

[Cal Const, Art. I § 1](#)

Deering's California Codes are current through the 2024 Regular Session Ch 210

Deering's California Constitution Annotated >
**CONSTITUTION OF THE STATE OF
CALIFORNIA > Article I DECLARATION OF
RIGHTS**

§ 1. Inalienable rights

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

History

Adopted November 5, 1974.

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[Cal Const, Art. I § 1.1](#)

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**CONSTITUTION OF THE STATE OF
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RIGHTS**

§ 1.1. Reproductive freedom

The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection.

History

Added by Proposition 1, Resolution Ch. 97, 2022, effective December 21, 2022.

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Cal Const, Art. I § 7, Part 1 of 3

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Deering's California Constitution Annotated >
**CONSTITUTION OF THE STATE OF
CALIFORNIA > Article I DECLARATION OF
RIGHTS**

§ 7. Due process; Equal protection; Privileges and immunities

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the [14th Amendment to the United States Constitution](#) with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the [14th Amendment to the United States Constitution](#), and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the [14th amendment of the United States Constitution](#).

Except as may be precluded by the

Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979–80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process,

preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

History

Adopted November 5, 1974. Amended November 6, 1979.

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[Cal Const, Art. I § 24](#)

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CALIFORNIA > Article I DECLARATION OF
RIGHTS**

Adopted November 5, 1974. Amendment approved
by voters, Prop. 115 § 3, effective June 6, 1990.

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§ 24. Construction of constitutional rights

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Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

This declaration of rights may not be construed to impair or deny others retained by the people.

History

USCS Const. Amend. 14, Part 1 of 21

Current through the ratification of the 27th Amendment on May 7, 1992.

United States Code Service > *Amendments* >
Amendment 14

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

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Caution

As of: October 18, 2026 1:40 AM Z

Abstract Inv. Co. v. Hutchinson

Court of Appeal of California, Second Appellate District, Division Four

May 29, 1962

Civ. No. 26220

Reporter

204 Cal. App. 2d 242 *; 22 Cal. Rptr. 309 **; 1962 Cal. App. LEXIS 2239 ***

ABSTRACT INVESTMENT COMPANY,
Plaintiff and Respondent, v. WILLIAM D.
HUTCHINSON, Defendant and Appellant

Prior History: [***1] APPEAL from a judgment of the Municipal Court for the Santa Anita Judicial District. John A. H. Sturgeon, Judge.

Proceeding in unlawful detainer.

Disposition: Reversed with directions. Judgment for plaintiff reversed with directions.

Case Summary

Procedural Posture

Defendant tenant appealed from a judgment of the Municipal Court for the Santa Anita Judicial District (California), which found in favor of plaintiff landlord in its action for unlawful detainer. The trial court refused to consider the tenant's affirmative defenses of racial discrimination under [U.S. Const. amend. XIV](#), [Cal. Const. art. I, § 13](#), or the Unruh Act, [Cal. Civ. Code §§ 51, 52](#).

Overview

A landlord proceeded to evict a tenant, who claimed that the only motivation for the action was the tenant's race. The court on appeal found that the tenant raised no counterclaims or questions of title, which would have been properly barred, but raised a fundamental equitable concern under the Fourteenth Amendment and its California

counterpart. The court noted that, although the alleged discriminatory action was private, any enforcement by the courts of such an eviction would constitute state action and, as such, would be prohibited by the Fourteenth Amendment. The court further noted that the landlord was operating a "business" under the Unruh Act, [Cal. Civ. Code §§ 51, 52](#), but was not clearly operating a "business establishment" such that the act's prohibitions against private discrimination would apply. Consequently, the court found that a new trial would be necessary where those issues could be considered.

Outcome

The court reversed the judgment in favor of the landlord and remanded the case for a new trial.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Privileges & Immunities

Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > Forcible Entry & Detainer

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Constitutional Rights

Real Property Law > Title Quality > Adverse Claim
Actions > Unlawful Detainer

HN1 See [U.S. Const. amend. XIV](#).

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Constitutional Law > Substantive Due
Process > Scope

Constitutional Law > Equal Protection > Nature &
Scope of Protection

HN2 [Cal. Const. art. I, § 13](#), provides in part that no person shall be deprived of life, liberty, or property without due process of law. This provision is identical in scope and purpose to [U.S. Const. amend. XIV](#).

Civil Rights Law > Protection of Rights > Public
Versus Private Discrimination

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Constitutional Law > Equal Protection > Nature &
Scope of Protection

Real Property Law > Encumbrances > Restrictive
Covenants > General Overview

HN3 The action inhibited by the first section of [U.S. Const. amend. XIV](#) is only such action as may fairly be said to be that of the states. The amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Constitutional Law > Equal Protection > Nature &
Scope of Protection

Business & Corporate
Compliance > Contracts > Types of

Contracts > Covenants

Contracts Law > Types of Contracts > Covenants

Real Property Law > Encumbrances > Restrictive
Covenants > General Overview

Real Property Law > Encumbrances > Restrictive
Covenants > Enforcement of Restrictive Covenants

HN4 Enforcement by state courts of restrictive covenant agreements constitutes state action.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Constitutional Law > Equal Protection > Nature &
Scope of Protection

Governments > Local Governments > Duties &
Powers

Governments > Local Governments > Elections

Governments > Local Governments > Employees &
Officials

HN5 Acts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Constitutional Law > Equal Protection > Nature &
Scope of Protection

Criminal Law & Procedure > Defenses > General
Overview

Real Property Law > ... > Landlord's Remedies &
Rights > Eviction Actions > General Overview

Real Property Law > Title Quality > Adverse Claim
Actions > Unlawful Detainer

HN6 The court has the power to look beyond the allegations of a complaint in an unlawful detainer proceeding and to inquire into the constitutional

issue placed before it by affirmative defenses to the action.

Civil Procedure > Preliminary
Considerations > Justiciability > General Overview

Civil Procedure > Preliminary
Considerations > Equity > General Overview

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Constitutional Law > Equal Protection > Nature &
Scope of Protection

HN7 Equal standing before the law is a traditional concept within equitable jurisdiction. The mere fact that an equitable concept has been denominated by the legislators and the people as a constitutional proposition does not strip it of its equitable nature and derivation.

Civil Procedure > Preliminary
Considerations > Equity > General Overview

Civil
Procedure > ... > Pleadings > Counterclaims > General Overview

Real Property Law > ... > Landlord's Remedies &
Rights > Eviction Actions > General Overview

Real Property Law > ... > Landlord's Remedies &
Rights > Eviction Actions > Forcible Entry &
Detainer

Real Property Law > Title Quality > Adverse Claim
Actions > Unlawful Detainer

HN8 Neither a counterclaim nor a cross complaint is admissible in an action of unlawful detainer. Also, the broad question of title cannot be raised and litigated by cross complaint or affirmative defense in an unlawful detainer action since the sole issue before the court is the right to possession. However, equity will refuse to enforce a forfeiture at the instance of one who has obtained the strictly legal right to it by fraud, deceit, or any form of

oppressive practice; and, upon the other hand, will relieve the innocent when such a forfeiture so secured is sought to be enforced. Thus, equitable principles apply in California where a forfeiture is sought in an action in unlawful detainer.

Constitutional Law > Equal Protection > Nature &
Scope of Protection

HN9 The Unruh Civil Rights Act, *Cal. Civ. Code* §§ 51, 52, provides in part: All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Governments > Legislation > Interpretation

HN10 Generalizations are treacherous in the application of large constitutional concepts.

Civil Rights Law > Protection of Rights > Public
Versus Private Discrimination

HN11 The Unruh Act, *Cal. Civ. Code* §§ 51, 52, prohibits discriminatory practices in all business establishments of every kind whatsoever. This language is all-inclusive and is used in the broadest sense reasonably possible. The word "business" embraces about everything about which one can be employed, and it is often synonymous with calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain. The word "establishment," as broadly defined, includes not only a fixed location, such as the place where one is permanently fixed for residence or business, but also a permanent commercial force or organization or a permanent settled position.

Headnotes/Summary

Headnotes**CALIFORNIA OFFICIAL REPORTS
HEADNOTES****CA(1a) (1a) CA(1b) (1b)****Landlord and Tenant—Unlawful Detainer—
Defenses.**

--In an unlawful detainer action, the defendant should have been permitted to produce proof of his special defenses that his eviction was sought wholly on the ground of his race and that the real reason for his eviction was that he was a Negro; such discrimination, if proven, would bar the court from ordering eviction because such state action would violate both federal and state Constitutions.

CA(2) (2)**Id.—Unlawful Detainer—Appeal—Presumptions.**

--On appeal by the tenant from a judgment for plaintiff in an unlawful detainer action, where the trial court refused to admit any evidence on the allegations of the tenant's affirmative defense that the plaintiff's sole motivation for eviction was racial discrimination, the appellate court must take as true the allegations of such affirmative defense.

CA(3) (3)**Constitutional Law—Due Process—Scope of
Guaranty.**

--The provision in Const., art. I, § 13, that no person shall be deprived of life, liberty, or property without due process of law is identical in scope and purpose with the Fourteenth Amendment of the federal Constitution.

CA(4) (4)**Landlord and Tenant—Unlawful Detainer—Right****of Action.**

--Acts generally lawful may become unlawful when done to accomplish an unlawful end, such as by bringing an unlawful detainer action to evict a tenant where the real reason for his eviction is that he is a Negro.

CA(5) (5)**Id.—Unlawful Detainer—Equitable Defenses.**

--The court may inquire into equitable considerations in an unlawful detainer suit and may look beyond the allegation of the complaint in such a suit to inquire into the constitutional issue of equal protection under the law where the defense is that the tenant's eviction is being sought solely on the ground of his race and that the real reason for his eviction is that he is a Negro. That an equitable concept has been denominated by the legislators and the people as a constitutional proposition does not in itself strip such concept of its equitable nature and derivation.

CA(6) (6)**Id. — Unlawful Detainer — Forfeitures.**

--Equitable principles apply where a forfeiture is sought in an unlawful detainer action.

CA(7) (7)**Id.—Unlawful Detainer—Nature of Proceeding.**

--Where the defense to an unlawful detainer action is the constitutional defense of racial discrimination, the interest in preserving the summary nature of unlawful detainer cannot outweigh the interest of doing substantial justice.

CA(8) (8)

Constitutional Law—Due Process—Persons Protected.

--Discrimination on the basis of race or color is contrary to the public policy of the United States and of this state.

CA(9) (9)

Civil Rights—Privileges and Immunities of Citizens.

--A court should pause as long as is necessary, even in a summary proceeding, to afford one an opportunity to prove allegations of racial discrimination which, if true, would proscribe the court from taking action under both the federal and state Constitutions.

Counsel: Miller & Malone and Loren Miller for Defendant and Appellant.

Stanley Mosk, Attorney General, Howard H. Jewel, Assistant Attorney General, Manly D. Calof, Deputy Attorney General, A. L. Wirin, Richard J. Kamins, R. Milton Smith and Gerald L. Rosen as Amici Curiae on behalf of Defendant and Appellant.

Fred W. Chase for Plaintiff and Respondent.

Lackman & Lackman, Samuel Lackman and Lawrence H. Lackman as Amici Curiae on behalf of Plaintiff and Respondent.

Judges: Burke, P. J. Jefferson, J., and Balthis, J., concurred.

Opinion by: BURKE

Opinion

[*244] [**310] Should the court receive evidence on a tenant's affirmative defense that his tenancy is being terminated solely because of his race?

This is the question posed in this proceeding in unlawful detainer in the Municipal Court, Santa Anita Judicial District. The plaintiff, Abstract Investment Co., instituted the action for the purpose of obtaining possession of certain premises leased to defendant [***2] under a month-to-month tenancy. Defendant's answer acknowledged, in [**311] effect, that a proper notice to quit had been served and that plaintiff was entitled to possession except for the facts alleged in defendant's affirmative defenses. The trial court refused to admit any evidence on the allegations of the affirmative defenses and rendered judgment in favor of plaintiff.

On appeal, the appellate department of the superior court in a split decision reversed the judgment of the trial court on the ground that it was error to exclude evidence under the affirmative defenses. In its opinion the appellate department held that if the allegations of the affirmative defenses were substantiated by competent evidence the judgment would violate the defendant's constitutional rights to equal protection of the law under the [Fourteenth Amendment of the Constitution of the United States](#).

The case was certified, on the superior court's own motion, ¹ to the District Court of Appeal, which latter court ordered it transferred for a hearing and decision.

[***3] [CA\(1a\) \(1a\)](#) In this appeal we are concerned with whether or not the issues tendered by the second and third affirmative defenses may be recognized in an unlawful detainer proceeding. In those defenses defendant contends that his eviction [*245] was sought solely on the ground of his race and that the real reason for his eviction was the fact that he was a Negro. Thus, we must determine: Does judicial enforcement of the eviction of a tenant because of race violate the tenant's rights guaranteed by the [Fourteenth Amendment of the Constitution of the United States](#)

¹Pursuant to rules 62 and 63 of the California Rules of Court [formerly Rules on Appeal].

and by [article I, section 13 of the Constitution of the State of California](#)?

CA(2) (2) For the purposes of this appeal we must take as true the allegations of the affirmative defenses as to the sole motivation for plaintiff's eviction of its tenant.

The relief sought by plaintiff in the unlawful detainer action is judicial action enforcing its effort to evict the tenant and recover possession of the premises. **HN1** The [Fourteenth Amendment of the United States Constitution](#) provides in part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive [***4] any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CA(3) (3) **HN2** [Section 13 of article I of the state Constitution](#) provides in part that no person shall ". . . be deprived of life, liberty, or property without due process of law. . . ." This provision has been held to be identical in scope and purpose with the [Fourteenth Amendment of the Federal Constitution](#). (*Manford v. Singh*, 40 Cal.App. 700 [181 P. 844].)

In the case of [Shelley v. Kraemer](#), 334 U.S. 1 [68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441], the Supreme Court of the United States declared (p. 13), ". . . the principle has become firmly embedded in our constitutional law that **HN3** the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Thus the court concluded that the restrictive covenants against use or occupancy of real property by any person by reason of his race could not be regarded by themselves as violative of any rights guaranteed [***5] by the Fourteenth Amendment. The court stated (p. 13), "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that

there has been no action by the State and the provisions of the Amendment have not been violated. [Citing case.]" The Supreme Court further declared (p. 14), "That the action of state courts and of judicial officers in their [***246**] official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." The [****312**] Supreme Court held that **HN4** enforcement by state courts of the restrictive covenant agreements constituted state action. The court noted that (pp. 20-21) ". . . freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or [***6] color. The Fourteenth Amendment declares 'that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.' *Strauder v. West Virginia*, *supra* (100 U.S. at 307, 25 L.Ed. 665)."

The rule announced in [Shelley v. Kraemer, supra](#), 334 U.S. 1 [68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441], has been followed and extended in subsequent cases, particularly in [Barrows v. Jackson](#), 346 U.S. 249 [73 S.Ct. 1031, 97 L.Ed. 1586].² In that case signers of racial restrictive covenants and their successors in interest sought damages against cosigners who, disregarding such covenants, had sold property burdened thereby to non-Caucasians. The Supreme Court declared (p. 254), "To compel respondent to respond in damages would be for the State to punish her for

² Which affirmed the California decision of [Barrows v. Jackson](#), 112 Cal.App. 534 [247 P.2d 99].

her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that [***7] extent, the State would act to put its sanction behind the covenants. . . . The action of a state court at law to sanction the validity of the restrictive covenant . . . would constitute state action as surely as it was state action to enforce such covenants in equity, as in [Shelley, supra](#)."

The Supreme Court stated further (in [Barrows, supra, at p. 258](#)): "This Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity, [Shelley, supra](#); or [*247] that this Court would deny California the right to incorporate in a statute (citing case); or that could not be enforced in a federal jurisdiction because such a covenant would be contrary to public policy: . . ."

[CA\(4\)](#) (4) In the case at bar plaintiff's right to dispossess defendant rests upon statutory grounds which, [***8] without the interjection of the issue of discrimination, absolutely entitled plaintiff to judgment. The trial court apparently believed that it could not examine into plaintiff's motives since plaintiff was acting entirely within the law. However, in [Gomillion v. Lightfoot, 364 U.S. 339, 347-348 \[81 S.Ct. 125, 5 L.Ed.2d 110\]](#), the Supreme Court of the United States held that [HN5](#) "Acts generally lawful may become unlawful when done to accomplish an unlawful end, [citing case], and a constitutional power cannot be used by way of condition to attain an unconstitutional result." In [Gomillion, supra](#), plaintiffs, Negro citizens of Alabama, sought an injunction to restrain city and county officials from enforcing a statute which altered the shape of the city and had the effect of removing practically all Negro voters but no white voters from the city. The Federal District Court dismissed the action on the ground that the court had no control over the boundaries of municipal

corporations fixed by a duly convened and elected legislative body. On certiorari the Supreme Court of the United States reversed the judgment below holding that assuming the truth of plaintiffs' allegations [***9] the statute was invalid because it violated the Fourteenth Amendment equal protection clauses and the Fifteenth [\[*313\]](#) Amendment, which forbids a state from passing any law depriving a citizen of his vote because of race. In *Gomillion* the Supreme Court stated (p. 341), "At this stage of the litigation we are not concerned with the truth of the allegations, that is, the ability of petitioners to sustain their allegations by proof. The sole question is whether the allegations entitle them to make good on their claim that they are being denied rights under the United States Constitution."

[CA\(5\)](#) (5) Similarly, in the case at bar [HN6](#) the court has the power to look beyond the allegations of the complaint in an unlawful detainer proceeding and to inquire into the constitutional issue placed before it by the second and third affirmative defenses of the action. That the court may inquire into equitable considerations in an unlawful detainer suit has been determined in this state in [Schubert v. Lowe, 193 Cal. 291 \[223 P. 550\]](#). In that case the defendant in an unlawful [\[*248\]](#) detainer action raised as an equitable defense his occupation of the premises under an oral agreement to [***10] lease. While his pleading was called a cross complaint for specific performance and as such was defective it was ruled sufficient to present the issue as an equitable defense to the plaintiff's attempt to wrest the possession of the premises from him by summary proceedings in unlawful detainer.

Amicus curiae California Apartment Owners Association in its brief argues that the defenses urged by defendant in this action are not equitable in nature because they are predicated upon the claimed violation of constitutional rights. An equitable defense is "[a] defense to an action on grounds which, prior to the passing of the Common Law Procedure Act (17 and 18 Vict. c. 125) would

have been cognizable only in a court of equity." (Black's Law Dictionary (4th ed. 1951).) It has also been construed to mean a defense which a court of equity would recognize or one founded upon some distinct ground of equitable jurisdiction. ([City of New York v. Holzderber](#), 44 Misc. 509 [90 N.Y.S. 63, 64].)

Discrimination according to Black's Law Dictionary (4th ed. 1951) is "a failure to treat all equally; favoritism." Certainly [HN7](#) equal standing before the law is a traditional concept within equitable [***11] jurisdiction. The mere fact that an equitable concept has been denominated by the legislators and the people as a constitutional proposition does not strip it of its equitable nature and derivation. A desire on the part of legislators and the people of the United States and the State of California to eliminate the injustices and inequities of discrimination has brought forth constitutional guarantees and statutes declaring a public policy opposed to denial of equal protection under the law. ([U.S. Const., Amends. XIV, XV](#); [Cal. Const., art. I, § 13](#); Unruh Civil Rights Act, [Civ. Code](#), §§ 51, 52; Hawkins Act, [Health & Saf. Code](#), §§ 35700-35741.)

Although defendant bases his defense upon constitutional propositions and statutes seeking to insure equal protection under the law, such defense nevertheless has its foundation in equitable principles.

The purpose of the general rule, that [HN8](#) neither a counterclaim nor a cross complaint is admissible in an action of unlawful detainer, is to prevent tenants who have violated the covenants of their leases from frustrating the ordinary and summary remedy provided by statute for the restitution of the premises. ([Smith v. Whyers](#), 64 Cal.App. [***12] 193 [221 P. 387].) Also, the [*249] broad question of title cannot be raised and litigated by cross complaint or affirmative defense in an unlawful detainer action since the sole issue before the court is the right to possession. ([Cheney v. Trauzettel](#), 9 Cal.2d 158, 159 [69 P.2d 832].)

However, as the court stated in [McCue v. Bradbury](#), 149 Cal. 108 [84 P. 993], at p. 113, ". . . equity will refuse to enforce a forfeiture at the instance of one who has obtained the strictly legal right to it by fraud, deceit, or any form of oppressive practice; and, upon the other hand, will relieve the innocent when such a forfeiture so secured is sought to be enforced."

[**314] [CA\(6\)](#) (6) "Equitable principles apply in this state also where a forfeiture is sought in an action in unlawful detainer." ([Strom v. Union Oil Co.](#), 88 Cal.App.2d 78, 83 [198 P.2d 347].) The court in [Knight v. Black](#), 19 Cal.App. 518, 525-526 [126 P. 512], speaking of the remedy of unlawful detainer, said, ". . . although the remedy provided by law for the breach of such a condition is summary in principle and process, nevertheless the very nature of the action, involving, as it does, [***13] a forfeiture, appeals to the equity side of the court and in turn requires 'a full examination of all of the equities involved to the end that exact justice be done.' [Citation.]"

In this case defendant does not raise a cross complaint or counterclaim, nor does he attempt to litigate the question of title. What he seeks does not violate any of the exclusionary rules with regard to unlawful detainer actions. [CA\(7\)](#) (7) His defense is a constitutional defense based upon a broad equitable principle. Certainly the interest in preserving the summary nature of an action cannot outweigh the interest of doing substantial justice. To hold the preservation of the summary proceeding of paramount importance would be analogous to the "tail wagging the dog."

In [James v. Marinship Corp.](#), 25 Cal.2d 721 [155 P.2d 329, 160 A.L.R. 900], the defendant employer had the right to discharge certain Negro employees because they were not members of a labor union with which their employer had a closed-shop agreement. The employees sought and were granted a preliminary injunction restraining their employer from discharging them. The employees had alleged that the defendant labor union did not

admit Negroes [***14] to membership. The union contended that it could close its membership to otherwise qualified persons for any reason whatsoever, be it arbitrary or otherwise, asserting that private voluntary associations [*250] have always had the right to limit membership to persons mutually acceptable. The labor union pointed out that it did permit Negroes to join an auxiliary union and thus they were not being excluded in fact. However, the court found that such auxiliary membership was discriminatory and unequal and that where a labor union has maintained a monopoly of the labor supply through closed-shop agreements such a union, like a public-service business, may not unreasonably discriminate against Negro workers solely for racial reasons.

Thus, in [*James v. Marinship Corp.*, supra, 25 Cal.2d 721](#), our Supreme Court went behind the allegations of the employer, that it was acting within its legal rights to hire and fire, and of the union, to admit or refuse membership, in order to reach the underlying issue of racial discrimination. The court held that Negroes must be admitted to union membership under the same terms and conditions applicable to non-Negroes, unless the union and [***15] the employer refrain from enforcing the closed-shop agreement against Negroes.

In [*Nebbia v. New York*, 291 U.S. 502 \[54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469\]](#), wherein a state statute regulating milk prices was upheld, the Supreme Court of the United States asserted that under our form of government the use of property and the making of contracts are normally matters of private and not public concern and that the general rule is that both shall be free from governmental interference; however, it pointed out (p. 523), ". . . neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."

In [*Hughes v. Superior Court*, 339 U.S. 460 \[70](#)

[S.Ct. 718, 94 L.Ed. 985\]](#), the Supreme Court upheld the right of the California courts ([*Hughes v. Superior Court*, 32 Cal.2d 850 \[198 P.2d 885\]](#)) to enjoin picketing a place of business for the purpose of securing submission to a demand for employment of Negro clerks in proportion to the number of Negro customers. Here again the court enjoined the exercise of a practice, [***16] [**315] picketing, which is lawful in itself, because it was being used to subvert state policy against involuntary employment on racial lines.

CA(8) (8) Our state Supreme Court has declared in a recent landmark decision, one of a series of four cases dealing with civil rights, "Discrimination on the basis of race or color is [*251] contrary to the public policy of the United States and of this state." ([*Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 471 \[20 Cal.Rptr. 609, 370 P.2d 313\]](#).) The Supreme Court pointed out that among the many California statutory prohibitions against racial discrimination is the [HN9](#) Unruh Civil Rights Act, *Civil Code* sections 51 and [52](#), which provides in part: "All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

3

[***17] In [*Burks v. Poppy Construction Co.*, supra, 57 Cal.2d 463, 471](#), the Supreme Court declared, "Discrimination in housing leads to lack of adequate housing for minority groups [citing case], and inadequate housing conditions contribute to disease, crime, and immorality. Under the police power reasonable restrictions may be placed upon the conduct of any business and the use of any property [citing cases]. . . ." In the same case the Supreme Court also considered the Hawkins Act, Health and Safety Code section 35720, which makes it unlawful for an owner of a "publicly

³ Prior to its amendment in 1961, the section was applicable to "all citizens" instead of "all persons."

assisted housing accommodation," with knowledge of such assistance, to discriminate against any person by reason of his race, color, religion, national origin or ancestry in connection with the rental or sale of the housing accommodation. The court declared the purpose of this act to be to prevent future discrimination in connection with the rental or sale of publicly assisted housing. In [Burks, supra](#), the defendants contended that the Hawkins Act contravenes the equal protection clauses of the federal and state Constitutions because it prohibits discrimination by owners of publicly assisted housing but [***18] not owners of other housing. The Supreme Court declared that there is a reasonable basis for the classification and no denial of equal protection.

In the amicus curiae brief of the California Apartment Owners Association in support of plaintiff it is asserted that to apply the doctrines of the *Shelley* ([Shelley v. Kraemer, supra, 334 U.S. 1](#)) and *Barrows* ([Barrows v. Jackson, supra, 346 U.S. 249](#)) cases would do more than merely protect the claimed rights of defendant. The Association asserts it would interfere with the contractual rights of the parties under [*252] their month-to-month tenancy agreement and would extend those rights by converting a terminable month-to-month tenancy (a tenancy at will) into an oral lease agreement which could by the unilateral action of defendant be extended into a lease of limitless years' duration, binding upon plaintiff landlord but terminable on only 30 days' notice at any time at the will of defendant tenant. Thus, it asserts, the tenant's shield could be turned by him, but only by him, into a sword. He would be permitted to say to his landlord, "I do not wish to rent from you because you are a white person, and hereby [***19] give you thirty days' written notice of my intention to terminate." This he could do with malice, it asserts, with the intent to discriminate, but nevertheless with impunity. The association queries: "Is this the *equal* protection which the Constitution guarantees? Is this the *equal* treatment appellant demands?"

The sage observation of the Supreme Court of the United States in [Hughes v. Superior Court, supra, 339 U.S. 460, 469 \[70 S.Ct. 718, 94 L.Ed. 985\]](#), is very pertinent at this point in answer to questions [**316] and speculations as to the future effect of a judicial decision: "We do not go beyond the circumstances of the case. [HN10](#) Generalizations are treacherous in the application of large constitutional concepts."

It is not the intention of this court to create a situation where persons of one or another race may be placed in position to discriminate against others. What we seek to do is to afford the opportunity to one claiming discrimination to offer proof of his claim. In doing so we act with the calm assurance that should other discriminatory practice result from this decision the courts can be relied upon to enjoin it as illustrated by the case of [***20] [Hughes v. Superior Court, supra, 339 U.S. 460 \[70 S.Ct. 718, 94 L.Ed. 985\]](#). Our purpose is to carry out the constitutional mandates of equal protection under the law as was the purpose of our Supreme Court in [James v. Marinship Corp., supra, 25 Cal.2d 721, 745](#). There the court disposed of a contention that its ruling would in itself result in discrimination by pointing out that the injunction granted in that case ". . . is not so broad as to give Negroes any greater right to membership than that extended to other persons; it was clearly intended to do no more than eliminate discrimination upon the basis of race and color alone."

[CA\(9\) \(9\)](#) Certainly, it is best for a court to pause, however long as may be necessary, albeit in summary proceedings, to afford one an opportunity to prove allegations of racial discrimination [*253] which, if found true, would proscribe the court from taking action under both the federal and state Constitutions.

The Attorney General of the State of California, in an amicus curiae brief filed in support of the position of defendant, refers to the Unruh and Hawkins Civil Rights Acts heretofore mentioned as examples of statutory prohibitions against [***21]

racial discrimination in California. He points out that since the Unruh Act was held by the Supreme Court in the *Burks* case ([Burks v. Poppy Construction Co., supra, 57 Cal.2d 463](#)) to apply to the business of selling houses "It follows, in this case, that the interdictions of that act apply to the business of renting housing accommodations."

California Apartment House Owners Association argues that the *Burks* case, *supra*, is not a proper basis for the assumption that renting housing accommodations is a business. It asserts that the Supreme Court in [Hudson v. Nixon, 57 Cal.2d 482 \[20 Cal.Rptr. 620, 370 P.2d 324\]](#), a case in the same series as *Burks*, negates the applicability of the Unruh Act to a rental situation. In the latter decision the Supreme Court notes "Our decision in [the *Burks* case] is controlling with respect to the validity and application of the Hawkins Act." (P. 483.) From this, amicus curiae Apartment House Owners Association, in our case, reasons that the Unruh Act can have no application to the renting of property. We find no logic in this reasoning.

The *Hudson* case, *supra*, dealt directly with discriminatory practices [***22] by an owner of a publicly assisted housing accommodation. The Hawkins Act deals solely and directly with that subject and was therefore held applicable to the facts in the *Hudson* case, *supra*. In [Burks, supra](#) (p. 470) the Supreme Court stated, "A court must, where reasonably possible, harmonize statutes and construe them so as to give force and effect to all their provisions. Both statutes are designed to discourage discrimination, and it would be unreasonable to hold that the provisions of the Hawkins Act, relating to only part of the housing field, reflect an intent to exclude from the Unruh Act all discriminatory practices with respect to housing, including those that clearly come within the terms of the Unruh Act but are not covered by the provisions of the Hawkins Act. Even as to a case appearing to come within both enactments, we cannot properly hold that the sections of the Hawkins Act were intended [**317] to exclude all operation of the Unruh Act without regard to the

circumstances. Of [*254] course, a plaintiff should not be permitted to recover under both acts and obtain double damages for the same discriminatory conduct, but he may proceed to trial [***23] on alternative causes of action if they are properly pleaded."

The validity of the Hawkins Act was attacked in [Burks, supra](#), upon the ground that it contravened the equal protection clauses of the federal and state Constitutions because it prohibits discrimination by owners of publicly assisted housing but not by owners of other housing. The Supreme Court held to the contrary and that there is a reasonable basis for the classification. The court declared (p. 476), "Discrimination based upon race or color in housing provided by the state through its branches or agencies violates the Fourteenth Amendment (*Banks v. Housing Authority, supra*, 120 Cal.App.2d 1, 16 et seq. [260 P.2d 668]), and an extension of the prohibition to private housing receiving public assistance is a reasonable further step in the application of the policy against such conduct. The closer the connection of the discrimination with governmental activity, the more odious its character, and accordingly the Legislature could reasonably conclude that the problem of discrimination is more important in publicly assisted housing than in private housing which has no governmental assistance. Moreover, the [***24] primary purpose of the governmental assistance, namely, to raise the housing standards of the community, will be frustrated to a substantial extent if racial minorities, whose housing conditions are often substandard, are hampered in obtaining the full benefits of the assistance."

HN11 The Unruh Act prohibits discriminatory practices in "all business establishments of every kind whatsoever." This language is all-inclusive and as the Supreme Court noted in [Burks, supra](#) (p. 468) was used "... in the broadest sense reasonably possible. The word 'business' embraces about everything about which one can be employed, and it is often synonymous with 'calling, occupation, or trade, engaged in for the purpose of making a

livelihood or gain.' (See [Mansfield v. Hyde](#), 112 Cal.App.2d 133, 137 [245 P.2d 577]; 5 Words and Phrases (perm. ed. 1940) p. 970 et seq.) The word 'establishment,' as broadly defined, includes not only a fixed location, such as the 'place where one is permanently fixed for residence or business,' but also a permanent 'commercial force or organization' or 'a permanent settled position (as in life or business).' (See Webster's New Internat. Dict. (2d ed. 1957) p. [***25] 874; *id.* (3d ed. 1961) p. 778.)"

[*255] Applying these definitions in the case before this court we hold that plaintiff was engaged in "business." Whether it operates a "business establishment," however, is not readily apparent from the record before us. Clearly, not all persons who rent their property to others can be held to operate business establishments. Plainly, many do not. We are not in position to hold, therefore, that the discrimination complained of constituted a violation of the Unruh Act. Neither is such a holding necessary to our decision in this case.

[CA\(1b\)](#) (1b) We hold that defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination, which if proven would bar the court from ordering his eviction because such "state action" would be violative of both federal and state Constitutions.

The judgment is reversed and the case is remanded to the Municipal Court, Santa Anita Judicial District, for retrial.



Caution

As of: October 18, 2026 1:40 AM Z

American Academy of Pediatrics v. Lungren

Supreme Court of California

August 5, 1997, Decided ; August 5, 1997

No. S041459.

Reporter

16 Cal. 4th 307 *; 940 P.2d 797 **; 66 Cal. Rptr. 2d 210 ***; 1997 Cal. LEXIS 4411 ****; 97 Daily Journal DAR 10141; 97 Cal. Daily Op. Service 6151

AMERICAN ACADEMY OF PEDIATRICS et al.,
Plaintiffs and Respondents, v. DANIEL E.
LUNGREN, as Attorney General, etc., et al.,
Defendants and Appellants.

Prior History: [****1] Superior Court of San Francisco County. Super. Ct. No. 884574. Maxine M. Chesney, Judge.

Disposition: For the foregoing reasons, we conclude that Assembly Bill 2274 violates the right of privacy set forth in [article I, section 1, of the California Constitution](#). The judgment of the Court of Appeal, upholding the judgment of the trial court, is affirmed.

Core Terms

abortion, privacy, pregnant, parental consent, pregnancy, right to privacy, adolescent, unemancipated minor, privacy interest, adult, plurality, mature, invasion, informed consent, woman, constitutional right, intrusion, terminate, medical care, bypass, expectation of privacy, unemancipated, italic, compelling interest, impinge, judicial authorization, emotional, plur, state constitutional, psychological

Case Summary

Procedural Posture

Defendant state attorney general appealed the judgment of the Court of Appeal (California),

affirming the trial court's judgment, which sustained plaintiff organizations' facial challenge to a law requiring a pregnant minor to obtain parental consent or judicial authorization for an abortion and held that the law violated the minor's right to privacy under [Cal. Const. art. I, § 7](#).

Overview

While California law permitted a minor to obtain pregnancy-related medical care without parental consent, the legislature amended former [Cal. Health & Safety Code § 25958](#) to require parental consent or judicial authorization to obtain an abortion. In plaintiff organizations' action challenging the statute's constitutionality, the trial court and the appellate court agreed that the statute violated the right to privacy guaranteed under [Cal. Const. art. I, § 7](#). On appeal, defendant attorney general maintained that the United States Supreme Court upheld similar parental consent laws under the federal constitution. The court responded that the state constitutional right of privacy was broader than the federal constitutional right. The statute in question intruded upon a fundamental autonomy privacy interest. The state's asserted compelling interests in protecting the health of minors and preserving parent-child relationships were undermined because the law permitted minors to obtain other medical care and the statute impeded the state's interests. The court affirmed the judgment.

Outcome

The court affirmed the judgment. A statute

requiring a pregnant minor to obtain parental consent or judicial authorization for an abortion was properly determined to be unconstitutional because the law infringed upon a minor's fundamental right to privacy guaranteed by the California Constitution.

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN1 Substantive Due Process, Privacy

The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles.

Family Law > Parental Duties & Rights > Consent > General Overview

Healthcare Law > Medical Treatment > Incompetent, Mentally Disabled & Minors > General Overview

HN2 Parental Duties & Rights, Consent

The requirement that medical care be provided to a minor only with the consent of the minor's parent or guardian remains the general rule, both in California and throughout the United States.

Constitutional Law > State Constitutional Operation

Constitutional Law > General Overview

HN3 Constitutional Law, State Constitutional Operation

The California Constitution is, and always has been, a document of independent force, and the rights embodied in and protected by the state constitution are not invariably identical to the rights contained in the federal constitution. California cases recognize the independence of the California Constitution, and the [Cal. Const. art. I, § 24](#), expressly confirms that the rights guaranteed by this constitution are not dependent on those guaranteed by the United States Constitution. Even when the terms of the California Constitution are textually identical to those of the federal constitution, the proper interpretation of the state constitutional provision is not invariably identical to the federal courts' interpretation of the corresponding provision contained in the federal constitution.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN4 Privacy, Personal Decisions

With respect to the constitutional right of privacy, there is a clear and substantial difference in the applicable language of the federal and state constitutions. The federal constitution contains no provision expressly setting forth or guaranteeing a constitutional right of privacy; the recent federal cases recognizing and protecting an individual's privacy interest in the area of reproductive rights have found such a right implied within the more general constitutional protection of liberty embodied in the [U.S. Const. amend. V](#) and [XIV](#). The California Constitution, by contrast, contains in [Cal. Const. art. I, § 1](#), an explicit guarantee of the right of privacy.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN5 Substantive Due Process, Privacy

In many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN6 Privacy, Personal Decisions

The California Constitution is interpreted to provide greater protection of a woman's right of choice than that provided by the federal constitution as interpreted by the United States Supreme Court.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > State Constitutional Operation

HN7 Privacy, Personal Decisions

The California Constitution is construed to provide California citizens with privacy protections encompassing procreative decisionmaking--broader, indeed, than those recognized by the federal constitution.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN8 Substantive Due Process, Privacy

The state right of privacy, unlike its federal counterpart, is not limited to state action, and applies to the actions of a private entity.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > Substantive Due Process > Scope

HN9 Substantive Due Process, Privacy

When a challenged action or regulation directly invades an interest fundamental to personal autonomy, a compelling interest must be present to overcome the vital privacy interest.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Torts > Intentional Torts > Invasion of Privacy > Defenses

Torts > Intentional Torts > Invasion of Privacy > General Overview

HN10 Substantive Due Process, Privacy

A plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. Plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's

conduct which have a lesser impact on privacy interests.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN11 Substantive Due Process, Privacy

The elements of a legally protected privacy interest, reasonable expectation of privacy, and serious invasion of privacy do not interpret significant requirements or hurdles that a plaintiff must meet in order to demonstrate a violation of the right to privacy under the state constitution, hurdles that would modify substantially the traditional application of the state constitutional privacy provision, by authorizing, in a wide variety of circumstances, the rejection of constitutional challenges to conduct or policies that intrude upon privacy interests protected by the state constitutional privacy clause, without any consideration of the legitimacy or importance of a defendant's reasons for engaging in the allegedly intrusive conduct and without balancing the interests supporting the challenged practice against the severity of the intrusion imposed by the practice.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN12 Substantive Due Process, Privacy

A legally protected privacy interest, reasonable expectation of privacy, and serious invasion of privacy are simply threshold elements that may be utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision.

HN13 Substantive Due Process, Privacy

The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information (informational privacy); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (autonomy privacy).

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN14 Substantive Due Process, Privacy

The interest in autonomy privacy protected by the California constitutional privacy clause includes a pregnant woman's right to choose whether or not to continue her pregnancy.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Criminal Abortion > General Overview

Healthcare Law > Medical Treatment > End-of-Life Decisions > General Overview

HN15 Substantive Due Process, Privacy

The right to choose whether to continue or to terminate a pregnancy implicates a woman's fundamental interest in the preservation of her personal health (and in some instances the preservation of her life), her interest in retaining personal control over the integrity of her own body,

and her interest in deciding for herself whether to parent a child. This right of personal choice is central to a woman's control not only of her own body, but also to the control of her social role and personal destiny. The implications of an unwanted child for a woman's education, employment opportunities and associational opportunities (often including marriage opportunities) are of enormous proportion. The right of choice may also implicate a woman's deepest philosophical, moral, and religious concerns, including her personal beliefs regarding the meaning of human existence and the beginning of human life.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN16 Substantive Due Process, Privacy

A pregnant woman's constitutional right of choice is clearly among the most intimate and fundamental of all constitutional rights.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN17 Substantive Due Process, Privacy

Minors as well as adults are persons under the California Constitution who are entitled to the protection provided by constitutional rights. Furthermore, the *Cal. Const. art. I, §* specifically declares that all people are by nature free and independent and have inalienable rights, including enjoying and defending life and liberty, acquiring, possessing, and protecting property, and privacy. Significantly, the constitutional right of privacy afforded by this provision is intended to apply to every Californian, including every man, woman, and child in the state.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Parental Duties & Rights > Consent > General Overview

Healthcare Law > Medical Treatment > Failures & Refusals to Treat > General Overview

Constitutional Law > Substantive Due Process > Privacy > General Overview

Healthcare Law > Medical Treatment > Incompetent, Mentally Disabled & Minors > General Overview

HN18 Privacy, Personal Decisions

Parents during a child's minority have the legal right and obligation to act on their child's behalf to protect their child's rights and interests, and in most instances this general rule applies to interests protected by the state constitutional right of privacy as well as to the minor's other rights and interests. Thus, at least with respect to most medical treatment relating to a minor, the legislature may grant a parent the authority to make medical decisions on behalf of his or her child. No one reasonably could suggest that a serious state constitutional privacy question would be presented, for example, whenever a parent, over a child's objection, requires the child to go to the dentist or to take his or her medicine.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Healthcare Law > Medical Treatment > End-of-Life Decisions > General Overview

HN19 Substantive Due Process, Privacy

A minor who is pregnant has a protected privacy interest under the California Constitution in making the decision whether to continue or to terminate her own pregnancy.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN20 Substantive Due Process, Privacy

The reasonable expectation of privacy element contemplates an inquiry into whether there is something in the particular circumstances in which an alleged intrusion of privacy arises that demonstrates plaintiff has no reasonable expectation of privacy in that context, so that the alleged intrusion would not violate the California Constitution even if there were no justification for the allegedly intrusive conduct.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN21 Substantive Due Process, Privacy

The element of a serious invasion of a privacy interest is intended simply to screen out intrusions on privacy that are de minimis or insignificant.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Constitutional Law > Substantive Due
Process > Scope

HN22 Privacy, Personal Decisions

The particular context, the specific kind of privacy interest involved and the nature and the seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis of the appropriate standard or test that a proposed justification must meet. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, such as freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a compelling

interest must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Constitutional Law > Substantive Due
Process > Scope

HN23 Substantive Due Process, Privacy

Statutory provisions that intrude or impinge upon such a fundamental autonomy privacy interest properly must be evaluated under the compelling interest standard, i.e., defendant must demonstrate a compelling state interest which justifies the intrusion and which cannot be served by alternative means less intrusive on fundamental rights.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Constitutional Law > Substantive Due
Process > Scope

HN24 Substantive Due Process, Privacy

When a statute significantly intrudes upon a fundamental, autonomy privacy interest of a minor, proper respect for a minor's state constitutional right of privacy requires a showing that the intrusion upon such a basic and fundamental right is necessary to further a compelling, i.e., an extremely important and vital, state interest. Under the [Cal. Const. art. I, § 1](#), a statutory intrusion upon an autonomy privacy interest of such a fundamental nature may not be justified simply by showing that the statute serves a legitimate competing interest sufficient to justify an impingement upon a less central privacy interest.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Constitutional Law > Substantive Due
Process > Scope

HN25 Substantive Due Process, Privacy

The circumstance that a statute is directed at minors unquestionably is relevant in determining the nature and strength of the state interests that defendants contend are served by a statute. The state has a special and particularly compelling interest in protecting the health and welfare of children. A statute's relationship to minors properly is employed in the constitutional calculus in determining whether an asserted state purpose or interest is compelling. Because a statute's impact on minors is taken into account in assessing the importance of the state interest ostensibly served by the infringement, it is not appropriate additionally to lower the applicable constitutional standard under which the statute is to be evaluated simply because the privacy interests at stake are those of minors.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN26 Substantive Due Process, Privacy

Under the constitutional analysis traditionally applied in past California privacy cases, when a statute, as written, broadly impinges upon fundamental constitutional privacy rights in its general, normal, and intended application, a court, in assessing the statute's constitutionality, must determine whether the justifications for the statute outweigh its impingement on privacy rights and the statute is narrowly drawn to avoid unnecessary impingement on such rights.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN27 Substantive Due Process, Privacy

A statute that imposes substantial burdens on fundamental privacy rights with regard to a large class of persons may not be sustained against a facial constitutional attack simply because there may be a small subclass of persons covered by the statute as to whom a similar but much more narrowly drawn statute constitutionally could be applied. Thus, a facial challenge to a statutory provision that broadly impinges upon fundamental constitutional rights may not be defeated simply by showing that there may be some circumstances in which the statute constitutionally could be applied, when there is nothing in the language or legislative history of the provision that would afford a reasonable basis for severing the asserted constitutionally permissible applications of the statute from the provision's unconstitutional applications.

Constitutional Law > ... > Case or
Controversy > Constitutionality of
Legislation > General Overview

HN28 Case or Controversy, Constitutionality of Legislation

A law may not be held unconstitutional on its face simply because those challenging the law may be able to hypothesize some instances in which application of the law might be unconstitutional.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Governments > Legislation > Overbreadth

HN29 Substantive Due Process, Privacy

When a statute broadly and directly impinges upon the fundamental constitutional privacy rights of a substantial portion of those persons to whom the statute applies, the statute can be upheld only if

those defending the statute can establish that, considering the statute's general and normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

HN30 Case or Controversy, Constitutionality of Legislation

As a general rule, it is not the judiciary's function to reweigh the legislative facts underlying a legislative enactment. When an enactment intrudes upon a constitutional right, however, greater judicial scrutiny is required. The ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN31 Case or Controversy, Constitutionality of Legislation

When a statute impinges upon a constitutional right, legislative findings with regard to the need for, or probable effect of, the statutory provision cannot be considered determinative for constitutional purposes. Although courts must give legislative findings great weight and should uphold them unless unreasonable or arbitrary, they also must enforce the provisions of the constitution and may not lightly disregard or blink at a clear constitutional mandate. The deference afforded to legislative findings does not foreclose a court's independent judgment on the facts bearing on an

issue of constitutional law.

Healthcare Law > Medical Treatment > Patient Consent > Informed Consent

Public Health & Welfare
Law > Healthcare > General Overview

Constitutional Law > Substantive Due Process > Privacy > General Overview

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Healthcare Law > Medical Treatment > Incompetent, Mentally Disabled & Minors > General Overview

HN32 Patient Consent, Informed Consent

A statute that impinges upon a fundamental constitutional right cannot be upheld on the basis of unsupported speculation that the legislature believes that health care professionals would not perform their duties in an honest and ethical manner.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The Legislature enacted legislation (Assem. Bill No. 2274) that required a pregnant minor to secure either parental consent or judicial authorization before she could obtain an abortion (Health & Saf. Code, former [§ 25958](#), now § 123450). Before the effective date of this legislation, a group of physicians' associations and other interested parties sought declaratory and injunctive relief on the ground that the legislation violated the state constitutional right to privacy ([Cal. Const., art. I, § 1](#)). The trial court declared the legislation unconstitutional and permanently enjoined its

enforcement, specifically ruling that the legislation violated a pregnant minor's rights to autonomy and informational privacy ([Cal. Const., art. I, § 1](#)) and to equal protection ([Cal. Const., art. I, § 7](#)). (Superior Court of the City and County of San Francisco, No. 884574, Maxine M. Chesney, Judge.) The Court of Appeal, First Dist., Div. One, No. A058627, affirmed on the ground that the legislation violated a pregnant minor's right to autonomy privacy.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that because this statute intruded significantly on fundamental autonomy privacy interests of pregnant minors, it was subject to scrutiny under the compelling interest test, and the state failed to establish that its intrusion was necessary to serve the interests proffered in support of the legislation, those being the protection of the mental, emotional, and physical health of minors, and the preservation and promotion of the parent-child relationship. First, the necessity of these statutory restrictions was undermined by state laws that authorized a minor, without parental consent, to obtain medical care and make other important decisions in analogous contexts that posed risks to a minor's health at least equal to, or greater than, those posed by the decision to terminate a pregnancy. Second, overwhelming, uncontroverted evidence introduced at trial demonstrated that the legislation would not protect the state's proffered interests, but rather would impede them. Finally, there was nothing in the record to indicate that a physician was not capable of determining whether a pregnant minor was competent to give informed consent in the event she chose to terminate her pregnancy. (Opinion by George, C. J., with Werdegard and Chin, JJ., concurring. Concurring opinion by Kennard, J. Dissenting opinions by Mosk, Baxter, and Brown, JJ.)

Headnotes

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b) [CA\(1c\)](#) (1c) [CA\(1d\)](#) (1d)

[CA\(1e\)](#) (1e) [CA\(1f\)](#) (1f) [CA\(1g\)](#) (1g) [CA\(1h\)](#) (1h)
[CA\(1i\)](#) (1i)

Constitutional Law § 58.1—First Amendment and Other Fundamental Rights—Right to Privacy—Right of Sexual and Reproductive Privacy—Abortion—Validity of Statute Requiring Parental Consent or Judicial Authorization for Minors: Abortion and Birth Control § 18—Minors.

--A state statute that required a pregnant minor to secure either parental consent or judicial authorization before she could obtain an abortion violated the right of privacy ([Cal. Const., art. I, § 1](#)) and was therefore invalid. Because the statute intruded significantly on fundamental autonomy privacy interests of pregnant minors, it was subject to scrutiny under the compelling interest test, and the state failed to establish that its intrusion was necessary to serve the interests proffered in support of the legislation, those being the protection of the mental, emotional, and physical health of minors, and the preservation and promotion of the parent-child relationship. First, the necessity of these statutory restrictions was undermined by state laws that authorized a minor, without parental consent, to obtain medical care and make other important decisions in analogous contexts that posed at least equal or greater risks to a minor's health as those posed by the decision to terminate a pregnancy (including the decision to give birth to a child, to place a child for adoption, and to make medical decisions during pregnancy). Second, overwhelming, uncontroverted evidence introduced at trial demonstrated that the legislation would not protect the state's proffered interests, but rather would impede them. Finally, there was nothing in the record to indicate that a physician was not capable of determining whether a pregnant minor was competent to give informed consent in the event she chose to terminate her pregnancy.

[5 **Witkin**, Summary of Cal. Law (9th ed. 1988) Torts, § 355.]

[CA\(2\)](#) (2)

Constitutional Law § 15—Construction of Constitutions—Parallel Provisions of State and Federal Constitutions.

--The California Constitution is, and always has been, a document of independent force, and rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution. Even when the terms of the California Constitution are textually identical to those of the federal Constitution, the proper interpretation of the state constitutional provision is not invariably identical to the federal courts' interpretation of the corresponding provision contained in the federal Constitution. (Per George, C. J., Werdegar, and Chin, JJ.)

CA(3) (3)

Constitutional Law § 58.1—First Amendment and Other Fundamental Rights—Right to Privacy—State Constitutional Right as Compared to Federal Constitutional Right.

--With respect to the constitutional right of privacy, there is a clear and substantial difference in the applicable language of the federal and state Constitutions. The federal Constitution contains no provision expressly setting forth or guaranteeing a constitutional right of "privacy"; the recent federal cases recognizing and protecting an individual's privacy interest in the area of reproductive privacy have found such a right implied within the more general constitutional protection of "liberty" embodied in U.S. Const., 5th and 14th Amends. Cal. Const., art. I, § 1, contains, by contrast, an explicit guarantee of the right of "privacy," added to the California Constitution in November 1972, when the electorate approved an initiative measure the purpose of which was to provide explicit protection of the right of privacy in the state Constitution. Furthermore, in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts. (Per

George, C. J., Werdegar, and Chin, JJ.)

CA(4a) (4a) CA(4b) (4b)

Constitutional Law § 58.1—First Amendment and Other Fundamental Rights—Right to Privacy—Sexual and Reproductive Privacy—State Constitution.

--The California Constitution provides greater protection of a woman's right of choice than that provided by the federal Constitution as interpreted by the United States Supreme Court. Moreover, the state right of privacy, unlike its federal counterpart, is not limited to "state action," but instead also protects an individual's privacy from infringement or invasion by private persons or entities. (Per George, C. J., Werdegar, and Chin, JJ.)

CA(5) (5)

Constitutional Law § 58—First Amendment and Other Fundamental Rights—Right to Privacy—Application of "Compelling State Interest" Test.

--Not every assertion of a privacy interest under Cal. Const., art. I, § 1, must be overcome by a "compelling state interest," and a defendant need not invariably demonstrate that the objective involved could not be met by less intrusive means. The particular context, i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a compelling interest must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed. (Per George, C. J., Werdegar, and Chin, JJ.)

CA(6a) (6a) CA(6b) (6b)**Constitutional Law § 58—First Amendment and Other Fundamental Rights—Right to Privacy—Elements of Claim and Defenses.**

--A plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and conduct by the defendant constituting a serious invasion of privacy. The defendant may prevail by negating any of these elements or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut the defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to the defendant's conduct which have a lesser impact on privacy interests.

CA(7) (7)**Constitutional Law § 58—First Amendment and Other Fundamental Rights—Right to Privacy—Threshold Elements of Claim—Application.**

--The elements that must be established in support of a right to privacy claim--a legally protected privacy interest, a reasonable expectation of privacy, and a serious invasion of privacy--should not be interpreted as establishing significant new requirements or hurdles that a plaintiff must meet, hurdles that would modify substantially the traditional application of the state constitutional privacy provision (and diminish the protection provided by that provision). Instead, these elements properly must be viewed simply as "threshold elements" that may be utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision. These elements do not eliminate the necessity for weighing and balancing the

justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy interest. Rather, these threshold elements permit courts to weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant. (Per George, C. J., Werdegar, and Chin, JJ.)

CA(8a) (8a) CA(8b) (8b)**Constitutional Law § 58—First Amendment and Other Fundamental Rights—Right to Privacy—Informational Privacy and Autonomy Privacy.**

--Legally recognized privacy interests are generally of two classes: interests in precluding the dissemination or misuse of sensitive and confidential information (informational privacy), and interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (autonomy privacy).

CA(9a) (9a) CA(9b) (9b)**Constitutional Law § 58.1—First Amendment and Other Fundamental Rights—Right to Privacy—Right to Sexual and Reproductive Privacy.**

--The interest in autonomy privacy protected by Cal. Const., art. I, § 1, includes a pregnant woman's right to choose whether or not to continue her pregnancy. The right to choose whether or not to terminate a pregnancy implicates a woman's fundamental interest in the preservation of her personal health (and in some instances the preservation of her life), her interest in retaining personal control over the integrity of her own body, and her interest in deciding for herself whether to parent a child. Thus, a pregnant woman's constitutional right of choice is clearly among the most intimate and fundamental of all constitutional

rights.

[CA\(10a\)](#) (10a) [CA\(10b\)](#) (10b) [CA\(10c\)](#) (10c)

Constitutional Law § 58—First Amendment and Other Fundamental Rights—Right to Privacy—Application to Minors.

--Minors as well as adults are "persons" under the Constitution who are entitled to the protection provided by our constitutional rights. Furthermore, [Cal. Const., art. I, § 1](#), specifically declares that "all people are by nature free and independent and have inalienable rights[, including] enjoying and defending life and liberty, acquiring, possessing, and protecting property, . . . and privacy." Significantly, the ballot argument accompanying the measure that added the privacy clause expressly confirms that the constitutional right of privacy afforded by this provision was intended to apply to "every Californian," including "every man, woman and child in this state." Hence, under the California constitutional privacy clause, a statute that impinges upon the fundamental autonomy privacy right of either a minor or an adult must be evaluated under the demanding "compelling interest" test.

[CA\(11\)](#) (11)

Parent and Child § 3—Relationship—Mutual Rights of Parent and Child.

--Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent. (Per George, C. J., Werdegar, and Chin, JJ.)

[CA\(12\)](#) (12)

Constitutional Law § 58.1—First Amendment and Other Fundamental Rights—Right to Privacy—Right to Sexual and Reproductive Privacy—Woman's Right to Choose—Challenge to Facial Validity of Statute.

--A statute that imposes substantial burdens on fundamental privacy rights with regard to a large class of persons may not be sustained against a facial constitutional attack simply because there may be a small subclass of persons covered by the statute as to whom a similar but much more narrowly drawn statute constitutionally could be applied. Furthermore, under the federal Constitution, a facial constitutional challenge to a statute that significantly impinges upon a woman's fundamental constitutional right of choice may not be defeated simply by showing that there may be some circumstances in which the statute constitutionally might be applied. If a statute operates as a substantial obstacle to such choice in a large fraction of the cases to which the statute applies, the statute is unconstitutional on its face. When a statute broadly and directly impinges upon the fundamental constitutional privacy rights of a substantial portion of those persons to whom the statute applies, the statute can be upheld only if those defending the statute can establish that, considering the statute's general and normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means. (Per George, C. J., Werdegar, and Chin, JJ.)

[CA\(13\)](#) (13)

Constitutional Law § 27—Constitutionality of Legislation—Rules of Interpretation—Purpose, Wisdom, and Motives of Legislature—Judicial Scrutiny of Legislative Findings.

--As a general rule, it is not the judiciary's function to reweigh the legislative findings underlying a legislative enactment. When an enactment intrudes upon a constitutional right, however, greater judicial scrutiny is required. The ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened. The rational connection between the remedy provided and the evil to be curbed, which

in other contexts might support legislation against attack on due process grounds, will not suffice. (Per George, C. J., Werdegarr, and Chin, JJ.)

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Opinion by: GEORGE

Opinion

[*313] [**800] [***213] GEORGE, C. J.

In this case we must determine the validity, under the California Constitution, of a statutory provision that requires a pregnant minor (whether just short of her 18th birthday, or several years younger) to secure parental consent or judicial authorization [****3] before she may obtain an abortion. The trial court, after a lengthy court trial, concluded that the statute was unconstitutional, and the Court of Appeal unanimously agreed with that ruling and affirmed the judgment.

As in past cases involving the controversial subject of abortion, we emphasize at the outset that the morality of abortion is not at issue in this case. "[HN1](#) The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles." ([Committee to Defend Reproductive Rights v. Myers \(1981\) 29 \[*314\] Cal. 3d 252, 284 \[172 Cal. Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118\]](#).) Our decision in this case does not turn upon the personal views of any justice with regard to that moral issue.

Nor is the desirability of parental involvement in a minor's decision whether to obtain an abortion or instead to give birth to a child in question here. No one would doubt the value to a pregnant minor of wise and caring parental guidance and support as she confronts a decision that will affect the rest of her life, assuming [****4] such support is available and the minor is willing to seek it. The statute at issue, however, applies not only to a pregnant minor who is willing to seek parental advice and consent, but rather has its most significant impact in those instances in which a pregnant minor is too frightened or too embarrassed to disclose her condition to a parent (or to a court).

The question before us is not whether, as a matter of policy, the challenged statute is wise or beneficial, but instead whether it is constitutional. We determine the validity of the legislative measure by applying the relevant legal principles embodied in the California Constitution, the preeminent expression of California law enacted by the people.

For the reasons explained hereafter, we conclude that both the trial court and the Court of Appeal correctly determined that the statute at issue violates the right of privacy guaranteed by [article I, section 1, of the California Constitution](#). Accordingly, we shall affirm the judgment rendered by the Court of Appeal.¹

[****5] I

The statutory provision in question--Assembly Bill No. 2274, 1987-1988 Regular Session (hereafter Assembly Bill 2274)--was enacted in 1987, but it has never been enforced because its application has been stayed by the lower courts pending determination of its validity. This measure constitutes just one part of a comprehensive statutory scheme governing the conditions and circumstances under which medical, surgical, and hospital care may be provided to minors in California. To place the challenged legislation in proper perspective, we review the history and evolution of the related California statutory provisions in this area.

At common law, minors generally were considered to lack the legal capacity to give valid consent to medical treatment or services, and consequently a parent, guardian, or other legally authorized person generally was [*315] required to provide the requisite consent. In the absence of an emergency, a physician who provided medical care to a minor without such parental or other legally authorized

consent could be sued for battery. [**801] [***214] (See generally, IJA-ABA Joint Com. on Juvenile Justice Standards, Standards Relating to Rights of [****6] Minors (1984) std. 4.1, com., p. 51.) As with other common law rules relating to the legal "disability" of minority, the purpose of the general common law rule regarding medical care was to protect the health and welfare of minors, safeguarding them from the potential overreaching of third parties or the improvidence of their own immature decisionmaking, and leaving decisions concerning the minor's medical care in the hands of his or her parents, who were presumed to be in the best position to protect the health of their child. (See, e.g., [Bonner v. Moran \(D.C. Cir. 1941\) 126 F.2d 121, 122-123 \[75 App.D.C. 156, 139 A.L.R. 1366\].](#))

[HN2](#) The requirement that medical care be provided to a minor only with the consent of the minor's parent or guardian remains the general rule, both in California and throughout the United States. (See, e.g., [Cobbs v. Grant \(1972\) 8 Cal. 3d 229, 243-244 \[104 Cal. Rptr. 505, 502 P.2d 1\]](#); [Rainer v. Community Memorial Hosp. \(1971\) 18 Cal. App. 3d 240, 251, fn. 14 \[95 Cal. Rptr. 901\]](#); see generally, Annot. [\(1989\) 67 A.L.R.4th 511, 516-517.](#)) Over the past half-century, however, a number of significant statutory developments in California have modified [****7] the general rule relating to the provision of medical care to minors.

One development involves the Legislature's enactment of a number of discrete, so-called "medical emancipation" statutes, each of which has designated a general category of minors who--although not legally emancipated for all purposes--nonetheless are authorized to obtain medical, surgical, or hospital care in all contexts, without parental consent. In 1961, the Legislature enacted statutory provisions authorizing (1) any lawfully married minor, and (2) any minor on active duty with any of the United States armed services, to consent to all hospital, medical, and surgical care without parental approval. (Stats. 1961, ch. 1407, § 1, p. 3212 [enacting former [Civ. Code, § 25.6](#)];

¹It bears emphasis that *all* of the lower court judges who have considered the validity of the statute in question have found that the statute violates the right of privacy guaranteed by the California Constitution.

Stats. 1961, ch. 1407, § 2, p. 3213 [enacting former [Civ. Code, § 25.7](#)].) ² And in 1968, the Legislature adopted a somewhat broader medical emancipation statute, providing that "a minor 15 years of age or older who is living separate and apart from his parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of [*316] the duration of such separate residence, and who is managing his [****8] own financial affairs, regardless of the source of his income," may consent to any hospital, medical, or surgical care without parental approval. (Stats. 1968, ch. 371, § 1, p. 785 [enacting former [Civ. Code, § 34.6](#), now [Fam. Code, § 6922](#)]; see [Carter v. Cangello \(1980\) 105 Cal. App. 3d 348 \[164 Cal. Rptr. 361\]](#).)

In addition to this first category of what might be characterized as "general medical emancipation" statutes, California has adopted a considerable number of additional statutory provisions that fall within a second category of what might be termed "limited medical emancipation" statutes, [****9] i.e., statutes that authorize minors, without parental consent, to obtain medical care only for specific, designated conditions, without authorizing the minor to consent to medical care for other medical needs. These limited medical emancipation statutes identify circumstances in which a minor in need of medical care may be reluctant, for a variety of reasons, to inform his or her parents of the situation or condition that has created the minor's need for such care, and in which, because of such reluctance, there is a substantial risk that minors would fail to seek medical care--"to the detriment of themselves, their families, and society" (Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State and Child* (1994) [1994 U.Ill.L.Rev. 311, 323-324](#))--were minors required to inform their parents and obtain

parental consent before being allowed to receive medical care. (See generally, Wadlington, *Consent to Medical Care for Minors*, in *Children's Competence to Consent* (Melton et al. eds. 1983) pp. 61-64.)

[**802] [****215] Over the past 40 years, California has enacted a variety of such limited medical emancipation statutes. The initial [****10] statute falling within this category--the amended version of which is challenged in this case--was enacted in 1953 and authorized an unmarried pregnant minor, *without parental consent*, to obtain hospital, medical, and surgical care *related to pregnancy*. (Stats. 1953, ch. 1654, § 1, p. 3383, enacting former [Civ. Code, § 34.5](#), now [Fam. Code, § 6925](#).) (We shall review the specific language and evolution of this statute in more detail below.) In 1968, the Legislature adopted a similar provision authorizing any minor, 12 years of age or older, to obtain, without parental consent, medical care *related to the diagnosis or treatment of any infectious, contagious, or communicable disease, including a sexually transmitted disease*. (Stats. 1968, ch. 417, § 1, p. 859, enacting former [Civ. Code, § 34.7](#), now [Fam. Code, § 6926](#).) In 1977, an analogous provision was adopted authorizing any minor, 12 years of age or older, to obtain, without parental consent, medical care *related to the diagnosis and treatment of rape*. (Stats. 1977, ch. 354, § 1, p. 1325, enacting former [Civ. Code, § 34.8](#), now [Fam. Code, § 6927](#).) That same year, the Legislature adopted another statute [*317] [****11] authorizing a minor (of any age) to obtain, without parental consent, medical care *relating to sexual assault*. (Stats. 1977, ch. 935, § 1, p. 2859, enacting former [Civ. Code, § 34.9](#), now [Fam. Code, § 6928](#).) ³ [****12] And in 1977 the Legislature also adopted a statute authorizing any minor, 12 years or older, without parental consent,

²In 1978, in adopting a new, comprehensive Emancipation of Minors Act, the Legislature provided that any person who has entered into a valid marriage or is on active duty with any of the armed forces of the United States is an emancipated minor for all purposes. (See Stats. 1978, ch. 1059, § 1, p. 3267, enacting former Civ. Code, § 62, subds. (a), (b), now [Fam. Code, § 7002, subds. \(a\), \(b\)](#).)

³The provision authorizing a minor to consent to medical care relating to sexual assault contains a provision directing the professional who renders such medical treatment to attempt to contact the minor's parent or parents, but also provides that such contact need not be attempted if the professional believes that the parent committed the sexual assault.

to obtain medical care and counseling *relating to the diagnosis and treatment of a drug or alcohol related problem*. (Stats. 1977, ch. 979, § 1, p. 2953, enacting former [Civ. Code, § 34.10](#), now [Fam. Code, § 6929](#).)⁴ Finally, in 1979, another, somewhat comparable statute was adopted by the Legislature, authorizing a minor, 12 years or older, to obtain, without parental consent, *mental health treatment or counseling on an outpatient basis*. (Stats. 1979, ch. 832, § 1, p. 2887, enacting former [Civ. Code, § 25.9](#), now [Fam. Code, § 6924](#).)

As this list demonstrates, over the past four decades the Legislature has recognized that, in a variety of specific contexts, the protection of the health of minors may best be served by permitting a minor to obtain medical care without parental consent. These statutes do not reflect a legislative determination that a minor who, for example, has been raped or has contracted a sexually transmitted disease would not benefit from the consultation and advice of a supportive parent. Indeed, as noted, a few of the statutes specifically call upon the treating physician or health care provider to notify and attempt to involve the minor's parents in the treatment process, so [****13] long as the circumstances suggest to the health care provider that such involvement will not be detrimental to the health or interests of the minor. (See *ante*, fns. 3, 4.) Nor do these statutes imply that a minor who, for example, has been sexually assaulted or has a drug or alcohol abuse problem is more mature or knowledgeable than other minors of similar age; a minor who may obtain medical care for such conditions still must obtain parental consent before she or he may obtain, for example, an appendectomy.

Instead, each of these statutory provisions embodies a legislative recognition that, particularly

in matters concerning sexual conduct, minors frequently are reluctant, either because of embarrassment or fear, to inform their parents of medical conditions relating to such conduct, and consequently that there is a considerable risk that minors will postpone or avoid [*318] seeking needed medical care if they are required to obtain parental consent before receiving medical care for such [***216] conditions. [**803] To protect their health in these particular circumstances, the statutes authorize minors to receive medical care for these designated conditions without [****14] parental consent.

As already noted, the present case involves the constitutional validity of a legislative measure that amends the oldest of California's limited medical emancipation statutes, the one pertaining to a minor's access to medical care relating to pregnancy. We now proceed to review the history of that measure in some detail.

As originally enacted in 1953, former [Civil Code section 34.5](#) provided in full: "Notwithstanding any other provision of the law, an unmarried, pregnant minor may give consent to the furnishing of hospital, medical and surgical care related to her pregnancy, and such consent shall not be subject to disaffirmance because of minority. The consent of the parent or parents of an unmarried, pregnant minor shall not be necessary in order to authorize hospital, medical and surgical care related to her pregnancy." (Stats. 1953, ch. 1654, § 1, p. 3383.) Under the terms of the statute, an unmarried pregnant minor was authorized to receive, without parental notification or consent, the full range of medical care related to her pregnancy that a pregnant adult could receive.

At the time former [Civil Code section 34.5](#) was enacted in 1953, the applicable California [****15] statute narrowly limited the right of *any* pregnant woman to obtain an abortion, providing that a physician lawfully could perform an abortion only when such a procedure was "necessary to preserve" the life of the pregnant

⁴ Although authorizing a minor to obtain medical care for drug and alcohol abuse problems without parental consent, the statute also provides that "[t]he treatment plan of a minor authorized by this section shall include the involvement of the minor's parent, parents, or legal guardian, if appropriate, as determined by the professional person or treatment facility treating the minor." (Stats. 1977, ch. 979, § 1, p. 2953.)

woman. (Former [Pen. Code, § 274](#); see, e.g., [People v. Ballard \(1959\) 167 Cal. App. 2d 803, 814 \[335 P.2d 204\]](#) [interpreting the scope of the statute].) Although no published decision addressed the question, it appears that at this time a pregnant minor, like a pregnant adult, lawfully could obtain an abortion only when the procedure was "necessary to preserve" the minor's life within the meaning of former [Penal Code section 274](#). Under the terms of former [Civil Code section 34.5](#), however, whenever such an abortion lawfully could be performed, a minor could obtain such medical and surgical care without parental involvement.

In 1967, the Legislature passed the Therapeutic Abortion Act (Stats. 1967, ch. 327, § 1, p. 1521, enacting former [Health & Saf. Code, § 25950-25954](#)). This act expanded the circumstances under which a woman lawfully could obtain an abortion, authorizing such a surgical procedure when (1) there was a substantial risk that continuation **[****16]** of the pregnancy would gravely impair the woman's physical or mental health, or (2) the pregnancy was the result **[*319]** of rape or incest. (Under the Therapeutic Abortion Act, the determination whether a woman was eligible for an abortion was to be made by a committee composed of members of the medical staff of the hospital at which the abortion was to be performed.)

In [Ballard v. Anderson \(1971\) 4 Cal. 3d 873 \[95 Cal. Rptr. 1, 484 P.2d 1345, 42 A.L.R.3d 1392\]](#), this court was presented with the question whether a pregnant minor, by virtue of former [Civil Code section 34.5](#), was authorized to consent to the same medical and surgical procedures relating to her pregnancy to which a pregnant adult could consent under the Therapeutic Abortion Act. Finding nothing in the language of the act that would preclude a pregnant minor from consenting to an abortion under the conditions set forth in the act, the court in *Ballard* concluded that because an abortion constituted surgical care related to pregnancy within the meaning of former [Civil Code section 34.5](#), under that provision a pregnant minor

lawfully could consent to a therapeutic abortion. The court in *Ballard* declared: **[****17]** "There is no rational basis for discriminatorily singling out therapeutic abortion as the only type of pregnancy-related surgical care which requires parental consent." ([4 Cal. 3d at p. 883](#).)

Thus, the decision in *Ballard* confirmed that, under the then existing provisions of former [Civil Code section 34.5](#), a pregnant minor could obtain, without parental consent, the full range of medical care relating to her pregnancy that a pregnant adult lawfully could obtain. Shortly after the *Ballard* decision, judicial decisions in this court and the United States Supreme Court ([People v. Barksdale \(1972\) 8 Cal. 3d 320, 332 \[105 Cal. Rptr. 1, 503 P.2d 257\]](#); [Roe v. Wade \(1973\) 410 U.S. 113 \[93 S. Ct. 705, 35 L. Ed. 2d 147\]](#); **[**804]** **[***217]** [Doe v. Bolton \(1973\) 410 U.S. 179 \[93 S. Ct. 739, 35 L. Ed. 2d 201\]](#)), as well as the electorate's adoption of an explicit California constitutional right of privacy in November 1972, provided additional protection of a pregnant individual's right to choose whether to continue or terminate her pregnancy. Because the provisions of former [Civil Code section 34.5](#) remained unchanged in all relevant respects,⁵ California law **[****18]** continued to afford pregnant minors the right to obtain, without parental consent, the same, full range of medical and surgical care relating to pregnancy that a pregnant adult could obtain.

From its enactment in 1953 until its amendment in 1987, former [Civil Code section 34.5](#) drew no distinction on the basis of whether or not a **[*320]** pregnant minor chose to continue or to terminate her pregnancy. The statute provided simply that a minor could obtain medical and surgical care "relating to pregnancy" without parental consent, affording a pregnant minor unencumbered access to

⁵ In 1975, former [Civil Code section 34.5](#) was amended to authorize an unmarried minor to obtain, without parental consent, not only medical and surgical care relating to pregnancy, but care, other than sterilization, relating to "the prevention . . . of pregnancy," e.g., the prescription and furnishing of contraceptive drugs and devices. (Stats. 1975, ch. 820, § 1, p. 1873.)

medical care relating to her pregnancy without regard [****19] to whether the minor chose to continue or to terminate her pregnancy.

In 1987, the Legislature enacted Assembly Bill 2274 (Stats. 1987, ch. 1237, § 1-7, pp. 4396-4399), which left unchanged the general language of former [Civil Code section 34.5](#) ("[n]otwithstanding any other provision of law, an unemancipated minor may give consent to the furnishing of hospital, medical and surgical care related to the prevention or treatment of pregnancy . . . [and t]he consent of the parent or parents of such minor shall not be necessary in order to authorize the hospital, medical, and surgical care"), but added a concluding clause that declares the section shall not be construed "to authorize an unemancipated minor to receive an abortion without the consent of a parent or guardian other than as provided in [Section 25958 of the Health and Safety Code](#)."⁶

[****20] Former [section 25958 of the Health and Safety Code](#) (now [§ 123450](#)), which was added by Assembly Bill 2274, in turn provides that (1) "[e]xcept in a medical emergency requiring immediate medical action, no abortion shall be performed upon an unemancipated minor unless she first has given her written consent to the abortion and also has obtained the written consent of one of her parents or legal guardian," and (2) "[i]f one or both of an unemancipated, pregnant minor's parents or her guardian refuse to consent to

the performance of an abortion, or if the minor elects not to seek the[ir] consent . . . , an unemancipated pregnant minor may file a petition with the juvenile court[,] . . . set[ting] forth with specificity the minor's reasons for the request." Declaring that the minor's identity is to be treated as confidential in such a proceeding, Health and Safety Code former [section 25958](#) goes on to provide that (1) if the court finds that the minor "is sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, and that the minor has, on that basis, consented thereto, the court shall grant the petition," and (2) if the court finds that [****21] the minor is not [*321] sufficiently mature and informed, "the court shall then consider whether performance of the abortion would be in the best interest of the minor," and shall grant the petition if the court finds that the performance of an abortion would be in the minor's best interest and deny the petition if it finds that the performance of an abortion would [****218] not be in the [**805] minor's best interest. The section also includes a number of provisions intended to ensure that the so-called "judicial bypass" proceeding is held and decided expeditiously, and, if the trial court denies the petition, that the denial is subject to expedited appellate review. Finally, the section provides that any person who knowingly performs an abortion on a minor without complying with the section's provisions is guilty of a misdemeanor (punishable by a fine or incarceration).⁷

⁶ Former [Civil Code section 34.5](#), as amended, read in full:

"Notwithstanding any other provision of law, an unemancipated minor may give consent to the furnishing of hospital, medical and surgical care related to the prevention or treatment of pregnancy, and that consent shall not be subject to disaffirmance because of minority. The consent of the parent or parents of such minor shall not be necessary in order to authorize the hospital, medical, and surgical care.

"This section shall not be construed to authorize a minor to be sterilized without the consent of his or her parent or guardian [or] to authorize an unemancipated minor to receive an abortion without the consent of a parent or guardian other than as provided in [Section 25958 of the Health and Safety Code](#)." (Stats. 1987, ch. 1237, § 2, p. 4396.)

⁷ [Health and Safety Code section 25958](#), as added by Assembly Bill 2274 (Stats. 1987, ch. 1237, § 3, pp. 4396-4398), reads in full:

"(a) Except in a medical emergency requiring immediate medical action, no abortion shall be performed upon an unemancipated minor unless she first has given her written consent to the abortion and also has obtained the written consent of one of her parents or legal guardian.

"(b) If one or both of an unemancipated, pregnant minor's parents or her guardian refuse to consent to the performance of an abortion, or if the minor elects not to seek the consent of one or both of her parents or her guardian, an unemancipated pregnant minor may file a petition with the juvenile court. If, pursuant to this subdivision, a minor seeks a petition, the court shall assist the minor or person designated by the minor in preparing the petition and notices

[****22] [*322] Accordingly, as revised by

required pursuant to this section. The petition shall set forth with specificity the minor's reasons for the request. The court shall ensure that the minor's identity is confidential. The minor may file the petition using only her initials or a pseudonym. An unemancipated pregnant minor may participate in the proceedings in juvenile court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel upon request. The hearing shall be set within three days of the filing of the petition. A notice shall be given to the minor of the date, time, and place of the hearing on the petition.

"(c) At the hearing on a minor's petition brought pursuant to subdivision (b) for the authorization of an abortion, the court shall consider all evidence duly presented, and order either of the following:

"(1) If the court finds that the minor is sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, and that the minor has, on that basis, consented thereto, the court shall grant the petition.

"(2) If the court finds that the minor is not sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, the court shall then consider whether performance of the abortion would be in the best interest of the minor. In the event that the court finds that the performance of the abortion would be in the minor's best interest, the court shall grant the petition ordering the performance of the abortion without consent of, or notice to, the parents or guardian. In the event that the court finds that the performance of the abortion is not in the best interest of the minor, the court shall deny the petition.

"Judgment shall be entered within one court day of submission of the matter.

"(d) The minor may appeal the judgment of the juvenile court by filing a written notice of appeal at any time after the entry of the judgment. The Judicial Council shall prescribe, by rule, the practice and procedure on appeal and the time and manner in which any record on appeal shall be prepared and filed. These procedures shall require that the notice of the date, time, and place of hearing, which shall be set within five court days of the filing of notice of appeal, shall be mailed to the parties by the clerk of the court. The appellate court shall ensure that the minor's identity is confidential. The minor may file the petition using only her initials or a pseudonym. Judgment on appeal shall be entered within one court day of submission of the matter.

"(e) No fees or costs incurred in connection with the procedures required by this section shall be chargeable to the minor or her parents, or either of them, or to her legal guardian.

"(f) It is a misdemeanor, punishable by a fine of not more than one thousand dollars (\$ 1000), or by imprisonment in the county jail of up to 30 days, or both, for any person to knowingly perform an abortion on an unmarried or unemancipated minor without complying with the requirements of this section." (Stats. 1987, ch. 1237, § 3, pp. 4396-4398.)

Assembly Bill 2274, the applicable California statutes continue to authorize a pregnant minor to obtain medical care relating to her pregnancy without parental consent or judicial authorization so long as the minor chooses to continue her pregnancy, but provide that the minor may obtain a medically safe abortion only if she first obtains parental consent or judicial authorization.

II

Plaintiffs filed the present action challenging the constitutionality of Assembly Bill 2274 in November 1987, shortly after the statute was enacted and before it was scheduled to go into effect on January 1, 1988. ⁸ [**806] [***219] Plaintiffs contended that the statute violated the right of privacy secured by [article I, section 1, of the California Constitution](#) and denied them equal protection of the laws in violation of [article I, section 7, of the California Constitution](#), and sought a preliminary injunction to enjoin its operation.

[****23] In December 1987, the superior court issued a preliminary injunction prohibiting state officials from enforcing the newly enacted legislation pending the resolution of plaintiffs' constitutional challenge. Defendants appealed from the order granting a preliminary injunction, and further proceedings with regard to the merits of the action were stayed pending that appeal. In October 1989, the Court of Appeal affirmed the trial court's order, concluding that in view of the substantiality of plaintiffs' constitutional challenge and the balance of relative hardships, the trial court did not err in granting the preliminary injunction. ([American Academy of Pediatrics v. Van de Kamp \(1989\) 214 Cal. App. 3d 831 \[263 Cal. Rptr. 46\] \(American Pediatrics I.\)](#).) In reaching this

⁸ Plaintiffs in this action are the American Academy of Pediatrics, California District IX; the California Medical Association; the American College of Obstetricians and Gynecologists, District IX; Planned Parenthood of Alameda-San Francisco; and Dr. Philip Darney, a board-certified specialist in obstetrics and gynecology. Defendants are the Attorney General of the State of California and the district attorneys of each California county.

conclusion, the Court of Appeal in *American Pediatrics I* determined that the provisions of Assembly Bill 2274 represented a significant infringement on a pregnant minor's intimate and fundamental constitutional right to choose whether or not to continue her pregnancy, and that to sustain the constitutionality of the provision "the burden at [*323] trial will be upon the People to prove they have a compelling [****24] interest in the regulation of unemancipated minors' consent to an abortion . . . [and] that this legislation is the least intrusive alternative available and is so narrowly drawn as to impinge upon the constitutionally protected area no more than is necessary to accomplish the state's legitimate goals." (214 Cal. App. 3d at pp. 846-847.) The Court of Appeal in *American Pediatrics I* further held that, in view of this court's decision in *Committee to Defend Reproductive Rights v. Myers, supra*, 29 Cal. 3d 252, "[t]he court at trial will have to determine if minors who have abortions have needs different from those of minors choosing to carry to term and, if not, whether legislation reasonably can be drafted which does not impermissibly discriminate between classes of minors." (214 Cal. App. 3d at p. 848.) The matter then was returned to the superior court for further proceedings.

In October and November 1991, the case was tried to the superior court, sitting without a jury. At trial, 25 witnesses testified, and the deposition testimony of 6 other witnesses was admitted into evidence. The witnesses represented a broad spectrum of experts with training and experience in [****25] the fields of health care, adolescent development, and the application of judicial bypass procedures in other states. The testimony covered a wide range of subjects, including the relative medical and psychological risks posed to pregnant minors by abortion and childbirth, the general maturity of minors seeking abortion, the existing guidelines and practices with regard to the counseling provided to minors seeking abortion, and the general efficacy (or lack thereof) of the judicial bypass process in other jurisdictions.

At the conclusion of the trial, the court issued a lengthy opinion, reviewing the evidence that had been presented at trial and making extensive findings on the basis of the evidence presented. The trial court concluded that although the two interests upon which the state relied to support the legislation--namely, the protection of the physical, emotional, and psychological health of minors, and the furtherance of the parent-child relationship --constituted "compelling state interests" for purposes of the relevant constitutional analysis, the state had failed to prove that the challenged legislation would, in fact, further these interests. Indeed, the trial court [****26] found that the evidence at trial overwhelmingly established that the legislation would *not* advance these worthy objectives, but rather would be counterproductive and detrimental both to the health of pregnant minors and to the parent-child relationship. In addition, the trial court found that defendants had failed to justify the distinction drawn by the legislation between pregnant minors who choose to undergo abortions and [**807] [****220] pregnant minors who choose to carry to term, i.e., by requiring minors who seek to terminate their pregnancy to obtain parental consent or judicial authorization before they obtain medical [*324] care, but permitting pregnant minors who choose to continue their pregnancy to obtain medical care without parental consent or judicial authorization.

On the basis of its factual findings and legal conclusions, the trial court concluded that Assembly Bill 2274 is unconstitutional, violating the right of privacy guaranteed by [article I, section 1, of the California Constitution](#) and denying the equal protection of the laws guaranteed by [article I, section 7, of the California Constitution](#). The court issued a judgment permanently enjoining [****27] the statute's enforcement. Defendants appealed from the judgment.

While the appeal was pending in the Court of Appeal, our court decided the case of [Hill v. National Collegiate Athletic Assn. \(1994\) 7 Cal. 4th 1 \[26 Cal. Rptr. 2d 834, 865 P.2d 633\]](#), concluding

that an athletic drug testing program, administered by a private organization, did not violate the state constitutional right of privacy. In the course of the decision in *Hill*, our court addressed a number of issues related generally to the proper scope and application of the state constitutional right of privacy. Although the trial court's decision in the present case preceded our decision in *Hill*, the Court of Appeal concluded that there was no need to remand this matter to the trial court for further proceedings in light of *Hill*,⁹ and further concluded that, on the basis of the trial court record and the applicable privacy principles set forth and reaffirmed in *Hill*, the trial court correctly had concluded that Assembly Bill 2274 violates the state constitutional right of privacy. Accordingly, the Court of Appeal affirmed the trial court judgment, permanently enjoining the application of Assembly [****28] Bill 2274.¹⁰

We granted defendants' petition for review in order to consider the important issue presented by this case.

III

CA(1a) (1a) In challenging the decisions of both the trial court and the Court of Appeal, defendants rely heavily upon the circumstance that the United States Supreme Court, in a series of decisions, has upheld the validity under the federal Constitution of abortion/parental consent laws--similar to that embodied in Assembly Bill 2274 --that have been enacted in other states.¹¹ [****30] Indeed, it is

⁹Neither plaintiffs nor defendants have challenged the Court of Appeal's conclusion that the present record provides an adequate basis upon which to decide the constitutional issue.

¹⁰Having concluded that the statute violated the state constitutional right of privacy, the Court of Appeal found no need to consider or resolve the state equal protection issue.

¹¹The United States Supreme Court has addressed the validity of parental notice and consent provisions in abortion statutes in the following decisions: *Planned Parenthood of Missouri v. Danforth* (1976) 428 U.S. 52 [96 S. Ct. 2831, 49 L. Ed. 2d 788]; *Bellotti v. Baird* (1979) 443 U.S. 622 [99 S. Ct. 3035, 61 L. Ed. 2d 797] (hereafter *Bellotti II*); *H. L. v. Matheson* (1981) 450 U.S. 398 [101 S.

quite clear that in drafting and enacting Assembly Bill 2274 in [*325] 1987, the California Legislature itself relied heavily [****29] upon the prior United States Supreme Court decisions in this area. Most of the express "legislative findings" set forth in *section 1* of Assembly Bill 2274 are either verbatim quotations or close paraphrases of language from opinions of the United States Supreme Court,¹² and the judicial [****221] bypass [**808] provisions of Health and Safety Code former [section 25958](#) clearly were drafted to comply with the requirements set forth in the applicable federal decisions. Defendants maintain that just as the United States Supreme Court has found such a statutory scheme permissible under the federal Constitution, we similarly should find the enactment permissible under the California Constitution.

[****31] **CA(2) (2)** As defendants acknowledge,

Ct. 1164, 67 L. Ed. 2d 388; *Planned Parenthood Assn. v. Ashcroft* (1983) 462 U.S. 476 [103 S. Ct. 2571, 76 L. Ed. 2d 733]; *Akron v. Akron Center for Reproductive Health* (1983) 462 U.S. 416 [103 S. Ct. 2481, 76 L. Ed. 2d 687] (hereafter *Akron I*); *Hodgson v. Minnesota* (1990) 497 U.S. 417 [110 S. Ct. 2926, 111 L. Ed. 2d 344]; *Ohio v. Akron Center for Reproductive Health* (1990) 497 U.S. 502 [110 S. Ct. 2972, 111 L. Ed. 2d 405]; *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833 [112 S. Ct. 2791, 120 L. Ed. 2d 674] (hereafter *Casey*); *Lambert v. Wicklund* (1997) 520 U.S. [117 S. Ct. 1169, 137 L. Ed. 2d 464].

¹²**Section 1** of Assembly Bill 2274 reads in full: "THE LEGISLATURE FINDS AS FOLLOWS: (a) the medical, emotional, and psychological consequences of an abortion are serious and can be lasting, particularly when the patient is an immature minor; (b) the capacity to become pregnant and the capacity for exercising mature judgment concerning the wisdom of an abortion are not logically related; (c) minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences of their actions; (d) parents ordinarily possess information essential to a physician's exercise of his or her best medical judgment concerning a minor child; and (e) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention subsequent to her abortion." (Stats. 1987, ch. 1237, § 1, p. 4396.)

The first four of these findings either directly quote or paraphrase language from two United States Supreme Court opinions. Findings (a), (b), and (d) correspond to language in *H. L. v. Matheson*, *supra*, 450 U.S. 398, 408, 411 [101 S. Ct. 1164, 1170-1171, 1172], and finding (c) corresponds to language in the lead opinion in *Bellotti II*, *supra*, 443 U.S. 622, 640 [99 S. Ct. 3035, 3046].

however, it is well established that [HN3](#) the California Constitution "is, and always has been, a document of independent force" ([People v. Brisendine \(1975\) 13 Cal. 3d 528, 549-550 \[119 Cal. Rptr. 315, 531 P.2d 1099\]](#)), and that the rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution. (See generally, [Raven v. Deukmejian \(1990\) 52 Cal. 3d 336, 351-355 \[276 Cal. Rptr. 326, 801 P.2d 1077\]](#).) California cases long have recognized the independence of the California Constitution (see, e.g., [Gabrielli v. Knickerbocker \(1938\) 12 Cal. 2d 85, 89 \[82 P.2d 391\]](#)), and [article I, section 24, of the California Constitution](#) expressly confirms that the rights "guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Past cases make clear that [\[*326\]](#) even when the terms of the California Constitution are textually identical to those of the federal Constitution, the proper interpretation of the state constitutional provision is not invariably identical to the federal courts' interpretation of the corresponding provision [\[****32\]](#) contained in the federal Constitution. (See, e.g., [Raven v. Deukmejian, supra, 52 Cal. 3d 336, 352-354; People v. Brisendine, supra, 13 Cal. 3d 528, 548-551.](#))

[CA\(3\) \(3\)](#) Furthermore, [HN4](#) with respect to the specific constitutional right at issue in this case--the constitutional right of privacy--there is a clear and substantial difference in the applicable language of the federal and state Constitutions. The federal Constitution contains no provision expressly setting forth or guaranteeing a constitutional right of "privacy"; the recent federal cases recognizing and protecting an individual's privacy interest in the area of reproductive rights have found such a right implied within the more general constitutional protection of "liberty" embodied in the Fifth and Fourteenth Amendments. (See, e.g., [Casey, supra, 505 U.S. 833, 846-853 \[112 S. Ct. 2791, 2804-2808\]](#).) The California Constitution, by contrast, contains in [article I, section 1](#), an explicit guarantee

of the right of "privacy."¹³ This explicit reference to the right of privacy was added to the California Constitution in November 1972, when the electorate approved an initiative measure whose purpose [\[****33\]](#) was to provide explicit protection of the right of privacy in the state Constitution. (See [Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. \(Nov. 7, 1972\), argument in favor of Prop. 11, pp. 26-27; id., rebuttal to argument against Prop. 11, p. 28.](#))

Finally, and most significantly, not only is the state constitutional right of privacy embodied in explicit constitutional language not present in the federal Constitution, but past California cases establish that, [HN5](#) in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted [\[****34\]](#) by the federal courts. (Compare [Hill v. National Collegiate Athletic Assn., supra, 7 Cal. 4th 1, 15-20 \[**809\] \[***222\]](#) [state constitutional right of privacy applies to private, as well as to state, action] with [Skinner v. Railway Labor Executives' Assn. \(1989\) 489 U.S. 602, 614 \[109 S. Ct. 1402, 1411-1412, 103 L. Ed. 2d 639\]](#) [federal privacy right applies only to governmental action]; [City of Santa Barbara v. Adamson \(1980\) 27 Cal. 3d 123 \[164 Cal. Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219\]](#) [for purposes of determining validity of zoning ordinance, state privacy right protects right to reside with [\[*327\]](#) unrelated persons] with [Village of Belle Terre v. Boraas \(1974\) 416 U.S. 1 \[94 S. Ct. 1536, 39 L. Ed. 2d 797\]](#) [contra].)

