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NOTES

Hodgson and *Akron II*: The Supreme Court's New Standard for Minor's Abortion Statutes

I. INTRODUCTION

Given the Supreme Court's recent recognition of a greater state interest in regulating abortions in *Webster v. Reproductive Health Services*,[1] the debate surrounding the permissible range of regulations that restrict the fundamental right to an abortion will intensify and might overshadow even the abortion issue itself. As legislatures begin to legislate these peripheral issues, the scope of their power to infringe upon the still fundamental right to an abortion will become a critical issue for the courts. The Supreme Court recently mooted some of this debate and clarified an unsettled area of the law by defining the limits on the state's power to require parental notification prior to a minor obtaining an abortion.

Since the Supreme Court decided *Bellotti v. Baird* (*Bellotti II*),[2] state legislatures have grappled with the formidable task of drafting a constitutional parental notification statute. *Bellotti II* only established the *requirement* that a state provide a minor seeking an abortion with a "judicial bypass" proceeding whereby she could avoid parental notification. The Court provided no guidance on the *nature or type* of proceeding necessary to comport with due process. The characteristics of the bypass proceeding have thus become the focal point of the debate surrounding the parental notification issue.

Two recent Supreme Court decisions provided the much needed guidance. The Court's decision in *Minnesota v. Hodgson*[3] reaffirmed the *Bellotti II* requirement of the bypass proceeding and invalidated the Minnesota law to the extent that the law did not make bypass available to the minor. Also, the Court's decision in *Ohio v. Akron Center for Reproductive Health* (*Akron II*)[4] over-

1 109 S. Ct. 3040 (1989).
2 443 U.S. 622 (1979) [hereinafter *Bellotti II*].
3 110 S. Ct. 2926 (1990).
4 110 S.Ct. 2972 (1990) [hereinafter *Akron II*].

turned the Sixth Circuit Court of Appeal's finding of six separate constitutional infirmities in an Ohio statutory bypass proceeding. The Court's analysis of the Ohio notification statute will be immensely helpful in defining the extent to which the bypass proceeding can burden or delay a minor's right to obtain an abortion.

This Comment reviews the case law since *Roe v. Wade*[5] that has focused on the minor's right to an abortion in part II, narrowing the issue to the adequacy of the statutory bypass proceeding in satisfying due process. Part III of the Comment outlines the background of *Hodgson* and *Akron II* by discussing the statutes in question and the procedural history of each case. Part IV of the Comment then analyzes each decision and provides an overview of the current state of the law in light of the decisions. The Comment concludes, in part V, with a brief forecast of how the Supreme Court may view the minor's right to an abortion in the future and how strictly states may regulate minors' abortions.

II. PARENTAL NOTIFICATION AND A MINOR'S RIGHT TO AN ABORTION

The Supreme Court recognized in 1973 that the constitutional right to privacy, extrapolated from a line of cases dating back to 1891,[6] guarantees a woman's right to terminate her pregnancy through abortion.[7] The Court declared that the right to privacy protects only those rights "deemed 'fundamental' or 'implied' in the concept of ordered liberty"[8] and the right to privacy "is broad enough to encompass a woman's decision to terminate her pregnancy."[9] While the *Roe v. Wade* decision found the woman's constitutional right to privacy guarantees her right to an abortion, the Court held this right to abortion not absolute and stated that a state interest may "[a]t some point in [the] pregnancy . . . become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."[10] After *Roe v. Wade*, the controversy centered on what regulations states may promulgate without unduly restricting the woman's right to an abortion.

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5 Roe v. Wade, 410 U.S. 113 (1973).

6 *Id.*

7 *Id.* at 153.

8 *Id.* at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

9 *Id.* at 153.

10 *Id.* at 154. The Court noted compelling state interests "in safeguarding health, in maintaining medical standards, and in protecting potential life." *Id.*

One particular source of controversy has been the right of a minor to seek an abortion and the state's ability to regulate that right by requiring the minor to obtain parental consent or, alternatively, to notify her parents of the pending abortion. The Court has held that constitutional protections apply equally to minors.[11] Although the Court has recognized that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority,"[12] the Court has also held that "the status of minors under the law is unique in many respects."[13] The question presented then is the extent to which a state may regulate a minor's abortion decision through parental consent/notification requirements without infringing upon the minor's fundamental right to obtain an abortion. The courts have struggled to accommodate the minor's constitutional rights and the state's interests in protecting minors.

A. *Striking Down an Absolute Parental Veto*: Planned Parenthood of Central Missouri v. Danforth[14]

The Supreme Court first addressed the constitutionality parental consent statutes in *Planned Parenthood of Central Missouri v. Danforth*. The Missouri statute at issue in *Danforth* required an unmarried female under eighteen years of age to obtain the consent of one parent or person *in loco parentis* prior to seeking an abortion during the first twelve weeks of pregnancy.[15] The Court struck down the statutory provision requiring the consent, holding that "the State may not impose a blanket provision, such as Sec. 3 (4), requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor."[16]

The Court's decision in *Danforth* stemmed from the finding that the state itself cannot regulate the abortion decision during the first trimester; "therefore, the state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision . . . to terminate the . . . pregnancy."[17] The *Danforth* Court recognized that minors receive con-

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11 *See* In Re Gault, 387 U.S. 1 (1967); Ingraham v. Wright, 430 U.S. 651 (1977); and In Re Winship, 397 U.S. 358 (1970).

12 Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1975).

13 Bellotti v. Baird, 443 U.S. 622, 633-34 (1979).

14 Danforth, 428 U.S. 52 (1975).

15 *Id.* at 58.

16 *Id.* at 74.

17 *Id.*

stitutional protection similar to adults; however, the Court also acknowledged that states may govern minors with a different legal standard than adults.[18] In consideration of the states' broader mandate for regard to minors, the Court discussed whether any compelling state interest existed to require parental consent for a minor's abortion.[19] Finding none, the Court concluded that the Missouri statute unconstitutionally allowed for the possibility of an absolute parental veto.[20] The Court prefaced the holding by stating that the decision was not to suggest *every* minor has the capability to give effective consent to an abortion. The Court left undecided questions concerning when a minor is able to give effective consent and, if the minor cannot consent, whether any other mechanism is available for the minor to have an abortion.

B. Providing a Model for Parental Consent Statutes and a Minor's Right to an Abortion: Bellotti v. Baird[21]

Three years after its decision in *Danforth,* the Supreme Court once again addressed the parental consent issue and minors' abortion rights in *Bellotti II.*[22] The Massachusetts statute at issue in *Bellotti II* required parental consent prior to a minor's abortion. This statute went further than the Missouri statute in *Danforth* by permitting the minor to obtain judicial consent where the parents refused to give consent. The statute provided that "consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary."[23] The Supreme Court, observing that the statute "was susceptible of a construction that 'would void or substantially modify the federal constitutional challenge to the statute,'"[24] vacated the district court ruling and certified nine questions pertaining to the statute to the Massachusetts Supreme Judicial Court.[25]

The paramount issues that the Massachusetts court considered centered on how the court should determine if the minor may have the abortion and also when the minor may proceed with seeking judicial consent in lieu of parental consent. The

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18 *Id.*

19 *See generally* Jipping, *Informed Consent to Abortion: A Refinement,* 38 CASE W. RES. L. REV. 329 (1987-88).

