Testimony of

Professor Peter Rubin

June 3, 2004

THE CONSTITUTIONALITY OF S. 851, THE PROPOSED "CHILD CUSTODY PROTECTION ACT"
WRITTEN TESTIMONY OF PETER J. RUBIN
PROFESSOR OF LAW
GEORGETOWN UNIVERSITY

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

June 2, 2004

Introduction
I have been asked by the Committee to assess whether S. 851, now pending before the Senate, is consistent with the Constitution of the United States. I am honored to have the opportunity to convey my views to the Committee.*

It is my considered conclusion that the proposed statute would, if enacted, violate the Constitution for three independent reasons. To begin with, it violates constitutional principles of federalism, principles that are fundamental to our constitutional order. The statute violates the rights of states to enact and enforce their own laws governing conduct within their territorial boundaries, and the rights of the residents of each of the United States and of the District of Columbia to travel to and from any state of the Union for lawful purposes, a right strongly reaffirmed by the Supreme Court in its recent landmark decision in Saenz v. Roe, 526 U.S. 489 (1999).

Second, because of the cruel and dangerous method it employs to attempt to deter pregnant young women from obtaining lawful abortions in states in which they do not reside, the proposed statute also violates the Due Process Clause of the Fifth Amendment. Government may not attempt to deter a minor from engaging in a particular activity by making it more dangerous. See Carey v. Population Services International, 431 U.S. 678 (1977). Here the proposed statute does not actually prohibit pregnant adolescents from obtaining out of state abortions without complying with the parental notification or consent laws of their states of residence. It seeks, rather, to deter them from doing so by denying them the assistance of any compassionate or caring adult, including family members such as grandparents, aunts and uncles, etc. This bill leaves the scared, pregnant minor on her own. Under the Due Process Clause of the Fourteenth Amendment this is not a permissible means of achieving even an otherwise legitimate governmental end.

Finally, the proposed statute violates the undue burden test for abortion regulation adopted by the Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992). Under the analytical approach articulated by the Court in that case, the proposed statute

has the unconstitutional purpose and would have the unconstitutional effect of placing a "substantial obstacle" in the path of the pregnant adolescents it affects seeking to exercise their right to choose to terminate a pregnancy. In addition, the statute as now drafted lacks an exception, required under Casey and the Court's most recent abortion decision, Stenberg v. Carhart, 530 U.S. 914, 930-938 (2000), for the health of the pregnant woman.

Analysis

S. 851 would provide criminal and civil penalties, including imprisonment for up to one year, for any person who

knowingly transports a minor across a State line, with the intent that such minor obtain an abortion. . . [if] an abortion is performed on the minor, in a State other than the State where the minor resides, without the parental consent or notification, or the judicial authorization, that would have been required by [a law in force in the state where the minor resides] had the abortion been performed in the State where the minor resides.

S. 851, §2 (a) (proposed 18 U.S.C. §2431(a)(1) and (2)).

In other words, this law makes it a federal crime to assist a pregnant minor to obtain a lawful abortion. The criminal penalties kick in if the abortion the young woman seeks would be performed in a state other than her state of residence, and in accord with the less restrictive laws of that state, unless she complies with the more severe restrictions her home state imposes upon abortions performed upon minors within its territorial limits.

The law contains no exceptions for situations where the young woman's home state purports to disclaim any such extraterritorial effect for its parental consultation rules, or where it is a pregnant young woman's close friend, or her aunt or grandmother, or a member of the clergy, who accompanies her "across a State line" on this frightening journey, even where she would have obtained the abortion anyway, whether lawfully in another state after a more perilous trip alone, or illegally (and less safely) in her home state because she is too frightened to seek a judicial bypass or too terrified of physical abuse to notify a parent or legal guardian who may, indeed, be the cause of her pregnancy.

It does not exempt health care providers, including doctors, from possible criminal or civil penalties. Nor does it uniformly apply home-state laws on pregnant minors who obtain out-of-state abortions. The law applies only where the young woman seeks to go from a state with a more restrictive regime into a state with a less restrictive one.

1. Constitutional Principles of Federalism

The proposed law amounts to a statutory attempt to force a most vulnerable class of young women to carry the restrictive laws of their home states strapped to their backs, bearing the great weight of those laws like the bars of a prison that follows them wherever they go (unless they are willing to go alone). Such a law violates the basic premises upon which our federal system is constructed, and therefore violates the Constitution of the United States.

