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SPECULATION AND REALITY: THE ROLE OF FACTS IN JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS

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Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom . . . [,] logic or philosophy But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.

If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and

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study and reflection; in brief, from life itself.*

—B. Cardozo

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INTRODUCTION

At times it seems that the law’s ignorance of its actual impact is one of the most severe threats to basic civil liberties. When justice is

* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-13 (1921).

blind to the fruits of scientific and social scientific research, and to the demonstrable effects of a statute in operation, rules of law are divorced from the empirical world. Courts are thus rendered impotent in the exercise of their duty to safeguard fundamental constitutional guarantees for rights may be violated in innumerable ways not apparent by speculation. Litigants seeking to expand or preserve constitutional rights have thus sought to introduce scientific and empirical evidence of the facts pertinent to constitutional analysis. In this way, courts have been educated about the medical, psychological, and socio-economic realities of matters such as racism, sexism, poverty, and pregnancy, and states have been forced to demonstrate that their reasons for restricting rights are in truth compelling.

This Article sets forth the unique properties of what is herein defined as an "operational challenge" to the constitutionality of law. In such a challenge, the actual burdens and benefits of a law infringing fundamental rights are at long last presented for judicial review. For the legal result in such a challenge to be predetermined by rules of law developed in cases devoid of a factual record would require that constitutional principle persist in ignorance of what is empirically known. Constitutional review would be an empty formalism in a changing world.

The argument made in the sections that follow proceeds on three basic premises: first, that standards of constitutionality should be informed by empirical truth; second, that judicial protection of fundamental rights is facilitated by proof of and reliance upon the facts underlying constitutional determinations; and third, that a degree of inconsistency among lower courts can and should be tolerated to permit the zealous protection of basic rights and liberties, at least pending Supreme Court review on a full factual record of the *real* effects of a law. With these principles in mind, Part I traces the emerging importance of facts to constitutional analysis by courts reviewing legislation. Part II illustrates how rules of law developed on the basis of assumed facts have acted to foreclose judicial protection of rights by lower courts even where reality has disproved judicial speculation about the operation of law. The discussion in Part II revolves around the cases consolidated in *Brown v. Board of Education*¹ and the cases involving the constitutional right of minors to abortion. Part III articulates a theory supporting lower court deviation from precedent in order to protect constitutional rights in cases based on new facts about the real effects of an operating law. Finally, Part IV describes and evaluates the risks of cre-

¹ 347 U.S. 483 (1954).

ating fact-based standards of constitutionality and of permitting lower court freedom from precedent based on factual findings.

I. THE EMERGING IMPORTANCE AND CENTRALITY OF FACTS TO JUDICIAL REVIEW

In the world of "natural law" there was little place for empirical reality.² The rules by which the judiciary resolved the disputes of citizens were universal, unchanging, even divine.³ Judges were the mouth-pieces of laws that were found, not made,⁴ and precedent was revered.⁵ This was the era of Blackstone and beyond.⁶

In the late nineteenth and early twentieth centuries, scholars be-

² At the turn of this century, American law was dominated by classical jurisprudence—the 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

Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 479 (1986); see Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908) (contrasting "scientific" jurisprudence to the new "sociological" jurisprudence). The central tenet of classical or formal jurisprudence was that "law" existed apart from those who decreed it." 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 467 (1986) [hereinafter *TREATISE ON CONSTITUTIONAL LAW*]. In this climate, "law" was conceptualized as distinct from "fact," see, e.g., J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 183-262 (1898) (discussing the importance of distinguishing between law and fact in jury trials), because "law did not change, so any demonstrably changeable material had to be 'fact' or else the concept of law risked 'embarrassment'." Monahan & Walker, *supra*, at 480 (quoting Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1315 (1942)).

³ See 1 W. BLACKSTONE, *COMMENTARIES* *39-40. See generally A. HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 236 (1966) (the medieval idea of a "natural law" is rooted in the Roman notion of a moral law).

⁴ See, e.g., 1 W. BLACKSTONE, *supra* note 3, at *37-42 (there exist "eternal immutable laws of good and evil" to be discovered by human nature); see also B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 131 (1921) ("The old Blackstonian theory of pre-existing rules of law which judges found, but did not make, fitted in with a theory still more ancient, the theory of a law of nature.").

⁵ See 1 W. BLACKSTONE, *supra* note 3, at *69-70. Even so, precedent was not to be followed if it was determined to be "flatly absurd or unjust." *Id.* at *70. This was because the opinions of judges may at times fail to state "the law" and not because a prior opinion was "bad law." *Id.* Even to Blackstone, however, precedent was only binding where "the same points come again in [subsequent] litigation." *Id.* at *69 (emphasis added).

⁶ See, e.g., 3 *TREATISE ON CONSTITUTIONAL LAW*, *supra* note 2, at 467 (discussing the natural law and contractual theorist movements). Such concepts of the nature of law continued to predominate throughout much of the nineteenth century, see *supra* note 2, but also preceded Blackstone. See Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 24 (1910) ("To the ancient, law was sacred. It was not made by man, and could not be changed by man. Man simply discovered it. Any attempt to alter it was of necessity futile.").

gan to foretell the demise of this doctrine and to rebel against its resistance to the notion that law, and justice, should be informed by empirical fact.⁷ Oliver Wendell Holmes, then a Justice of the Supreme Judicial Court of Massachusetts, predicted that the "black-letter man" of the present would give way to the "man of statistics and the master of economics."⁸ He expressed absolute revulsion at the adherence to a rule of law through "blind imitation of the past" though its "grounds" in fact or principle "have vanished long since."⁹ Roscoe Pound, lauding the development of new principles of law "express[ing] the spirit of the time,"¹⁰ followed suit. Pound admonished students and practitioners of the law to "look the facts of human conduct in the face[; to] look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient."¹¹

Under this new legal philosophy, rules of law were not "final truths, but [were instead] working hypotheses, continually retested in

⁷ These scholars sowed the seeds of a transformation in American jurisprudence that began as "sociological jurisprudence" and ultimately came to be known as "realism." See generally White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 VA. L. REV. 999, 1000-26 (1972) (tracing the evolution of legal philosophy through "mechanical jurisprudence," "sociological jurisprudence," and "legal realism"). Realism was a "revolt against formalism," Monahan & Walker, *supra* note 2, at 482, and its proponents rejected the emphasis on deductive logic and embraced the importance of social sciences and the empirical world to the understanding and evolution of law. See, e.g., White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 280-82 (1973) (describing components of realism); see generally L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 688-89 (2d ed. 1985) (explaining that realists did not revere tradition); W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1985) (discussing the American realist movement in historical context). Of the lasting importance of this chapter in American legal history, it has been said that "realism is dead; we are all realists now." W. TWINING, *supra*, at 382; see also Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152, 1152 (1985) (stating that realists "debunked" formalists).

⁸ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (address delivered at Boston University School of Law).

⁹ *Id.*

¹⁰ Pound, *supra* note 6, at 35.

¹¹ *Id.* at 35-36. "It is the work of lawyers . . . to make the law in action conform to the law in books . . . by making the law in the books such that the law in action can conform to it . . ." *Id.* at 36. While Pound's writings were motivated by the same "revolt against formalism" that fueled the so-called "realist movement," see Monahan & Walker, *supra* note 2, at 482, he was a critic of certain elements of "realist" thought and saw himself as an outsider. See, e.g., Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 707 (1931) ("Radical neo-realism seems to deny that there are rules or principles or conceptions or doctrines at all . . ."); *id.* at 697 (criticizing some elements of realism). Pound was, however, the leading proponent of what he called "sociological jurisprudence." See Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140 (1911), 25 HARV. L. REV. 489 (1912).

those great laboratories of the law, the courts of justice."¹² Benjamin Cardozo drew the inevitable conclusion that laws resulting from this experimental process are in truth created by judges acting as legislators in the interstices of precedent and of existing law,¹³ and celebrated the "ageless process of testing and retesting"¹⁴ by which the law evolves in pursuit, "as best may be, [of] justice and social utility"¹⁵ This

¹² B. CARDOZO, *supra* note 4, at 23 (quoting M. SMITH, JURISPRUDENCE 21 (1909)).

[U]ntil the end of the eighteenth century people believed in generalizations for their own sake[.] The nineteenth century has, of course, made its own generalizations . . . but it has insisted on observation as the basis of generalization and has reserved the right to alter, amend or repeal all generalizations in accordance with the facts found from time to time.

Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 2 (1922); see also Corbin, *The Law and the Judges*, 3 YALE REV. 234, 249 (1914) ("[T]he growth of the law is an evolutionary process. Its principles consist of such generalizations as may tentatively be made from a vast number of individual instances.").

¹³ See B. CARDOZO, *supra* note 4, at 115 ("[W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.").

¹⁴ *Id.* at 179.

¹⁵ *Id.* at 120. The realists and sociological jurists plainly embraced the principles of constitutional adjudication first hinted at by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315, 406 (1819) ("it is a *constitution* we are expounding"). "A *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future." B. CARDOZO, *supra* note 4, at 83. The method of the law involves "filling the gaps" by reference to "social welfare," *id.* at 71, and "present-day conditions, as revealed by the labors of economists and students of the social sciences in our own country and abroad," *id.* at 81. See generally 3 TREATISE ON CONSTITUTIONAL LAW, *supra* note 2, at 469 (describing "sociological jurisprudence").

A complete discussion of "realist" theory, its opponents, and its relationship to the development of American constitutional jurisprudence since the 1930s is well beyond the scope of this Article. Suffice it to say that some have equated "realism" with "nihilism" in its purported ratification of freewheeling subjective judicial lawmaking. See Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1340, 1342 (1979); see also Mechem, *The Jurisprudence of Despair*, 21 IOWA L. REV. 669, 669-70 (1936) (discussing the realists' rebellion against the myth of law). See generally 3 TREATISE ON CONSTITUTIONAL LAW, *supra* note 2, at 474-77 (discussion of realism and the "neutral principles" theorists).

Although "realism" per se fell out of favor by the late 1930s, its teachings have remained a part of American jurisprudence. See, e.g., Kaufman, *The Anatomy of Decisionmaking*, 53 FORDHAM L. REV. 1, 2 (1984) (maintaining that cases must not be decided on the basis of abstract generalities and pure logic, but that emphasis must be placed on concrete and particular facts and on the importance of the outcome to the individual litigant); Wald, *Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1, 3 (1984) (noting the empirical bases for some judicial decisions); Wisdom, *Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases*, 39 LAW & CONTEMP. PROBS., Winter 1975, at 134, 137 ("Sociology has always played a part in the decisionmaking process, although frequently it comes in wearing a mask."). Moreover, the perceived nihilistic elements of

legitimation of change in the law and of courts as the locus for testing legal principles against empirical observation and the social welfare¹⁶ opened the door to an expanded role for facts in the judicial process and particularly in constitutional adjudication.¹⁷ The importance of facts to the interpretation¹⁸ and constitutional validity¹⁹ of laws came to be accepted, and courts correspondingly broadened the permissible sources of fact upon which they would rely in deciding the cases before them: "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."²⁰ From *Muller v. Oregon*²¹ to *Brown v.*

the "realist" vision of the judicial process spawned an entirely new jurisprudential movement that defended the role of so-called "neutral principles" in even an activist judicial process. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26-35 (1959) (discussing "neutral principles" in the context of past Supreme Court decisions on fundamental rights).

¹⁶ See, e.g., Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1235-37 (1931) [hereinafter *Some Realism*] (discussing "realist" belief in investigation of the facts to ascertain the effect of law and make judgments about the future); see also Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 454 (1930) (discussing the realist response to "the tendency of the crystallized legal concept to persist after the fact model from which the concept was once derived has disappeared or changed out of recognition").

¹⁷ See Monahan & Walker, *supra* note 2, at 482. Realists sought to evaluate the merits of particular rules of law, not through moral or political philosophies of natural law, but by "the practical benefits or burdens allocated to members of society." 3 TREATISE ON CONSTITUTIONAL LAW, *supra* note 2, at 472. Moreover, realists emphasized that when courts make law in the gaps left by precedent, the real effect that law has on people is an important component of the policy analyses courts then perform. See Llewellyn, *supra* note 16, at 1223, 1253-55; Peller, *supra* note 7, at 1242-43.

¹⁸ See, e.g., Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 467 (1916) ("[N]o law, written or unwritten, can be understood without a full knowledge of the facts out of which it arises, and to which it is to be applied.").

¹⁹ See, e.g., Bickl, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 6 (1924).

[N]o court can undertake to decide upon the validity of legislation . . . [without] first be[ing] informed as to the truth of some question of fact which the statute postulates or with reference to which it is to be applied; and the validity of the legislation depends on the conclusions reached by the court with reference to this question of fact.

Id.

²⁰ Monahan & Walker, *supra* note 2, at 477; see also *supra* note 2; see generally N. CHANNELS, *SOCIAL SCIENCE METHODS IN THE LEGAL PROCESS* 258 (1985) (discussing how "social science methodology is accepted now by courts," and "empirical research has become the standard resource for the legal professional"); J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 17 (1985) (stating that "empiricism . . . has become an inherent aspect of current American legal thought"); P. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* 197-229 (1972) (discussing the use of social science by the Supreme Court); *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* (M. Saks & C. Baron eds. 1980) (symposium on the application of social research findings to the judicial process); Collins, *The Use of Social Research in the Courts*, in L. LYNN, *KNOWLEDGE AND POLICY: THE*

*Board of Education*²² and since,²³ the Supreme Court has relied upon social facts presented either through expert testimony, "Brandeis briefs," or judicial notice.²⁴

UNCERTAIN CONNECTION 145, 146 (1978) (explaining why law and social science have been incompatible in the past); Doyle, *Social Science Evidence in Court Cases*, in EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS 10, 10 (1977) (noting that congressional grants of jurisdiction over areas such as civil rights requires use of social sciences); Schlessinger & Nesse, *Justice Harry Blackmun and Empirical Jurisprudence*, 29 AM. U.L. REV. 405, 406 (1980) (discussing Justice Blackmun's reliance on quantifiable criteria to elucidate the bases of decisions).

²¹ 208 U.S. 412 (1908). It is in this case that Louis Brandeis presented the Court with his infamous "Brandeis brief," setting forth the results of a vast storehouse of medical and social science research regarding the debilitating effect of long work hours on women. See Monahan & Walker, *supra* note 2, at 480-81.

²² 347 U.S. 483 (1954). See generally R. KLUGER, SIMPLE JUSTICE 491, 491-504 (1976) (discussing the role of social science testimony in the *Brown* trial); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-15 (1978) (reviewing rationales for the decision in *Brown*). But see generally Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 165-67 (1955) (discussing the dangers of grounding fundamental rights in social science research).

²³ See, e.g., *United States v. Leon*, 468 U.S. 897, 907 n.6 (1984) (research on the effects of the exclusionary rule); *New York v. Ferber*, 458 U.S. 747, 758 n.9 (1982) (research on the long-term consequences of sexual exploitation of children); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727 n.13 (1982) (social history of the college's gender-based discrimination); *Ballew v. Georgia*, 435 U.S. 223, 231-39 (1978) (empirical data relevant to the question of jury size); *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 n.16, 564 n.17 (1976) (statistical estimates refuting contention that apparent Mexican ancestry served as sole criterion in selecting motorists for investigation). See generally J. MONAHAN & L. WALKER, *supra* note 20, at 99 (reviewing cases in which social science research was considered by the Supreme Court). For a discussion of the recent trend away from reliance on such data as reflected in recent cases, see *infra* note 30.

Researchers have attempted to study the reliance upon social science and other secondary authority through empirical means. See generally Hafemeister & Melton, *The Impact of Social Science Research on the Judiciary*, in REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 27, 27-56 (1987) [hereinafter REFORMING THE LAW]. For example, the growth in frequency of Supreme Court citations to nonlegal secondary sources was summarized as follows:

About one-fifth of opinions published in 1978 (34.1% of majority opinions) cited a nonlegal source, double the percentage of 1940 and a 1,000-fold increase since 1900. Nonlegal citations per opinion rose even more markedly The absolute growth also was striking: from 17 citations of nonlegal sources in 1900 to 99 in 1940 and 260 in 1978. The sources cited were quite diverse. In 1978, 26 different journals accounted for the 49 citations of nonlegal periodicals. They were drawn from accounting, anthropology, business, foreign affairs, history, insurance, optometry, political science, psychiatry, psychology, and sociology.

See *id.* at 35 (citing Daniels, "Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions, October Terms 1900, 1940 and 1978, 76 L. LIBR. J. 1, 5-27 (1983)).

²⁴ *Brown*, 347 U.S. at 494 n.11, 495; *Muller*, 208 U.S. 420-21. A discussion of the various methods of introducing social facts into judicial proceedings is beyond the scope of this Article. For a full exposition and evaluation of these methods, see P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS

In 1942, amidst this background, Kenneth Culp Davis first made the distinction between what he called "legislative" and "adjudicative" facts.²⁵ This distinction marked the impact of the "realists": "Davis's candid recognition of a judicial lawmaking function [and] his recognition that facts are a component of lawmaking directly contradicted the classical position that law was deductively discovered rather than judicially created."²⁶

In subsequent decades, legislative fact-finding by courts came to be increasingly accepted.²⁷ Commentators recognized that judicial scrutiny

938-42 (1975); J. MONAHAN & L. WALKER, *supra* note 20, at 45-66; Melton, *Judicial Notice of "Facts" About Child Development*, in REFORMING THE LAW, *supra* note 23, at 232-47; Monahan & Walker, *supra* note 2, at 495-98; Walker & Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 583-98 (1987).

²⁵ Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942). In his treatise on administrative law, Professor Davis further explained:

Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion.

2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 12:3 (2d ed. 1979).

²⁶ Monahan & Walker, *supra* note 2, at 483. "When [a court or] an agency wrestles with a question of law or policy, it is acting legislatively . . . and the facts which inform its legislative judgment may [thus] be denominated legislative facts." Davis, *supra* note 25, at 402.

Davis's distinction between these two sorts of facts has been widely recognized by courts. See, e.g., *Concerned Citizens v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 657 (1977) (Rehnquist, J., dissenting); *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987); *id.* at 1267 (Weis, J., dissenting); *City of New York Mun. Broadcasting Sys. v. FCC*, 744 F.2d 827, 840 n.17 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *NOW, D.C. Chapt. v. Social Sec. Admin.*, 736 F.2d 727, 737 n.95 (D.C. Cir. 1984). Commentators have also recognized this distinction. See, e.g., FED. R. EVID. 201(a) advisory committee's note; Davis, "There is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1540-41 (1987); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 76-77; Monahan & Walker, *supra* note 2, at 482-83; see also P. BREST, *supra* note 24, at 894-953 (discussing problems presented by legislative or constitutional facts); 1 WEINSTEIN'S EVIDENCE §§ 200[03]-[04] (1986) (concerning the judge's use of legislative fact).

²⁷ See *supra* note 23; see, e.g., Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 678 (1966) (concluding that it is feasible and in some instances "indispensable to sound constitutional adjudication" for the Supreme Court to examine legislative facts); Karst, *supra* note 26, at 78 ("Although some of the [Court's] justices have been reluctant, they now appear to be unanimous in accepting the necessity of weighing the factual justification of state regulation." (footnote omitted)); Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. FLA. L. REV. 236, 242-45 (1983) (acceptance of fact-finding by courts is a consequence of heightened scrutiny); see also Biklé, *supra* note 19, at 6 (laws are premised on facts that courts must assess for accuracy).