20 *Id.*

21 *Bellotti II,* 443 U.S. 622,622.

22 *Id.*

23 *Id.* at 625.

24 *Id.* at 628 (quoting Bellotti v. Baird, 428 U.S. 132, 148 (1976)).

25 *Id.* at 628-29.

Massachusetts court interpreted the statute as requiring the court to consider the minor's best interests even where the court finds the minor is capable of making a sound decision concerning the abortion. The court also held that "[a]s a general rule, a minor who desires an abortion may not obtain judicial consent without first seeking both parents' consent."[26]

The Supreme Court struck down the Massachusetts statute, holding that, where state regulations require parental consent, the regulation must provide an alternative judicial procedure whereby the minor may proceed without first seeking parental consent. The minor, the Court stated further, must be permitted to show: 1) that she is mature enough to intelligently make a decision whether to terminate her pregnancy; and/or 2) the abortion would be in her best interest. Should the minor persuade the court of her maturity and capability to make such a decision, the court could not look any further and must permit the abortion.[27] Should the court find the minor immature but also find the abortion in her best interests, the court may again permit the abortion.[28] The Court found that parental consent statutes are not *per se* unconstitutional[29] as long as the judicial bypass procedure is part of the statute.[30] The *Bellotti II* decision thus provided a blueprint for future parental consent statutes.

The Court upheld the constitutionality of a statutory parental consent requirement in *Planned Parenthood Association v. Ashcroft*.[31] The statute coupled the consent requirement with an alternative judicial bypass proceeding. The Court found the requirements consistent with those announced by the *Bellotti II* decision, and provided further guidance on the bypass proceeding requirements. Although the statute required the name and address of each parent,[32] the Court found the statute preserved anonymity by requiring the minor to complete the court petition by using only her initials.[33] The statute also preserved the expediency required by *Bellotti II*[34] by mandating a hearing on the minor's petition within five days of filing, notice of appeal within

26 *Id.* at 630.
27 *Id.* at 646-47.
28 *Id.* at 648.
29 *Id.* at 649.
30 *Id.*
31 462 U.S. 476 (1983).
32 *Id.* at 479 n.4.
33 *Id.* at 491 n.16.
34 *Bellotti II*, 443 U.S. 622, 644.

twenty-four hours of the judge's decision, and completion of the record for appeal within five days.[35]

C. *Constitutionality of Parental Notification Statutes*: H.L. v. Matheson

H.L. v. Matheson[36] questioned the constitutionality of a statute requiring only notice to the parents and not parental consent to a minor's abortion. The Court's ruling narrowly focused on the appellant before it, holding the statute constitutional where applicable only to immature minors.[37]

The Utah statute in question required the minor's physician to "notify if possible" the minor's parents or legal guardian.[38] The minor appellant challenged the statute's constitutionality claiming the statute was overly broad in that it includes all unmarried minors regardless of maturity.[39] The Court did not reach that issue and decided the case solely on the basis of the appellant's immaturity. The *Matheson* Court's deference set the stage for the *Akron II* decision.

III. PROCEDURAL BACKGROUND OF THE RECENT CASES

A. *The Minor's Consent to Health Services Act and* Hodgson

In 1981 the Minnesota Legislature amended its earlier Minors' Consent to Health Services Act.[40] This amendment became Subdivisions 2 through 6 of Section 144.343 which governs a minor's right to an abortion in Minnesota.[41] The controversy

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35 *Ashcroft*, 462 U.S. at 476.

36 450 U.S. 398 (1981).

37 *Id.* at 401, 413.

38 UTAH CODE ANN. § 76-7-304 (1974).

39 *Matheson*, 450 U.S. at 405.

40 Minor's Consent to Health Services Act, MINN. STAT. § 144.343 (1981).

41 Subdivision 2 provides:

"No abortion operation shall be performed upon an unemancipated 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."

Subdivision 3 provides:

"'[P]arent' 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 . . . "

Subdivision 4 provides three exceptions for applying Subdivisions 2 and 3:

(a) . . . 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 theperson or persons who are entitled to notice; or

surrounded subdivisions 2, 3 and 6 of the notification statute. Subdivisions 2 and 3 required a mandatory forty-eight hour delay between notification of *both* parents and performance of the abortion, unless the minor alleged parental abuse and reported it to the authorities.[42] They included no provisions for a *Bellotti II* judicial by-pass proceeding. Subdivision 6 provided that if the courts enjoined enforcement of subdivision 2, a minor would be afforded a judicial by-pass proceeding, however, all other notification provisions would remain effective.[43]

Two days before the statute's effective date, the plaintiffs[44] in *Hodgson* filed suit seeking an injunction against enforcement of the statute. Their complaint alleged that the statute violated the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.[45]

The Federal District Court of Minnesota, enjoined enforcement of the entire statute.[46] It invalidated subdivision 2 because it failed to provide the *Bellotti II* by-pass proceeding and it required a forty-eight hour mandatory waiting period.[47] It also invalidated subdivision 3 because it required two-parent notification.[48] Finally, it invalidated subdivision 6 because it incorporated the notification provisions of subdivisions 2 and 3.[49] The United States Court of Appeals for the Eighth Circuit, affirmed the district court's invalidation of subdivision 2 because it failed to comply with the mandate of *Bellotti II*.[50] It reversed the

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(c) the pregnant woman declares that she is a victim of sexual abuse, neglect, or physical abuse . . .

and notice is given to the proper authorities.

Subdivision 5 makes the performance of an abortion acriminal offense if in violation of this section.

Subdivision 6 provides that if enforcement of subdivision 2 is ever enjoined, then a minor is entitled to a judicial by-pass proceeding. All other notification provisions of subdivision 2 will remain in effect. *Id.*

42 *Id.*

43 *Id.* This Comment does not address the nature of the Minnesota by-pass proceeding. The Court's guidance regarding the adequacy of the proceeding is addressed in the context of its *Akron II* decision.

44 Plaintiffs included two Minnesota doctors, four abortion clinics, six pregnant minors (as representatives of a class) and the mother of a pregnant minor. Hodgson v. Minnesota, 110 S. Ct. 2926, 2934 (1990).

45 *Id.* The complaint also alleged several violations of the Minnesota Constitution. *Id.* This Note addresses only United States Constitutional issues.

46 Hodgson v. Minnesota, 648 F. Supp. 756 (D.Minn. 1986).

47 *Id.* at 773, 778.

48 *Id.* at 777.

49 *Id.* 777, 778.

50 853 F.2d 1452, 1456-57 (8th Cir. 1988). A three-judge panel first heard the case.

court's invalidation of subdivisions 3 and 6 and approved the forty-eight hour waiting period and the two-parent notification requirement.[51] The plaintiffs appealed the Eighth Circuit's ruling.