The essence of federalism is that the several states have not only different physical territories and

different topographies but also different political and legal regimes. Crossing the border into another state, which every citizen has a right to do, may perhaps not permit the traveler to escape all tax or other fiscal or recordkeeping duties owed to the state as a condition of remaining a resident and thus a citizen of that state, but necessarily permits the traveler temporarily to shed her home state's regime of laws regulating primary conduct in favor of the legal regime of the state she has chosen to visit. Whether cast in terms of the destination state's authority to enact laws effective throughout its domain without having to make exceptions for travelers from other states, or cast in terms of the individual's right to travel - which would almost certainly be deterred and would in any event be rendered virtually meaningless if the traveler could not shake the conduct-constraining laws of her home state - the proposition that a state may not project its laws into other states by following its citizens there is bedrock in our federal system.

One need reflect only briefly on what rejecting that proposition would mean in order to understand how axiomatic it is to the structure of federalism. Suppose that your home state or Congress could lock you into the legal regime of your home state as you travel across the country. This would mean that the speed limits, marriage regulations, restrictions on adoption, rules about assisted suicide, firearms regulations, and all other controls over behavior enacted by the state you sought to leave behind, either temporarily or permanently, would in fact follow you into all 49 of the other states as you traveled the length and breadth of the nation in search of more hospitable "rules of the road." If your search was for a more favorable legal environment in which to make your home, you might as well just look up the laws of distant states on the internet rather than roaming about in a futile effort at sampling them, since you will not actually experience those laws by traveling there. And if your search was for a less hostile legal environment in which to attend college or spend a summer vacation or obtain a medical procedure, you might as well skip even the internet, since the theoretically less hostile laws of other jurisdictions will mean nothing to you so long as your state of residence remains unchanged.

Unless the right to travel interstate means nothing more than the right to change the scenery, opting for the open fields of Kansas or the mountains of Colorado or the beaches of Florida but all the while living under the legal regime of whichever state you call home, telling you that the laws governing your behavior will remain constant as you cross from one state into another and then another is tantamount to telling you that you may in truth be compelled to remain at home -- although you may, of course, engage in a simulacrum of interstate travel, with an experience much like that of the visitor to a virtual reality arcade who is strapped into special equipment that provides the look and feel of alternative physical environments -- from sea to shining sea -- but that does not alter the political and legal environment one iota. And, of course, if home-state legislation, or congressional legislation, may saddle the home state's citizens with that state's abortion regulation regime, then it may saddle them with their home state's adoption and marriage regimes as well, and with piece after piece of the home state's legal fabric until the home state's citizens are all safely and tightly wrapped in the straitjacket of the home state's entire legal regime. There are no constitutional scissors that can cut this process short, no principled metric that can supply a stopping point. The principle underlying S. 851 is nothing less, therefore, than the principle that individuals may indeed be tightly bound by the legal regimes of their home states even as they traverse the nation by traveling to other states with very different regimes of law. It follows, therefore, that -- unless the right to engage in interstate

travel that is so central to our federal system is indeed only a right to change the surrounding scenery -- S. 851 rests on a principle that obliterates that right completely.

It is irrelevant to the federalism analysis that the proposed federal statute does not literally prohibit the minor herself from obtaining an out-of-state abortion without complying with the parental consent or notification laws of her home state, criminalizing instead only the conduct of assisting such a young woman by transporting her across state lines. The manifest and indeed avowed purpose of the statute is to prevent the pregnant minor from crossing state lines to obtain an abortion that is lawful in her state of destination whenever it would have violated her home state's law to obtain an abortion there because the pregnant woman has not fully complied with her home state's requirements for parental consent or notification. The means used to achieve this end do not alter the constitutional calculus. Prohibiting assistance in crossing state lines in the manner of this proposed statute suffers the same infirmity with respect to our federal structure as would a direct ban on traveling across state lines to obtain an abortion that complies with all the laws of the state where it is performed without first complying also with the laws that would apply to obtaining an abortion in one's home state.

The federalism principle I have described operates routinely in our national life. Indeed, it is so commonplace it is taken for granted. Thus, for example, neither Virginia nor Congress could prohibit residents of Virginia, where casino gambling is illegal, from traveling interstate to gamble in a casino in Nevada. (Indeed, the economy of Nevada essentially depends upon this aspect of federalism for its continued vitality.) People who like to hunt cannot be prohibited from traveling to states where hunting is legal in order to avail themselves of those pro-hunting laws just because such hunting may be illegal in their home state. And citizens of every state must be free, for example, to read and watch material, even constitutionally unprotected material, in New York City the distribution of which might be unlawful in their own states, but which New York has chosen not to forbid. To call interstate travel for such purposes an "evasion" or "circumvention" of one's home-state laws - as S. 851 purports to do, see S. 851, §2(a) (heading of the proposed 18 U.S.C. § 2431) ("Transportation of minors in circumvention of certain laws relating to abortion") - is to misunderstand the basic premise of federalism: one is entitled to avoid those laws by traveling interstate. Doing so amounts to neither evasion nor circumvention.

