Getting the Facts: Empirical Evaluation and the Constitutionality of Pre-Abortion Parental Notification Statutes

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I. INTRODUCTION

In Hodgson v. Minnesota and Ohio v. Akron Center for Reproductive Health, the Supreme Court upheld two state statutes requiring that, before undergoing abortions, minors must notify their parents or proceed through judicial hearings. In Hodgson, the Court held unconstitutional the portion of a statute requiring notification of both parents without providing the minor with the option of a judicial hearing in lieu of notifying both parents. In addition to revealing fundamental disagreements regarding the appropriate standard of review, the Court's fragmented opinions in the two cases reveal sharp differences in the use of social science evidence by the various Justices. Although differences among the Justices with regard to the use of social science evidence have surfaced before, these differences are particularly pronounced in Hodgson and Ohio v. Akron Center because of the large body of empirical data that was presented to the Court as relevant to a resolution of the constitutional issues. The Court's use of this data takes on added significance given the volatile nature of the abortion debate and given recent challenges to legislative action in the abortion area.

This Note examines the consideration given to empirical data in the two cases. Section II reviews the prior decisions in which the Supreme Court has addressed statutes mandating parental involvement in abortion decisions by minors. Section III discusses the wide divergence in reasoning that is apparent in the nine opinions filed in Hodgson and Ohio v. Akron Center. That section focuses on the Justices' consideration of
empirical data in determining the legitimacy of the state’s purpose, the burden of the statute and the statute’s ability to further the state’s purpose. Particularly evident is the contrast between Justice Marshall’s opinion in Hodgson, which relies on empirical data and an “as applied” test of constitutionality, and Justice Kennedy’s opinion in Hodgson, which relies on precedent, the “pages of human experience” and a “facial” test of constitutionality. Section IV suggests a method of constitutional analysis that takes into account empirical reality and data from the actual operation of state statutes. That section recommends more precise analysis of the relative interests of the minor, her parents and the state. Finally, section V advocates the use of research data to ensure more sensible and sensitive legislation and adjudication in the abortion area.

II. BACKGROUND


10. See infra notes 105-47 and accompanying text.
11. See infra notes 148-83 and accompanying text.
12. See infra notes 184-234 and accompanying text.
15. See infra notes 270-99 and accompanying text.
16. See infra notes 288-91 and accompanying text.
17. See infra notes 300-06 and accompanying text.
abortion. 20

In Planned Parenthood v. Danforth, 21 the Court’s first decision in this area, the Court acknowledged that a minor has a constitutional right to privacy that prevents the state from placing an undue burden on her access to an abortion. 22 Thus, the state may not constitutionally grant parents an absolute veto power over a minor’s decision. 23 The Court also made it clear, however, that a minor’s right could be limited in ways that would be unconstitutional if applied to adults. 24 A state statute regulating minors’ abortion decisions need only further a “significant” state interest rather than the more stringent “compelling” state interest required for a statute regulating the decisions of adults. 25 Because a state interest of a lesser degree was sufficient to support it, a statute regulating the abortion decisions of minors was permitted to be more restrictive than a statute regulating the abortion decisions of adults.

In Bellotti v. Baird (Bellotti II), 26 the Court again addressed the balance between the state’s interest in mandated parental involvement and the minor’s constitutional right to seek an abortion. 27 There, a Massachusetts statute was held unconstitutional because it allowed a judge to overrule a minor’s decision to abort even if she were found mature enough to give informed consent to the procedure and because it re-

20. For a discussion of these interests, see infra notes 105-47 and accompanying text.
22. Id. at 74 (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”). In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court held that the right to an abortion is founded on the right to privacy. Id. at 153.
23. Danforth, 428 U.S. at 74. The Missouri statute required unmarried minors to obtain the consent of a parent prior to an abortion. Id. at 72. The Court found that this statute gave a minor’s parent an absolute, and possibly arbitrary, veto over her decision, a power the Court found constituted an unconstitutional burden on the minor’s right to seek an abortion. Id. at 74.
24. Id. at 74 (“The Court... long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults.”).
25. Id. at 75 (there is “significant state interest in conditioning an abortion... that is not present in the case of an adult”). This relaxed standard “left the door open to consideration of other statutory requirements for parental involvement in minors’ abortion decisions.” Melton & Pliner, Adolescent Abortion: A Psycholegal Analysis, in ADOLESCENT ABORTION 1, 5 (G. Melton ed. 1986). For a discussion of the standard of review applicable to parental notification and consent statutes, see infra notes 75-97 and accompanying text.
27. Id. In an earlier decision, Bellotti I, 428 U.S. 132 (1976), the Court vacated a district court’s declaration that a Massachusetts parental consent statute was unconstitutional and ordered the district court to certify questions regarding the meaning of the statute to the Massachusetts Supreme Judicial Court. Id. at 151-62. After the Massachusetts court answered these questions, the statute was again declared unconstitutional in Baird v. Bellotti, 450 F. Supp. 997, 1006 (D. Mass. 1978), and the appeal became Bellotti II, 443 U.S. 622 (1979).
quired all minors seeking abortions to first seek parental consent. Bellotti II made it clear that by failing to allow minors to bypass parental involvement in abortion decisions, Massachusetts had created an impermissible burden on their right to privacy. Thus, the Court concluded that to meet constitutional requirements, a statute must provide for an alternative proceeding, allowing the minor to obtain an abortion without parental involvement. The plurality, against a vigorous protest, provided a blueprint for a statute that would withstand a constitutional challenge. The plurality stated that the statute must provide for an alternative proceeding in which the minor may either demonstrate that she is sufficiently mature to make a reasoned, informed decision, or that an abortion is in her best interests.

The framework developed in Bellotti II has served as a guide for both legislatures and courts. A number of states enacted parental notification or consent statutes based on the guidelines provided by the Bellotti II Court. The Court's decisions in City of Akron v. Akron Center for Reproductive Health and Planned Parenthood Association v. Ashcroft

28. Bellotti II, 443 U.S. at 651. As construed by the Supreme Judicial Court of Massachusetts, the statute in Bellotti II required parental notice in virtually every case where the parent was available. Id. at 651, 646. Also, the statute permitted "a judge to veto the abortion decision of a minor found to be capable of giving informed consent." Id. at 692.

29. Id. at 647. As noted earlier, the right to seek an abortion is grounded in the right to privacy. See supra note 22.


31. Id. at 643-44. The plurality opinion was authored by Justice Powell and joined by Chief Justice Burger and Justices Stewart and Rehnquist. Justice Stevens, joined by Justices Brennan, Marshall and Blackmun, declined to join the plurality opinion because he felt that in laying out the blueprint of a statute that would pass constitutional muster the Court was rendering an advisory opinion when it should wait for an actual "case or controversy." Id. at 656 n.4. Justice White dissented. Id. at 656.

32. Id. at 643-44.

33. Some commentators maintain that the Bellotti II framework has served as a straitjacket. See Pine, Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights, 156 U. PA. L. REV. 655, 694-97 (Bellotti II framework has been "constitutionalized" and courts have felt constrained to accept constitutionality of statutes that appear to conform to dicta in that decision). For a discussion of how the district court and appellate court in the Hodgson litigation felt bound by Bellotti II, see infra notes 59-62 and accompanying text.

34. At least 16 states have enacted parental consent statutes that provide the option of bypassing parents and seeking approval from a judge, and at least eight states have enacted parental notice statutes with a judicial bypass option. See 2 H. HOOD, I. Kavass & C. Galvin, ABORTION IN THE UNITED STATES: A COMPILATION OF STATE LEGISLATION 167-309 (1991).

A recent review found that 38 states had enacted laws requiring either parental consent or notice, with or without a judicial bypass option, of which 15 were enforced, 13 were enjoined and 10 were not enforced. Greenberger & Connor, Parental Notice and Consent for Abortion: Out of Step with Family Law Principles and Policies, 23 FAM. PLAN. PERSP. 31 (1991).

supported the application of the Bellotti II framework to parental consent statutes. In *Akron v. Akron Center*, the Court reviewed a local ordinance that required all minors under the age of fifteen to obtain parental consent prior to abortions. The ordinance was held unconstitutional because minors under the age of fifteen did not have an alternative means to obtain a determination that they were mature or that an abortion without parental approval was in their best interests. In *Ashcroft*, the Court upheld a Missouri parental consent statute patterned after the standards outlined in Bellotti II. The Missouri statute provided a pregnant minor who elected not to seek parental consent with an alternative avenue (i.e., petition to the juvenile court) whereby she could demonstrate that she was sufficiently mature to make the decision herself or, alternatively, that despite her immaturity, an abortion would be in her best interests.

Thus, these four cases indicated that a state could require a minor to obtain parental consent prior to an abortion only if the state provided for an alternative procedure whereby the minor could obtain judicial authorization of the abortion in lieu of parental consent. Judicial decisionmaking in such alternative procedures was to be conditioned on a determination of the minor's maturity, or if she was immature, her best interests.

37. For a discussion of how these cases supported Bellotti II, see infra notes 38-41 and accompanying text.

38. *Akron v. Akron Center*, 462 U.S. at 422 n.4 (quoting *AKRON, OHIO, CODIFIED ORDINANCES* § 1870.05 (1978)). The ordinance prohibited a physician from performing an abortion upon a minor pregnant woman under the age of fifteen (15) years without . . . (1) First having obtained the informed written consent of one of her parents or her legal guardian . . . or (2) The minor pregnant woman first having obtained an order from a court . . . that the abortion be performed or induced. *Id.* The Court held that the provision for a court order was not sufficient to meet the requirements of Bellotti II because it did not provide for a determination of the minor's maturity. *Id.* at 439-42.

39. *Id.* This decision explicitly supported the Bellotti II framework: "Akron’s ordinance does not create expressly the alternative procedure required by Bellotti II." *Id.* at 440.


41. The Missouri statute provided that the court shall for good cause: (a) Grant the petition for majority rights for the purpose of consenting to the abortion; or (b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or (c) Deny the petition, setting forth the grounds on which the petition is denied. *Id.* at 493. The Court's dicta in Bellotti II had suggested that a statute must provide for a bypass alternative in which it is determined whether the minor is mature enough to consent or if an abortion is in her best interests. *Bellotti II*, 443 U.S. at 643-44.

42. See *Akron v. Akron Center*, 462 U.S. 416; *Ashcroft*, 462 U.S. 476. For a discussion of Akron and Ashcroft, see supra notes 37-41 and accompanying text.

Prior to Hodgson and Ohio v. Akron Center, however, there was still some debate as to whether the same framework would be necessary to preserve the constitutionality of parental notification statutes, as opposed to parental consent statutes. In 1981, in H.L. v. Matheson, the Supreme Court held that a state may require parental notification without providing an alternative when an immature, unemancipated, dependent minor seeks an abortion, but the Court reserved judgment on whether state interests would justify requiring notification of the parents of a mature minor seeking an abortion. The Supreme Court had another opportunity to evaluate the constitutionality of a parental notification statute in 1987. In that case, Zbaraz v. Hartigan, the Court affirmed, without opinion, the Seventh Circuit's decision to uphold in part and invalidate in part an Illinois parental notification statute. The Seventh Circuit had upheld the provisions of the statute that conformed to Bellotti II, suggesting that parental notification statutes must meet the

44. Justice Stevens said in concurrence in Bellotti II that neither that case nor Danforth “determine[d] the constitutionality of a statute which does no more than require notice to the parents.” Bellotti II, 443 U.S. at 654 n.1 (Stevens, J., concurring in judgment). He reiterated this view in H.L. v. Matheson, 450 U.S. 398, 421 (1981) (Stevens, J., concurring in judgment). However, in another concurring opinion in Matheson, Justice Powell expressed the view that Bellotti II also controlled parental notification statutes. See id. at 420 (Powell, J., concurring). For a discussion of the debate over this issue, see Lindsey, supra note 18.


46. Id. at 406. The statute required the physician to “[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor . . . .” Id. at 400. Appellant contended that the statute was “overbroad in that it [could] be construed to apply to all unmarried minor girls, including those who [were] mature and emancipated.” Id. at 405. The Court did not reach that question because the appellant “did not allege or proffer any evidence that either she or any member of her class [was] mature or emancipated.” Id. at 406 (footnote omitted). Therefore, the Court only addressed

the facial constitutionality of a statute requiring a physician to give notice to parents if possible . . . . when: the girl is living with and dependent on her parents, . . . . she is not emancipated by marriage or otherwise, and . . . . she has made no claim or showing as to her maturity or as to her relation with her parents.

Id. at 407. The Court held that “[a]s applied to immature and dependent minors, the statute plainly serves . . . . important considerations . . . . In addition, as applied to the class, the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician.” Id. at 411. At another point, the Court stated that “[a]s applied to that class properly before us, the statute plainly serves important state interests, is narrowly drawn to protect only those interests and does not violate any guarantees of the Constitution.” Id. at 413; cf. id. at 438-53 (Marshall, J., dissenting).

47. 108 U.S. 479 (1987), aff’d mem., 763 F.2d 1532 (7th Cir. 1985).

48. Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985), aff’d mem., 484 U.S. 171 (1987). The court of appeals held that the 24 hour waiting period imposed by the statute was unconstitutional. Id.
Bellotti II criteria to the same extent as parental consent statutes.\footnote{49. Id. Appellees "d[id] not contest the sufficiency of the procedures . . . for making the determination that the minor is mature or that, if the court finds that she is immature, an abortion is nonetheless in her best interests," but rather, the dispute was whether "the procedures were unconstitutional because they failed to ensure the expeditious and confidential disposition of the proceedings required by Bellotti II," \textit{Id.} at 1539. The court of appeals enjoined enforcement of the statute until the Illinois Supreme Court enacted "rules assuring the expeditious and confidential disposition of the judicial hearings which allowed a minor . . . to forego . . . notice." \textit{Id.} at 1545.}

\textit{Hodgson} and \textit{Ohio v. Akron Center} presented the Court with the opportunity to resolve the debate over whether a bypass mechanism is necessary to preserve the constitutionality of a notification statute. More importantly for this analysis, \textit{Hodgson} provided the Court with the opportunity to consider accumulated data on the actual benefits and burdens of statutes enacted to conform to the \textit{Bellotti II} guidelines.\footnote{50. At the trial level, extensive data was collected on the operation of the Minnesota statute. \textit{Hodgson v. Minnesota}, 648 F. Supp. 756, 762-70 (D. Minn. 1986). For a discussion of this data, see infra notes 117-18, 148-49 & 184 and accompanying text.} The earlier cases had not addressed the "as applied" or "in operation" constitutionality of state statutes mandating parental involvement or requiring waiting periods.\footnote{51. The constitutionality of notice statutes "as applied" was specifically left open by Justice Stevens in \textit{Bellotti II} where he stated that, in actual application, state regulations entailing parental consent or notification coupled with a judicial bypass procedure may create undue and unforeseen burdens on a minor that the Court failed to anticipate. \textit{Bellotti II}, 443 U.S. at 655 (Stevens, J., concurring in judgment).} Although some "research" literature had been cited in prior cases, the \textit{Hodgson} Court was presented with data that was not available at the time those cases were decided.\footnote{52. In \textit{H.L. v. Matheson}, Chief Justice Burger's majority opinion cited two articles from psychiatric literature as support for the proposition that "the emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under 18 than in adults." \textit{Matheson}, 450 U.S. at 411 n.20. As one commentator has noted, both articles were published prior to the Court's decision in \textit{Roe v. Wade}, when elective abortions were difficult to obtain. Bersoff, \textit{Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science}, 37 VILL. L. REV. — (forthcoming Nov. of 1992). The first article limited its study to therapeutic}
presented the Court with an opportunity to review the constitutionality of imposing requirements in addition to those suggested in Bellotti II.\(^5\)

 Much of the data that had been accumulated on the burdens and benefits of statutes mandating parental involvement or requiring waiting periods was relevant to the constitutionality of the Ohio statute at issue in Ohio v. Akron Center, but no data was available regarding the impact of some provisions of that statute.\(^5\)

III. DISCUSSION

A. Procedural Background and Holdings

1. Proceedings in Lower Federal Courts

The Minnesota statute at issue in Hodgson provided, in subdivision 2, that no abortion was to be performed on an unemancipated minor until at least forty-eight hours after both of her parents had been notified.\(^5\) The statute did allow for certain exceptions to the notice requirement.\(^5\) Additionally, another part of the statute provided that if a court enjoined the enforcement of subdivision 2, notice to both parents was required unless a court of competent jurisdiction ordered the abortion to proceed without notice upon proof by the minor that she was “mature and capable of giving informed consent” or that an abortion abortions—abortions where the woman’s health was endangered by continuation of the pregnancy. \textit{Id.} The authors of that study admitted that it was sociologically and methodologically skewed. \textit{Id.} The second article consisted of “unsystematic psychoanalytic impressions of a sample of adolescents who carried their pregnancies to term.” \textit{Id.}

Justice Marshall’s dissenting opinion in Matheson cited a large number of sources from medical and mental health literature. \textit{Matheson}, 450 U.S. at 438 nn.24-26 After the Matheson decision in 1980, more methodologically sound research was conducted that was directly relevant to the questions faced by the Hodgson Court. See infra note 117. In addition, data was collected on the actual operation of statutes mandating parental involvement and providing for judicial bypass mechanisms. See infra notes 117-18, 148-49 & 184 and accompanying text.

