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Hodgson v. Minnesota: Balancing the Competing Interets of the State, Parents and Minor - A Missed Opportunity?

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HODGSON V. MINNESOTA: BALANCING THE COMPETING INTERESTS OF THE STATE, PARENTS AND MINOR—A MISSED OPPORTUNITY?

I. INTRODUCTION

The landmark decision of *Roe v. Wade*[1] established that the constitutional right to privacy encompassed a woman's choice to terminate her pregnancy through abortion.[2] This controversial 1973 ruling inspired a plethora of legislation as states sought to define the parameters of the abortion right; many states enacted statutes imposing informed consent, spousal consent and hospitalization requirements.

Further testing the scope of *Roe*, some state legislatures enacted regulatory provisions requiring parental consent or notification[3] before a minor could obtain an abortion. These parental involvement statutes purported to further the legitimate interest of the state in protecting the welfare of pregnant minors, and—to some extent—the parents' interests in the control and well-being of their pregnant child. Parental consent and notification provisions have been successfully challenged, however, when the asserted state and parental concerns supplant the minor's autonomy and fundamental right to choose abortion.

In *Hodgson v. Minnesota*,[4] the Supreme Court addressed the constitutionality of a Minnesota statute[5] requiring an unemancipated minor[6] to notify both of her parents[7] of her intent to obtain an abortion at least forty-eight hours[8] before the procedure was performed.[9] The Minne-

1. 410 U.S. 113 (1973).

2. *Id.* at 153. Noting that the Constitution does not explicitly provide for a right to privacy, the Court recognized that the right is found in the concepts of personal liberty and restriction upon state action contained in the Fourteenth Amendment. *Id.* at 153-54.

3. Consent provisions require the minor to secure parental *approval* of her decision to obtain an abortion. In contrast, notification provisions require the minor to *inform* her parents of her decision to have an abortion. Whether, in reality, "parental consent" is significantly different from "parental notification" remains to be seen.

Statutes differ with respect to the number of parents involved in the minor's decision; the state may require either single-parent or two-parent involvement with various exceptions. *See infra* appendicies 1 and 2 and notes 154-57 and accompanying text.

4. 110 S. Ct. 2926 (1990).

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

6. Minnesota has no statutory definition of "emancipation." *See* Streitz v. Streitz, 363 N.W.2d 135, 137 (Minn. Ct. App. 1985). The Supreme Court, however, accepted the Minnesota case law notion of an emancipated woman as one who is living apart from her parents or who is either married or has borne a child. *Hodgson*, 110 S. Ct. at 2931 n.3 (applying MINN. STAT. ANN. §§ 144.341-.342 (West 1989)).

7. MINN. STAT. ANN. § 144.343(3) (West 1989) provides in part: " '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, or the guardian or conservator if the pregnant woman has one."

8. MINN. STAT. ANN. § 144.343(2) (West 1989) provides in part: "[N]o abortion operation shall be performed upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed . . . until at least 48 hours after written notice of the pending operation has been delivered [to the parent]."

sota statute provided no exception regarding notification of a divorced or noncustodial parent.[10] In anticipation of a challenge to the statute, the Minnesota legislature incorporated a provision that became effective if ever a court enjoined the two-parent notification requirement.[11] This alternative proviso retained the core notification requirements of the original statute, but provided a judicial bypass proceeding whereby a mature or "best-interests" minor could seek court approval of her decision instead of notifying her parents.[12] Through two different majorities, the Supreme Court held that the primary two-parent notice provision alone was unconstitutional,[13] but that the same two-parent notification requirement withstood constitutional challenge when accompanied by the judicial bypass alternative.[14]

This Comment examines the Supreme Court's treatment of the most restrictive[15] parental notification statute in the Nation. Part II traces the progression of Supreme Court abortion rulings from the recognition of a woman's fundamental right in *Roe* through cases limiting the scope of *Roe* with respect to parental consent and notification provisions. Part III surveys the facts and procedural history of *Hodgson*, providing a synopsis of the Justices' divergent opinions. Part IV presents an analysis of the *Hodgson* decision including: (1) a discussion of the competing interests of the state, parents and minor; (2) application of the judicial bypass alternative and (3) the burdens of two-parent notification. Part V concludes that the Supreme Court has validated a statute that surpasses both the degree of regulation necessary to effectuate the legitimate interest of the state in protecting the welfare of pregnant minors and the parents' interest in the well-being of their child. Unlike the

9. An analysis of the constitutionality of delay requirements is beyond the scope of this Comment. For a general discussion of the issue, see Debra Harvey, Note, *Zbaraz v. Hartigan: Mandatory Twenty-Four Hour Waiting Period After Parental Notification Unconstitutionally Burdens A Minor's Abortion Decision*, 19 J. MARSHALL L. REV. 1071 (1986).

10. *See supra* note 7.

11. MINN. STAT. ANN. § 144.343(6) (West 1989) provides in part:
If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

12. MINN. STAT. ANN. § 144.343(c)(i) (West 1989) provides:
If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction 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 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, guardian, guardian, or conservator 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.

13. *Hodgson*, 110 S. Ct. at 2947.

14. *Id.* at 2961.

15. *See infra* notes 159-65 and accompanying text.

Minnesota two-parent notification provision, a single-parent notice requirement, combined with a judicial bypass option, would better balance the competing interests of the state, parents and minor. A single-parent involvement provision protects the welfare of pregnant minors and encourages minors to consult a parent without imposing an undue burden upon a minor's fundamental right to choose abortion.

II. BACKGROUND

A. *Recognition of the Fundamental Right*

Although *Roe* established that the right to privacy encompassed a woman's decision to choose abortion,[16] her freedom of choice is not absolute and "must be considered against important state interests in regulation."[17] Reaffirming "strict scrutiny" as the applicable standard of review, the Supreme Court observed that regulation of a fundamental right is justified only by legislation that is narrowly drawn to express a compelling state interest.[18] Compelling interests include those that safeguard maternal health and protect certain potential life.[19]

Applying the *Roe* standard, the Court determined that the important state interest in the mother's health became compelling at the end of the first trimester, and its interest in protecting potential life became compelling at fetal viability.[20] During the first trimester of pregnancy, therefore, the woman and her physician could choose to terminate the pregnancy without state interference.[21]

B. *Restricting A Minor's Fundamental Right*

Since *Roe*, the Supreme Court has decided several cases concerning the constitutionality of statutes restricting a minor's fundamental right to obtain an abortion through parental consent and notification provisions. One such case of particular importance is *Planned Parenthood v.*

16. *Roe*, 410 U.S. at 153. The Court noted that only personal rights, which can be deemed "fundamental" or "implicit in the concept of ordered liberty," are included in the guarantee of personal privacy. *Id.* at 152 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

17. *Roe*, 410 U.S. at 154.

18. *Id.* at 155 (citing Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969) and Griswold v. Connecticut, 381 U.S. 479, 485 (1965)).

19. *Id.*

20. *Id.* at 163-65. "Viability is usually placed at about seven months (28 weeks), but may occur earlier, even at 24 weeks." *Id.* at 160.

21. *Id.* at 163. *Roe*'s trimester framework for limiting a state's authority to regulate abortions "is inherently tied to the state of medical technology that exists whenever particular litigation ensues." Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 458 (1983)(O'Connor, J., dissenting). As a result, *Roe*'s trimester standard may be ill-suited for analysis as technological developments move the point of fetal viability further toward conception and enable the states to regulate the performance of an abortion at an earlier point in the pregnancy. *Id.* ("As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back to conception."). *See also* Jan G. Laitos, *The abortion question: Reasoning of Roe vs. Wade out of date*, ROCKY MTN. NEWS, Mar. 1, 1989, (Colorado Views), at 37 (questioning whether the exercise of a woman's right to an abortion should "vary according to the progress of medical technology").

Danforth.[22] There, the Court addressed a constitutional challenge to a Missouri statute regulating the performance of abortions by requiring the written consent of one parent or a person acting *in loco parentis* unless the abortion was necessary to protect the mother's life.[23]

The *Danforth* Court recognized that minors, as well as adults, receive constitutional protection because "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[24] The Court observed, however, that states may regulate the activities of children to a greater extent than is permissible for adults.[25] This greater degree of control is reflected in the Court's application of the less-stringent standard of "intermediate review" to the challenged parental consent provision. Using an ends-means analysis, which required only a "significant state interest" to condition a minor's abortion on the consent of a parent, the Court demonstrated the application of this intermediate standard.[26] In contrast, the Court employed the "strict scrutiny" standard to provisions of the statute as applied to adult women.