Some commentators have relabeled Davis's "legislative" facts "constitutional" facts

of the factual bases for legislation was not only inherent in judicial review generally,²⁸ but was critical to the protection of fundamental rights.²⁹ With the advent of the Warren Court³⁰ and the development of a firmer jurisprudential basis for aggressive constitutional scrutiny of legislation,³¹ concern with the time-worn "presumption of constitution-

in that they are defined as those factual issues whose "determination is 'decisive of constitutional rights'." Bishin & Stone, *Constitutional Facts*, in *THE JUDICIAL PROCESS* 703, 703-04 (1976); see Shaman, *supra*, at 236. Other commentators have preferred the term "constitutional" facts because such facts are "constitutionally relevant legislative facts." P. BREST, *supra* note 24, at 894.

²⁸ "[I]t is not only manifestly feasible for the Court to examine legislative facts, but such an examination is often altogether indispensable to sound constitutional adjudication." Alfange, *supra* note 27, at 678; see Biklé, *supra* note 19, at 6; Shaman, *supra* note 27, at 236, 242; see also 1 WEINSTEIN'S EVIDENCE, *supra* note 26, § 200[04] (discussing judicial scrutiny of legislative assumptions).

²⁹ "To uphold the regulation [or law] without determining that it will in fact [serve the state's asserted interests] would be inconsistent with the principles of heightened scrutiny. . . . The Supreme Court has frequently recognized that meaningful evaluation of constitutional fact is a critical element of heightened scrutiny." Shaman, *supra* note 27, at 245 (footnote omitted). Thus, "where the exercise of legislative power approaches a constitutionally prohibited area, as in legislation restricting speech, . . . no sound constitutional judgment can be made except by consideration of legislative facts." Alfange, *supra* note 27, at 644.

³⁰ Supreme Court reliance on secondary sources, including nonlegal sources, increased substantially during the Warren Court years. See Hafemeister & Melton, *supra* note 23, at 37. Hafemeister and Melton, however, draw the following conclusions:

In the past 40 years, the use of secondary authority has become commonplace on the Supreme Court and, to a lesser extent, the lower federal courts and the state appellate courts. This trend has been both cause and effect of the expansion of constitutional doctrines and the re-shaping of judicial roles in response to realist and post-realist critics of the law. . . .

Nonetheless, the use of social science still is controversial and rather uncommon, especially in state courts. Courts appear unsure of whether and how to use social science to examine the policy questions that they have been asked to decide in recent decades. As a result, with the exception of a few judges who "specialize" in cases involving scientific expertise, reliance on social science still is largely a "liberal" practice of judges who have an expansive view of the judiciary's role in shaping legal doctrine and protecting disenfranchised groups.

Id. at 54-55. These conclusions are confirmed by recent trends in the more conservative era of the Burger and Rehnquist Courts. The Court has continued to cite and analyze social science and record evidence of constitutional fact. While doing so, however, it has sharply curtailed the degree and frequency with which it relies on such proofs in reaching constitutional results. Thus, in cases such as *McCleskey v. Kemp*, 107 S. Ct. 1756, 1769 (1987) (statistical study of race factors in imposition of death penalty), and *Lockhart v. McCree*, 106 S. Ct. 1758 (1986) (research on jury composition regarding impanelment of death-qualified juries), the Supreme Court has seemingly gone out of its way to discredit or entirely disregard statistical, testimonial, and other forms of evidence probative of constitutional fact. Thus, judicial reliance on constitutional facts appears to go hand in hand with the protection of civil liberties. *But see* *United States v. Leon*, 468 U.S. 897, 907 n.6 (1984) (contracting constitutional protections based on statistical data regarding the effects of the exclusionary rule).

³¹ See, e.g., R. DWORKIN, *LAW'S EMPIRE* 369-73 (1986) (discussing the self-con-

ality"³² gave way. Instead of presuming the legitimacy of statutory law, courts began weighing means against ends, burdens against benefits, and asserted state interests against a law's *actual* achievements in the course of determining constitutional validity.³³

Such judicial tasks necessitate legislative fact-finding by courts.³⁴

tradictory nature of "passivism"—the doctrine of judicial deference to a legislature); J. ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980) (discussing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)); Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 824-32 (1986) (the durability of the Constitution has stemmed from flexible and adaptive interpretation).

³² The so-called "presumption of constitutionality" calls upon courts to extend a degree of deference to the policy determinations of legislators. See Alfange, *supra* note 27, at 661-67; see also *INS v. Chadha*, 462 U.S. 919, 944 (1982) ("We begin, of course, with the presumption that the challenged statute is valid."); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to [invalidate it]"); *United States v. Harris*, 106 U.S. 629, 635 (1882) ("Proper respect for [Congress] requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power."); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 17 (1800) (Washington, J., seriatim) ("The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated."). Legislative fact-finding by courts has led some commentators to express "concern for the survival of the presumption" in that it appears to permit courts to make independent policy judgments. See Karst, *supra* note 26, at 86 (citing L. HAND, *THE BILL OF RIGHTS* 27-30 (1958)).

³³ With the rise of judicial activism under Chief Justice Warren, the Court developed three tiers of judicial scrutiny (strict, intermediate, and minimal or rational) in its effort to answer the essential constitutional question as to whether there existed sufficient justification for the governmental infringement of any particular constitutional right. See, e.g., *Shaman*, *supra* note 27, at 242-45. Some commentators have viewed these "tiers" as reflecting different degrees of "presumption." See Karst, *supra* note 26, at 86-95. With judicial activism came the emergence of the "public law litigation model," which, for the first time, made courts more than a forum for private dispute resolution. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1296-98 (1976). In making the policy judgments traditionally made *only* by legislators, judicial fact-finding became "principally concerned with 'legislative' rather than 'adjudicative' fact." *Id.* at 1297.

Whether the question be one of political freedom or economic freedom, "We deal not with absolutes but with questions of degree." And regardless of the weight one attaches to the presumption of constitutionality, the same questions—the objectives of the regulation, the means of achieving them, and the impact on the protected interest—remain to be illuminated by the legislative facts.

Karst, *supra* note 26, at 94-95 (quoting *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 530 (1959)).

³⁴ Although it has been argued that legislative fact-finding should be as important to an absolutist constitutional approach as it is to judicial balancing, see Karst, *supra* note 26, at 80, this has traditionally not been the case. As Dean Alfange observed:

[T]he defenders of judicial self-restraint and constitutional absolutism unite on this common ground: the common ground of mechanical jurisprudence. For, at bottom, either position requires acceptance of the theory that constitutional questions can be decided by merely holding the words of the statute up against the applicable constitutional provision, and deciding on that basis alone whether the statute is permissible. It was the prev-

For example, Professor Karst noted that courts called upon to review the constitutionality of a statute would be required to answer the following questions:

On the objective (or purpose, or utility) side of the balance, the questions of legislative fact are these:

1. How much will this regulation advance the chosen governmental objective? It is essential to recognize that there are two parts to this question:

a) If the regulation is completely successful, how much more safe, or healthy, or moral will the community be?

b) What is the chance of complete success for the regulation? Of partial success?

2. How much more will this regulation advance the objective than some other regulation which might interfere less with constitutionally protected interests?

On the impact (or cost) side, the questions of legislative fact are exact parallels:

1. How much will freedom (of speech, of commerce, etc.) be restricted by this regulation? This question also divides into two parts:

a) If the regulation operates with its maximum restrictive effect, how, and how much, will freedom be restricted?

b) What is the chance that the regulation will have its maximum restrictive effect? A partial effect?

2. How much more restrictive is this regulation than some other regulation which might achieve the same objective?

All of these are questions of fact; all of them are answered, whether or not the judge recognizes what he is do-

alence of this belief in mechanical jurisprudence at the start of the century that led Dean Roscoe Pound . . . to decry "the sharp line between law and fact . . . which requires constitutionality, as a legal question, to be tried by artificial criteria of general application and prevents effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes."

Alfange, *supra* note 27, at 642 (footnote omitted) (quoting Pound, *Liberty of Contract*, 18 YALE L.J. 454, 458 (1909)). Thus, the influence of the realists and the move toward aggressive judicial protection of fundamental rights through a tiered balancing analysis have shared an emphasis on legislative fact-finding by courts in constitutional cases. This has, in turn, blurred the traditional bright line distinction between facts and law in general. See generally Monahan & Walker, *supra* note 2, at 488-95 (stating that classification of social science research as either fact or law is plausible); Morris, *supra* note 2 (law and fact do not naturally stand apart because laws determine the selection and description of facts, while facts determine the scope of the laws based upon them).

ing. If he 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 . . . Such assumptions may be correct or incorrect, enlightened or unenlightened, but they are always made.³⁵

Trial courts have a duty to answer these questions on a fully developed factual record³⁶ and appellate courts have a duty to ensure, through remand or otherwise, that facts of constitutional significance are found based on such a record and not simply assumed.³⁷ Moreover, as a general matter,

it seems clear that [judicial] decisions, in order to command public support, should be based upon the records in the cases before them, and should find in the evidence, or in matters properly brought before them for judicial notice, a complete basis for a determination that legislation, challenged because of some underlying question of fact, is invalid because it is so demonstrated upon the record.³⁸

³⁵ Karst, *supra* note 26, at 84. *But see* Monahan & Walker, *supra* note 2, at 516 (arguing that social or legislative facts should, for some purposes, be treated by courts as authority akin to law).

³⁶ *See, e.g.*, Shaman, *supra* note 27, at 246 (Courts should "not uphold governmental regulations on the basis of speculative or hypothetical facts. Important constitutional rights . . . may not be circumscribed by imaginary state interests. Nothing less than a relatively sound factual basis for governmental action would seem to be acceptable under heightened scrutiny." (footnotes omitted)). The Supreme Court has often noted that a full factual record is advisable when deciding questions of constitutional magnitude or of public importance. *See, e.g.*, Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972) (declining to consider constitutionality of certain Ohio election laws without record setting forth relevant facts); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 762-63 (1947) (constitutional questions not to be entertained upon dubious presentations); Rescue Army v. Municipal Court, 331 U.S. 549, 575 (1947) (constitutional question not determinable when municipal court did not make clear which charge was being brought against defendant and thus did not properly develop facts of the case); Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 462 (1945) (refusing to pass on constitutionality of state statute "without reference to some precise set of facts").

³⁷ *See, e.g.*, Karst, *supra* note 26, at 98 (Supreme Court must ensure that lower federal court judges engage in proper factual inquiries). *See generally* Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) (arguing for de novo review by appellate courts transcending, at times, the "clearly erroneous" standard).

³⁸ Bickel, *supra* note 19, at 27. When the Court is engaged in its public law task of overseeing the complex activities of modern government,

[t]he extended impact of the judgment demands a more visibly reliable and credible procedure for establishing and evaluating the fact elements in the litigation, and one that more explicitly recognizes the complex and continuous interplay between fact evaluation and legal consequence. The major

In keeping with these developments, rules of constitutional law have increasingly come to reflect social, psychological, economic, and medical realities. Out of necessity, and contrary to these trends, however, a tradition of facial adjudication of constitutional claims based on assumed legislative facts has persisted.³⁹ Part II, below, will illustrate how defenders of rights-infringing legislation have relied upon these cases to resurrect and maintain the wall between constitutional principle and empirical truth, thereby attempting to prevent courts from examining the *real* effects of a challenged statute in operation.

II. WHEN THE FACTS FAIL TO COMPEL A CONSTITUTIONAL RESULT

A. A Preview of the Problem

At the very birth of the evidentiary proof of legislative facts in the courtroom can be found one means of its demise: district court refusal to rely on factual findings found to support a legal result contrary to precedent. Many of the district courts in the cases consolidated in *Brown v. Board of Education*,⁴⁰ after hearing evidence on the harm to minority school children resulting from segregated but substantially equal educational facilities, nevertheless felt precluded from relying on these facts in searching for a constitutional result. For example, concluding that segregation in South Carolina's public schools did not "of itself" violate the fourteenth amendment, the three-judge district court in *Briggs v. Elliott*⁴¹ found support in "overwhelming authority which we are not at liberty to disregard on the basis of theories ad-

response to the new requirements has been to place the responsibility for fact-finding increasingly on the trial judge.

Chayes, *supra* note 33, at 1297; see also Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 56 (1982) (even the more conservative Burger Court recognized the necessity of finding legislative facts when deciding public law litigation cases).

³⁹ See *infra* notes 40-50, 190-96 and accompanying text.

⁴⁰ See 347 U.S. 483, 486 n.1 (1954). The cases consolidated are as follows: *Davis v. County School Bd.*, 103 F. Supp. 337 (E.D. Va. 1952); *Brown v. Board of Educ.*, 98 F. Supp. 797 (D. Kan. 1951); *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951); *Belton v. Gebhart*, 32 Del. Ch. 343, 87 A.2d 862, *aff'd*, 33 Del. Ch. 144, 91 A.2d 137 (Del. 1952). The same issues were raised in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (racial segregation in District of Columbia public schools violated fifth amendment).

⁴¹ 98 F. Supp. 529 (E.D.S.C. 1951).

vanced by a few educators and sociologists.”⁴² Similarly, in *Belton v. Gebhart*,⁴³ the court declared itself precluded from issuing the relief compelled by the evidence. The Delaware chancellor summarized the un rebutted testimony and found that, as a matter of fact, “[s]tate-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated”⁴⁴. Although the Supreme Court had never “passed upon a case containing [such] a specific finding,”⁴⁵ and although the “separate but equal” rule of *Plessy v. Ferguson*⁴⁶ had at best “implicit” applicability to the school segregation context, the court nevertheless concluded that it could not enjoin segregation in the Delaware schools.⁴⁷

The Supreme Court in *Brown*, of course, made clear that new facts and extralegal social-scientific evidence could contribute to judicial alteration or even reversal of a constitutional rule of law. But this in no way ameliorated the general problem experienced by district courts, when presented with such evidence.

As the finder of facts,⁴⁸ charged with the power to invalidate un-

⁴² *Id.* at 537. The court’s view was bolstered by the absence of a fully developed and judicially acceptable concept of strict scrutiny of legislative judgments when fundamental rights or suspect statutory classifications were at issue. Thus, the *Briggs* court went on to state:

The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics.

Id. *Briggs* thus illustrates once again how deference to the legislature and judicial failure to modify legal authority in the presence of new facts go hand in hand. A lower court that feels its hands are tied in this way is likely to be unable or unwilling to scrutinize state legislation with the requisite degree of care. See *infra* notes 250-71 and accompanying text.

⁴³ 32 Del. Ch. 343, 87 A.2d 862, *aff’d*, 33 Del. Ch. 144, 91 A.2d 132 (1952).

⁴⁴ *Id.* at 349, 87 A.2d at 865.

⁴⁵ *Id.*

⁴⁶ 163 U.S. 537 (1896) (holding that separate but equal railroad cars satisfy the fourteenth amendment), *overruled*, *Brown*, 347 U.S. at 494.

⁴⁷ *Belton*, 32 Del. Ch. at 350, 87 A.2d at 865. The court stated:

I, therefore, conclude that while State-imposed segregation in lower education provides Negroes with inferior educational opportunities, such inferiority has not yet been recognized by the United States Supreme Court as violating the Fourteenth Amendment. On the contrary, it has been by implication excluded as a Constitutional factor. It is for that Court to re-examine its doctrine in the light of my finding of fact. It follows that relief cannot be granted plaintiffs under their first contention.

Id. at 351, 87 A.2d at 866; see also *Gebhart v. Belton*, 33 Del. Ch. 144, 152, 91 A.2d 137, 141-42 (only the Supreme Court may overrule *Plessy*).

⁴⁸ District courts are the factfinders of the federal judiciary and all facts upon

constitutional laws,⁴⁹ what is a district court to do when it concludes that a law is unconstitutional on the basis of facts unknown to those courts that previously established the applicable standards of constitutionality? Should it be barred from granting relief pending appellate review in all circumstances? The example discussed in detail in Part II B below demonstrates that, at least in some cases, justice delayed is in truth justice denied.⁵⁰ Lower courts must be empowered to grant the relief compelled by the facts, even if in so doing they implicitly arrive at a constitutional result at odds with the decision of a higher court.

B. *The Right of Minors to a Confidential Abortion: An Unresolved Question*

The state of the law regarding a minor's constitutional right to choose an abortion reveals with precision how adherence to precedent continues to lead postrealist courts to discount facts pertinent to constitutional analysis. The problem previewed in the cases consolidated in *Brown* has become full blown. The unduly binding nature of ill-considered precedent still ties the hands of even courts applying a fully modern and developed standard of strict judicial scrutiny.

As the discussion which follows will reveal, the Supreme Court has recognized that minors, too, have a constitutional right of privacy but has allowed that right to be heavily burdened through a constitutional analysis predicated on wide ranging and assumed legislative

which the constitutionality of legislation depend are "properly . . . the subject of judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1937) (citing *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 210 (1934)). Where there is precedent, the proper inquiry includes "whether a change has occurred in the factual basis" of that precedent as well as "the existence of a particular state of facts assumed but never demonstrated." *Hodgson v. Minnesota*, 648 F. Supp. 756, 774 (D. Minn. 1986), *petition for cert. before judgment in the Court of Appeals denied*, 107 S. Ct. 1333 (1987) (this petition attempted to consolidate the case with *Hartigan v. Zbaraz*, 763 F.2d 1532 (7th Cir. 1985), *aff'd without opinion by an equally divided court*, 56 U.S.L.W. 4053 (U.S. Dec. 14, 1987)), *aff'd*, 827 F.2d 1191 (8th Cir. 1987), *vacated and reh'g granted*, Nos. 86-5423/86-5431 (8th Cir. Nov. 13, 1987) (rehearing held in abeyance pending Supreme Court decision in *Zbaraz*), *judgment reinstated and reh'g en banc granted*, Nos. 86-5423/86-5431 (8th Cir. Dec. 31, 1987).

⁴⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. . . . This is the very essence of judicial duty."); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) ("[I]t is of course the duty of this Court 'to say what the law is' . . ."); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting) ("At least since *Marbury v. Madison*, it has been the settled province of the federal judiciary to 'say what the law is' with respect to the constitutionality of Acts of Congress." (citation omitted)).

⁵⁰ Cf. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) ("leadfootedness" weakens justice); *In re Ragan*, 2 F.2d 785, 791 (1st Cir. 1924) (Anderson, J., dissenting) ("Justice thus delayed is justice denied.").

facts.⁵¹ In particular, the Court has assumed that parental notice or consent requirements serve a purported state interest in protecting minors and promoting family integrity.⁵² Although both experience and scientific research have since virtually disproved this and other assumed legislative facts,⁵³ lower courts continue to find themselves precluded from departing from precedent.⁵⁴ Such a result mistakes fact for law, interprets too narrowly the judicial duty to safeguard fundamental rights from infringement and, at minimum, delays relief from the ongoing violation of rights until Supreme Court review should occur.⁵⁵

1. An Overview

In 1976, the Supreme Court held that the right to terminate a pregnancy, first recognized in *Roe v. Wade*,⁵⁶ does not arise "magically only when one attains the state-defined age of majority."⁵⁷ Instead, the Court found that minors, as well as adults, are protected by both the Bill of Rights and the fourteenth amendment⁵⁸ and that the state may not constitutionally delegate an absolute veto power over a minor's abortion choice to a third party, such as a parent, regardless of that minor's age or maturity.⁵⁹ Thus, judicial interpretation of the reach of specific constitutional guarantees led the Supreme Court to conclude that a state law requiring *every* minor to obtain parental consent is flatly and facially unconstitutional.⁶⁰

⁵¹ See *infra* notes 56-92 and accompanying text.

