the evidence meets a 'clear and convincing' standard of proof." *Id.* at 536 (Blackmun, J., dissenting).

192. *See id.* at 516-17.

193. *See id.* at 518-19.

194. *See id.* at 510.

nesota.¹⁹⁵ Written in five separate opinions, in this decision, the Court indicated that a law requiring the consent of both parents, even if one or both did not maintain legal custody of the minor, and establishing a forty-eight hour waiting period after giving parental notice before performing an abortion on a minor, could be permissible if it included a constitutionally adequate judicial bypass option.¹⁹⁶

In its most recent cases, the Court has continued its permissiveness toward increasingly stringent parental consent requirements for minors seeking abortions. In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁹⁷ the Court upheld the constitutionality of a Pennsylvania law that requires, except in cases of medical emergency, an unemancipated minor seeking an abortion to give her own informed consent and obtain the informed consent of one parent or guardian.¹⁹⁸ The law provides for a judicial bypass option, through which “a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.”¹⁹⁹ To obtain “informed consent,” however, is a much more significant burden than simply to obtain consent. A physician must: (1) “inform” the minor and her parent about the abortion procedure, health risks, and “probable gestation age of the unborn child”; (2) provide state-sponsored literature—which the consenting party must certify in writing that she received—about assistance for childbirth, child support, adoption agencies, and alternatives to abortion; and (3) wait at least twenty-four hours after providing this “information” before performing the abortion.²⁰⁰

Finally, in 1997, in *Lambert v. Wicklund*,²⁰¹ the Court upheld a Montana parental notification statute it found to be qualitatively identical to the statute in *Akron II*.²⁰² The Court found the statutes the same, even though the judicial bypass option in *Lambert* turned on a determination that *parental notification was not* in the minor’s best interest, which required the minor to prove a negative assertion.²⁰³ This standard is arguably more difficult to meet than the previous *Akron II* standard, which required the minor to prove that the *abortion was* in her best interest.²⁰⁴

195. 497 U.S. 417 (1990).

196. *See id.* at 497.

197. 505 U.S. 833 (1992).

198. *See id.* at 899.

199. *Id.*

200. *See id.* at 881, 920-21.

201. 520 U.S. 292 (1997).

202. *See id.* at 298-99.

203. *See id.* at 296-99 (emphasis added).

204. *See id.*

By the mid-1980s, it was clear that the Supreme Court would prohibit any absolute, blanket parental notification requirement for minors to obtain contraception or an abortion.²⁰⁵ However, given the Court's rulings during the 1990s, upholding increasingly more restrictive parental consent requirements for abortion as long as they included some judicial bypass option, no matter how burdensome, it is likely that a properly crafted parental consent requirement for contraception, such as the Parental Notification Act of 1998, will be upheld.

There is, of course, a difference between abortion and contraception: as the Supreme Court noted in *Carey*, "[t]he State's interests in protection of the mental and physical health of the pregnant minor . . . are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive."²⁰⁶ However, given the legislative move toward more conservative strategies for reducing teenage pregnancy, the Court could find that a state's interest in protecting the structure of the family and the authority of parents in order to reduce teenage pregnancy is a "significant state interest not present in the case of adults" that meets the *Danforth* standard and justifies limiting a minor's right to reproductive privacy.²⁰⁷ Thus, the concerns of the Court could be assuaged with a parental requirement bill crafted like the 1998 Act, which provides both that an emancipated minor under state law is exempt from notification requirements, and that a minor may avoid parental notification if "a court of competent jurisdiction has directed that the minor may receive the drugs or devices."²⁰⁸

3. Additional State Law Options for Requiring Parental Consent

Finally, regardless of whether Congress passes an explicit parental notification requirement like the 1998 Act, if Congress passes any law that indicates that its intention of confidentiality for teens under Title X has changed, the Court has left the door open to properly constructed state laws that mandate parental notification. As *Planned Parenthood Association of Utah v. Matheson*, *Does v. Utah*, and *Planned Parenthood v. Heckler* all indicate, a state is only prohibited from enacting a parental notification law where such a law directly contradicts the language of Title X and its amendments.²⁰⁹ Thus even if Congress itself does not man-

205. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977); see also *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. 1001, 1009 (1983); Olah, *supra* note 23, at 498-99, 508, 519.

206. *Carey*, 431 U.S. at 694.

207. See *supra* Part I.B.2; *infra* Part III.A.

208. H.R. 4721, 105th Cong. (1998) (visited Apr. 10, 2000) <<http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.4721:>>.

