

# The Burger Court Opinion Writing Database

*Bellotti v. Baird*

443 U.S. 622 (1979)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



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

CHAMBERS OF  
THE CHIEF JUSTICE

June 8, 1979

Re: (78-329 - Bellotti v. Baird  
(  
(78-330 - Hunerwadel v. Baird

Dear Lewis:

I join. However, there are some points on which we can discuss several possible changes as the "paperflow" proceeds.

Regards,

WRB

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

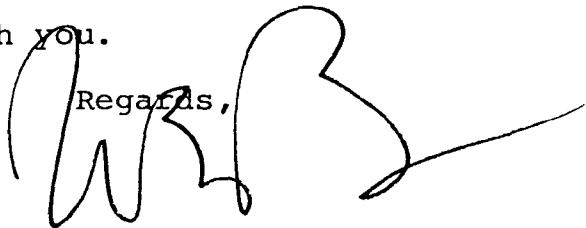
June 25, 1979

Re: 78-329 - Bellotti v. Baird  
78-330 - Hunerwadel v. Baird

Dear Lewis:

I'm still with you.

Regards,

A handwritten signature in black ink, appearing to read "W. B. P." followed by a stylized "B".

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 26, 1979

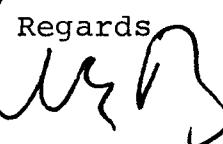
Re: (78-329 - Bellotti v. Baird  
(78-330 - Hunerwadel v. Baird

Dear Lewis:

I agree there are risks in the final hours of a Term -- a hard one especially -- in "losing our cool." I try to govern my advocate instincts and ignore barbs of the Brethren.

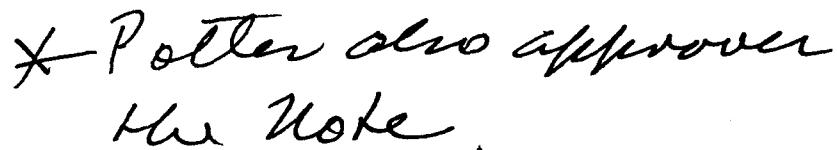
We should always avoid deciding cases not here notwithstanding the natural desire to put things to rest. Just as a dozen to twenty years ago our predecessors opened "cans of worms," we have done so, notably in Roe and Doe, but there are others. Getting the worms back in the can is difficult.

At this stage I am prepared to go along with you. I do not read your June 26 material as harsh, strident or unseemly.

Regards  


Mr. Justice Powell

cc: Mr. Justice Stewart  
Mr. Justice Rehnquist

 Potter also approves  
the Note.

To Eric to Note & Tell

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 7, 1979

78-329 Bellotti v. Baird  
78-330 Hunerwadel v. Baird

Dear Lewis,

As I suggested in our conversation yesterday, since (1) it's possible that any opinion detailing what kind of statute would be constitutional may have difficulty attracting five votes, and (2) there seem to be five of us who agree that the Massachusetts statute as authoritatively interpreted unconstitutionally burdens the minor's right to choose whether or not to have an abortion, the best course may be to construct an opinion for the Court around the points of general agreement, avoiding even mention of areas of disagreement. I would suggest a short, "bare bones" opinion simply identifying the respects in which the Massachusetts statute is recognized as unconstitutional by a majority of us, and not discussing the "applications" of the statute that your opinion holds would be constitutional. Although this would not give Massachusetts the rather extraordinary assistance they have asked for in writing a constitutional statute, it would avoid the hazards of an advisory-type opinion and would contain as much guidance as the Court, given our division, is presently capable of giving authoritatively. I recognize that this means a bottom line of "affirm", but I see no other alternative.

Sincerely,

Bill

Mr. Justice Powell

I discussed this with  
WJB. He agrees that we  
are too far apart to  
work out a common position.

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 8, 1979

RE: Nos. 78-329 & 330 Bellotti & Hunerwadel v. Baird

Dear John:

Your opinion expresses precisely my view and therefore please join me. I would be delighted if it attracted the joins of three more of our colleagues. If it should not, I'd be willing to consider some other disposition with a bottom line of "Affirm" provided it was not inconsistent with what you've written.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 4, 1979

Re: No. 78-329 and 78-330, Bellotti v. Baird, etc.

Dear Lewis,

I think that your proposed opinion reflects not only a great deal of hard work, but also an admirable effort to bring some consensus out of the diversity of views expressed during our Conference discussion of this case. My view, however, still remains that a pregnant minor should not have even the rather light burden that you would require of satisfying the Superior Court that her parents would probably deny consent and seek to obstruct her efforts to seek judicial relief. In my opinion, her burden should be only to convince the Court that she is sufficiently mature to decide the matter for herself or that an abortion would be in her best interest. My difference with the views you express probably depends ultimately upon a differing assessment of what is an "undue burden" as that phrase is used in the last full paragraph on page 145 of the Court's opinion in Bellotti v. Baird, 428 U.S. 132.