Put simply, you may not be compelled to abandon your citizenship in your home state as a condition of voting with your feet for the legal and political regime of whatever other state you wish to visit. The fact that you intend to return home cannot undercut your right, while in another state, to be governed by its rules of primary conduct rather than by the rules of primary conduct of the state from which you came and to which you will return. When in Rome, perhaps you will not do as the Romans do, but you are entitled -- if this figurative Rome is within the United States -- to be governed as the Romans are. If something is lawful for one of them to do, it must be lawful for you as well. The fact that each state is free, notwithstanding Article IV, to make certain benefits available on a preferential basis to its own citizens does not mean that a state's criminal laws may be replaced with stricter ones for the visiting citizen from another state, whether by that state's own choice or by virtue of the law of the visitor's state or by virtue of a congressional enactment. To be sure, a state need not treat the travels of its citizens to other states as suddenly lifting otherwise applicable restrictions when they return home. Thus, a state that bans the possession of gambling equipment, of specific kinds of weapons, of liquor, or of

obscene material may certainly enforce such bans against anyone who would bring the contraband items into the jurisdiction, including its own residents returning from a gambling state, a hunting state, a drinking state, or a state that chooses not to outlaw obscenity. But that is a far cry from projecting one state's restrictive gambling, firearms, alcohol, or obscenity laws into another state whenever citizens of the first state venture there.

Thus states cannot prohibit the lawful out-of-state conduct of their citizens, nor may they impose criminal-law-backed burdens - as S. 851 would do - upon those lawfully engaged in business or other activity within their sister states. Indeed, this principle is so fundamental that it runs through the Supreme Court's jurisprudence in cases that are nominally about provisions and rights as diverse as the Commerce Clause, the Due Process Clause, and the right to travel, which is itself derived from several distinct constitutional sources. See, e.g., Healy v. Beer Institute, 491 U.S. 324, 336 n. 13 (1989) (Commerce Clause decision quoting Edgar v. Mite Corp., 457 U.S. 624, 643 (1982) (plurality opinion), which in turn quoted the Court's Due Process decision in Shaffer v. Heitner, 433 U.S. 186, 197 (1977)) ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limit of the State's power.'").

The Supreme Court recently reaffirmed this fundamental principle in its landmark right to travel decision, Saenz v. Roe, 526 U.S. 489 (1999). There the Court held that, even with congressional approval, the State of California was powerless to carve out an exception to its otherwise-applicable legal regime by providing recently-arrived residents with only the welfare benefits that they would have been entitled to receive under the laws of their former states of residence. This attempt to saddle these interstate travelers with the laws of their former home states - even if only the welfare laws, laws that would operate far less directly and less powerfully than would a special criminal-law restriction on primary conduct - was held to impose an unconstitutional penalty upon their right to interstate travel, which, the Court held, is guaranteed them by the Privileges or Immunities Clause of the Fourteenth Amendment. See Saenz, 526 U.S. at 503-504.

Although Saenz concerned new residents of a state, the decision also reaffirmed that the constitutional right to travel under the Privileges and Immunities Clause of Article IV, Section 2, provides a similar type of protection to a non-resident who enters a state not to settle, but with an intent eventually to return to her home state:

[B]y virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States." Paul v. Virginia, 8 Wall. 168, 180 (1869). It provides important protections for nonresidents who enter a State whether to obtain employment, Hicklin v.Orbeck, 437 U.S. 518 (1978), to procure medical services, Doe v. Bolton, 410 U.S. 179, 200 (1973), or even to engage in commercial shrimp fishing, Toomer v. Witsell, 334 U.S. 385 (1948).

Saenz, 526 U.S. at 501-502 (footnotes and parenthetical omitted).

Indeed, Doe v. Bolton, 410 U.S. 179 (1973), which was decided over thirty years ago, and to which the Saenz court referred, specifically held that, under Article IV of the Constitution, a state may not restrict the ability of visiting non-residents to obtain abortions on the same terms and conditions under which they are made available by law to state residents. "[T]he Privileges and Immunities Clause, Const. Art. IV, §2, protects persons . . . who enter [a state] seeking the medical services that are available there." Id. at 200.