[CA\(4a\) \(4a\)](#) Indeed, a past decision of this court involving the same aspect of the right of privacy as that involved in the present case--namely, the right

¹³ [Article I, section 1, of the California Constitution](#) provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Italics added.)

of a pregnant woman to choose whether to continue her pregnancy or to have an abortion--clearly demonstrates that [HN6](#) the state Constitution has been interpreted to provide greater protection of a woman's right of choice than that provided by the federal Constitution as interpreted [****35] by the United States Supreme Court. In [Committee to Defend Reproductive Rights v. Myers, supra, 29 Cal. 3d 252](#) (Myers), this court was faced with the question of the validity, under the California Constitution, of state Budget Act provisions that afforded full funding of medical expenses incurred by an indigent pregnant woman if she chose to continue her pregnancy and bear a child, but that, at the same time, generally denied public funding of medical expenses to an indigent women if she chose to have an abortion. In defending the constitutionality of the provisions challenged in Myers, the state relied upon a then recent decision of the United States Supreme Court that had upheld the validity, under the federal Constitution, of a similar funding scheme under which the federal government paid the medical expenses of an indigent pregnant woman if she chose to continue her pregnancy but did not pay for necessary medical expenses if the woman chose to have an abortion. (See [Harris v. McRae \(1980\) 448 U.S. 297 \[100 S. Ct. 2671, 65 L. Ed. 2d 784\]](#); see also [Maher v. Roe \(1977\) 432 U.S. 464 \[97 S. Ct. 2376, 53 L. Ed. 2d 484\]](#) [upholding similar state regulation [****36] against federal constitutional challenge].) In Myers, this court concluded that the federal precedent was not controlling as to the validity of the challenged funding scheme under the state Constitution, and, applying state constitutional principles, went on to find that the unequal funding scheme violated the protection afforded a pregnant woman's right of privacy by the privacy provision of [article I, section 1, of the California Constitution](#) that had been adopted several years earlier.

In the more than 15 years that have elapsed since the Myers decision, California courts repeatedly and uniformly have recognized that "[HN7](#) our state Constitution has been construed to provide California citizens with privacy protections

encompassing procreative decisionmaking--broader, indeed, than those recognized by the federal Constitution." ([Johnson v. Calvert \(1993\) 5 Cal. 4th 84, 100 \[19 Cal. Rptr. 2d 494, 851 P.2d 776\]](#), italics added [citing Myers]; see also [Urbaniak v. Newton \(1991\) 226 Cal. App. 3d 1128, 1136 \[277 Cal. Rptr. 354\]](#) ["the state right of privacy has been held to be broader than the federal right," citing Myers]; [American Pediatrics I, \[****37\] supra, 214 Cal. App. 3d 831, 839](#) ["the California Constitution . . . expressly recognizes a right to privacy . . . which is broader than the federal right to privacy," [*328] citing Myers]; [Chico Feminist Women's Health Center v. Scully \(1989\) 208 Cal. App. 3d 230, 241 \[256 Cal. Rptr. 194\]](#) ["our state privacy guaranty is broader than the federal privacy right," citing Myers]; [Planned Parenthood Affiliates v. Van de Kamp \(1986\) 181 Cal. App. 3d 245, 277 \[226 Cal. Rptr. 361\]](#) ["[t]he California Supreme Court has declared the state constitutional right to be much broader than the privacy rights guaranteed by the federal Constitution," citing Myers]; accord, [Chico Fem. Women's Hlth. Cr. v. Butte Glenn Med. S. \(E.D.Cal. 1983\) 557 F. Supp. 1190, 1203](#) ["the right of procreative choice protected by Article I, § 1 has already been established as significantly broader than the comparable federal right," citing Myers].)

Because the applicable California authority establishes that the protection afforded by the California Constitution of a pregnant woman's right of choice is broader than the constitutional protection afforded by the federal [****38] [**810] [***223] Constitution as interpreted by the United States Supreme Court, the circumstance that the federal high court has concluded that abortion/parental consent statutes similar to Assembly Bill 2274 do not violate the federal Constitution, does not establish that Assembly Bill 2274 is compatible with the governing constitutional privacy principles established by the California Constitution. To decide that issue, it is necessary for us to evaluate Assembly Bill 2274 under applicable state constitutional principles.

IV

CA(1b) (1b) In determining whether Assembly Bill 2274 violates the state constitutional right of privacy, we examine the challenged statute under the standards and principles set forth in this court's prior decisions interpreting and applying [article I, section 1, of the California Constitution](#).

In [Hill v. National Collegiate Athletic Assn., supra, 7 Cal. 4th 1](#) (*Hill*), a case involving a state constitutional challenge to a drug testing program imposed by a private organization (the National Collegiate Athletic Association (NCAA)) upon student athletes engaged in intercollegiate competition sponsored by the organization, our court conducted an exhaustive [****39] review of the history and past application of the state constitutional privacy clause, and attempted to clarify a number of issues concerning the proper application of this provision. Because of the breadth of the inquiry conducted in *Hill*, we believe that it is helpful to begin our analysis of the state constitutional privacy issue with a discussion of that decision.

CA(4b) (4b) The initial issue addressed by the court in *Hill* was whether the state constitutional privacy clause properly should be interpreted to protect individuals only from invasions of privacy by governmental entities or other [*329] "state actors," or instead also protects an individual's privacy from infringement or invasion by private persons or entities, such as the NCAA. After reviewing the background of the state constitutional provision, the court in *Hill* concluded that [HN8](#) the state right of privacy, *unlike its federal counterpart*, is not limited to "state action," and applies to the actions of the NCAA at issue in *Hill*.¹⁴

[****40] **CA(5) (5)** Having found that the state constitutional privacy clause applies to the actions of the NCAA, the court in *Hill* turned to the question of the appropriate legal standard to be applied in determining whether the challenged drug testing program violated state constitutional privacy principles. The lower courts in *Hill* had ruled that the NCAA was required to prove both that its drug testing program was supported by a "compelling state interest" and that there were no less intrusive alternative means by which the interest served by the drug testing program could be achieved. After reviewing the history and background of the state constitutional privacy clause and prior California case law applying the provision, the court in *Hill* concluded that the lower courts had erred in suggesting "that every assertion of a privacy interest under article I, *section 1*, must be overcome by a 'compelling interest,' " or that a defendant invariably was required to demonstrate that the objective involved could not be met by less intrusive means. ([7 Cal. 4th at pp. 34-35](#).) Noting that although some prior California privacy decisions "use 'compelling interest' language[,] others appear to rely [****41] on balancing tests giving less intense scrutiny to nonprivacy interests," the court in *Hill* explained: "The particular context, i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a 'compelling interest' must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is [**811] [****224] less central, or in bona fide dispute, general balancing tests are employed." ([7 Cal. 4th at p. 34](#), fn. omitted.)

With respect to the particular privacy interests implicated by the athletic drug testing program at issue in *Hill*, the court ultimately determined that a general balancing test, rather than a compelling interest test, was applicable. ([Hill, supra, 7 Cal. 4th](#)

¹⁴In the present case, of course, plaintiffs' state constitutional privacy challenge is directed at *a statutory measure enacted by the Legislature* that limits the circumstances under which a pregnant minor may obtain an abortion, and thus there is no question that even if "state action" were required to bring into play the state constitutional privacy clause, such a requirement would be satisfied here.

[at pp. 43-44, 53-54.](#)) On the other hand, as the above [*330] quotation indicates, the court recognized in *Hill* that [HN9](#) when a challenged action or regulation [****42] directly invades "an interest fundamental to personal autonomy, . . . a 'compelling interest' must be present to overcome the vital privacy interest." ([Id. at p. 34.](#)) As we explain below, the statute at issue in the case now before us intrudes upon just such "an interest fundamental to personal autonomy," and we conclude that the statute thus is subject to scrutiny under the "compelling interest" test. (See, *post*, pp. 340-342.)

[CA\(6a\)](#) (6a) After clarifying that the "compelling interest" test does not apply to all intrusions upon privacy interests protected by the state constitutional right of privacy, the court in *Hill* went on to consider "the correct legal standard to be applied in assessing plaintiffs' claims for invasion of privacy" ([7 Cal. 4th at p. 35](#)), setting forth three "elements" of a cause of action for violation of the state constitutional right of privacy and discussing the "defenses" that might be raised in opposition to such a claim. ([Id. at pp. 35-39.](#)) The court summarized its conclusions as follows: [HN10](#) "[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected [****43] privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." ([Id. at pp. 39-40.](#)) "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." ([Id. at p. 40.](#))¹⁵ The court further explained that "[t]he

plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests." ([Id. at p. 40.](#))

[****44] [CA\(7\)](#) (7) As explained in the lead opinion in the recent decision in [Loder v. City of Glendale \(1997\) 14 Cal. 4th 846, 891 \[59 Cal. Rptr. 2d 696, 927 P.2d 1200\]](#) (*Loder*): "[HN11](#) The three 'elements' set forth in *Hill*--a legally protected privacy interest, reasonable expectation of privacy, and serious invasion of privacy--should not be interpreted as establishing significant *new* requirements or hurdles that a plaintiff must meet in order to demonstrate a [*331] violation of the right to privacy under the state Constitution--hurdles that would modify substantially the traditional application of the state constitutional privacy provision (and diminish the protection provided by that provision), by authorizing, in a wide variety of circumstances, the rejection of constitutional challenges to conduct or policies that intrude upon privacy interests protected by the state constitutional privacy clause, without any [****812] [****225] consideration of the legitimacy or importance of a defendant's reasons for engaging in the allegedly intrusive conduct and without balancing the interests supporting the challenged practice against the severity of the intrusion imposed by the practice." [****45] (Lead opn. by George, C. J.)

Instead, "[HN12](#) the three 'elements' set forth in *Hill* properly must be viewed simply as 'threshold elements' that may be utilized to screen out claims

balancing of diverse interests is central to the privacy jurisprudence of both common and constitutional law. [P] Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." ([7 Cal. 4th at pp. 37-38.](#))

¹⁵In further explaining this point, the court in *Hill* observed: "The diverse and somewhat amorphous character of the privacy right necessarily requires that privacy interests be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a 'balancing test.' The comparison and

that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision. These elements do not eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy interest. As we have noted, *Hill* was the first case in which our court addressed the question whether the state constitutional privacy clause applies to *private* as well as to governmental entities. Having concluded that that privacy clause applies to private entities and also that the legal concept of 'privacy' potentially has a very broad sweep, the court in *Hill* determined that it was appropriate to articulate several threshold elements that may permit courts to weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation [****46] or justification by the defendant. *Hill* cannot properly be read, however, to have adopted a sweeping new rule under which a challenge to conduct that significantly affects a privacy interest protected by the state Constitution may be rejected without any consideration of either the legitimacy or strength of the defendant's justification for the conduct." (*Loder, supra*, 14 Cal. 4th 846, 893-894, fn. omitted (lead opn. by George, C. J.).)

We proceed to analyze the validity of Assembly Bill 2274 under the broad general framework discussed in *Hill*.

V

We conclude initially that the state constitutional privacy claim advanced by plaintiffs in this case clearly satisfies the "threshold elements" set forth in *Hill* in order to screen out claims that do not involve a significant intrusion upon a privacy interest protected by the state constitutional privacy clause. Indeed, as we shall see, Assembly Bill 2274 intrudes significantly on a [*332] privacy interest that past California decisions have identified as "clearly among the most intimate and fundamental

of all constitutional rights." (*Myers, supra*, 29 Cal. 3d 252, 275.)

A

As the court noted in [****47] *Hill*, *HN13* "[t]he first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest." (*Hill, supra*, 7 Cal. 4th 1, 35.) Accordingly, we begin by determining whether Assembly Bill 2274 implicates a "protected privacy interest" that falls under the aegis of the state constitutional privacy clause.

CA(8a) (8a) As the court in *Hill* observed, "[l]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Hill, supra*, 7 Cal. 4th 1, 35.) CA(1c) (1c) Because we conclude that Assembly Bill 2274 significantly intrudes upon a fundamental autonomy privacy interest protected by the state privacy clause, and further conclude that defendants have failed to establish that the statute's intrusion on this autonomy privacy interest is necessary to serve the interests proffered in support of Assembly Bill 2274, we shall [****48] confine our analysis to the autonomy privacy interest, and need not determine whether Assembly Bill 2274's impact on any informational privacy interest is sufficient to satisfy the threshold elements of *Hill* and, if so, whether the proffered state interests are sufficient to justify any such intrusion on informational privacy.

[**813] [***226] CA(9a) (9a) Past California cases firmly and unequivocally establish that *HN14* the interest in autonomy privacy protected by the California constitutional privacy clause includes a pregnant woman's right to choose whether or not to continue her pregnancy. (See, e.g., *People v. Belous* (1969) 71 Cal. 2d 954, 963-964 [80 Cal. Rptr. 354,

[458 P.2d 194](#)]; *Ballard v. Anderson*, [supra](#), 4 Cal. 3d 873, 879-881; *People v. Barksdale*, [supra](#), 8 Cal. 3d 320, 326-327; *Myers*, [supra](#), 29 Cal. 3d 252, 274-275.) As these decisions explain, [HN15](#) the right to choose whether to continue or to terminate a pregnancy implicates a woman's fundamental interest in the preservation of her personal health (and in some instances the preservation of her life), ¹⁶ her interest in retaining [\[*333\]](#) personal control over the integrity of her own body, ¹⁷ [\[****49\]](#) and her interest in deciding for herself whether to parent a child. And our court also has made clear the profound importance of this constitutional right: "This right of personal choice is central to a woman's control not only of her own body, but also to the control of her social role and personal destiny. . . . 'The implications of an unwanted child for a woman's education, employment opportunities and associational opportunities (often including marriage opportunities) are of enormous proportion.' [Citation.]" (*Myers*, [supra](#), 29 Cal. 3d at p. 275, italics added.) The right of choice may also implicate a woman's deepest philosophical, moral, and religious concerns, including her personal beliefs regarding the meaning of human existence and the beginning of human life. (Accord, [Casey](#), [supra](#), 505 U.S. 833, 851 [112 S. Ct. 2791, 2807] (lead opn.) ["[P]ersonal decisions relating to . . . procreation . . . involv[e] the most intimate and

personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . [and] to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own [\[****50\]](#) concept of existence, of meaning, of the universe, and of the mystery of human life."].) In *Myers*, [supra](#), 29 Cal. 3d 252, 275, we declared that [HN16](#) a pregnant woman's constitutional right of choice is "clearly among the most intimate and fundamental of all constitutional rights."

[\[****51\]](#) All of the fundamental autonomy privacy interests embodied in the constitutional right of choice clearly are implicated by the statute at issue in this case, because the statute prohibits a pregnant minor from obtaining the medical care necessary safely to terminate her pregnancy unless she first obtains either the consent of a parent or judicial authorization. There would be no question, of course, that a provision applicable to a pregnant *adult* would impinge upon a woman's constitutionally protected interest in autonomy privacy if it conditioned her right to obtain the medical care necessary safely to terminate her pregnancy upon the woman's obtaining the consent of another person (for example, a spouse, parent, or other relative), or obtaining a judicial order authorizing an abortion. Such a statute clearly would intrude upon the woman's right, as an individual, to retain personal control over the fundamental autonomy interests involved in the decision whether to continue [\[*334\]](#) or to terminate her pregnancy. [CA\(1d\)](#) (1d) Defendants contend, however, that because Assembly Bill 2274 applies only to pregnant *minors*, and requires only parental consent (or judicial authorization), [\[****52\]](#) it should not be viewed as intruding upon a protected privacy interest for [\[***227\]](#) purposes of [\[**814\]](#) determining whether the initial "threshold element" of the *Hill* analysis is satisfied.

We do not agree. Although the circumstances that Assembly Bill 2274 applies to minors and involves parental consent certainly are relevant

¹⁶ "[T]he choice between childbirth and abortion in some instances involves potential risks to the life of the pregnant woman. Moreover, even when a life-threatening condition is not present, the constitutional choice directly involves the woman's fundamental interest in the preservation of her personal health." (*Myers*, [supra](#), 29 Cal. 3d at p. 274.)

¹⁷ "If a man is the involuntary source of a child--if he is forbidden, for example, to practice contraception--the violation of his personality is profound; the decision that one wants to engage in sexual intercourse but does not want to parent another human being may reflect the deepest of personal convictions. But if a woman is forced to bear a child--not simply to provide an ovum but to carry the child to term--the invasion is incalculably greater . . . [I]t is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary." [Citation.] (*Myers*, [supra](#), 29 Cal. 3d at p. 274.)

considerations in evaluating the adequacy of the justifications for the statute, in our view a statute that restricts a pregnant individual's ability to decide on her own whether to continue or to terminate her pregnancy unquestionably implicates a constitutionally protected privacy interest of a pregnant minor (as well as a pregnant adult) for purposes of the initial threshold element of *Hill*.

CA(10a) (10a) To begin with, it is well established that, as a general matter, **HN17** "minors as well as adults are 'persons' under the Constitution who are entitled to the protection" provided by our constitutional rights. (*In re Roger S.* (1977) 19 Cal. 3d 921, 927 [141 Cal. Rptr. 298, 569 P.2d 1286]; see also *In re Scott K.* (1979) 24 Cal. 3d 395 [155 Cal. Rptr. 671, 595 P.2d 105].) Furthermore, article I, section 1, of the California Constitution specifically ******53** declares that "[a]ll people are by nature free and independent and have inalienable rights[, including] enjoying and defending life and liberty, acquiring, possessing, and protecting property, . . . and privacy" (italics added). Significantly, the ballot argument accompanying the measure that added the privacy clause to article I, section 1, expressly confirms that the constitutional right of privacy afforded by this provision was intended to apply to "every Californian," including "every man, woman and child in this state." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, pp. 26, 27, underlining omitted, italics added.) Accordingly, there can be no question but that minors, as well as adults, possess a constitutional right of privacy under the California Constitution.

Indeed, a few examples will make it clear that the constitutional right of privacy widely has been recognized as applying to minors as well as adults. As numerous decisions have pointed out (see, e.g., *White v. Davis* (1975) 13 Cal. 3d 757, 774-775 [120 Cal. Rptr. 94, 533 P.2d 222]; *Hill, supra*, 7 ******54** Cal. 4th 1, 21), the ballot argument supporting the privacy measure establishes that one

principal objective of the privacy clause is to protect individuals from the unnecessary collection, and improper use, of personal information about them. Nothing in the language or history of the privacy provision suggests that minors, unlike adults, do not enjoy constitutional protection with regard **[*335]** to the improper use of such information, and past cases have not drawn any distinction between the informational privacy rights of minors and adults. ¹⁸ ******56** Thus, if a governmental entity or business enterprise were to obtain private information concerning a minor for a particular purpose and then use or disclose the information for a different, unauthorized purpose, no one reasonably could maintain that the conduct would not implicate a constitutionally protected privacy interest simply because the privacy of a minor, rather than of an adult, was infringed. Similarly, if a group or an individual--perhaps motivated by an unusually strong ideological opposition to teenagers becoming mothers--were to compel a pregnant minor to undergo an abortion against her will, there would be no question ******55** but that the offending conduct, in addition to violating any number of penal statutes and tort doctrines, also would constitute a direct intrusion upon a constitutionally protected autonomy privacy interest of the minor. **CA(1e) (1e)** Thus, it is clear that the circumstance that Assembly Bill 2274 is ****815** ******228** directed to minors is not a valid basis for concluding that the statute does not impinge upon a protected privacy

¹⁸ In *Porten v. University of San Francisco* (1976) 64 Cal. App. 3d 825 [134 Cal. Rptr. 839], the Court of Appeal held that the defendant's alleged unauthorized disclosure and use of information that had been submitted to the school as part of an application for admission constituted a violation of the applicant's right of privacy under article I, section 1, of the California Constitution. Nothing in *Porten* suggests that the validity of the plaintiff's action depended upon whether the applicant was over or under 18 years of age when the misuse of information occurred. Similarly, a number of this court's decisions have discussed the applicability of article I, section 1, to students in a collegiate setting, and have not suggested that the application of the privacy provision to the circumstances of those cases turned on whether the plaintiffs were over or under the age of majority. (See, e.g., *White v. Davis, supra*, 13 Cal. 3d 757; *Hill, supra*, 7 Cal. 4th 1.)

interest.¹⁹

The question whether a statute or rule intrudes upon a minor's state constitutional right of privacy admittedly becomes more complex when the only effect of the statute or rule is to condition the minor's exercise of his or her constitutional privacy [****57] right upon parental consent. As a general matter, [HN18](#) parents during a child's minority have the legal right (and obligation) to act on behalf of their child to protect their child's rights and interests, and in most instances this general rule would apply to interests of the minor that are protected by the state constitutional right of privacy as well as to other rights [*336] and interests of the minor. Thus, for example, although past cases have established that the state constitutional right of privacy generally guarantees an individual's right to consent to, or to refuse to consent to, medical treatment or medication (see, e.g., [Thor v. Superior Court \(1993\) 5 Cal. 4th 725, 733-738 \[21 Cal. Rptr. 2d 357, 855 P.2d 375\]](#); [Bartling v. Superior Court \(1984\) 163 Cal. App. 3d 186, 195 \[209 Cal. Rptr. 220\]](#)), we believe it is clear that, at least with respect to most medical treatment relating to a minor, the Legislature may grant a parent the authority to make medical decisions on behalf of his or her child. No one reasonably could suggest that a serious state constitutional privacy question would be presented, for example, whenever a parent, over a child's objection, requires [****58] the child to go to the dentist or to take his or her

medicine.²⁰

But while in most instances a statute that simply recognizes a parent's authority or responsibility to exercise a child's privacy right on the child's behalf (and in his or her interest) would raise no serious constitutional question, that is not the case with respect to the particular privacy right that is here at issue, namely the right to decide whether a pregnant minor will continue or terminate her pregnancy. As Justice Powell explained in his plurality opinion for the United States [****59] Supreme Court in [Bellotti II, supra, 443 U.S. 622, 642 \[99 S. Ct. 3035, 3047-3048\]](#): "The abortion decision differs in important ways from other decisions that may be made during minority. . . . [P] The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy. [P] Moreover, the potentially severe detriment facing a pregnant [minor] . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."

[CA\(11\) \(11\)](#) We agree. As we explained in another [****60] context in [In re Jasmon O.](#)

¹⁹This is not to say that the constitutional privacy clause grants to minors all of the privacy rights that are enjoyed by adults. No case has suggested, for example, that the Legislature does not have greater latitude to regulate or proscribe voluntary sexual activity by or with a minor than it does with regard to voluntary sexual activity engaged in by an adult. (See, e.g., [Michael M. v. Superior Court \(1979\) 25 Cal. 3d 608, 611-613 \[159 Cal. Rptr. 340, 601 P.2d 572\]](#); [id. at p. 624](#) (dis. opn. by Mosk, J.); [Pen. Code, § 261.5](#).) The issue presented by this case, of course, does not concern any claim that a minor enjoys a constitutional right to engage in sexual activity, but rather concerns whether a minor who already has become pregnant has a constitutional right to determine whether she will continue or terminate her pregnancy.

²⁰Similarly, we have no occasion in this case to question the validity of statutes that, for example, prohibit a minor from using a tanning facility without parental consent ([Bus. & Prof. Code, § 22706, subd. \(b\)\(3\) & \(4\)](#)), prohibit a minor, without parental consent, from undergoing voluntary sterilization ([Fam. Code, § 6925, subd. \(b\)\(1\)](#)) or indeed, prohibit a minor, with or without parental consent, from receiving a permanent tattoo ([Pen. Code, § 653](#)).

(1994) 8 Cal. 4th 398, 419 [33 Cal. Rptr. 2d 85, 878 P.2d 1297]: "Children are [*337] not simply chattels [***229] belonging [**816] to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." (See also *In re Roger S.*, *supra*, 19 Cal. 3d 921, 929-931 [parent may not waive a minor's right to due process before commitment to a mental hospital]; *In re Scott K.*, *supra*, 24 Cal. 3d 395, 403-404 [parent may not waive a minor's right to be free of unreasonable search and seizure].) **CA(1f) (1f)** The fundamental values and principles that a parent has transmitted to his or her daughter of course will play a substantial, and often a determinative, role in shaping a minor's decision in this matter. Nonetheless, because the decision whether to continue or terminate her pregnancy has such a substantial effect on a pregnant minor's control over her personal bodily integrity, has such serious long-term consequences in determining her life choices, is so central to the preservation of her ability to define and adhere to her ultimate values regarding the meaning of human existence and life, and (unlike [****61] many other choices) *is a decision that cannot be postponed until adulthood*, we conclude that **HN19** a minor who is pregnant has a protected privacy interest under the California Constitution in making the decision whether to continue or to terminate her own pregnancy--and that this interest is intruded upon by the provisions of Assembly Bill 2274. ²¹

[**62]** As already noted, our conclusion that Assembly Bill 2274 intrudes upon a pregnant minor's protected autonomy privacy interest does not mean that the circumstances that the statute

²¹To avoid any misunderstanding, our conclusion in this regard is not intended, of course, to suggest that a pregnant minor's protected privacy interest in this setting is any greater than the interest of a pregnant adult. Assembly Bill 2274 makes no distinction with regard to different stages of pregnancy, and requires a pregnant minor to obtain parental consent or judicial authorization before obtaining an abortion at even the earliest stage, when a pregnant adult clearly would have the right to determine for herself whether to continue her pregnancy or have an abortion. We conclude that the state constitutional privacy provision accords a pregnant minor a similar protected privacy interest.

involves minors rather than adults, and is concerned with furthering the parent-child relationship, are irrelevant to the ultimate resolution of the constitutional issue presented by this case. These circumstances are in fact directly relevant in assessing the nature and strength of the state interests that may justify the legislation's impact upon the constitutionally protected privacy interests at issue. Under the framework established in *Hill*, however, we consider potential justifications for a challenged statute at a subsequent stage of the analysis, and not in determining the threshold question whether the statute implicates a protected privacy interest. ²²

[**63] [*338] B**

We also conclude that plaintiff's constitutional challenge satisfies the second **[**817] [***230]** threshold element of *Hill*--"a reasonable expectation of privacy."

²²We note that there is absolutely no basis for suggesting that this interpretation of the California constitutional privacy clause--namely, as affording constitutional protection to a minor's interest in determining, for herself, whether to continue or to terminate her pregnancy--constitutes an impermissible infringement of the federal constitutional right of a parent to direct the upbringing of his or her child. The United States Supreme Court has explained that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant" (*Planned Parenthood of Missouri v. Danforth*, *supra*, 428 U.S. 52, 75 [96 S. Ct. 2831, 2844]). The high court has further held that even if a pregnant minor is not competent to give informed consent, a state must permit such a minor to obtain an abortion, without parental consent, if a judge or similar official determines that an abortion is in the minor's best interest. (*Bellotti II*, *supra*, 443 U.S. 622, 643-644 [99 S. Ct. 3035, 3048-3049] (plur. opn. of Powell, J.); *Casey*, *supra*, 505 U.S. 833, 899 [112 S. Ct. 2791, 2832].) Thus, the federal cases make clear that a parent's right under the federal Constitution to direct the upbringing of one's child does not include the right to decide whether a pregnant daughter will continue her pregnancy or have an abortion.

Indeed, if such an argument were sound, it would follow that a state would be prohibited, by the federal Constitution, from enacting a statute authorizing a minor to obtain an abortion without parental consent. As we have seen, California long had such a statutory provision, and defendants have cited no authority, and we are aware of none, holding that the federal Constitution precludes a state from adopting such a medical emancipation statute.

In discussing the application of this element to the athletic drug testing program challenged in *Hill*, the court in *Hill* explained that "the reasonable expectation of privacy of plaintiffs (and other student athletes) . . . must be viewed within the context of intercollegiate athletic activity and the normal conditions under which it is undertaken." (*Hill, supra*, 7 Cal. 4th 1, 41.) Thus, *Hill* indicates that [HN20](#) this element contemplates an inquiry into whether there is something in the particular circumstances in which an alleged intrusion of privacy arises that demonstrates the plaintiff has no reasonable expectation of privacy in that context, so that the alleged intrusion would not violate the state Constitution even if there were no justification for the allegedly intrusive conduct.

In the present case, the challenged statutory requirements apply to *all* pregnant minors and, unlike the drug testing program in *Hill*, are not confined to a specific setting or limited [****64] context. Because, as we have explained in the previous section, Assembly Bill 2274 impinges upon a fundamental autonomy privacy interest of pregnant minors protected by the state constitutional privacy clause, and because the statute applies to all such minors (whether 17 years of age, or much younger), there is absolutely nothing in the circumstances of the present case that would support a conclusion that the pregnant minors affected by this legislation do not have a "reasonable expectation of privacy" for purposes of the second element of the *Hill* test. Although it has been suggested that, in light of the general statutory rule requiring a minor to obtain parental consent for medical care, [*339] and the existence of numerous abortion/parental consent statutes in other states, a minor has no reasonable expectation of privacy in this context, it plainly would defeat the voters' fundamental purpose in establishing a constitutional right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any "reasonable expectation of privacy" [****65] with regard to the

constitutionally protected right.

C

Finally, in regard to the threshold elements, we conclude that the constitutional challenge to Assembly Bill 2274 also clearly satisfies the third threshold element of *Hill*--"a serious invasion of a privacy interest." As explained in the lead opinion in the recent decision in *Loder*, the application of this element in *Hill* demonstrates "that [HN21](#) this element is intended simply to screen out intrusions on privacy that are de minimis or insignificant." (*Loder, supra*, 14 Cal. 4th 846, 895, fn. 22 (lead opn. by George, C. J.).)

In the present case, the effect of Assembly Bill 2274 upon a pregnant minor's constitutional right of privacy cannot, by any stretch of the imagination, properly be characterized as "de minimis or insignificant." The statute significantly intrudes upon autonomy privacy by denying a pregnant minor the ability to obtain a medically safe abortion on her own, and instead requiring her to secure parental consent or judicial authorization in order to obtain access to the medical care she needs to terminate her pregnancy safely. In this respect, the statute denies a pregnant minor, who believes [****66] it is in her best interest to terminate her pregnancy rather than have a child at such a young age, control over her own destiny. In addition, the statutory requirement that the minor obtain parental consent or judicial authorization will delay the minor's access to a medically safe abortion in many instances, and thereby will increase, at least to some extent, the health risks posed by an abortion. Finally, in some instances, a minor who does not wish to continue her pregnancy but who is too frightened to tell her parents about her condition or go to court may be led by the statutory restrictions to attempt to terminate the pregnancy herself or seek a "back-alley abortion"--courses of conduct that in the past have produced truly tragic results--or, alternatively, to postpone action until it is too late to terminate her pregnancy, leaving her no choice but to bear an unwanted child. Of course,

such consequences unquestionably **[**818]** **[***231]** would represent a most significant intrusion on the minor's protected privacy interest.

D

In sum, plaintiffs' constitutional challenge to Assembly Bill 2274 satisfies the three threshold elements set forth in *Hill*. Accordingly, **[****67]** under the *Hill* **[*340]** framework, to determine the validity of Assembly Bill 2274 we must consider whether the statute's intrusion on a pregnant minor's constitutional right of privacy is justified by the state interests relied upon in support of the legislation. (*Hill, supra*, 7 Cal. 4th 1, 38.)

VI

In analyzing the adequacy of the justifications tendered by defendants to support the challenged legislation, we begin by addressing two preliminary points. First, we determine the appropriate "standard" or "test" that the proffered justifications must satisfy. Second, we consider how the analysis of defendants' proffered justifications is affected by the circumstance that the constitutional challenge in this case is a "facial" challenge to the statute as a whole, rather than an "as applied" challenge to the statute's application to a particular individual or in a particular setting. We turn first to the question of the appropriate constitutional "standard" or "test" that the justifications must satisfy in this case.

A

As we already have noted, in discussing the issue of the appropriate "standard" or "test" that a proposed justification must meet, the court in **[****68]** *Hill, supra*, 7 Cal. 4th 1, while "declin[ing] to hold that every assertion of a privacy interest under article I, section 1 must be overcome by a 'compelling interest' " (*Hill, supra*, 7 Cal. 4th 1, 34-35, italics added), explained that *HN22* "[t]he particular context, i.e., the specific kind of privacy interest involved and the nature and the seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. *Where the case*

involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a 'compelling interest' must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed." (*Id. at p. 34*, italics added, fn. omitted.)

As we have explained, the statute at issue in this case unquestionably impinges upon "an interest fundamental to personal autonomy," indeed an interest that is "clearly among the most intimate and fundamental of all constitutional rights." (*Myers, supra*, 29 Cal. 3d 252, 275.) **[****69]** Under *Hill* and prior decisions of this court (see, e.g., *People v. Belous, supra*, 71 Cal. 2d 954, 964; *Conservatorship of Valerie N. (1985)* 40 Cal. 3d 143, 164 [219 Cal. Rptr. 387, 707 P.2d 760]), *HN23* statutory provisions that intrude or impinge upon such a fundamental autonomy privacy interest properly must be evaluated under the "compelling interest" standard, i.e., the defendant must **[*341]** demonstrate "a 'compelling' state interest which justifies the [intrusion] and which cannot be served by alternative means less intrusive on fundamental rights." (*White v. Davis, supra*, 13 Cal. 3d 757, 772.)

Defendants argue that although the "compelling interest" standard may constitute the appropriate test for analyzing a statutory provision that impinges upon a pregnant *adult's* constitutional right of choice, a less rigorous standard should apply to a statute--such as Assembly Bill 2274 -- that affects the right of choice of a pregnant *minor*. Defendants note that federal decisions have adopted, for purposes of federal constitutional analysis, a less rigorous standard for evaluating the validity of statutes affecting pregnant minors. (See, e.g., *Planned Parenthood of Missouri v. Danforth, supra*, 428 U.S. 52, 75 [96 S. Ct. 2831, 2844] [burden on minor's privacy right may be justified by the state's showing of "any significant state interest . . . that is not present in the case of an

adult").) On the other **[**819]** **[***232]** hand, at least one other state supreme court, in applying an explicit state constitutional privacy provision to an abortion/parental consent statute, has concluded that its state constitutional provision mandates application of the compelling interest standard to a statute that impinges upon fundamental, constitutionally protected privacy rights of minors as well as to a statute that impinges upon similar rights of adults. (*In re T.W. (Fla. 1989) 551 So.2d 1186, 1195.*)

We conclude that, under the California constitutional privacy clause, the statute here at issue must be evaluated under the "compelling interest" standard. **HN24** When a statute significantly intrudes upon a fundamental, autonomy privacy interest of a minor, we believe that proper respect for a minor's state constitutional right of privacy requires a showing that the intrusion upon such a basic and fundamental right is necessary to **[****71]** further a "compelling"--i.e., an extremely important and vital--state interest. (See *American Pediatrics I, supra, 214 Cal. App. 3d 831, 843-845*; accord, *Conservatorship of Valerie N., supra, 40 Cal. 3d 143, 164* [applying "compelling interest" standard in evaluating validity of statute restricting fundamental, autonomy privacy interest of incompetent adult].) As *Hill* indicates, under *article I, section 1, of the California Constitution* a statutory intrusion upon an autonomy privacy interest of such a fundamental nature may not be justified simply by showing that the statute serves a legitimate "competing interest" sufficient to justify an impingement upon a "less central" privacy interest. (*Hill, supra, 7 Cal. 4th at p. 34.*)

In applying a test less rigorous than the "compelling interest" standard to evaluate statutes that impinge upon a minor's privacy right, the federal decisions have relied upon a state's "somewhat broader authority to regulate the activities of children" (*Planned Parenthood of Missouri v. Danforth, supra, 428 U.S. 52, 74 [96 S. Ct. 2831, 2843]*.) As we already have **[*342]**

indicated, **HN25** the circumstance that the **[****72]** statute at issue is directed at minors unquestionably is relevant in determining the nature and strength of the state interests that defendants contend are served by Assembly Bill 2274. Numerous California decisions recognize that the state has a special and particularly compelling interest in protecting the health and welfare of children. (See, e.g., *Michael M. v. Superior Court, supra, 25 Cal. 3d 608, 611-612*; *People v. Stritzinger (1983) 34 Cal. 3d 505, 512 [194 Cal. Rptr. 431, 668 P.2d 738]*.) As these decisions demonstrate, a statute's relationship to minors properly is employed in the constitutional calculus in determining whether an asserted state purpose or interest is "compelling." Because the statute's impact on minors is taken into account in assessing the importance of the state interest ostensibly served by the infringement, in our view it is not appropriate *additionally* to lower the applicable constitutional standard under which the statute is to be evaluated simply because the privacy interests at stake are those of minors.

CA(10b) (10b) We conclude that, under the California constitutional privacy clause, a statute that impinges upon the fundamental autonomy privacy **[****73]** right of either a minor or an adult must be evaluated under the demanding "compelling interest" test.

B

Next, we consider the effect of the circumstance that this case involves a challenge to the constitutionality of the statute "on its face," rather than to the constitutionality of the statute "as applied" to a particular person, group of persons, or setting covered by the statute. Defendants contend that because this case involves a facial challenge to the statute, their burden of justification may be satisfied simply by demonstrating that the provisions of the statute constitutionally may be applied in even a single circumstance covered by the statute. Thus, defendants maintain that this facial challenge to the statute must be rejected if

they are able to establish, for example, that the statutory requirement for parental consent or judicial authorization is justified as applied to the relatively small subclass of pregnant minors who lack the mental capacity to give informed consent to **[**820]** **[***233]** an abortion, even though the statute is not limited to this class of minors--and even if the statute is invalid as to all other pregnant minors.

As we shall explain, **[****74]** defendants' contention lacks merit. If the analytical approach proposed by defendants were valid, even the broadest statutory prohibition on abortion--a statute that, for example, prohibited abortion *under all circumstances*--could not be found unconstitutional on its face, because the statute would encompass *some* circumstances--for example, a **[*343]** late-term abortion completely unrelated to the protection of the life or health of the pregnant woman--in which an abortion constitutionally could be prohibited. Similarly, a statute that prohibited *all adult* women from obtaining an abortion without first securing either the consent of a spouse, parent, or guardian, or authorization from a court, likewise could not be found unconstitutional on its face, because such a law might be valid as applied to the small class of pregnant adult women who are legally incompetent to give informed consent to the procedure. No California decision has taken such a restrictive approach in evaluating a facial constitutional challenge to a law, such as that at issue here, that directly and substantially impinges upon fundamental constitutional privacy rights in the vast majority of its applications.

[**75]** On the contrary, **HN26** under the constitutional analysis traditionally applied in past California privacy cases, when, as here, a statute, as written, broadly impinges upon fundamental constitutional privacy rights in its general, normal, and intended application, a court, in assessing the statute's constitutionality, must determine whether the justifications for the statute outweigh its impingement on privacy rights and the statute is narrowly drawn to avoid unnecessary impingement

on such rights. **CA(12) (12) HN27** A statute that imposes substantial burdens on fundamental privacy rights with regard to a large class of persons may not be sustained against a facial constitutional attack simply because there may be a small subclass of persons covered by the statute as to whom a similar but much more narrowly drawn statute constitutionally could be applied. Thus, contrary to defendants' contention, a facial challenge to a statutory provision that broadly impinges upon fundamental constitutional rights may not be defeated simply by showing that there may be some circumstances in which the statute constitutionally could be applied, when, as here, there is nothing in the language or legislative history of the **[****76]** provision that would afford a reasonable basis for severing the asserted constitutionally permissible applications of the statute from the provision's unconstitutional applications.

Past California cases make this point clear. For example, in *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal. 3d 259 [85 Cal. Rptr. 1, 466 P.2d 225, 37 A.L.R.3d 1313], one of this court's earliest decisions affording explicit protection to a constitutional right of privacy, the court concluded that the financial disclosure statute at issue in that case, which applied to an extremely broad range of local and state public officers (as well as candidates for such offices) and required extensive disclosure of private financial information, was unconstitutional as a violation of the constitutional right of privacy. Although the court in *City of Carmel-by-the-Sea* explicitly acknowledged that "[i]t may well be that such extensive disclosure rules [as those **[*344]** embodied in the challenged statute] may appropriately be imposed by the Legislature upon its own members" and "may also be appropriate for other public officials or employees" (2 Cal. 3d at p. 272)--classes of public officials that **[****77]** fell within the scope of the challenged statute--the court nonetheless determined that the statute properly should be held unconstitutional on its face, explaining: "When, as here, a statute contains unconstitutionally broad

restrictions and its language is such that a court cannot reasonably undertake to eliminate its invalid operation by severance or construction, *the statute is void in its entirety regardless of whether it could be narrowly applied to the facts of the particular case before the court.* The only way in which the statute now at issue could be limited to a proper scope with respect to the officials and employees of plaintiff city would be by reading into it numerous qualifications and exceptions, thereby performing a wholesale rewriting of the statute which the courts cannot reasonably [**821] [***234] be expected to undertake. [Citations.] We conclude that the statute is unconstitutional in its entirety." (*Ibid.*, italics added.)

In like manner, this court's decision in *Myers, supra*, 29 Cal. 3d 252 found that a statute that provided public funding for the medical expenses of an indigent pregnant woman who chose to bear a child, but denied [****78] similar funding for medical expenses if such a woman chose to have an abortion, was unconstitutional *on its face*, even though some indigent women covered by the statute may have been able to obtain funding for an abortion from private charitable sources. (See 29 Cal. 3d at pp. 275-276; accord, e.g., *Blair v. Pitchess* (1971) 5 Cal. 3d 258, 282 [96 Cal. Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206] ["It is, of course, an accepted principle of judicial review that 'courts will limit the operation of a statute by construction or severance of the language to avoid unconstitutionality. Where, however, unconstitutionality cannot reasonably be avoided in this way, a statute cannot be upheld merely because a particular factual situation to which it is applicable may not involve the objections giving rise to its invalidity. [Citations.] If the rule were otherwise, the determination of constitutionality would be a piecemeal and unpredictable process. [Citations.]" (Italics added.)]; *Mulkey v. Reitman* (1966) 64 Cal. 2d 529, 543-545 [50 Cal. Rptr. 881, 413 P.2d 825]; *In re Blaney* (1947) 30 Cal. 2d 643, 655-656 [184 P.2d 892].)

Thus, past California cases do not [****79]

support defendant's claim that a statute whose broad sweep directly impinges upon the fundamental constitutional privacy rights of a large class of persons may not be found invalid on its face so long as there are *any* circumstances in which the statute's restrictions constitutionally may apply.

The United States Supreme Court has followed a similar approach in addressing facial constitutional challenges to statutory restrictions on abortion. In *Roe v. Wade, supra*, 410 U.S. 113, for example, the court invalidated [*345] *in its entirety* a Texas statute, concluding that it "sweeps too broadly [because it] makes no distinction between abortions performed early in pregnancy and those performed later, and . . . limits to a single reason, 'saving' the mother's life, the legal justification for the procedure." (*Id. at p. 164* [93 S. Ct. at p. 732].) Thus, even though, under the principles enunciated in *Roe*, the Texas statute constitutionally could have been applied to at least some pregnant women who fell within the statute's coverage (i.e., those women in their last trimester for whom an abortion was not necessary to preserve their life or health), the court [****80] nonetheless invalidated the law in its entirety, rejecting the argument--explicitly advanced in a dissenting opinion--that because the restrictions imposed by the law constitutionally could be applied to *some* women covered by the statute, the court was precluded from striking down the statute on its face. (*Id. at pp. 177-178* [93 S. Ct. at p. 739] (dis. opn. of Rehnquist, J.).)

Similarly, in its more recent decision in *Casey, supra*, 505 U.S. 833, the high court adopted a comparable approach in striking down, on its face, a spousal-notification provision contained in the abortion statute before it. The plurality opinion in *Casey* explained that "[r]espondents attempt to avoid the conclusion that [the spousal-notification provision] is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. They begin by noting that only about 20 percent of the women who obtain abortions are married. They then note that of

these women about 95 percent notify their husbands of their own volition. Thus, respondents argue, the effects of [the challenged provision] are felt by only one percent of the women who obtain abortions. [****81] Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute affects fewer than one percent of women seeking abortions. *For this reason, it is asserted, the statute cannot be invalid on its face.*" (*Id. at p. 894 [112 S. Ct. at p. 2829]*, italics added.)

The plurality opinion in *Casey, supra, 505 U.S. 833*, speaking in this passage for a majority of the court (see *id. at p. 922 [112 S. Ct. at pp. 2843-2844]* [**822] [****235] (opn. by Stevens, J.); *ibid.* (opn. by Blackmun, J.)), rejected the argument, explaining: "We disagree with respondents' basic method of analysis. [P] The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. [P] . . . [A]s we have said, [the spousal-notification provision's] real target . . . is married women seeking [****82] abortions who do not wish to notify their [*346] husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement. The unfortunate yet persisting conditions we document above will mean that *in a large fraction of the cases in which [the spousal-notification provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.*" (*Id. at pp. 894-895 [112 S. Ct. at pp. 2829-2830]*, italics added.)²³

²³ Contrary to the suggestion in Justice Brown's dissent (dis. opn. of Brown, J., *post*, at p. 423, fn. 3), the paragraph in *Casey* that follows the above passage (*Casey, supra, 505 U.S. 833, 895 [112 S. Ct. 2791, 2829-2830]*) does not suggest that *Casey's* analysis of the

[****83] Thus, *Casey, supra, 505 U.S. 833*, makes it clear that, under the federal Constitution, a facial constitutional challenge to a statute that significantly impinges upon a woman's fundamental constitutional right of choice may not be defeated simply by showing that there may be *some* circumstances in which the statute constitutionally might be applied. Under *Casey*, if a statute operates as a substantial obstacle to such choice "in a large fraction" of the cases to which the statute applies (*id. at p. 895 [112 S. Ct. at pp. 2829-2830]*), the statute is unconstitutional on its face. And in *Casey*, as in *Roe v. Wade, supra, 410 U.S. 113*, the court's determination that the challenged provision was unconstitutional on its face was plainly a considered decision, reached in the face of a dissenting opinion that explicitly argued, as defendants argue here, that in order to prevail in a facial challenge to such a provision the opponents of the provision "must 'show that no set of circumstances exist under which the [provision] would be valid.' [Citation.]" (*Casey, supra, 505 U.S. at pp. 972-974 & fn. 2 [112 S. Ct. at p. 2870]* (dis. opn. of Rehnquist, [****84] C. J.); see also *Fargo Women's Health Org. v. Schafer* (1993) 507 U.S. 1013, 1014 [113 S. Ct. 1668, 1669, 123 L. Ed. 2d 285] (conc. opn. of O'Connor, J., joined by Souter, J.) [discussing this aspect of *Casey* in an opinion accompanying a denial of a stay request]; *Janklow v. Planned Parenthood, Sioux Falls Clinic* (1996) 517 U.S. 1174, 1175 [116 S. Ct. 1582, 1583, 134 L. Ed. 2d 679] (Stevens, J., mem. re: den. of cert.)²⁴

circumstances in which an abortion statute properly may be invalidated on its face does not apply to a facial challenge to a parental consent statute. Instead, that paragraph in *Casey* simply reflects the high court's conclusion that, as a substantive matter, its invalidation of the spousal consent provision was not inconsistent with its prior decisions upholding parental consent statutes.

²⁴ Indeed, most of the United States Supreme Court decisions in the abortion context have involved facial constitutional challenges to statutory provisions, and whenever the court has determined that the defenders of a measure have failed to provide a sufficient justification to support a challenged provision's overall impingement upon the constitutional rights at issue, the court has struck down the provision "on its face," even if the statute may encompass at least some situations in which its provisions would not unduly burden the

[****85] [*347] [**823] [***236] Contrary to defendants' contention, language in this court's decision in *Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084 [40 Cal. Rptr. 2d 402, 892 P.2d 1145] (*Tobe*) is in no way inconsistent with the foregoing principles. The language in *Tobe* upon which defendants rely states: " ' "To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." ' (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal. 4th 251, 267 [5 Cal. Rptr. 2d 545, 825 P.2d 438], quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal. 3d 168, 180-181 [172 Cal. Rptr. 487, 624 P.2d 1215].)" (*Tobe, supra*, 9 Cal. 4th 1069, 1084, original italics.)

The decision in *Tobe, supra*, 9 Cal. 4th 1069, and the decisions in *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal. 4th 251 [5 Cal. Rptr. 2d 545, 825 P.2d 438], and *Pacific Legal Foundation v. Brown* (1981) 29 Cal.

constitutional right. (See, e.g., *Hodgson v. Minnesota, supra*, 497 U.S. 417, 450-455 [110 S. Ct. 2926, 2945-2948] [striking down two-parent notification provision on its face, even though the opinion acknowledged there are some families in which such a requirement would not unduly burden the minor's right]; *Akron I, supra*, 462 U.S. 416, 434-438 [103 S. Ct. 2481, 2494-2497] [invalidating, on its face, a requirement that all second trimester abortions be performed in a hospital, even though the court recognized that there are some circumstances in which the health risks associated with a particular pregnancy could justify such a requirement]; *Doe v. Bolton, supra*, 410 U.S. 179, 193-195 [93 S. Ct. 739, 748-749] [invalidating, on its face, a requirement that all abortions, including first trimester abortions, be performed in a licensed hospital].)

Although three justices of the United States Supreme Court recently have questioned the soundness of *Casey's* approach to the facial invalidity question (see *Janklow v. Planned Parenthood, Sioux Falls Clinic, supra*, 517 U.S. 1174, 1176-1181 [116 S. Ct. 1582, 1584-1587] (dis. from den. of cert. by Scalia, J., joined by Rehnquist, C. J., and Thomas, J.)), these justices' views did not prevail on this point in *Casey, supra*, 505 U.S. 833.

3d 168 [172 Cal. Rptr. 487, 624 P.2d 1215], from which *Tobe* drew the language in question, make it clear that *HN28* a law may not be held unconstitutional on its face simply because those challenging the law may be able to hypothesize some instances in which application of the law might be unconstitutional. In each of these cases, the court found that the statute in question clearly was constitutional in its general and ordinary application, and explained that such a law could not be struck down "on its face" merely because there might be some instances in which application of the law might improperly impinge upon constitutional rights. (See also *Superior Court v. County of Mendocino* (1996) 13 Cal. 4th 45, 59-61 [51 Cal. Rptr. 2d 837, 913 P.2d 1046].) None of the cases suggests, however, that where a statute broadly impinges upon fundamental constitutional rights, the statute may not be held invalid on its face so long as there is *any* person covered by the law as to whom the statute's requirements constitutionally may be applied. [****87] (See, e.g., *Tobe, supra*, 9 Cal. 4th 1069, 1109 [" [A] facial challenge to a law [that [*348] directly impinges upon a fundamental constitutional right] on grounds that it is overbroad . . . is an assertion that the law is invalid in all respects and cannot have *any* valid application [citation] or a claim that the law sweeps in a substantial amount of constitutionally protected conduct." (Second italics added.)].) Instead, as noted above, our cases establish that *HN29* when a statute broadly and directly impinges upon the fundamental constitutional privacy rights of a substantial portion of those persons to whom the statute applies, the statute can be upheld only if those defending the statute can establish that, considering the statute's general and normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means.

Accordingly, we now turn to the question whether defendants have met that burden here.

VII

[CA\(1g\) \(1g\)](#) In defending the challenged statutory provisions, defendants rely upon two interests assertedly furthered by Assembly Bill 2274: (1) the [****88] protection of the physical, emotional, and psychological health of minors, and (2) the preservation and promotion of the parent-child relationship. The trial court concluded that both of these interests are "compelling interests" for purposes of constitutional analysis, and on appeal plaintiffs have not taken issue with that determination. We agree that the state's interests in protecting the health of minors and in preserving and fostering the parent-child relationship are extremely important interests that rise to the level of "compelling interests" for purposes of constitutional analysis.

After determining that these two interests or purposes constitute "compelling interests, [**824] [***237] " however, the trial court went on to find, on the basis of the evidence presented at trial, that defendants had failed to establish that the provisions of Assembly Bill 2274 actually would further either of these interests. On the contrary, the trial court found that the provisions of Assembly Bill 2274 were likely to harm rather than protect the health of pregnant minors, and that the statute also was likely to be detrimental to the parent-child relationship.

On appeal, the parties [****89] dispute the weight that properly should be given to the trial court's findings in this regard. Plaintiffs contend that the evidence clearly supports the trial court's findings and that they should be confirmed by this court, but defendants maintain that the trial court failed to give proper deference to the legislative findings accompanying the statute.

[CA\(13\) \(13\) HN30](#) As a general rule, "[i]t is not the judiciary's function . . . to reweigh the 'legislative facts' underlying a legislative enactment." ([American Bank & Trust Co. v. Community Hospital \(1984\) 36 Cal. 3d 359, 372 \[204 \[*349\] Cal. Rptr. 671, 683 P.2d 670, 41](#)

[A.L.R.4th 233\]](#).) ²⁵ When an enactment intrudes upon a constitutional right, however, greater judicial scrutiny is required. (See, e.g., [Spiritual Psychic Science Church v. City of Azusa \(1985\) 39 Cal. 3d 501, 514 \[217 Cal. Rptr. 225, 703 P.2d](#)

²⁵ The United States Supreme Court decision in [Minnesota v. Clover Leaf Creamery Co. \(1981\) 449 U.S. 456 \[101 S. Ct. 715, 66 L. Ed. 2d 659\]](#) exemplifies the general rule. In that case, a Minnesota law prohibiting the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers such as paperboard milk cartons, was challenged on the ground that, as an empirical matter, the legislation would not serve the legislative purposes--promoting resource conservation, easing solid waste disposal problems, and conserving energy--that the statute was designed to promote. The trial court conducted extensive evidentiary hearings into the statute's probable consequences, and, after finding the evidence in sharp conflict, concluded that it was obliged to weigh and evaluate the evidence itself. The trial court ultimately resolved the evidentiary conflict in favor of those challenging the legislation, concluding that the legislation " 'will not succeed in effecting the Legislature's published policy goals . . . ' " ([449 U.S. at p. 460 \[101 S. Ct. at p. 722\]](#)), and on this basis the trial court found the statute unconstitutional. On appeal, the United States Supreme Court reversed, explaining that in cases in which the "rational basis" test is applicable, "[s]tates are not required to convince the courts of the correctness of their legislative judgments. . . . [P] . . . Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence that the legislature was mistaken." ([449 U.S. at p. 464 \[101 S. Ct. at p. 724\]](#)); see also [Firemen v. Chicago, R. I. & P. R. Co. \(1968\) 393 U.S. 129, 138-139, 143 \[89 S. Ct. 323, 327-328, 330, 21 L. Ed. 2d 289\]](#).)

In a different context, in rejecting the contention that a Georgia capital punishment statute should be held unconstitutional on the ground that it had not been empirically established that the death penalty is, in fact, an effective deterrent, the United States Supreme Court explained in [Gregg v. Georgia \(1976\) 428 U.S. 153 \[96 S. Ct. 2909, 49 L. Ed. 2d 859\]](#) that the question of the deterrent value of capital punishment effectively involves a policy decision that appropriately should be left to the legislative branch. The court stated: "Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. . . . [P] Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. . . . [P] The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. . . ." ([428 U.S. at pp. 184-186 \[96 S. Ct. at pp. 2930-2931\]](#)), fns. omitted.)

[1119](#)] "[T]he ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened. 'The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.' [****90] [Citations.] . . . [W]e would abandon our constitutional duty if we took at face value the municipality's determination . . .".)

[****91] Numerous decisions establish that [HN31](#) when a statute impinges upon a constitutional right, legislative findings with regard to the need for, or probable effect of, the statutory provision cannot be considered determinative for [*350] constitutional purposes. As we explained in our recent decision in [Professional Engineers v. Department of Transportation \(1997\) 15 Cal. 4th 543, 569 \[63 Cal. Rptr. 2d 467, **825\] \[***238\] 936 P.2d 473](#): "Although courts must give legislative findings great weight and should uphold them unless unreasonable or arbitrary, ' . . . we also must enforce the provisions of our Constitution and "may not lightly disregard or blink at . . . a clear constitutional mandate." . . . ' . . . '[T]he deference afforded to legislative findings does "not foreclose [a court's] independent judgment on the facts bearing on an issue of constitutional law." . . . ' " (Citations omitted.)²⁶ [CA\(1h\) \(1h\)](#) Accordingly, in

this case we must go beyond the legislative findings accompanying the statute to determine whether the provisions of Assembly Bill 2274 can be sustained, as defendants maintain, on the basis of the state's interests in protecting the health of minors and in [****92] preserving and promoting the parent-child relationship.

[****93] The Florida Supreme Court addressed a virtually identical issue in the case of [In re T.W., supra, 551 So.2d 1186](#). In that case, the court was faced with the question whether a Florida abortion/parental consent statute violated the express constitutional right of privacy contained in the Florida Constitution.²⁷ As defendants contend here, the State of Florida argued that the statute should be upheld on the basis of the state's interests in protecting the health of minors and in preserving the parent-child relationship. After explaining that the applicable constitutional test for evaluating the statute under the Florida Constitution was the "compelling interest" standard ([551 So.2d at p. 1192](#)), the Florida court went on to address, and reject, the state's [*351] contention that the challenged statute could be sustained on the basis of the two interests proffered by the state.

[****94] The Florida Supreme Court stated in this regard: "We agree that the state's interests in protecting minors and in preserving family unity are worthy objectives. Unlike the federal Constitution, however, which allows intrusion based on a 'significant' state interest, the Florida Constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated. [Citation.] We note that Florida does not recognize these two interests as being sufficiently compelling to justify a parental consent requirement where

²⁶ Federal decisions, reviewing federal constitutional challenges to statutes affecting reproductive rights, are in accord. (See, e.g., [Casey, supra, 505 U.S. 833, 887-898 \[112 S. Ct. 2791, 2825-2831\]](#) [invalidating provision imposing spousal-notification requirement; court rejected the legislative determination that such a requirement promoted the family relationship]; [Hodgson v. Minnesota, supra, 497 U.S. 417, 450-455 \[110 S. Ct. 2926, 2945-2948\]](#) [invalidating a statute imposing a two-parent notification requirement; the court rejected the legislative determination that such notification would enhance family relations and provide added protection for minors]; [Akron I, supra, 462 U.S. 416, 434-438 \[103 S. Ct. 2481, 2494-2497\]](#) [invalidating an ordinance that required all second trimester abortions to be performed in a hospital; the court rejected a legislative determination that such a requirement was a reasonable health regulation]; [Carey v. Population Services International \(1977\) 431 U.S. 678, 696 \[97 S. Ct. 2010, 2022, 52 L. Ed. 2d 675\]](#) [invalidating a statute prohibiting distribution of contraceptives to minors; the court rejected the state's claim, unsupported by evidence,

that such a ban could be justified as a means of discouraging early sexual behavior].)

²⁷ [Article I, section 23, of the Florida Constitution](#), enacted by the voters in 1980, provides: "Right of privacy.--Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

procedures other than abortion are concerned. . . . [P] Under [the applicable Florida] statute, a minor may consent, without parental approval, to any medical procedure involving her pregnancy or her existing child--no matter how dire the possible consequences--except abortion. Under [*In re Guardianship of Barry*, 445 So.2d 365 \(Fla. 2d DCA 1984\)](#) (parents permitted to authorize removal of life support system from infant in permanent coma), this could include authority in certain circumstances to order life support discontinued for a comatose child. In light of this wide authority that the state grants an unwed mother to make life-or-death decisions [****95] concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned. We fail to see the [**826] [***239] qualitative difference in terms of impact on the well-being of the minor between allowing the life of an existing child to come to an end and terminating a pregnancy, or between undergoing a highly dangerous medical procedure on oneself and undergoing a far less dangerous procedure to one's pregnancy. If any qualitative difference exists, it certainly is insufficient in terms of state interest. Although the state does have an interest in protecting minors, 'the selective approach employed by the legislature evidences the limited nature of the . . . interest being furthered by these provisions.' [Citation.] We note that the state's adoption act similarly contains no requirement that a minor obtain parental consent prior to placing a child for adoption, even though this decision is clearly fraught with intense emotional and societal consequences." ([*In re T.W.*, supra, 551 So.2d 1186, 1195](#), fn. omitted.)

In our view, [****96] the Florida Supreme Court's reasoning in [*In re T.W.*, supra, 551 So.2d 1186](#), is persuasive. As the court observed, the state's contention that the imposition of a parental consent requirement in the abortion context was necessary in order to protect the physical, emotional, or psychological health of the minor and to preserve

the parent-child relationship was belied by the numerous, analogous circumstances in which Florida authorized a [*352] pregnant minor to obtain other medical care, or to make equally significant decisions affecting herself and her child, without parental consent.²⁸

[****97] This same reasoning applies to Assembly Bill 2274. Defendants' contention that the restrictions imposed by that statute upon a minor's constitutionally protected right of privacy are necessary to protect the physical and emotional health of a pregnant minor is undermined by the circumstance that California law authorizes a minor, without parental consent, to obtain medical care and make other important decisions in analogous contexts that pose at least equal or greater risks to the physical, emotional, and psychological health of a minor and her child as those posed by the decision to terminate pregnancy. As we have seen, like the Florida statute noted in [*In re T.W.*, supra, 551 So.2d 1186](#), Assembly Bill 2274 authorizes a pregnant minor, without parental advice or consent, to make the decision to continue her pregnancy and give birth to a child (rather than have an abortion), a decision that often will have exceedingly far-reaching consequences for the minor's future. (See, e.g., [*Michael M. v. Superior Court*, supra, 25 Cal. 3d 608, 612.](#))²⁹ [****99]

²⁸ Although we agree with the reasoning of the Florida decision in [*In re T.W.*, supra, 551 So.2d 1186](#), some of the language of the opinion is potentially confusing. The court in *In re T.W.* states that other statutory provisions indicate that the state's interests in protecting minors and in preserving family unity are not "sufficiently compelling to justify a parental consent requirement." The opinion's analysis makes it clear, however, that the court in *In re T.W.* was not suggesting that the interests of "protecting minors" and "preserving family unity" were not, in themselves, sufficiently important or vital interests to be characterized as "compelling," but rather was explaining that the other Florida statutes to which it referred demonstrated that imposition of a parental consent requirement was not necessary to serve or further those important interests.

²⁹ In upholding the constitutional validity of California's statutory rape provision in *Michael M.*, the court, quoting a then recently published article, observed: "The social consequences of teenage childbearing are even more pervasive than the health consequences. Thus, eight out of 10 women who first become mothers at age 17 or

Furthermore, Assembly Bill 2274 authorizes a minor who has decided to continue her pregnancy to obtain medical care, without parental **[****98]** consent, for all conditions relating to pregnancy, thus permitting a minor who, for example, develops life-threatening medical complications during her pregnancy to make medical decisions relating both to her own health and to her fetus's survival, without parental consent, in circumstances that may pose much greater risks than generally are presented in undergoing an abortion. (See, e.g., [25 Cal. 3d at p. 611.](#))³⁰

[827]** **[***240]** In addition, when a minor gives birth to a child, California law, like the applicable Florida law noted in [In re T.W., supra, 551 So.2d 1186, 1195](#), **[*353]** authorizes the minor to decide, without parental advice or consent, whether or not to give her child up for adoption. (See [Fam. Code, § 8700, subd. \(b\)](#), [8814, subd. \(d\).](#)) It is particularly difficult to reconcile defendants' contention--that parental or judicial involvement in the abortion decision is necessary to protect a minor's emotional or psychological health--with these statutory provisions authorizing a minor who has given birth to consent, on her own, to the adoption of her child. "The decision to relinquish motherhood after giving birth would seem to have at least as great a potential **[****100]** to cause long-lasting sadness and regret as the decision not to bear a child in the first place." (Donovan, Our Daughters' Decisions: The Conflict in State Law on Abortion and Other Issues (Alan Guttmacher Institute, 1992) p. 21.)

Moreover, the existence in California of numerous

younger never complete high school--twice as high a proportion as those who do not give birth until they are 20 or older. A recent study clearly finds that the pregnancy directly causes the dropout, independent of any effect of antecedent education achievement or aptitude.' [Citation.]" ([Michael M. v. Superior Court, supra, 25 Cal. 3d 608, 612.](#))

³⁰ As the court noted in *Michael M.*, "births to teenage mothers pose substantially increased medical risks as evidenced by the record of complications reported on the birth certificates in one-fourth of recent teenage pregnancies. [Citation.]" ([Michael M. v. Superior Court, supra, 25 Cal. 3d 608, 611.](#))

other "limited medical emancipation" statutes that authorize minors, without parental consent, to obtain medical care in a variety of settings relating to sexual activity further undermines defendants' claim that Assembly Bill 2274 is necessary to protect the health of minors or to sustain the parent-child relationship. As noted at the outset of this opinion, over the past 30 years the Legislature has enacted a series of statutes authorizing minors, *without parental consent*, to obtain medical care related to the diagnosis or treatment of *sexually transmitted diseases* ([Fam. Code, § 6926](#)), *rape* ([Fam. Code, § 6927](#)), and *sexual assault* ([Fam. Code, § 6928](#)). As is indicated by our earlier discussion of these provisions (see, *ante*, pp. 316-317), the statutes in question reflect a long-standing legislative recognition that (1) minors frequently are reluctant to disclose to their parents medical **[****101]** needs arising out of the minor's involvement in sexual activity and may postpone or avoid seeking such care if parental consent is required, and (2) as a consequence, the health of minors generally will be protected best in this setting by authorizing minors to obtain medical care relating to such activity without parental consent.

The premise underlying these numerous and well-established statutes authorizing a minor, in analogous circumstances, to obtain medical care without parental consent is fundamentally inconsistent with defendants' contention that Assembly Bill 2274's imposition of a parental consent (or judicial authorization) requirement before a pregnant minor may obtain a physician-performed abortion is necessary to protect the health of such minor or to support the parent-child relationship. Indeed, these numerous statutes suggest that Assembly Bill 2274's imposition of a parental consent or judicial authorization requirement is likely to impair, rather than protect, the health of pregnant minors who do not wish to bear a child. In this context, the introduction of a parental consent or judicial authorization **[*354]** requirement may well lead those minors who are **[****102]** too frightened or ashamed to tell their

parents or a judge about their condition either to forgo proper medical care and seek to terminate their pregnancy through a dangerous self-induced or back-alley abortion, or, alternatively, to postpone action until it is too late safely to terminate pregnancy, at which point such minors will have no choice but to endure the increased physical, emotional, and psychological risks posed by an unwanted full-term pregnancy and birth.

Accordingly, like the Florida Supreme Court in *In re T.W.*, supra, 551 So.2d 1186, we conclude that in view of the numerous statutes authorizing a minor, without parental consent, to obtain medical care or make other fundamental decisions for herself and her child in other, analogous settings, Assembly Bill 2274 cannot properly be sustained on the ground that its requirements are necessary either to protect the health of a pregnant minor or to protect the minor's relationship [**828] [****241] with her parent. (Accord, *Denver Area Educ. Tel. v. FCC* (1996) 518 U.S. 727 [116 S. Ct. 2374, 2393, 135 L. Ed. 2d 888] (lead opn. of Breyer, J.) ["[W]e can take Congress' different . . . treatment of a highly [****103] similar problem at least as some indication that more restrictive means are not 'essential' (or will not prove very helpful). Cf. *Boos v. Barry*, 485 U.S. 312, 329 . . . (1988) (existence of a less restrictive statute suggested that a challenged ordinance, aimed at the same problem, was overly restrictive)." (Italics omitted.); *Hodgson v. Minnesota*, supra, 497 U.S. 417, 455 [110 S. Ct. 2926, 2947] ["These [other] statutes provide testimony to the unreasonableness of the Minnesota two-parent notification requirement and to the ease with which the State can adopt less burdensome means to protect the minor's welfare."].) ³¹

[****104] This conclusion, moreover, is supported not only by consideration of the numerous related California statutory provisions, but also by the overwhelming evidence, much of it uncontested, that was introduced at the trial in this case. As the Court of Appeal observed in its decision below: "The evidence was nothing less than overwhelming that the legislation would not protect these interests, and would in fact *injure* the asserted interests of the health of minors and the parent-child relationship." (Italics in original.)

[*355] As we have seen, prior to the enactment of Assembly Bill 2274 pregnant minors in California for many years had been authorized to obtain medically safe abortions without parental consent. Defendants presented no empirical studies or other comparable evidence at trial to demonstrate that this long-standing policy had proven detrimental to the physical, emotional, or psychological health of pregnant minors or had affected family relationships adversely. To the contrary, the testimony of the numerous expert witnesses called by plaintiffs established that the pre-Assembly Bill 2274 statutory provision was successful both in protecting the physical, emotional, [****105] and psychological health of minors and in supporting parent-child relationships. This testimony further indicated that the imposition of a statutory requirement compelling a pregnant minor to obtain parental consent or judicial authorization before obtaining a medically safe abortion was likely to be detrimental both to the health of such minors and to their family relationships.

The testimony revealed, in this regard, that an abortion, when performed by qualified medical personnel, is one of the safest medical procedures, and that the risk of medical complications resulting from continuing a pregnancy and giving birth is considerably greater than that posed by an abortion.

³¹ The Supreme Judicial Court of Massachusetts recently upheld its state's abortion/parental consent law against a state constitutional challenge (except for a provision of the law requiring the minor to obtain the consent of both parents). (*Planned Parenthood v. Attorney General* (1997) 424 Mass. 586 [677 N.E.2d 101].) The Massachusetts Constitution, however, unlike the California and Florida Constitutions, does not contain an explicit privacy provision, and under Massachusetts law (again unlike California and Florida

law) the parental consent statute in question was not subject to scrutiny under the demanding "compelling interest" test. (See 677 N.E.2d at pp. 103-104 & fn. 4.) For these reasons, we believe the decision of the Florida Supreme Court in *In re T.W.*, supra, 551 So.2d 1186, constitutes the more relevant authority.

The testimony also revealed that the overwhelming majority of minors who become pregnant have the requisite maturity and capacity to give informed consent to an abortion, and that the interests of those relatively few pregnant minors who do not have the capacity to provide informed consent remain fully protected under the pre-Assembly Bill 2274 statute, because a physician may not perform any medical procedure, including an abortion, unless he or she determines that the patient is capable of giving (and has given) [****106] informed consent. (See *Ballard v. Anderson, supra*, 4 Cal. 3d 873, 883.) Of course, physicians are well qualified to determine a minor's capacity to provide informed consent and regularly do so in providing medical care under California's numerous medical emancipation statutes.

The evidence introduced at trial further established that the majority of pregnant minors consult their parents before obtaining an abortion, without being compelled to do so [**829] [***242] by statute, and that many minors who do not voluntarily consult their parents have good reason to fear that informing their parents will result in physical or psychological abuse to the minor (often because of previous abusive conduct or because the pregnancy is the result of intrafamily sexual activity). The testimony disclosed that the primary determinant of whether a pregnant minor will consult her parent or parents is the quality of the parent-child relationship that existed before the minor became pregnant, and not the presence or absence of a parental [*356] consent statute such as Assembly Bill 2274. ³² The evidence further indicated that to the extent the provisions of Assembly Bill 2274 were [****107] to cause a pregnant minor from an abusive or potentially abusive family to seek parental consent, the statute would endanger the minor by leading her to place herself at physical or mental risk and would exacerbate the instability

and dysfunctional nature of the family relationship.

Finally, the testimony also indicated that although the judicial bypass procedure in Assembly Bill 2274 provides a mechanism by which a pregnant minor may avoid informing her parents of her pregnancy, resort to this judicial procedure inevitably will delay the minor's access to a medically safe abortion, thereby increasing the medical risks posed by the abortion procedure, and will inflict emotional and psychological stress upon a minor without providing any greater protection of the interests [****108] of either a mature or immature minor than what is provided by the minor's own health care provider under the pre-Assembly Bill 2274 law. Furthermore, several witnesses testified that past experience in other jurisdictions demonstrates that at least some minors who are too frightened or ashamed to consult their parents also will be too frightened or ashamed to go to court (often fearing that their presence at the courthouse might be discovered and disclosed by a neighbor or acquaintance), and may resort to the dangerous alternatives of either attempting to terminate their pregnancy themselves or seeking an illegal, back-alley abortion. (See also Note, *Hodgson v. Minnesota: Chipping Away at Roe v. Wade in the Aftermath of Webster* (1991) 18 *Pepperdine L.Rev.* 955, 955-956 [describing the tragic case of Becky Bell, a 17-year-old Indiana girl who, too frightened to seek parental consent or judicial authorization, died after obtaining an illegal abortion].)

In sum, as the Court of Appeal observed, the evidence introduced at trial overwhelmingly indicated that Assembly Bill 2274 would not serve--but rather would impede--the state's interests in protecting the health of minors and enhancing [****109] the parent-child relationship.

Accordingly, when we consider the numerous, analogous California statutory provisions authorizing a minor, without parental consent, to make medical and other significant decisions with regard to her own and her child's health and future,

³²The evidence at trial indicated that health clinics that provide pregnancy counseling and treatment routinely encourage minors to consult with their parents except in circumstances in which such consultation is likely to lead to abuse.

as well as the overwhelming evidence introduced at trial, we conclude that both the trial court and the Court of Appeal correctly determined that defendants have failed to establish that Assembly Bill 2274's infringement upon a pregnant minor's fundamental constitutional [*357] privacy interest is necessary to further the state's interests in protecting the health of minors or the parent-child relationship.

Finally, an amicus curiae brief filed in this case suggests that Assembly Bill 2274 may be justified by the state's interest in ensuring that the determination whether a pregnant minor is sufficiently competent and mature to consent to an abortion is made in a fair and unbiased manner. The brief acknowledges that, even in the absence of Assembly Bill 2274, a health care provider may not provide medical or surgical care relating to pregnancy unless the provider determines that the minor is capable of giving [****110] "informed consent" to the procedure (see *Ballard v. Anderson*, *supra*, 4 Cal. 3d 873, 883), but argues that a health care provider who agrees to perform an abortion at a minor's request may have a conflict of interest (pecuniary, ideological, or both) that would impair the provider's ability [**830] [***243] to make an unbiased decision with regard to whether the minor is capable of providing informed consent. As a consequence, the amicus curiae brief maintains, Assembly Bill 2274 permissibly requires that the determination of the minor's competence or maturity be made by the minor's parent or by a court.

We conclude that Assembly Bill 2274 cannot be sustained on this theory. Nothing in the record justifies an assumption that licensed health care providers cannot be trusted to make an unbiased determination as to whether a minor is capable of giving informed consent to an abortion, or, indeed, suggests that the Legislature entertained any such view. None of the legislative findings supports such a proposition.³³ It is clear that [HN32](#) a statute that

impinges upon a fundamental constitutional right cannot be upheld on the [*358] basis of unsupported speculation that [****111] the Legislature believed that health care professionals would not perform their duties in an honest and ethical manner. (Accord, *Carey v. Population Services International*, *supra*, 431 U.S. 678, 696 [97 S. Ct. 2010, 2022] ["when a State . . . burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy"]; *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718, 730 [102 S. Ct. 3331, 3339, 73 L. Ed. 2d 1090] ["although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification"].) Indeed, as we have seen, in numerous analogous contexts the Legislature has authorized minors to obtain medical care without parental consent or judicial authorization, thus recognizing the general

stating that nothing in the record suggests that the Legislature entertained the view that health care providers cannot be trusted to make unbiased determinations with regard to a minor's capacity to give informed consent to an abortion. (Dis. opn. of Brown, J., *post*, at pp. 434-435.) As support, the dissent quotes a passage from a document it cites as "Legis. Analysis Supporting Assem. Bill No. 2274." (*Ibid.*) Although the cited document bears the self-styled title of "Legislative Analysis Supporting Assembly Bill 2274," the document was not prepared by a sponsoring member of the Legislature or by legislative staff, but, as the dissent notes, rather is an "alternative analysis," written and submitted by an organization supporting the legislation because of the organization's dissatisfaction with the bill analysis that had been prepared by the Senate committee staff itself. (Christian Action Council, unofficial analysis designated as "Legislative Analysis Supporting Assembly Bill 2274 (Frazee), As Amended in Assembly June 25, 1987," submitted to Sen. Com. on Health and Human Services, pp. 1-2.) Even if it were appropriate to take judicial notice of this document (no one has requested that we do so; the document simply is appended to an amicus curiae brief filed in this matter), its existence does not alter our view that there is nothing in the record that suggests that the Legislature entertained the view that licensed health care providers cannot be trusted to make unbiased determinations as to whether a minor is capable of giving informed consent to an abortion. As we have noted, none of the legislative findings included in the legislation supports such a proposition.

³³ Justice Brown's dissent asserts that the opinion is mistaken in

competence of health care professionals to determine whether a minor is capable of giving informed consent. (See, e.g., [Fam. Code, § 6925](#) [prenatal [****112] care], 6926 [care for communicable disease], 6927 [care for rape], 6928 [care for sexual assault], 6929 [care for drug or alcohol related problem].) There simply is no basis on the present record for concluding that a physician is capable of determining whether a pregnant minor is competent to give informed consent to necessary medical care when the minor chooses to proceed with her pregnancy, but is incapable of determining whether such a minor is competent to give informed consent when the minor chooses to terminate her pregnancy.

[****113] The dissenting opinions of Justices Baxter and Brown advance an argument related to that raised by amicus curiae, suggesting that if it is constitutionally permissible to require a physician to determine that a pregnant minor has the requisite understanding and maturity to give informed consent before performing an abortion without parental consent, it must be constitutionally permissible to require that the informed consent decision be made by a judge rather than a physician. (See dis. [**831] [***244] opn. of Baxter, J., *post*, at pp. 410-411; dis. opn. of Brown, J., *post*, at p. 434.) The suggested conclusion, however, does not follow from the premise. A physician must also determine that an adult woman has the capacity to give informed consent before performing an abortion at her request, or--for that matter--any medical procedure. That does not mean, however, that the state constitutionally may require all pregnant women, before they may obtain an abortion, to secure a court order certifying that they are competent to provide informed consent. A legislative measure that requires a woman to go to court, to reveal her condition to a judge, and to submit to a judicial [****114] determination of competency obviously imposes a substantially greater intrusion on privacy than one that permits a woman to obtain an abortion from a physician in the same manner [*359] as she may obtain other medical care. And the increased intrusion on

autonomy privacy imposed by a judicial authorization requirement may be even greater with regard to pregnant minors, because minors frequently may be too embarrassed or frightened to seek judicial authorization and may endanger their health or forfeit their right of choice rather than venture into an unfamiliar and intimidating court setting. Further, as already noted, there is no reasonable basis for concluding that a physician is able to determine the competency of a pregnant minor to provide informed consent when the minor chooses to continue her pregnancy but that the competency determination must be made by a judicial officer when the minor chooses to terminate her pregnancy.³⁴

³⁴ Furthermore, we do not agree with the suggestion that one effect of the trial court's judgment in this case--invalidating Assembly Bill 2274 as a whole, including the provision establishing a judicial bypass procedure--would be to leave a pregnant minor (who a treating health care provider finds lacks the capacity to give informed consent) without any means of obtaining a medically safe abortion if the minor reasonably fears that informing a parent will place her in physical danger or if her parent, once notified, refuses to consent to an abortion. Under the applicable federal decisions, a state that in general requires a pregnant minor to secure parental consent before obtaining an abortion must provide the minor with the option of obtaining an abortion without parental consent by demonstrating to an unbiased official (who has the power to authorize the abortion) either that the minor is sufficiently mature to make the decision on her own or, if not sufficiently mature, that it is in the best interests of the minor to terminate her pregnancy. (See, e.g., [Bellotti II, supra](#), 443 U.S. 622, 643-644 [99 S. Ct. 3035, 3048-3049] (plur. opn.); [Casey, supra](#), 505 U.S. 833, 899 [112 S. Ct. 2791, 2832].) Thus, even without an explicit statutorily prescribed "judicial bypass" procedure, a pregnant minor who is denied medical care relating to pregnancy because of a doctor's determination that she lacks the capacity to give informed consent, but who is too frightened to seek--or unable to obtain--a parent's consent for such care, is entitled to seek a court order authorizing such medical care. A similar procedure is available, for example, when a parent, on the basis of his or her own religious beliefs, refuses to consent to a blood transfusion or other medical care for a child that a treating physician concludes is necessary for the child's health. (See, e.g., [In re Eric B. \(1987\) 189 Cal. App. 3d 996 \[235 Cal. Rptr. 22\]](#).) We see no reason why a similar procedure cannot be invoked on behalf of a pregnant minor who is incapable of giving informed consent to treatment relating to her pregnancy. (Cf. [Akron I, supra](#), 462 U.S. 416, 441 [103 S. Ct. 2481, 2498] ["[A] state court presented with a state statute specifically governing abortion consent procedures for pregnant minors will attempt to construe the statute consistently with constitutional requirements."].)

[****115] In sum, as concluded by the courts below, defendants have failed to demonstrate adequate justification for the statute's intrusion upon a pregnant minor's right of privacy under the California Constitution.

VIII

For the foregoing reasons, we conclude that Assembly Bill 2274 violates the right of privacy set forth in [article I, section 1, of the California Constitution](#). The judgment of the Court of Appeal, upholding the judgment of the trial court, is affirmed.

[*360] Werdegar, J., and Chin, J., concurred.

Concur by: KENNARD

Dissent by: MOSK; BAXTER; BROWN

Dissent

KENNARD, J.

[CA\(1i\) \(1i\)](#) [CA\(6b\) \(6b\)](#) [CA\(8b\) \(8b\)](#) [CA\(9b\) \(9b\)](#) [CA\(10c\) \(10c\)](#) I concur in the judgment. Before this court granted a rehearing in this matter, I authored a dissenting opinion setting forth my views, which have not changed and which are in substantial agreement with the reasoning of the plurality opinion. Because that [****832**] [*****245**] dissenting opinion no longer appears in the Official Reports (see [Cal. Rules of Court, rule 976\(d\)](#)), I reiterate that opinion here in relevant part, with additions in brackets and deletions reflected as [].

California's parental consent law, which prohibits abortions for women under [******116**] the age of 18 years without either the consent of one parent or judicial authorization, may at first glance appear so eminently reasonable that its constitutional validity could scarcely be in doubt. But evidence received at the trial of this case, much of it based on the experience of other states with similar laws, shows that the benevolent appearance of parental

involvement laws is deceiving; the laws have serious adverse effects and yield few benefits for children or society.

In brief, the relevant facts are these: Most adolescent women who become pregnant will consult a parent voluntarily, and those who do not frequently have good reasons for not doing so. With a parental consent law in effect, some pregnant adolescents who do not voluntarily consult a parent will seek and obtain judicial authorization, but the delay caused by the procedure will increase the medical risks of the abortion significantly without in any way enhancing the process by which the adolescent makes the abortion decision. Others will reveal their pregnancy to a parent and request consent, but will derive little or no benefit from parental consultation that is legally coerced rather than voluntary. Finally, [******117**] there will be some pregnant adolescents who cannot or will not obtain parental consent for an abortion and who will not seek judicial authorization because they perceive this process as unbearably intimidating, dangerous, or humiliating. Some of these adolescents will risk their health and their very lives with illegal or self-induced abortion, while others will delay any decision until abortion is no longer feasible and will bear a child they are ill equipped to care for.

Determining the constitutional validity of a law having such paradoxical and potentially serious effects is no easy task. Indeed, this case presents a confluence of state constitutional issues of great complexity and delicacy. We must adjudicate rights under the state constitutional right of privacy in the always thorny context of abortion, rendered all the more volatile and challenging because the rights at issue are those of adolescents rather than adults. And we must do so using a test newly established in [Hill v. National Collegiate Athletic Assn. \(1994\) 7 Cal. 4th 1 \[26 Cal. Rptr. 2d 834, 865 P.2d 633\]](#). Without question this is one of the most important and difficult cases we have decided [******118**] in many years.

[]

I [join in] [] affirm[ing] the judgment of the Court of Appeal holding that California's parental consent law violates the right of privacy guaranteed by our state Constitution. As the evidence received at the trial of this case persuasively demonstrates, the great majority of pregnant adolescents who do not voluntarily consult their parents are sufficiently mature to make the abortion decision by themselves and should be permitted to do so in consultation with their physicians and without requiring parental consent or judicial authorization.

There is a very small group of pregnant adolescents for whom parental consent is not an available option but who are too immature to give informed consent to an abortion. Almost all members of this group are under the age of 14 years. Because the Legislature has not enacted a parental consent law applying solely to these younger adolescents, and thus the issue is not now before this court, I do not decide whether a parental consent law so narrowed in focus would violate the state constitutional right of privacy, although I note that the interests of these younger adolescents would be better served by a law that [****119] allowed their physicians or others concerned with their welfare to petition for judicial authorization on their behalf. The present parental consent [law], by contrast, requires the adolescent herself to shoulder the entire burden of initiating legal proceedings to obtain judicial authorization.

I

Preliminarily, it is essential to state what this case is *not* about.

The morality of abortion is *not* at issue in this case. As this court has noted, the morality of abortion is "a subject upon which [**833] [***246] reasonable people can, and do, adhere to vastly divergent convictions and principles." ([Committee to Defend Reproductive Rights v. Myers \(1981\) 29 Cal. 3d 252, 284 \[172 Cal. Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118\]](#) (lead opn. by Tobriner, J.),

fn. omitted.) The United States Supreme Court has made the same point: "Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. . . . Our obligation is to define the liberty of all, not to mandate our own moral code." ([Planned Parenthood of Southeastern Pa. v. Casey \[****120\] \(1992\) 505 U.S. 833, 850 \[112 S. Ct. 2791, 2806, 120 L. Ed. 2d 674\]](#).)

[*362] Nor is this case about the value of parental involvement in the decision of a pregnant adolescent to continue or terminate her pregnancy. On the contrary, all parties and all members of this court agree that, *in general*, an adolescent who learns she is pregnant and is considering an abortion will benefit substantially from consultation with a parent and should be encouraged to do so. Parental assistance is important and beneficial because, *in general*, no one knows the child as well, or cares as deeply about the child's welfare, as the parent.

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

What *is* this case about? The primary issues are these: (1) Will [****121] the parental consent law advance the state's interest in protecting the physical and mental health of adolescent women []? (2) If the law will accomplish this purpose for only a small percentage of the adolescents affected by its provisions, is there some other way to do so without the substantial adverse effects that will arise from the legally mandated invasion of the privacy rights of the many adolescents who wish to

have an abortion, are capable of giving informed consent, and cannot or will not obtain parental consent?

This court is fortunate to have a well-developed factual record [] with which to resolve these issues. At the trial, 25 witnesses testified in person and 6 others by deposition. The witnesses included distinguished professionals in the fields of medicine, psychology, adolescent development, reproductive health statistics, and family violence, as well as lawyers, counselors, and judges who have participated in the implementation of similar laws in other states. Based on this evidence, the superior court issued a 39-page statement of decision containing many findings of fact. *On appeal, the state has not challenged the sufficiency of the evidence to support [****122] these findings.*

In its statement of decision, the superior court acknowledged that "the State has a compelling interest in the protection of minors from physical, psychological and emotional harm." But the court found no evidence that the parental consent law would further that interest. In particular, the court found:

1. "[A]n abortion is one of the safest medical procedures available for all women and, in particular, for teenagers. The risk of complications in [*363] pregnancy and childbirth are significantly higher for all women and particularly for younger teenagers." ¹

¹Michael Policar, a medical doctor who is board certified in obstetrics and gynecology and a member of the faculty of the Medical School of the University of California at San Francisco, testified that "abortion is the safest operation which is available in the United States . . . it has the lowest rate of deaths associated with it and also has the lowest rate of serious complications in comparison to any other operation which is widely performed in this country." He testified that adolescents are even less likely than adults to experience medical complications after abortion.

Philip Darney, a medical doctor who is board certified in obstetrics, gynecology and preventative medicine, similarly testified that "[e]lective abortion has a very low complication rate at [San Francisco General Hospital] and at other institutions" and that this low complication rate "applies to teens as well."

[****123] [*834] [***247] 2. "The medical history relevant to the abortion procedure is the type of information the minor herself would best know and, in fact, might be hesitant to disclose in the presence of a parent." ²

[****124] 3. "[M]inors rarely, if ever, experience complications following an abortion."

4. "[F]or most women, abortion poses no threat to their psychological or emotional well-being. . . . [A]dolescents are at no special risk and are actually less likely than adult women to experience any adverse psychological reaction to abortion." ³

In *Hodgson v. Minnesota* (1990) 497 U.S. 417 [110 S. Ct. 2926, 111 L. Ed. 2d 344], Justice Thurgood Marshall cited a study concluding that a "minor's overall risk of dying from childbirth is over nine times greater than [the] risk of dying from [a] legal abortion." (*Id.* at p. 467 [110 S. Ct. at p. 2954] (conc. & dis. opn. of Marshall, J.), citing Greydanus & Railsback, *Abortion in Adolescence* (1985) 1 Seminars in Adolescent Med. 213, 214.)

²Dr. Darney (see fn. 1, *ante*) testified: "I have never in the course of more than 15 years of doing abortions of teenagers and others felt that I didn't get an adequate history from the patient to deal with problems that might come up in the course of an abortion."

Dr. Policar (see fn. 1, *ante*) testified that adolescents are able to provide a medical history for abortion "as well as any other group of individuals" but also that teens are reluctant to disclose some relevant facts, such as previous abortions or sexually transmitted diseases, in the presence of their parents.

Curtiss Eugene Weidmar, a medical doctor and the Director of Public Health for El Dorado County, testified that a medical history is necessary to determine contraindications before prescribing oral contraceptives, and that this history is routinely taken from the minor without involving the parent.

³Nancy Adler, a professor of medical psychology in the Department of Psychiatry and Pediatrics of the University of California at San Francisco, testified that she was part of an expert panel appointed by the American Psychological Association to survey the scientific literature on the psychological responses to abortion. This survey resulted in an article of which Dr. Adler was the lead author. (Adler et al., *Psychological Responses After Abortions* (1990) 248 Science 41.) From the literature review, Dr. Adler concluded that "for the vast majority of women having their first trimester procedure, . . . there is no hazard to mental health, that the predominant responses to abortion are positive and that the negative responses tend to be mild and transient." She also found that there was no evidence that adolescents were particularly vulnerable to serious adverse psychological responses to abortion.

[**125] [*364]** 5. "[P]arental involvement in this specific area may have an adverse psychological effect . . . if it takes on a coercive character, and . . . the ability to make an autonomous decision about abortion is an important predictor **[**835] [****248]** of a minor's satisfaction with her decision." ⁴

Nada Logan Stotland, a board-certified psychiatrist who is also associate professor of clinical psychiatry and associate professor of clinical obstetrics and gynecology at the University of Chicago, testified that she had reviewed the scientific literature on psychiatric consequences of abortion and "according to the published literature, the majority of women who undergo abortions experience relief afterwards. Some smaller proportion experience loss and some guilt and, again, in the reported literature, the vast majority of those responses are transient and self-limited. That is they don't require intervention by a professional." She also testified that "[i]n every study, the incidence [of adverse psychiatric sequelae] following childbirth is considerably higher, on the order of four times as high following childbirth as following abortion." She also testified that age by itself was not a risk factor, that adolescents were no more likely than adults to experience adverse psychiatric effects. These conclusions appear in a chapter she wrote in a peer reviewed book, of which she was the editor, that was published by the American Psychiatric Press, which is the press of the American Psychiatric Association. (Stotland, *Psychiatric Issues in Abortion* in *Psychiatric Aspects of Abortion* (Stotland edit. 1991).) She noted that the 1991 literature review published by the American Psychiatric Association reached similar conclusions. (Dagg, *The Psychological Sequelae of Therapeutic Abortions--Denied and Completed* (1991) 148 Am. J. of Psychiatry 578.)