53. For a discussion of these additional requirements, see infra notes 63-65 and accompanying text.

54. No data was available because the Ohio statute had not yet been put into operation. See infra note 67 and accompanying text.

55. MINN. STAT. § 144.343(2)-(7) (1988). Subdivision 2 provides: “Notwithstanding the provisions of section 13.02, subdivision 8, 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.” \textit{Id.}

56. \textit{Id.} § 144.343(4). Subdivision 4 provides that the two-parent notice requirement is mandatory unless: (1) a physician certifies that an immediate abortion is necessary to prevent the woman’s death and there is insufficient time to provide the required notice; (2) both of her parents have consented in writing; or (3) the woman declares that she is a victim of parental abuse or neglect, in which event notice of her declaration must be given to the proper authorities. \textit{Id.}
without notice to both parents was in her best interests. Two days before the statute's effective date, a group consisting of doctors, clinics, pregnant minors and the mother of a pregnant minor filed suit in the United States District Court for the District of Minnesota, alleging that the statute violated the due process and equal protection clauses of the fourteenth amendment. The court declared the statute unconstitutional and enjoined its enforcement. The United States Court of Ap-

57. Id. § 144.343(6). Subdivision 6 provides:
If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by a judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision: . . .

(c)(i) 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 pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, 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.

Id.

It should be noted that in reviewing a parental consent statute, the Bellotti II Court stated that if the minor was not capable of making the abortion decision independently, the judge should determine in the alternative proceeding whether the abortion is in the minor's best interests. Bellotti II, 443 U.S. at 644. The Minnesota parental notification statute requires the judge to determine whether an abortion without notice to both parents is in the minor's best interest. MINN. STAT. § 144.343(6) (1988).

58. Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986). "On July 31, 1981, the court temporarily restrained enforcement of subdivision 2 of the statute, but denied plaintiff's motion for an order temporarily restraining enforcement of subdivision 6." Id. at 760. "On March 22, 1982, the court preliminarily enjoined subdivision 2 but denied a preliminary injunction of subdivision 6." Id. "By virtue of those two rulings, the parental notification requirement and the judicial bypass option of subdivision 6 went into effect on August 1, 1981," and remained in effect throughout the trial. Id.

59. Id. at 781. The district court held that without the judicial bypass option of subdivision 6, the Minnesota statute would unduly burden a minor's right to seek an abortion. Id. at 773. It found that with the judicial bypass option, the statute imposed a substantial burden that was "not justified by the state's interest in encouraging intra-family communication and protecting immature minors because [the statute] fails to further either of those interests in any meaningful way." Id. at 776. Nevertheless, the court felt bound by the Supreme Court's holdings in Bellotti II and Ashcroft. Id. at 776. The district court opined that "it was not [its] place to determine whether the facts actually demonstrated at trial comport or conflict with any assumptions the Supreme Court may have made," but rather, "[t]he Supreme Court directs that this court's inquiry be limited instead to an issue purely of statutory construction: whether Minnesota provides a judicial alternative that is consistent with established legal standards." Id. at 776-77. The court held that the Minnesota statute satisfied those standards, and
peals for the Eighth Circuit, sitting en banc, reversed.\textsuperscript{60} Although the court rejected the State’s contention that the two-parent notice requirement of subdivision 2 was constitutional without any bypass procedure, it held that subdivision 6 was valid and that its bypass procedure saved the statute as a whole.\textsuperscript{61} The court also rejected the argument that the forty-eight hour waiting period imposed a significant burden on the minor’s abortion right.\textsuperscript{62}

The Ohio statute at issue in \textit{Ohio v. Akron Center} made it a crime for a person to perform an abortion on an unmarried, unemancipated minor, unless: (1) the person performing the abortion had given twenty-four hours actual notice to the minor’s parent or guardian; (2) one of the minor’s parents or her guardian had consented in writing; (3) a court order had been issued authorizing the abortion in the absence of parental notification; or (4) the court had constructively authorized the minor to consent to the abortion through the court’s inaction.\textsuperscript{63} To obtain a judicial bypass of the notice requirement, the minor was required to present clear and convincing proof that she had sufficient maturity and information to make the abortion decision herself, that one of her parents had engaged in a pattern of physical, emotional or sexual abuse against her, or that notice was not in her best interest.\textsuperscript{64} In addition, the statute allowed the physician to give constructive notice if actual notice therefore, it upheld the constitutionality of Minnesota’s notification and bypass requirements. \textit{Id.} at 777.

The district court, however, found that the provision of the Minnesota statute requiring that both parents be notified, even when the nuclear family unit either had broken apart or never formed, failed to further the state’s interest and was therefore unconstitutional. \textit{Id.} at 778. It also found the 48 hour delay requirement unconstitutional because it was “unreasonable” and unduly burdened the pregnant minor. \textit{Id.} at 779-80. The court found that the 48 hour delay provision was severable, but that the requirement that both parents be notified was not; it therefore enjoined the state from enforcing the statute in its entirety. \textit{Id.} at 780-81.

\textsuperscript{60} Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988). A panel of the court of appeals had initially affirmed the judgment of the district court, but the court granted a rehearing en banc. \textit{Id.} at 1453.

\textsuperscript{61} \textit{Id.} at 1457-62. The court of appeals stated that “[t]he Supreme Court has ... recognized as a matter of law that parental notice or consent requirements do not unconstitutionally burden a minor’s abortion right when an appropriate judicial bypass is in place.” \textit{Id.} at 1459 (emphasis added). The court concluded that the statute complied with the standards set forth in \textit{Bellotti II} and that, therefore, it was bound to hold the statute constitutional. \textit{Id.} at 1462. The court opined that any added burden imposed by the requirement that both parents (as opposed to one parent) be notified was negated by the judicial bypass mechanism. \textit{Id.} at 1463.

\textsuperscript{62} \textit{Id.} at 1465 (concluding that “delay requirement as a part of the overall statutory scheme [was not] significant burden in light of Minnesota’s interest in ensuring that notification results in parental involvement”).

\textsuperscript{63} \textbf{Ohio REV. CODE ANN.} § 2919.12 (Anderson 1990) (as amended by Ohio Amended Substitute House Bill 319).

\textsuperscript{64} \textbf{Ohio REV. CODE ANN.} § 2151.85 (Anderson 1990) (as enacted by Ohio Amended Substitute House Bill 319).
to the parent proved impossible “after a reasonable effort”; required the minor to file a bypass complaint in the juvenile court on prescribed forms; mandated expedited bypass hearings, decisions and appellate review; and specified that both courts must maintain the minor’s anonymity and the confidentiality of all papers. Shortly before the statute’s effective date, the appellees filed a facial challenge to the statute’s constitutionality in the United States District Court for the Northern District of Ohio, which ultimately issued an injunction preventing the statute’s enforcement. The United States Court of Appeals for the Sixth Circuit affirmed, finding six constitutional defects among the various provisions of the statute.

2. *Supreme Court Holdings*

In *Hodgson*, Justices Brennan, Marshall, Blackmun, Stevens and O’Connor held that subdivision 2 of the Minnesota statute, requiring two-parent notification with no provision for a judicial bypass procedure, was unconstitutional. Chief Justice Rehnquist and Justices White, O’Connor, Scalia and Kennedy declared that subdivision 6, providing for a judicial bypass procedure in the event that subdivision 2 was invalidated, was constitutional. The Court also upheld the constitutionality of the forty-eight hour waiting period. Four separate opinions were filed in the case, with a confusing array of partial dissents and concurrences.

65. *Id.* The *Bellotti II* plurality had stated that judicial bypass procedures must provide for expedited hearings and must allow the minor to remain "anonymous." *Bellotti II*, 443 U.S. at 644.

66. Appellees included an abortion facility, one of its doctors, and an unmarried, unemancipated, minor woman seeking an abortion at the facility. *Ohio v. Akron Center*, 110 S. Ct. at 2978.


68. *Ohio v. Akron Center for Reproductive Health*, 854 F.2d 852 (6th Cir. 1988). These defects related to the physician’s personal obligation to give notice to the minor’s parents, the burdensome pleading requirements, the clear and convincing evidence standard, the confidentiality provisions, the provision for expedited procedures and the constructive authorization provisions. *Id.* at 861-69.

69. *Hodgson*, 110 S. Ct. at 2945-47. Thus, the Court indirectly upheld the application of the *Bellotti II* framework to notification statutes, at least when notification must be given to both parents.

70. *Id.* at 2951 (O’Connor, J., concurring in part and concurring in judgment in part); *Id.* at 2970 (Kennedy, J., concurring in judgment in part and dissenting in part).

71. Justice Kennedy wrote for a plurality in declaring the 48-hour waiting period constitutional. *Id.* at 2969 (Kennedy, J., concurring in judgment in part and dissenting in part). Justice Stevens, in a portion of his opinion joined only by Justice O’Connor, also found the 48-hour waiting period constitutional. *Id.* at 2944 (Stevens, J., joined by O’Connor, J.).

72. The various parts of Justice Stevens’ opinions had differing degrees of support from the other Justices. First, in parts I, II, IV and VII, Justice Stevens...
In *Ohio v. Akron Center*, Chief Justice Rehnquist and Justices White, Stevens, O'Connor, Scalia and Kennedy concluded that, on its face, the Ohio statute did not impose an unconstitutional burden on a minor seeking an abortion. 73

held for the Court that subdivision 2 of the Minnesota statute violated the Constitution insofar as it required two-parent notification without providing a judicial bypass alternative. Justices Brennan, Marshall, Blackmun and O'Connor joined these parts of Justice Stevens' opinion. These portions of the opinion will be cited without a parenthetical phrase following, because they are part of the majority opinion. Next, parts V and VI of Justice Stevens' opinion, which described the various interests at stake and upheld the constitutionality of the 48-hour notification requirement, were joined only by Justice O'Connor. Citations to these parts of his opinion will be followed by the following parenthetical phrase: (Stevens, J., joined by O'Connor, J.). Third, part III of Justice Stevens' opinion discussed the nature of the minor's interest and was joined only by Justice Brennan. Citations to this part of Justice Stevens' opinion will be followed by the following parenthetical phrase: (Stevens, J., joined by Brennan, J.). Finally, in part VIII of his opinion, Justice Stevens dissented from the holding that the two-parent notification requirement was made constitutional by the provision of a judicial bypass option in subdivision 6 of the Minnesota statute. Citations to this part of Justice Stevens' opinion will be followed by the following parenthetical phrase: (Stevens, J., dissenting in part).

Justice O'Connor concurred that two-parent notice without a judicial bypass provision was unconstitutional, and joined in that part of Justice Stevens' opinion. She also concurred in the judgment that two-parent notice with a judicial bypass provision was constitutional. Citations to her opinion will therefore be followed by the following parenthetical phrase: (O'Connor, J., concurring in part and concurring in judgment).

Justice Marshall concurred that two-parent notice without bypass was unconstitutional and joined in that part of Justice Stevens' opinion. He dissented from the holdings that two-parent notice with a bypass provision was constitutional and that the 48-hour notice provision was constitutional. His opinion was joined by Justices Brennan and Blackmun. Citations to Justice Marshall's opinion will be followed by the following phrase: (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).

Justice Kennedy concurred in the judgment that two-parent notice with bypass was constitutional, concurred in the judgment that 48-hour notice was constitutional and dissented from the holding that two-parent notice without bypass was unconstitutional. His opinion was joined by Chief Justice Rehnquist and Justices White and Scalia. Citations to his opinion will be followed by the following phrase: (Kennedy, J., concurring in judgment in part and dissenting in part).

Justice Scalia believed that the Minnesota statute was constitutional with or without a judicial bypass provision and therefore, citations to his opinion will be followed by the following phrase: (Scalia, J., concurring in judgment in part and dissenting in part).

73. *Ohio v. Akron Center*, 110 S. Ct. at 2977-83. Justice Kennedy wrote for the majority in parts I, II, III and IV of his opinion; part V of his opinion was joined by Chief Justice Rehnquist and Justices White and Scalia. Id. at 2977-84. Justice Scalia filed a concurring opinion. Id. at 2984. Justice Stevens wrote an opinion concurring in part and concurring in the judgment. Id. at 2994-95. Justice Blackmun filed a dissenting opinion that was joined by Justices Brennan and Marshall. Id. at 2984-94.
B. Minor's Interest and Standard of Review

In Hodgson, the Court reaffirmed the holding that minors have a constitutionally protected interest in making the decision to have an abortion. The majority opinions in Hodgson and Ohio v. Akron Center, however, applied a different standard of review than had been applied in prior cases. Earlier cases had suggested that statutes impinging on a minor’s right to an abortion should be subject to a “significant state interest test” or “intermediate scrutiny.” The opinions in Hodgson and

74. As stated by Justice Marshall, the Hodgson decision “reaffirms the vitality of Roe, as five Justices have voted to strike down a state law restricting a woman’s right to have an abortion.” Hodgson, 110 S. Ct. at 2952 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).

There was no consensus among the Justices, however, as to the correct characterization of the minor's constitutionally protected interest. In a section of his opinion joined only by Justice Brennan, Justice Stevens simply stated that “the constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women.” Id. at 2937 (Stevens, J., joined by Brennan, J.). Justice O'Connor characterized the interest as a “liberty interest.” Id. at 2949 (O'Connor, J., concurring in part and concurring in judgment). Justice Marshall characterized the pregnant minor's interest as a “fundamental right.” Id. at 2951-52 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). In writing for the majority in Ohio v. Akron Center, Justice Kennedy stated, “[w]e do not need to determine whether a statute that does not accord with [Danforth, Bellotti II, Matheson, Ashcroft and Akron v. Akron Center] violates the Constitution, for we conclude that H.B. 319 is consistent with them.” Ohio v. Akron Center, 110 S. Ct. at 2978. Therefore, he did not directly address the characterization of a minor's constitutional right to seek an abortion.

75. For a discussion of the standard of review applied in the majority opinions, see infra notes 82-97 and accompanying text.

76. In Roe v. Wade, the Court held that regulation of an adult woman’s choice to abort could be justified only by a “compelling state interest,” and that “legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.” 410 U.S. 113, 155 (1973). In Planned Parenthood v. Danforth, the Court held that state statutes regulating a minor's decision over an abortion need only further a “significant” state interest rather than a “compelling” state interest. 428 U.S. 52, 75 (1976) (requiring “significant state interest in conditioning an abortion...that is not present in the case of an adult”). See also Carey v. Population Servs. Int’l, 431 U.S. 678, 693 n.15 (1977) (stating that lesser scrutiny applies to regulation of activities of minors because minors possess diminished capacity for making important decisions and commenting that “significant” state interest test is less rigorous than “compelling” state interest test applicable to restraints on privacy rights of adults). In Bellotti II the Court declared that if a “significant” state interest is present, then “the constitutional rights of children cannot be equated with those of adults.” 443 U.S. 622, 634 (1979). In H.L. v. Matheson, the Court upheld the constitutionality of a parental notification statute because it “plainly serve[d] important state interests [and] [was] narrowly drawn to protect only those interests...” 450 U.S. 398, 413 (1981). In Akron v. Akron Center, the majority of the Court maintained the distinction of demanding that a state possess a “compelling” interest to regulate an adult’s right to an abortion while requiring only a “significant” interest to restrict the same right in the case of a minor. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427-28 n.10 (1983).