Thus, in terms of protection from being hobbled by the laws of one's home state wherever one travels, nothing turns on whether the interstate traveler intends to remain permanently in her destination state, or to return to her state of origin. Combined with the Court's holding that, like the states, Congress may not contravene the principles of federalism that are sometimes described under the "right to travel" label, Saenz reinforces the conclusion, if it were not clear before, that even if enacted by Congress, a law like S. 851 that attempts by reference to a state's own laws to control that state's resident's out-of-state conduct on pains of criminal punishment, whether of that resident or of whoever might assist her to travel interstate, would violate the federal Constitution. See also Shapiro v. Thompson, 394 U.S. 618, 629-630 (1969) (invalidating an Act of Congress mandating a durational residency requirement for recently-arrived District of Columbia residents seeking to obtain welfare assistance).

In 1999, Professor Lino Graglia of the University of Texas School of Law testified before Congress in favor of a bill essentially identical to this one. An opponent of constitutional abortion rights, he candidly conceded that the proposed law would "make it . . . more dangerous for young women to exercise their constitutional right to obtain a safe and legal abortion." Testimony of Lino A. Graglia on H.R. 1218 before the Constitution Subcommittee of the Committee on the Judiciary, U.S. House of Representatives, May 27, 1999 at 1. He also concluded, however, that "the Act furthers the principle of federalism to the extent that it reinforces or makes effective the very small amount of policymaking authority on the abortion issue that the Supreme Court, an arm of the national government, has permitted to remain with the States." Id. at 2. He testified that he supported the bill because he would support "anything Congress can do to move control of the issue back into the hands of the States." Id. at 1.

Of course, as the description of S. 851 given above demonstrates, that proposed statute would do nothing to move "back" into the hands of the states any of the control over abortion that was precluded by Roe v. Wade, 410 U.S. 113 (1973), and its progeny. The several states already have their own distinctive regimes for regulating the provision of abortion services to pregnant minors, regimes that are permitted under the Supreme Court's abortion rulings. That, indeed, is the very premise of this proposed law. But, rather than respecting federalism by permitting each state's law to operate within its own sphere, the proposed federal statute would contravene that essential principle of federalism by saddling the abortion-seeking young woman with the restrictive law of her home state wherever she may travel within the United States unless she travels unaided. Indeed, it would add insult to this federalism injury by imposing its regime regardless of the wishes of her home state, whose legislature might recoil from the prospect of transforming its parental notification laws, enacted ostensibly to encourage the provision of loving support and advice to distraught young women, into an obstacle to the most desperate of these young women, compelling them in the moment of their greatest despair to choose between, on the one hand, telling someone close to them of their situation and perhaps exposing this loved

one to criminal punishment, and, on the other, going to the back alleys or on an unaccompanied trip to another, possibly distant state. This federal statute would therefore violate rather than reinforce basic constitutional principles of federalism.

The fact that the proposed law applies only to those assisting the interstate travel of minors seeking abortions may make the federalism-based constitutional infirmity somewhat less obvious - while at the same time rendering the law more vulnerable to constitutional challenge under the Due Process Clause because of the danger in which it will place the class of frightened, perhaps desperate young women least able to travel safely on their own. See infra at 12-14. The importance of protecting the relationship between parents and their minor children cannot be gainsaid. But in the end, the fact that the proposed statute involves the interstate travel only of minors does not alter the conclusion that it violates constitutional principles of federalism.

No less than the right to end a pregnancy, the constitutional right to travel interstate and to take advantage of the laws of other states exists even for those citizens who are not yet eighteen. "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." Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976). Nonetheless, the Court has held that, in furtherance of the minors' best interests, government may in some circumstances have more leeway to regulate where minors are concerned. Thus, whereas a law that sought, for example, to burden adult women with their home state's constitutionally acceptable waiting periods for abortion (or with their home state's constitutionally permissible medical regulations that may make abortion more costly) even when they traveled out of state to avoid those waiting periods (or other regulations) would obviously be unconstitutional, it might be argued that a law like the proposed one, which seeks to force a young woman to comply with her home state's parental consent laws regardless of her circumstances, is, because of its focus on minors, somehow saved from constitutional invalidity.

It is not, for at least two reasons. First, the importance of the constitutional right in question for the pregnant minor too desperate even to seek judicial approval for abortion in her home state - either because of its futility there, or because of her terror at a judicial proceeding held to discuss her pregnancy and personal circumstances - means that government's power to burden that choice is severely restricted. As Justice Powell wrote over two decades ago:

The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. . . . A pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.

