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## *Hodgson v. Minnesota: Chipping Away at Roe v. Wade in the Aftermath of Webster*

### I. INTRODUCTION

Becky Bell was only seventeen years old when she died in 1988 as a result of complications from an illegal abortion.<sup>1</sup> Her parents, Bill and Karen Bell, blame her death on an Indiana state law, which requires that minors get parental consent or, in the alternative, receive permission from a judge prior to obtaining an abortion.<sup>2</sup> After Becky died, the Bells pieced together the frightened decisions and tragic events that led to their daughter's death. They learned from Becky's friends that she had become pregnant some three to four months before seeking the abortion.<sup>3</sup> The father of Becky's child was a young man Becky had been seeing for a short while who was unwilling to help Becky out of her predicament.<sup>4</sup> Becky decided to visit the Planned Parenthood office in Indianapolis where she was informed that her options were either to seek consent to have an abortion from one of her parents; apply to a juvenile court judge for a waiver from the consent requirements of the state law; or travel to Kentucky, the closest state where no parental consent was required, and obtain an abortion.<sup>5</sup> Apparently, none of these choices seemed feasible to the young, frightened girl. Instead, she sought and obtained an illegal abortion. Five days later she was dead.<sup>6</sup> The coroner determined the cause of death to be "infections stemming from a 'septic abortion.'"<sup>7</sup>

Before their daughter's death, the Bells were unaware that Indiana had a parental consent law.<sup>8</sup> They candidly admit that prior to the tragedy, they probably would have approved of the law and sided

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1. Carlson, *Abortion's Hardest Cases*, TIME, July 9, 1990, at 22.

2. *Id.* See IND. CODE ANN. § 35-1-58.5-25(a)-(c) (Burns Supp. 1988).

3. Hewitt, Freeman, Nelson & Shaw, *Mortal Choices at a Tender Age*, PEOPLE, July 23, 1990, at 34.

4. *Id.*

5. *Id.* See *infra* note 182 (explaining that Kentucky's parental consent law was not enforced in 1988).

6. *Id.*

7. L.A. Times, Aug. 13, 1990, at E1, col. 6. The doctor attending Becky when she died said that she was the victim of blood poisoning, the result of a dirty instrument inserted in her vagina to effect the abortion. Hewitt, Freeman, Nelson & Shaw, *supra* note 3, at 34.

8. Hewitt, Freeman, Nelson & Shaw, *supra* note 3, at 34.

with prolife advocates who claim that such laws promote family communication.<sup>9</sup> Today, however, they actively participate as spokespeople in a new campaign by prochoice advocates to convince voters that allowing a teenager to have an abortion without notifying her parents should be legal.<sup>10</sup>

In *Hodgson v. Minnesota*,<sup>11</sup> the Supreme Court upheld the most restrictive parental notification statute then existing in the United States.<sup>12</sup> That statute requires notice to *both* parents or compliance with a judicial bypass procedure before a minor may obtain an abortion within the State of Minnesota.<sup>13</sup>

The Supreme Court decision, however, did not settle the political controversy over minors' rights to abortions. In fact, the debate goes much deeper and centers at the heart of the abortion issue. Prolife advocates hail the Court's ruling as a victory for the unborn child and the family unit,<sup>14</sup> but prochoice advocates see the decision as another obstacle, legislatively placed by the states and judicially upheld by the Supreme Court, in the path of women seeking to exercise their right to have an abortion.<sup>15</sup> Currently, this right is guarded by the protections granted women in the Court's 1973 *Roe v. Wade*<sup>16</sup> decision, but those protections are continually waning as more and more state regulations of abortion are upheld.

This Note will critique the Court's decision in *Hodgson* regarding parental notification statutes and will discuss the history and evolving status of permissible state regulation of the abortion decision. Part II traces the history of the major abortion cases decided by the Supreme Court with specific focus upon parental notification and consent decisions. Part III analyzes the majority, concurring and dis-

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9. Wash. Post, Aug. 8, 1990, at A3.

10. *Id.*

11. 110 S. Ct. 2926 (1990).

12. It was considered by the Supreme Court to be the most restrictive notice statute because it requires notice to *both* parents, whether or not they reside in the same household and regardless of whether they are divorced or separated. *Id.* at 2931 n.5. The Court upheld two main portions of the statute, including the portion which requires notification to both parents and the portion which provides an alternative judicial bypass procedure whereby a minor, who is either mature or for whom notification will not serve her best interests, can avoid notification. Additionally, the Court upheld the forty-eight hour waiting period contained in the statute, which commences upon notification of the minor's parents. For a full discussion of the case, see *infra* notes 204-319 and accompanying text.

13. See MINN. STAT. ANN. § 144.343 (West Supp. 1989). For the text of the statute, see *infra* note 185.

14. See Comment, *The Viability of Parental Abortion Notification and Consent Statutes: Assessing Fact and Fiction*, 38 AM. U.L. REV. 881, 887 (1989) (noting that the Court deems a state's interest in promoting parental authority as legitimate and favors the "traditional parental role of child rearing").

15. See Wash. Post, Aug. 8, 1990, at A3, col. 1.

16. 410 U.S. 113 (1973). The *Roe* decision drastically limited the ability of the states to regulate women's abortion decisions.

senting opinions in the *Hodgson* decision. The judicial, legislative and social impacts flowing from *Hodgson* are considered in Part IV. Part V concludes with a look at the present state of permissible abortion regulation as sanctioned by the Court. Finally, any pending cases before the Court which might impact the future extent of permissible state regulation are discussed.

## II. HISTORICAL BACKGROUND

### A. State Regulation Before *Roe*

Abortion was a fairly accepted and common practice during the colonization and unionization of the United States.<sup>17</sup> In fact, state regulation of abortion by statute in this country was nonexistent until the nineteenth century.<sup>18</sup> Even then, the statutes promulgated by the various states were not enacted for religious or moral reasons; rather, their main purpose was to protect women's health.<sup>19</sup> Physicians of the time, who recognized that many abortions performed during that period were unsafe,<sup>20</sup> were the leading force behind a movement to criminalize abortions.<sup>21</sup> Partly to gain sentiment in their favor and partly because of their increased scientific understanding of fetal development,<sup>22</sup> the physicians focused on the fetus's right to life in their public campaign.<sup>23</sup> It was this focus which helped change the public attitude toward abortion and led to the

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17. L. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 28 (1990). The American jurisdictions were governed by the common law, which permitted abortion "until 'quickening,' the time when the first movement of the fetus was perceived by the woman." *Id.* The result was that abortion was commonly practiced through the fourth or fifth month of pregnancy. *Id.* While postquickening abortion was considered a crime, it was usually only a misdemeanor offense. *Id.*

18. J. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* 3-4 (1978). The first abortion regulation in the United States was enacted by the state of Connecticut in 1821. *Id.* at 20. Connecticut's statute prohibited the inducement of abortion through dangerous poisons. *Id.* at 21.

19. L. TRIBE, *supra* note 17, at 29.

20. For example, administering a dose of poison, hopefully sufficient to kill the fetus but not the pregnant woman, was a popular abortion method which physicians of the time hoped to curb. *Id.* Additionally, statistics from the period show that the mortality rate from surgically-performed abortions was much higher than the mortality rate incident to childbirth, the result of postprocedure infections. *Id.* Another problem was the wide variety of dangerous "home remedies" which were commercially available, ranging from strenuous exercise programs to products which were physically inserted into the uterus. *Id.*

21. J. MOHR, *supra* note 18, at 34.

22. The scientific community had recognized that human development was a continuing process, rather than a sudden event which occurred at "quickening." *Id.* at 165.

23. L. TRIBE, *supra* note 17, at 30.

modern moral debate over the procedure.<sup>24</sup>

The physicians were ultimately successful in their campaign, and, in over forty states, abortion procedures were legislatively declared illegal except when such procedures were necessary to protect the life of the woman involved.<sup>25</sup> However, these statutes were largely unenforced,<sup>26</sup> and medical practitioners often defined “therapeutically necessary”<sup>27</sup> abortions loosely<sup>28</sup> in order to accommodate their patients’ desires.

During the 1960s and 1970s, two new factors played upon the view held by the medical community about the proper regulation of abortion. Specifically, ingestion of the tranquilizer thalidomide and an outbreak of the German Measles among pregnant women resulted in widespread birth defects.<sup>29</sup> Patients desperately sought the approval of their physicians to undergo abortions. Resistance by the courts in terming these requested abortions “medically necessary” led physicians to challenge the same criminal abortion laws their predecessors had sought to establish.<sup>30</sup>

In support of the emerging view within the medical community, the American Medical Association issued a statement in 1967 which expressly favored liberalization of abortion regulation among the states.<sup>31</sup> This was followed in 1970 by a statement recognizing the legitimacy of the abortion procedure, limited only by the “[s]ound clinical judgment” of a woman’s best interests by her physician.<sup>32</sup> The American public expressed support of this viewpoint, as evidenced by their response to a Gallup poll taken during the

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24. *Id.*

25. *Id.* at 34. Additionally, the distinction between “quick” and “non-quick” fetuses was abandoned. J. MOHR, *supra* note 18, at 35.

26. In fact, illegal abortions were the norm. L. TRIBE, *supra* note 17, at 35.

27. Traditionally, an abortion was considered “therapeutic” when it was induced to save the life of the mother. SCHMIDT’S ATTORNEYS’ DICTIONARY OF MEDICINE A-18 (1990). In modern times, the term includes abortions induced to preserve the health of the mother as well. *Id.*

28. For example, during the first half of the twentieth century, doctors were known to perform “therapeutic” abortions for poverty or psychiatric reasons, both of which questionably threaten a woman’s life. L. TRIBE, *supra* note 17, at 35.

29. *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. ILL. L.F. 177, 178 (1972). “During the 1960s, thalidomide was prescribed and ingested by pregnant women in both Europe and the United States. The drug was later discovered to cause severe fetal abnormalities.” *Id.* at 178 n.11. Additionally, German Measles, otherwise known as rubella, was an epidemic during the 1960s. *Id.* at 178. It was estimated that 30,000 abnormal children were born to women who had been afflicted with German Measles during pregnancy. *Id.* See also L. TRIBE, *supra* note 17, at 37.

30. L. TRIBE, *supra* note 17, at 37.

31. R. PETCHESKY, ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 124 (1984).

32. *Id.*

thalidomide episode of the 1960s.<sup>33</sup>

Legislative reforms followed upon the heels of these two tragic medical episodes. Starting in 1967, states began considering revisions to their penal codes, and by 1970, twelve states had implemented reforms.<sup>34</sup> Most states based their reforms upon the American Law Institute's 1962 suggested model abortion provisions, which would allow abortions in three situations: (1) when continuation of the pregnancy would seriously impair the mental or physical health of the mother; (2) when the child was likely to be born with serious mental or physical defects; and (3) when the pregnancy was the result of rape or incest.<sup>35</sup> While these revisions appeared to be a far cry from the previous stance of the states, which generally criminalized abortion except when the life of the mother was at stake, the result of the new laws was not always beneficial. In fact, statistics showed that fewer women were successful in obtaining abortions after the reforms than before they were enacted.<sup>36</sup> This result appeared to occur because of the bureaucratic nature of the new laws, which required women to wade through extremely burdensome regulations, such as seeking the approval of hospital review boards before obtaining an abortion, or proving certain facts to the state solicitor general in cases of rape.<sup>37</sup> The net effect was that almost all abortions were prohib-

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33. F. GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* 27 (1989) (noting that a poll taken shortly after one woman's well-publicized abortion following thalidomide ingestion indicated that 52% of Americans supported the abortion, and only 32% were opposed to it).

34. E. RUBIN, *ABORTION, POLITICS AND THE COURTS* 23 (2d ed. 1987).

35. Graham, *The Law: Review of Abortion*, N.Y. Times, Sept. 10, 1967, at E11.

36. For example, following reform in Colorado, 19 out of 20 women seeking legal abortions were turned away. N.Y. Times, Dec. 8, 1969, at 1. Likewise, following a change in California's laws, it was found that while 2,035 legal abortions were performed in 1968, 100,000 illegal abortions occurred. Monroe, *How California's Abortion Law Isn't Working*, N.Y. TIMES MAGAZINE, Dec. 29, 1968, at 10.

37. Georgia, for example, enacted a statute which provided, in pertinent part:

(3)(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians . . . who certify in writing based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary . . . .

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made by any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

ited, though no longer criminalized.<sup>38</sup>

The negative effects upon women resulting from the promulgation of these new abortion laws gave rise to a new challenge, supported by women's organizations,<sup>39</sup> to repeal criminal abortion statutes altogether.<sup>40</sup> By 1973, the year of the landmark *Roe v. Wade* decision, four states had already repealed their abortion laws and "guaranteed a woman by law the right to choose for herself whether to terminate her pregnancy."<sup>41</sup> Nineteen other states, choosing to follow the aforementioned reform movement rather than outright repeal, had decriminalized abortion only in certain situations.<sup>42</sup>

### B. *The Development of the Right of Privacy*

The individual right of privacy, although not found expressly in the Constitution, has been legitimized by the Supreme Court.<sup>43</sup> This privacy doctrine was first announced twenty-six years ago in *Griswold v. Connecticut*.<sup>44</sup> There, the Court struck down statutes prohibiting the use and distribution of contraceptive devices.<sup>45</sup> Additionally, the Court articulated that a right of privacy could be discerned in the "penumbras"<sup>46</sup> of the first, third, fourth, fifth, and ninth amend-

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Doe v. Bolton, 410 U.S. 179, 202 (1973) (Appendix A to the Court's opinion) (setting out the Georgia criminal statute at issue).

38. *See id.* at 202-05.

39. Until the movement for total repeal of abortion, women's organizations had virtually avoided participation in the abortion issue. E. RUBIN, *supra* note 34, at 23. However, in 1967, the newly formed National Organization for Women (NOW) included the "Right of Women to Control their Reproductive Lives" in their Women's "Bill of Rights." *Id.*

40. L. TRIBE, *supra* note 17, at 43. In 1969, the National Association for the Repeal of Abortion Laws (NARAL) was formed. L. LADER, ABORTION II: MAKING THE REVOLUTION 88-97 (1973). The NARAL eventually became a prominent lobbying group for prochoice viewpoints. *Id.*

41. *Roe v. Wade*, 410 U.S. 113, 140 n.37 (1973). The four states were Alaska, Hawaii, New York and Washington. *Id.*

42. M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 32 (1987).

43. The concept of a right of privacy probably originated in an article written by Samuel Warren and Louis D. Brandeis in 1890. *See Warren & Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In that article, the writers advocated that all persons possess an "inviolable personality" which deserves protection. *Id.* at 211. The right to privacy concept subsequently evolved in cases decided by the Supreme Court. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing parents' *liberty interest* in educating their children in languages other than English); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (validating parents' *freedom of choice* in sending their children to private, rather than public, schools); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down a mandatory sterilization statute for criminals who had committed crimes of moral turpitude and establishing that rights related to marriage and procreation are *fundamental*).

44. 381 U.S. 479 (1965).

45. *Id.* at 485-86.

46. The term "penumbra" here means at the periphery or fringe of the specific Bill of Rights provisions listed. *See THE AMERICAN HERITAGE DICTIONARY* 919 (2d College ed. 1982).

ments.<sup>47</sup> This right was recognized by the Court to be inherent in the marital relationship and included the right to decide what to do within the "sacred precincts of marital bedrooms. . . ."<sup>48</sup>

Seven years later, in *Eisenstadt v. Baird*,<sup>49</sup> the Court expressly extended this right of privacy regarding the distribution of contraceptives to unmarried persons<sup>50</sup> as well. Eliminating any doubts that *Griswold* applied to married persons only, the Court elaborated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>51</sup>

The decisions in *Griswold* and *Eisenstadt*, which delineated the constitutionally protected right of privacy, were the crucial progenitors to the development of abortion regulation in the Supreme Court. Indeed, it was the year following *Eisenstadt*, in the controversial *Roe v. Wade* opinion, when the Court determined that the privacy doctrine was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>52</sup>

### C. *The Modern Abortion Cases*

The progeny of modern abortion cases developed out of the *Roe v. Wade* decision which legalized abortion nationwide.<sup>53</sup> In *Roe*, the Supreme Court was faced with striking a difficult compromise between prolife advocates who claimed that "human life deserves protection from the moment of conception," and prochoice advocates who claimed that the choice should be the pregnant woman's until

47. *Griswold*, 381 U.S. at 484.

48. *Id.* at 485. Perhaps the most famous quote from the *Griswold* opinion lies in this statement: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" *Id.*

49. 405 U.S. 438 (1972).

50. *Id.* at 454.

51. *Id.* at 453.

52. *Roe*, 410 U.S. at 153. The outer limits of this privacy doctrine appear to have been defined in the Supreme Court case of *Bowers v. Hardwick*, 478 U.S. 186 (1986). There, the Court determined that a state could criminalize homosexual sodomy without violating the right to privacy. *Id.* at 189. The Court specifically refused to elevate the act of homosexual sodomy to a fundamental right. *Id.* at 195-96. The court reasoned that homosexual sodomy, in contrast to marriage, procreation, and child rearing, was not one of the traditional values which the framers of the Bill of Rights intended to protect. *Id.* at 192-94.

53. The Texas statute at issue there made it a crime to procure or attempt an abortion, unless necessary to save the life of the mother. See *Roe*, 410 U.S. at 117-18 n.1.



childbirth.<sup>54</sup> However, in a seven-two decision,<sup>55</sup> the Court strategically avoided the moral and religious issues and based its ruling on a woman's constitutional right to privacy.<sup>56</sup> The *Roe* majority recognized this right to privacy as a fundamental right.<sup>57</sup> Thus, after *Roe*, states have been allowed to interfere with a woman's abortion decision only if they have a "compelling reason" for doing so.<sup>58</sup>

The Court used a trimester approach in its analysis.<sup>59</sup> In the first trimester of a woman's pregnancy, her decision to have an abortion is completely private and protected from state interference; however, the state can require that the procedure be performed by a licensed physician.<sup>60</sup> In the second trimester, the state's interest in the woman's health becomes compelling, and the state is thereby granted the limited authority to regulate abortions only when the woman's health is at stake.<sup>61</sup> Otherwise, the woman's decision to have an abortion is still protected by her right of privacy.<sup>62</sup> At approximately the beginning of the third trimester of pregnancy, the fetus becomes viable and is capable of surviving outside the mother's womb, making the state's interest in protecting the potential for life compelling.<sup>63</sup> The state is then permitted to regulate the woman's abortion decision even to the point of prohibition, in order to protect a fetus's life, unless the abortion is necessary to preserve the life or health of the woman.<sup>64</sup>

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54. W. SCHWARTZ, *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT, 1969-1986* 115 (1987).