B. Ohio House Bill 319 and Akron II

The suit in *Akron II* followed the passage of Ohio Amended Substitute House Bill 319 (H.B. 319) by the Ohio Legislature.[52] That statute required parental notification by a physician prior to performing an abortion on an unemancipated minor. The statute provided a judicial bypass procedure through which a minor could avoid the parental notification requirement. In the proceeding, a court would order the abortion if the minor proved that she was sufficiently mature to make her own decision or the abortion was otherwise in her best interest.[53] In addition, the bill established procedural guidelines governing the bypass proceedings from the minor's filing of a complaint through final appellate review.[54]

Plaintiffs Akron Center for Reproductive Health, a physician employed by the Center, and minors Patty Poe and Rachel Roe[55] filed suit on March 21, 1986. They asked the United States District Court for the Northern District of Ohio to declare certain provisions of Ohio H.B. 319 unconstitutional and to enjoin their enforcement. The plaintiffs' challenges focused primarily on the bypass proceeding as opposed to the issue of notification per se. The district court entered judgement in favor of the plaintiffs.[56] It held that various provisions of the law violated a minor's right to due process under the fourteenth amendment by unduly burdening her fundamental right to an abortion.[57] Defendant Slaby[58] filed an appeal to the United States Court of Appeals for

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Its decision was vacated and the court decided the case *en banc.*

51 853 F.2d at 1463, 1466.

52 OHIO REV. CODE ANN. § 2919.12 (Anderson 1985) [hereinafter *Ohio H.B. 319*].

53 *Id.* at § 2919(C)(1)(a).

54 *Id.* at § 2505.073.

55 Poe thought she might be pregnant and Roe was denied an abortion at the Center by the operation of *Ohio H.B. 319.*

56 Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123 (N.D. Ohio 1986).

57 The circuit court analyzed each of the six separate constitutional violations found by the district court and affirmed the lower court. These violations were simply judgement calls by the courts regarding what was an undue burden on a minor's right to an abortion. To more clearly analyze the current status of the law, the lower courts' rationale for these violations will be discussed in the context of the Supreme Court's rejection of each.

58 The original suit named as defendants prosecutors Gary Rosen and Lynn Slaby

the Sixth Circuit. The Sixth Circuit analyzed each of the six separate violations of due process found by the district court and affirmed the lower court's decision.[59] The United States Supreme Court reversed.

IV. *HODGSON* AND *AKRON II*: TOWARD A MORE LIBERAL STANDARD FOR PARENTAL NOTIFICATION STATUTES

This section discusses the Supreme Court's decisions in *Hodgson* and *Akron II* and how the Court has liberalized the minimum standard that parental notification statutes must surpass to meet constitutional muster. The *Hodgson* analysis first examines the Court's determination that the two-parent notification statute had a detrimental affect on both the parents and children. The analysis continues with an exploration of the Court's finding that this two-parent notification requirement furthers no legitimate state interest. The *Hodgson* analysis concludes by examining the Court's assertion that the availability of the judicial bypass proceeding saves the two-parent notification requirement. The *Akron II* analysis looks at the six points that the Sixth Circuit found violated a minor's right to due process. The six points and the Supreme Court's rejection of the Sixth Circuit's analysis are examined in the *Akron II* analysis.

A. Hodgson: *Highlighting the Need for the Bypass Proceeding*

The Supreme Court's ruling in *Hodgson* underscores the Court's willingness to uphold restrictions on the availability of abortions to minors.[60] Neither *Hodgson* nor *Akron II* provided the Court an opportunity to examine the continued validity of *Roe*. The Justices in *Hodgson* limited their analyses to the questions presented by the issue of a minor's right to obtain an abortion. A majority of the Court struck down that portion of the Minnesota statute requiring a minor seeking an abortion to notify both parents. Nonetheless, another majority ruled that the statutory provision providing a bypass proceeding should a minor wish to bypass the parental notification requirement preserved the constitutional-

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as well as Ohio's Attorney General and Governor. The State of Ohio intervened and prosecuted the case on appeal.

59 Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988).

60 Notwithstanding *Roe*, the Supreme Court has always held that a state may impose greater limitations on a minor female given the responsibilities of a state to its minor citizens.

ity of the statute.[61] The following analysis of the *Hodgson* decision suggests that the majority, by upholding subdivision 6 of the statute, continued to balance the minor's privacy right to seek an abortion with the state's interest in the health and safety of the minor as well as the parental right to raise children free of state interference.[62]

1. The Two Parent Notification Requirement's Detrimental Affects on Minors Seeking Abortions and Their Parents

The Stevens majority,[63] in determining the validity of the two parent notification requirement, reviewed the district court findings of the impact of the two parent notification requirement on the minor and the parents. The Stevens majority noted that the findings were not previously challenged in the court of appeals or before the Supreme Court.[64] With the divorce rate near fifty percent, the district court concluded that only fifty percent of the minors in Minnesota live with both parents, nine percent live with neither parent and thirty-three percent live with only one parent.[65] With those percentages as background, the district court concluded that the two parent notification requirement was harmful to those minors who did not live with both parents as well as to the custodial and non-custodial parents.[66]

The Stevens majority approvingly cited the district court conclusion that the relationship between the non-custodial parent and the minor often worsened after notification.[67] The minor often believes that notification will aid in reconciliation but the forced notification more often than not leads to further alienation between the non-custodial parent and the minor.[68] The district court also noted that the custodial parent is adversely affected by

61 *See infra* notes 64-68 and accompanying text.

62 The Supreme Court upheld the Minnesota statutory provision that requires a minor to wait fourty-eight hours after notifying her parents of her decision to have an abortion. The Court found that delay only imposes a minimum burden on the right of a minor to seek an abortion. While other factors may cause delays of up to a week or more, the Court found no evidence to suggest that the statutorily imposed waiting period greatly added to the delay. Hodgson v. Minnesota, 110 S. Ct. 2926, 2944 (1990).

63 The Stevens majority consisted of Justices Stevens, Brennan, Marshall, Blackmun and O'Connor.

64 *Hodgson*, 110 S. Ct. 2926, 2938.

65 *Id.* at 2938.

66 *Id.* at 2938.

67 *Id.* at 2938.

68 *Id.* at 2938.

the forced notification to the non-custodial parent.[69] The custodial parent fears that the notification may threaten his or her custody rights and the custodial parent also experiences resentment at the need for the non-custodial parent to play a role in the decision.[70] The district court concluded the two parent notification also adversely affected families where the minor lived with both parents and family violence occurs.[71] The district court reasoned that minors have difficulty using the exception to parental notification where they are subject to sexual or physical abuse because of the necessity of reporting the abuse to authorities. The district court then found that the possibility of family violence actually impairs notification because of the necessity of explaining the violence to the court.[72] The communication between the minor and the parent the minor chooses to notify deteriorates once the minor and parent go to court to avoid notifying the second parent. The need to notify the second parent in those circumstances discussed above actually interferes with the objective of the Minnesota statute to foster communications between the minor and her parents.