Realizing, however, that we are quite fragmented in this case but nonetheless have a duty to produce a Court opinion if one is possible, I would give hospitable consideration to joining your opinion if my vote would make a Court. As to the specific question contained in your Memorandum to the Conference, I would prefer not to request further certification on the part of the state court with respect to the question of severability. It seems to me that severability is something of a misnomer in this context, and I would simply hold the state statute unconstitutional to the extent described in the opinion. The problem will then be one for the state legislature.

Sincerely yours,

P.S.  
P.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 5, 1979

Re: Nos. 78-329 and 78-330, Bellotti v. Baird

Dear Lewis,

My views conform substantially with those expressed by Bill Rehnquist in his second letter to you today about this case. In short, if your proposed opinion, minus any discussion of severability, becomes the opinion of the Court, I should suppose that it would conclude by saying "to the extent indicated in this opinion, the Massachusetts statute is unconstitutional," or something to that effect. The judgment of the District Court could then be "affirmed in part, reversed in part," without any discussion of severability. The Massachusetts Legislature could take it from there.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

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1/

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 25, 1979

Re: Nos. 78-329 and 78-330,  
Bellotti v. Baird, etc.

Dear Lewis,

I am glad to join your opinion as re-circulated today, also agreeing to your proposal to delete a large part of the second paragraph of Part IV.

Sincerely yours,

PS,  
P

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 27, 1979

Re: 78-329 - Bellotti v. Baird

Dear Lewis:

Your proposed new footnote is satisfactory  
to me.

Sincerely yours,

P.S.

Mr. Justice Powell

The Chief Justice

Mr. Justice Rehnquist

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 7, 1979

Re: No. 78-329 & 78-330 - Bellotti v. Baird;  
Hunerwadel v. Baird

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Dear Lewis,

I shall shortly circulate a very brief  
dissent in this case.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

cmc

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: June 7, 1979

Recirculated: \_\_\_\_\_

Re: No. 78-329 - Bellotti v. Baird; and,  
No. 78-330 - Hunerwadel v. Baird

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MR. JUSTICE WHITE, dissenting.

I was in dissent in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 94-95 (1976), on the issue of the validity of requiring the consent of a parent when an unmarried woman under 18 years of age seeks an abortion. I continue to have the views I expressed there and also agree with much of what MR. JUSTICE STEVENS said in dissent in that case. Id., at 101-105. I would not, therefore, strike down this Massachusetts law.

But even if a parental consent requirement of the kind involved in Danforth must be deemed invalid, that does not condemn the Massachusetts law, which, when the parents object, authorizes a judge to permit an abortion if he concludes that an abortion is in the best interests of the child. Going beyond Danforth, the Court now holds it unconstitutional for a state to require that in all cases parents receive notice that their daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the "best interests" of the child to undergo the surgery. Until now, I would have thought inconceivable

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 19, 1979

Re: Nos. 78-329 and 78-330 - Bellotti and  
Hunerwadel v. Baird

Dear John:

Please join me in your concurring in part and  
dissenting in part opinion.

Sincerely,

*T.M.*

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 18, 1979

Re: No. 78-329 - Bellotti v. Baird  
No. 78-330 - Hunerwadel v. Baird

Dear Lewis:

I have read and reread your proposed opinion for the Court in these cases. Potter stated in his letter of June 4 to you that the proposed opinion reflects a great deal of hard work and an effort to bring some consensus out of the diversity of views expressed during our Conference discussion. I have been through these woods before and I know how sticky and difficult the going is in this general area.

There is much in your opinion with which I could agree, but there are also parts I could not join. I have concluded, after much thought, that on balance I shall vote merely to affirm. I definitely would not reach the question of severability by way of certification to the Supreme Judicial Court. I therefore am joining John's brief opinion.

Sincerely,



Mr. Justice Powell  
cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 18, 1979

Re: No. 78-329 - Bellotti v. Baird  
No. 78-330 - Hunerwadel v. Baird

Dear John:

Please join me in your opinion concurring in part  
and dissenting in part.

Sincerely,

Harry

Mr. Justice Stevens  
cc: The Conference

March 5, 1979

78-329 Bellotti v. Baird  
78-330 Hunerwadel v. Baird

Dear Chief:

I am not sure that I am in agreement with four other Justices as to how each of the separate issues in these cases should be resolved.

I will be glad, however, to write and circulate a memorandum, if this is your wish.

Sincerely,

The Chief Justice

lfp/ss

May 24, 1979

PERSONAL

Bellotti

Dear Potter:

In accordance with our talk today, I am sending you two copies of a "1st draft" of Bellotti.

Although discussion at the Conference afforded relatively little guidance, I have tried to shape this opinion around the essence of your concurring opinion in Danforth, that I joined.

I would appreciate very much your taking a look at this and giving me the benefit of your thoughts before I circulate.

Sincerely,

Mr. Justice Stewart

lfp/ss

June 1, 1979

Bellotti

Dear Potter:

I again thank you for reviewing my preliminary first draft of an opinion in this case, and for going over it with me.