Heeding the *Roe* requirement of narrowly drawn statutes that regulate fundamental rights,[27] the *Danforth* Court held the parental consent provision unconstitutional. It concluded that the asserted state interests did not justify an absolute and possibly arbitrary parental veto over the decision of the minor to terminate her pregnancy.[28] In so ruling, the Court observed that the award of parental veto power would not strengthen the family unit or enhance parental control "where the minor and nonconsenting parent are so fundamentally in conflict that the very existence of the pregnancy already has fractured the family structure."[29] Although the *Danforth* Court placed the minor's autonomy before the asserted state and parental interests, the majority emphasized that its holding did not suggest that every minor, regardless of age or maturity, may give effective consent to an abortion.[30] The Court, instead, limited its holding to statutes imposing unjustified third-party consent requirements as a prerequisite to a mature minor's abortion.[31]

In 1979, the Supreme Court presented guidelines that, if incorpo-

22. 428 U.S. 52 (1976).

23. MO. ANN. STAT. § 188.020(4) (Vernon 1974). The plaintiffs also challenged statutory provisions concerning fetal viability, informed consent, spousal consent, the standard of care for physicians, the custody of infants who survived an attempted abortion, amniocentesis, and reporting and record-keeping requirements. *See id.* §§ 188.010-040.

24. *Danforth*, 428 U.S. at 74 (citing Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967)).

25. *Id.* at 73-75 (citing Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944)).

26. *Id.* at 75. For a discussion of the Supreme Court's inconsistent application of standards of review in the abortion context, see Note, *Leading Cases: I. Constitutional Law; E. Right to Privacy*, 104 HARV. L. REV. 247 (1990).

27. *Roe*, 410 U.S. at 155.

28. *Danforth*, 428 U.S. at 74.

29. *Id.* at 75.

30. *Id.*

31. *Id.*

rated, would have salvaged the infirmities of the Missouri statute under scrutiny in *Danforth*. In *Bellotti v. Baird (Bellotti II)*,[32] the Court addressed a facial challenge to a Massachusetts statute requiring the consent of both parents before a minor could obtain an abortion.[33] Unlike the consent provision struck down in *Danforth*, the Massachusetts statute provided for judicial authorization of the minor's abortion for "good cause shown" when one or both parents refused consent.[34]

The *Bellotti II* plurality observed that a child's peculiar vulnerability and inability to make informed, critical decisions—together with the importance of the parental role in child rearing—justified regulating a minor's fundamental rights to a greater extent than those of an adult.[35] The parental consent requirement of the Massachusetts abortion statute reflects that legislature's desire to exercise greater control over abortion rights of minors. The *Bellotti II* plurality concluded, however, that a pregnant minor was entitled to avoid a parental consent requirement through a judicial determination where either (1) she was mature and capable of giving informed consent independent of her parents' interests, or (2) the abortion was in her best interests regardless of her level of maturity.[36] The plurality also noted that the judicial proceeding should ensure the pregnant minor's anonymity and be expeditiously conducted to allow the minor an effective opportunity to obtain the abortion.[37] Thus the Court attempted to balance the pregnant minor's constitutional right with the state's interest in encouraging parental involvement by safeguarding against provisions that would amount to the veto power found impermissible in *Danforth*.[38] The plurality emphasized the balance that the bypass procedure lends to the competing interests rejecting the contention that, as a general rule, two-parent consent requirements unduly burden a minor's fundamental right to obtain an abortion.[39]

The plurality determined that the Massachusetts statute was unconstitutional because it failed in two respects to satisfy the articulated standards for a valid restraint on a minor's right. First, the statute permitted judicial authorization to be withheld from a minor who was otherwise

32. 443 U.S. 622 (1979). In *Bellotti I*, reported as Bellotti v. Baird, 428 U.S. 132 (1976), the Court vacated the judgment of a three-judge panel of the district court which had sustained a facial challenge to the statute. The Supreme Court held that the district court erred in not abstaining and certifying questions concerning the meaning of the statute to the Massachusetts Supreme Judicial Court. On remand, the district court certified nine questions to the state court. Following the judgment of the state court, the district court again found the statute unconstitutional and enjoined its enforcement.

Bellotti II, the appeal from the district court's ruling on remand, is a plurality opinion. Justice Powell's lead opinion was joined by Chief Justice Burger and Justices Stewart and Rehnquist. Justices Brennan, Marshall and Blackmun joined in Justice Stevens's concurring opinion. Only Justice White dissented.

33. MASS. GEN. L. ANN. ch. 112, § 12S (West 1983).

34. *Id.*

35. *Bellotti II*, 443 U.S. at 634-37.

36. *Id.* at 643-44.

37. *Id.* at 644.

38. *Id.*

39. *Id.* at 649.

found to be mature and capable of giving informed consent.[40] The plurality observed that a judge could, in effect, place the state's and parents' interests above those of the minor and deny authorization.[41] Second, the statute required parental involvement *before* the minor was afforded an opportunity to receive a judicial determination.[42] Under *Bellotti II's* guidelines, a pregnant minor must have an opportunity to obtain judicial approval of her decision without first consulting her parents;[43] the pregnant minor may be denied authorization only where the court is *not* persuaded that the minor is mature or that the abortion would be in her best interests.[44]

Both *Danforth* and *Bellotti II* involved statutes that conditioned a minor's right to abortion on parental *consent* to her decision. In contrast, the Supreme Court first addressed a constitutional challenge to a parental *notification* statute in *H.L. v. Matheson*.[45] This 1981 case presented a facial challenge to Utah's notification provision requiring a physician to "notify, if possible" the parents of a pregnant minor before performing the abortion.[46] The statute did not provide a judicial bypass alternative to the minor.

The plaintiff, a pregnant minor living with and dependent upon her parents, asserted that the statute was unconstitutional because courts could construe it so as to apply to all unmarried minors who were mature or emancipated.[47] The Court found, given the plaintiff's dependence upon her parents and her failure to allege that she was mature, that the minor lacked standing to advance the overbreadth argument.[48] Nevertheless, the Court upheld the provision only as it applied to immature and dependent minors. The Court reasoned that, as so limited, the statute was reasonably calculated to protect that class of pregnant minors by "enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences."[49]

Over a sharp dissent,[50] the *Matheson* Court observed that the Utah statute did not afford parents the veto power characterized by some consent provisions and noted that the "mere requirement of parental notice does not violate the constitutional rights of an immature dependent minor."[51] In effect, the lesser degree of intrusion accompanying notification, in contrast to requiring parental approval under a consent

40. *Id.* at 651.
41. *Id.*
42. *Id.*
43. *Id.* at 647.
44. *Id.* at 647-48.
45. 450 U.S. 398 (1981).
46. *See* UTAH CODE ANN. § 76-7-304(2) (1990).
47. *Matheson*, 450 U.S. at 405.
48. *Id.* at 406.
49. *Id.* at 411-12.
50. Led by Justice Marshall, the dissent rejected the majority's narrow holding grounded on a lack of standing. Moreover, the dissent argued that state-imposed notification results in the same infringement on the minor's right as does a consent requirement. *Id.* at 425-41.
51. *Id.* at 409 (quoting *Bellotti II*, 443 U.S. at 640).

provision, enabled the statute to survive a constitutional challenge without incorporation of the judicial bypass alternative. As applied to the class of immature and dependent minors, the statute furthered the interests of the state in protecting the welfare of its minors and preserving family integrity, and was narrowly drawn to protect only those interests.[52]

In 1983, the Supreme Court upheld an entire parental *consent* statute regulating a minor's right to abortion. That statute was the one challenged in *Planned Parenthood Ass'n v. Ashcroft*[53] requiring an unemancipated minor to (1) secure the consent of one parent or (2) obtain a court order for "good cause" shown before she could obtain an abortion.[54] Adhering to the criteria set forth in *Bellotti II* for a valid restraint on a minor's abortion right,[55] the question presented in *Ashcroft* was whether the Missouri statute provided a judicial alternative that satisfied those criteria without unconstitutionally burdening the minor's right.[56] The Supreme Court concluded that the interest of the state in protecting immature minors sustained the consent requirement because of the judicial bypass alternative. Because a court could not deny a pregnant minor's petition "for good cause" unless it first found that the minor was immature, the statute avoided any constitutional infirmities.[57]

The *Ashcroft* dissent, however, emphasized that *Bellotti II* did not command a majority, and thus, the Court was not bound by the judicial bypass guidelines.[58] It further maintained that a judicial proceeding imposes a burden on the minor of at least the same degree as obtaining parental consent and that the discretion inherent in the proceeding results in nothing less than a judicial veto of the minor's decision to obtain an abortion.[59]

In *Ohio v. Akron Center for Reproductive Health (Akron II)*,[60] the companion case to *Hodgson*, the Supreme Court upheld a parental *notification* statute prohibiting the performance of an abortion upon an unmarried, unemancipated minor unless, inter alia, the physician provided notice to

52. *Matheson*, 450 U.S. at 411-13.