55. The majority opinion was written by Justice Blackmun and joined by Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall and Powell. Additionally, Chief Justice Burger, Justice Douglas and Justice Stewart filed separate concurring opinions. A dissenting opinion was written by Justice White and joined by Justice Rehnquist. Justice Rehnquist also filed a separate dissenting opinion.

56. *Roe*, 410 U.S. at 155. For a discussion of the right of privacy, see *supra* notes 43-52 and accompanying text.

57. See *supra* notes 43-52 and accompanying text. The most often recognized fundamental rights are: the right to freedom of association (see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)); the right to vote (see *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966)); the right to interstate travel (see *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969)); and the right to privacy, including freedom of choice in marital, child bearing, and child rearing decisions (see *supra* notes 43-52 and accompanying text).

58. Fundamental rights are reviewed under a "strict scrutiny" standard. J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 418-19 (2d ed. 1983). Basically, if a law restricts fundamental rights, the Court has raised the standard that the law must meet in order to pass constitutional muster. *Id.* at 418. The strict scrutiny standard requires that the legislation be "necessary to promote a compelling or overriding interest of government," or it will be struck down as "violative of the due process clause." *Id.* at 418-19.

59. See *Roe*, 410 U.S. at 162-64.

60. *Id.* at 163-65.

61. *Id.* at 163-64.

62. *Id.*

63. *Id.* at 163.

64. *Id.* at 163-65. It is interesting to note that the point of viability is dependent

Since *Roe*, the Court has attempted to define the parameters placed upon state power to regulate abortion. The cases it has considered generally center around three separate issues: (1) whether states can restrict the types of abortion procedures which may be utilized; (2) whether the pregnant woman's decision to have an abortion can be limited by a third person's consent; and (3) whether public funding must be provided for abortions. Each category of the cases will be considered in turn.

### 1. The Abortion Procedure Cases

In efforts to restrict the number of abortions performed within their boundaries, some states, subsequent to the *Roe* decision, enacted regulations which limited the types of abortions that could be performed, or the procedures that could be used pursuant to the performance of those abortions. For example, Missouri enacted a law which required physicians to utilize the prostaglandin method<sup>65</sup> of abortion, rather than the much more common saline amniocentesis method,<sup>66</sup> after the first twelve weeks of pregnancy.<sup>67</sup> Missouri asserted that the purpose of the law was to protect maternal health.<sup>68</sup>

However, in *Planned Parenthood v. Danforth*,<sup>69</sup> the Court noted that the Missouri law actually resulted in the use of abortion techniques which were more dangerous than the outlawed saline amni-

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upon the changing state of medical technology, which will presumably continue to move that point forward into earlier stages of pregnancy. See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). For example, at the time *Roe* was decided, the state of medical technology placed viability at about twenty-eight weeks gestation; however, present day technology places viability at about twenty-four weeks. *Id.* at 457; L. TRIBE, *supra* note 17, at 21-22. Hence, as Justice O'Connor has noted, "[t]he *Roe* framework . . . is clearly on a collision course with itself." *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting). The point to be inferred is that, as technology pushes the point of viability forward into the second, and possibly, someday, the first trimester of pregnancy, state regulation of abortion to protect the life of the fetus will technically be permitted at a time when it was historically prohibited under the framework set out in *Roe*.

65. With the prostaglandin method, the hormone prostaglandin is injected into the woman's womb to effect the abortion. S. TERKEL, *ABORTION: FACING THE ISSUES* 52 (1988).

66. "Saline amniocentesis" is a process "whereby the amniotic fluid is withdrawn and 'a saline or other fluid' is inserted into the amniotic sac" in order to cause premature labor and an expulsion of the fetus. *Planned Parenthood v. Danforth*, 428 U.S. 52, 76 (1976). Sixty-eight to eighty percent of all abortions performed in the United States utilize this procedure. *Id.* at 77.

67. *Planned Parenthood*, 428 U.S. at 75-76.

68. *Id.* at 76.

69. 428 U.S. 52 (1976).

ocentesis method and found that the saline method was actually safer for pregnant women than carrying their children to term and undergoing childbirth.<sup>70</sup> Furthermore, since the riskier prostaglandin method was not yet available within Missouri,<sup>71</sup> the Court held that the law was plainly a regulation designed to prevent abortions, rather than to protect maternal health.<sup>72</sup>

Next, the Court considered an Ohio regulation which mandated that all abortions after the first trimester be performed in a hospital.<sup>73</sup> In *Akron v. Akron Center For Reproductive Health*,<sup>74</sup> the Court concluded that the regulation, which had the effect of barring abortions in licensed clinics, unconstitutionally violated the abortion right established in *Roe*.<sup>75</sup> While conceding that the state's interest in protecting the woman's health becomes compelling during the second trimester, the Court held that Ohio's regulation was not "reasonably designed to further" that interest.<sup>76</sup> The Court pointed out that abortions are substantially more expensive in hospitals than clinics<sup>77</sup> and that at least one type of abortion procedure could be performed safely in a suitably-equipped clinic.<sup>78</sup> Hence, since the statute prevented some economically disadvantaged women from obtaining abortions, the Ohio regulation was struck down as an unreasonable means of achieving the state's interest in protecting the woman's health.<sup>79</sup>

In contrast, on the same day *Akron* was decided, the Court upheld in *Simopoulos v. Virginia*<sup>80</sup> a Virginia statute which allowed second trimester abortions to be performed in a hospital or outpatient clinic only if the facility was licensed as a "hospital" by the state.<sup>81</sup> The Court upheld the statute's constitutionality and affirmed the conviction of a Virginia physician who had performed a second trimester

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70. *Id.* at 76-78.

71. *Id.* at 77 n.12.

72. *Id.* at 79.

73. See *Akron v. Akron Center For Reproductive Health*, 462 U.S. 416 (1983).

74. *Id.*

75. *Id.* at 438-39.

76. *Id.* at 434.

77. *Id.* at 434-35 (remarking that abortions in hospitals generally cost \$850.00 - \$900.00 at that time, while abortions at a licensed clinic generally cost \$350.00 - \$400.00).

78. *Id.* at 436 (noting that the Dilation and Evacuation procedure could safely be performed in licensed clinics).

79. *Id.* at 438-39. However, the Court noted that the state's interest could *reasonably* be served through regulations which require that *certain types* of abortions be performed only in hospitals, if medical concerns reasonably require that the procedure be undertaken in a full-service hospital. *Id.* at 433-34, 438 n.27. The primary fault with the Ohio statute was that it required that *all* second trimester abortions be performed in hospitals. *Id.* at 433-34.

80. 462 U.S. 506 (1983).

81. *Id.* at 511-15, 519.

abortion in an unlicensed clinic.<sup>82</sup> The Court reasoned that requiring these procedures to be undertaken in a licensed clinic was not an unreasonable means of furthering the state's interest in protecting the woman's health, because the licensing requirement enabled the state to make certain that abortion procedures were performed "'under circumstances that insure maximum safety for the patient.'"<sup>83</sup>

Finally, the Court struck down two state regulations that worked mainly to discourage abortions under the guise of "informed consent"<sup>84</sup> procedures.<sup>85</sup> Both Ohio and Pennsylvania required that, in conjunction with obtaining a woman's informed consent to the surgical procedure, the physician involved had to disclose certain facts to the woman such as: 1) that "the unborn child is a human life from the moment of conception;"<sup>86</sup> 2) that abortion is "a major surgical procedure;"<sup>87</sup> and 3) that "[m]edical assistance benefits may be avail-

82. *Id.* at 509, 519. The facts in *Simopoulos* were especially unsettling. A certified obstetrician-gynecologist was indicted for violating a Virginia criminal abortion statute which provided:

'[I]f any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be guilty of a Class 4 felony. [However,] there is no criminal liability if the abortion (i) is performed within the first trimester . . . ; (ii) is performed in a licensed hospital in the second trimester . . . ; (iii) is performed during the third trimester under certain circumstances, . . . ; [or] (iv) is necessary to save the woman's life.'

*Id.* at 509 n.2 (quoting VA. CODE ANN. § 18.2-10(d) (1982)). The obstetrician had performed many first trimester abortions at his unlicensed clinic. *Id.* at 508. A seventeen-year-old, unmarried high school student came to him and requested an abortion. *Id.* The obstetrician examined her and found her to be five months pregnant, which is well into the second trimester of pregnancy. *Id.* The young girl never informed her parents of her decision to have an abortion. *Id.* Instead, she returned to the clinic two days later and was injected with a saline solution designed to cause premature labor and abortion of the fetus. *Id.* Then, the girl rented a motel room and stayed there alone, where she aborted her fetus, forty-eight hours after the injection, in the bathroom. *Id.* at 508-09. When the police found the fetus in the wastebasket at the motel, they began an investigation which led to the arrest of the defendant obstetrician. *Id.* at 509.

83. *Id.* at 519 (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)).

84. "Informed consent" involves a patient agreeing to a surgical or other medical procedure with full knowledge of the risks involved. BLACK'S LAW DICTIONARY 779 (6th ed. 1990).

85. See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

It is important to note that the Court in *Thornburgh* stated that a true informed consent procedure is both proper and constitutional. *Thornburgh*, 476 U.S. at 760.

86. AKRON, OHIO, COD. ORDINANCES § 1870.06(3) (1978).

87. AKRON, OHIO, COD. ORDINANCES § 1870.06(5) (1978).

able for prenatal care, childbirth and neonatal care.”<sup>88</sup> In both *Akron v. Akron Center for Reproductive Health*<sup>89</sup> and *Thornburgh v. American College of Obstetricians*,<sup>90</sup> the Court declared these informed consent procedures unconstitutional, reasoning that they were not designed to further the state’s interest in making sure informed consent was obtained, but rather encouraged women to withhold their consent altogether.<sup>91</sup>

In sum, state restrictions upon allowable abortion procedures that are not reasonably related to a compelling state interest have been consistently struck down since *Roe*.

## 2. The Consent Cases

Several states have enacted statutes which require that third persons, including either husbands or parents of the mother,<sup>92</sup> consent to a woman’s decision to get an abortion before the procedure can be performed. In *Planned Parenthood v. Danforth*,<sup>93</sup> the Court addressed a Missouri statute which barred abortions during the first trimester unless the procedure was consented to by the woman’s husband.<sup>94</sup> Two Missouri physicians challenged the constitutionality of the statute and demanded declaratory and injunctive relief against its enforcement.<sup>95</sup> The Court declared the portion of the statute requiring spousal consent unconstitutional,<sup>96</sup> holding that a state cannot “delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.”<sup>97</sup> Moreover, the Court in *Planned Parenthood* specifically ruled that states could not grant *any* third

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88. PA. CONS. STAT. ANN. § 3205(a)(2)(ii) (Purdon Supp. 1991). See also *AKRON, OHIO, COD. ORDINANCES § 1870.06(7)* (1978) (requiring physicians to inform patients that there are “numerous public and private agencies . . . available to assist her during pregnancy and after the birth of her child. . .”).

89. 462 U.S. 416 (1983).

90. 476 U.S. 747.

91. *Akron*, 462 U.S. at 443-44 (ruling that a state may not adopt “abortion regulations designed to influence the woman’s informed choice between abortion or childbirth”); *Thornburgh*, 476 U.S. at 762 (noting that the required information was not of a nature that was always “relevant to the woman’s decision” and, the statute, therefore, was “plainly overinclusive”).

92. For a discussion of parental consent and notification statutes, see *infra* notes 139-183 and accompanying text.

93. 428 U.S. 52 (1976).

94. *Id.* at 85 (appendix to the Court’s opinion). The Missouri statute at issue provided, in pertinent part: “No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except: . . . [w]ith the written consent of the woman’s spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother. . . .” *Id.*

95. *Planned Parenthood*, 428 U.S. at 56-57.

96. *Id.* at 69.

97. *Id.* at 69 (quoting *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1375 (1975) (Webster, J., concurring and dissenting)).

party an absolute veto over a woman's decision to have an abortion.<sup>98</sup> Reiterating its prior statement in *Roe*, the Court stressed that "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."<sup>99</sup>

### 3. The Public Funding Cases

While states customarily provide public funds for the expenses associated with ordinary childbirth, many states have refused to provide funding for abortions. When addressing the issue of whether public funding for abortions is required, the Court has appeared to diverge from its holding in *Roe* which placed the abortion decision with the woman to the exclusion of the state legislatures.<sup>100</sup>

In *Maher v. Roe*,<sup>101</sup> the Court considered Connecticut's decision to refuse to give Medicaid funding for nontherapeutic<sup>102</sup> abortions. In a creative analysis of the type of fundamental rights guarded by *Roe*, the Court determined that *Roe* does not protect a woman's fundamental right to *abortion*; rather, it protects only her *freedom to decide* whether to have an abortion.<sup>103</sup> The majority chose to uphold Connecticut's regulation, reasoning that the lack of public funding merely encouraged childbirth and placed no additional obstacles in the path of women who could not afford to pay for an abortion, since the obstacle of poverty was pre-existing and not imposed by the state.<sup>104</sup>

However, the dissenting justices in *Maher* viewed the decision as retreating from the notion, which they contended was firmly estab-

98. *Id.* at 69.

99. *Id.* at 61 (quoting *Roe v. Wade*, 410 U.S. 113, 164 (1973)).

100. See *supra* notes 53-64 and accompanying text.

101. 432 U.S. 464 (1977).

102. "Nontherapeutic" abortions are those that are not necessary to protect the mother's life or health. Cf. *supra* note 27.

103. *Maher*, 432 U.S. at 473-74.

104. *Id.* at 474, 478-79. The *Maher* majority apparently chose to ignore prior cases which established that the government's decision to fund one program and not another may be unconstitutional if its purpose is to discourage the exercise of a constitutionally-protected right. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that a state may not grant unemployment compensation to some workers while denying it to other workers who are discharged because of conflicts with the exercise of their religion).

However, the majority countered this criticism by claiming that if the above viewpoint was upheld, the state could be required to pay for other private rights, such as private education, just as it paid for public education, since the right to private education had been established by the Court. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court viewed this result as undesirable. *Maher*, 432 U.S. at 475-80.

lished in *Roe*, that the right to have an abortion is fundamental.<sup>105</sup>

Logically, the next issue addressed by the Court regarding public funding was whether the states could refuse to fund even therapeutic abortions. In *Harris v. McRae*,<sup>106</sup> the bitterly divided Court responded, 'yes.'<sup>107</sup> The majority relied on the *Maher* holding in concluding that economically disadvantaged pregnant women were no worse off after the Court's holding, since the right created in *Roe* merely prohibited governmental interference with the abortion decision.<sup>108</sup> The Court asserted that the recognition of a constitutionally-protected right produced no companion obligation by the government to provide funds for the exercise of that right.<sup>109</sup>

As the dissenters in *Maher* and *Harris* would probably agree, by allowing states to refuse to fund abortion expenses, the Court appeared to be removing the abortion decision from economically disadvantaged women and returning it to the state legislatures and Congress, the very entities from whom *Roe* was supposed to have removed it.

#### D. *The Invitation to Increased State Regulation*

It appears that, at the present time, several members of the Court are more willing than ever to uphold increased state regulations upon abortion. Specifically, in the 1989 decision of *Webster v. Reproductive Health Services*,<sup>110</sup> a plurality of the Court<sup>111</sup> "implicitly suggested that a woman's right to choose to terminate a pregnancy would no longer receive heightened judicial protection."<sup>112</sup> While the regulations upheld by the majority<sup>113</sup> in *Webster* were not especially significant in changing the existing status of permissible state regulation,<sup>114</sup> statements found in dicta<sup>115</sup> and supported by a plurality of

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105. *Maher*, 432 U.S. at 482 (Brennan, Marshall & Blackmun, JJ., dissenting).

106. 448 U.S. 297 (1980).

107. *Id.* at 328-29. Justice Stewart wrote the majority opinion and was joined by Chief Justice Burger and Justices White, Powell, and Rehnquist. Justice Brennan countered with the dissenting opinion, joined by Justices Marshall and Blackmun. Justice Stevens wrote a separate dissenting opinion. Although this case dealt with the issue of whether the federal government must provide funding for abortions, the principle announced is analogous to the state funding issue.

108. *Id.* at 316-17.

109. *Id.* at 317-18. The Court noted that state governments have no duty to fund other medically necessary operations. *Id.* at 309-11.

110. 109 S. Ct. 3040 (1989).

111. The plurality opinion in *Webster* contained the views of three justices, Chief Justice Rehnquist, Justice White and Justice Kennedy, the largest faction of justices voting with the majority.

112. Dellinger & Sperling, *Webster v. Reproductive Health Services: Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 87 (1989).

113. A five member majority in *Webster*, composed of Chief Justice Rehnquist and Justices White, O'Connor, Scalia and Kennedy, voted to uphold the challenged Missouri statute.

114. The most controversial regulation upheld within the state statute requires doctors to test for fetal viability at twenty weeks, though the state of current technology

the Court seemed to explicitly invite states to propose new regulations.

First, the plurality struck a blow directly at the integrity of the *Roe* decision by attacking its "rigid trimester analysis,"<sup>116</sup> calling it "'unsound in principle and unworkable in practice.'"<sup>117</sup> In the next breath, the plurality announced that the trimester framework should be abandoned.<sup>118</sup> The question now is to what extent states will be able to avoid the restrictions formerly placed upon them by the trimester framework in enacting future regulations and sustaining previously challengeable regulations. The question can only be answered as the Court decides future cases regarding state regulations which test the framework, and the outcome will depend upon how many justices choose to side with the *Webster* plurality's view.

The *Webster* plurality's direct invitation to additional state regulation came in the form of cryptic statements, which neither guaranteed that the three-member plurality would vote to directly overturn *Roe* if given the chance, nor clearly delineated the extent of limitations the plurality intended to place upon the *Roe* holding. For instance, the plurality stated that "[t]here is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of [earlier Court de-

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suggests that fetuses are not viable before twenty-four weeks. L. TRIBE, *supra* note 17, at 21-22. Therefore, by upholding the state statute, the Court appeared to be sanctioning state regulation during the second trimester of pregnancy, which it specifically prohibited in *Roe* unless the mother's health is determined to be at stake. See *Roe*, 410 U.S. at 163-64.

However, in looking beyond the face of the statute, it becomes apparent that the impact of the Court's decision is less than significant in light of the fact that "there is a roughly four-week margin of error in determining a fetus's actual gestational age." L. TRIBE, *supra* note 17, at 21-22.