Following this discussion on Wednesday morning, I spent the remainder of the day - working with my clerk - making substantial changes in the draft. With these changes incorporated, I returned the opinion to the print shop Thursday morning.

With the view to facilitating your review of the changes, I enclose a copy of the "first draft" that you reviewed, marked up to reflect all of the changes made since our conversation. This is simply a xerox of what the printer now has. I also return to you the original copy of this draft with your pencil notations.

I believe I have satisfied all of your concerns, with one exception. You expressed reservations about what I will call the "initial showing": that the pregnant minor who wishes to bypass her parents, and go directly to the court, must satisfy the court that the parents probably would deny consent and make it difficult if not impossible for the minor to seek judicial relief. I have retained this requirement for an "initial showing", although I have tempered the language of the opinion to make clear that the showing required is rather modest.

At least a majority of the Court viewed this case from the outset as being different from Danforth because, and only because, the Massachusetts statute combined provisions for parental consent (actually, consultation, since the judge has the last word) and court review. This is clear from Harry's opinion in Bellotti I, 428 U.S. 132, 145-148. Also,

I understood your Danforth concurrence, which I joined, as emphasizing the importance of a parental role provided there also is recourse to judicial review. You stated that the "primary constitutional deficiency [of the Missouri statute] lies in its imposition of an absolute limitation on the minor's right to obtain an abortion." 428 U.S., at 90. You continued:

"The Court's opinion today in Bellotti v. Baird, post, at 147-148, suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child." pp. 90-91.

I read the foregoing as indicating approval of a provision "requiring parental consent or consultation in most cases" if there were adequate judicial review to resolve differences and determine claims of maturity or best interests. Indeed, I think all of us agreed in Danforth, as you stated, that the "State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents . . . ." Id., 91. If a minor, in every case, may bypass her parents and go directly to the court to seek a judgment as to maturity or best interest, we can be sure that a high percentage of pregnant minors would elect this option. They would view it as a easy way to avoid possible family argument or disapproval. Absent a requirement of some showing of probable parental hostility, both the interest of the state in furthering a parental role and the interest of the parents will be frustrated - I would confidently expect - in most cases. Putting it differently, the interests of the state and parents would be furthered only in cases where the minor voluntarily elects to consult her parents, or where the court rules against her. In the latter event, the minor would then be free to seek parental consent but under circumstances far

less likely to result in an amicable resolution than if the minor were encouraged by law to consult first her parents.

It also seems to me that at least an "initial showing" requirement is consistent with - if, indeed, not required by - the rationale of your concurring opinion in Paraham v. J.L. and J.R. That case involves the extent to which the State is permitted to leave a child's liberty interest under the control of its parents. The right not to be deprived of liberty without due process, explicitly guaranteed by the Constitution, is no less important than the right to seek an abortion, an interest derived only by implication from the "privacy" concept originating in Griswold. I also would find it difficult to say that the parents' interest and guiding role are less important with respect to an abortion decision than with respect to whether the minor is to be deprived of its liberty.

I have written at this length to make clear why I have incorporated in my draft of Bellotti what I view as an extremely modest requirement of an initial showing of a right to bypass the parents altogether. If, upon further thought, you agree that I have been faithful to Danforth and Bellotti I, I would be more than a little pleased.

Sincerely,

Mr. Justice Stewart

lfp/ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 1, 1979

78-329 Bellotti v. Baird  
78-330 Hunerwadel v. Baird

MEMORANDUM TO THE CONFERENCE:

As I stated after the writing of this opinion was assigned to me, there was no clear guidance from our Conference discussion as to how a majority of the Court would decide the several questions presented by this case.

Accordingly, following Harry's example in his recent circulation of Jones, I submit the enclosed draft as a "proposed" opinion of the Court. I believe, however, that this draft is in accord with Danforth and Bellotti I, as I understand our decisions in those cases. In Danforth we held that a state could not lawfully authorize an absolute parental veto of the pregnant minor's abortion decision. It is clear, however, from Bellotti I, 428 U.S. 132, that the Court viewed this case as being different from Danforth because the Massachusetts statute could be construed to combine valid provisions for parental consent (actually only consultation) and court review. Id., at 145-148. These cases recognized that the state has a legitimate interest in assuring a parental role in the abortion decision, subject to judicial review.

I conclude, however, that §12S, as construed by the Supreme Judicial Court, unduly burdens, in certain respects, the right of a pregnant minor to seek an abortion: it fails to account for minors capable of making a mature decision on their own, and to permit minors to avoid consulting with their parents under any circumstances.

With respect to the latter point, my draft states that a minor wishing to avoid any consultation with her parents must satisfy the court that her parents probably would deny consent and make it difficult if not impossible

2.

for her to seek judicial relief. Unless a minimal showing to this effect is required, many if not most minors simply will bypass their parents altogether. If this were permissible, the state and parental interests that we previously have recognized would be frustrated.