53. 462 U.S 476 (1983).

54. MO. ANN. STAT. § 188.028 (Vernon Supp. 1991).

55. *Ashcroft*, 462 U.S. at 493.

56. *Id.* at 491. Justice Powell and Chief Justice Burger viewed the issue as a matter of statutory construction and applied the *Bellotti II* criteria. *Id.* at 491-92. Justices O'Connor, White and Rehnquist concluded in a concurring opinion that the provision was valid because it imposed no undue burden on the minor's fundamental right. *Id.* at 505.

57. *Id.* at 493.

58. *Id.* at 504. Justices Brennan, Marshall and Stevens joined Justice Blackmun's dissenting opinion.

59. *Id.*

60. 110 U.S. 2972 (1990). In City of Akron v. Akron Ctr. for Reproductive Health (Akron I), 462 U.S. 416 (1983), the Court held unconstitutional an ordinance that prohibited, inter alia, the performance of an abortion on a woman under 15 years of age unless the physician obtained the consent of one parent or the minor received judicial authorization. The Court stated that the judicial proceeding failed to meet the standard provided by *Bellotti II*, and was invalid because the ordinance made a blanket determination that all minors under the age of 15 are too immature to provide informed consent or that an abortion would never be in their best interests without parental consent.

one parent, or the minor received judicial authorization to obtain the abortion.[61] The majority concluded that the notification requirement and accompanying judicial bypass procedure did not impose an unconstitutional burden on the minor's right since the statute was in accord with the guidelines propounded by the Court in previous abortion rulings.[62] The bypass proceeding allowed the minor to avoid parental notification by establishing either her maturity or that the performance of the abortion, without notification, would be in her best interests.[63] Furthermore, the statute provided for an expedited and confidential determination of the minor's petition if she sought a judicial bypass.[64] The Court left unanswered, however, the question of whether parental *notification* statutes *must* contain a judicial bypass alternative to be held constitutional.[65] Recall that the Ohio statute included a bypass procedure that satisfied *Bellotti II's* standards, but the *Ashcroft* Court stated only that "it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute."[66]

III. *HODGSON V. MINNESOTA*

A. *Facts and Procedural History*

On July 30, 1981, two days before the effective date of the Minnesota parental *notification* provision,[67] the plaintiffs[68] commenced their suit in the United States District Court for the District of Minnesota challenging the constitutionality of the statute and seeking declaratory and injunctive relief.[69] The primary requirement of the statute demanded an unemancipated minor notify[70] both her parents of her intent

61. *Akron II*, 110 S. Ct. at 2982. *See* OHIO REV. CODE ANN. § 2151.85 (Anderson 1990).

62. *Akron II*, 110 S. Ct. at 2981-82.

63. *Id.* at 2979.

64. *Id.* at 2979-80. The Court rejected the challenges to: (1) the constructive authorization condition of the bypass provision; (2) the standard for establishing maturity or best interests and (3) the pleading requirements. *See* OHIO REV. CODE ANN. § 2151.85(A)-(C) (Anderson 1990).

65. *Akron II*, 110 S. Ct. at 2978-79.

66. *Id.* at 2979.

67. MINN. STAT. ANN. § 144.343 (West 1989). The statute amended the "Minors' Consent to Health Services Act" which remains in effect as §§ 144.343(1) and 144.346. For a brief discussion of the Act, see *Hodgson*, 110 S. Ct. at 2931.

68. The plaintiffs included six class-action minors who claimed to be mature, two physicians and four abortion clinics in Minnesota. They argued that notification of one or both parents of the minors would not be in the minors' best interests. A mother of a minor plaintiff claimed that notifying the minor's father would not be in the minor's best interests.

69. Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986). The plaintiffs alleged violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and various provisions of the Minnesota Constitution.

70. MINN. STAT. ANN. § 144.343(4) (West 1989) states:

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

to obtain an abortion at least forty-eight hours before the procedure was performed.[71] The Minnesota legislature incorporated a judicial bypass provision, however, that was to become effective if the primary two-parent notification requirement was ever temporarily or permanently enjoined.[72] Under this contingency, a pregnant minor could obtain a waiver of the notification requirement if the court determined that the minor was mature or that the performance of the abortion, without parental notification, was otherwise in her best interests.[73] The statute provided that the bypass hearing must be confidential and be given precedence over other matters.[74] An expedited appeal was available to minors who were denied judicial authorization by the lower court.[75]

The district court temporarily enjoined the pure notification provision of the statute before its effective date, but allowed the enforcement of the notice-bypass provision since it was constitutional per se. The court determined, however, that the plaintiffs should have an opportunity to offer evidence in support of their allegations that the notice-bypass provision was unconstitutional as applied.[76] During a five-week trial, the court considered, apart from the remainder of the statute, both the forty-eight hour delay and two-parent notification requirements. The district court held that the waiting period was unconstitutional per se because it unduly burdened the opportunity of pregnant minors to obtain an abortion.[77] The core two-parent notice requirement, without the judicial bypass, was also held unconstitutional because it failed to promote the interests of the state and placed an unjustified burden of obtaining parental approval on mature and "best-interests" minors.[78] The trial court determined, however, that the judicial bypass procedure complied both on its face and in practice with the guidelines established by the Supreme Court[79] although extensive factual findings suggested that the procedure did not significantly further the interests of the state

(c) The pregnant minor woman declares that she is the victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

71. *See supra* notes 5-8 and accompanying text. MINN. STAT. ANN. § 144.343(5) (West 1989) provides in part: "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."

72. MINN. STAT. ANN. § 144.343(6) (West 1989). *See supra* note 7 and accompanying text.

73. MINN. STAT. ANN. § 144.343(6)(c)(i)(West 1989).

74. MINN. STAT. ANN. § 144.343(c)(iii) (West 1989) provides in part: "[p]roceedings 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."

75. MINN. STAT. ANN. § 144.343(c)(iv) (West 1989) states in part: "[a]n 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."

76. *See Hodgson*, 110 S. Ct. at 2934.

77. *Hodgson*, 648 F. Supp. at 779.

78. *Id.* at 778.

79. *Id.* at 775-76. *See Ashcroft*, 462 U.S. at 476; *Bellotti II*, 443 U.S. at 622.

in protecting pregnant minors or fostering intrafamily communication.[80] While the forty-eight hour delay provision was severable from the remainder of the statute, the statute could not be given effect in the absence of the two-parent notification requirement.[81] Accordingly, though the judicial bypass was held constitutional in isolation from the remainder of the statute, the two-parent notification requirement necessitated that the statute be enjoined in its entirety.[82]

On appeal, the Eighth Circuit reversed,[83] thus rejecting the state's argument that the two-parent notification requirement was constitutional without a judicial bypass option.[84] Concluding that a bypass procedure was constitutionally required under *Bellotti II*, *Ashcroft* and *Matheson*,[85] the Eighth Circuit determined that the two-parent notice requirement was valid only when accompanied by the judicial bypass alternative.[86] The appellate court considered the statute as a whole and stated that, by providing for a judicial bypass, the statute safeguards those minors for whom parental involvement may not be in their best interests, while at the same time encouraging parental involvement for those minors who may be greatly assisted at a difficult time.[87] Although the district court's factual findings concerning the burdens associated with the two-parent notice requirement and judicial bypass raised "considerable questions about the practical wisdom of the statute," the Eighth Circuit deferred to the decision of the legislature.[88]

Both parties appealed to the United States Supreme Court. Minnesota challenged the determination of the Eight Circuit that the pure notification provision was unconstitutional.[89] In contrast, the plaintiffs challenged the approval of the same two-parent requirement when accompanied by the judicial bypass alternative.[90] The Supreme Court, however, affirmed the holdings of the Eighth Circuit in two different majority opinions.

