STATE REGULATION OF A MINOR'S ABORTION RIGHTS: WHERE DO WE GO FROM HERE?  

HODGSON V. MINNESOTA

INTRODUCTION

A woman's right to decide whether to terminate her pregnancy is a fundamental right, according to the United States Supreme Court's decision in Roe v. Wade. Subsequent Supreme Court decisions have both extended this right to pregnant minors and established that the states cannot allow a third party to veto a decision made by a woman and her physician. Challenges to newly enacted statutes by which the states attempted to regulate abortion have allowed the Court to develop a framework of broad guidelines for use in reviewing this type of legislation.

Hodgson v. Minnesota represents an extension of the principles in the Court's framework by the United States Court of Appeals for the Eighth Circuit in upholding a Minnesota statute which is unlike any of those dealt with in earlier Supreme Court decisions. The Hodgson court admittedly went beyond the limits of the Supreme Court's holdings in the guideline-establishing decisions. In doing so, the Eighth Circuit ignored the detailed factual findings of the United States District Court for the District of Minnesota and avoided the questions regarding the unique burdens the statute imposes on a minor's abortion right.

This Note begins by reviewing decisions in which the Supreme Court has established guidelines for examining legislation regulating adolescent abortions. The facts and holding of the Hodgson decision are then summarized. The Note concludes with an analysis which discusses the Hodgson decision in light of the logic of the court's application of the Supreme Court's established principles and the extension into areas where the Supreme Court has offered no further guidance.

2. 853 F.2d 1452 (8th Cir. 1988).
3. See infra notes 171-77 and accompanying text.
4. See infra notes 173-77 and accompanying text.
5. See infra notes 188-98 and accompanying text.
6. See infra notes 9-83 and accompanying text.
7. See infra notes 84-153 and accompanying text.
8. See infra notes 154-214 and accompanying text.
BACKGROUND

THE PERSONAL PRIVACY REALM

According to Justice Blackmun, who wrote for the majority in *Roe v. Wade*, the task was to resolve the issue of a woman's right to choose an abortion "by constitutional measurement, free of emotion and of predilection." In earlier decisions, the Supreme Court had struggled to define the area of personal privacy—certain zones or areas of privacy existing under the Constitution, even though never explicitly mentioned. Whatever its source, however, the *Roe* Court found the right of privacy to be "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

The *Roe* Court made it clear that a woman's right to choose abortion is not absolute. The Court recognized the burden a state could impose upon a pregnant woman by denying her the abortion choice altogether. However, the woman is not "entitled to terminate her pregnancy altogether.""
pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." Justice Blackmun noted that the Court, in earlier decisions in which a privacy right had been recognized, had acknowledged that the states could appropriately regulate in the areas protected by that right. Thus, the Court observed, states may properly assert their important interests in the maintenance of medical standards, the protection of potential life, and the safeguarding of health. The conclusion of the Court seemed clear: the abortion decision was included within the right of personal privacy, and "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may 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."

The Roe Court noted existing state statutes requiring parental consent when a minor seeks an abortion, but postponed discussion of the issue. The Court stated that "[w]e need not now decide whether provisions of this kind are constitutional."

**The Extent of the Minor's Privacy Right**

Three years after Roe, the Supreme Court turned its attention to the troublesome issue concerning a minor's right to terminate her pregnancy in Planned Parenthood of Central Missouri v. Danforth. In that case, the Court reviewed a challenge to a Missouri statute enacted for the stated purpose of imposing a structure to regulate abortions in the state through all stages of pregnancy. Utilizing the balancing analysis proposed in Roe, the Danforth Court upheld certain provisions of the statute while striking down others which were
inconsistent with the Roe standards.23 Falling into the latter category was a provision requiring an unmarried woman under the age of eighteen to obtain parental consent before undergoing an abortion.24 The Danforth Court observed that minors possess constitutional rights and that a state "does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto" by requiring parental consent as a condition to having an abortion.25 However, noting earlier Court recognition of the states' broad authority to regulate activities of children, the Court proceeded to determine whether the consent provision served any significant state interest.26

In its review of the state's purported interests in safeguarding parental authority and protecting the family unit, the Danforth Court showed its willingness to consider the factual realities of the situation to which the Missouri statute would be applied.27 The Court found it difficult to conclude that giving the parent an absolute veto power over the decision made by the minor patient and her physician would serve the state's interest of strengthening the family unit.28 Although emphasizing that not every minor is capable of giving effective consent, the Danforth Court found that the parent's interest did not outweigh the privacy right of the minor.29

In three accompanying opinions, the Justices of the Danforth

23. Id. at 63-84. Among the provisions which were upheld were: a definition of viability of the fetus; a written prior consent by the woman; and state reporting and record keeping requirements. Provisions that were found unconstitutional included a spousal consent requirement and an outright proscription of the saline amniocentesis method of abortion. Id.
24. Id. at 75.
25. Id. at 74. Justice Blackmun cited several earlier cases, including Breed v. Jones, 421 U.S. 519 (1975) and In re Gault, 387 U.S. 1 (1967), for the proposition that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." Danforth, 428 U.S. at 74.
26. Id. at 75. In recognizing that the state has greater authority to regulate activities of minors than of adults, Justice Blackmun cited Prince v. Massachusetts, 321 U.S. 158, 170 (1944), and Ginsberg v. New York, 390 U.S. 629 (1968). Danforth, 428 U.S. at 74-75. The proposition that parental discretion has been protected from unreasonable and unwarranted interference by the state was supported by Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); and Wisconsin v. Yoder, 406 U.S. 205 (1972). Danforth, 428 U.S. at 73.
27. Id. at 75. It was not likely, the court concluded, that such veto power would enhance the parent's control and authority when a minor and her nonconsenting parent are "so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure." Id. at 75. The court stated that any independent interest a parent might have in terminating the minor daughter's pregnancy was "no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." Id. at 75.
28. Id.
29. Id.
Court took note of the states' efforts to legislate in this area. These opinions reflect the concern of the Justices and their acknowledgment that there are considerations supporting the states' interest in encouraging parental involvement. Justice Stewart offered guidance in establishing a judicial resolution procedure as a means to encourage parental or adult consultation without requiring the absolute parental approval which the Danforth Court found to be an undue burden on the minor's rights.