The deficiencies that I find in the statute as construed by the Supreme Judicial Court of Massachusetts raise the severance problem. If this were a federal statute, I would simply invalidate it, and let the legislature commence afresh. But, as stated in the proposed opinion, the severability of a state statute is a question of state law, and the Supreme Judicial Court has been more willing than the federal courts to salvage what it can of the legislature's intent from flawed statutes. Accordingly, Part V proposes a further certification to the state court to determine severability. I would be equally happy simply to make the decision here, although the question would be to rule as we believe the Supreme Judicial Court would do. I will be guided by the wishes of a majority on this issue.

This proposed opinion is divided into parts and subparts. If I cannot persuade you to go all the way with me, I will welcome - especially in view of my track record this Term - even the most fragmented "joins".

L.F.P., Jr.

ss

*L.F.P. Jr.*

17, 1924 25

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

1 JUN 1979

Circulated: \_\_\_\_\_

1st DRAFT

~~Recirculated:~~  
**SUPREME COURT OF THE UNITED STATES**

Nos. 78-329 AND 78-330

Francis X. Bellotti, Attorney General of Massachusetts, et al.,  
Appellants,  
78-329 v.  
William Baird et al.  
Jane Hunerwadel, Etc., Appellant,  
78-330 v.  
William Baird et al.

On Appeal from the  
United States District  
Court for the District  
of Massachusetts.

[May —, 1979]

MR. JUSTICE POWELL's proposed opinion for the Court.

These appeals present a challenge to the constitutionality of a state statute regulating the access of minors to abortions. They require us to continue the inquiry we began in *Planned Parenthood v. Danforth*, 428 U. S. 52 (1976), and *Bellotti v. Baird*, 428 U. S. 132 (1976).

I

A

On August 2, 1974, the legislature of the Commonwealth of Massachusetts passed, over the Governor's veto, an act pertaining to abortions performed within the State. 1974 Mass. Acts, ch. 706. According to its title, the statute was intended to regulate abortions "within present constitutional limits." Shortly before the act was to go into effect, the class action from which these appeals arise was commenced in the District Court<sup>1</sup> to enjoin, as unconstitutional, the provision of the

<sup>1</sup> The court promptly issued a restraining order which remained in effect until its decision on the merits. Subsequent stays of enforcement were

June 6, 1979

Bellotti

Dear Potter and Bill:

This refers to your letters with respect to the "bottom line" if my opinion is to become a Court opinion.

In a word, I am quite willing to conclude by saying, in effect, that "to the extent indicated in this opinion, the Massachusetts statute is unconstitutional", with the judgment to be "affirmed in part, reversed in part".

I laid out the full discussion of severability because of uncertainty as to the views of the Conference. I am more than content not to discuss it.

I suppose John's letter this morning makes it less likely that my draft will attract a Court. If I understand his letter correctly, he would leave the abortion decision entirely to any minor! Although this is difficult to believe, I read his letter as saying that since Danforth takes the decision away from parents he sees no reason to think judges should be substituted as decision makers. Thus, I suppose a 12 year old could become one of Dr. Zupnick's uncounseled but no doubt contented patients.

The Chief said to me on yesterday that he had not read my opinion, and I have heard from no one else.

Sincerely,

Mr. Justice Stewart  
Mr. Justice Rehnquist

lfp/ss

June 20, 1979

Bellotti

Dear Potter:

I return herewith your copy of the first draft of my opinion, which you were good enough to review with great care, suggest some quite helpful changes, and returned to me on yesterday.

Also, I deliver herewith a master copy of the draft on which I have included many of your changes verbatim, and others that I have revised. By comparing the two drafts, you will be able to see exactly where revisions are suggested. I do not think I have changed the substance anywhere. In some instances I simply reframed the language in my words; in other cases, I tried to harmonize it with the general tone of the opinion. In all cases, I have preserved carefully your basic point: that the pregnant minor always has the option of going directly to the court in the first instance.

Where it seemed appropriate, I have retained language emphasizing the importance of parental consultation as a basic norm. We are dealing here not just with 16 and 17 year old, street wise minors (the type Thurgood visualizes); we are addressing the spectrum of ages.

Before we make a final decision as to omission of the equal protection discussion, I have had one further thought. If Massachusetts should reenact this statute in accordance with our opinion, I suppose it is possible - if not probable - that these same plaintiffs (appellees) may renew the challenge on equal protection grounds unless we settle that issue. I would like to put an end to this protracted litigation. Therefore, on balance, I slightly favor retaining the equal protection section - with any changes you may wish.

As time is running out, I would welcome your view whether you and I both should go to Bill Rehnquist. He will not like the one basic change we have made. Yet, as we have often agreed, he is a team player and the alternatives to obtaining four votes for our opinion are not attractive. I am assuming that the CJ, who assigned the case to me, would join three of us.

I will be available whenever you want to talk.

Sincerely,

Mr. Justice Stewart

lfp/ss

June 25, 1979

Bellotti

Dear Bill:

First, may I say that I hope you found your mother improved, or at least to be in a stable condition.