115. See *Webster*, 109 S. Ct. at 3054-58 (sections II-D and III of the Court's opinion).

116. *Id.*

117. *Id.* at 3056 (quoting *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985)). The plurality reasoned that the framework is "unsound in principle" because its key elements are not contained in the Constitution. *Id.* at 3057. However, they failed to take notice of the fact that the elements of most other important constitutional doctrines are *interpreted* based on constitutional principles and are *not found in the text* of the Constitution. See *id.* at 3071-72 (Blackmun, J., dissenting).

Likewise, the plurality determined that the framework is "unworkable in practice" because it creates a "web of legal rules that have become increasingly intricate resembling a code of regulations rather than a body of constitutional doctrine." *Webster*, 109 S. Ct. at 3057. Again, the plurality was criticized for this determination because it undertook no inquiry into whether lower courts had actually experienced difficulty in applying the framework. See *id.* at 3076 (Blackmun, J., dissenting).

118. *Webster*, 109 S. Ct. at 3057 n.15.



cisions].”<sup>119</sup> Somewhat apologetically, the plurality went on to say that “[t]his case . . . affords us no occasion to revisit the holding of *Roe*,<sup>120</sup> . . . and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases.”<sup>121</sup> How far they intend to narrow *Roe*, given the chance, is unclear from their opinion.

Not only did the three plurality members indicate that they, themselves, would be amenable to increased state regulation of abortion, but Justice Scalia explicitly stated in a concurring opinion that he favored overturning *Roe*.<sup>122</sup> The other member of the Court who might have joined the majority had *Webster* been the proper case to overturn *Roe* is Justice O’Connor. She implied in her concurring opinion that she might support this hypothetical majority’s opinion by stating that “[w]hen the constitutional invalidity of a State’s abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully.”<sup>123</sup>

While the remaining four justices who made up the minority<sup>124</sup> in *Webster* clearly supported the *Roe* holding and its right of privacy protections, there is no doubt that the above cited statements from the majority justices in *Webster* “suggest that the constitutional tide turned in 1989 for state regulation of abortion.”<sup>125</sup> This fact becomes extremely evident in light of the Court’s 1990 decision in *Hodgson v. Minnesota* which upheld a significant burden upon a minor’s ability to obtain an abortion.<sup>126</sup>

### *E. Cases Addressing the Constitutional Rights of Minors*

As long as *Roe* remains intact, the right of an adult woman to pursue an abortion during the first trimester of pregnancy is protected by her privacy right. However, if a minor wishes to pursue the abortion option, the issue becomes more complex. No doubt with equal protection principles in mind, the Supreme Court has stated that “neither the Fourteenth Amendment nor the Bill of Rights is for

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119. *Id.* at 3058.

120. The plurality suggested that the *Webster* case was not the appropriate vehicle for overruling the *Roe* decision since the facts of *Webster* differed from those of *Roe*. *Id.* They indicated that a case having the requisite similarity would involve a criminal statute which would essentially prohibit all abortions, as did the statute in *Roe*. *Id.*

121. *Id.*

122. *Id.* at 3064 (Scalia, J., concurring).

123. *Id.* at 3061 (O’Connor, J., concurring) (emphasis added).

124. The minority was made up of Justices Blackmun, Brennan, Marshall and Stevens.

125. L. TRIBE, *supra* note 17, at 24.

126. *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990).

adults alone."<sup>127</sup> Nevertheless, it is undisputed that a woman, whether adult or minor, can be restricted in the exercise of her fundamental rights<sup>128</sup> if the state can justify its restrictions based upon compelling interests.<sup>129</sup> With that premise in mind, the Court has painstakingly determined that some constitutional rights can be enjoyed by all persons regardless of their age, while some important state interests justify restriction of other rights based upon age differences.<sup>130</sup>

*Carey v. Population Services International*<sup>131</sup> established that the fundamental right of privacy enjoyed by adults is applicable to minors, at least in the area of contraception.<sup>132</sup> The Court has also recognized that "a pregnant minor has a *substantial interest* in being free to choose to have an abortion."<sup>133</sup> In apparent conflict, however, is the view that "parents' rights to raise and train their children have been granted a status approaching, if not achieving, fundamentality."<sup>134</sup> To provide a balance between these juxtaposed interests, the Court has permitted states to exercise their police powers and *parens patriae*<sup>135</sup> authority to override parental rights when to do so is in a child's best interest.<sup>136</sup> Therefore, if a minor wishes to exercise her

127. *In re Gault*, 387 U.S. 1, 13 (1966).

128. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 58, at 418-19.

129. *See supra* note 58 (discussing the strict scrutiny standard).

130. Comment, *Sexual Privacy: Access of a Minor to Contraceptives, Abortion, and Sterilization Without Parental Consent*, 12 U. RICH. L. REV. 225, 235 (1977).

The Court has declined "to conclude that minors must be accorded the full panoply of constitutional rights, coextensive in kind and degree with those accorded an adult." Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 315 (1974). *See also* *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (acknowledging that states have broader authority to regulate the activities of minors than of adults).

131. 431 U.S. 678 (1977).

132. *Id.* at 693-94 (explaining that contraceptive decisions do not raise the life and death issues of abortion).

133. *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (emphasis added to illustrate that the Court did not determine this interest to be a *fundamental right*).

134. Note, *Minors' Right of Privacy Versus Parental Right of Control*, 1976 B.Y.U. L. REV. 297, 300 (1976). *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (permitting Amish parents to remove their children from school after the eighth grade); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing "liberty of parents and guardians to direct the upbringing and education of children"); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (establishing parents' liberty interests in making educational decisions for their children).

135. The *parens patriae* doctrine allows the states to override parental decision making power when the child's welfare or best interests necessitate it. H. CLARK, *LAW OF DOMESTIC RELATIONS* 335-45 (2d ed. 1987).

136. *See, e.g.*, *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) (approving of a state's use of its *parens patriae* authority to prevent minors from purchasing obscene

right of privacy, she must demonstrate that her interests outweigh interests asserted by both her parents<sup>137</sup> and the state.<sup>138</sup>

#### F. Parental Notification and Consent Statutes

Parental notification or consent laws are now on the books in many states.<sup>139</sup> States assert various "compelling" interests pursuant

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publications); *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488, 504-05 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (approving of the order of lifesaving blood transfusions for children over the objection of their parents who claim religious grounds for their decision).

137. Legitimate parental interests include directing a child's emotional development and protecting her physical and psychological health. See *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).

138. Legitimate state interests include promoting parental authority and protecting minors from their own immature decisions. See *Bellotti v. Baird*, 443 U.S. 622, 637, 640-41 (1979).

139. Twenty-four states have *consent* statutes; 11 have *notification* statutes. Two other states encourage, but do not require, parental involvement in a minor's abortion decision. The difference between notice and consent statutes is that under a consent statute, a minor is prohibited from having an abortion without a parent's *active consent*, while under a notice statute, a minor can have an abortion whether or not a parent consents, provided a parent has been *notified* of the impending procedure. L. TRIBE, *supra* note 17, at 202.

Those states with consent statutes are: Alabama (ALA. CODE §§ 26-21-1, 26-21-3 to -8 (Supp. 1988)); Alaska (ALASKA STAT. § 18.16.010(a)(3) (1986)); Arizona (ARIZ. REV. STAT. ANN. §§ 36-2152 to -2153 (Supp. 1988)); California (CAL. CIV. CODE § 34.5 (West Supp. 1991)), CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1991)); Colorado (COLO. REV. STAT. § 18-6-1-1(1) (Repl. vol. 1986)); Delaware (DEL. CODE ANN. tit. 24, § 1790 (b)(3) (Repl. vol. 1987)); Florida (FLA. STAT. § 390.001(4)(a) (1989)); Illinois (ILL. ANN. STAT. ch. 38, paras. 81-54(3), 81-65 to -67, ch. 40, para. 1015 (Smith-Hurd Supp. 1990)); Indiana (IND. CODE ANN. § 35-1-58.5-2.5(a)-(c) (Burns Supp. 1988)); Kentucky (KY. REV. STAT. ANN. §§ 311.732(2), 311.733 (Baldwin 1986)); Louisiana (LA. REV. STAT. ANN. §§ 40:1299.33(D), 40:1299.35.5(A) (West 1977 & Supp. 1989)); Massachusetts (MASS. ANN. LAWS ch. 112, § 12S (Law. Co-op. 1985)); Mississippi (MISS. CODE ANN. § 41-41-53(1), (3) (Supp. 1989)); Missouri (MO. ANN. STAT. § 188.028.1(1)-(3) (Vernon 1989)); New Mexico (N.M. STAT. ANN. §§ 30-5-1, 30-5-3 (1978)); North Dakota (N.D. CENT. CODE § 14-02.1-03(1), (2)(a)-(b) (Repl. vol. 1981), § 14.02.1-03.1 (1981 & Supp. 1987)); Pennsylvania (18 PA. CONS. STAT. ANN. § 3206 (Purdon 1983 & Supp. 1989)); Rhode Island (R.I. GEN. LAWS §§ 23-4.7-6, 23-4.8-2 to -3 (1985)); South Carolina (S.C. CODE ANN. §§ 44-41-20(c), 44-41-30(b)-(c) (Law. Co-op. 1985)); South Dakota (S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986)); Tennessee (TENN. CODE ANN. §§ 37-10-303 (Supp 1988), 37-10-304, 39-4-202(f) (Repl. vol. 1982)); Virginia (VA. CODE ANN. § 18-2-76 (1990)); Washington (WASH. REV. CODE ANN. § 9.02.070(a) (1988)); and Wyoming (WYO. STAT. § 35-6-118 (1989)).

States with notice statutes are: Arkansas (ARK. STAT. ANN. §§ 20-16-801 to -808 (1990)); Georgia (GA. CODE ANN. § 15-11-112(a)-(b) (Supp. 1988)); Idaho (IDAHO CODE § 18-609(6) (Repl. vol. 1987)); Maine (ME. REV. STAT. ANN. tit. 22, §§ 1597, 1597-A (Repl. vol. 1980)); Maryland (MD. HEALTH-GEN. CODE ANN. § 20-103 (1987)); Minnesota (MINN. STAT. ANN. § 144.343 (2), (6) (West 1989)); Montana (MONT. CODE ANN. §§ 41-1-405, 50-20-107 (1989)); Nebraska (NEB. REV. STAT. § 28-347 (1985)); Nevada (NEV. REV. STAT. ANN. §§ 442.255, 442.2555 (Michie 1987)); Ohio (OHIO REV. CODE ANN. § 2919.12(B)(1)(a) (Anderson 1987)); and Utah (UTAH CODE ANN. § 76-7-304 (Repl. vol. 1978)).

Connecticut (1990 Conn. Acts 113 (Reg. Sess.)) and Wisconsin (WIS. STAT. ANN. § 146.78(5) (West 1989)) require the abortion practitioner to encourage minors to notify their parents. West Virginia (W. VA. CODE §§ 16-2F-3 to -5 (Repl. vol. 1985)) allows one

to these statutes, and the Court examines them to determine whether they are sufficiently important to override the minor's claimed rights.<sup>140</sup>

The Court first addressed the constitutionality of consent statutes in its 1976 decision, *Planned Parenthood v. Danforth*.<sup>141</sup> The Missouri statute in that case required a minor to obtain the written consent of one parent before undergoing an abortion.<sup>142</sup> The only exception to the requirement was when the abortion was necessary to preserve the life of the mother.<sup>143</sup> The State of Missouri defended the constitutionality of the statute by pointing to the Court's previous decisions that had permitted states to limit the rights of minors.<sup>144</sup> Additionally, the state asserted that certain decisions are considered to be "outside the scope of a minor's ability to act in his [or her] own best interest or in the interest of the public."<sup>145</sup> Finally, Missouri claimed that, pursuant to the consent statute, it was protecting its legitimate interest in safeguarding the family unit and parental authority.<sup>146</sup>

In counterargument, the class representative physicians who represented Planned Parenthood in the litigation pointed out that "no other Missouri statute specifically requires the additional consent of a minor's parent for medical or surgical treatment. . . ."<sup>147</sup> Moreover, the physicians noted that the state allowed minors to legally consent

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parent or a second physician to waive notice if a minor is mature or if the notification would not be in her best interests.

The minority of states without either notice or consent laws are: the District of Columbia, Hawaii, Iowa, Kansas, Michigan, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Texas and Vermont.

140. "The Supreme Court has acknowledged three 'significant' state interests that justify the regulation of a minor's abortion decision. These legitimate interests concern (1) protecting the unique vulnerability of children; (2) recognizing a child's diminished capacity to make intelligent decisions; and (3) facilitating the traditional parental role of child rearing." Comment, *supra* note 14, at 887 (footnotes omitted).

141. 428 U.S. 52 (1976).

142. See *id.* at 84-89 (appendix to the opinion of the Court). The statute provided, in pertinent part:

No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except . . . [w]ith the written consent of one parent [or person who stands in the place of the parent] if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician, as necessary in order to preserve the life of the mother.

*Id.* at 85.

143. *Id.*

144. *Id.* at 72. See also *supra* notes 135-36 and accompanying text.

145. *Planned Parenthood*, 428 U.S. at 72.

146. *Id.* at 75.

147. *Id.* at 73.

to other medical services related to pregnancy, venereal disease, and drug abuse.<sup>148</sup>

In holding the Missouri parental consent statute unconstitutional, the Court held that parents could not be given an "absolute, and possibly arbitrary, veto" power over their minor child's decision to terminate her pregnancy.<sup>149</sup> Even though the Court recognized that states have somewhat broader powers to regulate the activities of minors than of adults, it held that no state interest in the family unit could be served under the statute.<sup>150</sup> The Court reasoned that an absolute veto power placed with a nonconsenting parent created a situation of intense conflict between the pregnant minor and her parent.<sup>151</sup>

Furthermore, the Court established that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."<sup>152</sup> Therefore, the Court seemed to indicate that any "fundamental right" that parents may contend they have<sup>153</sup> in raising and controlling their children never outweighs the competent minor's right to decide for herself whether to have an abortion.

In *Bellotti v. Baird*,<sup>154</sup> the Court was, once again, faced with a consent statute. The Massachusetts statute at issue required every minor seeking an abortion to initially seek parental consent.<sup>155</sup> If the parents refused to consent, then, as a secondary measure, the minor could try to obtain consent from a state court judge.<sup>156</sup> The Supreme Court ruled the statute unconstitutional.<sup>157</sup>

The *Bellotti* decision established what has been subsequently called the "*Bellotti* framework," a test for determining the constitutionality of consent statutes.<sup>158</sup> The framework provides that:

A pregnant minor is entitled in [an alternative proceeding] to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents'

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148. *Id.* (citing MO. REV. STAT. §§ 431.061-063 (Supp. 1975)).

149. *Id.* at 74. The Court adhered to the viewpoint that "[c]onstitutional 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." *Id.*

150. *Id.* at 74-75.

151. *Id.* at 75 (explaining that the family structure becomes fractured as soon as the woman becomes pregnant).

152. *Id.*

153. See *supra* note 134 and accompanying text.

154. 443 U.S. 622 (1979) (plurality opinion).

155. *Baird v. Attorney General*, 371 Mass. 741, 360 N.E.2d 288 (1977) (interpreting the Massachusetts statute).

156. *Id.*

157. *Bellotti*, 443 U.S. at 650-51.

158. See *id.* at 643-44 (opinion of Powell, J.).

wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.<sup>159</sup>

Hence, for a consent statute to withstand constitutional scrutiny, it must provide for the *initial* alternative of judicial permission.

The Court first addressed a parental notice statute in *H.L. v. Matheson*.<sup>160</sup> In *Matheson*, a Utah statute which required notification to parents<sup>161</sup> of an unemancipated<sup>162</sup> minor who wished to terminate her pregnancy was examined. Like the consent statute in *Bellotti*, the statute in *Matheson* lacked a judicial bypass option. The Court never reached the issue of whether notice statutes, like consent statutes, must contain judicial bypass options<sup>163</sup> because it determined that, in the case at hand, the minor challenging the statute had failed to show that she was, in fact, mature or emancipated.<sup>164</sup> Therefore, *Matheson*, as decided by the Court, stands for the narrow proposition that a state may legitimately require a minor's parents to be notified in cases where an immature minor seeks an abortion.<sup>165</sup>

In 1983, the Court was faced with determining the validity of two parental consent laws. The first was an Akron, Ohio city ordinance which prohibited physicians from performing abortions on minors unless the physician obtained the consent of one parent or an order from a court.<sup>166</sup> The Court in *Akron v. Akron Center for Reproduc-*

159. *Id.* (footnote omitted) (avoiding the " 'absolute, and possibly arbitrary, veto' " struck down in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)).

160. 450 U.S. 398 (1981).

161. The term "parents" was not defined within the Utah statute. *Id.* at 400-01. See *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2938 n.23 (1990) (analyzing the omission). Therefore, because the statute was deemed ambiguous in that it did not specify whether notice to one parent would be sufficient, the Court in *Matheson* never discussed whether notice to both parents would be required. *Id.*

162. "Emancipation" involves an entire surrender of the right to the care, custody, and earnings of a child by his or her parents as well as a renunciation of parental duties. BLACK'S LAW DICTIONARY 272 (5th ed. 1983). Emancipation is considered express when there is a voluntary agreement between parent and child as to the status, and it may be considered implied when either acts or conduct of the parent and child indicate there is consent to the emancipation. *Id.*

163. *But see Matheson*, 450 U.S. at 420 (Powell, J., concurring) (asserting that the *Bellotti* framework applies to parental notification statutes as well).

164. *Id.* at 405-06.

165. *Id.* at 412-13.

166. See AKRON, OHIO, COD. ORDINANCES § 1870.05 (1978), which provided, in pertinent part:

No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman . . . , and (1) First having obtained the informed written consent of one of her parents or her legal guardian . . . , or (2) The minor pregnant woman first having obtained an order from a court . . . that the abortion be performed or induced.