A great deal of comment was generated by state legislation, such as Missouri's, which made it more difficult for adolescents to terminate their pregnancies than for adult women to do so. One commentator who reviewed such legislation and its results has stated:

Some commentators have noted that the liberalized consent statutes of the 1970's for the treatment of venereal disease, pregnancy, and chemical dependency resulted from a legislative awareness of the social interest in assuring that treatment was provided. Danforth—and Roe itself—may well have been the Court's response to the same kind of awareness. The increasing tendency of legislatures to restrict the liberty of teenagers to consent to such treatment may reflect a new legislative sensitivity both to a social interest in family decisionmaking and a social interest in restricting abortion in general and teenage sexual activity in particular.

The Danforth Court showed that it was willing to extend constitutional protection to minors in their abortion decision under the principles of substantive due process, thus reinforcing the importance of the privacy right established in Roe. However, again, many questions were left for future analysis:

The Court permitted a third party, not a parent, to assert a constitutional claim on a child's behalf, thereby assuring future litigation to vindicate unpopular children's rights, notwithstanding parental objection. The four separate opinions in Planned Parenthood, including four dissents from the

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30. Id. at 89-105 (Stewart, J., concurring; White, J., concurring and dissenting; Stevens, J., concurring and dissenting).
31. Id.
32. Id. at 90-91 (Stewart, J., concurring).
33. See generally Bennett, Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis, 62 Va. L. Rev. 285 (1976); Buchanan, The Constitution and the Anomoly of the Pregnant Teenager, 24 Ariz. L. Rev. 553, 553 n.2 (1982) (stating that "[t]hese statutes may be exceptions to liberalizing consent statutes that are themselves exceptions to a general common law or statutory rule requiring parental consent to the medical treatment of minors").
34. Buchanan, 24 Ariz. L. Rev. at 610.
parental consent holding, did not clearly resolve, however, the question of the extent to which the state could involve parents in a child's abortion decision. Nor did it definitively establish the scope of a child's privacy rights or the applicable scrutiny under which to test legislation implicating these rights.36

In *Bellotti v. Baird (Bellotti II)*,37 the Court clarified its stance concerning minors' rights in dealing with Massachusetts legislation regulating abortion, which was found to fall short of constitutional standards.38 In a plurality opinion, Justice Powell reviewed the unique status of minors reflected by prior Supreme Court decisions.39 He recognized three reasons supporting the conclusion that children's constitutional rights are not to be equated with the rights of adults: "[T]he peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."40 However, Justice Powell continued, the abortion decision differs in important ways from other decisions made during minority.41 He discussed the many options which must be reviewed by the pregnant minor while making the decision in a "matter of weeks from the onset of pregnancy."42 Thus, he stated, "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a [s]tate to act with particular sensitivity when it legislates to foster parental involvement in this matter."43

36. *Id.*
37. 433 U.S. 622, 647 (1979) [hereinafter *Bellotti II*]. *Bellotti I* is reported at *Bellotti v. Baird*, 428 U.S. 132 (1976). In *Bellotti I*, the Court concluded that questions regarding the interpretation of the abortion regulation were to be certified to the Supreme Judicial Court of Massachusetts. *Id.* at 146-48.
39. *Id.* at 633.
40. *Id.* at 634. Justice Powell preceded this finding by stating: "The unique role in our society of the family, the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural,' requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." *Id.* (citation omitted).
41. *Id.* at 642.
42. *Id.* at 642-43.
43. *Id.* at 642. In commenting on the *Bellotti II* decision and Justice Powell's balancing formula, Professor Keiter stated:

The failure of the plurality to address directly the degree of constitutional protection provided to the minors' recognized privacy interests when they face an abortion decision is more troublesome. The Court avoided application of the traditional 'ends-means' formula in testing the extent of the state's interest against the invaded right. The explicit balancing which Justice Powell engaged in as he sought to apply constitutional principles 'with sensitivity and flexibility in view of the special needs of parents and children' suggests an alternative approach to handling the constitutional privacy claims of children. Rather than measuring the state interests reflected in the Massachusetts stat-
The Massachusetts statutory scheme, as construed by the state courts, required the consent of both parents to a minor's abortion. If parental consent was refused, judicial consent could be obtained through a superior court proceeding, with notice then given to an available parent. This construction of the statute was found to impose an undue burden on the minor's exercise of her right to choose an abortion, because it subjected her decision to a third-party veto in every instance.

When a state regulates in this area, the Court concluded, the minor must be given the opportunity to go to a court directly, with no requirement to first notify or consult her parents. If, the Court stated, the minor convinces the court that she is informed and mature enough to intelligently decide on her own, her action on the abortion decision must be authorized without parental consultation. If the minor is not found to be competent to make an independent decision, she must be allowed, the Court suggested, to show that the

44. *Bellotti II*, 443 U.S. at 625-26, 646-47.
45. *Id.* at 625.
46. *Id.* at 647.
47. *Id.* In discussing the undue burden placed upon a minor's right, the Court stated:

As the district court recognized, "there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court." There is no reason to believe that this would be so in the majority of cases where consent is withheld. But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.

48. *Id.* The concept of maturity is discussed in King, *Treatment and Minors: Issues Not Involving Lifesaving Treatment*, 23 J. Fam. L. 241 (1984-85). Professor King states:

[T]he *Bellotti* Court gave no guidance to judges about what it considered a mature minor to be. . . . If anything, the guidance we have from the Supreme Court does not go any further than the concept of emancipation already takes us. In the absence of any guidance about who is a mature minor or how to ascertain which minors are mature, judges are left with only their own biases about parental roles and relationships with children as well as their biases about whether judges can make decisions better than parents.

*Id.* at 259.
abortion would nevertheless be in her best interests.\textsuperscript{49} The Court noted finally that at the conclusion of this judicial proceeding, the court would either authorize or refuse to sanction the abortion, based on the minor's showing of her maturity or best interests.\textsuperscript{50}

The \textit{Bellotti II} Court found that the requirement to obtain the consent of both parents generally would not place an undue burden on the minor's abortion rights because she is entitled to seek a judicial determination, independent of parental consent.\textsuperscript{51} Where the pregnant minor lived at home with both parents, the Court saw the parental involvement and consent requirement as protective of her immaturity.\textsuperscript{52}

Despite the exclusion of parental input sanctioned by \textit{Bellotti II}, the statute upheld in \textit{H.L. v. Matheson}.\textsuperscript{53} provided for a type of parental involvement to which the Supreme Court could finally agree—a parental notice requirement.\textsuperscript{54} The challenged Utah provision required the physician to inform, if possible, the parent or guardian of a minor before an abortion was performed.\textsuperscript{55} Chief Justice Burger, writing for the majority, found that important state interests were plainly served by the statute and that it was "narrowly drawn to protect only those interests."\textsuperscript{56} The Court, noting that the law did not provide a third party an absolute veto power over the minor's decision, found that no constitutional guarantees were violated.\textsuperscript{57}

The Court found protection of the adolescent and promotion of family integrity to be important interests served by the law as applied to dependent and immature minors and the parent's opportunity to supply essential information to the physician was seen as a

\textsuperscript{49} \textit{Bellotti II}, 443 U.S. at 647-48.
\textsuperscript{50} \textit{Id.} at 648. Justice Powell summarized by stating:

If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement. On the other hand, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required. For the reasons stated above, the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court.