2. The Requirement that a Minor Notify Both Parents Furthers No Legitimate State Interests

The Stevens majority found that the Minnesota statutory requirement that a minor notify both parents serves no particular state interest in any family situation. The opinion identified a privacy right possessed by the children and then "carefully assess[ed] the interests of child and parent individually and as family members, as well as any justifications for the legislation proffered by the state."[73] The opinion noted that the justification most often offered for the two parent requirement is that it serves to protect the authority of the parents who are best able to ensure that a minor's decision to seek an abortion is knowing and deliberate.[74] Without finding that parental interest legitimate, the Stevens majority stated that the parental interest can be fulfilled by the minor notifying one parent "who can then seek the coun-

69 *Id.*
70 *Id.* at 2938.
71 *Id.* at 2944.
72 *Id.* at 2939.
73 Keiter, *Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 U. MINN. L. REV. 459 (1982).
74 *Hodgson*, 110 S. Ct. 2926, 2945.

sel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision."[75] The Stevens majority examined potential family situations, concluding that two parent notification would not promote any state interest and in some instances may prove harmful to the minor and the parents.[76] The opinion presents a reasoned analysis, balancing the minor's privacy right and the state's interest in insuring the minor's health and safety.[77]

The Stevens majority noted that the state supported the two-parent notification requirement by stating that a minor should only make a decision about abortion in consultation with both parents so that the parents may have an opportunity to determine what is in the best interest of their minor child.[78] The Stevens majority stated that, while a parent may have an interest in the minor's abortion decision, the state cannot force communication between the minor and parent.[79] This reasoning is consistent with prior Court rulings in *Bellotti II* and *Ashcroft*. In those decisions, the Court found statutes requiring parental consent constitutional only where the minor has the opportunity to avoid seeking parental consent through a judicial bypass procedure.[80] Without the judicial bypass procedure, the statutes would have forced

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75 *Id.* at 2945.

76 *Id.* at 2946. The Stevens majority noted that, in the ideal family situation, notice to one parent would normally serve as notice to both; therefore, the two-parent notification would not further any state interest. The Stevens majority stated that "the State has no legitimate interest in questioning one parent's judgment that notice to the other parent would not assist the minor." Where a dysfunctional family unit is involved, the Stevens majority concluded the two parent notification requirement actually "disserves the State interest." *Id.* at 2945. Where the parents are divorced, notification to the parent who does not have custody invades the privacy of the custodial parent and the minor. In other situations where one parent had abandoned or abused the child, the Stevens majority noted that the requirement was counterproductive to the state goals and supported its conclusion with district court testimony of a plaintiff expert. *Id.* at 2945.

77 The review of the state interests involved has become altered somewhat from the *Danforth* ruling where the statute at issue was examined by the Court to determine if the statute furthered any significant state interest. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74-5. Justice Stevens framed the analysis of the two parent notification requirement by inquiring if the requirement furthered any "legitimate state interest." *Hodgson*, 110 S. Ct. at 2945.

78 *Hodgson*, 110 S. Ct. at 2946.

79 The Stevens majority likened this reasoning to the court's decision in *Moore v. East Cleveland*, 431 U.S. 494 (1977), where the court invalidated a zoning requirement that forced families to live in certain patterns. The majority opinion stated that "the State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together." *Hodgson*, 110 S. Ct. 2926,2946.

80 *See supra* notes 21-35 and accompanying text.

communication between the minor and parent.

The parental interest in influencing a minor's decision to seek an abortion does not outweigh the minor's interest where the minor acts with the consent of the other parent or court.[81] The Stevens majority found support for that proposition from the rulings in *Bellotti II* and *Danforth*. In *Danforth*, the Court stated that the interest proffered by the state did not support the requirement that a mature minor receive parental consent and the Court concluded 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.'"[82] The *Bellotti II* Court's holding that the statute there was constitutionally defective where it required that the minor consult with her parents even where the minor is mature and independent is "predicated on the assumption that the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child."[83]

Justice Kennedy, in dissenting from Justice Stevens' opinion that the two parent notification requirement is unconstitutional, rested his constitutionality argument on Justice Stevens' concurring opinion in the *Matheson* decision.[84] There, Justice Stevens stated that the Utah notification statute furthered substantial state interests.[85] The Utah statute provided for notification to the parents or guardian of the minor.[86] While the statute required notification of the minor's parents, the legal issues were not grounded in the requirement of notice to both parents; rather, *Matheson* involved a challenge to the parental notification generally.[87] Thus, the challenge to the Utah statute and the Minnesota statute differed such that Justice Stevens' opinions in both cases do not conflict. In this respect Justice Kennedy's dissent was wrong. If a minor's interest is at least as important as the parental interest,

81 *Hodgson*, 110 S. Ct. 2926, 2946.

82 *Id.* at 2946 (quoting Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1975)).

83 *Id.* at 2947. The Stevens majority surveyed other federal and state statutory provisions involving the health and welfare of children finding that few required two-parent notification. Only one other Minnesota statute requires two-parent notification, that which authorizes a minor to change her name. *Id.* at 2947.

84 *Id.* at 2966 (Kennedy, J., dissenting).

85 H.L. v. Matheson, 450 U.S. 398, 421-23 (1981) (Stevens, J., concurring).

86 UTAH CODE ANN. § 76-7-304(2) (1965).

87 *Matheson*, 450 U.S. at 407.

which *Danforth* indicates, any notification required ought to be measured by the minor's needs. A minor's needs are best served by encouraging the minor to seek the advice and counsel of one parent. A minor does not need the advice of two parents where a parent can provide sufficient advice and also conclude whether the other parent should have any input.

3. The Two-Parent Notification Requirement Survives Constitutional Scrutiny Where the Statute also Provides for a Judicial Bypass Procedure

Another majority of the Court held that the requirement that both parents be notified of their daughter's decision to have an abortion becomes constitutional as a result of the statutory provision that provides for a judicial bypass procedure should the two-parent requirement be invalidated.[88] Justice Kennedy, joined by Chief Justice Rehnquist, and Justices White, O'Connor and Scalia, found that the bypass procedure provided for by the Minnesota statute fits within the framework developed in earlier Supreme Court cases.[89] As the Minnesota statute's bypass provision comports with the rulings in prior court decisions, the Court's decision is not surprising.

Justice Kennedy initially recognized that the bypass procedure provided for by the Minnesota statute accomplished what prior Court rulings required—it created "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."[90] The *Bellotti II* decision permitted a two-parent consent requirement where the requirement was coupled with a judicial bypass procedure.[91] In *Matheson*, the Court upheld a two-parent notification as applied to immature minors whose best interests would be served by notification in *Matheson*.[92] The Minnesota statute requires that a physician notify an immature minor's parents where the minor's best interests are served by the notification but, where the minor is

88 *See supra* note 61 and accompanying text.

89 Justice O'Connor also found that the parental notice requirement survived constitutionally when coupled with a judicial bypass procedure. Justice O'Connor stated that "the interference with the internal operation of the family required by subdivision 2 simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure." *Hodgson*, 110 S. Ct. 2926, 2926.

90 *Id.* at 2970.

91 *See supra* notes 21-35 and accompanying text.