During your absence, the printer delivered the second draft of this worrisome case. Indeed, I just missed you on Friday afternoon when I wanted to brief you on the changes that may be viewed as substantive. They are:

1. The first draft provided that before the Superior Court considered whether the minor was mature or that an abortion was in her best interest, it must be satisfied that a prior consultation with parents would be fruitless and likely to result in their attempt to obstruct access to the court. Potter thinks this imposes a precondition that cannot be squared with Danforth. Although I do not share Potter's concern, I do understand it and recognize that it is entirely arguable. Accordingly, I have made the changes, with Potter's assistance, you will find on pages 24 and 25. There are minor conforming changes elsewhere. E.g., p. 26.

As Potter agrees, I do not believe this change - except in theory - has practical significance. If a judge believes a minor is mature, or that the abortion is in her best interest, he is quite likely to have ascertained why she didn't want to consult her parents. If he is in doubt, he is free to - and undoubtedly will in most cases - reserve judgment until the parents are brought into the consultations. We must assume (as the opinion indicates) an extremely informal and confidential procedure.

2. Potter prefers to omit discussion of the Equal Protection issue since it is irrelevant in view of our

holding. None of the other opinions addresses the issue. Accordingly, I have omitted what was Part IV.

3. As indicated in prior correspondence, I was willing - indeed, entirely content - to resolve the severability issue here. As the good and bad features of §12S are interwoven into a single paragraph, I see no way in which the statute can be saved by severability.

This means that we affirm the judgment of the District Court, but only insofar as it invalidates the statute and enjoins its enforcement. The opinion makes clear, however, that §12S "satisfies constitutional standards in large part", and falls short only in two specifically identified respects (p. 27). Accordingly, assuming that what I have written becomes a plurality opinion, it will - in light of Byron's vote to reverse - become the controlling opinion. Thus, it will constitute the authoritative guidance to Massachusetts and other states that wish to prevent wholly unrestricted and unsupervised exercise of the abortion right by children of all ages.

To my astonishment (and I think contrary to Bellotti I) four of our Brothers apparently would impose no restrictions whatever upon the exercise of this right by minors.

As time is short, I am available to discuss this further if you wish. I am sending copies of this letter to the Chief and Potter, hoping that we can settle upon an opinion promptly.

I hardly need say that I appreciate, as do others, your typical willingness to accept a position different from your preference (at least for the time being), where by doing so you facilitate the making of a majority for a position that at least you can view as a moderate one.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Chief Justice  
Mr. Justice Stewart

11, 12, 14

16-21, 24-29

2nd DRAFT

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

**SUPREME COURT OF THE UNITED STATES.**

Justice Powell

Nos. 78-329 AND 78-330

Circulated:

25 JUN 1979

recirculated;

Francis X. Bellotti, Attorney General of Massachusetts, et al.,

**Appellants,**

78-329

3

William Baird et al.

Jane Hunerwadel, Etc., Appellant,

78-330

William Baird et al.

On Appeal from the  
United States District  
Court for the District  
of Massachusetts.

[May —, 1979]

Opinion of MR. JUSTICE POWELL.

These appeals present a challenge to the constitutionality of a state statute regulating the access of minors to abortions. They require us to continue the inquiry we began in *Planned Parenthood v. Danforth*, 428 U. S. 52 (1976), and *Bellotti v. Baird*, 428 U. S. 132 (1976).

II

A

On August 2, 1974, the legislature of the Commonwealth of Massachusetts passed, over the Governor's veto, an act pertaining to abortions performed within the State. 1974 Mass. Acts, ch. 706. According to its title, the statute was intended to regulate abortions "within present constitutional limits." Shortly before the act was to go into effect, the class action from which these appeals arise was commenced in the District Court<sup>1</sup> to enjoin, as unconstitutional, the provision of the

<sup>1</sup> The court promptly issued a restraining order which remained in effect until its decision on the merits. Subsequent stays of enforcement were

June 26, 1979

Bellotti

Dear Chief, Potter and Bill:

In a fourth draft of his opinion, circulated yesterday afternoon, John added two concluding sentences and footnote 4.

In his final sentence he states that we are addressing the constitutionality of an abortion statute that "Massachusetts has not enacted".

In footnote 4 he chides us at greater length, stating that our opinion is "advisory" and that there is no "real case or controversy".

The enclosed draft of a footnote that might be added to my opinion is sent to you for your comments. At this late date, I am weary of trading "insults" with respected Brothers. I must say, however, that John's footnote arouses my combative instincts. My disposition is to reply, but I view our opinion - at this stage - as a joint enterprise and therefore I would welcome your views both as to the desirability of some reply, and the merits of my particular draft.

If convenient (and particularly since the Chief is leaving after the Conference tomorrow), your views before his departure would be helpful.