\textit{Id.}

\textsuperscript{51} \textit{Id.} at 649.
\textsuperscript{52} \textit{Id.} The Court stated that, in this situation, both mother and father have an interest in determining the course which best serves the interests of their daughter.

\textit{Id.} The Court did not consider any alternative family situations.

\textsuperscript{53} 450 U.S. 388 (1981).
\textsuperscript{54} \textit{Id.} at 413.
\textsuperscript{55} \textit{Id.} at 399-400.
\textsuperscript{56} \textit{Id.} at 413.
\textsuperscript{57} \textit{Id.} at 411, 413.
significant state interest.\textsuperscript{58} Although some minors might be inhibited from seeking abortions by the notice requirement, the Chief Justice saw this as no reason to strike down the law, stating that: "The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions."\textsuperscript{59}

In commenting on the \textit{Matheson} decision and the approach of Chief Justice Burger, Professor Robert Keiter has stated that:

Instead of using the opportunity presented in \textit{Matheson} to clarify important questions regarding the extent and degree of constitutional protection available to minors facing critical choices in matters of extreme importance and sensitivity, the Court further confused constitutional jurisprudence in this area. As in its \textit{Bellotti} decision, the Court made no effort to define the scope of a minor's privacy right... Even with the previously recognized abortion right at issue, the majority failed to articulate explicitly the applicable standard of review. In part, the Chief Justice's opinion seemed to apply a heightened scrutiny standard of review, but his conclusion that the states need not "fine-tune" their abortion statutes contradicts such an approach... The Chief Justice's \textit{Matheson} opinion certainly relies more upon an ends-means approach to the issue than upon a balancing rationale.\textsuperscript{60}

In 1983, the Court, on the same day, decided two cases involving parental consent—\textit{Akron v. Akron Center for Reproductive Health},\textsuperscript{61} and \textit{Planned Parenthood Association v. Ashcroft}.\textsuperscript{62} In \textit{Akron}, the Court relied on \textit{Danforth} and \textit{Bellotti II} in striking down a city ordinance provision requiring written parental consent or a court order before an abortion could be performed on a minor under the age of fifteen.\textsuperscript{63} Stating that there was no dispute concerning the relevant legal standards, the Court re-emphasized the necessity of providing

\textsuperscript{58} Id. at 411. The Court stated: "An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." \textit{Id}.

\textsuperscript{59} \textit{Id}. at 413.

\textsuperscript{60} Keiter, 66 MINN. L. REV. at 481.

\textsuperscript{61} 462 U.S. 416 (1983).


\textsuperscript{63} \textit{Akron}, 462 U.S. at 439-44. The section of the ordinance in question stated in part:

No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of one of her parents or her legal guardian... or (2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced.
an alternative judicial procedure by which the minor could demonstrate either her maturity to make the abortion decision or that the abortion is in her best interests despite her immaturity. The majority found that the provision in question worked to impose a blanket determination either that all minors under age fifteen are too immature to make the abortion decision or that the procedure never may be in the best interests of the minor without parental consent. The ordinance did not expressly create an alternative judicial procedure, nor could the Ohio Juvenile Court provide the “opportunity for case-by-case evaluations of the maturity of pregnant minors” as required by Bellotti II.

In the case decided with Akron, Planned Parenthood Association v. Ashcroft, a Missouri statutory scheme which provided a judicial procedure as an alternative to a parental consent requirement, was upheld by the Court. Stating that the issue in the case was purely one of statutory construction, the Court found that the detailed judicial alternative provision was consistent with established legal standards and thus avoided the constitutional infirmities encountered in Akron.

**MANDATED WAITING PERIODS**

The Supreme Court has dealt with a twenty-four waiting period mandated by a city ordinance in the Akron decision. The provision prohibited the performance of the abortion within twenty-four hours

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64. Id. at 422 n.4 (quoting Akron, Ohio, Codified Ordinances No. 160-1978, § 1870.05 (1978)).
65. Id. at 439-40.
66. Id. at 440.
67. Id. at 440-41 (quoting Bellotti II, 443 U.S. at 643 n.23).
68. Ashcroft, 462 U.S. at 490-93.
69. Akron, 462 U.S. at 449.
of the signing of the consent form by the woman, or her parent or guardian, as required by the ordinance.70 The majority found that no legitimate state interests were furthered by an inflexible and arbitrary waiting period.71 The Court stated that the decision to proceed was best left to the medical judgment of the physician and the woman who has given her informed consent.72

In Zbaraz v. Hartigan,73 which was affirmed without opinion by the Supreme Court, the United States Court of Appeals for the Seventh Circuit struck down that portion of an Illinois parental notice provision which required a twenty-four hour waiting period.74 The court stated that the mandatory waiting period was unconstitutional for two reasons:

[F]irst, it imposes a far greater burden on a minor's rights than a parental notification requirement which provides an exception to notification for mature minors and immature minors whose best interests require an abortion, and second, it does not significantly further the state’s interest in promoting parental consultation when combined with a notification requirement, which itself promotes that interest.75

RECENT DEVELOPMENTS

While the Akron Court maintained that there was no dispute regarding the relevant legal standards to be applied, disputes dealing with state abortion regulations continued to work their way through the courts.76 In 1987, an equally divided Supreme Court affirmed

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70. Id. at 424 n.6. Akron Ordinance No. 160-1978, § 1870.07 stated: No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, and one of her parents or her legal guardian whose consent is required . . . have signed the consent form required . . . and the physician so certifies in writing that such time has elapsed.

71. Id. (quoting AKRON, OHIO, CODIFIED ORDINANCES No. 160-1978, § 1870.07 (1978)).

72. Id. at 450. Akron argued that it had legitimate interests in safety and concern that the decision of the woman be informed. Id.

73. 763 F.2d 1532 (7th Cir. 1985) aff’d per curiam by an equally divided court, 108 S. Ct. 479 (1987).

74. Id. at 1545.

75. Id. at 1538. In Indiana Planned Parenthood Affiliates Ass’n v. Pearson, 716 F.2d 1127 (7th Cir. 1983), the United States Court of Appeals for the Seventh Circuit stated: “The same objections to the waiting periods for adults listed in [Akron] apply to waiting periods for minors.”