In the first opinion, Justices Brennan, Marshall, Blackmun and O'Connor joined Justice Stevens in striking down the primary two-parent notification provision. In the second, Chief Justice Rehnquist and Justices White and Scalia joined Justice Kennedy in upholding the two-parent notice requirement with the appended judicial bypass. As be-

80. *Hodgson*, 648 F. Supp. at 775-76. Between August of 1981 and March of 1986, judges denied only nine of the approximately 3500 judicial bypass petitions. In addition, the judges—hearing 90% of the petitions—viewed the process as a means to affix a "rubber-stamp" to the minor's decision. *Id.* at 781.

81. MINN. STAT. ANN. § 144.343(7) (West 1989) provides in part: "[i]f any provision . . . of this section . . . shall be held invalid, such invalidity shall not affect the provisions . . . which can be given effect without the invalid provision . . . ."

82. *Hodgson*, 648 F. Supp. at 780-81.

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

84. *Id.* at 1456.

85. *Id.* at 1462.

86. *Id.* at 1464.

87. *Id.*

88. *Id.* at 1459.

89. *Hodgson*, 110 S. Ct. at 2927.

90. *Id.* at 2961.

tween the two opinions, Justice O'Connor provided the swing vote in the decision by concurring with the judgment upholding the two-parent requirement when it was accompanied by the bypass procedure.[91]

B. *The Stevens Majority*

The Stevens majority began its scrutiny of the pure notification provision by noting that none of the Court's prior decisions in the abortion context focused on the significance of involving *both* biological parents in the abortion decision.[92] The majority then summarized the unchallenged factual findings of the district court concerning the distinction between one and two-parent involvement.[93]

The majority noted that—on the basis of testimony amassed at trial concerning the impact of the statute in operation—the district court found the two-parent notification requirement had harmful effects on both the minor and custodial parent where the parents were divorced or separated.[94] Some minors anticipated reestablishing their relationship with the absent parent after gaining that parent's advice, and were often disappointed when reestablishment did not occur.[95] In addition, the reaction of the custodial parent to the requirement of forced notification was often one of anger, resentment and frustration at the intrusion of the absent parent.[96]

The district court also found that involvement of the absent parent was especially detrimental when the minor came from an abusive, dysfunctional family. Studies, introduced into evidence, suggested that violence and harassment often continued well beyond the divorce, particularly where children were involved, and notification of the minor's pregnancy and abortion decision could provoke further violence.[97] Moreover, the district court believed that "a mother's perception in a dysfunctional family that there will be violence if the father learns of the daughter's pregnancy is likely to be an accurate perception."[98]

The two-parent notification requirement also had adverse effects in families where the minor lived with both parents in circumstances involving domestic violence. Even where minors lived in fear of physical and sexual abuse, few invoked the statutory exception to notice because of the reporting requirements and attendant loss of privacy.[99] Consequently, the two-parent notification requirement actually reduced, instead of fostered, intrafamily communication. Minors who would ordinarily notify one parent were dissuaded from doing so when notifi-

91. Justice Marshall filed an opinion concurring in part and dissenting in part in which Justices Brennan and Blackmun joined. Justice Scalia also filed a separate opinion concurring in part and dissenting in part.

92. *Hodgson*, 110 S. Ct. at 2938.

93. *Id.*

94. *Hodgson*, 648 F. Supp. 756, 768-69 (D. Minn. 1986).

95. *Id.* at 769.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

cation would involve the parent "in the tortuous ordeal of explaining to a court why the second parent should not be notified."[100]

Justice Stevens then analyzed the statute while considering the district court's extensive findings of fact. Noting that the state did not rely primarily on its asserted interest in protecting the welfare of pregnant minors in defending the statute, Justice Stevens concluded that instead it concentrated on its interest in protecting the right of the parents "to determine and strive for what they believe to be best for their children."[101] Wherever the emphasis, neither of these interests justified the two-parent notification requirement according to Justice Stevens. He concluded that the state had no legitimate interest in (1) questioning one parent's judgment that notice to the other parent would not benefit the minor and (2) in presuming that the custodial parent was incompetent to make decisions concerning the minor's health and welfare.[102] Thus, the two-parent requirement was unconstitutional because the "combined force of the separate interest of one parent and the minor's privacy interest must outweigh the separate interest of the second parent" in shaping the child's values and lifestyle.[103]

C. *The Kennedy Dissent to the Stevens Majority*

Justices Kennedy, White, Scalia and Chief Justice Rehnquist dissented from the portion of the Stevens opinion that struck down the primary two-parent notification requirement of the Minnesota statute. The dissent maintained that a state furthers legitimate ends when it attempts to foster and preserve intrafamily relations by "giving *all* parents the opportunity to participate in the care and nurture of their children."[104] The Kennedy dissent rejected Justice Marshall's assertion that Minnesota attempted, through the two-parent notification requirement, to force families to conform to a state-designed ideal.[105] Instead, the dissent supported the state's interest in providing information to both parents by arguing that such an interest was valid regardless of whether the child was living with one or both biological parents, or the particular relationship between the parents.[106]

The Kennedy dissent further observed that the notification statute was consistent with joint custody laws in Minnesota since it enabled divorced or separated parents to share the legal responsibility and authority for making decisions regarding their child's welfare.[107] Furthermore, the dissent asserted that the state did not dictate intrafamily communication by requiring parental notice. The Court ar-

100. *Hodgson*, 110 S. Ct. at 2939 (discussing *Hodgson*, 648 F. Supp. at 769).
101. *Id.* at 2946. *See* Brief of Respondents at 28-29, Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (No. 88-1125).
102. *Hodgson*, 110 S. Ct. at 2946.
103. *Id.* at 2946-47.
104. *Id.* at 2963 (emphasis added).
105. *Id.*
106. *Id.* at 2964.
107. *Id.* at 2964-65.

gued that Minnesota acted only on the common-sense proposition that—in counseling their minor child—parents could best fulfill their roles only when fully informed of the child's medical condition and relative choices.[108]

The dissent criticized the Stevens majority for doing the state and "our constitutional tradition a sad disservice by impugning the legitimacy" of such essential objectives.[109] In conclusion, Justice Kennedy stated that the permissive language and incorporated exceptions of the statute, combined with the less demanding nature of a *notice* provision as opposed to a *consent* provision, did not place an absolute obstacle before a pregnant minor seeking an abortion. Instead, Justice Kennedy viewed the statute as representing a considered weighing of the competing interests of minors and their parents.[110]

D. *The Kennedy Majority*

The Justices favoring the Kennedy dissent, with the addition of Justice O'Connor—who represented the swing vote between the two majorities—saved the two-parent notice component of the statute. Although Justices Kennedy, Scalia, White and Chief Justice Rehnquist would have upheld the two-parent notice requirement without an appended judicial bypass option, they were defeated by the Stevens majority. With the addition of Justice O'Connor, however, the Kennedy group succeeded in upholding the two-parent notification requirement when it was accompanied by the judicial bypass mechanism.