92 *See supra* notes 36-39 and accompanying text.

mature or her best interests are not served by notification, then the judicial bypass is necessary.[93] Justice Kennedy concluded that the bypass proceeding is the best method to "separate the applications of the law which are constitutional from those which are not."[94]

Justice Stevens' dissent in Hodgson focused on the minor having to go to court even where she has notified one parent of her abortion decision.[95] The *Bellotti II* decision indicates that a statute requiring consent of both parents is permissible where accompanied by a judicial bypass procedure. Justice Stevens argued that the Minnesota statute places an intolerable burden on the minor.[96] Yet, the Minnesota statute, as upheld by the Court, would require the minor only to notify one parent. The *Bellotti II* reasoning would arguably imply a greater burden on the minor by forcing her to choose between seeking parental consent or opting for the judicial procedure. As Justice O'Connor indicated, the judicial bypass procedure as provided for by the Minnesota statute lessens the state's intrusion into family matters by not forcing a minor to notify her parents.

B. Akron II: *Defining the limits of state power*

In *Akron II* the Sixth Circuit found the Ohio parental notification statute unconstitutional due to a number of due process violations. These violations relate to the following points: 1) the requirement that a physician notify the parent; 2) the pleading requirements of the bypass proceeding; 3) the burden of proof at the bypass proceeding, 4) the bypass procedure's lack of confidentiality; 5) the procedure's lack of expedition; and 6) the statute's

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93 *See supra* note 41.

94 *Hodgson*, 110 S. Ct. 2926, 2971.

95 *Id.* at 2948-49.

96 *Id.* at 2949. Justice Marshall dissenting separately with Justices Brennan and Blackmun, argued that the bypass procedure could not cure the constitutional defects of the two-parent notification requirement. He argued that even a one-parent notification requirement would inflict great harm on the minor by leading to a "family crisis, characterized by severe parental anger and rejection." *Id.* at 2953. He further argued that the bypass procedure itself was constitutionally invalid because it gives "'an absolute veto over the decision of the physician and his patient.'" *Id.* at 2957 (quoting Planned Parenthood Assn. of Kansas City, 462 U.S. 476, 504 (1983)). Justice Marshall ignores the special relationship that the state has with its minor citizens. A state must insure that a minor receives guidance from either parents or the state in making a decision of such great importance. The parental notification provisions coupled with judicial bypass procedures appear to most efficiently balance the minor's interests, the parent's right to influence his or her child, and the state's right to insure minors are protected.

"pocket authorization" provision.[97] As is set out below, the Sixth Circuit's arguments are flawed in their reasoning and have been rejected by the Supreme Court.

1. REQUIREMENT THAT PHYSICIAN NOTIFY THE PARENT

The Ohio parental notification statute requires that the person performing the abortion on a minor be the one who provides parental notification. The Sixth Circuit indicated that this requirement "unduly burdens a minor's right to seek an abortion."[98] In reaching this conclusion, the court argued that the state made no showing that its interests were advanced by requiring that a physician, rather than another responsible person, provide parental notification.[99]

There are several flaws in the court's conclusion regarding the requirement that the physician notify the minor's parents. In prior abortion cases, it has been stressed that abortion decisions should be made by the woman in conjunction with her physician.[100] The Sixth Circuit itself stated that the Supreme Court has "appeared hostile to the notion that any party other than the expectant mother and her physician should be a party to the abortion decision."[101] Because of the close relationship between the expectant mother and her physician, it seems logical that parental notification should be the physician's responsibility. Second, even if the state has not advanced a reason for this requirement, it does not appear to place any greater burden on the *minor* than having adults other than the physician effectuate notification.[102] The burden on the minor's right is notification. This burden has already been validated by the Supreme Court[103] and

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97 Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1989). The district court had invalidated the statute on these grounds. In addition, the district court had found the statute's venue provisions unconstitutional. The Sixth Circuit disagreed with the lower court on the last issue.

98 *Id.* at 861.

99 *Id.* at 862.

100 "[T]he abortion decision and its effectuation must be left to the medical judgement of the pregnant woman's attending physician." Roe v. Wade, 410 U.S. 113, 165 (1973).

101 *Akron Center for Reproductive Health*, 854 F.2d at 857.

102 A law requiring a physician to effectuate notification that is not supported by a state interest may place a burden on the physician's right to perform abortions. But, the burden on the physician's rights was not at issue in this case.

103 "[A] statute setting out a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent minor." H.L. v. Matheson, 450 U.S. 398, 409 (1981) (citing Bellotti v. Baird, 443 U.S. 622, 640 (1979) (*Bellotti II*).

will remain in place regardless of who provides notification. Finally, and most significantly, in *H.L. v. Matheson*, the Supreme Court upheld a Utah law that required the *physician* to effectuate notification.[104]

The Supreme Court cited *Matheson* in rejecting the contention that the Ohio statute is unconstitutional because of the requirement of physician notification. The Court stressed that requiring a physician to effectuate notification serves the valuable purpose of providing important medical data to the physician. "An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data."[105] The Court also pointed out that physician notification may facilitate better advice being given from parent to child.[106] In addition the Court recognized that requiring the physician to provide notification is not overly burdensome on the physician.[107]

2. Bypass Proceeding Pleading Requirements

The Sixth Circuit, in its *Akron II* decision, argued that the bypass proceeding's pleading requirements created a "procedural trap" by forcing the pregnant minor to choose one of the three complaint forms.[108] In *Bellotti II*, the Court indicated that in a bypass proceeding the court must determine if the minor is mature *or* if she is not mature, whether an abortion is in her best interest.[109] The lower court contended that because only one of the Ohio complaint forms permits a judge to consider both the maturity and best interests of the minor, the Ohio statute does not meet the standards of *Bellotti II*.[110]

The Sixth Circuit's *Akron II* decision incorrectly held the

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104 UTAH CODE ANN. § 76-7-304 (1978).

105 Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972, 2983 (1990) (*Akron II*) (citing *Matheson*, 450 U.S. at 411).

106 "The parent who must respond to an event with complex philosophical and emotional dimensions is given some access to an experienced and in an ideal case, detached physician who can assist the parent in approaching the problem in a mature and balanced way. This access may benefit both the parent and child in a manner not possible through notice by less qualified persons." *Hodgson*, 110 S.Ct. 2926, 2983.

107 *Id.*

108 *Akron II*, 854 F.2d at 863.

109 *Bellotti II*, 443 U.S. at 643-44.

110 *Akron II*, 854 F.2d at 863.

pleading requirements to be unconstitutional. The Sixth Circuit correctly cites *Bellotti II* as establishing the requirement that even if a court finds a minor too immature to make the decision on her own it must determine whether an abortion is nonetheless in the minor's best interest. The court held that the Ohio law failed to comply with *Bellotti II*'s mandate and failed to advance a valid state interest for not doing so.[111] Although the law does in fact create pleadings that would allow a court to pass only on the issues of maturity *or* the minor's best interest, the minor is in no way restricted to those pleadings. The minor may at her discretion elect to file complaint form C, which requires the court to enter a *Bellotti II* style judgement.