76. In recognizing the unusual problems presented in these cases, Professor Buchanan has stated: Challenges to these statutes have forced the courts to address constitutional issues of exceeding complexity. The teenage abortion cases are more complex than other abortion cases because they require resolution of difficult conflicts among children, their parents, and the state. They are more complex than other child, parent, and state cases because they require resolution of dif-
Zbaraz v. Hartigan without opinion, thus failing to give any further guidance in dealing with the parental notice and waiting period provisions challenged in the Eighth Circuit's Hodgson decision.\(^7\) The Zbaraz court found the Illinois statute's twenty-four hour waiting period unconstitutional, but ruled that it could be severed from the statute without affecting the statute's essential purpose.\(^8\) The court enjoined the enforcement of the remaining provisions of the statute, which required notification of both parents or participation in an alternative judicial proceeding before a minor could undergo an abortion.\(^9\) The case was remanded to the district court with a charge to the state's supreme court to promulgate rules assuring the expeditious disposition and confidentiality of the alternative judicial proceedings, with the constitutionality of such rules to be determined when they are enacted.\(^10\)

The United States Court of Appeals for the Sixth Circuit dealt with the Ohio version of a parental notification and judicial bypass procedure in Akron Center for Reproductive Health v. Slaby.\(^11\) In this 1988 ruling, the Sixth Circuit affirmed the district court finding that the statutory scheme was constitutionally deficient in not providing a Bellotti II type of bypass procedure for the minor seeking an abortion.\(^12\) The list of deficiencies found by the court included: a requirement that the physician effectuate the notice, a burdensome pleading requirement and standard of proof imposed on the minor, and insufficient guarantees of confidentiality and expediency in the judicial procedure.\(^13\)

**FACTS AND HOLDING**

_Hodgson v. Minnesota\(^14\)_ was initiated on July 30, 1981, by a group seeking declaratory and injunctive relief from sections

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\(^7\) Buchanan, 24 ARIZ. L. REV. at 554.

\(^8\) 108 S. Ct. 479 (1987). The Illinois statute in question included provisions requiring notification to both parents of a minor's decision to have an abortion, a judicial alternative to notice, and the mandatory twenty-four hour waiting period. Zbaraz, 763 F.2d at 1535.

\(^9\) Id. at 1545.

\(^10\) Id.

\(^11\) Id. at 1544-45. The court stated that the statute lacked the specificity of the standards set forth in Ashcroft and Bellotti II. Id. at 1544.

\(^12\) 854 F.2d 852 (6th Cir. 1988). The legislation at issue, Ohio Amended Substitute House Bill 319, required parental notification or consent or a juvenile court order before performing an abortion on an unmarried, unemancipated woman under age eighteen. Id. at 854.

\(^13\) Id. at 869.

\(^14\) 853 F.2d 1452 (8th Cir. 1988).
of the Minnesota statutes, which was to become effective the following day. The plaintiff group was made up of "six class action minors seeking abortions," a parent, two physicians, and four clinics performing abortions in Minnesota. The statute requires a minor seeking an abortion to notify both of her parents forty-eight hours before the procedure, or to demonstrate in a judicial proceeding that she is either "mature and capable of giving informed consent" or that performing the abortion without parental notification is in her best interests.

Section 144.343(2) (the "notice-delay provision") of the statute mandates that an unemancipated minor must wait forty-eight hours after her parents receive written notice before performance of her abortion and includes provisions for effectuating such notice. "Parent" is defined in section 144.343(3) as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one." The legislature added section 144.343(6) providing that, in the event that the notice-delay provision was ever restrained or enjoined by judicial order—as did later occur—the pregnant minor had the option of either providing notice to her parent or guardian, as set forth in the notice-delay provision, or electing a judicial bypass procedure. The statute also contains a penalty provision, exceptions to the notice requirement, and a severability provision.

The plaintiffs sought a declaratory judgment that the statute violated both the United States and Minnesota constitutions as well as injunctive relief against its enforcement. They claimed that the

85. Id. at 1453-55. In 1981, the Minnesota Legislature enacted Minnesota Statute section 144.343, which addressed a "minor's consent to treatment for pregnancy, venereal disease, and alcohol and drug abuse." Id. at 1453. The Hodgson decision deals with the constitutionality of only that part of the statute relating to abortion operations performed on unemancipated minors. Id. at 1453 n.1.

86. Id. at 1454-55. The minors seeking abortions claimed to be mature and claimed that notification to their parents "would not be in their best interests." Id. at 1455. The parent alleged that notification of the other parent was not in the best interests of the minor. The two physicians were performing abortions in Minnesota. Id. at 1455.

87. Id. at 1453.
88. Id. Subdivision 2 of the statute provides that:
[N]o 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.

89. MINN. STAT. § 144.343(3) (1987).
90. Id. § 144.343(6).
91. Id. § 144.343(4)(5)(7).
statute violated their due process rights, on its face as well as in its application, and violated the equal protection clause.\textsuperscript{93}

The state asserted that its primary purpose in enacting the statute was the protection of the minor's well-being by encouraging discussion with her parents in making an abortion decision.\textsuperscript{94} This discussion was intended to bring about parental involvement in other ways: provision of emotional support and guidance, availability of the minor's medical history, and supervision of post-abortion care.\textsuperscript{95} The court also found, through testimony, that the legislature was motivated by a desire to dissuade and deter minors who might choose to terminate their pregnancies.\textsuperscript{96}

In the initial action, the United States District Court for the District of Minnesota granted a preliminary injunction against the enforcement of the notice-delay provision.\textsuperscript{97} However, due to the denial of injunctive relief on section 144.343(6) (the "judicial bypass provision") the notification requirement with the bypass option became effective in August, 1981 and has since remained in effect.\textsuperscript{98} In January, 1985, the district court granted partial summary judgment for the state defendants.\textsuperscript{99} The court ruled that the judicial bypass provision, on its face, did not violate the due process or equal protection rights of minors.\textsuperscript{100} However, the plaintiffs were given the opportunity to show at trial that the judicial bypass provision was unconstitutional as applied.\textsuperscript{101}

After a five-week trial, the district court held that the notification segment of the notice-delay provision, with no judicial bypass option, was unconstitutional.\textsuperscript{102} While finding no factual support that the notice-bypass requirement furthered the state's interest in assuring the integrity of the family or protecting pregnant minors, the court found that, both on its face and in application, the scheme complied with the procedural standards established by the United States Constitution.