Requiring the state to demonstrate a significant interest appears to repre-
Ohio v. Akron Center, however, covered the full spectrum. At one extreme was Justice Marshall, who stated that “[n]either the scope of a woman’s privacy right nor the magnitude of a law’s burden is diminished because a woman is a minor.” 77 Justice Marshall thus favored the same strict scrutiny test, “requiring a State to show that such a law is narrowly drawn to serve a compelling interest,” that he would apply to statutes regulating an adult woman’s abortion decision. 78 At the other extreme was Justice Scalia, who asserted that “the Constitution contains no right to abortion,” 79 and hence would not subject legislation regulating abortion to judicial review. 80 Justice Blackmun’s view fit between the two extremes, favoring a “significant state interest test” or “intermediate scrutiny.” 81

None of these positions, however, was embraced by a majority of the Court. In delivering the Court’s opinion in Hodgson holding unconstitutional the portion of the Minnesota statute requiring notice to both parents of the pregnant minor without a bypass procedure, Justice Stevens stated that it “[did] not reasonably further any legitimate state interest.” 82 He reiterated this standard in his concurring opinion in Ohio sent an intermediate level of scrutiny, greater than the “rational relation” test and less than the “compelling state interest” test. Lindsey, supra note 18, at 889 n.49. The district court in Hodgson applied an intermediate scrutiny, significant state interest test. Hodgson v. Minnesota, 648 F. Supp. 756, 771-72 (D. Minn. 1986). The concept of intermediate scrutiny is not new; it consistently has been employed in gender discrimination cases under the equal protection clause. See, e.g., Craig v. Boren, 429 U.S. 190 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

77. Hodgson, 110 S. Ct. at 2952; see also Matheson, 450 U.S. at 442 n.32 (Marshall, J., dissenting) (“Although it may seem that the minor’s privacy right is somehow less fundamental because it may be overcome by a ‘significant state interest,’ the more sensible view is that the state interests inapplicable to adults may justify burdening the minor’s right.”).

78. Hodgson, 110 S. Ct. at 2952 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part). Justice Marshall has consistently viewed this as the proper standard. See, e.g., Matheson, 450 U.S. at 441.


80. Justice Scalia advocates deference to the legislature in this area. Ohio v. Akron Center, 110 S. Ct. at 2984 (Scalia, J., concurring).

81. Id. (Blackmun, J., dissenting). Justice Blackmun stated that [a]lthough the Court “has recognized that the State has somewhat broader authority to regulate the activities of children than of adults,” in doing so, the State nevertheless must demonstrate that there is a “significant state interest in conditioning an abortion . . . that is not present in the case of an adult.”

Id. (quoting Danforth, 428 U.S. at 74-75 (emphasis added in Justice Blackmun’s opinion)). Justice Blackmun’s standard is the one most firmly rooted in the Court’s prior opinions. For a discussion of the dominance of the significant state interest standard, see supra note 76.

82. Hodgson, 110 S. Ct. at 2945.
In delivering the plurality opinion in *Hodgson* that held subdivision 6 to be constitutional, Justice Kennedy never clearly stated what standard should be applied. He did state that the statute "represents a permissible, reasoned attempt to preserve the parents' role in a minor's decision to have an abortion without placing any absolute obstacles before a minor who is determined to elect an abortion." In his opinion in *Ohio v. Akron Center*, Justice Kennedy concluded that "[t]he Ohio statute . . . does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion[,] . . . [and] the legislature acted in a rational manner in enacting [the Ohio statute]."

Justice Kennedy's language suggests that he was using the standard that has been advocated consistently by Justice O'Connor. In *Hodgson*, Justice O'Connor, who was the swing vote in declaring subdivision 2 unconstitutional and subdivision 6 constitutional, reiterated this standard by quoting her dissenting opinion from *City of Akron v. Akron Center for Reproductive Health*: "If the particular regulation does not 'unduly burden[n]' the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." Due to the changing composition of

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83. *Ohio v. Akron Center*, 110 S. Ct. at 2993 (Stevens, J., concurring in part and concurring in judgment) ("The State may presume that, in most . . . applications, the statute will reasonably further its legitimate interest in protecting the welfare of its minor citizens.").

84. Justice Kennedy initially referred to "applying the standards established in our prior decisions to the case at hand," but he did not directly state those standards. *Hodgson*, 110 S. Ct. at 2966 (Kennedy, J., concurring in judgment in part and dissenting in part).

85. *Id.* at 2969 (Kennedy, J., concurring in judgment in part and dissenting in part). At another point, Justice Kennedy stated that the Minnesota law "does not place an absolute obstacle before any minor seeking to obtain an abortion, and it represents a considered weighing of the competing interests of minors and their parents." *Id.* (Kennedy, J., concurring in judgment in part and dissenting in part). He also quoted Justice O'Connor's dissenting opinion from *Akron v. Akron Center*: "It cannot be doubted that as long as a state statute is within 'the bounds of reason and [does not] assum[e] the character of a merely arbitrary fiat . . . [then] [t]he State . . . must decide upon measures that are needful for the protection of its people . . . .'" *Id.* (Kennedy, J., concurring in judgment in part and dissenting in part) (quoting *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting)) (citation omitted).

86. *Ohio v. Akron Center*, 110 S. Ct. at 2983 (Kennedy, J., joined Chief Justice Rehnquist and Justices White and Scalia). This portion of Kennedy's opinion was not endorsed by a majority of the Court.


88. *Hodgson*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring in part and concurring in judgment in part) (alteration by Court) (quoting *Akron v. Akron*
the Court, Justice O'Connor in 1989 became the swing vote in cases reviewing abortion legislation, and thus, her two stage standard of review became outcome determinative. She has advocated an initial determination of whether the state regulation "unduly burdens" the pregnant woman's choice. If the regulation is "unduly burdensome," then the "heightened scrutiny" standard of review should be applied. Otherwise, the Court should limit itself to a determination of whether the regulation "rationally relates to a legitimate state purpose.

In short, it appears that in declaring that the Minnesota statute was unconstitutional if it lacked a bypass procedure, the Court was using a

Center, 462 U.S. at 453 (O'Connor, J., dissenting)). Justice O'Connor characterized the right at stake as a "liberty interest" and stated that the minor's liberty interest was different from the adult's in that “[p]arental notice and consent are qualifications that typically may be imposed by the state on the minor's right to make important decisions.” Id. at 2949 (O'Connor, J., concurring in part and concurring in judgment in part) (quoting Bellotti II, 443 U.S. 622, 640-41 (1979)).

89. L. Tribe, Abortion: The Clash of Absolutes 23-24 (1990) ("With four apparent votes to overturn Roe and four to uphold it, Justice O'Connor became the swing vote on the permissibility of state abortion legislation.").

90. The composition of the Court changed again in 1990 when Justice Brennan retired and Justice Souter was appointed to the Court. In Webster, four Justices upheld a Missouri statute on the ground that the right to decide whether to terminate a pregnancy merits no special protection from the government. L. Tribe, supra note 89, at 23. Because Justice Brennan was not one of the four, Justice Souter could become a fifth vote against protecting the right to choose an abortion. The fifth vote also could be provided by Justice Thomas who in 1991 replaced Justice Marshall on the Court.

In a recent decision, the United States Court of Appeals for the Third Circuit stated that Justice O'Connor's standard was the standard for lower federal courts to apply when reviewing abortion legislation. Planned Parenthood v. Casey, 947 F.2d 682, 691-98 (3d Cir. 1991), cert. granted, 60 U.S.L.W. 3498 (1992).


92. This position was explained more fully in Thornburgh: [J]udicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests [in ensuring maternal health and in protecting potential life] with heightened scrutiny reserved for instances in which the State has imposed an "undue burden" on the abortion decision. Id. (O'Connor, J., dissenting); cf. Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986) (district court squarely rejecting idea that "undue burden" is necessary to trigger heightened scrutiny).

93. Hodgson, 110 S. Ct. at 2949-50 (quoting Akron v. Akron Center, 462 U.S. at 453 (O'Connor, J., dissenting)). The rational relation standard is the lowest standard used by the Court and the easiest for the state to overcome. L. Tribe, supra note 89, at 10-11 (noting that "choice of which test to apply usually resolves the case").
standard of review akin to the second part of Justice O'Connor's standard. Although Justice Stevens used the language "reasonably further" rather than "rationally relate," the two phrases are generally viewed as equivalent. In applying this "rational basis test," however, the Court engaged in a more intense scrutiny of the statute than is traditional when the rational basis test applies. Such focused scrutiny under the rational basis test has been called "rational means scrutiny with bite." In upholding the constitutionality of the Minnesota statute with a judicial bypass procedure, and in upholding the constitutionality of the Ohio statute, a majority of the Court determined that the statutes did not "unduly burden" the pregnant minor's choice and were "rationally related to a legitimate state purpose."

C. Evaluating the Statutes

1. The Minnesota Statute

Even apart from differences regarding the appropriate standard of review, there was wide disagreement among the Justices as to the proper analytic approach to be used in examining the constitutionality of the Minnesota statute. Specifically, Justice Kennedy favored a facial constitutional analysis and relied on judicial precedent, history and the "pages of human experience." In contrast, Justice Marshall analyzed


95. There are "less than a handful" of recent cases in which the Court has overturned legislation while applying the rational basis test. Turkington, Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Crisis, 32 Vill. L. Rev. 1299, 1310 n.33 (1987). The "rationality" that the Court has required has been said to be a "species of hypothetical rationality in which the Court imagines whether there is any state of affairs under which the legislative decision could serve the asserted purpose." L. Tribe, supra note 94, § 16-2 at 1440. In spite of this low level of scrutiny, the Court held that a portion of the Minnesota statute was unconstitutional.


would have the Court "assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture," and "would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing."

Id. (quoting Gunther, supra, at 1.)

97. For a discussion of the Court's adoption of this standard, see supra notes 85-93 and accompanying text.

98. For a discussion of the disagreement among the Justices, see infra notes 148-234 and accompanying text.

99. See, e.g., Hodgson, 110 S. Ct. at 2968-69 (Kennedy, J., concurring in judg-
the burdens and benefits of the statute "as applied," and supported his analysis with empirical data and the district court's findings of fact. Justice Stevens, in announcing the decision of the Court, took an intermediate approach, as did Justice O'Connor. Justice Scalia merely reiterated his belief that the Court has no business reviewing the decisions of the legislature regarding abortion.

In evaluating the constitutionality of the Minnesota statute, it was necessary for the Court to examine: (1) the legitimacy of the state purposes or interests; (2) the degree to which the statute burdened the minor's right to privacy; and (3) the degree to which the statute furthered the state's interests. These examinations are particularly necessary given Justice O'Connor's standard, but the same general framework could be used with any of the standards used by the Court. For a discussion of the different standards, see supra notes 75-97 and accompanying text. For example, one could examine whether the state's interest is "compelling" rather than whether its purpose is "legitimate" and whether the statute is "narrowly tailored to serve the state's interest" rather than whether it "reasonably relates" to the state's interest.

Although the standard used by the Court refers to legitimate state "purposes," the Justices focused on the state "interests" that the statutes purportedly served. The plurality in Bellotti II suggested three reasons that might permit states to infringe upon a minor's privacy and liberty in ways that would be unconstitutional if applied to adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in childrearing." Bellotti II, 463 U.S. 622, 634 (1979).

In Hodgson, the district court found that: The Minnesota legislature had several purposes in mind when it amended Minn. Stat. § 144.343 in 1981. The primary purpose was to protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies. En-
Hodgson as justifications for the Minnesota statute fit into two broad categories:\textsuperscript{106} 1) the state’s interest in the welfare of the child\textsuperscript{107} and 2) the state’s interest in protecting the rights of the parents in the upbringing of their child.\textsuperscript{108} Although the Court was presented with a substantial body of empirical data that was relevant to the validity of these interests,\textsuperscript{109} the Court’s use of this data was haphazard at best.\textsuperscript{110} Justice Stevens treated the family’s right to privacy as a third interest, distinct from the others.

Courting such discussion was intended to achieve several salutory results. Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor’s medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor’s psychological well-being and thus mitigate adverse psychological sequelae that may attend the abortion procedure.

Hodgson v. Minnesota, 648 F. Supp. 756, 765-66 (D. Minn. 1986). The district court also found that the legislature was motivated by “a desire to deter and dissuade minors from choosing to terminate their pregnancies.” Id. at 766. It found that “[t]estimony before a legislative committee considering the proposed notification requirement indicated that influential supporters of the measure hoped it ‘would save lives’ by influencing minors to carry their pregnancies to term rather than aborting.” Id.

The interest in “potential life” is presumably no greater in the case of a pregnant minor than it is in the case of an adult. Because the state’s interest in potential life is not sufficient in the early stages of pregnancy to justify state regulation of the decisions of adult women, the interest in potential life should not be sufficient to justify regulating the decisions of minors. See Roe v. Wade, 410 U.S. 113, 163-64 (1973).

\textsuperscript{106} Justice Kennedy noted that the state identified two interests served by the law: 1) an interest in the welfare of pregnant minors, and 2) protection of the right of each parent to participate in the upbringing of his or her own children. Hodgson, 110 S. Ct. at 2962 (Kennedy, J., concurring in judgment in part and dissenting in part).

One commentator has suggested that the legitimate and competing interests present in the teenage abortion context involve: (1) a minor’s limited constitutional right to choose an abortion; (2) a state’s interest in ensuring that the parents are involved in the decision; and (3) the parents’ interest in participating and aiding in their child’s growth, development, and physical and emotional well-being.

Lindsey, supra note 18, at 888. In the cases, however, the Court actually has addressed the state’s interest in intervention to protect the minor or to facilitate the interests of the parents. The minor’s privacy right must therefore be measured against the state’s interest in intervention, which is derivative of the minor’s and the parents’ interests.

\textsuperscript{107} For a discussion of the state’s interest in the welfare of the child, see infra notes 112-20.

\textsuperscript{108} For a discussion of the state’s interest in protecting the rights of parents in the upbringing of their child, see infra notes 121-32.

\textsuperscript{109} For a discussion of this data, see infra notes 117-18 and accompanying text.

\textsuperscript{110} For a discussion of the Justices’ use, or non-use, of this data and their conclusions regarding these interests, see infra notes 112-47 and accompanying text.
from the second interest above, that weighed against mandatory notification of both parents.\footnote{111}

i. The Welfare of the Child

The state's interest in the welfare of the child was recognized by all of the Justices as a legitimate interest.\footnote{112} Given the language of the Justices' opinions, it primarily appears to be an interest in ensuring that the minor makes a "knowing and intelligent decision,"\footnote{113} although it also may be a general concern for the "peculiar vulnerability" of the child.\footnote{114} In recognizing the state's interest in the welfare of the child as a legitimate justification for regulation of the abortion decision that is not present in the case of adults, the Justices implicitly accepted either the assumption that minors are less capable than adults of making knowing and intelligent decisions or the assumption that minors are peculiarly vulnerable.\footnote{115} In doing so, the Justices appear to have relied on "the...
A substantial body of research suggests, however, that most adolescents do have the capacity to make "informed decisions about life situations" and "sound health care decisions, including decisions about abortions."117 In addition, research does not and judgment." Id. at 2962 (Kennedy, J., concurring in judgment in part and dissenting in part). He asserted that the legitimacy of the use of age as an approximation of maturity and of the state's interest in making sure that a child has her parents' assistance in making a decision as serious as an abortion decision were settled by previous cases. Id. at 2962 (Kennedy, J., concurring in judgment in part and dissenting in part) (citing H.L. v. Matheson, 450 U.S. 398, 409-11 (1981) (Stevens, J., concurring in judgment); Bellotti II, 443 U.S. 622, 640-41 (1979)).


117. See, Brief for Amicus Curiae, American Psychological Association, National Association of Social Workers, Inc., and American Jewish Committee in support of petitioners/cross respondents, Ohio v. Akron Center, 110 S. Ct. 2972 (Nos. 88-1125, 88-1309) and in support of appellees, Hodgson, 110 S. Ct. 2926 (No. 88-805) at 17-26 (1990) [hereinafter APA Amicus Brief]. Amici Curiae contended that "[p]sychological theory and research about cognitive, social and moral development strongly supports the conclusion that most adolescents are competent to make informed decisions about important life situations." Id. at 18. They also contended that "[r]esearch does not support the States' assumption that adolescents typically lack the capacity to make sound health care decisions, including decisions about abortion." Id. at 21; see also 1 NATIONAL RESEARCH COUNCIL, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING 277 (1987) [hereinafter NRC REPORT] ("[O]n the basis of existing research . . . contention that adolescents are unlikely or unable to make well-reasoned decisions . . . is not supported."); Melton & Pliner, supra note 25, at 18.