*tive Health*<sup>167</sup> deemed the ordinance unconstitutional because it did not explicitly provide for the mandated alternative procedure requirements as set forth in the *Bellotti* framework.<sup>168</sup> The Court based its decision upon the fact that the statute contained no explicit requirement that a court inquire into a minor's maturity or emancipation.<sup>169</sup> In effect, the statute contained a blanket presumption that *all* minors are too immature to make an abortion decision.<sup>170</sup> Furthermore, the statute created an assumption that an abortion is never in a minor's best interests without parental approval.<sup>171</sup> Therefore, the Court established that, in order to pass constitutional muster, a statute must strictly comply with the requirements set out in *Bellotti*.<sup>172</sup> It refused to assume that courts would always inquire into a minor's maturity or best interests without the required provisions.<sup>173</sup>

The second statute was addressed in the companion case of *Planned Parenthood Association v. Ashcroft*.<sup>174</sup> The Missouri statute in question was enacted subsequent to the Court's decision in *Planned Parenthood v. Danforth*,<sup>175</sup> which found that Missouri's former parental consent statute unconstitutionally infringed upon a minor's right to privacy.<sup>176</sup> The new statute required parental consent prior to a minor's abortion and included an alternative provision for judicial bypass.<sup>177</sup> This statute differed from the Akron ordinance in that the Missouri statute required a court hearing a petition for judicial bypass to make findings regarding the minor's maturity and best interests.<sup>178</sup> Hence, the Court determined that the Missouri statute

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*Id.*

167. 462 U.S. 416 (1983).

168. *Id.* at 439-40.

169. *Id.* at 441.

170. *Id.* at 439-40.

171. *Id.*

172. *Id.*

173. *Id.* at 441.

174. 462 U.S. 476 (1983).

175. 428 U.S. 52 (1976).

176. *Id.* at 75.

177. MO. REV. STAT. § 188.030.3 (Supp. 1982) provided, with regard to the judicial bypass procedure:

A hearing on the merits of the petition, . . . shall be held as soon as possible within five days of the filing of the petition . . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor . . . and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor . . . . In a decree, the court shall for good cause: (a) [g]rant the petition for majority rights for the purpose of consenting to the abortion; or (b) [f]ind the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or (c) deny the petition, setting forth the grounds on which the petition is denied . . . .

*Id.*

178. *Id.*

was facially valid since it provided for a judicial alternative consistent with the legal standards outlined in *Bellotti*.<sup>179</sup>

Finally, in its 1989 term, the Court was faced with two unique challenges by the plaintiffs in *Hodgson v. Minnesota*<sup>180</sup> and *Ohio v. Akron Center for Reproductive Health*<sup>181</sup> to parental notification statutes.<sup>182</sup> Minnesota and Ohio had enacted parental notice statutes which facially complied with the *Bellotti* standards. However, the plaintiffs in both cases attempted to show that, despite facial compliance with established Supreme Court standards, the statutes as applied were unduly burdensome upon minors and failed to actually further significant state interests. Additionally, there was growing public sentiment that even judicial bypass procedures, in practice, create serious obstacles to the exercise of a minor's right to obtain an abortion, and hence, amount to impermissible state regulations.<sup>183</sup> Furthermore, since the decisions followed upon the heels of the controversial *Webster* decision, the public anxiously awaited the outcome of the *Hodgson* and *Akron II* cases to see if the Court would continue its trend of upholding challenged state regulations.

### III. HODGSON V. MINNESOTA

#### A. Facts of the Case and Procedural History

The parental notification statute at issue in *Hodgson* mandated that

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179. 462 U.S. at 490-93.

180. 110 S. Ct. 2926 (1990).

181. 110 S. Ct. 2972 (1990) (companion case to *Hodgson*) [hereinafter *Akron II*].

182. The *Hodgson* statute was the most restrictive notification statute which the Court had ever addressed in that it required notification to *both* parents of a minor. See *Hodgson*, 110 S. Ct. at 2938 (noting that none of the Court's previous opinions had addressed the possible significance of making a consent or notice statute applicable to both parents as opposed to just one).

The Ohio notification statute was novel in that, *inter alia*, it imposed more onerous evidentiary burdens upon a minor seeking judicial bypass than those required in other states. See *Akron II*, 110 S. Ct. at 2974-75.

Before the Court's recent *Hodgson* and *Akron II* decisions, only 14 states actually enforced their parental notification or consent laws. USA Today, June 26, 1990, at 1. Those states were Alabama (consent), Arkansas (notice), Indiana (consent), Louisiana (consent), Maine (notice), Massachusetts (consent), Missouri (consent), North Dakota (consent), Rhode Island (consent), South Carolina (consent), Utah (notice), West Virginia (notice), Wisconsin (notice), and Wyoming (consent). *Id.* The other states awaited a definitive Supreme Court ruling before considering enforcement. *Id.*

183. See Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 FAM. PLAN. PERSP. 259 (Nov./Dec. 1983) (concluding that judicial bypass laws "constitute a serious, and in some cases insurmountable, barrier confronting minors who wish to obtain abortions") [hereinafter *Judging Teenagers*].



a minor's physician notify both of her parents<sup>184</sup> at least forty-eight hours before the abortion procedure was to occur.<sup>185</sup> The minor could avoid notification if she was emancipated;<sup>186</sup> if immediate ac-

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184. Notification to both parents was required unless one of the parents was deceased or could not be located through a "reasonably diligent effort." See *infra* note 185 for the statutory language of MINN. STAT. ANN. § 144.343(2)-(4).

185. MINN. STAT. ANN. § 144.343(2) (West 1989). Section 144.343 provides, in pertinent part:

(2) [N]o abortion operation shall be performed upon an emancipated minor . . . until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

(a) The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or his agent.

(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee . . . .

(3) . . . For purposes of this section, "parent" means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort. . . .

(4) . . . No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse . . . . Notice of that declaration shall be made to the proper authorities . . . .

(5) Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification.

(6) (c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents . . . , any judge . . . shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents . . . would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal . . . . Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal . . . , shall be afforded such a pregnant woman 24 hours a day, seven days a week.

MINN. STAT. ANN. § 144.343 (West 1989).

186. The Court defined an "emancipated" minor as one "who is living separate and apart from her parents or who is either married or has borne a child . . ." *Hodgson*, 110 S. Ct. at 2931 n.3.

tion was necessary to save her life; or if the minor alleged that she was the victim of sexual abuse,<sup>187</sup> physical abuse,<sup>188</sup> or neglect.<sup>189</sup> Alternatively, the minor could bypass the requisite parental notification if she could convince a judge that she was mature enough to give informed consent independent of her parents.<sup>190</sup> If the judge determined she was not sufficiently mature, the minor could avoid notice if she showed that an abortion without notification would be in her best interests.<sup>191</sup>

The plaintiffs in the litigation included two Minnesota physicians, four Minnesota abortion clinics, a class of pregnant minors, and the mother of a pregnant minor.<sup>192</sup> The plaintiffs claimed that the statute violated the Due Process Clause, the Equal Protection Clause, and the Minnesota Constitution.<sup>193</sup>

After finding that the two-parent notification requirement and the forty-eight hour waiting period were unduly burdensome,<sup>194</sup> the

187. MINN. STAT. § 626.556(2)(a) (Supp. 1989) defines "sexual abuse" as "any sexual contact by a parent or other person responsible for the child's care or in a position of authority with respect to the child."

188. MINN. STAT. ANN. § 144.343(4) (West 1989). MINN. STAT. § 626.556(2)(d) (Supp. 1989) defines "physical abuse" as "any physical injury inflicted by a person responsible for the child's care on a child other than by accidental means."

189. MINN. STAT. § 626.556(2)(c) (Supp. 1989) defines "neglect" as "the failure of a parent to supply a child with necessary food, clothing, shelter or medical care when reasonably able to do so or failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able to do so."

190. *Id.* at § 144.343(6)(c)(i).

191. *Id.*

192. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2934 (1990).

193. *Id.*

194. The district court determined that the 48 hour waiting period was invalid in Minnesota because abortion clinics there are mainly located near metropolitan areas. *Hodgson v. Minnesota*, 648 F. Supp. 756, 761 (D. Minn. 1986). This fact creates a situation where abortion procedures are much less accessible in Minnesota than in the nation as a whole. Statistics show that only 44% of women in Minnesota live in areas where abortions are available, while nationally, 72% of women live in areas accessible to abortion procedures. *Id.* Therefore, to comply with the statute, many minors were required to travel significant distances to undergo the procedure. *Id.* at 779-80. Because of the waiting period, a minor was forced to make two trips to the clinic or spend three days in the city where the clinic was located. *Id.* Costs for the minor were increased because of the travel required; her pregnancy diagnosis was often delayed; and her privacy was threatened, since she might have to find a place to stay overnight. *Id.* The district court found this situation created an undue burden upon minors, since the state's interest in promoting parental consultation could be furthered with a shorter waiting period. *Id.* at 780.

Additionally, the district court found that the two-parent notification requirement was invalid because it actually inhibited parental consultation, since a minor who otherwise would notify one parent but not the other would be discouraged from pro-

United States District Court for the District of Minnesota ruled that the entire statute was unconstitutional and enjoined its enforcement.<sup>195</sup> The district court made several findings of fact in support of its conclusion, including the remarkable finding that the statute had not resulted in any more minors actually notifying their parents than prior to the statute's enactment.<sup>196</sup>

The United States Court of Appeals for the Eighth Circuit, sitting en banc, reversed the district court's ruling.<sup>197</sup> The court determined that subdivision six<sup>198</sup> of the statute, which gave minors the alternative options of notifying their parents or meeting the requirements of a judicial bypass procedure, was constitutional.<sup>199</sup> However, it rejected the state's assertion that subdivision two<sup>200</sup> of the statute was likewise constitutional since it provided no bypass procedure.<sup>201</sup> Finally, the court of appeals reversed the district court's determination that the forty-eight hour waiting period was unduly burdensome.<sup>202</sup>

The United States Supreme Court granted certiorari to determine whether the Minnesota statute was, in whole or in part, unconstitutional.<sup>203</sup>

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viding any notification under the provisions of the statute. *Id.* at 769. Therefore, pursuant to this finding of fact, no alleged state interest in parental consultation could be furthered.

195. *Hodgson*, 648 F. Supp. at 780.

196. *Id.* at 775. The district court made a total of 74 findings of fact pursuant to its determination that the Minnesota statute, as applied in fact, was unconstitutional. *See Hodgson*, 648 F. Supp. at 759-70. *See also infra* notes 213-42 and accompanying text for a discussion of those findings of fact in the Supreme Court.

197. *Hodgson v. Minnesota*, 853 F.2d 1452, 1466 (8th Cir. 1988) (en banc).

198. *See supra* note 185 for the statutory language of MINN. STAT. ANN. § 144.343(6).

199. *Hodgson*, 853 F.2d at 1459. The circuit court determined that the notice statute "plainly serves important state interests and is narrowly drawn to protect only those interests . . . . Considering the statute as a whole and as applied to all pregnant minors, the two-parent notice requirement does not unconstitutionally burden the minor's abortion right." *Id.* at 1464-65 (citation omitted).

Moreover, the court found that the 48-hour waiting period did not create an undue burden on minors because, it reasoned, "the waiting period could run concurrently with the scheduling of an appointment for the procedure." *Id.* at 1466.

200. *See supra* note 185 for the statutory language of MINN. STAT. ANN. § 144.343(2).

201. *Hodgson*, 853 F.2d at 1456-57.

202. *Id.* at 1465 (finding that the problems with Minnesota's application of its notice statute resulted from the "inaccessibility of abortion providers in Minnesota" and not from the 48 hour waiting period).

203. *Hodgson v. Minnesota*, 109 S. Ct. 3240 (1989).

*B. Analysis of the Case*

## 1. Majority Opinion

A majority of the Supreme Court<sup>204</sup> ruled that the portion of the Minnesota statute which required notice to both parents of a pregnant minor was not reasonably related to any legitimate state objective.<sup>205</sup> However, a separate majority of the Court<sup>206</sup> concluded that the portion of the statute which mandated that minors notify both of their parents, unless the minor could obtain judicial permission, passed constitutional scrutiny.<sup>207</sup> In upholding the latter portion of the statute, the majority reasoned that the bypass procedure contained therein complied with the framework established in *Bellotti* and validated by its progeny.<sup>208</sup> The separate majority opinions will be considered in turn.

*a. Constitutionality of Parental Notification Statutes Without Bypass Procedures*

Justice Stevens expressed the views of one majority of the Court by analyzing the constitutionality of the portion of Minnesota's notification statute which contained no judicial bypass option.<sup>209</sup> The members of this majority relied heavily upon the district court's extensive findings of fact concerning the availability of abortion services, the application of the standards of the statute, and the effects of the statute.<sup>210</sup> While the Court had considered the constitutionality of six statutes requiring parental involvement in a minor's abortion decision in the fourteen years preceding the *Hodgson* decision,<sup>211</sup> the

204. This portion of the majority opinion was written by Justice Stevens and joined by Justices Brennan, Marshall, Blackmun and O'Connor.

205. *Hodgson*, 110 S. Ct. at 2945.

206. Justice Kennedy wrote this portion of the majority opinion and was joined by Chief Justice Rehnquist and Justices White and Scalia. Justice O'Connor concurred to complete the majority.

207. *Hodgson*, 110 S. Ct. at 2969-70.

208. *Id.* at 2970.

209. *Id.* at 2931. See also MINN. STAT. ANN. § 144.343(2) (West 1989). See *supra* note 185 for the text of statute.

210. See *Hodgson*, 110 S. Ct. at 2938-41 (reviewing the district court's findings of fact). See also *Hodgson v. Minnesota*, 648 F. Supp. 756, 759-70 (D. Minn. 1986) (setting forth 74 separate findings of fact).

211. For an in depth discussion of the statutes previously considered by the Court, see *supra* notes 139-183 and accompanying text. These statutes were considered in *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976) (finding unconstitutional the consent provision of a Missouri statute); *Bellotti v. Baird*, 443 U.S. 622, 651 (1979) (invalidating a Massachusetts consent statute); *H.L. v. Matheson*, 450 U.S. 398, 412-13 (1981) (upholding the constitutionality of a Utah consent statute); *Akron v. Akron*

statute in *Hodgson* presented a difficult issue since it required, possibly more burdensome, notification to both parents, instead of just one.<sup>212</sup>

The Stevens majority summarized the findings of fact it deemed important to its decision.<sup>213</sup> It cited statistics presented to the district court indicating that only fifty percent of minors in Minnesota live with both biological parents.<sup>214</sup> Further, because of the prevalence of single-parent families, the Court deferred to the district court finding that the two-parent notice requirement produced "particularly harmful effects" upon minors and custodial parents in family situations affected by divorce or separation.<sup>215</sup> The range of possible harms could only increase in abusive or dysfunctional families.<sup>216</sup>

Even in traditional two-parent families, the Court recognized that requiring that both parents be notified could prove detrimental, especially if one parent was prone to violence.<sup>217</sup> The Stevens majority emphasized the district court's specific finding that the two-parent notice requirement actually worked to impair family communication,

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Center for Reproductive Health, 462 U.S. 416, 441-42 (1983) (explaining that the consent provision of an Akron city ordinance did not pass constitutional muster); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 492-93 (1983) (interpreting and upholding a Missouri consent statute with a bypass provision); *Bellotti v. Baird*, 428 U.S. 132, 150 (1976) (abstaining until the constitutionality of the Massachusetts statute could be more clearly addressed).

212. See *Hodgson*, 110 S. Ct. at 2938 (noting that none of the previous cases considered by the Court "focused on the possible significance of making the consent or the notice requirement applicable to both parents. . .").

The Court found the two-parent notice requirement to be unusual when compared to other state and federal consent regulations regarding minors. *Id.* at 2947 (citing 10 U.S.C. §§ 505(a), 2104(b)(4), 2107(b)(4) (1988) (requiring a minor wishing to join the armed services to obtain the permission of one parent); 22 C.F.R. § 51.27 (1989) (deeming the consent of one parent sufficient for a minor to obtain a passport for foreign travel); 45 C.F.R. §§ 46.404, 46.405 (1988) (mandating that one parent consent for a minor to participate as a subject for medical research)). The Court further noted that MINN. STAT. § 259.10 (1988) (which outlined a name change procedure) was the only other statute in Minnesota requiring two-parent consent. *Id.*

213. See *id.* at 2938-40.

214. *Id.* at 2938 (citing *Hodgson*, 648 F. Supp. at 768).

215. *Id.* (citing *Hodgson*, 648 F. Supp. at 769). These harmful effects were manifested when the minor experienced disappointment upon realizing that the communication to the absent parent did not reestablish their former relationship. *Id.* The required communication could prove even more detrimental if the noncustodial parent was abusive or easily provoked to violence. *Id.* at 2938-39. The court also pointed to the "custodial parent" and the harmful effects occurring as a result of that parent's "anger, resentment, and frustration," resulting from forced notification to the absent parent, along with that parent's fear of violence from the noncustodial parent due to the notification requirements. *Id.* at 2938.

216. *Id.* at 2938 (quoting *Hodgson*, 648 F. Supp. at 769).

217. *Id.* at 2939 (citing *Hodgson*, 648 F. Supp. at 769). The Court again remarked that family violence was a possible consequence. *Id.* The district court specifically recognized that many Minnesota minors were the victims of "rape, incest, neglect, and violence" by family members. *Hodgson*, 648 F. Supp. at 768.

rather than enhance it.<sup>218</sup> Moreover, it acknowledged the substantial testimony at the district court level which established that the portion of the statute in question did little to serve any state interest in promoting the welfare of pregnant minors or in protecting parental authority.<sup>219</sup>

Before reaching its conclusion, however, the majority considered Minnesota's asserted state interests. Minnesota alleged that two state ends were served by the statute.<sup>220</sup> The first was the state's interest in the welfare of pregnant minors.<sup>221</sup> In response, the majority held that "[t]o the extent that such an interest is legitimate, it would be fully served by a requirement that the minor notify *one* parent . . . ." <sup>222</sup>

The second state interest Minnesota asserted was an interest in promoting the parental role "in the care and upbringing of their children."<sup>223</sup> The majority, however, denounced that asserted state interest as illegitimate.<sup>224</sup> It reasoned that, while complete communication among family members may be beneficial under some circumstances, the state had no right to require such communication.<sup>225</sup> Therefore, the Stevens majority recognized that the first alleged state interest had some merit under a one-parent notice statute but deemed the second alleged state interest to be completely without merit.<sup>226</sup> Based upon its consideration of the district court's findings of fact, the majority determined that the two-parent notice requirement in the statute did not reasonably further any legitimate state interest.<sup>227</sup>

218. See *Hodgson*, 648 F. Supp. at 769.

219. *Hodgson*, 110 S. Ct. at 2941 (quoting *Hodgson*, 648 F. Supp. at 775). "At least 37 witnesses testified to the issue whether the statute furthered the State's interest in protecting pregnant minors. Only two witnesses testified that a two-parent notification statute did minors more good than harm; neither of these witnesses had direct experience with the Minnesota statute." *Id.*

220. *Id.* at 2962 (Kennedy, J., concurring in part and dissenting in part).