209. See *supra* Part II.B.2.

date parental notification, if the Court believes that the congressional intent behind Title X has sufficiently changed to favor such a mandate, a state may be able to pass a law requiring parental notification for contraception funded by Title X so long as it includes some judicial bypass option.

Alternatively, a state may opt out of Title X funding altogether and enforce any parental notification requirement it wishes, provided it comports with its own legislation and state Constitution. In *Does v. Utah*, the Tenth Circuit struck down the Utah State Health Department's attempt to enforce a state parental notification law while administering Title X funds, holding that "Utah is free to apply parental consent requirements in the use of its own funds," just not in the use of Title X funds.²¹⁰ Should this state strategy of foregoing Title X funds result in decreased availability or subsidization of publicly funded contraception, for example clinics raising the cost of services or closing their doors, low-income teens who rely more heavily on public clinics as their source for obtaining family planning services will suffer the greatest negative effects.²¹¹

As recently as 1997, the disturbing possibility of this alternate state strategy surfaced in the federal courts. In *County of St. Charles, Missouri v. Missouri Family Health Council*,²¹² the Eighth Circuit held that a county with a blanket parental consent requirement for some forms of contraception was properly denied Title X funds by its state health department. Relying on the appellate cases of the early 1980s, the court said that circuits "which have considered the issue have uniformly found that parental consent cannot be required before a minor receives Title X services," and that blanket notification requirements are "prohibited by [federal] statute, regardless of whether they are based on state law."²¹³ Yet in so finding, the court merely upheld the dismissal of the County's request to compel the state council that administers Title X to provide the County with funds;²¹⁴ the court did not strike down the County's parental notification requirement as itself invalid. Thus the County appears to have the option of foregoing its Title X funds and maintaining its parental consent law, a frightening option that not only infringes upon a minor's reproductive privacy rights by mandating absolute parental consent, but simultaneously burdens these rights by simply not providing access to contraception at all.

210. See *Does v. State of Utah Dep't of Health*, 776 F.2d 253, 256 (10th Cir. 1985).

211. See *supra* notes 15-20 and accompanying text.

212. 107 F.3d 682 (8th Cir. 1997).

213. *Id.* at 684-85.

214. See *id.* at 685.

III. THE DIMINISHING REPRODUCTIVE PRIVACY RIGHTS OF MINORS

A. The Legislative and Judicial View of Minors' Privacy Rights

As Congress changed its strategy for reducing teenage pregnancy, its vision of minors' reproductive privacy rights changed significantly as well. Faced with what it viewed as a teenage pregnancy epidemic in the mid-1970s, when Congress saw that Title X clinics were reaching millions of teenage girls, it recognized that adolescents acted independently with regard to their sexual activity. Thus Congress valued confidentiality as an important factor in reaching teens.²¹⁵ Yet by 1981, this legislative strategy had changed to favor parental involvement and abstinence over confidential access to information and contraception as a means for reducing teenage pregnancy. Confidentiality and the independent rights of teens gave way to the interests of the state and the notion of parents' rights.²¹⁶

The 1998 passage of the Parental Notification Act through the House of Representatives signals the completion of this legislative change: the majority of the House has adopted the formerly conservative belief that parents have the right to control the sexual behavior of their teenagers. In February of 1998, while presenting earlier versions of the 1998 Act to the House, sponsor Representative Donald Manzullo (R-Ill.) argued primarily from a parents' rights perspective. This strategy was reminiscent of Representative Volkmer's argument during his unsuccessful attempt to pass a parental notification amendment to Title X in 1978.²¹⁷ Representative Manzullo decried the "intrusive, overbearing federal government" policies, and lamented that Congress "make[s] laws saying parents are legally responsible for their children's actions until the children become adults, but then . . . rip[s] parents from the equation when it comes to something as critical and potentially dangerous as sexuality."²¹⁸ Later that year, in October of 1998, while presenting the current Act to the House, Manzullo explained that "[w]hat we are simply saying here is this: Allow the parents in this Nation to be put in charge of the sexuality of their children."²¹⁹

Moreover, even those who opposed the Act and argued for an alternate version that did not mandate parental notification argued not from the position of protecting adolescent privacy rights, but from the posi-

215. See *supra* Part I.A.1.

216. See *supra* Part I.B.1.

217. See *supra* Part I.B.

218. 144 CONG. REC. E179 (Feb. 12, 1998).