This finding is also supported by the testimony of Laurie Schwab Zabin, Ph.D., an associate professor at Johns Hopkins School of Hygiene and Public Health. In her expert opinion, based on her own research (Zabin et al., *When Urban Adolescents Choose Abortion: Effects on Education, Psychological Status and Subsequent Pregnancy* (1989) 6 Fam. Planning Perspectives 248) and that of others in the field, abortion does not have any negative psychological effect on adolescents.

This conclusion is further supported by the testimony of Dr. Policar (see fn. 1, *ante*), who testified that emotional reaction to abortion "serious enough to require consultation with a psychiatrist . . . literally never occurs" and that less serious emotional reactions, which would be referred to a social worker, are rare for all women and even more so for teens.

David Elkind, a child psychologist and professor of child study at Tufts University, testified: "In terms of negative impact, I think it's been well-established in studies that there are, so far as we know, no negative sequelae to abortion long-term."

⁴Dr. Adler (see fn. 3, *ante*) testified that a woman is more likely to

[**126] [*365]** 6. "[W]ith the exception of the small percentage of very young adolescents, again the great majority of minors possess the cognitive ability and maturity to make a fully-informed choice as to abortion and are competent to give informed consent to abortion" ⁵

7. "[A]s to that small percentage of minors who are not competent to give informed consent, medical ethics and practices preclude abortion in the absence of parental approval." ⁶

[**127]** The superior court then considered whether the parental consent law would further the state's compelling interest in "preserving and fostering the parent-child relationship." On this point, the court made these findings:

1. "[A] majority of minors voluntarily consult with a parent as to their decision to have an abortion."

have negative psychological responses following abortion if the woman was coerced by her parents or partner to terminate a pregnancy that she would have preferred to continue.

Dr. Stotland (see fn. 3, *ante*) testified that lack of autonomy or control over the abortion decision is associated with a negative psychiatric outcome and that pressure from a parent can therefore have a negative impact on the psychiatric outcome of an adolescent's abortion decision.

Based on her research, Dr. Laurie Zabin (see fn. 3, *ante*) testified that whether an adolescent is later satisfied with her decision to terminate a pregnancy by abortion is not significantly related to whether the adolescent consulted a parent before making the decision. Those who independently made the decision to terminate or not terminate the pregnancy were significantly more likely to be satisfied with the decision than those who succumbed to pressure from a parent or other adult.

⁵The evidence supporting this finding is discussed in the text, *post*, at pages 371 through 373.

⁶Dr. Policar (see fn. 1, *ante*) testified that the "vast majority" of adolescents are capable of giving informed consent and that he would not perform an abortion on an adolescent or any other patient without informed consent.

Adele D. Hofmann, a medical doctor and professor of pediatrics and director of adolescent medicine at the University of California at Irvine, testified that generally adolescents are capable of giving informed consent and that no adolescent can be treated on her own consent unless that consent is informed. Dr. Stotland (see fn. 3, *ante*) testified to the same effect.

2. "[P]arental involvement laws do not serve to change the numbers [that is, do not increase the number of minors who consult with a parent as to their decision to have an abortion]." ⁷

[**128]** 3. "Rather than legislation, the chief determinant of whether a minor consults a parent appears to be the quality of the relationship established between the parent and child before the pregnancy." ⁸

4. "[I]f a trusting and supportive relationship between a parent and child has not already been established, it is unlikely that the State can create in a moment of crisis what the parents were unable to develop over the course of the preceding years."

[*366] 5. "[F]or a significant number of minors, parental consultation is not a realistic option." ⁹

⁷ Robert Blum, a medical doctor and professor of pediatrics at the University of Minnesota, testified to a 1984 study based on interviews with minors who were at clinics awaiting abortions in Minnesota (which had a two-parent notification law) and Wisconsin (which had no parental involvement law). The study concluded that the Minnesota law had no effect on the number of minors who consulted one parent, and only a slight effect on the number who consulted both parents. (Blum et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decision-making* (1987) 77 Am. J. Pub. Health 619.)

⁸ Based on his study (see fn. 7, *ante*), Dr. Blum testified that the most important factors influencing whether a pregnant minor consulted a parent (almost invariably her mother) were the quality of the relationship, the age of the minor (younger minors being far more likely to consult), and the family's socio-economic status.

⁹ In states with parental involvement laws, the reasons minors give for not consulting their parents include fear of a physically or emotionally abusive parent, fear of being ejected from the home, concern that the parent will not keep the information confidential, and an unwillingness to give upsetting news to a parent who is physically or emotionally fragile.

Although the experts who testified did not agree on the percentage of families that qualify as dysfunctional or abusive, they agreed that the number of such families was significant. Moreover, evidence in the record indicates that for teens who become pregnant, the percentage of families that are abusive and/or dysfunctional is much higher than for teens generally.

Lenore E. A. Walker, a psychologist specializing in family violence and abuse, testified that approximately 25 to 30 percent of families in the United States "will have some form of domestic or family

[**129] [**836] [***249]** Regarding the effect of a judicial bypass procedure, the superior court found that in other states with parental consent laws, "rather than further the State's interest in the health of its minors, or even having no effect at all, the legislation actually had a detrimental effect." IN PARTICULAR, THE COURT FOUND:

1. The bypass procedure delays the performance of the abortion, and "increases the likelihood of a second trimester abortion." This delay significantly increases the medical risks of abortion. ¹⁰

violence at some part of their life history" and that an adolescent revealing her pregnancy to her parents is likely to trigger violence or some other form of abuse in such families. (See also [*Hodgson v. Minnesota*, supra](#), 497 U.S. 417, 439 [110 S. Ct. 2926, 2939] [referring to "the distressingly large number of cases in which family violence is a serious problem"]; testimony of social worker Jeth Gold stating that some parents "react very violently when they find out their child is sexually active"; testimony of Dr. Adele Hofmann (see fn. 6, *ante*) citing instances of a parent inflicting physical injury on the adolescent after learning of her pregnancy.)

Charles R. Figley, a psychologist and a professor at Florida State University, testified that approximately 10 percent of families would not have any of the characteristics necessary for providing appropriate support to a pregnant minor. He also testified that forcing a pregnant adolescent to involve her parents in the abortion decision would be inappropriate if the parents are psychologically or physically abusive.

W. Robert Beavers, a psychiatrist and clinical professor of psychiatry at the University of Texas, Southwestern Medical Center, testified about a test (the Beavers System Model) he developed to rate family competence. Using this test, he found that 5 percent of families attained the optimal level of competence, 38 percent were judged "adequate," 38 percent were judged "mid-range," 16 percent were "borderline," and 3 percent were "severely dysfunctional." He also testified that child abuse occurs in 3 to 5 percent of American families. He conceded that some teens cannot involve parents in the abortion decision.

¹⁰ Anita Lorraine Nelson, a medical doctor who is board certified in obstetrics and gynecology, an assistant professor at the School of Medicine at the University of California at Los Angeles, and the medical director of women's health clinics in the Los Angeles area, testified that in her opinion implementation of California's parental consent law would cause minors to delay abortions, resulting in significantly increased medical risks. Dr. Adler (see fn. 3, *ante*) testified to the same effect, adding that delay increases the psychological as well as the medical risks.

Dr. Policar (see fn. 1, *ante*) testified that the risk of complications in an abortion increases 50 percent per week for each week after the 10th week of pregnancy.

[****130] [*367] 2. "In addition to adverse medical consequences, the bypass procedure entails serious psychological and emotional consequences." ¹¹

[****131] 3. The bypass procedure does not assist pregnant minors in making "a mature and informed decision." ¹²

Jamie Ann Sabino, a Massachusetts attorney who is cochair of the Judicial Consent for Minors Lawyer Referral Panel in that state, testified that for minors who use the Massachusetts bypass procedure, "there is at least a week but more like a 2-week delay."

¹¹ Gerald Martin, a Minnesota district court judge from the Duluth area, testified: "It's clearly a very nerve-racking, tense, stressful experience for them."

Lynne MacBean, the volunteer coordinator of the Guardian Ad Litem Program in Minneapolis, Minnesota, testified that the judicial bypass procedure is very difficult and frightening for minors even though the judges who hear the petitions are careful to act in a nonthreatening manner. (See also [Hodgson v. Minnesota, supra, 497 U.S. 417, 441 \[110 S. Ct. 2926, 2940\]](#) ["The court experience produced fear, tension, anxiety, and shame among minors . . ."]; testimony of social worker Jeth Gold that "[t]he court system is a fearful, anxiety-producing, intimidating experience for most kids.")

Jamie Ann Sabino (see fn. 10, *ante*) testified: "I see a very high level of stress in the young women going to court that I have represented including crying, freezing in court, wringing of their hands, telling me how scared they are, telling me that they have had nightmares, that they can't sleep."

¹² The judges testifying that judicial bypass procedures provide no benefit to minors were Minnesota District Court Judges Gerald Martin and Allen Oleisky, and former Massachusetts Superior Court Judge Rudolph F. Pierce.

Lynne MacBean (see fn. 11, *ante*) testified that the judicial bypass process does not assist minors in deciding whether to continue or terminate their pregnancies because their decisions have already been made when they seek judicial authorization. Jamie Ann Sabino (see fn. 10, *ante*) testified to the same effect. She added that, in her opinion, the Massachusetts parental involvement law "has created a substantial burden for the young women in Massachusetts and that it has not met--it is not substantively working, it has not met any of the stated goals of the statute or the state interests involved." She noted that during the 10 years the law had been in effect, Massachusetts courts had ruled on approximately 9,000 bypass petitions, of which all but 13 were granted. All 13 denials were appealed and only one was affirmed (in that case the parents gave consent and the minor obtained the abortion). The overwhelming majority of petitions (97-98 percent) were granted on the ground of maturity.

Paula Marie Wendt, the director of an abortion facility in Minnesota, cited similar statistics for Minnesota: Of three thousand bypass

[****132] [*368] [**837] [***250] Summing up, the superior court made this finding:

"One must conclude from all of the evidence presented as to the effectiveness of the judicial bypass procedure that the procedure has no effect on a minor's ultimate decision with respect to abortion nor on the process by which that decision is made. Further, rather than providing a benefit to minors, the bypass procedure poses a gratuitous threat to their physical and emotional well-being."

Concluding that the parental consent law violates the right of privacy guaranteed by [article I, section 1, of the California Constitution](#), the superior court declared the law invalid and permanently enjoined its enforcement. On appeal, a unanimous Court of Appeal affirmed.

II

The issue before this court is whether California's parental consent law violates the privacy rights of minors guaranteed by the California Constitution.

Unlike the federal Constitution, the California Constitution expressly recognizes and safeguards the right of privacy. In article I, *section 1*, the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying [****133] and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining

petitions heard during a five-year period, only nine were initially denied and most of those nine were eventually granted. She also testified that in her opinion the Minnesota parental involvement law did not assist minors' decisionmaking and provided no benefit to minors.

In [Hodgson v. Minnesota, supra, 497 U.S. 417, 441](#), footnote 29 [[110 S. Ct. 2926, 2940](#)], Justice John Paul Stevens cited similar testimony by a judge to the effect that judicial bypass serves no useful public purpose. When judicial bypass is invoked, authorization is granted so routinely that judges view the procedure as a "rubber stamp." (See *id. at p. 436, fn. 21 [110 S. Ct. at p. 2937]* (conc. opn. of Stevens, J.) [noting that of 3,573 petitions filed in Minnesota courts, 6 were withdrawn, 9 were denied, and 3,558 were granted]; *id. at p. 477 [110 S. Ct. at p. 2959]* (conc. & dis. opn. of Marshall, J.) [citing judge's testimony characterizing the bypass as a "rubber stamp"].)

safety, happiness, *and privacy*." (Italics added.) The words "and privacy" were added by an initiative adopted by the voters on November 7, 1972 (hereafter the Privacy Initiative).

The elements of a cause of action for invasion of the state constitutional right to privacy are: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy on the plaintiff's part; and (3) an invasion of the privacy interest that is "serious" rather than "slight or trivial." (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal. 4th 1, 35-37.) Once a plaintiff has established these elements, the defendant may defend on the basis "that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Id.* at p. 40.) If this defense is raised, the plaintiff may rebut it by "showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests." (*Ibid.*)

A. Legally Protected Privacy Interest

Privacy interests are of two kinds: (1) autonomy privacy, which [****134] is the interest "in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference"; and (2) informational privacy, which is the interest in preventing "dissemination or misuse [*369] of sensitive and confidential information." (*Hill v. National Collegiate Athletic Assn.*, *supra*, [****251] 7 Cal. 4th 1, 35.)

[**838] A woman's decision to continue or terminate a pregnancy implicates both of these privacy interests, but I will focus here only on the interest in autonomy privacy. Because I conclude that the parental consent law is an unconstitutional invasion of the autonomy interest, I need not and do not address whether it is also an unconstitutional invasion of the informational privacy interest.

"It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties." (

Bellotti v. Baird (1979) 443 U.S. 622, 655 [99 S. Ct. 3035, 3054, 61 L. Ed. 2d 797] (conc. opn. of Stevens, J.).) Few decisions are more intimate or more important in determining the subsequent course of a woman's [****135] life than her decision to continue or terminate a pregnancy. Not surprisingly, this court has recognized that the state constitutional right of privacy protects a woman's right to choose whether or not to give birth, including the right to terminate a pregnancy by abortion. (See *Committee to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal. 3d 252, 262; *People v. Belous* (1969) 71 Cal. 2d 954, 963 [80 Cal. Rptr. 354, 458 P.2d 194].)

[]

The term "interest" generally means "having a share or concern" in some thing so that one is "liable to be affected or prejudiced" depending on its condition or outcome. (*Estate of Brown* (1938) 24 Cal. App. 2d 573, 575 [75 P.2d 658].) The term may be used to refer to "the object of any human desire" (*Rest.2d Torts*, § 1, p. 2), whether beneficial or not, or only to "that which is 'truly good for a person whether he desires it or not.'" (Houlgate, *The Child & the State, A Normative Theory of Juvenile Rights* (1980) p. 105, quoting Feinberg, *Social Philosophy* (1973) p. 26; see also *Scott v. McPheeters* (1939) 33 Cal. App. 2d 629, 631 [92 P.2d 678] [defining "interest" as "anything that is profitable or beneficial"].) But [****136] the term "interest," by itself, "carries no implication that the interest is or is not given legal protection." (*Rest.2d Torts*, § 1, *com. a*, p. 2.) When an interest has legal protection, it is then referred to as a "right." (*Id.*, § 1, *com. b*, p. 2.)

Every pregnant woman, regardless of age, is vitally affected by the decision to continue or terminate her pregnancy and stands to gain or lose depending upon whether that decision is made without interference by the state or any other third party and without public disclosure. Thus, the privacy [*370] interest in procreative choice does not vary based on the age or maturity of the pregnant

woman whose choice is at issue.

This is not to say that a child's privacy *right* in procreative choice under the state Constitution is equal in all respects to that of an adult. Generally speaking, children's constitutional *rights* are not coextensive with those of adults in similar situations. (See, e.g., *McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 545 [91 S. Ct. 1976, 1986, 29 L. Ed. 2d 647] [no right to jury trial in juvenile court delinquency adjudication]; *Prince v. Massachusetts* (1944) 321 U.S. 158, 170 [****137] [64 S. Ct. 438, 444, 88 L. Ed. 645] [stating that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults"].) But this is not because of any inherent qualitative difference between the interests of children and those of similarly situated adults; rather, it is because children's interests are counterbalanced by other significant interests, including the interest of the state, as *parens patriae*, in protecting youth, the interest of parents in preserving their relationships with and their authority over their children, and the interests shared by children and their parents in family autonomy and family privacy. (See Mnookin et al., *In the Interest of Children* (1985) p. 32; Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach* (1982) 66 Minn. L.Rev. 459, 492-493.)

Under *Hill v. National Collegiate Athletic Assn.*, supra, 7 Cal. 4th 1, a court considers these countervailing interests in due course *after* it has found the elements of a privacy cause of action: (1) a significant, legally protected privacy interest; (2) a reasonable expectation [****839**] [*****252**] [******138**] of privacy under the circumstances; and (3) an actual or threatened invasion of this privacy interest that is sufficiently serious to warrant constitutional protection. If these elements are present, the scope of the *right* of privacy in a given context can be determined only by undertaking the full analysis mandated by this court's decision in *Hill v. National Collegiate Athletic Assn.*, supra, 7 Cal. 4th 1.

[]

[] [N]othing in the history or language of the privacy provision of the California Constitution suggests that it was intended for adults alone or that children were to receive only some greatly watered-down protection. The ballot pamphlet argument in support of the Privacy Initiative advised voters that the initiative "creates a legal and enforceable right of privacy for *every Californian*" and, even more explicitly, that "[t]here should be no ambiguity about whether our constitutional freedoms are for every man, woman *and child* in this state." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) argument in favor of Prop. 11, pp. 26-27, underlining deleted, italics added.)

[*371] B. Reasonable [******139**] *Expectation of Privacy*

During childhood and adolescence, a person prepares for life as an adult, gradually assuming greater control and responsibility over his or her life. The pace of this developmental process should be regulated so that it is neither too fast nor too slow. The emerging adults should be neither charged with responsibilities they are not yet competent to handle nor deprived of control over matters they are perfectly able to deal with on their own.

During the process of human growth, therefore, the individual's competence gradually increases, accompanied by a gradual increase in the control a person exercises over his or her life. This expanding competence and control, in turn, supplies the individual with a reasonable expectation that he or she will be permitted to exercise that control without undue interference from parents or others who are charged with supervising the child's development. Accordingly, we may conclude that an adolescent has a reasonable expectation of autonomy privacy--that is, the power to make a decision without outside

interference, observation, or disclosure--as to decisions that are within that person's competence and that are protected [****140] by the right of privacy for adults.

An adult woman's decision to either continue a pregnancy to term or terminate it by abortion is protected by the right of privacy under both the state and federal Constitutions. (Roe v. Wade (1973) 410 U.S. 113 [93 S. Ct. 705, 35 L. Ed. 2d 147]; Doe v. Bolton (1973) 410 U.S. 179 [93 S. Ct. 739, 35 L. Ed. 2d 201]; Committee to Defend Reproductive Rights v. Myers, *supra*, 29 Cal. 3d 252, 262.) An adolescent woman may reasonably expect the same privacy protection if she is mature enough to make the decision competently by herself. The question, then, is this: At what point in a woman's growth from childhood to adulthood does she acquire the competence to make this decision?

After considering the evidence presented by the parties in this case, the superior court found that "with the exception of the small percentage of very young adolescents . . . the great majority of minors [who have become pregnant] possess the cognitive ability and maturity to make a fully-informed choice as to abortion and are competent to give informed consent to abortion."

The evidence at trial amply supports this finding. Gary Melton, a professor [****141] of psychology, testified that after the United States Supreme Court's decisions in Bellotti v. Baird, *supra*, 443 U.S. 622 and H. L. v. Matheson (1981) 450 U.S. 398 [101 S. Ct. 1164, 67 L. Ed. 2d 388], the American [*372] Psychological Association set up an interdivisional committee to study issues related to adolescent abortion. Professor Melton was selected to chair this committee. After surveying the relevant scientific literature, this committee determined, among other things, that although a number of relevant studies had been performed, there was no basis in existing research to conclude that adolescents as a group were less competent than adults to [**840] make decisions

[***253] concerning abortion. (See Am. Psychological Assn., Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues* (Jan. 1987) 42 Am. Psychologist 73.) These conclusions were published in book form, and were later reviewed and adopted by the National Academy of Sciences. Professor Melton testified that "at least from the age of 14 or so" adolescents have the ability to "comprehend the information that's given to them and to weigh it [****142] rationally at adult-like levels." He further testified that adolescents are "able to reason about real life situations and to do so in ways that show a good comprehending of circumstances and a rational logical process of dealing with that information." Finally, he testified that this evidence of adolescents' competence in making decisions applies to health care decisions in general and to decisions concerning abortion in particular.

Michael Saks, a social psychologist and professor at the University of Iowa College of Law, testified about a working paper he wrote for the Office of Technology Assessment of the United States Congress addressing this question: "At what age are adolescents competent to make their own health care decisions?" After surveying the relevant psychological studies, he concluded that there are no detectable differences between mid-adolescents and young adults in their 20's regarding their ability to make such decisions, and thus adolescents are competent to consent to general health care by the age of 14.

Based on her own research and her review of another study, Nancy Adler, a professor of medical psychology in the Department of Psychiatry and Pediatrics [****143] at the University of California at San Francisco, testified that in her opinion adolescents do not differ from adults in their ability to understand the risks and benefits of abortion. (See also, Houlgate, *The Child & the State, A Normative Theory of Juvenile Rights*, *supra*, at p. 72 [stating that available empirical evidence "does not give any support to the claim

that children over the age of thirteen or fourteen years lack the capacity for rational choice").)

[]

[] [T]he [] concept of legal minority, or nonage, embodies an assumption of incompetence to exercise the full panoply of rights and privileges available to adults. Our laws have established various age restrictions for voting, [*373] driving motor vehicles, purchasing alcoholic beverages, and the like. Because individuals mature at different rates, these age limits are a necessarily inexact and therefore arbitrary measure of maturity, but they have nonetheless been accepted as constitutionally valid for most purposes. But not for all.

There are some decisions so fundamental and so "life-shaping" that age limits are not constitutionally acceptable as a means of conclusively determining that an adolescent [****144] below the prescribed age is not yet ready to assume sole responsibility for those decisions. The decision to continue or terminate a pregnancy is one such decision. The United States Supreme Court has so held. (*Planned Parenthood of Missouri v. Danforth* (1976) 428 U.S. 52, 74 [96 S. Ct. 2831, 2843, 49 L. Ed. 2d 788]; *Bellotti v. Baird, supra*, 443 U.S. 622, 643 & fn. 23 [99 S. Ct. 3035, 3048].)

The abortion decision is different not only because [] a pregnancy decision fundamentally affects the subsequent course of a woman's life, but also because, unlike a decision concerning marriage or sterilization [], the abortion decision is highly time sensitive. Although marriage and sterilization can be postponed to adulthood, the option of abortion "effectively expires in a matter of weeks from the onset of pregnancy." (*Bellotti v. Baird, supra*, 443 U.S. 622, 642 [99 S. Ct. 3035, 3047].) "[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences." (*Id. at p. 643* [99 S. Ct. at p. 3048].)

Regardless of age restrictions, therefore, an adolescent's expectation of privacy is reasonable as [****145] to decisions with the following characteristics: (1) they are protected by the right of privacy for adults, (2) they are within the adolescent's competence, (3) they have serious and enduring consequences, and (4) they cannot be postponed to the age of legal [**841] [***254] majority. (See Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach, supra*, 66 Minn. L.Rev. 459, 503, 517.)

For those adolescents of sufficient maturity (that is, generally, adolescents of 14 years or older), the decision to continue or terminate a pregnancy has each of these characteristics. These adolescents therefore have a reasonable expectation of autonomy privacy in the making of this decision.

C. Seriousness of the Invasion

An important purpose of the Privacy Initiative was to "safeguard[] certain intimate and personal decisions from government interference in the form of penal and regulatory laws." (*Hill v. National Collegiate Athletic Assn., supra*, [*374] 7 Cal. 4th 1, 36.) The parental consent law at issue here is both penal and regulatory--it imposes criminal sanctions on any doctor who performs an abortion in violation [****146] of its provisions, and it regulates abortions by requiring a pregnant adolescent woman who has decided to terminate her pregnancy to obtain either the consent of a parent or judicial authorization for the abortion procedure.

Although the parental consent law does not absolutely preclude mature adolescent women from obtaining abortions without parental consent, the trial court record convincingly demonstrates that resort to the judicial bypass procedure by those adolescents unable or unwilling to obtain parental consent is time-consuming and emotionally traumatic, and it exposes the affected minors to significantly increased medical risks occasioned by the delay attributable to the procedure. (See *Bellotti*

[v. Baird, supra, 443 U.S. 622, 642-643 \[99 S. Ct. 3035, 3047-3048\]](#) [stating that the right to terminate a pregnancy "effectively expires in a matter of weeks"].)

That pregnant adolescents find the judicial bypass procedure highly repugnant and that it operates as a major obstacle to their exercise of free choice are illustrated by the tragic story of Becky Bell, who died at the age of 17 as a result of complications from an illegal abortion. When she learned she [****147] was pregnant, she also learned that under the law of her state (Indiana) she could obtain a legal abortion without parental consent only by applying to a juvenile court judge for a waiver of the consent requirement. "What does a judge have to do with this?" she reportedly asked a counselor. Unwilling to reveal her very personal decision for scrutiny by a judge, she resorted to an illegal abortion, a choice that cost her her life. (See Note, *Hodgson v. Minnesota: Chipping Away at Roe v. Wade in the Aftermath of Webster* (1991) 18 Pepperdine L.Rev. 955; Tribe, *Abortion: The Clash of Absolutes* (1990) p. 203; *Indiana Dad in S.F. to Tell How Abortion Law Led to Death*, S.F. Chronicle (Jan. 22, 1996) p. A15, cols. 1-4.)

I therefore agree with the Court of Appeal that the parental consent law invades the privacy interests of pregnant adolescents in a way that is not "slight or trivial." ([Hill v. National Collegiate Athletic Assn., supra, 7 Cal. 4th 1, 37.](#))

[]

[Although California law long required parental consent for many medical procedures,] [] an abortion is unlike [other medical procedures] [] in constitutionally significant ways. As previously mentioned, [****148] the *decision* to continue or terminate a pregnancy is exceptional and virtually unique among [*375] decisions that an adolescent woman might be called upon to make, because it both has profound nonmedical implications for the subsequent course of a woman's life and is time sensitive, requiring a decision within days or at most weeks. ([Bellotti v. Baird, supra, 443 U.S.](#)

[622, 642-643 \[99 S. Ct. 3035, 3047-3048\].](#)) Similarly, as a medical procedure, an abortion is exceptional; if the pregnancy is proceeding normally, abortion is an elective procedure, yet one that is medically time sensitive and that has far-reaching nonmedical implications for the subsequent course of the patient's life. It is also a medical procedure for which the utmost confidentiality is generally expected.

In addition, the Legislature has generally *not* required parental consent for medical procedures relating to sexuality and procreation. [**842] [***255] For example, minors are "medically emancipated"--that is, they may obtain medical treatment without parental consent--for purposes of prescribing and furnishing contraceptive drugs and devices ([Fam. Code, § 6925](#)), for medical treatment [****149] relating to pregnancy (*ibid.*), for the diagnosis and treatment of sexually transmitted diseases, rape, and sexual assault (*id.*, § 6925-6928), and for testing for HIV infection ([Health & Saf. Code, § 121020, subd. \(a\)\(1\)](#) [minors 12 years and older deemed competent to consent]). Indeed, except for sterilization, abortion is the only medical procedure related to sexuality and procreation for which the Legislature has required parental consent. Accordingly, the statutory scheme regarding medical treatment for persons under the legal age of majority, [] provides an additional ground for concluding that the parental consent law at issue here is a serious invasion of the privacy interests of pregnant adolescents.

[] [Although] a number of other states have enacted parental consent laws[,] [] the Florida Supreme Court, the only other state court to consider the constitutionality of a parental involvement law under a state constitutional right of privacy, [has] concluded that the [Florida parental consent] law violated the right of privacy guaranteed by the Florida Constitution. ([In re T.W. \(Fla. 1989\) 551 So.2d 1186, 1194.](#))

Plaintiffs have established the [****150] elements of a cause of action for invasion of the state

constitutional right of privacy--a legally protected privacy interest, a reasonable expectation of privacy, and a serious invasion of the protected privacy interest. Therefore, the burden shifts to the state to establish justification for the parental consent law.

D. Legal Standard

The [] proper legal standard by which to judge the state's asserted justification for the parental consent law is the compelling state interest standard [].

[*376] The compelling state interest standard is required by this court's previous decision in *Hill*. Without qualification, we there said: "Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a 'compelling interest' must be present to overcome the vital privacy interest." (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal. 4th 1, 34; see also *id.* at pp. 59 (conc. & dis. opn. of Kennard, J.), 62 (conc. & dis. opn. of George, J.), 73 (dis. opn. of Mosk, J.).) The burdens that the parental consent law imposes on a [****151] pregnant adolescent's decision to terminate her pregnancy constitute an obvious invasion of an interest fundamental to personal autonomy. Therefore, the compelling interest standard applies.

The compelling interest standard is no less applicable because the parental consent law's burdens are imposed on minors rather than adults. As previously mentioned, the state Constitution's privacy guarantee extends equally to "every man, woman *and child* in this state." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27, italics added.)

E. Justification

The [] [state argues that the parental consent law furthers] the state's []interest in protecting the physical and mental health of unemancipated

minors.[] The superior court considered this interest compelling, as do I. But I also agree with the superior court's conclusion that the state has failed to demonstrate that the parental consent law advances this interest.

The [] [state has argued] that the parental consent law will protect the physical and mental health of pregnant adolescents because, for those pregnant adolescents who cannot [****152] or will not obtain parental consent, it affords them a judicial bypass procedure through which a judge may authorize the abortion upon determining either that the adolescent is mature enough to make the decision by herself or, if not, that the abortion would be in her best interests. [] [Although] the adolescent's physician is required to make the same determination of maturity in deciding whether the adolescent has given informed consent to the abortion [], [] [****256] [**843] [the state argues] that an additional maturity determination by a judge will better protect the adolescent's physical and mental health because (1) unlike the physician, the judge has no pecuniary interest in the decision and is thus more objective [], and (2) if the adolescent is not sufficiently mature to give informed consent to an abortion, the judge can authorize the abortion upon a finding that it is in the adolescent's best interests, whereas the adolescent's physician may not proceed without the informed consent of either the adolescent or her parents []. []

[*377] [] [In] determining whether a law furthers an identified state interest, a court must consider both the [****153] positive and negative impacts of the law on that interest. Only by such a balanced inquiry may a court determine whether, considering all effects of the legislation, both positive and negative, the legislation on balance advances the interest offered to justify it. Accordingly, I will consider first the claimed beneficial effects of the legislation, and then any detrimental effects, as they relate to the physical and mental health of pregnant adolescents seeking abortions.

1. Superiority of judges over physicians in making

the maturity determination

[] The [] [state's argument] that doctors may not be relied upon to act impartially "is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his [or her] female patients." (*Doe v. Bolton, supra*, 410 U.S. 179, 196 [93 S. Ct. 739, 750].) Determining whether a patient has given informed consent to a proposed medical procedure is an integral part of the practice of medicine with respect to patients of all ages (see *Arato v. Avedon* (1993) 5 Cal. 4th [****154] 1172, 1182-1184 [23 Cal. Rptr. 2d 131, 858 P.2d 598]; *Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal. App. 3d 1303, 1322-1323 [271 Cal. Rptr. 199]), and the physician's license provides sufficient assurance that the physician will do so competently, fairly, and objectively (see *Doe v. Bolton, supra*, 410 U.S. 179, 199-200 [93 S. Ct. 739, 751-752]). Should a particular physician fail to do so, the consequences would include professional censure, revocation or suspension of the medical license, and tort liability to the patient for negligence or battery. The state has not demonstrated that these safeguards are inadequate.

Indeed, the [] assertion that physicians cannot be relied upon to make the maturity determination accurately, fairly, and objectively is supported by no evidence in the present record. Mere supposition, even when plausible, is insufficient. When a state law burdens the exercise of a fundamental right, the government's "attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the [****155] burden is connected to such a policy." (*Carey v. Population Services International* (1977) 431 U.S. 678, 696 [97 S. Ct. 2010, 2022, 52 L. Ed. 2d 675], fn. omitted (plur. opn. by Brennan, J.); see also *id.*, p. 702 [97 S. Ct. at p. 2025] (conc. opn. of White, J.) ["the State has

not demonstrated that the prohibition against distribution of contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justification [*378] for the restriction"]; *New Jersey Citizen Action v. Edison TP.* (3d Cir. 1986) 797 F.2d 1250, 1257 ["when, as here, fundamental free speech interests are patently burdened, the district court not only is free to but indeed is required to overturn regulations that are premised on legislative assumptions contradicted by facts in the record"].)

Finally, the state has less restrictive alternatives available. It could by statute regulate the manner in which physicians make the informed consent determination for adolescents seeking abortion, just as it may regulate other aspects of medical treatment, to ensure that the determination is made according to the highest professional standards.

2. *Best interests* [****156] *authorization for immature minors*

The [] [state has argued] that the judicial bypass option furthers the physical and mental [**844] [***257] health of pregnant immature minors who seek an abortion without parental consent because it permits judicial authorization of abortions for these minors if abortion would be in their best interests. I agree that the law as it exists without the parental consent legislation does not well serve the needs of pregnant immature minors who seek an abortion but cannot obtain parental consent.

But immature minors (that is, generally, those below the age of 14) constitute only a very small percentage, certainly less than 5 percent, of the entire class of adolescents who seek abortions without parental consent.¹³ This is so for two reasons: the pregnancy rate for adolescents below the age of fourteen is much lower and their rate of voluntary parental involvement much higher than

¹³ Jamie Ann Sabino (see fn. 10, *ante*) testified that "probably under three or four percent" of the adolescents who sought judicial authorization for abortion in Massachusetts were 14 years of age or under.

for older adolescents. (See Alan Guttmacher Inst., *Sex and America's Teenagers* (1994) pp. 49, 81, fn. 151.) Because the group of immature minors is so small compared with the larger class of pregnant minors affected by the parental consent law, and because a [****157] law could easily be tailored to affect only this group, the parental consent law may not be justified on the ground that it advances the welfare of pregnant immature minors who seek an abortion without parental consent.

As I mentioned at the outset, because the parental consent law at issue in this case applies to all unemancipated minors, I need not and do not decide whether a more narrowly drawn law, applying only to adolescents under the age of 14 years, would violate the state constitutional right of privacy. I note, however, that California's existing parental consent law [] is subject to [*379] criticism insofar as it requires a child who is or may be immature to herself shoulder the burden of initiating and pursuing legal proceedings to obtain judicial authorization for an abortion. [****158] By comparison, the Legislature has established a judicial authorization procedure for adults who lack the capacity to give informed consent to a medical procedure (*Prob. Code, § 3200 et seq.*), but the Legislature has provided that proceedings to obtain this authorization may be commenced not only by the patient, but also by his or her physician, spouse, relative, friend, "or other interested person" (*id.*, § 3203, subd. (c)). Thus, the Legislature has implicitly recognized that it may be unreasonable to require an adult who is incapable of giving informed consent to a medical procedure to undertake the task of commencing legal proceedings for judicial authorization. For an immature adolescent seeking an abortion without parental consent, it seems equally unreasonable to expect the adolescent to apply for judicial authorization. The physician who has determined that the adolescent is too immature to give informed consent to an abortion, or another individual counseling the adolescent, should be able to request judicial authorization on the adolescent's behalf. (See Keiter, *Privacy, Children,*

and Their Parents: Reflections on and Beyond the Supreme Court's Approach, supra, [****159] 66 Minn. L.Rev. 459, 514 & fn. 272.)

3. *Detrimental effects of bypass procedure--delay and emotional distress*

The superior court found that the judicial bypass option would in many cases delay performance of the abortion until the second trimester, thereby significantly increasing the medical risks and the cost of the procedure. [] The evidence presented at trial supports the superior court's conclusion []. For example, Dr. Policar (see fn. 1, *ante*) testified that after the 10th week of pregnancy, the medical risks "go up quite precipitously" and in fact increase at the rate of "50 percent for every week beyond the tenth week." Paula Marie Wendt (see fn. 12, *ante*) testified that delay associated with the judicial bypass procedure in Minnesota has caused some abortions to be performed in the second trimester (that is, after the thirteenth week of pregnancy) that otherwise would have [been] performed during the first trimester. I note also that in *Hodgson v. Minnesota, supra*, 497 U.S. 417, United States Supreme Court Justice Thurgood Marshall cited [**845] [***258] a study finding that "for women 19 years old and younger, the number of deaths per [****160] 100,000 abortions was 0.2 for the first 8 weeks of pregnancy, 0.6 for weeks 9 through 12, 3.4 for weeks 13 through 16, and 7.8 for week 17 and after." (*Id. at pp. 465-466 [110 S. Ct. at pp. 2953-2954]* (conc. & dis. opn. of Marshall, J.), citing Cates et al., *The Risks Associated With Teenage Abortion* (1983) 309 New Eng. J. Med. 621, 623.)

The superior court also found that the judicial bypass option would subject the adolescents who use it to considerable emotional trauma. [] [Although [*380] this] emotional distress [usually] would be transitory, causing no adverse psychological effects long term, [] the true significance of the emotional distress occasioned by judicial bypass lies not in its long-term psychological impact but in its short-term

behavioral impact. Adolescents will be extremely reluctant to use a procedure they perceive and experience as stressful, dangerous, and humiliating,¹⁴ and they will go to great lengths to avoid such a procedure, turning instead to illegal abortions or self-induced abortions, or delaying all action until abortion is no longer feasible, thereby allowing the decision to be made by default rather than by careful and mature [****161] reflection and deliberate choice.

[****162] []

Furthermore, judicial bypass will not be a realistic option for many adolescents in rural, sparsely populated counties because of the long distances required to reach a courthouse and because of the unacceptable risk that confidentiality will be lost by a chance encounter with a relative, neighbor, or acquaintance at the courthouse. Also, many counties in California have no providers for second trimester abortions (see trial testimony of Dr.

Michael Policar), so that delays occasioned by the judicial bypass procedures may effectively preclude abortions for some minors living in these counties.

Like the superior court and the Court of Appeal, I conclude that any beneficial effect of the parental consent law on the physical and emotional well-being of pregnant adolescent minors seeking abortion would be outweighed by the detrimental effect of the judicial bypass, and thus that on [*381] balance the parental consent law would not further the state's compelling interest in the physical and emotional well-being of children.

4. *Increasing parental involvement in adolescents' abortion decisions*

To justify the parental consent law's serious invasion of the privacy interests [****163] of pregnant adolescents seeking abortion, the [] [state asserts] that the law will increase parents' involvement in their children's abortion decisions. [] [Indeed,] to many disinterested observers[,] increasing parental involvement may appear to be the legislation's primary purpose.

The law existing before and apart from the parental consent law permitted but did not require parental involvement; it left to the pregnant adolescent herself the decision [**846] [***259] whether or not to consult her parents. Under the parental consent law also, parental involvement is permitted but not required, the only difference being that a pregnant adolescent who chooses not to involve a parent must obtain judicial authorization for an abortion. Is this change likely to *increase* the rate or incidence of parental involvement that would occur in the law's absence by causing at least some minors who would not otherwise do so to consult a parent before making the abortion decision?

After considering evidence concerning the experience with parental involvement laws in Massachusetts and Minnesota, the superior court found that these laws do not in fact increase the number of [****164] minors who consult their parents about the abortion decision. [] [T]he

¹⁴Jeth Gold, a social worker in San Francisco, testified that adolescents find any court appearance stressful because they "perceive court as a place you go when you have committed a crime," because they may be required to answer questions even if they would prefer not to, because their answers may cause trouble for parents or friends or sexual partners, and because the result of the court proceeding may profoundly affect their lives. He added that the stress would increase if the adolescents expected to be questioned about intimate topics like sexuality. Dr. Anita Lorraine Nelson (see fn. 10, *ante*) testified that in California many Hispanic adolescents have the particular fear that going to court could lead to the deportation of parents or other relatives who are illegal immigrants. Jamie Ann Sabino (see fn. 10, *ante*) testified that adolescents seeking judicial authorization for abortion in Massachusetts worry that authorization will be denied, that they will be forced to reveal intimate details of their lives to a stranger, and that confidentiality may be lost if they encounter an acquaintance of their parents at the courthouse. Paula Marie Wendt (see fn. 12, *ante*) testified that adolescents seeking abortions in Minnesota "are afraid that they are going to be recognized, that somebody will see them, that their confidentiality will not be protected" and they "feel like they are a criminal if they go to court and that's going to be a record against them or somebody can use it against them in the future." As a result, she added, "[s]ome are just too afraid to even think about going to court." Dr. Lenore E. A. Walker (see fn. 9, *ante*) testified that it would be particularly difficult for adolescents from abusive families to seek judicial authorization because such adolescents have "learned secrecy" and "do not see authority figures as helpful to them."

evidence to support this finding is far from conclusive but is probably sufficient to support the more cautious finding that any increase in parental involvement resulting from parental involvement laws is probably not great.

Of greater significance, in my view, is the superior court's related finding that when a pregnant adolescent consults a parent against her better judgment and only to avoid having to apply for judicial authorization, the adolescent is unlikely to derive any of the benefit that would normally be expected from parental consultation. The superior court reasoned that an adolescent's initial reluctance to consult a parent often evidences a significant underlying problem or dysfunction in the parent-child relationship. Although facing and jointly resolving a crisis situation--such as an adolescent's unplanned pregnancy (which must be resolved under the time constraints imposed by the steeply escalating medical risks of abortion as the pregnancy progresses beyond the 10th week)--can strengthen a parent-child relationship that is fundamentally sound, a flawed relationship is likely to further [****165] deteriorate or unravel under this sort of pressure, resulting in emotional, psychological, and even physical harm to the child. Thus, it is [*382] doubtful that parental consultation that is coerced by a parental consent law will, on balance, benefit or strengthen parent-child relationships. This reasoning is supported by the evidence presented at the trial in superior court. (See fn. 4, *ante*; see also Rhode, *Politics and Pregnancy: Adolescent Mothers and Public Policy* (1991) 1 S. Cal. Rev. L. & Women's Stud. 99, 126 [stating that "[v]irtually every major professional study has concluded that compulsory parental involvement ill serves adolescent needs and family relationships"]; Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach, supra*, 66 Minn. L.Rev. 459, 500-501 [stating that "[w]hen notification or consent requirements mandate parental involvement, conflict between the parent and child portending severe disruption of the family is likely"].)

If the goal is to encourage beneficial parent-child communications about a pregnant adolescent's options, there are feasible and effective alternatives having [****166] a lesser impact on privacy interests.

For example, the state could act to ensure that before an abortion is performed adolescents are advised in an effective but noncoercive manner to consult their parents,¹⁵ and that adolescents who are reluctant to do so receive appropriate professional assistance in working with their parents. The evidence at trial revealed that in California many and perhaps most pregnancy tests are performed in health clinics that receive state funding. The state may attach conditions to this funding, including adherence to counseling protocols. Through such protocols, the state may insist that adolescents who have tested positive for pregnancy are encouraged to consult their parents. To ensure that this encouragement is effective, the state may provide written materials and videos to use either as training aids for the counselors or to be [**847] [***260] shown or given directly to the adolescents.¹⁶ In addition, the state could ensure that the clinics make their facilities available, or the state could provide its own facilities, so that adolescents may discuss their pregnancies with their parents in a neutral setting and in the presence of a trained [****167] and supportive counselor or family therapist. (See Rhode, *Politics and Pregnancy: Adolescent Mothers and Public Policy, supra*, 1 S. Cal. Rev. L. & Women's Stud. 99, 126 [advocating "voluntary

¹⁵ A number of witnesses at the trial testified about the "options counseling" given at health clinics in California to adolescents who have tested positive for pregnancy. Without exception, they testified that during this counseling adolescents *are* encouraged to discuss the fact of their pregnancy, and their plans for dealing with it, with their parents. (See, e.g., testimony of Dr. Nelson, Dr. Policar, Dr. Hofmann, Catherine Dodd, Ellen Eidem.)

¹⁶ For example, Catherine Dodd, the former director of the Women's Health Center at San Francisco General Hospital, testified that the clinic has prepared a pamphlet entitled, *Talk to My Parents?* which it provides to teens to assist them in discussing sensitive issues such as contraception and abortion with their parents.

parental outreach [*383] programs" that "seek to improve family communication and adolescent decision-making skills while avoiding the notice or consent requirements that deter teenagers from seeking assistance"].)

[****168] I conclude that the state has failed to justify the parental consent law's serious invasion of the privacy interests of pregnant adolescents.

Conclusion

California's parental consent law was enacted to protect the physical and mental health of pregnant adolescents and to give these adolescents the benefit of consultation with a caring and supportive parent. Laudable purposes, to be sure. But the parental consent law also seriously invades the privacy interests of adolescents, and when a law burdens fundamental rights, "merely stating a laudable purpose" is insufficient. ([People v. Glaze \(1980\) 27 Cal. 3d 841, 848 \[166 Cal. Rptr. 859, 614 P.2d 291\]](#).) The constitutionality of a law is judged not by the value of the policies it seeks to implement, but by "the objective effect of the legislative terms." ([County of Los Angeles v. Superior Court \(1975\) 13 Cal. 3d 721, 727 \[119 Cal. Rptr. 631, 532 P.2d 495\]](#).)

Benefiting from the experience of other states with similar laws, and a well-developed trial record, this court is equipped to assess the "objective effect" of the parental consent law. What the trial record shows is that most pregnant teenagers consult their parents [****169] voluntarily, and that there are a variety of reasons why the others do not. Some merely wish to spare their parents' feelings, but others do not consult their parents because the parents are physically or emotionally abusive or because parent-child relations have broken down or would break down completely if the pregnancy were disclosed. The delays caused by the judicial bypass option will move many abortions into the second trimester, significantly increasing medical risks. To avoid having to reveal their pregnancy to a judge and submit to the judge's questioning about their decision to terminate the pregnancy, some

pregnant teenagers will obtain illegal abortions, and may die as a result, and others will delay taking any action until an abortion is no longer feasible. As Professor Laurence Tribe has summed it up, "parental consent and notice requirements may sound like moderate recognitions of the parents' central role in family life but are likely in practice to achieve little and to cause great grief." (Tribe, *Abortion: The Clash of Absolutes*, *supra*, p. 203.)

[]

As United States Supreme Court Justice Lewis Powell has written, "[t]he need to preserve the constitutional [****170] right and the unique nature of the abortion [*384] decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." ([Bellotti v. Baird, supra, 443 U.S. 622, 642 \[99 S. Ct. 3035, 3047\]](#) (lead opn. by Powell, J.).) California's parental consent law, though certainly well intentioned, lacks the sensitivity required to satisfy the privacy guarantee of our state Constitution. Because the parental consent law seriously invades the privacy interests of minors, and because its practical effects are such that it does not significantly advance any countervailing interest of either the state, the pregnant minor women, or their parents, I [] [concur in the judgment] uphold[ing] the decisions of the superior court and the Court of Appeal declaring unconstitutional and enjoining the enforcement of the parental consent law on the ground that it [**848] [****261] violates the right of privacy guaranteed to every Californian--man, woman, *and child*--by our state Constitution.

MOSK, J.

I dissent.

The plurality hold that Assembly Bill No. 2274, which prohibits unemancipated [****171] minors--including girls as young as nine years old--from obtaining abortions without either consent by a parent or a legal guardian or authorization by a neutral juvenile court judge, violates [article I,](#)

[sections 1 and 7 of the California Constitution](#). As I shall explain, I strongly disagree. Setting aside any personal beliefs concerning the morality--and politics--of abortion, I conclude the law is valid and should not be enjoined. Accordingly, I would reverse the judgment of the Court of Appeal.

I.

Enacted by the Legislature in 1987 (Stats. 1987, ch. 1237, § 2, 3), Assembly Bill No. 2274 amends former [Civil Code section 34.5](#) (now [Family Code section 6925](#)) to exclude abortion from the medical procedures for which an unemancipated minor may give consent "[without] disaffirmance because of minority." ([Fam. Code, § 6921](#).) It also added former [section 25958](#) to the Health and Safety Code (now [Health & Saf. Code, § 123450](#), in subd. (a)) providing that "[e]xcept in a medical emergency requiring immediate medical action, no abortion shall be performed upon an unemancipated minor unless she first has given her written consent to the abortion and also has obtained the written consent [****172] of one of her parents or legal guardian."

Assembly Bill No. 2274 includes judicial bypass provisions, with the following requirements. If an unemancipated minor's parent or guardian is unavailable or refuses consent, or if the unemancipated minor elects not to [*385] seek consent, she may file a petition in the juvenile court. ([Health & Saf. Code, § 123450, subd. \(b\)](#).) The court must assist her, or a person she designates, in preparing the petition and notices; it must also advise her that she has a right to court-appointed counsel, and it may appoint a guardian ad litem. (*Ibid.*) A hearing must be set within three days of filing the petition. (*Ibid.*) At the hearing, the juvenile court must determine whether the unemancipated minor is "sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion." (*Id.*, subd. (c).) If it finds that she is, and that she has consented on that basis, it must grant the petition. (*Id.*, subd. (c)(1).) If it determines that she is not sufficiently mature, it must grant the petition nevertheless if an abortion

would be in her "best interest," but must otherwise deny the petition. (*Id.*, subd. [****173] (c)(2).)

The Judicial Council adopted rules and developed forms to implement the judicial bypass provisions. (Cal. Rules of Court, rule 240; Cal. Standards Jud. Admin., § 23.) Those rules require, inter alia, that the hearings "be conducted informally in the chambers of a judge of the superior court, sitting as a juvenile court." (Cal. Rules of Court, rule 240(e).) The petitioner may, if she desires, be accompanied by a "support person" and "one or more parents or a guardian." (*Ibid.*) The hearing "may be conducted immediately if a courtroom or chambers is available; otherwise it shall be scheduled and conducted not more than three calendar days after the date of filing." (*Id.*, rule 240(d).) If the court grants the petition, it must "immediately provide [the] petitioner with two certified copies of the Order Authorizing Abortion Without Parental Consent and the Confidential Affidavit of Minor," and explain to the petitioner that, to establish her identity, she should take one copy of each document to the provider of any abortion. (*Id.*, rule 240(g).) If the court denies the petition, it must make "findings of facts and state the evidence supporting each finding in its [****174] order of denial." (*Id.*, rule 240(h).) Moreover, if the court denies the petition, it must advise the petitioner of her right to appeal, that the appeal will be decided within five court days of filing the notice of appeal, that she is entitled to an attorney, and that the appeal and the attorney will not cost her or her parents or guardian any money. (*Id.*, rule 240(i).) The court must immediately appoint counsel if petitioner has not been represented at the hearing. (*Ibid.*)

[**849] [****262] Assembly Bill No. 2274 was to become effective January 1, 1988. Before that date, in November 1987, plaintiffs American Academy of Pediatrics, California District IX; the California Medical Association; the American College of Obstetricians and Gynecologists, District IX; Planned Parenthood of Alameda-San Francisco; and Philip Darney, M.D., sought

declaratory and injunctive relief, on the ground that the legislation violates the right to privacy under [article I, section 1 of the California Constitution](#).

[*386] In December 1987, the superior court issued a preliminary injunction enjoining enforcement of any provision of Assembly Bill No. 2274. The People appealed. In October **[****175]** 1989, the Court of Appeal affirmed the order granting issuance of the preliminary injunction and remanded for trial. ¹ In October and November 1991, the superior court conducted a 16-day trial, without a jury. Twenty-five expert witnesses testified, including physicians, psychologists, lawyers, counselors, and judges; an additional six expert witnesses were heard by deposition.

In June 1992, the trial court issued a lengthy statement of decision and a judgment declaring Assembly Bill No. 2274 unconstitutional and permanently enjoining its enforcement. Specifically, it ruled that the legislation violates the rights to "autonomy" and "informational" privacy under [California Constitution, article I, section 1](#), **[****176]** and the right to equal protection of the laws under [article I, section 7](#).

The People appealed from the judgment. While the appeal was pending, we laid down, in [Hill v. National Collegiate Athletic Assn. \(1994\) 7 Cal. 4th 1 \[26 Cal. Rptr. 2d 834, 865 P.2d 633\]](#) (Hill), the standard for deciding claims under the state constitutional right to privacy. The Court of Appeal concluded that "although the superior court could not and did not specifically employ the approach established in *Hill*, its decision remains valid." It affirmed the judgment on the ground that Assembly Bill No. 2274 violates an unemancipated minor's right to autonomy privacy. It declined to decide whether it also violates her rights to informational privacy or to equal protection. We granted review.

¹ The Court of Appeal concluded, inter alia, that the right to privacy under the California Constitution extends to the decision whether to undergo childbirth, does not distinguish between the right to privacy of adults and children, and may not be intruded upon absent a compelling state interest.

II.

In resolving the present challenge to Assembly Bill No. 2274 under the California Constitution, we are bound by the "incontrovertible conclusion that the California Constitution is, and always has been, a document of independent force." ([Committee to Defend Reproductive Rights v. Myers \(1981\) 29 Cal. 3d 252, 261 \[172 Cal. Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118\]](#) (plur. opn. of Tobriner, **[****177]** J.).) Thus, although we may derive guidance from the numerous decisions of the United States Supreme Court concerning comparable statutes, we are not bound by its determinations. ² Just as the rights guaranteed by the **[**850]** **[***263]** California Constitution are "not dependent on those **[*387]** guaranteed by the United States Constitution" ([Cal. Const., art. I, § 24](#)), our interpretation of those rights, including the

² The United States Supreme Court has addressed the constitutionality of parental notice and consent requirements in numerous decisions, recently in [Lambert v. Wicklund \(1997\) 520 U.S. \[117 S. Ct. 1169, 137 L. Ed. 2d 464\]](#). (See also [Planned Parenthood of Southeastern Pa. v. Casey \(1992\) 505 U.S. 833 \[112 S. Ct. 2791, 120 L. Ed. 2d 674\]](#); [Ohio v. Akron Center for Reproductive Health \(1990\) 497 U.S. 502 \[110 S. Ct. 2972, 111 L. Ed. 2d 405\]](#); [Hodgson v. Minnesota \(1990\) 497 U.S. 417 \[110 S. Ct. 2926, 111 L. Ed. 2d 344\]](#); [Akron v. Akron Center for Reproductive Health \(1983\) 462 U.S. 416 \[103 S. Ct. 2482, 76 L. Ed. 2d 687\]](#); [Planned Parenthood Assn. v. Ashcroft \(1983\) 462 U.S. 476 \[103 S. Ct. 2517, 76 L. Ed. 2d 733\]](#); [H. L. v. Matheson \(1981\) 450 U.S. 398 \[101 S. Ct. 1164, 67 L. Ed. 2d 388\]](#); [Bellotti v. Baird \(1979\) 443 U.S. 622 \[99 S. Ct. 3035, 61 L. Ed. 2d 797\]](#); [Planned Parenthood of Missouri v. Danforth \(1976\) 428 U.S. 52 \[96 S. Ct. 2831, 49 L. Ed. 2d 788\]](#).) Most recently, in *Casey*, a majority of the court upheld a Pennsylvania statute requiring that before an unemancipated minor under the age of 18 may obtain an abortion she must obtain the consent of one of her parents or opt for a judicial procedure that allows her to bypass the consent requirement. (505 U.S. at p. 899 [112 S. Ct. at p. 2832] (opn. of O'Connor, Kennedy, and Souter, JJ.) ["Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."]; and *id.* at pp. 970-971 [112 S. Ct. at p. 2869] (conc. & dis. opn. of Rehnquist, C. J.) ["We think it beyond dispute that a State 'has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.' [Citation.] A requirement of parental consent to abortion, like myriad other restrictions placed upon minors in other contexts, is reasonably designed to further this important and legitimate state interest."].)

right to privacy, is not dependent on analogous federal decisions.

[**178]** Nor are the California and United States Constitutions identical. In 1972, the electors added the explicit right to "privacy" to the other inalienable rights enumerated in [article I, section 1 of the state Constitution](#); "[t]he federal constitutional right of privacy, by contrast, enjoys no such *explicit* constitutional status." ([Committee to Defend Reproductive Rights v. Myers, supra, 29 Cal. 3d 252, 262-263](#) (plur. opn. of Tobriner, J.), *italics in original*.)

Moreover, "we have on numerous occasions construed the California Constitution as providing greater protection than that afforded by parallel provisions of the United States Constitution." ([Committee to Defend Reproductive Rights v. Myers, supra, 29 Cal. 3d at p. 261, fn. 4](#) (plur. opn. of Tobriner, J.).) Thus, we recognized state constitutional right of procreative choice in [People v. Belous \(1969\) 71 Cal. 2d 954 \[80 Cal. Rptr. 354, 458 P.2d 194\]](#), four years before the United States Supreme Court acknowledged the existence of a comparable right under the Fourteenth Amendment, in [Roe v. Wade \(1973\) 410 U.S. 113 \[93 S. Ct. 705, 35 L. Ed. 2d 147\]](#): "The fundamental right of the woman to choose whether **[****179]** to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." ([People v. Belous, supra, 71 Cal. 2d at p. 963](#).) In [Committee to Defend Reproductive Rights v. Myers, supra](#), a plurality reiterated the "basic recognition that, for a woman, the constitutional right of choice is essential to her ability to retain **[*388]** personal control over her own body." ([29 Cal. 3d at p. 274](#) (plur. opn. of Tobriner, J.).)

Recently, in *Hill*, this court reaffirmed that the right to privacy under the California Constitution, including "central, autonomy-based privacy rights" in the area of procreation, is distinct from, and in some respects broader than, the federal right. ([Hill](#),

[supra, 7 Cal. 4th at p. 49](#); see also *id. at pp. 73-86* (dis. opn. of Mosk, J.).) For example, unlike under the Fourteenth Amendment, the right to privacy under the California Constitution applies to nongovernmental as well as governmental action.

Nevertheless, it bears emphasis that the present case, concerning the right of unemancipated minors to privacy in the area of reproductive **[****180]** choice, involves a question of first impression. Although *Myers* and *Belous* upheld an adult woman's right to be free of undue intrusion or burden in making the intimate and fundamental decision whether to bear a child, those precedents are not readily applicable to young adolescents who may lack the maturity and understanding to exercise informed choice without parental or other adult oversight.

This case is not about the morality of abortion. "The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles." ([Committee to Defend Reproductive Rights v. Myers, supra, 29 Cal. 3d at p. 284](#), fn. omitted (plur. opn. of Tobriner, J.).) Rather, "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." ([Planned Parenthood of Southeastern Pa. v. Casey, supra, 505 U.S. at p. 850 \[112 S. Ct. at p. 2806\]](#).)

Nor, despite some of the more rhetorical assertions of the parties and amici curiae, does this case require us to choose between two extreme results, i.e., either **[****181]** "forc[ing] at least some minor mothers to carry unwanted pregnancies to term" or "prohibit[ing] parental involvement in an unemancipated minor's decision to terminate a pregnancy by abortion." Similarly, we are not called upon to **[**851]** **[***264]** approve or disapprove of Assembly Bill No. 2274 as a matter of social policy.

Instead, we must undertake the more modest, if difficult, task of determining whether Assembly

Bill No. 2274 survives under those provisions of our Constitution protecting the rights to privacy and equal protection. I conclude that it does.

[*389] III.

The plurality purport to apply the standard articulated in our recent decision in [Hill, supra, 7 Cal. 4th 1](#), for deciding claims under the state constitutional right to privacy. Instead, they reverse the principle, sub silentio.

a.

Under *Hill*, "a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by [a] defendant constituting a serious invasion of privacy." (*Hill*, [\[****182\] supra, 7 Cal. 4th at pp. 39-40](#).) Only then does the burden shift to the defendant to plead and prove "as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Id.* [at p. 40](#).)

As to the third threshold element--"conduct by a defendant constituting a serious invasion of privacy" (*Hill, supra, 7 Cal. 4th at p. 40*)--*Hill* emphasized that the invasion must be substantial. "No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. . . . Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Id.* [at p. 37](#); accord, *id.* [at p. 68](#) (conc. & dis. opn. of George, J.) ["Under the third element adopted by the majority, a plaintiff is not entitled even to put a defendant to the burden of presenting a justification for its conduct unless the plaintiff can establish not only that the defendant's conduct infringes upon a constitutionally **[****183]** protected privacy

interest, but that the invasion of privacy is 'sufficiently serious in [its] nature, scope, and actual or potential impact to constitute an *egregious* breach of the social norms underlying the privacy right.' "], italics in original; see also [Heller v. Norcal Mutual Ins. Co. \(1994\) 8 Cal. 4th 30, 44 \[32 Cal. Rptr. 2d 200, 876 P.2d 999\]](#).)³

[**184]** Plainly, Assembly Bill No. 2274 does not constitute an "egregious breach of the social norms underlying the privacy right" of unemancipated minors. **[*390]** It requires parental consent or a determination from a juvenile court judge that an unemancipated minor seeking an abortion is mature, or, even if not, that terminating her pregnancy is in her best interest. California has long required parental consent before an unemancipated minor can undergo most medical procedures. There is, moreover, under our statutes, a general presumption that an unemancipated minor, unlike an emancipated minor or an adult woman, is *incapable* of informed consent.⁴

³The test crafted by the majority in *Hill* was obviously intended to confine privacy litigation in the area of personal autonomy rights to invasions that are truly serious, i.e., offensive to a reasonable person. The majority in *Hill* appears to have been particularly concerned that, unless we so confined the right to privacy, it would become a "back door" legal theory in employment cases. I was the only member of the court dissenting in *Hill*. ([7 Cal. 4th at pp. 73-110](#) (dis. opn. of Mosk, J.)) Two members of the present plurality filed concurring and dissenting opinions. (See [id. \[at pp. 62-73\]\(#\) \(conc. & dis. opn. of George, J.\) \[dissenting from the majority opinion "insofar as it fashions a novel general legal standard for the evaluation of privacy claims arising under the California Constitution" \(*id.* \[at p. 62\]\(#\)\) but concurring in the disposition\]; *id.* \[at pp. 58-62\]\(#\) \(conc. & dis. opn. of Kennard, J.\) \[concurring in the "basic legal analysis" \(*id.* \[at p. 58\]\(#\)\) but dissenting from the disposition\].\)](#)

⁴Even under the medical emancipation provisions, the right to consent is limited to a handful of medical procedures and treatment. (See, e.g., [Fam. Code, § 6924, subd. \(b\)\(1\) & \(2\)](#) [minor 12 years or older may consent to mental health treatment if, in the opinion of the attending professional, he or she is "mature enough to participate intelligently" in the services *and* would present a danger of serious physical or mental harm to self or to others without the treatment or is the alleged victim of incest or child abuse]; *id.*, § 6926 [minor 12 years of age or older may consent to medical care related to diagnosis or treatment of infectious, contagious, or communicable disease]; *id.*, § 6927 [minor 12 years of age or older may consent to medical care related to diagnosis or treatment for rape]; *id.*, § 6928

[****185] [**852] [***265] Nor do our social values and traditions exist in a vacuum. Thus, it is of some significance that most states have required parental notice or consent before an unemancipated minor can terminate her pregnancy by an abortion.

5

Moreover, the United States Supreme Court, in upholding parental notice and consent statutes, has repeatedly emphasized that such requirements [****186] are consistent with our national social norms about the interests of unemancipated minors. That an unemancipated minor might prefer, for any number of [*391] reasons, not to be required to obtain consent from a parent or appear before a juvenile court judge--and may not have been required to do so previously--does not mean, as the Court of Appeal concluded, that the legislative act is an "egregious breach of social norms" in requiring her to do so.

[minor may consent to medical care related to diagnosis and treatment for sexual assault]; *id.* § 6929 [minor 12 years of age or older may consent to medical care and counseling related to diagnosis and treatment of drug or alcohol related problem].) Moreover, many of the provisions require parental notice and involvement. Thus, treatment for mental health problems, sexual assault, and alcohol or drug abuse requires involvement of the minor's parent or guardian unless, in the opinion of the professional treating or counseling the minor, it would be inappropriate. (*Id.*, § 6924, *subd.* (b)(2)(B), 6928, *subd.* (c), 6929, *subd.* (c)). The right of even an "independent minor" to confidentiality as against his or her parents is also limited under the "medical emancipation" statutes. Thus, although a minor 15 years of age or older may consent to medical care if he or she is living separate and apart from parents or guardian and is financially independent, "[a] physician and surgeon or dentist may, *with or without the consent of the minor patient*, advise the minor's parent or guardian of the treatment given or needed if the physician and surgeon or dentist has reason to know, on the basis of the information given by the minor, the whereabouts of the parent or guardian." (*Id.*, § 6922, *subd.* (c), *italics added.*)

⁵ States with consent or notification requirements for minors in force include: Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming. Evidently the people in a majority of states, acting through their Legislatures, have rejected the conclusion that a requirement of parental consent or judicial authorization is detrimental to the health of such minors and to their family relationships.

Although they advert to the *Hill* standard, a plurality now appear to have had second thoughts, at least with regard to how it applies in this case. Rather than return to first principles, however, they prefer to maintain the fiction that they are merely following the true holding in *Hill*, while, in effect, returning to a slightly modified version of the "compelling interest" standard expressly rejected in *Hill*. (See [Hill, supra, 7 Cal. 4th at pp. 32-35](#); *id.* at pp. 62-70 (conc. and dis. opn. of George, J.).) Under their revised standard, to establish a "serious" invasion of privacy, a plaintiff need only establish a more than "de minimis" intrusion. Not surprisingly, they conclude that plaintiffs have done so [****187] here.

b.

No longer compelled by the old *Hill* standard--which now apparently fails to command a majority of the court--and unpersuaded by a new plurality's revised standard, I prefer to apply neither in assessing the validity of Assembly Bill No. 2274.

In my dissent in *Hill*, I reviewed, in its full context, the right to privacy declared in [article I, section 1 of the California Constitution](#). I set out the law relating to a plaintiff's right of action thereunder as follows: "[T]he plaintiff must plead that he has a right of privacy and that it was interfered with by the defendant. The defendant may then plead, beyond simple denial, that any conduct on his part adversely affecting the right of privacy was justified by a compelling public need if it rose to the level of abridgment or that it was [**853] [***266] allowed as reasonable if it did not. The plaintiff must prove his right of privacy and the defendant's interference therewith by shouldering the generally applicable burden of proof by a preponderance of the evidence [citation]. The defendant must prove under the same burden the justification or allowance of his conduct." ([Hill, supra, 7 Cal. 4th \[****188\] at pp. 85-86](#) (dis. opn. of Mosk, J.).)

Under that test, I conclude that plaintiffs have not properly pleaded and proved that Assembly Bill

No. 2274 interferes with the right to privacy of unemancipated minors. That is because, with respect to whether an unemancipated minor has a legally protected privacy interest concerning reproductive choice, our consistent precedents compel the conclusion that she has such an interest but it is neither coequal with that of an adult, nor, in the case [*392] of an *immature* unemancipated minor, absolute even in the early stages of pregnancy. It is not the case, as the plurality erroneously conclude, that the legally protected privacy interest in procreative choice does not vary based on the maturity or cognitive ability of the person whose choice is at issue.⁶

[****189] The privacy provision of the California Constitution does not expressly distinguish between adults and minors. It provides that "*All people . . . have inalienable rights. Among these are . . . privacy.*" (*Cal. Const., art. I, § 1*, italics added.) Nor does the ballot argument in favor of Proposition 11, which added the express right to privacy to the California Constitution, offer relevant extrinsic evidence on this point. It appears to draw no distinction between adults and children. "This amendment creates a legal and enforceable right of privacy for every Californian." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 26.) Its definition refers broadly to the right to privacy as "the right to be left alone." (*Id. at p. 27.*)

Although we have not previously addressed the point in the context of the right to privacy, our analysis of the closely related right to liberty under the California Constitution requires the conclusion that the privacy interests of an unemancipated

minor are qualitatively different from those of an adult and subject both to reasonable regulation by the state to an extent [****190] not permissible with adults and to control by the unemancipated minor's parents to an even greater extent.

In *In re Roger S.* (1977) 19 Cal. 3d 921 [141 Cal. Rptr. 298, 569 P.2d 1286], we assessed the state constitutional right of a 14-year-old unemancipated minor, committed to a state hospital on the application of his parent, to an opportunity for a precommitment hearing before a neutral fact finder. We concluded that "the personal liberty interest of a minor is less comprehensive than that of an adult, and a parent or guardian not only may but must curtail that interest in the proper exercise of his obligation to guide the child's development . . ." (*Id. at p. 927.*)

We emphasized that although "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," "the liberty interest of a minor is not coextensive with that of an adult." (*In re Roger S., supra*, 19 Cal. 3d at pp. 927-928.) An unemancipated [*393] minor's liberty interest is more limited both as related to his or her parents and as against the state. "Parents, of course, have powers greater than that of the state to curtail a [****191] child's exercise of the constitutional rights he may otherwise enjoy, for a parent's own constitutionally protected 'liberty' includes the right to 'bring up children. . . .' " (*Id. at p. 928.*) This parental right involving an unemancipated minor is not unlimited; it may be curtailed by the state "if it appears that parental [****267] decisions [**854] will jeopardize the health or safety of the child, or have a potential for significant social burdens." (*Ibid.*) "We emphasize here our assumption that the great majority of parents are well motivated and act in what they reasonably perceive to be the best interest of their children. That fact cannot, however, detract in any way from the child's right to procedures that will protect him from arbitrary curtailment of his liberty interest in . . . a drastic manner no matter how well motivated." (*Id. at p.*

⁶It bears emphasis that the present case, concerning the right of unemancipated minors to privacy in the area of reproductive choice, involves a question of first impression. Although we have previously affirmed "[t]he fundamental right of [a] woman to choose whether to bear children" (*People v. Belous, supra*, 71 Cal. 2d at p. 963), that precedent is not readily applicable to young adolescent girls who may lack the maturity and understanding to exercise informed choice without parental or other adult oversight.

[936.](#))

The state may also curtail an unemancipated minor's constitutional right to liberty. "[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" (*In re Roger S.*, *supra*, 19 Cal. 3d [****192] at p. 928.)

In *In re Roger S.*, we balanced the liberty interest of a 14-year-old unemancipated minor as against his parents and as against the state regarding the right to due process in proceedings to admit him to a state mental hospital. We determined that "no interest of the state or a parent sufficiently outweighs the liberty interest of a minor old enough to independently exercise his right to due process to permit the parent to deprive him of that right." (*In re Roger S.*, *supra*, 19 Cal. 3d at p. 931.) The unemancipated minor's liberty interest did not, however, entitle him to all the same procedural protections as an adult in the same situation. (*Id.* at p. 935.)

Although *In re Roger S.* involved the state constitutional right to liberty, a similar analysis applies to the closely related right to privacy.⁷

⁷ Indeed, in *In re Roger S.*, we repeatedly relied on decisions of the United States Supreme Court concerning the right to privacy, including decisions specifically involving the right of minors to obtain abortions. Thus, we cited *Planned Parenthood of Missouri v. Danforth*, *supra*, 428 U.S. 52, in support of our conclusion that the liberty interest of a minor is qualitatively different from that of an adult. (*In re Roger S.*, *supra*, 19 Cal. 3d at p. 931.) *Danforth* underscored the state's "somewhat broader authority to regulate the activities of children than of adults" and emphasized that, in holding the legislation at issue in that case invalid, it did not "suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." (*Planned Parenthood of Missouri v. Danforth*, *supra*, 428 U.S. at pp. 74-75 [96 S. Ct. at pp. 2843-2844].) In a recent case implicating the privacy rights of unemancipated minors, the United States Supreme Court observed: "Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians." (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 654 [115 S.

Here, as in *In re Roger S.*, we must balance the constitutional rights of an unemancipated [*394] minor--in this case the right to make the fundamentally private decision whether or not to bear a child--with the right of the parent, and of the state in loco parentis, to oversee critical decisions that may affect the welfare of the unemancipated [****193] minor, and, if appropriate, to decide what is in her best interest.

[****194] From *In re Roger S.* we may derive the following principles. First, an unemancipated minor's constitutional rights are not equal to, but are more limited than, those of an adult, both as against his or her parents and as against the state. Second, an unemancipated minor has a right to procedures that will protect him or her from arbitrary and drastic curtailment of constitutional rights by his or her parents, or, presumably, the state, no matter how well motivated. Third, a mature unemancipated minor, as opposed to one who is immature, has an increased right to exercise her constitutional rights, but even a mature unemancipated minor is not entitled to all of the same procedural protections as an adult in the same situation.⁸

Ct. 2386, 2391, 132 L. Ed. 2d 564.) Significantly, the plurality not only decline to be guided by the numerous federal precedents directly in point, but also ignore our own precedents concerning the rights, and limitations thereon, of unemancipated minors, including *In re Roger S.*

⁸ In reviewing a Massachusetts abortion consent statute, Justice Powell wrote: "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." (*Bellotti v. Baird*, *supra*, 443 U.S. at p. 634 [99 S. Ct. at p. 3043] (lead opn. of Powell, J.).) These grounds for distinguishing the rights of children from those of adults are deeply rooted in our culture and society. They are based on normative assumptions about the family, including the mutual interests of children and their parents and the benefits to children of parental guidance and control. As such, although not immutable or even pellucid, they are not subject to simple "proof" by the preponderance of the evidence through a battle of the experts, or to the vagaries of the adversarial process. In this case, the parties presented evidence and the trial court made extensive factual findings concerning the cognitive abilities of adolescents to make critical decisions and about the importance of

[****195] [**855] [***268] Applying those principles to the privacy right asserted here yields several elementary conclusions.

First, as a general matter, the right to privacy of an unemancipated minor is more limited than that of an adult. An unemancipated minor has limited privacy rights as against the state. The state can intervene in his or her interests, including by requiring or precluding medical treatment. (See, e.g., [*395] *In re Roger S.*, *supra*, 19 Cal. 3d at p. 933; cf. *Bellotti v. Baird*, *supra*, 443 U.S. at p. 635 [99 S. Ct. at p. 3044] (lead opn. of Powell, J.) ["[T]he States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."].)

By statute, the Legislature has in numerous areas curtailed an unemancipated minor's ability to make choices implicating privacy. Thus, before the age of 18, a minor is not "capable of consenting to and consummating marriage" without parental consent and a court order (*Fam. Code*, § 302); nor can an unmarried minor legally consent to sexual intercourse (*Pen. Code*, § 261.5). Among other restrictions implicating [****196] privacy, an unemancipated minor cannot obtain most medical and dental treatment, including most surgical procedures and even routine X-rays, without parental notification and/or consent, or, in certain circumstances, court consent. (*Fam. Code*, § 6910, 6911, 6922; *Health & Saf. Code*, § 123930; *Pen. Code*, § 11171.) An unemancipated minor may not, before the age of 18, undergo voluntary sterilization, with or without parental consent. (*Fam. Code*, § 6925, *subd. (b)(1)*; *Cal. Code Regs.*, tit. 22, § 70701, *subd. (a)(1)*.) No minor may, before the age of 18, donate any part of his body in the event of his death (*Health & Saf. Code*, § 7150.5) or receive a permanent tattoo (*Pen. Code*, § 653), again regardless of parental consent. Minors

are also restricted from obtaining a driver's license (*Veh. Code*, § 17700, 17701), or even using a tanning facility (*Bus. & Prof. Code*, § 22706, *subd. (b)(3)* & (4)), without parental consent.

Such restrictions are based, in large part, on an unemancipated minor's disability of nonage, including the inability to enter into a binding contract. (See *Civ. Code*, § 1556 ["All persons are capable of contracting, except minors, persons of unsound mind, and [****197] persons deprived of civil rights."].) They are premised on a fundamental social tenet that children require protection against their own immaturity and vulnerability in making decisions that may have serious consequences for their health and well-being. (See *Ballard v. Anderson* (1971) 4 Cal. 3d 873, 878 [95 Cal. Rptr. 1, 484 P.2d 1345, 42 A.L.R.3d 1392] [" 'The right of the infant to avoid his contracts is one conferred by law for his protection against his own improvidence and the designs of others.' "]; *Stanford v. Kentucky* (1989) 492 U.S. 361, 395 [109 S. Ct. 2969, 2989, 106 L. Ed. 2d 306] (dis. opn. of Brennan, J.) ["[M]inors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life. [P] . . . Adolescents 'are more vulnerable, more impulsive, and less self-disciplined than adults,' and are without the same 'capacity to control [*396] their conduct and to think in long-range terms.' "]; accord, *Hodgson v. Minnesota*, [****198] *supra*, 497 U.S. at p. 459 [110 S. Ct. at pp. 2949-2950] (conc. opn. of O'Connor, J.); *Bellotti* [**856] [***269] *v. Baird*, *supra*, 443 U.S. at p. 635 [99 S. Ct. at p. 3044] (lead opn. of Powell, J.) ["Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . .

the parental role in a child's exercise of her privacy interest concerning the decision to have an abortion. Those findings prove to be of limited application to an assessment of the constitutional interests involved in this case.

paternal attention.' "].)⁵

[****199] The Legislature has the power to remove the disability in certain instances, as in the so-called medical emancipation statutes. ([Fam. Code, § 6920 et seq.](#); see also [Ballard v. Anderson, supra](#), 4 Cal. 3d at p. 878 [discussing express limitations on the power of unemancipated minors to disaffirm their contracts for medical services].) It is not, however, constitutionally required to do so. I discern no basis for concluding that the addition by the electors of an express privacy provision to [article I, section 1 of the California Constitution](#) was intended to remove entirely an unemancipated minor's disability of nonage--even though that disability necessarily places limits on liberty and privacy interests that do not apply to adults.

Unemancipated minors also have limited privacy interests as against a parent. We have recognized a parent's right to direct his or her child's upbringing as " 'a compelling one, ranked among the most basic of civil rights.' " ([In re Roger S., supra](#), 19 Cal. 3d at p. 934; cf. [Pierce v. Society of Sisters \(1925\) 268 U.S. 510, 535 \[45 S. Ct. 571, 573, 69 L. Ed. 1070, 39 A.L.R. 468\]](#) ["The child is not the mere creature of the State; [****200] those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."].) Those rights include extensive power to direct the education of a child and to make critical decisions concerning medical treatment. The interest of a child in privacy yields to the necessity for parental guidance and oversight. A parent may, if he or she deems it advisable, give consent to most medical treatment of his or her unemancipated minor children, so long as it will not jeopardize health or

safety--even if the child objects. Certainly, a parent can compel an obdurate six-year-old--or sixteen-year-old--to submit to a tetanus vaccination.

As observed by Richard M. Mosk, *Motion Picture Ratings in the United States* (1997) [15 Cardozo Arts & Ent. L.J. 135, 140](#), "Many aspects of our [****397] legal system are premised on the principle that parents have certain responsibilities toward their children. . . . If we do not recognize and act upon what we consider parental responsibility, we risk erosion of parental accountability." Indeed, parents have a statutory responsibility to properly supervise the well-being of their children. [****201] ([Pen. Code, § 270.](#))

Second, an unemancipated minor has a right to procedures that will protect her from arbitrary and drastic curtailment of her privacy interest by her parents, or, presumably, by the state, no matter how well motivated.

In [In re Roger S., supra](#), 19 Cal. 3d 921, we held that the physical restraint and injury to reputation of involuntary confinement in a mental hospital are consequences so severe that an unemancipated minor who is mature enough to participate intelligently in the decision must be permitted to assert her right to due process. Although pregnancy involves a different set of considerations, arbitrary curtailment of a pregnant unemancipated minor's privacy interest may result in emotional, physical, and psychological detriment. "[T]he potentially severe detriment facing a pregnant woman [citation] is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like the attainment of the age of majority, [****202] is one of the traditional criteria for [****857] [****270] the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will

⁵Some of the more obvious areas in which minors have fewer "rights" and greater restrictions on privacy and liberty than adults include the right to vote ([Cal. Const., art. II, § 2](#)) and the "right" to purchase or consume alcoholic beverages ([Bus. & Prof. Code, § 25658, subd. \(b\)](#)) or tobacco products ([Pen. Code, § 308, subd. \(b\)](#)). Minors must also attend school ([Ed. Code, § 49100](#)) and may be subject to curfews not imposed on adults (see [In re Nancy C. \(1972\) 28 Cal. App. 3d 747, 758 \[105 Cal. Rptr. 113\]](#)).

have consequences so grave and indelible. [P] Yet, an abortion may not be the best choice for the minor." ([Bellotti v. Baird, supra, 443 U.S. at p. 642 \[99 S. Ct. at pp. 3047-3048\]](#) (lead opn. of Powell, J.).)

Justice Powell emphasized the "unique nature of the abortion decision, especially when made by a minor," which requires the state "to act with particular sensitivity when it legislates to foster parental involvement in this matter." ([Bellotti v. Baird, supra, 443 U.S. at p. 642 \[99 S. Ct. at p. 3047\]](#) (lead opn. of Powell, J.).) Because of the gravity of the decision whether to bear a child, I am persuaded that an unemancipated minor's interest in privacy under the California Constitution is at least as strong as that under the United States Constitution: Neither a parent nor the state can exercise an *absolute veto* over a mature unemancipated minor's decision to terminate a pregnancy. (See [Planned Parenthood of Missouri v. Danforth, \[****203\] supra, 428 U.S. at p. 74 \[96 S. Ct. at p. 2843\]](#) ["[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."]; [Bellotti v. Baird, supra, 443 U.S. at p. 643 \[99 S. Ct. at p. 3048\]](#) (lead opn. of Powell, [*398] J.) [if the state requires parental consent, it must provide for an alternative procedure for obtaining authorization for abortion].) The constitutionally protected interest in privacy of an unemancipated minor includes terminating her pregnancy if it is in her best interest to do so, or, if she is mature, if it is her informed decision to do so--even if her parent denies consent.

Third, although an unemancipated minor has a privacy interest if she is mature, even a mature unemancipated minor is not entitled to all of the same freedoms and protections as an adult in the same situation. Her interest in privacy is subject to greater restrictions, which may include parental consent or notice or judicial authorization that

would not be required in [****204] the case of an adult woman.

In [In re Roger S., supra](#), we rejected the petitioner's suggestion that a minor is entitled to all the procedures needed before an adult may be involuntarily committed to a state mental institution. Instead, we required only that before a minor could be committed by his parents to a mental institution, he must be afforded procedures to ensure "a fair opportunity to establish that (1) he is not mentally ill or disordered, or that, (2) even if he is, confinement in a state mental hospital is unnecessary to protect him or others and might harm rather than improve his condition." ([19 Cal. 3d at p. 935.](#)) We emphasized that "[p]rocedures designed to establish these facts are necessary to accommodate both the parent's right to control his child's development and the state's interest in limiting parental control when parental action may harm the physical or mental health of the child." (*Ibid.*)

Assembly Bill No. 2274 accommodates the same balance of interests: The parent's right to control his child's development is advanced by the consent requirement, while the state's interest in limiting parental control when it might harm the physical or mental [****205] health of the child is advanced by providing a judicial bypass that includes a prompt hearing before a juvenile court judge, confidentiality, and a right to counsel. As in [In re Roger S., supra](#), the procedures adequately "protect [her] from arbitrary curtailment of [her privacy] interest in such a drastic manner no matter how well motivated." ([19 Cal. 3d at p. 936.](#))

The legislation at issue here alters the procedure for an unemancipated minor obtaining an abortion, but it does not impose a restriction that could fairly be said to violate her interest in privacy. Indeed, the legislation *facilitates* the ability of a mature unemancipated minor to obtain an abortion, regardless of parental consent, if she so chooses. It also facilitates the ability of an immature unemancipated minor to obtain an abortion, again

regardless of parental consent, if it is in her best interest. Moreover, it preserves the confidentiality of the decision-making process.

[*399] [**858] [***271] IV.

Even under the plurality's newly revised standard, I conclude that Assembly Bill No. 2274 passes constitutional scrutiny.

Accepting the plurality's conclusion that plaintiffs have [****206] met the threshold requirement of establishing a more than "de minimis" breach of a privacy interest, the burden has shifted to the state to establish that Assembly Bill No. 2274 advances a compelling interest and is narrowly tailored. It has done so. The intrusion on any right to privacy enjoyed by an unemancipated minor is justified because it "substantively furthers one or more countervailing"--and, indeed, "compelling"--interests of the state.

The state unquestionably has an interest in protecting the physical and mental health of unemancipated minors. That interest is both legitimate and compelling. It includes assuring that an unemancipated minor who desires an abortion is capable of giving informed consent or, even if not, that an abortion is in her best interest.

Under prior law, absent any statutory requirement to the contrary, the determination of informed consent was left to the physician: "A minor of any age who is unable to convince competent medical authorities that she has the requisite understanding and maturity to give an informed consent for any medical treatment, including a therapeutic abortion, will be denied such treatment without the consent of either a parent [****207] or legal guardian." (*Ballard v. Anderson, supra*, 4 Cal. 3d at p. 883, fn. omitted.) As the trial court here underscored: "[t]he physician who performs the abortion must be satisfied that the minor is, in fact, capable of giving informed consent for that procedure and that her decision to have an abortion, is, in fact, the result of such informed consent. If the physician is not satisfied in this regard, he/she cannot and will not

perform an abortion."

Assembly Bill No. 2274 provides that the determination of informed consent will, instead, be made by a parent or a juvenile court judge. It presumes that a parent--as opposed to a physician--is the person most likely to have knowledge of an unemancipated minor's maturity and ability to give informed consent, and, unlike a physician, is capable of determining, in the case of an unemancipated immature minor, what is in her best interest. It provides, however, that when that presumption fails, or when an unemancipated minor either cannot or, for whatever reason, will not, seek consent from a parent, a neutral juvenile court judge, as opposed to a physician, must make the determination whether she is mature enough to give informed [****208] consent, or, as a physician *cannot* do, authorize an abortion that is nonetheless in her best interest.

The trial court concluded that the legislation, though perhaps reasonable in purpose, does not, in fact, advance any compelling interest. It based the [*400] conclusion on extensive findings of fact and conclusions of law. Principally, it determined that abortion is "one of the safest medical procedures available for all women and, in particular, for teenagers"; that "for the great majority of minors, abortion has no serious medical, emotional, or psychological consequences and poses no significant risk to their physical well-being"; and that "with the exception of the small percentage of very young adolescents, again the great majority of minors possess the cognitive ability and maturity to make a fully informed choice."

The state contends that the evidence on these issues was conflicting and subject to debate; some of the findings are supported by studies whose results are, at the very least, counterintuitive, e.g., the finding that "adolescents as a group do not differ from adults as a group with respect to how they make the decision as to whether or not to have an [****209]

abortion." ¹⁰ [****210] Moreover, it suggests [**859] [***272] that most of the statutes requiring parental consent for medical procedures are founded on the counterassumption that unemancipated minors are *not*, as a group, as capable as adults of making decisions about shortand long-term effects of medical procedures. In any event, it argues that the factual findings are immaterial; because the Legislature reasonably believed it was furthering legitimate interests, we must accept as true its "findings" to that effect. ¹¹

We need not decide whether the trial court's findings, if supported by substantial evidence, are binding on this court, and whether they can override contrary legislative findings. Even accepting those [****211] findings by the trial court that are supportable, I conclude they do not establish that the compelling interest of protecting the physical and mental health of unemancipated [**401] minors is not substantively advanced. That is, in large part, because the determination whether

any *individual* unemancipated minor is sufficiently mature to make a fully informed choice about abortion cannot rest on statistics about "adolescents as a group" or generalities about "the great majority of minors." Although this is particularly crucial in the case of "very young adolescents," absent a bright line rule concerning when an unemancipated minor is "mature," *someone* must in every case make the determination whether an individual unemancipated minor is capable of giving informed consent, or, if not, whether the procedure is in her best interest. ([Ballard v. Anderson, supra](#), 4 Cal. 3d at p. 883.) ¹²

¹² As Justice Powell noted in *Bellotti*, "the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors." ([Bellotti v. Baird, supra](#), 443 U.S. at p. 644, fn. 23 [99 S. Ct. at p. 3049] (lead opn. of Powell, J.).) "Not only is it difficult to define, let alone determine, maturity, but also the fact that a minor may be very much an adult in some respects does not mean that his or her need and opportunity for growth under parental guidance and discipline have ended." ([Id. at pp. 643-644, fn. 23.](#)) Indeed, one of plaintiffs' own experts testified that "[t]o assume a 13-year old with a physical appearance of someone five years her senior has advanced cognitive skills is to run the risk of failing to reach the patient: it is akin to a misdiagnosis." Significantly, in oral argument, plaintiffs conceded that the capacity to give informed consent varies in the case of each individual unemancipated minor; thus, in response to our question whether a 17-year-old is capable of giving informed consent, counsel answered, "Maybe, maybe not."

¹⁰ For example, amici curiae point to an article criticizing the studies on which the trial court relied as overstating what is known about the cognitive ability of minors to make decisions concerning health care, including decisions about abortion. The article stresses that there are "few data supporting the assertion of equivalent decision-making competence . . . [and] few studies in which subjects made decisions or in which adolescent and adult abilities were compared." (Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights* (June 1989) Am. Psychologist 895, 898.) The authors conclude that "[t]he assertion of equal decision-making capacity was unwarranted . . . because at present little is known about the relative decision-making competence of adolescents and adults." ([Id. at p. 899.](#))

¹¹ The legislative "findings," culled from opinions of the United States Supreme Court, are as follows: "(a) the medical, emotional, and psychological consequences of an abortion are serious and can be lasting, particularly when the patient is an immature minor; (b) the capacity to become pregnant and the capacity for exercising mature judgment concerning the wisdom of an abortion are not logically related; (c) minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences of their actions; (d) parents ordinarily possess information essential to a physician's exercise of his or her best medical judgment concerning a minor child; and (e) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention subsequent to her abortion." (Stats. 1987, ch. 1237, § 1, p. 4396.)

For the same reason, I also reject the notion that Assembly Bill No. 2274 might be deemed constitutional as applied to unemancipated minors under the age of 14 and unconstitutional only as to minors 14 years and older. As Justice Brennan observed, "18 is the dividing line that society has generally drawn, the point at which it is thought reasonable to assume that persons have the ability to make, and a duty to bear responsibility for their, judgments." ([Stanford v. Kentucky, supra](#), 492 U.S. at p. 396 [109 S. Ct. at p. 2989] (dis. opn. of Brennan, J.).) It is true that a minor 14 years or older may, inter alia, petition for emancipation ([Fam. Code, § 7120](#)), for a guardian ([Prob. Code, § 1510, subd. \(a\)](#)) or for a guardian ad litem ([Code Civ. Proc., § 373](#)), obtain a "junior permit" to operate a motor vehicle ([Veh. Code, § 12513](#)), or, under certain conditions, be detained in jail ([Welf. & Inst. Code, § 207.1, subd. \(d\)](#)), or found not to be a "fit and proper subject to be dealt with under the juvenile . . . law" (*id.*, § 707, subd. (a)). None of these statutes, however, suggests that a 14-year-old unemancipated minor *must* or *should* ordinarily be treated as an adult--indeed, they implicitly recognize that he or she is usually *not* mature enough to be so treated. Moreover, although some of these statutes arguably recognize the age of 14 as a dividing line between childhood and *adolescence* (as opposed to adulthood), the

[****212] [**860] [***273] The Legislature could reasonably determine that the decision should not be left in the hands of the treating physician, if for no other reason than that, in the case of an unemancipated minor, unlike an adult, there is no presumption that she is capable of giving informed consent.¹³ [****213] Nor, of course, is a physician's determination that an unemancipated minor has given informed [*402] consent legally dispositive. Moreover, a physician is ethically barred from performing an abortion without parental consent or judicial authorization--even if it is in the unemancipated minor's best interest--if she is *not* sufficiently mature to give informed consent. (*Ballard v. Anderson, supra*, 4 Cal. 3d at p. 883.) Assembly Bill No. 2274 facilitates a determination of whether abortion is in the unemancipated minor's best interest in such cases, even if she cannot, or will not, obtain parental consent.¹⁴

There are, of course, additional considerations. In any individual case, factors beyond mere medical judgment may weigh in favor of, or against, an abortion. A parent may offer a more complete and accurate perspective on those factors than a physician; so also might a neutral juvenile court judge in a bypass procedure. Further, unlike a parent acting in the unemancipated minor's overall

medical consent statutes have never created any bright line rule for adolescents of 14 years or older. Nor, in any event, was the evidence presented in the trial court sufficient to establish 14 as the age at which adolescents achieve sufficient maturity to give informed consent to medical procedures.