221. *Id.* (Kennedy, J., concurring in part and dissenting in part).

222. *Id.* at 2945 (emphasis added).

223. *Id.* at 2962 (Kennedy, J., concurring in part and dissenting in part).

224. *Id.* at 2946.

225. *Id.* (holding that a state's interest in standardizing the structure of private family life to meet some "state-designed ideal, is not a legitimate interest at all"). *Contra Hodgson*, 110 S. Ct. at 2963 (Kennedy, J., concurring in part and dissenting in part) (stating that "[a] state pursues a legitimate end under the Constitution when it attempts to foster and preserve the parent-child relation by giving all parents the opportunity to participate in the care and nurture of their children").

226. See *id.* at 2962 (Kennedy, J., concurring in part and dissenting in part).

227. *Id.* at 2945 (further pointing to situations where two-parent notification could actually "disserve the state interest in protecting and assisting the minor").

Hence, after *Hodgson*, it is clear that future constitutional challenges to two-parent notification statutes, which do not provide for judicial alternatives, will be successful.<sup>228</sup>

*b. Constitutionality of Parental Notification Statutes With Bypass Procedures*

A different majority of the Court, whose opinion was expressed by Justice Kennedy, addressed the portion of Minnesota's statute which contained a judicial bypass procedure.<sup>229</sup> The district court's findings of fact regarding the judicial bypass procedure contained in the Minnesota statute noted that, during a five-year period while statistics were kept, 3,573 judicial bypass petitions were filed within the state.<sup>230</sup> Of those petitions filed, all but fifteen were granted.<sup>231</sup> Furthermore, the district court's findings pointed out that, despite the large number of petitions heard, the confidentiality of minors requesting bypasses had been maintained.<sup>232</sup>

However, the district court noted that one problem with the operation of the bypass procedure was that some rural counties were served by judges who refused to hear the petitions.<sup>233</sup> Additionally, judges who testified to the district court claimed that they could perceive no positive benefits flowing from the Minnesota statute.<sup>234</sup> Rather, they generally attested that the bypass procedure was an unnecessary obstacle placed in the path of minors by the state, which produced mainly negative effects.<sup>235</sup> These effects included "fear,

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228. The states which have either two-parent notification or consent statutes without bypass procedures are: Arkansas (notice); Delaware (consent); Idaho (notice); and Illinois (notice/consent). USA Today, June 26, 1990, at A1. However, only Arkansas enforced its statute at the time *Hodgson* was decided. *Id.*

229. *Hodgson*, 110 S. Ct. at 2969. See generally MINN. STAT. ANN. § 144.343(6) (West 1989). See *supra* note 185 for the full text of the statute.

230. *Hodgson v. Minnesota*, 648 F. Supp. 756, 765 (1986) (covering the period from August 1, 1981 until March 1, 1986).

231. *Id.* Of those fifteen petitions, only nine were denied, because six petitions were withdrawn subsequent to filing. *Id.* For a discussion detailing why the petitions were denied, see Findings of Fact, Nos. 56 & 57, *Hodgson*, 648 F. Supp. at 765.

232. *Hodgson*, 648 F. Supp. at 763. The judges involved took numerous steps to insure confidentiality. For instance, they often held the hearings in their chambers, rather than in open court; many destroyed their notes after interviewing petitioning minors; and most referred to the petitioners by their first names only. *Id.* The district court found that the confidentiality of minors had only been breached in a minute number of cases. *Id.* See MINN. STAT. ANN. § 144.343(6)(c)(ii) (West 1989) (mandating the confidentiality of judicial bypass proceedings).

233. *Hodgson*, 648 F. Supp. at 763. This situation resulted in an increased burden on some minors who were forced to travel to other counties where their petitions would be heard. *Id.* However, the district court found that, although an additional burden was placed upon minors in some instances, the mere fact that some judges would not hear the petitions was not fatal to the statute. *Id.*

234. *Id.* at 766. One judge testified that he could not "perceive any useful public purpose to what [he was] doing in these cases." *Hodgson*, 110 S. Ct. at 2940 n.29.

235. *Hodgson*, 648 F. Supp. at 766.

tension, anxiety, and shame" among the minors involved,<sup>236</sup> who often feared the court procedure more than the abortion operation itself.<sup>237</sup> The end result was that some minors, who were either mature or whose best interests would be served by an abortion without notification, chose to avoid the bypass option and, instead, notified their parents or carried their babies to term.<sup>238</sup>

The Kennedy majority referred to the district court's finding that twenty to twenty-five percent of minors who sought a bypass under the statute had already notified one parent and were seeking a bypass only as to the other parent.<sup>239</sup> Other findings showed that parents who chose to accompany their minor daughters to court to seek the bypass expressed similar anxiety-type reactions.<sup>240</sup> After evaluating these apprehension-provoking circumstances, the district court determined that the requisite court hearings burdened the privacy of both the minor and the parent who chose to accompany her.<sup>241</sup>

Despite the district court's findings, this majority of the Court, in accordance with Justice Kennedy's opinion, determined that the remainder of the Minnesota statute, except for subdivision two,<sup>242</sup> which was struck down by the Stevens majority,<sup>243</sup> was saved by the judicial bypass procedure contained within subdivision six.<sup>244</sup> The Kennedy majority reached this decision by referring to the previously established "*Bellotti* framework"<sup>245</sup> and concluded that the

236. *Hodgson*, 110 S. Ct. at 2940.

237. *Hodgson*, 648 F. Supp. at 763-64. Doctor Hodgson, one of the plaintiffs in the action, testified that many of the minors who came to her following the court hearing were "wringing wet with perspiration" and often intimated that the court procedure was the worst part of the whole ordeal. *Hodgson*, 110 S. Ct. at 2940 n.29.

238. *Hodgson*, 648 F. Supp. at 763. Hence, it follows that the statute actually restricted the number of abortions that would otherwise be performed.

239. *Hodgson*, 648 F. Supp. at 769. "The vast majority of these voluntarily informed parents [were] women who [had] divorced or separated from spouses whom they [had] not seen in years." *Id.*

240. *Id.* They were often angry that their consent was not considered sufficient under the state law, and some feared that the involvement of the other, possibly abusive, parent would cause additional strain on the family. *Id.*

241. *Id.*

242. MINN. STAT. ANN. § 144.343(2) (West 1989). See *supra* note 185 for the full text of the statute.

243. *Hodgson*, 110 S. Ct. at 2945.

244. *Hodgson*, 110 S. Ct. at 2970. See MINN. STAT. ANN. § 144.343(6) (West 1989). For the text of subdivision six, see *supra* note 185.

245. See *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (opinion of Powell, J.). A discussion of the *Bellotti* framework can be found, *supra*, at notes 158-59 and accompanying text.



Minnesota statute met the prerequisites of that guideline.<sup>246</sup> Specifically, the majority noted that the standards set out in *Bellotti* would sustain a parental consent statute if it contained a judicial bypass option.<sup>247</sup> Since such an alternative was sufficient to sustain a consent statute, the Kennedy majority felt compelled to sustain Minnesota's less burdensome notice statute.<sup>248</sup>

Moreover, the Kennedy majority, in choosing to uphold the remainder of the Minnesota statute, asserted that the judicial bypass alternative effectively allayed the fear expressed by the Stevens majority that two-parent notice laws could be harmful to some minors.<sup>249</sup>

Finally, the Kennedy majority stated that its decision could be alternatively supported by the conclusion previously reached in *Matheson*.<sup>250</sup> It interpreted the *Matheson* holding as establishing that two-parent notice requirements without judicial bypass alternatives were "Constitutional as applied to immature minors whose best interests would be served by notice."<sup>251</sup> The majority then asserted that the requirements of the Minnesota law were essentially the same as the mandates of the *Matheson* law, since parents of immature minors, whose best interests would be served by parental notice, would be notified under either statute.<sup>252</sup> Although similar notice requirements would not be constitutional as applied to either mature minors or minors whose best interests would not be served by notice, the Kennedy majority ruled that the bypass procedure was a constitutional means of insuring that the rights of immature minors were protected.<sup>253</sup>

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246. *Hodgson*, 110 S. Ct. at 2970 (Kennedy, J., concurring in part and dissenting in part).

247. *Id.* at 2971 (Kennedy, J., concurring in part and dissenting in part). See *Bellotti*, 443 U.S. at 643-44 (opinion of Powell, J.). Although the consent statute in *Bellotti* was struck down, Justice Powell went on to state the minimum requirements for such a statute to be sustained. See *id.* Five justices who participated in the *Bellotti* decision supported his opinion. See *Hodgson*, 110 S. Ct. at 2970-71 (Kennedy, J., concurring in part and dissenting in part) (outlining the opinions of the justices).

248. *Hodgson*, 110 S. Ct. at 2970 (Kennedy, J., concurring in part and dissenting in part).

249. *Id.* at 2970 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy stated that "[i]f one were to attempt to design a statute that would address the Court's concerns, one would do precisely what Minnesota has done in . . . creat[ing] a judicial mechanism to identify, and exempt from the strictures of the law, those cases in which the minor is mature or in which notification of the minor's parents is not in the minor's best interests." *Id.*

250. *Id.* at 2971 (Kennedy, J., concurring in part and dissenting in part). See generally *H.L. v. Matheson*, 450 U.S. 398 (1981). For a discussion of the Court's decision in *Matheson*, see *supra* notes 160-65 and accompanying text.

251. *Hodgson*, 110 S. Ct. at 2971 (Kennedy, J., concurring in part and dissenting in part). This interpretation of the holding in *Matheson* was criticized by Justice Stevens. See *id.* at 2938 n.23. Justice Stevens claimed that the Court in *Matheson* never determined that the state statute at issue applied to both parents, rather than just one. *Id.*

252. *Id.* at 2971 (Kennedy, J., concurring in part and dissenting in part).

253. *Id.* (Kennedy, J., concurring in part and dissenting in part) (holding that "a

In summary, laws which require notice to one or both parents of a minor will withstand constitutional scrutiny so long as they include a judicial bypass alternative.<sup>254</sup>

*c. Constitutionality of Forty-Eight Hour Waiting Periods*

Though not extensively considered by the Court, the Kennedy majority affirmed the decision of the court of appeals and declared constitutional the forty-eight hour waiting period as contained in the statute.<sup>255</sup> It concluded that the waiting period was necessary in order to allow time for notified parents to consult with their daughters.<sup>256</sup> Additionally, it found the resultant delay which accompanied the waiting period to be insignificantly burdensome.<sup>257</sup>

2. Separate Opinion Written by Justice Stevens

Justice Stevens wrote a separate opinion<sup>258</sup> in which he addressed Minnesota's requirement that a minor wait forty-eight hours after notifying her parents before undergoing an abortion operation.<sup>259</sup> He readily acknowledged the findings of fact from the district court's opinion that "scheduling factors, weather, and the minor's school and work commitments may combine, in many cases, to create a delay of a week or longer between the initiation of notification and the abortion."<sup>260</sup> Nonetheless, he concluded that the forty-eight hour waiting period furthered the legitimate state objective of "ensuring that the minor's decision is knowing and intelligent."<sup>261</sup>

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judicial bypass is an expeditious and efficient means by which to separate the applications of the law which are constitutional from those which are not").

254. See *id.* at 2971 (Kennedy, J., concurring in part and dissenting in part).

255. *Id.* at 2969 (Kennedy, J., concurring in part and dissenting in part). See MINN. STAT. ANN. § 143.343(2) (West 1989). See *supra* note 185 for the full text of the statute.

256. *Hodgson*, 110 S. Ct. at 2969 (Kennedy, J., concurring in part and dissenting in part).

257. *Id.* (Kennedy, J., concurring in part and dissenting in part). Justice Stevens, in a separate opinion, agreed with this conclusion. *Id.* at 2944 (opinion of Stevens, J.) (noting that the waiting period imposed only a "minimal burden" upon minors).

258. This portion of Justice Stevens's opinion was joined only by Justice O'Connor.

259. See *Hodgson*, 110 S. Ct. at 2941-45 (opinion of Stevens, J.).

260. *Id.* at 2944 (opinion of Stevens, J.). See *Hodgson*, 648 F. Supp. at 765. The district court further found that any delays in performing the procedure statistically increased the medical risk for minors involved. *Id.* Delays, especially those over one week, increased the risk and, sometimes, pushed the minor over into her second trimester of pregnancy. *Id.*

261. *Hodgson*, 110 S. Ct. at 2944 (opinion of Stevens, J.).

### 3. Dissenting Opinion Written by Justice Kennedy

Justice Kennedy's dissenting opinion<sup>262</sup> rounded out the opposition between his viewpoint and Justice Stevens's viewpoint. He expressed the opinion that "the judicial bypass provisions of the [Minnesota statute were] not necessary to its validity."<sup>263</sup> It is apparent, then, that the only point of agreement between the two justices involved the validity of the forty-eight hour waiting period.<sup>264</sup>

Justice Kennedy asserted that subdivision two of the statute,<sup>265</sup> which mandated that both parents be notified of a minor's decision to have an abortion, was valid even though it contained no judicial bypass provision.<sup>266</sup> In contrast to Justice Stevens's majority opinion,<sup>267</sup> he felt that this portion of the statute was supported by legitimate state interests.<sup>268</sup> Justice Stevens determined that Minnesota's asserted interest in promoting the parental roles related to child-rearing in enacting the statute was invalid.<sup>269</sup> However, Justice Kennedy refused to agree that the Constitution prevented a state from ensuring that both parents of a minor were informed of medical procedures which the minor sought to undergo.<sup>270</sup> He stated that "[a] State pursues a legitimate end under the Constitution when it attempts to foster and preserve the parent-child relation by giving *all* parents the opportunity to participate in the care and nurture of their children."<sup>271</sup>

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262. Justice Kennedy's dissenting opinion was joined by Chief Justice Rehnquist and Justices White and Scalia.

263. *Hodgson*, 110 S. Ct. at 2965 (Kennedy, J., concurring in part and dissenting in part).

264. For a discussion of the waiting period, see *supra* notes 255-57 and accompanying text.

265. See MINN. STAT. ANN. § 143.343(2) (West 1989). For the full text of the subdivision, see *supra* note 185, subd. (2).

266. *Hodgson*, 110 S. Ct. at 2965 (Kennedy, J., concurring in part and dissenting in part).

267. See *id.* at 2945 (opinion of Stevens, J.).

268. *Hodgson*, 110 S. Ct. at 2962 (positing that "a State has an interest in seeing that a child, when confronted with serious decisions such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice").

269. *Id.* at 2946 (opinion of Stevens, J.). See *supra* notes 223-25 and accompanying text for a discussion of Justice Stevens's opinion. Justice Kennedy pointed out how Justice Stevens's views had apparently changed since writing a concurring opinion to a previous decision by the Court to uphold a Utah notice statute. *Hodgson*, 110 S. Ct. at 2962; see *H.L. v. Matheson*, 450 U.S. 398, 420-25 (1980) (Stevens, J., concurring). In *Matheson*, Justice Stevens asserted that the notification statute at issue was valid as to both mature and immature unmarried minors. *Id.* at 424-25. He claimed that the statute was based upon the legitimate state interest of ensuring that a child receives the appropriate parental advice. *Id.* at 423.

270. *Hodgson*, 110 S. Ct. at 2962 (Kennedy, J., concurring in part and dissenting in part).

271. *Id.* at 2963 (Kennedy, J., concurring in part and dissenting in part) (emphasis added). He cited to cases which held that parents have a liberty interest in developing close relationships with their children. *Id.* See *Santosky v. Kramer*, 455 U.S. 745, 753-

In support of Minnesota's two-parent notice requirement, Justice Kennedy asserted that a state could take affirmative steps, presumably through legislation, to facilitate the "parent-child bond," and he maintained that the state would be justified in assuming that the parents would act in their child's best interests.<sup>272</sup> He advocated against assuming that a parent should be deemed unfit without giving that parent an opportunity to prove otherwise.<sup>273</sup>

Next, Justice Kennedy attacked the Stevens majority's position which viewed the two-parent notice requirement as an attempt by the state to force families to "conform to some state-designed ideal."<sup>274</sup> Justice Kennedy believed that no such purpose could be found in the explicit words of the statute or through any reasonable inference.<sup>275</sup> Rather, he observed that the state's interest in mandating notification to both parents was valid regardless of whether the parents lived together or were separated.<sup>276</sup> Moreover, he stated that "[h]ow the family unit responds to such notice is, for the most part,

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54 (1982) (holding that freedom of personal choice in matters of family life is a fundamental liberty interest); *Caban v. Mohammed*, 441 U.S. 380, 391-93 (1979) (recognizing the parental interest in developing a substantial relationship with their child); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (noting that the right to raise one's children is among the basic civil rights of man).

272. *Hodgson*, 110 S. Ct. at 2963 (Kennedy, J., concurring in part and dissenting in part).

273. *Id.* He relied on previous decisions by the Court to support his viewpoint: *Santosky*, 455 U.S. at 753 (holding that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents. . ."); *Stanley*, 405 U.S. at 658 (ruling that parental rights can only be terminated after a hearing where the state proves allegations of parental unfitness).

274. *See Hodgson*, 110 S. Ct. at 2963 (Kennedy, J., concurring in part and dissenting in part). *But see Hodgson*, 110 S. Ct. at 2956.

275. *Id.* at 2963 (Kennedy, J., concurring in part and dissenting in part).

276. *Id.* at 2964 (Kennedy, J., concurring in part and dissenting in part). He pointed to the trend among state legislatures to deem a joint custody arrangement upon the divorce of parents as the most beneficial custody arrangement for the children. *Id.* Under a joint custody arrangement, both parents are legally responsible for making important decisions for the child, including decisions regarding medical treatment. *See H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 19.5, at 816 (2d ed. 1987).