219. 144 CONG. REC. H10,144 (Oct. 8, 1998).

tion of the practical consequences of privileging parents' rights.²²⁰ Where confidentiality and autonomy for teenagers were valued as effective means of reducing teenage pregnancy in the early days of Title X, by 1998 such values were reduced to little more than their practical consequences. Notably, the sponsors of the alternate amendment, Representatives James Greenwood (R-Pa.) and Michael Castle (R-Del.), distanced themselves from the notion of a minor's right to reproductive privacy. Representative Castle stated, "I love the idea of mandatory parental notification . . . but if we do that, we are not going to have these kids go in and get the help they need."²²¹ Representative Greenwood remarked that his amendment "makes it clear that every . . . counselor has to encourage family involvement . . . [and] have state of the art training to encourage, to learn how, and [to] teach kids to involve their parents with these decisions."²²² However, this compromise bill valuing parents' rights without mandating them was not strong enough for the majority of the House; the Manzullo/Istook Amendment defeated the Greenwood/Castle Amendment by 224 votes to 200.²²³

Court decisions from the mid-1970s to the present have reflected a similar change in the judicial vision of minors' privacy rights, beginning with the characterization of minors' reproductive privacy rights as slightly more limited than those of adults, and increasingly diminishing the scope of these rights. In 1976, in *Danforth*, the Supreme Court established an intermediate scrutiny standard for burdening a minor's right to reproductive privacy, requiring a "substantial state interest," distinguished from the state's interest in an adult's reproductive decision.²²⁴ By 1979, in *Bellotti II*, the Court held that "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors,"²²⁵ and that "the tradition of parental authority is not inconsistent with our tradition of individual liberty."²²⁶

By 1990, the Court further diminished the scope of minors' privacy rights, most notably by upholding its most restrictive parental notification requirement for a minor to obtain an abortion in *Akron II*. After finding that "[i]t is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature," the Court held that

220. One exception to this complete abandonment of the language of adolescent privacy rights was a statement made by Representative Johnson, arguing in favor of the Greenwood/Castle alternative, who stated: "Furthermore, [not mandating parental notification] gives [adolescent girls] a chance to develop their personal power as a young woman [sic]." 144 CONG. REC. H10,145 (Oct. 8, 1998).

221. 144 CONG. REC. H10,144 (Oct. 8, 1998).

222. *Id.* at H10,143.

223. *See id.* at H10,147.

224. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74-75 (1976).

225. *Bellotti II*, 443 U.S. 622, 637 (1979).

226. *Id.* at 638-39.

Ohio's parental notification statute "is a *rational* way to further those ends."²²⁷ In so doing, the Court completely ignored the "substantial state interest" test of *Danforth* and replaced it with a simple rational relation test for imposing permissible burdens on a minor's right to privacy in reproductive decisions. The Court reasoned that "[i]t would deny all dignity to the family to say that the State cannot take this reasonable step in regulating its health professions to ensure that, in most cases, young women will receive guidance and understanding from a parent."²²⁸ Thus, by 1990 the Court envisioned a minor's right to privacy as less compelling than a rationally related interest of her parents or the state.

B. The Criminalization of Consensual Sexual Activity Among Minors

While legislative and judicial trends in the laws of contraception and abortion moved toward diminishing minors' privacy rights, a separate and parallel legal movement similarly diminished adolescent sexual autonomy in the name of reducing teenage pregnancy. Starting in the mid-1980s, state and federal governments began to criminalize consensual adolescent sexual activity through increasing prosecution of minors under the laws of sexual abuse and statutory rape.²²⁹

Like conservative strategies for reducing teenage pregnancy through encouraging parental involvement and abstinence education under Title X, these laws aimed to reduce teenage pregnancy by discouraging sexual activity among minors, here through criminal sanctions. The historical and legal analysis of sexual abuse and statutory rape laws in the context of teenage pregnancy is a vast topic beyond the scope of this article,²³⁰ but brief examples of parallels in this area are useful to illustrate the general legislative and judicial trend toward reducing the sexual autonomy and privacy rights of minors as a purported means to reduce teenage pregnancy.

1. Child Abuse Reporting Model

One means for criminalizing consensual sexual activity among minors is to treat such activity as child sexual abuse, regardless of the age of the so-called "abuser" or the voluntariness of the behavior. One example of this strategy was the 1986 attempt by the Attorney General of California to interpret the California law requiring health professionals to report suspected instances of child abuse to include suspected instances of

227. *Akron II*, 497 U.S. 502, 520 (1990) (emphasis added).

228. *Id.* at 520.