In allowing the minor to choose her complaint, Ohio was effectively advancing the interests of the minor. Consideration of the Ohio law in its entirety reveals the state interest, expedition of the proceedings, that the court said was missing.[112] The statute evinces a concerted effort by the Ohio legislature to expedite the bypass procedure. By having the judge pass only on the disputed facts the Legislature was attempting to shorten the proceeding. Ironically, the court gave failure to expedite the proceeding as a separate grounds for invalidating the statute.[113]

The Supreme Court also rejected the "procedural trap" argument on two grounds. First, the Court stated that while the pleading requirement might cause confusion in an unrepresented minor, "[i]t seems unlikely that the Ohio courts will treat a minor's choice of complaint form without due care and understanding for her unrepresented status"[114]. Second, the Court noted that the "minor does not make a binding election by the initial choice of pleading form."[115] As noted above[116], the Ohio law actually advances the interests of the minor by allowing her to expedite the

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111 *Akron II*, 854 F.2d at 862-3.

112 OHIO REV. CODE ANN. § 2151.85(C)(1)-(2) (Anderson Supp. 1988) contain the provisions that govern a court's actions if a minor files a complaint that alleges *either* maturity or best interest. A court finding in favor of the minor enters judgement immediately. Section (3) provides instructions to the court should the minor plead *both* counts. If the court finds in favor of the minor in the first count it considers, it immediately enters judgement. The sections, considered together, indicate an intent on the part of the legislature to have a court pass only on contested issues. The *immature* minor could therefore ask a court to consider only whether abortion was in her best interest. The result is a shorter process.

113 *See Akron II*, 854 F.2d at 866-68.

114 *Hodgson*, 110 S. Ct. at 2982.

115 *Id.*

116 *See supra* notes 107-108 and accompanying text.

proceeding by eliminating areas from judicial consideration. At the same time, because the initial selection may be changed after consultation with appointed counsel, the minor is protected from making an immature decision.

3. Standard of Proof

The Ohio statute requires a minor to prove by "clear and convincing" evidence either that she is mature or that an abortion is in her best interest.[117] The Sixth Circuit, in *Akron II*, found that this standard of proof threatened a minor's right to proceed with an abortion without parental intervention.[118] In this section of its decision the court examined the competing interests which underlie the entire issue of parental notification or consent.

The Sixth Circuit made several references to abortion as a fundamental right.[119] Contrary to other courts that have passed on this issue, as well as to its earlier statements,[120] the court seems to have placed the minor's right to an abortion on the same level as an adult's right. By characterizing the minors' right as "fundamental," the lower court discounted the state's interest and concluded that the heightened burden of proof is unconstitutional.[121]

Bellotti II pointed out that "although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, . . . and parental attention.'"[122] Based on this language the clear and convincing standard was a valid adjustment to the state's legal system. As mentioned above, the Sixth Circuit, in *Akron II*, gave little weight to the state's interests. The court stated that "the only possible interest that the state may assert . . . is to ensure that the proceeding is fair and yields a reliable result."[123] In *Bellotti II*, Justice Powell's plurality opinion[124] pointed out that "minors often lack the experience,

117 OHIO REV. CODE ANN. § 2151.85 C(1), (2) (Anderson 1985).

118 *Akron II*, 854 F.2d at 864.

119 "[A] woman's right to obtain a first trimester abortion is a fundamental one." *Id.* at 863.

120 "[T]he Supreme Court has recognized that, under certain circumstances, parental intervention is appropriate when the abortion decision is made by a minor." *Id.* at 857.

121 *Id.*

122 *Bellotti II*, 443 U.S. at 635, (citing McKeiver v. Pennsylvania, 403 U.S. 528 (1971)).

123 *Akron II*, 854 F.2d at 864.

124 Powell's opinion was joined by Chief Justice Burger and Justices Stewart and

perspective, and judgment to recognize and avoid choices that could be detrimental to them."[125] Therefore, the state apparently has a substantial interest in insuring that immature minors do not make the choice to have an abortion. In order to advance this interest, the state should be able to require the minor to meet the "clear and convincing" standard of proof.

In *Akron II*, the Supreme Court, citing *Bellotti II*, pointed out that a state may require the minor to prove maturity or best interest in a bypass proceeding.[126] In addition, "[a] state . . . may require a heightened standard of proof when, as here, the bypass procedure contemplates an *ex parte* proceeding at which no one opposes the minor's testimony and she is assisted by an attorney and a guardian *ad litem*."[127]

4. Confidentiality

The Ohio bypass proceeding's complaint form requires the minor to sign her name at the end of the petition unless she is represented by an attorney.[128] The Sixth Circuit, in *Akron II*, found this requirement to be a violation of the rule of anonymity set out in *Bellotti II*.[129] Because the Ohio law fails to ensure anonymity, the Sixth Circuit held that the statute's provisions dealing with this subject are unconstitutional.

It is difficult to contest the lower court's argument relating to confidentiality. But, there is an interpretation of *Planned Parenthood v. Ashcroft*[130] that does contradict the Sixth Circuit's position. *Ashcroft* examined a Missouri statute that allowed the minor to use her initials on the petition for judicial bypass. The statute

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Rehnquist.

125 *Bellotti II*, 443 U.S. at 635.

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

127 *Id.*

128 The actual requirement that a minor sign the complaint appears nowhere in the text of the statute. This requirement was added by the Ohio Supreme Court Clerk pursuant to the requirement (found in the statute) that he draft the complaint forms. Rather than address the issue of amending the court-created complaint form, the court found the statute itself unconstitutional.

129 In *Bellotti II*, Justice Powell stated that a bypass procedure "must assure that a resolution of the issue . . . will be completed with anonymity." *Bellotti II*, 443 U.S. at 644. This anonymity requirement has been reiterated in numerous cases. *See* Hartigan v. Zbaraz, 763 F.2d 1532, 1542 (7th Cir. 1985); American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283 (3rd Cir. 1984), *aff'd on other grounds*, 476 U.S. 747 (1986); Planned Parenthood Ass'n of Atlanta v. Harris, 670 F. Supp. 971 (N.D. Ga. 1987).

130 462 U.S. 476 (1983).

also required the minor or minor's "next friend" to sign the petition.[131] The United States Court of Appeals for the Eighth Circuit stated that it was "satisfied that anonymity is sufficiently protected by these procedures, which do not *require* the minor to disclose her name."[132] The Supreme Court affirmed the decision of the circuit court.[133] The Ohio procedure requires the minor to sign her complaint *unless* she is represented by an attorney. Thus, procedures that allow the minor to use a pseudonym and do not *require* her to disclose her name sufficiently protect anonymity. One criticism of the above argument might be that poor women will not be able to afford attorneys and therefore will be forced to sign the complaint form. Nonetheless, the anonymity requirement is satisfied as long as the statute does not require the minor to disclose her name. On its face, the Ohio statute clearly does not require disclosure in all cases. In addition, it cannot successfully be contended that the state is required to make abortions as convenient as possible for all women. Supreme Court cases that have denied federal aid to women seeking abortions have a much more direct effect on the rights of poor women to obtain abortions than does the Ohio statute at issue.[134] A poor woman denied federal aid may have her right to an abortion completely cut off. Even if a poor minor is completely unable to obtain legal aid (a proposition that seems unlikely in most cases), she may still be able to obtain an abortion under the Ohio statute.