\textsuperscript{93} Id. Plaintiffs also claimed that the statute violated the privacy, equal protection, and due process provisions of the Minnesota Constitution. Id.
\textsuperscript{94} Id. at 766.
\textsuperscript{95} Id. In addition, the state contended that parents could support the psychological well-being of the minor, mitigating any adverse psychological results secondary to the abortion procedure. Id.
\textsuperscript{96} Id. The court further 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.
\textsuperscript{97} Id. at 760.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id. All of plaintiff's state constitutional claims were dismissed on jurisdictional grounds. Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 773.
Supreme Court. However, when considering the waiting period and the two-parent notification requirements in isolation, the district court found that both were unconstitutional. While the state contended that these two provisions could be severed from the remainder of the statute, the court held that the definition of parent was not severable and thus permanently enjoined the state from enforcing section 144.343(2)-(7) in its entirety.

On appeal by the state, a panel of the United States Court of Appeals for the Eighth Circuit affirmed the district court judgment. A rehearing en banc was then granted. On August 8, 1988, the full court reversed and remanded the case to the district court. The Eighth Circuit directed the district court to enter judgment that the statutory scheme was constitutional.

The Eighth Circuit began by reviewing the principles established by the Supreme Court which govern the constitutionality of any state's attempt to regulate abortions. The court concluded that the district court did not err in ruling that a parental notification provision must be accompanied by an alternative judicial bypass procedure by which a minor may demonstrate either that she has the level of maturity required to make her own decision or that it is in her best interests to undergo an abortion.

The Hodgson court proceeded to review the district court's examination of the notice-bypass provision. The court noted the detailed factual findings which led to the lower court's conclusion that the two-parent notice requirement substantially burdened that group of minors who must obtain a judicial waiver and did not further the state's interests in a meaningful way. The court agreed with the district court's conclusion that, despite the factual findings, Supreme Court approval of similar notice-bypass schemes mandated approval here; thus, the procedure as a whole was found to be constitutional.

Although the plaintiffs argued that the state had failed to meet
its burden of showing that the actual operation of the statute served state interests, the court rejected this contention, finding that Minnesota's asserted state interests had been recognized as significant as a matter of law as in Bellotti v. Baird (Bellotti II),\textsuperscript{115} Planned Parenthood Association v. Ashcroft,\textsuperscript{116} and H.L. v. Matheson.\textsuperscript{117} The court also rejected the possibility that the statute might be facially valid and yet unconstitutional in its operation, stating its satisfaction that these same factual issues had been considered by the Supreme Court in approving similar statutory plans.\textsuperscript{118} The majority did agree that "considerable questions about the practical wisdom of this statute" could be raised when comparing the burden imposed to the statute's effectiveness.\textsuperscript{119} These questions, however, were left by the court to the legislature.\textsuperscript{120}

The Hodgson court confessed to some confusion as to why the district court, after finding that the statute, as a whole, was constitutional, returned to an isolated examination of the two-parent notice and forty-eight hour delay requirements and used its conclusions in this area as a basis for invalidating the entire statutory procedure.\textsuperscript{121} The majority rejected the finding of invalidity by the lower court by again referring to the recognized principles found in the applicable Supreme Court decisions.\textsuperscript{122} The court was willing to hold these principles applicable to the mature minor and to nontraditional family units, even though the Bellotti II ruling dealt only with minors living with both parents and Matheson spoke only of dependent and immature minors.\textsuperscript{123} Parental and family interests were to be considered, in addition to those of the minor, and, the court insisted, those parental interests had never been held to be contingent upon parental custody.\textsuperscript{124}

The Hodgson court admitted that there is much difficulty in designing a plan which would apply, regardless of their family situation,
to all pregnant minors. However, perfect correspondence to the state's interest, in all cases, was not found by the court to be necessary to the validity of the statute. The court reasoned that any added burden imposed by the two-parent notification provision is negated when an alternative judicial bypass mechanism is in place. In its conclusion that the district court erred in enjoining the statute after its consideration of the notice requirement, the majority reiterated its reliance on the Supreme Court finding that a notice-consent/bypass provision serves important state interests and is narrowly drawn to protect only those interests.

The forty-eight hour delay requirement was treated similarly by the Eighth Circuit. Considering the statutory plan as a whole, the court found that the delay requirement does not significantly burden the minor's abortion right. In reviewing the lower court's findings of fact, the court noted that the burdensome delays between initiation of notification and the abortion itself are caused by factors other than the statutory scheme. In light of the state's interest in ensuring that notification brings about parental involvement, the court concluded that the delay requirement is not a significant burden.

The court disposed of the plaintiffs' equal protection argument by noting the rejection of similar challenges in recent Supreme Court cases. The court again discussed the permissibility of state regulation of a minor's exercise of constitutional rights, even though such regulation would not be allowable when dealing with an adult.

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125. Id. The court observed that the lower court's "conclusion that the two-parent notice requirement failed to further the state's interests was based primarily on its factual findings regarding the burden imposed on minors in family units that have either 'broken apart or never formed.'" Id. (quoting Hodgson, 648 F. Supp. at 778).
126. Id.
127. Id. This mechanism, the court stated, allows a mature or "best-interests" minor to go to court directly without notifying or consulting both parents. Id.
128. Id. at 1464-65 (relying on Matheson, 450 U.S. at 413).
129. Id. at 1465-66.
130. Id. at 1465.
131. Id. The court pointed out that no mandatory delay is imposed by the bypass provision; the delay results when complying with the written notice portion of the statute. The district court had found that compliance with the notice provision often resulted in a seventy-two hour delay. When this delay was compounded by scheduling factors, weather, and transportation requirements, a week or more could pass between the initiation of notification and the abortion procedure. Further, the court noted that "[d]elay of any length in performing an abortion increased the statistical risk of mortality." Id. at 1465 (citing Hodgson, 648 F. Supp. at 764-65).
132. Id.
133. Id. at 1466.
134. Id. The majority stated:

Based on the interests discussed, states may rationally conclude that the decision to have an abortion poses risks to the physical, mental or emotional well-being of minors which are greater than those associated with other health care services. "If the pregnant girl elects to carry her child to term, the medi-
Chief Judge Lay and Circuit Judge Heaney dissented in separate opinions. Chief Judge Lay noted a "seriously flawed" analysis in several aspects of the majority opinion. The fundamental issue in this case, he stated, was the effect of the application of the two-parent notification provision in Minnesota, the only state to require this type of notice with no exception. The Chief Judge accused the majority of abdicating its judicial responsibility by ignoring the lower court's factual findings. The majority, he noted, never directly stated that the findings of fact were clearly erroneous. Thus, he found, the majority rejected the established principle that the state must demonstrate that any infringement of constitutional rights is closely related to the achievement of important state interests.