The Minnesota notification statute with a judicial bypass alternative purportedly conformed to the framework supplied by the *Bellotti II* plurality. The Kennedy majority noted that *Bellotti II's* guidelines would support a two-parent consent or notification statute if it provided, as did Minnesota's provision, for a sufficient judicial bypass alternative.[111] Minnesota's judicial bypass, according to the Kennedy majority, was valid since it furnished mature and best-interests minors with an opportunity to avoid parental notification through a confidential judicial proceeding.[112]

The Kennedy majority also reconciled the decision in *Matheson* with the facts presented by the Minnesota statute. Justice Kennedy observed that, as in *Matheson*, if a two-parent notification statute is constitutional as applied to immature minors whose best interests are served by notification, but not as applied to mature or best interests minors, "a 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."[113] Thus legislatures are entitled to combat the wrongs of parental

108. *Id.*
109. *Id.* at 2964.
110. *Id.* at 2969.
111. *Id.* at 2970.
112. *Id.* at 2971.
113. *Id.*

failure and social ills and still take reasonable measures to "recognize and promote the privacy of the family tie."[114] This concept, maintained Justice Kennedy, was destined to constitutional irrelevance under the Stevens opinion.[115]

E. *Justice O'Connor's Concurrence with the Kennedy Opinion*

In casting the decisive vote, Justice O'Connor concluded that interference in the intrafamily relationship associated with requiring two-parent notice does not exist where the minor can avoid notification through the use of the judicial bypass mechanism.[116] If the questioned regulation does not unduly burden the fundamental right, observed Justice O'Connor, then the Court's evaluation is limited to a determination of whether the regulation rationally relates to a legitimate state purpose.[117]

Justice O'Connor maintained, as did Justice Stevens, that Minnesota offered no sufficient justification for the notice requirement's interference with the family's decision-making processes.[118] In support of her conclusion, she cited the stringent nature of the two-parent requirement, the ineffectiveness of the state's physical and sexual abuse exception, and the unreasonableness of requiring two-parent notice when only one-half of the minors residing in Minnesota live with both biological parents.[119] Emphasizing the Court's decision in *Danforth*, Justice O'Connor further observed that the infirmities of the statute were negated by the inclusion of the judicial bypass option. She concluded that the existence of such an alternative avoids unduly burdening the minor's limited right to obtain an abortion and alleviates the possibility of parental notification serving as an absolute condition upon the minor's fundamental right.[120]

F. *Justice Marshall Concurring and Dissenting in Part*

Joined by Justices Brennan and Blackmun, Justice Marshall concurred in the judgment with respect to the Court's rejection of the "unreasonable and vastly overbroad requirement" that a pregnant minor notify both her parents of her decision to obtain an abortion.[121] Justice Marshall adopted the Stevens rationale for holding the two-parent notification requirement unconstitutional, and noted that the provision would not satisfy the standard of strict scrutiny applicable to restrictions

114. *Id.* at 2972.
115. *Id.*
116. *Id.* at 2951 (O'Connor, J., concurring).
117. *Id.* at 2950. Justice O'Connor seems to apply the minimum rationality standard of review to the regulation of a minor's fundamental right to abortion, whereas the Marshall dissent would utilize the strict scrutiny standard applied in *Roe*. *See supra* note 26.
118. *Id.*
119. *Id.* at 2950.
120. *Id.*
121. *Id.* at 2960.

on fundamental rights.[122] According to Justice Marshall the parental notification requirement significantly restricted a young woman's reproductive freedom and was not narrowly tailored to serve any compelling state interest. Justice Marshall rejected the asserted state interest in protecting independent parental rights because the family's right against state interference in personal matters would be undermined by governmental intrusion in the form of forced compliance to the state's "archetype of the ideal family."[123] Furthermore, he argued, the exercise of parental authority in some instances obstructs the minor's decision to have an abortion. Stern parental disapproval, with the threat of withdrawal of financial support, accompanied by physical and emotional abuse would effectively become an impermissible veto over the minor's decision.[124]

Justice Marshall objected to forced notification of even a *single* parent, an argument which served as a foundation for opposing the rigors of a two-parent notification requirement. Justice Marshall observed that any notification requirement violates the privacy right of pregnant minors who choose not to inform their parents and further precipitates severe physical and psychological effects on the minor.[125] Additionally, Justice Marshall observed that a single-parent notice requirement may force some pregnant minors to travel outside of the state to obtain an abortion and others to resort to self-induced or illegal abortions.[126]

Justice Marshall vehemently dissented from the Kennedy decision, reasoning that the mere presence of a judicial bypass alternative did not rid the underlying notice requirement of its unconstitutionality.[127] The Marshall dissent argued that the judicial bypass procedure could not salvage the parental notification requirement because the procedure itself was unconstitutional. The bypass was invalid, according to Justice Marshall, since a court's refusal was the equivalent of a veto with respect to women who were denied a judicial bypass and were forced either to carry the fetus to term or were otherwise obstructed by their parents.[128]

The dissent argued that an immature minor has no less right to make decisions regarding her own body than a mature adult, and that the conditional defects in any provision effectively allowing for a third-party veto were exacerbated by the vagueness of Minnesota's statute.[129] In particular, the Marshall dissent challenged the standards, or lack thereof, for determining the maturity and best interests of the pregnant minor.[130]

The Marshall dissent then noted that the Court had never before

122. *Id.* at 2951.
123. *Id.* at 2956.
124. *Id.*
125. *Id.* at 2953.
126. *Id.* at 2953-54.
127. *Id.* at 2952. The Justices also dissented from the portion of the Court's decision upholding the 48 hour delay requirement. *Id.* at 2954.
128. *Id.* at 2957.
129. *Id.*
130. *Id.* at 2958.

addressed the constitutionality of a bypass option as applied.[131] Justice Marshall focused in large part on the factual findings of the district court and concluded that the Minnesota bypass provision was an excessive burden, not a remedy to an otherwise unconstitutional statute.[132] He argued that the statute "forces a young woman in an already dire situation to choose between two fundamentally unacceptable alternatives: notifying a possibly dictatorial or even abusive parent and justifying her profoundly personal decision in an intimidating judicial proceeding to a black-robed stranger."[133]

IV. ANALYSIS

A. *The Minor's Rights*

The historical attitude regarding children was one in which children were regarded as personal property of their parents or appendages of an entity, unable to develop an autonomous image.[134] In effect, children had no rights and were wholly subordinate to those who had power over them whether in the family, the factory or the community.[135] The Chancery Courts rejected appeals to subject parental authority to state intervention and ignored the wishes of children when they conflicted with those of their parents.[136] Furthermore, minors—not recognized as persons in their own right—could not consent to medical care, and physicians feared charges of assault and battery if they treated minors without first obtaining parental consent.[137]

Today, children are regarded as individuals, with constitutionally protected rights,[138] actively involved in decisions that affect their

131. *Id.*

132. *Id.*

133. *Id.* at 2960.

134. Nan Berger, *The Child, the Law and the State, in* CHILDREN'S RIGHTS: TOWARD THE LIBERATION OF THE CHILD 153, 179 (1971).

135. Maxine Greene, *An Overview of Children's Rights: A Moral and Ethical Perspective, in* CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 1, 7 (Patricia A. Vardin & Ilene N. Brody eds., 1979).

136. Berger, *supra* note 134, at 153. In effect, the father's rights were superior to those of the child since mothers had few legal rights in relation to their children. *Id.* "The right of a father to the custody and control of his children is one of the most sacred rights." *Id.* (quoting Lord Justice James, Chancery Court (1878)).

For a discussion of the protective nature of the current juvenile court system, see Laura J. Staples, Comment, *Parental Notification Prior to Abortion: Is Minnesota's Statute Consistent With Current Standards*, 14 WM. MITCHELL L. REV. 653, 662-67 (1988)(discussing Hartigan v. Zbaraz, 484 U.S. 171 (1987), and the ruling in Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988)).

137. Harriet F. Pilpel, *Minors' Rights to Medical Care*, 36 ALB. L. REV. 462, 463 (1972). There are three recognized exceptions to the general rule requiring parental consent to medical treatment of a child. First, parental consent is not required in emergency situations involving an immediate danger to life or limb. *Id.* at 464. The second exception allows an emancipated minor to give effective consent provided he or she understands the nature and consequences of the treatment. *Id.* at 464-65. Third, mature minors, even if unemancipated, may give effective consent where the minor understands the nature and consequences of the treatment. *Id.* at 466.

138. *In re* Gault, 387 U.S. 1, 13 (1966)("neither the Fourteenth Amendment or the Bill of Rights is for adults alone"). Juveniles are entitled to due process protection including

lives.[139] Remnants of the common law are evident, however, in parental involvement statutes since some restrictions, having no legitimate basis as applied to adults, may be used to purportedly further significant state interests with respect to minors.[140]

Justice Powell, writing for the plurality in *Bellotti II*, stated three justifications for sanctioning greater state regulation of the constitutional rights of children: "[1] the peculiar vulnerability of children; [2] their inability to make critical decisions in an informed, mature manner; and [3] the importance of the parental role in child rearing."[141] The Supreme Court, however, has yet to articulate a general theory that properly balances the competing interests of the state, parent and child.[142] At the core of these rival concerns and the inconsistencies in the case law[143] preventing the formation of a standard "lies a controversy over the scope of the Constitution's protection of the individual's rights to autonomy and respect as a person."[144] Although the Supreme Court has addressed the minor's right to autonomy in developing the constitutional right to privacy, the right has been "unduly limited [by] the protection of biological parenthood."[145]

The inquiry, therefore, is "whether biological parenthood is the proper locus for the constitutional values of autonomy and respect inherent in the right to privacy."[146] In this sense, it would seem that re-

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the rights to timely notice of the charges, assistance of counsel, the privilege against self-incrimination and the rights to confrontation and cross-examination. *Id.* at 49-57.