229. See *infra* Part III.B.1 and Part III.B.2.

230. See, e.g., Patricia Donovan, *Special Report, Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?*, 29 FAM. PLAN. PERSP. 30 (1997); Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287 (1997).

any sexual activity of minors under age fourteen as sexual abuse. This Attorney General policy was challenged in *Planned Parenthood Affiliates of California v. Van de Kamp*.²³¹ Like the HHS interpretive regulation of the 1981 “family participation” amendment to Title X that established the “squeal rule,” this case challenged the Attorney General’s interpretive opinion on the intent of the California legislature.²³² The opinion applied the California Child Abuse Reporting law “to all sexual activity of minors under 14, without regard to whether the minor is the victim of child abuse or is engaging in voluntary sexual conduct.”²³³ The Attorney General filed his opinion in response to a Los Angeles District Attorney inquiry about whether the law required filing a report “when a child receives medical attention for a sexually transmitted disease, for birth control, for pregnancy, or for abortion.”²³⁴ Such an interpretation would require any health professional who provided contraception to or treated the sexually transmitted disease of a teenager under fourteen years old to report that teenager as the victim of sexual abuse, leading to the punishment of her partner as a sexual abuser regardless of the circumstances of their sexual activity.

The California Supreme Court struck this interpretation down as an impermissible sanction on the voluntary sexual activity of adolescents.²³⁵ The court found that “if such minors are unable to obtain reproductive health care on a confidential basis, without their sexual conduct being reported to law enforcement for investigation, they will be deterred from seeking such care.”²³⁶ The court then held that “by requiring blanket reporting of voluntary sexual activity solely on the basis of age, the Attorney General has taken a position inconsistent with the [State] Legislature’s judgment that minors under 14 are entitled to confidential reproductive health care.”²³⁷ Much like the “squeal rule,” which was struck down for violating the federal congressional intent behind Title X, the Attorney General’s interpretive opinion was struck down as contravening state legislative intent behind the Child Abuse Reporting Law.

As this case was in California state court rather than federal court, however, the constitutional issues raised were slightly different. In its ruling in *Van de Kamp*, the California Supreme Court explained that “[t]he California [State Constitution’s] right of sexual privacy [is] broader than its federal counterpart necessarily.”²³⁸ As such, the California Constitution “imports the same constitutional privileges to the mature minor” as

231. 226 Cal. Rptr. 361 (Ct. App. 1986).

232. *See id.*

233. *Id.* at 363.

234. *Id.* at 366 (quoting 67 Op. Cal. Att’y. Gen. 235, 235 (1985)).

235. *See id.* at 381-382.

236. *Id.* at 371.

237. *Id.* at 373-74.

238. *Id.* at 379.

the United States Constitution, if not more.²³⁹ Applying a standard analogous to that articulated in *Danforth*, the Court found that because "no significant state interest [is] served[,] . . . [t]he reporting of voluntary nonabusive behavior as mandated by the Attorney General's opinion . . . violate[d] the right to sexual privacy guaranteed mature minors by the California Constitution."²⁴⁰ Also, while the California Supreme Court struck down the Attorney General's interpretive opinion as it related to consensual sexual activity among peers, two years later, in *People ex rel. Eichenberger v. Stockton Pregnancy Control Medical Clinic, Inc.*,²⁴¹ a California Court of Appeal held that a Title X clinic could permissibly be required to report the consensual sexual activity of a minor as child abuse where there was a significant age disparity among the sexual partners involved in the consensual activity.²⁴²

2. Increased Prosecution of Statutory Rape

A more prevalent means of implementing the strategy of reducing teenage pregnancy by criminalizing consensual adolescent sexual activity is the recent revival of statutory rape prosecution. The notion of using statutory rape laws to reduce teen pregnancy was articulated as early as 1981, in the Supreme Court case *Michael M. v. Superior Court of Sonoma County*.²⁴³ In *Michael M.*, the Court accepted the "justification for the [statutory rape] statute offered by the State . . . that the legislature sought to prevent illegitimate teenage pregnancies."²⁴⁴ Citing the infamous Alan Guttmacher Institute report of 1976, the Court stated: "We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the 'purposes' of the statute, but also that the State has a strong interest in preventing such pregnancy," particularly because the "illegitimacy [of the resulting children] makes them likely candidates to become wards of the State."²⁴⁵ Thus the Court used the rationale of cutting costs to the state as one reason to uphold a strict liability statutory rape law that diminished adolescent privacy rights.²⁴⁶

239. *See id.*

240. *Id.* at 380.