Moreover, the potentially severe detriment facing a pregnant woman 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 attainment of the age of majority, is one of the traditional criteria for 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 have consequences so grave and indelible.

Bellotti v. Baird (Bellotti II), 443 U.S. 622, 642 (1979) (plurality opinion) (citations omitted).

Second, the fact that the penalties on travel out of state by minors who do not first seek parental consent or judicial bypass are triggered only by intent to obtain a lawful abortion and only if the minor's home state has more stringent "minor protection" provisions in the form of parental involvement rules than the state of destination, renders any protection-of-minors exception to the basic rule of federalism unavailable.

To begin with, the proposed law, unlike one that evenhandedly defers to each state's determination of what will best protect the emotional health and physical safety of its pregnant minors who seek to terminate their pregnancies, simply defers to states with strict parental control laws and subordinates the interests of states that have decided that legally-mandated consent or notification is not a sound means of protecting pregnant minors. The law does not purport to impose a uniform nationwide requirement that all pregnant young women should be subject to the abortion laws of their home states and only those abortion laws wherever they may travel. Thus, under S. 851, a pregnant minor whose parents believe that it would be both destructive and profoundly disrespectful to their mature, sexually active daughter to require her by law to obtain their consent before having an abortion, and who live in a state whose laws reflect that view, would, despite the judgment expressed in the laws of her home state, still be required to obtain parental consent should she seek an abortion in a neighboring state with a stricter parental involvement law - something she might do, for example, because that is where the nearest abortion provider is located. This substantively slanted way in which S. 851 would operate fatally undermines any argument that might otherwise be available that principles of federalism must give way because this law seeks to ensure that the health and safety of pregnant minors are protected in the way their home states have decided would be best.

In addition, the proposed law, again unlike one protecting parental involvement generally, selectively targets one form of control: control with respect to the constitutionally protected procedure of terminating a pregnancy before viability. The proposed law does not do a thing for parental control if the minor is being assisted into another state (or, where the relevant regulation is local, into another city or county) for the purpose of obtaining a tattoo, or endoscopic surgery to correct a foot problem, or laser surgery for an eye defect. The law is activated only when the medical procedure being obtained in another state is the termination of a pregnancy. It is as though Congress proposed to assist parents in controlling their children when, and only when, those children wish to buy constitutionally protected but sexually explicit books about methods of birth control and abortion in states where the sale of such books to these minors is entirely lawful.

The basic constitutional principle that such laws overlook is that the greater power does not necessarily include the lesser. Thus, for example, even though so-called "fighting words" may be banned altogether despite the First Amendment, it is unconstitutional, the Supreme Court held in 1992, for government selectively to ban those fighting words that are racist or anti-semitic in character. See R.A.V. v. City of St. Paul, 505 U.S. 377, 391-392 (1992). To take another example, Congress could not make it a crime to assist a minor who has had an abortion in the past to cross a state line in order to obtain a lawful form of cosmetic surgery elsewhere if that minor has not complied with her state's valid parental involvement law for such surgery. Even though Congress

might enact a broader law that would cover all the minors in the class described, it could not enact a law aimed only at those who have had abortions. Such a law would impermissibly single out abortion for special burdens. The proposed law does so as well. Thus, even if a law that were properly drawn to protect minors could constitutionally displace one of the basic rules of federalism, the proposed statute can not.

Lastly, in oral testimony given in 1999 Professor John Harrison of the University of Virginia, while conceding that ordinarily a law such as this, which purported to impose upon an individual her home state's laws in order to prevent her from engaging in lawful conduct in one of the other states, would be constitutionally "doubtful," argued that the constitutionality of this law is resolved by the fact that it relates to "domestic relations," a sphere in which, according to Professor Harrison, "the state with the primary jurisdiction over the rights and responsibilities of parties to the domestic relations is the state of residence. . . and not the state where the conduct" at issue occurs. See transcript of the Hearing of the Constitution Subcommittee of the House Judiciary Committee on the Child Custody Protection Act, May 27, 1999.

This "domestic relations exception" to principles of federalism described by Professor Harrison, however, does not exist, at least not in any context relevant to the constitutionality of S. 851. To be sure, acting pursuant to Article IV, § 1, Congress has prescribed special state obligations to accord full faith and credit to judgments in the domestic relations context -- for example, to child custody determinations and child support orders. 28 U.S.C. §§ 1738A, 1738B. These provisions also establish choice of law principles governing modification of domestic relations orders. In addition, in a controversial provision whose constitutionality is open to question, Congress has said that states are not required to accord full faith and credit to same-sex marriages. Id. at § 1738C.