¹³In the leading case of *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 242 [104 Cal. Rptr. 505, 502 P.2d 1], we held that "a person of *adult years* and in sound mind" has the right to determine whether to submit to lawful medical treatment. (Italics added; see also *Health & Saf. Code, § 7185.5, subd. (a)* ["The Legislature finds that an adult person has the fundamental right to control the decisions relating to the rendering of his or her own medical care . . ."].) In the case of an unemancipated minor, however, there is no such absolute postulate.

¹⁴I do not, of course, doubt the professional integrity of conscientious physicians, including obstetricians. That does not mean, however, that the Legislature could not reasonably determine that the legal determination of an unemancipated minor's maturity should be made by judges, who, after all, are professionals of equal integrity.

best interest or a neutral judge, a physician may have a " 'direct, personal, substantial, pecuniary interest in reaching a conclusion' " (*People v. Belous, supra*, 71 Cal. 2d at p. 972), or a personal bias in favor of--or against--abortion. As Justice Stewart observed: "There can be little doubt that the State furthers a constitutionally permissible end by encouraging [****214] an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision of whether or not to bear a child. . . . It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." (*Planned Parenthood of Missouri v. Danforth, supra*, 428 U.S. at p. 91 [96 S. Ct. at p. 2851], fn. omitted (conc. opn. of Stewart, J.).) By the same token, she may not obtain objective counsel and support from the attending physician at an antiabortion, or "pro-life," pregnancy clinic.

The trial court's findings do not establish that voluntary parental involvement is detrimental. Indeed, on the contrary, the trial court determined, based on extensive uncontroverted evidence, that, ordinarily, encouraging unemancipated minors to consult with a parent about an abortion decision serves to promote the physical and emotional welfare of children. The legislation advances the state's compelling purpose to the extent that it encourages unemancipated minors to obtain parental consent.

The trial court also found, however, that "parental involvement laws do [****215] not serve to change the numbers." The finding is based primarily on a single [*403] study comparing the rate of involvement of parents in the abortion decisions of minors in Minnesota, which requires consent, and Wisconsin, which does not. (Blum et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decision-making* (1987) 77 Am.J. Pub. Health 619.) The study is doubtful authority for the conclusion that enactment of the Minnesota parental involvement law had no effect on the percentage of adolescents who involved their

parents in the abortion decision.¹⁵ [****216] The additional evidence in point was [**861] [***274] conflicting and largely anecdotal.¹⁶

[****217] In any event, however, even if the rate of parental involvement remained the same, that fact would not be dispositive. The legislation takes into account that not all emancipated minors will seek parental consent; a significant number may not. Indeed, in some instances, it could be positively detrimental to an unemancipated minor to inform her parents. Again, that does not mean that a physician should--or can--make the

¹⁵The study involved interviews with a sample of minors from both states--148 in Minnesota and 37 in Wisconsin--who were about to undergo abortions at abortion clinics. More than half were 16 and 17 years old. None of the participants in the study was a minor who had decided to carry her pregnancy to term. The author of the study testified that the small number of minors interviewed in Wisconsin was not even intended to yield data from which to draw any conclusions about the rate of parental consent in Wisconsin. On the limited data, however, he concluded that the percentage of minors notifying one parent was about the same in both states. Significantly, under the Minnesota statute, enacted in 1981, a minor notifying only one parent must still obtain judicial authorization. ([*Minn. Stat. Ann. § 144.343, subd. \(6\)*](#) (West 1989); see [*Hodgson v. Minnesota, supra, 497 U.S. at p. 481 \[110 S. Ct. at p. 2961\]*](#) (conc. & dis. opn. by Kennedy, J.) [holding that a Minnesota provision requiring two-parent notification of abortion decision of a minor unless she obtains a judicial bypass is constitutional].) The data indicated that the percentage of minors notifying two parents was greater in Minnesota than Wisconsin.

¹⁶Thus, one witness for plaintiffs testified about her personal knowledge of instances in which minors had informed their parents rather than opt for a judicial bypass under the Minnesota law. Another witness for plaintiffs offered the contrary opinion concerning the Massachusetts law, testifying that she did not believe it has encouraged parental involvement or communication. She also testified, however, that no statistics were kept concerning the number of minors involving their parents in abortion decisions prior to the enactment of the statute. She was also unaware of any study in any other state that has implemented a consent statute concerning the percentage of minors who involve their parents in their abortion decision. The trial court also relied on a Michigan study conducted between 1974 and 1975, before the implementation of a parental consent requirement, indicating that 57 percent involved a parent in the decision, roughly the same percentage who did so in Minnesota according to the results of the Blum study. According to Professor Blum's testimony, however, it would be "plain and simply bad science" to derive any conclusions about the impact of a consent statute by comparing studies involving different time periods and different data sets in that manner.

determination whether the unemancipated minor is mature, or whether an abortion is nevertheless in her best interest. The Legislature has provided for a judicial bypass in those instances.

[*404] The trial court concluded that a judicial bypass does not advance the state's purpose and would "result in more harm than help" for those unemancipated minors who lack a "realistic option" of consulting with their parents. The conclusion is unsound.

The trial court stated that the judicial bypass procedure "is of absolutely no benefit to minors": It "has no effect on a minor's ultimate decision with respect to abortion . . . [and] rather than providing a benefit to minors . . . poses a gratuitous threat to their physical and emotional well-being." The statements [****218] are based exclusively on expert testimony and submissions concerning judicial bypass procedures *in other states*. The trial court placed great emphasis on the testimony of three judges--two judges from Minnesota and one from Massachusetts--that they felt like "a rubber stamp" and did not "make any difference" in the decisions of the minors who petitioned for a judicial bypass. It also stressed the testimony of some out-of-state witnesses that adolescents using the bypass procedure manifest anxiety and find the experience "nerve-racking."¹⁷

Evidence concerning the way different statutes have operated in different states is of limited value in evaluating the constitutionality of Assembly Bill No. 2274.¹⁸ Any [**862] [***275] assessment

¹⁷By contrast, a Minnesota judge, who had heard over a thousand petitions between 1981 and 1986, characterized the demeanor of the teenagers as "very calm. . . . I didn't really feel they were under a great deal of stress."

¹⁸It is merely speculative to conclude that the California judicial bypass will resemble those of Minnesota or Massachusetts. First, the applicable statutes are different in crucial ways. Assembly Bill No. 2274 requires the consent of only one parent; the Minnesota statute, as discussed, requires notice to *both* parents or judicial authorization; the Massachusetts statute requires consent of *both* parents or judicial authorization. ([*Minn. Stat. Ann. § 144.343, subd. \(6\)*](#); [*Mass. Gen. Laws Ann. ch. 112, § 12S*](#) (West 1995).) Thus, in both states, as

of the bypass system in the California [****219] juvenile courts must of necessity await implementation of the statute. We cannot determine, in advance of its implementation, that the judicial bypass under our legislation is pointless or unduly intimidating to minors, let alone that it poses a "threat to their physical and emotional well-being."

[****220] The findings are, moreover, largely beside the point. The purpose of the California judicial bypass is not to have an "effect" one way or another on a [*405] *mature* unemancipated minor's "ultimate decision with respect to abortion." Its purpose, instead, is to determine whether an unemancipated minor is, in fact, mature enough to give informed consent, and, if not, whether an abortion is in her best interest. Thus, even if the findings are accepted, i.e., that in most cases, an unemancipated minor seeking a judicial bypass will receive authorization for an abortion, the judicial bypass nonetheless advances substantial purposes not addressed by the prior law. It provides for a neutral judicial determination of each individual unemancipated minor's ability to give informed consent; it also allows immature unemancipated minors who cannot, for whatever reason, obtain parental consent, to obtain a determination by a juvenile court judge whether abortion is in her best interest and, if it is, authorization for the procedure.

Although requiring an unemancipated minor to obtain parental consent or a judicial bypass may result in some delay in obtaining an abortion, plaintiffs have [****221] not demonstrated that the

legislation will result in a substantially increased health risk to unemancipated minors seeking abortion. An unemancipated minor who obtains parental consent may suffer no delay at all. Even if she uses the judicial bypass, once she files a petition with the juvenile court, the legislation requires that a hearing be set within three days and judgment must be entered within one day of submission of the matter. ([Health & Saf. Code, § 123450, subds. \(b\) & \(c\).](#)) Any appeal must be set within five days of filing the notice for appeal and judgment must be entered within one court day of submission of the matter. (*Id.*, subd. (d).) Use of the judicial bypass, then, may, at most, result in a delay of approximately two weeks. Although there is some degree of increased risk with delay, abortion remains, as the trial court found, "one of the safest medical procedures available for all women and, in particular, for teenagers." One physician testified that "it has the lowest rate of deaths associated with it and also the lowest rate of serious complications in comparison to any other operation which is widely performed in this country." ¹⁹

¹⁹There is, in fact, no empirical evidence before us that the California law will actually result in a greater number of delayed abortions. A study on the impact of the Minnesota parental notification law over the period between August 1981 through March 1986 suggests that parental notification requirements may result in an overall *decrease* in the number of abortions for unemancipated minors--including late abortions. (Rogers et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth* (1991) 81 Am.J. Pub. Health 294, 296.) Thus, over the nearly six-year period covered by the study, "[t]he pre-enactment to post-enactment late abortion rate substantially declines for women of 15-17 years" (*Id.* at p. 296.) Although the late-to-early abortion *rate* increased, "a steep decline in early abortions, not an increase in late abortions, accounts for the increased late-to-early abortion ratio in 15-17 year old women." (*Ibid.*) The authors account for the increase in the proportion of late abortions as follows: "First, the law may have been more successful in preventing pregnancy among minors who would have had early abortions than among minors who would have had late abortions. A second possibility is that the law caused delays for a greater percentage of a declining number of minors seeking abortions. Regardless, the claim that the law caused more minors to obtain late abortions is unsubstantiated. In fact, the reverse is true. For ages 15-17, the number of late abortions per 1,000 women decreased following the enactment of the law. Therefore, an increased medical hazard due to a rising number of late abortions was not realized." (*Id.* at p. 297.)

opposed to California, even if one parent is notified *and consents*, a minor must invoke a judicial bypass. No evidence was presented concerning the judicial bypass in any of the states requiring only one parent's consent. Moreover, we cannot derive a general conclusion from the experience of only two states out of the more than twenty-five with judicial bypass procedures. As one amicus curiae points out, the Indiana judicial bypass procedure (which requires written consent from one parent or judicial authorization) has apparently not operated as a "rubber stamp": "[W]hat is routine in Massachusetts is all but unheard of in Indiana" (Quoting *Parental Consent to Abortion: How Enforcement Can Vary*, New York Times (May 28, 1992) p. A1.)

[****222] [**863] [***276] I also conclude that the judicial bypass is minimally intrusive: it is speedy, informal, and confidential. There is no substantial evidence supporting the [*406] trial court's "finding" that requiring an unemancipated minor to appear before a juvenile court judge for an expedited, informal hearing on these important questions--even if somewhat intimidating--poses a "gratuitous threat" to the physical and emotional well-being of either a mature or an immature unemancipated minor.

The state has carried its burden of showing that the legislation substantively furthers a "compelling interest" and that there were no less intrusive means of accomplishing its legitimate objectives. Accordingly, I proceed to the additional issues raised: whether Assembly Bill No. 2274 violates an unemancipated minor's right to informational privacy, and whether it violates the equal protection clause of [article I, section 7 of the California Constitution](#).

V.

The trial court erred in concluding that the judicial bypass procedures violate an unemancipated minor's right to informational privacy, i.e., the interest in preventing dissemination or misuse of sensitive confidential [****223] information.

As *Hill* emphasized, informational privacy is the "core value furthered by the Privacy Initiative." (*Hill, supra*, 7 Cal. 4th at p. 35.) "A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." (*Ibid.*) The right to informational privacy is not, however, absolute. "Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. . . . [P] . . . [I]f intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged." (*Id.* at p. 38.)

The disclosures required under Assembly Bill No. 2274 do not violate an unemancipated minor's reasonable expectation of privacy or seriously invade her privacy interest. An unemancipated minor who seeks parental consent for an abortion will be required to disclose the fact of her pregnancy to her parents. In light of an unemancipated minor's limited privacy interest [*407] [****224] as against her parents, I conclude that her reasonable expectation of privacy is not violated. She may, of course, elect not to tell her parents anything at all and seek a judge's authorization.

An unemancipated minor who seeks judicial authorization for an abortion will be required to provide certain confidential information to the juvenile court. The disclosures required are minimal; Assembly Bill No. 2274 requires no more information than is necessary to satisfy the state's compelling interest in protecting the physical and mental health of unemancipated minors, by providing a judicial bypass for determining whether an unemancipated minor seeking an abortion is mature, or, if she is not, whether an abortion is in her best interest.

Thus, Assembly Bill No. 2274 permits a petitioner to use only her initials or a pseudonym and requires the juvenile court to ensure that the unemancipated minor's identity is held confidential. ([Health & Saf. Code, § 123450, subd. \(b\).](#)) Although the petitioner must file an affidavit with her real name and date of birth, any declarations bearing her real name must be sealed in an envelope marked confidential; all documents filed in any proceeding may [****225] be inspected only by the judge, specifically authorized court personnel, the petitioner, her attorney, and her guardian ad litem. (*Id.*, subd. (c); Cal. Rules of Court, rule 240(c) & (j); Judicial Council Forms, form AB-110.)

The medical information required to be disclosed is minimal. The forms adopted by the Judicial Council require the unemancipated minor to state how she knows she is pregnant, how many weeks

pregnant she is, whether she has talked to someone about the medical and emotional consequences, and where she receives her usual health care. They do not require disclosure of detailed **[**864]** **[***277]** medical information or history. (Cal. Rules of Court, rule 240 (j); Judicial Council Forms, form AB-105.)

VI.

Citing a plurality opinion in [Committee to Defend Reproductive Rights v. Myers, supra, 29 Cal. 3d 252](#), the trial court also concluded that Assembly Bill No. 2274 violates equal protection by distinguishing between two similarly situated groups: pregnant unemancipated minors who choose abortion and pregnant unemancipated minors who choose to carry their pregnancies to term. It concluded that because unemancipated minors who carry their pregnancies **[****226]** to term may obtain medical care without parental consent, unemancipated minors who seek to terminate their pregnancies cannot be required to obtain consent or judicial authorization.

I disagree. Assembly Bill No. 2274 does not unfairly discriminate on the basis of an unemancipated minor's reproductive choice.

[*408] In [Committee to Defend Reproductive Rights v. Myers, supra, 29 Cal. 3d 252](#), a plurality emphasized that "the decision whether to bear a child or to have an abortion is so private and so intimate that each woman in this state--rich or poor--is guaranteed the constitutional right to make that decision *as an individual*, uncoerced by governmental intrusion." ([Id. at p. 284](#) (plur. opn. of Tobriner, J.), italics in original.) Accordingly, *Myers* invalidated budget act restrictions that eliminated Medi-Cal funding of abortion while maintaining Medi-Cal funding of prenatal care and childbirth, on the ground that the restrictions lacked compelling justification. *Myers* rejected the suggestion that restrictions on the funding of abortions relate to a legitimate state interest in encouraging childbirth: once the state " 'chooses to enter the constitutionally **[****227]** protected area

of [reproductive] choice, it must do so with genuine indifference.' " ([Id. at p. 285](#) (plur. opn. of Tobriner, J.).)

Myers is not controlling.²⁰

[**228]** First, Assembly Bill No. 2274 does not effectively nullify the constitutional right to abortion, through the "power of the purse" or otherwise. (See [Committee to Defend Reproductive Rights v. Myers, supra, 29 Cal. 3d at p. 284](#) (plur. opn. of Tobriner, J.).) Nor does it involve imposing a condition on the enjoyment of publicly conferred benefits. The Court of Appeal's attempt to draw an analogy between the benefit of government funding and "the 'benefit' of consent without parental involvement" is wholly unpersuasive; indeed, the parties agree that for most unemancipated minors, parental involvement--not its absence--is beneficial. More fundamentally, unlike the legislation in *Myers*, Assembly Bill No. 2274 affects unemancipated minors, whose rights and interests, as discussed, are distinct from those of adult women.

Plaintiffs contend that because the "right" to give birth is not burdened with a consent requirement, no such burden can be imposed on the "right" to an abortion. They argue that the Legislature's decision to burden only abortion cannot be justified as promoting the welfare of teenagers because the medical, psychological, and social consequences of choosing **[****229]** teenage **[*409]** motherhood are more profound than the consequences of

²⁰ Nor, of course, is the Florida Supreme Court decision in [In re T.W. \(Fla. 1989\) 551 So.2d 1186](#), on which the plurality place undue emphasis. The reasoning in that case is similar to *Myers* and should be rejected for the same reasons. I am more persuaded by the reasoning of the Massachusetts Supreme Court in [Planned Parenthood v. Attorney General \(1997\) 424 Mass. 586 \[677 N.E.2d 101\]](#) on the same point. "The claim that a pregnant unmarried minor is denied equal protection of the law fails because the classification made by [the statute] has a rational basis. The differences between an adult and a minor . . . and between the special considerations applicable to an abortion as opposed to some other intrusive medical procedure justify the special treatment that [it] accords to an unmarried pregnant minor who seeks to terminate her pregnancy." ([Id. at p. 595, fn. 10 \[677 N.E.2d at p. 106\]](#).)

terminating an unplanned pregnancy. Their suggestion that any burden on an unemancipated minor's reproductive choice must be "equal" FAILS TO WITHSTAND SCRUTINY: an unemancipated minor seeking an abortion and an unemancipated [**865] [***278] minor carrying a pregnancy to term are not similarly situated.²¹

[****230] Thus, the Legislature could legitimately require that a pregnant unemancipated minor's interest in consenting to medical treatment differs depending on whether she chooses to carry her fetus to term or to obtain an abortion. It could reasonably, and neutrally, determine, as a matter of policy, that in the case of an unemancipated minor who is pregnant and intends to bear a child the public health interest in allowing her to obtain medical care for herself and her fetus is overriding, regardless of parental approval and whether or not the unemancipated minor is mature. It is widely accepted that early prenatal care can reduce medical risks and assure a healthy outcome for both mother and child. At the same time, the Legislature could neutrally determine that voluntary abortion, which ordinarily involves an *optional* surgical procedure with significant consequences, requires mature consent or a determination that it is in the unemancipated minor's best interest.

²¹ Plaintiffs' argument both proves too much and too little. Sterilization, which also implicates the right to privacy and to reproductive choice, is unavailable to unemancipated minors regardless of parental consent. ([Cal. Code Regs., tit. 22, § 70707.1, subd. \(a\)\(1\)](#); [Conservatorship of Valerie N. \(1985\) 40 Cal. 3d 143, 161 \[219 Cal. Rptr. 387, 707 P.2d 760\]](#) ["[S]terilization is encompassed within the right to privacy," i.e., "the right of women to exercise procreative choice 'as they see fit.' "].) Yet, if plaintiffs' analysis is carried to its logical extension, the state could not preclude unemancipated minors from consenting to that procedure because it would discriminate on the basis of reproductive choice. On the other hand, although plaintiffs urge that every legislative finding in favor of mandatory parental or judicial consent for abortion applies with greater force to medical care for childbirth, they do not suggest that the Legislature could require a pregnant unemancipated minor to obtain consent from a parent or authorization from a judge to *give birth* or *not* to have an abortion. Nor do they suggest that the Legislature must *withhold* vital prenatal care from a pregnant unemancipated minor in the absence of parental consent if it requires consent for an abortion.

Plaintiffs implicitly concede as much when they acknowledge that the Legislature may recognize legitimate differences between the needs of women who choose childbirth or abortion. A fortiori, it may also do so in the case [****231] of unemancipated minors making the same choice, whose needs and interests may require protections distinct from those accorded to adult women.²²

[*410] Because I conclude, for all the foregoing reasons, that Assembly Bill No. 2274 withstands the constitutional [****232] challenges raised by plaintiffs, I would reverse the judgment of the Court of Appeal.

BAXTER, J.

I respectfully dissent.

Missing from the plurality and concurring opinions (hereafter majority) is a concise and accurate description of the change in California law occasioned by Assembly Bill No. 2274. This statute simply shifts the ultimate responsibility of determining whether a child is sufficiently mature to give informed consent to an abortion from the abortion provider to a neutral judge when a parent of the child has not consented to the abortion. Moreover, even when the judge concludes that a child is incapable of giving informed consent, an abortion may be ordered if the judge concludes it is in the child's best interest. Assembly Bill No. 2274 represents the collective judgment of the Legislature, patterned after numerous precedents of the United States Supreme Court, that this shift of responsibility is in the best interests of pregnant

²² Although they fail to acknowledge their reliance on *Myers*, the plurality's reasoning is clearly derivative of the lead opinion in that case. The gist of their argument is that the Legislature cannot require parental consent for abortion because it permits unemancipated minors to obtain prenatal care and some other limited medical treatment without parental consent. As discussed, I disagree with the plurality's conclusion that the existence of limited medical emancipation statutes implicating reproductive choice establishes that Assembly Bill No. 2274 is "unnecessary" to protect the health of a minor or to support the parent-child relationship--is, indeed, positively detrimental to those compelling interests--and is, therefore, unconstitutional.

children and their parents.

The plurality opinion asserts that this shift of responsibility violates the California Constitution because the requirement that a court determine competence when a child seeks an abortion unless a [****233] parent has consented [**866] [***279] to the procedure impermissibly intrudes on the child's autonomy privacy. The opinion claims the Legislature has no reasonable basis for a conclusion that a physician, who is permitted to determine competence when a child seeks other pregnancy-related treatment, is unable to do so when the child wants an abortion. Moreover, it is suggested, mandating judicial consent is unreasonable because a child may be intimidated and reluctant to seek approval for an abortion if she must approach a judicial officer.

The plurality opinion simply substitutes the views and conclusions of the justices who ascribe to that opinion for those of the Legislature and ultimately constitutes judicial legislation. That physicians determine the competence of an adult to consent to abortion is irrelevant since children do not have the same autonomy privacy rights as adults. The observation that a physician may determine a child's competence to consent to other pregnancy-related medical treatment is also irrelevant. When a child seeks treatment related to a continuing pregnancy, the physician is not called upon to assess the child's competence to decide to continue [****234] the pregnancy.

[*411] The Legislature can reasonably conclude, based on universally acknowledged facts, that children do not have the same capacity for mature decisionmaking as adults. For that reason, and because children are more vulnerable to outside pressures, a higher degree of care in assessing competence and assured neutrality in making that assessment is necessary for their protection. The ipse dixit of the plurality opinion--that there is no reasonable basis upon which the Legislature might conclude that physicians are not able to determine a child's competence to consent to an abortion--is

misdirected therefore. The ability of any particular physician to assess a child's competence to consent to abortion is not in issue. Rather, the question is whether the Legislature can reasonably conclude that children who seek abortion are in need of additional protection.

In concluding that either parental consent or a judicial determination of competence should be required, the Legislature has considered the potential impact on pregnant children of requiring parental consent and of shifting the responsibility for assessing the competence of a child unwilling to seek parental [****235] consent to the court. The Legislature has weighed the competing considerations and, following United States Supreme Court precedent, has reasonably concluded that the need for neutrality and extra protection outweighs the burden imposed on the child. Nothing in the California Constitution permits a court to override that legislative judgment.

In short, the conclusion that a neutral judge rather than an abortion provider who may have an interest in the minor's decision should assess competence has been made by the Legislature. This court cannot say that the conclusion is wrong. Instead of acknowledging this constitutional reality, the plurality opinion focuses on implementing procedures which, with a single exception, have passed constitutional muster in every other state in which they have been challenged, and conclude that the California Constitution somehow prohibits imposing the burden of seeking judicial authorization for abortion on a pregnant minor. The child, they hold, must be permitted to seek an abortion without parental consent or a judicial determination that the child is either sufficiently mature to make such an important decision without parental guidance or that the [****236] abortion will be in the child's best interest.

That holding fails to accord deference to the Legislature, whose statement of its findings is more than adequate to explain the intent and purpose

underlying Assembly Bill No. 2274. It is also sufficient to establish that the state has a substantial, and even compelling, interest in requiring that a neutral judge rather than an interested provider of abortions assess the child's ability to give voluntary and informed consent or determine whether [*412] an abortion is in the child's best interest. Moreover, in reaching a contrary conclusion, the majority's construction of the privacy provision of [article I, section 1 of the California Constitution \(article I, section 1\)](#) departs radically from any defensible view of the voters' intent when they added a right of privacy to the Declaration of Rights in 1972 and undermines the fundamental and constitutionally [**867] [***280] protected right of parents to guide and control the upbringing of their children.

I agree with Justices Mosk and Brown, who accurately and persuasively refute the claim of the majority that the precedents on which their opinions rest support a conclusion [****237] that Assembly Bill No. 2274 is invalid. I write separately, however, to emphasize both the limited nature of the change in minor's abortion rights brought about by Assembly Bill No. 2274 and the extent to which the majority are forced to revise, overturn, and ignore precedent that would otherwise compel the court to uphold Assembly Bill No. 2274 in order to invalidate this carefully crafted legislative effort.

I. REVISION OF THE LEGAL RULES GOVERNING FACIAL CHALLENGES TO THE CONSTITUTIONAL VALIDITY OF STATUTES

Only last year, this court, in a unanimous opinion, recognized and applied the well-established rule that a facial challenge to the constitutional validity of a statute must fail unless the statute is invalid in all of its applications, i.e., it must be invalid "*under any and all circumstances.*" ([Superior Court v. County of Mendocino \(1996\) 13 Cal. 4th 45, 60 \[51 Cal. Rptr. 2d 837, 913 P.2d 1046\]](#), original italics.) Until today the rule in civil actions challenging the validity of a statute was: " ' "To support a determination of facial unconstitutionality, voiding

the statute as a whole, . . . petitioners must demonstrate that the act's provisions inevitably pose [****238] a present total and fatal conflict with applicable constitutional prohibitions." ' ' ([Tobe v. City of Santa Ana \(1995\) 9 Cal. 4th 1069, 1084 \[40 Cal. Rptr. 2d 402, 892 P.2d 1145\]](#).)¹

One might assume that, having conceded that there are children who are too immature to give informed consent to an abortion, as to whom a requirement of parental or judicial consent is constitutionally permissible, the majority would conclude that this attack on the facial validity of Assembly Bill No. 2274 fails. But no. Now the rules have changed, as they must if [*413] the majority is to invalidate this statute. Today the rule is that a facial [****239] challenge will be entertained if the statute "substantially impinges upon fundamental constitutional privacy rights in the vast majority of its applications." (Plur. opn. of George, C. J., *ante*, at p. 343.) It matters not that no minor is a party to this suit. No such exception to the rules governing facial challenges appears in this court's past decisions.

II. FAILURE TO ACCORD DEFERENCE TO LEGISLATIVE FINDINGS

The majority again (see [Professional Engineers v. Department of Transportation \(1997\) 15 Cal. 4th 543 \[63 Cal. Rptr. 2d 467, 936 P.2d 473\]](#)) decline to recognize the deference due legislative findings. The plurality opinion declares that no deference need be given if a statute affects a fundamental constitutional right. The concurring opinion of Justice Kennard appears to agree. Committee hearings, consideration of precedents of our nation's highest court, empirical research, and data from consultants, constituents, lobbyists, and others are henceforth irrelevant. The findings of a co-

¹ As we recognized in [Tobe v. City of Santa Ana, supra](#), 9 Cal. 4th at pages 1095-1096, a criminal defendant challenging a statute on vagueness grounds may assert its facial invalidity if the statute prohibits a substantial amount of constitutionally protected conduct, but that rule does not apply to persons who are not presently charged with violating the statute.

equal branch of government are meaningless. Instead, even in actions presenting only a facial challenge to a statute, evidence may be taken to demonstrate that the Legislature's conclusion [****240] that a statutory change is necessary or appropriate is wrong. The findings of a trial judge who hears only the evidence the parties to a single lawsuit choose, and can afford, to present will be paramount.

With due respect, that has not been and should not be the governing rule. "[D]ecisions dating back to the turn of the century require the courts to always presume that the Legislature acts with integrity and with [**868] [****281] an honest purpose to keep within constitutional restrictions and limitations. [Citations.] '[U]nder the doctrine of separation of powers neither the trial nor appellate courts are authorized to "review" legislative determinations.' [Citation.] Thus, the Legislature's determination of the facts warranting its action ' "must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted" ' [Citations.] In other words, legislative determinations are not to be judicially nullified unless they are manifestly unreasonable, arbitrary or capricious. [Citations.] Judges may not substitute their [*****241] judgment for that of the Legislature if there is any reasonable justification for the latter's action. [Citations.] This means that if reasonable minds may differ as to the reasonableness of a legislative enactment [citations], or if the reasonableness of the enactment is fairly debatable [citation], the enactment must be upheld." [*414] ([Professional Engineers v. Department of Transportation, supra](#), 15 Cal. 4th at pp. 575-576, fn. omitted (dis. opn. of Baxter, J.).)

The majority's refusal to accord due deference to the Legislature's findings so as to invalidate Assembly Bill No. 2274 thus violates the separation of powers doctrine and results in a further step toward government by the judiciary.

When the Legislature adopted Assembly Bill No. 2274, it recited the findings which satisfied that body of the need for a change in California law. As the majority concede, those findings are derived in part from opinions of the United States Supreme Court which accept the accuracy of stated factual propositions as support for their conclusions that statutes like Assembly Bill No. 2274 would not violate any privacy interest a pregnant minor has under the United States [****242] Constitution. (See, e.g., *H. L. v. Matheson* (1981) 450 U.S. 398, 408, 411 [101 S. Ct. 1164, 1172, 67 L. Ed. 2d 388]; *Bellotti v. Baird* (1979) 443 U.S. 622, 640 [99 S. Ct. 3035, 3046-3047, 61 L. Ed. 2d 797] (lead opn. by Powell, J.).) The majority nonetheless reject both the conclusions of the Supreme Court and those of the California Legislature, a co-equal branch of government and the branch charged with resolving policy questions such as those arising in the debate over minors' abortion rights, in favor of findings by a single trial judge which support the majority view that Assembly Bill No. 2274 is invalid.

As I, and Justice Ardaiz in his dissenting opinion in [Professional Engineers v. Department of Transportation, supra](#), 15 Cal. 4th at page 586, have observed, a rule which permits a court to summarily disregard legislative findings has no support in our case law and does violence to the constitutional doctrine of separation of powers. ([Cal. Const., art. III, § 3.](#))

III

Rewriting Article I, *Section 1*, to Abrogate Parental Rights

In 1972, concerned that theretofore private information was too easily accessible in an age of increased "surveillance [****243] and data collection" ([White v. Davis](#) (1975) 13 Cal. 3d 757, 774 [120 Cal. Rptr. 94, 533 P.2d 222]), the citizens of this state added "privacy" to the rights secured in the Declaration of Rights of the California Constitution. At that time there was no reason to [*415] believe that this right of privacy

encompassed anything other than informational privacy.²

[**244] [**869] [***282]** Today, culminating a quarter-century of increasingly expansive reading of the privacy provision of article I, *section 1*, the majority hold that, by adopting a constitutional right to privacy, the voters

²"[T]he moving force behind the new constitutional provision was a more focussed privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy.

"The principal objectives of the newly adopted provision are set out in a statement drafted by the proponents of the provision and included in the state's election brochure. The statement begins: 'The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create 'cradle-to-grave' profiles of every American. [P] At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.' (Italics in original.)

"The argument in favor of the amendment then continues: 'The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us.

" 'Fundamental to our privacy is the ability to control circulation of personal information. [(Italics in original.)] This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.

" 'Even more dangerous is the loss of control over the accuracy of government and business records of individuals. Obviously if the person is unaware of the record, he or she cannot review the file and correct inevitable mistakes. . . . [P] The average citizen . . . does not have control over what information is collected about him. Much is secretly collected . . . ' (*White v. Davis*, *supra*, 13 Cal. 3d at pp. 774-775.)

of this state intended to grant children the right to obtain abortions without the knowledge or consent of their parents or even of a judicial officer acting in the best interest of a child too immature to give consent. They do so notwithstanding their acknowledgment that in this state a child's right to obtain any type of medical care has always been subject to parental and legislative control, and despite their recognition that other aspects of this newly recognized right of minors to "autonomy privacy" in reproductive matters, i.e., the sexual conduct necessary to exercise this "right," is also subject to parental and legislative control. (See, e.g., [Pen. Code, § 261.5](#).)

Nothing in the history of the privacy provision of article I, *section 1*, suggests that it was the intent of the voters that parents be denied their **[*416]** fundamental right to direct this aspect of the upbringing of their children, a right that finds its source in the federal Constitution **[****245]**³ and that is also protected by the California Constitution. We have described this right of parents as "a compelling one, ranked among the most basic of civil rights." (*In re B.G.*, *supra*, 11 Cal. 3d at p. 688.) Yet, abrogation of parental rights is the inevitable result of the majority's opinions. One looks in vain to the history and wording of the privacy provision to find an intent to limit parental rights. No such intent may be presumed, since parental rights are protected not only by the state Constitution, but also by the federal Constitution and may not be restricted by the state. Nor, even by the closest scrutiny of the entrails of the 1972 constitutional change can we discern a basis for concluding that the voters realized that they had excised, and intended to excise, from all other parental and state authority over minors, the right of parents and the state to control a child's access to abortion.

³ See *Wisconsin v. Yoder* (1972) 406 U.S. 205, 230 [92 S. Ct. 1526, 1540-1541, 32 L. Ed. 2d 15]; *In re Roger S.* (1977) 19 Cal. 3d 921, 934 [141 Cal. Rptr. 298, 569 P.2d 1286]; *In re B.G.* (1974) 11 Cal. 3d 679, 688 [114 Cal. Rptr. 444, 523 P.2d 244].)

[****246] Moreover, the majority next relegate a competing *constitutional* interest--parental rights--to the status of simply another factor to be weighed as part of the state interest in Assembly Bill No. 2274. The majority fail to acknowledge that state and federal *constitutional* rights of a parent are not only a "compelling state interest" per se, but rights that were in no way diminished by the addition of a right of privacy to article I, *section 1*.

Of course, nothing said in these opinions has any impact on parents' rights under the federal Constitution. Whether the California Constitution, as construed by the majority to condition a parent's involvement in a minor daughter's decision to undergo an abortion on the child's willingness to seek the parent's advice and counsel, impermissibly intrudes on the parent's rights may yet be decided in [**870] [***283] another forum. The majority's wholesale abdication of the judiciary's obligation to protect and preserve parental rights under the California Constitution should not be overlooked, however.

Once again, past precedent is overlooked or ignored in the downgrading of the parents' constitutional rights. Until today, a court [****247] was obligated to use every effort to avoid finding that a newly adopted statute or constitutional provision effected a pro tanto repeal of an existing provision. Finding a pro tanto repeal is disfavored and is recognized only when there is a clear legislative intent that a newly enacted statute repeal existing legislation. (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal. 4th 257, 267 [41 Cal. Rptr. 2d 220, 895 P.2d 56].) That rule was equally applicable to possibly conflicting constitutional provisions. Rather than finding a conflict [*417] and resulting pro tanto repeal, whenever possible the two were to be harmonized so as to give effect to both to the extent possible. (*City and County of San Francisco v. County of San Mateo* (1995) 10 Cal. 4th 554, 563 [41 Cal. Rptr. 2d 888, 896 P.2d 181].)

Were these well-established rules applied here, of

course, the majority would be hard pressed to explain their implicit conclusion that when a right to privacy was added to article I, *section 1*, the electorate intended a pro tanto repeal of existing, fundamental, constitutionally protected, parental rights. In Assembly Bill No. 2274 the Legislature has acted [****248] to preserve and advance parental rights by creating a procedure which encourages parental involvement in a child's decision on whether or not to undergo an abortion. There is nothing unreasonable, irrational, or capricious in the Legislature's conclusion that parental consent should be required wherever possible and that when it is not feasible for a pregnant minor to consult with a parent, a judge, rather than an abortion provider, should decide if the minor child is sufficiently mature to give informed consent. In the constitutional world of the majority, by contrast, any third party, even one interested in avoiding parental responsibility--the father of the unborn child--may "assist" the minor in a round of "physician shopping" until a doctor is found who can be convinced that the minor is capable of giving informed consent.

IV. THE REVISION OF HILL

This court has long since expanded the privacy right found in article I, *section 1*, to encompass "autonomy" as well as "informational" privacy. (See *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal. 3d 252, 275 [172 Cal. Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118]; cf. *People v. Privitera* (1979) 23 Cal. 3d [****249] 697 [153 Cal. Rptr. 431, 591 P.2d 919, 5 A.L.R.4th 178]; *White v. Davis, supra*, 13 Cal. 3d 757.) Now, only three years after enunciating, in a carefully crafted opinion, the elements identified in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal. 4th 1 [26 Cal. Rptr. 2d 834, 865 P.2d 633] (*Hill*), as necessary to establish a violation of that right of privacy, the plurality opinion finds *Hill* too restrictive. What appeared to be a relatively insignificant modification of those elements in the lead opinion in *Loder v. City of Glendale* (1997) 14 Cal. 4th 846 [59 Cal. Rptr. 2d 696, 927 P.2d 1200]

(*Loder*), in which an "egregious" breach of social norms became a "serious" breach, now accelerates into a wholesale erosion of the threshold elements.

The plurality opinion confirms what *Loder* presaged. It is no longer necessary that a plaintiff establish the threshold elements identified in *Hill* [*418] before the state must justify challenged legislation. According to the lead opinion in *Loder*, a not too subtle "stalking horse" for this opinion, and now repeated in this plurality opinion, *Hill* did not establish any new requirements. [****250] The threshold elements are simply irrelevant if the court considering a privacy claim believes the complaint alleges conduct which "significantly affects" a protected privacy interest. It is no longer necessary to determine at the outset whether a reasonable expectation of privacy exists in the circumstances. (*Hill, supra, 7 Cal. 4th at p. 40.*) Were that still necessary, of course, the plurality opinion might have to focus immediately on whether and why minors have expectation of privacy in circumstances [**871] [***284] that have been subject to parental and state control since California joined the union, and how the procedures established by Assembly Bill No. 2274 constitute *any* "breach of the social norms underlying [a child's] privacy right." (*Hill, supra, 7 Cal. 4th at p. 37.*) Having not so subtly revised *Hill*, the plurality opinion is able to postpone discussion of this otherwise dispositive question until it is subsumed in its examination of "compelling state interest."

As with beauty, what may "significantly affect" a privacy interest lies in the eye of the judicial beholder. What is clear to this majority may be cloudy in the eyes of another [****251] court. The plurality opinion reformulates the crucial *Hill* threshold elements and the concurring opinion misapplies them leaving both the bench and bar asea in an ocean of uncertainty over the reach of the privacy provision of article I, *section 1*. Presumably a judge will know a violation when he or she sees one.

BROWN, J.,

Dissenting.--

I. INTRODUCTION

Today, the court invalidates the Legislature's effort to increase the involvement of parents in the abortion decisions of their unemancipated minor daughters, concluding the enactment cannot survive the exacting scrutiny of a compelling state interest test. To reach this result, the plurality must ignore the historic limits of the federal Constitution, rewrite the privacy provision of the state Constitution, and abrogate the constitutional interests of parents in an opinion that cannot survive *any* level of scrutiny, much less strict scrutiny.

In 1987, our Legislature enacted Assembly Bill No. 2274, 1987-1988 Regular Session (hereafter Assembly Bill 2274), which prohibits a physician from performing an abortion on an unemancipated minor without either the written consent of one of her parents or judicial authorization. [****252] Assembly Bill 2274 embodies a legislative effort to accommodate the competing interests [*419] involved in an unemancipated minor's abortion decision--the minor's interests, the interests of her parents, and the state's interest in her health and welfare. As this court and the United States Supreme Court have repeatedly cautioned, when dealing with the sensitive subject of abortion, "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." (*Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 850 [112 S. Ct. 2791, 2806, 120 L. Ed. 2d 674] (hereafter *Casey*).) ¹

[****253] In our assessment of liberty interests, we would do well to heed the advice of Justice Holmes: "[T]he word 'liberty' . . . is perverted when it is held to prevent the natural outcome of a

¹Unless otherwise indicated, all further undesignated citations to *Casey* are to portions of the plurality opinion reflecting the views of a majority of the United States Supreme Court. (See *Casey, supra*, 505 U.S. at p. 922 [112 S. Ct. at pp. 2843-2844] (conc. and dis. opn. of Stevens, J.) [joining portions of the plurality opinion]; *ibid.* (conc. and dis. opn. of Blackmun, J.) [same].)

dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." (*Lochner v. New York* (1905) 198 U.S. 45, 76 [25 S. Ct. 539, 547, 49 L. Ed. 937] (dis. opn. of Holmes, J.)) "The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. . . . No formula could serve as a substitute, in this area, for judgment and restraint." (*Poe v. Ullman* (1961) 367 U.S. 497, 542 [81 S. Ct. 1752, 1776, 6 L. Ed. 2d 989] (dis. opn. [****254] of Harlan, J.))

This is such a case. Its resolution demands delicate balance and exquisite restraint. We are faced with one of the most troubling paradoxes of human endeavor. Although liberty may find "no refuge in a jurisprudence of doubt" (*Casey, supra*, 505 U.S. at p. 844 [112 S. Ct. at p. 2803]), "[t]he spirit of liberty is the spirit which is not too sure that it is right" (Hand, *The Spirit of Liberty*, in [**872] [***285] *The Spirit of Liberty* (Dilliard edit. 1974) p. 190), for too much certainty is the surest way to extinguish liberty altogether. (Cf. *Washington v. Glucksberg* (1997) __ U.S. __, __ [117 S. Ct. 2258, 2275, 138 L. Ed. 2d 772] ["Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."].)

Courts must speak with clarity and precision when the available tools are adequate to the task at hand, but when the claim at issue involves fundamentally moral and philosophical questions as to which there is no clear answer, [*420] [****255] courts must

remain tentative, recognizing the primacy of legislative prerogatives. The temptation always exists for judges to "wrap up their veto" of a legislative policy in a "protective veil of adjectives such as . . . 'reasonable,' 'inherent,' [or] 'fundamental,' . . . whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision." (Hand, *The Bill of Rights* (Harv.U. Press 1958) p. 70.) Whether judges act innocently or deliberately, the harm to the body politic is the same. The very real danger we face when "courts foreclose ordinary politics in one area after another" is that the "democratic elements in our republican experiment will wither away, while new forms of tyranny by the powerful few arise." (Scalia, Comment by Glendon in *A Matter of Interpretation* (Princeton U. Press 1997) p. 113.) "WHOM SHOULD WE FEAR MORE: an aroused populace, or the vanguard who know better than the people what the people should want?" (*Ibid.*)

The danger is most acute when the language to be interpreted is amorphous, vague, or general enough [****256] to provide broad scope for judicial policymaking and the court insists on creating its own standard, untethered to either the language, as used by its authors or, in the case of a constitution, the apparent intent of those who ratified it. The word "privacy" as used in the California Constitution, for example, has a meaning which can easily be derived from its history, context, and text. The controlling opinion reads this history backwards to infuse "privacy" with a meaning it did not clearly possess at the time of its enactment. As Jefferson warned us, "Laws are made for men of ordinary understanding, and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties, which may make anything[] mean everything or nothing, at pleasure." (15 *The Writings of Thomas Jefferson* (Lipscomb edit. 1903) p. 450.)

The plurality goes to extraordinary lengths to

declare Assembly Bill 2274 unconstitutional. The fundamental flaw running throughout its analysis is the utter lack of deference to the ordinary constraints of judicial decisionmaking--deference to state precedent, to federal precedent, to the collective judgment [****257] of our Legislature, and, ultimately, to the people we serve. The plurality begins by reinventing the legal standards governing facial constitutional challenges and proceeds to misapply its own new standards. Then, without any analytical foundation, it invokes the doctrine of independent state grounds, thereby disposing of two decades of highly pertinent United States Supreme Court precedent. Next, the plurality all but eliminates the threshold elements of a state privacy cause of action and misanalyzes what little remains of the elements. Finally, it subjects Assembly Bill 2274 to an [*421] inherently insurmountable level of scrutiny, expressly disavowing any requirement of deference to the Legislature along the way.

A justice "is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." (Cardozo, *The Nature of the Judicial Process*, in *Selected Writings of Benjamin Nathan Cardozo* (Hall edit. 1947) p. 164.) It is impossible to know the motives of any other judge. I do not purport to do so here. It is fair, however, to criticize the reasoning and justifications presented in a judicial opinion. In this case, [****258] the court's reliance on highly questionable premises to invalidate so eminently reasonable a statute invites cynicism.

I dissent.

II. [*873] [***286] FACIAL CONSTITUTIONALITY OF ASSEMBLY BILL 2274

Not until two-thirds of the way through its opinion does the plurality address a dispositive procedural fact--namely, that this case involves a *facial* challenge to Assembly Bill 2274. "To support a determination of facial unconstitutionality, voiding the statute as a whole, [plaintiffs] cannot prevail by

suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute Rather, [plaintiffs] must demonstrate that the act's provisions inevitably pose a present *total and fatal* conflict with applicable constitutional prohibitions." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal. 3d 168, 180-181 [172 Cal. Rptr. 487, 624 P.2d 1215], second italics added; see also *Superior Court v. County of Mendocino* (1996) 13 Cal. 4th 45, 60-61 [51 Cal. Rptr. 2d 837, 913 P.2d 1046]; *Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084 [40 Cal. Rptr. 2d 402, 892 P.2d 1145]; [****259] *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal. 4th 251, 267 [5 Cal. Rptr. 2d 545, 825 P.2d 438].) In order to succeed on a facial challenge, plaintiffs must show that a statute or ordinance is unconstitutional "under any and all circumstances." (*Superior Court v. County of Mendocino*, *supra*, 13 Cal. 4th at p. 60, original italics; see also *Tobe v. City of Santa Ana*, *supra*, 9 Cal. 4th at p. 1111 (conc. opn. of Werdegar, J.) ["in all its possible applications"].) Plaintiffs have failed to make the requisite showing in this case.

There can be no question that Assembly Bill 2274 is constitutional as to minors who lack the capacity to give informed consent. As the plurality acknowledges (see plur. opn., *ante*, at pp. 355, 357), under our decision in *Ballard v. Anderson* (1971) 4 Cal. 3d 873 [95 Cal. Rptr. 1, 484 P.2d 1345, 42 A.L.R.3d 1392], "there is an additional limitation implicit in each of the medical emancipation statutes: the minor must be of sufficient maturity to [*422] give an *informed consent* to any treatment procedure. [Citation.] A minor of any age who is unable to convince competent medical authorities [****260] that she has the requisite understanding and maturity to give an informed consent for any medical treatment, including a therapeutic abortion, will be denied such treatment without the consent of either a *parent or legal guardian*." (*Id.* at p. 883, second italics added & fn. omitted.) Subsequent to our decision in *Ballard*, the United States Supreme

Court held that a minor's federal constitutional right to an abortion includes a right to nontherapeutic abortions and requires that, *in lieu of parental consent*, "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." ([*Akron v. Akron Center for Reproductive Health* \(1983\) 462 U.S. 416, 439-440 \[103 S. Ct. 2481, 2497-2498, 76 L. Ed. 2d 687\]](#).) Thus, as the plurality must ultimately concede, the bypass procedure established by Assembly Bill 2274 is not only constitutional but constitutionally *mandated* for minors who are not capable of giving informed consent. (See plur. opn., *ante*, at p. 359, fn. 34.) The state *must* provide such [****261] a minor with a bypass option in addition to parental consent. (See [*People v. Brisendine* \(1975\) 13 Cal. 3d 528, 548 \[119 Cal. Rptr. 315, 531 P.2d 1099\]](#) [state court's interpretation of state law cannot "restrict the liberties guaranteed the entire citizenry under the federal charter"].) ² Because Assembly Bill 2274 is [**874] [***287] not unconstitutional in all its possible applications, it clearly survives a facial constitutional challenge.

[****262] Since Assembly Bill 2274 does not inevitably pose a present total and fatal conflict with applicable constitutional prohibitions, the plurality must resort to an overbreadth analysis. According to the plurality, such an analysis is

required when "a statute, as written, broadly impinges upon fundamental constitutional privacy rights in its general, normal, and intended application." (Plur. opn., *ante*, at p. 343; see also *ibid.* [direct and substantial impingement]; [*id. at p. 348*](#) [broad and direct impingement].) Whatever the merits of this assertion in the abstract, there is no basis for resorting to the doctrine of overbreadth in this case. At the very most, the evidence at trial established what Assembly Bill 2274 was "likely" to do, "in some instances," "at least to some extent." (Plur. opn., *ante*, at pp. 355, 359; see also *post*, [**423] at p. 439.) The statute does not impose a broad, direct, and substantial impingement in its general, normal, and intended application. ³ (See *post*, at pp. 429-439.)

[****263] Moreover, as one of the plurality's principal authorities explains, before a court declares a statute to be unconstitutional on overbreadth grounds, it must be "convinced that the [legislative] purpose can be achieved by regulations drawn more narrowly and precisely than is attempted by the statute [at issue]." ([*City of Carmel-by-the-Sea v. Young* \(1970\) 2 Cal. 3d 259, 270 \[85 Cal. Rptr. 1, 466 P.2d 225, 37 A.L.R.3d 1313\]](#).) Although the plurality suggests "there may be a small subclass of persons covered by [Assembly Bill 2274] as to whom a similar but much more narrowly drawn statute constitutionally

² At oral argument, plaintiffs' counsel suggested that when a minor is not capable of giving informed consent and does not want to seek parental consent, her physician should initiate a child protective services investigation. This suggestion is both grossly overintrusive and legally insufficient to comply with the governing federal constitutional mandate. The plurality's suggestion that a common law judicial bypass procedure could be invoked for such immature minors (plur. opn., *ante*, at p. 359, fn. 34) is equally unworkable. How a minor who is too immature to give informed consent can possibly be expected to navigate the perils of an uncoded judicial bypass procedure escapes me. Assembly Bill 2274, by contrast, assists such a minor by authorizing the appointment of a guardian ad litem and by guaranteeing the right to court-appointed counsel. (See former [*Health & Saf. Code, § 25958, subd. \(b\)*](#), now [*§ 123450, subd. \(b\)*](#).)

³ Nor does federal law support the use of an overbreadth analysis. Although the plurality asserts that [*Casey, supra, 505 U.S. 833*](#), extended the overbreadth doctrine to the abortion context (see plur. opn., *ante*, at pp. 345-346), in reality this is an open question. (See [*Washington v. Glucksberg, supra, ___ U.S. at p. ___ \[117 S. Ct. at p. 2275\]*](#) (conc. opn. of Stevens, J.) [the issue is "the subject of debate" within the high court].) In any event, even if the passage the plurality quotes from *Casey* could somehow be deemed to have extended the doctrine, the *very next paragraph* of *Casey*, which the plurality fails to quote, explicitly limits the extension to adult women: "This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. [Citations.] Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women." ([*Casey, supra, 505 U.S. at p. 895 \[112 S. Ct. at p. 2830\]*](#).)

could be applied" (plur. opn., *ante*, at p. 343), in fact, the line drawn by the statute--age 18--is the only sensible one to draw. Plaintiffs themselves concede that the capacity to give informed consent varies in the case of each individual unemancipated minor. Thus, in response to our inquiry whether a 17-year-old girl is capable of giving informed consent, counsel answered, "Maybe, maybe not." (See *Bellotti v. Baird* (1979) 443 U.S. 622, 643-644, fn. 23 [99 S. Ct. 3035, 3048, 61 L. Ed. 2d 797] (plur. opn. of Powell, J.) (hereafter *Bellotti II*) ["[T]he peculiar [****264] nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors."]; see also *Akron v. Akron Center for Reproductive Health*, supra, 462 U.S. at pp. 441-442 [103 S. Ct. at pp. 2498-2499] [same]; *Stanford v. Kentucky* (1989) 492 U.S. 361, 396 [109 S. Ct. 2969, 2989, 106 L. Ed. 2d 306] (dis. opn. of Brennan, J.) ["... 18 is the dividing line that society has generally drawn, the point at which it is thought reasonable to assume that persons have an ability to make, and a duty to bear responsibility for[,] their[] judgments. . . . [A]ge 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility[.] [G]iven the different developmental rates of individuals, it is in fact 'a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an [**875] [***288] adolescent experiences in maturing do not actually occur until the early 20s.'"].)

[*424] Assembly Bill 2274 does not inevitably pose a present total and fatal conflict with applicable constitutional prohibitions, [****265] and there is no basis for applying an overbreadth analysis in this case. Plaintiffs' facial challenge to the statute should be rejected on this basis alone.

III. INDEPENDENT STATE GROUNDS

The plurality candidly acknowledges that the Legislature drafted Assembly Bill 2274 to comply with well-established United States Supreme Court precedent. (See plur. opn., *ante*, at pp. 324-325.)

Nevertheless, the plurality, without any analysis or discussion, relegates *nine* United States Supreme Court decisions addressing the validity of parental involvement statutes to a single footnote (see *id.* at p. 324, fn. 11), resurrecting their language out of context only when necessary to reach its ultimate destination. (See, e.g., *id.* at pp. 333, 336, 337-338, fn. 22, 344, 350, fn. 26, 354, 359, fn. 34.) The plurality's wholesale departure from more than 20 years of high court precedent is itself wholly unprecedented.

In an attempt to justify the departure, the plurality relies on the fact that under the California Constitution the right to privacy is *explicit* whereas under the United States Constitution the right is *implicit*. (See plur. opn., *ante*, at p. 326.) Granted. [****266] The express phrase "and privacy" was added to *article I, section 1 of the California Constitution* by an initiative adopted by the voters on November 7, 1972 (hereafter the Privacy Initiative). But it does not follow that we should *ignore* United States Supreme Court precedent in defining the state right. To the contrary, one of the principal sources we look to in order to discern the meaning of "privacy" as used in the Privacy Initiative is the "federal constitutional right, derived from various provisions of the Bill of Rights, that took distinct shape in United States Supreme Court decisions in the 1960's safeguarding the rights of individuals and private entities from government invasion." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal. 4th 1, 23 [26 Cal. Rptr. 2d 834, 865 P.2d 633] (hereafter *Hill*).) "The ballot arguments refer to the right to privacy as 'an important American heritage and essential to the fundamental rights guaranteed by the *First, Third, Fourth, and Ninth Amendments to the U.S. Constitution*,' thereby invoking the federal constitutional right to privacy as recognized in decisions of the United States Supreme Court. [Citation.] [P] The [****267] Privacy Initiative was placed before the voters following a two-thirds vote of each house of the Legislature. (*Cal. Const., art. XVIII, § 1*.) Testimony before the Assembly Constitution Committee, together with staff reports

and analyses prepared for that committee and the Senate Constitution Committee, makes explicit reference to the federal constitutional right to privacy, particularly as it developed beginning with *Griswold v. Connecticut* (1965) 381 U.S. 479 [14 L. Ed. 2d 510, 85 S. Ct. 1678]." (*Hill, supra*, 7 Cal. 4th at p. 28.)

[*425] Where, as here, a state constitutional protection was modeled on a federal constitutional right, we should be extremely reticent to disregard United States Supreme Court precedent delineating the scope and contours of that right. As this court unanimously recognized in *Raven v. Deukmejian* (1990) 52 Cal. 3d 336 [276 Cal. Rptr. 326, 801 P.2d 1077], relied on by the plurality, "[a]s early as 1938, we stated that 'cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the [****268] federal Constitution.' [Citations.] [P] [Our cases] acknowledge and support a general principle or policy of deference to United States Supreme Court decisions, a policy applicable [**876] [***289] in the absence of good cause for departure or deviation therefrom." (*Id. at p. 353*, italics omitted; see also *id. at p. 356* (conc. and dis. opn. of Mosk, J.) [joining the majority opinion on this issue].)

In the context of an unemancipated minor's abortion decision, it is particularly appropriate to seek guidance from the high court and to follow this general policy of deference. The nine decisions addressing the constitutionality of parental involvement statutes reflect the collective wisdom of sixteen Supreme Court justices gleaned over the course of more than two decades. In *Casey*, the most recent parental consent decision, eight of the court's nine justices concluded that parental consent statutes such as California's were constitutional. (See *Casey, supra*, 505 U.S. at pp. 899-900 [112 S. Ct. at p. 2832] (plur. opn. of O'Connor, Kennedy, and Souter, JJ.); *id. at p. 922, fn. 8 [112 S. Ct. at pp. 2843-2844]* (conc. and dis. opn. of Stevens, [****269] J.); *id. at pp. 970-971 [112 S. Ct. at pp.*

2868-2869] (conc. and dis. opn. of Rehnquist, C. J.).) As I explain in greater detail below (see *post*, at pp. 429-439), the Supreme Court's decisions in this area reflect a delicate balancing of a number of competing interests.

The only "cogent reason" the plurality articulates for departing from federal precedent is that the plurality opinion in *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal. 3d 252 [172 Cal. Rptr. 866, 625 P.2d 779] (hereafter *Myers*), "clearly demonstrates that the state Constitution has been interpreted to provide *greater* protection of a woman's right of choice than that provided by the federal Constitution as interpreted by the United States Supreme Court." (Plur. opn., *ante*, at p. 327, italics added.) *Myers* does not support this proposition. The *Myers* opinion concluded only that "the protection afforded the woman's right of procreative choice as an aspect of the right of privacy under the explicit provisions of our Constitution is *at least as broad* as that described in *Roe v. Wade* [(1973) 410 U.S. 113 (93 S. Ct. 705, 35 L. Ed. 2d 147)]." (*Myers, supra*, [****270] 29 Cal. 3d at p. 281, italics added (plur. opn. of Tobriner, J.); see also *Conservatorship of Valerie* [*426] N. (1985) 40 Cal. 3d 143, 163 [219 Cal. Rptr. 387, 707 P.2d 760] [state and federal Constitutions afford "similar protection" to procreative choice].) Only by broadly misreading *Myers* can the plurality here avoid the analytical force of federal authority.

Assuming arguendo the state Constitution does afford greater protection to procreative choice, United States Supreme Court precedent surely remains relevant. ⁴ More importantly, in the

⁴ An examination of the plurality's selective quotation from the case law is telling. The plurality quotes *Urbaniak v. Newton* (1991) 226 Cal. App. 3d 1128 [277 Cal. Rptr. 354] for the proposition that " 'the state right of privacy has been held to be broader than the federal right.' " (Plur. opn., *ante*, at p. 327.) The complete passage from the case states that "[a]lthough the state right of privacy has been held to be broader than the federal right [citation], *California courts construing article I, section 1, have looked for guidance to federal precedents.*" (*Urbaniak v. Newton, supra*, 226 Cal. App. 3d at p.

context of this case, the fact that the state right to privacy may afford greater protection does not alter the fundamental nature of the interests to be balanced. Rather, to the extent the state right to privacy affords greater protection to an unemancipated minor's procreative choice, it affords at least commensurate protection to her family's right to privacy. (See Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27 ["The right of privacy is the right to be left alone. It is a fundamental and compelling **[**877]** **[***290]** **[****271]** interest. It protects *our homes, our families*, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose." (Italics added.)].)

[**272]** This explicit reference to "our homes" and "our families" demonstrates that the voters did not intend the Privacy Initiative to erect a barrier between an unemancipated minor and her own parents. To the contrary, the voters intended to incorporate well-established state and federal precedent affording a sphere of constitutional protection to our homes and families, a sphere that encompasses the right of parents to direct the moral and spiritual upbringing of their own children. (See, e.g., Moore v. East Cleveland (1977) 431 U.S. 494, 503-504 & fn. 12 [97 S. Ct. 1932, 1937-1938, 52 L. Ed. 2d 531] (plur. opn. of Powell, J.); Ginsberg v. New York (1968) 390 U.S. 629, 639 [88 S. Ct. 1274, 1280, 20 L. Ed. 2d 195]; see generally *post*, at pp. 429-432.) In other words, the same Constitution that protects an unemancipated minor's privacy also protects "the private realm of family

life which the state **[*427]** cannot enter." (Prince v. Massachusetts (1944) 321 U.S. 158, 166 [64 S. Ct. 438, 442, 88 L. Ed. 645].)

IV. ELEMENTS OF A STATE LAW PRIVACY CAUSE OF ACTION

Having dramatically expanded the scope of the plurality holding in Myers, supra, 29 Cal. 3d 252, **[****273]** the plurality here turns to our recent decision in Hill, supra, 7 Cal. 4th 1. In Hill, following an extended discussion of the state constitutional right to privacy, this court held that "a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Id. at pp. 39-40*; see also Heller v. Norcal Mutual Ins. Co. (1994) 8 Cal. 4th 30, 42-43 [32 Cal. Rptr. 2d 200, 876 P.2d 999] [same].)

Today, in a sentence whose length is exceeded only by its circuitry, the plurality offers the following gloss on our holding in Hill: "The three 'elements' set forth in Hill--a legally protected privacy interest, reasonable expectation of privacy, and serious invasion of privacy--should not be interpreted as establishing significant *new* requirements or hurdles that a plaintiff must meet in order to demonstrate a violation of the right to privacy under the state Constitution--hurdles that would modify substantially **[****274]** the traditional application of the state constitutional privacy provision (and diminish the protection provided by that provision), by authorizing, in a wide variety of circumstances, the rejection of constitutional challenges to conduct or policies that intrude upon privacy interests protected by the state constitutional privacy clause, without any consideration of the legitimacy or importance of a defendant's reasons for engaging in the allegedly intrusive conduct and without balancing the interests supporting the challenged practice against

1136, italics added.) Likewise, the plurality quotes American Academy of Pediatrics v. Van de Kamp (1989) 214 Cal. App. 3d 831 [263 Cal. Rptr. 46] for the proposition that " 'the California Constitution . . . expressly recognizes a right to privacy . . . which is broader than the federal right to privacy.' " (Plur. opn., *ante*, at pp. 327-328.) The very next paragraph of the case explains that the state right "is to be construed by our courts " *"informed but untrammelled* by the United States Supreme Court's reading of parallel federal provisions. [Citations.]" ' " (American Academy of Pediatrics v. Van de Kamp, supra, 214 Cal. App. 3d at p. 839, italics added.)

the severity of the intrusion imposed by the practice.' " (Plur. opn., *ante*, at pp. 330-331, original italics, quoting Loder v. City of Glendale (1997) 14 Cal. 4th 846, 891 [59 Cal. Rptr. 2d 696, 927 P.2d 1200] (lead opn. of George, C.J.) (hereafter *Loder*).) Amazingly, according to the plurality, the 58-page opinion in Hill, supra, 7 Cal. 4th 1, did not establish any "significant new requirements."

Again quoting from Loder, supra, 14 Cal. 4th at page 893, the plurality tells us that the three elements established in *Hill* " 'do not eliminate the necessity for weighing and balancing the justification for the [****275] conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy interest.' " (Plur. opn., *ante*, at p. 331, italics added.) Instead, we are told, the [*428] elements were designed simply to " 'permit courts to weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or [***291] justification [**878] by the defendant.' " (*Ibid.*, italics added, quoting Loder, supra, 14 Cal. 4th at p. 893 (lead opn. of George, C. J.).)

This strained interpretation of *Hill* has never been endorsed by a majority of this court. And with good reason. It is inconceivable that when the court in *Hill* required and in *Heller* reiterated that "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right" (Hill, supra, 7 Cal. 4th at p. 37; Heller v. Norcal Mutual Ins. Co., supra, 8 Cal. 4th at p. 44), it really meant the invasions need only [****276] be "nontrivial"--that is, not "insignificant" or "de minimis." (See Hill, supra, 7 Cal. 4th at pp. 67-68 & fn. 1 (conc. and dis. opn. of George, J.).) Only Lewis Carroll could countenance this sleight of hand. ⁵

"There is enough confusion in the law. We should say what we mean and mean what we say." (Hill, supra, 7 Cal. 4th at p. 57.) Courts should guard against the appearance of "limitless manipulation" lest they "endanger the very legitimacy that has been the great accomplishment of American constitutionalism." (Casper, *Constitutionalism*, [****277] in 2 Encyclopedia of the American Const. (Levy et al. edits. 1986) p. 480.)

V. PRESENCE OF REQUISITE ELEMENTS IN THIS CASE

The plurality purports to find that plaintiffs meet the *Hill* criteria. It does so only by a determinedly superficial application of its elements.

A. Legally Protected Privacy Interest

"The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. Whatever their common denominator, privacy interests are best assessed separately and in context. Just as the right to privacy is not absolute, privacy interests do not encompass all conceivable assertions of individual rights." (Hill, supra, 7 Cal. 4th at p. 35.) "Whether established [*429] social norms safeguard a particular type of information or protect a specific personal decision from public or private intervention is to be determined from the usual sources of positive law governing the right to privacy--common law development, constitutional development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative." (Id. at p. 36.)

1. The Unique Status [****278] of

tone, 'it means just what I choose it to mean--neither more nor less.'

" 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

" 'The question is,' said Humpty Dumpty, 'which is to be master--that's all.' " (Carroll, *The Annotated Alice: Alice's Adventures in Wonderland & Through the Looking Glass* (Gardner edit. 1960) p. 269, original italics.)

⁵ " 'When I use a word,' Humpty Dumpty said, in rather a scornful

Unemancipated Minors

The plurality correctly concludes "there can be no question but that minors, as well as adults, possess a constitutional right of privacy under the California Constitution." (Plur. opn., *ante*, at p. 334.) This conclusion, however, marks only the beginning, not the end, of the analysis. The fact that minors enjoy a state constitutional right to privacy does not mean that their privacy interests are coextensive with those of adults. (Cf. [In re Roger S. \(1977\) 19 Cal. 3d 921, 927-928 \[141 Cal. Rptr. 298, 569 P.2d 1286\]](#) ["'Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.' [Citation.] [P] It is equally well established, however, that the liberty interest of a minor is not coextensive with that of an adult."].)

The law has long recognized the unique status of minors. "AS MR. JUSTICE FRANKFURTER APTLY PUT IT: 'Children have a very special place in life which law should reflect. Legal [**879] [***292] theories and their phrasing in other cases readily lead to fallacious [****279] reasoning if uncritically transferred to determination of a State's duty towards children.' [May v. Anderson, 345 U.S. 528, 536 \[73 S. Ct. 840, 844-845, 97 L. Ed. 1221\]](#) (1953) (concurring opinion). The unique role in our society of the family, the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural,' [Moore v. East Cleveland, 431 U.S. 494, 503-504 \[97 S. Ct. 1932, 1937-1938, 52 L. Ed. 2d 531\]](#) (1977) (plurality opinion), requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. . . . [T]hree reasons justify[] the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." ([Bellotti II, supra, 443 U.S. at pp.](#)

[633-634 \[99 S. Ct. at p. 3043\]](#) (plur. opn. of Powell, J.).)

"[I]t has been of profound importance in all legal inquiries involving children that minors are presumed by all phases of the law (and by the culture reflected by our [****280] law) not to have the same basic capacities as adults." (Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"* (1976) *BYU L.Rev.* 605, [*430] 646-647.) The courts have generally recognized the prevailing understanding in our society that the typical child is not possessed of full capacity for individual choice. " '[M]inors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience, that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life.' " ([Hodgson v. Minnesota \(1990\) 497 U.S. 417, 459 \[110 S. Ct. 2926, 2949, 111 L. Ed. 2d 344\]](#) (conc. opn. of O'Connor, J., quoting [Stanford v. Kentucky, supra, 492 U.S. at p. 395 \[109 S. Ct. at pp. 2988-2989\]](#) (dis. opn. of Brennan, J.).) The fact there may be exceptions only serves to validate this truism.

The privacy interests of an unemancipated minor are particularly limited vis-a-vis her own parents. "Parents, of course, have powers greater than that of the state to curtail [****281] a child's exercise of the constitutional rights he may otherwise enjoy, for a parent's own constitutionally protected 'liberty' includes the right to 'bring up children' [citation], and to 'direct the upbringing and education of children.' " ([In re Roger S., supra, 19 Cal. 3d at p. 928.](#)) Thus, in the closely related context of liberty, we have observed, "[t]he liberty interest of a minor is qualitatively different than that of an adult, being subject both to reasonable regulation by the state to an extent not permissible with adults [citations], and to an even greater extent to the control of the minor's parents unless 'it appears that the parental decisions will jeopardize the health or safety of the child or have a potential for significant social

burdens.' " (*Id.* at p. 934.)

A parent's interest in directing his child's upbringing is firmly rooted in both the state and federal Constitutions. It is "a compelling one, ranked among the most basic of civil rights." (*In re B.G.* (1974) 11 Cal. 3d 679, 688 [114 Cal. Rptr. 444, 523 P.2d 244]; see also *In re Roger S.*, *supra*, 19 Cal. 3d at p. 934.) As Justice Powell explained in *Bellotti II*, *supra*, [****282] 443 U.S. 622:

"[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors. But an additional and more important justification for state deference to parental control over children is that '[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' *Pierce v. Society of Sisters*, 268 U.S. 510, 535 [45 S. Ct. 571, 573-574, 69 L. Ed. 1070, 39 A.L.R. 468] (1925). 'The duty to prepare the child for "additional obligations" . . . must be read to include the [*431] inculcation of moral standards, [**880] [****293] religious beliefs, and elements of good citizenship.' *Wisconsin v. Yoder*, 406 U.S. 205, 233 [92 S. Ct. 1526, 1544, 32 L. Ed. 2d 15] (1972). This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially [****283] responsible citizens.

"We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. Thus, '[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and

freedom include *preparation for obligations the state can neither supply nor hinder.*' *Prince v. Massachusetts*, *supra*, [321 U.S.] at [p.] 166 [64 S. Ct. at p. 442] (emphasis added).

"Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, [****284] 'constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.' *Ginsberg v. New York*, [390 U.S.] at [p.] 639 [88 S. Ct. at p. 1280].

"Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding. Under the Constitution, the State can 'properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.' *Ginsberg v. New York*, 390 U.S., at 639 [88 S. Ct. at p. 1280]." (*Bellotti II*, *supra*, 443 U.S. at pp. 637-639 [99 S. Ct. at pp. 3045-3046], fns. omitted (plur. opn. of Powell, J.).)

Because it fails to consult "the usual [****285] sources of positive law governing the right to privacy" (*Hill*, *supra*, 7 Cal. 4th at p. 36), the plurality does not acknowledge, much less justify, its decision to infringe on a liberty interest [*432] historically more sacrosanct than a minor's right to privacy. There is no solace in the knowledge that

the plurality's decision does not *prohibit* minors from confiding in their parents. It does prohibit this legislative attempt to *encourage* minors to confide, and this prohibition cannot be altered without a constitutional amendment. We ought to think long and hard before constructing a virtually impregnable citadel. "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' [citation] lest the liberty protected . . . be subtly transformed into the policy preferences of the members of this Court." (*Washington v. Glucksberg*, *supra*, __ U.S. at p. __ [117 S. Ct. at pp. 2267-2268].) Scholar Raoul Berger asks the rhetorical [****286] question: "How long can public respect for the Court, on which its power ultimately depends, survive if the people become aware that the tribunal which condemns the acts of others as unconstitutional is itself acting unconstitutionally? Respect for the limits on power are the essence of a democratic society; without it the entire democratic structure is undermined." (Berger, *Government by Judiciary* (2d ed. 1997) pp. 459-460.)

2. The Unique Context of Abortion

The plurality does not seriously dispute any of these fundamental principles. Indeed, it acknowledges that "[a]s a general matter, parents during a child's minority have the legal right (and obligation) to act on behalf of their child to protect their child's rights and [**881] [***294] interests, and in most instances this general rule would apply to interests of the minor that are protected by the state constitutional right of privacy as well as to other rights and interests of the minor." (Plur. opn., *ante*, at pp. 335-336.) According to the plurality, however, "that is not the case with respect to the particular privacy right that is here at issue, namely the right to decide whether a pregnant minor will [****287] continue or terminate her pregnancy." (*Id.* at p. 336.)

The plurality's conclusion that in the abortion context--and possibly *only* in the abortion context--an unemancipated minor's privacy interests are coextensive with those of an adult (plur. opn., *ante*, at p. 337 & fn. 21) is indefensible. Ironically, in attempting to justify its decision to treat abortion differently, the plurality quotes extensively from Justice Powell's plurality opinion in *Bellotti II*, *supra*, 443 U.S. 622, observing, among other things, that " '[t]he abortion decision differs in important ways from other decisions that may be made during minority' " and that " 'there are few situations in which *denying* a minor the right to make an important decision will have consequences so grave and indelible.' " (Plur. opn., *ante*, at p. 336, italics [**433] added, quoting *Bellotti II*, *supra*, 443 U.S. at p. 642 [99 S. Ct. at p. 3047] (plur. opn. of Powell, J.).)

What the plurality fails to appreciate is that, unlike the Massachusetts statute at issue in *Bellotti II*, Assembly Bill 2274 does not deny a mature unemancipated minor the right to make her own abortion decision. Rather, [****288] our Legislature has established precisely the procedure approved in *Bellotti II* and in several subsequent decisions of the United States Supreme Court. Specifically, although Assembly Bill 2274 requires an unemancipated minor to obtain the written consent of one of her parents, it also "provide[s] an alternative procedure whereby authorization for the abortion can be obtained. [P] A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made . . . assure[s] that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure . . . ensure[s] that the provision requiring parental consent does not in

fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in [*Planned Parenthood of Missouri v. Danforth* [****289] (1976) 428 U.S. 52 (96 S. Ct. 2831, 49 L. Ed. 2d 788)]." (*Bellotti II, supra*, 443 U.S. at pp. 643-644 [99 S. Ct. at p. 3048], fns. omitted (plur. opn. of Powell, J.); see also *Akron v. Akron Center for Reproductive Health, supra*, 462 U.S. at pp. 439-440 [103 S. Ct. at pp. 2497-2498].)

The plurality's statement that Assembly Bill 2274 "restricts a pregnant individual's ability to decide on her own whether to continue or to terminate her pregnancy" (plur. opn., *ante*, at p. 334) fails to account for the differences between unemancipated minors who are capable of giving informed consent and those who are not. Under Assembly Bill 2274, only unemancipated minors who *lack* the capacity to give informed consent are restricted in their ability to decide on their own whether to continue or terminate their pregnancies. (See former *Health & Saf. Code, § 25958, subd. (c)(2)*, now *§ 123450, subd. (c)(2)* ["If the court finds that the minor is not sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, *the court* shall then consider whether performance of the abortion would [****290] be in the best interest of the minor. In the event that *the court* finds that the performance of the abortion would be in the minor's best interest, the court shall grant the petition ordering the performance of the abortion without consent of, or notice to, the parents or guardian. In the [*434] event that *the court* finds that the performance of the abortion is not in the best interest of the minor, the court shall deny the petition." (Italics added.)].) As to such immature unemancipated [**882] [***295] minors, Assembly Bill 2274 establishes the constitutionally mandated bypass procedure. (See *ante*, at pp. 421-423.) Unemancipated minors who *are* capable of giving informed consent, by contrast, are *not* restricted in their ability to decide on their own whether to continue or terminate their pregnancies. (See former *Health & Saf. Code, § 25958, subd. (c)(1)*, now *§ 123450, subd. (c)(1)* ["If the court finds that the minor is sufficiently mature

and sufficiently informed to make the decision on her own regarding an abortion, and that the minor has, on that basis, consented thereto, the court *shall* grant the petition." (Italics added.)].)

The [****291] plurality significantly downplays the difficulties with its approach when it acknowledges, "[t]he question whether a statute or rule intrudes upon a minor's state constitutional right of privacy *admittedly becomes more complex* when the only effect of the statute or rule is to condition the minor's exercise of his or her constitutional privacy right upon parental consent." (Plur. opn., *ante*, at p. 335, italics added.) Since Assembly Bill 2274 contains a judicial bypass procedure, under which an unemancipated minor need never consult her parents at all, it is a gross mischaracterization of the statute to say that it "condition[s] the minor's exercise of his or her constitutional privacy right upon parental consent." (*Ibid.*) As noted above, our cases establish that an implicit limitation in *any* medical emancipation statute is that "[a] minor of any age" must "convince competent medical authorities that she has the requisite understanding and maturity to give an informed consent for any medical treatment, including a[n] . . . abortion." (*Ballard v. Anderson, supra*, 4 Cal. 3d at p. 883; see also plur. opn., *ante*, at p. 355.) In other words, *someone* [****292] must determine whether an individual unemancipated minor, regardless of her age, has the capacity to give informed consent.

Properly viewed, Assembly Bill 2274 simply shifts the determination of whether an individual unemancipated minor has the capacity to give informed consent from a physician to a disinterested judicial officer. In the alternative, the statute gives an unemancipated minor the *option* of seeking the consent of one of her parents. If requiring an unemancipated minor to convince a physician that she has the requisite understanding and maturity to give informed consent to an abortion does not offend the Constitution, I cannot fathom how it can be unconstitutional to require her to convince a disinterested judicial officer of the

same fact or, alternatively, to seek parental consent.

The plurality mistakenly responds that there is no indication *in the record* that the Legislature was concerned with the potential for physician bias [*435] when it enacted Assembly Bill 2274. (Plur. opn., *ante*, at pp. 357-358.) But that is beside the point. There is also no proof the Legislature concluded these concerns were irrelevant. In fact, the potential for physician [****293] bias was brought to the attention of the Senate Committee on Health and Human Services by outside proponents of the bill, who were dissatisfied with the bill analysis prepared by committee staff. They submitted an alternative legislative analysis to the committee, which specifically observed that "[m]any of the opponents of AB 2274 are engaged in the business of offering abortion services and giving 'counsel' to pregnant women, including teenagers. Obviously, they have a direct conflict-of-interest (profit) when it comes to giving counsel to frightened teenagers who have unplanned pregnancies." (See Legis. Analysis Supporting Assem. Bill No. 2274, Sen. Com. on Health & Human Services, Aug. 19, 1987, p. 28.) Moreover, as the plurality recognizes, one of the primary reasons for requiring "parental or other legally authorized consent" as a precondition to medical treatment for unemancipated minors is to "safeguard[] them from the potential overreaching of third parties." (Plur. opn., *ante*, at p. 315; see also *Bellotti II*, *supra*, 443 U.S. at p. 641, fn. 21 [99 S. Ct. at p. 3047] (plur. opn. of Powell, J.) [Minors "are less likely than adults to know or be able to recognize [****294] ethical, qualified physicians."].) Finally, as the plurality freely admits, the Legislature drafted Assembly Bill 2274 with [**883] [***296] United States Supreme Court precedent in mind. (Plur. opn., *ante*, at pp. 324-325.) The high court's decisions question the advisability of relying on physicians to counsel minors on their abortion decisions. (See, e.g., *H. L. v. Matheson* (1981) 450 U.S. 398, 409-410 [101 S. Ct. 1164, 1171, 67 L. Ed. 2d 388] [" 'There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried

pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." ' ']; *Bellotti II*, *supra*, 443 U.S. at pp. 640-641 [99 S. Ct. at pp. 3046-3047] (plur. opn. of Powell, J.) [same]; *Planned Parenthood* [****295] of *Missouri v. Danforth* (1976) 428 U.S. 52, 91 [96 S. Ct. 2831, 2851, 49 L. Ed. 2d 788] (conc. opn. of Stewart, J.) [same].)

Nor is it dispositive that "in numerous analogous contexts the Legislature has authorized minors to obtain medical care without parental consent or judicial authorization, thus recognizing the general competence of health care professionals to determine whether a minor is capable of giving informed consent. (See, e.g., *Fam. Code*, § 6925 [prenatal care], 6926 [care for communicable disease], 6927 [care for rape], 6928 [care for sexual [**436] assault], 6929 [care for drug or alcohol related problem].)" (Plur. opn., *ante*, at p. 358.) Unlike prenatal care, unlike care for communicable disease, unlike care for rape, unlike care for sexual assault, and unlike care for drug or alcohol related problems, abortion " 'is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles.' " (*Id.* at p. 313, quoting *Myers*, *supra*, 29 Cal. 3d at p. 284 (plur. opn. of Tobriner, J.).) Since " '[t]he abortion decision differs in important ways from other decisions that may be made during minority' [****296] " (plur. opn., *ante*, at p. 336), it was certainly not unreasonable for the Legislature to conclude that, in the unique context of abortion, it wanted a disinterested judicial officer, rather than a physician in the business of performing abortions, to make the informed consent determination.

3. The Relevance of Social Norms

Finally, the plurality maintains that "the circumstances that the statute involves minors rather than adults, and is concerned with furthering the parent-child relationship" are relevant only when "we consider potential justifications for a challenged statute at a subsequent stage of the analysis, and not in determining the threshold question whether the statute implicates a protected privacy interest." (Plur. opn., *ante*, at p. 337; see also *id. at pp. 334, 341-342*.) My disagreement with this conclusion could not be more profound. The one factor common to *each* of the three threshold elements of a cause of action for violation of the state constitutional right to privacy is the incorporation of social norms. (See *Hill, supra, 7 Cal. 4th at pp. 35-36* [existence of a "legally protected privacy interest" turns on "established social [****297] norms"]; *id. at pp. 36-37* [existence of a "reasonable expectation of privacy" turns on "broadly based and widely accepted community norms"]; *id. at p. 37*, italics omitted [existence of a "[s]erious invasion of [a] privacy interest" turns on "an egregious breach of the social norms underlying the privacy right"].) To say that the social norms underlying the incapacity of unemancipated minors in general and the parent-child relationship in particular are not relevant until "a subsequent stage of the analysis" (plur. opn., *ante*, at p. 337) is revisionist legal history at its best and judicial activism at its worst. By deferring consideration [**884] [***297] of these factors, the plurality condemns to second-class status the protections expressly afforded to "our homes" and "our families" by the Privacy Initiative. (See *ante*, at p. 426.)

B. Reasonable Expectation of Privacy

"The second essential element of a state constitutional cause of action for invasion of privacy is a reasonable expectation of privacy on plaintiff's part." (*Hill, supra, 7 Cal. 4th at p. 36.*) [*437]

The plurality summarily addresses this element as follows: "Although [****298] it has been

suggested that, in light of the general statutory rule requiring a minor to obtain parental consent for medical care, and the existence of numerous abortion/parental consent statutes in other states, a minor has no reasonable expectation of privacy in this context, it plainly would defeat the voters' fundamental purpose in establishing a *constitutional* right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right." (Plur. opn., *ante*, at pp. 338-339, original italics.)

The plurality's analysis is circular, referencing a "reasonable expectation of privacy" without explaining what that term means legally. As we explained in *Hill, supra, 7 Cal. 4th at page 37*, "[a] 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. (See, e.g., Rest.2d Torts, [] § 652D, com. c ['The protection afforded to the plaintiff's interest in his privacy must be relative [****299] to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens.'].)" (See also *Heller v. Norcal Mutual Ins. Co., supra, 8 Cal. 4th at pp. 43-44* [same]; cf. *Washington v. Glucksberg, supra*, __ U.S. at p. __ [117 S. Ct. at p. 2268] ["Our Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking.' "].) Under *Hill* and its progeny, the social norms reflected in both case law and statutory law--the nine decisions of the United States Supreme Court (plur. opn., *ante*, at pp. 324-325, fn. 11), the "numerous abortion/parental consent statutes in other states" (*id. at p. 339*), and "the general statutory rule requiring a minor to obtain parental consent for medical care" (*id. at p. 338*)--clearly demonstrate that Assembly Bill 2274 does not implicate any "reasonable expectation of privacy."

Indeed, it was a concept of privacy consonant with

community norms that the drafters invoked when they authored the Privacy Initiative, and we must conclude this commonly understood meaning is what the electorate ratified. As Justice [****300] Story recognized, "[c]onstitutions are not designed for metaphysical or logical subtleties." (3 Story, Commentaries on the Constitution of the United States (Rotunda et al. edits. 1987) § 210, p. 157.) Constitutions are "instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss." (*Id.* at pp. 157-158.)

[*438] The plurality's assertion that plaintiffs have demonstrated a "reasonable expectation of privacy" because "the challenged statutory requirements apply to *all* pregnant minors and, unlike the drug testing program in *Hill*, are not confined to a specific setting or limited context" (plur. opn., *ante*, at p. 338, original italics) is disingenuous. The fact that Assembly Bill 2274 applies *only* to unemancipated minors and *not* to emancipated minors or adults is a specific setting and a limited context. Like the parental involvement statutes [****301] of most other states and in line with the requirements set out in nine high court decisions, Assembly Bill 2274 encourages but [**885] [***298] does not mandate that an unemancipated minor consult her parents prior to obtaining an abortion. (See, e.g., *H. L. v. Matheson*, *supra*, 450 U.S. at pp. 409-410 [101 S. Ct. at pp. 1171-1172]; *Bellotti II*, *supra*, 443 U.S. at pp. 640-641, 648 [99 S. Ct. at pp. 3046-3047, 3050-3051] (plur. opn. of Powell, J.)) The bypass procedure established by Assembly Bill 2274 reflects a delicate, time-honored balancing of the privacy interests of the unemancipated minor, the liberty interests of her parents, and the state's compelling interest in her health and welfare, both physical and emotional. For these reasons, it does not implicate any "reasonable expectation of privacy."

C. Serious Invasion of a Privacy Interest

The third essential element of a state constitutional cause of action for invasion of privacy is a "[s]erious invasion of [a] privacy interest[.]" (*Hill*, *supra*, 7 Cal. 4th at p. 37, italics omitted.) "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual [****302] or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (*Ibid.*; see also *Heller v. Norcal Mutual Ins. Co.*, *supra*, 8 Cal. 4th at p. 44 [same].)

The plurality begins its analysis of this element by reiterating "that this element is intended simply to screen out intrusions on privacy that are de minimis or insignificant." (Plur. opn., *ante*, at p. 339, quoting *Loder*, *supra*, 14 Cal. 4th at p. 895, fn. 22 (lead opn. of George, C. J.)) As noted earlier, this reincarnation of *Hill* eviscerates the requirement that an actionable invasion of privacy constitute an "egregious breach of . . . social norms." (See *ante*, at pp. 427-428.) The plurality's analysis of this element is faulty in a number of other respects as well.

For instance, the plurality asserts that Assembly Bill 2274 "significantly intrudes upon autonomy privacy" by "den[ying] a pregnant minor, who believes it is in her best interest to terminate her pregnancy rather than have a child at such a young age, control over [****303] her own destiny." (Plur. opn., *ante*, [*439] at p. 339.) As explained above, however, the statute merely shifts the determination of whether an individual unemancipated minor has the capacity to give informed consent from a physician to a disinterested judicial officer. Far from denying a mature unemancipated minor "control over her own destiny" (*ibid.*), the statute actually *guarantees* her the right to make her own abortion decision. (See *ante*, at pp. 433-434.) As such, Assembly Bill 2274 surely does not effect a serious invasion of a

privacy interest. (See *Washington v. Glucksberg*, *supra*, __ U.S. at p. __ [117 S. Ct. at p. 2271] ["That many of the [constitutionally protected] rights and liberties . . . sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."].)

The plurality also maintains that "the statutory requirement that the minor obtain parental consent or judicial authorization will delay the minor's access to a medically safe abortion in many instances, and thereby will increase, at least to some extent, the health risks posed by an [****304] abortion." (Plur. opn., *ante*, at p. 339.) Once again, the plurality fails to appreciate the nature of a facial challenge to a statute. The fact that "in many instances" the statute may increase "at least to some extent" the health risks associated with an abortion (*ibid.*) is insufficient to establish the facial unconstitutionality of the statute. (See *ante*, at pp. 421-424.) In fact, the United States Supreme Court has considered and rejected this very line of argument. In *Ohio v. Akron Center for Reproductive Health* (1990) 497 U.S. 502 [110 S. Ct. 2972, 111 L. Ed. 2d 405], the plaintiffs argued that a judicial bypass procedure was inadequate because, under certain circumstances, it could result in a three-week delay, which "could increase by a substantial measure both the [**886] [***299] costs and the medical risks of an abortion." (*Id.* at p. 513 [110 S. Ct. at p. 2980].) The high court rejected this argument, reasoning as follows: "[B]ecause [plaintiffs] are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.' [Citation.] The Court of Appeals should not have invalidated [****305] the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur. [Citation.] Moreover, under our precedents, the mere possibility that the procedure may require up to 22 days in a rare case is plainly insufficient to invalidate the statute on its face." (*Id.* at p. 514 [110 S. Ct. at pp. 2980-2981].)

VI. APPROPRIATE LEVEL OF SCRUTINY

In my view, plaintiffs have failed to establish each of the three requisite elements of a state constitutional cause of action for invasion of privacy, and, for that reason alone, defendants should prevail. (See *Hill, supra*, 7 Cal. 4th at p. 40.) Because the plurality concludes otherwise, it is necessary [**440] to examine the state's affirmative defense. (*Ibid.*) Thus, I turn to the appropriate level of scrutiny to which Assembly Bill 2274 should be subjected.

The plurality concludes that the statute must be subjected to strict scrutiny. The significance of the plurality's decision to apply a "compelling interest" test cannot be overstated. Whether an interest is protected, what level of scrutiny is appropriately applied to any infringement, and who has the burden of proof depend on how the interest [****306] is characterized in the first instance. As we recognized in *Hill*, "strict scrutiny generally functions as a judicial 'trump card,' invalidating any attempt at state regulation." (*Hill, supra*, 7 Cal. 4th at p. 30; see also *id.* at p. 37.) It also shifts the burden of proof. Instead of deferring to legislative findings of fact, the analysis begins by assuming the interest in question is constitutionally protected and requires the state to *prove* normative presuppositions that are incapable of objective proof. (Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy--Balancing the Individual and Social Interests* (1983) 81 Mich. L.Rev. 463, 548-550; see also *Dunn v. Blumstein* (1972) 405 U.S. 330, 363-364 [92 S. Ct. 995, 1013, 31 L. Ed. 2d 274] (dis. opn. of Burger, C. J.) ["Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection."].) The plurality's decision to apply a "compelling interest" test is thus tantamount to [****307] declaring Assembly Bill 2274 unconstitutional. (See Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses* (1973) 75 W.Va. L.Rev. 213, 232 [The "compelling interest"

test imposes such a severe burden of justification on the state as to be "a statement of a conclusion rather than a measure of constitutionality.")

The plurality justifies its decision to apply a "compelling interest" test, the highest level of constitutional scrutiny, by quoting the following passage from *Hill*: "[T]he particular context, i.e., the specific kind of privacy interest involved and the nature and the seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. *Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a "compelling interest" must be present to overcome the vital privacy interest.* If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.' " (Plur. opn., *ante*, at p. 340, adding italics, [****308] quoting [Hill, supra, 7 Cal. 4th at p. 34](#); see also plur. opn., *ante*, at pp. 329-330.)

Based on the italicized portion of the quotation, the plurality concludes that a "compelling interest" test is required whenever an interest fundamental to personal autonomy is at stake. The full passage from *Hill* does not [*441] support this proposition. Rather, it requires that "the nature and seriousness of [**887] [***300] the invasion and any countervailing interests" also be taken into account in determining the appropriate level of scrutiny. ([Hill, supra, 7 Cal. 4th at p. 34](#).) Significantly for the present purposes, where the privacy interest at stake is "in bona fide dispute," a general balancing test is employed. (*Ibid.*)

As discussed above, Assembly Bill 2274 burdens an unemancipated minor's privacy interest only by requiring her to convince a disinterested judicial officer, rather than a physician, that she has the capacity to give informed consent. The statute guarantees a mature unemancipated minor the right to make her own abortion decision. (See *ante*, at pp. 433-434.) Under these circumstances, "the nature and seriousness of the invasion" [****309] do not

warrant the application of a "compelling interest" test. ([Hill, supra, 7 Cal. 4th at p. 34](#); see also *id. at p. 79* (dis. opn. of Mosk, J.) ["[C]onduct adversely affecting, but not abridging, an established right of privacy may be allowed if reasonable."]; *id. at pp. 85, 107*.) Nor does the fact that Assembly Bill 2274 encourages an unemancipated minor to consult with her parents warrant the application of a "compelling interest" test. Rather, in this regard, the statute effects a reasonable accommodation of "countervailing interests." ([Hill, supra, 7 Cal. 4th at p. 34](#).) To put it another way, at most the privacy interest at stake in this case is "in bona fide dispute," and, hence, a general balancing test ought to apply. (*Ibid.*)

The fundamental problem with the plurality's approach to constitutional jurisprudence is that it allows the courts to topple every cultural icon, to dismiss all societal values, and to become the final arbiters of traditional morality in a context in which their view of wisdom cannot be challenged. "[T]he judiciary can change the most fundamental patterns of our social character with no real proof that the change [****310] will be for the better--or, in the long run, even tolerable." (Hafen, [The Constitutional Status of Marriage, Kinship, and Sexual Privacy--Balancing the Individual and Social Interests, supra, 81 Mich. L.Rev. at p. 550](#).) That is why legislatures must be accorded broad deference on issues as to which reasonable minds can differ and why courts must exercise reasoned judgment and self-restraint.