Conclusions that were drawn from a review of research and contained in an earlier amicus curiae brief filed with the Supreme Court by the American Psychological Association (APA), Brief for Amicus Curiae, American Psychological Association, in support of appellees, Zbaraz v. Hartigan, 484 U.S. 171 (1987) (No. 85-673), had been criticized. Gardner, Scherer & Tester, Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights, 44 AM. PSYCHOLOGIST 895, 897-900 (1989) ("[T]he brief] legitimately and constructively pointed to the lack of evidence for the Court's belief that adolescents are incompetent. [I]t stepped too far, however, in claiming that there are authoritative grounds for the positive assertion that adolescents and adults have equivalent decision-making competence."). But see Melton, Knowing What We Do Know: APA and Adolescent Abortion, 45 AM. PSYCHOLOGIST 1171, 1171-72 (1990) ("Although Gardner et al.'s critical tone may lead some readers . . to believe that the APA briefs were discredited, . . the authors raised no criticism at all of much of the content of the briefs and they accepted the thrust of the argument even in the portion that they criticized."). The APA's brief filed in Hodgson apparently satisfied some of the critics of the Zbaraz brief. Scherer & Gardner, Reasserting the Authority of Science, 45 AM. PSYCHOLOGIST 1173, 1174 (1990) (recent APA amicus brief "proves that a narrowly drawn statement of the current research can be written in spite of the limits imposed on amicus briefs"). This brief has not satisfied all critics, however. See Scott, Judgment and Reasoning in Adolescent Decisionmaking, 37 VILL. L.
support the assumption regarding the "peculiar vulnerability" of adolescents.\textsuperscript{118} This research was presented to the Court,\textsuperscript{119} but none of the Justices appeared to have been willing to use such research to question these assumptions regarding the decisionmaking capacity and vulnerability of minors.\textsuperscript{120}

\hspace{2cm} ii. Parental Rights

There was substantial disagreement on the Court as to whether the state could justify its intervention into the abortion decision on the basis of a parental interest that was separate from the interests of the child.\textsuperscript{121} In a part of his opinion in \textit{Hodgson} that was joined only by Justice O'Connor, Justice Stevens stated that parents have an interest in controlling the education and upbringing of children which may rise to the...
level of a liberty interest. He asserted for the majority, however, that "any state interest in protecting a parent's interest in shaping a child's values and lifestyle [cannot] overcome the liberty interests of a minor acting with the consent of a single parent or court," because "the justification for any rule requiring parental involvement in abortion decisions rests entirely on the best interests of the child." This suggests that he perceived the parent's interest in involvement as not being independent of the child's interests, but rather, as being derived from the best interests of the child. Justice Marshall viewed the parents' interest as a very limited one; he did not believe that protection of a parental interest independent of the child's interests was a valid justification for state intervention. He asserted that the right to direct a child's upbringing was a right against state interference with family matters, and even if the state was only attempting to facilitate the exercise of parental authority, any such regulations must be narrowly drawn. Justice Blackmun, dissenting in Ohio v. Akron Center, also believed that the independent interest of the parent was very limited.

In contrast to Justices Marshall, Blackmun and Stevens, Justice Kennedy stressed the state's interest in the "[p]rotection of the right of each parent to participate in the upbringing of her or his own children" as

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122. *Hodgson*, 110 S. Ct. at 2942 (Stevens, J., joined by O'Connor, J.). Justice Stevens differentiated this interest from the family's privacy interest. See infra notes 139-42 and accompanying text.

123. Id. at 2946 (Stevens, J., joined by O'Connor, J.).

124. Id. at 2947 (Stevens, J., joined by O'Connor, J.).

125. Id. at 2956 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part) (addressing state's asserted "interest of protecting parents' independent right 'to shape the[ir] child[ren]'s values and lifestyle[s]' and 'to determine and strive for what they believe to be best for their children'" and concluding that "where parental involvement threatens to harm the child, the parent's authority must yield").

126. Id. at 2956 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). For a discussion of this family interest, see infra notes 139-44 and accompanying text.

127. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). Justice Marshall went on to state that "[m]oreover, as a practical matter, 'state intervention is hardly likely to resurrect parental authority that the parents themselves are unable to preserve.'" Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part) (quoting H.L. v. Matheson, 450 U.S. 398, 448 (1981) (Marshall, J., dissenting)).

128. *Ohio v. Akron Center*, 110 S. Ct. at 2994 (Blackmun, J. dissenting) (citing Planned Parenthood v. Danforth, 428 U.S. 52 (1976), as support for proposition 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").

129. *Hodgson*, 110 S. Ct. at 2962 (Kennedy, J., concurring in judgment in part and dissenting in part). Justice Kennedy stated that "[a] State pursues a legitimate end under the Constitution when it attempts to foster and preserve the parent-child relation by giving all parents the opportunity to participate in the care and nurture of their children." Id. at 2963 (Kennedy, J., concurring in judgment in part and dissenting in part).
a justification for the notification statute. As support for this interest, Justice Kennedy stated that "[t]he common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf." Although Justice Kennedy acknowledged that "[l]imitations have emerged on the prerogatives of parents to act contrary to the best interest of the child," he stated that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." Furthermore, he stated that "parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children." Paralleling this difference in opinion regarding the importance of the parental interest, and perhaps contributing to its explanation, was a difference in the frames of reference of the Justices. Justice Kennedy asserted that "[a] State may seek to protect and facilitate the parent-child bond on the assumption that parents will act in their child's best interest." He believed that the state may legislate based on its conception of the ideal family and need not look at the realities of contem-

that the parents' "opportunity" exists whether the state intervenes or not. Cf. H.L. v. Matheson, 450 U.S. 398, 448 (1981) (Marshall, J., dissenting) ("state intervention is hardly likely to resurrect parental authority that parents themselves [were] unable to preserve").

130. Hodgson, 110 S. Ct. at 2962 (Kennedy, J., concurring in judgment in part and dissenting in part). As authority for this proposition, Justice Kennedy cited treatises from the 19th century. Id. (Kennedy, J., concurring in judgment in part and dissenting in part). Justice Kennedy also cited other state and federal laws as support for the notion that the state has an interest in keeping both parents informed. Id. at 2964-65 (Kennedy, J., concurring in judgment in part and dissenting in part).

131. Id. at 2962-63 (Kennedy, J., concurring in judgment in part and dissenting in part) (quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)). The other Justices focused more on those families where there was not as much "concern for the nurture and upbringing of their children." Id. For a discussion of this difference in focus, see infra notes 135-38 and accompanying text.

132. Hodgson, 110 S. Ct. at 2963 (Kennedy, J., concurring in judgment in part and dissenting in part). It would seem that this is a right against state intrusion and not a justification for state intrusion. Id. at 2956 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part) ("It is a strange constitutional alchemy that would transform a limitation on state power into a justification for governmental intrusion into family interactions.").

133. Id. at 2963 (Kennedy, J., concurring in judgment in part and dissenting in part). Kennedy emphasized supportive families:

[I]t was reasonable for the legislature to conclude that in most cases notice to both parents will work to the minor's benefit . . . . This is true not only in what the Court calls the 'ideal family setting,' where both parents and the minor live under one roof, but also where the minor no longer lives with both parents . . . . [M]any absent parents maintain significant ties with their children, and seek to participate in their lives, to guide, to teach, and to care for them.

Id. at 2967 (Kennedy, J., concurring in judgment in part and dissenting in part); see also Parham v. J.R., 442 U.S. 584, 602 (1979) (law may presume parents will act in child's best interest).
temporary family life. On the other hand, Justices Marshall, Stevens and O'Connor took judicial notice of the data relating to dysfunctional families, and asserted that the state should take these families into account. They also seemed to support the proposition that the Court should look at how state legislation actually affects families, whereas Justice Kennedy suggested that how the family actually responds is "beyond the state's control."

iii. The Family's Right to Privacy

The Justices discussed a third interest which was relevant to the legitimacy of the state's purpose—the family's interest in privacy in its

134. Hodgson, 110 S. Ct. at 2967 (Kennedy, J., concurring in judgment in part and dissenting in part). Justice Kennedy acknowledged that in some cases "notifying both parents will not produce desirable results," but he pointed to the exceptions in the Minnesota statute which he said were "to ensure that the statutory notice requirement does not apply if it proves a serious threat to the minor's health or safety." Id. at 2967-68 (Kennedy, J., concurring in judgment in part and dissenting in part). He did not acknowledge the limitations of the abuse exception. But see id. at 2950 (O'Connor, J., concurring in part and concurring in judgment in part) (abuse exception is "less than effectual" because of the "abused minor's reluctance to report sexual or physical abuse" and because of the "likelihood that invoking the abuse exception for the purpose of avoiding notice will result in notice").

At another point, Justice Kennedy stated that "[i]t is true that for all too many young women the prospect of two parents, perhaps even one parent, sustaining her with support that is compassionate and committed is an illusion." Hodgson, 110 S. Ct. at 2972 (Kennedy, J., concurring in judgment in part and dissenting in part). He then stated, however, that the Court should not focus on these families. Id. (Kennedy, J., concurring in judgment in part and dissenting in part).

This debate over focus was also evident in the lower courts in the Hodgson litigation. Hodgson v. Minnesota, 853 F.2d 1452, 1464 (8th Cir. 1988). The district court focused on the impact of the statute on pregnant minors not living with both parents, and the court of appeals stated that the district court had not given enough consideration to the 50% or more pregnant minors who live with both parents. Id.

135. Id. at 2938-39, 2950 (O'Connor, J., concurring in part and concurring in judgment in part); id. at 2955 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).

136. Justice Blackmun also felt that the court should take these families into account. Ohio v. Akron Center, 110 S. Ct. at 2989-90 (Blackmun, J., dissenting). He said that "[t]he Court's selective blindness to . . . stark social reality is bewildering and distressing." Id. at 2990-91 (Blackmun, J., dissenting). He also cautioned that there is "another world "out there" that the Court 'either chooses to ignore or refuses to recognize.'" Id. at 2993 (Blackmun, J., dissenting).

137. Hodgson, 110 S. Ct. at 2988-99 (majority opinion describing findings of district court on how legislation affects families).

138. Id. at 2964 (Kennedy, J., concurring in judgment in part and dissenting in part). Justice Kennedy stated that Minnesota has "an interest in seeing that parents know about a vital decision facing their child . . . . How the family unit responds to such notice is, for the most part, beyond the State's control." Id. at 2963-64 (Kennedy, J., concurring in judgment in part and dissenting in part).
decisionmaking processes. In Hodgson, Justices Marshall, Stevens and O'Connor saw this interest as militating against state intrusion. Justice Stevens stated in Hodgson that "the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference." He therefore concluded that any state interest in communication among family members was not a legitimate interest, and could not be used as justification for the parental notice provision in the Minnesota statute. Justice O'Connor stated that the Minnesota statute's interference with a family's decisionmaking process supported the finding that it was unconstitutional. Justice Kennedy, on the other hand, opined that the family's interest in its decisionmaking process supported the constitutionality of the statute.

iv. Conclusion

In a part of his Hodgson opinion joined only by Justice O'Connor, Justice Stevens concluded that it was only the first interest—the interest in the welfare of the pregnant minor—that could justify notification of

139. See Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (plurality opinion) ("Constitution prevents [the state] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."); Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (parents have a right to direct religious upbringing of their children); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating in dicta that Supreme Court decisions "have respected the private realm of family life which the state cannot enter"); Pierce v. Society of Sisters, 268 U.S. 510, 554-35 (1925) (Constitution protects "liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (Constitution protects right of parents to control education of their children).

This interest is not entirely conceptually distinct from the interest discussed earlier—the parental interest in controlling the upbringing of his or her child. Justice Stevens recognized two distinct interests, one being an interest of the parents and the other being an interest of the family unit, whereas Justices Marshall and Kennedy did not.

140. Hodgson, 110 S. Ct. at 2943 (Stevens, J., joined by O'Connor, J.); id. at 2950 (O'Connor, J., concurring in part and concurring in judgment in part); id. at 2956 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).

141. Id. at 2943 (Stevens, J., joined by O'Connor, J.).

142. Id. at 2946 ("[F]ull communication among all members of a family [may be] desirable in some cases, but such communication may not be decreed by the State.").

143. Id. at 2950 (O'Connor, J., concurring in part and concurring in judgment in part) (expressing agreement with Justice Stevens that "Minnesota has offered no sufficient justification for [the] interference with the family's decision-making processes created by subdivision 2").

144. Id. at 2962 (Kennedy, J., concurring in judgment in part and dissenting in part). Justice Kennedy appeared to merge two interests which Justice Stevens saw as separate: the parental interest in controlling the education and upbringing of their children and the family's privacy interest. Id. at 2943 (Stevens, J., joined by O'Connor, J.).
both parents. Justice Marshall, joined by Justices Brennan and Blackmun, agreed. 

Thus, a majority of the Court believed that primarily the best interests of the minor should be taken into account, and more particularly, the interest in ensuring that the minor's decision was knowing and intelligent. Independent of the minor's interests, the parents have only a limited interest in the minor's abortion decision. 

b. The Burden

In Hodgson, the District Court was presented with substantial data regarding the burdens the Minnesota statute presented in actual operation, and the court made extensive findings of fact based on this data. In addition, the Supreme Court was presented with data from research on the burdens of parental notice, waiting periods and judicial bypass procedures. Justice Marshall made extensive use of this data in his analysis of the burdens presented by the statute. He concluded that

145. Id. at 2941-44 (Stevens, J., joined by O'Connor, J.).
146. Id. at 2955-57 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
147. For a discussion of the parents limited interest in the minor's abortion decision, see supra notes 121-32 and accompanying text.
148. As noted earlier, Minnesota's parental notification statute and judicial bypass procedure went into effect on August 1, 1981. Hodgson v. Minnesota, 648 F. Supp. 756, 760 (D. Minn. 1986). This statutory scheme remained in effect through the trial and argument in 1986. Id. The district court heard considerable evidence relating to the operation of the statutory scheme, including statistical evidence, testimony from judges and parents of pregnant minors involved in the bypass hearings, and testimony from psychologists, medical doctors and counselors. Id. at 759-60. The district court made eleven findings that it specifically placed under the heading of "Burdens." Id. at 763-65. The court found that the judicial bypass procedure typically resulted in delays that could impose greater cost, inconvenience and medical risk. Id. at 763. The bypass procedure produced fear, anxiety, anger, resentment, guilt, shame and other negative emotions in many minors; some mature minors and minors in whose best interests it was to proceed without notifying their parents were so intimidated by the judicial proceeding that they avoided the bypass option and notified their parents or carried to term. Id. at 763-64. The court further found that the two-parent notice requirement necessitated notification of non-custodial parents even where the non-custodial parent had exhibited no interest in the minor's development and even where the non-custodial parent was likely to respond with psychological, sexual or physical violence toward either the minor or the custodial parent. Id. at 764. The two-parent notification requirement also burdened minors in two-parent homes who voluntarily had consulted with one parent but not with the other out of fear of abuse toward either the minor or the notified parent; such interference with parent-child communication voluntarily initiated was not uncommon. Id. The court further found that minors were unlikely to avail themselves of the exception to notification. Id. Finally, the court found that the 48-hour delay requirement was often compounded by other factors to result in delays of a week or more which increased the statistical risk of mortality or morbidity and imposed greater cost and inconvenience. Id. at 764-65.
149. APA Amicus Brief, supra note 117, at 7-15.
150. See infra notes 155-66 and accompanying text.
parental notification and delay "significantly restrict a young woman's right to reproductive choice" and based his conclusion "not on [his] intuition about the needs and attitudes of young women, but on a sizable and impressive collection of empirical data documenting the effects of parental notification statutes and of delaying an abortion." In contrast, Justice Kennedy did not mention this data at all; rather, he relied on a facial analysis of the constitutionality of the statute. Justices Stevens and O'Connor made selective use of the accumulated data.

i. Justice Marshall

Justice Marshall referred to several burdensome consequences of the parental notification statute. The most basic burden was that "the notification requirement destroys [the young woman's] right to avoid disclosure of a deeply personal matter." In addition, Justice Marshall stated that a notification requirement can have severe physical and psychological effects. He asserted that forced notification can be emotionally traumatic and even devastating for a young woman, can cause a woman to delay her abortion, thereby increasing the health risks of the procedure, and can cause a woman to seek other alternatives with their attendant risks. As support for these assertions, Justice Marshall cited empirical data.