But the special measures adopted by Congress in the domestic relations context can provide no justification for S. 851. There is a world of difference between provisions like §§ 1738A and 1738B, which prescribe the full faith and credit to which state judicial decrees and judgments are entitled, and proposed S. 851, which in effect gives state statutes extraterritorial operation -- by purporting to impose criminal liability for interstate travel undertaken to engage in conduct lawful within the territorial jurisdiction of the state in which the conduct is to occur, based solely upon the laws in effect in the state of residence of the individual who seeks to travel to a state where she can engage in that conduct lawfully.

The Supreme Court has always differentiated "the credit owed to laws (legislative measures and common law) and to judgments." Baker v. General Motors Corp., 522 U.S. 222, 232 (1998). For example, while a state may not decline on public policy grounds to give full faith and credit to a judicial judgment from another state, see, e.g., Fauntleroy v. Lum, 210 U.S. 230, 237 (1908), a forum state has always been free to consider its own public policies in declining to follow the legislative enactments of other states. See Nevada v. Hall, 440 U.S. 410, 421-24 (1979). In short, under the Full Faith and Credit Clause, a state has never been compelled "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939). In fact, the Full Faith and Credit Clause was meant to prevent "parochial entrenchment on the interests of other States." Thomas v. Washington Gas Light Co., 448 U.S.

261, 272 (1980) (plurality opinion). A state is under no obligation to enforce another state's statute with which it disagrees.

But S. 851 would run afoul of that principle. It imposes the restrictive laws of a woman's home state wherever she travels, in derogation of the usual rules regarding choice of law and full faith and credit.

2. The Statute Fails to Use Reasonable Means To Achieve Its Ends In Violation of the Due Process Clause

Even if it were permissible for the government to prevent the pregnant minors affected by this statute from crossing state lines in order to obtain out of state abortions without complying with the laws of their home state, the means used in this statute to achieve those ends violate the Due Process Clause. Under that provision government may use only "reasonable" means to achieve even legitimate ends. See Hodgson v. Minnesota, 497 U.S. at 450.

This law does not prohibit pregnant minors themselves from crossing state lines nor does it purport to criminalize their conduct in obtaining abortions in other states without complying with the laws of their state of residence. Indeed, it expressly states that the pregnant minor who obtains an out of state abortion is not herself subject to the law. See S. 851, §2 (a) (proposed 18 U.S.C. §2431(b) (2)). Rather it punishes any adult who provides her assistance by transporting them across state lines. And it covers all adults, including relatives to whom a desperate, frightened pregnant adolescent might turn. Even a grandmother would be subject to imprisonment under this federal law for assisting her terrified granddaughter who, for whatever reason, simply could not speak to her parents about her unintended pregnancy.

The law thus would deny pregnant minors fearful of telling their parents of their pregnancy - perhaps because of a history of abuse or even because their own father or another relative may be responsible for the pregnancy - or of running the gantlet of their state's judicial bypass procedure the assistance of any compassionate or sympathetic adult, including any adult family member, at a time when they need it the most. These pregnant minors would still be permitted to attempt to obtain an out of state abortion, but the proposed law would require them to do so on their own. The law thus would operate by increasing the danger to and fear of these terrified young women. Those who chose to make the journey could rely on no adult to watch out for them, assist them or accompany them either on their trip, at the office of the abortion provider, or as they return home from the procedure - possibly suffering from aftereffects including disorientation from anesthesia or bleeding. Others will choose not to travel, but will seek unlawful abortions in their home states. As described above, at least one seventeen-year-old too scared to comply with her home state's law requiring parental consent or judicial bypass has already died from an unlawful abortion. See supra n. 6.

The Court's cases make clear that such a brutal and harmful mechanism for achieving even a legitimate governmental purpose would violate the Constitution. Government may not attempt to deter a minor from engaging in a particular activity - here, obtaining an out of state abortion without complying with her home state's parental consultation or bypass law - by making it more hazardous. See Carey v. Population Services International, 431 U.S. 678, 694-695 (1977) (plurality opinion) (state may not restrict minors' access to contraceptives as a means of

"deter[ing]" "minors' sexual activity" by "increasing the hazards attendant on it"); id. at 714-716 (Stevens, J., concurring in the judgment) (same principle); Eisenstadt v. Baird, 405 U.S. 438, 448 (1973) (prohibiting distribution of contraceptives to the unmarried is an "unreasonable" way of achieving the goal of "discouraging premarital sexual intercourse").