Balance is the Holy Grail for courts in a constitutional system: to strike a balance between the will of majorities, the rights of minorities, and the insatiable appetite of political institutions for power. To preserve a healthy equilibrium in a world hell-bent for absolutes, that is the judiciary's crucial and difficult role. Today, the plurality abandons this historic and irreplaceable legacy with a shrug and without a backward glance.

[*442] VII. REVIEW OF ASSEMBLY BILL

2274 UNDER THE APPROPRIATE LEVEL OF SCRUTINY

A. Deference to the Legislative Process

If there were any doubt that a "compelling interest" test functions as a judicial trump card, the plurality promptly dispels it by expressly disavowing any requirement of deference to the legislative process. Thus, the [****311] plurality explains, "[t]he ordinary deference a court owes to any legislative action *vanishes* when constitutionally protected rights are threatened." (Plur. opn., *ante*, at p. 349, italics added, quoting *Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal. 3d 501, 514 [217 Cal. Rptr. 225, 703 P.2d 1119].) "Vanishing" acts may be appropriate to the lexicon of a magician whose task is to make things disappear. It cannot seriously be used to describe the work of a judiciary cognizant of the inherent limits of our constitutional scheme. Smoke and mirrors should be no part of our repertoire.

Even if this sweeping principle of "vanishing" deference were correct in the First Amendment context, no rationale justifies extending the principle beyond that limited realm. (See *Professional Engineers v. Department of Transportation* (1997) 15 Cal. 4th 543, 577-578 [63 Cal. Rptr. 2d 467, 936 P.2d 473] (dis. opn. of Baxter, J.); see also *id.* at p. 605 (dis. opn. of Ardaiz, J.)) As we recently observed [**888] [***301] in *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal. 4th 1243, 1252 [48 Cal. Rptr. 2d 12, 906 P.2d 1112], "[i]n considering [****312] the constitutionality of a legislative act we *presume* its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal Constitution is *clear and unquestionable*, we must uphold the Act. [Citations.]" (Italics added; see also *People v. Sanders* (1990) 51 Cal. 3d 471, 495 [273 Cal. Rptr. 537, 797 P.2d 561]; *County of Sonoma v. State Energy Resources Conservation etc. Com.* (1985) 40 Cal. 3d 361, 368 [220 Cal. Rptr. 114, 708 P.2d 693]; *California Housing Finance Agency v. Elliott* (1976) 17 Cal.

3d 575, 594 [131 Cal. Rptr. 361, 551 P.2d 1193]; *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal. 2d 536, 544-545 [63 Cal. Rptr. 21, 432 P.2d 717].) " 'All presumptions and intendments favor the validity of a statute and *mere doubt* does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality *clearly, positively and unmistakably appears*. [Citations.]" ' " (*In re Ricky H.* (1970) 2 Cal. 3d 513, 519 [86 Cal. Rptr. 76, 468 P.2d 204], italics added.) Likewise, courts "presume that the legislature acted with [****313] integrity, and with an honest purpose to keep within the restrictions and limitations laid down by the constitution. The legislature is a coordinate department of the government, invested with high and responsible duties, and it must be presumed that it has considered and discussed the [*443] constitutionality of all measures passed by it." (*Beach v. Von Detten* (1903) 139 Cal. 462, 465 [73 P. 187].)⁶

[****314] Deference is especially warranted in this case. First, the Legislature drafted Assembly Bill 2274 to comply with the guidelines set out in several United States Supreme Court decisions and heeded that court's advice to act with "particular sensitivity" in this arena. (*Bellotti II, supra*, 443

⁶The plurality mischaracterizes *Gregg v. Georgia* (1976) 428 U.S. 153 [96 S. Ct. 2909, 49 L. Ed. 2d 859] as an example of the deference courts owe legislatures in *nonconstitutional* cases (plur. opn., *ante*, at p. 349, fn. 25), suggesting such deference does not extend to *constitutional* cases. *Gregg* actually addressed an *Eighth Amendment* claim that capital punishment amounted to cruel and unusual punishment because it did not deter crime. The court acknowledged that "there is no convincing empirical evidence either supporting or refuting this view" (*Gregg v. Georgia, supra*, 428 U.S. at p. 185 [96 S. Ct. at p. 2930] (plur. opn. of Stewart, Powell, and Stevens, JJ.)), but nonetheless rejected the claim. "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. [Citation.] . . . [P] In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is *clearly wrong*." (*Id.* at p. 186 [96 S. Ct. at p. 2931], italics added.)

U.S. at p. 642 [99 S. Ct. at pp. 3047-3048] (plur. opn. of Powell, J.).) "[O]ur past cases establish that the presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind. (See, e.g., San Francisco v. Industrial Acc. Com. (1920) 183 Cal. 273, 279 [191 P. 26].) In such a case, the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision. Although the ultimate constitutional interpretation must rest, of course, with the judiciary (see Marbury v. Madison (1803) 5 U.S. (1 Cranch) 137, 176-180 [2 L. Ed. 60, 73-74]), a focused legislative judgment on the question enjoys significant weight and deference by the courts." (Pacific Legal Foundation v. Brown, supra, 29 Cal. 3d at p. 180.) [****315]

Second, before enacting Assembly Bill 2274, the Legislature considered and evaluated much of the same conflicting empirical evidence the trial court later purported to resolve. The Senate Committee on Health and Human Services, for example, considered competing legislative analyses. One lambasted the failure of parental involvement statutes in states such as Massachusetts and Minnesota; the other praised their success. (Compare Legis. Analysis Supporting Assem. Bill No. 2274, Sen. Com. on Health & Human Services, Aug. 19, 1987, pp. 5-7, with Staff Analysis of Assem. Bill No. 2274, Sen. Com. on Health & Human Services, July 15, 1987, pp. 4-5.) Because much of the evidence [**889] [***302] related to normative presuppositions not subject to objective proof, resolution of any conflicts lay within the province of the Legislature, a collective and accountable body.

[*444] "It is not for us to resolve empirical uncertainties underlying state legislation, save in the *exceptional* case where that legislation *plainly impinges* upon rights protected by the Constitution itself." (Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49, 60 [93 S. Ct. 2628, 2936-2937, 37 L. [***316] Ed. 2d 446], italics added & fn.

omitted; see also Hill, supra, 7 Cal. 4th at p. 47 ["Plaintiffs cite no authority imposing a 'scientific' burden of proof on a defendant in an invasion of privacy case; we have located none."].) Unless such an impingement plainly appears, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." (FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 315 [113 S. Ct. 2096, 2102, 124 L. Ed. 2d 211].) "[T]he proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and . . . Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." (Tyson & Brother v. Banton (1927) 273 U.S. 418, 446 [47 S. Ct. 426, 433-434, 71 L. Ed. 718, 58 A.L.R. 1236] (dis. opn. of Holmes, J.).)

Finally, in addition to the state's compelling interest in the health and welfare of an unemancipated minor, [****317] this case implicates other, competing constitutional interests--specifically, the minor's privacy interest and the liberty interests of her parents. "[H]ow are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?--who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. . . . History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures. [P] Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the [legislature]." (Dennis v. United States (1951) 341 U.S. 494, 525 [71 S. Ct. 857, 875, 95 L. Ed. 1137] (conc. opn. of Frankfurter, J.).)

"Our right to pass on the validity of legislation is now too much part of our constitutional system to be brought into question. But the implications [****318] of that right and the conditions for its exercise must constantly be kept in mind and vigorously observed. Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete [*445] disinterestedness." (*A. F. of L. v. American Sash Co. (1949) 335 U.S. 538, 556-557 [69 S. Ct. 258, 267, 93 L. Ed. 222, 6 A.L.R.2d 481]* (conc. opn. of Frankfurter, J.). "Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its [****319] functions can be assumed by this Court only in disregard of the historic limits of the Constitution." (*Id. at p. 557.*)

B. The Court as a Super-Legislature

The plurality presumes to disregard the limits of its constitutional role because numerous "analogous" statutes authorize a minor to obtain medical care or make other fundamental decisions for herself and her child without parental consent. Based on these statutes, the plurality concludes Assembly [**890] [***303] Bill 2274 is not necessary either to protect the health of a pregnant minor or to protect the minor's relationship with her parents. (See plur. opn., *ante*, at pp. 353-354.) I cannot agree with this mode of analysis.

The plurality itself acknowledges abortion is fundamentally different in that it includes a unique moral and philosophical dimension: "[T]he decision whether to continue or terminate [a] pregnancy has . . . a substantial effect on a pregnant minor's control over her personal bodily integrity, has . . . serious long-term consequences in determining her life choices, [and] is . . . central to the preservation of her ability to define and adhere to her ultimate values regarding the [****320] meaning of human existence and life." (Plur. opn., *ante*, at p. 337; see also *id. at pp. 313-314, 332-334*; *ante*, at pp. 433-436.) "Though [a mature unemancipated minor] has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. . . . It follows that States are free to enact laws to provide a reasonable framework for [her] to make a decision that has such profound and lasting meaning." (*Casey, supra, 505 U.S. at pp. 872-873 [112 S. Ct. at p. 2818]* (plur. opn. of O'Connor, Kennedy, and Souter, JJ.). "What is at stake is the [mature unemancipated minor's] right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express [their views] are permitted, if they are [*446] not a substantial obstacle to [her] exercise of the right to choose." (*Id. at p. 877 [112 S. Ct. at p. 2821]*.)

Even the decisions to bear a child or to put a child up for adoption-- [****321] decisions that implicate similar concerns--are not truly analogous, for a state has an independent and compelling interest in the health and welfare of the unemancipated minor's child. In order to further this interest, our Legislature could reasonably conclude that it was necessary to ensure an unemancipated minor unrestricted access to prenatal care and the ability to give her child up for adoption if, for whatever reason, she deems herself unable or unwilling to care for it. In fact, plaintiffs' own expert testified that "entry into early prenatal

care is absolutely critical for a healthy outcome of [a] pregnancy."

This case is an excellent example of the folly of courts in the role of philosopher kings. Here, the trial court "found" there is no difference in the decisionmaking capacities of minors and adults. Under the usual rules, this conclusion would be insulated from appellate review if the record provides any support for the finding. There is only one problem. The "finding" is contrary to what every adult in the country knows from experience. The greatest distance between two points is time. Information is not the same thing as knowledge. Knowledge is not wisdom. And wisdom [****322] we gain only with time. We have a vastly richer perspective from which to judge our actions at 45 than at 15.

A trial judge may "find" that ages 15 and 45 are indistinguishable, but that will never make it true.

This is not to say that such truths are capable of proof. Does the death penalty deter? Does pornography deform? Does a terminally ill patient have a right to die? Our laws reflect, as they must, working assumptions on which there is a general consensus. These broadly conceived principles, captured under the rubric of culture and tradition, are not empirically determined. They represent value judgments growing out of the collective conscience of the people, taking authority from custom itself. The proponents of these traditional understandings--including the general incapacity of minors--cannot prove their truth. But neither can their opponents prove their falsity; they can only impose the tyranny of the anecdote.

Certainly, in matters of normative judgment, no court should be in the position to supplant a society's collective understanding, distilled through experience and expressed in legislative enactments, on the basis of the [**891] [***304] evidence presented [****323] in a single case. "Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and [*447] sacred." (Madison et al., *The Federalist*

No. 20 (Rossiter edit. 1961) p. 138.) But, as this case demonstrates, truth is not the same thing as proof. Apparently, the court believes profound questions about the way we live our lives together should be resolved not on the basis of collective experience but on the basis of expert testimony.

When fundamentally moral and philosophical issues are involved and the questions are fairly debatable, the judgment call belongs to the Legislature. The reasons are both pragmatic and political. Legislatures are in the business of accommodating interests and building consensus. They represent the will of the people. Courts are in the business of articulating inviolable rights that cannot be accommodated and are shielded from the will of the majority.

The government may not extinguish constitutional rights. But, when the Legislature accommodates competing constitutional claims in a way that is appropriate to the historical and cultural context, congruent with long-standing tradition and respectful of all interests, [****324] courts have nothing more to say.

VIII. CONCLUSION

"A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The State is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, society's most intimate association. It 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 statute in issue here is a rational way to further those ends. It 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, a young woman will

16 Cal. 4th 307, *447; 940 P.2d 797, **891; 66 Cal. Rptr. 2d 210, ***304; 1997 Cal. LEXIS 4411, ****324

receive guidance and understanding from a parent."
([*Ohio v. Akron Center for Reproductive Health*](#),
[*supra*](#), 497 U.S. at p. 520 [110 S. Ct. at pp. 2983-
2984] (plur. opn. of Kennedy, [****325] J.).)

I dissent.



Caution

As of: October 18, 2026 1:40 AM Z

Barrows v. Jackson

Supreme Court of the United States

April 28-29, 1953, Argued ; June 15, 1953, Decided

No. 517

Reporter

346 U.S. 249 *; 73 S. Ct. 1031 **; 97 L. Ed. 1586 ***; 1953 U.S. LEXIS 1902 ****

BARROWS ET AL. v. JACKSON

respondent grantor and the homeowners.

Prior History: [****1] CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

Petitioners sued respondent in a California state court to recover damages for an alleged breach of a racial restrictive covenant. The trial court sustained a demurrer to the complaint. The District Court of Appeal affirmed. [112 Cal. App. 2d 534, 247 P. 2d 99](#). The State Supreme Court denied a hearing. This Court granted certiorari. *345 U.S. 902*. Affirmed, p. 260.

Disposition: [112 Cal. App. 2d 534, 247 P. 2d 99](#), affirmed.

Core Terms

covenant, non-caucasians, restrictive covenant, state action, state court, constitutional right, impair, equal protection of the law, coercion, constitutional limits, federal constitution, coerce, occupy

Case Summary

Procedural Posture

Petitioner homeowners sought review of a judgment of the District Court of Appeal of California, Second Appellate District, which affirmed a demurrer to the homeowners' action at law to recover damages resulting from a breach of a restrictive covenant agreement entered into by

Overview

The homeowners sued the grantor for damages for a breach of a restrictive covenant agreement entered into between the parties. Under the terms of the restrictive covenant, the signors and their successors promised that no part of the real property would ever be used or occupied by persons who were not white. The homeowners brought suit after the grantor conveyed her property to minorities and failed to include the restrictive covenant in the deed. Affirming the lower court's order sustaining a demurrer to the petition, the Court held that because enforcement of the restrictive covenant at law would have constituted state action, the state's enforcement would have denied minorities of their right to enjoy property on the same terms as whites, so that said denial of equal protection of the law would be in violation of the [Fourteenth Amendment](#). While noting that the grantor would not be constitutionally injured, the Court permitted the grantor's assertion of others' rights where the need to protect fundamental rights would be denied if the action for damages was maintained.

Outcome

The Court affirmed the judgment sustaining the demurrer to the homeowners' petition.

LexisNexis® Headnotes

Business & Corporate

Compliance > Contracts > Types of

Contracts > Covenants

Contracts Law > Types of

Contracts > Covenants

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Real Property

Law > Encumbrances > Restrictive

Covenants > Enforcement of Restrictive
Covenants

Constitutional Law > Equal
Protection > National Origin & Race

Real Property

Law > Encumbrances > Restrictive

Covenants > General Overview

HN1 Types of Contracts, Covenants

Racial restrictive covenants can not be enforced in equity against Negro purchasers because such enforcement would constitute state action denying equal protection of the laws to the Negroes, in violation of the [*Fourteenth Amendment to the federal Constitution*](#).

Constitutional Law > ... > Case or
Controversy > Constitutionality of
Legislation > General Overview

Constitutional Law > ... > Case or
Controversy > Standing > General Overview

HN2 Case or Controversy, Constitutionality of Legislation

A person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation.

Constitutional Law > Congressional Duties &
Powers > Contracts Clause > General Overview

HN3 Congressional Duties & Powers, Contracts Clause

The [*U.S. Const. art. I, § 10*](#), protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts.

Civil

Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > Equal Protection > Nature
& Scope of Protection

HN4 Justiciability, Standing

The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to other individuals.

Lawyers' Edition Display

Summary

The owners of residential estates in the same neighborhood in Los Angeles entered into a covenant, running with the land, restricting the use and occupancy thereof to persons of the white or Caucasian race, and obligating the signers to incorporate this restriction in all transfers of land. For breaching the covenant in both respects, an action at law for damages was brought against defendant by other signers. No action was taken against the non-Caucasian occupants. The state courts decided in favor of the defendant in view of the holding in [*Shelley v. Kramer, 334 US 1, 92 L ed 1161, 68 S Ct 836, 3 ALR2d 441*](#), that racial restrictive covenants could not be enforced in equity against Negro purchasers because such enforcement would constitute state action denying

equal protection of the laws to the Negroes, in violation of the [Fourteenth Amendment](#).

Relying upon the principles announced in the Shelley Case, six members of the Supreme Court, in an opinion by Minton, J., held that a restrictive covenant could not be enforced at law by a suit for damages against a co-covenantor who broke the covenant. Recognizing that ordinarily one may not claim standing in the Supreme Court to vindicate the constitutional rights of some third party, the majority thought that a departure from that rule was justified in the situation at hand, in which it was the action of a state court which might result in a denial of constitutional rights to non-Caucasians and in which it would be difficult, if not impossible, for these persons to present their grievance before any court. The refusal to enforce the covenant was held not to impair the obligation of contracts in violation of the constitutional prohibition nor to constitute a denial of due process or equal protection of the laws.

Vinson, Ch. J., dissented on the ground that the defendant had not shown that she was, herself, a victim of unconstitutional discrimination. In any event, he thought that the absence of any direct injury to any identifiable non-Caucasian was decisive.

Reed and Jackson, JJ., did not participate.

Headnotes

CONSTITUTIONAL LAW §314 > covenant restricting use and occupancy of real property -- court action as state action. -- > Headnote: [LEdHN\[1\]](#) [1]

A state court's award of damages in an action for breach of a covenant restricting the use and occupancy of real property to persons of the Caucasian race is state action under the [Fourteenth Amendment](#).

CIVIL RIGHTS §7 > equal protection -- awarding damages for breach of restrictive covenant. --

> Headnote:

[LEdHN\[2\]](#) [2]

If a state court awards damages for breach of a covenant restricting the use and occupancy of real property to persons of the Caucasian race, non-Caucasians, unidentified but identifiable, are deprived of equal protection of the laws in violation of the [Fourteenth Amendment](#).

APPEAL AND ERROR §703 > action for breach of restrictive covenant -- defendant's standing to rely on invasion of constitutional rights of others. --

> Headnote:

[LEdHN\[3\]](#) [3]

In defense to an action for the breach of a covenant restricting the use and occupancy of real property to persons of the Caucasian race, a defendant may, in the Supreme Court of the United States, rely on the invasion of the constitutional rights of non-Caucasians, although no non-Caucasian is before the court.

APPEAL AND ERROR §703 > standing to vindicate constitutional rights of some third party. -- > Headnote:

[LEdHN\[4\]](#) [4]

Ordinarily, one may not claim standing in the Supreme Court of the United States to vindicate the constitutional rights of some third party. But this rule does not apply in an action for breach of a covenant restricting the use and occupancy of real property to persons of the Caucasian race, in which it is the action of the state court which might result in a denial of constitutional rights and in which it

would be difficult, if not impossible, for the non-Caucasians, whose rights are asserted by the defendant to the action, to present their grievance before any court.

CIVIL RIGHTS §7 > enforcement of restrictive covenant by action for damages. -- > Headnote:
[LEdHN\[5\]](#) [5]

The United States Supreme Court will not permit or require a state to coerce a defendant to respond in damages for failure to observe a covenant restricting the use and occupancy of real property to persons of the Caucasian race.

CIVIL RIGHTS §7 > PUBLIC POLICY §1 > enforcement of restrictive covenant -- in federal jurisdiction. -- > Headnote:
[LEdHN\[6\]](#) [6]

A covenant restricting the use and occupancy of real property to persons of the Caucasian race cannot be enforced in a federal jurisdiction because such a covenant is contrary to public policy.

CONSTITUTIONAL LAW §309 > impairing obligation of contracts -- by court's refusal to enforce restrictive covenant. -- > Headnote:
[LEdHN\[7\]](#) [7]

A state court's refusal to enforce a covenant restricting the use and occupancy of real property to persons of the Caucasian race does not violate the constitutional guaranty against impairing the obligation of a contract.

CONSTITUTIONAL LAW §309 > impairment of obligation of contracts -- by legislative action only. -- > Headnote:
[LEdHN\[8\]](#) [8]

The constitutional prohibition against impairment of contracts is directed against legislative action only, and not against action by judgments of courts.

CONSTITUTIONAL LAW §488 > equal protection -- due process -- refusal to enforce restrictive covenant. -- > Headnote:
[LEdHN\[9\]](#) [9]

The signers of a covenant restricting the use and occupancy of real property to persons of the Caucasian race are not denied due process or equal protection of the laws by the failure of the courts to enforce the covenant.

CONSTITUTIONAL LAW §313 > equal protection of laws. -- > Headnote:
[LEdHN\[10\]](#) [10]

The Constitution confers upon no individual the right to demand action by a state which results in the denial of equal protection of the laws to other individuals.

Syllabus

The enforcement of a covenant forbidding use and occupancy of real estate by non-Caucasians, by an action at law in a state court to recover damages from a co-covenantor for a breach of the covenant, is barred by the [Fourteenth Amendment of the Federal Constitution](#). Pp. 251-260.

(a) The action of a state court in thus sanctioning a racial restrictive covenant would constitute state

action within the prohibition of the [Fourteenth Amendment](#). P. 254.

(b) State action in allowing damages for breach of a covenant not to permit non-Caucasians [****2] to use and occupy their property would deprive such non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the [Fourteenth Amendment](#). P. 254.

(c) The principle that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation has no application to the instant case, in which respondent has been sued for damages totaling \$ 11,600, and in which a judgment against respondent would constitute a direct pocketbook injury to her. Pp. 254-256.

(d) Under the peculiar circumstances of this case, the reasons which underlie the rule denying standing to raise another's constitutional rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. P. 257.

(e) The principle that the right to equal protection of the laws is a "personal" right, guaranteed to the individual rather than to groups or classes, is not here violated, since it is not non-Caucasians as a group whose rights are asserted by the defendant in the damages action, but the rights of particular non-Caucasian would-be users [****3] of restricted land. Pp. 259-260.

(f) The provision of Art. I, § 10 of the Federal Constitution, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts," is not violated by the refusal of a state court to enforce a racial restrictive covenant, since that provision is directed against legislative action only, not against the judgments of courts. P. 260.

(g) The plaintiffs in an action for damages for breach of a racial restrictive covenant are not denied due process and equal protection of the laws

by the state court's refusal to enforce the covenant, since the Constitution confers upon no individual the right to demand action by the State which would result in the denial of equal protection of the laws to others. P. 260.

Counsel: J. Wallace McKnight argued the cause for petitioners. With him on the brief were John C. Miles and Charles Leland Bagley.

Loren Miller argued the cause for respondent. With him on the brief were Thurgood Marshall and Franklin H. Williams.

Briefs of amici curiae urging reversal were filed by John W. Preston for Affiliated Neighbors et al.; and Walter H. Pollmann, Gerald L. Seegers and Paul M. Gerwitz, Jr. for O'Fallon [****4] Park Protective Association et al.

Briefs of amici curiae urging affirmance were filed by A. L. Wirin for the American Civil Liberties Union (Southern California Branch); by Fred Okrand for the Greater Los Angeles C. I. O. Council, Saburo Kido for the Japanese American Citizens' League, and David Ziskind for the Los Angeles Urban League et al.; by Phineas Indritz for the American Veterans Committee, Inc.; by Arnold Forster, Harry Graham Balter, Mr. Ziskind and Theodore Leskes for the American Jewish Committee et al.; and by Irving Kane, Lewis H. Weinstein, Will Maslow, Leo Pfeffer and Joseph B. Robison for the National Community Relations Advisory Council.

Judges: Vinson, Warren, Black, Frankfurter, Douglas, Burton, Clark, Minton; Reed and Jackson took no part in the consideration or decision of this case.

Opinion by: MINTON

Opinion

[*251] [**1032] [***1592] MR. JUSTICE MINTON delivered the opinion of the Court.

This Court held in [*Shelley v. Kraemer*, 334 U.S. 1](#), that [HN1](#) racial restrictive covenants could not be enforced in equity against Negro purchasers because such [\[****5\]](#) enforcement would constitute state action denying equal protection of the laws to the Negroes, in violation of the [\[***1593\]](#) [Fourteenth Amendment to the Federal Constitution](#). The question we now have is: Can such a restrictive covenant be enforced at law by a suit for damages against a co-covenantor who allegedly broke the covenant?

Petitioners ¹ sued respondent at law for damages for breach of a restrictive covenant the parties entered into as owners of residential real estate in the same neighborhood in Los Angeles, California. The petitioners' complaint alleged in part:

"That by the terms of said Agreement each of the signers promised and agreed in writing and bound himself, his heirs, executors, administrators, successors, and assigns, by a continuing covenant that no part of his said real property, described therein, should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race, and also agreed and promised in writing that this restriction should be incorporated in all papers and transfers of lots or parcels of land hereinabove referred to; provided, however, that said restrictions should not prevent the employment by [\[****6\]](#) [\[*252\]](#) the owners or tenants of said real property of domestic servants or other employees who are not wholly of the white or Caucasian race; provided, further, however, that such employees shall be permitted to occupy said real property only when actively [\[**1033\]](#) engaged in such employment. That said Agreement was agreed to be a covenant running with the land. That each provision in said Agreement was for the benefit for all the lots therein described."

The complaint further alleged that respondent broke the covenant in two respects: (1) by conveying her

real estate without incorporating in the deed the restriction contained in the covenant; and (2) by permitting non-Caucasians to move in and occupy the premises. The trial court sustained a demurrer to the complaint, the District Court of Appeal for the Second Appellate District affirmed, [112 Cal. App. 2d 534, 247 P. 2d 99](#), and the Supreme [\[****7\]](#) Court of California denied hearing. We granted certiorari, 345 U.S. 902, because of the importance of the constitutional question involved and to consider the conflict which has arisen in the decisions of the state courts since our ruling in the *Shelley* case, *supra*. Like the California court in the instant case, the Supreme Court of Michigan sustained the dismissal of a claim for damages for breach of a racial restrictive covenant, [Phillips v. Naff](#), 332 Mich. 389, 52 N. W. 2d 158. See also *Roberts v. Curtis*, 93 F.Supp. 604 (Dist. Col.). The Supreme Court of Missouri reached a contrary result, [Weiss v. Leason](#), 359 Mo. 1054, 225 S. W. 2d 127, while the Supreme Court of Oklahoma has held that a claim for damages may be maintained against a white seller, an intermediate straw man, and a non-Caucasian purchaser for a conspiracy to violate the covenant, [Correll v. Earley](#), 205 Okla. 366, 237 P. 2d 1017.

[\[*253\]](#) The trial court in the case here held that a party to a covenant restricting use and occupancy ² of real estate to Caucasians could not maintain a suit at law against [\[****8\]](#) a co-covenantor for breach of the covenant because of our ruling in [Shelley, supra](#). In *Shelley*, this Court held that the action of the lower courts in granting equitable relief in the enforcement of such covenants constituted state action denying to Negroes, against whom the covenant [\[***1594\]](#) was sought to be enforced, equal protection of the laws in violation of the [Fourteenth Amendment](#). This Court said:

²There is no question of restraint of sale here, as agreements restraining sale of land to members of defined racial groups have long been held unenforceable in California because they contravened the State's statutory rule and public policy against restraints on alienation. [Wayt v. Patee](#), 205 Cal. 46, 269 P. 660; *Title Guarantee & Trust Co. v. Garrett*, 42 Cal. App. 152, 183 P. 470.

¹Petitioner Pikaar was not a signer of the covenant but is successor in interest of a signer.

"We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the [Fourteenth Amendment](#). So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. . . ." [334 U.S. 1, 13](#).

[****9] [LEdHN\[1\]](#) [1]That is to say, the law applicable in that case did not make the covenant itself invalid, no one would be punished for making it, and no one's constitutional rights were violated by the covenantor's voluntary adherence thereto. Such voluntary adherence would constitute individual action only. When, however, the parties cease to rely upon voluntary action to carry out the covenant and the State is asked to step in and give its sanction to the enforcement of the covenant, the first question [*254] that arises is whether a court's awarding damages constitutes state action under the [Fourteenth Amendment](#). To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use [****10] her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages. The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in [Shelley, supra](#).

[LEdHN\[2\]](#) [2]The next question to emerge is

whether the state action in allowing damages deprives anyone of rights protected by the Constitution. If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation [****11] of the [Fourteenth Amendment](#). See [Shelley, supra](#).

[LEdHN\[3\]](#) [3]But unlike [Shelley, supra](#), no non-Caucasian is before the Court claiming to have been denied his constitutional rights. May respondent, whom petitioners seek to coerce by an action to pay damages for her failure to honor her [*255] restrictive covenant, rely on the invasion of the rights of others in her defense to this action?

[***HR4] [4] Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party. Reference to this rule is made in varied situations. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, [341 U.S. 123, 149-154](#) (concurring opinion). The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to "cases" and "controversies." See [Coleman v. Miller](#), [307 U.S. 433, 464](#) (concurring opinion). [***1595] Apart from the jurisdictional requirement, this Court has developed a complementary [****12] rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. See [Ashwander v. Tennessee Valley Authority](#), [297 U.S. 288, 346-348](#) (concurring opinion). The common thread underlying both requirements is that [HN2](#) a person cannot challenge the constitutionality of a statute

unless he shows that he himself is injured by its operation.³ This principle has no application to **[**1035]** the instant **[*256]** case in which respondent has been sued for damages totaling \$ 11,600, and in which a judgment against respondent would constitute a direct, pocketbook injury to her.

[**13]** There are still other cases in which the Court has held that even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed. *Bode v. Barrett*, 344 U.S. 583, 585; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576; *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160-161; see also *Tennessee Elec. Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 144.⁴ One reason for this ruling is that the state court, when actually faced with the question, might narrowly construe the

statute to obliterate the objectionable feature, or it might declare the unconstitutional provisions separable. *New York ex rel. Hatch v. Reardon*, *supra*, at 160-161; *Wuchter v. Pizzutti*, 276 U.S. 13, 26-28 (dissenting opinion). It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. Nor are we so ready **[****14]** to frustrate the expressed will of Congress or that **[*257]** of the state legislatures. Cf. *Southern Pacific Co. [***1596] v. Gallagher*, 306 U.S. 167, 172.

This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to **[****15]** raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, 184 Cal. 26, 192 P. 1021.

In other unique situations which have arisen in the past, broad constitutional policy has led the Court to proceed without regard to its usual rule. In *Pierce v. Society of Sisters*, 268 U.S. 510, a state statute required all parents (with certain immaterial exceptions) to send their children to public schools. A private and a parochial school brought suit to enjoin enforcement of the act on the ground that it violated the constitutional rights of parents and guardians. No parent or guardian to whom the act applied was a party or before the Court. The Court held that the act was unconstitutional because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v.*

³ See *Frothingham v. Mellon*, 262 U.S. 447, 486-489 (federal taxpayer sought to challenge a federal statute in the enforcement of which federal revenues were applied); *Doremus v. Board of Education*, 342 U.S. 429, 434 (state taxpayer unable to show that there was "a measurable appropriation or disbursement of . . . funds occasioned solely by the [state] activities complained of"); *Tileston v. Ullman*, 318 U.S. 44 (doctor sought a declaratory judgment that a state statute would deprive certain of his patients of their lives without due process of law); *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 410 (landowner sought to challenge the notice provisions for a land registration proceeding in which he had not made himself a party, although he had notice of the proceedings, and even though "his interest in the land would remain unaffected" if the act were subsequently declared unconstitutional); *Gange Lumber Co. v. Rowley*, 326 U.S. 295; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-480; cf. *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U.S. 151, 162-164 (four Negroes who sought to enjoin enforcement of discriminatory state action denied relief on the ground that they failed to allege that they themselves had suffered, or were about to suffer, discriminatory treatment for which there was no adequate remedy at law). And compare *Doremus v. Board of Education*, *supra*, with *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 206, 234.

⁴ Cf. *Goldstein v. United States*, 316 U.S. 114; *Hale v. Henkel*, 201 U.S. 43, 69-70, and the lower court cases which restrict to the person whose premises were invaded the right to have illegally-seized evidence excluded. The rights in these cases are obviously closely linked to the person of the individual.

Society of Sisters, supra, at 534-535. In short, the schools were permitted to assert in defense of [****16] their property rights the constitutional rights of the parents and guardians. See also *Joint Anti-Fascist Refugee Comm. v. McGrath, supra, at 141, 153-154*; *Columbia Broadcasting System v. [**1036] United States, 316 U.S. 407, 422-423*; *Helvering v. [*258] Gerhardt, 304 U.S. 405*; *Truax v. Raich, 239 U.S. 33*; *United States v. Railroad Co., 17 Wall. 322*; *Quong Ham Wah Co. v. Industrial Acc. Comm'n, supra*; cf. *United States v. Jeffers, 342 U.S. 48, 52*; *Federal Communications Comm'n v. Sanders Brothers Radio Station, 309 U.S. 470*; *Wuchter v. Pizzutti, supra*.

LEdHN[5] [5]LEdHN[6] [6]There is such a close relationship between the restrictive covenant here and the sanction of a state court which would punish respondent for not going forward with her covenant, and the purpose of the covenant itself, that relaxation of the rule is called for here. It sufficiently [****17] appears that mulcting in damages of respondent will be solely for the purpose of giving vitality to the restrictive covenant, that is to say, to punish respondent for not continuing to discriminate against non-Caucasians in the use of her property. This Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity, *Shelley, supra*; or that this Court would deny California the right to incorporate in a statute, *Buchanan v. Warley, 245 U.S. 60*; or that could not be enforced in a federal jurisdiction because such a covenant would be contrary to public policy:

"It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action [****1597] has been held

to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against [****18] discriminatory action of federal courts than against such action taken by the courts of the States." *Hurd v. Hodge, 334 U.S. 24, 35-36*. See also *Roberts v. Curtis, supra*.

[*259] Consistency in the application of the rules of practice in this Court does not require us in this unique set of circumstances to put the State in such an equivocal position simply because the person against whom the injury is directed is not before the Court to speak for himself. The law will permit respondent to resist any effort to compel her to observe such a covenant, so widely condemned by the courts, since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use. The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand. She will be permitted to protect herself and, by so doing, close the gap to the use of this covenant, [****19] so universally condemned by the courts.

Petitioners argue that the right to equal protection of the laws is a "personal" right, guaranteed to the individual rather than to groups or classes. For instance, discriminatory denial of sleeping-car and dining-car facilities to an individual Negro cannot be justified on the ground that there is little demand for such facilities by Negroes as a group. *McCabe v. Atchison, T. & S. F. R. Co., 235 U.S. 151, 161-162*. See *Sweatt v. Painter, 339 U.S. 629, 635*. This description of the right as "personal," when considered in the context in which it has been used, obviously has no bearing on the question of standing. Nor do we violate this principle by protecting the rights of persons not identified in this record. For instance, in the *Pierce* case, the persons

whose rights were invoked were identified only as "present and prospective patrons" of the two schools. [Pierce](#) [\[**1037\]](#) [v. Society of Sisters](#), [supra](#), at 535. In the present case, it is not non-Caucasians [\[*260\]](#) as a group whose rights are asserted by respondent, but the rights of particular non-Caucasian would-be [\[****20\]](#) users of restricted land.

[LEdHN\[7\]](#) [\[7\]](#)[LEdHN\[8\]](#) [\[8\]](#)It is contended by petitioners that for California courts to refuse to enforce this covenant is to impair the obligation of their contracts. Article I, § 10, of the Federal Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts" The short answer to this contention is that this provision, as its terms indicate, is directed against legislative action only.

"It has been settled by a long line of decisions, that [HN3](#) the provision of § 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts. . . ." *Tidal Oil Co. v. Flanagan*, 263 U.S. [444](#), [451](#).

[LEdHN\[9\]](#) [\[9\]](#)[LEdHN\[10\]](#) [\[10\]](#)It is finally contended that petitioners are denied due process and equal protection of the laws by [\[****21\]](#) the failure to enforce the covenant. The answer to that proposition is stated by the Court in [Shelley](#), [supra](#), in these words:

[HN4](#) "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the [\[***1598\]](#) laws to other individuals. . . ." [334 U.S. 1](#), [22](#).

The judgment is

Affirmed.

MR. JUSTICE REED and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

Dissent by: VINSON

Dissent

MR. CHIEF JUSTICE VINSON, dissenting.

This case, we are told, is "unique." I agree with the characterization. The Court, by a unique species of [\[*261\]](#) arguments, has developed a unique exception to an otherwise easily understood doctrine. While I may hope that the majority's use of "unique" is but another way of saying that the decision today will be relegated to its precise facts tomorrow, I must voice my dissent.

The majority seems to recognize, albeit ignores, a proposition which I thought was made plain in the *Shelley* case.¹ That proposition is this: these racial [\[****22\]](#) restrictive covenants, whatever we may think of them, are not legal nullities so far as any doctrine of federal law is concerned; it is not unlawful to make them; it is not unlawful to enforce them unless the method by which they are enforced in some way contravenes the Federal Constitution or a federal statute.

Thus, in the *Shelley* case, it was not the covenants which were struck down but judicial enforcement of them against Negro vendees. The question which we decided was simply whether a state court could decree the ouster of Negroes from property which they had purchased and which they were enjoying. We held that it could not. We held that such judicial action, which operated directly against the Negro petitioners and deprived them of their right to enjoy their property solely because of their race, was state action and constituted a denial of "equal protection."²

¹ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

² The state action which we struck down was epitomized in this language, [334 U.S.](#), at 19:

[****23] [*262] This case is different.

[**1038] The majority identifies no non-Caucasian who has been injured or could be injured if damages are assessed against respondent for breaching the promise which she willingly and voluntarily made to petitioners, a promise which neither the federal law nor the Constitution proscribes. Indeed, the non-Caucasian occupants of the property involved in this case will continue their occupancy undisturbed, regardless of the outcome of the suit. The state court was asked to do nothing which would impair their rights or their enjoyment of the property.

The plain, admitted fact that there is no identifiable non-Caucasian before this Court who will be denied any right to buy, occupy or otherwise enjoy the properties involved in this lawsuit, or any other particular properties, is decisive to me. It means that the constitutional defect, present in the *Shelley* case, is removed from this case. It means that this Court has no power [***1599] to deal with the constitutional issue which respondent seeks to inject in this litigation as a defense to her breach of contract. It means that the covenant, valid on its face, can be enforced between [****24] the parties -- unless California law or California policy forbids its enforcement -- without running afoul of any doctrine ever promulgated by this Court, without any interference from this Court.

"We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

"These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. . . ."

[*263] I turn, first, to the matter of our power to decide this case. The majority states the issue:

". . . May respondent, whom petitioners seek to coerce by an action to pay damages for her failure to honor her restrictive covenant, rely on the invasion of the rights of others in her defense to this action?"

Logically this issue should be met where such an issue is usually met -- at the "threshold";³ this decision should precede any discussion of the merits of respondent's constitutional claim. Yet it is not amiss to point out that the majority has failed to put first things first; it decides the merits and then, comforted by its decision on the merits, resolves its doubts that it has power to decide the merits.

[****25] A line of decisions -- long enough to warrant the respect of even the most hardened skeptic of the strength of *stare decisis* as an effective limitation upon this Court's exercise of jurisdiction in constitutional cases -- establishes the principle⁴ [****26] which should stay this Court from deciding [*264] what it decides today -- from doing what it does today -- from imposing a novel constitutional limitation upon the power of the courts of the several states to enforce their own contract [**1039] laws as they choose. This deep-

³ Compare [Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.](#), 344 U.S. 178, 179 (1952); [United Public Workers v. Mitchell](#), 330 U.S. 75, 86 (1947).

⁴ The principle derives, of course, from the nature of the judicial power conferred by Art. III of the Constitution. At a very early stage in this Court's history, Mr. Chief Justice Marshall put the matter thus:

". . . The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to 'a case in law or equity,' in which a right, under such law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. . . ." [Cohens v. Virginia](#), 6 Wheat. 264, 405 (1821).

And see the discussion of this principle and its ramifications in Mr. Justice Brandeis' concurring opinion in [Ashwander v. Tennessee Valley Authority](#), 297 U.S. 288, 341 (1936).

rooted, vital doctrine demands that the Court refrain from deciding a constitutional issue until it has a party before it who has standing to raise the issue.⁵ [****27] The majority agrees that this is a "salutary" principle, and supplies us with but a small sampling [***1600] of the cases to show that it has been rigorously applied in many varied situations, and surely no sophistry is required to apply it to this case. Accordingly, respondent must show, at the outset, that she, herself, and not some unnamed person in an [*265] amorphous class, is the victim of the unconstitutional discrimination of which she complains.⁶

⁵ MR. JUSTICE FRANKFURTER, concurring in [Coleman v. Miller](#), 307 U.S. 433, 460 (1939), sets forth the basis of the principle which I believe the Court has failed to observe today:

"In endowing this Court with 'judicial Power' the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. . . .

. . . .

". . . It is our ultimate responsibility to determine who may invoke our judgment and under what circumstances. . . . The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined. No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all. [Stearns v. Wood](#), 236 U.S. 75; [Fairchild v. Hughes](#), 258 U.S. 126.

. . . .

"We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it. . . ."

⁶ [Tyler v. Judges of the Court of Registration](#), 179 U.S. 405 (1900), while not the first, is generally cited as the leading case on this aspect of the rules governing our exercise of jurisdiction. The Court said:

"The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defence set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury

[****28] Respondent makes no such showing. She does not ask the Court to protect her own constitutional rights, nor even the rights of the persons who now occupy her property. Instead, she asks the Court to protect the rights of those non-Caucasians -- whoever they may be -- who might, at some point, be prospective vendees of some other property encumbered by some other similar covenant. Had respondent failed to designate herself as the agent of this anonymous, amorphous class, the majority certainly would have no power to vindicate its rights. Yet, because respondent happens to have decided to act as the self-appointed agent of these principals [**1040] whom she cannot identify -- in order to relieve herself of the obligations of her own covenant -- the majority finds itself able to assert [*266] the power over state courts which it asserts today. I do not think that such tenuous circumstances can spawn the broad constitutional limitation upon state courts which springs from today's decision.⁷

peculiar to himself, as distinguished from the great body of his fellow citizens." [179 U.S., at 406](#).

This historic view has been voiced again and again and applied in various situations down through the decades. See, e. g., [Lampasas v. Bell](#), 180 U.S. 276 (1901); [Cronin v. Adams](#), 192 U.S. 108 (1904); [The Winnebago](#), 205 U.S. 354 (1907); [Rosenthal v. New York](#), 226 U.S. 260 (1912); [McCabe v. Atchison, T. & S. F. R. Co.](#), 235 U.S. 151 (1914); [Jeffrey Manufacturing Co. v. Blagg](#), 235 U.S. 571 (1915); [Sprout v. City of South Bend](#), 277 U.S. 163 (1928); [Tileston v. Ullman](#), 318 U.S. 44 (1943); [Gange Lumber Co. v. Rowley](#), 326 U.S. 295 (1945); [Bode v. Barrett](#), 344 U.S. 583 (1953).

⁷ Similarly, I think that respondent's reliance, in her brief, on [Buchanan v. Warley](#), 245 U.S. 60 (1917), as a precedent to show that she has met the minimum requirements on standing, is misplaced. In that case, a white vendor attacked a zoning ordinance which prohibited the sale of his property to any Negroes. The Court held he had standing to attack the ordinance since his constitutional attack was founded on the theory that the ordinance unconstitutionally abridged *his* right to sell his property to any willing purchaser, and not on the theory that it abridged the Negro vendee's right to buy property without being subject to discrimination by the state. The Court then held the statute invalid as an unreasonable classification.

Similarly, in [Pierce v. Society of Sisters](#), 268 U.S. 510 (1925), upon which the majority relies, a private school challenged a state law forbidding private education on the theory that the statute unreasonably abridged *its* (the school's) property rights. It was the assertion of the school's property rights which the Court considered

[****29] Yet we are told that the rule [***1601] which restricts our power to impose this constitutional limitation is but a rule of "self-restraint." So is every other jurisdictional limitation which depends, in the last analysis, solely upon this Court's willingness to govern its own exercise of power. And certainly to characterize the rule as self-imposed does not mean that it is self-removable by a simple self-serving process of argument. Yet the majority's logic, reduced to its barest outlines, seems to proceed in that fashion. We are told that the reasons for the self-imposed rule, which precludes us from reaching the merits, have been dissipated in this case, but the only reason why the reasons do not exist is because the Court first holds for respondent, and, having thus decided the merits, it feels free to abandon the rule which should preclude it from reaching the merits. In my view, respondent cannot [*267] surmount the hurdle of our well-established rule by proceeding with an argument which carries her in a circle right back to her precise point of departure. If it should be, as the majority assumes, that there is no other way that the rights of unidentified non-Caucasians [****30] can be vindicated in court, that is only an admission that there is no way in which a substantial case or controversy can be predicated upon the right which the majority is so anxious to pass upon. I cannot assent to a manner of vindicating the constitutional rights of persons unknown which puts personal predisposition in a paramount position over well-established proscriptions on power.

But even if the merits are to be reached, even if we must decide whether enforcement of this covenant in a lawsuit of this kind is state action which contravenes the [Fourteenth Amendment](#), I think that the absence of any direct injury to any identifiable non-Caucasian is decisive. The *Shelley* case, resting on the express determination that restrictive covenants are valid between the parties, dealt only with a state court's attempt to enforce them directly against innocent third parties whose right to enjoy

their property would suffer immediate harm.

In this case, the plaintiffs have not sought such relief. The suit is directed against the very person whose solemn promise helped to bring the covenant into existence. The plaintiffs ask only that respondent do what she in turn had a right to [****31] ask of plaintiffs -- indemnify plaintiffs for the bringing about of an event which she recognized would cause injury to the plaintiffs. We need not concern ourselves now with any question of whether this injury is fancied or real. The short of that matter is that the parties thought that any influx of non-Caucasian neighbors would impair their enjoyment of their properties, and, [**1041] whether right or wrong, each had the right to control the use of his property against that event and to exact a promise from his or her neighbor that he or [*268] she would act accordingly. And that is precisely what petitioners and respondent did. Moreover, we must, at this pleading stage of the case, accept it as a fact that respondent has thus far profited from the execution of this bargain; observance of the covenant by petitioners raised the value of respondent's properties. By this suit, the plaintiffs sought only to have respondent disgorge that which was gained at the expense of depreciation in her neighbors' property.

The majority speaks of this as an attempt to "coerce" respondent to continue to abide by her agreement. Yet the contract has already been breached. The non-Caucasians [****32] are in undisturbed occupancy. Furthermore, the respondent consented to the "coercion" -- if "coercion" there be -- by entering into the covenant. Plaintiffs ask only that respondent now pay what she legally obligated herself to pay for an injury which she recognized would occur if she did what she did.

[***1602] Of course, there may be other elements of coercion. Coercion might result on the minds of some Caucasian property owners who have signed a covenant such as this, for they may now feel an economic compulsion to abide by their agreements.

But visiting coercion upon the minds of some unidentified Caucasian property owners is not at all the state action which was condemned in the *Shelley* case. In that case, the state court had directed "the full coercive power of government" against the Negro petitioners -- forcefully removing them from their property because they fell in a class discriminatorily defined. But in this case, where no identifiable third person can be directly injured if respondent is made to disgorge enough to indemnify petitioners, the Court should not undertake to hold that the [Fourteenth Amendment](#) stands as a bar to the state court's enforcement of [****33] its contract law.

[*269] Obviously we can only interfere in this case if the [Fourteenth Amendment](#) compels us to do so, for that is the only basis upon which respondent seeks to sustain her defense. While we are limited to enforcement of the [Fourteenth Amendment](#), the state courts are not; they may decline to recognize the covenants for other reasons. Since we must rest our decision on the Constitution alone, we must set aside predilections on social policy and adhere to the settled rules which restrict the exercise of our power of judicial review -- remembering that the only restraint upon this power is our own sense of self-restraint.⁸

Because I cannot see how respondent can avail herself of the [Fourteenth Amendment](#) rights of total strangers -- the only rights which she has chosen to assert -- and since I cannot see how the Court can find that those rights would be impaired in this particular [****34] case by requiring respondent to pay petitioners for the injury which she recognizes that she has brought upon them, I am unwilling to join the Court in today's decision.

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⁸ See Mr. Justice Stone dissenting in [United States v. Butler, 297 U.S. 1, 78-79 \(1936\)](#).



Positive

As of: October 18, 2026 7:14 AM Z

Bay World Trading, Ltd. v. Nebraska Beef, Inc.

Court of Appeal of California, First Appellate District, Division Three

August 13, 2002, Decided ; August 13, 2002, Filed

No. A095036.

Reporter

101 Cal. App. 4th 135 *; 123 Cal. Rptr. 2d 632 **; 2002 Cal. App. LEXIS 4506 ***; 2002 Cal. Daily Op. Service 7399; 2002 Daily Journal DAR 9305

BAY WORLD TRADING, LTD., Plaintiff and Respondent, v. NEBRASKA BEEF, INC., Defendant and Appellant.

Notice: [*1]** Opinion certified for partial publication. *

Prior History: Superior Court of the City and County of San Francisco, No. 997070. Hon. Diane Elan Wick, Judge.

Disposition: The judgment is affirmed. Appellant shall bear costs of the appeal.

Case Summary

Procedural Posture

In a breach of contract action, defendant, a slaughterhouse operator, appealed a judgment of the Superior Court of the City and County of San Francisco, California, which was entered in favor of plaintiff meat distributor.

Overview

The slaughterhouse operator argued, among other things, that the trial court exceeded its authority when it amended its statement of decision to include prejudgment interest. According to the operator, the trial court's original statement of decision was "final," and the trial court had no

power to change it before entry of judgment. The operator contended that the trial court was bound by the alternative procedure for preparing a statement of decision to which the parties stipulated. The instant court rejected this argument. The trial court stated that the parties would have three days to "look over" the statement of decision and proposed judgment. The meat distributor could have reasonably concluded that the alternative procedure to which it had agreed did not preclude it from objecting to the absence of prejudgment interest in the trial court's decision. The parties' stipulation did not expressly preclude such an objection. The trial court did not err when it ultimately decided to amend its statement of decision. Because judgment had not yet been entered, the trial court had inherent power to amend its statement of decision to award prejudgment interest.

Outcome

The judgment was affirmed. The slaughterhouse operator was ordered to bear costs of the appeal.

LexisNexis® Headnotes

Civil Procedure > Trials > Bench Trials

Governments > Legislation > Statutory Remedies & Rights

HN1 When the trial court seeks a waiver of the

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part I and part II.

statutory requirements set forth in *Cal. Code Civ. Proc.* § 632 for preparing a statement of decision, the court must clearly explain the alternative procedure it proposes. If the alternative procedure will deprive the parties of their statutory rights to file objections, the record must disclose the express consent to surrender such rights.

Civil Procedure > Trials > Bench Trials

HN2 *Cal. Code Civ. Proc.* § 632 requires the court to issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial when a party requests such a written statement within 10 days after the court has announced a tentative decision. After a party submits such a request, specifying the controverted issues upon which written findings are requested, all parties have a right to submit proposals regarding the content of the statement of decision. In general, such proposals must be submitted to the court within 10 days after a statement of decision is requested, and the court (or a party designated by the court) then has 15 days to prepare a proposed statement of decision and proposed judgment. Cal. R. Ct. 232(a)-(c). Within 15 days after service of the proposed statement of decision and proposed judgment, the parties may file objections. Cal. R. Ct. 232(d).

Civil Procedure > Trials > Bench Trials

HN3 *Cal. Code Civ. Proc.* § 634 and Cal. R. Ct. 232, taken together, clearly contemplate any defects in the trial court's statement of decision must be brought to the court's attention through specific objections to the statement itself, not through a proposed alternative statement of decision served prior to the court's issuance of its own statement. By filing specific objections to the court's statement of decision, a party pinpoints alleged deficiencies in the statement and allows the court to focus on facts or issues the party contends were not resolved or

whose resolution is ambiguous. A proposed alternative statement of decision does not serve these functions and does not satisfy the requirements of *Cal. Code Civ. Proc.* § 634 and Cal. R. Ct. 232.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > General Overview

Civil Procedure > Remedies > Judgment Interest > General Overview

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Governments > Courts > Clerks of Court

HN4 A statement of decision issued by the trial court cannot automatically constitute a final decision for purposes of entry of judgment because *Cal. Code Civ. Proc.* § 632 and Cal. R. Ct. 232 contemplate that a court may amend its statement of decision after it receives objections from affected parties. Where judgment has not yet been entered, the trial court has inherent power to amend its statement of decision to award prejudgment interest. Even after a court has issued a written decision, the court retains the power to change its findings of fact or conclusions of law until judgment is entered. Until a judgment is entered, it is not effectual for any purpose, *Cal. Code Civ. Proc.* § 664, and at any time before it is entered, the court may change its conclusions of law and enter a judgment different from that first announced. Moreover, a judge who has heard the evidence may at any time before entry of judgment amend or change his or her findings of fact.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a bench trial of a breach of contract action, the trial court utilized a streamlined procedure for preparing a statement of decision. The trial court considered the prevailing plaintiff's objection to the absence of prejudgment interest in its decision, and amended the statement of decision to enter a judgment for plaintiff that included prejudgment interest. (Superior Court of the City and County of San Francisco, No. 997070, Diane Elan Wick, Judge.)

The Court of Appeal affirmed. The court held that plaintiff may have reasonably concluded the alternative procedure to which it had agreed did not preclude it from objecting to the absence of prejudgment interest in the trial court's decision. The parties' stipulation did not expressly preclude such an objection, and defendant filed briefs addressing the merits of plaintiff's claim to prejudgment interest. If a trial court intends to abrogate the parties' statutory rights to object to its statement of decision, the trial court should make this clear when it seeks the parties' approval of its proposed alternative procedure. (Opinion by Parrilli, J., with Corrigan, Acting P. J., and Pollack, J., concurring.)

Headnotes

[CA\(1\)](#) (1)

Appellate Review § 111—Briefs—Rely Brief.

--Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.

[CA\(2a\)](#) (2a)[CA\(2b\)](#) (2b)

Trial § 157—Trial by Court—Statement of Decision—Amendment Under Streamlined Procedure.

--In a bench trial of a breach of contract action in which the trial court utilized a streamlined

procedure for preparing a statement of decision, the trial court did not err in considering the prevailing plaintiff's objection to the absence of prejudgment interest in the court's decision. The trial court did not clearly state that the parties would be precluded from submitting objections to the court's statement of decision. To the contrary, the court stated the parties would have three days to "look over" the statement of decision and proposed judgment "as to form"; thus, plaintiff may have reasonably concluded the alternative procedure to which it had agreed did not preclude it from objecting to the absence of prejudgment interest in the court's decision. The parties' stipulation did not expressly preclude such an objection, and defendant filed briefs addressing the merits of plaintiff's claim to prejudgment interest.

[See 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 408.]

[CA\(3\)](#) (3)

Trial § 161—Trial by Court—Statement of Decision—Objections.

--If a trial court intends to abrogate the parties' statutory rights to object to the court's statement of decision, the court should make this clear when it seeks the parties' approval of its proposed alternative procedure. The ability to submit a proposed statement of decision in advance is no substitute for an opportunity to object to the court's own statement of decision. [Code Civ. Proc., § 634](#), and Cal. Rules of Court, rule 232, taken together, clearly contemplate any defects in the trial court's statement of decision must be brought to the court's attention through specific objections to the statement itself, not through a proposed alternative statement of decision served prior to the court's issuance of its own statement. By filing specific objections to the court's statement of decision, a party pinpoints alleged deficiencies in the statement and allows the court to focus on facts or issues the party contends were not resolved or whose

resolution is ambiguous. A proposed alternative statement of decision does not serve these functions and does not satisfy the requirements of [Code Civ. Proc., § 634](#), and Cal. Rules of Court, rule 232.

[CA\(4\)](#) (4)

Trial § 159—Trial by Court—Statement of Decision—Conclusiveness and Effect.

--A statement of decision issued by the trial court cannot automatically constitute a final decision for purposes of entry of judgment, because *Code Civ. Proc.*, § 632, and Cal. Rules of Court, rule 232, contemplate that a court may amend its statement of decision after it receives objections from affected parties. Even after a court has issued a written decision, the court retains the power to change its findings of fact or conclusions of law until judgment is entered. Until a judgment is entered, it is not effectual for any purpose (*Code Civ. Proc.*, § 664), and at any time before it is entered, the court may change its conclusions of law and enter a judgment different from that first announced. Moreover, a judge who has heard the evidence may at any time before entry of judgment amend or change the findings of fact.

Counsel: Weisberg & Miller, Craig S. Miller and Kenneth J. Sperandio, Jr., for Defendant and Appellant.

Spiegel Liao & Kagay, Charles M. Kagay and Bartholomew Lee for Plaintiff and Respondent.

Judges: (Opinion by Parrilli, J., with Corrigan, Acting P. J., and Pollak, J., concurring.)

Opinion by: Parrilli

Opinion

[*137] [**633] PARRILLI, J.

Nebraska Beef, Inc. (Nebraska Beef) appeals from a judgment entered against it following the bench

trial of a breach of contract action. Nebraska Beef claims: (1) the trial court abused its discretion in denying Nebraska Beef's request to reopen discovery or for a continuance of the trial; (2) insufficient evidence supports the findings on causation and damages; and (3) the court exceeded its authority when it [***2] amended the statement of decision to award prejudgment interest. We reject each of these arguments and affirm the judgment. In the published portion of the opinion, we hold that [HN1](#) when the trial court seeks a waiver of the statutory requirements set forth in *Code of Civil Procedure section 632* for preparing a statement of decision, the court must clearly explain the alternative procedure it proposes. If the alternative procedure will deprive the parties of their statutory rights to file objections, the record must disclose their express consent to surrender such rights.

BACKGROUND

Nebraska Beef operates a slaughterhouse in Omaha, Nebraska, from which it produces meat products for human consumption. On July 2, 1996, Bay World Trading, Ltd. (Bay World), a distributor of meat products, entered into a contract with Nebraska Beef. Bay World agreed to purchase 12 "full container loads" of frozen [**634] beef tripe (weighing 45,000 pounds each) at a cost of 20 cents per pound, with shipment to begin in September. The purchase order noted this price reflected a discount of 5 cents per pound [*138] from a previous agreement. Later that month, Bay World arranged to sell four of these [***3] containers to Pekpol, a company located in Poland. When the shipment reached Poland in October or November of 1996, Polish inspectors rejected it due to spoilage of the meat. Bay World discarded three of the tripe containers in Poland and attempted to sell the remaining container to a customer in China, but the Chinese customer also rejected the meat due to spoilage.

Having satisfied itself that the spoilage did not occur due to temperature control problems in the

railroad or shipping transport of the tripe, Bay World confronted Nebraska Beef about the problem and eventually sued Nebraska Beef for breach of contract, misrepresentation, breach of warranties and negligent performance of contract. After a bench trial, the court found Nebraska Beef's improper processing was responsible for the spoilage of the tripe and awarded Bay World damages totaling close to \$ 125,000. The court later amended its statement of decision, upon motions from Bay World, to include an award of prejudgment interest.

DISCUSSION

I. , II. *

III. Trial Court Had [***4] the Power to Correct the Statement of Decision

Finally, Nebraska Beef contends the trial court erred in amending its statement of decision to include prejudgment interest [CA\(1\) \(1\)](#). Based on two procedural arguments,³ Nebraska Beef claims the original statement of decision was "final" and the court had no power to change it before entry of judgment.

Near the end of the two-day trial, the court suggested a streamlined procedure for preparing the statement of decision. The court stated: "[W]hat I'm going [***5] to suggest is that each side prepare a proposed statement of decision. We will set a date when that would be due, and then the opposing party would have whatever number of days, say up to ten--shorter if you [*139] think you can do it--whereby you could send me an objection to the

other side's statement. And then we would forget the regular rules and statute, or you would waive the rules . . . and the statute on statements of decision. [P] I would have both of your positions, your recognized opposition to the other side, and then I would be filing my statement of decision along with the proposed judgment to give you three days to just look it over as to form. And then the judgment would be filed. And this will condense the time. . . . [P] And then once I get each of your oppositions, then I of course have 90 days." The parties agreed to the court's suggestion and accordingly submitted proposed findings and responsive briefs. Thereafter, apparently with no prior notice to the parties, the court filed a statement of decision, in which it awarded Bay World close to \$ 125,000 in damages but declined to award punitive damages or prejudgment interest.

[**635] What the court intended by its proposed [***6] alternative procedure under *Code of Civil Procedure* section 632 then became the subject of dispute. Fourteen days (10 court days) after the court filed its statement of decision, Bay World filed a motion requesting that prejudgment interest be included. Nebraska Beef objected to this motion as an improper attempt to amend the court's final decision. Ultimately, after several briefs and hearings on the issue, the trial court issued an amendment to the statement of decision, awarding Bay World prejudgment simple interest totaling close to \$ 41,000. Three days later, the court entered a judgment in accordance with the statement of decision as amended.

[CA\(2a\) \(2a\)](#) Nebraska Beef first argues the court had no authority to amend its statement of decision because it was bound by the alternative procedure to which the parties stipulated. *Code of Civil Procedure* section 632 [HN2](#) requires the court to issue a statement of decision "explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial" when a party requests such a written statement within 10 days after the court has announced a tentative decision. [***7] After a party submits such a

* See footnote, *ante*, page 135.

³ Nebraska Beef raised no substantive argument on this issue in its opening brief on appeal, though it did dispute Bay World's right to prejudgment interest in the reply brief. We decline to consider this belated argument. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894 [93 Cal.Rptr.2d 364, fn. 10] [" ' "Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before " ' [Citations.]"].)

request, specifying the controverted issues upon which written findings are requested, all parties have a right to submit proposals regarding the content of the statement of decision. (*Code Civ. Proc.*, § 632.) In general, such proposals must be submitted to the court within 10 days after a statement of decision is requested, and the court (or a party designated by the court) then has 15 days to prepare a proposed statement of decision and proposed judgment. (Cal. Rules of Court, rule 232(a)-(c).) Within 15 days after service of the proposed statement of decision and proposed judgment, the parties may file objections. (Cal. Rules of Court, rule 232(d).)

According to Nebraska Beef, the trial court's request for proposed statements of decision after the trial essentially skipped over the statutory [*140] requirements that (1) the court announce a tentative decision, and (2) a party formally request a statement of decision. Then, because the court filed its statement of decision and proposed judgment after the parties presented objections to each other's proposed statements and *did not* specify that the parties would have an opportunity [***8] to object to the court's own statement, Nebraska Beef contends the court's statement of decision was final, pursuant to the Code of Civil Procedure, and not subject to further amendment. Moreover, Nebraska Beef asserts, the parties stipulated to an alternative statement of decision procedure that did not permit either party to file objections to the court's statement of decision.

CA(3) (3) If the trial court intended to abrogate the parties' statutory rights to object to the court's statement of decision, the court should have made this absolutely clear when it sought the parties' approval of its proposed alternative procedure. The ability to submit a proposed statement of decision in advance is no substitute for an opportunity to object to the court's own statement of decision: "*Code of Civil Procedure section 634* and California Rules of Court, rule 232, **HN3** taken together, clearly contemplate any defects in the trial

court's statement of decision must be brought to the court's attention through specific objections to the statement itself, not through a proposed alternative statement of decision served prior to the court's issuance of its own statement. By filing specific [***9] objections to the court's statement of decision a party pinpoints alleged deficiencies in the statement and allows the court to focus on facts or issues the party contends were not resolved or whose resolution is ambiguous. A proposed alternative [**636] statement of decision . . . does not serve these functions and does not satisfy the requirements of *Code of Civil Procedure section 634* and California Rules of Court, rule 232." (*Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 Cal.App.4th 1372, 1380 [25 Cal. Rptr. 2d 242].*) **CA(2b) (2b)**

The trial court here did not clearly state that the parties would be precluded from submitting objections to the court's statement of decision.⁴ To the contrary, the court stated the parties would have three days to "look over" the statement of decision and proposed judgment "as to form"; thus, Bay World may have reasonably concluded the alternative procedure to which it had agreed did not preclude it from objecting to the absence of prejudgment interest in the court's decision. The parties' stipulation did not expressly preclude such an objection, and the trial court did not err in [*141] considering it.⁵ Moreover, Nebraska Beef suffered no prejudice [***10] because it had a full opportunity to address the merits of Bay World's claim to prejudgment interest and did so in numerous briefs.

CA(4) (4) Nor did the court err when it ultimately

⁴ Though Nebraska Beef repeatedly calls the court's filing a "final statement of decision," the document was simply captioned a "Statement of Decision."

⁵ *Whittington v. McKinney (1991) 234 Cal.App.3d 123, 129-130 [285 Cal. Rptr. 586]* does not support Nebraska Beef's position because the appellant in *Whittington* agreed to waive the right to a written statement of decision. As discussed, given the trial court's ambiguous description of the proposed alternative procedure, Bay World did not clearly waive its right to file objections.

decided to amend its statement of decision. Relying on *Code of Civil Procedure* section 664, Nebraska Beef insists the clerk of the court was statutorily required to enter judgment immediately upon the court's filing of its statement of decision. This argument, [***11] of course, begs the question of whether the statement of decision issued by the trial court must be construed as final. [HN4](#) A statement of decision issued by the court cannot automatically constitute a final decision for purposes of entry of judgment, as Nebraska Beef suggests, because *Code of Civil Procedure* section 632 and California Rules of Court, rule 232 contemplate that a court may amend its statement of decision after it receives objections from affected parties. Because judgment had not yet been entered, the trial court had inherent power to amend its statement of decision to award prejudgment interest. Even after a court has issued a written decision, the court retains the power to change its findings of fact or conclusions of law until judgment is entered. ([Phillips v. Phillips \(1953\) 41 Cal.2d 869, 874-875 \[264 P.2d 926\]](#).) "Until a judgment is entered, it is not effectual for any purpose (*Code Civ. Proc.*, § 664), and at any time before it is entered, the court may change its conclusions of law and enter a judgment different from that first announced. [Citations.] Moreover, a judge who has heard the evidence [***12] may at any time before entry of judgment amend or change his findings of fact. [Citations.]" ([Id. at p. 874.](#))

DISPOSITION

The judgment is affirmed. Appellant shall bear costs of the appeal.

Corrigan, Acting P. J., and Pollak, J., concurred.



Brewer v. Simpson

Supreme Court of California

February 9, 1960

L. A. No. 24587

Reporter

53 Cal. 2d 567 *; 349 P.2d 289 **; 2 Cal. Rptr. 609 ***; 1960 Cal. LEXIS 236 ****

MAUDE P. BREWER et al., Plaintiffs and Appellants, v. ABIGAIL PARKHURST SIMPSON et al., Defendants and Appellants

wills, to declare a trust, and for an accounting. The judgment impressed a trust for the beneficiaries' benefit on all property owned by the wife.

Prior History: [****1] APPEALS from a judgment of the Superior Court of Los Angeles County. William J. Palmer, Judge.

Action for specific performance of a contract to make mutual wills, to declare a trust and for an accounting.

Disposition: Affirmed. Judgment awarding plaintiffs some but not all of the relief sought, affirmed.

Core Terms

the will, marriage, codicil, survivor, trial court, kindred, joint tenancy, decree, elect, died, undue influence, oral agreement, repudiate, notice, spouse, appellate court, probation, statute of limitations, one half, conversation, survive, revoke, gift, trust property, entire estate, beneficiary, covenant, merge, memorandum, formulae

Case Summary

Procedural Posture

Both plaintiff beneficiaries and defendant wife and her new husband attacked the judgment of the Superior Court of Los Angeles County (California). The judgment awarded the beneficiaries some but not all of the relief they sought in an action for specific performance of a contract to make mutual

Overview

The wife and her new husband alleged that the evidence did not support the essential findings, that there were irreconcilable conflicts in material findings, and that the judgment erroneously based its calculation of the beneficiaries' interest on the value of the estate at the time of the wife's death and not at the time of the death of the testator. The court held that the oral agreement and the mutual wills were evidence of an understanding to treat the property as community property, that it was clear that mutual wills were made for the express benefit of the beneficiaries named in the wills, and therefore that the mutual wills were valid. The court further held that the wife executed her will and codicil voluntarily and not under undue influence or mistake. The court also held that the subsequent marriage of the wife to her new husband did not revoke the mutual wills previously created between the wife and the testator. The court determined that it was not error to not require an accounting of the trust property because the beneficiaries' interests were protected without an accounting, and the calculation of the beneficiaries' interests was correct.

Outcome

The court affirmed the judgment of the lower court.

LexisNexis® Headnotes

Civil Procedure > ... > Standards of
Review > Substantial Evidence > General Overview

HN1 When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence which will support the finding of fact. When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. Appellate courts, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding, and in searching the record and exploring the inferences which may arise from what is found there to discover whether such doubt or conflict exists, the court should be realistic and practical. But where there are material, inconsistent findings upon substantially conflicting evidence, an appellate court must reverse; it is not appropriate for it to assume to strike one determination or the other in order to uphold the judgment.

Civil Procedure > ... > Standards of
Review > Substantial Evidence > General Overview

HN2 It is only when a judgment rests upon some particular finding for its validity and support that the lack of sufficient evidence to support such finding, or the contradictoriness between two findings, treating of the same essential matter, will necessitate a reversal of the case. However lame, however inconclusive, any number of the findings may be, if in any case there be one clear, sustained and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be here concluded that the court did rest its judgment upon that finding, or those findings, and the others may and will be disregarded.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Contracts Law > Third
Parties > Beneficiaries > General Overview

Business & Corporate
Compliance > Contracts > Types of
Contracts > Covenants

Contracts Law > Types of Contracts > Covenants

Estate, Gift & Trust Law > Wills > General Overview

HN3 In every contract, there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed. Also implied as part of the good faith and fair dealing is a covenant of the survivor not to make unreasonable use of the property, as by conveying it all away so that the named third party beneficiaries will receive nothing.

Estate, Gift & Trust Law > Trusts > General
Overview

Estate, Gift & Trust Law > ... > Private Trusts
Characteristics > Trustees > General Overview

Estate, Gift & Trust
Law > Wills > Interpretation > General Overview

HN4 Husband and wife are subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts. Cal. Civ. Code, §158. All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.

[Cal. Civ. Code, §2235](#). A husband dealing with his wife must, if he would avoid the presumption of undue influence emanating from the procurement of any advantage over her, make full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, or else himself deal with her at arm's length and as he would with a stranger, all the while giving her the opportunity of independent advice as to her rights in the premises.

Real Property Law > Deeds > General Overview

[HN5](#) See Cal. Prob. Code § 1222.

Real Property Law > Deeds > General Overview

[HN6](#) See [Cal. Gov't Code § 27326](#).

Real Property Law > Deeds > General Overview

Real Property Law > Priorities &
Recording > General Overview

[HN7](#) See [Cal. Civ. Code § 1213](#).

Contracts Law > Breach > Anticipatory
Repudiation > General Overview

Governments > Legislation > Statute of
Limitations > General Overview

Governments > Legislation > Statute of
Limitations > Time Limitations

[HN8](#) Where a defendant definitely and unconditionally repudiates a contract before the time fixed for his performance, there is no necessity for making the statutory period of limitation begin to run against the plaintiff until the day fixed by the contract for the rendition of performance, at least unless the plaintiff definitely elects to regard the anticipatory repudiation as a final breach. It is generally said that he need not so elect and that he

may properly wait until the time that performance was due, before regarding the contract as broken.

Civil Procedure > ... > Defenses, Demurrers &
Objections > Affirmative Defenses > General
Overview

[HN9](#) Mere delay without prejudice does not give rise to the defense of laches and the doctrine is not designed to punish plaintiffs but only to prevent unwarranted injustice.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Appeal—Questions of Law and Fact—Extent of Power of Court.

--When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, that will support the finding.

[CA\(2\)](#) (2)

Id.—Questions of Law and Fact—Evidence Subject to Different Inferences.

--When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.

[CA\(3\)](#) (3)

Id.—Questions of Law and Fact—Resolving

Conflicts.

--Appellate courts, if there be any reasonable doubt as to the sufficiency of evidence to sustain a finding, should resolve that doubt in favor of the finding; in searching the record and exploring the inferences to discover whether such doubt exists, the court should be realistic and practical.

CA(4) (4)**Id.—Reversible Error—Findings—Inconsistent Findings.**

--Where there are material, inconsistent findings on substantially conflicting evidence, an appellate court must reverse; it is not appropriate for it to assume to strike one determination or the other in order to uphold the judgment.

CA(5) (5)**Id.—Reversible Error—Findings—Findings Against or on Insufficient Evidence.**

--It is only when a judgment rests on some particular finding for its validity and support that the lack of sufficient evidence to support such finding, or the contradictoriness between two findings, treating of the same essential matter, will necessitate reversal.

CA(6) (6)**Id.—Presumptions—Findings.**

--However lame or inclusive any number of findings may be, if there be one clear, sustained and sufficient finding on which the judgment may rest, every presumption being in favor of the judgment, it will be concluded on appeal that the trial court rested its judgment on that finding and the others may be disregarded.

CA(7) (7)**Husband and Wife—Actions—Findings.**

--Where a surviving wife testified that she and her deceased husband each had some property when they intermarried, but she did not testify to the total value and extent of her property and did not know the extent of his property at that time, a finding that at such time his property was "of substantially greater value than hers" must fall. However, such finding was not necessary to uphold a further finding of fairness of their agreement to make mutual wills and of their mutual wills where the unidentified separate properties brought to the marriage by each, whatever their respective values, became indistinguishable parts of the mass of properties owned by them some 26 years later, when they made the attacked agreement and wills, and the surviving wife could not trace any particular piece of the original property, or any computable share of such properties, as having its origin in separate property.

CA(8) (8)**Id.—Commingle of Property: Changing Character of Property by Agreement.**

--Whatever may have been the former understanding of husband and wife as to the character of their properties which stood in their names in a certain year some 26 years after their marriage, their oral agreement to make mutual wills and their mutual wills of that year evidenced an understanding that they would treat the whole as property in which their interests were "present, existing and equal interests under the management and control of the husband" (*Civ. Code, § 161a*), i. e., community property. There was nothing unfair to the wife in the simple fact of an agreement that thus dealt with properties which either originated in the husband's efforts during marriage or, if they were separate in origin at the time of marriage, had become indistinguishably confused over the years with property acquired by the husband's efforts

during marriage and had been cared for and increased by such efforts. matters. (Code Civ. Proc., §§ 1847, [2061](#).)

[CA\(9\)](#) (9)

Id.—Transactions Inter Se—Undue Influence—Evidence.

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), testimony of an attorney of the legal firm which prepared the mutual wills that he did not recall having any legal matters with the wife alone prior to the death of her first husband, except that in the preparation of such wills "I did certainly, of course, work professionally" for her prior to her husband's death, was relevant to defendants' claim that the evidence established that the legal firm represented only the first husband, not the wife, and that she was under the undue influence of her husband and did not understand the transaction.

[CA\(10\)](#) (10)

Id.—Actions—Appeal—Review.

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), defendants' argument on appeal as to the credibility and effect of the testimonies of the attorneys who prepared the mutual wills, and of the wife, were not appropriately addressed to the Supreme Court, the trier of fact being the exclusive judge of those

[CA\(11\)](#) (11)

Contracts—Actions—Contract for Benefit of Third Persons.

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), the contract evidenced by the mutual wills was readily and reasonably susceptible of the trial court's view that it was "made for the express benefit of all the persons named therein as beneficiaries," contrary to defendant's argument that any promise of the wife to leave one half of the property to plaintiffs, her own kin, if she survived her husband was only incidental to the main purpose of the contract (which was to make sure that if she survived him she would receive the entire estate), that therefore the contract was not "made expressly for the benefit" of plaintiffs ([Civ. Code, § 1559](#)) and that plaintiffs, as mere incidental beneficiaries, could not enforce it, where the husband and wife, after having lived together for 26 years, could have entertained the desire that the estate which they had built together should go to their relatives rather than to a second wife or husband.

[CA\(12\)](#) (12)

Wills—Mutual Wills.

--Omission of mutual wills to refer expressly to irrevocability does not in itself render the agreement evidenced by such wills inconsistent with the oral agreement by husband and wife to make such wills by which all property of the first to die should go to the survivor, all property of the survivor should go to named relatives of the

spouses, and that the survivor could not change the beneficiaries or deprive them of their benefits agreed upon.

CA(13) (13)

Contracts—Interpretation—Implied Covenants.

--In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.

CA(14) (14)

Wills—Agreements as to Wills—Interpretation.

--Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed.

CA(15) (15)

Id.—Mutual Wills—Interpretation.

--Part of the implied covenant of "good faith and fair dealing" in an agreement of spouses to execute mutual wills, leaving the property of either to the survivor and providing that the survivor shall leave the property to named relatives of both, is a covenant of the survivor not to make unreasonable use of the property, as by conveying it all away so that the named third party beneficiaries will receive nothing.

CA(16) (16)

Husband and Wife—Transactions Inter Se—Undue Influence—Evidence.

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first

husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), defendants' suggested theory that there was some sort of "advantage" to the first husband because at the time of the oral agreement and the execution of the mutual wills he was older than his wife and therefore the probability was that he would die first was too tenuous to prevail as a matter of law over the contrary view of the trier of fact, and it appearing that, at the time of execution of the wills (26 years after marriage) and for some years later, the wife was vigorous in mind and body and was not the "clingingvine" type, and that both had "respect for and perfect confidence in each other," the fair agreement for mutual, irrevocable wills, which gave neither spouse an advantage over the other, need not be stricken merely because neither attorney who prepared the wills insisted that the wife consult privately with other counsel.

CA(17) (17)

Id.—Transactions Inter Se—Undue Influence—Evidence.

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), the evidence supporting the trial court's determination that the wife executed her will and codicil voluntarily and not under undue influence or mistake likewise supported the determination that her subsequent election to take under her husband's will was an intelligent ratification of their agreement. The further finding that the wife kept and concealed her original will and codicil with the intent of making

them inoperative was supported where she produced the husband's will and codicil for probate, where after the close of probate she obtained from her attorneys the sole office copies of her will and codicil, where at the trial of this case neither her will nor a copy was in court in response to plaintiffs' notice to produce, and where the wife's sole explanation was that she did not know what had happened to her will.

CA(18) (18)

Decedents' Estates—Decree of Distribution—Recordation—Effect.

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), a finding that the second husband knew and had notice of the agreement between his wife and her first husband was supported where the wife, through her attorneys, caused recordation of the decree distributing to her the estate of her first husband, where the decree referred to the husband's will reciting that it was made in consideration of a mutual will on the part of his wife, where, at all pertinent times before and since the decree was recorded, Prob. Code, § 1222, provided that recordation of a decree making distribution of real property imparted notice to all persons of the contents thereof, Pol. Code, §§ 4134, 4135 (now Gov. Code, § 27326), made a similar provision with regard to certified copies of final decrees affecting realty, and Civ. Code, § 1213, provided that a recorded conveyance of realty was constructive notice of its contents to subsequent purchasers, and where the second husband, who was a real estate broker, testified that he and his wife "had no secrets whatsoever," and that they "discussed everything."

CA(19) (19)

Wills—Agreements as to Wills—Effect of Subsequent Marriage.

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), the trier of fact was not required to determine that subsequent conduct of defendants during their marriage *ex post facto* converted the wife's originally fair agreement with her first husband into a harsh, unjust agreement violative of public policy.

CA(20) (20)

Id.—Agreements as to Wills—Enforcement in Equity.

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), defendant could not be heard to argue that enforcement of the contract was inequitable because it was not shown that plaintiffs were the victims of actual "fraud" on the part of defendants and that plaintiffs did not give anything for, or change position in reliance on, any promise of the first husband or his wife, where the court's concern in enforcing, by quasi-specific performance, an agreement such as that of these spouses was not that the donee beneficiaries should receive something for which they had not paid, but that the promise of the wife for which her first husband bargained should be performed.

CA(21) (21)**Id.—Revocation—Mutual Wills.**

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), defendants could not assert on appeal that the wife's will was revoked by operation of law on her marriage to her second husband because the agreement between her and her first husband contained an implied covenant that it would not be binding in the event of remarriage of the survivor, where there was nothing expressed in the record or inferable therefrom which would warrant the Supreme Court in finding such a covenant.

CA(22) (22)**Id.—Agreements as to Wills—Limitation of Actions.**

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), defendant could not urge that as a matter of law the statute of limitations had run when plaintiffs began the action, where the contract of which quasi-specific performance was decreed was not to be performed until the wife's death, and plaintiffs were not bound to treat her contract as abandoned at any particular time prior to the date when her performance became due. Although plaintiffs could seek equitable relief against the wife's *inter vivos* transfers in constructive fraud of their rights, they

had their election to continue to rely on such contract and during such reliance the statute of limitations would not begin to run.

CA(23) (23)**Contracts—Actions—Time to Sue.**

--Where defendant definitely and unconditionally repudiates a contract before the time fixed for his performance, there is no necessity for making the statutory period of limitation begin to run against plaintiff until the day fixed by the contract for rendition of performance, at least unless plaintiff definitely elects to regard the anticipatory repudiation as a final breach. He need not so elect, and may properly wait until the time performance was due, before regarding the contract as broken.

CA(24) (24)**Id.—Actions—Time to Sue.**

--Plaintiff's mere knowledge of an anticipatory repudiation of a contract does not cause the statute of limitations to run.

CA(25) (25)**Equity—Laches.**

--Mere delay without prejudice does not give rise to the defense of laches; the doctrine is not designed to punish plaintiffs, but only to prevent unwarranted injustice.

CA(26) (26)**Wills—Joint Wills and Mutual Wills.**

--The makers of a joint and mutual will have the right to provide that all of the property owned by the survivor at his death shall pass under their will.

"redistribution," and they declined such invitation.

CA(27) (27)

Id.—Agreements as to Wills—Enforcement in Equity—Judgment.

--In an action by beneficiaries under mutual wills for specific performance of a contract to make mutual wills, to declare a trust and for an accounting, defendants could not urge that the operation of the judgment was inequitable because it provided that "for the duration of said trust" defendants "may" not deal with the trust property "with the intent to defeat . . . the purpose of this judgment and/or of said trust or of the rights of plaintiffs . . . under the said agreement for the making of mutual wills," since this was contrary to findings, supported by evidence, that the spouses executing the mutual wills intelligently made a fair agreement that neither "could, after the death of the other, . . . in any way deprive . . . [the named beneficiaries of their agreed mutual wills] of the benefits of said agreement" and that "the survivor could have during his or her lifetime the reasonable use and enjoyment of their combined estates."

CA(28) (28)

Id.—Agreements as to Wills—Enforcement in Equity—Appeal.

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), defendants were not in a position to urge on appeal that, to make it possible for the second husband to deal freely with his own property, the trial court should have "redistributed" the "merged" properties to him and his wife, where the trial court expressly offered defendants an opportunity to propose a form of judgment which would accomplish such

CA(29) (29)

Id.—Agreements as to Wills—Enforcement in Equity—Judgment.

--In an action by beneficiaries under mutual wills against a wife who had, subsequent to her first husband's death, married codefendant and transferred to herself and him in joint tenancy all property which she had agreed with her first husband should pass under their mutual wills to his named relatives (not parties to this action) and to her named relatives (plaintiffs here), the chancellor was justified in framing his decree by providing that "Except for the restrictions herein imposed, said defendants shall be free to use . . ., sell and otherwise deal with said property to serve . . . their needs . . . and general well-being in any reasonable manner," where, in view of defendants' attempts to make performance of the wife's agreement with her first husband impossible, and particularly in view of the facts that defendants deliberately commingled their properties and that the second husband, entrusted with their management, failed to keep records so that they could be readily traced, such decree awarded substantial justice according to the requirements of the varying complications presented for adjudication.

CA(30) (30)

Id.—Agreements as to Wills—Enforcement in Equity—Relief Granted.

--In an action by beneficiaries under mutual wills for specific performance of a contract to make mutual wills, to declare a trust and for an accounting, where it appeared that the rights of all parties had been adjusted by a decree which protected plaintiffs' remainder interest without an accounting, it was not necessary to reverse the litigation in order to require such accounting.

CA(31) (31)**Id.—Agreements as to Wills—Enforcement in Equity—Appeal.**

--In an action by beneficiaries under mutual wills for specific performance of a contract to make mutual wills, to declare a trust and for an accounting, where plaintiffs asserted that they should have "an undivided 50% remainder interest in and to all trust property whereas the formulae devised by the trial court reduce that interest to 37% of all combined property of [defendants] and the trust," but plaintiffs pointed to no evidence which would require a finding that 37 per cent of the "merged" properties was less than 50 per cent of the "trust res," and did not show that the finding in question was unsupported or that they were harmed by it, there was no occasion for the Supreme Court to disturb the formulae based thereon.

CA(32) (32)**Id.—Agreements as to Wills—Enforcement in Equity—Appeal.**

--In an action by beneficiaries under mutual wills for specific performance of a contract between defendant wife and her predeceased former husband to make mutual wills, to declare a trust and for an accounting, where plaintiffs asserted on appeal that the trial court should have restored to the "trust estate" the expenses of defendants' litigation hostile to such trust and the value of gifts by the surviving wife to her second husband and his parents, it should be presumed, in support of the judgment, that the trial court, confronted with records or lack of records which made mathematical precision impossible, took this difficulty into consideration and effected an approximate allowance to plaintiffs on behalf of gifts and sums expended from the trust in litigation hostile to it.

Counsel: Edmond Gattone and Clifford A. Hemmerling for Plaintiffs and Appellants.

George I. Devor, Paul P. Selvin, Irving M. Walker, Mark Mullin and Robert A. Schlesinger for Defendants and Appellants.

Judges: In Bank. Schauer, J. Gibson, C. J., Traynor, J., Spence, J., McComb, J., Peters, J., and White, J., concurred.

Opinion by: SCHAUER

Opinion

[*576] [**292] [***612] Plaintiffs and defendants by cross-appeals attack a judgment which awards plaintiffs some but not all of the relief sought in an action for specific performance of a contract to make mutual wills, to declare a trust, and for an accounting. Defendant Abigail Simpson and her former husband George Brown made mutual wills which provided that all the property of the first to die should go to the survivor and all the property of the survivor should go one half to named relatives of George (not parties to this action) and [****2] one half to named relatives of Abigail (plaintiffs here). George died and Abigail took under his mutual will. She married defendant E. Ross Simpson and transferred all her property to herself and Ross in joint tenancy. Plaintiffs then brought this action.

The trial court found, among other things, that there was and is an enforceable oral agreement between Abigail and George that they would make the mutual wills and "that neither George nor Abigail could, after the death of the other, change the . . . named beneficiaries or in any way deprive them of the benefits of said agreement; . . . the survivor could have during his or her lifetime the reasonable use and enjoyment of their combined estates . . ." To effect the agreement the judgment impresses a trust for plaintiffs' benefit on all property owned by Abigail, or by Abigail and her present husband Ross in joint tenancy, on the date of conclusion of

trial; it provides that for the duration of the trust neither Abigail nor Ross can deal with trust property so as to obstruct plaintiffs' rights; and it sets forth formulae for computing the share of the trust property which plaintiffs shall receive on Abigail's death, either if she [****3] predeceases Ross or if he predeceases her.

Abigail and Ross (hereinafter sometimes called defendants ¹) contend that the evidence does not support essential findings, that there are irreconcilable conflicts in material [*577] findings, and that, assuming arguendo that the judgment is otherwise proper, it erroneously bases its calculation of plaintiffs' interests on the value of the estate at Abigail's death rather than at George's death. Plaintiffs complain that the judgment does not require defendants to restore to the trust estate (a) sums expended by defendants from such estate in their unsuccessful attempts to defeat the trust and (b) the value of gifts made by Abigail from such estate to Ross and his parents; that under the formulae of the judgment plaintiffs will receive less than their proper share as remaindermen beneficiaries of the trust; and that defendants should be compelled to render an accounting to plaintiffs. We have concluded that the evidence supports the essential findings, the findings support the judgment, and the methods of computation of plaintiffs' share of the trust estate are proper.

[****4] In the following summary of the findings pertinent to this appeal, capital Roman numerals are the numbers by which the trial court designated its findings; small bracketed Roman numerals, inserted for convenience of subsequent reference, designate those portions of the findings which are attacked as unsupported by the evidence.

I

Abigail, then a widow, and George intermarried in

1910. No children were born to or adopted by either Abigail or George. When they married "each owned substantial separate property" and [i] "George's property was . . . of substantially greater value than Abigail's [ii] Property acquired by them subsequent to their marriage was community property even though various portions were held in their separate names or in joint tenancy for convenience only."

II

[iii] "Prior to July 21, 1936, Abigail and George orally agreed to make mutual wills [**293] [***613] wherein the entire estate of each party would be bequeathed and devised to the other, and the entire combined estate of the survivor would be bequeathed and devised" one half to named relatives of George in designated shares and one half to named relatives of Abigail in designated shares.

[****5] "Abigail and George also agreed that: (1) their mutual wills would contain the provisions included in the mutual wills subsequently executed by them as set forth below; (2) the agreement for the making of mutual wills was intended [*578] and made for the express benefit of all of the persons named therein as beneficiaries without distinction as to whether said beneficiaries were the kindred of George or Abigail; . . . that neither George nor Abigail could, after the death of the other, change the aforementioned named beneficiaries or in any way deprive them of the benefits of said agreement; (3) the survivor could have during his or her lifetime the reasonable use and enjoyment of their combined estates; and (4) that upon the death of the survivor they both desired the property to pass to the persons named . . . as beneficiaries . . . as stated in the mutual wills and not otherwise."

III, VII

Abigail and George on July 21, 1936, concurrently executed mutual wills [iv] which "conformed in all respects to the terms . . . of said agreement . . ."

¹ Ellis P. Brewer, a grandnephew of Abigail, refused to be a plaintiff, is joined as a defendant, and does not appear on appeal. References to "defendants" in this opinion include only Abigail and Ross, not Ellis P. Brewer.

IV

The pertinent provisions of Abigail's will of July 21, 1936, are as follows:

"I, Abigail Parkhurst Brown, being of sound and [****6] deposing [sic] mind and memory and not acting under fraud, duress or undue influence of any person, do make, publish and declare this my Last Will and Testament, and I do hereby further declare that this Last Will and Testament is made in consideration of a mutual Will on the part of my husband, George Stanley Brown, of even date herewith and in pursuance to an agreement between myself and my said husband . . . for the making of these mutual Wills on the part of each of us, and it is understood that should I be the survivor as between myself and my said husband and should I deem it advisable to appoint other executors in the place of those named herein, I reserve the right to do so and my said husband shall have the like privilege so long as one of the coexecutors is appointed from my family and one from the family of my said husband . . .