Sincerely,

The Chief Justice  
Mr. Justice Stewart  
Mr. Justice Rehnquist

1fp/ss

Possibly add a footnote along the following lines, in response to JPS's note 4 added to his opinion on yesterday:

The opinion of Mr. Justice Stevens, concurring in the judgment, joined by three members of the Court, characterizes this opinion as "advisory" and the questions it addresses as "hypothetical". Apparently this is criticism of the attempt of this opinion to provide some guidance as to how a state constitutionally may provide for adult involvement - either by parents or a state official such as a judge - in the abortion decisions of minors. In view of the importance of the issues raised, and the protracted litigation to which these parties already have been subjected, we think it would be irresponsible simply to condemn §12S without stating our views as to the controlling principles.

The statute before us today is the same one that was before us in Bellotti I, supra. In a unanimous opinion, joined by Justice Stevens, we remanded the case with directions that appropriate questions be certified to the Supreme Judicial Court of Massachusetts "concerning the meaning of [§12S] and the procedure it imposes". Id., at 151. We directed this procedure because, as stated in the opinion, we thought the construction of §12S urged by appellants would "avoid or substantially modify the federal constitutional challenge to the statute". Id., at 148. The central feature of §12S was its provision that a state court judge could make the ultimate decision, when necessary, as to the exercise by a minor of the right to an abortion. See id., at 145. We held that this "would be fundamentally different from a statute that creates a 'parental veto' [of the kind rejected in Danforth] id., (footnote omitted)."

Thus, providing for decision-making authority in a judge was not the kind of veto power held invalid in Danforth.

Apparently, the Justices who join the concurring opinion now read Danforth as standing for precisely the opposite proposition. It would have been well, and some may think fairer to the litigants and the courts below, had our concurring Brethren expressed their views when §12S was before us in Bellotti I rather than having agreed to a remand that they believed could not possibly result in a decision upholding the statute.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 26, 1979

Bellotti v. Baird, No.s 78-329, 78-330

MEMORANDUM TO THE CONFERENCE

The next draft of my opinion in these cases will include the change indicated on the enclosed pages.



L.F.P., Jr.

ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 27, 1979

No. 78-329 Bellotti v. Baird  
No. 78-330 Hunerwadel v. Baird

Dear John:

In response to note 4, pg. 5, added to your opinion, I intend to add the enclosed note at an appropriate place in my plurality opinion.

Sincerely,

*Lewis*

Mr. Justice Stevens

Copies to the Conference

LFP/lab

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

3rd DRAFT

Circulated: ..

28 JUN 1979

## Basirevulatadi

**SUPREME COURT OF THE UNITED STATES-** Argued and decided.

Nos. 78-329 AND 78-330

Francis X. Bellotti, Attorney General of Massachusetts, et al.,

**Appellants,**

78-329

22

William Baird et al.

Jane Hunerwadel, Etc., Appellant.

78-330

v.

William Baird et al.

On Appeal from the  
United States District  
Court for the District  
of Massachusetts.

[May —, 1979]

MR. JUSTICE POWELL announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST joined.

These appeals present a challenge to the constitutionality of a state statute regulating the access of minors to abortions. They require us to continue the inquiry we began in *Planned Parenthood v. Danforth*, 428 U. S. 52 (1976), and *Bellotti v. Baird*, 428 U. S. 132 (1976).

I

A

On August 2, 1974, the legislature of the Commonwealth of Massachusetts passed, over the Governor's veto, an act pertaining to abortions performed within the State. 1974 Mass. Acts, ch. 706. According to its title, the statute was intended to regulate abortions "within present constitutional limits." Shortly before the act was to go into effect, the class action from which these appeals arise was commenced in the District Court<sup>1</sup> to enjoin, as unconstitutional, the provision of the

<sup>1</sup> The court promptly issued a restraining order which remained in effect

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 5, 1979

Re: 78-329 and 78-330 - Bellotti v. Baird, et al.

Dear Lewis:

After some agonizing, I have decided that I can join your proposed opinion for the Court on much the same basis that Potter advanced in his letter regarding the draft presently in circulation. I will join if you retain the present analysis on the merits, as opposed to Potter's stated preference in his recently circulated letter; if you would be willing to adopt Potter's suggestion with respect to the treatment of severability; and if my vote will make your opinion one for the Court.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 5, 1979

Re: Nos. 78-329 and 78-330 - Bellotti v. Baird

Dear Lewis:

I fear there may be a latent possibility for misunderstanding in connection with the comments contained in my letter circulated earlier today about the "severability" treatment in your opinion. My impression of Potter's suggestion, which I have subsequently discussed with him, is that your opinion for the Court would simply say "affirmed in part, reversed in part", or something to that effect, without discussing severability at all. It would then be up to the legislature of Massachusetts, as Potter suggested in his letter, to decide whether it wanted those parts of the statute which your opinion holds constitutional to remain on the books, whether it wished to take a new try at the whole subject matter, or whether it wished to repeal what was left of the statute. I had thought this was in accord with our earlier discussion, but can readily understand how without detailed and explicit discussion there could be a misunderstanding. If your position irrevocably differs from the one I had stated in this letter, I will have to take a second look at my position in the case.