139. Berger, *supra* note 134, at 179.

140. Richard F. Thomas, Comment, *Distinguishing Guidelines for Minors' Abortion Rights*, 56 UMKC L. REV. 779, 780 (1988).

141. *Id.* (citing *Bellotti II*, 443 U.S. at 634); *see supra* note 35 and accompanying text. The Supreme Court stated that the protection of a minor's right to privacy would not be equated with that of an adult since a significant state interest, as opposed to a compelling state interest, would sustain restriction of a minor's fundamental rights. Carey v. Population Services Int'l, 431 U.S. 678, 692 (1977)(The Court also questioned whether the means employed by the New York legislature were related to the end it sought to achieve.).

142. David A.J. Richards, *The Individual, The Family, and The Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 3 (1980). Failure to articulate such a theory is to some extent a consequence of a judicial method focused on "cases and controversies" and "the idea that a decision need only articulate those principles that are necessary to the reasonable disposition of a particular case." *Id.*

143. *Id.* at 3-4. "Some decisions respect a child's right to autonomy, while others, inexplicably, ignore it." *Id.* (discussing Carey v. Population Services Int'l, 431 U.S. 678 (1977)(constitutional right to privacy extends to minor's access to contraceptives despite parental disapproval); Ingraham v. Wright, 430 U.S. 651 (1977)(denial of hearing or review after corporal punishment); Planned Parenthood v. Danforth, 428 U.S. 52 (1976)(parents cannot assert veto power over minor's constitutional right to privacy, abortion); Goss v. Lopez, 419 U.S. 565 (1975)(to satisfy due process concerns, students entitled to some form of hearing after suspension by school); Wisconsin v. Yoder, 406 U.S. 205 (1972)(parents' religious objections were sufficient to overcome the state's interest in education beyond the eighth grade); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)(extending First Amendment rights to public school students); Prince v. Massachusetts, 321 U.S. 158 (1944)(state's interest in regulating child labor outweighed parents' religious interest in having child distribute religious literature)).

144. Richards, *supra* note 142, at 4.

145. *Id.*

146. *Id.* at 4-5. "Protecting the nuclear family by the right to privacy may only reinforce malign features of the American family." *Id.* at 5 n.36 (for a discussion of these

quiring a minor to notify an absent parent of her intent to obtain an abortion hinders the achievement of a proper balance between the opposing interests.

B. *The Judicial Bypass Mechanism*

While the judicial bypass may, in some instances, further the asserted state interest in protecting the welfare of pregnant minors without unduly burdening the minor's fundamental right, courts are selective in its application. The judicial bypass alternative allows only mature and best-interest minors to circumvent the rigors of notifying both parents. The mechanism provides no alternative to pregnant women deemed immature or to those minors whose best interests, according to the juvenile court, would not be served without parental notification. The limited application of the bypass, thus, forces the class of immature and non best-interest minors either to adhere to the two-parent notification requirement and its inherent burdens or to carry the fetus to term.

The judicial bypass mechanism, however, is not flawed merely because it excludes some pregnant minors from an alternative to parental notification. Rather, the procedure is warranted because the class of immature and non best-interest minors that are denied circumvention of the notice requirement arguably benefit from parental advice to a greater extent than their mature and best-interest counterparts. The real dilemma underlying the *Hodgson* holding concerns the ability to append a judicial bypass option to salvage an otherwise unconstitutional parental involvement requirement.

The judicial bypass option embodied in the Minnesota statute allowed the core two-parent notification requirement to pass constitutional muster.[147] Contrary to the holding of the Supreme Court, the incorporation of a judicial bypass mechanism does not negate the many burdens associated with the underlying two-parent notification requirement and thereby purge the statute of its unconstitutionality.[148] The judicial proceeding exists not for the purpose of making an unconstitutional notice provision constitutional, but because even a valid notice requirement may be imposed only on minors who are immature or whose best interests are not served by making the abortion decision without parental involvement.[149] The bypass alternative is intended only to address exceptions from a reasonable general rule and to thereby preserve the constitutionality of the substantive requirement.[150]

In contrast, statutes requiring single-parent involvement in the mi-

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possible consequences, see ARLENE S. SKOLNICK, THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY 63, 134-35, 210-31 (2d ed. 1978).

147. The Court reaffirmed the *Bellotti II* guidelines for regulating a minor's fundamental right to obtain an abortion through the incorporation of a valid judicial bypass alternative. *See Hodgson*, 110 S. Ct. at 2970.

148. *See Hodgson*, 853 F.2d at 1468 (Lay, C.J., dissenting).

149. *Id.*

150. *Hodgson*, 110 S. Ct. at 2948 (Stevens, J. dissenting). *See infra* notes 165-67 and

nor's abortion decision are reasonable general rules. Therefore, when an immature or non best-interest minor is denied judicial approval, she faces a single-parent involvement provision that balances the competing interests without unduly burdening her fundamental right.

C. *The Two-Parent Notification Requirement*

The Supreme Court effectively ignored the district court's extensive factual determinations that were based on the operation of the statute during the four and one-half years before it was enjoined.[151] The Court relied instead upon the incorporation of a valid judicial bypass alternative[152] to uphold the most restrictive parental notification statute in the Nation.[153]

In addition to Minnesota, only five[154] of the thirteen states[155] mandating parental *notification* before the minor may obtain an abortion impose a two-parent requirement. In comparison, five[156] of the twenty-three states[157] requiring parental *consent* impose a two-parent requirement. Each of the other five two-parent notification statutes—even where the statute does not include a valid judicial bypass[158]—provide exceptions to notice in the case of divorced or noncustodial parents, or where notice is otherwise impossible.[159] In contrast, the Minnesota statute provides no exception for notice to a divorced, noncustodial or disinterested biological parent. Furthermore, the statute makes no exception to notice for a parent, custodial or not, whom the minor considers likely to react abusively to notification, unless the minor declares that

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accompanying text for a discussion of the burdens associated with the two-parent notification requirement.

151. *See Hodgson*, 648 F. Supp. at 759-70.

152. *Bellotti II*, 443 U.S. at 622.

153. *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring).

154. *See* ARK. STAT. ANN. §§ 20-16-801 to 808 (Michie Supp. 1989); IDAHO CODE § 18-610(6) (1987); ILL. ANN. STAT. ch. 38, ¶ 81-63 to 68 (Smith-Hurd Supp. 1991); TENN. CODE ANN. § 39-4-202 (Supp. 1989); UTAH CODE ANN. § 76-7-304 (1990).

155. The seven parental notification statutes that impose one-parent requirements are as follows: MD. HEALTH-GEN. CODE ANN. § 20-103 (Supp. 1991); W. VA. CODE § 16-2F-3 (1985); MONT. CODE ANN. § 50-2-107 (1991); NEV. REV. STAT. ANN. § 442.255 (Michie 1986); GA. CODE ANN. §§ 15-11-110 to -118 (Michie 1990); NEB. REV. STAT. § 28-347 (1989); OHIO REV. CODE ANN. § 2929.12 (Anderson 1987).

156. DEL. CODE ANN. tit. 24, § 1790 (1987); KY. REV. STAT. ANN. § 311.731 (Michie/Bobbs-Merrill 1990); MISS. CODE ANN. §§ 41-41-51 to 57 (Supp. 1990); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); N.D. CENT. CODE §§ 14-02.1-03.1 to 04 (1991).

157. The 18 other consent statutes are as follows: ALASKA STAT. § 18.16.010 (1991); COLO. REV. STAT. § 18-6-1 (1986); N.M. STAT. ANN. § 30-5-1 (Michie 1991); S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986); WASH. REV. CODE ANN. § 9.02.070 (West 1988); ARIZ. REV. STAT. ANN. § 36-2152 (West Supp. 1990); CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1991); FLA. STAT. ANN. § 390.001 (West Supp. 1991); 18 PA. CONS. STAT. ANN. § 3206 (Purdon 1983 & Supp. 1991); ALA. CODE §§ 26.21-1 to 5 (Supp. 1990); IND. CODE ANN. § 35-1-58.5-2.5 (Burns 1985 & Supp. 1991); LA. REV. STAT. ANN. § 1299.35.5 (Supp. 1991); ME. REV. STAT. ANN. tit. 22, § 1597-A (West Supp. 1990); MICH. COMP. LAWS ANN. §§ 722.902 to .909 (West Supp. 1991); MO. ANN. STAT. § 188.028 (Vernon Supp. 1991); R.I. GEN. LAWS § 23-4.7-7 (1989); S.C. CODE ANN. §§ 44-41-30 to 37 (Law. Co-op. Supp. 1990); WYO. STAT. § 35-6-118 (Supp. 1991).