"In the event my said husband . . . shall survive me, I hereby give . . . to my husband . . . all of my estate . . .

"If my husband . . . be deceased at the time of my demise then . . . I hereby give . . . my entire estate including any and all property or estate that I may have received from my said husband one-half (1/2) to my kindred and one-half [****7] (1/2) to the kindred of my said husband, as hereinafter directed. [There follow gifts in designated shares to named relatives.] . . ."

[*579] The provisions of George's will are identical or, in appropriate part, reciprocal.

V, VIII

With the consent and knowledge of one another, Abigail and George on October 27, 1936, concurrently executed codicils [v] which "conformed in all respects to the terms . . . of said agreement for the making of mutual wills as

modified . . ."

VI

The codicils changed a trust provision of the will because of a change of circumstance of the beneficiary of such trust, Abigail's sister, and provided, "All other terms and conditions of my said Last Will and Testament to remain as originally written."

IX

Abigail was about 67 years old and George was about 72 when they executed their wills.

X

[vi] "The wills of George and Abigail constitute a true written memorandum of [**294] [***614] said oral agreement for the making of mutual wills . . ."

XI

[vii] "At the time the oral agreement to make mutual wills was made and during the negotiations leading to the same, and at the time the wills and codicils were executed and during the drafting [****8] thereof, Abigail and George were each represented and fully and independently advised by Ralph E. Wallace and William M. Crandall, attorneys at law. Said mutual wills and codicils were . . . voluntarily executed . . . by both Abigail and George, in each other's presence and with full knowledge and understanding of the contents and consequences thereof. At said times, Abigail was not in any respect imposed upon."

XII

During George's life the mutual wills were not changed except by the above described codicils, and the wills and codicils were not revoked. [viii] "Relying on the relationship of trust and confidence which existed between them, and further relying on Abigail's promised performance and her conduct as aforesaid, George, with Abigail's full knowledge, agreement and consent, did not revoke his will and

codicil and died leaving the same in full force . . . with the belief, understanding and expectation that Abigail's mutual will and codicil **[*580]** was and would continue to be in full force . . . and would become fully operative at her death, and that she would hold their combined estates for the uses and purposes declared by said agreement . . . and by said mutual **[****9]** wills . . ."

XIII

[ix] "[The] agreement for the making of mutual wills, and the mutual wills and codicils made pursuant thereto, were at all times fair, just and equitable as to both Abigail and George."

XIV

George died on March 31, 1937. On petition of Abigail his will and codicil were admitted to probate on May 3, 1937. Abigail was appointed and qualified as executrix.

XV

The property standing in George's name was appraised at a value in excess of \$ 80,000 during probate. All his estate was distributed to Abigail by decree of distribution recorded on December 21, 1937. Also Abigail became the owner of George's interest in [x] those portions of their community property which had been of record for convenience in joint tenancy or in her name.

XVI

After George's death Abigail retained Messrs. Wallace and Crandall to act as attorneys for her as proponent and executrix of George's will [xi] and "as attorneys for her personally . . . Her conduct in offering George's will for probate and in accepting benefits thereunder was free, voluntary and with full knowledge and understanding of the terms of said agreement, wills and codicils, and was not under any undue influence, **[****10]** mistake or fraud. Abigail elected to take under George's will and to abide by the terms of their agreement and after George's death ratified and affirmed the

same."

XVII

After the probate of George's estate, Abigail obtained from Wallace and Crandall their only office copies of her will and codicil. She did not return such papers to the attorneys and did not produce in court the original or a copy of her will or codicil. [xii] She kept the originals from the time of their execution, and has not accounted for her failure to produce them or copies of them in court. "She has concealed or destroyed said will and codicil with the intent of making the same inoperative . . ."

[*581] XIX

On February 7, 1945, Ross and Abigail intermarried. He was then not more than 49 years old and she was not less than 75. Prior to their marriage "there had been **[**295]** **[***615]** substantial business dealings between them, and Ross had knowledge of the size, extent and value of Abigail's estate. [xiii] Both prior to their marriage and also . . . at the time of the transfers referred to in paragraphs XXI and XXII [infra], Abigail had come to believe from her conversations and dealings **[****11]** with Ross that his estate was equal . . . to the estate then owned by Abigail."

XX

Ross and Abigail orally agreed to "merge" their estates by transferring title to their respective properties to themselves as joint tenants. [xiv] Prior to their marriage Ross "knew and had notice of the agreement between George and Abigail for the making of mutual wills, of the mutual wills made by them, of the probate of George's will and of the distribution of George's estate to Abigail," and one purpose of Ross's and Abigail's "merger" of their properties was to evade Abigail's duties under her agreement with George and her mutual will.

XXI

In March and April, 1945, Ross obtained from Abigail transfers and conveyances to herself and Ross as joint tenants of almost all her property.

XXII

In March, 1945, Ross transferred to Abigail and himself as joint tenants only a part of his property. [xv] Ross did not disclose to Abigail the value of the property then transferred by him, but represented to her and she reasonably believed that he was transferring all his property. (Attacked finding [xv] is of little importance, since neither plaintiffs nor defendants attack finding XXIV, *infra* [****12] , as to the respective values of the properties of Ross and Abigail, and it is clear from the memorandum opinion and the judgment of the trial court that it determined that Ross contributed about 26 per cent of the "merged" properties.)

XXIV

When Abigail transferred her property into joint tenancy with Ross, Ross's entire estate had a value not in excess of \$ 90,000; Abigail's estate which she transferred into joint tenancy had a value of at least \$ 255,000; and Ross's estate had [*582] a value of not more than 26 per cent of the combined value of their entire estates.

XXVI

[xvi] For "a considerable period of time" prior to Abigail's transfers of her property to Ross he was her confidential adviser, entrusted with management and control of her property and affairs. In making the transfers she had no independent advice.

XXVII

In October, 1948, George's kindred named as beneficiaries of the mutual wills began a proceeding to perpetuate testimony of Ross, Abigail, and Crandall in contemplation of a proposed action to determine the rights of such kindred under an asserted contract of Abigail and George to make mutual wills. (See [Brown v.](#)

[Superior Court \(1949\), 34 \[****13\] Cal.2d 559 \[212 P.2d 878\].](#)) On July 18, 1950, Abigail and Ross compromised the claims of the Brown relatives for \$ 27,000. This sum and \$ 13,000 costs and fees expended in the proceedings brought by the Brown relatives were paid from the "merged" estates of Abigail and Ross.

XXVIII

During their marriage Abigail and Ross gave plaintiffs bonds having a cash value of \$ 7,000 and gave Ross's parents real estate having a value of \$ 10,500. Prior to their marriage Abigail made a gift to Ross of about \$ 5,650 by cancelling a debt and encumbrance which she had against one of his properties.

XXIX

From 1937 to 1953 Abigail devoted her time, talent, effort, and money, with some assistance from Ross, to making the property on which the trust is imposed more valuable.

[**296] [***616] XXX, XXXII

"At all times during the marriage to George, Abigail had complete trust, faith and confidence in him and at all times during such marriage she signed such papers and documents as George requested her to sign."

XXXIII

[xvii] "Ross and Abigail concealed from plaintiffs . . . the fact that they had repudiated . . . Abigail's obligations to plaintiffs . . . and did not give plaintiffs . [****14] . . notice of said repudiation until issue was joined in this action. . . . [After] the aforesaid settlement with the kindred of George, and [*583] during defendants' last visit with plaintiff, Maude P. Brewer, in Iowa, both Ross and Abigail acknowledged and affirmed Abigail's obligations to plaintiffs . . . and led plaintiffs to reasonably believe that they intended to fully perform all of Abigail's obligations to plaintiffs under said agreement with George and the mutual

wills . . ."

Findings that allegations of affirmative defenses are untrue include findings that:

[xviii] Plaintiffs were not guilty of laches.

[xix] Plaintiffs' claim is not "barred" by the statute of frauds ([Civ. Code, § 1624, subd. 6](#), and [Code Civ. Proc., § 1973, subd. 6](#): "an agreement . . . to make any provision for any person by will").

[xx] The alleged oral agreement is not against public policy; its enforcement would not violate the rights of Ross or Abigail under their marriage contract and would not be harsh and inequitable as to Ross or Abigail.

[xxi] Abigail's will was not revoked by operation of law upon her marriage to Ross.

Our consideration of the attacked findings (indicated [****15] as stated, by small Roman numerals in brackets) is governed by the following rules: [CA\(1\) \(1\)](#) [CA\(2\) \(2\)](#) [HN1](#) "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact," and "When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." ([Grainger v. Antoyan \(1957\)](#), 48 Cal.2d 805, 807 [1, 2] [313 P.2d 848].) [CA\(3\) \(3\)](#) "Appellate courts . . . if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolved that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical." ([Estate of Bristol \(1943\)](#), 23 Cal.2d 221, 223-224 [3] [143 P.2d 689].) [CA\(4\) \(4\)](#) But where there are material, inconsistent findings upon substantially conflicting evidence, an appellate court [****16]

must reverse; it is not appropriate for it to assume to strike one determination or the other in order to uphold the judgment. ([Spaulding v. Cameron \(1952\)](#), 38 Cal.2d 265, 270 [239 P.2d 625].)

[*584] [CA\(5\) \(5\)](#) However, [HN2](#) "it is only when a judgment rests upon some particular finding for its validity and support that the lack of sufficient evidence to support such finding, or the contradictoriness between two findings, treating of the same essential matter, will necessitate a reversal of the case. . . . [CA\(6\) \(6\)](#) [However] lame, however inconclusive, any number of the findings may be, if in any case there be one clear, sustained and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be here concluded that the court did rest its judgment upon that finding, or those findings, and the others may and will be disregarded." ([American National Bank v. Donnellan \(1915\)](#), 170 Cal. 9, 15 [148 P. 188, Ann.Cas. 1917C 744].)

Defendants urge that the evidence does not support finding I [i] -- that [**297] [****617] at the time George and Abigail intermarried his property was "of substantially greater value" than hers -- [****17] and findings I [ii] and XV [x] -- that all property acquired by them during their marriage was community property. And, defendants argue, if those findings are unsupported then finding XIII [ix] -- that the agreement and the wills made pursuant thereto were fair to Abigail -- cannot stand.

There is no direct evidence that property which was acquired by George and Abigail during their marriage and which stood in their separate names was community. (See the presumption that such property placed in Abigail's name was separate; [Civ. Code, § 164](#), as amended Stats. 1923, ch. 360, p. 746, Stats. 1927, ch. 487, p. 826.) But the record as a whole would support a finding that all property acquired by George and Abigail during their marriage was community in character, for its only disclosed source (aside from the separate properties

brought to the marriage by the spouses in 1910, hereinafter discussed) was the work and talent of George during the approximately 27 years of marriage. Abigail testified that until 1921 George worked for a salary and that "He resigned in 1921, and he didn't work for anybody after that, only himself. . . . [He] was interested in trust deeds and real [****18] estate." The obvious principal source of the substantial amount of property owned by Abigail and George when he died in 1937 was his active and successful "interest" in trust deeds and real estate.

CA(7) (7) Abigail further testified that she and George each had some property when they intermarried, but she did not testify to the total value and extent of her property, and did not know the extent of George's property, at that time. Therefore, [*585] finding I [i] must fall. Such finding, however, is not necessary to uphold the further finding of fairness of the agreement and mutual wills of George and Abigail. The unidentified separate properties brought to the marriage by each in 1910, whatever their respective values, became indistinguishable parts of the mass of properties owned by them in 1936, when they made the attacked agreement and wills, and Abigail could not trace any particular piece of 1910 property, or any computable share of such properties, as having its origin in separate property. (See Grolemund v. Cafferata (1941), 17 Cal.2d 679, 683 [1] [111 P.2d 641].)

CA(8) (8) Whatever may have been the former understanding of George and Abigail as to the character of the [****19] properties which stood in their names in 1936, their oral agreement and the mutual wills of that year evidenced an understanding that they would treat the whole as property in which their interests were "present, existing and equal interests under the management and control of the husband" (Civ. Code, § 161a), i.e., community property. Certainly there is nothing unfair to the wife in the simple fact of an agreement that thus deals with properties which either originated in the husband's efforts during

marriage or, if they were separate in origin in 1910, had become indistinguishably confused over the years with property acquired by the husband's efforts during marriage and had been cared for and increased by such efforts.

The following evidence relates to the attacked finding (II [iii]) that George and Abigail orally agreed that they would make mutual wills for the express benefit of the persons named as beneficiaries, that the survivor would not change the beneficiaries or deprive them of the benefits of the agreement, and that the survivor during his or her life could have "the reasonable [inferentially, not the unlimited] use and enjoyment of their combined estates"; the [****20] findings (III, VII [iv], V, VIII [v]) that the wills and codicils conformed to the oral agreement and (X [vi]) that the wills "constitute a true written memorandum of said oral agreement"; and the findings (XI [viii]) that Abigail and George were independently represented and advised by Messrs. Wallace and Crandall and that Abigail executed her will and codicil voluntarily [**298] [***618] and with understanding of its consequences and was not imposed upon:

Mr. Wallace testified as follows: In the early 1930's George employed Wallace and Crandall as his attorneys in connection with real estate transactions. Abigail "was in the office with her husband, George . . . , on two or more occasions prior to [*586] the discussion with reference to the will" but prior to such discussion she did not consult Mr. Wallace professionally.

Abigail and George came into the office "a week or two before July 21, 1936." Mr. Wallace was then "acting in a professional capacity as a lawyer, and seeing Mr. and Mrs. Brown as clients." "I [Wallace] believe it was George who opened the conversation by saying that he wanted me to prepare wills for them, and gave me the memorandum of the [****21] legatees on both sides of the family, and told me that they had agreed on a general plan, that . . . whichever one

died first, they thought that there should be no division of their property for distribution outside of the couple, that the survivor should have the money and property and the use of it for the life of the survivor, and that at the death of the survivor they wanted it to go to the designated heirs on this memorandum. . . ." Other provisions of the wills, not here material, were discussed "at this conversation or at [a further conversation] one or two days later . . .

"And I believe I also told them at the time that these wills could be changed by mutual consent during the lifetime of both of them, and could be changed by the survivor after the death of one of them only as to the appointment of executors or executrixes . . . I pointed that out to them, that it was binding and conclusive upon the survivor following the death of the first of them.

"After the explanation that I gave them of these various provisions, I asked them if that was what they wanted, and they said they did, that was it. So I then prepared the wills in their final form and notified them, and [****22] they came in on the 21st, at which time they were executed."

On July 21, 1936, Mr. Wallace testified, "I read one of them [the mutual wills] aloud . . . I gave Mr. Brown a copy of his will and Mrs. Brown a copy of her will. Then as I read . . . I asked them to follow me, and if there was anything . . . they wanted to ask or . . . suggest, to interrupt me, and they were gone through that way completely." Three copies of the wills had been prepared and "Following the execution . . . I handed the original and one copy to each of the parties, and retained the third copy in our files."

Particularly asked whether Abigail said anything "during these conversations," Mr. Wallace testified, "When the draft was gone over, I remember asking each of them if that was what they wanted, and they both told me yes . . . I asked Mrs. Brown about the group of persons in her family that [*587] were named as legatees, and she told me about them. And at the time of the going over the wills, when I

read it aloud, I think . . . I hesitated several times and asked if they were following me, to which they both said yes, they were. . . .

"I said, 'You understand then that there is a reservation [****23] there that you can change the executor that is provided in the will?' and they said yes, they understood that, and they wanted it that way. Both of them told me that."

Mr. Crandall's testimony as to the events leading up to and the execution of the mutual wills was materially similar to that of Mr. Wallace. Crandall also testified that on October 27, 1936, the Browns called at the office of Wallace and Crandall and stated that they wished to change a provision of the will which left a share of the property in trust for Abigail's sister; the mutual codicils were prepared and executed "right then and there"; and one or the other of the Browns took the original codicils from the office.

[**299] [****619] [CA\(9\)](#) (9) The following testimony of Crandall is relevant to defendants' claim that the evidence establishes that Wallace and Crandall represented only George, not Abigail, and that Abigail was under the undue influence of George and did not understand the transaction: "I don't recall having anything [legal matters] for Mrs. Brown alone prior to the death of Mr. Brown" except that in the preparation of the mutual wills "I did certainly, of course, work professionally for Mrs. Brown [****24] prior to the death of Mr. Brown."

Previous to the preparation of the mutual wills "Mr. and Mrs. Brown both stated that they wanted to have their wills drawn . . .; that they wanted to will on the part of each of them to the survivor, but if the other spouse did survive, that the will of the surviving spouse was to specify that the heirs of Mr. Brown would have a half of the remaining estate, and the heirs of Mrs. Brown would have the other half . . ." During the ensuing consultations Mr. Brown carried on most of the conversation; he was more "a talking person" than Abigail, but she did not appear reluctant to speak or under any

compulsion to keep silent.

CA(10) (10) Defendants' lengthy arguments as to the credibility and effect of the testimonies of Mr. Wallace, Mr. Crandall, and Abigail are not appropriately addressed to this court. The trier of fact was the exclusive judge of those matters. (Code Civ. Proc., §§ 1847, [2061](#).) Upon any fair view of the evidence favorable to supporting the findings it is clear that Abigail and George did orally agree to make mutual wills, **[*588]** irrevocable upon the death of either, for the express benefit of the beneficiaries named in the wills, and that **[****25]** such wills were executed pursuant to and (see Rest., Contracts (1932), § 207, Illus. 1, § 208) sufficiently memorialize that agreement.

CA(11) (11) Defendants argue that any promise of Abigail to leave one half the property to plaintiffs, her own kin, if she survived George, was only incidental to the main purpose of the contract, which was to make sure that if she survived George *she* would receive the entire estate, and if she did not survive him, her own relatives would receive one half the estate; therefore, defendants say, the contract was not "made expressly for the benefit" of plaintiffs ([Civ. Code, § 1559](#)) and plaintiffs, as mere incidental beneficiaries, cannot enforce it. Acceptance of this argument would lead to peculiar conclusions. The will of Abigail and the will of George each set forth the gifts to the kindred of both in language which does not differentiate between the intent to benefit the testator's own kindred and the intent to benefit the kindred of the spouse. Yet Abigail would have us believe that she intended that her relatives should be the express beneficiaries of George's will if she predeceased George but only incidental beneficiaries of her will if she survived **[****26]** George. From this it would follow that George's will, listing the gifts to kindred of both spouses in the same straightforward manner as Abigail's, nevertheless is the vehicle of the same subtle differentiation of intent.

On the other hand, the contract evidenced by the mutual wills is readily and reasonably susceptible

of the trial court's view that it was "made for the express benefit of all the persons named therein as beneficiaries." As the trial judge stated, "After having lived together for twenty-six years, . . . [George and Abigail] being fairly wise in the ways, temptations and frailties of human nature, could have entertained the firm desire that the estate which they had built together, through their own industry, thrift and sacrifice, go to relatives, even those for whom they had no deep concern and to whom they recognized no obligation or debt of gratitude, than to a second wife or husband who would have no natural or ethical claim upon the fruits of their joint labor."

CA(12) (12) Nor can we accept defendants' argument that the omission of the wills to refer expressly to irrevocability renders the agreement evidenced by such wills inconsistent with the oral agreement as found **[****27]** **[**300]** **[***620]** by the trial court. **CA(13) (13)** Here, as [HN3](#) in every contract, "there is an implied covenant of good faith and fair dealing that neither party will do anything which **[*589]** injures the right of the other to receive the benefits of the agreement. [Citations.] **CA(14) (14)** Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed." (*Brown v. Superior Court* (1949), [supra](#), [34 Cal.2d 559, 564-565](#) [8, 9] [[212 P.2d 878](#)].) **CA(15) (15)** Also implied as part of the "good faith and fair dealing" is a covenant of the survivor not to make unreasonable use of the property, as by conveying it all away so that the named third party beneficiaries will receive nothing. (See [id.](#), [p. 565](#) [11] of 34 Cal.2d.)

Defendants urge that the findings that Abigail was "independently advised" by Wallace and Crandall and "not . . . imposed upon" and "voluntarily executed" the will "with full knowledge and understanding of the contents and consequences," are contrary to the substance of the finding (XXX, XXXII) that "At all times during **[****28]** the

marriage to George, Abigail had complete trust, faith and confidence in him and . . . signed such papers . . . as George requested her to sign."

Defendants rely upon the following rules: [HN4](#) Husband and wife are "subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts." (Civ. Code, § 158.) "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." ([Civ. Code, § 2235](#).) A husband dealing with his wife "must, if he would avoid the presumption of undue influence emanating from the procurement of any advantage over her, make full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, or else himself deal with her at arm's length and as he would with a stranger, all the while giving her the opportunity of independent advice [****29] as to her rights in the premises." ([Estate of Cover \(1922\)](#), [188 Cal. 133, 144](#) [7] [[204 P. 583](#)].)

[CA\(16\)](#) (16) The record supports the trial judge's stated view that George gained no "advantage" over Abigail by the agreement, for "Abigail was to receive all the property if George died first, and she did receive it. George was to receive no more, could not have received more, if Abigail died first." The [*590] suggested theory that there was some sort of "advantage" to George because at the time of the oral agreement and the execution of the mutual wills he was older than Abigail and therefore the probability was that he would die first is altogether too tenuous to prevail as a matter of law over the contrary view of the trier of fact.

Furthermore, the trial court pointed out that Abigail at the time of the execution of the mutual wills and for years thereafter was vigorous in mind and body;

she was not "the frail, weak, 'clinging-vine,' vassal type of wife"; and when "respect for and perfect confidence in each other" such as George and Abigail had existed "after twenty-six years of marriage, its roots are in experience." In the circumstances the altogether fair agreement for mutual, [****30] irrevocable wills, which gave neither spouse an "advantage" over the other, need not be stricken down because neither George nor Messrs. Crandall and Wallace insisted that Abigail employ and consult privately with other counsel.

Not controlling here are such cases as [Gregory v. Gregory \(1949\)](#), [92 Cal.App.2d 343, 349](#) [2] [[206 P.2d 1122](#)]; [Khoury v. Barham \(1948\)](#), [85 Cal.App.2d 202, 212](#) [4] [[192 P.2d 823](#)]; and [Andrew v. Andrew \(1942\)](#), [51 Cal.App.2d 451, 455](#) [1, 2] [[125 P.2d 47](#)], in which the appellate court upheld [**301] [***621] the trial court's determination based on the presumption of undue influence where the agreement in question appeared unfair, and such cases as [Matassa v. Matassa \(1948\)](#), [87 Cal.App.2d 206, 214-220](#) [1-3] [[196 P.2d 599](#)], in which the appellate court held that the evidence did not support a finding of fairness of a postnuptial agreement in circumstances strikingly different from those here (i.e., by such agreement the wife, aged 18, relinquished her right of inheritance although prior to the marriage the husband, aged 53, had told her "that half of everything that he had would be mine"; when she protested [****31] that she did not understand the agreement and wished to obtain independent advice before signing, the husband instructed her to sign and refused to allow her to consult with her family concerning the matter).

[CA\(17\)](#) (17) The above described view of the evidence which supports the trial court's determination that Abigail executed her will and codicil voluntarily and not under undue influence or mistake likewise supports the determination that her subsequent election to take under George's will was an intelligent ratification of their agreement. The further finding that Abigail kept and concealed her original will and codicil with the [*591] intent

of making the same inoperative is amply supported. She produced George's will and codicil for probate; after the close of probate she obtained from Wallace and Crandall the sole office copies of her will and codicil; at the trial of this case neither her will nor a copy was in court in response to plaintiffs' notice to produce; and Abigail's sole explanation was that she did not know what had happened to her will.

The attacked findings [xiii] through [xvii] concerning particularities of the relationship and dealings between Abigail and Ross, [****32] and their concealment from plaintiffs of Abigail's repudiation of her obligations to plaintiffs under her agreement with George, need be reviewed only insofar as they bear upon the more general findings which reject defendants' claims that plaintiffs were barred by limitations or laches [xviii], that the agreement of George and Abigail is contrary to public policy and inequitable to Ross and Abigail [xx], and that Abigail's will was revoked by her marriage to Ross [xxi].

CA(18) (18) As to finding [xiv] -- that Ross knew and had notice of the agreement between George and Abigail -- the following matters are pertinent: On December 21, 1937, Abigail, through Wallace and Crandall, caused recordation of the decree distributing to her the estate of George. The decree recited "That in pursuance of and according to the provisions of the Last Will of said decedent [George], . . . all . . . property belonging to said estate . . . be distributed . . . to Abigail." The thus referred to will of George recited that it "is made in consideration of a mutual Will on the part of my wife, Abigail . . . and in pursuance to an agreement between myself and my said wife . . . for the making of these mutual [****33] Wills on the part of each of us." Although the will itself was not recorded it was on file with the county clerk as a part of the records of the probate proceeding and was, of course, available for examination by any interested person.

At all pertinent times before and since the decree

was recorded, **HN5** section 1222 of the Probate Code has provided that "When an order is made . . . making distribution of real property . . . a certified copy thereof must be recorded in the office of the county recorder of each county in which the land . . . lies; and from the time of filing the same for record, notice is imparted to all persons of the contents thereof"; **HN6** sections 4134 and 4135 of the Political Code (now **Gov. Code, § 27326**) provided that "The recorder must file and record in the record of deeds . . . certified copies of final judgments [***592**] or decrees . . . affecting the title or possession of real property . . . Every such certified copy . . . from the time of filing the same . . . for [****302**] [*****622**] record, imparts notice to all persons of the contents thereof; and subsequent purchasers . . . take with like notice and effect as if such copy of decree . . . was a duly recorded [******34**] deed . . ."; and **HN7** **section 1213 of the Civil Code** has provided that "Every conveyance of real property . . . recorded as prescribed by law . . . is constructive notice of the contents thereof to subsequent purchasers . . ."

Furthermore, Ross was a real estate broker and dealt in real property on his own account; before he married Abigail they had business dealings with realty, and he told her, "I have no ties on me, this is what I have" and "[We] had no secrets whatsoever. We discussed everything" although "I don't think we discussed the properties." In these circumstances defendants attribute remarkable naivete to Ross in contending that the finding that he "knew and had notice of the agreement between George and Abigail" is not supported.

CA(19) (19) Manifestly the trier of fact was not required to determine that subsequent conduct of Ross and Abigail during their marriage *ex post facto* converted Abigail's originally fair agreement with George into a harsh, unjust agreement violative of public policy.

CA(20) (20) In arguing that enforcement of the contract is inequitable defendants urge that it is not shown that plaintiffs are the victims of actual

"fraud" on the part of defendants (citing [****35] *Brown v. Superior Court* (1949), [supra](#), 34 Cal.2d 559, 564; *Fowler v. Security-First Nat. Bank* (1956), 146 Cal.App.2d 37, 47 [14] [303 P.2d 565]). Defendants emphasize that plaintiffs did not give anything for, or change position in reliance on, any promise of George or Abigail. But the court's concern in enforcing, by quasi-specific performance, an agreement such as that of George and Abigail is not that the donee beneficiaries should receive something for which they have not paid, but that the promise of Abigail for which George bargained should be performed.

CA(21) (21) Defendants assert that Abigail's will was revoked by operation of law on her marriage to Ross, because the agreement between George and Abigail contained an implied covenant that it would not be binding in the event of remarriage of the survivor. There is nothing expressed in the record or inferable therefrom which could warrant our finding such a covenant.

[*593] **CA(22) (22)** Defendants, without settling upon any particular statutory period of limitation as assertedly being applicable, or upon any particular act of anyone as marking the asserted accrual of plaintiffs' cause of action, or upon any particular [****36] time when they claim that the statute of limitations began to run, urge that as a matter of law the statute of limitations had run when plaintiffs began this action on September 4, 1953. But the contract of which quasi-specific performance is decreed was not to be performed until Abigail's death. Plaintiffs were not bound to treat her contract as abandoned at any particular time prior to the date when Abigail's performance became due. (*Rogers v. Schlotterback* (1914), 167 Cal. 35, 46-48 [138 P. 728]; *Lubin v. Lubin* (1956), 144 Cal.App.2d 781, 789-790 [6] [302 P.2d 49].) Although plaintiffs could, as they did, seek equitable relief against Abigail's *inter vivos* transfers in joint tenancy in constructive fraud of their rights (*Brown v. Superior Court* (1949), [supra](#), 34 Cal.2d 559, 564), they had their election to continue to rely on such contract and during such

reliance the statute of limitations would not begin to run (*Union Sugar Co. v. Hollister Estate Co.* (1935), 3 Cal.2d 740, 745-746 [3] [47 P.2d 273]).

CA(23) (23) The following comment (4 Corbin, Contracts (1951), § 989, p. 967) is pertinent: **HN8** Where a defendant definitely and unconditionally [****37] repudiates a contract before the time fixed for his performance, "[there] is no necessity for making the statutory period of limitation begin to run against the [**303] [****623] plaintiff until the day fixed by the contract for the rendition of performance, at least unless the plaintiff definitely elects to regard the anticipatory repudiation as a final breach. It is generally said that he need not so elect and that he may properly wait until the time that performance was due, before regarding the contract as broken."

We need not consider whether a definite election of a plaintiff to regard an anticipatory repudiation as a final breach might in some circumstances start the running of the statute of limitations, because there is nothing in the record here which would compel a determination that any plaintiff made any such election.

The only plaintiff who expressed a position as to the present controversy prior to the institution of this action was Maude Brewer. On July 6, 1950, Maude wrote to defendants from her home in Iowa as follows: "We have known all the time of your trouble with the Browns [the kindred of George [*594] who were beneficiaries of the mutual wills [****38] and whose claims were settled by Ross and Abigail] and that we could have shared as they would -- and still want us to join them -- but we all felt if you wanted us to come in on equal shares with them you would have done it. . . ."

Later in 1950 or in 1951 defendants visited Maude in Iowa and, according to Abigail's testimony, the following conversation took place:

Maude said that "George told her that she was to have some money." Abigail replied, "I never heard him say it. . . . We have always been here together

and he has never seen you alone, he never did." Maude then "started to tell about the Brown family, and she thought she should have as much as they had, and so we tried to explain . . . that Mr. Brown had passed away, that was entirely different, I was still alive, and 'I hope I will be yet a while.' . . .

"Mr. Simpson tried to settle it with her right then and there, and he said, 'I will give you twenty thousand. . . .' Well, she said that she would think about it, and she didn't want green grass . . ." (On defendants' motion the trial court struck the foregoing testimony "only . . . insofar as it might be construed to be . . . an admission of liability.")

Obviously [****39] Maude did not express a definite election to treat Abigail's words and conduct as a final breach of contract; rather, Maude concluded that "she would think about it." [CA\(24\) \(24\)](#) And defendants' assumption that the beneficiary's mere knowledge of an anticipatory repudiation of a contract causes the statute of limitations to run is untenable.

Defendants further contend that laches is established as a matter of law. [CA\(25\) \(25\)](#) [HN9](#) Mere delay without prejudice does not give rise to the defense (*Maquire v. Hibernia S. & L. Soc.* (1944), [23 Cal.2d 719, 735-736](#) [17-19] [[146 P.2d 673, 151 A.L.R. 1062](#)]) and the doctrine is not designed to punish plaintiffs but only to prevent unwarranted injustice (*Berniker v. Berniker* (1947), [30 Cal.2d 439, 448-449](#) [6-7] [[182 P.2d 557](#)]). In this regard the trial judge pertinently said, "The only possible fact in this case which, so far as I know, might be urged to be pregnant with such an injustice is that the defendants have been more frugal and canny in their management of their properties . . . than they would have been had they known earlier than plaintiffs intended to seek the enforcement of the contract in question. . . . The record, however, seems [****40] to indicate that they have had a pretty good time, certainly enough income to provide . . . not only the [*595] ordinary necessities and comforts of life, but as many luxuries as persons of their age usually ask of

life. . . . In the years when they were most likely to enjoy their joint estate, they were not burdened with this litigation, and it seems probable that they have had more fun than they would have had if the action were commenced years sooner than it was."

Defendants say, "Assuming arguendo that the judgment is otherwise proper, it is nevertheless erroneous in calculating plaintiffs' beneficial interest upon the [**304] [****624] value of the estate at Abigail's death rather than upon the value of the estate at George's death." (For the purpose of discussing this contention we accept defendants' assertion that the formulae of the judgment are based on "the value of the estate at Abigail's death." It should be noted, however, that the constructive trust attached as of the date of the conclusion of trial; it does not purport to cover any property thereafter acquired by Abigail.)

In support of this contention defendants cite *Murphy v. Slaton* (1954), [154 \[****41\] Tex. 35 \[273 S.W.2d 588, 594-595](#) [3, 4]], and *Ward v. Ward* (1955, *Tex.Civ.App.*), [278 S.W.2d 886, 888](#) [1]. Each of these cases properly construed a joint will of husband and wife as attaching only to property owned by the spouses at the time of the death of the first to die. The language of the wills showed such intention of the makers. [CA\(26\) \(26\)](#) But the Texas Supreme Court in the *Murphy* case recognized the right of the makers of a joint and mutual will "to provide that all of the property owned by the survivor at his death shall pass under . . . their will." Here the mutual wills so provide; they read, "If my [spouse] . . . be deceased *at the time of my demise* then . . . I hereby give . . . *my entire estate* including any . . . estate that I may have received from my said [spouse] . . . as hereinafter directed." (Italics added.)

[CA\(27\) \(27\)](#) Defendants urge that the operation of the judgment is inequitable because it provides that "[for] the duration of said trust" defendants "may" not deal with the trust property "with the intent to defeat . . . the purpose of this judgment and/or of said trust or of the rights of plaintiffs . . . under the

said agreement for the making of [****42] mutual wills." This is but another aspect of defendants' argument, contrary to the findings which, as we have seen, are supported by the evidence, that Abigail and George intelligently made a fair agreement that neither "could, after the death of the other, . . . in any way deprive . . . [the named beneficiaries of [*596] their agreed mutual wills] of the benefits of said agreement" and that "the survivor could have during his or her lifetime the *reasonable* use and enjoyment of their combined estates" (*italics added*).

[CA\(28\)](#) (28) Defendants further assert that, to make it possible for Ross to deal freely with his own property, the trial court should have "redistributed" the "merged" properties to Ross and Abigail. The trial court expressly offered defendants an opportunity to propose a form of judgment which would accomplish such "redistribution," and defendants declined such invitation. Therefore, they are not now in a position to raise the subject contention. [CA\(29\)](#) (29) The trial court was careful not to limit defendants' enjoyment of their properties any more than was necessary to effect the purposes of its decree; it provided that "Except for the restrictions herein imposed, said defendants [****43] shall be free to use . . . , sell and otherwise deal with said property to serve . . . their needs . . . and general well-being in any reasonable manner . . ." In view of defendants' long-standing attempts to make performance of Abigail's agreement with George impossible, and particularly in view of the facts that defendants deliberately commingled their properties and that Ross, entrusted with their management, failed to keep records so that they could be readily traced, the chancellor was justified in framing his decree as he did so as "to award substantial justice according to the requirements of the varying complications . . . presented . . . for adjudication." ([Times-Mirror Co. v. Superior Court \(1935\)](#), 3 Cal.2d 309, 331 [3] [44 P.2d 547]; [Humboldt Sav. Bank v. McCleverty \(1911\)](#), 161 Cal. 285, 292 [119 P. 82].)

[CA\(30\)](#) (30) The foregoing principle is pertinent also to our disposition of the contentions of plaintiffs, as appellants. They urge that the trial court should have required that defendants render to plaintiffs an accounting of the trust property. In support of this contention they cite, among other cases, [Newport v. Hatton \(1924\)](#), 195 Cal. 132, 149-151 [****44] [13, 15], 152 [**305] [***625] [231 P. 987], which holds that where remaindermen-beneficiaries can trace trust property to a commingled mass of property held by constructive trustees, "[it] only remains for the court to "disentangle the account, and separate the trust from the private moneys" . . . [Although the life estate has not yet terminated, and the beneficiaries cannot yet recover the property,] [their] immediate concern is that their remainder interest in the *corpus* of the estate be preserved." [*597] We may agree that if an accounting had been required more precision in the definition of the trust would have been possible. But where, as here, it appears that the rights of all parties have been adjusted by a decree which protects plaintiffs' remainder interest without an accounting it is not necessary to reverse and prolong this litigation in order to require such accounting.

[CA\(31\)](#) (31) Plaintiffs assert that they should have "an undivided 50% remainder interest in and to all trust property whereas the formulae devised by the trial court reduce that interest to 37% of all combined property of Ross, Abigail and the trust." Plaintiffs point to no evidence [****45] which would require a finding that 37 per cent of the "merged" properties of Abigail and Ross (one half of Abigail's proportionate contribution to such "merged" properties) is less than 50 per cent of the "trust res." (See finding XXIV, *supra*, pp. 581-582.) Since they do not show that finding XXIV is unsupported or that they are harmed by it there is no occasion to disturb the formulae based thereon.

[CA\(32\)](#) (32) This same consideration disposes of plaintiffs' further contentions that the trial court should have restored to the "trust estate" the expenses of defendants' litigation hostile to such

trust (finding XXVII, *supra*, p. 582; see [Estate of Baird \(1955\), 135 Cal.App.2d 343, 347](#) [4, 5] [287 P.2d 372]; [Estate of Vokal \(1953\), 121 Cal.App.2d 252, 260](#) [9] [263 P.2d 64]), and the value of gifts by Abigail to Ross and his parents (finding XXVIII, *supra*, p. 582; [Hill v. Thomas \(1955\), 135 Cal.App.2d 672, 677-678](#) [3, 1c] [288 P.2d 157]). It should be presumed, in support of the judgment, that the trial court, confronted with records, or a lack of records, which made mathematical precision impossible, took this difficulty into consideration and effected an [****46] approximate allowance to plaintiffs on behalf of gifts and sums expended from the trust in litigation hostile to it.

For the reasons above stated, the judgment is affirmed.



Caution

As of: October 18, 2026 7:14 AM Z

Brinkerhoff-Faris Trust & Sav. Co. v. Hill

Supreme Court of the United States

May 1, 1930, Argued ; June 2, 1930, Decided

No. 464

Reporter

281 U.S. 673 *; 50 S. Ct. 451 **; 74 L. Ed. 1107 ***; 1930 U.S. LEXIS 415 ****

BRINKERHOFF-FARIS TRUST & SAVINGS
COMPANY v. HILL, TREASURER AND EX-
OFFICIO COLLECTOR OF HENRY COUNTY,
MISSOURI

Prior History: [****1] CERTIORARI TO THE
SUPREME COURT OF MISSOURI.

CERTIORARI, 280 U.S. 550, to review a judgment
of the Supreme Court of Missouri affirming the
dismissal of a bill to enjoin the collection of taxes.

Disposition: [323 Mo. 180](#), reversed.

Core Terms

state court, deprive, administrative remedy, percent

Case Summary

Procedural Posture

Petitioner taxpayer challenged by certiorari a
judgment from the Supreme Court of Missouri,
which affirmed the dismissal of its bill to enjoin the
allegedly discriminatory collection of taxes by
respondent tax collector.

Overview

The taxpayer, acting as trustee for its shareholders,
filed an action against the tax collector to enjoin
him from collecting or attempting to collect taxes
that were allegedly discriminatorily assessed. The
trial court refused the injunction and dismissed the
bill. The state supreme court affirmed the trial
court's judgment. In its decision, the state supreme

court reversed the existing precedent and created a
new administrative remedy in the tax commission.
It then held that because the taxpayer had an
adequate legal remedy, it was not entitled to
equitable relief; and because the taxpayer had not
complained to the tax commission, it was guilty of
laches. The court granted certiorari and reversed the
dismissal of the taxpayer's action. The state
supreme court refused to hear the taxpayer's
complaint and denied it relief because, assuming
power and merit, the taxpayer did not first seek an
administrative remedy which, in fact, was never
available and which was not subsequently open to
it. By denying to it the only remedy ever available
for the enforcement of its right to prevent the
seizure of its property, the judgment deprived the
taxpayer of its property without due process.

Outcome

The court reversed the dismissal of the taxpayer's
request for an injunction and remanded the action
for further proceedings.

LexisNexis® Headnotes

Tax Law > State & Local

Taxes > Administration & Procedure > General
Overview

**[HN1](#) State & Local Taxes, Administration &
Procedure**

The powers and duties of the Missouri State Tax Commission are prescribed by Mo. Rev. Stat. art. 4, ch. 119 (1919).

Constitutional Law > Substantive Due Process > Scope

HN2 Constitutional Law, Substantive Due Process

When a state court refused to hear a plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it, the United States Supreme Court held that by denying to the plaintiff the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property in violation of due process.

Banking Law > Federal Acts > General Overview

Constitutional Law > Bill of Rights > State Application

HN3 Banking Law, Federal Acts

The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > State Court Decisions

HN4 Federal & State Interrelationships, Erie Doctrine

The courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; the power of the Supreme Court of the United States to review decisions of state courts is limited to their decisions on federal questions; the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the [Fourteenth Amendment](#) or otherwise confer appellate jurisdiction on the Supreme Court.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN5 Subject Matter Jurisdiction, Federal Questions

When the plaintiff's claim is one arising under the Federal Constitution it is one on which the opinion of the state court is not final.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Constitutional Law > Bill of Rights > State Application

HN6 Federal & State Interrelationships, Erie Doctrine

While it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary

or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Constitutional Law > Bill of Rights > State Application

Governments > Courts > Judicial Precedent

HN7 Bill of Rights, State Application

The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like the Supreme Court of the United States, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.

Lawyers' Edition Display

Headnotes

APPEAL, §436 > Federal question first raised on petition for rehearing. -- > Headnote:

[LEdHN\[1\]](#) [1]

A Federal question raised for the first time on petition for rehearing in the highest court of the state is raised in time, where it is presented by a construction placed upon a statute by such court in its decision, at variance with a construction formerly adopted by it.

CONSTITUTIONAL LAW, §779 > due process -- denial of equitable relief where no other remedy available. -- > Headnote:

[LEdHN\[2\]](#) [2]

Due process of law is denied by a decision of a state court denying an injunction against the collection of a tax based on an alleged discriminatory assessment, on the ground that the plaintiff had a remedy by complaining to the state tax commission before the tax books were delivered to the collector, and was guilty of laches in not so doing, where prior to the decision in the instant case an application to the state tax commission would have been unavailing because the highest court of the state had held in a former case that the tax commission was without power to afford relief, and at the time of the instant decision that it had such power the time for filing such complaint had expired.

CONSTITUTIONAL LAW, §513 > due process -- construction of statute as denial. -- > Headnote:

[LEdHN\[3\]](#) [3]

A violation of the due process clause may be accomplished by the state judiciary in the course of construing an otherwise valid state statute.

CONSTITUTIONAL LAW, §513 > due process -- state action through courts. -- > Headnote:

[LEdHN\[4\]](#) [4]

The Federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government.

APPEAL, §512 > appellate jurisdiction of Supreme Court -- state decision on question of state law. --

> Headnote:

[LEdHN\[5\]](#) [5]

The interpretation by the courts of a state of the written and unwritten laws of the state is not reviewable by the Supreme Court of the United States.

APPEAL, §446 > appellate jurisdiction of Supreme Court -- review of state court decisions -- necessity of existence of Federal question. -- > Headnote:

[LEdHN\[6\]](#) [6]

The power of the Supreme Court of the United States to review decisions of state courts is limited to their decisions on Federal questions.

APPEAL, §529 > appellate jurisdiction of Supreme Court -- erroneous decision -- overruling of previous decision. -- > Headnote:

[LEdHN\[7\]](#) [7]

The mere fact that a state court has rendered an erroneous decision on questions of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the [14th Amendment](#), or otherwise confer appellate jurisdiction on the Supreme Court of the United States.

CONSTITUTIONAL LAW, §779 > due process -- denial of remedy. -- > Headnote:

[LEdHN\[8\]](#) [8]

Whether acting through its judiciary or through its legislature, a state may not deprive a person of all

existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Syllabus

1. A federal claim first raised by petition for rehearing in a state court is in time for purposes of review here if it was raised at the first opportunity, even though the petition was denied without opinion. P. 677.

2. Where, under repeated constructions of laws of a State, consistently acted upon in administrative practice, a suit in equity to enjoin collection was the appropriate and the only remedy against a discriminating state tax violative of the [equal protection clause of the Fourteenth Amendment](#), and the state court, overruling its earlier decisions, denies this remedy, not for want of power, but upon the ground that the party seeking it should first have exhausted an administrative remedy, which, under the decisions overruled, was never open to him, and which, under the overruling decision, it is too late for him to invoke, -- the judgment violates due process of law, in its primary sense of an opportunity to be heard and to defend one's substantive right. P. 678.

3. The [****2] federal guaranty of due process extends of state action through its judicial as well as through its legislative, executive or administrative branch of government. P. 679.

4. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. P. 682.

5. The state court having dismissed the bill upon a ground not sufficient to support the judgment independently, without deciding whether the plaintiff's allegations, presenting a claim under the

[equal protection clause](#), were sustained by proof, this Court does not inquire into the merits of that claim, but reverses the judgment and remands the case for further proceedings. *Id.*

Counsel: Mr. Roy W. Rucker, with whom Messrs. John Montgomery, Jr., and Lee Montgomery were on the brief, for petitioner.

Mr. Lieutellus Cunningham, with whom Messrs. Stratton Shartel, Attorney General of Missouri, N. B. Conrad, Frederick F. Wesner, and Charles A. Calvird, Jr., were on the brief, for respondent.

Judges: [****3] Hughes, Holmes, Van Devanter, Brandeis, Sutherland, Butler, Stone; McReynolds did not hear the argument and took no part in the decision of this case.

Opinion by: BRANDEIS

Opinion

[*674] [**452] [***1110] MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In 1928, the Brinkerhoff-Faris Trust & Savings Company, acting as trustee for its shareholders, brought this suit in a Missouri court against the Treasurer of Henry County, Missouri, to enjoin him from collecting or attempting to collect a certain part of the taxes assessed against them for the year 1927 on the shares of its stock; and, pending decision in this suit, to restrain the prosecution of an action already brought by him against the plaintiff for that purpose.

The bill alleged that the township assessor had intentionally and systematically discriminated against the shareholders by assessing bank stock at full value, while intentionally and systematically omitting to assess certain classes of property and assessing all other classes of property at 75 per cent or less of their value. It asserted that, to the extent of 25 per cent, the assessments were void because such discrimination violated the [equal protection](#)

[clause of the Fourteenth Amendment](#). [****4] And it recited that the plaintiff had tendered, and was continuing to tender, payment of the 75 per cent of the taxes assessed, which amount it conceded was due. As grounds for equity jurisdiction, the bill charged that relief could not be had at law, either by way of defense in the pending action brought by the Treasurer or by paying the tax in full under protest and suing for a refund of 25 per cent thereof; and that no administrative remedy for the relief [*675] sought was, or ever had been, provided by law either by appeal or otherwise to or from the County Board of Equalization or the State Board of Equalization.

The defendant's answer denied all the allegations of discrimination and further opposed relief in equity on the grounds that the plaintiff had not pursued remedies before the County or State Board of Equalization pursuant to Articles 3 and 5 of Chapter 119 of the Missouri Revised Statutes of 1919; and that the plaintiff was guilty of laches in not so doing. The trial court refused the injunction and dismissed the bill, without opinion or findings of fact.

The Supreme Court of Missouri held, on appeal, that relief from the alleged discriminatory assessment could [****5] not be had in any suit at law; that this bill in equity was the appropriate and only remedy, unless relief could have been had by timely application to some administrative board; and that neither of the boards of equalization was charged with the power and duty to grant such relief. But, without passing definitely upon the question of discrimination, it concluded that if the plaintiff had "at any time before the tax books were delivered to the collector, filed complaint before the State Tax Commission, that body, in the proper exercise of its jurisdiction, would have granted a hearing, and would have heard evidence with respect to the valuations complained of, and, if the charges contained in the complaint had been found to be true, the valuations placed on its property would have been lowered, or that on other property raised, the property omitted from the assessment

roll would have been placed thereon, and the discrimination complained of thereby removed. The remedy provided by the statute is adequate, certain, and complete." Compare [First National Bank of Greeley v. Weld County](#), 264 U.S. 450. The court held, therefore, that, because plaintiff had this adequate [*676] [****6] legal remedy, it [***1111] was not entitled to equitable relief, and because plaintiff had not complained to the Tax Commission, "it was clearly guilty of laches in not so doing." On these grounds, the Supreme Court affirmed the judgment of the trial court. [323 Mo. 180](#).

[HN1](#) The powers and duties of the State Tax Commission are prescribed by Article 4 of Chapter 119 of the Revised Statutes of 1919. Six years before this suit was begun, those provisions had been construed by the Supreme Court of Missouri in *Laclede Land & Improvement Co. v. State Tax Commission*, 295 Mo. 298. There, the court had been required to determine whether the Commission had power to grant relief of the character here sought. The Commission had refused, on the ground of lack of power, an application for relief from discrimination similar to that here alleged. The Laclede Company petitioned for a mandamus to compel the Commission to hear its complaint. The Supreme Court denied the petition, saying that it was "preposterous" and "unthinkable" that the statute conferred such power on the Commission; and that if the statute were thus construed, it would violate [section 10 of article 10 of the constitution of Missouri](#). [****7] That decision was thereafter consistently acted upon by the Commission; and it was followed by the Supreme Court itself in later cases.¹

¹ In *Boonville National Bank v. Schlottzauer*, 317 Mo. 1298, where the taxpayer was represented by the same counsel who represent the plaintiff here, relief was sought by bill in equity from like discrimination, without prior application to the State Tax Commission. The Supreme Court of Missouri was required to decide whether the taxpayer had invoked the appropriate remedy; and it held, in an elaborate opinion which did not mention the Tax Commission, that the remedy pursued was the appropriate one and that the taxpayer was entitled to relief thereby, if the facts alleged

[*677] [**453] No one doubted the authority of the *Laclede* case [****8] until it was expressly overruled in the case at bar.² While the defendant's answer asserted that the plaintiff had not availed itself of the administrative remedies under Articles 3 and 5 of Chapter 119 by application to the boards of equalization and was guilty of laches in not so doing (contentions which the state court held to be unsound), the answer significantly omitted any contention that there had been a remedy by application to the State Tax Commission, whose powers are dealt with in the intervening Article 4. The possibility of relief before the Tax Commission was not suggested by anyone in the entire litigation until the Supreme Court filed its opinion on June 29, 1929. Then it was too late for the plaintiff to avail itself of the newly found remedy. For, under that decision, the application to the Tax Commission could not be made after the tax books were delivered to the collector; and this had been done about October 1, 1927.

[****9] [LEdHN\[1\]](#) [1][LEdHN\[2\]](#) [2]The plaintiff seasonably filed a petition for a rehearing in which it [***1112] recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of Article 4 of Chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the Commission, the court transgressed the [due](#)

were proved. See also *Jefferson City Bridge & Transit Co. v. Blaser*, 318 Mo. 373; *Columbia Terminals Co. v. Koeln*, 3 S. W. 2d 1021; *State v. Baker*, 9 S. W. 2d 589, 592-93; *State v. Dirckx*, 11 S. W. 2d 38.

² The reason which prompted the Supreme Court to reexamine and overrule the *Laclede* case is thus stated in its opinion: "It is doubtful whether the evidence in this case warrants a finding that the local assessor intentionally and systematically undervalued real estate and personal property listed with him, other than bank stock; but there can be no question but that his failure to assess sucking animals and poultry was both intentional and pursuant to system. . . . If the owners of bank stock are entitled to an abatement of a portion of their taxes because other property was undervalued, it would appear on principle that all taxpayers of the state should be entirely relieved, so far as the taxes for 1927 are concerned, because the owners of poultry were not taxed at all. It seems necessary that we rechart our course." [323 Mo. 180](#); [19 S. W. 2d 746, 749](#).

[\[*678\] process clause of the Fourteenth Amendment](#). The additional federal claim thus made was timely, since it was raised at the first opportunity. *Missouri ex rel. Missouri Ins. Co. v. Gehner*, ante, p. 313. The petition was denied without opinion. This Court granted certiorari, 280 U.S. 550. We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law -- using that term in its primary sense of an opportunity to be heard and to defend its substantive right.

First. It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion of its substantive right under the Federal Constitution [****10] to equality of treatment. [Greene v. Louisville & Interurban R. R. Co.](#), 244 U.S. 499; *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441. If the allegations of the complaint could be established, the Federal Constitution conferred upon the plaintiff the right to have the assessments abated by 25 per cent. In order to protect its property from being seized in payment of the part of the tax alleged to be unlawful, the plaintiff invoked the appropriate judicial remedy provided by the State. [Second Employers' Liability Cases](#), 223 U.S. 1, 55-57.

Under the settled law of the State, that remedy was the only one available. That a bill in equity is appropriate and that the court has power to grant relief, even under the new construction of the statute dealing with the Tax Commission, is not questioned.³ And it is held by the state court in this case that no other judicial remedy is open to the plaintiff and that no administrative [*679] remedy, other than that before the State Tax Commission, has been provided. But, after the decision in the

Laclede case, it would have been entirely futile for the plaintiff to apply to the Commission. That body had persistently [****11] refused to entertain such applications; and the Supreme Court of the State had supported it in its refusal. Thus, until June 29, 1929, when the opinion in the case at bar was delivered, the Tax Commission could not, because of the rule of the *Laclede* case, grant the relief to which the plaintiff was entitled on the facts alleged. After June 29, 1929, the Commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the Commission could act had long expired. Obviously, therefore, at no time did the State provide to the plaintiff an administrative remedy against the alleged illegal tax; and in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent. [Montana National Bank v. Yellowstone County](#), 276 U.S. 499, 505.

[****12] If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. [HN2](#) The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack [**454] of power or because of [***1113] any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.

[LEdHN\[3\]](#) [3][LEdHN\[4\]](#) [4]*Second*. If the result above stated were attained by an exercise of the State's legislative power, the transgression of the [due process clause of the Fourteenth Amendment](#) [*680] would be obvious. [Ettor v. Tacoma](#), 228 U.S. 148. ⁴ The violation is none the less clear

³Equitable relief was denied solely on the equitable doctrines that the plaintiff had an adequate legal remedy by application to the Commission and was guilty of laches in not pursuing it.

⁴Compare [Turner v. New York](#), 168 U.S. 90, 94; *Saranac Land & Timber Co. v. Comptroller*, 177 U.S. 318, 325; [Crane v. Hahlo](#), 258

when that result is accomplished by the state judiciary in the course of construing an otherwise valid ([First National Bank of Greeley v. Weld County](#), 264 U.S. 450) state statute. [HN3](#) The federal guaranty of due process extends to state action [****13] through its judicial as well as through its legislative, executive or administrative branch of government. ⁵

[LEdHN\[5\]](#) [5][LEdHN\[6\]](#) [6][LEdHN\[7\]](#) [7]It is true that [HN4](#) the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; ⁶ and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions [****14] on which a party relied, does not give rise to a claim under the [Fourteenth Amendment](#) or otherwise confer appellate jurisdiction on this Court. ⁷

[U.S. 142, 147](#); [Atchafalaya Land Co. v. F. B. Williams Cypress Co.](#), 258 U.S. 190, 197.

⁵ [Ownbey v. Morgan](#), 256 U.S. 94, 111. Compare [Pennoyer v. Neff](#), 95 U.S. 714; [Standard Oil Co. v. Missouri](#), 224 U.S. 270, 281; [Frank v. Mangum](#), 237 U.S. 309, 326, 335; [Moore v. Dempsey](#), 261 U.S. 86.

⁶ [Kryger v. Wilson](#), 242 U.S. 171, 176; [Mount St. Mary's Cemetery Ass'n v. Mullins](#), 248 U.S. 501, 503; [Quong Ham Wah Co. v. Industrial Accident Comm.](#), 255 U.S. 445, 448; [Fox River Paper Co. v. Railroad Comm.](#), 274 U.S. 651, 655.

⁷ [Central Land Co. v. Laidley](#), 159 U.S. 103, 112; [Patterson v. Colorado](#), 205 U.S. 454, 461; [Willoughby v. Chicago](#), 235 U.S. 45, 50; [O'Neil v. Northern Colorado Irrigation Co.](#), 242 U.S. 20, 26-7; [Dunbar v. City of New York](#), 251 U.S. 516, 519; [Rooker v. Fidelity Trust Co.](#), 261 U.S. 114, 118; [Tidal Oil Co. v. Flanagan](#), 263 U.S. 444, 450; [American Railway Express Co. v. Kentucky](#), 273 U.S. 269, 273. For "a long line of decisions" holding "that the provision of § 10, Article 1, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts," see [Tidal Oil Co. v. Flanagan](#), 263 U.S. 444, 451, note 1. Likewise, with reference to *ex post facto* laws. [Kring v. Missouri](#), 107 U.S. 221, 227; [Ross v. Oregon](#), 227 U.S. 150, 161; [Frank v. Mangum](#), 237 U.S. 309, 344.

[****15]

[*681] [***1114] [LEdHN\[8\]](#) [8]But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that [HN5](#) the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the *Laclede* case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, -- whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review. ⁸ [****17] But, [*682] [HN6](#) while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process [****16] of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless

⁸ [HN7](#) The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions. The doctrine of [Gelpcke v. Dubuque](#), 1 Wall. 175, and [Butz v. Muscatine](#), 8 Wall. 575, like that of *Swift v. Tyson*, 16 Pet. 1, is, if applied at all, confined strictly to cases arising in the Federal courts. [Fleming v. Fleming](#) 264 U.S. 29, 31; [Tidal Oil Co. v. Flanagan](#), 263 U.S. 444, 451; [Moore-Mansfield Const. Co. v. Electrical Installation Co.](#), 234 U.S. 619, 624-26; [Bacon v. Texas](#), 163 U.S. 207, 220-24; [Central Land Co. v. Laidley](#), 159 U.S. 103, 111-12.

there is, or was, afforded to him some real **[**455]** opportunity to protect it.⁹ Compare *Postal Telegraph Cable Co. v. Newport*, [247 U.S. 464, 475-6](#).

Third. The court's finding of laches was predicated entirely on the plaintiff's failure to apply to the State Tax Commission. In view of what we have said, this ground is not sufficient independently to support the judgment. And, as the Supreme Court of Missouri did not decide whether the allegations of the plaintiff's bill were sustained by the proof, we do not inquire into the merits of the plaintiff's claim under the [equal protection clause](#). The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE McREYNOLDS did not hear the argument and took no part in the decision of this case.

End of Document

⁹Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own. Likewise, if the administrative remedy were still available to the plaintiff, there would be no denial of due process in that regard.



Positive

As of: October 18, 2026 1:40 AM Z

C.M. v. M.C.

Court of Appeal of California, Second Appellate District, Division One

January 26, 2017, Opinion Filed

B270525

Reporter

7 Cal. App. 5th 1188 *; 213 Cal. Rptr. 3d 351 **; 2017 Cal. App. LEXIS 56 ***; 2017 WL 372024

C.M., Plaintiff and Respondent, v. M.C., Defendant and Appellant.

LexisNexis® Headnotes

Subsequent History: Review denied by [C.M. v. M.C., 2017 Cal. LEXIS 2801 \(Cal., Apr. 12, 2017\)](#)

US Supreme Court certiorari denied by, Motion granted by [M.C. v. C.M., 138 S. Ct. 239, 199 L. Ed. 2d 189, 2017 U.S. LEXIS 4562 \(U.S., Oct. 2, 2017\)](#)

Prior History: [***1] APPEAL from an order of the Superior Court of Los Angeles County, No. BF054159, Amy M. Pellman, Judge.

[Cook v. Harding, 190 F. Supp. 3d 921, 2016 U.S. Dist. LEXIS 73466 \(C.D. Cal., June 6, 2016\)](#)

Disposition: Affirmed.

Case Summary

Overview

HOLDINGS: [1]-In a surrogacy case, the family court properly declared the father to be the sole parent of triplets and entered judgment against the gestational surrogate in her action seeking custody of at least one of children because challenges to the constitutionality and enforceability of surrogacy agreements were foreclosed by [Fam. Code, § 7962](#), and existing case law.

Outcome

Judgment affirmed.

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

[HN1 Fam. Code, § 7962](#) establishes a procedure for a summary determination of parental rights when specific requirements for an enforceable surrogacy agreement are met. The section requires that an assisted reproduction agreement for gestational carriers contain: (1) the date on which the agreement was executed; (2) the identity of the persons from which the gametes originated, unless anonymously donated; (3) the identity of the intended parent or parents; and (4) disclosure of how the intended parents will cover the medical expenses of the gestational carrier and of the newborn or newborns. § 7962, subd. (a)(1)-(4). The section also requires that the surrogate and the intended parent be represented by separate counsel with respect to the agreement; that the agreement be executed and notarized; and that the parties begin embryo transfer procedures only after the agreement has been fully executed. § 7962, subds. (b)-(d).

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

[HN2](#) An action to establish the parent-child

relationship between the intended parent or parents and the child conceived pursuant to an assisted reproduction agreement may be filed before the child's birth. The parties are to attest, under penalty of perjury, and to the best of their knowledge and belief, as to their compliance with [Fam. Code, § 7962, subd. \(e\)](#). A notarized agreement signed by all parties with the attached declarations of independent attorneys lodged with the court in accordance with [§ 7962](#) shall rebut any presumptions of parenthood contained in various specified Code sections. [§ 7962, subd. \(f\)\(1\)](#).

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

[HN3 Fam. Code, § 7962](#), provides that, on petition by any party to a properly executed agreement, the court shall issue a judgment or order establishing the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement, subject to proof of compliance with the section. ([§ 7962, subd. \(f\)\(2\)](#)). That judgment shall also establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section.

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Constitutional Law > The Judiciary > Case or
Controversy > Constitutionality of Legislation

[HN4](#) Interpretation and constitutionality of statutes are reviewed under a de novo standard.

Civil Procedure > ... > Standards of
Review > Substantial Evidence > Sufficiency of
Evidence

Family Law > Parental Duties & Rights

[HN5](#) The court applies the substantial evidence standard of review to findings of fact relevant to claimed parental rights.

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

[HN6](#) The evident purpose of the detailed requirements in [Fam. Code, § 7962](#), is to ensure that the parties to an assisted reproduction agreement enter into the agreement knowingly and voluntarily. Where there is substantial compliance with [§ 7962](#)'s requirements showing that the parties agreement was knowing and voluntary, the purpose of the statute is met.

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

[HN7](#) Whether or not [Fam. Code, § 7962, subd. \(f\)\(1\)](#) rebuts a presumption of parenthood based upon giving birth, the subsequent subpart of subd. (f) makes clear that a surrogate has no parental rights when an assisted reproduction agreement complies with the requirements of the section. The directive of subd. (f)(2), is quite clear. Compliance with the requirements of an assisted reproduction agreement and submitting the proof identified in [§ 7962](#) is all that is necessary to establish a parent-child relationship for the intended parent or parents and to extinguish any claim of parenthood by the surrogate.

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

HN8 Intended parents are the natural parents. Even without a genetic link, the parties who intended to bring a child into the world are the child's legal parents.

Family Law > Paternity &
 Surrogacy > Surrogacy > Agreements
 Civil Procedure > Preliminary
 Considerations > Justiciability > Standing

HN9 *Fam. Code, § 7962*, permits the parties to a surrogacy arrangement to enter into a legally binding contract—subject to specific statutory safeguards—that determines the parentage of children conceived pursuant to the arrangement. There is no constitutional impediment to giving effect to the parties intent expressed in such a contract.

Civil Procedure > Preliminary
 Considerations > Justiciability > Standing
 Civil Procedure > Appeals > Standards of Review

HN10 The court liberally construes the issue of standing and resolves doubts in favor of the right to appeal.

Civil Procedure > Preliminary
 Considerations > Justiciability > Standing

HN11 Where the interests of two parties interweave, either party has standing to litigate issues that have an impact upon the related interests. This is a matter of first party standing.

Family Law > Paternity &
 Surrogacy > Surrogacy > Agreements

HN12 *Fam. Code, § 7962*, specifies that the only showing necessary to obtain an order establishing the parentage of the intended parent(s) and extinguishing claims of parental rights by a

surrogate is proof of compliance with this section. (*§ 7962, subd. (f)(2)*). Upon such a showing, the judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section. Thus, *§ 7962* does not leave room for litigating challenges to the parental rights of intended parents on any basis beyond the circumstances and content of the surrogacy agreement itself.

Family Law > Paternity & Surrogacy > Surrogacy

HN13 Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. A decision on the parentage of children born to a surrogacy arrangement is separate from determining custody based upon the best interests of the children, which should be left to the dependency laws.

Contracts Law > Remedies

HN14 Courts may, in appropriate circumstances, void contracts on the basis of public policy, but the determination of public policy of states resides, first, with the people as expressed in their Constitution and, second, with the representatives of the people—the state Legislature.

Family Law > Paternity & Surrogacy > Surrogacy
 Constitutional Law > Equal Protection > Nature &
 Scope of Protection

HN15 For purposes of an equal protection analysis, it is more appropriate to compare children born to surrogates with children born in a traditional manner to other parents than it is to compare

children born to surrogates with children placed through adoption or family courts. Of course, the state does not regulate who is permitted to give birth.

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

HN16 A surrogate can permissibly contract to surrender whatever parental rights she has.

Headnotes/Summary

Summary

[*1188] CALIFORNIA OFFICIAL REPORTS SUMMARY

In a surrogacy case, the trial court declared the father to be the sole parent of triplets ([Fam. Code, § 7962](#)) and entered judgment against the surrogate (the gestational carrier of the children) in her action seeking custody of at least one of the children. (Superior Court of Los Angeles County, No. BF054159, Amy M. Pellman, Judge.)

The Court of Appeal affirmed the judgment, holding that the challenges to the constitutionality and enforceability of surrogacy agreements in California were foreclosed by specific legislative provisions and existing case law. The father substantially complied with the requirements of [Fam. Code, § 7962](#), for establishing a parent-child relationship and for terminating the parental rights of the surrogate. Although the father did not provide a declaration from the surrogate's lawyer for the agreement, the lawyer testified at the hearing on the petition. Although the surrogate did not provide a declaration attesting under penalty of perjury that the parties complied with the statutory requirements, the agreement itself contained her affirmation under oath that she intended to comply. (Opinion by Lui, J., with Chaney, Acting P. J., and Johnson, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Parent and Child § 13—Parentage—Surrogates—Agreements—Parental Rights—Summary Determination.

[Fam. Code, § 7962](#), establishes a procedure for a summary determination of parental rights when specific requirements for an enforceable surrogacy agreement are met. The section requires that an assisted reproduction agreement for gestational carriers contain (1) the date on which the agreement was executed; (2) the identity of the persons from which the gametes originated, unless anonymously donated; (3) the identity of the intended parent or parents; and (4) disclosure of how the intended parents will cover the medical expenses of the gestational carrier and of the newborn or newborns ([§ 7962, subd. \(a\)\(1\)–\(4\)](#)). The section also requires that the surrogate and the intended parent be represented by separate counsel with respect to the agreement; that the agreement be executed and notarized; and that the parties begin embryo transfer procedures only after the agreement has been fully executed ([§ 7962, subs. \(b\)–\(d\)](#)).

[CA\(2\)](#) (2)

Parent and Child § 13—Parentage—Surrogates—Actions.

An action to establish the parent-child relationship between the intended parent or parents and the child conceived pursuant to an assisted reproduction agreement may be filed before the child's birth. ([Fam. Code, § 7962, subd. \(e\)](#).) The parties are to attest, under penalty of perjury, and to the best of their knowledge and belief, as to their compliance with [Fam. Code, § 7962](#), in entering into their agreement ([§ 7962, subd. \(e\)](#)). A notarized agreement signed by all parties with the attached declarations of independent attorneys

lodged with the court in accordance with [§ 7962](#) shall rebut any presumptions of parenthood contained in various specified code sections ([§ 7962, subd. \(f\)\(1\)](#)). [Section 7962](#) also provides that, on petition by any party to a properly executed agreement, the court shall issue a judgment or order establishing the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement, subject to proof of compliance with the section ([§ 7962, subd. \(f\)\(2\)](#)). That judgment shall also establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section.

[CA\(3\)](#) (3)

Parent and Child § 13—Parentage—Surrogates—Agreements.

The evident purpose of the detailed requirements in [Fam. Code, § 7962](#), is to [*1190] ensure that the parties to an assisted reproduction agreement enter into the agreement knowingly and voluntarily. Where there is substantial compliance with [§ 7962](#)'s requirements showing that the parties' agreement was knowing and voluntary, the purpose of the statute is met.

[CA\(4\)](#) (4)

Parent and Child § 13—Parentage—Surrogates—Presumptions.

Whether or not [Fam. Code, § 7962, subd. \(f\)\(1\)](#), rebuts a presumption of parenthood based upon giving birth, the subsequent subpart of [subd. \(f\)](#)

makes clear that a surrogate has no parental rights when an assisted reproduction agreement complies with the requirements of the section. The directive of [subd. \(f\)\(2\)](#), is quite clear. Compliance with the requirements of an assisted reproduction agreement and submitting the proof identified in [§ 7962](#) is all that is necessary to establish a parent-child relationship for the intended parent or parents and to extinguish any claim of parenthood by the surrogate.

[CA\(5\)](#) (5)

Parent and Child § 13—Parentage—Surrogates—Agreements—Intended Parents—Status.

Intended parents are the natural parents. Even without a genetic link, the parties who intended to bring a child into the world are the child's legal parents. [Fam. Code, § 7962](#), permits the parties to a surrogacy arrangement to enter into a legally binding contract—subject to specific statutory safeguards—that determines the parentage of children conceived pursuant to the arrangement. There is no constitutional impediment to giving effect to the parties' intent expressed in such a contract.

[CA\(6\)](#) (6)

Parties § 1.2—Standing.

Where the interests of two parties interweave, either party has standing to litigate issues that have an impact upon the related interests. This is a matter of first party standing.

[CA\(7\)](#) (7)

Parent and Child § 13—Parentage—Surrogates—Agreements—Requirements.

[Fam. Code, § 7962](#), specifies that the only showing necessary to obtain an order establishing the parentage of the intended parent(s) and

extinguishing claims of parental rights by a surrogate is proof of compliance with this section. ([§ 7962, subd. \(f\)\(2\)](#)). Upon such a showing, the judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section. Thus, [§ 7962](#) does not leave room for litigating challenges to the parental rights of intended parents on any basis beyond the circumstances and content of the surrogacy agreement itself.

[*1191] [CA\(8\)](#) (8)

Parent and Child § 13—Parentage—Surrogates—Applicable Law.

Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. A decision on the parentage of children born to a surrogacy arrangement is separate from determining custody based upon the best interests of the children, which should be left to the dependency laws.

[CA\(9\)](#) (9)

Parent and Child § 13—Parentage—Surrogates—Equal Protection.

For purposes of an equal protection analysis, it is more appropriate to compare children born to surrogates with children born in a traditional manner to other parents than it is to compare children born to surrogates with children placed through adoption or family courts. Of course, the state does not regulate who is permitted to give birth.

[CA\(10\)](#) (10)

Parent and Child § 13—Parentage—Surrogates—Constitutionality.

Under constitutional principles, a surrogate can permissibly contract to surrender whatever parental rights she has.

[CA\(11\)](#) (11)

Parent and Child § 13—Parentage—Surrogates—Agreements—Validity.

In a surrogacy case, the family court properly declared under [Fam. Code, § 7962](#), that the intended father was the sole parent of triplets and entered judgment against the gestational surrogate in her action seeking custody of at least one of the children. Challenges to the constitutionality and enforceability of surrogacy agreements in California were foreclosed by specific legislative provisions and existing case law.

[[Cal. Forms of Pleading and Practice \(2016\) ch. 12, Adoption: Nature and Effect, § 12.16](#); 10 Witkin, Summary of Cal. Law (11th ed. 2017) Parent and Child, §§ 48 et seq., 79 et seq.]

Counsel: Buchalter Nemer, Michael W. Caspino, Robert M. Dato; The Cassidy Law Firm and Harold J. Cassidy for Defendant and Appellant.

John L. Dodd & Associates, John L. Dodd, Benjamin Ekenes; Jarrette & Walmsley and Robert R. Walmsley for Plaintiff and Respondent.

Judges: Opinion by Lui, J., with Chaney, Acting P. J., and Johnson, J., concurring.

Opinion by: Lui, J.

Opinion

[**354] LUI, J.—Defendant and appellant M.C. (M.C.) appeals from a judgment declaring plaintiff

and respondent C.M. (Father) to be the sole legal parent of [*1192] triplet children (the Children) and finding that M.C. has no parental rights. M.C. was the gestational carrier for the Children, who were conceived in vitro using Father's sperm and ova from an anonymous donor. Father and M.C. entered into the surrogacy arrangement pursuant to a written "In Vitro Fertilization Surrogacy Agreement" in 2015 (the Agreement). Each party was represented by separate counsel in negotiating the Agreement.

Despite the Agreement, during the pregnancy M.C. developed reservations about the arrangement. She sought rights as the Children's mother and custody of at least one of the Children. [***2] When Father filed a petition pursuant to [Family Code section 7962](#) to be declared the sole parent of the Children, M.C. opposed the petition.¹ Following a hearing on the petition on February 9, 2016, the trial court entered judgment in favor of Father.

On appeal, M.C. raises various substantive and procedural challenges to the judgment. The challenges amount to an all-out attack on the constitutionality and enforceability of surrogacy agreements in California.

We conclude that M.C.'s arguments are foreclosed by specific legislative provisions and by a prior decision by our Supreme Court. In view of the well-established law in this area, our role on appeal is limited to reviewing whether the legislative requirements for establishing an enforceable surrogacy agreement were met in this case. We find no error in the trial court's ruling on that issue, and we therefore affirm.

BACKGROUND

1. The Agreement

M.C. executed the 75-page Agreement on May 31, 2015; Father executed the agreement on June 3,

2015. The Agreement identified Father as the "Intended Parent" and M.C. as "Surrogate."

M.C. was 47 years old at the time she entered into the Agreement. She represented in the Agreement that she has four children of "childcare [***3] age," and that she "has previously been a surrogate mother and is familiar with the undertaking." She stated that she did "not desire to have a parental relationship" with any children born pursuant to the surrogacy arrangement and that she "believes any Child conceived and born pursuant to this Agreement is/are morally, ethically, contractually and legally that of Intended Parent." The Agreement stated that the underlying intent of all parties to the Agreement [*1193] was that "any Child conceived and/or born pursuant to the conduct contemplated under this Agreement shall be treated, in all respects, as the sole and exclusive natural, biological and/or legal Child of Intended Parent. It is also the intent of all Parties to this Agreement that Surrogate and her Partner shall not be treated as a natural, biological and/or legal parent of any Child conceived and/or born pursuant to the conduct contemplated under this Agreement."

The Agreement stated that the parties were "informed and advised of the California Supreme Court decision in *Johnson v. Calvert*, and the Court of Appeal decision in *In re Marriage of Buzzanca*, and agree that these decisions apply to and govern [**355] this Agreement and the conduct [***4] contemplated thereby.² Specifically, each Party agrees that the intent to bear and raise the Child conceived and born pursuant to this Agreement shall be determinative of Parentage, to wit: that Intended Parent shall be treated as the legal, natural, and biological parent of any Child(ren) conceived and born pursuant to this Agreement." The parties further acknowledged that [sections](#)

¹ Subsequent undesignated statutory references are to the Family Code.

² *Johnson v. Calvert* (1993) 5 Cal.4th 84 [19 Cal. Rptr. 2d 494, 851 P.2d 776] (Calvert); *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410 [72 Cal. Rptr. 2d 280] (Buzzanca) (discussed post).

[7960](#) and [7962](#) “apply to this Agreement,” and represented that “in entering into this Agreement they have taken steps to execute this Agreement in compliance with [sections 7960](#) (as amended) and [7962](#).”

The Agreement contained a disclosure that the “ova/eggs were provided by an anonymous donor,” and that the embryos “will be created through the use of sperm provided by Intended Parent with ova/eggs anonymously donated to Intended Parent for his exclusive use.” The parties agreed that “the donated ova/eggs shall be deemed as being the property of Intended Parent and as having come from Intended Parent.”

In addition to describing the compensation that M.C. was to receive for her “discomfort, pain, suffering and for pre-birth child support,” the Agreement addressed medical costs. It provided that medical expenses would be [***5] paid through a combination of “Surrogate’s insurance and Intended Parent’s direct payment for such uncovered costs.”

M.C. promised in the Agreement that she would “freely and readily assist Intended Parent in legalizing his parent-child relationship with the Child.” The parties stated their understanding that, “based upon the current law in the State of California, an action to terminate the Parental rights of Surrogate is not necessary and Intended Parent is entitled to a judicial determination of his Parentage, notwithstanding any objection to the contrary by Surrogate.”

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M.C. was represented by separate counsel, Lesa Slaughter, in negotiating the Agreement. Father agreed to pay the costs of M.C.’s counsel up to an amount of \$1,000 for legal advice with respect to the Agreement and up to \$500 for review and advice with respect to the legal documents “necessary to establish the Intended Parent’s parentage.” The Agreement contained a disclosure and waiver of the potential conflict of interest from Father’s payment of M.C.’s legal counsel fees.

M.C. initialed each page of the Agreement, and her signature was notarized. Attorney Slaughter transmitted the executed and notarized Agreement [***6] to Father’s counsel with a transmittal letter dated May 31, 2015. The letter stated that Slaughter had “independently represented [M.C.] and my consultation and review with her is now complete.” She reported that her consultations with M.C. and M.C.’s signature to the Agreement “prove to me that my client has a clear and informed understanding of the nature of the Gestational Surrogacy Contract and agrees to be fully bound by its terms.” Slaughter provided her “full legal clearance to proceed with medication in this matter.”

2. Proceedings to Determine Parentage

An embryo transfer took place on August 17, 2015. A subsequent pregnancy test confirmed a pregnancy, and an ultrasound on September 8, 2015, revealed that M.C. was carrying triplets.

[**356] On January 16, 2016, before the Children were born, Father filed a “Verified Petition to Declare Existence of Parent-Child Relationship Between the Children to be Born and Petitioner, and Non-existence of Parent-Child Relationship Between the Children to be Born and Respondent/Surrogate” (Petition). The Petition was supported by declarations from Father, Father’s counsel, and a doctor who was responsible for the embryo creation and transfer procedure. [***7] Father also lodged a copy of the Agreement and filed a memorandum of points and authorities in support of the Petition (Memorandum).

Father’s submission did not include a declaration from M.C. or her counsel. The Memorandum stated that “[i]n conjunction with the Petition it was anticipated Respondent, [M.C.], would comply with the [In Vitro Fertilization Surrogacy] Agreement and provide her Declaration in support of the Petition and a Stipulation admitting that she was not the parent of the Children at issue and did not wish to have a parental relationship with the Children. At this time that may not be.”

A hearing on the Petition was noticed for February 9, 2016. On February 1, 2016, M.C. filed a 65-page verified answer and counterclaim responding to [*1195] Father's Petition. The answer and counterclaim sought a range of relief, including that (1) M.C. be declared “the legal parent and mother” of the Children; (2) Father be declared “not the sole parent” of the Children and “not entitled to the benefits” of [section 7962](#); (3) M.C. be awarded sole custody of one of the Children, and a custody trial be scheduled to determine “what custody arrangement will be in the best interests” of the other two Children; [***8] (4) a declaration that [section 7962](#) violates the due process and equal protection rights of the Children and of M.C.; (5) a declaration that the Agreement cannot form the basis for terminating the parental rights of M.C.; and (6) an order that Father submit to DNA testing to determine whether he is the genetic father of the Children.

The counterclaim described a series of e-mail communications from Father in which he allegedly sought to abort at least one of the fetuses, first for financial reasons and then out of an allegedly pretextual concern for the health of the Children. M.C. refused to abort any of the fetuses, stating that she is “pro-life.” She offered to raise one of the Children.

The counterclaim also alleged that Father was single, 50 years old, deaf, employed as a postal worker in Georgia, and responsible for caring for his elderly parents, with whom he lives. M.C. alleged that Father is “not capable of raising three children by his own admission, and may not be capable of raising even one or two children.” M.C. claimed that she learned for the first time while pregnant that the organization that facilitated the surrogacy arrangement had never done a “home study” to determine whether [***9] Father “is capable of raising any children.”

After filing the counterclaim, M.C. moved ex parte on February 4, 2016, to continue the date for the hearing on the Petition, requesting a schedule for

discovery concerning Father's willingness and ability to raise the Children. The ex parte application recited many of the same factual allegations concerning M.C.'s communications with Father that were included in M.C.'s counterclaim.

The trial court heard the ex parte application on February 8, 2016. The court denied the application, finding that M.C. had been aware of the Petition for a month and the ex parte proceeding was therefore not justified. The court also summarized the content and the circumstances of the Agreement and the Petition, referred to [**357] the decisions in *Calvert* and *Buzzanca* and the requirements of [section 7962](#), and observed that Father “has complied with these requirements other than submitting the declaration of [M.C.] and her attorney.” Father's counsel indicated that he might have to call M.C.'s former counsel, Slaughter, to testify in lieu of a declaration.

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The hearing on Father's Petition took place on February 9, 2016. Father's counsel explained that he had not been able to obtain [***10] a declaration from Slaughter because she had previously represented M.C. However, Father had served her with a subpoena and she was present in court. The court permitted her to testify.

Slaughter testified that she had “probably represented over a thousand surrogates.” She previously represented M.C. with respect to two surrogacy arrangements, including the Agreement with Father. M.C. initially waived the attorney-client privilege to permit Slaughter to testify about her representation, but then revoked the waiver when Father's counsel began to question Slaughter concerning the first surrogacy arrangement. Over objections, the court permitted Slaughter to authenticate her May 31, 2015 transmittal letter, and to testify that the contents were “true and correct.” Slaughter also testified that it was her standard practice to review surrogacy contracts with her clients thoroughly and to discuss any questions they might have. When asked if she had

employed her standard practice with M.C., Slaughter responded that she has “not varied my practice regarding surrogates or intended parents or egg donors, for that matter, whenever I undertake representation.” 2016.³

On cross-examination, Slaughter testified [***11] that she had about 15 telephone conversations with M.C. concerning the surrogacy arrangement with Father, including revisions to the Agreement. She testified that she “withdrew my representation when ... it became obvious [M.C.] was not following my legal advice.” Over objection, the trial court admitted the May 31, 2015 transmittal letter as an exhibit.

Prior to ruling on the Petition, the trial court also questioned M.C. under oath. In response to the court's questions, M.C. confirmed that she had signed the Agreement and initialed each page.

3. The Trial Court's Ruling

The court found that Father “substantially complied” with [section 7962](#), “the holding of the Supreme Court in [Johnson v. Calvert](#), and the holding of” [Buzzanca](#). Specifically, the court found that M.C. “read and reviewed every page of the gestational agreement”; that she initialed and signed “the Agreement”; that “her agreement was voluntary”; and that “all the other provisions of 7962 have been satisfied.” The court entered a detailed judgment establishing that Father is the sole parent of the Children.

With respect to M.C.'s counterclaim, the trial court initially observed that it appeared to be “procedurally improper,” and that [***12] the court did not believe [*1197] that “counsel is even entitled to counterclaim.” However, the court declined to strike the counterclaim. The court concluded that the documents M.C. submitted in support of the counterclaim were, “essentially, challenges to the petition.” The court denied the counterclaim on the merits “even if it were proper.”

M.C. filed her notice of appeal on February 23,

[**358] DISCUSSION

[CA\(1\)](#) (1) [HN1](#) [Section 7962](#) establishes a procedure for a summary determination of parental rights when specific requirements for an enforceable surrogacy agreement are met. The section requires that an “assisted reproduction agreement for gestational carriers” contain (1) the date on which the agreement was executed; (2) the identity of the persons “from which the gametes originated,” unless anonymously donated; (3) the identity of the “intended parent or parents”; and (4) disclosure of how the “intended parents” will “cover the medical expenses of the gestational carrier and of the newborn or newborns.” ([§ 7962, subd. \(a\)\(1\)–\(4\)](#).) The section also requires that the surrogate and the intended parent be represented by separate counsel with respect to the agreement; that the agreement be executed and notarized; and that the parties [***13] begin embryo transfer procedures only after the agreement has been fully executed. ([§ 7962, subds. \(b\)–\(d\)](#).)

[CA\(2\)](#) (2) [HN2](#) An action to “establish the parent-child relationship between the intended parent or parents” and the child conceived pursuant to an assisted reproduction agreement may be filed before the child's birth. ([§ 7962, subd. \(e\)](#).) The parties are to “attest, under penalty of perjury, and to the best of their knowledge and belief,” as to their compliance with [section 7962](#) in entering into their agreement. ([§ 7962, subd. \(e\)](#).) A notarized agreement signed by all parties “with the attached declarations of independent attorneys” lodged with the court in accordance with [section 7962](#) “shall

³ M.C. also filed a petition for a writ of supersedeas, which this court denied on April 14, 2016. In addition to these proceedings in state court, M.C. filed an action on February 2, 2016, in federal court, asserting various alleged constitutional violations. (See [Cook v. Harding \(C.D.Cal., 2016\) 190 F.Supp.3d 921, 930–931 \[2016 U.S.Dist. Lexis 73466, pp. *18–*20\] \(Harding\)](#).) The federal court dismissed that action on June 6, 2016, on abstention grounds. ([Id.](#) at p. *39.)

rebut any presumptions” of parenthood contained in various specified code sections. ([§ 7962, subd. \(f\)\(1\).](#))

[HN3 Section 7962](#) also provides that, on petition by any party to a properly executed agreement, the court shall issue a judgment or order establishing “the parent-child relationship of the intended parent or intended parents [*1198] identified in the surrogacy agreement,” subject to proof of compliance with the section. ([§ 7962, subd. \(f\)\(2\).](#)) That judgment shall also establish that “the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children.” (*Ibid.*) The judgment “shall [***14] terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section.” (*Ibid.*)

In light of these well-defined criteria and procedures and despite the range of M.C.'s arguments, there are ultimately only two questions that determine the outcome of this appeal. First, did Father comply with the requirements for establishing a parent-child relationship and for terminating M.C.'s claimed parental rights under [section 7962](#)? Second, was the trial court's application of [section 7962](#) here consistent with the constitutional rights of M.C. and the Children? We conclude that the answer to both questions is yes.

1. Standard of Review

Neither party addresses the appropriate standard of review to apply to M.C.'s challenges to the judgment. We employ well-accepted principles in reviewing M.C.'s various arguments. Most of M.C.'s arguments focus on the [HN4](#) interpretation and [***359] constitutionality of statutes, which we review under [***15] a de novo standard. (See [Herbst v. Swan \(2002\) 102 Cal.App.4th 813, 816 \[125 Cal. Rptr. 2d 836\]](#) [constitutionality of

statute]; [In re D.S. \(2012\) 207 Cal.App.4th 1088, 1097 \[143 Cal. Rptr. 3d 918\]](#) [statutory interpretation].) To the extent that M.C.'s arguments involve a challenge to the trial court's findings of fact relevant to M.C.'s claimed parental rights, [HN5](#) we apply the substantial evidence standard. ([Adoption of Arthur M. \(2007\) 149 Cal.App.4th 704, 717 \[57 Cal. Rptr. 3d 259\]](#) [applying substantial evidence standard to factual findings concerning biological father's right to object to adoption].)

2. M.C. Is Not Estopped from Challenging the Legal Effect or Validity of the Agreement

Before reaching the merits of M.C.'s arguments, we consider Father's claim that M.C. is estopped from making those arguments by the terms of the Agreement. Father argues that M.C. is precluded from claiming that she has any parental rights concerning the Children because she promised in the Agreement that she would not assert any such rights. In support, Father cites cases holding that parties can be estopped from seeking an unfair benefit by manipulating or taking inconsistent positions in judicial proceedings.

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The principle involved in those cases does not apply here. Those cases focus on the need to protect the integrity of judicial proceedings.⁴ The conduct

⁴ In [In re Griffin \(1967\) 67 Cal.2d 343 \[62 Cal. Rptr. 1, 431 P.2d 625\]](#), the court held that a defendant accused of a probation violation could not obtain dismissal as a result of his conduct in requesting a continuance that extended beyond the period of his probation. A contrary rule would “‘permit the parties to trifle with the courts.’” (*Id.* at p. 348, quoting [City of Los Angeles v. Cole \(1946\) 28 Cal.2d 509, 515 \[170 P.2d 928\]](#).) In [re Marriage of Hinman \(1992\) 6 Cal.App.4th 711, 716 \[8 Cal. Rptr. 2d 245\]](#), held that a wife could not challenge a judgment in a dissolution action awarding joint custody of her two children from a prior marriage where she stipulated to the judgment. Similarly, in [Kristine H. v. Lisa R. \(2005\) 37 Cal.4th 156 \[33 Cal. Rptr. 3d 81, 117 P.3d 690\]](#), one lesbian partner was estopped from arguing that her estranged partner was not the parent of their child when she had previously stipulated to a judgment declaring them both the “‘joint intended legal parents.’” (*Id.* at p. 161.) Again, the court was concerned that a contrary result would “‘trifle with the courts.’” (*Id.* at p. 166, quoting [Adoption of Matthew B. \(1991\) 232 Cal.App.3d 1239, 1269 \[284 Cal. Rptr.](#)

that Father argues should result in estoppel here was [***16] not a position taken in a judicial proceeding but rather commitments made in a written Agreement before the Children had been conceived and before any judicial action had been initiated. What Father seeks is not estoppel, but rather enforcement of the Agreement. Father asks us to find the promises that M.C. made in the Agreement enforceable on their own terms, before even considering whether such summary enforcement is appropriate here under the governing statute and the constitutional arguments that M.C. has made.

We decline that approach. M.C.'s arguments challenge the proper interpretation and validity of the Agreement. Whatever the merits of those arguments, the doctrine of estoppel does not provide a ground to ignore them. We will not require enforcement of the Agreement without first considering whether it is enforceable. (Cf. *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1235 [30 Cal. Rptr. 2d 893] [there is “no doubt that enforcement of a surrogacy contract prior to a child's birth presents a host of thorny legal problems”]; *Buzzanca, supra*, 61 Cal.App.4th at p. 1422 [**360] [“There is a difference between a court's enforcing a surrogacy agreement and making a legal determination based on the intent expressed in a surrogacy agreement”].) We therefore reach the merits of M.C.'s appeal.

3. The Trial [***17] Court Correctly Ruled That the Agreement Substantially Complied with the Requirements of [Section 7962](#)

The Agreement contained all the information required by [section 7962](#). It included (1) the dates it was executed; (2) the source of the gametes to be used for the embryos (Father and an anonymous egg donor); (3) the identity of the intended parent (Father); and (4) disclosure of how medical expenses would be covered. ([§ 7962, subd. \(a\).](#)) Father and M.C. were represented by separate counsel in negotiating the Agreement. ([§ 7962,](#)

[subd. \(b\).](#)) The [***1200**] parties' signatures were notarized. ([§ 7962, subd. \(c\).](#)) And M.C. did not undergo an embryo transfer procedure or begin medication to prepare for such a procedure until after the Agreement had been executed. ([§ 7962, subd. \(d\).](#))

Father also substantially complied with the procedural requirements under [section 7962](#) for summary determination of parentage pursuant to the Agreement. Father lodged a copy of the Agreement. ([§ 7962, subd. \(e\).](#)) Because M.C. opposed the petition to declare Father the sole parent, she did not provide a declaration attesting under penalty of perjury that the parties complied with [section 7962](#) in entering into the Agreement. (*Ibid.*) However, she signed the Agreement itself under penalty of perjury, affirming that the contents of the Agreement were “true [***18] and correct except as to those matters which are based on information and belief, and as to those matters, we believe them to be true.” The Agreement states that [sections 7960](#) and [7962](#) “apply to this Agreement,” and that the parties “are also informed and hereby represent that they have taken active steps to execute this Agreement in compliance with [Sections 7960](#) (as amended) and [7962](#).” M.C. also confirmed under oath at the hearing on the Petition that she had signed the Agreement and initialed each page.