Justice Kennedy noted that the presumption existed under Minnesota law, as well, that a joint custody arrangement serves the best interests of the child. *Hodgson*, 110 S. Ct. at 2964 (Kennedy, J., concurring in part and dissenting in part) (citing MINN. STAT. § 518.17(2) (Supp. 1989)). He observed that, even in cases where joint custody was not awarded, the noncustodial parent still had a right to be notified of important medical procedures and to have access to the child's medical records. *Id.* at 2964-65. Justice Kennedy asserted that Minnesota's two-parent notice statute did nothing more "than apply these general principles to the specific case of abortion." *Id.* at 2965.

beyond the State's control."<sup>277</sup>

Justice Kennedy claimed that subdivision three of the Minnesota statute provided sufficient protection to minors in that it made exceptions for situations where notice would not serve the minors' interests, even though it contained no bypass alternative.<sup>278</sup> These exceptions provided that the notice requirement did not apply when either or both parents could not be notified through a "reasonably diligent effort."<sup>279</sup> Additionally, he explained that notice was not required under the statute if the abortion was immediately necessary to save the minor's life.<sup>280</sup> Notice could also be waived if the minor claimed she was a victim of physical or sexual abuse or neglect.<sup>281</sup>

In conclusion, Justice Kennedy stated that the Minnesota law did "not place an absolute obstacle before any minor seeking to obtain an abortion, and it represents a considered weighing of the competing interests of minors and their parents."<sup>282</sup>

#### 4. Concurring Opinion Written by Justice O'Connor

Justice O'Connor wrote a concurring opinion<sup>283</sup> in which she expressed her support for the Court's decision to strike down subdivision two of the statute.<sup>284</sup> Additionally, she agreed with the Court's separate opinion that subdivision six of the statute was a constitu-

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277. *Id.* at 2964 (Kennedy, J., concurring in part and dissenting in part).

278. *Id.* at 2967 (Kennedy, J., concurring in part and dissenting in part).

279. *Id.* (Kennedy, J., concurring in part and dissenting in part) (quoting MINN. STAT. ANN. § 144.343(3) (1988)). For the text of the subdivision, see *supra* note 185, subd. (3).

280. *Hodgson*, 110 S. Ct. at 2967 (Kennedy, J., concurring in part and dissenting in part) (citing MINN. STAT. ANN. § 144.343(4)(a) (1988)). For the text of the subdivision, see *supra* note 185, subd. (4).

281. *Hodgson*, 110 S. Ct. at 2967 (Kennedy, J., concurring in part and dissenting in part) (citing MINN. STAT. ANN. § 144.343(4)(c) (1988)). For the text of the subdivision, see *supra* note 185, subd. (4).

Justice Stevens's majority opinion, in contrast, asserted that this exception did not effectively serve minors' interests in that most minors were reluctant to report abuse because the recipient of such information was required to convey it to the proper state authorities who would inevitably conduct an investigation into the matter. *Hodgson*, 110 S. Ct. at 2932 n.7.

Justice O'Connor expressed support for Justice Stevens's assertion. See *id.* at 2950 (O'Connor, J., concurring). She explained that the welfare department would conduct the investigation and would be required to inform the parents of that investigation. *Id.* (citing MINN. STAT. ANN. § 626.556(10)(a) (1988)). Since the parents had a right of access to information surrounding the investigation, the result was that the parents would be likely notified of the abortion nonetheless. *Id.* (citing MINN. STAT. ANN. §§ 626.556(10)(c), (11) (1988)).

282. *Id.* at 2969 (Kennedy, J., concurring in part and dissenting in part).

283. Justice O'Connors's concurring opinion represented only her views; she was joined by no other justices.

284. See *Hodgson*, 110 S. Ct. at 2949-51 (O'Connor, J., concurring). The main fact upon which she based her opinion was the District Court finding that only 50% of Minnesota's minors resided in two parent households. *Id.* at 2950.

tional state regulation of abortion.<sup>285</sup> She explained that by including the bypass alternative, Minnesota had tailored its parental notification statute in accordance with the standards established by Supreme Court precedent.<sup>286</sup> Significantly, this was the first time that Justice O'Connor sided with the liberal wing of the Court in striking down a regulation of abortion.<sup>287</sup>

##### 5. Concurring and Dissenting Opinion Written by Justice Marshall

Justice Marshall wrote an opinion<sup>288</sup> in which he agreed with the Stevens majority that "Minnesota's two-parent notification requirement is not even reasonably related to a legitimate state interest."<sup>289</sup> However, he "vehemently" dissented from the Kennedy majority's opinion by disagreeing with the conclusion that the bypass procedure saved the notification and delay requirements of the Minnesota statute.<sup>290</sup> He based his dissent upon the premise that the bypass procedure was unconstitutional both on its face and as applied.<sup>291</sup>

Justice Marshall focused upon the most politically controversial aspects of the Minnesota statute—its social impacts. He cited exten-

285. *Hodgson*, 110 S. Ct. at 2951 (O'Connor, J., concurring).

286. *Id.* at 2950 (O'Connor, J., concurring). She cited *Planned Parenthood v. Danforth*, 428 U.S. 52, 90-91 (1976) (advocating judicial bypass procedures) and *Bellotti v. Baird*, 443 U.S. 622, 642-44 (1978) (establishing prerequisites for constitutional bypass procedures), as applicable precedent. *Id.* at 2950.

287. Facts on File, *World News Digest*, June 29, 1990, at F3.

288. Justice Marshall was joined by Justices Brennan and Blackmun.

289. *Hodgson*, 110 S. Ct. at 2951 (Marshall, J., concurring in part and dissenting in part). Therefore, he concluded that the strictures of the statute could never pass a strict scrutiny test. *Id.*

290. *Id.* at 2960 (Marshall, J., concurring in part and dissenting in part).

291. *Id.* (Marshall, J., concurring in part and dissenting in part). Justice Marshall noted that, in all of its opinions regarding consent and notice statutes, the Court had only directed its attention to facial challenges to the statutes' judicial bypass procedures. *Id.* at 2958 (Marshall, J., concurring in part and dissenting in part). In contrast, he deemed it important in evaluating a statute's constitutionality to address the actual burdens that the bypass procedures placed upon minors in practice. *Id.* (Marshall, J., concurring in part and dissenting in part).

He asserted that two problems were inherent with the Minnesota statute: (1) it substantially burdened a minor's right to privacy without promoting a concomitant compelling state interest; and (2) it gave either a minor's parents or the court an absolute veto over a minor's decision to terminate her pregnancy. *Id.* at 2951 (Marshall, J., concurring in part and dissenting in part).

Justice Marshall noted that "*Roe* remains the law of the land," which means that state laws limiting the fundamental right to obtain an abortion must pass the strict scrutiny test and be narrowly drawn so as to serve a compelling state interest. *Id.* at 2952 (Marshall, J., concurring in part and dissenting in part).

sively to a collection of empirical data and reports, rather than a string of judicial precedents. For example, he noted that fifty-one percent of minors consulted their parents regarding abortion in states without notice or consent statutes.<sup>292</sup> Therefore he concluded that, while the statute did not burden those minors who would opt to notify a parent anyway, it significantly burdened minors who desired not to provide notice.<sup>293</sup> Justice Marshall asserted that forced notification was extremely traumatic for most minors, often leading to a family crisis.<sup>294</sup>

The statute was burdensome, he opined, in not only psychological ways, but in physical ways as well. Justice Marshall noted that many minors who dreaded notifying their parents chose to delay their abortions, which increased the attendant health risks of undergoing the operation.<sup>295</sup> Combined with the fact that minors are known to delay their abortions until fairly late in their pregnancies even without the increased burdens created by statutes,<sup>296</sup> he concluded that the significant burdens accompanying compliance with the notification requirements are obvious.<sup>297</sup>

Justice Marshall found other possible burdens in the statute evidenced by the fact that one-third of minors affected by a notice statute in another state travelled out of state to seek abortions, rather than choosing to comply with the local notification requirements.<sup>298</sup> Justice Marshall also cited statistics showing that nine percent of minors would rather effect self-induced abortions or seek out illegal abortions than notify their parents.<sup>299</sup> Other minors indicated that

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292. *Id.* at 2952 (Marshall, J., concurring in part and dissenting in part) (citing Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284, 287, 288, 290 (1980)).

293. *Id.* at 2953 (Marshall, J., concurring in part and dissenting in part).

294. *Id.* (Marshall, J., concurring in part and dissenting in part) (citing Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 CLINICAL OBSTETRICS & GYNECOLOGY 1161, 1164-65 (1978)).

295. *Id.* (Marshall, J., concurring in part and dissenting in part) (citing Cates, Schulz & Grimes, *The Risks Associated with Teenage Abortion*, 309 NEW ENG. J. OF MED. 621, 623 (1983)). This particular article stated that the number of deaths for minors under 19 progressively rises from 0.2 per 100,000 during the first eight weeks of pregnancy to 7.8 per 100,000 after the 16th week. Cates, Schulz & Grimes, *supra* at 623.

296. 1 NATIONAL RES. COUNCIL, *RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY AND CHILDBEARING* 114 (C. Hayes ed. 1987) (explaining several reasons for the delay).

297. *Hodgson*, 110 S. Ct. at 2953 (Marshall, J., concurring in part and dissenting in part).

298. *Id.* (Marshall, J., concurring in part and dissenting in part). Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 AMERICAN J. OF PUB. HEALTH 397, 399 (1986).

299. *Hodgson*, 110 S. Ct. at 2953 (Marshall, J., concurring in part and dissenting in part) (citing Torres, Forrest & Eisman, *supra* note 292, at 288). He also noted that a 100-times greater death rate accompanies illegal abortions as opposed to legal ones. *Id.*

they would rather carry a fetus to term than tell their parents that they wanted to terminate their pregnancies.<sup>300</sup> In response to that social effect, Justice Marshall pointed out that a minor's risk of death from childbirth was over nine times greater than the risk of undergoing a legal abortion procedure.<sup>301</sup>

Justice Marshall concluded that the forty-eight hour notice requirement could not possibly pass constitutional scrutiny, since it served only to compound harms created by the burdens accompanying the notice requirement.<sup>302</sup> With regard to the notice requirement itself, Justice Marshall never reached the issue of whether it could pass the strict scrutiny test because he determined that, in any event, the statute was not narrowly tailored to achieve the intended state objectives.<sup>303</sup> He reasoned that for the majority of minors who would voluntarily consult their parents regardless of the statutory requirements, the notification mandate was "superfluous."<sup>304</sup> For the other minors who would not notify their parents if they had a choice, he deduced that the forced notification would not result in beneficial family communications, the broad objective behind the statute.<sup>305</sup>

Furthermore, Justice Marshall maintained that Minnesota's notice statute was overbroad in that, under certain circumstances, it gave parents the power to absolutely veto their minor child's wishes.<sup>306</sup> He explained that this phenomenon resulted because, following notification, some parents could exert extreme pressure on their vulnera-

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(Marshall, J., concurring in part and dissenting in part) (citing Greydanus & Railsback, *Abortion in Adolescence*, 1 SEMINARS IN ADOLESCENT MEDICINE 213, 214 (1985)).

300. See Torres, Forrest & Eisman, *supra* note 292, at 289, 291.

301. *Hodgson*, 110 S. Ct. at 2954 (Marshall, J., concurring in part and dissenting in part) (citing Greydanus & Railsback, *supra* note 299, at 214).

302. *Id.* (Marshall, J., concurring in part and dissenting in part). In response to Justice Stevens's statement that the waiting period imposed only "a minimal burden" upon minors, Justice Marshall replied that "[c]ertainly no pregnant woman facing these heightened risks to her health would dismiss them as 'minimal.'" *Id.* (Marshall, J., concurring in part and dissenting in part).

303. *Id.* at 2955 (Marshall, J., concurring in part and dissenting in part). He referred to the only state interest deemed legitimate by the majority—that of "protecting the well-being of minors." *Id.* (Marshall, J., concurring in part and dissenting in part).

304. *Id.* (Marshall, J., concurring in part and dissenting in part).

305. *Id.* (Marshall, J., concurring in part and dissenting in part) (citing Melton, *Legal Regulation of Adolescent Abortions: Unintended Effects*, 42 AM. PSYCHOLOGIST 79, 81 (1987) (indicating that forced notification was "unlikely to result in meaningful discussion about the daughter's predicament"))).

306. *Id.* at 2956-57. (Marshall, J., concurring in part and dissenting in part). "In such circumstances, the notification requirement becomes, in effect, a consent requirement." *Id.* at 2956.



ble daughters.<sup>307</sup> Because, a state cannot allow anyone, including a minor's parents, in accordance with constitutional precedents, to exercise an unlimited veto power over a minor's decision, Justice Marshall opined that the operation of the statute created unconstitutional ramifications.<sup>308</sup>

Justice Marshall further argued that the bypass procedure did not save the Minnesota statute because that procedure created an absolute veto power among judges,<sup>309</sup> a situation which could result when a judge refused to authorize an abortion.<sup>310</sup> For minor women who determined they could not notify their parents, he felt that the bypass procedure amounted to an unconstitutional veto over their request to obtain a legal abortion.<sup>311</sup> Thus, minors in that position were faced with only the alternatives of carrying their babies to term or seeking illegal abortions.

Finally, Justice Marshall posited that, even if the bypass procedure was constitutional, it amounted to nothing more than a "rubber stamp" proceeding since very few petitions were ever denied.<sup>312</sup> Since the courts provided no beneficial counseling of any kind to the petitioning minors, Justice Marshall determined that the proceedings, in practice, served no legitimate state interest.<sup>313</sup> In fact, the State of Minnesota had conceded in oral argument before the court of appeals that it would be unconstitutional to subject all minors seeking an abortion to judicial approval requirements.<sup>314</sup> Because of that concession, Justice Marshall questioned how Minnesota's judicial bypass procedure could save the statute's already burdensome notifica-

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307. *Id.* (Marshall, J., concurring in part and dissenting in part). Justice Marshall noted that the pressure could take several forms: "stern disapproval, withdrawal of financial support, or physical or emotional abuse. . . ." *Id.*

308. *Id.* at 2956-57 (Marshall, J., concurring in part and dissenting in part).

309. *Id.* at 2957 (Marshall, J., concurring in part and dissenting in part). Justice Marshall quoted Justice Stevens's concurring opinion in *Bellotti*: "The provision of an absolute veto to a judge . . . is to me particularly troubling. . . . It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties." *Bellotti v. Baird*, 443 U.S. 622, 655 (1978) (Stevens, J., concurring).

310. *Hodgson*, 110 S. Ct. at 2957 (Marshall, J., concurring in part and dissenting in part).

311. *Id.* (Marshall, J., concurring in part and dissenting in part).

312. *Id.* at 2959 (Marshall, J., concurring in part and dissenting in part) (citing district court statistics in *Hodgson*, 648 F. Supp. at 765).

Justice Marshall took note of additional statistics which indicated that the hearings usually lasted no longer than fifteen minutes and experts were rarely called to testify. *Id.* (citing Melton, *supra* note 305, at 79-80). Additionally the courts provided no counseling to aid the minor in her decision. *Id.*

313. *Id.* (Marshall, J., concurring in part and dissenting in part).

314. See *Hodgson v. Minnesota*, 853 F.2d 1452, 1469 (8th Cir. 1988) (Lay, C.J., dissenting).

tion and waiting period requirements.<sup>315</sup>

#### 6. Concurring and Dissenting Opinion Written by Justice Scalia

Justice Scalia concurred with the Kennedy majority's position that Minnesota's notification statute combined with its judicial bypass procedure passed constitutional muster.<sup>316</sup> Additionally, he opposed the viewpoint expressed by the Stevens majority that the portion of the statute without judicial bypass should be stricken.<sup>317</sup> Finally, Justice Scalia wrote a small passage only to reiterate his often expressed opinion that the courts are not the proper forum for addressing and developing abortion laws.<sup>318</sup> Rather, he advocated, in accordance with his position on previous occasions, that abortion related decisions should be made by the legislatures.<sup>319</sup>

### IV. IMPACT OF THE *HODGSON* DECISION

*Hodgson* does more than reiterate the traditional standard regarding minors' abortion rights. The case is significant for several reasons. First, it is the initial abortion case to be decided by the Supreme Court since the *Webster* decision was handed down. Second, it appears to do exactly what critics of the *Webster* decision forecasted—by upholding the most restrictive notice statute in the nation, it proves that the Court is amenable to increased state regulations in the abortion arena.<sup>320</sup> The popular question is whether the Court is planning to abandon Supreme Court control over the abortion issue by allowing the regulatory power to fall back into the hands of the states. Therefore, in the following analysis of the expected impacts from the *Hodgson* decision, not only will the potential impact upon minors be evaluated, but also the potential impact upon the current

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315. *Hodgson*, 110 S. Ct. at 2960 (Marshall, J., concurring in part and dissenting in part).

316. *Id.* at 2969-71 (Scalia, J., concurring in part and dissenting in part).

317. *Id.* at 2961-69 (Scalia, J., concurring in part and dissenting in part).

318. *See id.* at 2960-61 (Scalia, J., concurring in part and dissenting in part). Justice Scalia stated that he continued "to dissent from this enterprise of devising an Abortion Code and from the illusion that we have authority to do so." *Id.* at 2961.

319. *Id.* (Scalia, J., concurring in part and dissenting in part). *See, e.g.*, *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2984 (Scalia, J., concurring) (stating that abortion should be a matter left to the political processes); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring) (recognizing abortion as a political, rather than a judicial, issue).

320. After the *Hodgson* decision was handed down, some pro-choice advocates grudgingly forecasted further erosions of the abortion rights established in *Roe*. *Newsday*, June 26, 1990, at 4.

status of permissible state regulation of abortion in general will be considered.

#### A. *Judicial Impact*

##### 1. Companion Case—*Ohio v. Akron Center for Reproductive Health*

*Ohio v. Akron Center for Reproductive Health*<sup>321</sup> was decided on the same day as *Hodgson*. The statute at issue makes it a crime for a physician to perform an abortion upon a minor unless he provides notice to one of the child's parents.<sup>322</sup> It provides an alternative judicial bypass procedure if the minor can present "clear and convincing" proof that she is either mature or that an abortion without notification is in her best interests.<sup>323</sup> It was this stringent burden of proof

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321. 110 S. Ct. 2972 (1990) [hereinafter *Akron II*].

322. OHIO REV. CODE ANN. § 2919.12 (Supp. 1985) provides, in pertinent part:

(A)(1)(a) No person shall knowingly perform or induce an abortion upon a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated unless at least one of the following applies:

(i) [T]he person has given at least twenty-four hours actual notice, in person or by telephone, to one of the woman's parents. . . ;

(ii) One of the woman's parents . . . has consented in writing to the performance or inducement of the abortion;

(iii) A juvenile court . . . issues an order authorizing the woman to consent to the abortion without notification of one of her parents. . . ;

(iv) A juvenile court or a court of appeals, by its inaction, constructively has authorized the woman to consent to the abortion without notification. . . .

(2) It is an affirmative defense to a charge under this section that compliance with the requirements of this section was not possible because an immediate threat of serious risk to the life or physical health of the pregnant woman from the continuation of her pregnancy created an emergency necessitating the immediate performance or inducement of an abortion.

(D) Whoever violates this section is guilty of unlawful abortion, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section, unlawful abortion is a felony of the fourth degree.