Citing the majority’s reasoning that the burden imposed by the two-parent notification is negated by a judicial bypass provision, Chief Judge Lay found this analysis "egregiously wrong" in two ways. First, he pointed out, the bypass procedure is required, not to make an unconstitutional notice provision constitutional, but rather because even valid notice requirements may be imposed only on immature minors or that group whose best interests are not served by making the decision without parental involvement. He stressed that the notice requirement must be examined in isolation because the scheme burdens an entire class for whom there is no alternative to notification—the immature, non-best interests minors. The second fault he found in the majority’s analysis was that the factual findings revealed that the two-parent notification provision, combined with the judicial bypass, actually resulted in reducing communication between certain minors and their parents.

Id. at 1466 (citations omitted) (quoting Matheson, 450 U.S. at 412-13).

135. Id. at 1466-72. Circuit Judge McMillian joined both dissents.

136. Id. at 1466 (Lay, C.J., dissenting).

137. Id. at 1467 (Lay, C.J., dissenting). The Chief Judge recognized that no other state has ever required two parent notification with no exception for separation, divorce, or other situations, and, thus, the Supreme Court has never reviewed this type of statute. Id.

138. Id.

139. Id.

140. Id. In what he terms "cavalier treatment" of the lower court's factual findings, Chief Judge Lay observed: "Nowhere does the majority point to evidence offered by the state to show the relationship between the ends sought and the means utilized." Id.

141. Id. at 1468 (Lay, C.J., dissenting).

142. Id.

143. Id.

144. Id. This was found to be true in the case of a minor who would be dissuaded from notifying one parent because she is required to notify both; other minors who,
Chief Judge Lay stated that courts must separately examine the parental notification provisions of these statutes in order to prevent states from formulating irrational and burdensome requirements under the pretense of protecting family integrity. In order to avoid absolute, inflexible rules, states must provide non-burdensome alternatives for minors which do not deny their constitutional rights.

Chief Judge Lay also stated that there has never been a declaration by the Supreme Court that parents have an absolute right to be notified when their minor child seeks an abortion. Rather, he stated, the requirements have been given Court approval primarily because they further the state's interest in the protection of the minor in assuring her well-informed decision. He found irony in the assumption by the majority that family integrity is promoted by forcing a minor child to locate a noncustodial parent and then inform that parent of her abortion decision.

Chief Judge Lay found the majority's upholding of the forty-eight hour delay provision to be a "complete disregard of pertinent precedent both in this court and the Supreme Court." The majority view, he stated, slights the judicial mandate to evaluate statutes in terms of their imposing undue burdens on a woman's right to choose to undergo an abortion. The Chief Judge also found no analysis or

under the statute, must seek court authorization, may elect not to notify either parent.

145. Id. at 1469 (Lay, C.J., dissenting). The Chief Judge envisions a statute which, in addition to mandating parental notice, also requires notification of all living grandparents. Id.

146. Id.

147. Id.

148. Id. Chief Judge Lay stated: "The [parental notification] statute is reasonably calculated to protect minors... by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences." Id. at 1470 (Lay, C.J., dissenting) (quoting Matheson, 450 U.S. at 419).

149. Id. Finding from the facts that, in Minnesota, approximately 42% of minors do not live with both of their biological parents, Chief Judge Lay stated:

For all of these minors, the "family" does not consist of the traditionally accepted unit, because of voluntary relinquishment of parental control, legal separation of parent and child, or other reasons. Yet the state of Minnesota declares that in this one instance only (a suspect indication in itself) the "family" must conform to state-mandated principles of what a family should be like. Far from promoting the integrity and independence of the family unit, the state is interfering in familial communications in a way that would be unimaginable in any other context. To justify this interference based on the purported rights of non-custodial parents is specious.

150. Id. at 1470-71 (Lay, C.J., dissenting). The Chief Judge found no logical analysis or explanation as to why past Supreme Court and Eighth Circuit cases and their principles should not apply. Id. at 1471 (Lay, C.J., dissenting).

151. Id.
consideration by the majority as to whether the state's interest in the protection of minors is furthered by this notification-delay provision.\textsuperscript{152} Thus, he concluded that the district court's findings were left unrebutted.\textsuperscript{153}

**ANALYSIS**

The 1988 decisions of *Hodgson v. Minnesota*\textsuperscript{154} and *Akron Center for Reproductive Health v. Slaby*\textsuperscript{155} are indicative of the ongoing struggle of the states to regulate abortions and the resulting attempt by the courts to deal with the challenges to these statutes based on their interference with personal privacy rights.\textsuperscript{156} Although the statutes involved in the two cases are very similar, the circuit courts came to opposite conclusions regarding their constitutionality.\textsuperscript{157} The courts have dutifully applied the standards and principles which have been developed in this line of cases, but the Supreme Court has stopped short of providing the necessary guidance in extending these principles to deal with the detailed provisions of the regulation statutes.\textsuperscript{158}

The Supreme Court itself has never accorded resounding support to either side of the issue dealing with the balance of an adolescent's privacy right and a state's asserted interests.\textsuperscript{159} The plurality opinion

\textsuperscript{152} Id.
\textsuperscript{153} Id. In his dissent, Circuit Judge Heaney agreed with the lower court that a two-parent notification provision undermines the state's asserted interests rather than serving them. Judge Heaney concluded that the court bypass procedure cannot save the two-parent notification provision, but that a single parent notification would withstand a constitutional challenge. *Id.* at 1472 (Heaney, J., dissenting).
\textsuperscript{154} 853 F.2d 1452 (8th Cir. 1988).
\textsuperscript{155} 854 F.2d 852 (6th Cir. 1988).
\textsuperscript{156} Keiter, *Privacy, Children, and their Parents: Reflections on and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459, 462 (1982). Commenting on the frequency of this type of legislation, Professor Keiter states:

> Judging from the Court's frequent opportunities to resolve the constitutional problems posed by parental consent or notification statutes in areas infringing upon a child's privacy interests, and judging from the incidence of similar litigation in the lower courts, the states will very likely continue to reinforce legislatively the parental role. The litigation itself indicates that children will increasingly resort to the courts to challenge state-enforced parental involvement that intrudes upon the right to privacy they claim in sensitive and critical areas of their own lives. Although the Court may not be particularly well suited as an institution to resolve these delicate matters, it has spawned the controversy by recognizing that children possess constitutional rights.