Also, while the minor may be called on to sign the complaint form, *Ohio H.B. 319* calls for confidentiality in the bypass proceedings. "Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records."[135] In citing the above language, the Supreme Court held that the Ohio procedure satisfies *Bellotti II*'s anonymity requirement.[136]

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131 MO. REV. STAT. § 188028 (1986). The statute provides: "The petition shall be signed by the minor or her next friend." *Id.*

132 Planned Parenthood Ass'n v. Ashcroft, 655 F.2d 848, 860 (8th Cir. 1981) (emphasis added).

133 *Ashcroft*, 462 U.S. 476.

134 *See* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Beal v. Doe, 432 U.S. 348 (1977).

135 *Ohio H.B. 319* section 2151.851(f).

136 "We refuse to base a decision on the facial validity of a statute on the mere

The Supreme Court, in *Akron II*, also seems to have pulled back from *Bellotti II's* anonymity requirement. The Court stated: "We do not find complete anonymity critical."[137] This statement indicates that a statute will be upheld as long as it prohibits public disclosure of the minor's identity.

5. Expedition of the Proceedings

The Sixth Circuit, in *Akron II*, also deemed the bypass procedure unconstitutional for failing to adequately expedite the appeals process.[138] The court determined that the statute permitted a possible delay of twenty-two days (including Saturdays and Sundays) between the initiation of the procedure by the minor and the completion of the final appellate disposition.[139] This delay, opined the lower court, unduly burdened the right of a minor to terminate the pregnancy.[140] The lower court, in arriving at twenty-two days correctly included Saturdays and Sundays when calculating the delay experienced by the minor. Nonetheless, the court did not include Saturdays and Sundays as days chargeable to the time limits allowable to the state in the appellate process. The Sixth Circuit effectively interpreted Ohio law to allow the state more time to process the appeal than was intended by the Ohio legislature. According to the court, an allowance of four days to docket the appeal would result in a net delay of six days if a weekend fell within the four days. Holding the state responsible for those days would produce only a delay of four days. When applied throughout the appellate process, counting weekends would result in only a sixteen-day delay.[141] As justification, the court cites Ohio Rule of Appellate Procedure 14,[142] which stipulates that weekends and holidays are not counted as days

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possibility of an unauthorized, illegal disclosure by state employees." *Akron II*, 110 S. Ct. at 2980.

137 *Id.*

138 *Akron II*, 854 F.2d at 866-68.

139 *Id.* at 866.

140 *Id.* at 867. The court recognized the delay most minors experience in initially discovering the pregnancy. A further delay, even of twenty-two days, could push the abortion into the second trimester of the pregnancy. The court expressed concern that a state's interest in regulating abortion is greater in the second trimester, and the delay could subject the minor to even greater state regulation. The Supreme Court's plurality opinion in *Webster* questions the validity of the trimester system which draws this court's reasoning into question.

141 *See* Note, *H.B. 319: Ohio Adopts An Abortion Notification Statute*, 12 U. DAYTON L. REV. 205, 219 n.134 [hereinafter *Note*].

142 *Akron II*, 854 F.2d at 866 n.8. *See Note*, *supra* note 140 at 217.

chargeable to a party for purposes of Ohio civil practice.

The Sixth Circuit's analysis of the delay issue is flawed. First, the court improperly failed to suspend application of Ohio Appellate Rule 14, which does in fact hold that only business days count toward calculation of time periods. Although the rule would result in a possible delay of twenty-two days, if facially applied the Ohio Constitution suspends application of the rule in cases like the present.[143] Article IV, section 5 only empowers the Ohio Supreme Court to make rules of procedure that in no way "abridge" or "modify" a citizens substantive rights.[144] To the extent that a civil or appellate rule abridges a right, Ohio courts have held it inapplicable.[145] In the present context, the Ohio constitution would suspend Appellate Rule 14, because its application would, in the opinion of the court, create a burdensome delay. The Sixth Circuit even admitted that there is some dispute over the calculation of the time period, yet refused to expound.[146]

Second, the statute itself clearly indicates the Ohio legislature's intent that weekends be chargeable to the state.[147] The statute dictates that a minor's initial hearing will be held "not later than the fifth *business* day after"[148] the complaint is filed. The guidelines for docketing the appeal then refer only to "four days"[149] and the time limit for rendering a decision is simply "five days."[150] After using the word "business" in the initial limitation, the legislature's omission of the word "business" in appellate time frames indicates the intent to count all days (weekends included) and not just business days.

A proper application of Ohio law would allow a possible delay of only sixteen days. A delay of sixteen days is likely to be constitutionally permissible under the United States Supreme Court's rule in *Ashcroft*. The *Ashcroft* Court upheld a Missouri

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143 *See Note, supra* note 140, at 217. The Ohio Constitution limits the rulemaking ability of the Ohio Supreme Court to rules of practice and procedure. This bars substantive rulemaking. *Id.*

144 Ohio Const. art. IV, § 5(B).

145 *See* Boyer v. Boyer, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1986); Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 739 (1972).

146 *Akron II*, 854 F.2d at 866 n.8.

147 *See, Note, supra* note 140, at 216-17. The Note provides an excellent analysis of the interaction of H.B. 319 with the Ohio Constitution and procedural rules.

148 OHIO REV. CODE ANN. § 2151.85 B(1) (Anderson 1985) (emphasis added).

149 *Id.* § 2505.073 A.

150 *Id.*

statute that called upon the Missouri Supreme Court to "provide for expedited appellate review of cases appealed"[151] under the bypass proceeding. Although the statute did not specifically identify time limits, the parties to *Akron II* stipulated, and the circuit court seemed to concur, that the "framework created by Missouri law at the time of the *Ashcroft* decision envisioned a process spanning sixteen or seventeen days . . . ."[152] Thus, a proper calculation of the delay would result in it being determined to be constitutional.

Nonetheless, assuming arguendo the court was correct in its calculation of the time period, its determination of unconstitutionality is incorrect. To support its position, the Sixth Circuit cites two district court decisions that found three weeks to be an improper delay.[153] The only guidance from the Supreme Court came in *Bellotti II*, where the plurality ruled that the proceeding be held with "sufficient expedition to provide an effective opportunity for an abortion to be obtained."[154] Given the limits on a state's ability to restrict abortion during the first two trimesters, the opportunity for an abortion will not be rendered any less effective by the passage of an additional five days (the difference between the lower court's twenty-two days and *Ashcroft*'s seventeen). Admittedly, the line must be drawn somewhere, but if possible a statute should be construed favoring constitutionality.[155] The lower court's worst-case analysis of the Ohio statute produced only a "possible twenty-two day delay,"[156] and even that delay is arguably permissible.

The Supreme Court's decision is in agreement with the above analysis. In addressing the expedition issue, the Court first pointed out that the Court of Appeals' calculation of twenty-two days was "dubious."[157] The Court also criticized the lower court's

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151 MO. ANN. STAT. § 188.028.2(6) (Vernon 1983).

152 *Akron II*, 854 F.2d at 867.

153 *Id.* at 868 (citing American College of Obstetricians and Gynecologists v. Thornburgh, 656 F. Supp. 879, 887-88 (E.D. Pa. 1987) and Glick v. McKay, 616 F. Supp. 322, 326 (D.Nev. 1985).

154 *Bellotti II*, 443 U.S. at 644.