158. After *Hodgson*, statutes that require parental involvement without providing a judicial bypass option for mature and best-interest minors are presumptively unconstitutional.

159. *See supra* note 156 and accompanying text.

she is a victim of physical or sexual abuse.[160]

The infirmities of this statute become more evident when one considers the characteristics of the modern-day family. National statistics indicate that approximately one out of every two marriages ends in divorce, and a study suggests that only fifty percent of the minors residing in Minnesota live with both biological parents.[161] Yet the statute makes no exception for minors residing in a single-parent home even where the minor has voluntarily notified the custodial parent. As a result, twenty to twenty-five percent of the minors who choose to initiate the judicial bypass procedure are either accompanied by one parent or have voluntarily consulted one parent, but are nonetheless required to endure the burdens of the court proceeding.[162]

The two-parent notification requirement also ignores the existence of dysfunctional two-parent homes. A pregnant minor, residing in such a home, may choose to consult with one parent, but not the other, out of fear of psychological, physical or sexual abuse directed toward her or the notified parent. Considering that domestic violence occurs in at least two million families in the United States,[163] the trauma inflicted upon a pregnant minor in such circumstances is exacerbated by the burdensome choice of facing either the two-parent notice requirement or a judicial bypass proceeding.

Only Justice Stevens, in a separate dissenting opinion, recognized and addressed the significant distinction between a statute requiring the involvement of both parents in the abortion decision and a statute requiring the involvement of only one.[164] The *Ashcroft* Court, using an ends-means analysis, upheld a statute requiring the pregnant minor to either secure the consent of one parent or succeed in a judicial bypass proceeding before she could obtain an abortion.[165] Justice Stevens noted that a two-parent notification provision must also be tested by its relationship to the legitimate state interests that it purportedly reflects.[166] States have a "strong and legitimate interest in providing the pregnant minor with the advice and support of a parent during the decisional period."[167] A single-parent provision, whether it requires consent or notification, combined with a judicial bypass alternative, furthers that legitimate interest without unduly burdening the minor's fundamental right. A provision, however, that requires a pregnant minor and

160. MINN. STAT. ANN. § 144.343(4)(c) (West 1989). Minors who are victims of physical or sexual abuse are often reluctant to report such abuse in order to invoke the exception. Reporting often results in parental notice and lost confidentiality. *See Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring).

161. *Hodgson*, 648 F. Supp. at 768. *See* Brief for American Psychological Association as Amici Curiae in Support of the Petitioners at 12-13, Hodgson v. Minnesota, 110 S. Ct. 2629 (1990) (No. 88-1125)(by age 17, nearly 70% of white children, and 94% of black children, will have lived in single-parent homes for some period of time).

162. *Hodgson*, 648 F. Supp. at 769.

163. *Id.* at 768.

164. *Hodgson*, 110 S. Ct. at 2948 (Stevens, J., dissenting).

165. *See supra* notes 53-59 and accompanying text.

166. *Hodgson*, 110 S. Ct. at 2948 (Stevens, J. dissenting).

167. *Id.*

a consenting parent to petition a court to override required notice to the second parent constitutes an "unjustified intrusion into the family's decisional process."[168] The "minor and her custodial parent, by virtue of their major interest and superior position, should alone have the opportunity to decide to whom, if anyone, notice of the minor's abortion decision should be given."[169]

V. CONCLUSION

The Supreme Court in *Hodgson* further retreated from *Roe* by upholding unjustified regulation of a minor's right to choose abortion. Although the conservative composition of the Court coupled with the appropriate case may once again provide the states with limitless control over a woman's freedom to choose abortion,[170] *Hodgson* seems limited by allowing only for two-parent involvement in the minor's decision where the statute includes a valid judicial bypass alternative. The rule stands though Minnesota failed to establish that the two-parent notification requirement was narrowly drawn to further, or actually served during its operation,[171] the asserted state interests in protecting the welfare of pregnant minors, promoting intrafamily communication or improving family integrity in any meaningful way.[172] The statute actually served to undermine those interests because minors who would ordinarily notify one parent were often dissuaded from doing so when presented with the opportunity to avoid notice through a judicial bypass alternative.[173] Furthermore, a minor does not make better informed decisions upon counsel by a disinterested parent nor is family integrity fostered by forcing the minor and her custodial parent to notify the noncustodial parent of the minor's decision to obtain an abortion.[174]

The Supreme Court has, by implication, elevated the interests of noncustodial parents in the activities of their children to a level which surpasses the combined interests of the custodial parent and pregnant minor. After *Hodgson*, a pregnant minor who gains the consent of one parent must either receive judicial approval of her decision or notify a person who may have a propensity for abuse toward the minor or the consenting parent.

The Court should have held the two-parent notification requirement, which provides no exception for divorce or desertion, unconstitutional per se, and thus forced the Minnesota legislature to enact a statute

168. *Id.* at 2949.

169. *Id.*

170. President Bush appointed David H. Souter and Clarence Thomas to replace Justices William J. Brennan and Thurgood Marshall, respectively. Although Justices Souter and Thomas have yet to articulate their views on a right to abortion, they will likely vote to further restrict the minor's fundamental right.

171. For a discussion of facial and as-applied challenges, see Lisa K. Richmond, Note, *The Art of Constitutional Bootstrapping A Minor's Right to Abortion: Hodgson v. Minnesota*, 34 S.D.L. REV. 158 (1989)(analysis of the Eighth Circuit's determination).

172. *Hodgson*, 648 F. Supp. at 769.

173. *Id.*

174. *See Hodgson*, 110 S. Ct. at 2955 (Marshall, J., dissenting).

consistent with those of the other thirty-five states that require only one-parent involvement in a minor's abortion decision. A single-parent notification requirement and an appended judicial bypass option better balance the legitimate interests of the state in protecting pregnant minors, the parents' interests in the control and well-being of their child and the minor's need for autonomy. Such balance is accomplished without forcing compliance to any elusive ideal of "the family" or exacerbating an otherwise traumatic experience.

The rights of children must develop into a concept widely accepted as a primary social value that influences social policy and planning at every level.[175] Moreover, the acceptance of the child as a person with rights independent from those of his or her parents admits fully to the child's individual human and legal rights.[176] Children should be encouraged to consult their parents, however, when they are faced with making decisions as fundamental to their future as the choice to obtain an abortion.[177] In this context, "[p]erhaps the term 'parental responsibility' should be substituted for 'parental rights,' emphasizing the social obligation and accountability rather than suggesting a kind of finality that cannot rationally be granted."[178] The important societal interests in protecting the welfare of our minors and encouraging communication between parent and child should only be reflected in abortion regulation that balances the competing interests of the state, parents and minor by providing a method, such as the judicial bypass alternative, to address exceptions from a constitutionally valid general rule.

James Shortall

175. Albert E. Wilkerson, *Children's Rights*, *in* THE RIGHTS OF CHILDREN: EMERGENT CONCEPTS IN LAW AND SOCIETY 305 (Albert E. Wilkerson, ed., 1973).

176. *Id.*

177. *Cf.* Richards, *supra* note 142, at 57.

> [T]he willingness to allow people to experiment, make their own mistakes, and learn from bearing the consequences is part of the education in self-awareness that rights cultivate. We allow adolescents their rights to privacy because it appears, in the contexts of contraception and abortion, that we thus better respect their potential for dignity. Any mistakes they make in exercising these rights not only do not appear irreparable but also appear to be of the kind that will better enable them to achieve a rational vision of their own good.

Id.

178. Wilkerson, *supra* note 175, at 305-06. *See also* Richards, *supra* note 142, at 57.

> [A]dults have a special responsibility for affording the kind of education that will enable children to exercise these rights wisely. It is cruel folly to extend the right of privacy to children and not, concomitantly, to ensure the kind of sexual education that will enable them to use these rights responsibly. Richards, *supra* note 142, at 57.