(E) Whoever violates this section is liable to the pregnant woman and her parents . . . for civil compensatory and exemplary damages.

323. OHIO REV. CODE ANN. § 2151.85 (Supp. 1985) provides, in pertinent part:

(A) A woman who is pregnant, unmarried, under eighteen years of age, and unemancipated and who wishes to have an abortion without the notification of her parents . . . may file a complaint in the juvenile court of the county in which she has a residence . . . requesting the issuance of an order authorizing her to consent to the performance or inducement of an abortion without the notification of her parents. . . .

The complaint shall be made under oath and shall include all of the following:

(4) An allegation of either or both of the following:

(a) That the complainant is sufficiently mature and well enough informed to intelligently decide whether to have an abortion without the notification of her parents. . . .

(b) That one or both of her parents . . . was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents . . . is not in her best interest.

(C)(1) [I]f the court finds, by clear and convincing evidence, that the complainant is sufficiently mature and well enough informed to decide intelli-

placed upon the minor in the proceeding which concerned the Court.

Justice Kennedy, writing for the majority,<sup>324</sup> concluded, in the wake of the *Hodgson* decision, that Ohio's one-parent notice requirement complied with Supreme Court precedent.<sup>325</sup> However, the plaintiffs in the action, an Ohio abortion clinic, an Ohio physician, and a pregnant minor, among others, maintained that a bypass procedure could not constitutionally require a minor to prove her maturity or best interests under a clear and convincing standard.<sup>326</sup> Moreover, they asserted that the burden of proof should rest with the state entirely.<sup>327</sup> They contended that when a state "seeks to deprive an individual of liberty interests, it must take upon itself the risk of

gently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents. . . .

(2) [I]f the court finds, by clear and convincing evidence, that there is evidence of a pattern of physical, sexual, or emotional abuse of the complainant by one or both of her parents . . . or that the notification of the parents . . . of the complainant otherwise is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents. . . .

324. Justice Kennedy was joined by Chief Justice Rehnquist and Justices White, Stevens, O'Connor and Scalia.

325. *Akron II*, 110 S. Ct. at 2978 (citing *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)).

Significantly, the Court went on to state that it need not decide whether a law requiring one-parent notification with no judicial bypass alternative would be constitutional, as the issue was not before it. *Id.* at 2979. *See also id.* at 2985 (Blackmun, J., dissenting) (remarking that the majority in *Akron II* failed to decide whether a one-parent notice statute must contain a bypass procedure).

326. *Id.* at 2981. Justice Blackmun, who wrote the dissenting opinion in *Akron II*, agreed with the plaintiff. He believed that the strictures of Ohio's statute itself and its unique bypass procedure placed significant obstacles in the path of minors seeking abortions. These statutory procedures amounted to "poorly disguised elements of discouragement for the abortion decision." *Id.* at 2985 (Blackmun, J., dissenting) (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 763 (1986)). He contended that the majority's decision to uphold the standard of clear and convincing proof unduly burdened the minor involved and "demonstrat[ed] a fundamental misunderstanding of the real nature of a court-bypass proceeding." *Id.* at 2989. He stressed that a bypass proceeding is designed to work like an interview between the judge and the minor, not like an evidentiary proceeding. *Id.* at 2990. He concluded that, since the minor's fundamental rights were at stake, a stringent burden of proof would not benefit her interests. *Id.*

Justice Blackmun was joined in his dissent by Justices Brennan and Marshall. They formed the same trio who dissented in *Hodgson*. *See supra* notes 288-315 and accompanying text for a discussion of the Marshall dissent in *Hodgson*.

327. *Akron II*, 110 S. Ct. at 2981.

error.”<sup>328</sup>

In response, the Court referred to the benchmark standard in *Bellotti*,<sup>329</sup> where the Court held that a state may require a minor to bear the burden of proof in showing her maturity or best interests.<sup>330</sup> Furthermore, the Court ruled that since a bypass proceeding was merely *ex parte*<sup>331</sup> in nature, the clear and convincing standard imposed no undue burden upon the minor involved.<sup>332</sup>

Therefore, while *Hodgson* stands for the proposition that two-parent notice requirements accompanied by judicial bypass procedures are constitutional state regulations, *Akron II* adds to the states' authority by holding that: 1) a minor can be required to shoulder the burden of proof in a bypass procedure; and 2) the minor can constitutionally be required to meet a clear and convincing standard in satisfying her burden of proof.

## 2. Changes on the Court—Membership and Philosophy

The most interesting question regarding abortion circulating throughout the popular press is whether the Court will overrule *Roe v. Wade* in one fell swoop. Or, will they continually chip away at its protections until it dies a slow and painful death?

President Bush's administration urged the Court in its consideration of *Hodgson* to take the opportunity it passed up with the *Webster* decision to overrule *Roe*.<sup>333</sup> Even though the Court declined the presidential invitation, some civil libertarians still consider the *Hodgson* and *Akron II* decisions to be strong blows to *Roe*'s integrity.<sup>334</sup>

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328. *Id.* The plaintiffs relied on *Santosky v. Kramer*, 455 U.S. 745 (1982), for support. *Id.* In *Santosky*, the Court held that the function of a standard of proof was “a societal judgment about how the risk of error should be distributed between the litigants.” *Id.* at 755. Further, the Court in *Santosky* noted that the clear and convincing standard is normally employed to promote fairness in governmentally-initiated proceedings by imposing the burden of proof upon the government where an individual is threatened with the deprivation of his or her liberty interests. *Id.* at 756.

329. *Akron II*, 110 S. Ct. at 2981 (citing *Bellotti v. Baird*, 443 U.S. 622 (1979)).

330. *Bellotti*, 443 U.S. at 643.

331. An *ex parte* proceeding is conducted for the benefit of one party only; there are no adverse witnesses, and the evidence presented by the party is not contested. BLACK'S LAW DICTIONARY 297 (5th ed. 1983).

332. *Akron II*, 110 S. Ct. at 2981-82 (defining “clear and convincing evidence” as “that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established,” and pointing out that it rises above a “mere preponderance,” but does not rise to the level of “beyond a reasonable doubt,” as is required in criminal cases).

333. Facts on File, World News Digest, June 29, 1990, at F3. President Bush is a staunch supporter of the pro-life position. L. TRIBE, *supra* note 17, at 170. In apparent conflict with his position is a statement he made during Reagan's 1980 campaign for the Republican presidential nomination: “I happen to think [the *Roe* decision] was right.” McQueen, *Bush's Vacillating Statements on Abortion Issue Lead to Criticism from Both Sides*, Wall Street Journal, October 25, 1989, at A20.

334. Newsday, June 26, 1990, at 4 (quoting the attorney for the American Civil Lib-

Whether the Court will specifically reverse *Roe* in the near future can only be hypothesized. However, an analysis of the changes in the membership of the Court since *Roe* sheds great light on the issue.

The *Roe v. Wade* decision emerged into the American political spotlight supported by seven justices and opposed by only two.<sup>335</sup> Following *Roe*, pro-life supporters began almost immediately to encourage change to the new state of the law.<sup>336</sup> First, they attempted to gain support in Congress for a constitutional amendment which would effectively limit or overturn the *Roe* holding.<sup>337</sup> Because the process of acquiring a constitutional amendment is very difficult,<sup>338</sup> these initial efforts failed.<sup>339</sup> Hence, the pro-life forces began efforts to encourage change to the membership of the federal judiciary to a majority of right-to-life advocates.<sup>340</sup> This secondary effort was realized with the election of President Ronald Reagan in 1980, who supported the pro-life position and helped enact its plan by appointing over half of the members of the federal judiciary during his terms in

erties Union as saying "*Roe* is in severe jeopardy. This is one more confirmation that we no longer have a majority of the Court."). Further, the president of Planned Parenthood of New York City accused the Court of "turning its back on the most vulnerable of young women." *Id.*

335. See *Roe v. Wade*, 410 U.S. 113 (1973); see also *supra* note 55.

336. M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 40 (2d ed. 1990). See also Ball, *Case Tactics and Court Strategies for Reversing Roe v. Wade*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 186 (1987). There, the author outlined the strategy of the Right to Life campaign: "Let them be assured that what we have in mind is not circumvention, but instead, a total erasure of legal access to abortion on demand . . . [I]t is an open effort [and] will involve moves both to chip away at the props now thought to uphold *Roe* and to forthrightly destroy the entire artifice." *Id.*

337. M. O'BRIEN, *supra* note 336, at 41. These efforts were termed "right to life" amendments. *Id.* at 41-42. Some proposed amendments advocated returning the control of abortion regulation back to the states. *Id.* Others were introduced by Senators Hatch and Helms and advocated for the recognition of fetuses as "persons." *Id.* Still other amendments were proposed that sought to restrict federal court jurisdiction over the abortion issue. *Id.*

338. Any proposed amendment requires the approval of two-thirds of both houses of Congress and ratification by three-fourths of the state legislatures. U.S. CONST., art. 5. An alternative method allows for the initial approval by two-thirds of the states, who must first call a constitutional convention. *Id.* However, this latter method has never been used. L. TRIBE, *supra* note 17, at 151.

339. L. TRIBE, *supra* note 17, at 17.

340. *Id.* They believed that these judges would interpret the Constitution differently than the Supreme Court had in preceding cases by not protecting a right to abortion. *Id.* Because lower court judges hear a majority of the challenges to abortion laws, they expected to gain some positive ground for their side. Wardle, *Judicial Appointments to the Lower Federal Courts: The Ultimate Arbiters of the Abortion Doctrine*, in *ABORTION AND THE CONSTITUTION*, *supra* note 336, at 218.

office.<sup>341</sup> President Reagan never hid the fact that a potential judge's view on the abortion issue was critical to his or her appointment.<sup>342</sup>

Most significantly, Reagan appointed three new conservative justices to the Supreme Court, all of whom replaced members of the former *Roe* majority.<sup>343</sup> The first new justice to join the Court was Sandra Day O'Connor.<sup>344</sup> After Justice O'Connor was appointed, it was quickly apparent that the *Roe* supporters had shrunk to six.<sup>345</sup> She strongly dissented in the first abortion case she heard, *Akron v. Akron Center for Reproductive Health*,<sup>346</sup> to the Court's decision to strike down a state regulation of abortion.<sup>347</sup> There, she explicitly stated her belief that "the State's interest in protecting potential human life exists throughout the pregnancy."<sup>348</sup>

By the time *Thornburgh v. American College of Obstetricians and Gynecologists*<sup>349</sup> was decided in 1986, the *Roe* majority had shrunk further to five through an apparent change of heart by then Chief Justice Burger.<sup>350</sup> In *Thornburgh*, Justices White, Rehnquist, O'Connor, and the Chief Justice all called for *Roe* to be "reexamined."<sup>351</sup> Shortly thereafter, Chief Justice Burger announced his resignation, and was replaced by the new Chief Justice Rehnquist, one of the original *Roe* dissenters.<sup>352</sup>

To fill the Court's empty slot, President Reagan, in 1986, appointed his second hand-picked justice, Antonin Scalia.<sup>353</sup> Justice Scalia has openly expressed his view that *Roe* should be directly overruled.<sup>354</sup> Hence, the split in the Court following his appointment remained five to four in favor of *Roe*.

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341. L. TRIBE, *supra* note 17, at 17.

342. *Id.*

343. *Id.* At the time of this writing, only three justices of the *Roe* majority remain on the Court: its author, Justice Blackmun; Justice Marshall; and Justice Stevens. Justices Blackmun and Marshall are both over eighty. See H. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 391 (2d ed. 1985).

344. H. ABRAHAM, *supra* note 343, at 392.

345. Justice O'Connor replaced Justice Stewart who had vacillated between pro and con positions in the Court's abortion opinions. Wardle, *supra* note 340, at 217.

346. 462 U.S. 416 (1983). For a discussion of the case, see *supra* notes 73-79 and accompanying text.

347. *Akron*, 462 U.S. at 452-59 (O'Connor, J., dissenting) (strongly criticizing *Roe*'s trimester framework as an illegitimate legal concept).

348. *Id.* at 461 (O'Connor, J., dissenting). *But see supra* note 287 and accompanying text.

349. 476 U.S. 747 (1986). For a discussion of the case, see *supra* notes 84-91 and accompanying text.

350. M. O'BRIEN, *supra* note 336, at 45.

351. *Id.*

352. *Id.*

353. L. TRIBE, *supra* note 17, at 20.

354. See *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3064 (1989) (Scalia, J., dissenting) (asserting that *Roe v. Wade* should be explicitly overruled).

Following the retirement of Justice Powell in 1987, President Reagan nominated one of the most controversial candidates in Supreme Court history, Judge Robert H. Bork, to fill the position.<sup>355</sup> Judge Bork was widely known for his opinion that an individual right to privacy is not protected by the Constitution.<sup>356</sup> His nomination was rejected by the Senate.<sup>357</sup>

Justice Kennedy was eventually confirmed to fill the open position on the Court. He is touted as a conservative and has often sided in opinions with known strong conservatives, Justice Scalia and Chief Justice Rehnquist.<sup>358</sup> Furthermore, in 1990, he evidenced his stance on state regulation of abortion by writing the majority opinions in both *Hodgson* and *Akron II*, where parental notice statutes were upheld by the Court.<sup>359</sup> Hence, the waning *Roe* supporters have apparently shrunk to four justices.

The *Webster* case provided the first vehicle for testing the new Court members' opinions as a group. However, it was a majority with splintered views that voted to uphold the Missouri regulations at issue.<sup>360</sup> While the five conservative members of the Court predictably favored the specific state regulation in question, certain members of that group refused to use *Webster* to reconsider *Roe*.<sup>361</sup>

It was this same five-member majority which upheld the parental notification statutes in *Hodgson* and *Akron II* but, once again, avoided a direct attack on *Roe*. When, and if, the appropriate case comes before the Court, it appears that the majority's position can only be strengthened by the newest Supreme Court Justice, David H. Souter.<sup>362</sup> He takes the place of the long-standing liberal, Justice Wil-

355. M. O'BRIEN, *supra* note 336, at 45. His nomination was opposed by a wide margin in the Senate—58 for, 42 against. *Id.*

356. L. TRIBE, *supra* note 17, at 169.

357. *Id.* at 170.

358. *Id.* at 19.

359. See *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2926-70 (1990); *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2978 (1990).

360. See *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

361. A three-member plurality (Chief Justice Rehnquist and Justices White and Kennedy) criticized the "rigid trimester framework" created by the *Roe* Court but concluded that the facts of *Webster* were not sufficiently similar to those in *Roe* to provide the proper basis upon which to review that decision. *Webster*, 109 S. Ct. at 3058 (plurality opinion). Justice Scalia disagreed and stated that he would have voted to overrule *Roe* through *Webster* without hesitation. *Id.* at 3064 (Scalia, J., concurring). Justice O'Connor indicated only that, when confronted with the proper case, she would reexamine *Roe* "carefully." *Id.* at 3061 (O'Connor, J., concurring).

362. Souter was sworn in on October 9, 1990. U.S.L.W., Oct. 10, 1990, at 1. President Bush trusted the advice of people who helped President Reagan pick the con-



liam Brennan,<sup>363</sup> an original *Roe* supporter.<sup>364</sup>

Justice Souter's personal views on abortion are not clear, but prochoice advocates, nonetheless, opposed his confirmation.<sup>365</sup> Kate Michelman, executive director of the National Abortions Rights Action League, expressed her concern that Souter might "destroy 17 years of precedent and cast the deciding vote to overrule *Roe v. Wade*."<sup>366</sup> In Senate confirmation hearings, Souter expressed his agreement that a right to privacy exists under the Constitution, but indicated that he had not made up his mind which way he would vote should *Roe* be reconsidered.<sup>367</sup> He emphasized that he "will listen to all sides of an issue before reaching a decision."<sup>368</sup> Indeed, liberal senators generally agreed that Justice Souter was probably the most moderate nominee they could have hoped for from the Bush administration.<sup>369</sup>

Therefore, it appears that as Justice Souter joined the Court in its 1990 term, *Roe* was threatened by at least five and, possibly, six justices. While parental notification and consent cases may not provide the vehicle by which the Court seeks to put *Roe* at issue,<sup>370</sup> the decisions in those cases at least provide support for the increased state regulation which will eventually breed the proper case. Prolife advo-

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servative Justices O'Connor, Scalia and Kennedy. Eastland, *When Anonymity Becomes a Virtue*, L.A. Times, July 25, 1990, at B13, col. 2.

363. Justice Brennan has been called "perhaps the Court's most effective proponent of individual rights, ever." Stewart, *The Great Persuader*, A.B.A. J., November 1990, at 58.

364. See *supra* note 55.

365. Abortion-rights leaders attacked him as a "total disaster for civil rights and women's rights." L.A. Times, September 19, 1990, at A16.

366. Anderson, "Stealth Nominee" Questioned, A.B.A. J., November, 1990, at 16.

367. *Id.* at 14. He believed it was likely, however, that *Roe* would be reexamined in the near future. *Id.*

Senator Edward Kennedy, a noted liberal, was somewhat troubled by the fact that, while Souter served in the New Hampshire Attorney General's Office, he had "referred to abortion as the killing of unborn children, and opposed the repeal of an unconstitutional state abortion statute." *Id.* at 16. Souter defended that when asserting those positions, "he was acting as an attorney in the service of his client, the governor of the state . . ." *Id.*

368. *Id.* at 14.

369. L.A. Daily News, September 28, 1990, at 22, col. 1.

370. See *supra* notes 333-34 and 361 and accompanying text. See also Rosenblum & Marzen, *Strategies for Reversing Roe v. Wade Through the Courts*, in ABORTION AND THE CONSTITUTION, *supra* note 336, at 202 (stating that these statutes probably do not threaten any of "Roe's core principles").