⁵² See *infra* notes 62-65, 85-90 and accompanying text.

⁵³ See *infra* notes 93-142 (experience with operating laws), 143-63 (social science, medicine, professional opinion) and accompanying text.

⁵⁴ See *infra* notes 164-85 and accompanying text.

⁵⁵ See *generally infra* notes 186-294 and accompanying text (arguing that lower courts should be free of precedent in certain types of constitutional cases).

⁵⁶ 410 U.S. 113 (1973).

⁵⁷ *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976); see also *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) [hereinafter *Bellotti II*] ("the status of minors under the law is unique," but "not beyond the protection of the Constitution").

⁵⁸ See *Danforth*, 428 U.S. at 74; see also *In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

⁵⁹ See *Danforth*, 428 U.S. at 74.

⁶⁰ See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 440 (1983). "[I]t is clear that Akron may not make a blanket determination that *all* minors under the age of 15 are too immature to make [the] decision [to have an abortion] or that an abortion never may be in the minor's best interests without parental approval." *Id.* (emphasis added); see also *Bellotti II*, 443 U.S. at 643; *Danforth*, 428 U.S. at 74. Such laws are unconstitutional because the right to privacy protects a woman's "interest in independence in making certain kinds of important decisions" as well as her "interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). Moreover, any asserted state interest in requiring parental involvement must "give way to the constitutional right [to have an abortion] of a mature minor or of an immature minor whose best interests are contrary to parental involvement." *Akron*, 462

In 1979, however, the Court noted that a state has a number of significant interests in regulating a minor's abortion choice in addition to those recognized as compelling in *Roe*.⁶¹ The Court suggested that a parental consent law that provided minors with an opportunity to bypass consent might be constitutionally permissible if it met certain requirements.⁶² Though no such statute was then presented,⁶³ the Court suggested that an anonymous, expeditious judicial bypass procedure that permitted a confidential abortion for any minor who could demonstrate sufficient maturity or establish that an abortion was in her best interests would be constitutional under the fourteenth amendment.⁶⁴ In three subsequent opinions the Court adhered to these basic principles.⁶⁵

U.S. at 428 n.10.

⁶¹ See *Bellotti II*, 443 U.S. at 634 ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of 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 child rearing."). In *Roe*, the Court permitted regulation of an adult woman's choice to abort only when necessary and narrowly tailored to protect her health after the first trimester of pregnancy, or to protect the potential life of the fetus after it became independently "viable." *Roe*, 410 U.S. at 162-64; see also *Akron*, 462 U.S. at 428-30. Though increasingly divided, a majority of the Court has never wavered in the zealous protection of a woman's right to reproductive choice. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169, 2178 (1986) ("The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. . . . [Neither may the States] deter a woman from making a decision that, with her physician, is hers to make.").

⁶² See *Bellotti II*, 443 U.S. at 643-44.

⁶³ See *id.* at 651 n.32; *id.* at 656 n.4 (Stevens, J., concurring).

⁶⁴ See *id.* at 643-44.

⁶⁵ In *H.L. v. Matheson*, 450 U.S. 398 (1981), a majority of the Court upheld a parental notification law with no judicial bypass procedure as applied to a class of immature, unemancipated minors living with and dependent on their parents. See *id.* at 407, 413. However, a *different* majority of the Court made clear that a requirement of parental notice without a judicial bypass option would be unconstitutional as applied to mature minors. See *id.* at 420 (Powell & Stewart, JJ., concurring); *id.* at 450-54 (Marshall, Brennan & Blackmun, JJ., dissenting). The Court's "primary holding" in *H.L.* was that a minor plaintiff who did not allege that she or any member of the plaintiff class was mature or emancipated did not have standing to challenge the parental notification requirement as applied to such minors. See *Akron*, 462 U.S. at 440 n.30 (citing *H.L.*, 450 U.S. at 406).

In *Akron*, the Court struck down a municipal ordinance that required parental consent because it failed to specifically and expressly provide minors with a procedure for bypassing the consent requirement. *Akron*, 462 U.S. at 440-42. The Court also made clear that any sort of mandatory parental involvement (consent or notice) was a burden on the exercise of a fundamental right, necessitating an alternative procedure for demonstrating maturity or best interests. See *id.* at 428 n.10.

In *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), decided the same day as *Akron*, the Court sustained a parental consent and judicial bypass statute of the sort it had anticipated in *Bellotti II*. *Ashcroft*, 462 U.S. at 491-93.

On November 3, 1987, the Supreme Court heard argument in yet another case involving a minor's right to abortion. The issues presented in that case were the constitutionality of a mandatory 24-hour waiting period after notification and before a mi-

The Court's decisions in *Bellotti v. Baird* ("*Bellotti II*"),⁶⁶ *H.L. v. Matheson*,⁶⁷ *Akron v. Akron Center for Reproductive Health*,⁶⁸ and *Planned Parenthood Association v. Ashcroft*⁶⁹ permitting a state to require parental notice or consent as long as a constitutionally adequate waiver procedure was provided were the result of its analysis, under the appropriate standard of review, of the states' asserted interests.⁷⁰ Contrary to its own admonition, the Court's constitutional analysis in all four cases was performed "in the absence of 'an adequate and full-

nor's abortion when the state has provided a judicial bypass procedure as well as the constitutional sufficiency of the bypass procedure itself. See *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd without opinion by an equally divided court*, 56 U.S.L.W. 4053 (U.S. Dec. 14, 1987).

⁶⁶ 443 U.S. 622 (1979).

⁶⁷ 450 U.S. 398 (1981).

⁶⁸ 462 U.S. 416 (1983).

⁶⁹ 462 U.S. 476 (1983).

⁷⁰ Although constitutional review has permitted the infringement of a minor's right to privacy in furtherance of state interests that would not justify burdening an adult woman's choice, in the earlier cases, "for all practical purposes [the Court's review] approach[ed] the 'compelling state interest' standard (employed in cases involving adults)." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 706 (1977) (Powell, J., concurring). In fact, a majority of the Court stated that "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, *especially* when made by a minor, require a State to act with *particular* sensitivity when it legislates to foster parental involvement . . ." *Bellotti II*, 443 U.S. at 642 (emphasis added). Thus, the Court has consistently held that a statute that burdens a minor's right to choose abortion by requiring parental involvement must be invalidated unless it "plainly serves important state interests [and] is narrowly drawn to protect only those interests." *H.L.*, 450 U.S. at 413. See *generally Akron*, 462 U.S. at 428 n.10 (summarizing the state's legitimate interest in encouraging parental involvement in their minor children's decision to have an abortion).

There remains, nevertheless, an underlying inconsistency in the Court's analysis of the standard of review applicable to governmental infringement of a minor's right to privacy. For one thing, although so-called "strict scrutiny" has traditionally resulted in the invalidation of state regulatory measures, the Court has upheld laws restricting a minor's abortion choice, at least in principle. See *Akron*, 462 U.S. at 440-41; *Bellotti II*, 443 U.S. at 643-44. The Court has also upheld laws that in fact have operated to restrict a minor's abortion choice. See *Ashcroft*, 462 U.S. at 491-93; *H.L.*, 450 U.S. at 413. Moreover, it has done so based upon the apparent legitimacy of what it calls "significant" or important state interests, see *Akron*, 462 U.S. at 428 n.10, rather than by expanding the list of interests recognized as "compelling" in *Roe*, see *supra* note 61. These inconsistencies have led to confusion, and some lower courts have labeled the analysis of the relationship between "significant" state interests and burdensome legislation as a "compelling [state] interest" test. See *Zbaraz*, 763 F.2d at 1536-37.

Whatever the appropriate label, it is clear that the Court has employed some form of heightened scrutiny and has never applied a "rational basis test" to laws infringing on a minor's abortion right. See *Akron*, 462 U.S. at 427-28 n.10; *H.L.*, 450 U.S. at 413; *Carey*, 431 U.S. at 695 n.18; *Danforth*, 428 U.S. at 75. Of course the concept of "intermediate scrutiny" is not new; it has been consistently employed in gender discrimination cases under the equal protection clause. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

bodied record”⁷¹ of the legislative history necessary for heightened judicial scrutiny of a state law that burdens a fundamental right. Also lacking was an understanding of the actual operation of the challenged law over time.⁷² Facial constitutional analysis⁷³ was the device for assuming the facts necessary for constitutional scrutiny without referring either to the limited factual hearings below or to a significant and representative sample of outside medical or social science data.

2. Assumed Facts in *Bellotti II*, *H.L.*, *Akron*, and *Ashcroft*

In concluding that mandatory parental notification or consent is permissible when accompanied by an adequate judicial bypass procedure, the Supreme Court necessarily made assumptions regarding the importance and legitimacy of the states’ asserted interests, the likelihood that the chosen means would further these interests, and the degree to which the means chosen would burden those seeking to exercise a fundamental constitutional right and others. In particular, the Court made assumptions about minors and their family relationships, about the abortion procedure and the provision of abortion-related health services, and about the impact of an operating judicial bypass procedure. Most of these factual assumptions have since been demonstrated to be either false or dubious.⁷⁴

The Court assumed, for example, that “minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them”⁷⁵ and that so-called “immature minors often lack the *ability* to make fully informed choices that take account of both immediate and long-range consequences,”⁷⁶ particularly while

⁷¹ *H.L.*, 450 U.S. at 414 n.25 (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (quoting *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 113 (1962))). See generally cases cited *supra* note 36.

⁷² The statutes at issue in *Bellotti II* and in *Ashcroft* were preliminarily enjoined before going into effect on the basis of a limited record compiled at a pretrial hearing without benefit of discovery. See *Bellotti II*, 443 U.S. at 627-31, 645 n.25; *Planned Parenthood Ass’n v. Ashcroft*, 483 F. Supp. 679, 683 (W.D. Mo. 1980). Although the statute at issue in *H.L.* had been in operation, the Court’s analysis was based on a factual record consisting *solely* of appellant, a 15-year-old girl, “giving monosyllabic answers to her attorney’s leading questions.” *H.L.*, 450 U.S. at 401-02.

⁷³ Though the Court gave only “as applied” relief in *H.L.*, 450 U.S. at 413, the Court itself described its analysis as “facial,” *id.* at 407.

⁷⁴ See *infra* notes 93-131 and accompanying text.

⁷⁵ *Bellotti II*, 443 U.S. at 635.

⁷⁶ *Id.* at 640 (emphasis added); see *id.* at 634; see also *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment.”). The Court also assumed that adults are more “capable” of making such decisions. See *Akron*, 462 U.S. at 430 n.10.

under stress and without parental support.⁷⁷ In a later decision, the Court summarily concluded that "[t]here is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion."⁷⁸

The Court also assumed that minors are vulnerable and in need of protection⁷⁹ from the "medical, emotional, and psychological consequences of an abortion [that] are serious and can be lasting[,] particularly so when the patient is immature."⁸⁰ Without any supporting authority, the Court drew the astonishing conclusion that the state's decision not to require parental notice for prenatal care was "rational" because "[i]f the pregnant girl elects to carry her child to term, the medical decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort."⁸¹

The Court also assumed the worst about providers of abortion services and concluded that minors need parental aid to ensure that they obtain quality care. For example, the Court stated that "[i]t seems unlikely that [a minor] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."⁸² The Court went on to state that

adult women [are] presumably capable of selecting and obtaining a competent physician [while minors] are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical.⁸³

The Court also questioned whether minors are capable of providing physicians with an adequate psychological and medical history and appears to have assumed that doctors would not question the adequacy of

⁷⁷ See *Bellotti II*, 443 U.S. at 641.

⁷⁸ *H.L.*, 450 U.S. at 408.

⁷⁹ See *Bellotti II*, 443 U.S. at 635.

⁸⁰ *H.L.*, 450 U.S. at 411.

⁸¹ *Id.* at 412-13 (emphasis omitted). *Contra Bellotti II*, 443 U.S. at 642 ("[T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." (emphasis added)).

⁸² *Bellotti II*, 443 U.S. at 641 (quoting *Danforth*, 428 U.S. at 91 (Stewart, J., concurring)).

⁸³ *Id.* at 641 n.21. Of course, such arguments do not distinguish minors from poor adults in states without Medicaid funding who, though "capable" of selecting a private doctor, are equally without the means to be selective.

the information provided by the minor. Consequently, it was assumed that parents would in fact be more reliable sources of such information.⁸⁴

The Court found that, at least for "immature and dependent minors, [a parental notification] statute plainly serves the important considerations of family integrity"⁸⁵ and parent-child "consultation" in matters raising, for some, "profound moral and religious concerns."⁸⁶ In reaching this conclusion the Court necessarily assumed a wide range of facts about family communication and relationships. The fundamental premises implicitly, if not explicitly, made by the Court were: 1) that even involuntary consultation with a parent or parents regarding matters such as sex, pregnancy and an abortion choice would be beneficial to the minor;⁸⁷ 2) that parents act in the best interests of their minor children;⁸⁸ and 3) even if they do not, that "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding".⁸⁹ Legal restrictions also may be important to the integrity of the institution of the family in general.⁹⁰ These assumptions would seem to lead to the view that mandatory notice or consent laws would, in practice, improve parent-child communication and support the family as a social institution.

In sustaining parental involvement laws containing a statutory procedure that allows a minor to get a waiver of the consent requirement from a judge—a "judicial bypass option"—the Court also made assumptions regarding the operation and impact of the bypass procedure itself.⁹¹ In particular, the Court implicitly found that such proce-

⁸⁴ See *H.L.*, 450 U.S. at 411. *Contra id.* at 442-43 (Marshall, J., dissenting) (stating that the majority opinion failed to identify what types of information may be provided by parents or why it is available only to parents and not to the minors).

⁸⁵ *Id.* at 411.

⁸⁶ *Id.* at 409 (quoting *Bellotti II*, 443 U.S. at 640-41 (quoting *Danforth*, 428 U.S. at 91 (Stewart, J., concurring))).

⁸⁷ See *H.L.*, 450 U.S. at 409. *But see id.* at 446 (Marshall, J., dissenting) (arguing that this assumption does not apply when the minor's pregnancy results from incest, when a hostile parental response is assured, or when the minor's fear of such a response deters her from the abortion she desires).

⁸⁸ See *H.L.*, 450 U.S. at 437; see also *Parham*, 442 U.S. at 602 (The law's concept of the family "recognizes that natural bonds of affection lead parents to act in the best interests of their children.").

⁸⁹ *Bellotti II*, 443 U.S. at 638-39.

⁹⁰ See *id.* at 637-39.

⁹¹ See, e.g., *Ashcroft*, 462 U.S. at 490-93. Relying almost entirely on the precedent of *Bellotti II*, *H.L.*, and *Akron*, the Court in *Ashcroft* saw the issue presented as "one purely of statutory construction: whether Missouri provides a judicial alternative that is consistent with these established legal standards." *Ashcroft*, 462 U.S. at 491-92.

dures would serve the state's interests in separating mature from immature minors and in accurately assessing the best interests of immature minors. It also implicitly found that there actually exists a category of immature minors whose best interests are served by requiring notification or consent, even at the risk of significant delay in or deterrence from obtaining an abortion. Finally, the Court implicitly found that the statutory bypass procedure relieves all mature minors and minors whose best interests would be served by an abortion of the conceded burdens imposed by a mandatory notice or consent requirement. The Court presumably assumed that the judicial bypass procedure accomplished this without imposing severe additional burdens of its own on *all* minors, their families, and health care providers.⁹²

3. Reality Disproves Speculation: Experience and Social Science

a. *The Minnesota and Massachusetts Experience*⁹³

Of the states that presently have statutes requiring parental involvement in a minor's abortion choice,⁹⁴ Minnesota's law is the most

No further constitutional scrutiny was performed, even though *Ashcroft* was the first case presenting the Court with a true *Bellotti II*-type bypass law.

⁹² See *Bellotti II*, 443 U.S. at 655-56 & n.4 (Stevens, J., concurring) (declining to join the majority opinion because the burden imposed by a duly enacted scheme may itself have been unconstitutional and was not before the Court).

⁹³ This section is drawn primarily from the district court's opinion and, where necessary, from the record at trial in the case of *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986). *Hodgson* was tried in February and March of 1986. The author of this Article is one of the attorneys for plaintiffs in the *Hodgson* case. The case is the first across-the-board challenge to a notice or consent/bypass law *in operation*. While there exists no equally comprehensive record of the Massachusetts experience, all available sources indicate that it is strikingly similar. See, e.g., *infra* note 97. See generally Brief Amicus Curiae in Support of Appellees by the Judicial Consent for Minors Lawyer Referral Panel, An Organization of Lawyers Who Represent Pregnant Minors Seeking Judicial Consent to Confidential Abortions in Massachusetts at 1-5, 20-34, 37-38, *Hartigan v. Zbaraz*, 56 U.S.L.W. 4053 (U.S. Dec. 14, 1987) [hereinafter *Zbaraz Amicus Brief*] (setting forth the effects and operation of the Massachusetts judicial bypass procedure and arguing that it creates a substantial burden on minors and does not advance any legitimate state interest).

⁹⁴ Twenty-three states have some form of either mandatory parental notification or consent legislation for abortion. For statutes requiring notification, see GA. CODE ANN. § 15-11-112 (1987); IDAHO CODE § 18-609(6) (Supp. 1986); ILL. ANN. STAT. ch. 38, para. 81-54(3), 81-64 (Smith-Hurd 1986); MD. HEALTH-GEN. CODE ANN. § 20-102, -103 (1982); MINN. STAT. ANN. § 144.343 subd. 2 (West Supp. 1988); MONT. CODE ANN. § 50-20-107 (1985); NEV. REV. STAT. ANN. § 442.255 (Michie 1986); OHIO REV. CODE ANN. § 2919.12(B) (Anderson 1985); UTAH CODE ANN. § 76-7-304 (1978); W. VA. CODE § 16-2F-3(a) (1985). For statutes requiring consent, see 1987 Ala. Acts 87-286 (approved by the governor June 25, 1987); ARIZ. REV. STAT. ANN. § 36-2152 (1986), *amended by* 1987 Ariz. Legis. Serv. ch. 192 (West) (approved by the governor Apr. 29, 1987); CAL. HEALTH & SAFETY CODE § 25958

restrictive.⁹⁵ Minnesota and Massachusetts have had the most long-standing and comprehensive experience with an operating and actively enforced judicial bypass system.⁹⁶ Between them, well over 7,000 mi-

(West 1984), *amended by* 1987 Cal. Legis. Serv. ch. 1237 (West) (approved by the governor Sept. 27, 1987); IND. CODE ANN. § 35-1-58.5-2.5 (West Supp. 1985); Ky. REV. STAT. ANN. § 311.732 (Michie/Bobbs-Merrill 1986); LA. REV. STAT. ANN. § 40:1299-35.5 (West Supp. 1986); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); 1986 Miss. Laws ch. 448; MO. ANN. STAT. § 188.028 (Vernon Supp. 1987); N.D. CENT. CODE § 14-02.1-03.1 (1981); 18 PA. CONS. STAT. ANN. § 3206 (Purdon 1983); R.I. GEN. LAWS § 23-4.7-6 (1985); S.C. CODE ANN. § 44-41-30 (Law. Co-op. 1976).