According to Justice Marshall, the forty-eight hour delay requirement also posed a significant burden in that it caused increased health risks. As evidence of these increased risks, he cited the findings of the district court that "[d]elay of any length in performing an abortion increases the statistical risk of mortality and morbidity." Justice Mar-

152. Id. at 2952 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
153. See infra notes 167-69 and accompanying text.
154. See infra notes 170-83 and accompanying text.
156. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
157. Id. at 2953-54 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
158. This data included journal articles, social science data and medical testimony. See id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
159. Id. at 2954 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
160. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part) (citing Hodgson v. Minnesota, 648 F. Supp. 756, 765 (D. Minn. 1986)). He also cited a book reviewing epidemiological evidence in support of the proposition that the "rate of major complications nearly doubles in the week following the end of the first trimester and increases significantly thereafter." Id. (Marshall, J., concurring in part, concurring in judgment in part and
shall further concluded that the judicial bypass option substantially burdened a woman's right to decisional autonomy. On its face, the bypass mechanism in the statute was too burdensome because it gave a judge an absolute veto over the decision of a physician and her patient. It was too burdensome in operation because it (1) caused delay, (2) caused long travel, and (3) was traumatic. As evidence of these burdens, Justice Marshall cited empirical data as embodied in dissenting in part (citing C. TIETZE & S. HENSHAW, INDUCED ABORTION: A WORLD REVIEW 1986, 103-04 (6th ed. 1986)).

161. Id. at 2957-60 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).

162. Id. at 2957-58 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). This constitutional defect was exacerbated by the vagueness of the standards in the statute. Id. at 2957-59 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part) ("The statute gives no guidance on how a judge is to determine whether a minor is sufficiently 'mature' and 'capable'... [nor] as to how a judge is to determine whether an abortion without parental notification would serve an immature minor's 'best interests.'").

163. Id. at 2958 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). To support this proposition, Justice Marshall cited the findings of the district court that scheduling practices in Minnesota courts typically result in two or three day delays between the first contact with the court and a hearing, and may in some cases result in delays of a week or more. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).

164. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). To support this proposition, Justice Marshall cited the findings of the district court that minors often must travel to another county to obtain a hearing and the results of an epidemiological study which found that 50% of Minnesota minors using the bypass procedure were not residents of the city in which the court was located. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). He also cited an article for the proposition that "[i]n Minnesota... minors sometimes have to travel a round-trip of more than 500 miles for the hearing." Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). The author of that article, as the basis for his conclusion, cited the epidemiological study cited by Marshall. Melton, Legal Regulation of Adolescent Abortion: Unintended Effects, 42 AM. PSYCHOLOGIST 79, 80 (1987) (citing Donovan, Judging Teenagers: How Minors Fare When They Seek Court- Authorized Abortions, 15 Fam. Plan. Persp. 259, 264 (1983)). Thus, although Justice Marshall cited two sources, both of them were relying on the same data.

165. Hodgson, 110 S. Ct. at 2959 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). To support this proposition, Justice Marshall cited the findings of the district court that the bypass procedure produced fear, anxiety, anger, resentment, guilt, shame and other negative emotions in many minors, and that some mature minors and minors in whose best interest it was to proceed without notifying their parents were so intimidated by the judicial proceeding that they avoided the bypass option and notified their parents or carried to term. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). Justice Marshall also cited specific testimony from Dr. Hodgson and a judge who had heard bypass petitions relating to the emotional trauma experienced by minors facing bypass procedures. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
the findings of the district court, the testimony at trial and research studies.\textsuperscript{166}

\section*{ii. Justice Kennedy}

Justice Kennedy concluded that because the Minnesota statute at issue in Hodgson was in accord with prior decisions, it was constitutional.\textsuperscript{167} Justice Kennedy explicitly rejected the relevance of the data on the burdens of the statutory framework: "Our holding [in \textit{H.L. v. Matheson}] was made with knowledge of the contentions, supported by citations to medical and sociological literature, that are proffered again today for the proposition that notification imposes burdens on minors."\textsuperscript{168} He did not acknowledge that Hodgson differed from prior cases, such as Matheson, in that the Hodgson Court was presented with evidence as to the actual operation of the statute.\textsuperscript{169}

\section*{iii. Justice Stevens}

Justice Stevens quoted extensively from the findings of the district court in Part IV of his opinion.\textsuperscript{170} He particularly focused on those findings of the district court relating to the burdens of two-parent notice as opposed to one-parent notice.\textsuperscript{171} In Part VII of his opinion, he stated for the Court:

The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony at trial established that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to a parent as well.\textsuperscript{172}

\begin{itemize}
\item \textsuperscript{166} \textit{Id.} at 2958-59 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). Justice Marshall has a long history of supporting the use of social science data by the judiciary. He was one of the attorneys for the appellants in \textit{Brown v. Board of Education}, 347 U.S. 483 (1954). In that case, then-attorney Marshall introduced social science evidence as to the negative effects of racial segregation on black children. \textit{See} J. Monahan \& L. Walker, \textit{Social Science in Law: Cases and Materials} 134-46 (2d ed. 1990) (discussing use of social science evidence in \textit{Brown v. Board of Education}).
\item \textsuperscript{167} \textit{Hodgson}, 110 S. Ct. at 2965-69 (Kennedy, J., concurring in judgment in part and dissenting in part).
\item \textsuperscript{168} \textit{Id.} at 2966 (Kennedy, J., concurring in judgment in part and dissenting in part).
\item \textsuperscript{169} \textit{Id.} (Kennedy, J., concurring in judgment in part and dissenting in part). For a discussion of the medical literature cited in Matheson, \textit{see supra} note 52 and accompanying text.
\item \textsuperscript{170} \textit{Id.} at 2938-41.
\item \textsuperscript{171} \textit{Id.} at 2938-39. Justice Stevens apparently believed that if the statute had provided for one-parent notice, it would have been constitutional. \textit{See id.} at 2945.
\item \textsuperscript{172} \textit{Id.} at 2945 (Stevens, J., joined by O'Connor, J.).
\end{itemize}
He then proceeded to relate specific testimony and findings that supported this statement.173 In Part VI of his opinion, Justice Stevens examined the district court’s findings on the actual impact of the forty-eight hour delay requirement.174 These included the findings that the statute could create “‘in many cases’ a delay of a week or more”175 and that “[a] delay of that magnitude increased the medical risk associated with the abortion procedure to ‘a statistically significant degree.’”176 Despite these findings, Justice Stevens concluded that the forty-eight hour delay requirement “imposes only a minimal burden on the right of the minor to decide whether or not to terminate her pregnancy.”177

iv. Justice O’Connor

The only burden that Justice O’Connor addressed in her concurring opinion was the “interference with the family’s decisionmaking processes created by . . . two-parent notification.”178 She believed this burden, in the absence of sufficient justification, was enough to invalidate subdivision 2 of the Minnesota statute, but she made no mention of the burdens that the statute placed on the minor’s individual right to privacy.179 She asserted that the judicial bypass procedure “passes constitutional muster because the interference with the internal operation of the family required by [two-parent notice] simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure.”180 Justice O’Connor did not address the extensive evidence on the burdens of the procedure in its actual operation.181

173. Id. at 2945-46 (Stevens, J., joined by O’Connor, J.). In a footnote, Justice Stevens discussed the testimony of a judge and a psychologist regarding the likelihood of notification resulting in abuse in families with a history of domestic violence. Id. at 2945 n.36 (Stevens, J., joined by O’Connor, J.).

174. Id. at 2944 (Stevens, J., joined by O’Connor, J.).

175. Id. at 2940 (citing Hodgson v. Minnesota, 648 F. Supp. 756, 765 (D. Minn. 1986)).

176. Id. (citing Hodgson, 648 F. Supp. at 765).

177. Id. at 2944 (Stevens, J., joined by O’Connor, J.). A conclusion that the delay is “minimal” seems cavalier in light of the district court’s conclusion that “[d]elay of any length in performing an abortion increases the statistical risk of mortality and morbidity.” Hodgson, 648 F. Supp. at 765. For a discussion of Justice Marshall’s conclusion from the same data, see supra notes 159-65 and accompanying text.

178. Id. at 2950 (O’Connor, J., concurring in part and concurring in judgment in part). For a discussion of this burden, see supra notes 139-44 and accompanying text.

179. Id. (O’Connor, J., concurring in part and concurring in judgment in part). Justice O’Connor did state that this was the most stringent notification statute in the country. Id. (O’Connor, J., concurring in part and concurring in judgment in part).

180. Id. at 2951 (O’Connor, J., concurring in part and concurring in judgment in part).

181. For a discussion of these burdens and Justice Marshall’s use of data
She did, however, cite data collected by the district court in Hodgson as support for her assertion that the exception to notification for minors who are victims of neglect or abuse was ineffectual in providing an opportunity for those minors to avoid notice. This selective use of empirical data is difficult to reconcile with a principled approach to constitutional adjudication.

c. The Relationship Between the Statute and the State's Interest

The Court was also presented with empirical data and factual findings from the district court relating to the ability of the statutory framework—specifically, parental notification, forty-eight hour notice and judicial bypass—to further the state's asserted interests.

182. Hodgson, 110 S. Ct. at 2950 (O'Connor, J., concurring in part and concurring in judgment in part). Justice O'Connor stated that "[t]he Minnesota exception to notification for minors who are victims of neglect or abuse is, in reality, a means of notifying the parents." Id. (O'Connor, J., concurring in part and concurring in judgment in part). The findings she cited relate to the reluctance of minors to report sexual or physical abuse. Id. (O'Connor, J., concurring in part and concurring in judgment in part).

183. Justice O'Connor's approach is an example of the phenomenon observed by one commentator that: "Courts cite the results of psychological research when they believe it will enhance the elegance of their opinions, as in the most oft-cited example of Brown v. Board of Education . . . , but empiricism is readily discarded when more traditional and legally acceptable bases for decisionmaking are available." Bersoff, supra note 52.

184. The district court made 15 findings of fact that it placed under the heading of "Testimony as to Beneficial Effect." Hodgson, 648 F. Supp. at 766-70. The testimony relating to the effects of the notice and bypass scheme came from judges who collectively had heard over 90% of the bypass petitions filed in Minnesota, a judge who had heard bypass petitions in Massachusetts, abortion clinic counselors, public defenders, psychologists, medical doctors and other expert witnesses. Id. at 766-68. The court found that the witnesses who had extensive experience working with minors confronting abortion decisions could not identify any positive effect of the Minnesota law. Id. Although the State of Minnesota offered the testimony of two experts as to the beneficial effects of the law, the court found the testimony of these two experts to be less credible than the contrary testimony of witnesses with greater qualifications and experience. Id. at 768.

The district court also cited statistics on the incidence of children not living with both parents and on the problem of domestic violence and made findings regarding the specific problems inherent in notifying a non-custodial parent. Id. at 768-69. The court found that forced notification of a second parent could be emotionally and physically harmful, and in some cases could reduce parent-child communication by discouraging notification of the first parent. Id. at 769.

Finally, the district court made two findings on the effects of the 48-hour waiting period. Id. at 769-70. The court found that the interest effectuated by the state's 48-hour waiting period could be effectuated as completely by a shorter waiting period. Id. at 769.

The Supreme Court was also presented with research suggesting that compelled parental disclosure does not serve to "Foster Productive Intrafamily Communication;" "Ensure That The Minor's Decision To Obtain An Abortion
the Justices differed markedly in their use of the data. Justices Stevens and O'Connor made selective use of empirical data. Justice Marshall examined the data on each aspect of the statute, and Justice Kennedy did not refer to the data at all.

i. Justice Stevens

Justice Stevens framed the issue in *Hodgson* by stating that the "Minnesota statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests."\(^{185}\) As noted earlier, it appears that the only state interest that Justice Stevens recognized as legitimate was the interest in the welfare of the child.\(^{186}\) Therefore, he examined how forty-eight hour notice and two-parent notification served the asserted state interest in the welfare of the child.\(^{187}\) Specifically, he examined whether these obstacles served to promote better decisionmaking on the part of the minor.\(^{188}\) To answer this question, Justice Stevens used data on the actual operation of the statute.\(^{189}\)

First, in examining the constitutionality of the two-parent notice requirement,\(^{190}\) Justice Stevens, writing for the Court in part VII of his opinion, concluded that the state's interest in ensuring that a minor's decision to terminate her pregnancy is knowing, intelligent and deliberate is fully served, "[t]o the extent . . . legitimate," by the requirement that the minor notify one parent.\(^{191}\) He examined the testimony at trial on the actual operation of the statute and determined that "two-parent notification fail[s] to serve any state interest with respect to functioning families . . . [and] disserves the state interest in protecting and assisting the minor with respect to dysfunctional families."\(^{192}\) Justice Stevens'...

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\(^{185}\) Hodgson, 110 S. Ct. at 2937 (Stevens, J., joined by Brennan, J.). For discussion of the disagreement as to the appropriate standard, see supra notes 75-97 and accompanying text.

\(^{186}\) Id. at 2946.

\(^{187}\) Id. at 2944 (Stevens, J., joined by O'Connor, J.); id. at 2945-47.

\(^{188}\) Id. at 2944 (Stevens, J., joined by O'Connor, J.) (48-hour wait furthers state interest in ensuring knowing and intelligent decision); id. at 2945-47 (two-parent notification too broad in furthering same state interest).

\(^{189}\) Id. at 2944 (Stevens, J., joined by O'Connor, J.); id. at 2945-47 (Stevens, J., majority opinion).

\(^{190}\) In writing for the Court in part VII of his opinion, Justice Stevens focused on the difference between two and one-parent notification, id. at 2945-57, but he did not reexamine one-parent notification requirements in light of the data. The district court's findings focused on two-parent notice, as opposed to notice in general. Hodgson v. Minnesota, 648 F. Supp. 756, 768-69 (D. Minn. 1986).

\(^{191}\) Hodgson, 110 S. Ct. at 2945. Justice Stevens did not systematically discuss how one-parent notice might lead to improved decisionmaking. In fact, there is a sizeable body of empirical evidence that compelled disclosure does not lead to better decisionmaking. See APA Amicus Brief, supra note 117, at 16-26.

\(^{192}\) Hodgson, 110 S. Ct. at 2945. Justice Stevens discussed the negative
conclusion that two-parent notification did not reasonably further any legitimate state interest was remarkable given that the standard of review chosen by the Court was one which traditionally entails a high degree of deference to legislative decisions and rarely results in the invalidation of legislation. The overwhelming negative data on two-parent notification may have been too much for the Court to ignore.

Second, in part VI of his opinion, Justice Stevens inquired as to whether the forty-eight hour delay requirement furthered the state interest in ensuring that the minor's decision was knowing and intelligent. To support his conclusion that the waiting period reasonably furthered this interest, he speculated as to how the waiting period might be used. In addition, in part IV of his opinion, he referred to the finding of the district court in Hodgson that a mandatory delay served the state's interest. Justice Stevens also cited evidence, however, that undermined his conclusion. He referred to the district court's finding that the state's interest could be served by a shorter waiting period, and he cited evidence as to the burdens imposed by the delay requirement.

After concluding that the two-parent notification requirement did not serve legitimate state interests, Justice Stevens examined whether the judicial bypass provision could save the statute. He concluded that the statute was unconstitutional even with the judicial bypass procedure, and therefore, this portion of his opinion (part VIII) is a dissent from the holding of the majority of the court. In reaching this conclusion, he did not examine whether the actual operation of the judicial bypass procedure furthered the state's interest. Instead, he looked to precedent to decide whether the bypass procedure met constitutional effects of the statutory scheme. Id. For a discussion of the district court's findings on this issue, see supra note 184.

193. For a discussion of the deferential nature of this standard of review, see supra note 95.

194. Hodgson, 110 S. Ct. at 2944 (Stevens, J., joined by O'Connor, J.).

195. Id. (Stevens, J., joined by O'Connor, J.) (stating that brief waiting period provides parent opportunity to consult with spouse and physician and permits parent to inquire into competency of doctor performing abortion, discuss religious or moral implications of abortion decision, and provide daughter needed guidance and counsel in evaluating impact of decision on her future).

196. Id. at 2940-41.

197. Id. at 2940 (waiting period in many cases compounded with other factors to create delay of week or more and delay of that magnitude increased medical risk of abortion procedure to statistically significant degree). Although the district court concluded that "[s]ome period of mandatory delay" would further the state's interest in protecting pregnant minors, the "reasonableness" of the 48-hour delay was questioned by the district court in light of the fact that a shorter waiting period would serve the same function. Hodgson v. Minnesota, 648 F. Supp. 756, 769 (D. Minn. 1986).