Sincerely,



Mr. Justice Powell  
Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 8, 1979

Re: Nos. 78-329 and 78-330 - Bellotti v. Baird; and  
Hunerwadel v. Baird

Dear Lewis:

I originally wrote you that I would join your presently circulating opinion if it became a Court opinion, and if it left entirely to the state courts the issue of severability as I understood Potter's memorandum to suggest. I have just read Byron's dissent; as I said in my earlier letter, I basically agree with his position, and yet I also feel strongly the necessity of some decision of the issues by this Court which is not totally fragmented. As of now, therefore, I am willing to recede from my earlier position that only if your opinion became an opinion for the Court would I join it; I will join it now on the "condition subsequent" that it attracts two additional votes, so that my departure from my views assists in making it the controlling opinion, if not a Court opinion. I will also file the attached concurrence.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Att.

Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Powell  
Mr. Justice Stevens

1. *What is the relationship between the two variables?*

8 JUNE 1979

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-329 AND 78-330

Francis X. Bellotti, Attorney General of Massachusetts, et al.,

Appellants,

78-329 v.

William Baird et al.

Jane Hunerwadel, Etc., Appellant.

78-330 v.

William Baird et al.

On Appeal from the  
United States District  
Court for the District  
of Massachusetts.

[June —, 1979]

MR. JUSTICE REHNQUIST, concurring.

I join the opinion of MR. JUSTICE POWELL and in the judgment of the Court. At such time as this Court is willing to reconsider its earlier decision in *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52 (1976), in which I joined the dissenting opinion of MR. JUSTICE WHITE, I shall be more than willing to participate in that task. But unless and until that time comes, literally thousands of judges cannot be left by this Court with nothing more than the guidance offered by a truly fragmented holding by this Court.

۲۷

Powell, J.

Supreme Court of the United States

Memorandum

6/25, 1929

Levitt -

I can go along with the substantive changes in Bellotti requested by PS - I cannot, as presently advised, go along with your discussion of severability on the last page - I agree with Potter's opinion held a couple of days ago on this (most)

Point, nothing more on  
present opinion - &  
could go along w an a-  
mission of my dissasent  
I recollect, but if  
you insist that I feel  
I can't ~~go~~ do all the  
going, & I will go back  
to B.R.W dissent  
When

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 25, 1979

Re: Nos. 78-329 and 78-330 - Bellotti v. Baird, et al.

Dear Lewis:

Please join me in the second draft of your circulation  
of June 25th in this case.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 5, 1979

Re: 78-329 - Bellotti v. Baird  
78-330 - Hunerwadel v. Baird

Dear Lewis:

Although my recollection of the Conference is a little hazy, I am quite sure that I voted to affirm on the theory that the Massachusetts statute as construed by the Massachusetts Supreme Judicial Court is invalid under Danforth. I would join an opinion that reaches that conclusion, but am reluctant to try to get into the business of writing a statute that is constitutional. The Massachusetts statute, as written and construed, gives a judge an absolute veto over the abortion decision of every minor who does not receive the consent of both parents. My position in Danforth was that the abortion decision could be made on behalf of the child by the parents, but now that that view has been rejected, I do not think we should be substituting a judge as a decisionmaker.

I hope that I will be able to circulate a short concurring opinion in two or three days.

Respectfully,



Mr. Justice Powell

Copies to the Conference

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

~~Agree: Mr. Justice Stevens~~

~~Extralated: JW 6 79~~

~~Reformulated: \_\_\_\_\_~~

78-329 - Bellotti v. Baird

78-330 - Hunerwadel v. Baird

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

In Roe v. Wade, 410 U.S. 113, the Court held that a woman's right to decide whether to terminate a pregnancy is entitled to constitutional protection. In Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 72-75, the Court held that a pregnant minor's right to make the abortion decision may not be conditioned on the consent of one parent. Although I did not participate in the first decision, and dissented from the second, id., at 101-105, I accept these decisions as part of our law. I am persuaded that they require affirmation of the District Court's holding that the Massachusetts statute is unconstitutional.

Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

8.2

1st / DRAFT

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: JUN 8 79

SUPREME COURT OF THE UNITED STATES

Nos. 78-329 AND 78-330

Francis X. Bellotti, Attorney General of Massachusetts, et al.,  
Appellants,  
78-329 v.  
William Baird et al.  
Jane Hunerwadel, Etc., Appellant,  
78-330 v.  
William Baird et al.

On Appeal from the  
United States District  
Court for the District  
of Massachusetts.

NP

[June —, 1979]

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

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The Massachusetts statute is, on its face, simple and straightforward. It provides that every woman under 18 who has not married must secure the consent of both her parents before receiving an abortion. "If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown." Mass. Gen. Laws Ann., ch. 112, § 12S (West).