Instructive in this regard is Hodgson v. Minnesota, 497 U.S. 417(1990), in which the Court held that a two-parent notification provision - constitutionally justifiable, like the proposed statute, only to the extent that it serves "to protect the minor's welfare," id. at 455 - did not "reasonably further any legitimate state interest." Id. at 450. The Court concluded that

Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families. The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony at trial established that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to a parent as well. . . . In [some] circumstances, the statute was not merely ineffectual in achieving the State's goals but actually counterproductive.

497 U.S. at 450-451 (citations omitted). See also id. at 454 (the only permissible justification for "any rule requiring parental involvement in the abortion decision" is "the best interests of the child.").

The Court of course has recognized that it would be desirable for parents to be involved in the important decisions their children may make, including the decision whether to carry a pregnancy to term. However, the Court has also recognized that "The need to preserve the constitutional right and the unique nature of the abortion 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 II, 443 U.S. at 642. Because S. 851 attempts to achieve its ends only by depriving the scared, pregnant minor of the assistance of any sympathetic adult, it violates the Constitution. As in Hodgson, the Due Process Clause requires government to "adopt less burdensome means to protect the minor's welfare." Hodgson, 497 U.S. at 455.

3. The Proposed Law Unduly Burdens The Right of a Pregnant Minor to Obtain an Abortion

Finally, under the analytical approach articulated by the Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883, 887 (1992), the proposed statute unconstitutionally imposes an "undue burden" upon the constitutional rights of those pregnant adolescents to whom it applies. See Casey, 505 U.S. 883, 887 (1992) (controlling plurality opinion of O'Connor, Kennedy, and Souter, JJ.) (reaffirming that the right of a pregnant minor "to make the ultimate decision" cannot be unduly burdened).

As the Supreme Court explained in Casey, an undue burden exists, and therefore a provision of law is invalid, if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Id. at 887. Because the proposed statute has both this purpose and this effect, it is unconstitutional.

a. First, the statute's effect will be to place a substantial obstacle in the path of the young women it targets who seek to exercise their constitutionally-protected right to choose. Casey explains that the proper procedure for determining the facial validity of an abortion restriction is to examine its operation upon the class of women "who do not wish" to comply with its requirements. Casey, 505 U.S. at 895. If "in a large fraction of" these cases the law would "operate as a substantial obstacle to a woman's choice to undergo an abortion," it is "an undue burden, and therefore invalid." Id. See also Fargo Women's Health Center v. Schafer, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of stay and injunction) (reaffirming that this is the proper approach for determining the facial validity of a statute under Casey's undue burden standard).

Undoubtedly many pregnant women cross state lines to obtain abortions because the nearest abortion provider is not in their home state. Among minors crossing state lines for this reason, many may have consulted their parents and involved them in their decision. Others would likely not object to the application of S. 851. Here, though, the constitutionality of the Act must be measured by its impact upon the class who would not wish to comply with it: the most vulnerable, scared and desperate pregnant young women and girls in our society, those who would rather seek the assistance of another adult, perhaps a close relative, in traveling out of state to obtain an abortion than notify their parents or undergo the judicial bypass regime of the state in which they reside.

The fact that they have chosen to go to such lengths to avoid the legal requirements imposed by their states of residence indicates that the proposed statute will "in a large fraction of the cases . . . operate as a substantial obstacle to [their] choice to undergo an abortion," id., effectively resulting in their carrying their pregnancies to term despite their desire to obtain an abortion. It thus violates the Constitution.

Casey makes clear that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S. at 877. Where, however, a regulation, even one with a benign purpose, will "dete[r]" a "significant number of women . . . from procuring an abortion as surely as if the [government] had outlawed abortion," it imposes an undue burden and it cannot stand. See Casey, 505 U.S. at 894 (invalidating as an undue burden Pennsylvania's spousal notification law). See also Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986) (statute is invalid if it would "intimidate women into continuing pregnancies").