198. Hodgson, 110 S. Ct. at 2947-49 (Stevens, J., dissenting in part).

199. Id. (Stevens, J., dissenting in part).

200. Id. (Stevens, J., dissenting in part). Justice Stevens did acknowledge...
requirements. After distinguishing Hodgson from Bellotti and Ashcroft to support his argument that the Court was not bound by stare decisis, he stated that while one-parent consent or notification reasonably furthered the state interest, two-parent notification did not. Justice Stevens failed to acknowledge that Hodgson was different from Bellotti and Ashcroft in that the Hodgson Court had actual data on the operation of a bypass procedure.

**ii. Justice O'Connor**

Although Justice O'Connor disagreed with Justice Stevens' conclusions regarding the constitutionality of the statute with the judicial bypass procedure, she agreed with Justice Stevens' framing of the issue in Hodgson: "[The] statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests." Like Justice Stevens, she appeared to see the primary state interest served by notice provisions as the interest in the welfare of the minor and, specifically, in the minor's informed decisionmaking. Justice O'Connor concluded that the requirement of notice to both parents swept too broadly and failed "to serve the purposes asserted by the State in too many

some of the district court's findings on the actual effect of the judicial bypass scheme in part IV of his opinion. Id. at 2940.

201. Id. at 2947-49 (Stevens, J., dissenting in part). Justice Stevens stated that "[n]either [Bellotti II nor Ashcroft] should control our decision today." Id. at 2948 (Stevens, J., dissenting in part).

202. Id. at 2948 (Stevens, J., dissenting in part). Justice Stevens noted that Bellotti II held the Massachusetts statute unconstitutional and that the discussion of the minimum requirements for a valid judicial bypass in Justice Powell's opinion was joined by only three other members of the Court. Id. (Stevens, J., dissenting in part). He distinguished Ashcroft by noting that it only dealt with a statute requiring involvement of one parent. Id. (Stevens, J., dissenting in part).

203. Id. (Stevens, J., dissenting in part). Justice Stevens stated that one-parent involvement reasonably furthers the state interest, but he offered no support for this proposition. Id. (Stevens, J., dissenting in part). He opined that [a] judicial bypass . . . designed to handle exceptions from a reasonable general rule [(one parent notice)] . . . is quite different from a requirement that a minor—or a minor and one of her parents—must apply to a court for permission to avoid the application of a rule that is not reasonably related to legitimate state goals.

Id. at 2948-49 (Stevens, J., dissenting in part).

204. Justice Stevens had said in Bellotti II that the constitutionality of parental consent statutes with judicial bypass in actual operation was still open. Bellotti II, 443 U.S. 622, 634 (1979). In Ohio v. Akron Center, he left open the question of the constitutionality of that statute in actual operation. For a discussion of this aspect of Ohio v. Akron Center, see infra notes 252-53 and accompanying text.

205. Hodgson, 110 S. Ct. at 2950 (O'Connor, J., concurring in part and concurring in judgment in part) (quoting Justice Stevens' opinion, id. at 2937 (Stevens, J., joined by Brennan, J.)).

206. Id. at 2949 (O'Connor, J., concurring in part and concurring in judgment in part) (citing Bellotti II, 443 U.S. at 640-41).
cases,”207 but she did not make it clear on what evidence she based the conclusion that it failed to serve the state’s purpose.208 Justice O’Connor stated that the judicial bypass provision brought the statute into line with constitutional requirements.209 Her rationale for approval of the statute with judicial bypass was that “[i]n a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid unduly burdening a minor’s limited right to obtain an abortion.”210 She failed, however, to examine whether a statute with judicial bypass “rationally relates to a legitimate state purpose” as applied (for example, by helping minors to make a knowing, intelligent decision).211

iii. Justice Marshall

In contrast to Justices Stevens and O’Connor, Justice Marshall closely examined how each aspect of the statute furthered state interests in actual operation. As noted earlier, Justice Marshall would have applied a strict scrutiny test to the Minnesota statute.212 He stated, however, that “[f:or the reasons stated by Justice S[t evens] ... Minnesota’s two-parent notification requirement is not even reasonably related to a legitimate state interest.”213 Justice Marshall made extensive use of data in examining the extent to which the restrictions were narrowly tailored to serve the state interests.214 Although Justice Marshall focused on whether the statute was “narrowly tailored to serve the state interests” and not whether the statute was “reasonably related to the state interests,” under both standards the Court looks at the degree to which the statute serves the state interest. The “narrowly tailored” standard requires an extra step to ensure that the state cannot further its purpose in a less burdensome way.

Justice Marshall acknowledged that the main purpose asserted for the notification and delay requirements was “to protect the well-being of...

207. Id. at 2950 (O’Connor, J., concurring in part and concurring in judgment in part).
208. This may be due to the fact that Justice O’Connor was only writing a concurring opinion.
209. Hodgson, 110 S. Ct. at 2950-51 (O’Connor, J., concurring in part and concurring in judgment in part).
210. Id. at 2950 (O’Connor, J., concurring in part and concurring in judgment in part).
211. Justice O’Connor did not refer to the findings of the district court on the actual operation of the notice/judicial bypass scheme. See id. at 2950-51 (O’Connor, J., concurring in part and concurring in judgment in part).
212. For a discussion of Justice Marshall’s rationale for application of a strict scrutiny test, see supra notes 77-78 and accompanying text.
214. Id. at 2951-60 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
minors” and, specifically, to help ensure that their decisions were “knowing and intelligent.”215 He asserted that he did not need to determine whether the state’s interest outweighed the privacy interest because the strictures were not “closely tailored” to further the state interest in helping ensure that the minor’s decision was “knowing and intelligent.”216 According to Justice Marshall, the notification and delay requirements of the Minnesota statute were not closely tailored to further this interest because: (1) they were superfluous for those minors who would voluntarily consult, and (2) they were unlikely to result in productive consultation in families where the daughter was not comfortable consulting her parents.217 In fact, Justice Marshall stated that these requirements were more likely to result in harm in certain “less than ideal” families.218 As support for these propositions, he cited an article from a psychology journal and the testimony of two experts.219

Justice Marshall also addressed the relationship between the statute and protection of the parents’ limited interest.220 He concluded that the requirements were not narrowly tailored to the state’s interest in facilitating legal exercise of parental authority,221 particularly because

215. Id. at 2955 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). The notification requirement will purportedly accomplish this goal by encouraging discussion, and the 48-hour delay will accomplish it by providing time for consultation. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).

216. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).

217. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). Presumably, this means that the notification and delay requirements were not reasonably related to furthering the state interest. Id. at 2951 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).

218. Id. at 2955 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).

219. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). In the psychology journal article, the author examined several findings in existing research from which he concluded that compelled notification was unlikely to result in helpful discussion. Melton, supra note 164, at 81 (1987). The author acknowledged, however, that direct evaluations of notice statutes had not been conducted. Id. Justice Marshall also cited the testimony of two experts, Dr. Steven Butzer and Dr. Lenore Walker, that forced notification was likely to lead to negative effects. Hodgson, 110 S. Ct. at 2955 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).


221. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). Justice Marshall focused on whether the statute’s requirements were narrowly drawn here, rather than on whether they furthered the state’s interest. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). He emphasized that they were not tailored to further a “legitimate” interest. Id. at 2957 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
they facilitated exercise of parental authority even when it might harm the child and because the parents were given the right to veto the child’s decision in some situations.\textsuperscript{222}

Justice Marshall concluded that the judicial bypass option did not render the parental notification and forty-eight-hour delay requirements constitutional because the bypass procedure was “unconstitutional both on its face and as applied.”\textsuperscript{223} The bypass procedure was unconstitutional as applied because it was too burdensome,\textsuperscript{224} and it did not serve the asserted state interest.\textsuperscript{225} According to Justice Marshall, the bypass procedure did not serve the state’s interest in promoting informed decisionmaking on the part of all minors, because first, it was merely a “rubber stamp.”\textsuperscript{226} As support for this, he cited the findings of the district court and a researcher’s description of the hearings.\textsuperscript{227} Second, he pointed out that no positive effects were noted by the judges who testified in the district court.\textsuperscript{228} Thus, based on his examination of the empirical data presented, Justice Marshall reached the conclusion that this statutory scheme was not likely to assist the minor in reaching an informed and voluntary decision.\textsuperscript{229}

\begin{itemize}
\item \textsuperscript{222} Id. at 2956-57 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
\item \textsuperscript{223} Id. at 2951 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). Justice Marshall concluded that the provision was invalid on its face because it gave a third party, the judge, an absolute veto. Id. at 2957 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
\item \textsuperscript{224} Id. at 2958-59 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). For Justice Marshall’s discussion of the burdens created by the bypass procedure, see supra notes 155-66 and accompanying text.
\item \textsuperscript{225} Id. at 2959-60 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). He concluded that the bypass “substantially burdens a woman’s right of privacy without advancing a compelling state interest.” Id. at 2951 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part).
\item \textsuperscript{226} Id. at 2959 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). It was a judge who had heard many bypass petitions who referred to the proceedings as a “rubber stamp.” Hodgson v. Minnesota, 648 F. Supp. 756, 766 (D. Minn. 1986).
\item \textsuperscript{227} Hodgson, 110 S. Ct. at 2959 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). Justice Marshall cited the finding of the district court that an extremely small number of petitions were denied. Id. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part). Nine petitions out of 3,567 that went to decision were denied, and “anomalous circumstances surrounded several of the petitions that were denied.” Hodgson v. Minnesota, 648 F. Supp. 756, 765 (D. Minn. 1986). Justice Marshall also cited a psychologist’s description of the hearings as merely pro forma. Hodgson, 110 S. Ct. at 2959. (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part) (citing Melton, supra note 164, at 80).
\item \textsuperscript{228} Hodgson, 110 S. Ct. at 2959 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part) (citing findings of district court).
\item \textsuperscript{229} Id. at (Marshall, J., concurring in part, concurring in judgment in part...
iv. Justice Kennedy

Justice Kennedy did not refer to any of the data collected regarding the statute's ability to further state interests in actual operation. Justice Kennedy concurred with the portion of the Court's decision upholding the two-parent notice requirement with judicial bypass, but dissented from the portion of the Court's judgment holding two-parent notice without judicial bypass unconstitutional. In concluding that the two-parent notification requirement was valid without a bypass procedure, he relied on precedent and gave great deference to the legislature. Justice Kennedy neither evaluated whether the state's interest in the welfare of pregnant minors was actually served by notification, nor examined whether the state's interest in the protection of the right of each parent to participate in the upbringing of her or his own children was actually served by notification. In reaching the conclusion that Minnesota's judicial bypass scheme was constitutional, Justice Kennedy relied solely on precedent and a facial analysis of the statute. In stark contrast to Justice Marshall, he did not address the substantial empirical data on the actual operation of the bypass procedure.

2. The Ohio Statute

The Ohio statute at issue in Ohio v. Akron Center presented the Court with a challenge different from that presented in Hodgson. The Ohio statute included more extensive requirements than those that had been addressed in prior cases. In addition, this statute had not yet been and dissenting in part). Justice Marshall raised the possibility that statutory schemes providing for counseling might be more likely to achieve the state's purpose of informed decisionmaking. Id. at 2959 & n.9 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part) (discussing Maine statute which provides option for receiving counseling according to specified criteria and Wisconsin statute under which abortion providers are to encourage notification of "another family member, close family friend, school counselor, social worker or other appropriate person" when minor has valid reason for not notifying parents).

230. Id. at 2961 (Kennedy, J., concurring in judgment in part and dissenting in part).

231. Id. at 2965-69 (Kennedy, J., concurring in judgment in part and dissenting in part). Justice Kennedy took it as a "well-accepted premise that [the Court] must defer to a reasonable judgment by the state legislature when it determines what is sound public policy." Id. at 2966 (Kennedy, J., concurring in judgment in part and dissenting in part).


233. See Hodgson, 110 S. Ct. at 2961-72 (Kennedy, J., concurring in judgment in part and dissenting in part).

234. See id. (Kennedy, J., concurring in judgment in part and dissenting in part) (Justice Kennedy made no reference to factual findings of district court).

235. For a discussion of these additional requirements, see supra notes 63-65 and accompanying text.
A detailed analysis of Ohio v. Akron Center is beyond the scope of this Note, but it is instructive to examine those aspects of the opinion that indicate the receptiveness of the Court to constitutional challenges to abortion statutes, particularly challenges based on empirical data. Although the analyses of Justices Stevens and Kennedy focused on how the Ohio statute fit with precedent, both Justices expressly left open the possibility that the statute could be challenged on the basis of its actual operation.

a. Legitimate State Purposes or Interests

In his majority opinion, Justice Kennedy did not engage in much discussion about the legitimacy of the Ohio legislature’s purposes for enacting H.B. 319.237 Justice Blackmun, however, concluded in his dissent that “[t]he challenged provisions of the Ohio statute were merely ‘poorly disguised elements of discouragement for the abortion decision.’”238 With regard to the pleading requirements, Justice Blackmun stated that “[t]he majority fails to elucidate any state interest in setting up this barricade for the young pregnant woman.”239 He dismissed the justification that the state put forward before the court of appeals as “absurd”240 and said that “[t]he State’s interest in ‘streamlining’ the claims, belatedly asserted for the first time before this Court, is no less absurd.”241

236. The statute had not been put into operation because the United States District Court for the Northern District of Ohio issued an injunction preventing the statute’s enforcement. For a discussion of the procedural posture of Ohio v. Akron Center, see supra notes 66-68 and accompanying text.

237. See Ohio v. Akron Center, 110 S. Ct. at 2977-84. Presumably, much of Justice Kennedy’s discussion in Hodgson on this point would be relevant here as well. For a discussion of Justice Kennedy’s views on legitimate state purposes or interests, as expressed in Hodgson, see supra notes 112-44.

238. Ohio v. Akron Center, 110 S. Ct. at 2985 (Blackmun, J., dissenting) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 763 (1986)). At another point, Justice Blackmun stated: “The Ohio Legislature, in its wisdom, in 1985 enacted its anti-abortion statute.” Id. at 2992 (Blackmun, J., dissenting). In concluding, he said: “The underlying nature of the Ohio statute is proclaimed by its strident and offensively restrictive provisions. It is as though the Legislature said: ‘If the courts of the United States insist on upholding a limited right to abortion, let us make it as difficult as possible to obtain . . . .’” Id. at 2993 (Blackmun, J., dissenting). Discouragement of the decision to abort is presumably still an illegitimate state purpose, at least in the first trimester of pregnancy. See Roe v. Wade, 410 U.S. 113, 162-64 (1973).

239. Ohio v. Akron Center, 110 S. Ct. at 2986 (Blackmun, J., dissenting).

240. Id. at 2986 (Blackmun, J., dissenting) (“The justification the State put forward before the Court of Appeals was the ‘absurd contention that ‘[a]ny minor claiming to be mature and well enough informed to independently make such an important decision as an abortion should also be mature enough to file her complaint under [the appropriate subsection].’” (quoting Ohio v. Akron Center, 854 F.2d at 863)).

241. Id. at 2986 (Blackmun, J., dissenting).
Justice Kennedy, writing for the Court, did consider the legitimacy of the state's reasons for enacting one particular provision of the Ohio statute—the physician notification requirement. Appellees contended that "Ohio ha[d] no reason for requiring the minor's physician, rather than some other qualified person, to notify one of the minor's parents." Justice Kennedy distinguished the statutory requirement that the treating physician notify the minor's parent from the physician counseling requirement held invalid in City of Akron v. Akron Center for Reproductive Health Services. He then stated that the physician notification provision was justified "because the parent often will provide important medical data to the physician" and because "[t]he conversation with the physician . . . may enable a parent to provide better advice to the minor."

The physician notification provision caused Justice Stevens, in his concurrence, to raise the possibility that the legislature's purpose was actually to discourage abortion rather than to foster informed decision-making. Justice Blackmun asserted that this was indeed the purpose of the Ohio legislature. He noted that the State did not "claim[] that personal notice by the physician was required to effectuate an interest in the minor's health until the matter reached this Court," and he therefore characterized the state's concern for the health of the minor as "chimerical."

242. Id. at 2983.

243. Id. In Akron v. Akron Center, the Court held invalid an ordinance requiring the attending physician to personally counsel the abortion patient. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 446-49 (1983). Justice Kennedy distinguished the requirement in Ohio v. Akron Center that the physician notify the parent by asserting that "although counselors may provide information about general risks as in Akron [v. Akron Center]," physicians have a superior ability "to garner and use information supplied by a minor's parents upon receiving notice." Ohio v. Akron Center, 110 S. Ct. at 2983. In addition, he stated that the "conversation with the physician . . . may enable a parent to provide better advice to the minor." Id.