*Id.*

\textsuperscript{158} See *infra* notes 167-72 and accompanying text.
\textsuperscript{159} See *infra* notes 160-66 and accompanying text.
written by Justice Powell in *Bellotti v. Baird (Bellotti II)*, which became a guideline for determining the constitutionality of parental involvement provisions, was never adopted by a majority of Justices. In *Planned Parenthood Association v. Ashcroft*, Justice Powell's opinion upholding the consent requirement was joined only by Chief Justice Burger. The three other Justices who found the consent requirement valid favored parental control over the minor's decision. The Court in *H.L. v. Matheson*, which relied on the reasoning of Justice Powell in *Bellotti II*, found that the important state interests asserted there were served by a parental notice provision and thus it did not violate any constitutional guarantees.

The inconsistency and lack of guidance in this evolving area of constitutional rights was seen as a source of future controversy by Professor Keiter. After the *Matheson* decision, he commented that:

> The voting alliances and numerous opinions generated by these controversies reveal the difficulty faced by the court in applying constitutional principles, recently evolved under the due process doctrine, to the family. Although the Court has sought to accommodate the competing interests of parent and child, its various prevailing opinions present inconsistent rationales, and thus provide inadequate guidance for handling future controversies in this area.

With no guidance beyond these frequently cited, broad guide-
lines, the lower courts are left to deal with the issues posed by application of state laws attempting to impose more detailed control in the abortion regulation arena. As Chief Judge Lay noted in his dissent in Hodgson, "the statutory provisions can contain as many variations as there are statutes." The Supreme Court's interpretation has not been broadened by any of the decisions subsequent to those cases, and the lack of clarity was compounded by the Court's four-to-four affirmation without opinion in Zbaraz v. Hartigan. That case might have been used as a vehicle to provide the sought for guidance to the courts and state legislatures.

The Hodgson court was faced with the task of evaluating a statute different from any which the Supreme Court had dealt with previously. The majority, although purporting to base their judgment on the adolescent abortion standards developed by the Supreme Court, failed in several ways to logically extend those principles when they applied them to this statute's variations.

The point at which the Hodgson majority extends its ruling beyond established principles and factual applications of preceding decisions is easily identified by the majority's own express statement. In its review of the district court's isolated reexamination of the parental notice and delay provisions, the majority admitted to confusion as to why the district court took this course after having found that the statute, as a whole, complies with established constitutional standards. Speculating that the district court determined it necessary to limit its holdings to immature and dependent minors (as in Mathes-
son), and to minors living at home with both parents (as in Bellotti II), the Hodgson majority agreed that "[c]ertainly, the Supreme Court limited its holdings to such minors." 177

However, the majority further stated that these limitations do not prevent applying these principles to no-parent and one-parent households, or to the mature minor. 178 Thus, at this juncture, the majority admittedly departed from the established analytical structure in finding that the state’s interests outweigh those of the minor and that the parental notice and forty-eight hour delay provisions were thereby justified. 179 The rationale given for these extended findings does not consistently reflect prior Supreme Court reasoning. 180

In Planned Parenthood of Central Missouri v. Danforth, 181 the Supreme Court established that state statutes regulating abortion procedures for minors were subject to a level of scrutiny which involved showing whether a significant state interest, rather than a compelling state interest as required by Roe v. Wade, 182 was furthered. 183 In Hodgson, however, the state failed to show that the two-parent notification statute is narrowly drawn to further any significant state interests. 184 As Chief Judge Lay pointed out in dissent, the factual findings of the district court, which the majority ignored, show that the statutory scheme actually serves to “undermine” rather than promote the state’s interests. 185 The majority admitted that these factual findings raised considerable questions regarding the practical wisdom of the statute, but did not further examine the statute’s effect in actual operation. 186

The Supreme Court, in its guideline-establishing decisions, seemed willing to consider the possible consequences of the application of the statutory schemes involved, even though the statutes in

177. Id. at 1462-63.
178. Id. at 1463.
179. Id. at 1463-65.
180. See infra notes 183-202 and accompanying text.
183. Danforth, 428 U.S. at 74-75. In Roe, the court stated that only a compelling state interest can justify regulation limiting fundamental rights. Roe, 410 U.S. at 155. Later, in Matheson, the Court sought to determine whether the statute “plainly serves important state interests [and] is narrowly drawn to protect only those interests.” Matheson, 450 U.S. at 413.
184. Hodgson, 853 F. 2d at 1467 (Lay, C.J., dissenting). Chief Judge Lay’s dissent points out that the state must bear the burden of showing that the “statute is tailored to achieve a significant state policy.” Id.
185. Id.
186. Id. at 1459. The majority stated: “We are satisfied, however, that the Supreme Court has considered the issues factually before the district court, and that approval given to similar statutory plans mandates approval in this case.” Id.
question had not yet been enforced. In Danforth, the Court discussed the effect of a parental veto power over the minor's abortion decision when the family structure had already been fractured by the pregnancy. In Bellotti II, the Court recognized the "strong views on the subject of abortion" held by many parents, making the pregnant minor vulnerable to efforts to obstruct her access to an abortion or to court. Unlike these possible factual consequences envisioned by the Court in earlier decisions, the factual findings before the Hodgson court reflected actual consequences of the Minnesota statute which had become effective in 1981. Chief Judge Lay noted that the uniqueness of the statute was the fundamental issue involved in Hodgson, and accused the majority of abdicating its judicial responsibility in ignoring the factual findings.

Another principle developed in the Supreme Court abortion decisions dealt with the balancing of the rights of the pregnant minor seeking an abortion with the interests which the state is seeking to promote through its legislation. The Court, in Danforth and Bellotti II spoke of placing an "undue burden" on the minor's right. However, further decisions failed to satisfactorily develop a method to balance the complex interests which are involved. In discussing this lack of consistency, as related to this unique area, Professor Buchanan stated that:

The United States Supreme Court, recognizing that teenage abortion presents unusual problems, has not dealt

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187. See supra notes 27-29, 47-50 and accompanying text.
188. Danforth, 428 U.S. at 75.
189. Bellotti II, 443 U.S. at 647.
190. Hodgson, 853 F.2d at 1453, 1467.
191. Id. at 1467.
192. Id. at 250.
193. See supra notes 22-36, 38-52 and accompanying text.
with the teenage abortion cases that have come before it quite so perfunctorily as it has dealt with other recent teenage autonomy cases . . . .