241. 249 Cal. Rptr. 762 (Ct. App. 1988)

242. *See id.* at 766-767, 769-70. "We hold that the [Child Abuse and Neglect Reporting] Act does not currently require the reporting of voluntary sexual conduct between minors under age 14 both of whom are of a similar age. However, the Act requires the reporting of sexual conduct between a minor under age 14 and a person of a disparate age, where the conduct is reasonably suspected to constitute a violation [under the Act]." *Id.* at 769.

243. 450 U.S. 464 (1981).

244. *Id.* at 470.

245. *Id.* at 470-71 (footnotes omitted).

246. While the facts of *Michael M.*, which more closely resemble facts of a rape case than a statutory rape case, may have played some factor in the outcome of this case, the point I wish to make is that the Court accepted reducing teenage pregnancy as a justification for the creation of a strict liability statutory rape law.

Nearly fifteen years later, at the direction of the federal government, states dusted off their seldom-used statutory rape laws in order to achieve welfare reform goals.²⁴⁷ To reduce teenage pregnancy and welfare costs, states began to prosecute even consensual adolescent sexual activity as statutory rape.²⁴⁸ The federal welfare reform legislation, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), also explicitly “reflect[ed] the belief that teenage pregnancy can be reduced through stricter enforcement of [statutory rape] laws.”²⁴⁹ Among its provisions, the PRWORA “mandates the establishment of a program to study ‘the linkage between statutory rape and teenage pregnancy, particularly predatory older men committing repeat offenses.’”²⁵⁰ In addition, state grant money is contingent upon each state providing a plan to reduce teenage pregnancy and illegitimacy. Each plan must address how the state intends to “[c]onduct a program, designed to reach State and local law enforcement officials, the education system, and relevant counseling services, that provides education and training on the problem of statutory rape.”²⁵¹ By linking statutory rape prosecution to reducing teenage pregnancy as part of PRWORA, Congress limited the sexual autonomy of adolescents by “assum[ing] that few teenage women are getting pregnant or raising children by choice; rather they become pregnant because they have been victimized by ‘predatory older men.’”²⁵²

As a result of this federal government mandate, states including California, Florida, Mississippi, Tennessee, and Wisconsin have significantly stepped up their prosecution of statutory rape in an effort to reduce teenage pregnancy.²⁵³ For example, in California, former Governor Pete Wilson created the Statutory Rape Vertical Prosecution Unit in 1995,

247. See Donovan, *supra* note 230, at 30; Weinstein, *supra* note 26, at 124.

248. See Weinstein, *supra* note 26, at 127.

249. *Id.* (citing PRWORA, Pub. L. No. 104-193, § 906, 110 Stat. 2105, 2349-50 (1996)). The issues of statutory rape prosecution and the reduction of teenage pregnancy in the context of welfare reform efforts are massive and far exceed the scope of this article. I merely include this information to help explain the origin of the revival of statutory rape prosecution. For a more complete discussion, see, e.g., Weinstein, *supra* note 26.

250. *Id.* at 124 (citing PRWORA, Pub. L. No. 104-193, § 906, 110 Stat. at 2349-50 (1996)).

251. Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 105-220, 42 U.S.C.A. § 602(a)(1)(A)(vi) (West 1998). See also Weinstein, *supra* note 26, at 124 (citing PRWORA, Pub. L. No. 104-193, § 103, 110 Stat. at 2114 (1996)).

252. Weinstein, *supra* note 26, at 127 (citation omitted).

253. See, e.g., OFFICE OF CRIMINAL JUSTICE PLANNING, STATUTORY RAPE VERTICAL PROSECUTION, THIRD-YEAR REPORT (last modified Jan. 1999) <<http://www.ocjp.ca.gov/pub-srvrprt.htm>>; FLA. C.S./H.B. 543 & 1317 (1997) (visited April 1, 1999) <<http://www.fdle.state.fl.us/index.asp>> (revising Florida sentencing guidelines for statutory rape); MISS. S.B. 2362 (1998) (visited Apr. 1, 1999) <<http://billstatus.ls.state.ms.us/1998/history/SB/SB2362.htm>> (creating Mississippi crime of unlawful sexual intercourse); TENN. S.B. 1746 (1997) (visited Apr. 1, 1999) <http://www.legislature.state.tn.us/bills/100gahtm/100_bill/SB1746.htm> (increasing Tennessee health provider reporting requirements for suspected statutory rape); Tommy G. Thompson, *Governor Adds Resources to Fight Teen Pregnancy* (Press Release, June 12, 1998) <<http://www.wisgov.state.wi.us/98pr/Teen%20pregnancy.htm>> (visited Apr. 1, 1999) (describing Wisconsin Governor's new pilot program to increase statutory rape prosecution).