APPENDIX 1
Consent Statutes

State Statute	Parental Consent	Bypass	Other Requirements or Exceptions
ALA. CODE §§ 26.21-1 to 5 (Supp. 1990)	Parent or Legal Guardian	Yes	• Includes legislative purpose & findings; • Incest exception; • Medical Emergency Exception.
ALASKA STAT. § 18.16.010 (1991)	Parent or Guardian	No	
ARIZ. REV. STAT. ANN. § 36-2152 (West Supp. 1991)	Parent or Legal Guardian	Yes***	• Medical Emergency Exception.
CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1991)	Parent or Legal Guardian	Yes***	• Medical Emergency Exception.
COLO. REV. STAT. § 18-6-101 (1986)	Parent or Guardian	No	
CONN. GEN. STAT. ANN. § 19a-900 to 602 (West Supp. 1991)	None	N/A	• Counseling of Minor required; • Medical Emergency Exception.
DEL. CODE ANN. tit. 24, § 1790 (1987)	Parents or Guardians residing in household	No	• Consent of one parent or guardian if minor does not reside with either parent.
FLA. STAT. ANN. § 390.001 (West Supp. 1991)	Parent, Custodian or Legal Guardian	Yes***	
IND. CODE ANN. § 35-1-58.5 to 2.5 (Burns 1985 & Supp. 1991)	Parent or Legal Guardian	Yes	• Physician may petition court for waiver of notice; • Medical Emergency Exception.
KY. REV. STAT. ANN. § 311.732 (Michie/ Bobbs-Merril 1990)	Both Parents, if available, or Legal Guardian	Yes***	• Medical Emergency Exception.
LA. REV. STAT. ANN. § 1299.35.5 (West Supp. 1991)	Parent, Legal Guardian or Tutor	Yes	
MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983)	Parents	Yes	• Deceased/Divorced or Unavailable Parent Exception.
ME. REV. STAT. ANN. tit. 22, § 1597-A (West Supp. 1990)	Parent, Guardian or Adult Family Member	Yes	• Counseling Required.
MICH. COMP. LAWS ANN. §§ 722.902 to 909 (West Supp. 1991)	Parent or Legal Guardian	Yes	• Medical Emergency Exception.
MISS. CODE ANN. §§ 41-41-51 to 57 (Supp. 1990)	Parents or Legal Guardian	Yes***	• Medical Emergency Exception; • Divorced/Unavailable Parent Exception; • Incest/Rape Exception.
MO. ANN. STAT. § 188.028 (Vernon Supp. 1991)	Parent or Guardian	Yes	

N.M. STAT. ANN. § 30-5-1 (Michie 1991)	Parent or Guardian	No	
N.D. CENT. CODE §§ 14-02.1-03.1 to 04 (1991)	Parents or Legal Guardian	Yes	• Includes legislative purpose & intent; • Deceased/Divorced Parent Exception; • Medical Emergency Exception.
18 PA. CONS. STAT. ANN. § 3206 (Purdon 1983 & Supp. 1991)	Parent	Yes***	• Medical Emergency Exception; • Divorced/Unavailable Parent Exception; • Incest Exception.
R.I. GEN. LAWS § 23-4.7-6 (1989)	Parent	Yes	• Legal Guardian may consent if both parents are deceased or unavailable.
S.C. CODE ANN. § 44-41-30 to 37 (Law. Co-op. Supp. 1990)	Parent, Legal Guardian, Grandparent or Person acting *in loco parentis*	Yes	• Medical Emergency Exception; • Incest Exception.
S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986)	Parent or Person acting *in loco parentis*	No	
WASH. REV. CODE ANN. § 9.02.070 (West 1988)	Legal Guardian	No	
WIS. STAT. ANN. § 146.78 (West 1990)	None	N/A	• Parental notice encouraged, but not required.
WYO. STAT. § 35-6-118 (1988)	Parent or Guardian	Yes	• 48 hours Notice; • Medical Emergency Exception.

Generally, parental consent and notice statutes apply to pregnant minors who are under eighteen years of age, unmarried, and otherwise unemancipated. Statutes providing a judicial bypass option typically waive the parental involvement provision where the minor establishes either that she is mature and capable of giving informed consent or that the abortion is in her best interest.

*** Statute is currently enjoined from enforcement.

APPENDIX 2
Notification Statutes

State Statute	Parental Notice	Bypass	Other Requirements or Exceptions
ARK. CODE ANN. §§ 20-16-801 to 808 (Michie Supp. 1989)	Parents or Guardian	Yes	• 48 hours Notice; • Medical Emergency Exception; • Physical Abuse/Neglect Exception; • Incest/Rape Exception • No notice where parent has not been in contact with custodial parent for 1 year.
GA. CODE ANN. §§ 15-11-110 to 118 (Michie 1990)	Parent, Guardian or Person acting *in loco parentis*	Yes	• 24 hours Actual Notice; • 48 hours Constructive Notice; • Medical Emergency Exception.
IDAHO CODE § 18-609(6) (1987)	Parent(s)* or Legal Guardian	No	• Notice if possible; • 24 hours Notice.
ILL. ANN. STAT. ch. 38, ¶¶ 81-63 to 68 (Smith-Hurd Supp. 1991)	Parents or Legal Guardian	Yes***	• Divorce/Unavailable Parent Exception; • 24 hours Actual Notice; • Medical Emergency Exception; • Incest Exception.
MD. HEALTH-GEN. CODE ANN. § 20-103 (Supp. 1991)	Parent or Guardian	No**	• Reasonable Effort to Give Notice.
MINN. STAT. ANN. § 144.343 (1988)	Parents or Guardian	Yes	• 48 hours Notice; • Reasonably Diligent Effort; • Medical Emergency Exception; • Physical/Sexual Abuse Exception.
MONT. CODE ANN. § 50-2-107 (1991)	Parent, Custodian or Legal Guardian	No	
NEB. REV. STAT. § 28-347 (1989)	Parent or Legal Guardian	Yes	• 24 hours Actual Notice; • 48 hours Constructive Notice; • Medical Emergency Exception.
NEV. REV. STAT. ANN. § 442.255 (Michie 1986)	Custodial Parent or Guardian	Yes***	• Medical Emergency Exception.
OHIO REV. CODE ANN. § 2929.12 (Anderson 1987)	Guardian or Custodian		• 24 hours Actual Notice; • 48 hours Constructive Notice After Reasonable Effort; • Physical/Sexual & Emotional Abuse Exception.
TENN. CODE ANN. § 39-15-202(f) (1991)	Parent(s)* or Legal Guardians	No	• Medical Emergency Exception; • 2 day Notice.

UTAH CODE ANN. § 76-7-304 (1990)	Parent(s)* or Legal Guardians	No	• Notice, if possible.
W. VA. CODE § 16-2F-3 (1985)	Parent or Legal Guardian	Yes***	• 24 hours Actual Notice; • Reasonable Effort to Give Notice or 48 hours Constructive Notice; • Counseling Referral; • Medical Emergency Exception.

Generally, parental consent and notice statutes apply to pregnant minors who are under eighteen years of age, unmarried, and otherwise unemancipated. Statutes providing a judicial bypass option typically waive the parental involvement provision where the minor establishes either that she is mature and capable of giving informed consent or that the abortion is in her best interest without parental involvement.

* Idaho, Tennessee and Utah require a pregnant minor to notify her "parents" of her intent to obtain an abortion, but do not specify whether "parents" refers to either of the parents or both parents. Nor do these states specify whether notice to one parent would constitute constructive notice to the other parent. *Hodgson*, 110 S. Ct. at 2931 n.5.

** Maryland and West Virginia allow a physician to perform an abortion on a pregnant minor, without parental notification, where the physician determines—in his or her professional judgment—that the minor is either mature and capable of giving informed consent or where parental notification would not be in the minor's best interest. MD. HEALTH-GENERAL CODE ANN. § 20-103(c)(i) (Supp. 1991)(physician may also perform the abortion, without parental notice, where the physician determines that notice may lead to physical or emotioinal abuse of the minor); W. VA. CODE § 16-2F-3(c) (1985)(the physician waiving the notice requirement must not be associated professionally or financially with the physician who is to perform the abortion; physician's waiver is independent from the judicial bypass alternative of § 16-2F-4).

*** Statute is currently enjoined from enforcement.