. . . [E]ven those who applaud a more restrictive approach to the liberty interests of teenagers must surely find the Court's recent opinions in this area unsatisfactory. The opinions fail to develop and adhere to a consistent method for dealing with the various elements comprising the special legal problem of teenage abortion. 195

The Hodgson court did recognize the burden imposed by the two-parent notice requirement on minors living in single-parent family units, stating that "the application of such a general statute will result in greater burdens for some individuals." 196 However, the majority found that, in certain cases, the judicial bypass provision, which is available to mature or "best interests" minors negates the added burden imposed by a two-parent notification requirement. 197 This reasoning, however, leaves no alternative open to the class consisting of immature, non-best interest minors who cannot take advantage of the judicial bypass route. 198 Another class of minors whose privacy right is unduly burdened is those who have voluntarily notified one parent of the abortion decision but must go to court in order to avoid notifying the other—perhaps an absent or abusive parent. 199 No state interests were advanced in the Hodgson decision which would outweigh the burden placed on the rights of the minor or those of the notified parent. 200

Professor Keiter spoke of a minor's constitutional privacy claim which arises when the state interjects itself through legislation restricting the minor's freedom of action. 201 He continued with a sug-
gested method of analysis which lends itself well to the interests involved in Hodgson:

Once the court recognizes a privacy right, it then must carefully assess the interests of child and parent individually and as family members, as well as any justifications for the legislation proferred by the state. Absent compelling state health or safety goals that only mandated parental involvement can accomplish, the interest of the child in privacy, coupled with the shared interests of parent and child in family privacy and integrity, should prevail over contrary parental authority concerns. Indeed, the Court has consistently recognized, although not as clearly or explicitly as it might have, the value of family integrity and harmony in instances when conflict has loomed between the parent and child. By properly recognizing the importance of this factor, it becomes clear that presumptions regarding youthful incapacity or parental benevolence are simply too crude a basis for legislative line-drawing, especially when the legislation affects the child’s critical individual rights and the institutional integrity of the family.202

The Hodgson majority’s terse analysis of the forty-eight hour delay provision is perhaps not so much an illogical extension of the Supreme Court’s principles but, as Chief Judge Lay states, a “complete disregard of pertinent precedent both in this court and the Supreme Court.”203 In the Bellotti II opinion, Justice Powell discussed the expediency surrounding the minor’s abortion decision, stating that the pregnant adolescent “cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy . . . . [T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.”204 Chief Judge Lay pointed out in dissent

202. Id. at 518. For more information on the Court’s “presumption of youthful incapacity” to which Keiter refers, see G. Melton, Adolescent Abortion: Psychological and Legal Issues (1986). In a summary of research related to the Court’s approval of regulation of abortion based on age, Melton states:

Although the research is scant on some issues, the available evidence raises substantial doubt about the validity of the premises underlying the Supreme Court’s approval of age-based regulation of abortion. Contrary to the Court’s assumption of marked vulnerability of minors who obtain abortions, age differences in response to abortion are small, and in any event most adolescents who obtain abortions report relief. Severe emotional reactions are very rare. On the other hand, deleterious psychosocial effects on many minors who complete their pregnancies are well documented. By the same token, the research on consent to medical treatment and the single study currently available on consent to abortion give no reason to doubt adolescents’ competence to make decisions about continuation of pregnancy. Id. at 22-23.

203. Hodgson, 853 F.2d at 1471 (Lay, C.J., dissenting).

204. Bellotti II, 443 U.S. at 642-43.
that in *Akron* the Court found that a twenty-four hour delay provision was invalid because it was imposed after a woman gave her consent to an abortion or a minor obtained the necessary parental consent. 205 The Court did not indicate that this waiting period would be found constitutional when applied to a minor. 206 Chief Judge Lay cited the United States Court of Appeals for the Eighth Circuit decision in *Planned Parenthood Association v. Ashcroft*, 207 in which it was held that a forty-eight hour delay was unconstitutional as applied to all women—a holding which the state did not appeal. 208 Among other agreeing courts, the United States Court of Appeals for the Seventh Circuit also is cited in stating that the "same objections to the waiting periods for adults listed in *City of Akron* apply to waiting periods for minors." 209

The majority opinion's handling of the forty-eight hour delay requirement also failed to follow the reasoning of other courts by again ignoring the facts peculiar to this finding. 210 Chief Judge Lay's dissent cites to a number of decisions which have taken into account such factors as scheduling difficulties, inaccessibility, weather, and other regional peculiarities which tend to increase the waiting period and, thus, the risk associated with the abortion. 211 The Seventh Circuit, in *Zbaraz*, summarized these cases by stating that: "These cases hold that a waiting period places a direct and substantial burden on women who seek to obtain an abortion. This burden is the same for minors as for adults." 212

The *Hodgson* majority was unable to conclude that the delay requirement here results in a significant burden. 213 With no cited support other than a dissenting opinion in *Matheson*, the court found any burden outweighed by the state's asserted interest. 214


206. Id.


209. Id. (citing *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983)).


211. Id.

212. Id. at 1470 n.7 (Lay, C.J., dissenting) (citing *Zbaraz v. Hartigan*, 763 F.2d 1532, 1537 (7th Cir. 1985)). The court in *Zbaraz* noted the "plethora" of cases in which waiting periods were struck down. *Zbaraz*, 763 F.2d at 1536.

213. *Hodgson*, 853 F.2d at 1465.

214. Id. The state had asserted an interest in ensuring that parental involvement resulted from notification. Id.
CONCLUSION

In Hodgson v. Minnesota, the court went beyond the bounds of the framework established by the United States Supreme Court in analyzing state statutes regulating adolescent abortion decisions. The lack of accord among the circuit courts in their review of similar statutes is indicative of the need for further development of guidelines in dealing with statutes of this type as they become more unique and burdensome in their detail. As Chief Judge Lay warned, dissenting in Hodgson, "if courts do not separately examine the notification portions of these statutes, states could formulate irrational and burdensome requirements, all in the guise of protecting 'family integrity.'"

Unless or until more guidance is forthcoming from the Supreme Court, the reviewing courts must be willing to: (1) analyze each provision and its alternatives with respect to the burden imposed on the pregnant woman; (2) consider the consequences of applying the statute, or the factual findings where the statute has been in effect; and (3) hold the states accountable to their burden of demonstrating that any infringement of constitutional rights is tailored to achieving significant state interests.

Mary Jo Schulte—'90

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215. 853 F.2d 1452 (8th Cir. 1988).
216. Id. at 1469 (Lay, C.J., dissenting).

Addendum: As the writing of this Note nears completion, the United States Supreme Court is preparing to hear oral arguments for Reproductive Health Service v. Webster, 851 F.2d 1071 (8th Cir. 1988) in order to re-examine the holding of Roe v. Wade. With the changes in the composition of the Court since 1973, it remains to be seen whether the Roe decision will be overturned or whether its framework will remain intact.