Eight of these statutes are currently under court injunction. *See* *Roe v. Collins*, No. 85-2118PHX (D. Ariz. Aug. 14, 1987) (Arizona); *Eubanks v. Collins II*, No. C82-0360-L(A) (W.D. Ky. filed June 6, 1986) (Kentucky); *Hartigan v. Zbaraz*, 534 F. Supp. 1452 (N.D. Ill. 1984), *modified*, 763 F.2d 1532 (7th Cir. 1985), *aff'd without opinion by an equally divided court*, 56 U.S.L.W. 4053 (U.S. Dec. 14, 1987) (Illinois); *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *petition for cert. before judgment in the Court of Appeals denied*, 107 S. Ct. 1333 (1987) (this petition attempted to consolidate the case with *Zbaraz*), *aff'd*, 827 F.2d 1191 (8th Cir. 1987), *vacated and reh'g granted*, Nos. 86-5423/86-5431 (8th Cir. Nov. 13, 1987) (rehearing held in abeyance pending Supreme Court decision in *Zbaraz*), *judgment reinstated and reh'g en banc granted*, Nos. 86-5423/86-5431 (8th Cir. Dec. 31, 1987) (Minnesota); *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *appeal dismissed sub nom.* *Akron Center for Reproductive Health v. Slaby*, 805 F.2d 1033 (6th Cir. 1986) (Ohio); *Barnes v. Mississippi*, No. J86-0458(W) (S.D. Miss. filed June 30, 1986) (Mississippi); *Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985) (Nevada); *American College of Obstetricians and Gynecologists v. Thornburgh*, 656 F. Supp. 879 (E.D. Pa. 1987) (Pennsylvania).

Three of the statutes, those of Idaho, Montana, and South Carolina, are facially unconstitutional under the analysis of *Bellotti II* and the alternate majority in *H.L.* because they fail to provide minors with a judicial mechanism to bypass the parental notice or consent requirement. *See Bellotti II*, 443 U.S. at 646-50; *H.L.*, 450 U.S. at 420 (Powell & Stewart, JJ., concurring); *id.* at 450-54 (Marshall, Brennan & Blackmun, JJ., dissenting). For this reason, these statutes are generally not enforced.

⁹⁵ Minnesota requires notification of *both* a minor's parents without exception for divorce, separation, or other comparable situations. *See* MINN. STAT. ANN. § 144.343(3) (West 1986).

⁹⁶ Minnesota's law requires two-parent notification before a minor's abortion or a judicial waiver of the requirement. *See* MINN. STAT. ANN. § 144.343(2)-(7) (West 1986). The effective date of this provision was August 1, 1981. A temporary restraining order was issued in *Hodgson v. Minnesota* on July 30, 1981, *see Hodgson*, 648 F. Supp. at 770; the case challenges the constitutionality of the law both on its face and as applied. *Hodgson*, 648 F. Supp. at 760. On July 31, 1981, the district court temporarily restrained enforcement of MINN. STAT. ANN. § 144.343(2) (West 1986) (requiring notification without a bypass option) and on August 1, the judicial bypass procedure in subdivision 6 of the law went into effect. *Hodgson*, 648 F. Supp. at 770. On January 23, 1985, the district court granted summary judgment to defendants on plaintiffs' claim that the law was unconstitutional under the due process clause on its face, *id.*, and the challenge to the statute "as applied" went to trial in February and March of 1986, *id.* at 759-60. At the time of trial, the bypass law had been operating for five years. On November 6, 1986, the district court declared the law unconstitutional and granted plaintiffs the injunctive relief they sought. *Id.* at 781. On August 28, 1987, the Eighth Circuit Court of Appeals affirmed the district court, *Hodgson*, 827 F.2d 1191 (8th Cir. 1987), but that decision was subsequently vacated. *Hodgson*, Nos. 86-5423/86-5431 (8th Cir. Nov. 13, 1987). The Eighth Circuit granted a rehearing, *id.*, but

nors have petitioned the courts for a waiver of the notification or consent requirements.⁹⁷

The *real* impact of such bypass laws on minors who go to court, on those who cannot, on the families of pregnant minors, and on the provision of health care was systematically documented for the first time in the five-week trial of *Hodgson v. Minnesota*.⁹⁸ The trial revealed that the judicial bypass alternative to parental notification and consent requirements does not afford minors a meaningful choice. Already pregnant, without supportive parents, and facing financial and logistical obstacles to obtaining an abortion,⁹⁹ the trial record demonstrated that these laws compel minors to choose among trauma in the courthouse, crisis at home, and unwanted teen-age motherhood. The pages of trial testimony, depositions, and exhibits tell a story of burdens and harm that the Supreme Court neither imagined nor antici-

held the rehearing in abeyance pending the Supreme Court's decision in *Hartigan v. Zbaraz*, *aff'd without opinion by an equally divided court*, 56 U.S.L.W. 4053 (U.S. Dec. 14, 1987). Following the *Zbaraz* decision, the Eighth Circuit has reinstated the court of appeals judgment and granted rehearing en banc. *Hodgson*, Nos. 86-5423/86-5431 (8th Cir. Dec. 31, 1987).

Massachusetts law requires the consent of both parents, or the custodial parent if divorced, or a judicial waiver of the requirement. See MASS. GEN. LAWS ch. 112, § 12S (West 1983). Although the predecessor to this statute had been enjoined before ever being implemented, see *Bellotti II*, 443 U.S. at 625 n.1, preliminary injunctive relief as to the parental consent portion of the amended statute was denied. See *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1023 (1st Cir. 1981). The challenge to the statute is still pending, but the bypass scheme has been operating since the post-*Bellotti II* version of the statute became effective.

⁹⁷ See *Hodgson*, 648 F. Supp. at 765 (3,573 from 1981-86 in Minnesota); *Zbaraz* Amicus Brief, *supra* note 93, at 2 (4,000 from 1981-87 in Massachusetts); see also *Mnookin, Bellotti v. Baird: A Hard Case*, in *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM AND PUBLIC POLICY* 149, 239 (1985) (approximately 1,300 from April 1981 to February 1983 in Massachusetts).

⁹⁸ 648 F. Supp. 756; see *supra* note 93.

⁹⁹ The obstacles for adult women seeking abortions in Minnesota—such as low availability of services, cost, inconvenience, travel, weather, and loss of privacy—are that much more severe for minors. See *Hodgson*, 648 F. Supp. at 761 (discussing the availability of abortion services in Minnesota). Nationwide, the trend is the same. See NATIONAL RESEARCH COUNCIL, *RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY AND CHILDBEARING* 114 (1987) [hereinafter NATIONAL RESEARCH COUNCIL] (a publication of the National Academy of Sciences); Cates, *Abortions for Teenagers*, in *ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS* 139, 144-45 (1981). The harsh effect of the unavailability of services on teens is exacerbated because teenagers generally tend to seek abortions later in pregnancy than do adult women. See Cates, *Adolescent Abortions in the United States*, 1 J. ADOLESCENT HEALTH CARE 18, 20 (1980); Henshaw, Forrest & Blaine, *Abortion Services in the United States, 1981 and 1982*, 16 FAM. PLAN. PERSP. 119, 125 (1984) (reduced availability of second trimester abortion services); Grimes, *Second Trimester Abortions in the United States*, 16 FAM. PLAN. PERSP. 260, 261-62 (1984) (disproportionate need for second trimester abortions among adolescents).

pated¹⁰⁰—of proposed ameliorative measures that have themselves become insurmountable barriers to the exercise of fundamental rights and of even the most laudable of governmental objectives undermined by the very means chosen to effectuate them.¹⁰¹ Contrary to the best of judicial prediction and logic, the experiences of Minnesota and Massachusetts have shaken the very foundation of the constitutional conclusions of *Bellotti II*, *H.L.*, *Akron*, and *Ashcroft*.

The federal district court found that “Minn. Stat. § 144.343(2)-(7) imposes the substantial burden of obtaining a judicial waiver of the parental notification requirement on a group of minors composed almost entirely of either mature minors or minors whose best interests are not served by notification.”¹⁰² The court concluded that “[t]his substantial burden is not justified by the state’s interests in encouraging intra-family communication and protecting immature minors because [the law] fails to further either of those interests”¹⁰³ In short, “[f]ive weeks of trial . . . produced no factual basis upon which the court [could] find that Minn. Stat. § 144.343(2)-(7), on the whole furthers in any meaningful way the state’s interest in protecting pregnant minors or assuring family integrity,”¹⁰⁴ nor, if it does so at all, that it “promotes these values more than it undermines them.”¹⁰⁵

In support of these factual conclusions, the court found that the judicial bypass option resulted in occasional breaches of confidentiality and that routine court scheduling problems, compounded by other factors, frequently resulted in a delay of more than a week in obtaining an abortion.¹⁰⁶ Such delays created a statistically significant increase in the medical risk of abortion for the minor; even shorter delays may push her from the first into the second trimester of pregnancy, necessitating “greater costs, inconvenience, and medical risk.”¹⁰⁷ The judicial bypass

¹⁰⁰ Only Justice Stevens, in his concurring opinion in *Bellotti II*, hinted at the burdens a bypass requirement might itself impose. See *Bellotti II*, 443 U.S. at 655-56 (Stevens, J., concurring). Indeed, in *Hodgson*, the district court noted, “it appears . . . that the prophecy with which Mr. Justice Stevens closed his concurrence in *Bellotti II* is fulfilled.” *Hodgson*, 648 F. Supp. at 776.

¹⁰¹ There is substantial evidence to support the allegation that, at least for some legislators, the *real* purpose behind parental notice and consent laws is “to deter and dissuade minors from choosing to terminate their pregnancies.” See, e.g., *Hodgson*, 648 F. Supp. at 766. Indeed, the *Hodgson* defendants were unable to persuade the court that, in practice, the Minnesota statute served any legitimate purpose in any meaningful way. See *id.* at 768.

¹⁰² *Id.* at 776.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 775.

¹⁰⁵ *Id.* at 768.

¹⁰⁶ See *id.* at 763.

¹⁰⁷ *Id.*; see also NATIONAL RESEARCH COUNCIL, *supra* note 99, at 277 (delays that result in postponements until the second trimester of pregnancy can result in an

procedure produced fear, tension, anger, and resentment in minors who were compelled "to reveal intimate details of their personal and family lives to . . . strangers."¹⁰⁸ They were made to feel "guilty and ashamed" about their lifestyles and their desire to terminate pregnancy.¹⁰⁹ In fact, the bypass procedure was considered by some minors to be more difficult than the abortion procedure itself.¹¹⁰

As Minnesota discovered, "[s]ome mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents [against their best interests] or carry to term."¹¹¹ Those choosing to brave the courthouse in order to exercise their right to an abortion "tend to be above average in intelligence, education, and personal motivation. They also tend to be ambitious and concerned about the effect their decision will have on their futures."¹¹² It is an underclass of teenagers, already possessing few options, that is deprived of yet one more.

In Minnesota, statistical data confirmed that the notification law deterred some teenagers from aborting, thus forcing them to carry to term. In the City of Minneapolis, where the most complete data were available, the figures were startling. The birthrate for teenagers 15-17 years old (those burdened by the notice requirement) rose 38.4% from 1980-1984¹¹³ while the birthrate for teenagers 18-19 years old (those unaffected by the law), rose a mere 0.3%.¹¹⁴ Statewide statistics on teen pregnancy in Minnesota indicated that the parental notification statute may have slowed down the decline in the rate of births to minors.¹¹⁵

increased health risk to the mother).

¹⁰⁸ *Hodgson*, 648 F. Supp. at 763.

¹⁰⁹ *See id.*

¹¹⁰ *See id.* at 763-64.

¹¹¹ *Id.* at 763.

¹¹² *Id.* at 767.

¹¹³ *See* Plaintiffs' Exhibit 116, *Hodgson*, 648 F. Supp. 756 (No. 3-81-538) [hereinafter *Hodgson P.Ex. 116*] (on file with the ACLU Reproductive Freedom Project); Transcript of Record at 2022-23, *Hodgson*, 648 F. Supp. 756 (No. 3-81-538) [hereinafter *Hodgson Record*] (on file with the ACLU Reproductive Freedom Project) (testimony of Dr. Edward Ehlinger, Director of Personal Health Services, Minneapolis Health Department). Further, the birthrate for teenagers 15-17 years old had risen only 2% over the entire nine-year period prior to passage of the notification law. *Id.* at 2023-24.

¹¹⁴ *See* *Hodgson P.Ex. 116*, *supra* note 113; *Hodgson Record*, *supra* note 113, at 2025-26 (testimony of Dr. Edward Ehlinger, Director of Personal Health Services, Minneapolis Health Department).

¹¹⁵ *See* *Hodgson Record*, *supra* note 113, at 38-39, 42 (testimony of Dr. Stanley Henshaw, Deputy Director of Research, Alan Guttmacher Institute, Feb. 10, 1986). For a comparison of adolescents' use of abortion services with and without parental notification, see Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284,

Finally, the state-wide abortion rate for those 15-17 years old, during the period that the notification law was in effect, declined much more noticeably than did the rate for those 18-19 years old, who were not covered by the parental notification law.¹¹⁶

Additional burdens imposed by the bypass procedure fell upon minors who successfully navigated the court process but were deprived of optimal medical care as a result. Doctors and clinics were compelled to forego the use of certain time-consuming precautionary medical procedures in order to permit minors to get through court, obtain the abortion, and travel home all in one day.¹¹⁷ Not surprisingly, counselling sessions began to focus on the court experience and the feelings it evoked, rather than on the abortion choice and procedure and their attendant emotions.¹¹⁸ Finally, involuntary parental involvement¹¹⁹ is often destructive to the medical welfare of the pregnant adolescent, and a preoperative judicial proceeding that produced tension and stress¹²⁰

291-92 (1980). See generally Tietze, *Teenage Pregnancies: Looking Ahead to 1984*, 10 FAM. PLAN. PERSP. 205, 205-07 (1978) (discussing teenage pregnancy and abortion rates generally).

¹¹⁶ See Hodgson Record, *supra* note 113, at 32-33 (testimony of Dr. Stanley Henshaw, Deputy Director of Research, Alan Guttmacher Institute, Feb. 10, 1986); *id.* at 2026 (testimony of Dr. Edward Ehlinger, Director of Personal Health Services, Minneapolis Health Department).

¹¹⁷ For example, the use of laminaria by ob-gyn doctors providing abortions to Minnesota minors had to be curtailed if the abortion was to remain a one-day procedure. Plaintiff's Exhibit No. 92 (vol. II) at 14-15, 103, *Hodgson*, 648 F. Supp. 756 (No. 3-81-538) [hereinafter *Hodgson P.Ex. 92*] (deposition testimony of Dr. Jane Hodgson). Laminaria is made from a seaweed extract, laminaria digitata, and is often used to soften and dilate the cervix prior to a second trimester abortion or, on a minor, even prior to a first trimester abortion. See, e.g., Grimes & Cates, *Dilatation and Evacuation*, in SECOND TRIMESTER ABORTION 119, 127 (1981); *Hodgson, Abortion by Vacuum Aspiration*, in ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS 225, 227 (1981); Cates, Schulz & Grimes, *The Risks Associated with Teenage Abortion*, 309 NEW ENG. J. MED. 621, 624 (1983); Grimes, Schulz & Cates, *Prevention of Uterine Perforation in Curettage Abortion*, 251 J. A.M.A. 2108, 2109, 2111 (1984); Schulz, Grimes & Cates, *Measures to Prevent Cervical Injury During Suction Curettage Abortion*, 1 LANCET 1182, 1183 (1983). Laminaria must be inserted at least six hours prior to the abortion to be fully effective. See *Hodgson P.Ex. 92* (vol. I), *supra*, at 103-05 (deposition testimony of Dr. Jane Hodgson). Since laminaria insertion is the first step in the abortion procedure, a judicial waiver must be obtained *before* insertion. For many minors, there is simply not enough time in one day to go to court and have the full benefits of laminaria. *Hodgson Record, supra* note 113, at 105-06 (testimony of Paula Wendt, clinic counselor, Feb. 10-11, 1986).

¹¹⁸ *Id.* at 57-62 (testimony of Paula Wendt, clinic counselor, Feb. 10-11, 1986).

¹¹⁹ See *Hodgson Record, supra* note 113, at 1357-58 (testimony of Dr. Steven Butzer, psychiatrist); *Hodgson P.Ex. 92* (vol. I), *supra* note 117, at 124 (deposition testimony of Dr. Jane Hodgson).

¹²⁰ See *Hodgson*, 648 F. Supp. at 763-764 ("Some minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself. Indeed, the anxiety resulting from the bypass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary.").

was always contrary to medical judgment and the minors' best interests.

The burdens imposed were not justified by the state's purported interest in protecting parent-child consultation because, as the district court found, consultation with a parent regarding an abortion choice was frequently inadvisable and detrimental to the family unit.¹²¹ Physical, sexual, and psychological abuse among family members was prevalent in Minnesota, as elsewhere,¹²² and "[n]otification of an abusive or even a disinterested absent parent may reintroduce that parent's disruptive or unhelpful" behavior toward the minor and the rest of the family in a time of stress.¹²³ Moreover, statutory exceptions made for minors fearful of abuse did not provide meaningful relief chiefly because "[m]inors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home."¹²⁴

Even for minors who did not fear abuse, the revelation, through inadvertence¹²⁵ or compulsion,¹²⁶ of a pregnancy or proposed abortion

¹²¹ See *supra* notes 111-20 and accompanying text.

¹²² See *Hodgson*, 648 F. Supp. at 764. Studies indicating two million incidents of family violence annually in the United States substantially underestimate the problem. See M. STRAUS, R. GELLES & S. STEINMETZ, *BEHIND CLOSED DOORS* 4 (1980). In 1978, the FBI estimated that 25% of all homicides in the United States occur between family members. L. WALKER, *THE BATTERED WOMAN SYNDROME* 38 (1984). In Minnesota, battering of women by their partners "has come to be recognized as perhaps the most frequently committed violent crime." See MINNESOTA DEP'T OF CORRECTIONS, *MINNESOTA PROGRAM FOR BATTERED WOMEN*, 1985 UPDATE 4 (1985). Further, 55% of battered women reported that their abuser also battered their children. Walker & Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce*, in *DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE* 127, 135 (1987). Of course, these reported figures do not include low-level or unreported abuse. See *Hodgson*, 648 F. Supp. at 768-769 (setting forth statistics on family violence with the caveat that underreporting is to be expected).

¹²³ *Hodgson*, 648 F. Supp. at 764. Notification can also be dangerous. See *id.* at 769 ("Notification of the minor's pregnancy and abortion decision can provoke violence . . ."). This is particularly true because the incidence of violence in an abusive dysfunctional family appears to escalate during pregnancy. See Gelles, *Violence in Pregnancy: A Note on the Extent of the Problem and Needed Services*, 24 *FAM. COORDINATOR* 81-86 (1975). See generally *H.L.* 450 U.S. at 439 (Marshall, J., dissenting) ("[T]he minor [forced by statute to notify her parents] may confront physical or emotional abuse.").

¹²⁴ *Hodgson*, 648 F. Supp. at 764.

Many minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence. It is impossible to accurately assess the magnitude of the problem of family violence in Minnesota because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to reveal violence or abuse in their families. Thus the incidence of such family violence is dramatically underreported.

Id. at 768-69.

¹²⁵ *Id.* at 768.