specifically to increase prosecution of statutory rape in order to reduce teenage pregnancy.²⁵⁴ From 1995 to 1998, this unit spent over nineteen million dollars on decreasing statutory rape, filed 5,379 cases, and came away with 3,818 convictions statewide.²⁵⁵

While there are, of course, legitimate cases of nonconsensual statutory rape by "predatory older males" that should be prosecuted, the nationwide effort to revive prosecution of statutory rape has resulted in further restrictions on the reproductive privacy rights of teens. One California county prosecutor's office advertises: "Spread the word that all reports of statutory rape are being evaluated and in appropriate cases charges are being filed."²⁵⁶ Like a parental notification requirement for federally funded contraception, this statement seems intended to deter teenagers from sexual activity in general. Yet in so doing, both parental notification requirements and aggressive statutory rape prosecution create a chilling effect that significantly burdens a minor's ability to exercise her reproductive privacy rights, based on an illogical and simplistic justification that making it difficult to obtain contraception or criminalizing adolescent sexual activity will stop such activity.

CONCLUSION

The success of the Parental Notification Act of 1998 in the House of Representatives marks the current diminished state of adolescent privacy rights in the United States. Mandating both parental notification for contraception and compliance with state child abuse and rape reporting laws, the Act reflects the modern dominance of dual conservative strategies for reducing teenage pregnancy: deterring adolescent sexual activity by mandating parental involvement and abstinence, while simultaneously criminalizing consensual sexual relations among adolescents.²⁵⁷

254. See OFFICE OF CRIMINAL JUSTICE PLANNING, STATUTORY RAPE VERTICAL PROSECUTION, THIRD-YEAR REPORT (last modified Jan. 1999) <<http://www.ocjp.ca.gov/pub-srvprpt.html>>.

255. See *id.* at 1-9.

256. STATUTORY RAPE PROSECUTION UNIT, EL DORADO COUNTY, CAL., STATUTORY RAPE VERTICAL PROSECUTION (visited Feb. 12, 1999) <<http://co.el-dorado.ca.us/eldoda/statutory.html>>.

257. Symbolic of these merging strategies, sponsors seized upon an extreme case to foster sympathy with their dual proposal, linking parental notification for contraception with statutory rape. Sponsors of the 1998 Act claimed they proposed the bill after a 37 year-old junior high school teacher took a 13 year-old girl with whom he was having sexual relations to the McHenry County Health Department, in Illinois, to receive birth control injections. In 1997, the teacher pled guilty to charges of criminal sexual assault and child pornography, for which he was sentenced to ten years in prison. Due to parent protest, McHenry County tried to drop the \$47,800 Title X grant from its health department budget. After one unsuccessful attempt, the Board of Health agreed to forego Title X funding in the summer of 1998, and instituted its own parental notification requirement. Teenagers in McHenry County, Illinois must now notify their parents before they may receive contraceptive services from the County Health Department—services which are no longer funded by Title X. See 144 CONG. REC. E179 (Feb. 12, 1998); Stanek, *supra* note 6.

Since the creation of Title X in 1970, Congress has moved from viewing minors as independent actors entitled to confidential access to contraception, to viewing them as children whose rights are less important than the authoritative interests of their parents and the state. At the same time, the Supreme Court has moved from requiring some intermediate level of scrutiny to justify state impositions on a minor's right to reproductive privacy, to allowing increasing burdens upon this right, as long as they are rationally related to any state interest. As a result of these changed legislative and judicial visions of adolescent privacy rights, it is possible that the 1998 Act or another similar amendment to Title X mandating parental notification for minors to receive contraception will pass through Congress and be upheld by the Court in the future.

In order to prevent such a parental notification requirement from becoming law, voters and legislators will have to pay close attention to efforts by sponsors of the 1998 Act to amend Title X, to ensure that the amendment does not pass through Congress, or that the language does not so closely mirror parameters accepted by the Supreme Court in the context of parental consent requirements for abortion. Tragically, mandatory parental notification will deter teens from going to Title X clinics and likely result in a massive increase in teenage pregnancy,²⁵⁸ thus defeating the one goal upon which both liberals and conservatives involved in family planning legislation had agreed.

258. See *supra* notes 15-20 and accompanying text.