155 Justice O'Connor's concurring opinion in *Webster* suggests a strong presumption of constitutionality. She asserts that to find a statute unconstitutional, a challenger must prove that under no circumstances will the statute function constitutionally. Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3060 (1989).

156 *Akron II*, 854 F.2d at 868.

157 The Court stated "Interpreting the term 'days' in section 2505.073(A) to mean business days instead of calendar days seems inappropriate and unnecessary because of the express and contrasting use of 'business day[s]' in section 2151.85(B)(1)." *Akron II*,

"worst-case" analysis.[158] Finally, the Court pointed out that based on its prior decisions (the Court specifically cited *Ashcroft's* approval of a seventeen-day delay), the twenty-two days is "plainly insufficient to invalidate the statute on its face."[159]

6. The "Pocket Authorization" Provision

Under the Ohio statute if the court does not hold a hearing within five business days after the complaint is filed, the minor may proceed with an abortion without parental notification.[160] In addition, if the court of appeals does not act upon the petition within five days after it is docketed, the minor may proceed without notification.[161] The Sixth Circuit found these provisions unconstitutional because they place an undue burden on the minor's right to an abortion. The court reasoned that when "pocket authorization" is given, the minor has "nothing tangible to show the physician in support of her authority to proceed in the absence of parental or express judicial authorization."[162] The physician, therefore, will not risk the penalties associated with violating the parental notification law and will not perform the abortion.

Based on the Sixth Circuit's reasoning, there is little doubt that the Ohio "pocket authorization" provision burdens the minor's right to an abortion. Nonetheless, the provision arguably does not create an undue burden. In *Webster v. Reproductive Health Services*,[163] the Court upheld a Missouri statute which required a physician to perform a viability test on women whom "he has reason to believe" are carrying unborn children of twenty or more weeks gestational age.[164] Just as with the Ohio parental notification statute, there were penalties associated with the violation of the Missouri law.[165] Following the logic of the Sixth Circuit, one might conclude that Missouri physicians will be more

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110 S. Ct. at 2980.

158 The Court criticized: "[B]ecause appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.' The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur." *Akron II*, 110 S. Ct. at 2980-81 (citing *Webster*, 109 S. Ct at 3060).

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

160 OHIO REV. CODE ANN. § 2151.85 B(1) (Anderson Supp. 1988).

161 *Id.* at § 2505.073 A.

162 *Akron II*, 854 F.2d at 868.

163 109 S. Ct. 3040 (1989).

164 MO. REV. STAT. § 188.029 (1986).

165 A violation of § 188.029 is a Class A misdemeanor. *Id.* § 188.075.

reluctant to perform abortions in the face of uncertain requirements that carry penalties for their violation. Thus, the statute creates an undue burden on the right to an abortion.

In *Webster,* the Supreme Court did not adopt such an analysis. The plurality opinion[166] stressed that the statute permissibly furthered a legitimate state interest.[167] Justice O'Connor, concurring, indicated that "requiring the performance of examinations and tests useful to determine whether a fetus is viable . . . does not impose an undue burden on a woman's abortion decision."[168]

Under the Ohio statute, the pocket authorization does not unduly burden the minor's right to an abortion. While it is true that physicians will not likely proceed with an abortion based solely on the minor's statement that she has pocket authorization, it would not take a great deal of effort for a physician to verify such statements. To avoid the penalties associated with the Ohio statute, the physician would merely have to verify the minor's story by contacting the court in which the complaint was filed. Such contact would not breach any requirements of confidentiality because the physician obviously knows the identity of the pregnant minor. It seems naive to assume that physicians will forego the profits associated with the performance of abortions based solely on the effect of the "pocket approval" provision.

Even assuming that the Sixth Circuit's argument is correct, finding the "pocket authorization" provision unconstitutional should not lead to the downfall of the entire parental notification statute. Under Ohio law, "[i]f any provision of a section of the Revised Code . . . is held invalid, the invalidity does not affect other provisions or applications of the section . . . which can be given effect without the invalid provision."[169] The pocket authorization provision could be severed from the remaining sections without affecting the implementation of the latter.

Again, the Supreme Court also rejected the pocket authorization challenge. The Court recognized that a physician can easily verify that a state court has given the pocket authorization.[170] In addition, the Court pointed out that it expected the Ohio courts

166 The plurality opinion of Chief Justice Rehnquist was joined by Justices White and Kennedy.

167 *Webster,* 109 S. Ct. at 3057.

168 *Id.* at 3063.

169 OHIO REV. CODE ANN. § 1.50 (Anderson 1989).

170 *Id.*

to comply with the statute's time limitations.[171] The pocket authorization is simply a method of ensuring expedition. In this sense it may be seen as protecting the minor's rights rather than unduly burdening them.

V. BEYOND *HODGSON* AND *AKRON II*: INCREASING LEVELS OF STATE REGULATION

The Court has spawned an era of increasing state regulation of abortion. Its decision in *Webster* recognized a growing state interest in restricting a woman's right to an abortion. Its subsequent decisions in *Hodgson* and *Akron II* exemplify the Court's growing toleration of restrictions on a minor's right to an abortion.

The Court in *Hodgson* creates a broad range of permissible state regulation of a minor's right to an abortion. The Court recognized that the "Minnesota statute is *the* most intrusive in the Nation."[172] It nonetheless found the major portion of the statute constitutional, based largely on the availability of the by-pass proceeding. This suggests that a state might impose stringent limitations on a minor's right to an abortion, provided it affords the minor an opportunity to avoid the limitations through a by-pass proceeding. This flexible approach recognizes and accommodates the states' interest in protecting immature minors from their own immaturity, yet protects the rights of the mature minor from state and parental interference.

Akron II also shows the Court's willingness to recognize the states' interest. By rejecting each of the Sixth Circuit's six grounds for declaring Ohio's by-pass proceeding unconstitutional, the Court significantly lessened the states' burden in administering the by-pass system. The states now have wider latitude in defining a minor's procedural rights. Only when those procedural rights truly burden the minor's right to an abortion will they be found infirm.

VI. CONCLUSION

Under *Hodgson*, states are now relatively free to restrict a minor's right to an abortion, provided it allows a minor to seek court intervention to avoid the restrictions. This approach balanc-

171 *Id.*

172 *Hodgson*, 110 S. Ct. at 2931, n.5 (emphasis added).

es the states' interest in the advancing the family as a unit with the minor's fundamental privacy rights. The result will be extensive case-by-case determinations by the courts. So long as the states are willing to provide the resources needed to expeditiously adjudicate each minor's case, their restrictions will be honored.

Given the *Hodgson* Court's reliance on the by-pass proceeding to justify broader state restrictions, the adequacy of by-pass proceedings will be an area of extensive litigation in the future. The possible points of controversy are endless. The Ohio statute involved in the *Akron II* case, for example, raised six separate constitutional issues. Each state will enact its own laws with its own bypass proceeding, and each will be the subject of strict constitutional scrutiny. The fact that the Supreme Court summarily rejected all six of the Sixth Circuit's constitutional violations in *Akron II* is indicative of increased latitude allowed to the states; however, unless the statute involved is identical to the Ohio statute, the lower courts will be free determine whether its provisions unduly burden a minor's right to an abortion.

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