While these types of statutes may not strike at the heart of *Roe*, it is very likely that the Supreme Court could face a new challenge regarding permissible state regulation under parental notification statutes. The Supreme Court explicitly left open the issue of whether one-parent notification statutes could pass constitutional muster without a bypass procedure. See *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2985 (1990) (Blackmun, J., dissenting). Therefore, states seeking to expand their regulatory powers are likely to rise to the occasion and enact statutes in this gray area to test Supreme Court leniency.

cates, who support the statutes, concede that parental notice and consent laws may not pose the ultimate threat to *Roe*, but for now they are content to pursue a step-by-step strategy to dismantle its principles.<sup>371</sup>

### B. Legislative Impact

While *Roe*'s protections remained basically intact immediately following *Hodgson* and *Akron II*, pro-choice advocates warned that the decisions would encourage additional regulations by state legislatures.<sup>372</sup> At the very least, the decisions will allow several states, which previously had not enforced their parental notice and consent laws, to begin enforcement.<sup>373</sup> The move for legislative reforms began following the *Webster* decision, one year prior to *Hodgson* and *Akron II*, which basically invited increased state regulation.<sup>374</sup> The National Right to Life Committee placed itself at the forefront of these efforts.<sup>375</sup> Those efforts paid off, for over 350 anti-abortion bills were introduced across the country.<sup>376</sup> These proposed laws generally took the form of: (1) laws requiring women to be informed of alternatives to abortion; (2) parental consent or notification laws; (3) laws granting rights to the father of the unborn child; and (4) laws prohibiting abortions sought for specific reasons, such as sex selection or birth control.<sup>377</sup>

While most of the bills appeared innocuous enough on the surface, some were actually disguised efforts to ban abortions in virtually all cases. For example, many bills were introduced as restrictions on

371. San Francisco Chronicle, June 30, 1990, at A12, col. 1. This strategy is especially effective in states where the legislatures are not solidly in support of the pro-life position. *Id.* The strategy is a familiar one: swallow several small bites, instead of choking on one big one.

372. Newsday, June 26, 1990, at 54. Another source stated that "the Supreme Court's latest pronouncement on abortion [referring to *Hodgson* and *Akron II*] all but guarantees a continuing legislative maelstrom." Wash. Post, July 3, 1990, at A1.

373. Wash. Post, July 3, 1990, at A1. For states affected, see *supra* notes 139 and 182.

374. San Francisco Chronicle, June 30, 1990, at A12.

375. *Id.* Membership in the National Right to Life Committee rose by as much as 33% during the year between the *Webster* and *Hodgson* decisions. Wash. Post, June 15, 1990, at A22.

376. San Francisco Chronicle, June 30, 1990, at A12.

377. Balz, *Abortion-Rights Groups Map Strategy to Protect Access*, Wash. Post, July 8, 1989, at A2. These laws were part of a new, subtle strategy by the Right to Life Committee. Previously, they had encouraged the enactment of the strictest abortion laws possible; now, in the wake of *Webster*, they proposed laws which, on the surface, appeared moderate, in an effort to gain political support. L. TRIBE, *supra* note 17, at 177-78.

abortions for "birth control purposes."<sup>378</sup> However, upon close reading, it became apparent that the true purpose of the proposed statutes was to ban all abortions except in cases of rape, incest, fetal deformity or where the pregnancy threatened the life of the mother.<sup>379</sup>

While most of the proposed laws failed in their respective state legislatures, prolife advocates won several key victories.<sup>380</sup> Pennsylvania, South Carolina, West Virginia and Guam all signed new regulations into law.<sup>381</sup> The most restrictive of these was enacted in Guam, where abortions were generally banned except under special circumstances.<sup>382</sup> Guam's law is currently being challenged in the federal courts.<sup>383</sup>

At the time *Hodgson* was handed down, Louisiana was scheduled to vote on a bill that also prohibited most abortions.<sup>384</sup> The proposed law passed in the state legislature, but Louisiana's governor, Buddy Roemer, though a recognized prolife backer, vetoed the bill because it made no exceptions for cases of rape or incest.<sup>385</sup> Although the Louisiana State Senate attempted to override the veto, it failed on two successive attempts.<sup>386</sup>

In response to all of the legislative activity among the states seeking to increase their regulatory powers over the abortion decision, members of the federal Congress proposed a bill that would effectively codify the ruling in *Roe v. Wade* and prevent further state limitations upon abortion.<sup>387</sup> Often referred to as the "Freedom of Choice Act of 1989," the bill was not expected to pass, especially considering President Bush's veto power.<sup>388</sup> However, the fact that the bill was introduced and considered illustrates the fact that Congress may eventually play some role in the tug-of-war between the states and the Supreme Court.<sup>389</sup>

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378. Whitman, *The New Power of Labels in the Abortion Wars*, U.S. News and World Rep., July 9, 1990, at 20. Public polls showed that Americans generally opposed abortion for birth control purposes. *Id.*

379. *Id.* It is interesting to note that these proposed laws basically conformed to the types of laws in effect in many states immediately preceding *Roe*. See *supra* notes 34-35 and accompanying text.

380. San Francisco Chronicle, June 30, 1990, at A12.

381. *Id.* See also U.S.A. Today, June 26, 1990, at 3A.

382. San Francisco Chronicle, June 30, 1990, at A12.

383. *Id.*

384. L.A. Times, July 8, 1990, at A1.

385. *Id.*

386. L.A. Times, Aug. 10, 1990, at A26, col. 1. Idaho experienced a similar scenario. See Whitman, *supra* note 378, at 20.

387. Wash. Times, Oct. 5, 1990, at A6.

388. L. TRIBE, *supra* note 17, at 191-92.

389. *Id.* at 192.

### C. Social Impact

It is important to note that a substantial percentage of pregnant minors voluntarily consult with a parent regardless of state laws requiring notification.<sup>390</sup> The resulting question to be answered, then, is why these laws are necessary, and what positive or negative effects have they had upon minors. Prochoice advocates claim that parental notice and consent laws work more to prohibit abortions than to promote beneficial family communication.<sup>391</sup> Hence, they maintain that the statutes serve only a state's illegitimate purpose of placing obstacles in the path of women who have a right to abortion under *Roe* and its progeny.<sup>392</sup> Prolife advocates, however, herald the states' interests in protecting the welfare of their resident minors and allege that the statutes work to advance these interests.<sup>393</sup>

There is little doubt that teenage pregnancy is a societal problem which must be confronted. The teenage pregnancy rate in the United States is the highest of all industrialized nations.<sup>394</sup> Statistics show that ten percent of girls aged fifteen to eighteen become pregnant, and forty-percent of minors terminate their pregnancies through

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390. Torres, Forrest & Eisman, *supra* note 292, at 287-90 (noting that 38% of all minors choose to notify their parents). Additionally, the district court in *Hodgson* found that 20 to 25% of minors were accompanied by a parent at the judicial bypass proceedings or had previously conferred with a parent. *Hodgson v. Minnesota*, 648 F. Supp. 756, 764 (D. Minn. 1986).

391. Facts on File, World News Digest, June 29, 1990, at F3; see also *Hodgson*, 648 F. Supp. at 764 (noting that "[t]he emotional trauma . . . tends to interfere with the parent-child communication").

392. See, e.g., Note, *H. 319: Ohio Adopts an Abortion Notification Statute*, 12 U. DAYTON L. REV. 205, 240 (1986) (asserting that the true purpose of Ohio's notice statute is to discourage minors from obtaining an abortion); Carlson, *Abortion's Hardest Cases*, TIME, July 9, 1990, at 22, 24 (citing a study conducted after the Minnesota law went into effect which indicated that the birthrate of minors subjected to the statute rose 38.4% while the birthrate for eighteen to nineteen year olds, who were not covered by the statute, rose only 0.3%).

Some prolife advocates candidly admit that parental notice and consent statutes "provide a significant opportunity to reduce the incidence of abortion." Rosenblum & Marzen, *supra* note 370, at 203 (published by the Americans United for Life Legal Defense Fund).

393. They find support for their position in *Bellotti v. Baird*, 443 U.S. 622, 637 (1979) (remarking that "[t]he State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors"). One writer remarked, "Pregnant adolescents are by definition incapable of making mature abortion decisions. Parental notice of an intent to abort is indispensable to mature judgment." Fein, *Blinking Yellow Light . . . From a Cautious Court*, Wash. Times, July 3, 1990, at F3.

394. Boston Globe, June 26, 1990, at 1.

abortion.<sup>395</sup> Additionally, minors undergoing abortions account for twelve percent of the 1.5 million abortions performed every year in the United States.<sup>396</sup> While parental notification and consent statutes may appear to provide an avenue for promoting family communication at this traumatic time in a minor's life, actual experience in the states shows that this objective is not achieved in practice.<sup>397</sup> These laws only make it harder for a minor to obtain an abortion which may be in her best interests.<sup>398</sup>

The fact that early abortion is safer than childbirth has been recognized by the Supreme Court.<sup>399</sup> Therefore, regulations which limit access to abortions and increase the time involved in obtaining them cause the affected minor to incur risks to her health and, possibly, her life.<sup>400</sup> Further, some minors would rather seek out illegal abortions than comply with the strictures of their state statutes.<sup>401</sup> The saddest cases involve minors who would rather resort to suicide than notify their parents.<sup>402</sup>

Statutorily-induced family communication, when it happens, can

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395. *Id.*

396. *Newsday*, June 26, 1990, at 4.

397. *See supra* note 196 and accompanying text.

398. Both studies and actual experience show that mandatory parental involvement statutes deter and delay teenagers from seeking medical help. In a study of unmarried teenage abortion patients, approximately one-quarter of those surveyed said that they would not come to an abortion clinic if parental notification was required. Torres, Forrest & Eisman, *supra* note 292, at 288. Furthermore, after the notification law in Minnesota went into effect, the number of minors' abortions decreased by almost 33%. Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 *FAM. PLAN. PERSP.* 259, 266 (Nov./Dec. 1983).

399. *Roe v. Wade*, 410 U.S. 113, 149, 163 (1973); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 429 n.11 (1983).

400. *See Hodgson v. Minnesota*, 648 F. Supp. 750, 764-65 (D. Minn. 1986). Osofsky & Osofsky, *supra* note 294, at 29. Teenagers face a much higher mortality and morbidity risk than do older women, evidenced by the fact that maternal death for minors under age fifteen is two-and-a-half times the rate for mothers aged twenty to twenty-four. *Id.* Further, minors are much more likely to suffer from toxemia, anemia and complications from premature birth than are their older counterparts. *Id.*

401. Hewitt, Freeman, Nelson & Shaw, *supra* note 3, at 31. Dr. Hodgson, a plaintiff in the *Hodgson* case, testified before the district court that one fourteen-year-old, who wanted to keep her pregnancy secret, inserted a metal object into her vagina, causing herself significant internal injuries. *Hodgson*, 110 S. Ct. at 2954 n.3 (Marshall, J., concurring in part and dissenting in part). When this home method failed, she went to an abortion clinic, where the doctors were forced to perform a hysterotomy. *Id.* Therefore, if the young girl wishes to have children in the future, she can only do so by Cesarean section. *Id.*

Other minors simply go out of state to obtain an abortion. L. TRIBE, *supra* note 17, at 209. For example, after a consent law went into effect in Massachusetts, the number of Massachusetts minors seeking abortions in Maine rose from zero, before the statute was enacted, to 219, six years later. *Id.*

402. *See Teicher, A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *CURRENT ISSUES IN ADOLESCENT PSYCHIATRY* 129, 136 (J. Scholar ed. 1973) (study showing that approximately one-fourth of minor women who attempt suicide do so because they believe they are pregnant).

result in extremely devastating, rather than beneficial effects. Many minors are faced with the wrath of abusive or violent parents.<sup>403</sup> In other families, where daughters feel free to discuss their predicament with one or both parents, the notification and consent laws are plainly unnecessary.

Finally, while supporters of these laws point to the fact that judicial alternatives are available for minors who do not wish to notify their parents, these bypass procedures have also been found to cause great anxiety for minors and delay of their abortions.<sup>404</sup> Furthermore, the medical professionals involved are probably better qualified to determine the minor's maturity and best interests than any judge.<sup>405</sup>

In light of these statistics and findings, it is apparent that the enactment of these parental involvement laws may not be the best method for dealing with this country's teenage pregnancy problem or for supporting the family unit. A better method would certainly be achieved if the states with these laws relented and allowed minors' decisions to abort to be protected by the same privacy interests recognized for adult women.<sup>406</sup> Alternatively, they could follow the lead of states such as Connecticut and Wisconsin, where the abortion practitioner is required to encourage minors to notify a parent, but where the final decision regarding notification rests with the minor.<sup>407</sup> In fact, one physician who testified in the *Hodgson* case indicated that minors may be the best judges of their parents' reactions upon notification of their pregnancies.<sup>408</sup>

Thus, as Laurence Tribe has said, "parental consent and notice requirements may sound like moderate recognitions of the parents' central role in family life but are likely in practice to achieve little

403. See *Hodgson*, 648 F. Supp at 768 (noting that many Minnesota minors are victims of "rape, incest, neglect and violence" from family members). A graphic example is the case of a 13 year old minor in Idaho who became pregnant by her own father. See L. TRIBE, *supra* note 17, at 203. After he was notified of this fact, he shot and killed her with a rifle. *Id.*

404. See *Hodgson*, 110 S. Ct. at 2940 n. 29.

405. See Note, *Judicial Consent to Abort: Assessing a Minor's Maturity*, 54 GEO. WASH. L. REV. 90 (1985) (arguing against the propriety of judicial bypass procedures). See also, *Hodgson*, 110 S. Ct. at 2959 (Marshall, J., concurring in part and dissenting in part) (remarking on the lack of judicial expertise on the subject of minors' abortions).

406. During the first trimester of pregnancy, an adult woman's decision to terminate her pregnancy is made solely by the woman and her physician. *Roe*, 410 U.S. at 163.

407. See 1990 Conn. Acts 113 (Reg. Sess.); WIS. STAT. ANN. § 146.78(5) (West 1989).

408. See *Hodgson*, 110 S. Ct. at 2953 (Marshall, J., concurring in part and dissenting in part) (citing the testimony of Dr. Elissa Benedek).

and to cause great grief.”<sup>409</sup>

## V. CONCLUSION

The *Hodgson v. Minnesota* decision appears harmless enough on the surface. After all, doesn't it simply allow parental involvement at a critical moment in a minor's life? A look at the political forces on each side of the issue in that case has revealed that its ramifications are much farther reaching than a first glance would indicate. When *Roe* was decided in 1973, the law on abortion seemed to be set against state regulation. However, the seventeen years since *Roe* have shown a progression, slow at first, and then gaining significant momentum through the Reagan years, of ever-increasing state regulation. What's more, the very law at issue in *Hodgson* does not appear to foster any legitimate state interest, but only provides an obstacle to the exercise of the very right first recognized in *Roe v. Wade*. Hence, it seems that the current prolife strategy of chipping away at *Roe*, slowly enough to avoid public offense, but consistently enough to achieve the ultimate goal,<sup>410</sup> is achieving some success with the cooperation of the Supreme Court.

If a majority of the court is bent on overturning *Roe*, it seems that they should come forward and do it. Obviously, the Bush administration would support that action, and uncertainty in an area of the law so personal and with such far-reaching effects can only produce unnecessary tension, anxiety, and litigation. If the Court continues on its current progression of disassembling the “constitutionalized mansion of abortion law . . . door jamb by door jamb,”<sup>411</sup> it seems that the Court has avoided fulfilling a duty owed to the public: to provide guidance and explanation regarding the extent of constitutional protections available in this nation.<sup>412</sup> If the issue is to be returned to the political processes, then the Court should let it go.<sup>413</sup>

Before *Roe* slips out the back door of the courthouse, some parting words might be appropriate. Justice Blackmun's foresight of this current constitutional dilemma was apparent in the concluding words

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409. L. TRIBE, *supra* note 17, at 203.

410. *See supra* note 336.

411. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3067 (1989) (Scalia, J., concurring).

412. Justice Scalia blasted the majority's refusal to reconsider *Roe* when confronted with *Webster*, saying, “Of the four courses we might have chosen today—to reaffirm *Roe*, to overrule it explicitly, to overrule it *sub silentio*, or to avoid the question—the last is the least responsible.” *Id.*

413. In fact, the general counsel for the National Right to Life Committee believes that the Court has already reversed *Roe* implicitly through its *Webster* decision. DeBenedictis, *Two Abortion Laws Struck Down*, A.B.A. J. 20, 21 (Nov/Dec 1990). He accused the Court of failing to expressly reveal its intentions and said, “I think that's a duty that they have.” *Id.*

to his dissenting opinion in *Webster*. He warned the Court of the ramifications which would inevitably flow from its vague opinion that day by saying, "[F]or today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. *But the signs are evident and very ominous, and a chill wind blows.*"<sup>414</sup>

## VI. EPILOGUE

In its 1990 term, the Supreme Court will face one challenge to the status of permissible governmental regulation of abortion. Recently enacted regulations affecting federally funded clinics prohibit counselors from informing their low-income patients of the availability of abortion as a family planning technique.<sup>415</sup> The issues, no doubt, include the rights to abortion as well as free speech.<sup>416</sup> Once again, the Bush administration has called for a reversal of *Roe* through the decision on this case.<sup>417</sup> The ruling, expected in 1991, may at least shed some light on Justice Souter's inclinations on the abortion issue.

Additionally, it is expected in the near future that the Court will be confronted with challenges to laws enacted in Pennsylvania and Guam. These laws are currently considered the nation's strictest anti-abortion laws.<sup>418</sup> Since Guam's law criminalizes abortion except when two independent doctors agree that the mother's life or health is seriously endangered, it is the most factually similar case to *Roe* that the Court could possibly consider in the short term.<sup>419</sup> Both laws have already been struck down in their respective district courts<sup>420</sup> and are currently in the appeals process.<sup>421</sup> Therefore,

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414. *Webster*, 109 S. Ct. at 3079 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).

415. Peck & Williams, *Supreme Court Preview: The "A" Word*, A.B.A. J. 54 (Nov./Dec. 1990). It would be illegal under the new regulations, for example, to show a patient a listing of abortion practitioners in the Yellow pages. L.A. Times, May 30, 1990, at A1, col. 1.

416. L.A. Times, May 30, 1990, at A1, col. 1. Prochoice advocates hope the Court will strike down the regulations as violations of the first amendment and, thereby, avoid any significant decision on the abortion issue. U.S.A. Today, May 30, 1990, at 3A.

417. DeBenedictis, *supra* note 413, at 20. The administration argued in its brief filed by the Justice Department that there is no fundamental right to abortion in the "text, structure, or history of the Constitution." *Id.*

418. *Id.*

419. *Id.* The Pennsylvania law, while imposing stiff restrictions on abortion, does not ban abortion outright. *Id.* at 21.

420. Wash. Post, July 3, 1990, at A1.

421. DeBenedictis, *supra* note 413, at 21.



although the Court has successfully side-stepped addressing *Roe* directly on two occasions thus far,<sup>422</sup> it may have to play its cards soon.<sup>423</sup>

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422. See *supra* notes 333-44 and 361 and accompanying text.

423. Janet Benshoof, director of the reproductive freedom project of the American Civil Liberties Union, asserts that "[t]here is no question that the Guam law and *Roe vs. Wade* are incompatible." L.A. Daily News, September 22, 1990, at 16, col. 1.