¹²⁶ See *Hodgson Record*, *supra* note 113, at 910-11, 993 (testimony of Dr. Elissa Benedek, psychiatrist); see also *id.* at 2543-46 (testimony of Dr. Henry David, psychol-

generally had a negative impact on and could provoke crisis and disharmony in the family.¹²⁷ Any parent-child consultation resulting from such a revelation lacked the voluntarism that is the "hallmark" of productive communication in a healthy family.¹²⁸

Addressing the aspect of Minnesota's law requiring that both parents be notified, the court found that "the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the State's purpose in requiring notification"¹²⁹ Both the burdensome, intrusive court process and notification of an abusive or disinterested second parent could distract from, complicate, and harm any communication process that had already been voluntarily undertaken.¹³⁰ The court also found that "the

ogist) (noting that the adolescent's privacy is important not only to the adolescent, but also to her parents because of their ambivalence about their daughter's sexual activity); *id.* at 1147-49 (testimony of Dr. Gary Melton, Director of the Law-Psychology Program, University of Nebraska) (describing the importance of privacy to adolescents and the effects of denying it to them).

¹²⁷ In general, the revelation of a secret, such as pregnancy, by one family member can result in "acute shock waves" to the delicate family system. Grunebaum & Glick, *The Basics of Family Treatment*, in 2 PSYCHIATRY UPDATE, THE AMERICAN PSYCHIATRIC ASSOCIATION ANNUAL REVIEW 202 (1983). For this reason, clinicians find that at times "secrets are better kept secret. While sharing secret feelings . . . may be useful, revealing . . . [a secret] can be destructive. Decisions in this area require clinical sensitivity and empathy rather than rules." *Id.* at 203.

¹²⁸ See Hodgson Record, *supra* note 113, at 906, 930-31 (testimony of Dr. Elissa Benedek, psychiatrist); *cf. id.* at 2355-56 (testimony of Dr. Vincent Rue, psychotherapist) (defendants' expert conceding that when parental notification is involuntary, the family does not receive the benefit of the child's having trusted her parents with her problems). In sum, "experts . . . of unquestionably high standing in their respective fields agreed [at trial] that although family relationships benefit from voluntary and open communication, compelling parental notice has an opposite effect. It is almost always disastrous." *Hodgson v. Minnesota*, 827 F.2d 1191, 1197 (8th Cir. 1987), *vacated and reh'g granted*, Nos. 86-5423/86-5431 (8th Cir. Nov. 13, 1987) (rehearing held in abeyance pending Supreme Court decision in *Hartigan v. Zbaraz*, 763 F.2d 1532 (7th Cir. 1985), *aff'd without opinion by an equally divided court*, 56 U.S.L.W. 4053 (U.S. Dec. 14, 1987)), *judgment reinstated and reh'g en banc granted*, Nos. 86-5423/86-5431 (8th Cir. Dec. 31, 1987). See generally D. CURRAN, TRAITS OF A HEALTHY FAMILY 59-63, 99-103, 231-33, 257 (1983) (among the fifteen traits discussed are affirmation and support of family members, a sense of trust among the family, respect for the privacy of family members, and the ability of the family to admit to and seek help for its problems).

¹²⁹ *Hodgson*, 648 F. Supp. at 778.

¹³⁰ *Hodgson*, 648 F. Supp. at 764, 769, 778. The two-parent requirement is particularly onerous in single-parent families. "In 1978, there were 1.1 million divorces and 2.2 million marriages If the current level of divorce continues on a lifetime basis, the proportion of marriages ending in divorce may be close to 40 percent." U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT 1 (Series p-23 No. 84 1979). In 1980, 18.4% of all births were out-of-wedlock, L. WEITZMAN, THE DIVORCE REVOLUTION 215 n.* (1985), and a census official estimates that 59% of children born in 1983 will live in single-parent families

requirement that minors notify both biological parents actually reduce[d] parent-child communication" by dissuading minors from notifying one parent, since they were going to court anyway.¹³¹

In both Minnesota and Massachusetts, experience has demonstrated that the burdens imposed by bypass systems on *all* minors are not counterbalanced by the state's desire to identify immature minors whose best interests compel parental involvement.¹³² Although the ostensible purpose of a judicial bypass mechanism is to permit an impartial, adult decisionmaker to separate immature minors whose best interests compel notification from all other minors, judges in Massachusetts and Minnesota have not in fact had the opportunity to do so. Data from both states indicate that nearly every petition filed was granted¹³³ and several of those denied were anomalies¹³⁴ or were refused due to the judge's "unfamiliarity" with the bypass procedure and its standards.¹³⁵ These statistics indicate that either immature "non-best interest" minors do not exist,¹³⁶ judges are unable to detect them,¹³⁷ or such

before the age of 18, *id.* "Divorce or separation usually impairs family communication severely. The non-custodial parent often has very little communication with the child. In addition, communication between divorced or separated spouses frequently is marked with . . . hostility and . . . vindictiveness . . ." *Hodgson*, 648 F. Supp. at 769. Reintegration of the non-custodial parent into the family is often disruptive and harmful and does not result in the reestablishment of beneficial relations between a minor and an absent parent. *Id.*

¹³¹ *Hodgson*, 648 F. Supp. at 769. In Minnesota, 20-25% of minors who go to court are accompanied by, or have notified, one parent. *Id.* at 764. "[A]pproximately 75 percent of Massachusetts minors seeking in-state abortions do consult their parents and obtain parental consent." Zbaraz Amicus Brief, *supra* note 93, at 42 n.8 (citation omitted).

¹³² Note that other state interests "must give way to the constitutional right" of minors outside this category to obtain a confidential abortion. *Akron*, 462 U.S. at 428 n.10.

¹³³ In Minnesota, 3,558 of the 3,573 bypass petitions were granted; six were withdrawn and nine were denied. *See Hodgson*, 648 F. Supp. at 765, 781. In Massachusetts, in slightly less than two years, 90% of the 1,300 minors petitioning were judged mature; five petitions were denied, three of which were overturned on appeal, one was granted by a second judge, and one minor went out-of-state for her abortion. *See NATIONAL RESEARCH COUNCIL*, *supra* note 99, at 195 (citing Mnookin, *supra* note 97); *see also* Zbaraz Amicus Brief, *supra* note 93, at 20-21 (11 denials through 1987, all but one reversed on appeal).

¹³⁴ *See Hodgson*, 648 F. Supp. at 765 (regarding Minnesota); *see, e.g.*, *Hodgson Record*, *supra* note 113, at 1286 (testimony of Judge George Peterson that he denied only one petition of more than 700 received and that his denial served to spare a minor who did not want an abortion from being coerced by her boyfriend into having the operation).

¹³⁵ *Hodgson*, 648 F. Supp. at 765.

¹³⁶ It is not at all inconceivable that it cannot, logically, be in the best interest of an immature minor to consult with her parents against her will if requiring her to do so will delay her abortion or deter her from obtaining an abortion at all. In short, it may never be in the best interest of an immature minor to become a parent, and therefore it may never be in her best interest to require her to do something that may lead to

minors do not or cannot get through the court process to its comple-

that result. See Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis*, in *ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES* 1, 33-34 (1986) (Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association) [hereinafter *APA REPORT*] ("It is hard to imagine a minor too immature to make the decision [whether to abort] but mature enough to bear a child."). Gary Melton, who was both Chair of the APA Interdivisional Committee and author of portions of the *APA REPORT*, *supra*, testified as an expert witness in the *Hodgson* trial. See *Hodgson Record*, *supra* note 113, at 1103-1227.

Moreover, "while there may be 'no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion,' some relationship does exist between the decision to abort in privacy and the capacity for mature judgment concerning the wisdom of this decision." *Hodgson*, 648 F. Supp. at 767-68 (quoting *H.L.*, 450 U.S. at 408); see *id.* at 775.

¹³⁷ The testimony of judges who, in the aggregate, heard 90% of the petitions in Minnesota, indicated that there was no consensus regarding the meaning of "maturity." Compare *Hodgson Record*, *supra* note 113, at 21-22 (testimony of Judge Allen Oleisky, Feb. 11, 1986) (maturity is synonymous with ability to give informed consent, and a mature decision was one made independently for good reasons after weighing available alternatives and giving thought to the future) and *id.* at 1032 (testimony of Judge William Sweeney) (maturity and ability to give informed consent are synonymous in practice and refer to a child of sufficient intellect to appreciate her situation and make a rational decision based on available alternatives) with *id.* at 408 (testimony of Judge Gerald Martin) (minors are ostensibly immature by definition, yet an immature person might give informed consent if she were given appropriate background information); see also *id.* at 1293-96 (testimony of Judge George Peterson) (maturity and ability to give informed consent are the same and are evaluated based on the minor's manner and conduct, her activities and whether they indicate an acceptance of responsibility, and the thought she has given to her decision); *id.* at 2008 (testimony of Judge Neil Riley) (maturity and ability to give informed consent are synonymous and depend on the minor's having been counselled and her understanding of the ramifications of her decision). See generally NATIONAL RESEARCH COUNCIL, *supra* note 99, at 277 (such an undefined standard runs "the risk of being inconsistently interpreted and applied, as well as being inaccurate").

Similarly, there was no consensus at trial regarding the meaning of "best interest." Compare *Hodgson Record*, *supra* note 113, at 23-24 (testimony of Judge Allen Oleisky, Feb. 11, 1986) ("best interest" refers to the choice between abortion and childbirth, not to parental notification) and *id.* at 10-11 (testimony of Judge Henry Albrecht, Feb. 19, 1986) ("best interest" refers to the choice between abortion and childbearing) and *id.* at 1032-33 (testimony of Judge William Sweeney) ("best interest" refers to "whether or not it is in the best interest of this particular minor to do the procedure") with *id.* at 1296 (testimony of Judge George Peterson) ("best interest" refers to parental notification only, not to whether an abortion is in the minor's best interest). See generally Zobel, *Judges and Abortion: The Judicial Question Becomes Political*, *Christian Sci. Monitor*, Oct. 17, 1984, at 16, col. 1 (arguing that the judge's role in deciding a minor's best interest is "entirely non-judicial").

In general, testimony at trial indicated that minors and their single parents are better able to determine the effects of involving an additional family member in the abortion-decision than are judges. Minors, especially those from violent or dysfunctional families, can accurately predict their families' reactions to notification of the minors' pregnancy. See *Hodgson Record*, *supra* note 113, at 314-15 (testimony of Dr. Lenore Walker, clinical psychologist); *id.* at 911 (testimony of Dr. Elissa Benedek, psychiatrist). Similarly, the parent accompanying a minor through the court process, with whom she has voluntarily communicated, is generally in the best position to predict the other parent's reaction to notification. See *id.* at 2009 (testimony of Judge Neil Riley); see also *Hodgson v. Minnesota*, 827 F.2d 1191, 1200 (8th Cir. 1987) ("[T]he

tion.¹³⁸ For these reasons, and because it does not involve counselling¹³⁹ or promote consultation, the bypass process does not appear to serve *any* purpose whatsoever.¹⁴⁰ In sum, documentation of the actual functioning of these laws

suggest[s] that special provisions for judicial review of adolescents' abortion decisions have served as obstacles to protection of privacy and to diminution of stress. At best, they are benign but costly and purposeless legal procedures. At worst, they increase pregnant minors' delay in seeking medical attention and induce embarrassment, anxiety, family conflict¹⁴¹

and unwanted teen motherhood. Nevertheless, after finding that the law should be unconstitutional upon this record, the district court felt precluded from restraining its enforcement on this ground.¹⁴²

b. *Social Science, Medicine, and Professional Opinion*

A growing body of psychological and medical research has confirmed what the court in *Hodgson* found: the harm imposed on minors

minor and/or custodial parent, and not a court, is in the best position to determine whether notifying the non-custodial parent would be in the child's best interests"), *vacated and reh'g granted*, Nos. 86-5423/86-5431 (8th Cir. Nov. 13, 1987) (rehearing held in abeyance pending Supreme Court decision in *Hartigan v. Zbaraz*, 763 F.2d 1532 (7th Cir. 1985), *aff'd without opinion by an equally divided court*, 56 U.S.L.W. 4053 (U.S. Dec. 14, 1987)), *judgment reinstated and reh'g en banc granted*, Nos. 86-5423/86-5431 (8th Cir. Dec. 31, 1987).

¹³⁸

Minnesota courts have denied only an infinitesimal proportion of the petitions brought since 1981. This fact indicates that in Minnesota immature, non-best interest minors rarely seek judicial authorization to terminate their pregnancies without parental involvement. Such minors either inform their parents, obtain an abortion outside Minnesota, or carry the pregnancy to term.

Hodgson, 648 F. Supp. at 767.

¹³⁹ *Id.*

¹⁴⁰ All witnesses at trial who had any direct involvement with implementation of the bypass procedure agreed that it served *no* purpose and instead functioned as a traumatic barrier to timely abortion services for minors. Nearly every judge involved in adjudicating minors' petitions in Minnesota testified at trial and agreed with this conclusion. *Id.* at 766; *id.* at 775. Trial testimony in Minnesota included the testimony of Judge Garrity who adjudicated such petitions in Massachusetts. *Id.* at 766; *see also* Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 AM. PSYCHOLOGIST 79, 80 (1987) (there is no evidence that judicial bypass proceedings promote more reasoned decisions). Moreover, the Court in *Hodgson* found that those immature minors who notify their parents rather than go to court do so because of their immaturity and not because of the notification law. *See Hodgson*, 648 F. Supp. at 775.

¹⁴¹ Melton, *supra* note 140, at 82 (based on a review of all available data and studies regarding the implementation of bypass laws in Minnesota and Massachusetts).

¹⁴² *See Hodgson*, 648 F. Supp. at 776-77; *infra* text accompanying notes 175-85.

by mandatory parental involvement laws cannot be justified by any of the asserted state interests because these interests have turned out to be based more on cliché and folklore than on empirical fact. For example, contrary to the assumptions made by both legislatures and courts, by all available measures¹⁴³ minors are on average indistinguishable from adults in their ability to understand and reason about health care alternatives.¹⁴⁴ These findings confirm the prevailing theories of cognitive development,¹⁴⁵ which place adolescents in the most advanced stage of development, thereby presuming them to be capable of abstract reason-

¹⁴³ Experts measure competency in the decisionmaking context by examining ability to make and express a preference among alternatives, ability to understand and appreciate the nature and consequences of a particular choice, ability to reason about alternatives and rationally weigh risks and benefits, and ability to arrive at an objectively reasonable choice. See Meisel, Roth & Lidz, *Toward a Model of the Legal Doctrine of Informed Consent*, 134 AM. J. PSYCHIATRY 285, 287 (1977); Roth, Meisel & Lidz, *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279, 280-82 (1977); Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595-96 (1982).

¹⁴⁴ See Kaser-Boyd, Adelman & Taylor, *Minors' Ability to Identify Risks and Benefits of Therapy*, 16 PROF. PSYCHOLOGY: RESEARCH AND PRAC. 411, 411-12 (1985); Kaser-Boyd, Adelman, Taylor & Nelson, *Children's Understanding of Risks and Benefits of Psychotherapy*, 15 J. CLINICAL CHILD PSYCHOLOGY 165, 166 (1986); Weithorn & Campbell, *supra* note 143, at 1596. See generally CHILDREN'S COMPETENCE TO CONSENT (1983) (arguing that minors have the ability to understand complex medical issues concerning their health and should be allowed to make such decisions); Interdivisional Committee on Adolescent Abortion, American Psychological Association, *Adolescent Abortion: Psychological and Legal Issues*, 42 AM. PSYCHOLOGIST 73, 73 (1987) [hereinafter APA SUMMARY REPORT] (suggesting that legislatures should recognize the proven ability of minors to make intelligent decisions regarding abortion); Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445, 463-66 (1984) (suggesting that, "for most purposes, there is no basis for differentiation of adolescents from adults on the ground of competence alone").

Although it is of course true that some minors do not use these abilities in what would appear to be an objectively mature or rational way, it is equally true that most adults would fail some of the available tests of competency on occasion. See C. LIDZ, A. MEISEL, E. ZERUBAVEL, M. CARTER, R. SESTAK & L. ROTH, INFORMED CONSENT: A STUDY OF DECISION MAKING IN PSYCHIATRY 26-30 (1984); cf. Thompson, *Psychological Issues in Informed Consent*, in 3 MAKING HEALTH CARE DECISIONS 86-87 (1982) (President's Commission for the Study of Ethical Problems in Medical and Biomedical and Behavioral Research); Melton, *Children's Participation in Treatment Planning: Psychological and Legal Issues*, 12 PROF. PSYCHOLOGY 246, 247 (1981) (noting that some jurisdictions did not distinguish between 19 year old minors and 21 year old adults in cases alleging malpractice due to lack of informed consent). In addition, "the limited evidence available from studies of pregnancy and contraceptive decision making suggests that minors may equal adults in their *competence* to reason about decisions, and that differences between minors and adults in decision-making *performance* may be a result of the circumscribed role of adolescents in the family and society" regarding empowerment and responsibility in general. Lewis, *Minors' Competence to Consent to Abortion*, 42 AM. PSYCHOLOGIST 84, 87 (1987).

¹⁴⁵ See Grisso & Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOLOGY 412, 418-20 (1978).

ing in a logical manner.¹⁴⁶ Moreover, studies have shown that minors are capable of making reproductive decisions, such as whether or not to terminate a pregnancy,¹⁴⁷ and of providing health histories, as accurately as are their parents.¹⁴⁸ Finally, many states have statutorily recognized that minors are competent to make medical treatment choices relating to pregnancy without parental involvement.¹⁴⁹

¹⁴⁶ See D. ELKIND, CHILDREN AND ADOLESCENTS: INTERPRETIVE ESSAYS ON JEAN PIAGET 99-103 (1974); J. FLAVELL, THE DEVELOPMENTAL PSYCHOLOGY OF JEAN PIAGET 204-06 (1963); B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING 335 (1958).

¹⁴⁷ See Lewis, *supra* note 144, at 86; Lewis, *A Comparison of Minors' And Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446, 451 (1980); Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis*, in APA REPORT, *supra* note 136, at 18-19. See generally APA SUMMARY REPORT, *supra* note 144.

To the extent that the abortion decision differs from other medical choices because of the moral or religious issues that may be implicated for some, it is clear that by age 14 adolescents have developed their own sense of conscience and morality. See generally 2 L. KOHLBERG, ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT 171 (1984) (most adolescents are capable of advanced moral reasoning); Mischel & Mischel, *Development and Behavior*, in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES 87-88 (1976) (adolescents are capable of moral reasoning). Further, they are capable of weighing such factors in making an abortion choice consistent with their own sense of what is right for them. See Smetana, *Reasoning in the Personal and Moral Domains: Adolescent and Young Adult Women's Decision Making Regarding Abortion*, 2 J. APPLIED DEV. PSYCHOLOGY 211 (1981). For a somewhat different analysis of moral judgment, see C. GILLIGAN, IN A DIFFERENT VOICE 17-18, 66, 95-101 (1982) (discussing gender-related differences in moral development).

As to the effect of factors other than specific competence, it is "noteworthy that comparisons of personality functioning between adolescents who abort and those who carry to term generally show more adaptive, healthier functioning in the former group." Melton & Pliner, *supra*, at 19. See Dixon, *Teenage Pregnancy: A Personality Comparison of Prenatal and Abortion Groups*, 38 DISSERTATION ABSTRACTS INT'L 168-A, 168-A (1977); Falk, Gispert & Baucom, *Personality Factors Related to Black Teenage Pregnancy and Abortion*, 5 PSYCHOLOGY OF WOMEN Q. 745-46 (1981); Kane & Lachenbruch, *Adolescent Pregnancy: A Study of Aborters and Non-Aborters*, 43 AM. J. ORTHOPSYCHIATRY 796, 802-03 (1973); see also Hodgson, 648 F. Supp. at 767-68, 775 (suggesting that there is a relationship between the decision to abort in privacy and the ability to make mature decisions).