Whatever confusion or uncertainty might have existed as

Mr. Justice BRENNAN  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice REHNQUIST

From: Mr. Justice Stevens

Circulated:

Recirculated: JUN 12 1979

SUPREME COURT OF THE UNITED STATES

Nos. 78-329 AND 78-330

Francis X. Bellotti, Attorney General of Massachusetts, et al.,

### Appellants,

78-329

William Baird et al.

Jane Hunerwadel, Etc., Appellant.

78-330

William Baird et al.

On Appeal from the  
United States District  
Court for the District  
of Massachusetts.

[June —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

In *Roe v. Wade*, 410 U. S. 113, the Court held that a woman's right to decide whether to terminate a pregnancy is entitled to constitutional protection. In *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52, 72-75, the Court held that a pregnant minor's right to make the abortion decision may not be conditioned on the consent of one parent. ~~Although I did not participate in the first decision, and dissented from the second, *id.*, at 101-105, I accept these decisions as part of our law.~~ I am persuaded that they require affirmance of the District Court's holding that the Massachusetts statute is unconstitutional.

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Whatever confusion or uncertainty might have existed as

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: JUN 14 79

3rd DRAFT

~~RECORDED.~~  
**SUPREME COURT OF THE UNITED STATES**

Nos. 78-329 AND 78-330

Francis X. Bellotti, Attorney General of Massachusetts, et al.,

Appellants,

78-329

William Baird et al.

Jane Hunerwadel, Etc., Appellant,

78-330 *v.*

William Baird et al.

On Appeal from the  
United States District  
Court for the District  
of Massachusetts.

[June —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

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Whatever confusion or uncertainty might have existed as to how this statute was to operate, see *Bellotti v. Baird*, 428 U. S. 132, has been eliminated by the authoritative construc-

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

3rd DRAFT

Recirculated: 11/14/09

SUPREME COURT OF THE UNITED STATES

Nos. 78-329 AND 78-330

<p>Francis X. Bellotti, Attorney General of Massachusetts, et al., Appellants, 78-329                      <i>v.</i>                                   William Baird et al.</p> <p>Jane Hunerwadel, Etc., Appellant, 78-330                      <i>v.</i>                                   William Baird et al.</p>	<p>On Appeal from the United States District Court for the District of Massachusetts,</p>

[June —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, concurring in part and dissenting in part.

In *Roe v. Wade*, 410 U. S. 113, the Court held that a woman's right to decide whether to terminate a pregnancy is entitled to constitutional protection. In *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52, 72-75, the Court held that a pregnant minor's right to make the abortion decision may not be conditioned on the consent of one parent. I am persuaded that these decisions require affirmance of the District Court's holding that the Massachusetts statute is unconstitutional.

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Whatever confusion or uncertainty might have existed as to how this statute was to operate, see *Bellotti v. Baird*, 428

PP. 1, 3-4.

Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Bahnquist

4th

3rd DRAFT

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: FM 20 79

## SUPREME COURT OF THE UNITED STATES

Nos. 78-329 AND 78-330

Francis X. Bellotti, Attorney General of Massachusetts, et al.,

Appellants,

78-329

v.

William Baird et al.

Jane Hunerwadel, Etc., Appellant,

78-330

v.

William Baird et al.

On Appeal from the  
 United States District  
 Court for the District  
 of Massachusetts.

[June —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, concurring in part and dissenting in part.

the  
 judgment.

In *Roe v. Wade*, 410 U. S. 113, the Court held that a woman's right to decide whether to terminate a pregnancy is entitled to constitutional protection. In *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52, 72-75, the Court held that a pregnant minor's right to make the abortion decision may not be conditioned on the consent of one parent. I am persuaded that these decisions require affirmance of the District Court's holding that the Massachusetts statute is unconstitutional.

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Whatever confusion or uncertainty might have existed as to how this statute was to operate, see *Bellotti v. Baird*, 428

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 27, 1979

78-329 - Bellotti v. Baird  
78-330 - Hunerwadel v. Baird

Dear Lewis:

Thanks for your note. I will not respond to your additional footnote. I believe the case is therefore ready to come down.

Respectfully,



Mr. Justice Powell

Copies to the Conference

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

Pp. 174-5.

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

4th DRAFT

Recirculated: JUN 27 '79

SUPREME COURT OF THE UNITED STATES

Nos. 78-329 AND 78-330

Francis X. Bellotti, Attorney General of Massachusetts, et al.,

Appellants,

78-329 v.

Jane Hunerwadel, Etc., Appellant,

78-330

William Baird et al.

On Appeal from the  
United States District  
Court for the District  
of Massachusetts.

[June —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, concurring in the judgment.

In *Roe v. Wade*, 410 U. S. 113, the Court held that a woman's right to decide whether to terminate a pregnancy is entitled to constitutional protection. In *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52, 72-75, the Court held that a pregnant minor's right to make the abortion decision may not be conditioned on the consent of one parent. I am persuaded that these decisions require affirmance of the District Court's holding that the Massachusetts statute is unconstitutional.

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Whatever confusion or uncertainty might have existed as to how this statute was to operate, see *Bellotti v. Baird*, 428