Of course it could be argued that what leads to the creation of the "substantial obstacle" in this case is the flawed operation of certain states' judicial bypass regimes. It is simply not material to the constitutional analysis, however, that, for many pregnant minors, flaws in the implementation of their home states' judicial bypass regimes will be one of the but-for causes of the interference that the proposed statute will work with respect to the right to choose. So long as the proposed statute would in effect impose a substantial obstacle upon the pregnant minors it affects, it violates the constitution under Casey. That the federal statute might not be the only cause of the obstacle imposed upon the pregnant minor, or that some group of pregnant minors might also be able to obviate this effect by bringing an action challenging as an undue burden the operation of

the notification and consent laws in their state of residence, is irrelevant. See Casey, 505 U.S. at 897 (striking down law that by its terms did nothing more than require women to notify their spouses of their intent to have an abortion because "[w]hether the prospect of the notification itself deters . . . women from seeking abortions, or whether the husband . . . prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to [a] veto . . .").

b. The statutory text, too, demonstrates that the purpose of the law within the meaning of Casey is to create a substantial obstacle that will in practice prevent these minor women from obtaining abortions. As described above, it is clear that the purpose of the law is not to permit every state to apply its laws extraterritorially upon its minor residents if it so chooses. The law is substantively slanted: It does not enforce the policy preferences of parents who may believe that legally enforced parental consent or notification laws interfere wrongly with the independence of their mature minor daughters and who, indeed, live in states that have made that same policy choice through their legislatures' decision not to adopt such laws. Nor does the law apply to all forms of parental involvement in their children's decisionmaking: only the decision with respect to abortion is singled out.

The goal of the law thus is not to advance federalism or to respect the laws of each state with respect to parental involvement in their children's lives. Nor, since it does not purport to impose a national standard for parental notification or consent, is its purpose to ensure that some uniform standard applies that in Congress's judgment properly expresses the appropriate balance. It ensures only that the most stringent parental consent or notification law applies in case a woman crosses state lines to have an abortion. And the only purpose for such a substantively slanted rule is to deter pregnant young women from obtaining abortions.

That the statute is designed to achieve this result can also be inferred from an exception contained in its text. Under the statute, the restriction on transportation across state lines for purposes of obtaining an abortion does not apply "if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself." Proposed 18 U.S.C. §2431(b).

Tellingly, this is not an exception for the emergency performance of a life-saving abortion, the performance of an abortion where there is no time to obtain parental consent or go through a judicial bypass procedure. Such an exception would make sense if the law were truly intended merely to enforce compliance with laws in the pregnant minor's home state relating to parental consent or notification.

Rather, this exception is designed to permit the pregnant woman to obtain a desired abortion if it is necessary to save her life, even when there is no immediate threat so that she could obtain such an abortion after complying with her home state's law. That the statute's drafters thought such an exception was necessary reflects an understanding that the proposed statute would, in fact, impose an absolute obstacle to the pregnant young woman obtaining an abortion, not merely a delay. This explains the inclusion of an exception for the pregnant minor's life that applies whether the pregnant minor faces an emergency or not.

Although in some sense this exception is broader than what might be expected in a law truly designed to compel notification or bypass, it reveals that the statute is intended not to foster effective compliance with state laws that themselves pose no substantial obstacle to the exercise of the right to choose, but to effectively require those young women afraid to comply with their home state's laws to carry their pregnancies to term. Even if the law would not be effective in achieving this goal, because this is its purpose, it violates the Fourteenth Amendment to the Constitution.

c. Lastly, even aside from these infirmities, the proposed statute would still violate the Constitution under Casey because it lacks the required exception for the health of the pregnant woman. The Court in Casey made clear that "the essential holding of Roe," which it reaffirmed, "forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." Casey, 505 U.S. at 880.

As currently written, the proposed statute contains no exception for the pregnant adolescent's health at all. The Supreme Court's decision in Stenberg v. Carhart confirms and reinforces that such an exception is constitutionally necessary. See Stenberg v. Carhart, 530 U.S. 914, 930-938 (2000). Indeed, the abortion restriction at issue there contained only an exception for the woman's life essentially identical to the one included in S. 851. See id. at 921-922. The law there was held invalid because, like S. 851, it failed to include a constitutionally-required "exception . . . for the preservation of the . . . health of the mother." Id. at 938 (quoting Casey, 505 U.S. at 879); cf. id. at 930, 945-946 (citations and internal quotation marks omitted) (independently invalidating that statute because it "impose[d] an undue burden on . . . the ability" of those among the approximately ten percent of women seeking abortions who do so during the second trimester of pregnancy "to choose a [particular method of obtaining an] abortion"). Here, as the proposed statute's authors recognized, a life exception is constitutionally required. A health exception is constitutionally required as well. Because the proposed statute does not contain any such exception, it is constitutionally infirm, for the same reason as the law struck down in Stenberg.