244. Ohio v. Akron Center, 110 S. Ct. at 2983.

245. Id. at 2995 (Stevens, J., concurring in part and concurring in judgment) ("One cannot overlook the possibility that this provision was motivated more by a legislative interest in placing obstacles in the woman's path . . . than by a genuine interest in fostering informed decisionmaking."). As noted earlier, discouragement of the decision to abort is presumably still an illegitimate state purpose, at least in the first trimester of pregnancy. See Roe v. Wade, 410 U.S. 113, 162-64 (1973).

246. Ohio v. Akron Center, 110 S. Ct. at 2991 (Blackmun, J., dissenting) ("[T]here is more than a 'possibility' that the physician-notification provision 'was motivated more by a legislative interest in placing obstacles in the woman's path to an abortion . . . than by a genuine interest in fostering informed decisionmaking.' " (quoting Id. at 2995 (Stevens, J., concurring in part and concurring in judgment)).

247. Id. at 2991-92 (Blackmun, J., dissenting). Justice Blackmun then proceeded to refute the idea that health concerns could have been the motivation behind the legislation. Id. at 2992 (Blackmun, J., dissenting).
b. The Burden

Justices Stevens and Kennedy differed markedly from Justice Blackmun in their conclusions regarding the burdens posed by the various provisions of the Ohio statute. Because these provisions had not been put into operation, the Justices were forced to speculate as to the impact the provisions would have. Although Justices Stevens and Kennedy concluded that the statute did not pose unconstitutional burdens on its face, they left open the possibility that a later challenge could be made based on the operation of the statute.

Justice Kennedy, in part V of his opinion, concluded that the "Ohio statute . . . does not impose an undue, or otherwise unconstitutional burden on a minor seeking an abortion." Writing for the Court, he relied primarily on precedent in determining that the Ohio statute was constitutional, stating that "[w]e do not need to determine whether a statute that does not accord with these cases would violate the Constitution, for we conclude that H.B. 319 is consistent with them." He examined each provision, one at a time, and either declared that it was consistent with precedent or that it did not pose unconstitutional burdens.

In dissent, Justice Blackmun reached a conclusion that Justice Kennedy refused to reach: He stated that a notice statute, like a consent statute, must contain a bypass procedure that comports with the standards set forth in Bellotti II. Justice Blackmun disagreed with Justice

248. Id. at 2983 (Kennedy, J., joined by Chief Justice Rehnquist and Justices White and Scalia).
249. Id. at 2978.
250. Justice Kennedy held that the provisions for confidentiality and anonymity in the Ohio statute were sufficient to meet the Bellotti II anonymity requirement. Id. at 2980. The Ohio complaint forms did require the minor to disclose her identity, but Justice Kennedy stated that "[w]e refuse to base a decision on the facial validity of a statute on the mere possibility of an unauthorized, illegal disclosure by state employees." Id. Similarly, he stated that the Ohio statute met the requirement of expediency laid down in Bellotti II because in "making a facial challenge to a statute, [appellees] must show that 'no set of circumstances exists under which the Act would be valid.'" Id. at 2980-81 (quoting Webster v. Reproductive Health Servs., 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in judgment)). He further stated that the "Court of Appeals should not have invalidated the Ohio statute . . . based upon a worst-case analysis that may never occur." Id. at 2981. Justice Kennedy asserted that Ohio was not required to provide for constructive authorization in the event of judicial delay and that this provision merely served as a safety net. Id. He also dismissed the burdens posed by the clear and convincing evidence standard, the pleading requirements and the physician notification requirement as not constitutionally infirm. Id. at 2981-83.
251. Justice Kennedy explicitly left open the question of whether the "Fourteenth Amendment requires notice statutes to contain bypass procedures" because the Ohio statute "meets the requirements identified for parental consent statutes in Danforth, Bellotti, Ashcroft and Akron [v. Akron Center]." Id. at 2979.
252. Id. at 2985 (Blackmun, J., dissenting).
Kennedy that the Ohio bypass procedure complied with the dictates of
Bellotti II and its progeny. 253 In this regard, he stated that "[t]he major-
ity consider[ed] each provision in a piecemeal fashion, never acknowl-
edging or assessing the 'degree of burden that the entire regime of
abortion regulations places' on the minor." 254

Although Justices Stevens and Kennedy concluded that the provi-
sions of H.B. 319 did not present unconstitutional burdens, they both
emphasized in Ohio v. Akron Center that the Court was making a facial
analysis of the statute. 255 Thus, they left open the possibility of a chal-

253. Id. (Blackmun, J., dissenting).

254. Id. (Blackmun, J., dissenting) (quoting Dellinger & Sperling, Abortion
and the Supreme Court: Retreat from Roe v. Wade, 138 U. Pa. L. Rev. 83, 100
(1989)). Justice Blackmun referred to the Ohio statutory framework as a "tortu-
ous maze," an "obstacle course," and a "labyrinth." Id. at 2985-86 (Blackmun,
J., dissenting). He expressed concern that the pleading requirements
"prevent[] some minors from showing either that they are mature or that an
abortion would be in their best interests" and that the identification requirement
would make a woman "more reluctant to choose an abortion." Id. at 2986, 2987
(Blackmun, J., dissenting) (quoting Thornburgh v. American College of Obstet-
ricians & Gynecologists, 476 U.S. 747, 766 (1989)). Justice Blackmun also re-
ferred to the increased medical risks associated with the delays allowed by the
Ohio statute. Id. at 2988 (Blackmun, J., dissenting). He stated that the "practical
effect of the [constructive authorization] provision is to frustrate the minor's
right to an expedient disposition of her petition." Id. at 2989 (Blackmun, J.,
dissenting) (quoting Akron Center for Reproductive Health v. Ohio, 854 F.2d
852, 868 (6th Cir. 1988)). Justice Blackmun asserted that "[t]he imposition of
[the] heightened standard of proof unduly burdens the minor's right to seek an
abortion." Id. (Blackmun, J., dissenting).

Justice Blackmun also concluded that "[t]he strictures of this Ohio law . . .
impinge on the physician's professional discretion in the practice of medicine."
Id. at 2992 (Blackmun, J., dissenting) (footnote omitted). He emphasized the
physician's right in his majority opinion in Roe v. Wade as well. Roe, 410 U.S.
113, 123 (1973) ("this decision vindicates the right of the physician to adminis-
ter medical treatment according to his professional judgment up to the point
where state interests provide compelling justifications for intervention").

255. For example, in addressing the confidentiality provisions, Justice Ken-
dy stated that "[w]e refuse to base a decision on the facial validity of a statute
on the mere possibility of unauthorized, illegal disclosure by state employees."
Ohio v. Akron Center, 110 S. Ct. at 2980 (emphasis added). In addressing the
expedition requirement, he stated that "because 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.'" Id. at 2980-81 (quoting Webster v. Reproduc-
and concurring in judgment)) (emphasis added). He further stated that
"[r]egardless of whether Ohio could have written a simpler statute, H.B. 319
survives a facial challenge." Id. at 2982 (emphasis added). Justice Kennedy con-
cluded that "[t]he confidentiality provisions, the expedited procedures, and the
pleading form requirements, on their face, satisfy the dictates of minimal due
process." Id. (emphasis added). With regard to the physician notification re-
quirement, he held that "[o]n this facial challenge, we find [it] unobjectionable."
Id. at 2983 (emphasis added).

Justice Stevens also stressed that "appellees have challenged the Ohio stat-
ute only on its face." Id. at 2993 (Stevens, J., concurring in part and concurring
in judgment) (emphasis added). He stated elsewhere that "[t]he Ohio statute,
It is surprising that Justice Kennedy emphasized the facial nature of the challenge to the Ohio statute and seemed to leave open the possibility of a challenge to the statute as applied, because in Hodgson, when faced with a challenge "in operation" or "as applied," he failed to acknowledge that fact. Rather, Justice Kennedy conducted a facial analysis in Hodgson, while ignoring substantial empirical data relating to the statute's operation.

c. Relationship between the Statute and the State’s Interest

Speculation dominated the discussion over whether the Ohio statute would further the interests of the state. Justices Kennedy and Blackmun reached different conclusions from this speculation. Justice Stevens indicated that his conclusion, finding the statute constitutional, was tentative, because as implemented, the statute might be unconstitutional.

Justice Kennedy did not discuss how the lack of anonymity in the Ohio statute's confidentiality provisions furthered any state interest nor did he discuss how the extended time available to the Ohio courts by the expedited procedure provisions furthered a state interest. He simply concluded that these provisions were not outside the scope of the requirements of Bellotti II. Similarly, he did not discuss what interest was served by the pleading requirements, describing them as "simple and straightforward." Justice Kennedy speculated as to the beneficial on its face, provides a sufficient procedure for those cases" in which a minor is mature or parental notice is not in her best interest, and that he was "unable to conclude that [the physician notification] provision is unconstitutional on its face." Id. at 2994-95 (Stevens, J., concurring in part and concurring in judgment) (emphasis added).

256. Justice Kennedy's opinion implies that if plaintiffs can show actual "unauthorized, illegal disclosure by state employees," that a "worst-case" scenario actually occurred or that "time limitations imposed by H.B. 319 will be ignored," they may have grounds for invalidating the statute. See id. at 2980-81. Justice Stevens expressly left open the possibility that the statute may be unconstitutional as "implemented," but he stated that he was unwilling to reach the conclusion that the statute should be invalidated "before the statute has been implemented and the significance of its restrictions evaluated in light of its administration." Id. at 2993 (Stevens, J., concurring in part and concurring in judgment). Justice Stevens made a similar point in Bellotti II, stating that in actual application, state regulations requiring parental consent or notification coupled with a judicial bypass procedure could create undue and unforeseen burdens on a minor that the Court failed to anticipate. Bellotti II, 443 U.S. 622, 634 (1979).

257. For a discussion of Justice Kennedy's failure to acknowledge the evidence on the actual operation of the statute at issue in Hodgson, see supra notes 154-156 & 215-219 and accompanying text.

258. For a discussion of Justice Kennedy's analysis in Hodgson, see supra notes 167-69 & 230-34 and accompanying text.


260. Id. at 2982. But see id. at 2985, 2986 (Blackmun, J., dissenting) (describing pleading requirements as a "pleading trap" and a "barricade").
effects of other aspects of the statute.\textsuperscript{261}

Justice Blackmun systematically examined the state interests that were served by each of the provisions of the Ohio statute and came to the conclusion that the statute did not further state interests in light of the burdens it imposed on the pregnant minor.\textsuperscript{262} Justice Blackmun expressed dismay that no reasons had been advanced for certain provisions of the Ohio statute and expressed concern about the real world effects of other provisions.\textsuperscript{263}

The contrasting conclusions reached by Justices Blackmun and Kennedy as a result of their speculation demonstrate the need for data on which to base a decision. Justice Stevens expressed receptiveness to data as to the actual impact of the Ohio statute. He asserted that "the State may presume that, in most of its applications, the statute will reasonably further its legitimate interest in protecting the welfare of its minor citizens.\textsuperscript{264} He left open the possibility, however, that once the

\textsuperscript{261} Justice Kennedy stated that the constructive authorization provision was added "[w]ith an abundance of caution, and concern for the minor's interests, ... to ensure expedition of the bypass procedures even if [the] time limits are not met." \textit{Id.} at 2981. He stated that the clear and convincing evidence standard "ensures that the judge will take special care in deciding whether the minor's consent to an abortion should proceed without parental notification." \textit{Id.} at 2982. Finally, he asserted that the physician notification provision served a state interest "because the parent often will provide important medical data to the physician" and because "[t]he conversation with the physician ... may enable a parent to provide better advice to the minor." \textit{Id.} at 2983. He did not discuss why these interests could not be furthered by a discussion with persons other than the physician.

\textsuperscript{262} \textit{Id.} at 2985 (Blackmun, J., dissenting).

\textsuperscript{263} Justice Blackmun concluded that the majority failed to elucidate any state interest that was served by the pleading requirements. \textit{Id.} at 2986 (Blackmun, J., dissenting). He asserted that "[t]he State has offered no justification for its failure to provide specific guidelines to be followed by the Juvenile Court to ensure anonymity for the pregnant minor." \textit{Id.} at 2987 (Blackmun, J., dissenting). Justice Blackmun stated that although the constructive authorization provision may have been intended to expedite the bypass procedure, its practical effect was to frustrate expedient disposition of the procedure, and "the State offer[ed] no reason why a formal order or some kind of actual notification from the clerk of court would not be possible." \textit{Id.} at 2989 (Blackmun, J., dissenting). He asserted that the clear and convincing evidence standard "does little to facilitate a fair and reliable result." \textit{Id.} at 2990 (Blackmun, J., dissenting).

Justice Blackmun expressed particular concern about the effect that the heightened standard of proof would have in dysfunctional families. \textit{Id.} at 2990-91 (Blackmun, J., dissenting). He also expressed skepticism about the state's asserted justification for the physician notification provision. \textit{Id.} at 2991-92 (Blackmun, J., dissenting) ("If these chimerical health concerns now asserted in fact were the true motivation behind this provision, I seriously doubt that the State would have taken so long to say so."). He believed the state's asserted interest could be served by conversation with the physician after "notification by some other competent professional, such as a nurse or counselor." \textit{Id.} at 2992 (Blackmun, J., dissenting).

\textsuperscript{264} \textit{Id.} at 2993 (Stevens, J., concurring in part and concurring in judgment).
statute was implemented it could be shown that the statute failed to fur-
ther the state's interest in enough cases, or to a great enough degree in
the exceptional case, that the statute should be invalidated. Thus, he
seemed to invite a challenge to the statute “as applied.”

Two ominous signs in the Ohio v. Akron Center opinions, however,
suggest that the Court will not be receptive to empirical data in this con-
text. First, Justice Scalia reiterated his position that there is no constitu-
tional right to an abortion and that this is a question for the legisla-
ture. Second, in section V of his opinion, which was joined by
three other Justices, Justice Kennedy stated that the Ohio statute was
a rational means of furthering the end of providing minors with “a
clearer, more tolerant understanding of the profound philosophic
choices confronted by a woman who is considering whether to seek an
abortion.” This statement suggests that the four Justices view issues
surrounding the abortion controversy as resting on a plane that is above
empirical refutation. In addition, Justice Kennedy's opinion in Hodgson
reflected an unwillingness to acknowledge empirical data.

IV. PROPOSAL FOR EMPIRICAL ANALYSIS

Justice Kennedy's opinion in Hodgson marks a return to the tradition
of classical jurisprudence. He appears to adhere to "the theory that
constitutional questions can be decided by merely holding the words
of the statute up against the applicable constitutional provision." The
importance of social sciences and the empirical world to the understand-

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265. Id. at 2993 (Stevens, J., concurring in part and concurring in
judgment).

266. Id. at 2984 (Scalia, J. concurring). Justice Scalia also agreed with the
majority that the statute did not deprive minors of procedural due process nor
contradict prior holdings. Id. (Scalia, J., concurring).

267. Chief Justice Rehnquist and Justices White and Scalia joined in Justice
Kennedy's opinion.

268. Ohio v. Akron Center, 110 S. Ct. at 2983 (Kennedy, J., joined by Chief
Justice Rehnquist and Justices White and Scalia). This section of Justice Ken-
nedy's opinion provoked a heated response from Justice Blackmun. Id. at 2993
(Blackmun, J., dissenting) ("hyperbole in Part V of Justice Kennedy's opinion
can have but one result: to further incite [] American press, public, and pulpit").

269. For a discussion of Justice Kennedy's failure to acknowledge the evi-
dence on the actual operation of the statute at issue in Hodgson, see supra
notes 154-156 & 215-219 and accompanying text.

270. Classical jurisprudence has been defined as:
[T]he belief that a single, correct legal solution could be reached in
every case by the application of logic to a set of natural, self-evident
principles. Classical jurisprudence understood the process of deciding
cases to be purely rational and exclusively deductive and thus produced
a formal mechanical approach to decisionmaking.

Monahan & Walker, Social Authority: Obtaining, Evaluating, and Establishing Social

271. Pine, supra note 33, at 665 n.34 (quoting Alflange, The Relevance of Leg-
islative Facts in Constitutional Law, 114 U. Pa. L. Rev. 637, 642 (1966)).
ing and evolution of law, however, is today a point of general agreement and should not be ignored.\textsuperscript{272} Justice Marshall’s approach is more consistent with this modern view. He “weigh[s] means against ends, burdens against benefits, and asserted state interests against [the] law’s \textit{actual} achievements in the course of determining constitutional validity.”\textsuperscript{273} Justice Marshall’s approach is particularly appropriate in cases such as \textit{Hodgson} where the issues addressed are susceptible to empirical evaluation. An approach to reviewing legislation regulating the abortion decisions of minors that takes into account empirical evidence is advocated below.