Father also did not provide a declaration from M.C.'s lawyer for the Agreement, Slaughter, as required under [section 7962, subdivision \(f\)\(1\)](#) to rebut various statutory presumptions concerning parenthood. However, Father explained to the trial court that Slaughter was not in a position to provide such a declaration supporting the Petition in light of her prior representation of M.C., and he subpoenaed Slaughter to testify at the hearing on the Petition. At the hearing, Father elicited testimony from Slaughter showing that she had provided M.C. with independent representation with respect to the Agreement; that M.C. had a “clear and informed understanding of the nature of the [Agreement];” and that she had entered into the

[18\].](#))

Agreement “freely [***19] and voluntarily” and had agreed to be “fully bound by its terms.”⁵

Under these facts, Father substantially complied with each requirement in [section 7962](#) [**361] to obtain the orders concerning parenthood authorized by that section. The Agreement itself contained M.C.'s affirmation under oath that she intended to comply with [section 7962](#) in entering into the Agreement. And Slaughter's testimony under oath was the functional equivalent of a [*1201] declaration. Indeed, it was arguably a better procedural vehicle for testimony about M.C.'s capacity and intent, as it provided an opportunity for cross-examination.

CA(3) (3) In the analogous area of consent to adoption, courts have concluded that substantial compliance with regulatory requirements is sufficient to provide enforceable consent, so long as the purpose of the requirements is met. (See [Tyler v. Children's Home Society \(1994\) 29 Cal.App.4th 511, 540 \[35 Cal. Rptr. 2d 291\]](#) [partial noncompliance with details of regulations for providing consent to adoption did not vitiate consent where the “purpose of assuring voluntary and knowing decisionmaking by the parents” was fulfilled]; [Adoption of Baby Boy D. \(2001\) 93 Cal.App.4th 1, 12–13 \[112 Cal. Rptr. 2d 760\]](#) [evidence showed that birth mother “substantially complied with every reasonable objective of the statute and regulations” despite inadvertent failure to check one of the boxes on a consent [***20] form].) Similarly, [HN6](#) the evident purpose of the detailed requirements in [section 7962](#) is to ensure that the parties to an assisted reproduction

agreement enter into the agreement knowingly and voluntarily. Where, as here, there is substantial compliance with [section 7962](#)'s requirements showing that the parties' Agreement was knowing and voluntary, the purpose of the statute is met.

Despite the evidence that the Agreement complied with the requirements of [section 7962](#), M.C. argues that it could not provide the basis to establish Father's parenthood under that section for several reasons. First, M.C. claims that, even if all the requirements of [section 7962](#) are met, that is not sufficient to rebut the presumption of parenthood that is established by giving birth. [Section 7610, subdivision \(a\)](#) provides that “[b]etween a child and the natural parent,” a parent and child relationship “may be established by proof of having given birth to the child.” M.C. correctly points out that this subdivision is not included in the list of presumptions that are rebutted by lodging a notarized assisted reproduction agreement “with the attached declarations of independent attorneys” under [section 7962, subdivision \(f\)\(1\)](#).⁶

Neither the text nor the legislative history of [section 7962](#) provides any indication of why the evidence of parenthood [***21] recognized under [section 7610, subdivision \(a\)](#) was omitted from the list of rebutted presumptions under [*1202] [section 7962, subdivision \(f\)\(1\)](#).⁷ Indeed, its omission seems

⁶ [Subdivision \(f\)\(1\) of section 7962](#) states that lodging an executed and notarized agreement and attorney declarations “shall rebut any presumptions contained within Part 2 (commencing with [Section 7540](#)), [subdivision \(b\) of Section 7610](#), and [Sections 7611](#) and [7613](#), as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children.” (Italics added.) Thus, the list of rebutted presumptions includes only [subdivision \(b\) of section 7610](#), which concerns establishing a parent and child relationship between a child and “an adoptive parent.”

⁷ Father suggests that [section 7962, subdivision \(f\)\(1\)](#) does not mention [section 7610, subdivision \(a\)](#) because that subdivision does not actually create a presumption. The basis for this argument is unclear. The subdivision states that giving birth to a child may establish a parent-child relationship. Moreover, our Supreme Court in *Calvert* characterized [section 7610, subdivision \(a\)](#)'s predecessor statute (*Civ. Code, former § 7003*) as establishing a presumption of motherhood, and rejected the argument that the statute could not

⁵ In her opening brief, M.C. states that she contended below that she “did not receive independent legal advice concerning the contract.” It is unclear whether she intended to raise this claim on appeal. If so, she has forfeited the claim, as she has not provided any argument or citations to authority or to the record in support. ([People v. Stanley \(1995\) 10 Cal.4th 764, 793 \[42 Cal. Rptr. 2d 543, 897 P.2d 481\]](#).) We therefore need not consider whether her argument about the adequacy of the legal counsel she received was relevant to the requirements of [section 7962](#) and, if so, whether the trial court erred in rejecting her argument below.

inconsistent **[**362]** with the purpose of the provision. A claim that a gestational carrier is the “birth mother” is the argument one would most likely expect a surrogate to make to establish a parent and child relationship. In summarizing the bill that became [section 7962](#), the Assembly Committee on the Judiciary explained that “if a woman undergoes in vitro fertilization, under a physician's supervision, using eggs donated on behalf of intended parent or parents and the woman agrees to that in a writing signed by the woman and the intended parents prior to creation of the embryo, then the woman is not treated as the natural parent of the child and the intended parents are presumed to be the child's natural parents.” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1217 (2011–2012 Reg. Sess.) as amended April 26, 2011, pp. 1–2 (Assembly Analysis).) Similarly, an analysis by the Senate Judiciary Committee explained that the bill would provide that “any agreement that is executed in accordance with the provisions of the bill is presumptively valid and shall rebut any presumptions that the surrogate, **[***22]** and her spouse or partner, are the parents of the child.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1217 (2011–2012 Reg. Sess.) as amended June 11, 2012, p. 4 (Senate Analysis).)

[CA\(4\)](#) (4) We need not attempt to resolve this apparent discrepancy. [HN7](#) Whether or not [section 7962, subdivision \(f\)\(1\)](#) rebuts a presumption of parenthood based upon giving birth, the subsequent subpart of [subdivision \(f\)](#) makes clear that a surrogate has no parental rights when an assisted reproduction agreement complies with the requirements of the section.

[Section 7962, subdivision \(f\)\(2\)](#) states that, in ruling on a petition, “[s]ubject to proof of compliance with this section, the judgment or order shall

establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children.” This directive is quite clear. Compliance with the requirements of an assisted reproduction agreement and submitting the proof identified in [section 7962](#) is all that is necessary to **[*1203]** establish a parent-child relationship for the intended parent or parents and to extinguish any claim of parenthood by the surrogate. **[***23]**

M.C. argues that this subdivision does not support the trial court's order here because Father's alleged conduct in requesting an abortion of one fetus and allegedly threatening to surrender one of the Children through adoption showed that he did not “intend” to be a parent. Whatever its merits, the argument is foreclosed by the language of the subdivision, which provides that the “intended parent or intended parents *identified in the surrogacy agreement*” are to be declared the sole parents of children born to a surrogate. ([§ 7962, subd. \(f\)\(2\)](#), italics added.) There is no doubt here that Father was the intended parent identified in the Agreement.

The conclusion that Father is the intended parent for purposes of [section 7962](#) is also supported by the definition of “[i]ntended parent” in [section 7960, subdivision \(c\)](#). That provision identifies an “intended parent” as an individual “who manifests the intent to be legally bound as **[**363]** the parent of a child resulting from assisted reproduction.” The Agreement clearly assigns that responsibility to Father.

Apart from these explicit statutory provisions, M.C.'s argument is inconsistent with the apparent purpose of [section 7962](#) to provide a certain and reliable procedure to determine the parent-child relationship *before* the parties **[***24]** enter into a surrogacy agreement. (See Senate Analysis, *supra*, at p. 7 [as a result of the bill enacting [§ 7962](#), “intended parents, surrogates, and courts would

apply to a gestational carrier who is not genetically related to the child. (See [Calvert, supra](#), 5 Cal.4th at pp. 92–93 & fn. 9.) Father also does not explain why, if [section 7610](#) does not contain any presumptions, [section 7610, subdivision \(b\)](#) would be included in the list of rebutted presumptions under [section 7962, subdivision \(f\)\(1\)](#).

arguably have a clear procedure to follow in creating and enforcing surrogacy agreements and determining parental rights”).) Permitting a surrogate to change her mind about whether the intended parent would be a suitable parent—or requiring a court to rule on whether the intended parent’s conduct subsequent to executing an assisted reproduction agreement is appropriate for a prospective parent—would undermine the predictability of surrogacy arrangements. We agree with the observation of the federal court in [Harding](#), that, were M.C.’s position to be accepted, we are “at a loss to imagine an intended parent in this state who would contract with a gestational surrogate, knowing that the woman could, at her whim, ‘decide’ that the intended parent or parents are not up to snuff and challenge their parenting abilities in court.” ([Harding, supra, 190 F.Supp.3d at p. 932, fn. 9 \[2016 U.S.Dist. Lexis 73466 at p. *23, fn. 9\].](#))

4. M.C.’s Constitutional Challenges Fail

[CA\(5\)](#) (5) M.C. makes various constitutional arguments challenging the procedure for establishing a parent-child relationship under [section 7962](#) and the legitimacy of surrogacy arrangements generally. It is important to note at [***25](#) the [\[*1204\]](#) outset that our Supreme Court has already rejected constitutional challenges to surrogacy agreements and ruled that such agreements are consistent with the public policy of California. (See [Calvert, supra, 5 Cal.4th at pp. 95, 98–100.](#)) Indeed, the Legislature’s stated intent in enacting [section 7962](#) was to codify the decisions in [Calvert](#) and [Buzzanca, supra, 61 Cal.App.4th 1410.](#) (See Assembly Analysis, *supra*, at p. 2 [“Case law in California makes clear that the [HN8](#) intended parents are the natural parents and this bill clarifies and codifies that case law”]; Senate Analysis, *supra*, at p. 4 [“California case law establishes that even without a genetic link, the parties who intended to bring a child into the world are the child’s legal parents [citing [Calvert](#) and [Buzzanca](#)]. This bill, with respect to surrogacy agreements, seeks to codify and clarify that case law by

requiring parties to enter into surrogacy agreements, as specified, prior to the commencement of any medical treatment related to the surrogacy arrangement”).)

In [Calvert](#), the court considered competing claims of parental rights by a surrogate and a husband and wife who contracted with the surrogate to give birth to a child for them. The child was conceived with sperm from the husband and an egg from the wife. The parties executed a contract providing that the child would be taken into [***26](#) the couple’s home as “‘their child,’” and that the surrogate would relinquish “‘all parental rights.’” ([Calvert, supra, 5 Cal.4th at p. 87.](#)) The relationship between the parties deteriorated before the child was born, leading to competing lawsuits seeking a declaration of parental rights. ([Id. at pp. 87–88.](#))

The [Calvert](#) court examined the competing parenthood claims under the [Uniform Parentage Act](#) (the Act), which was the only statutory framework available at the time for assessing the parties’ parenthood [**364](#) claims.⁸ The court concluded that both the surrogate and the wife who donated her egg had plausible claims for parental rights under the Act. In that circumstance, the court gave effect to the parties’ intent for parentage as expressed in their agreement. The court noted that, “[b]ut for their acted-on intention, the child would not exist.” ([Calvert, supra, 5 Cal.4th at p. 93.](#)) The court observed that “[n]o reason appears why [the surrogate’s] later change of heart should vitiate the determination that [the wife] is the child’s natural mother.” (*Ibid.*) The court rejected the public policy and constitutional objections that the surrogate raised to the parties’ contract, concluding that giving effect to the parties’ intent “does not offend the state or federal Constitution or public [***27](#) policy.” ([Id. at pp. 87, 95–100.](#))⁹

⁸ The Act is now codified at [section 7600 et seq.](#)

⁹ In [Buzzanca](#), the Fourth District Court of Appeal applied the reasoning of [Calvert](#) to a situation where a surrogate gave birth to a child conceived with the sperm and egg of anonymous donors at the instigation of a husband and wife who subsequently separated. In

[*1205]

M.C. attempts to distinguish *Calvert* and limit the scope of its holding by noting that the court in that case resolved competing claims of parenthood by two claimed *mothers*: The gestational carrier and the genetic mother of the child. The court acknowledged that “[b]oth women ... adduced evidence of a mother and child relationship as contemplated by the Act,” but concluded that “for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.” (*Calvert, supra, 5 Cal.4th at p. 92.*) Here, of course, the dispute is not between two claimed mothers, but between a claimed mother and Father, the intended parent under the Agreement.

M.C.'s argument misses the broader implication of the holding in *Calvert*. The court held that it could give effect to the parties' intentions for the parentage of the child as expressed in their surrogacy contract because the agreement was “not, on its face, inconsistent with public policy.” (*Calvert, supra, 5 Cal.4th at p. 95.*) That holding is ultimately dispositive for all of the constitutional arguments that M.C. raises here. *HN9 Section 7962* permits the parties to a surrogacy arrangement to enter into a legally [***28] binding contract—subject to specific statutory safeguards—that determines the parentage of children conceived pursuant to the arrangement. There is no constitutional impediment to giving effect to the parties' intent expressed in such a contract.

a. *M.C. has standing to assert constitutional claims on behalf of the Children*

that case, neither the surrogate nor the husband claimed parental rights, and the trial court concluded that the child had *no* parents. The Court of Appeal reversed. The court held that the wife in that case was “situated like a husband in an artificial insemination case whose consent triggers a medical procedure which results in a pregnancy and eventual birth of a child.” (*Buzzanca, supra, 61 Cal.App.4th at p. 1421.*) Therefore, just as in *Calvert*, motherhood could plausibly be established in two women, and the conflict should be resolved by giving effect to the intention of the parties. (*Ibid.*)

Father argues that M.C. does not have standing to assert the Children's constitutional rights on appeal because she is not a parent. Like his estoppel theory, this argument is inextricably bound up in the merits of M.C.'s appeal.

[**365] But for the Agreement, M.C. would have a colorable claim to motherhood based on the fact that she gave birth to the Children. (See [§ 7610, subd. \(a\)](#); *Calvert, supra, 5 Cal.4th at pp. 89–90*; *Robert B. v. Susan B. (2003) 109 Cal.App.4th 1109, 1115 [135 Cal. Rptr. 2d 785]* [woman who gave birth to a child from an embryo belonging to another couple that was mistakenly implanted by a fertility clinic “clearly established a mother-child relationship by the undisputed fact that she gave birth” to the child].) Thus, Father's standing argument depends upon a conclusion that the Agreement is valid and that by executing it M.C. surrendered any claims to motherhood that she [*1206] might have. One of the challenges that M.C. seeks to assert to the Agreement's validity is the claimed constitutional [***29] rights of the Children to a parent-child relationship with her. Whatever the merits of this claim, concluding that she has no standing to assert it because she is not a parent would assume that her argument fails before it is even considered. We do not believe that Father's standing argument compels such a circular result.

Father relies on the rule that only a “party aggrieved” has standing to appeal under [Code of Civil Procedure section 902](#). That rule does not help him. *HN10* We “liberally construe the issue of standing and resolve doubts in favor of the right to appeal.” (*In re L. Y. L. (2002) 101 Cal.App.4th 942, 948 [124 Cal. Rptr. 2d 688]* [parent had standing to raise the sibling relationship exception to termination of parental rights].)

CA(6) (6) M.C. has standing to assert her own claimed statutory and constitutional rights to a parent-child relationship with the Children. (See [§ 7650, subd. \(a\)](#) [“Any interested person may bring an action to determine the existence or

nonexistence of a mother and child relationship”]; Calvert, supra, 5 Cal.4th at pp. 89–90; see also In re Rauch (1951) 103 Cal.App.2d 690, 694–695 [230 P.2d 115] [father had standing to appeal an order declaring his child to be a ward of the court despite a previous order appointing other relatives as guardians and giving them custody of the child].) M.C.'s interest in a relationship with the Children is intertwined with the Children's alleged [***30] interest in a relationship with her. She may therefore assert the Children's interests along with her own. HN11 “Where the interests of two parties interweave, either party has standing to litigate issues that have a[n] impact upon the related interests. This is a matter of first party standing.” (In re Patricia E. (1985) 174 Cal.App.3d 1, 6 [219 Cal. Rptr. 783] [father had standing to raise the issue of his minor daughter's right to counsel in a dependency proceeding because “independent representation of the daughter's interests impacts upon the father's interest in the parent-child relationship”], disapproved on other grounds in In re Celine R. (2003) 31 Cal.4th 45, 60 [1 Cal. Rptr. 3d 432, 71 P.3d 787].)¹⁰

[*1207]

[**366] In other contexts, courts have found that persons who had no claim to be natural or genetic parents had standing to assert the interests of minor children. (See, e.g., In re Santos Y. (2001) 92 Cal.App.4th 1274, 1314, fn. 24 [112 Cal. Rptr. 2d

692] [foster parents could raise the constitutional claims of a minor in a custody dispute under the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. § 1901 et seq.) even though they did not themselves possess a fundamental interest in a relationship with the minor under a substantive due process analysis]; Guardianship of Olivia J. (2000) 84 Cal.App.4th 1146, 1152–1153 & fn. 7 [101 Cal. Rptr. 2d 364] [appellant could pursue a guardianship proceeding on behalf of a minor who previously lived with her and her partner, despite appellant's status as a nonparent who [***31] was a “former participant in a lesbian relationship”].) The fact that the Children are not parties to this appeal and therefore cannot assert their own interests provides further reason to consider M.C.'s arguments on their behalf. (Cf. In re Alexandria P. (2014) 228 Cal.App.4th 1322, 1342 [176 Cal. Rptr. 3d 468] [de facto parents lacked standing to raise constitutional challenges to the ICWA on minor's behalf where the minor's counsel and guardian ad litem “sought an outcome consistent with the ICWA's requirements”].) We therefore proceed to the merits of M.C.'s constitutional claims.

b. Procedural due process

M.C. claims that the trial court denied her due process rights and the due process rights of the Children under the United States and California Constitutions by failing to consider her counterclaim and failing to give her a hearing prior to terminating her claimed parental rights. We reject the argument.

The record shows that the trial court gave M.C. the hearing that section 7962 contemplates. Section 7962, subdivision (f)(2) provides that, “[u]pon motion by a party to the assisted reproduction agreement for gestational carriers, the matter shall be scheduled for hearing before a judgment or order is issued.” The trial court did conduct a hearing to determine if the requirements of section 7962 had been met. With [***32] respect to the one procedural element of the statute that had not yet been met—a declaration from M.C.'s former attorney—the court heard the attorney's testimony

¹⁰ Father also relies on federal cases discussing whether parties had standing to raise constitutional claims under the constitutional and prudential standing requirements in federal court. He does not explain the relevance of those cases to this proceeding. To the extent such cases are analogous, they also do not support Father's argument. The United States Supreme Court has found that foster parents had standing to argue their view of the constitutional interests of minor children in a state's foster care procedures, even when the children and parents were separately represented parties. (Smith v. Organization of Foster Families (1977) 431 U.S. 816, 841, fn. 44 [53 L. Ed. 2d 14, 97 S. Ct. 2094].) But for the Agreement, M.C. would have at least as much interest as a foster parent in the Children's alleged constitutional right to a parent-child relationship with her. (See Calvert, supra, 5 Cal.4th at p. 99, fn. 13 [citing Smith and noting that the trial court in Calvert had analogized the surrogate's relationship with the child to “that of a foster mother”].)

and permitted M.C. to cross-examine.

CA(7) (7) HN12 Section 7962 specifies that the only showing necessary to obtain an order establishing the parentage of the intended parent(s) and extinguishing claims of parental rights by a surrogate is “proof of compliance with this section.” (§ 7962, subd. (f)(2).) Upon such a showing, the judgment or order “shall terminate any parental rights of the surrogate and her spouse or partner *without further hearing or evidence*, unless the court or a party to the assisted [*1208] reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section.” (*Ibid.*, italics added.) Thus, section 7962 does not leave room for litigating challenges to the parental rights of intended parents on any basis beyond the circumstances and content of the surrogacy agreement itself.

The trial court therefore properly denied M.C.'s counterclaim under section 7962, subdivision (f)(2) without further proceedings. The counterclaim did not challenge whether the [***33] Agreement fulfilled the requirements of section 7962 or allege that [**367] the Agreement was “not executed in accordance with” section 7962. Rather, it asserted broad claims challenging the legitimacy and constitutionality of surrogacy agreements and contesting Father's fitness and intention to be a parent. Under section 7962, subdivision (f)(2), no “further hearing or evidence” was required to consider such claims.¹¹

M.C.'s procedural due process claim therefore amounts to a challenge to the constitutionality of

section 7962. The crux of the claim is that the statutory scheme improperly permits a surrogate's parent-child relationship to be denied based only upon the intentions expressed in a surrogacy contract without further consideration of the surrogate's post-birth wishes, the intended parent's fitness to be a parent, or the best interests of the children. The substance of M.C.'s procedural due process claim is therefore indistinguishable from her substantive due process and equal protection claims, which are discussed below.

c. Alleged violation of the Children's substantive due process rights

M.C. argues that the termination of her claimed parental rights under section 7962 violates the Children's liberty interest in (1) their relationship with their mother and (2) [***34] freedom from “commodification.” We conclude that both of these arguments are foreclosed by the court's opinion in *Calvert*.

M.C.'s argument fails in light of her own agreement surrendering any right to form a parent-child relationship with the Children. Her argument amounts to a claim that she either (1) had no right to make such a promise or (2) was permitted to later change her mind about that promise based upon the best interests of the Children. Both claims are inconsistent with the court's decision in *Calvert*. [*1209]

The first claim is a direct challenge to the legitimacy of surrogacy arrangements. If a child's liberty interest in a relationship with its birth mother trumps the surrogate's right to enter into a contract agreeing to surrender the child to intended parents, then no surrogacy arrangement is possible. That result would conflict with the fundamental holding in *Calvert* that surrogacy agreements are not inconsistent with public policy. (*Calvert, supra, 5 Cal.4th at pp. 87, 95.*) It would also run afoul of the court's observation that “[t]he argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries

¹¹ In attacking the legitimacy of section 7962 in her counterclaim, M.C. in fact acknowledged the limited showing necessary to terminate a surrogate's claimed parental rights under section 7962: “California's Surrogacy Enabling Statute, C.F.C. § 7962(f)(2) authorizes the court to terminate the parental rights of [M.C.] based solely upon proof that the ‘gestational’ surrogate signed a surrogacy contract which complies with § 7962 and nothing more.”

prevented women [***35] from attaining equal economic rights and professional status under the law.” (*Id.* at p. 97.)

CA(8) (8) The second claim conflicts with the court's rejection of the adoption paradigm for surrogacy arrangements. By analogy to the statutes governing adoption, the surrogate in *Calvert* argued that a prebirth waiver of her parental rights was unenforceable. The court rejected that argument, concluding that *HN13* “[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes.” (*Calvert, supra*, 5 Cal.4th at pp. 95–96.) [***368] The court also held that a decision on the parentage of children born to a surrogacy arrangement is separate from determining custody based upon the best interests of the children, which should be left to the dependency laws. (*Id.* at pp. 93–94, fn. 10.)

The opinion in *Calvert* also precludes M.C.'s argument that surrogacy agreements impermissibly result in the “commodification” of children by permitting their sale. The court in *Calvert* expressly rejected the concern that “the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will.” (*Calvert, supra*, 5 Cal.4th at p. 97.) Moreover, the court rejected the argument that payments to the surrogate in that case were in exchange for the surrender of her parental [***36] rights, instead concluding that they were “meant to compensate her for her services in gestating the fetus and undergoing labor.” (*Id.* at p. 96.) Similarly, here, payments to M.C. under the Agreement were for the stated purpose of “compensation for her discomfort, pain, suffering and for pre-birth child support” and for living expenses. Moreover, M.C.'s argument that she could not enter into the surrogacy arrangement in exchange for compensation also amounts to a wholesale attack on the legitimacy of surrogacy contracts, which is inconsistent with the holding in *Calvert*.¹²

¹² M.C. argues that *Calvert* did not decide this issue because it only considered whether the payment of money to the surrogate in that

[*1210]

d. Alleged violation of the Children's equal protection rights

M.C. argues that denying a parent-child relationship between her and the Children violated the Children's right to equal protection under the United States Constitution. M.C. claims that permitting the children of surrogates to be “placed” with intended parents based only upon the intent of the contracting parties without considering the best interests of the children denies such children the consideration given to children in other contexts involving state-sponsored placement, such as adoption and marital dissolution proceedings.

While the court did not consider this [***37] argument directly in *Calvert*, we believe that the court's opinion in that case forecloses it. As mentioned, the court concluded that the determination of *parentage* is separate from the question of *custody*. (See *Calvert, supra*, 5 Cal.4th at pp. 93–94, fn. 10.) Whether a particular custodial arrangement is harmful to a child is a subject for the state's dependency laws, not for the law governing surrogacy contracts.¹³

case violated this state's public policy, not whether it was constitutionally permissible. The argument ignores the source of public policy against which the validity of contractual provisions is measured. A court's understanding of the public policy affecting a contract is generally derived from constitutional and statutory provisions. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777, fn. 53 [62 Cal. Rptr. 3d 527, 161 P.3d 1095] [courts *HN14* “may, in appropriate circumstances, void contracts on the basis of public policy,” but “[t]he determination of public policy of states resides, first, with the people as expressed in their Constitution and, second, with the representatives of the people—the state Legislature,”” quoting *Jensen v. Traders & General Ins. Co.* (1959) 52 Cal.2d 786, 794 [345 P.2d 1].) In light of this relationship, M.C.'s claim that surrogacy arrangements could be consistent with California public policy and yet violate the United States and/or California Constitutions is illogical.

¹³ *Calvert* referred to California's dependency laws, which the court explained “are designed to protect *all* children irrespective of the manner of birth or conception.” (*Calvert, supra*, 5 Cal.4th at p. 93, fn. 10.) Where, as here, an intended parent resides in another state, different dependency laws would likely apply, but the principle remains the same. One can imagine an extreme set of circumstances that might test the constitutional boundaries of *section 7962's*

[**369] As applied to M.C.'s equal protection argument, the court's conclusion means that a child's right to suitable *placement* by the state once born is not at issue. Rather, the issue is the extent of state control over individuals' decisions to give birth in the first place.

The court in *Calvert* recognized that the decision of the intended parents led to the birth of the child whose parentage was at issue. “But for their acted-on intention, the child would not exist.” (*Calvert, supra*, 5 Cal.4th at p. 93.) A conclusion that children born to surrogates must be placed by the state using the same criteria that apply to adoptions or custody disputes would certainly affect—and perhaps eliminate—the willingness of intended [*1211] parents to have children through surrogacy arrangements. “[I]t is safe to say that [the surrogate] would not have been given the opportunity [***38] to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother.” (*Ibid.*)

CA(9) (9) Thus, HN15 for purposes of an equal protection analysis, it is more appropriate to compare children born to surrogates with children born in a traditional manner to other parents than it is to compare children born to surrogates with children *placed* through adoption or family courts. Of course, the state does not regulate who is permitted to give birth. “[W]hat a far different experience life would be if the State undertook to issue children to people in the same fashion that it now issues driver's licenses. What questions, one wonders, would appear on the written test?” (*Harding, supra*, 190 F.Supp.3d at p. 932, fn. 9 [2016 U.S.Dist. Lexis 73466 at pp. *23–*24, fn. 9], quoting *J.R. v. Utah (D. Utah 2003)* 261 F.Supp.2d 1268, 1298, fn. 29.)

Thus, M.C.'s equal protection argument on behalf

of the Children does not provide any ground for reversal.

e. *Alleged violation of M.C.'s constitutional rights*

M.C. argues that the trial court's order terminating her claimed parental rights violated her substantive due process and equal protection rights in several respects. Her arguments can be grouped into two categories for purposes of discussion. First, she claims that she has a constitutionally protected liberty interest [***39] in a relationship with the Children that she could not waive before their birth. She argues that permitting such a prebirth waiver would also violate her equal protection right to be treated similarly to mothers who surrender their children through adoption. Second, she argues that surrogacy arrangements are impermissibly exploitative and dehumanizing. Again, we conclude that these arguments are foreclosed by *Calvert*.

M.C. argues that *Calvert* did not hold that a surrogate can never have a liberty interest in a relationship with the child that she bears. She correctly points out that the court's analysis in that case was colored by the need to weigh the surrogate's interests against the interests of the genetic mother, and that such balancing is not necessary here. (See *Calvert, supra*, 5 Cal.4th at p. 100 [**370] [the surrogate “fails to persuade us that sufficiently strong policy reasons exist to accord her a protected liberty interest in the companionship of the child when such an interest would necessarily detract from or impair the parental bond enjoyed by [the intended parents]”].) [*1212]

CA(10) (10) We need not determine the scope of the court's ruling on this issue, because the opinion otherwise makes clear that HN16 a surrogate can permissibly [***40] contract to surrender whatever parental rights she has. The court held that the surrogacy contract in that case was consistent with public policy.¹⁴ The court rejected the argument

summary procedure, such as an intended parent with a history of child abuse who plans to take a child to another country that does not have a functioning dependency system. Hopefully such a case is hypothetical only. In any event, it is not the situation here.

¹⁴ As discussed *ante*, we are not persuaded by M.C.'s assertion that “the public policy considerations raised in [*Calvert*] are not

that “a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents” as antiquated and dismissive of a woman's “equal economic rights.” (*Calvert, supra, 5 Cal.4th at p. 97.*) Here, as in *Calvert*, there is no suggestion that M.C., who had children of her own and had previously served as a surrogate, “lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract.” (*Ibid.*)

M.C.'s argument that, like mothers giving up children for adoption, she could not knowingly waive her parental rights until *after* she had given birth also fails in light of the Supreme Court's holding in *Calvert*. The court rejected the surrogate's argument in that case that the policies underlying California's adoption laws were violated by the surrogacy contract because it amounted to a “prebirth waiver of her parental rights.” (*Calvert, supra, 5 Cal.4th at p. 96.*) The court concluded that “[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes.” [***41] (*Ibid.*)

Finally, the court in *Calvert* expressly rejected the argument that surrogacy contracts violate public policy because they “tend to exploit or dehumanize women.” (*Calvert, supra, 5 Cal.4th at p. 97.*) In particular, the court found that, “[a]lthough common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.” (*Ibid.*) More generally, “[t]he limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.” (*Ibid.*)

applicable to a constitutional challenge.” We do not believe that our Supreme Court would have held that the surrogacy contract in *Calvert* was consistent with public policy if it believed that the surrogacy arrangement violated a constitutional right. Of course, the Legislature has also now expressed its view of the permissibility of surrogacy arrangements by enacting [section 7962](#).

[CA\(11\)](#) (11) We therefore conclude that the Agreement did not violate the constitutional rights of M.C. or the Children. The trial court's ruling was consistent with the requirements of [section 7962](#) and the court's decision in *Calvert*. M.C. has presented no ground to reverse the trial court's ruling.

[*1213]

DISPOSITION

The trial court's February 9, 2016 judgment is affirmed. Plaintiff and respondent C.M. (Father) is entitled to recover his costs on appeal.

[**371] Chaney, Acting P. J., and Johnson, J., concurred.

Appellant's petition for review by the [***42] Supreme Court was denied April 12, 2017, S240517.

End of Document



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As of: October 18, 2026 1:40 AM Z

[California Grocers Assn. v. City of Los Angeles](#)

Supreme Court of California

July 18, 2011, Filed

S176099

Reporter

52 Cal. 4th 177 *; 254 P.3d 1019 **; 127 Cal. Rptr. 3d 726 ***; 2011 Cal. LEXIS 7067 ****; 191 L.R.R.M. 2267; 161 Lab. Cas. (CCH) P61,166

CALIFORNIA GROCERS ASSOCIATION, Plaintiff and Respondent, v. CITY OF LOS ANGELES, Defendant and Appellant; LOS ANGELES ALLIANCE FOR A NEW ECONOMY, Intervener and Appellant.

bargaining agreement, bargaining process, weapon, burn, new owner, negotiate, grocer, high court, labor practice, food safety, unfair, the, ownership

Case Summary

Subsequent History: Reported at [California Grocers Association v. City of Los Angeles \(Los Angeles Alliance for a New Economy\), 2011 Cal. LEXIS 7689 \(Cal., July 18, 2011\)](#)

US Supreme Court certiorari denied by [Cal. Grocers Ass'n v. Angeles, 2012 U.S. LEXIS 1016 \(U.S., Jan. 23, 2012\)](#)

Prior History: [****1] Superior Court of Los Angeles County, No. BC351831, Ralph W. Dau, Judge. Court of Appeal, Second Appellate District, Division Five, No. B206750.

[California Grocers Assn. v. City of Los Angeles, 176 Cal. App. 4th 51, 98 Cal. Rptr. 3d 34, 2009 Cal. App. LEXIS 1259 \(Cal. App. 2d Dist., 2009\)](#)

Disposition: The court reversed the court of appeal's judgment and remanded the case for further proceedings.

Core Terms

ordinance, hire, bargain, preemption, preempt, work force, predecessor's, food, machinist, new employer, successor, retention, successorship, grocery, retail, state law, collective bargaining,

Procedural Posture

Plaintiff grocers association filed a complaint against defendant city, seeking to enjoin enforcement of the city's Grocery Worker Retention Ordinance, L.A. Ord. No. 177,231, L.A. Mun. Code, § 181.00 et seq. A trial court entered a judgment enjoining enforcement of the ordinance. The California Court of Appeal affirmed. The city sought review.

Overview

The court held that the ordinance was not preempted as intruding upon either matters of health and safety already regulated by the state or matters of employee organization and collective bargaining fully occupied by federal law. The ordinance promoted the same goals as the enactment of a higher governmental authority, but did so without entering the field that enactment preempted, i.e., the setting of specific uniform standards. The trial court erred in concluding that, because the ordinance arguably was intended to enact a different approach to ensuring food safety than that crafted by the legislature, ipso facto it was preempted. Retention ordinances such as the instant ordinance did not dictate the outcomes of the successorship inquiry in any way that would call for Machinists preemption. The ordinance was fully

consistent with both the state and federal equal protection clauses. The city rationally could conclude both that disruptions at larger stores, involving larger workforces, would have a larger impact on the community, and that larger stores would be more readily positioned to absorb any short-term burdens the ordinance's requirements might impose on employers.

Outcome

The court reversed the court of appeal's judgment and remanded the case for further proceedings.

LexisNexis® Headnotes

Evidence > Burdens of Proof > Allocation

Governments > Local

Governments > Ordinances & Regulations

Governments > State & Territorial

Governments > Relations With Governments

HN1 Burdens of Proof, Allocation

Local ordinances and regulations are subordinate to state law. *Cal. Const., art. XI, § 7*. Insofar as a local regulation conflicts with state law, it is preempted and invalid. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation enters an area fully occupied by general law when the legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent. Express field preemption turns on a comparative statutory analysis: What field of exclusivity does the state preemption clause define, what subject matter does the local ordinance regulate, and do the two overlap? The burden of proving the existence of such an overlap rests on the party asserting preemption.

Business & Corporate

Compliance > Governments > Agriculture &

Food > Food Product Quality

Governments > Agriculture & Food > Product Quality

HN2 Agriculture & Food, Food Product Quality

See [Health & Saf. Code, § 113705](#).

Business & Corporate

Compliance > Governments > Agriculture &

Food > Food Product Quality

Governments > Agriculture & Food > Product Quality

Governments > State & Territorial

Governments > Relations With Governments

HN3 Agriculture & Food, Food Product Quality

Pursuant to [Health & Saf. Code, § 113705](#), the State alone may adopt health and sanitation standards for retail food facilities. The remainder of the statutory scheme demonstrates by way of example the precise scope of exclusive state regulation.

Business & Corporate

Compliance > Governments > Agriculture &

Food > Food Product Quality

Governments > Agriculture & Food > Product Quality

Governments > State & Territorial

Governments > Relations With Governments

Labor & Employment Law > Employment

Relationships > General Overview

HN4 Agriculture & Food, Food Product Quality

The Grocery Worker Retention Ordinance, L.A.

Ord. No. 177,231, L.A. Mun. Code, § 181.00 et seq., imposes no substantive food safety standards. Its provisions regulate, for certain grocery stores during ownership transitions, how a new owner may select its workforce. L.A. Mun. Code, §§ 181.02-181.04. It does not speak to how employees must conduct themselves to ensure sanitation, how food should be handled or transported, how grocery stores should be designed or cleaned, or any of the various other topics for which the California Retail Food Code, [Health & Saf. Code, § 113700 et seq.](#), sets out exclusive state standards. The face of the ordinance thus discloses no incursion into the exclusive realm reserved for the State by [Health & Saf. Code, § 113705](#); the former regulates employment, not food safety, while the latter regulates food safety, not employment.

Governments > Local
Governments > Ordinances & Regulations

Governments > State & Territorial
Governments > Relations With Governments

[HN5](#) Local Governments, Ordinances & Regulations

Purpose alone is not a basis for concluding a local measure is preempted. While the California Supreme Court and the Courts of Appeal have occasionally treated an ordinance's purpose as relevant to state preemption analysis, they have done so in the context of a nuanced inquiry into the ultimate question in determining field preemption: whether the effect of the local ordinance is in fact to regulate in the very field the State has reserved to itself. An ordinance is not transformed into a statute prohibiting crime simply because a city uses its licensing power to discourage illegitimate activities associated with certain businesses. Most licensing ordinances have a direct impact on the enforcement of state laws that have been enacted to preserve the health, safety and welfare of state and local citizens. This fact does not deprive a municipality of the power to enact them.

Business & Corporate
Compliance > Governments > Agriculture & Food > Food Product Quality
Governments > Agriculture & Food > Product Quality

Governments > State & Territorial
Governments > Relations With Governments

[HN6](#) Agriculture & Food, Food Product Quality

The California Retail Food Code, [Health & Saf. Code, § 113700 et seq.](#), does not preempt all laws that have as their purpose the promotion of food health and safety; it preempts only those that establish health and sanitation standards for retail food establishments, so as to ensure uniformity for such facilities. [Health & Saf. Code, § 113705](#). The Retail Food Code itself dictates those uniform standards, but does not specify by whom they are to be carried out; as far as state law is concerned, a retail food store may employ whomever it likes, so long as those it employs comply with the State's standards for distributing food in a safe and healthful manner.

Governments > State & Territorial
Governments > Relations With Governments

Labor & Employment Law > Employment
Relationships > General Overview

[HN7](#) State & Territorial Governments, Relations With Governments

The Grocery Worker Retention Ordinance, L.A. Ord. No. 177,231, L.A. Mun. Code, § 181.00 et seq., regulates only who may be hired to engage in certain work, and though it may have been intended in part to reduce violations of state law by those workers, it does not itself add to or subtract from the State's uniform standards of conduct for whoever engages in that work. The ordinance promotes the same goals as the enactment of a

higher governmental authority, but does so without entering the field that enactment preempts, i.e., the setting of specific uniform standards.

Business & Corporate

Compliance > Governments > Agriculture & Food > Food Product Quality

Governments > Agriculture & Food > Product Quality

HN8 Agriculture & Food, Food Product Quality

[Health & Saf. Code, § 113947, subd. \(a\)](#), requires the person in charge and all food employees to have adequate knowledge of, and be properly trained in, food safety as it relates to their assigned duties. The California Retail Food Code, [Health & Saf. Code, § 113700 et seq.](#), further requires that specified food facilities have either an owner or employee who has received state certification in food safety, [Health & Saf. Code, §§ 113947.1, subds. \(a\), \(b\)\(1\), 113947.2, 113947.3](#), or otherwise be able to demonstrate to an enforcement officer that the employees have adequate knowledge of food safety as it relates to their duties. [§ 113947.1, subd. \(b\)\(2\)](#). For facilities that have just opened, gone through a change in ownership, or otherwise lost their certified food safety specialist, the scheme offers a 60-day grace period. [§ 113947.1, subd. \(e\)](#).

Business & Corporate

Compliance > Governments > Agriculture & Food > Food Product Quality

Governments > Agriculture & Food > Product Quality

Governments > State & Territorial

Governments > Relations With Governments

Labor & Employment Law > Employment

Relationships > General Overview

HN9 Agriculture & Food, Food Product Quality

The California Retail Food Code, [Health & Saf. Code, § 113700 et seq.](#), establishes standards for what certain employees, particularly one certified owner or supervising food service employee, must know or be taught, but does not regulate who must be hired; the Grocery Worker Retention Ordinance, L.A. Ord. No. 177,231, L.A. Mun. Code, § 181.00 et seq., regulates the pool of nonsupervising, nonmanagerial employees from which a new owner temporarily must hire, but imposes no standards concerning what the hired employees must know or be taught about food safety. The Retail Food Code's required certified food safety specialist is by definition a managerial or supervisory employee, while the ordinance by its terms expressly excludes from its scope all such employees, and thus does not regulate or restrict in any way an employer's freedom to hire whomever it chooses to satisfy that position. As such, the ordinance does not intrude upon the field the state has expressly reserved to itself and is not preempted by state law.

Constitutional Law > Supremacy
Clause > Federal Preemption

Labor & Employment Law > Collective
Bargaining & Labor Relations > Federal
Preemption

HN10 Supremacy Clause, Federal Preemption

The [Supremacy Clause of the United States Constitution](#) vests Congress with the power to preempt state law. [U.S. Const., art. VI, cl. 2](#). While Congress may exercise that power by enacting an express preemption provision, the National Labor Relations Act, [29 U.S.C. § 151 et seq.](#), contains no such provision; indeed, Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action.

Labor & Employment Law > Collective

Bargaining & Labor Relations > Federal
Preemption

HN11 Collective Bargaining & Labor Relations, Federal Preemption

Even where the National Labor Relations Act (NLRA), [29 U.S.C. § 151 et seq.](#), does not address a particular economic weapon, preemption may still apply. Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding preemption is the same: whether the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes. Except insofar as the NLRA itself regulates the use of particular economic weapons, Congress intended a "no-fly" zone, with neither states nor the National Labor Relations Board (NLRB) permitted to interfere in the bargaining process by dictating which weapons labor and management might employ in negotiations. To sanction state regulation of such economic pressure deemed by the NLRA desirably left for the free play of contending economic forces is not merely to fill a gap by outlawing what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant the party to have available. The United States Supreme Court has extended Machinists principles to other instances in which, from the text or structure of the NLRA, it could infer Congress intended the subject matter to be free from state or municipal regulation.

Labor & Employment Law > Collective
Bargaining & Labor Relations > Federal
Preemption

HN12 Collective Bargaining & Labor Relations, Federal Preemption

At the core of Machinists preemption is the principle that, in specific instances, one may discern from the text and structure of the National Labor Relations Act (NLRA), [29 U.S.C. § 151 et](#)

[seq.](#), a basis for inferring that Congress affirmatively intended to leave a particular subject free from further National Labor Relations Board and state and local government regulation. Machinists preemption is based on the premise that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes. As in any preemption analysis, the purpose of Congress is the ultimate touchstone. Given that Congress's purpose was to regulate the process of establishing terms of employment, not the content of those terms, it follows that the areas Congress intended to leave free of local regulation are those relating to the process by which an employment agreement is reached: matters of self-organization and collective bargaining. In sharp distinction, because the NLRA is not a federal code of employment law, Machinists preemption does not extend to local establishment of substantive employment terms: Such regulation provides protections to individual union and nonunion workers alike, and thus neither encourages nor discourages the collective-bargaining processes that are the subject of the NLRA.

Labor & Employment Law > Collective
Bargaining & Labor Relations > Federal
Preemption

Labor & Employment Law > Employment
Relationships > General Overview

HN13 Collective Bargaining & Labor Relations, Federal Preemption

The employer-employee relationship is one traditionally regulated by state and local governments under their police powers. Preemption should not be lightly inferred in this area, as the establishment of labor standards falls within the traditional police power of the State.

Labor & Employment Law > Collective

Bargaining & Labor Relations > Federal
Preemption

HN14 Collective Bargaining & Labor Relations, Federal Preemption

There is no evidence that Congress affirmatively intended in the National Labor Relations Act (NLRA), [29 U.S.C. § 151 et seq.](#), to leave the subject of employee retention unregulated by states and municipalities. On the subject of employee hiring and firing, the text of the NLRA is, with one notable exception, resoundingly silent. It neither guarantees nor prohibits the retention of employees; it does not affirmatively protect new employers' latitude to hire and fire whomever they please, nor does it address in any way the power of states and localities to regulate the subject. The only portion of the NLRA to speak to these matters, § 8(a)(3), protects employees from discrimination on the basis of union affiliation; an employer may not use the power to hire and fire to exercise anti-union animus and eliminate pro-union employees from its workforce. [29 U.S.C. § 158\(a\)\(3\)](#). This silence leaves unrebutted the initial presumption that Congress did not intend preemption.

Labor & Employment Law > Collective
Bargaining & Labor Relations > Federal
Preemption

HN15 Collective Bargaining & Labor Relations, Federal Preemption

The statutory text of the National Labor Relations Act (NLRA), [29 U.S.C. § 151 et seq.](#), does not disturb state and local authority to address, as these entities see fit, matters of hiring and firing, authority traditionally recognized as a core incident of their police power. Thus, it is that states and localities have long been permitted to provide common law wrongful discharge remedies and enact statutes of general application regulating hiring and firing without intruding upon the NLRA's narrowly tailored concerns.

Labor & Employment Law > Collective
Bargaining & Labor Relations > Federal
Preemption

HN16 Collective Bargaining & Labor Relations, Federal Preemption

While the Grocery Worker Retention Ordinance, L.A. Ord. No. 177,231, L.A. Mun. Code, § 181.00 et seq., regulates the existence of the employment relationship rather than just its terms, this distinction is not crucial; federal courts routinely have upheld as not preempted under Machinists employment laws that broadly regulate hiring and firing. The ordinance regulates the terms and conditions of employment, extending the benefit of a potential temporary extension of employment to each employee individually, rather than conferring a collective right, and applying the benefit to all employees equally, irrespective of union or nonunion status. The ordinance does not enter into the substantive aspects of the bargaining process to an extent Congress has not countenanced. It does not regulate the process by which a bargaining agreement may be reached. Nor does the ordinance speak directly to the process of organizing; rather, it temporarily preserves the status quo, whatever that might be, whether the workforce is unionized or not. And, while the ordinance does confer on each employee, as an individual, certain rights the individual employees might otherwise have obtained only through organizing and collective bargaining, it is well established that so doing is no basis for Machinists preemption.

Mergers & Acquisitions Law > General
Business Considerations > Labor Laws

HN17 General Business Considerations, Labor Laws

Successorship depends on a consideration of the totality of the circumstances, including whether the

business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Mergers & Acquisitions Law > General Business Considerations > Labor Laws

HN18 Collective Bargaining & Labor Relations, Federal Preemption

Existing case law indicates that a successor employer will be obligated to bargain with a union only if the successor employer retains its predecessor's employees beyond the mandatory employment period or if it extends an offer for permanent employment prior to expiration of the mandatory retention period. Until that point, the predecessor's employees are essentially probationary and no basis exists for concluding one of the prerequisites of a successorship bargaining obligation, the hiring of a majority of the predecessor's employees, will come to pass. It follows that retention ordinances like the Grocery Worker Retention Ordinance, L.A. Ord. No. 177,231, L.A. Mun. Code, § 181.00 et seq., do not dictate the outcomes of the successorship inquiry in any way that would call for Machinists preemption.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Mergers & Acquisitions Law > General Business Considerations > Labor Laws

HN19 Federal Common Law, Preemption

No clear and manifest congressional intent to foreclose indirect impacts on successorship can be discerned in the National Labor Relations Act (NLRA), [29 U.S.C. § 151 et seq.](#) As with any preemption question, the purpose of Congress is the ultimate touchstone, and on this point there is neither textual nor historical support. Successorship is a question of federal common law because no provision of the NLRA mentions successorship. By ignoring entirely the issue of successorship, Congress left no indication of any views on the matter. Accordingly, nothing suggests Congress intended states and their subdivisions to be displaced from regulating in any otherwise permissible way that could affect, even incidentally, how a federal court or agency ultimately might decide an individual successorship question.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Mergers & Acquisitions Law > General Business Considerations > Labor Laws

HN20 Collective Bargaining & Labor Relations, Federal Preemption

The Grocery Worker Retention Ordinance, L.A. Ord. No. 177,231, L.A. Mun. Code, § 181.00 et seq., applies equally to unionized and nonunionized workplaces. The ordinance does not selectively preserve or favor unionization or unionized workers; it simply preserves, temporarily, the status quo, whatever that might be. Just as an employer taking over a formerly unionized workplace might, if left to its own devices, hire a less union-friendly workforce through regression to the mean, rather than because

of any animus, so might an employer taking over a formerly nonunionized or even anti-union workplace through a similar effect tend to wind up with a more pro-union workforce in the absence of the ordinance. In the aggregate, a new owner hiring nonmanagement employees from the pool dictated by the ordinance is neither more nor less likely to wind up with pro-union workers than if it were to hire freely from the workforce at large, assuming anti-union animus truly plays no part in its hiring decisions, as the National Labor Relations Act (NLRA), [29 U.S.C. § 151 et seq.](#), demands. [29 U.S.C. § 158\(a\)\(3\)](#).

Mergers & Acquisitions Law > General
Business Considerations > Labor Laws

[HN21](#) General Business Considerations, Labor Laws

The Grocery Worker Retention Ordinance, L.A. Ord. No. 177,231, L.A. Mun. Code, § 181.00 et seq., does not place the new owner at greater risk of an unfair labor practice charge than were there no ordinance. Irrespective of the ordinance, a new owner would be subject to an unfair labor practice charge if it manipulated its hiring specifically to discriminate against union members and avoid successorship obligations. In deciding whom to hire from the ordinance pool and whom to retain or dismiss at the conclusion of the 90-day period, a new owner has the same freedom to choose employees without regard to union status or sentiment, and the same theoretical exposure to an unfair labor practice charge if it were to allow anti-union animus to enter its decisionmaking, as it would without the ordinance.

Governments > Courts > Authority to
Adjudicate

Labor & Employment Law > Collective
Bargaining & Labor Relations > Federal
Preemption

[HN22](#) Courts, Authority to Adjudicate

In labor preemption cases, the California Supreme Court's role is not to pass judgment on the reasonableness of state or local policy. When evaluating claims of National Labor Relations Act (NLRA), [29 U.S.C. § 151 et seq.](#), preemption, the court may not substitute its own views of sound economic policy for those of the elected branches. Rather, the court inquires solely into whether the challenged regulation is one Congress sought to preclude; if the text and structure of the NLRA demonstrate an affirmative intent to leave the subject matter of the challenged regulation untouched by state and local regulation, only then may the court find it preempted.

Labor & Employment Law > Collective
Bargaining & Labor Relations > Federal
Preemption

[HN23](#) Collective Bargaining & Labor Relations, Federal Preemption

The presumption against preemption has not been rebutted for Grocery Worker Retention Ordinance, L.A. Ord. No. 177,231, L.A. Mun. Code, § 181.00 et seq., and Machinists preemption does not apply.

Constitutional Law > ... > Case or
Controversy > Constitutionality of
Legislation > General Overview

Governments > Local
Governments > Ordinances & Regulations

Labor & Employment Law > Employment
Relationships > General Overview

[HN24](#) Case or Controversy, Constitutionality of Legislation

The Grocery Worker Retention Ordinance, L.A. Ord. No. 177,231, L.A. Mun. Code, § 181.00 et seq., is constitutional.

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN25 Judicial Review, Standards of Review

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. So long as the challenged distinction bears some rational relationship to a conceivable legitimate state purpose, it will pass muster; once the California Supreme Court identifies plausible reasons for the classification, the court's inquiry is at an end. Of significance to the court's inquiry, because the court never requires a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. The burden is on the party challenging the statute to negate any such rational basis or relationship to a conceivable legitimate purpose.

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN26 Judicial Review, Standards of Review

The decision how broadly and in what manner to attack perceived problems is for the elected branches in the first instance. Past decisions by both the California Supreme Court and the United States Supreme Court establish that, under the rational relationship test, the State may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for

regulation is thought to be more crucial or imperative. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem that seems most acute to the legislative mind. Such line-drawing is the province of legislative bodies, and the precise coordinates of the resulting legislative judgment are virtually unreviewable, as the legislature must be allowed leeway to approach a perceived problem incrementally.

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

Labor & Employment Law > Employment
Relationships > General Overview

HN27 Judicial Review, Standards of Review

Both Congress and the state legislature frequently, and constitutionally, have incorporated exceptions for smaller employers when regulating the employment relationship. So long as the California Supreme Court can identify a rational relationship between a classification and at least one legitimate purpose of an enactment, the classification will pass constitutional muster.

Labor & Employment Law > Collective
Bargaining & Labor Relations > Federal
Preemption

HN28 Collective Bargaining & Labor Relations, Federal Preemption

Affording employers and unions the right to opt out and negotiate their own terms increases the likelihood a given regulation will be found not preempted by the National Labor Relations Act, [29 U.S.C. § 151 et seq.](#) An opt-out provision thus is rationally related to the desire to enact valid

(nonpreempted) legislation, as well as to the legitimate goal of balancing the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A grocers association filed a complaint against a city seeking to enjoin enforcement of the city's Grocery Worker Retention Ordinance (L.A. Ord. No. 177231, L.A. Mun. Code, § 181.00 et seq.) on the grounds that it was preempted by provisions of the Health and Safety Code, the Labor Code, and federal labor law, and that it violated the equal protection provisions of the state and federal Constitutions. The trial court entered a judgment enjoining enforcement of the ordinance. (Superior Court of Los Angeles County, No. BC351831, Ralph W. Dau, Judge.) The Court of Appeal, Second Dist., Div. Five, No. B206750, affirmed.

The Supreme Court reversed the Court of Appeal's judgment and remanded the case for further proceedings. The court held that the ordinance was not preempted as intruding upon either matters of health and safety already regulated by the state or matters of employee organization and collective bargaining fully occupied by federal law. The ordinance promotes the same goals as the enactment of a higher governmental authority, but does so without entering the field that enactment preempts, i.e., the setting of specific uniform standards. The trial court thus erred in concluding that, because the ordinance arguably was intended to enact a different approach to ensuring food safety than that crafted by the Legislature, ipso facto it was preempted. Moreover, retention ordinances such as the instant ordinance do not dictate the outcomes of the successorship inquiry in any way that would call for *Machinists* preemption.

The court concluded that the ordinance is fully consistent with both the state and federal equal protection clauses. The city could rationally conclude both that disruptions at larger stores, involving larger workforces, would have a larger impact on the community, and that larger stores would be more readily positioned to absorb any short-term burdens the ordinance's requirements might impose on employers. (Opinion [*178] by Werdegarr, J., with Cantil-Sakauye, C. J., Kennard, Baxter, Chin, and Corrigan, JJ., concurring. Dissenting opinion by Grimes, J.* (see p. 211).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1)

Municipalities § 56—Ordinances and Regulations—Validity—Conflict with State Law—Test for Preemption.

Local ordinances and regulations are subordinate to state law (*Cal. Const., art. XI, § 7*). Insofar as a local regulation conflicts with state law, it is preempted and invalid. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation enters an area fully occupied by general law when the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent. Express field preemption turns on a comparative statutory analysis: What field of exclusivity does the state preemption clause define, what subject matter does the local ordinance regulate, and do the two overlap? The burden of proving the existence of such an overlap rests on the party asserting preemption.

* Associate Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

CA(2) (2)**Food § 1—State Regulation.**

Pursuant to [Health & Saf. Code, § 113705](#), the state alone may adopt health and sanitation standards for retail food facilities. The remainder of the statutory scheme demonstrates by way of example the precise scope of exclusive state regulation.

CA(3) (3)**Food § 1—Regulation—State Preemption—
Grocery Worker Retention Ordinance.**

The Grocery Worker Retention Ordinance (L.A. Ord. No. 177231, L.A. Mun. Code, § 181.00 et seq.) imposes no substantive food safety standards. Its provisions regulate, for certain grocery stores during ownership transitions, how a new owner may select its workforce (L.A. Mun. Code, §§ 181.02–181.04). It does not speak to how employees must conduct themselves to ensure sanitation, how food should be handled or transported, how grocery stores should be designed or cleaned, or any of the various other topics for which the California Retail Food Code ([Health & Saf. Code, § 113700 et seq.](#)) sets out exclusive state standards. The face of the ordinance thus discloses no incursion into the exclusive realm reserved for the state by [Health & Saf. Code, § 113705](#); the former regulates employment, not food safety, while the latter regulates food safety, not employment.

[*179] CA(4) (4)**Municipalities § 56—Ordinances—Validity—
Conflict with State Law—Test for Preemption.**

Purpose alone is not a basis for concluding a local measure is preempted. While the California Supreme Court and the Courts of Appeal have occasionally treated an ordinance's purpose as

relevant to state preemption analysis, they have done so in the context of a nuanced inquiry into the ultimate question in determining field preemption: whether the effect of the local ordinance is in fact to regulate in the very field the state has reserved to itself. Most licensing ordinances have a direct impact on the enforcement of state laws that have been enacted to preserve the health, safety, and welfare of state and local citizens. This fact does not deprive a municipality of the power to enact them.

CA(5) (5)**Food § 1—Regulation—State Preemption.**

The California Retail Food Code ([Health & Saf. Code, § 113700 et seq.](#)) does not preempt all laws that have as their purpose the promotion of food health and safety; it preempts only those that establish health and sanitation standards for retail food establishments, so as to ensure uniformity for such facilities ([Health & Saf. Code, § 113705](#)). The Retail Food Code itself dictates those uniform standards, but does not specify by whom they are to be carried out; as far as state law is concerned, a retail food store may employ whomever it likes, so long as those it employs comply with the state's standards for distributing food in a safe and healthful manner.

CA(6) (6)**Labor § 6—Regulation of Working Conditions—
Grocery Worker Retention Ordinance—State
Preemption.**

The Grocery Worker Retention Ordinance (L.A. Ord. No. 177231, L.A. Mun. Code, § 181.00 et seq.) regulates only who may be hired to engage in certain work, and though it may have been intended in part to reduce violations of state law by those workers, it does not itself add to or subtract from the state's uniform standards of conduct for whoever engages in that work. The ordinance

promotes the same goals as the enactment of a higher governmental authority, but does so without entering the field that enactment preempts, i.e., the setting of specific uniform standards.

CA(7) (7)

Food § 1—Regulation—Food Facilities—Safety.

Health & Saf. Code, § 113947, subd. (a), requires the person in charge and all food employees to have adequate knowledge of, and be properly trained in, food safety as it relates to their assigned duties. The California Retail Food Code (Health & Saf. Code, § 113700 et seq.) further requires that specified food facilities have either an owner or employee who has received state certification in food safety (Health & Saf. Code, [*180] §§ 113947.1, subds. (a), (b)(1), 113947.2, 113947.3) or otherwise be able to demonstrate to an enforcement officer that the employees have adequate knowledge of food safety as it relates to their duties (§ 113947.1, subd. (b)(2)). For facilities that have just opened, gone through a change in ownership, or otherwise lost their certified food safety specialist, the scheme offers a 60-day grace period (§ 113947.1, subd. (e)).

CA(8) (8)

Food § 1—Regulation—Safety—Employee Standards—Grocery Worker Retention Ordinance—State Preemption.

The California Retail Food Code (Health & Saf. Code, § 113700 et seq.) establishes standards for what certain employees, particularly one certified owner or supervising food service employee, must know or be taught, but does not regulate who must be hired; the Grocery Worker Retention Ordinance (L.A. Ord. No. 177231, L.A. Mun. Code, § 181.00 et seq.) regulates the pool of nonsupervising, nonmanagerial employees from which a new owner temporarily must hire, but imposes no standards concerning what the hired employees must know or

be taught about food safety. The Retail Food Code's required certified food safety specialist is by definition a managerial or supervisory employee, while the ordinance by its terms expressly excludes from its scope all such employees, and thus does not regulate or restrict in any way an employer's freedom to hire whomever it chooses to satisfy that position. As such, the ordinance does not intrude upon the field the state has expressly reserved to itself and is not preempted by state law.

CA(9) (9)

Labor § 78—Federal Preemption.

The supremacy clause of the United States Constitution vests Congress with the power to preempt state law (U.S. Const., art. VI, cl. 2). While Congress may exercise that power by enacting an express preemption provision, the National Labor Relations Act (29 U.S.C. § 151 et seq.) contains no such provision; indeed, Congress has not seen fit to lay down even the most general of guides to construction of the act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action.

CA(10) (10)

Labor § 78—Federal Preemption—Test.

Even where the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.) does not address a particular economic weapon, preemption may still apply. Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding preemption is the same: whether the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the act's processes. Except insofar as the NLRA itself regulates the use of particular economic weapons, Congress intended a “no-fly” zone, with neither states nor the National [*181] Labor Relations Board permitted to interfere in the bargaining process by dictating

which weapons labor and management might employ in negotiations. To sanction state regulation of such economic pressure deemed by the federal act desirably left for the free play of contending economic forces is not merely to fill a gap by outlawing what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant the party to have available. The United States Supreme Court has extended *Machinists* principles to other instances in which, from the text or structure of the NLRA, it could infer Congress intended the subject matter to be free from state or municipal regulation.

[CA\(11\)](#) (11)

Labor § 78—Federal Preemption—*Machinists* Principles.

At the core of *Machinists* preemption is the principle that, in specific instances, one may discern from the text and structure of the National Labor Relations Act (NLRA) ([29 U.S.C. § 151 et seq.](#)) a basis for inferring that Congress affirmatively intended to leave a particular subject free from further National Labor Relations Board and state and local government regulation. *Machinists* preemption is based on the premise that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes. As in any preemption analysis, the purpose of Congress is the ultimate touchstone. Given that Congress's purpose was to regulate the process of establishing terms of employment, not the content of those terms, it follows that the areas Congress intended to leave free of local regulation are those relating to the process by which an employment agreement is reached: matters of self-organization and collective bargaining. In sharp distinction, because the NLRA is not a federal code of employment law, *Machinists* preemption does not extend to local establishment of substantive employment terms: Such regulation provides protections to individual union and nonunion

workers alike, and thus neither encourages nor discourages the collective-bargaining processes that are the subject of the NLRA.

[CA\(12\)](#) (12)

Labor § 78—Federal Preemption—State Police Power.

The employer-employee relationship is one traditionally regulated by state and local governments under their police powers. Preemption should not be lightly inferred in this area, as the establishment of labor standards falls within the traditional police power of the state.

[CA\(13\)](#) (13)

Labor § 78—Federal Preemption—Employee Retention.

There is no evidence that Congress affirmatively intended in the National Labor Relations Act (NLRA) ([29 U.S.C. § 151 et seq.](#)) to leave the subject of employee retention unregulated by states and municipalities. On the [*182] subject of employee hiring and firing, the text of the NLRA is, with one notable exception, resoundingly silent. It neither guarantees nor prohibits the retention of employees; it does not affirmatively protect new employers' latitude to hire and fire whomever they please, nor does it address in any way the power of states and localities to regulate the subject. The only portion of the NLRA to speak to these matters, § 8(a)(3), protects employees from discrimination on the basis of union affiliation; an employer may not use the power to hire and fire to exercise antiunion animus and eliminate prounion employees from its workforce ([29 U.S.C. § 158\(a\)\(3\)](#)). This silence leaves unrebutted the initial presumption that Congress did not intend preemption. The NLRA's statutory text does not disturb state and local authority to address, as these entities see fit, matters of hiring and firing, authority traditionally recognized as a core incident

of their police power. Thus, it is that states and localities have long been permitted to provide common law wrongful discharge remedies and enact statutes of general application regulating hiring and firing without intruding upon the NLRA's narrowly tailored concerns.

[CA\(14\)](#) (14)

Labor § 78—Federal Preemption—*Machinists* Principles—Grocery Worker Retention Ordinance.

While the Grocery Worker Retention Ordinance (L.A. Ord. No. 177231, L.A. Mun. Code, § 181.00 et seq.) regulates the existence of the employment relationship rather than just its terms, this distinction is not crucial; federal courts routinely have upheld as not preempted under *Machinists* employment laws that broadly regulate hiring and firing. The ordinance regulates the terms and conditions of employment, extending the benefit of a potential temporary extension of employment to each employee individually, rather than conferring a collective right, and applying the benefit to all employees equally, irrespective of union or nonunion status. The ordinance does not enter into the substantive aspects of the bargaining process to an extent Congress has not countenanced. It does not regulate the process by which a bargaining agreement may be reached. Nor does the ordinance speak directly to the process of organizing; rather, it temporarily preserves the status quo, whatever that might be, whether the workforce is unionized or not. And, while the ordinance does confer on each employee, as an individual, certain rights the individual employees might otherwise have obtained only through organizing and collective bargaining, it is well established that so doing is no basis for *Machinists* preemption.

[CA\(15\)](#) (15)

Labor § 15—Unions—Duty of Successor Employer to Bargain—Worker Retention Ordinances—

Federal Preemption.

Existing case law indicates that a successor employer will be obligated to bargain with a union only if the successor employer retains its predecessor's employees beyond the mandatory employment period or if it extends an offer [*183] for permanent employment prior to expiration of the mandatory retention period. Until that point, the predecessor's employees are essentially probationary and no basis exists for concluding one of the prerequisites of a successorship bargaining obligation, the hiring of a majority of the predecessor's employees, will come to pass. It follows that retention ordinances like the Grocery Worker Retention Ordinance (L.A. Ord. No. 177231, L.A. Mun. Code, § 181.00 et seq.) do not dictate the outcomes of the successorship inquiry in any way that would call for *Machinists* preemption.

[CA\(16\)](#) (16)

Labor § 78—Federal Preemption—Successorship.

No clear and manifest congressional intent to foreclose indirect impacts on successorship can be discerned in the National Labor Relations Act (NLRA) ([29 U.S.C. § 151 et seq.](#)). As with any preemption question, the purpose of Congress is the ultimate touchstone, and on this point there is neither textual nor historical support. Successorship is a question of federal common law because no provision of the NLRA mentions successorship. By ignoring entirely the issue of successorship, Congress left no indication of any views on the matter. Accordingly, nothing suggests Congress intended states and their subdivisions to be displaced from regulating in any otherwise permissible way that could affect, even incidentally, how a federal court or agency ultimately might decide an individual successorship question.

[CA\(17\)](#) (17)

**Labor § 78—Federal Preemption—Grocery
Worker Retention Ordinance—Successorships.**

The Grocery Worker Retention Ordinance (L.A. Ord. No. 177231, L.A. Mun. Code, § 181.00 et seq.) applies equally to unionized and nonunionized workplaces. The ordinance does not selectively preserve or favor unionization or unionized workers; it simply preserves, temporarily, the status quo, whatever that might be. Just as an employer taking over a formerly unionized workplace might, if left to its own devices, hire a less union-friendly workforce through regression to the mean, rather than because of any animus, so might an employer taking over a formerly nonunionized or even antiunion workplace through a similar effect tend to wind up with a more prounion workforce in the absence of the ordinance. In the aggregate, a new owner hiring nonmanagement employees from the pool dictated by the ordinance is neither more nor less likely to wind up with prounion workers than if it were to hire freely from the workforce at large, assuming antiunion animus truly plays no part in its hiring decisions, as the National Labor Relations Act ([29 U.S.C. § 151 et seq.](#)) demands ([29 U.S.C. § 158\(a\)\(3\)](#)). Nor does the ordinance place the new owner at greater risk of an unfair labor practice charge than were there no ordinance. Irrespective of the ordinance, a new owner would be subject to an unfair labor practice charge if it manipulated its hiring specifically [*184] to discriminate against union members and avoid successorship obligations. In deciding whom to hire from the ordinance pool and whom to retain or dismiss at the conclusion of the 90-day period, a new owner has the same freedom to choose employees without regard to union status or sentiment, and the same theoretical exposure to an unfair labor practice charge if it were to allow antiunion animus to enter its decisionmaking, as it would without the ordinance.

CA(18) (18)

Labor § 78—Federal Preemption—Role of

Judiciary.

In labor preemption cases, the California Supreme Court's role is not to pass judgment on the reasonableness of state or local policy. When evaluating claims of National Labor Relations Act (NLRA) ([29 U.S.C. § 151 et seq.](#)) preemption, the court may not substitute its own views of sound economic policy for those of the elected branches. Rather, the court inquires solely into whether the challenged regulation is one Congress sought to preclude; if the text and structure of the NLRA demonstrate an affirmative intent to leave the subject matter of the challenged regulation untouched by state and local regulation, only then may the court find it preempted.

CA(19) (19)

**Labor § 78—Federal Preemption—Machinists
Principles—Grocery Worker Retention
Ordinance.**

The presumption against preemption has not been rebutted for the Grocery Worker Retention Ordinance (L.A. Ord. No. 177231, L.A. Mun. Code, § 181.00 et seq.), and *Machinists* preemption does not apply. The trial court thus erred in enjoining enforcement of the ordinance on the ground that it was preempted by federal labor law.

[[Cal. Forms of Pleading and Practice \(2011\) ch. 126A, Constitutional Law, §§ 126A.23, 126A.24](#); 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 22; 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, §§ 715, 988; 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 553.]

CA(20) (20)

**Municipalities § 52—Ordinances—
Constitutionality.**

The Grocery Worker Retention Ordinance (L.A.

Ord. No. 177231, L.A. Mun. Code, § 181.00 et seq.) is constitutional.

CA(21) (21)

Constitutional Law § 81—Equal Protection— Classification—Rational Basis Standard—Scope of Judicial Inquiry.

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. So long as the challenged distinction bears some rational relationship to a conceivable legitimate state purpose, it will pass muster; once the California Supreme Court identifies plausible [*185] reasons for the classification, the court's inquiry is at an end. Of significance to the court's inquiry, because the court never requires a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. The burden is on the party challenging the statute to negate any such rational basis or relationship to a conceivable legitimate purpose.

CA(22) (22)

Constitutional Law § 82—Equal Protection— Classification—Legislative Power and Discretion—Rational Relationship Test.

The decision how broadly and in what manner to attack perceived problems is for the elected branches in the first instance. Past decisions by both the California Supreme Court and the United States Supreme Court establish that, under the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of

risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem that seems most acute to the legislative mind. Such line drawing is the province of legislative bodies, and the precise coordinates of the resulting legislative judgment are virtually unreviewable, as the legislature must be allowed leeway to approach a perceived problem incrementally.

CA(23) (23)

Constitutional Law § 94—Equal Protection— Classification—Regulation of Employment Relationship.

Both Congress and the state Legislature frequently, and constitutionally, have incorporated exceptions for smaller employers when regulating the employment relationship. So long as the California Supreme Court can identify a rational relationship between a classification and at least one legitimate purpose of an enactment, the classification will pass constitutional muster.

CA(24) (24)

Labor § 78—Federal Preemption—Opt-out Provisions.

Affording employers and unions the right to opt out and negotiate their own terms increases the likelihood a given regulation will be found not preempted by the National Labor Relations Act ([29 U.S.C. § 151 et seq.](#)). An opt-out provision thus is rationally related to the desire to enact valid (nonpreempted) legislation, as well as to the legitimate goal of balancing the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and

conditions of employment.

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Judges: Opinion by Werdegarr, J., with Cantil-Sakauye, C. J., Kennard, Baxter, Chin, and Corrigan, JJ., concurring. Dissenting opinion by Grimes, J.*

Opinion by: Werdegarr

Opinion

[**1022] [***730] **WERDEGAR, J.**—The City of Los Angeles, like numerous other municipalities in California and elsewhere, regulates the ability of certain employers to summarily replace the workforce upon acquiring a new business. Is such a worker retention ordinance preempted as intruding upon either matters of health and safety already regulated by the state or matters of employee organization and collective bargaining fully occupied by federal law? We conclude it is not. As well, we conclude the challenged ordinance is fully consistent with both the state and federal [equal protection clauses](#). As the Court of Appeal found the ordinance preempted, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2005, [****3] the City of Los Angeles (City) adopted the Grocery Worker Retention Ordinance (Ordinance). (L.A. Ord. No. 177231, adding [*187] ch. XVIII, § 181.00 et seq. to L.A. Mun. Code.) ¹ For grocery stores of a specific size (15,000 square feet or larger) that undergo a change of ownership, the Ordinance vests current employees with certain individual rights during a 90-day transition period. First, the incumbent owner is to prepare a list of

¹The Ordinance mirrors grocery worker retention ordinances adopted by various other California municipalities (see Gardena Mun. Code, ch. 5.10; S.F. Police Code, art. 33D; Santa Monica Mun. Code, ch. 5.40) and is substantially similar to worker retention ordinances for other fields adopted in California (e.g., Berkeley Mun. Code, ch. 13.25 [marina business workers]; Emeryville Mun. Code, tit. 5, ch. 32, § 5-32.1.1(b) [hotel workers]; L.A. Mun. Code, § 183.00 et seq. [hotel workers]; Oakland Mun. Code, ch. 2.36 [hospitality workers]; San Jose Mun. Code, § 25.11.700 et seq. [airport business workers]) and throughout the United States (N.Y. City Admin. Code, tit. 22, ch. 5, § 22-505 [building service workers]; Philadelphia Mun. Code, ch. 9-2300 [service contract workers]; Providence, R.I., Code of Ord., §§ 2-18.5 [hospitality workers], 14-16 [building service workers]; D.C. Off. Code, § 32-101 et seq. [health care, food service, and janitorial workers]).

* Associate Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

nonmanagerial employees with at least six months' employment as of **[**1023]** the date of transfer in ownership, and the successor employer must hire from that list during the transition period. (L.A. Mun. Code, § 181.02.) Second, during that same period, the hired employees may be discharged only for cause. (*Id.*, § 181.03, subds. A–C.) Third, at the conclusion of the transition period, the successor employer must prepare a written evaluation of each employee's performance. The Ordinance **[***731]** does not require that anyone be retained, but if an employee's performance is satisfactory, the employer must “consider” offering continued employment. (*Id.*, § 181.03, subd. D.) If the workforce is unionized, however, the union and the employer may agree on terms that supersede the Ordinance. (*Id.*, **[****4]** § 181.06.)

Plaintiff California Grocers Association (Grocers) filed a complaint against the City seeking to enjoin enforcement of the Ordinance on the grounds that it was preempted by provisions of the Health and Safety Code, the Labor Code, **[****5]** and federal labor law, and that it violated the equal protection provisions of the state and federal Constitutions. The Los Angeles Alliance for a New Economy, a nonprofit organization, intervened to defend the Ordinance.

After a two-day bench trial, the trial court entered a judgment enjoining enforcement of the Ordinance, declaring it void on two of the four asserted grounds. The court concluded the Ordinance affected health and sanitation standards for retail food establishments, an area fully occupied by state law, and was on that basis preempted, and further concluded the Ordinance violated equal protection because there was no rational basis for its differential treatment of grocery stores smaller than 15,000 square feet or its permitting employers and unions to contract around the Ordinance's terms.

A divided Court of Appeal affirmed. The majority agreed with the trial court that the California Retail Food Code (Retail Food Code) ([Health & Saf. \[*188\] Code, § 113700 et seq.](#)) fully occupied the

field of health and sanitation standards for retail food establishments, and the Ordinance had the impermissible purpose and effect of regulating in the same area. It further concluded, contrary **[****6]** to the trial court, that the Ordinance was also preempted by the National Labor Relations Act (NLRA or the Act) ([29 U.S.C. § 151 et seq.](#)) because, in the majority's view, federal labor law guaranteed successor employers the right to pick and choose whom they wished to employ, free of local regulation. The majority did not address the trial court's further equal protection conclusions. In contrast, the dissent argued that the Ordinance was neither preempted nor inconsistent with equal protection principles.

We granted review to resolve significant preemption and constitutional questions placing into doubt the validity of this and other similar worker retention ordinances throughout the state.

DISCUSSION

I. State Preemption

A. Preemption Principles

HN1 CA(1) (1) Local ordinances and regulations are subordinate to state law. (*Cal. Const.*, art. XI, § 7.) Insofar as a local regulation conflicts with state law, it is preempted and invalid. (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067 [63 Cal. Rptr. 3d 67, 162 P.3d 583]; *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 [16 Cal. Rptr. 2d 215, 844 P.2d 534].) “ ‘ “A conflict exists if the local legislation ‘ “*duplicates, contradicts, or enters an area fully occupied by general law, either expressly [****7] or by legislative implication.*” ’ ” [Citations.]’ ” (*O'Connell*, at p. 1067, quoting *Sherwin-Williams*, at p. 897; accord, *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1251 [23 Cal. Rptr. 3d 453, 104 P.3d 813].)

Only the last of these bases for conflict, field preemption, is at issue here. “Local legislation enters an area ‘fully occupied’ by general law when

the Legislature has expressly manifested its intent to [***732] fully occupy the area or when it has impliedly done so in light of recognized indicia of intent.” (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150 [45 Cal. Rptr. 3d 21, 136 P.3d 821].) Grocers contends the Ordinance impermissibly intrudes into an area the state has, in the Retail Food Code, expressly [**1024] reserved for itself. (See *Health & Saf. Code*, § 113705.) Express field preemption turns on a comparative statutory analysis: What field of exclusivity does the state preemption clause define, what subject matter does the local ordinance regulate, and do the two overlap? (See, e.g., *Big Creek Lumber*, at [*189] pp. 1152–1157; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 748–751 [29 Cal. Rptr. 2d 804, 872 P.2d 143].) The burden of proving the existence of such an overlap rests on Grocers, as the party asserting preemption. (*Big Creek Lumber*, at p. 1149.)

B. [****8] Express Preemption

CA(2) (2) We begin with the language of the preemption clause and the Ordinance. *Health and Safety Code section 113705*'s definition of the regulatory field it reserves for the state is clear and precise: **HN2** “Except as provided in *Section 113709*,² it is the intent of the Legislature to occupy the whole field of health and sanitation standards for retail food facilities, and the standards set forth in this part and regulations adopted pursuant to this part shall be exclusive of all local health and sanitation standards relating to retail food facilities.” Thus, **HN3** the state alone may adopt “health and sanitation standards for retail food facilities.” (*Ibid.*) The remainder of the statutory scheme demonstrates by way of example the precise scope of exclusive state regulation, comprehensively detailing standards for, e.g., employee training on health matters (*id.*, §§

[113947–113947.3](#)), employee health and hygiene (*id.*, §§ [113949–113978](#)), food transportation, storage, and preparation (*id.*, §§ [113980–114057.1](#)), food display and service (*id.*, §§ [114060–114083](#)), food labeling (*id.*, §§ [114087–114094](#)), the design and sanitizing of food preparation areas and utensils (*id.*, §§ [114095–114185.5](#)), [****9] and the design and cleanliness of food facilities (*id.*, §§ [114250–114282](#)).³

CA(3) (3) In contrast, **HN4** the Ordinance imposes no substantive food safety standards. Its provisions regulate, for certain grocery stores during ownership transitions, how a new owner may select its workforce. (See generally L.A. Mun. Code, §§ 181.02–181.04.) It does not speak to how employees must conduct themselves to ensure sanitation, how food should be handled or transported, how grocery stores should be designed or cleaned, or any of the various other topics for which the Retail Food Code sets out exclusive state standards. The [****10] face of the Ordinance thus discloses no incursion into the exclusive realm reserved for the state by *Health and Safety Code section 113705*; the former regulates employment, not food safety, while the latter regulates food safety, not employment.

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In concluding that the Ordinance nevertheless is preempted, the Court of Appeal [***733] majority relied on language in the Ordinance's preamble and statements by City officials indicating the City, in passing the Ordinance, was concerned with promoting health and safety. The preamble notes in part: “The City has an interest in ensuring the welfare of the residents of [Los Angeles] through the maintenance of health and safety standards in grocery establishments. Experienced grocery

² *Health and Safety Code section 113709*, a savings clause preserving local authority over certain subjects not relevant here, does not affect our disposition of this case.

³ As examples of the sorts of concerns addressed and level of detail provided by the Retail Food Code, the statutory scheme specifies, to the degree and minute, the temperatures at which various foods must be stored and cooked (*Health & Saf. Code*, §§ [113996](#), [114004](#)), to the hour, how long food contact surfaces may go between cleanings (*id.*, § [114117](#)), and, to the inch, how large food preparation sinks must be (*id.*, § [114163](#)).

workers with knowledge of proper sanitation procedures, health regulations, and understanding of the clientele and communities they serve are instrumental in furthering this interest.” (L.A. Mun. Code, § 181.00.) Remarks by members of the city attorney's office and some city council members during deliberations similarly suggest the promotion of health and safety may have been a City concern.

[CA\(4\)](#) (4) We may accept for the sake of argument that the promotion of health and safety was [****11] one of the City's purposes in passing the Ordinance. That the Ordinance is preempted does not, however, follow. [HN5](#) Purpose alone [**1025] is not a basis for concluding a local measure is preempted.⁴ While we and the Courts of Appeal have occasionally treated an ordinance's purpose as relevant to state preemption analysis (see, e.g., [Lancaster v. Municipal Court \(1972\) 6 Cal.3d 805, 809–810 \[100 Cal. Rptr. 609, 494 P.2d 681\]](#); [Bravo Vending v. City of Rancho Mirage \(1993\) 16 Cal.App.4th 383, 404–409 \[20 Cal. Rptr. 2d 164\]](#)), we have done so in the context of a nuanced inquiry into the ultimate question in determining field preemption: whether the effect of the local ordinance is in fact to regulate in the very field the state has reserved to itself.

Thus, in [Cohen v. Board of Supervisors \(1985\) 40 Cal.3d 277 \[219 Cal. Rptr. 467, 707 P.2d 840\]](#), [****12] we upheld against a preemption challenge a local ordinance requiring a permit to provide an escort service. The state had impliedly occupied the field with respect to the criminalization of prostitution and sexual conduct. (See [In re Lane \(1962\) 58 Cal.2d 99, 103 \[22 Cal. Rptr. 857, 372 P.2d 897\]](#).) Although the

ordinance's likely purpose was to reduce vice and deter conduct proscribed by the state, this purpose did not support preemption: “An ordinance is not transformed into a statute prohibiting crime simply because the city uses its licensing power to discourage illegitimate activities associated with certain businesses. Most licensing ordinances have a direct impact on the enforcement of state laws which have been enacted to preserve the health, safety and welfare of state and local citizens. This fact does not deprive a municipality of the power to enact them.” ([Cohen, at p. 299.](#)) The ordinance in actual effect did not enter the field of criminalizing [**191] sexual conduct, but only controlled who might operate an escort service, leaving the regulation of any such conduct to the state; as such, it was not preempted. ([Id. at pp. 295–296, 299–300](#); see also [EWAP, Inc. v. City of Los Angeles \(1979\) 97 Cal. App. 3d 179, 191 \[158 Cal. Rptr. 579\]](#) [****13] [upholding an ordinance regulating picture arcades so as to discourage violations of state law, without criminalizing or imposing any new standard for sexual conduct]; cf. [Lancaster v. Municipal Court, supra, 6 Cal.3d at pp. 809–810 \[***734\]](#) [concluding an ordinance was preempted where its effect was to criminalize aspects of sexual conduct].)

Similarly, in [Bravo Vending v. City of Rancho Mirage, supra, 16 Cal.App.4th 383](#), a tobacco company challenged a local ordinance forbidding vending machine cigarette sales. The tobacco company contended that, because the ordinance was intended to reduce sales to minors and the state had expressly occupied the field of penal sanctions for sales to minors, the ordinance was preempted. The Court of Appeal found no preemption. While the local ordinance was intended to make less likely violations of the laws against sales to minors, in actual effect it neither expanded upon nor detracted from the state-mandated prohibitions and sanctions for sales. ([Id. at p. 412.](#))

More recently, in [Personal Watercraft Coalition v. Marin County Bd. of Supervisors \(2002\) 100 Cal.App.4th 129 \[122 Cal. Rptr. 2d 425\]](#), the Court

⁴To rest preemption analysis solely on considerations of purpose would generate the anomalous circumstance, rejected by the United States Supreme Court, that one jurisdiction's measure might survive preemption, while another identical measure passed in a different jurisdiction might fall, “merely because its authors had different aspirations.” ([Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co. \(2010\) 559 U.S. ___, ___ \[176 L. Ed. 2d 311, 130 S. Ct. 1431, 1441\]](#).)

of Appeal rejected the argument that, because a municipality had adopted an [****14] ordinance banning the use of personal watercraft out of a concern for pollution, the ordinance was preempted by federal law prohibiting the adoption of state and local emission standards for nonroad vehicles. The Court of Appeal correctly recognized that the purpose of the federal preemption provision was only to alleviate the problems that would arise from “a multiplicity of conflicting state and local exhaust emission standards.” (*Id. at p. 155.*) Consequently, state and local laws were preempted only to the extent they adopted such standards. Laws that simply promoted the same antipollution goals without setting pollution standards were entirely valid. (*Ibid.*)

[**1026] [CA\(5\)](#) (5) These cases are on point here. [HN6](#) The Retail Food Code does not preempt all laws that have as their purpose the promotion of food health and safety; it preempts only those that establish “health and sanitation standards” for retail food establishments, so as to ensure uniformity for such facilities. ([Health & Saf. Code, § 113705.](#)) The Retail Food Code itself dictates those uniform standards, but does not specify by whom they are to be carried out; as far as state law is concerned, a retail food store may employ whomever it likes, [****15] so long as those it employs comply with the state's standards for distributing food in a safe and healthful manner. [CA\(6\)](#) (6) For its part, [HN7](#) the Ordinance, like the escort service ordinance in [Cohen v. Board of Supervisors, supra, 40 Cal.3d 277](#), regulates only who may be hired to engage in certain [*192] work, and though it may have been intended in part to reduce violations of state law by those workers, it does not itself add to or subtract from the state's uniform standards of conduct for whoever engages in that work. Like the watercraft ordinance in [Personal Watercraft Coalition v. Marin County Bd. of Supervisors, supra, 100 Cal.App.4th 129](#), the Ordinance promotes the same goals as the enactment of a higher governmental authority, but does so without entering the field that enactment preempts, i.e., the setting of specific uniform standards. The trial court erred in

concluding that, because the Ordinance arguably was intended to enact “a different approach to ensuring food safety than that crafted by the Legislature,” ipso facto it was preempted.

[CA\(7\)](#) (7) Grocers argues, purpose aside, that the Ordinance goes beyond issues of worker retention and *does* impose food sanitation standards. As foundation for this [****16] argument, Grocers focuses on the portion of the Retail Food Code that regulates employee training and knowledge. (See [Health & Saf. Code, §§ 113947–113947.6.](#)) [HN8](#) [Health and Safety Code section 113947, subdivision \(a\)](#) [***735] requires “[t]he person in charge and all food employees [to] have adequate knowledge of, and ... be properly trained in, food safety as it relates to their assigned duties.” The Retail Food Code further requires that specified food facilities have either an owner or employee who has received state certification in food safety (see *id.*, [§§ 113947.1, subds. \(a\), \(b\)\(1\), 113947.2, 113947.3](#)) or otherwise be able to demonstrate to an enforcement officer that the employees have adequate knowledge of food safety as it relates to their duties (*id.*, [§ 113947.1, subd. \(b\)\(2\)](#)). For facilities that have just opened, gone through a change in ownership, or otherwise lost their certified food safety specialist, the scheme offers a 60-day grace period. (*Id.*, [subd. \(e\)](#).) Grocers contends the Ordinance, too, regulates employee qualifications.

[CA\(8\)](#) (8) Contrary to Grocers's argument, this portion of the Retail Food Code and the Ordinance do not overlap. [HN9](#) The Retail Food Code establishes standards for what [****17] certain employees, particularly one certified owner or supervising food service employee, must know or be taught, but does not regulate who must be hired; the Ordinance regulates the pool of nonsupervising, nonmanagerial employees from which a new owner temporarily must hire, but imposes no standards concerning what the hired employees must know or be taught about food safety. Notably, the Retail Food Code's required certified food safety specialist is by definition a managerial or

supervisory employee,⁵ while the Ordinance by its terms expressly excludes from its [*193] scope all such employees⁶ and thus does not regulate or restrict in any way an employer's freedom to hire whomever it chooses to satisfy that position. As such, the Ordinance does not intrude upon the field the state has expressly reserved to itself and is not preempted by state law.

[**1027] II. Federal Preemption

A. Machinists Preemption Principles

CA(9) (9) We consider as well whether the Ordinance is preempted by the NLRA, a federal law enacted to protect “the right of employees to organize and bargain collectively.” (29 U.S.C. § 151.) HN10 The supremacy clause of the United States Constitution vests Congress with the power to preempt state law. (Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc. (2007) 41 Cal.4th 929, 935 [63 Cal. Rptr. 3d 50, 162 P.3d 569]; see U.S. Const., art. VI, cl. 2.) While Congress may exercise that power by enacting an express preemption provision, the NLRA contains no such provision; indeed, “Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action.” (Bethlehem Co. v. State Board (1947) 330 U.S. 767, 771 [91 L. Ed. 1234, 67 S. Ct. 1026].) Instead, Grocers contends the Ordinance is impliedly preempted under the *Machinists* doctrine. (Machinists v. Wisconsin Emp. Rel. Comm’n (1976) 427 U.S. 132 [49 L.Ed.2d 396, 96 S.Ct. 2548]

[****19] (*Machinists*)). Determining whether *Machinists* preemption extends [***736] here requires that we examine its principles in some depth.

In Machinists, supra, 427 U.S. 132, the United States Supreme Court considered whether labor or management self-help (economic pressure tactics such as boycotts, strikes, and lockouts used to extract concessions during the collective bargaining process), although neither protected nor prohibited by the NLRA, might nevertheless be “ ‘deemed privileged against state regulation.’ ” (Machinists, at p. 141.) A union, seeking to pressure an employer to make concessions in negotiations over renewal of an expired collective bargaining agreement, urged its members to refuse all overtime work. A state labor commission, concluding the conduct was neither arguably protected nor arguably prohibited by federal labor law, enjoined the concerted activity as being in violation of state law, and the state supreme court upheld the injunction.

CA(10) (10) The United States Supreme Court reversed. It explained that HN11 even where the NLRA does not address a particular economic weapon, preemption [*194] may still apply. “Whether self-help economic activities are employed by employer or union, the crucial [****20] inquiry regarding pre-emption is the same: whether ‘the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act’s processes.’ ” (Machinists, supra, 427 U.S. at pp. 147–148.) Except insofar as the NLRA itself regulates the use of particular economic weapons, Congress intended a “no-fly” zone, with neither states nor the National Labor Relations Board (NLRB) permitted to interfere in the bargaining process by dictating which weapons labor and management might employ in negotiations. “To sanction state regulation of such economic pressure deemed by the federal Act ‘desirabl[y] ... left for the free play of contending economic forces, ... is not merely [to fill] a gap [by] outlaw[ing] what

⁵ See Health and Safety Code section 113947.1, subdivision (f) (“The responsibilities of a certified owner or employee ... shall include the safety of food preparation and service, including ensuring that all employees who handle, or have responsibility for handling, nonprepackaged foods of any kind, have sufficient knowledge to ensure the [****18] safe preparation or service of the food, or both.”).