¹⁴⁸ See McKinney, Chin, Reinhart & Trierweiler, *Health Values in Early Adolescence*, 14 J. CLINICAL CHILD PSYCHOLOGY 315, 316 (1985).

¹⁴⁹ See, e.g., ALA. CODE § 22-8-6 (1984); ALASKA STAT. § 09.65.100(3)-(4) (1983); ARK. STAT. ANN. § 82-363(d) (1976); CAL. CIV. CODE § 34.5 (West 1982); DEL. CODE ANN. tit. 13, § 708(b) (1981); FLA. STAT. ANN. § 743.065(1) (West 1986); GA. CODE ANN. § 31-9-2(a)(5)(1985); HAW. REV. STAT. § 577A-2 (1985); ILL. ANN. STAT. ch. 111, para. 4501 (Smith-Hurd 1978); KAN. STAT. ANN. § 38-123 (1986); KY. REV. STAT. ANN. § 214.185(1) (Michie/Bobbs-Merrill 1982); LA. REV. STAT. ANN. § 40:1299.53(e) (West 1977); MD. HEALTH-GEN. CODE ANN. § 20-102(4) (1982); MASS. ANN. LAWS ch. 112, § 12F (Law. Co-op. 1985); MINN. STAT. ANN. § 144.343(1) (West Supp. 1987); MISS. CODE ANN. § 41-41-3(i) (West 1981 & Supp. 1986); MO. ANN. STAT. § 431.061 (1)(4)(a) (Vernon Supp. 1987); MONT. CODE ANN. § 41-1-402(c) (1985); NEV. REV. STAT. ANN. § 129.030(1)(c), (2) (Michie 1986); N.J. STAT. ANN. § 9:17A-1 (West 1976); N.M. STAT. ANN. § 24-1-13 (1986); N.Y. PUB. HEALTH LAW § 2504(3) (McKinney 1985); N.C. GEN. STAT.

Contrary to the assumptions of both courts and legislatures, the abortion procedure itself is safer than continued pregnancy and childbirth.¹⁵⁰ Abortion is rarely followed by significant medical¹⁵¹ or psychological¹⁵² sequelae. Statistical studies have demonstrated that the life

§ 90-21.5(a)(ii) (1985); OKLA. STAT. ANN. tit. 63, § 2602(A)(3) (West 1984); PA. STAT. ANN. tit. 35, § 10103 (Purdon 1977); TEX. FAM. CODE ANN. § 35.03 (a)(4) (Vernon 1986); UTAH CODE ANN. § 78-14-5(4)(f) (1987); VA. CODE ANN. § 54-325.2(D)(2) (1982).

Many of these statutes, which grant minors the right to make their own decisions regarding medical treatment concerning pregnancy, are the same statutes that require a minor to give parental notice or obtain consent for an abortion. A comparison of the statutes listed above with those listed *supra* note 94, reveals that abortion has been statutorily singled out as an exception. Because minors are equally competent to make the abortion choice and because minors who abort generally tend to be better functioning in other respects, *see supra* notes 143-49 and accompanying text, this statutory distinction defies both reason and reality. *But see H.L.*, 450 U.S. at 412-13 (assuming that the decision to abort carries "potentially more grave emotional and psychological consequences").

¹⁵⁰ At eight weeks of gestation or earlier, the risk of death from abortion is about 20 times lower than that of childbirth, *see* LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J. AM. MED. A. 188, 191 (1982), and at no point in pregnancy is abortion more dangerous than childbirth, *see* Cates, Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J. A.M.A. 192, 195-96 (1982).

Teenagers, particularly young teenagers, have a two and a half times greater risk of death from continued pregnancy or childbirth than adult women. ALAN GUTTMACHER INSTITUTE, *TEENAGE PREGNANCY: THE PROBLEM THAT HASN'T GONE AWAY* 29 (1981) [hereinafter *HASN'T GONE AWAY*]. This is equally true for morbidity rates (major health complications). *See id.* at 28-29; Cates, Schultz & Grimes, *The Risks Associated with Teenage Abortion*, 309 NEW ENG. J. MED. 621, 622 (1983). For example, women younger than age 15 are 15% more likely to suffer from toxemia, 92% more likely to develop anemia, and 23% more likely to suffer complications from a premature delivery than are women age 20-24. *See HASN'T GONE AWAY, supra*, at 29.

While studies show that prenatal care might alleviate some of the problem, *see* Makinson, *The Health Consequences of Teenage Fertility*, 17 FAM. PLAN. PERSP. 132, 133 (1985), a significant percentage of teenagers in the United States do not obtain prenatal care in the first three months of pregnancy. *See* Singh, Torres & Forrest, *The Need for Prenatal Care in the United States: Evidence from the 1980 National Natality Survey*, 17 FAM. PLAN. PERSP. 118, 119 (1985).

¹⁵¹ For example, abortions have no demonstrable negative effect on subsequent pregnancies either in the United States, *see* Scheinberg v. Smith, 550 F. Supp. 1112, 1117 (S.D. Fla. 1982); Chung, Smith, Steinhoff & Mi, *Induced Abortion and Spontaneous Fetal Loss in Subsequent Pregnancies*, 72 AM. J. PUB. HEALTH 548, 551 (1982) or worldwide, *see* Hogue, Cates & Tietze, *The Effects of Induced Abortion on Subsequent Reproduction*, 4 EPIDEMIOLOGIC REVS. 66, 88-89 (1982); *see also* C. TIETZE & S. HENSHAW, *INDUCED ABORTION: A WORLD REVIEW* 1986, at 97-105 (6th ed. 1986) (examining complications and sequelae from induced abortion).

¹⁵² Studies show that the most frequent emotional response to the abortion procedure is relief. *See* NATIONAL RESEARCH COUNCIL, *supra* note 99, at 195; Adler & Dolcini, *Psychological Issues in Abortion for Adolescents*, in APA REPORT, *supra* note 136, at 84. Severe psychological aftereffects are very rare, *see* Marecek, *Consequences of Adolescent Childbearing and Abortion*, in APA REPORT, *supra* note 136, at 110, and other sequelae such as regret, depression, or guilt "are mild and diminish rapidly

consequences of the choice to carry to term are vastly more grave, long-lasting, and irreparable.¹⁵³

Studies have similarly conflicted with the assumption that parental input into an adolescent's decisionmaking in the areas of sex, pregnancy, and abortion is good for the adolescent. For example, communication between parents and their adolescent children about sexuality

over time and general functioning is not adversely affected," Adler & Dolcini, *supra*, at 84. In addition, adverse psychological aftereffects such as depression are more common for childbirth than for abortion. See Cates, *Adolescent Abortions in the United States*, 1 J. ADOLESCENT HEALTH CARE 18, 22 (1980). See generally Marecek, *supra*, at 112 (suggesting that severe emotional consequences rarely, if ever, occurred, and that there is evidence that suggests positive changes in personality in some cases).

¹⁵³ Teen-age motherhood, particularly unwanted motherhood, is often psychologically, economically, and educationally devastating. Mothers who give birth before age 18 are only half as likely to have graduated from high school than those who postpone childbearing until after age 20. See Card & Wise, *Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives*, 10 FAM. PLAN. PERSP. 199, 203-04 (1978); see also Moore & Waite, *Early Childbearing and Educational Attainment*, 9 FAM. PLAN. PERSP. 220, 222-23 (1977); Mott & Marsiglio, *Early Childbearing and Completion of High School*, 17 FAM. PLAN. PERSP. 234, 235-36 (1985). They are four to five times less likely to finish college. See Card & Wise, *supra*, at 204. Families headed by teenage mothers are seven times more likely than others to be poor, and the younger the mother, the lower the family income. See HASN'T GONE AWAY, *supra* note 150, at 33. See generally Marecek, *supra* note 152, at 98-108 (long-term effects of carrying to term can include negative impact on educational and occupational attainment, economic status, marital experiences, and subsequent childbearing).

The children of teenage mothers are also adversely affected. They are twice as likely to die in infancy as the children of women in their 20's. See HASN'T GONE AWAY, *supra* note 150, at 29. They are more likely to be premature or of low birth weight. See *id.* But see *Social Factors, Not Age, Are Found to Affect Risk of Low Birth Weight*, 16 FAM. PLAN. PERSP. 142, 142 (1984) (arguing that factors other than youth, such as race, prematurity, untimely prenatal care, and low maternal weight, are in fact the cause of low birth weight). Low birth weight is itself a major cause of infant mortality, serious illness, birth injury, mental retardation, and other neurological defects. See HASN'T GONE AWAY, *supra* note 150, at 29; *Substantially Higher Morbidity and Mortality Rates Found Among Infants Born to Adolescent Mothers*, 16 FAM. PLAN. PERSP. 91, 91-92 (1984). Moreover, the children of teenage mothers also suffer educational disadvantage, tend to have lower I.Q. and achievement scores, and are more likely to repeat at least one grade. See Baldwin & Cane, *The Children of Teenage Parents*, 12 FAM. PLAN. PERSP. 34, 37 (1980). In addition, children born to teenage mothers as the result of a denial of permission to abort have been shown to manifest particular problems in adjustment, mental and physical capacity, and in the mother/child-relationship. Cf. Caplan, *The Disturbance of the Mother-Child Relationship by Unsuccessful Attempts at Abortion*, 38 MENTAL HYGIENE 67, 77 (1954) (reporting the findings of studies on development problems of children born as the result of denied abortions); David & Matejcek, *Children Born to Women Denied Abortion: An Update*, 13 FAM. PLAN. PERSP. 32, 33 (1981) (same); Hook, *Refused Abortion: A Follow-Up Study of Two Hundred and Forty Nine Women Whose Applications Were Refused by the National Board of Health in Sweden*, 42 ACTA PSYCHIATRICA SCANDINAVICA 71-88 (1966) (same); Born Unwanted: Developmental Effects of Denied Abortion (H. David, Z. Dytrych, Z. Matejcek & V. Schuller eds. forthcoming) (same). See generally Marecek, *supra* note 152, at 111 (noting that in Europe, studies indicate that such children are deficient in numerous areas when compared to a control sample).

and related matters is characterized by severe discomfort on both sides and is often entirely absent from the parent-child relationship.¹⁵⁴ Clinicians thus question the rationality of an emphasis on parental consultation regarding such matters.¹⁵⁵ Moreover, compelling parental involvement in adolescent decisionmaking can be detrimental to the psychological development and maturation of the adolescent. Individuation from parents,¹⁵⁶ control over the process and consequences of decisionmaking,¹⁵⁷ and a sense of privacy itself¹⁵⁸ are all critical to the

¹⁵⁴ See Fox & Inazu, *Mother-Daughter Communication About Sex*, 29 FAM. REL. 347, 349-50 (1980); Rothenberg, *Communication About Sex and Birth Control Between Mothers and Their Adolescent Children*, 3 POP. & ENV'T 35 (1980); see also NATIONAL RESEARCH COUNCIL, *supra* note 99, at 102-03 (review of studies of sexually active teenagers demonstrates that communication between parents and children on matters concerning sex is often ineffective).

¹⁵⁵ Upon finding that communication about sex is absent and uncomfortable with parents but more prevalent with peers, one researcher noted the following:

Although parents, particularly mothers, have traditionally been viewed as the most appropriate persons to inform children about sex, the present findings cause us to question this assumption. More than one-third of the mothers indicated they did not find it easy to discuss sex with their children. If this is the case, why burden them with a task they find difficult and as a result avoid?

Rothenberg, *supra* note 154, at 48-49. The author goes on to suggest that sex education in school may be the appropriate response to the problem.

¹⁵⁶ Development of an individual identity and value system are the most important developmental tasks confronting the adolescent. See Blos, *The Second Individuation Process of Adolescence*, 22 PSYCHOANALYTIC STUDY CHILD 162, 162-64 (1967).

¹⁵⁷ Learning to make decisions independently is critical to the individuation process. In fact, control over decisionmaking, both perceived and actual, leads to psychological well-being, high academic achievement, high motivation, high self-esteem and behavioral responsibility. See deCharms, *Personal Causation and Perceived Control*, in CHOICE AND PERCEIVED CONTROL 29 (1979); Melton, *Decision Making by Children: Psychological Risks and Benefits*, in CHILDREN'S COMPETENCE TO CONSENT 21, 27-34 (1983). Loss of control over decisionmaking or a social message that a minor is not competent to make decisions can result in rebellion, depression, hypertension, or regression. See, e.g., J. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE 2 (1966) (discussing relationship between decisionmaking, need satisfaction, and health and well-being); M. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH 9-11, 20 (1975) (consistent feelings of helplessness lead to health and emotional problems); Strickland, *Internal-External Expectancies and Cardiovascular Functioning*, in CHOICE AND PERCEIVED CONTROL, *supra*, at 221, 228 (suggesting "that the relationship(s) between real control and perceived control is (are) complex and unlikely to be understood through any simple hypotheses linking control and adaptive functioning" because "individual attributions such as perceived control or learned helplessness may be embedded in a net of numerous other cognitions that would be expected to interact with behavior"); Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 AM. PSYCHOLOGIST 122, 136-37 (1982) (suggesting that ability to control events is stress-reducing and that lack of control leads to severe anxiety).

¹⁵⁸ The need for privacy is integral to the process of differentiating and integrating in relation to society as a whole. See Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455, 487-88 (1983). "[C]hildren's experiences with privacy feed back into their sense of self-esteem and help define the ranges, limits, and consequences of individual autonomy within our society."

transition from adolescence to adulthood.

Based on the foregoing medical and behavioral research, and on the experiences with such laws in both Minnesota and Massachusetts, major nonpartisan professional groups such as the American Psychological Association and the National Academy of Sciences have issued reports summarizing these findings.¹⁵⁹ These groups have called for the abolition of laws requiring parental notification or consent for a minor seeking an abortion¹⁶⁰ and have noted the burdens imposed by judicial bypass procedures,¹⁶¹ as well as their unworkable and inaccurate nature.¹⁶² They have also joined the numerous groups that have argued against such laws as *amici curiae* before the Supreme Court.¹⁶³

Id. at 487 (footnote omitted).

¹⁵⁹ See APA REPORT, *supra* note 136; NATIONAL RESEARCH COUNCIL, *supra* note 99.

¹⁶⁰ See, e.g., APA REPORT, *supra* note 136, at 33; NATIONAL RESEARCH COUNCIL, *supra* note 99, at 278-79.

¹⁶¹ See, e.g., APA REPORT, *supra* note 136, at 23-28; NATIONAL RESEARCH COUNCIL, *supra* note 99, at 195, 277.

¹⁶² See APA REPORT, *supra* note 136, at 23-24; NATIONAL RESEARCH COUNCIL, *supra* note 99, at 277.

¹⁶³ See *Danforth*, 428 U.S. 52 (Center for Constitutional Rights; Planned Parenthood Federation of America, Inc.); *Bellotti II*, 443 U.S. 622 (Medical Organizations: American Academy of Child Psychiatry; Society for Adolescent Medicine; Association of Planned Parenthood Physicians; American Public Health Association. Family Planning Organizations: Planned Parenthood Federation of America, Inc.; National Family Planning Forum, Inc. Women's Organizations: YWCA National Board.); *H.L.*, 450 U.S. 398 (Medical Organizations: Association of Planned Parenthood Physicians, Inc.; American Academy of Child Psychiatry. Family Planning Organizations: Coalition for the Medical Rights of Women; Planned Parenthood Federation of America, Inc. Legal Organizations: Juvenile Law Section of the National Legal Aid and Defender Association. Other Professional Associations: American Association of Sex Educators, Counselors, and Therapists; National Association of Social Workers, Inc.; Association for Women in Psychology); *Akron*, 462 U.S. 416 (Medical Organizations: American College of Obstetricians and Gynecologists; American Medical Association; American Academy of Pediatrics Nurses Association of the American College of Obstetricians and Gynecologists; Association of Planned Parenthood Physicians, Inc.; Society for Adolescent Medicine; American Psychiatric Association. Family Planning Organizations: Planned Parenthood Federation of America, Inc.; National Family Planning and Reproductive Health Association, Inc.; Center for Population Options; Reproductive Rights National Network. Legal Organizations: NAACP Legal Defense and Educational Fund, Inc.; California Women Lawyers; Women Lawyers' Association; Emergency Civil Liberties Committee; Equal Rights Advocates; National Lawyers Guild; National Bar Association (Women Lawyers Division). Religious Organizations: National Council of Jewish Women; American Jewish Congress; American Jewish Committee. Other Professional Organizations: American Psychological Association; American Association of Sex Educators, Counselors and Therapists. Women's Organizations: Committee for Abortion Rights and Against Sterilization Abuse; National Women's Health Network; National Organization for Women.); *Ashcroft*, 462 U.S. 476 (Medical Organizations: Association of Planned Parenthood Physicians, Inc.; Society for Adolescent Medicine; American Psychiatric Association. Family Planning Organizations: Planned Parenthood Federation of America, Inc.; National Family Planning and Reproductive Health Association, Inc. Religious Organizations: American Jewish

4. The *Hodgson* Litigation

From the outset, the State of Minnesota defended the constitutionality of one of the most restrictive mandatory parental notification laws in the country¹⁶⁴ by taking the position that the district court was precluded from inquiring into the actual effects of a notification/judicial bypass scheme in operation.¹⁶⁵ Pointing to prior decisions of the United States Supreme Court,¹⁶⁶ the state ignored nearly a century of American jurisprudence¹⁶⁷ in arguing that legislative facts previously assumed by the Supreme Court¹⁶⁸ were "legal principles," which could not be explored by a district court through the introduction of "evidence" at trial.¹⁶⁹ Moreover, the state argued that, far from being "issues of fact

Congress. Other Professional Organizations: American Association of Sex Educators, Counselors and Therapists.); *Hartigan v. Zbaraz*, 763 F.2d 1532 (7th Cir. 1985), *aff'd without opinion by an equally divided court*, 56 U.S.L.W. 4053 (U.S. Dec. 14, 1987) (Medical Organizations: American College of Obstetricians and Gynecologists; American Academy of Pediatrics; American Medical Women's Association. Family Planning Organizations: Planned Parenthood Federation of America, Inc.; National Abortion Federation; National Abortion Rights Action League; Center for Population Options. Health Organizations: American Public Health Association; National Black Women's Health Project; National Women's Health Network; American Psychological Association. Legal Organizations: Center for Constitutional Rights; Committee to Defend Reproductive Rights; Equal Rights Advocates; Northwest Women's Law Center; National Organization for Women Legal Defense and Education Fund; Women's Law Project, Women's Legal Defense Fund. Religious Organizations: American Jewish Congress (Minnesota and Massachusetts); National Council of Jewish Women; Anti-Defamation League (Minnesota and Massachusetts). Women's Organizations: American Association of University Women; Coalition of Labor Union Women; National Federation of Business and Professional Women's Clubs, Inc. of the United States of America; National Organization for Women; National Women's Political Caucus; Women's Equity Action League. Other Organizations: U.S. Student Association; Americans for Democratic Action; National Campaign to Restore Abortion Funding; Voters for Choice.).

¹⁶⁴ See *supra* note 95.

¹⁶⁵ See, e.g., Defendants' Post-Trial Brief at 42, *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn.) (No. 3-81-538) [hereinafter Defendants' Post-Trial Brief] ("Evidence Of The 'Effects Of A Judicial Bypass Applied In Conformance With The Standards Of *Bellotti II* Is Immaterial To Its Constitutionality").