\textbf{A. Minor’s Interest and Standard of Review}

The initial question that must be answered by the Court in reviewing legislation regulating the abortion decisions of minors is what degree of protection from state interference these decisions should receive. As noted earlier, the Court is divided as to the appropriate standard of review to apply to a statute regulating a minor’s abortion decision.\textsuperscript{274} In the \textit{Hodgson} decision, it appeared that a majority of the Court would at least require that the state regulation be reasonably related to a legitimate state purpose.\textsuperscript{275} Although it was not clear from the opinions, it may be that if a regulation “unduly burdens” the minor’s decision, a heightened standard of scrutiny will apply.\textsuperscript{276} Thus, in re-

\textsuperscript{272}. It is commonly accepted today that law should be informed by empirical fact. Monahan & Walker, \textit{supra} note 270, at 477 (“Once heretical, the belief that empirical studies can influence the content of legal doctrine is now one of the few points of general agreement among jurists.”). Professors Monahan and Walker state that all nine justices that were on the Supreme Court in 1986 had either authored or joined an opinion using social science research to establish or criticize a rule of law. \textit{Id.} at 477 n.2. Another commentator states that “[t]he Supreme Court in \textit{Brown} [v. \textit{Board of Education}] ... made [it] clear that new facts and extralegal social-scientific evidence could contribute to judicial alteration or even reversal of a constitutional rule of law.” Pine, \textit{supra} note 33, at 669. \textit{But cf.} Lockhart v. McCree, 476 U.S. 162, 168 (1986) (“We will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that ‘death qualification’ in fact produces juries somewhat more ‘conviction-prone’ than ‘non-death-qualified’ juries. We hold, nonetheless, that the Constitution does not prohibit the States from ‘death qualifying’ juries in capital cases.”).

\textsuperscript{273}. Pine, \textit{supra} note 33, at 665. For a detailed discussion of the historical roots of Justice Marshall’s and Justice Kennedy’s approaches, see Pine, \textit{supra} note 33, at 658-68.

\textsuperscript{274}. For a discussion of the different standards of review proposed in \textit{Hodgson} and \textit{Ohio v. Akron Center}, see Pine notes 75-97 and accompanying text.

\textsuperscript{275}. \textit{Hodgson}, 110 S. Ct. at 2945. This standard was used in declaring unconstitution al the portion of the Minnesota statute requiring notice to both parents of the pregnant minor without providing for a judicial bypass. \textit{Id.}

\textsuperscript{276}. Justice O’Connor has advocated a heightened standard of scrutiny where the statute unduly burdens the abortion decision, and Justices Marshall and Blackmun, joined in their opinions by Justice Brennan, have advocated heightened scrutiny in all cases. See \textit{supra} notes 77-81 & 87-93.
viewing a parental notification or consent statute, the Court would need to address three questions: (1) the importance and legitimacy of the state's interests, (2) the degree to which the means chosen would further those interests, and (3) the degree to which the means chosen would burden those seeking to exercise a constitutional right and would burden others.277

Empirical data can assist the Court in answering each of these three questions. In examining the extent to which the regulation furthers a state interest, however, the Court has adopted the very deferential rational relationship standard.278 Traditionally, if the rational relationship test applies, then the Court will defer to the legislature and uphold the regulation.279 In Hodgson, however, the Court overturned a part of Minnesota’s statutory scheme despite applying this very deferential standard.280 The Court appeared to rely on the substantial evidence that had been accumulated regarding the positive and negative effects of two-parent notification in holding that such a notification requirement was unconstitutional without a judicial bypass alternative.281 This decision is thus one of a handful in which the court has overturned legislation while applying the most deferential standard of review.282

It is proposed that when the Court applies a rational basis test, and substantial empirical evidence has accumulated as to the statute's ability to further the state's interest, the test should be a rational basis test "with bite."283 Legislation should be overturned when there is substantial empirical evidence to suggest that the statute at issue does not further the state interest. It has been suggested that the courts have in fact

Given the current composition of the Court, with Justices Souter and Thomas having replaced Justices Brennan and Marshall, it is difficult to predict what standard of review will be adopted by a majority of the Court. In a recent decision, the United States Court of Appeals for the Third Circuit stated that Justice O'Connor's two-part standard was the standard for lower federal courts to apply when reviewing abortion legislation. Planned Parenthood v. Casey, 947 F.2d 682, 691-98 (3d Cir. 1991), cert. granted, 60 U.S.L.W. 3498 (1992). For a discussion of Justice O'Connor's two-part standard, see supra notes 87-93 and accompanying text.

277. For a discussion of why these were the three questions to be answered by the Court in Hodgson, see supra note 104 and accompanying text.

278. As noted earlier, the terms "reasonable" and "rational" are generally used interchangeably. See supra note 94 and accompanying text.

279. Turkington, supra note 95, at 1310 ("Practitioners versed in constitutional law know they must bring their case out from under the rational basis test if they are to be successful in challenging legislation under the due process or equal protection clause of the fourteenth amendment.").

280. For a discussion of the deferential nature of this standard, see supra note 95 and accompanying text.

281. For a discussion of the Court's reliance on this evidence, see supra notes 190-93 and accompanying text.

282. See Turkington, supra note 95, at 1310 n.33.

283. For a description of what is meant by "with bite," see supra note 96 and accompanying text.
applied such a "rational basis test with bite" in public health cases where there is substantial medical evidence.\textsuperscript{284} The legislation here is similar to public health legislation in that it purportedly helps to ensure informed decisions and to protect the emotional health of "peculiarly vulnerable" minors. Moreover, the empirical evidence available in \textit{Hodgson} is analogous to the medical evidence available in public health cases.

In addition to using empirical evidence in assessing the degree to which a statute furthers the state's interest, the Court should make use of relevant empirical evidence in assessing the legitimacy of the state's purpose and in assessing the burdens of the statute.

\textbf{B. Legitimate State Purpose}

In \textit{Hodgson}, all members of the Court took for granted certain assumptions related to the importance and legitimacy of the state's interest. The main interest that was addressed was the state interest in the welfare of the pregnant minor. All members of the Court assumed either that minors are not as capable as adults in decisionmaking with regard to abortion or are more vulnerable than adults to psychological harm as a result of abortion decisions.\textsuperscript{285} These assumptions have been challenged,\textsuperscript{286} and the Court should acknowledge these challenges. When a legislature enacts a right-infringing law to address a problem that research suggests does not exist, the Court should question the legislature's purpose. As Professor Tribe has stated:

\begin{quote}
[T]he requirement that legislation be rationally related to a legitimate governmental purpose \ldots can serve as little more than a source of pressure on government to articulate purposes that fit a challenged law, unless substantive principles are put forth to exclude from consideration (1) purposes manufactured with the benefit of hindsight but not in fact motivating a challenged provision; and \ldots (2) purposes deemed illegitimate in the context of the provision being challenged.\textsuperscript{287}
\end{quote}

Empirical research can provide substantive grounds for evaluating the purposes articulated by legislators. If a purpose such as discouragement of the abortion decision is deemed illegitimate, then a statute that research suggests will do nothing more than that should be overturned. In addition, when the legislature puts extensive burdens in front of the

\textsuperscript{285} For a discussion of the Justices' assumptions about minors' decision-making capacities and psychological vulnerability, see \textit{supra} notes 112-20 and accompanying text.
\textsuperscript{286} For a discussion of the empirical evidence regarding minors' decision-making capacities and psychological vulnerability, see \textit{supra} notes 117-18 and accompanying text; \textit{see also} Pine, \textit{supra} note 33, at 677-93.
\textsuperscript{287} L. Tribe, \textit{supra} note 94, § 15-2, at 1306 (footnotes omitted).
minor, or when the legislature continues to promote regulations that have been demonstrated not to serve the asserted purpose, the Court should question whether the asserted purpose is merely a pretext for an illegitimate purpose.

The Court also needs to articulate more precisely the interests of parents in minors' decisionmaking and the extent to which legislatures may intervene to promote those interests. The Hodgson decision produced divergent analyses of the relative interests of minors, their parents and the state. Justice Kennedy's analysis was troubling in that it gave very little recognition to the status of children as persons apart from their parents. In addition, the various opinions in Hodgson reflected the Court's tendency to refer to a series of prior cases as reflecting a general interest in "family privacy" without considering whether those decisions involved state-parent conflicts or parent-child conflicts. The Court needs to determine more precisely the contours of the family's privacy right; family privacy should not be used as a rationale for denying competent children basic rights of self-determination. Certainly the right to family privacy should not serve as a basis for state intervention as suggested by Justice Kennedy.

C. The Burden

The nature of the burden of a law is a question of fact. When presented with a facial challenge to a statute, the Court by necessity must speculate as to the burdens the statute might present. Thus, the Court in Bellotti II speculated that the judicial bypass framework would not present "undue burdens" to minors seeking abortions without parental consent. When a statute has been put into effect, however,

288. For a discussion of these divergent analyses, see supra notes 121-47.
289. For a discussion of Justice Kennedy's view on the interests of parents that are implicated by notification statutes, see supra notes 129-32 & 142 and accompanying text.
291. For a discussion of Justice Kennedy's views on the interests of the parents and the family, see supra notes 129-32 & 144 and accompanying text.
292. Questions of burden and benefit are questions of fact. Pine, supra note 33, at 698. If [a judge] does not hear testimony or receive memoranda illuminating these questions, he assumes their answers on the basis of his own experience and education. Thus a judge may make assumptions far beyond the ordinary range of judicial notice... [s]uch assumptions may be correct or incorrect, enlightened or unenlightened, but they are always made.

Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75, 84. Cf. Monahan & Walker, supra note 270, at 516 (arguing that social or legislative facts should, for some purposes, be treated by courts as authority akin to law).
293. See Bellotti II, 443 U.S. 622, 646-48 (1979). But see id. at 655-56 (Stevens, J., concurring in judgment) ("The need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as,
evidence accumulates as to its actual burdens. It is no longer necessary to rely on assumptions, and the Court’s refusal to examine empirical evidence is tantamount to putting on a blindfold in the face of a potential infringement of constitutional rights. Even where a statute has not yet been put into operation, the Court should inform its speculation as to the burdens the statute will present through reference to experience with similar statutes and reference to research literature. In Hodgson, substantial evidence existed regarding the burdens created by Minnesota’s statutory scheme—evidence that Justice Stevens largely ignored and Justice Kennedy ignored completely. Yet, Justices Stevens and Kennedy did express an openness to as applied challenges in Ohio v. Akron Center; it is to be hoped that this receptiveness to empirical data is not an illusion.

D. The Relationship Between the Statute and the State’s Interest

When a Court is faced with a facial challenge to a statute, it must speculate as to the degree to which that statute will further the state’s interest, much as the Court must speculate as to the burden of a statute. Again, any such speculation should be informed by reference to relevant empirical data. In Hodgson, however, the Court was not forced to speculate, because it was presented with substantial evidence relating to the statute’s furtherance of the state’s interest. There was no evidence that the statute served the state’s interest, and substantial evidence suggested that the statute disserved the state interest. The district court was led to the contradictory conclusion that although as a matter of fact the state law served no purpose, as a matter of law, it did serve a legitimate state purpose. Such contradictions between law and fact can do and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent.” (footnote omitted).

294. For a discussion of the evidence relating to the burdens created by Minnesota’s statutory scheme, see supra notes 135-36 and accompanying text.

295. For a discussion of the consideration that Justices Stevens and Kennedy gave to the evidence on the burdens of the Minnesota statute, see supra notes 154-64 and accompanying text.

296. For a discussion of the evidence relating to the statute’s furtherance of the state’s interest that was presented to the Hodgson Court, see supra note 184 and accompanying text.


298. The district court found “as a matter of fact that [the statute] fails to serve the State’s asserted interest in fostering intra-family communication and protecting pregnant minors.” Id. at 775. Nonetheless, the court felt that as a matter of law the notification and bypass requirements were constitutional because they met the standards contained in prior cases decided by the Supreme Court. Id. at 776-77. The district court felt bound by the Supreme Court’s prior decisions even though the facts before it were facts that were not available to the Supreme Court when it rendered those decisions. For a more extensive discussion of the problem facing district courts when they are presented with facts contradicting the assumptions of a higher court that had established a standard of constitutionality, see Pine, supra note 33, at 668-670.
much to undermine the faith of the public in the law. When there is
direct evidence as to the effect of the law, the Court should attend to
that evidence. Where a statute's ability to further a state interest can be
empirically determined, the Court should put teeth into the rational ba-
sis test.299

V. Conclusion

In sum, an empirical approach to constitutional adjudication in the
abortion area involves examination of legislative facts relating to the
problem that the state purports to address with its potentially rights-
infringing legislation to determine whether the state's purpose is legiti-
mate, whether the burdens the statute presents are undue, and whether
the statute furthers the state purpose. If the statute has not yet been put
into operation, the Court should make an informed speculation based on
the existing relevant data. If sufficient relevant data to invalidate the
statute do not yet exist, the Court should state this. Once the statute has
been put into operation, the Court should examine the accumulated
data relating to the burden of the legislation and the degree to which the
legislation furthers the state interest.

Although a number of barriers to judicial use of empirical data ex-
ist, these barriers are not insurmountable.300 What is needed is a firm
resolve to address these barriers. In addition, legislatures should make
use of available data and collect new data that will inform the drafting of
laws.301 In this way, legislation may more effectively and sensitively ad-
dress social problems. Legislatures should also attempt to monitor the
actual effect of their laws. Researchers should continue their efforts to
inform both courts and legislatures and should serve as advocates for
empirical truth.

Abortion law is an area where irrationality dominates both sides of
the debate,302 thus preventing effective compromise. As one commen-
tator has stated about the compromises attempted by legislatures:

299. For a discussion of a rational basis test with teeth, see supra notes 283-
84 and accompanying text.

300. For example, professors Monahan and Walker make specific proposals
for obtaining, evaluating and establishing, in court, the findings of empirical re-
search. Monahan & Walker, supra note 270, at 495-516.

301. Unfortunately, recent large scale efforts to collect information about
adult and adolescent sexual behavior were scuttled by the United States Depart-
ment of Health and Human Services and the United States Congress. Young-
strom, Sex Behavior Studies Are Derailed, APA Monitor, Nov., 1991, at 1, col. 1; see
also Benac, Sullivan Terminates $18 Million Survey on Teens’ Sex Habits, Phila.
Inquirer, July 24, 1991, at A5, col. 5 (discussing reasons why Health and Human
Services Secretary cancelled study on adolescent sexual behavior). These stud-
ies could have been useful in developing public policy approaches to problems
such as teenage pregnancy and AIDS. Youngstrom, supra, at 1.

302. See generally L. Tribe, supra note 89 (discussing problems generated by
extreme views on either side of abortion debate).
The overarching problem with all these purported compromises is that they are not compromises at all. Many of the laws put forward to stake out what is supposedly a middle ground in the abortion debate, rather than meaningfully protecting either life or choice, randomly frustrate both and do not move us closer to a society of caring, responsible people.\footnote{303}

Counseling has been suggested by a number of commentators as a possible part of a sensible compromise—one that might effectively further informed decisionmaking and prevent negative psychological sequelae.\footnote{304} Some state legislatures have made counseling part of their statutory schemes.\footnote{305} One goal that should be acceptable to all parties is taking steps toward the prevention of unwanted pregnancies.\footnote{306} Whatever measures are undertaken, they should be undertaken with our eyes open to the real world effects of those measures.

\textit{Stephen J. Anderer}

\footnote{303. \textit{Id.} at 208.}
\footnote{304. \textit{See, e.g.,} Melton & Pliner, \textit{supra} note 25, at 29 ("Outcome research on counseling of minors about abortion decisions is limited [but] [t]here is some evidence that counseling lessens negative emotional effects and promotes a sense of relief." (citation omitted)).}
\footnote{306. \textit{See L. Tribe, supra} note 89, at 211 ("The most obvious thing all of this suggests about how we might best find our way around the conflict between the woman's liberty and the fetus's life is that we must reduce the number of situations in which women are pregnant but do not want to be."); \textit{see also} NRC \textit{Report, supra} note 117, at 6-8 (suggesting specific strategies for reducing unwanted pregnancies).}