⁶ See Los Angeles Municipal Code section 181.01, subdivision C (“ ‘Eligible Grocery Worker’ does not include a managerial, supervisory, or confidential employee.”).

federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available.’ ” ([Machinists, at p. 150.](#))

In subsequent years, the United States Supreme Court has extended *Machinists* principles to other instances in which, from the text or structure of the NLRA, it could infer Congress intended the subject matter to be free from state or municipal regulation. Thus, in [Golden State Transit Corp. v. Los Angeles \(1986\) 475 U.S. 608, 618 \[89 L. Ed. 2d 616, 106 S. Ct. 1395\]](#), [****21] again addressing regulation of economic weapons in the bargaining process, the United States Supreme Court concluded the City of Los Angeles was preempted from conditioning renewal of a taxicab company's operating license on the company's settling a labor dispute. The taxi drivers were permitted under the NLRA to strike to pressure the taxi company, and the taxi company was permitted to resist that pressure and seek to outlast the drivers. The city, by requiring the taxi company to settle in order to keep operating, was effectively placing a time limit on the company when none was contemplated, thereby interfering with its use of permitted economic weapons, and was imposing an obligation to [**1028] agree where the text and legislative history of the NLRA contemplated only an obligation to bargain. ([Golden State Transit, at pp. 615–617.](#))

Most recently, in [Chamber of Commerce of United States v. Brown \(2008\) 554 U.S. 60 \[171 L. Ed. 2d 264, 128 S. Ct. 2408\]](#), the United States Supreme Court concluded California could not prohibit employers who received state funding from using those funds to influence support for or opposition to union organizing. (See [Gov. Code, §§ 16645.2, 16645.7.](#)) [***737] Reviewing the history of federal labor regulation, [****22] the court noted Congress had “expressly preclude[d] regulation of speech about unionization ‘so long as the communications do not contain a “threat of reprisal or force or promise of benefit.” ’ ” ([Brown, at p. 68](#); see [29 U.S.C. § 158\(c\).](#)) As well, Congress could have included in section 8(a) and (b) of the NLRA

(see [29 U.S.C. § 158\(a\), \(b\)](#)) further limits on pro- and anti-unionization advocacy; the limits it chose to [**195] include could thus be seen as this-much-and-no-more determinations by Congress. Accordingly, state law was preempted. ([Brown, at p. 69.](#))

The foregoing cases each dealt with circumstances where, from the structure of the NLRA, it was evident Congress had spoken to a particular topic and no state interference could be countenanced. A second line of post-*Machinists* decisions, by contrast, has articulated significant limits on the scope of *Machinists* preemption arising from the fact the NLRA is a regulation of process, not substance.

The NLRA was enacted “to remedy ‘[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.’ [****23] ” ([Metropolitan Life Ins. Co. v. Massachusetts \(1985\) 471 U.S. 724, 753 \[85 L. Ed. 2d 728, 105 S. Ct. 2380\]](#) (*Metropolitan Life*), quoting [29 U.S.C. § 151.](#)) “One of the ultimate goals of the Act was the resolution of the problem of ‘depress[ed] wage rates and the purchasing power of wage earners in industry,’ [29 U.S.C. § 151](#), and ‘the widening gap between wages and profits,’ 79 Cong. Rec. 2371 (1935) (remarks of Sen. Wagner), thought to be the cause of economic decline and depression.” ([Metropolitan Life, at p. 754.](#)) Congress addressed this problem not by directly dictating particular wage levels, but by establishing procedures for employee organization and collective bargaining that, it hoped, would result in fairer negotiations and higher wages. (*Ibid.*) The resulting law was “concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions.” ([Id. at p. 753.](#))

The United States Supreme Court in *Metropolitan Life* analyzed whether the process-oriented NLRA was intended to have any effect on local employment laws of general application. A Massachusetts [****24] law required that employee health care plans include certain minimum benefits, a subject that otherwise might have been addressed in collective bargaining. Rejecting the argument that *Machinists* preemption applied, the Supreme Court drew a line between laws that regulate process and those that regulate substance: “No incompatibility exists ... between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.” (*Metropolitan Life, supra*, 471 U.S. at pp. 754–755.) While the NLRA facilitates collective bargaining over the terms of employment, it does not dictate—nor does it preclude states from dictating—any particular substantive terms of employment.

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As the Supreme Court further explained, because the NLRA regulates only [***738] the process of organizing and bargaining, “[f]ederal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of [****25] the purposes of the federal Act.” (*Metropolitan Life, supra*, 471 U.S. at p. 756.) The NLRA operates [**1029] against the background of the vast tapestry of substantive state regulation of employer-employee relations—the “‘backdrop of state law that provided the basis of congressional action.’” (*Metropolitan Life, at p. 757.*) Congress did not intend “to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization.” (*Id. at p. 756.*) Massachusetts thus could exercise its broad police powers to regulate the terms of employee health benefits without trespassing into any area cordoned

off by the NLRA for exclusive federal regulation.

In *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1 [96 L. Ed. 2d 1, 107 S. Ct. 2211] (*Fort Halifax*), the United States Supreme Court extended these principles to a state law guaranteeing employees a severance payment in the event of a plant closing. The high court reiterated that “the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining.” (*Id. at p. 20.*) States may regulate what might otherwise be the subject of negotiation: [****26] “ ‘[T]here is nothing in the NLRA ... which expressly forecloses all state regulatory power with respect to those issues ... that may be the subject of collective bargaining.’ ” (*Id. at pp. 21–22.*) Given that “ ‘Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety ...’ ” (*id. at p. 22*), Maine could by statute provide employees some minimal economic security, in the event of a plant closing, without running afoul of the NLRA.

Our own decision in *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690 [166 Cal. Rptr. 331, 613 P.2d 579] presaged the high court's later recognitions of the power of localities to promote public health and safety through regulation of the employer-employee relationship without falling prey to *Machinists* preemption. We considered there whether federal preemption precluded the state Industrial Welfare Commission from issuing wage orders regulating the minimum wages, maximum hours, and conditions of employment for employees in a range of industries. We rejected the argument out of hand, relying on what we viewed as settled precedent that “the federal labor laws do not ‘preempt [****27] ... the field of regulating working conditions ...’ ” (*Industrial Welfare Com., at p. 728, fn. 16*, quoting *Terminal Assn. v. Trainmen* (1943) 318 U.S. 1, 7 [87 L.Ed. 571, 63 S.Ct. 420].) Instead, we recognized preemption was confined to

circumstances in which local regulation interfered with the process of organizing and bargaining, [*197] including the use of economic weapons to achieve particular bargaining goals. (*Industrial Welfare Com.*, at p. 728, fn. 16.)

CA(11) (11) As these cases demonstrate, **HN12** at the core of *Machinists* preemption is the principle that, in specific instances, one may discern from the text and structure of the NLRA a basis for inferring that Congress affirmatively intended to leave a particular subject free from further NLRB and state and local government regulation. “*Machinists* preemption is based on the premise [***739] that ‘Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.’ ” (*Chamber of Commerce of United States v. Brown*, *supra*, 554 U.S. at p. 65, quoting *Machinists*, *supra*, 427 U.S. at p. 140, fn. 4.) “[A]s in any pre-emption analysis, ‘[t]he purpose of Congress is the ultimate touchstone.’ ” (*Metropolitan Life*, *supra*, 471 U.S. at p. 747.)

Given [****28] that Congress's purpose was to regulate the process of establishing terms of employment, not the content of those terms (*Metropolitan Life*, *supra*, 471 U.S. at p. 753; *Fort Halifax*, *supra*, 482 U.S. at p. 20), it follows that the areas Congress intended to leave free of local regulation are those relating to the process by which an employment agreement is reached: matters of self-organization and collective bargaining. (See *Metropolitan Life*, at p. 751.) In sharp distinction, because the NLRA is not a federal [**1030] code of employment law, *Machinists* preemption does not extend to local establishment of substantive employment terms: “Such regulation provides protections to individual union and nonunion workers alike, and thus ‘neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA.’ ” (*Fort Halifax*, at pp. 20–21; see also *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085, 1100 [45 Cal. Rptr. 3d 485] [Local employment

regulation is permitted “as long as the purpose of the law or regulation is not incompatible with the general goals of the NLRA to restore the equality of bargaining power and resolve the problem of depressed wages.”].)

With [****29] these principles in mind, we consider whether the text or structure of the NLRA evidences any intent to preclude worker retention ordinances such as the one at issue here.

B. Application to the Ordinance

CA(12) (12) We begin with an initial presumption against preemption. (E.g., *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc.* (1993) 507 U.S. 218, 224 [122 L. Ed. 2d 565, 113 S. Ct. 1190].) This presumption is particularly heavy here because the subject matter, **HN13** the employer-employee relationship, is one traditionally regulated by [*198] state and local governments under their police powers. (*Fort Halifax*, *supra*, 482 U.S. at p. 21 [“[P]re-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State.”].) Thus, we consider whether there is evidence of a “ ‘clear and manifest’ ” congressional intent (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 957 [17 Cal. Rptr. 3d 180, 95 P.3d 422]) to bar at any level the regulation of employee retention during ownership transitions (see *Metropolitan Life*, *supra*, 471 U.S. at p. 749).

CA(13) (13) Examining the text and structure of the NLRA, we discern **HN14** no evidence that Congress affirmatively intended to leave the subject [****30] of employee retention unregulated by states and municipalities. On the subject of employee hiring and firing, the text of the NLRA is, with one notable exception, resoundingly silent. It neither guarantees nor prohibits the retention of employees; it does not affirmatively protect new employers' latitude to hire and fire whomever they please, nor does it address in any way the power of states and localities to regulate the subject. The only portion of the NLRA to speak to these matters,

section 8(a)(3), protects employees from discrimination on the basis of union [***740] affiliation; an employer may not use the power to hire and fire to exercise antiunion animus and eliminate prounion employees from its workforce. (See [29 U.S.C. § 158\(a\)\(3\)](#).)

This silence leaves unrebutted the initial presumption that Congress did not intend preemption. [HN15](#) The NLRA's statutory text does not disturb state and local authority to address, as these entities see fit, matters of hiring and firing, authority traditionally recognized as a core incident of their police power. (See [De Canas v. Bica \(1976\) 424 U.S. 351, 356 \[47 L. Ed. 2d 43, 96 S. Ct. 933\]](#) ["States possess broad authority under their police powers to regulate the employment relationship [****31] to protect workers within the State."].) Thus it is that states and localities have long been permitted to provide common law wrongful discharge remedies (e.g., [Tameny v. Atlantic Richfield Co. \(1980\) 27 Cal.3d 167 \[164 Cal. Rptr. 839, 610 P.2d 1330\]](#)) and enact statutes of general application regulating hiring and firing (e.g., [Gov. Code, § 12900 et seq.](#) [Cal. Fair Employment and Housing Act]) without intruding upon the NLRA's narrowly tailored concerns.

The congressional silence concerning the subject matter of the Ordinance distinguishes this case from those where the United States Supreme Court has found *Machinists* preemption. (See [Machinists, supra, 427 U.S. 132](#).) Without exception, preemption in each was traceable in part to specific statutory language evincing a congressional intent to regulate only at the federal level. (See [Chamber of Commerce of United States v. Brown, supra, 554 U.S. at pp. 67–69](#) [preempting a statute that effectively limited employer speech about union organizing, where Congress in §§ 7, 8(a), 8(b), and 8(c) of the [*199] NLRA ([29 U.S.C. §§ 157, 158\(a\), \(b\), \(c\)](#)) [**1031] already had regulated the extent to which employer speech should be permitted]; [Golden State Transit Corp. v. Los Angeles, supra, 475 U.S. at pp. 614–618](#) [****32] [preempting municipal action that

compelled a settlement, where Congress in § 8(d) of the NLRA ([29 U.S.C. § 158\(d\)](#)) had imposed only a duty to bargain, not to agree]; [Machinists, at pp. 143–151](#) [preempting a state bar on slowdowns, where Congress in § 8 of the NLRA ([29 U.S.C. § 158](#)) had already identified those economic weapons it found necessary to bar]; [Teamsters Union v. Morton \(1964\) 377 U.S. 252, 258–260 \[12 L. Ed. 2d 280, 84 S. Ct. 1253\]](#) [preempting regulation of economic weapons, where Congress had already spoken in §§ 7 and 8 of the NLRA ([29 U.S.C. §§ 157, 158](#)) to the availability of economic weapons in obtaining negotiating concessions, and specifically to secondary boycotts in [29 U.S.C. § 187](#)].)

[CA\(14\) \(14\)](#) Instead, the Ordinance on its face appears of a piece with other state and local regulations upheld against claims of *Machinists* preemption, a part of the background tapestry of state and local laws against which unions and employers may negotiate when reaching the terms of a collective bargaining agreement. [HN16](#) While the Ordinance regulates the existence of the employment relationship rather than just its terms, this distinction is not crucial; federal courts routinely have upheld as not preempted under *Machinists* employment [****33] laws that broadly regulate hiring and firing. (See [St. Thomas-St. John Hotel v. Government of U.S. Virgin Islands \(3d Cir. 2000\) 218 F.3d 232, 243](#) [upholding a U.S. Virgin Islands wrongful termination statute as a minimum substantive requirement permitted under *Metropolitan Life and Fort Halifax*]; [Peabody Galion v. Dollar \(10th Cir. 1981\) 666 F.2d 1309, 1316–1319](#) [upholding an Okla. wrongful discharge statute against claimed *Machinists* preemption].) Like the health benefits law in [Metropolitan \[***741\] Life, supra, 471 U.S. 724](#), and the severance benefits law in [Fort Halifax, supra, 482 U.S. 1](#), the Ordinance regulates the terms and conditions of employment, extending the benefit of a potential temporary extension of employment to each employee individually, rather than conferring a collective right, and applying the benefit to all employees equally, irrespective of union or

nonunion status. (See [Fort Halifax](#), at pp. 20–21; [Metropolitan Life](#), at p. 755.)⁷

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What the Ordinance does not do, in contrast, is “‘[enter] into the substantive aspects of the bargaining process to an extent Congress has not countenanced.’” ([Machinists](#), *supra*, 427 U.S. at p. 149.) It does not regulate the process by which a bargaining agreement may be reached. Nor does the Ordinance speak directly to the process of organizing; rather, it temporarily preserves the status quo, whatever that might be, whether the workforce is unionized or not. (See [Metropolitan Life](#), *supra*, 471 U.S. at p. 755 [“Nor do [local labor and employment standards] have any but the most [****35] indirect effect on the right of self-organization established in the Act.”].) And, while the Ordinance does confer on each employee, as an individual, certain rights the individual employees might otherwise have obtained only through organizing and collective bargaining, it is well established that so doing is no basis for *Machinists* preemption. (See [Fort Halifax](#), *supra*, 482 U.S. at pp. 21–22; [Metropolitan Life](#), at pp. 751–758; [Malone v. White Motor Corp.](#) (1978) 435 U.S. 497, 504–505 [55 L. Ed. 2d 443, 98 S. Ct. 1185].)⁸

⁷The Ordinance's neutrality is essential to its validity. Just as employment regulations aimed solely at unionized workers may intrude into aspects of organizing and bargaining Congress intended the states not to regulate, so may regulations that apply only to [****34] nonunionized workers and select out unionized workers for disfavored status be preempted as forcing employees to choose between exercising their right to enter a collective bargaining agreement and having their state-granted employment rights enforced. (See [Livadas v. Bradshaw](#) (1994) 512 U.S. 107, 116–118 [129 L. Ed. 2d 93, 114 S. Ct. 2068].) In contrast, employment regulations, such as the 90-day retention period imposed by the Ordinance, that “affect union and nonunion employees equally ... neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA.” ([Metropolitan Life](#), *supra*, 471 U.S. at p. 755.)

⁸Grocers argues that the Ordinance cannot qualify as a generally applicable employment standard because it regulates only a single industry. (See [Chamber of Commerce of U.S. v. Bragdon](#) (9th Cir. 1995) 64 F.3d 497, 504.) However, the Ninth Circuit Court of Appeals has effectively repudiated *Bragdon* (see [Associated Builders and Contractors, Southern California v. Nunn](#) (9th Cir. 2004) 356

[1032]** While recognizing that the Ordinance on its face does not regulate organizing or bargaining, Grocers contends it is nevertheless preempted because of its indirect effects on those subjects. Grocers's principal argument, accepted by the Court of **[***742]** Appeal majority, is that the Ordinance alters how the NLRB would decide successorship questions, i.e., whether and to what extent labor liabilities and bargaining or contractual obligations should follow when ownership of a unionized business is transferred from one entity to another.

The NLRA does not speak to successorship. Consequently, successorship questions are governed by federal common law. ([Howard Johnson Co. v. Hotel Employees](#) (1974) 417 U.S. 249, 255–256 [41 L.Ed.2d 46, 94 S.Ct. 2236].)

[**37]** In a trilogy of cases ([John Wiley & Sons v. Livingston](#) (1964) 376 U.S. 543 [11 L. Ed. 2d 898, 84 S. Ct. 909]; [NLRB v. Burns Security Services](#) (1972) 406 U.S. 272 [32 L.Ed.2d 61, 92 S.Ct. 1571]; [Howard Johnson Co.](#), *supra*, 417 U.S. 249), the United States Supreme Court outlined the circumstances **[*201]** and considerations that might lead a court to conclude the new owner of a business should be bound by an existing bargaining agreement entered into by its predecessor or have an independent duty to negotiate with a union that had represented the predecessor workforce.⁹

[F.3d 979, 990](#)), and a majority of other circuits have limited *Bragdon* to its facts (see [Rondout Electric, Inc. v. New York State Dept. of Labor](#) (2d Cir. 2003) 335 F.3d 162, 169; [St. Thomas-St. John Hotel v. Government of U.S. Virgin Islands](#), *supra*, 218 F.3d at p. 244; but see [520 South Michigan Avenue Associates v. Shannon](#) (7th Cir. 2008) 549 F.3d 1119, 1131–1137 **[****36]** [following *Bragdon*]). *Bragdon* also has been squarely rejected by the only previous California decision to consider its reasoning. (See [Southern California Edison Co. v. Public Utilities Com.](#), *supra*, 140 Cal.App.4th at pp. 1103–1104.) Nothing in the NLRA indicates Congress intended to prevent states and localities from attacking employment problems industry by industry, as they traditionally have. (See, e.g., [Martinez v. Combs](#) (2010) 49 Cal.4th 35, 57 [109 Cal. Rptr. 3d 514, 231 P.3d 259] [discussing Industrial Welfare Commission's historic industry-by-industry approach to wage orders].)

⁹As the court subsequently summarized, [HN17](#) successorship depends on a consideration of the “totality of the circumstances,” including “whether the business of both employers is essentially the

A premise of Grocers's general argument is that these cases ratify a new owner's right, untouchable by state or local regulation, not to hire its predecessor's employees upon acquiring [****38] a new store. The Court of Appeal majority agreed; reversing the trial court on this point, it embraced the existence of such a right as a basis for federal preemption. Upon close examination, these authorities do not support Grocers's claim.

The language Grocers and the Court of Appeal majority rely upon traces to [NLRB v. Burns Security Services, supra, 406 U.S. 272](#). In the course of analyzing a new employer's legal obligations, the United States Supreme Court explained: "The [NLRB] has never held that *the National Labor Relations Act itself* requires that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of [***743] the predecessor though it is possible that such an obligation might be assumed by the employer." (*Id. at p. 280, fn. 5*, italics added.) The Supreme Court reiterated the point the following year, noting that "the purchaser [of a business] is not obligated by the Act to hire any of the predecessor's employees" ([Golden State Bottling Co. v. NLRB \(1973\) 414 U.S. 168, 184, fn. 6 \[38 L. Ed. 2d 388, 94 S. Ct. 414\]](#), italics added, citing [Burns, at p. 280, fn. 5](#).)

Notwithstanding these statements, the petitioner union in [****39] [Howard Johnson Co. v. \[**1033\] Hotel Employees, supra, 417 U.S. 249](#), contended federal common law and the existing collective bargaining agreement should be interpreted so that " 'the successor does not have the right not to hire' " (*Id. at p. 261, fn. 7*.) The Supreme Court rejected the argument: "What the

Union seeks here is completely at odds with the basic principles this Court elaborated in *Burns*. We found there that nothing in the federal labor laws 'requires that an employer ... who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer.' " (*Id. at p. 261*, quoting [NLRB v. Burns Security Services, supra, 406 U.S. at p. 280, fn. 5](#), and citing [Golden State Bottling Co. v. NLRB, supra, 414 U.S. at p. 184, fn. 6](#).) The [*202] court thereafter used shorthand for the principle that the NLRA and federal common law do not compel retention of predecessor employees. (See [Howard Johnson, at p. 262](#) ["Clearly, *Burns* establishes that Howard Johnson had the right not to hire any of the former Grissom employees, if it so desired."]; *id. at p. 264* [recognizing that "employees of the [****40] terminating employer have no legal right to continued employment with the new employer ..." and acknowledging "the new employer's right to operate the enterprise with his own independent labor force"]; see also [Fall River Dyeing & Finishing Corp. v. NLRB, supra, 482 U.S. at p. 40](#) [explaining that *Burns* held a "successor is under no obligation to hire the employees of its predecessor"].)

That the United States Supreme Court was using "right" in this instance in the sense of a Hohfeldian privilege¹⁰ against any asserted duty arising from federal common law or an existing collective bargaining agreement to hire particular workers, and not to describe an immunity from the state or local regulation of such hiring,¹¹ is clear from the context. This was what *Burns* had said (see [NLRB v. Burns Security Services, supra, 406 U.S. at p.](#)

same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." ([Fall River Dyeing & Finishing Corp. v. NLRB \(1987\) 482 U.S. 27, 43 \[96 L. Ed. 2d 22, 107 S. Ct. 2225\]](#).)

¹⁰ See Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1919) pages 38–50 (explaining a "privilege" as the negation of a duty to another).

¹¹ As Justice Kennedy has explained, *Machinists* preemption arises when the NLRA confers on an entity in "the familiar Hohfeldian terminology ... an immunity from" state and local regulation. ([Golden State Transit Corp. v. Los Angeles \(1989\) 493 U.S. 103, 115 \[107 L. Ed. 2d 420, 110 S. Ct. 444\]](#) (dis. opn. of Kennedy, J.).)

[280, fn. 5](#)), what *Golden State Bottling* had said (see *Golden State Bottling Co. v. NLRB*, [supra](#), [414 U.S. at p. 184, fn. 6](#)), and what *Howard Johnson* itself said when it explained that “nothing in the federal labor laws ‘requires’ ” a business purchaser to hire predecessor employees (*Howard Johnson Co. v. Hotel Employees*, [supra](#), [417 U.S. at p. 261](#)).¹² *Howard Johnson* was not [****41] a preemption case and did not at any point contemplate whether a successor's hiring choices might be regulated or restricted by sources other than an existing collective bargaining agreement or federal common law. It thus does not resolve the preemption issue here. (See *R. A. V. v. St. Paul* (1992) [505 U.S. 377, 386, fn. 5](#) [[120 L. Ed. 2d 305, 112 S. Ct. 2538](#)] [“It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.”].)¹³

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[***744] [**1034] The dissent's assertion otherwise, viz., that the NLRA was founded on and assumes an employer's unfettered right to select its employees, cannot withstand historical scrutiny. For decades, the United States Supreme Court had invoked employer liberty of contract to strike down employee-protective legislation. (See, e.g., *Adair v. United States* (1908) [208 U.S. 161, 174](#) [[52 L. Ed.](#)

[436, 28 S. Ct. 277](#)] [holding unconstitutional [****43] a federal ban on yellow-dog contracts conditioning hiring on an agreement not to join a union because “it is not within the functions of government ... to compel any person in the course of his business and against his will to accept or retain the personal services of another ...”]; see also *Coppage v. Kansas* (1915) [236 U.S. 1, 9–21](#) [[59 L. Ed. 441, 35 S. Ct. 240](#)] [invalidating a state ban on identical grounds].) Far from yielding to such edicts, Congress in the NLRA defied them. (See [29 U.S.C. § 158\(a\)\(3\)](#) [prohibiting yellow-dog contracts].)¹⁴ The Supreme Court acceded to this judgment, reversing course and holding that both Congress and the several states could constrict an employer's freedom to hire without violating liberty of contract. (See *Labor Board v. Jones & Laughlin*, [supra](#), [301 U.S. at pp. 43–46](#) [rejecting liberty of contract challenge to the NLRA]; *Lincoln Union v. Northwestern Co.* (1949) [335 U.S. 525, 534–537](#) [[93 L. Ed. 212, 69 S. Ct. 251](#)] [rejecting *Adair* and *Coppage* and upholding a state's right similarly to regulate employer hiring].) To start from the premise that the NLRA is founded upon employer liberty of contract, as the dissent does, is to stand history on its head.¹⁵

¹² Indeed, it was what the court had said as far back as 1937. (See *Labor Board v. Jones & Laughlin* (1937) [301 U.S. 1, 45](#) [[81 L. Ed. 893, 57 S.Ct. 615](#)] [“The Act does not interfere with the normal exercise of the right of [****42] the employer to select its employees or to discharge them.” (italics added)].)

¹³ We observe that the United States Court of Appeals for the District of Columbia Circuit, considering essentially the identical claim, viz., that successorship principles compelled preemption of a local 90-day retention ordinance, has similarly concluded that nothing in the NLRA guarantees to new employers the right to refuse to hire predecessor employees, or even the right to refuse to recognize a union constituted of them; thus, “[a]pplication of the successorship doctrine under [a 90-day retention ordinance] ... would not require the employer to do anything that it has a right under the NLRA to refuse.” (*Washington Service Contractors v. Dist. of Columbia* (D.C. Cir. 1995) [311 U.S. App.D.C. 407](#) [[54 F.3d 811, 817](#)], cert. den. (1996) [516 U.S. 1145](#) [[134 L. Ed. 2d 96, 116 S.Ct. 1015](#)].)

¹⁴ If an employer's liberty of contract to hire whom [****44] it chooses truly were a foundation of the NLRA, the Act's proponents would have mentioned as much in support of the measure. They did not. (See, e.g., Remarks of Sen. Wagner, 79 Cong. Rec. 2371 (daily ed. Feb. 21, 1935) [the NLRA, also known as the Wagner Act, “merely provides that employees, if they desire to do so, shall be free to organize for their mutual protection or benefit”]; Remarks of Sen. Wagner, 79 Cong. Rec. 6184 (daily ed. Apr. 23, 1935) [decrying employers' abuse of their ability to hire and fire as an impediment to economic recovery and describing the NLRA as a corrective measure]; Sen. Rep. No. 74-573, 1st Sess. pp. 1–4 (1935) [discussing the NLRA's purposes without mentioning protection of employer liberty of contract].) Instead, it was the NLRA's opponents who invoked employer liberty of contract in arguing against the Act's constitutionality. (See, e.g., Remarks of Sen. Hastings, 79 Cong. Rec. 7676–7680 (daily ed. May 15, 1935).)

¹⁵ The dissent acknowledges the NLRA enacted what were new, fiercely contested restrictions on an employer's liberty of contract. In so doing, the dissent implicitly surrenders the larger point as well: the NLRA addresses employer liberty [****45] of contract solely to limit it; employer liberty of contract was defended only by those who opposed the Act. (Fn. 14, *ante*; see also *Labor Board Cases* (1937)

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We think the closer question is whether, as Grocers contends, the Ordinance is preempted because its indirect effects impermissibly intrude on successorship determinations that Congress intended to leave free of local regulation. The party asserting preemption, Grocers, has the burden of demonstrating both the minor and major premises: that the Ordinance intrudes on successorship determinations, and that Congress did not want such indirect effects. (See [Bronco Wine Co. v. Jolly](#), *supra*, 33 Cal.4th at pp. 956–957.) Because neither premise has been established, we [***745] decline to find preemption on this basis as well.

The successorship inquiry is highly fact dependent, to be decided on a case-by-case basis after consideration of numerous factors. (See [Fall River Dyeing & Finishing Corp. v. NLRB](#), *supra*, 482 U.S. at p. 43; [Howard Johnson Co. v. Hotel Employees](#), *supra*, 417 U.S. at p. 256.)

[****46] The United States Supreme Court has not had occasion to consider whether in assessing business continuity for successorship purposes a temporary, involuntary retention of a workforce is materially different from a permanent, voluntary retention, but language in the court's opinions supports the view that it is. (See [Fall River Dyeing](#), at p. 41 [considering as relevant to successorship whether a “new employer makes a conscious decision” to retain employees, because it demonstrates “the employer intends to take advantage of the trained work force [**1035] of its predecessor”]; [NLRB v. Burns Security Services](#), *supra*, 406 U.S. at p. 278 [upholding the imposition of a duty to bargain based in part on the fact a successor employer had “selected as its work force the employees of the previous employer”].)

The NLRB likewise has not formally spoken to the effect of a 90-day retention ordinance on the

successorship inquiry, but several of the agency's administrative law judges (ALJ's) have. In [U.S. Service Industries, Inc. \(NLRB, Dec. 13, 1995, No. 5-CA-24575\)](#) 1995 N.L.R.B. Lexis 1151, pages *11–*13, an ALJ imposed a bargaining obligation on a new employer because there was substantial business continuity, [****47] as the employer had conceded. But notwithstanding that concession, the employer argued it should not succeed to the predecessor's bargaining obligation because its initial hiring was dictated by a temporary retention ordinance. Because the NLRB had not as yet formally differentiated between voluntary and involuntary initial hiring, the ALJ, not feeling at liberty to establish new precedent, rejected the argument. (*Id.* at p. *12.)

More helpful in discerning the current federal rule is [M&M Parkside Towers LLC \(NLRB, Jan. 30, 2007, No. 29-CA-27720\)](#) 2007 N.L.R.B. Lexis 27.

There, an ALJ found an obligation to bargain where the new employer was running the same business with the same employees, who had been initially hired pursuant to a 90-day retention ordinance but thereafter retained voluntarily based on their satisfactory performance. (*Id.* at pp. *11–*14.)

Although [*205] the employer argued that in the absence of a retention ordinance it would not have hired the predecessor's employees, the ALJ rejected the argument *inter alia* for want of proof. Because the employer had offered no lawful, nondiscriminatory reason for why it would have refused to hire the predecessor employees, it had failed [****48] to establish as a factual matter that the retention ordinance affected the initial hiring. (*Id.* at p. *13.)

Of significance, the ALJ embraced the NLRB general counsel's argument that the obligation to bargain as a successor arose only *after* expiration of the initial 90-day period. During the temporary retention period, whether the new employer would ultimately retain a majority, or indeed any, of the predecessor workforce was unclear. Only on day 113—when the new employer was free of any retention ordinance restrictions, had evaluated each

301 U.S. 76, 103 [81 L.Ed. 921, 57 S.Ct. 645] (dis. opn. of McReynolds, J.) [arguing the NLRA should be struck down for violating an employer's right to “freely select[] those to whom his [business] operations are to be entrusted”].)

employee's performance, had judged each satisfactory, and had voluntarily extended to each an offer of permanent employment—did a bargaining obligation attach. (*M&M Parkside Towers LLC, supra*, [***746] 2007 N.L.R.B. Lexis 27 at pp. *6–*8, *15–*18.)¹⁶

CA(15) (15) Summarizing the import of these decisions, the federal district court in *Rhode Island Hospitality Assn. v. City of Providence (D.R.I. 2011) 775 F.Supp.2d 416* [****49] recently concluded: “[E]xisting **HN18** case law indicates that the successor employer will be obligated to bargain with [a union] only if the successor employer retains its predecessor's employees beyond the mandatory employment period or if it extends an offer for permanent employment prior to expiration of the mandatory retention period.” (*Id. at p. 432.*) We agree. Until that point, the predecessor's employees are essentially probationary and no basis exists for concluding one of the prerequisites of a successorship bargaining obligation, the hiring of a majority of the predecessor's employees (see *Fall River Dyeing & Finishing Corp. v. NLRB, supra*, 482 U.S. at p. 47; *NLRB v. Burns Security Services, supra*, 406 U.S. at p. 278), will come to pass. It follows that retention ordinances like the Ordinance here do not dictate the outcomes of the successorship inquiry in any way that would call for *Machinists* preemption. (*Rhode Island Hospitality [**1036] Assn., at p. 433*; see also *Washington Service Contractors v. Dist. of Columbia, supra*, 54 F.3d at pp. 816–817.)

CA(16) (16) Additionally, we can **HN19** discern in the NLRA no clear and manifest congressional intent to foreclose indirect impacts on successorship. As with [****50] any preemption question, “ ‘ “[t]he purpose of Congress is the ultimate touchstone” ’ ” (*Metropolitan Life, supra*, 471 U.S. at p. 747), and on this [*206] point we

find neither textual nor historical support. Successorship is a question of federal common law because “[n]o provision of the [NLRA] even mentions successorship.” (*McLeod, Rekindling Labor Law Successorship in an Era of Decline (1994) 11 Hofstra Lab. L.J. 271, 342, fn. 289.*) By ignoring entirely the issue of successorship, Congress left no indication of any views on the matter. Accordingly, nothing suggests it intended states and their subdivisions to be displaced from regulating in any otherwise permissible way that could affect, even incidentally, how a federal court or agency ultimately might decide an individual successorship question.¹⁷

[***747] **CA(17) (17)** In a related vein, Grocers contends the Ordinance affects successorship by preserving unionized workplaces intact, preventing a new owner from hiring without regard to union status, and placing new owners at risk from unfair labor practice charges if they elect not to retain a significant portion of the workforce after expiration of the temporary 90-day window. What these arguments omit is that **HN20** the Ordinance applies equally to unionized *and* nonunionized workplaces. It does not selectively preserve or favor unionization or unionized workers; it simply preserves, temporarily, [****52] the status quo, whatever that might be. Just as an employer taking over a formerly unionized workplace might, if left to its own devices, hire a less union-friendly

¹⁶ A similar result would have obtained if the employer had voluntarily offered permanent employment to a majority of its predecessor's employees before expiration of the 90 days. (*M&M Parkside Towers LLC, supra*, 2007 N.L.R.B. Lexis 27 at p. *17.)

¹⁷ We do not deal here with legislation whereby a state or locality has specifically regulated the collective bargaining process, either by imposing on state-defined successors a duty to bargain and assessing state law sanctions for the refusal to bargain (*Commonwealth Edison Co. v. Internat. Brotherhood of Electrical Workers (N.D.Ill. 1997) 961 F. Supp. 1169, 1181–1183*) or by obligating state-defined successors [****51] to agree to the terms of existing bargaining agreements on a going-forward basis rather than negotiate their own terms with any duly authorized bargaining representative (*United Steelworkers v. St. Gabriel's Hospital (D.Minn. 1994) 871 F. Supp. 335, 342–344*). (See *Rhode Island Hospitality Assn. v. City of Providence, supra*, 775 F. Supp. 2d at p. 433 [distinguishing retention ordinances from such direct regulations of the bargaining process].) Such regulations of the very subject matter Congress expressly did choose to regulate in enacting the NLRA understandably are preempted.

workforce through regression to the mean, rather than because of any animus, so might an employer taking over a formerly nonunionized or even antiunion workplace through a similar effect tend to wind up with a more prounion workforce in the absence of the Ordinance. In the aggregate, a new owner hiring nonmanagement employees from the pool dictated by the Ordinance is neither more nor less likely to wind up with prounion workers than if it were to hire freely from the workforce at large, assuming antiunion animus truly plays no part in its hiring decisions, as the NLRA demands. ([29 U.S.C. § 158\(a\)\(3\)](#); [Howard Johnson Co. v. Hotel Employees](#), *supra*, 417 U.S. at p. 262, fn. 8; [NLRB v. Burns Security Services](#), *supra*, 406 U.S. at pp. 280–281, fn. 5; [Phelps Dodge Corp. v. Labor Board](#) (1941) 313 U.S. 177, 183–185 [85 L. Ed. 1271, 61 S. Ct. 845].)

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HN21 Nor does the Ordinance place the new owner at greater risk of an unfair labor practice charge than were there no Ordinance. Irrespective of the Ordinance, a new owner would be subject to an unfair labor practice charge [****53] if it manipulated its hiring specifically to discriminate against union members and avoid successorship obligations. ([Great Lakes Chemical Corp. v. N.L.R.B.](#) (D.C. Cir. 1992) 296 U.S. App.D.C. 257 [967 F.2d 624, 627–628]; see [Howard Johnson Co. v. Hotel Employees](#), *supra*, 417 U.S. at p. 262, fn. 8.) In deciding whom to hire from the Ordinance pool and whom to retain or dismiss at the conclusion of the 90-day period, a new owner has the same freedom to choose employees without regard to union status or sentiment, and the same theoretical exposure to an unfair labor practice charge if [**1037] it were to allow antiunion animus to enter its decisionmaking, as it would without the Ordinance.¹⁸

¹⁸More generally, there is, as the District of Columbia Circuit has recognized, no federal right to a nonunion workplace. (See [Washington Service Contractors v. Dist. of Columbia](#), *supra*, 54 F.3d at p. 817.) What matters under the NLRA is the employees' choice of a bargaining representative (or no representative). (E.g., [Labor](#)

[Grocers](#) posits the hypothetical of a union organizing and being named bargaining representative for the workplace within the first 90 days, then filing an unfair labor practice charge if many or most of the employees are discharged and the new employer refuses to recognize the union. It does not explain how this scenario is a particular risk occasioned by the Ordinance. If the retained workers were already represented by a union, there would be no occasion for an immediate organizing [***748] drive, while if they were not, a union could mount the very same organizing drive absent the Ordinance and would be as likely to file the very same unfair labor practice charge if the response was to dismiss employees en masse.

We are not the first court to consider these questions. The City is not unique in California in enacting a worker retention ordinance, nor is California alone in having its municipalities do so.¹⁹ A [****55] small but growing number of federal courts have considered the argument that such ordinances are preempted under *Machinists* (see [Machinists](#), *supra*, 427 U.S. 132); to a one, they have concluded, as we do, that neither indirect effects on successorship nor any other aspect of the ordinances gives rise to preemption. (See [Washington Service Contractors v. Dist. of Columbia](#), *supra*, 54 F.3d at pp. 817–818 [D.C. retention ordinance does not “disturb[] the process established by the [*208] NLRA for resolving labor disputes” and is permissible “substantive employee protective legislation having nothing to do with rights to organize or bargain collectively”]; [Rhode Island Hospitality Assn. v. City of Providence](#), *supra*, 775 F. Supp. 2d at p. 433 [Providence retention ordinance “is primarily

[Board v. Jones & Laughlin](#), *supra*, 301 U.S. at p. 33 [The NLRA “safeguard[s] the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual [****54] protection without restraint or coercion by their employer.”].) Whether its employees prefer representation is, as a purely legal matter, of no moment to an employer, and whatever its employees choose, an employer under the NLRA is bound to respect. (See [29 U.S.C. §§ 158\(a\)\(2\), \(5\)](#).)

¹⁹ See *ante*, footnote 1.

designed to provide temporary job protection to both unionized and nonunionized employees[,] which does not constitute a significant intrusion into the equitable collective bargaining process established by the NLRA”]; *Alcantara v. Allied Properties, LLC* (E.D.N.Y. 2004) 334 F. Supp. 2d 336, 345 [N.Y. City retention ordinance “does not conflict with or inhibit the bargaining or dispute [****56] resolution process established by the NLRA,” nor does it “regulate economic self-help activities”).] We join the developing consensus.

CA(18) (18) We close with an observation concerning our role. **HN22** “In labor pre-emption cases ... our office is not to pass judgment on the reasonableness of state [or local] policy” (*Livadas v. Bradshaw, supra*, 512 U.S. at p. 120.) When evaluating claims of NLRA preemption, we may not substitute our own views of sound economic policy for those of the elected branches. (See *St. Thomas-St. John Hotel v. Government of U.S. Virgin Islands, supra*, 218 F.3d at p. 246 [rejecting the “unsettling supposition” that courts should use preemption to strike down local hiring and firing laws as impermissible intrusions into “an area that has traditionally been left to the freedom of contract between an employer and an employee”].) Rather, we inquire solely into whether the challenged regulation is one Congress sought to preclude; if the text and structure of the NLRA demonstrate an affirmative intent to leave the subject matter of the Ordinance untouched by state and local regulation, only then may we find it preempted. **CA(19) (19)** Having found no such indication, we conclude [****57] **HN23** the presumption against preemption has not been rebutted and *Machinists* does not apply.

[**1038] III. Equal Protection

CA(20) (20) As an alternate basis for affirmance, Grocers contends the Ordinance violates the *equal protection clauses* of both the state and federal Constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).) We consider the

question de novo. (E.g., *Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 381 [115 Cal. Rptr. 3d 685].) We conclude **HN24** the Ordinance is constitutional.

A. Constitutional Principles

CA(21) (21) As the trial court concluded, and as all parties agree, because the Ordinance [****749] involves neither suspect classifications nor fundamental rights or interests it is subject only to “rational basis” or “rational relationship” review. [*209] (See *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 299 [59 Cal. Rptr. 3d 442, 159 P.3d 33].) “ ‘[I]n **HN25** areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*’ ” (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644 [88 Cal. Rptr. 2d 283, 982 P.2d 154], italics added by Warden, quoting *FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313 [124 L. Ed. 2d 211, 113 S. Ct. 2096].) [****58] So long as the challenged distinction “bear[s] some rational relationship to a conceivable legitimate state purpose” (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784 [87 Cal. Rptr. 839, 471 P.2d 487]; accord, *Hernandez, at p. 299*; *Warden, at p. 641*), it will pass muster; once we identify “ ‘plausible reasons’ for [the classification] “our inquiry is at an end” ’ ” (*Warden, at p. 644*, quoting *FCC v. Beach Communications, Inc., at p. 313*). Of significance to our inquiry, “because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.” (*FCC v. Beach Communications, Inc., at p. 315*.) The burden is on Grocers, as the party challenging the Ordinance, to negate any such rational basis or relationship to a conceivable legitimate purpose. (*FCC v. Beach Communications, Inc., at p. 315*; *Hernandez, at p. 299*.)

B. Application

Subject to a union's and an employer's ability to opt out through collective bargaining (L.A. Mun. Code, § 181.06), the Ordinance applies to retail stores over 15,000 square feet in size that primarily sell household **[****59]** food for offsite consumption—in other words, large grocery stores (*id.*, § 181.01, subd. E; see also *id.*, § 12.24, subd. U14(a) [excluding membership stores]). Grocers takes issue with four distinctions implicit in this scope: (1) between nonmember grocery stores and membership stores; (2) between grocery stores more than and less than 15,000 square feet in size; (3) between grocery stores and restaurants; and (4) between grocery stores where a unionized workforce has agreed to different terms and those where it has not.

CA(22) (22) In evaluating the City's determination of the scope of the Ordinance, we are mindful that **HN26** the decision how broadly and in what manner to attack perceived problems is for the elected branches in the first instance. Past decisions by both this court and the United States Supreme Court “establish that, under the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more **[*210]** crucial or imperative.” (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 644, citing **[****60]** *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 371 [204 Cal. Rptr. 671, 683 P.2d 670], and *Williamson v. Lee Optical Co.* (1955) 348 U.S. 483, 489 [99 L. Ed. 563, 75 S. Ct. 461].) “Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation.] **[***750]** Or the reform may take one step at a time, addressing itself to the **[**1039]** phase of the problem which seems most acute to the legislative mind.” (*Williamson*, at p. 489.) Such line drawing is the province of legislative bodies,

and “the precise coordinates of the resulting legislative judgment [are] virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.” (*FCC v. Beach Communications, Inc.*, *supra*, 508 U.S. at p. 316.)

Here, the City elected to impose temporary job retention requirements on large grocery stores, but not on, e.g., restaurants or membership clubs that also sell food. (See L.A. Mun. Code, §§ 12.24, subd. U14(a), 181.01, subd. E.) The City believed supermarkets function as community anchors, a judgment it is not our role to question. (See *id.*, § 181.00 [“Supermarkets and other grocery retailers are the main points of distribution for food and daily necessities **[****61]** for the residents of Los Angeles and are essential to the vitality of any community.”].) Given their perceived significance, the City rationally could conclude it was more important to ensure stability and continuity at such entities than at restaurants or members-only stores that arguably do not serve a similarly crucial function. The trial court correctly rejected Grocers's equal protection argument on these grounds.

CA(23) (23) As to the constitutionality of the Ordinance's size distinction, the Ordinance on its face has as one of its purposes the promotion of job security and the minimization of community disruption that arises from job losses and changes. (See L.A. Mun. Code, § 181.00 [“Through this ordinance, the City seeks to sustain the stability of a workforce that forms the cornerstones of communities in Los Angeles.”].) The City rationally could conclude both that disruptions at larger stores, involving larger workforces, would have a larger impact on the community, and that larger stores would be more readily positioned to absorb any short-term burdens the Ordinance's requirements might impose on employers. (See *Garcia v. Four Points Sheraton LAX*, *supra*, 188 Cal.App.4th at p. 384 [upholding **[****62]** size classification as rationally related to a business's ability to bear regulatory burdens].) **HN27** Both Congress and the state Legislature frequently, and

constitutionally, have incorporated exceptions for smaller employers when regulating the employment relationship. (See, e.g., [42 U.S.C. § 2000e\(b\)](#) [tit. VII small-employer exception]; *Gov. Code*, § 12926, *subd. (d)* [Cal. Fair Employment and Housing Act small-employer exception].) So long as we can identify a rational relationship between a classification and at least one legitimate purpose of an enactment, the classification will pass constitutional muster. (See [Hernandez v. City of \[**211\] Hanford, supra, 41 Cal.4th at pp. 299–302](#) [rejecting an equal protection challenge to a store size classification because size was rationally related to community impact].)

[CA\(24\)](#) (24) Finally, concerning the Ordinance's opt-out provision (L.A. Mun. Code, § 181.06), the United States Supreme Court has made clear that [HN28](#) affording employers and unions the right to opt out and negotiate their own terms increases the likelihood a given regulation will be found not preempted by the NLRA. ([Fort Halifax, supra, 482 U.S. at p. 22.](#)) An opt-out provision thus is rationally related [****63] to the desire to enact valid (nonpreempted) legislation, as well as to the legitimate goal of “balanc[ing] the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions [***751] of employment.” (*Ibid.*; see also [Viceroy Gold Corp. v. Aubry \(9th Cir. 1996\) 75 F.3d 482, 490–491](#) [upholding labor protections subject to a collective bargaining opt-out provision because the Legislature rationally could have believed unionized workers are competent to negotiate their own protections]; [Garcia v. Four Points Sheraton LAX, supra, 188 Cal.App.4th at pp. 385–386](#) [applying Viceroy's rationale to uphold an L.A. Mun. Code collective bargaining opt-out provision identical to the one at issue here].)

DISPOSITION

For the foregoing reasons, we reverse the Court of Appeal's judgment and remand this case for further proceedings consistent with this opinion.

Cantil-Sakauye, C. J., Kennard, J., Baxter, J., Chin, J., and Corrigan, J., concurred.

Dissent by: Grimes [1040]**

Dissent

GRIMES, J.,* Dissenting.—I respectfully dissent, finding City of Los Angeles Ordinance No. 177231 is preempted by the National Labor Relations Act (NLRA) ([29 U.S.C. § 151 et seq.](#)).

In my view, the ordinance intrudes [****64] on the collective bargaining process in an extraordinary and fundamental way, at its very source. It determines the individual workers who will comprise a new employer's workforce for the first 90 days of its operation. During those 90 days, the new employer must provide employment to a group of workers it did not choose. In addition, the new employer must provide to this mandated workforce specified benefits (such as termination for cause only) for which the workers did not bargain and to which the new employer did not agree. I recognize that governments, [*212] including states and municipalities, have the authority to impose minimum employment standards of general application—including restrictions on hiring and firing. Consequently, an employer has no absolute right to choose its employees by, for example, discriminating on the basis of some group characteristic or union membership. But federal labor law does not permit a government mandate that an employer hire either a particular worker or a specific group of workers based on a group characteristic (or on anything else). That fundamental choice is left under federal law to the employer and employee, that is, to the free play of [****65] economic forces. This has been clear since the Supreme Court first upheld the constitutionality of the NLRA in [Labor Board v.](#)

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[*Jones & Laughlin* \(1937\) 301 U.S. 1, 45 \[81 L.Ed. 893, 57 S.Ct. 615\]](#) (*Jones & Laughlin*), when the high court said that the NLRA “does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.”

The point—that the NLRA does not interfere with an employer's selection of its workforce—has been reiterated many times by the high court: in [*NLRB v. Burns Security Services* \(1972\) 406 U.S. 272, 294 \[32 L.Ed.2d 61, 92 S.Ct. 1571\]](#) (*Burns*) (an employer “is ordinarily free to set initial terms on which it will hire the employees of a predecessor”); in [*Howard Johnson Co. v. Hotel Employees* \(1974\) 417 U.S. 249, 262 \[41 L.Ed.2d 46, 94 S.Ct. 2236\]](#) (*Howard Johnson*) (“Clearly, *Burns* establishes that [the new employer] had the right not to hire any of the former [employer's] employees, if it so desired”); and in [*Fall River Dyeing & Finishing Corp. v. NLRB* \(1987\) 482 U.S. 27, 40 \[***752\] \[96 L. Ed. 2d 22, 107 S. Ct. 2225\]](#) (*Fall River Dyeing*) (“[w]e further explained [in *Burns*] that the successor is under no obligation to hire the employees of its predecessor”).

The majority says these high court precedents establish only a principle of federal common [****66] law, and have no bearing on the authority of state and local governments to require the hiring for 90 days of a particular bloc of workers. With this I cannot agree. Under the preemption doctrine established in [*Machinists v. Wisconsin Emp. Rel. Comm'n* \(1976\) 427 U.S. 132 \[49 L.Ed.2d 396, 96 S.Ct. 2548\]](#) (*Machinists*) and its progeny, the salient inquiry is “whether Congress intended that the conduct involved be unregulated because left ‘to be controlled by the free play of economic forces.’ ” (*Id. at p. 140.*) The implicit right of the employer to select its employees in the first instance—recognized by the high court since 1937—is, it seems to me, as fundamental to the structure of the NLRA as is the correlative express right of those selected employees to organize to secure the redress of grievances and to promote agreements with the employer on working

conditions. (See [*Jones & Laughlin, supra*, 301 U.S. at pp. 43–44.](#)) State or municipal regulation that directly interferes with that right is preempted by the NLRA under *Machinists* doctrine as surely as is regulation that is directed at the collective bargaining process itself. And, even if we ignore the employer's [*213] right to select its workforce as a fundamental [****67] premise of the NLRA, the impact of the ordinance on the determination whether the [**1041] new employer is a successor—and thus bound to bargain with the union selected by the predecessor's employees—likewise is an unpermitted intrusion on the collective bargaining process.

1. The ordinance

The City of Los Angeles (City) adopted the Grocery Worker Retention Ordinance in 2005. (L.A. Ord. No. 177231, adding ch. XVIII, § 181.00 et [****68] seq. to the L.A. Mun. Code.) The ordinance is described fully in the majority opinion. In brief, it applies to grocery stores exceeding a specified size that undergo a change of ownership. It gives nonmanagerial employees of the former owner who have worked for that owner for at least six months the right to demand employment by the new owner: the new employer must select its employees from among that group, by seniority, and must retain them for 90 days, discharging them only for cause. After 90 days, the new employer must prepare a written performance evaluation for each such employee and consider offering continued employment to those with satisfactory evaluations. As the majority notes, other municipalities in California and elsewhere have adopted similar ordinances.

2. The NLRA

The NLRA “is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. As such it is of course the law of the land which no state law can modify or repeal.” ([*Nash v. Florida Industrial Comm'n.* \(1967\) 389 U.S. 235, 238 \[19 L. Ed. 2d 438, 88 S. Ct. 362\]](#).) The NLRA declares the policy

of the United States: “to eliminate ... obstructions to the free flow of commerce ... by [****69] encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” (29 U.S.C. § 151.)

[***753] The need for the NLRA flowed from a free market economy in which equality of bargaining power did not exist. Employers were (and are) “organized in the corporate or other forms of ownership association” and employees “[did] not possess full freedom of association or actual liberty of contract” (29 U.S.C. § 151.) Congress found it unnecessary to say in the NLRA that the composition of an employer's workforce is a matter of the employer's choice, but in our country, hiring has always occurred on an individual basis, one employee at a time: the employer advertises, prospective workers apply, and the employer selects.

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The Supreme Court recognized this underlying premise of the NLRA almost immediately, when it said in 1937 that the NLRA “does not prevent the employer ‘from refusing to make a collective contract and hiring individuals on whatever [****70] terms’ the employer ‘may by unilateral action determine.’ ” (Jones & Laughlin, supra, 301 U.S. at p. 45.) The NLRA prohibits specified unfair labor practices by employers and unions (29 U.S.C. § 158) and empowers the National Labor Relations Board (NLRB) to prevent anyone from engaging in those unfair labor practices. (29 U.S.C. § 160.) The point of the NLRA was to “restor[e] equality of bargaining power between employers and employees” (29 U.S.C. § 151) by requiring an employer to bargain with “representatives of [the workers'] own choosing” (ibid.)—and *not* to “interfere with the normal exercise of the right of the employer to select its employees or to discharge

them.” (Jones & Laughlin, supra, 301 U.S. at p. 45.)

Thus, the very foundation of the NLRA lies in a workplace composed of individuals selected by the employer. The NLRA protects the rights of those individuals whom the employer has chosen to hire, to associate with each other, to organize themselves, and to designate representatives of *their* choosing to negotiate the terms and conditions of their employment. (29 U.S.C. § 151.) If the workers vote to select a union to represent them, the employer must negotiate with the [****71] union in a good faith effort to reach agreement on wages, hours and other terms of employment. The NLRA does not mandate that the parties reach agreement, only that they try to agree. If they cannot agree, the [**1042] NLRA establishes the rules of the battleground, protecting certain pressure tactics and prohibiting others, to keep the process fair.

The NLRA specifies the single circumstance under which the NLRB may interfere with the employer's selection of its workers: the employer cannot hire or fire based on union membership. The NLRA specifies that an employer commits an unfair labor practice “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization” (29 U.S.C. § 158 (a)(3).) Jones & Laughlin, after stating that the NLRA does not interfere with the employer's right to select or discharge its employees, tells us that “[t]he employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of [****72] discharge when that right is exercised for other reasons than such intimidation and coercion.” (Jones & Laughlin, supra, 301 U.S. at pp. 45–46.) Twelve years after deciding Jones & Laughlin, the high court announced the corollary principle that states may prohibit discrimination in hiring and

firing against *nonunion* workers. ([*Lincoln Union v. Northwestern Co.* \(1949\) 335 U.S. 525, 537 \[***754\] \[93 L. Ed. 212, 69 S. Ct. \[*215\] 251\]](#) [“Just as we have held that the *due process clause* erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers.”].)

The majority is mistaken in saying I have expressed here the view that the NLRA was founded on an employer's absolute right to select its employees. Plainly, the NLRA was not founded on an employer's liberty to discriminate against either union or nonunion members because they are such. In my view, regulations prohibiting unlawful discrimination and imposing minimum employment standards in no way undermine the foundation of the NLRA that each workplace may be composed of individuals selected by the employer for reasons other than discrimination.

The NLRA does not transform the fundamentally individual nature [****73] of the employment relationship. Its focus is on the right of individual workers to band together, if they so choose, and to select representatives of their own choosing, to bargain with the employer who has hired them. This is the base upon which the NLRA is constructed and from which all of its provisions flow. Just as *Jones & Laughlin* made it clear that Congress did not intend in the NLRA to change the fundamental, individual nature of the employer-employee relationship, including “the right of the employer to select its employees” ([*Jones & Laughlin, supra*, 301 U.S. at p. 45](#)), I conclude it necessarily follows that Congress did not intend to allow any other governmental entity to do so either. To permit a city to mandate that a new employer hire the predecessor's employees as a group violates the fundamental structure of the NLRA and necessarily hands weapons of economic power to a group the employer did not choose to hire. It is preempted under the doctrine established in *Machinists* and its progeny, to which I now turn.

3. *Machinists* preemption

Machinists examined the history of labor law preemption under the NLRA and identified two lines of preemption analysis. The first is based [****74] on the primary jurisdiction of the NLRB to regulate conduct that is a protected right under section 7 ([*29 U.S.C. § 157*](#)) or conduct that is an unfair labor practice in violation of section 8 of the NLRA ([*29 U.S.C. § 158*](#)). State regulation of conduct that is protected under section 7 or an unfair labor practice under section 8 is preempted under what is now called the *Garmon* preemption. ([*San Diego Unions v. Garmon* \(1959\) 359 U.S. 236, 244 \[3 L. Ed. 2d 775, 79 S. Ct. 773\]](#).) Because the City's ordinance does not “ ‘regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits’ ” ([*Chamber of Commerce of United States v. Brown* \(2008\) 554 U.S. 60, 65 \[171 L. Ed. 2d 264, 128 S. Ct. 2408\]](#) (*Brown*)) under sections 7 and 8, there is no *Garmon* preemption.

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[**1043] But *Machinists* recognized “a second line of pre-emption analysis ... developed in cases focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left ‘to be controlled by the free play of economic forces.’ ” ([*Machinists, supra*, 427 U.S. at p. 140](#).) As *Brown* put it, *Machinists* preemption forbids both the NLRB and states from regulating conduct Congress intended be unregulated: “*Machinists* pre-emption is based on the premise that ‘ “Congress struck [****75] a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.” ’ ” ([*Brown, supra*, 554 U.S. at p. 65](#); see [*id. at p. 66*](#) [***755] [holding statutes preempted under *Machinists* “because they regulate within ‘a zone protected and reserved for market freedom’ ”].)

Under *Machinists*, “congressional intent to shield a zone of activity from regulation is usually found only ‘implicit[ly] in the structure of the Act,’ [citation], drawing on the notion that ‘ “[w]hat Congress left unregulated is as important as the regulations that it imposed,” ’ [citation].” ([*Brown,*](#)

[supra](#), 554 U.S. at p. 68.) This is just such a case. An employer's right to select the members of the workforce with whose representatives it will be required to bargain, if they so choose, is the foundation on which the NLRA was built, unstated but implicit in its structure. This is a paradigm of the principle that what Congress left unregulated is fully as important as the regulations it imposed. In my view, this alone is reason enough to conclude the City's ordinance, which stands in direct contradiction to one of the building blocks of the NLRA, cannot stand.

Machinists arose [****76] from the collective bargaining process itself and the pressure tactics employed by both sides during that process. In *Machinists*, the court found the state could not enjoin a union and its members from refusing to work overtime as part of a union effort to put economic pressure on the employer during contract negotiations. ([Machinists, supra](#), 427 U.S. at p. 133.) The court observed that many of its past decisions concerning conduct “left by Congress to the free play of economic forces” ([id. at p. 147](#)) involved union and employee activities, but that “self-help is of course also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable.” (*Ibid.*) Thus, “ ‘[r]esort to economic weapons’ ” was the right of both employer and employee, “and the State may not prohibit the use of such weapons or ‘add to an employer's federal legal obligations in collective bargaining’ any more than in the case of employees.” (*Ibid.*) So, “[w]hether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether ‘the exercise of plenary state authority to curtail or entirely prohibit self-help [****77] would frustrate effective implementation of the Act's processes.’ ” ([Id. at pp. 147–148](#).) Congress meant that these activities “were not to be regulable by States any more than by the NLRB” ([id. at \[*217\] p. 149](#)), and sanctioning state regulation of economic pressure “deemed by the federal Act ‘desirabl[y] ... left for the free play of contending economic

forces’ ” amounts to “ ‘denying one party to an economic contest a weapon that Congress meant him to have available.’ ” ([Id. at p. 150](#).) *Machinists* concluded that such regulation by the state was “impermissible because it ‘ “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” ’ ” ([Id. at p. 151](#).)

The majority concludes from *Machinists* and subsequent cases that the areas Congress intended to leave free of local regulation are confined to those relating to the *process* by which an agreement is reached on the terms of employment and not on the *substance* of those terms. Certainly, it is true that the NLRA is not concerned with the substance of the parties' agreement, and cases since *Machinists* have made it clear that state or federal regulations establishing minimum terms of employment that protect [****78] union and nonunion workers alike “ ‘neither encourage[] nor discourage[] the collective-bargaining processes that are the subject of the NLRA’ ” and are not preempted. ([Fort \[**1044\] Halifax Packing Co. v. Coyne \(1987\) 482 U.S. 1, 21, 23 \[96 L. Ed. 2d 1, \[****756\] 107 S. Ct. 2211\]](#) (*Fort Halifax*) [Me. statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing was not preempted; “establishment of a minimum labor standard does not impermissibly intrude upon the collective-bargaining process”]; see also [Metropolitan Life Ins. Co. v. Massachusetts \(1985\) 471 U.S. 724, 757, 758 \[85 L. Ed. 2d 728, 105 S. Ct. 2380\]](#) (*Metropolitan Life*) [“[w]hen a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act”; state law requiring that minimum mental health benefits be provided under certain insurance policies was not preempted].)

But in my view, the ordinance profoundly interferes with the *collective bargaining process*. We are not here concerned with local regulation “establishing minimum terms of employment.” ([Metropolitan](#)

[Life, supra, 471 U.S. at p. 754.](#)) Nor are we concerned with state regulations “prescribing [****79] the minimum wages, maximum hours, and standard conditions of employment” ([Industrial Welfare Com. v. Superior Court \(1980\) 27 Cal.3d 690, 698 \[166 Cal. Rptr. 331, 613 P.2d 579\]](#).) The ordinance does not merely impose a term or condition of employment, in the sense of requiring mental health insurance coverage as in *Metropolitan Life*, or a severance payment in the event of a plant closing as in *Fort Halifax*, or minimum wages and maximum hours as in *Industrial Welfare Com.*—benefits that apply across the board to every individual employee among the employer's selected workforce.

We are concerned with a local regulation that *creates employment* by dictating which individuals the new grocery owner must hire, and then [*218] establishes minimum standards for those workers. It is the initial requirement to hire, not the minimum standards applied to those hired, that causes the ordinance to be preempted under *Machinists*. The requirement to hire, of course, is not a part of the collective bargaining process at all. But it necessarily subverts that process, because it determines the members of the workforce who will decide the matters of “self-organization and collective bargaining” ([Metropolitan Life, supra, 471 U.S. at p. 751](#)) [****80] that are concededly the exclusive province of the NLRA.

As the majority points out, the ordinance does not, on its face, regulate organizing or bargaining. But the ordinance does indeed regulate the economic contest, in at least two basic ways. (See [Machinists, supra, 427 U.S. at p. 150](#) [state regulation of economic pressure, deemed by the NLRA to be left to the free play of contending economic forces, is “ ‘denying one party to an economic contest a weapon that Congress meant him to have available’ ”].)

First, the fact that the employer's choice of employees who will comprise its workforce necessarily precedes any “ ‘ union organization,

collective bargaining, and labor disputes” ’ ” ([Brown, supra, 554 U.S. at p. 65](#)) does not reduce the significance of that choice to the regulatory scheme Congress fashioned in the NLRA, which was created to provide “a framework for self-organization and collective bargaining.” ([Metropolitan Life, supra, 471 U.S. at p. 751.](#)) The people who comprise the workforce are an integral part of that framework, and the employer's right to select its employees, one by one, was left undisturbed in the NLRA, as *Jones & Laughlin* explicitly tells us. So, I cannot accept [****81] the notion that states are left free to do what the [***757] NLRA does not do simply because the conduct in question—hiring the employees who will launch the new employer's grand opening—precedes the collective bargaining process.

Second, while the City's ordinance is not expressly aimed at the collective bargaining process, I think it is fair to say that the ordinance itself is an economic weapon—not a weapon wielded by either of the parties to a labor dispute, but one superimposed by the City that necessarily “ ‘upset[s] the balance that Congress has struck between labor and management in the collective-bargaining relationship.’ ” ([Metropolitan Life, supra, 471 U.S. at p. 751.](#)) An ordinance [**1045] that dictates whom a new employer must hire denies that new employer the ability to choose the employees it deems most suited to ensuring the success of its enterprise, and does so during the critical first 90 days of its operation. This is a matter of considerable moment to new owners with their own management styles, the implementation of which depends on selecting employees one by one.

The trial testimony demonstrates this point, showing that the first 90 days of a new grocery owner's operation are [****82] the most important to establish the [*219] new owner's image and to “deliver” to new customers. One witness said, “The supermarket business is a very competitive business, and if you don't deliver to the customers in the first 90 days, you've probably lost them.” Another witness testified it was critical to his

company, when acquiring a new store, to bring in experienced personnel from the grocer's other stores who understand the company's business philosophy. The company tries to hire from the community (and if a predecessor's employee were the right fit for the company, it would hire him or her to work in one of its other stores), but the company had significant concerns about retaining a bloc of employees without the option "to determine whether they would fit, have the work ethic, the work history that would fit our organizational style as a collective group"; "we would have more difficult[y] running that store from day one in the style and fashion that we require." One witness indicated his company's need to "hire our own crew" because the company wanted bilingual employees to fully serve the shoppers to whom it catered. In short, new owners of previously faltering grocery stores [****83] have sound reasons for the "normal exercise" of their right under federal law to select their own workforces. (*Jones & Laughlin, supra*, 301 U.S. at p. 45.) The ordinance, stripping away the new employer's choices in hiring during the critical first 90 days, operates as an economic weapon and directly affects the economic activities of the employer. To say that it is not a form of economic pressure that alters the collective bargaining relationship is, in my view, fundamentally erroneous.

The economic pressure is not imposed by the employees as union members during collective bargaining, but it is government imposed on their behalf during a time when they are free to engage in the process of self-organization governed by the NLRA. The ordinance mandates which individuals are to comprise the workforce that will decide how or whether to bargain with the employer. To deny that an economic weapon is in play between contending economic forces as a result of the ordinance is to ignore the fundamental relationship between labor and management upon which the NLRA is constructed. The requirement to hire a specific bloc of employees, it seems to me, necessarily "has altered the economic balance [****84] between labor and management." (*New*

York Tel. Co. v. New York Labor Dept. (1979) 440 U.S. 519, 532 [59 [***758] L.Ed.2d 553, 99 S.Ct. 1328]; see also *Burns, supra*, 406 U.S. at p. 288 ["The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities."].) Workforce selection is perforce one of the most basic "economic power realities."

The majority's view is that the ordinance is of a piece with other state and local regulations broadly regulating hiring and firing, and that it does not regulate bargaining or speak directly to the process of organizing; instead the ordinance temporarily preserves the status quo, whatever that [*220] may be (whether the workforce is unionized or not). (Maj. opn., ante, at pp. 199–200.) But the flaw in the City's ordinance lies in the mandated selection of an employer's workforce in the first instance, a sui generis form of regulation. And, in my view, the temporary nature of the ordinance is entirely irrelevant; either Congress intended that the employer's right to select its workforce be unregulated, or it did not; I do not see how there can be any [****85] middle ground on congressional intent. (See *Metropolitan Life, supra*, 471 U.S. at p. 749 [the "second [*Machinists*] pre-emption doctrine protects against state interference with policies implicated by the structure of the Act itself, by pre-empting [**1046] state law ... concerning conduct that Congress intended to be unregulated"; while "[a]n appreciation of the State's interest in regulating a certain kind of conduct may still be relevant in determining whether Congress in fact intended the conduct to be unregulated" (*id. at pp. 749–750, fn. 27*), such preemption "does not involve in the first instance a balancing of state and federal interests, ... but an analysis of the structure of the federal labor law to determine whether certain conduct was meant to be unregulated" (*ibid.*, italics added & citation omitted)].)

In the end, the majority frames the question as whether there is evidence that Congress affirmatively intended to leave the subject of

employee “retention” during ownership transitions unregulated by states and municipalities, and finds the NLRA “resoundingly silent.” (Maj. opn., *ante*, at p. 198.) In my view, this misstates the question, which is whether Congress intended to leave unregulated the [****86] employer's initial selection—not the retention—of its workforce. And the NLRA is indeed silent on both questions; there is nothing in the text of the NLRA about hiring or firing (except to prohibit doing either based on union affiliation). But the silence is hardly surprising; the high court has told us that congressional intent to shield a zone of activity from regulation in *most* cases is found “only ‘implicit[ly] in the structure of the Act’ ” (*Brown, supra*, 554 U.S. at p. 68), not in its text. The NLRA was founded on, and everything in it assumes, the existence of a freely formed employer-employee relationship. (*Jones & Laughlin, supra*, 301 U.S. at p. 45.) It would be anomalous to conclude that, despite this foundation, Congress did not intend to prevent states and localities from doing the very thing that it declined to do: interfere with an employer's selection of the people who will conduct its business.

For the foregoing reasons alone, I would find the City's ordinance preempted. But there is more, because the ordinance *does* have a direct impact on the collective bargaining *process*. The ordinance's requirement that the new owner hire the predecessor's workforce necessarily [****87] influences whether or not the new employer will be considered a successor to the former employer, and thus bound to bargain with the [***759] union selected by the predecessor's employees—a direct intrusion on the collective bargaining process.

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4. The successorship doctrine

If a new employer is deemed a successor of the old employer and hires a majority of its employees from the predecessor's workforce, the new employer has a duty to recognize and bargain with the union representing the predecessor's employees.

This “successorship doctrine” developed through several high court cases. The first of these, *John Wiley & Sons v. Livingston* (1964) 376 U.S. 543 [11 L. Ed. 2d 898, 84 S. Ct. 909] (*John Wiley*), involved the disappearance by merger of a corporate employer and the wholesale transfer of its employees to the company into which the corporate employer merged. The union representing the predecessor's employees asserted that the new employer (*Wiley*) was obligated to recognize certain rights of the employees under its collective bargaining agreement with *Wiley's* predecessor; *Wiley* asserted the merger terminated the collective bargaining agreement for all purposes; and the union sought to compel arbitration. (*Id. at pp. 545–546.*)

The [****88] high court first observed that “[f]ederal law, fashioned ‘from the policy of our national labor laws,’ controls.” (*John Wiley, supra*, 376 U.S. at p. 548.) It then held that the disappearance by merger of a corporate employer that had entered into a collective bargaining agreement did not automatically terminate all rights of the employees covered by the agreement, and that, “in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.” (*Ibid.*) The court elaborated: “The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the [**1047] employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by ‘the relative strength ... of the contending forces,’ [citation].” (*Id. at p. 549.*)

The court found *Wiley's* obligation to arbitrate the dispute [****89] “in the [predecessor's] contract construed in the context of a national labor policy.” (*John Wiley, supra*, 376 U.S. at pp. 550–551; see

[id. at p. 550](#) [“the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed”].) But the court cautioned: “We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. ... [T]here may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not [*222] reasonably to be found in the particular bargaining agreement and the acts of the parties involved.” ([Id. at p. 551.](#)) In *John Wiley*, the required “similarity and continuity of operation across the change in ownership [was] adequately evidenced by the wholesale transfer of [the predecessor’s] employees to the Wiley plant” (*Ibid.*)

Next, the high court decided [Burns, supra, 406 U.S. 272](#), holding that an employer that hired a majority of its predecessor’s employees had an obligation to bargain with the union that [****90] represented [***760] those employees, but could not be required to observe the terms of the union’s collective bargaining agreement with the predecessor. ([Id. at pp. 278, 286–287.](#)) In *Burns* there was no relationship between the new employer and its predecessor. The new employer replaced the predecessor when it bid for and obtained a service contract to provide plant protection services. ([Id. at pp. 274–275.](#)) The new employer’s obligation to bargain with the union “stemmed from its hiring of [the former employer’s] employees and from the recent election and Board certification.” ([Id. at pp. 278–279.](#)) “[I]t would be different if Burns had not hired employees already represented by a union certified as a bargaining agent” ([Id. at p. 280.](#))

The *Burns* court noted that the NLRB “has never held that the National Labor Relations Act itself requires that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible

that such an obligation might be assumed by the employer.” ([Burns, supra, 406 U.S. at p. 280, fn. 5.](#)) But while the new employer had a duty to bargain, it could [****91] not be required to honor the terms of the previous employer’s collective bargaining agreement. “The source of its duty to bargain with the union is not the collective-bargaining contract but the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year. Nothing in its actions, however, indicated that Burns was assuming the obligations of the contract, and ‘allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.’ ” ([Id. at p. 287.](#)) And, *Burns* said, a successor employer “is ordinarily free to set initial terms on which it will hire the employees of a predecessor” ([Id. at p. 294.](#))

Then came [Howard Johnson, supra, 417 U.S. 249](#), where the court held that the new employer, who hired only a small fraction of the predecessors’ employees, could *not* be compelled to arbitrate, under its predecessors’ collective bargaining agreements, the extent of its obligations under those agreements [****92] to the predecessors’ employees. ([Id. at pp. 250, 264.](#)) In *Howard Johnson*, the new employer leased restaurant and motor lodge premises from the old employer, and purchased all the personal property used in their operations. [**1048] ([Id. at p. 251.](#)) The seller notified its employees their employment would terminate when operations were transferred. Upon the sale, the new employer began operations with 45 employees, only nine of whom had been employed by the seller, and the union sued, seeking arbitration, which the trial court granted under *John Wiley*. ([Howard Johnson, at pp. 252–253.](#))

The high court held that *Burns* principles applied. The court acknowledged some inconsistencies in reasoning between *John Wiley* and *Burns*, but

found it unnecessary to decide whether an irreconcilable conflict existed, because the facts in *John Wiley* were entirely different from those before the court in *Howard Johnson*. ([Howard Johnson, supra, 417 U.S. at pp. 255–256.](#)) In addition to the fact (among others) that the seller remained a viable entity after the asset sale, “[e]ven more important, in *Wiley* the surviving corporation hired *all* of the employees of the disappearing corporation,” making [***761] no substantial changes [****93] in the operation of the business. ([Howard Johnson, at p. 258.](#)) “It was on this basis that the Court in *Wiley* found that there was the ‘substantial continuity of identity in the business enterprise,’ [citation], which it held necessary before the successor employer could be compelled to arbitrate.” ([Howard Johnson, at p. 259.](#))

By contrast, the new employer in *Howard Johnson* “decided to select and hire its own independent work force” ([Howard Johnson, supra, 417 U.S. at p. 259.](#)) The union's position was that the new employer was bound by the seller's collective bargaining agreement to hire all of the seller's former employees. ([Id. at p. 260.](#)) This position, the high court said, was “completely at odds with the basic principles this Court elaborated in *Burns*.” ([Id. at p. 261.](#)) The court said: “Clearly, *Burns* establishes that *Howard Johnson* had the right not to hire any of the former [employer's] employees, if it so desired.” ([Id. at p. 262.](#)) The continuity of identity in the business enterprise that *John Wiley* required “necessarily includes, we think, a substantial continuity in the identity of the work force across the change in ownership.” ([Howard Johnson, at p. 263.](#))

Moreover: [****94] “This interpretation of *Wiley* is consistent also with the Court's concern with affording protection to those employees who are in fact retained in ‘[t]he transition from one corporate organization to another’ from sudden changes in the terms and conditions of their employment At the same time, it recognizes that the employees of the terminating employer have no legal right to continued employment with the new employer

This holding is compelled, in our view, if the protection afforded employee interests in a change of ownership by *Wiley* is to be reconciled with the new employer's right to operate the enterprise with his own independent labor force.” ([Howard Johnson, supra, 417 U.S. at p. 264,](#) italics added.)

[*224]

Finally, there was *Fall River Dyeing*, where the court held that a successor's [***762] obligation to bargain was not limited to a situation where (as in *Burns*) the union had recently been certified; instead, where a union has a rebuttable presumption of majority status, that status continues through a change in employers if “the new employer is in fact a successor of the old employer *and* the majority of its employees were employed by its predecessor.” ([Fall River Dyeing, supra, 482 U.S. at p. 41,](#) [****95] italics added.) *Fall River Dyeing* repeated the principles established in *Burns*: “We further explained that the successor is under no obligation to hire the employees of its predecessor If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor.” ([Fall River Dyeing, at pp. 40–41,](#) citations omitted.) Thus “[t]he ‘triggering’ fact for the bargaining obligation was this composition of the successor's work force.” ([Id. at p. 46;](#) see [id. at p. 47](#) [adopting NLRB rule that the determination of the composition of [**1049] the successor's workforce is to be made when a transitioning successor has employed a “ ‘substantial and representative complement’ ” of its workforce; “[i]f, at this particular moment, a majority of the successor's employees had been employed by its predecessor, then the successor has an obligation to bargain with the union that represented these employees”].)

The majority sees nothing in these successorship [****96] cases (which presented no preemption

issue) to suggest that Congress intended in the NLRA to prevent states and localities from interfering with the employer's right to choose its employees. I cannot agree. From *John Wiley* to *Fall River Dyeing*, these cases show that the employer's free selection of employees has always been a fundamental part of national labor policy. *John Wiley* and *Howard Johnson* could hardly have been more clear: *John Wiley* tells us that the “*objectives of national labor policy*, reflected in established principles of federal law, *require that the rightful prerogative of owners* independently to rearrange their businesses” be balanced “by some protection to the employees from a sudden change in the employment relationship” (*John Wiley, supra*, 376 U.S. at p. 549, italics added), and *Howard Johnson* tells us that the high court in *John Wiley* was “concern[ed] with affording protection to those employees who are in fact retained in ‘[t]he transition from one corporate organization to another’ from sudden changes in the terms and conditions of their employment” (*Howard Johnson, supra*, 417 U.S. at p. 264, italics added.)

In short, it seems to me incontrovertible that [****97] the “objectives of national labor policy,” as stated by the high court, have always included the employer's prerogative to select its workforce (subject to the prohibition on discrimination on the basis of union membership). As *Howard Johnson* put it, “the [*225] employees of the terminating employer have no legal right to continued employment with the new employer” (*Howard Johnson, supra*, 417 U.S. at p. 264.) Consequently, states or cities are not free to regulate to the contrary. (See *John Wiley, supra*, 376 U.S. at p. 548 [“Federal law, fashioned ‘from the policy of our national labor laws,’ controls.”]; cf. *Howard Johnson, supra*, 417 U.S. at p. 255 [observing that federal common law regarding enforcement of collective-bargaining agreements “must be ‘fashion[ed] from the policy of our national labor laws’ ”].)

The City conceded in oral argument that the ordinance would be preempted by the NLRA if it

expressly declared the new owner to be a successor within the meaning of the successorship doctrine, but the City asserted the express 90-day limitation avoids preemption. If the ordinance were unlimited in duration, I think there would be little doubt, under the terms of the ordinance [****98] itself, that it would dictate the successorship outcome. The new employer—defined in the ordinance as the person “that owns, controls, and/or operates the Grocery Establishment” (L.A. Mun. Code, § 181.01, subd. I) after the transfer of “all or substantially all of the assets or a controlling interest” (*id.*, § 181.01, subd. B) of the old employer—would necessarily be a successor, and would necessarily be bound to bargain with the union representing the workers that the new employer has been required (indefinitely under this scenario) to retain. This scenario would present an obvious intrusion into the collective bargaining process, requiring the employer to bargain with a workforce it did not choose.¹

[***763] [**1050] In my view, the ordinance seeks to do indirectly that which the City acknowledges it cannot do directly, because the practical effect of the ordinance is to visit upon the new owner all the obligations of a successor under

¹ In *Washington Service Contractors v. Dist. of Columbia* (D.C. Cir. 1995) 311 U.S. App.D.C. 407 [54 F.3d 811, 816], the court, upholding a retention ordinance of unlimited duration against a preemption claim, stated that this argument contains a “logical flaw,” because the NLRB may decide *not* to require the new employer to bargain with the union in circumstances where a statute or ordinance requires the employer to retain its predecessor's employees. According to the court, if the NLRB decides not to require bargaining, [****99] then the problem disappears and there is no intrusion in the bargaining process. And if the NLRB does require bargaining, that would mean that in the NLRB's judgment, the ordinance is congruent with the aims of the NLRA. (*Washington Service Contractors*, 54 F.3d at pp. 816–817.) In my view, both scenarios miss the mark. The first (not requiring bargaining) would intrude on the employees' rights to representatives of their own choosing, and the second presumes that the NLRB's judgment would presage that of the high court, a conclusion I find to be unwarranted. In either case, the ordinance has an impact on, and “upset[s] the balance that Congress has struck between labor and management in the collective-bargaining relationship.” (*Metropolitan Life, supra*, 471 U.S. at p. 751.)

the successorship doctrine. The majority, however, concludes, based on existing NLRB decisions by the agency's administrative law judges (ALJ's) and a federal district court decision, that the new employer [****100] will be obligated [*226] to bargain “only if the successor employer retains its predecessor's employees beyond the mandatory employment period” (*Rhode Island Hospitality Assn. v. City of Providence (D.R.I. 2011) 775 F.Supp.2d 416, 432 (Rhode Island Hospitality).*)² (Maj. opn., ante, at pp. 204–205.) In other words, because the ordinance does not in so many words require the employer to maintain the predecessor's workforce after 90 days, the ordinance does not dictate the outcome of the successorship inquiry (maj. opn., ante, at p. 205) (and therefore does not intrude on the processes of organization, collective bargaining, or labor disputes).

I cannot agree with this analysis.

First, it is entirely uncertain that the obligation to bargain will not arise unless the new employer voluntarily retains the workforce after the 90 days. As the *Rhode Island Hospitality* court acknowledged, the two NLRB decisions on the issue are not of a single mind (though both concluded the new employer under a mandatory

retention ordinance [****102] was a successor with an obligation to bargain). One of [***764] them rejected the new employer's contention that it was forced to hire its predecessor's employees (and therefore did not “consciously decide[] to take advantage of its predecessor's trained workforce”); the ALJ observed that the NLRB had “never formally adopted a requirement that a successor employer must consciously decide to avail itself of its predecessor's trained workforce in order to be considered a *Burns'* successor employer” (*U.S. Service Industries, Inc. (NLRB, Dec. 13, 1995, No. 5-CA-24575) 1995 N.L.R.B. Lexis 1151, pp. *11–*12 (Service Industries).*)³ In [**1051] the other case, the ALJ found that successorship obligations attach on the date the new employer makes offers of permanent employment [*227] to the workers (or, if no offers are made, at a reasonable time after the expiration of the 90-day period). (*M&M Parkside Towers LLC (NLRB, Jan. 30, 2007, No. 29-CA-27720) 2007 N.L.R.B. Lexis 27, pp. *15–*17 (M&M Parkside).*)⁴

² In *Rhode Island Hospitality*, the federal district court upheld the enforcement of a municipal ordinance similar to the one challenged here. The ordinance required a new employer in the hospitality business to retain the previous employer's workers for three months, subject to a “good cause” right to discharge. (*Rhode Island Hospitality, supra*, 775 F.Supp.2d at p. 423.) The court acknowledged that the NLRB had “not yet developed a consistent position” on when the duty to bargain would accrue [****101] when there is a mandatory retention ordinance (*id. at p. 432*), that “[t]his is a close case” (*ibid.*), and that the ordinance could not be “simply characterized as a ‘minimum labor standard.’” (*Id. at p. 433.*) But, because the ordinance did not preclude an employer from making its own hiring decisions after 90 days, did not compel a successor employer to honor the terms of a collective bargaining agreement negotiated by its predecessor, and allowed the new employer to set employment terms (*ibid.*), the district court concluded that the ordinance was “primarily designed to provide temporary job protection to both unionized and nonunionized employees which does not constitute a significant intrusion into the equitable collective bargaining process established by the NLRA.” (*Ibid.*)

³ In *Service Industries*, a union filed a charge with the NLRB and a complaint was issued alleging the employer refused to recognize and bargain with the union. The employer's predecessor provided janitorial [****103] services to buildings in the District of Columbia and had recognized the union as the exclusive bargaining representative of its janitorial employees. The predecessor lost its contract to clean a particular building. The new employer contracted with the building's management, and hired 24 janitorial employees, 15 of whom had been employed by the predecessor. (*Service Industries, supra*, 1995 N.L.R.B. Lexis 1151 at pp. *8–*9.) The union requested bargaining on the terms and conditions of employment, but the new employer refused. (*Id. at p. *10.*) The ALJ found substantial continuity in the employing enterprises, but the new employer contended that it was forced to hire its predecessor's employees by the district's Displaced Workers Protection Act. (*1995 N.L.R.B. Lexis 115 at p. *11.*) The ALJ rejected the argument, and found the new employer's refusal to recognize and bargain with the union was an unfair labor practice. (*Id. at p. *14.*)

⁴ *M&M Parkside*, decided 11 years after *Service Industries*, involved a New York City ordinance requiring a purchaser of apartment buildings and commercial property to retain all employees for 90 days (and to offer permanent employment to employees who received a satisfactory [****104] written evaluation after 90 days). (*M&M Parkside, supra*, 2007 N.L.R.B. Lexis 27 at pp. *3–*4.) After the 90-day period ended, the purchaser in *M&M Parkside*, while claiming not to be a successor, retained all the seller's employees,

This uncertainty as to when the obligation to bargain attaches, it seems to me, itself demonstrates that the ordinance impermissibly intrudes on [****105] the processes of self-organization and collective bargaining that are the exclusive province of the NLRA. The fact is that under the current state of the law, a “[s]uccessor [g]rocery [e]mployer” (defined in the ordinance) (L.A. Mun. Code, § 181.01, subd. I, boldface omitted) in a unionized workplace would not know whether it is obliged to bargain, at the request of the union representing the employees it was forced to hire, during that 90-day retention period. The new employer is, at a minimum, exposed to charges of an unfair labor practice if it refuses to bargain.

[***765] An obvious illustration of this point would be the case of an employee who files a grievance with the union because he was fired within the first 90 days. The right to continue employment unless there is good cause for termination is a significant benefit ordinarily conferred, if at all, only after the employer and union have negotiated all other terms of employment, and the union has made concessions to offset the employer's “termination for cause only” agreement. The ordinance bestows this benefit upon a unit of employees whom the successor has not chosen to hire. The successor did not obtain [*228] concessions from the predecessor in exchange [****106] for the promise to hire the predecessor's employees, nor did the successor exercise its right to choose which employees to hire from among the predecessor's workforce. Yet if the successor were to fire any

employee in the first 90 days (or any time thereafter), it is likely the employee will file a grievance, and if the successor refuses to go through grievance procedures under the predecessor's collective bargaining agreement, the successor risks being found guilty of an unfair labor practice. If the successor were to implement new wages, hours, and benefits without bargaining with the union, the employees might file grievances, demand union negotiation and arbitration, and even walk out or call a strike.

Of course no one can foresee what will occur in any particular case. But the exposure to unfair labor practice charges caused by the ordinance illustrates its intrusion into an area reserved for market freedom. *Machinists* tells us that, just as the state may not prohibit the use of economic weapons such as strikes, lockouts and other “self-help economic activities,” the state “may not ... ‘add to an employer's federal legal obligations in collective bargaining’” (*Machinists*, [supra](#), 427 U.S. at p. 147.) [****107] It seems to me that the City's ordinance does just that, effectively “ ‘upset[ting] the balance that Congress has struck between labor and management in the collective-bargaining relationship.’ ” (*Metropolitan* [**1052] *Life*, [supra](#), 471 U.S. at p. 751.)

The ordinance does not on its face prevent the new employer, after 90 days, from terminating the workers it was forced to employ and hiring its own independent workforce. But, once an employment relationship is established, it is not easy to terminate, certainly not without substantial risk. For one thing, it is highly impractical to terminate an entire workforce at once, and virtually impossible to do so without business disruption and damage to the new employer's reputation in the community. For another, it is easy to imagine the litigation consequences that would ensue if the employees in a previously unionized workplace are terminated en masse after working for the new employer for 90 days. The likelihood of unfair labor practice charges alleging union animus would be high, as would the likelihood of wrongful termination

established new terms and conditions of employment, and declined the union's request to negotiate and execute a collective bargaining agreement. (*Id.* at pp. *8–*9.) In the ensuing proceeding alleging unfair labor practices, the ALJ found the new employer's business was unchanged and the predecessor's employees were the entirety of the workforce, so the new employer had a legal obligation to recognize and bargain with the union. (*Id.* at pp. *10–*11.) The ALJ rejected the notion that the local ordinance compelling the employer to retain the employees for 90 days should mitigate against a successorship finding, viewing the argument as a nonsequitur, since the issue was whether the employer had an obligation to bargain after it *chose*, for whatever reason, to hire the predecessor's employees. (*Id.* at pp. *12–*14.)

claims. The majority finds that similar consequences, at least in terms of unfair labor practice charges, would ensue if [****108] there were no ordinance and the new employer were free to hire an entirely new workforce at the time of acquisition. I disagree. We need not blind ourselves to probable consequences that ordinary experience suggests will occur.

Moreover, it seems obvious that a new employer free to hire as it chooses before going into business does not have to discharge anyone, much less terminate en masse, in order to employ the people it wants to conduct its business, so its exposure to claims necessarily will be significantly different. [*229] In effect, the City's ordinance requires a new grocery employer to step into a morass of litigation—and to function during the important initial period [***766] of its operations with a workforce it deems, for entirely legitimate reasons, unsuitable for its planned operations—if it wishes to exercise its right, recognized under federal labor policy, to hire its own independent workforce. (Indeed, this impact was demonstrated at trial, at least in part, by the evidence that, since the City's ordinance was enacted, three different grocers have declined to buy stores in Los Angeles because of the importance to them of choosing their workforce.) This is not a result [****109] within the contemplation of the NLRA.

In short, the facially temporary nature of the ordinance's interference with an employer's right to select its workforce does nothing, in my view, to change the core facts. It is simply unrealistic to believe the temporary nature of the ordinance will not materially affect the successorship inquiry. In reality, whether the obligation to recognize the union ripens on day one, or on day 91, or on some later date, may depend on the various circumstances of each successor grocer's workplace. But there is little room for doubt that, under the law as applied by the NLRB in the decades since *John Wiley* and *Burns*, many successor grocers will be deemed obligated to recognize and bargain with the union at *some* point,

as a direct consequence of complying with the ordinance.

Thus, under any of the scenarios that may occur under the ordinance, there is an impact, to a greater or lesser degree, on collective bargaining: either the new employer is a successor who must bargain with the union during the 90-day period and/or shortly thereafter, or the employer must terminate employees en masse after the 90-day period, exposing it to business consequences and legal [****110] claims that would otherwise not exist, if it wishes to choose its own workforce. The ordinance legislates in an area that federal labor law, clearly articulated by the high court, left unregulated: “the normal exercise of the right of the employer to select its employees” (*Jones & Laughlin, supra*, 301 U.S. at p. 45), “ ‘the rightful prerogative of owners independently to rearrange their businesses’ ” (*Burns, supra*, 406 U.S. at p. 301, quoting *John Wiley, supra*, 376 U.S. at p. 549), and a new employer's “right not to hire any of the former [employer's] employees, if it so desire[s]” (*Howard Johnson, supra*, 417 U.S. at p. 262). To me, the ineluctable conclusion is that the ordinance is preempted under *Machinists* because it regulates “within ‘a zone protected and reserved for market freedom.’ ” (*Brown, supra*, 554 U.S. at p. 66.)

[**1053] 5. Summary and conclusion

The high court in *Burns* identified the freedom of contract as a fundamental premise on which the NLRA is based—“ ‘private bargaining under [*230] governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.’ ” (*Burns, supra*, 406 U.S. at p. 287, quoting *Porter Co. v. NLRB* (1970) 397 U.S. 99, 108 [25 L. Ed. 2d 146, 90 S. Ct. 821].)

[****111] In the nearly 40 years since *Burns* was decided, the high court has continued to recognize the freedom of every employer and union to reach agreement, or not, in their negotiation of the terms and conditions of employment. This case presents a

very different, far more fundamental issue than the freedom of parties who choose to work together to agree on the terms of employment.

The very different question presented here is whether the NLRA evinces an intent to prohibit regulations that interfere with an employer's freedom to choose whether to enter into *any employment [***767] relationship at all* with a particular employee or bloc of employees. In my view, the absence of high court precedent saying in so many words that the intent of the NLRA is to preserve the freedom of choice for employees and employers alike to decide whether to form an employment relationship does not mean states and municipalities are free to enact so-called worker “retention” ordinances. Rather, the high court has not yet had occasion to address this truly extraordinary intrusion upon the freedom of contract, one that threatens to upend the very foundation of our national labor laws and policies. Perhaps this case will [****112] offer the high court the occasion to address the question now.