¹⁶⁶ See Defendants' Post-Trial Brief, *supra* note 165, at 42; see also Brief of State of Minnesota Filed in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit Before Judgment at 8-11, *Hodgson*, 648 F. Supp. 756 (No. 86-882) [hereinafter Opposition to Petition for Certiorari] (discussing *Bellotti II*, 443 U.S. 662, *H.L.*, 450 U.S. 398, and *Ashcroft*, 462 U.S. 476). For a discussion of these cases, see *supra* notes 66-92 and accompanying text. For an analysis and rebuttal of the state's argument in this regard, see *infra* notes 186-226 and accompanying text.

¹⁶⁷ See *supra* notes 2-39 and accompanying text.

¹⁶⁸ See *supra* notes 74-92 and accompanying text; *supra* note 27.

¹⁶⁹ Opposition to Petition for Certiorari, *supra* note 166, at 3. The state contended that

trial in this matter was not to be held to explore, through alleged "evidence," the correctness of the legal principles recognized by . . . [the Supreme] Court in *Ashcroft* . . . , *Matheson* . . . , and *Bellotti II* Nor

subject to trial," these empirical assumptions about minors and families are principles "inherent in the very fabric of our culture, society and system of government."¹⁷⁰ The state thus concluded that it did not bear the burden of "prov[ing] as matters of fact" that its asserted interests are significant or even legitimate,¹⁷¹ "or even that laws . . . designed to comport with these fundamental principles have achieved . . . a specified quantum of success, in the eyes of the court, in fulfilling their goals."¹⁷² The State of Minnesota thus adopted a self-imposed limit on the scope of permissible proof at trial¹⁷³ and attempted to meet its heavy burden¹⁷⁴ by relying on facts assumed in prior cases which it contended were legal principles immune from evaluation by subsequent courts.

Because "law has always been dominated by ideas of the past long after they have ceased to be vital in other departments of learning"¹⁷⁵ and because precedent continues to be revered,¹⁷⁶ the district court's conclusions of law failed to follow from its post-trial findings of fact.

would it appear that the factual nature of the supposed "burden" imposed by the underlying requirement of advance notice to both parents was to be tried as an issue of fact insofar as it relates to the functioning of the notice/bypass system operating in tandem.

Id.; see also Reply Brief of Appellants and Cross-Appellees State of Minnesota at 17-18, *Hodgson*, 648 F. Supp. 756 (Nos. 86-5423-MN, 86-5431-MN) [hereinafter Reply Brief of Appellants] ("[T]he cases . . . have articulated a rule of law, the application of which is in no way conditioned upon any particular lower court agreement with its . . . underpinning as matters of 'fact'.")

¹⁷⁰ Opposition to Petition for Certiorari, *supra* note 166, at 9. The state would presumably consider the principles universal, unchanging, even divine. *Cf. supra* text accompanying note 3.

¹⁷¹ See Opposition to Petition for Certiorari, *supra* note 166, at 10.

¹⁷² *Id.*

¹⁷³ The state believed that the only issue reserved for trial was whether its judicial bypass mechanism had in fact been operating with the requisite confidentiality (anonymity) and expedition. See *id.* at 3. It claimed to have therefore "refrained from consuming the time of the trial court or potential witnesses with philosophical or sociological debate" regarding its asserted interests and whether they had in fact been served by operation of the notification law. *Id.* at 10-11. In its brief on appeal, the state argued that to have attempted to prove that its interests were served by the law "would have been a waste of the court's time." Reply Brief of Appellants, *supra* note 169, at 20 n.16. Given the state's difficulty in finding credible expert testimony in support of its case, see *Hodgson*, 648 F. Supp. at 768, 774-75 (finding state's "experts" to be lacking in credibility and qualifications), it appears that the state may have adopted this stance to hide its inability to meet its burden of proof.

¹⁷⁴ See *infra* notes 227-48 and accompanying text.

¹⁷⁵ Pound, *supra* note 6, at 25.

¹⁷⁶ See, e.g., *Akron*, 462 U.S. 416, 419-20 ("[T]he doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." (footnote omitted)); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983) (chastising the appellate court for twisting the facts in order to distinguish the case from what the Ninth Circuit had referred to as a "most troublesome precedent").

The court "reject[ed] plaintiffs' challenge to Minnesota's notification/bypass requirement as a whole,"¹⁷⁷ despite its finding "as a matter of fact"¹⁷⁸ that the law "fails to further either of [the state's asserted] interests in any meaningful way,"¹⁷⁹ and despite its recognition that "[w]hen, as here, the state's asserted interest fails to justify the burden imposed upon pregnant minors by an abortion regulation, the Supreme Court has invalidated such regulations as unduly burdensome upon the rights of pregnant minors."¹⁸⁰

The district court reasoned that while it was proper to inquire into and make findings regarding "the existence of a particular state of facts [previously] assumed but never demonstrated,"¹⁸¹ it was nevertheless not the "court's place to determine whether the facts actually demonstrated at trial comport or conflict with any assumptions the Supreme Court may have made" in prior cases.¹⁸² The court concluded that, "[w]here [it] writing on a clean slate, it could not uphold the constitutionality of" Minnesota's notification/bypass law but believed this conclusion to be precluded by *Bellotti II* and *Ashcroft* even on the facts as found.¹⁸³ In short, the district court understood the Supreme Court in *Ashcroft* to have directed all subsequent courts to disregard the facts in determining constitutional results in the area of minors' abortion

¹⁷⁷ *Hodgson*, 648 F. Supp. at 777. Although the court refused to invalidate Minnesota's law "as a whole," the court nevertheless found both its waiting period and its two-parent notice requirement to be unconstitutional. *Id.* at 777-81. The court further found that the two-parent notice requirement was not severable from the remainder of the statute. *Id.* The entire statute is thus under court injunction at this time. *Id.* at 781. The court of appeals relied on the district court's findings of fact, concluding that they were supported by the record and not clearly erroneous, *Hodgson*, 827 F.2d 1191, 1198 (8th Cir. 1987), *vacated and reh'g granted*, Nos. 86-5423/86-5431 (8th Cir. Nov. 13, 1987) (rehearing held in abeyance pending Supreme Court decision in *Hartigan v. Zbaraz*, 763 F.2d 1532 (7th Cir. 1985), *aff'd without opinion by an equally divided court*, 56 U.S.L.W. 4053 (U.S. Dec. 14, 1987)), *judgment reinstated and reh'g en banc granted*, Nos. 86-5423/86-5431 (8th Cir. Dec. 31, 1987), but affirmed the decision of the lower court without modification in that it failed to reverse or even comment on the lower court's rejection of the challenge to the law "as a whole." *Id.* at 1202.

¹⁷⁸ *Hodgson*, 648 F. Supp. at 775.

¹⁷⁹ *Id.* at 776; see also *supra* notes 98-142 and accompanying text (reviewing the evidence adduced at trial on this point).

¹⁸⁰ *Hodgson*, 648 F. Supp. at 776 (citations omitted).

¹⁸¹ *Id.* at 774.

¹⁸² *Id.* at 776-77. For a discussion of these assumptions, see *supra* notes 74-92 and accompanying text.

¹⁸³ *Hodgson*, 648 F. Supp. at 776-77. For a description of the court's findings, see *supra* notes 98-142 and accompanying text. See also *supra* notes 143-63 and accompanying text (analyzing sociological, medical, and professional opinions concerning, *inter alia*, the deleterious effects of notification/bypass statutes). For a discussion of how the district courts in the cases consolidated in *Brown* felt similarly precluded, see *supra* notes 40-47 and accompanying text.

rights.¹⁸⁴ Dutifully, the district court did exactly that.¹⁸⁵

III. TOWARDS A MORE RIGHTS-PROTECTIVE RESULT: THE "OPERATIONAL CHALLENGE"

The *Hodgson*¹⁸⁶ result¹⁸⁷ is fundamentally inconsistent with judicial review and appears to legitimate the abdication, at least by lower federal courts, of their responsibility to safeguard constitutional rights. In a challenge to an operational statutory scheme as in *Hodgson*, a different conclusion is not only possible, but necessary for the adequate protection of fundamental rights.¹⁸⁸ This Part sets forth the defining

¹⁸⁴ See *Hodgson*, 648 F. Supp. at 777. In sum, although the court made findings of fact pursuant to "the factual inquiry mandated by the *Carolene Products* Court," *id.* at 774 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938)), to the effect that Minnesota's law "is not [even] rationally related to the State's asserted interests," *Hodgson*, 648 F. Supp. at 774, it read *Ashcroft* to "direct[] that [its] 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 777 (citing *Ashcroft*, 462 U.S. at 491-92). The court's reading of *Ashcroft* was, however, incorrect in this regard. The question before the Supreme Court in *Ashcroft* was indeed limited to statutory interpretation by the statement of issues presented made to the Court by the parties. See 50 U.S.L.W. 3928 (U.S. 1982). Though properly limiting its own review in that case, the Court in its opinion nowhere "directed" all future constitutional review of such statutes to be thus limited regardless of the questions or factual record presented to subsequent courts.

¹⁸⁵ See *Hodgson*, 648 F. Supp. at 777. Moreover, the district court apparently believed that any other result would constitute an effort to overrule Supreme Court precedent. *Id.* at 776.

¹⁸⁶ *Hodgson v. Minnesota*, 648 F. Supp. 756, 774 (D. Minn. 1986), *petition for cert. before judgment in the Court of Appeals denied*, 107 S. Ct. 1333 (1987) (this petition attempted to consolidate the case with *Hartigan v. Zbaraz*, 763 F.2d 1532 (7th Cir. 1985), *aff'd without opinion by an equally divided court*, 56 U.S.L.W. 4053 (U.S. Dec. 14, 1987)), *aff'd*, 827 F.2d 1191 (8th Cir. 1987), *vacated and reh'g granted*, Nos. 86-5423/86-5431 (8th Cir. Nov. 13, 1987) (rehearing held in abeyance pending Supreme Court decision in *Zbaraz*), *judgment reinstated and reh'g en banc granted*, Nos. 86-5423/86-5431 (8th Cir. Dec. 31, 1987).

¹⁸⁷ See *supra* notes 177-85 and accompanying text. The term "*Hodgson* result" here refers to the district court's dutiful disregard of factual findings that should have compelled invalidation of Minnesota's law "as a whole" and to the resulting constitutional validation by the Court of a state statute that burdened minors' fundamental right to choose abortion independently and privately, although the statute in fact failed to achieve or even to promote any legitimate state purpose. See *Hodgson*, 648 F. Supp. at 776-77. As the term is used in this sense, it is of no consequence that the court in *Hodgson* found an alternate and narrower basis for enjoining the notification law. See *supra* note 177.

¹⁸⁸ The district court in *Hodgson* appears to have been particularly concerned with what a lower court was free to decide in the face of Supreme Court precedent. Section C of this part of the Article addresses the role of facts in reaching a result in lower courts and in the Supreme Court in the presence of prior cases in which the facts in question were assumed. The central premise is that a legal result is impermissible if it sustains, for any amount of time, a statute that infringes rights and that serves no legitimate state purpose. Under the peculiar circumstances of the *Hodgson* case, the

properties of an "Operational Challenge" and argues that a lower court presented with such a challenge is uniquely free to rely on facts in arriving at a rights-protective constitutional result at variance with existing precedent.

A. *The Peculiar Importance of Facts to
an "Operational Challenge"*

Constitutional challenges to statutory or regulatory law can take many forms and can vary in the degree to which they rely upon or require legislative fact-finding by courts. Such challenges may be mounted either before or after the effective date of the statute in question. They may attack the entire statutory scheme or only an individual application or subset of applications of the statute. Finally, they may challenge the statute on principle, contesting its facial validity, or they may attack the factual underpinnings or impact of the operating statutory scheme, through discovery, observation, and expert analysis where available. These considerations, alone and in combination, determine the form of constitutional challenge and determine, as well, the nature and importance of legislative and adjudicative facts to the litigation and to the judicial opinions that result.

Traditional concepts and terminology, such as "facial" versus "as applied" analyses of constitutionality, offer a woefully inadequate means of understanding the case law. The concepts are confused by the courts and, as classically conceived, fail to account for what is unique about cases such as *Hodgson*.¹⁸⁹

"Facial" challenges to legislation, outside the context of the first amendment, are "the most difficult challenge[s] to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."¹⁹⁰ Such challenges generally in-

statute in question was enjoined by the court on other grounds. *See Hodgson*, 648 F. Supp. at 780-81. Ordinarily, the plaintiffs in a constitutional challenge would not be thus protected. In such a case, fundamental rights would be subject to ongoing violation, in fact, and without means of legal address, either until Supreme Court review or, if the Supreme Court denies review, ad infinitum.

¹⁸⁹ *See infra* notes 205-08 and accompanying text; *see also supra* notes 98-142 (discussing the evidence presented and the findings of fact in *Hodgson*).

¹⁹⁰ *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987) (holding the Bail Reform Act to be "facially" constitutional); *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("A 'facial' challenge . . . means a claim that the law is 'invalid *in toto*—and therefore incapable of any valid application'." (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974))). The Court in *Salerno* went on to note that "[t]he fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the

volve judicial scrutiny of the four corners of the document, and the factual record may be limited or nonexistent.¹⁹¹ The relevance of adjudicative facts regarding the individual litigants may be disavowed by choice¹⁹² or by doctrine,¹⁹³ and critical legislative facts often are as-

First Amendment." *Salerno*, 107 S. Ct. at 2100. But see *H.L. v. Matheson*, 450 U.S. 398, 427 & n.2 (1981) (Marshall, Brennan, and Blackmun, JJ., dissenting) (referring to plaintiffs' claim as an "overbreadth challenge to an abortion statute"). For a discussion of "overbreadth," see *infra* note 193.

¹⁹¹ See *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (finding of facial invalidity based on "deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation").

¹⁹² One example of a choice to disregard adjudicative facts is when the challenge to the constitutionality of the law "as applied" to the plaintiff or criminal defendant, see *infra* notes 197-201 and accompanying text, either is not made or is not pursued on appeal. See, e.g., *Houston v. Hill*, 107 S. Ct. 2502, 2508 n.6 (1987) ("[t]he question whether the ordinance has been unconstitutionally applied . . . is neither presented by this appeal nor essential to our decision"); *Salerno*, 107 S. Ct. at 2100 n.3 (no claim by respondent that the law is unconstitutional as applied). Another example is when counsel chooses not to develop adjudicative facts in a strategic attempt to obtain a broad across-the-board invalidation of the law in question. For example, in *H.L.*, counsel insisted that "the specifics of the reasons [that H.L., a minor class representative, did not wish to notify her parents of her abortion] are really irrelevant to the Constitutional issue," 450 U.S. at 403, despite indication by the trial court that such specifics could be important in determining the constitutionality of the notice requirement as applied in specific circumstances. *Id.* at 403 n.7. One final example is when a case is commenced before the challenged statute goes into effect, rendering adjudicative (and legislative) facts speculative, even if relevant. See, e.g., *Zbaraz v. Hartigan*, 584 F. Supp. 1452, 1454 (N.D. Ill. 1984) (action instituted and injunction granted before the Act took effect); *Planned Parenthood Ass'n v. Ashcroft*, 483 F. Supp. 679, 683 (W.D. Mo. 1980) (temporary restraining order granted one day after statute's effective date).

¹⁹³ The primary example of a facial case that is litigated and decided independently of adjudicative facts by doctrine is an "overbreadth" challenge under the first amendment. See, e.g., *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S. Ct. 2568, 2571 (1987) (holding a total airport ban on first amendment activity to be substantially overbroad in that it created a virtually first amendment-free zone); *Houston*, 107 S. Ct. at 2508 ("a statute that is substantially overbroad may be invalidated on its face"); *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (rejecting an approach requiring the "contours of regulation . . . to be hammered out case by case").

Both the "facial" nature of an "overbreadth" challenge and recognition of the "chilling effect" of an overbroad law on free expression have led the Supreme Court to permit a litigant as to whom a law has been applied constitutionally to raise the claims of those as to whom it would be unconstitutional if applied. See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 619-20 (1971) ("Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others."); *Dombrowski*, 380 U.S. at 487 ("permitting determination of the invalidity of [overbroad] statutes without regard to [their] permissibility . . . on the facts of particular cases . . . avoid[s] making vindication of freedom of expression await the outcome of protracted litigation"); *NAACP v. Button*, 371 U.S. 415, 432 (1963) (in ruling on the first amendment constitutionality of a statute, "this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar"); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) ("Proof of an abuse of power in a particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas."); see also

sumed, judicially noticed, or determined a priori by logic or reference to judicial precedent.¹⁹⁴ If a litigant meets the "heavy burden" of demonstrating facial unconstitutionality,¹⁹⁵ the remedy is invalidation of the law or the relevant provision in its entirety.¹⁹⁶

L. TRIBE, *supra* note 22, § 12-24 (discussing the chilling effect of vague and overbroad statutes). But see *Broaderick v. Oklahoma*, 413 U.S. 601, 615 (1973) (requiring "substantial" overbreadth for the facial invalidation of a law). In short, the Court has "not required that all of those subject to overbroad regulations risk prosecution to test their rights." *Dombrowski*, 380 U.S. at 486. This is an exception to the usual rules of standing. See *id.*; *United States v. Raines*, 362 U.S. 17, 21-22 (1960); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 423-24 (1974) (discussing exceptions to the Supreme Court's general rule that one may not claim standing to vindicate the constitutional rights of a third party).

The result of this exception is that neither the constitutionality nor the facts regarding the application of the law to the particular plaintiff or criminal defendant in that case are material to the overall constitutionality of the law or the court's power to declare it. See, e.g., *Houston*, 107 S. Ct. at 2508 n.6; *Dombrowski*, 380 U.S. at 487. Interestingly, however, although evidence regarding the actual application and enforcement of the law is not necessary for facial invalidation, such evidence has been found to be probative of the law's potential for unconstitutional application, that is, probative of its overbreadth. See *Houston*, 107 S. Ct. at 2508 n.6.

In a challenge to a statute as "void for vagueness," but when first amendment freedoms are not at issue, adjudicative facts remain relevant for purposes of standing. *Hoffman*, 455 U.S. at 495 n.7. However, some vagueness challenges are still considered to be facial by doctrine. "As a matter of due process, a law is void on its face if it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application'." L. TRIBE, *supra* note 22, § 12-28 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); see *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); see also *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (statute requiring oaths of all teachers is "indefinite . . . [and] abut[s] upon sensitive areas of First Amendment freedoms"). A statute that is "perfectly vague" in the sense that it is entirely standardless, is vague "in all its applications" and thus unconstitutional on its face. L. TRIBE, *supra* note 22, § 12-25; see *Hoffman*, 455 U.S. at 494-95. Such a statute will be invalidated in its entirety; see, e.g., *Smith v. Goguen*, 415 U.S. 566, 578 (1974) (flag-misuse statute is held void for vagueness in all its applications); *Coates*, 402 U.S. at 614 (statute prohibiting sidewalk assembly held unconstitutionally vague because "no standard . . . is specified"). Alternatively, a statute may be "vague as applied." See *infra* notes 197-201 and accompanying text.

¹⁹⁴ See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (Court relies upon presumption that parents act in the best interests of their children); cf. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 106 S. Ct. 2968, 2976 & n.6, 2977-78 (1986) (Supreme Court will "abide by the narrowing constructions announced by the Superior Court and approved *sub silentio* by the Supreme Court of Puerto Rico" because of its understanding of the "unique [local] cultural and legal history"). But see *FED. R. EVID.* 201(a) and advisory committee's note (permitting judicial notice of adjudicative facts only). See generally *Karst*, *supra* note 26, at 84 (judges assume legislative facts not found in the record).

¹⁹⁵ See, e.g., *Salerno*, 107 S. Ct. at 2100 ("A facial challenge to a legislative Act is, of course, the most difficult challenge . . . since the challenge must establish that no set of circumstances exists under which the Act would be valid.").

¹⁹⁶ See, e.g., *Edwards v. Aguillard*, 107 S. Ct. 2573, 2583 (1987) ("Creationism Act" unconstitutional on its face); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S. Ct. 2568, 2571 (1987) (resolution banning all "First Amendment activities" in

"As applied" challenges to statutory or regulatory law assert that a law actually was or will be applied in an unconstitutional manner as to an individual¹⁹⁷ or a subclass of individuals¹⁹⁸ within its reach. In this type of challenge, the statute generally is in effect and enforced,¹⁹⁹ and the adjudicative and some of the legislative facts may be proven on a fully developed factual record.²⁰⁰ Such challenges may be distinguished from those addressed to the "face" of a statute, first, because of the availability and relevance of adjudicative and/or legislative facts, and second, because of the nature of the remedy sought. In an "as applied" case, the court simply invalidates the application or enforcement of the law as to the litigant and, either expressly or by operation of precedent, to the class she represents. The challenged law remains in

airport terminal held facially unconstitutional).

¹⁹⁷ See, e.g., *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971) ("ordinance is so vague and lacking in ascertainable standards of guilt that, as applied to Palmer it failed to give" notice of what conduct is forbidden); *id.* at 546 (Stewart and Douglas, JJ., concurring) (basing their opinion on ground that ordinance is also "unconstitutionally vague on its face"); see also *Cox v. Louisiana*, 379 U.S. 559, 564, 571 (1965) (anti-picketing law constitutional "on its face" but unconstitutional "as applied" to a particular parade and demonstration led by Cox).

¹⁹⁸ See, e.g., *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S. Ct. 2862, 2870 (1987) (exemption from Title VII of the Civil Rights Act of 1964 for religious organizations held constitutional "as applied to the nonprofit activities of religious employers"); *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (parental notification requirement for abortion without judicial bypass option is constitutional "[a]s applied to the class [of immature, unemancipated minors] properly before us"); *Wisconsin v. Yoder*, 406 U.S. 205, 235-36 (1972) (invalidating state's "generally valid" compulsory school attendance law as applied to the Amish).

¹⁹⁹ Of course, so long as the plaintiff has standing and the claim is ripe for judicial consideration, in theory an "as applied" challenge could be asserted against an anticipated application of a law even before it takes effect. See generally *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) (ripeness doctrine "does not [require one] to await the consum[m]ation of threatened injury to obtain preventative relief"), quoted in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974).

²⁰⁰ For example, in *Yoder*, the challenged compulsory school attendance law had been in operation since 1933. 406 U.S. at 227 n.15. As to the burden the law placed on the constitutional rights of the Amish, the Court stated:

[T]he unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement . . . would gravely endanger if not destroy the free exercise of respondents' religious beliefs.

Id. at 219; see *id.* at 209-13 (summarizing expert testimony). In scrutinizing the state's asserted interests, the Court rejected the speculation that Amish children who leave the church would be unprepared for the world, holding that the state had failed to introduce any particularized evidence of attrition from the Amish community, of the inadequacy of Amish home education, or evidence that two additional years of school would make any difference in terms of preparation for life. *Id.* at 224-27. The Court also noted the "independence and successful social functioning of the Amish community for a period approaching almost three centuries . . ." *Id.* at 226-27.

operation, although subsequent applications may continue to be challenged.²⁰¹

Thus, the customary distinction between the constitutionality of a law "on its face" and "as applied" appears in most cases to be clear,²⁰² and the two forms of constitutional analysis often compete, as if opposites, for the prevailing view of the court. For example, appellate courts frequently split, with majority and concurring or dissenting opinions disagreeing over a "facial" versus an "as applied" conclusion in the case presented.²⁰³ Moreover, courts frequently reject a facial attack but go on to consider the constitutionality of a law as applied to the litigants.²⁰⁴

However, neither of these concepts as traditionally used by the courts are applicable to a constitutional challenge of the *Hodgson* type.²⁰⁵ In *Hodgson*, plaintiffs challenged an operating state law scheme based on evidence of the law's real operational impact as applied and enforced by the state throughout the effective period of the law. The case is not an attack on the law "as applied," however, because plaintiffs sought across-the-board relief, not invalidation of a particular application or set of applications of the parental notice and by-

²⁰¹ See, e.g., *Palmer*, 402 U.S. at 545 (Court reverses judgment against Palmer without holding statute facially unconstitutional). See generally *Schall v. Martin*, 467 U.S. 253, 273 (1984) (rejecting challenge to state law permitting pretrial detention of juveniles "on its face," but stating that "[i]t may be . . . that in some circumstances detention of a juvenile would not pass constitutional muster . . . [b]ut the validity of those detentions must be determined on a case-by-case basis").

²⁰² At times, however, the terms become murky. For example, in *H.L. v. Matheson* the Court rejected a "facial" challenge to a law in favor of an "as applied" theory of relief to a subclass of individuals, *H.L.*, 450 U.S. at 413, but nevertheless referred to the issue before it as "facial," presumably because the litigant chose not to develop a factual record and had sought across-the-board invalidation as to a definable class of individuals to which the law appeared to apply. See *id.* at 407.

²⁰³ See, e.g., *Palmer*, 402 U.S. at 545-46 (majority held ordinance unconstitutional "as applied"; concurrence would hold ordinance unconstitutional "on its face"); *United States v. Melendez-Carrion*, 790 F.2d 984, 1004-05, 1010 (2d Cir. 1986) (opinion of the court held Bail Reform Act unconstitutional "on its face"; concurrence would hold Act unconstitutional "as applied"; dissent would hold Act constitutional).

²⁰⁴ See, e.g., *County Court v. Allen*, 442 U.S. 140, 162-63 (1979) (stating that the Court should not pass on the constitutionality of the "presumption of possession" statute "on its face," but should consider it "as applied to the facts"); *T.L.J. v. Webster*, 792 F.2d 734, 735 (8th Cir. 1986) (considering constitutionality of law requiring parental notification for abortion, first "facially" and then "as applied" to named plaintiffs in case). It is also common for a district court to grant in part and deny in part a motion for summary judgment under FED. R. CIV. P. 56, holding a challenged law to be constitutional "on its face" but holding that genuine issues of material fact remain to be tried as to claims that the law is unconstitutional "as applied." See *Hodgson*, 648 F. Supp. at 760; *Weissman v. City of Alamogordo*, 472 F. Supp. 425, 432 (D.N.M. 1979).

²⁰⁵ See *supra* notes 91-185 and accompanying text.

pass law.²⁰⁶ The case also is not, at the trial stage, an attack on the "facial" validity of the law, because facial validity had previously been adjudicated.²⁰⁷ Moreover, the case is not a descriptively "facial" attack in the sense that it is addressed to the four corners of the law; both the five-week trial and the district court's findings of fact were based on record evidence and expert evaluation of nearly every application of the law over its five years of operation.²⁰⁸

No existing term adequately describes a constitutional challenge of the *Hodgson* variety. Thus, this Article proposes that the term "operational challenge" be adopted to identify an across-the-board constitutional challenge to an operating statutory scheme when: a) that challenge is based on empirical evidence as to the statute's operating record drawn from the totality of statutory applications; and b) the statute in question is or previously has been held valid on its face.²⁰⁹ Again, a case litigated in this fashion is neither "facial" nor "as applied" as these terms traditionally have been understood.

Operational-style challenges are not unprecedented.²¹⁰ One example of such a challenge is the recent Supreme Court case *McCleskey v.*

²⁰⁶ Cf. *Webster*, 792 F.2d at 736-39 ("facial" challenge dismissed in part because Supreme Court had upheld challenged statute; "as applied" challenge dismissed because the case was moot as applied to the individual litigants and no class with standing to seek across-the-board relief had been certified).

²⁰⁷ *Hodgson*, 648 F. Supp. at 760. The court's determination that the bypass portion of the law was constitutional on its face purported to be on the authority of *Bellotti II*, 443 U.S. 622 (1979), and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). See *Hodgson v. Minnesota* No. 3-81 CIV 538, slip op. at 4-9, (D. Minn. Jan. 23, 1985) (order denying summary judgment); *supra* notes 181-85 and accompanying text.

²⁰⁸ The trial of the case involved the presentation of years of research and study, taking the form of testimony by single parents, minors, abortion clinic nurses and counselors, nationally renowned physicians, psychologists, psychiatrists, reproductive epidemiologists, state court judges, guardians, and public defenders involved in the implementation of the judicial bypass procedure. Among the 57 witnesses whose testimony forms a part of the *Hodgson* record, "[t]he court heard testimony of judges who collectively [had] adjudicated over 90 percent of the parental notification petitions," *Hodgson*, 648 F. Supp. at 766, as well as testimony about each of the anomalous applications of the law leading to denial of such a petition. *Id.* at 765. The court also heard testimony from counselors who counseled nearly every pregnant minor in the state since the law went into effect. *Id.* at 766-67.

²⁰⁹ One obvious question is how long must a statute be in operation before a true "operational challenge" may be mounted. An "operational challenge" can be made at any time, but it should be successful only if the plaintiffs have gathered sufficient facts to meet their burden of proof, see *infra* notes 229-30, 281-82 and accompanying text, and to rebut the defense that the sample is too small to permit an inference that the law cannot operate in a constitutional manner.

²¹⁰ They are, however, unusual. This is largely because they are tremendously resource-intensive. They require lengthy and costly discovery, extensive expert witness participation, and many attorneys, witnesses, documents, weeks at trial, and dollars.

Kemp.²¹¹ In *McCleskey*, a criminal defendant who had been sentenced to death under Georgia's capital punishment law challenged the constitutionality of that law under the eighth and fourteenth amendments.²¹² The law had previously been held to be valid on its face.²¹³ Despite the fact that *McCleskey* was an individual litigant who did not represent a class of similarly situated individuals,²¹⁴ the thrust of *McCleskey*'s case consisted of "wide ranging arguments that basically challenge[d] the validity of capital punishment in our multi-racial society"²¹⁵ These arguments were largely based on statistical evidence indicating that the law actually operated in a manner that discriminated against black capital defendants, such as *McCleskey* himself, whose victims were white.²¹⁶

The Supreme Court rejected *McCleskey*'s "operational challenge" to the Georgia statutory scheme in its entirety. In essence, the Court found statistical evidence to be insufficient to prove either that racial animus pervades Georgia's facially constitutional sentencing process²¹⁷ or that it played an impermissible role in *McCleskey*'s sentence.²¹⁸ In so holding, the Court expressed its emerging philosophy of judicial restraint²¹⁹ as well as its concern for a workable system of criminal jus-

²¹¹ 107 S. Ct. 1756 (1987).

²¹² *Id.* at 1763.

²¹³ See *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976). In *Gregg*, the Court "found that the Georgia capital sentencing system could operate in a fair and neutral manner." *McCleskey*, 107 S. Ct. at 1769 (citation omitted).

²¹⁴ See *McCleskey*, 107 S. Ct. at 1766 n.8.

²¹⁵ *Id.* at 1781; *id.* at 1770 ("McCleskey also argues that . . . the Georgia capital sentencing system violates the Eighth Amendment." (emphasis added)).

²¹⁶ *McCleskey* introduced a statistical study by Professor David C. Baldus (the "Baldus study") that "purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970s." *Id.* at 1723. The study concluded that "black defendants, such as *McCleskey*, who kill white victims have the greatest likelihood of receiving the death penalty." *Id.* at 1764. (footnote omitted).

²¹⁷ *Id.* at 1769-70. Having previously found the scheme to be constitutional on its face, proof of apparent disparities in sentencing was found to be inadequate to invalidate the law in the context of adequate safeguards and of a criminal justice system that depends on jury discretion. *Id.* at 1778 ("we decline to assume that what is unexplained is invidious").

²¹⁸ "Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in *McCleskey*'s particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions." *Id.* at 1775 (footnote omitted). The Court also rejected statistical evidence as proof of intent for purposes of the equal protection challenge to the capital sentencing decision. *Id.* at 1769.

²¹⁹ Noting that *McCleskey*'s operational challenge might be "best presented to [a] legislative bod[y]," *id.* at 1781, the Court indicated that the "ultimate duty of courts" was to make "case-by-case" determinations, *id.*, at least where facial validity is estab-

tice.²²⁰ But in considering the statistical proof with care, the Court made clear that facial validity alone will not save a statutory scheme subject to an operational challenge in which the litigant is able to meet the threshold burden of proof.²²¹

A close examination of *Hodgson* and *McCleskey* reveals the importance of a unique sort of factual proof to the constitutional issues presented. Adjudicative facts regarding any one individual or named litigant are of only secondary and representative importance. The central legislative or constitutional facts, instead of being assumed, are subject to proof through statistics or testimony regarding the law in operation.²²² Thus, while the Supreme Court assumed that Georgia's death penalty would be implemented rationally and without discrimination on grounds of race under the procedural safeguards approved in *Gregg v. Georgia*,²²³ *McCleskey* attempted to demonstrate that racially discriminatory imposition of capital sentences was not, in fact, prevented

lished and no class action is present. *See id.* ("the only question before us is whether in [*McCleskey's*] case, . . . the law of Georgia was properly applied").

²²⁰ *Id.* at 1779.

²²¹ *See infra* notes 222-48 and accompanying text. The Court's conclusion that *McCleskey* had failed to meet his burden of proof in that case would not, of course, preclude success in an operational challenge generally. *McCleskey* faced three difficulties not present in most such cases. First, because he was an individual petitioner in a federal *habeas corpus* proceeding rather than a named plaintiff and class representative in a civil class action, the Court was able to sidestep the full scope of the operational proof presented and construe the issue before it to be the constitutionality of *McCleskey's* individual sentence. *See McCleskey*, 107 S. Ct. at 1766-67. Second, although statistics concededly prove only a risk of capital sentencing based on race, *see id.* at 1775, *McCleskey* was necessarily limited in the evidence he could introduce to supplement the *Baldus* study. "[C]ontrolling considerations of public policy," . . . dictate that jurors 'cannot be called . . . to testify to the motives and influences that led to their verdict.'" *Id.* at 1768 (citations omitted). Finally, in rejecting "the *Baldus* study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions," *id.* at 1775, the Court relied on an eighth amendment principle that regardless of "imperfections, . . . constitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.'" *Id.* at 1778 (citation omitted). Thus, it is conceivable that even if *McCleskey* had been able to prove that capital sentences are discriminatorily imposed in Georgia, the Supreme Court might nevertheless have sustained the law on the ground that procedural safeguards are presumed to work. This principle appears to mandate deferential review of legislative facts. *See Booth v. Maryland* 107 S. Ct. 2529, 2532 (1987) ("this Court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision"). Such deference would be antithetical to fundamental rights review in the context of an affirmative constitutional challenge.

²²² In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), noting that facial challenges focus on the face of a law, the Court stated that in a challenge to an operating law, "[w]e are not obliged to reason from the probable to the actual . . . [f]or the cases present the ordinances in actual operation . . ." *Id.* at 373.

²²³ 428 U.S. 153, 163-68, 196-207 (1976) *discussed in McCleskey*, 107 S. Ct. at 1772.

by such safeguards.²²⁴ Similarly, while the Supreme Court assumed that a judicial bypass procedure would alleviate the unconstitutional burdens of requiring parental involvement in a minor's abortion choice,²²⁵ the facts presented in *Hodgson* establish that this assumption is incorrect as a matter of fact.²²⁶

The very essence of an operational challenge is the availability and presentation of factual proof as to the statute's application while in operation. It is upon this sort of evidence that assumed legislative or constitutional facts may at last be conclusively evaluated. The implications of the availability of such evidence on burdens of proof and on the constitutional result in an operational challenge to a law previously upheld on its face will be discussed in Sections B and C of Part IV respectively.

B. *Burdens of Proof in an "Operational Challenge"*

The ultimate burden of persuasion²²⁷ in a civil case is placed upon the plaintiff who must generally prove by a preponderance of the evi-

²²⁴ See *McCleskey*, 107 S. Ct. at 1763-64, 1775 (Court conceded that there is "some risk of racial prejudice influencing a jury's decision in a criminal case"). This claim was rejected for the reasons discussed *supra* notes 218-20. See also *supra* notes 211-21 and accompanying text (discussing the burden of proof imposed in *McCleskey*).

²²⁵ See *supra* notes 51-55, 66-73 and accompanying text.

²²⁶ See *supra* notes 154-74 and accompanying text.

²²⁷ There are three evidentiary burdens: The burden of pleading (alleging the necessary facts); the burden of production (coming forward with evidence); and the burden of persuasion (to convince the trier of fact of the truth of the material facts alleged). See Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 171 (1969). The ultimate burden of persuasion is thought to have "both a location and a weight: the location specifies the party that loses if the burden is not met, and the weight specifies how persuasive the evidence must be in order to carry the burden." Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1300 (1977). Intermediate, as opposed to ultimate, burdens of persuasion may be placed with different parties on different issues. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (describing the allocation of burdens of proof in a Title VII case).

The burden of production and the burden of persuasion are frequently placed upon the same party; when they are, the distinction serves to allocate the roles of judge and jury as well as to set a threshold quantum of proof. See generally McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1386 (1955) ("[T]he burden of production involves not just a determination of the probabilities of a fact by a jury. It involves also an estimate by the judge as to the limits within which such determinations might fall."); Underwood, *supra*, at 1300 n.3 (contrasting this situation with the assignment of the burden of production to the party who does not have the burden of persuasion). These burdens are sometimes assigned to different parties in order to facilitate an orderly presentation and consideration of proof. See, e.g., *Burdine*, 450 U.S. at 253-54, 255 n.8 (allocation of burdens serves to sharpen the inquiry into factual questions).

dence²²⁸ "that what is alleged is true."²²⁹ When the law imposes a rebuttable presumption against the defendants, however, the burden of production shifts to the defendant to produce evidence rebutting the plaintiff's *prima facie* showing.²³⁰

In an affirmative constitutional challenge to a state statute, a law that impinges on a fundamental right is considered "presumptively unconstitutional."²³¹ Thus, the state bears the burden of justifying any regulation that infringes on the exercise of a such a right under the appropriate standard.²³² To meet this burden, the state must come for-

²²⁸ In "the typical civil case" the burden of proof is the "preponderance of the evidence," *Addington v. Texas*, 441 U.S. 418, 423 (1979). This standard contrasts with the more stringent "beyond a reasonable doubt" and "clear and convincing evidence" standards. *Id.* at 423-24. In general, the function of a standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423.

²²⁹ Ashford & Risinger, *supra* note 227, at 173.

²³⁰ See *Burdine*, 450 U.S. at 254-55 nn.7 & 8; FED. R. EVID. 301.

²³¹ *Harris v. McRae*, 448 U.S. 297, 312 (1980) (citing *Mobile v. Bolden*, 446 U.S. 55, 76 (1980)). See generally 2 TREATISE ON CONSTITUTIONAL LAW, *supra* note 2, at 323 (statutes touching upon "fundamental constitutional values" will be subject to strict scrutiny and upheld only if "necessary to promote an extremely important or 'compelling' end of government").

²³² See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 55 U.S.L.W. 4208, 4209 (U.S. Feb. 25, 1987) (burden on free exercise of religion can "be justified only by proof by the State of a compelling state interest" (emphasis added)); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 430 (1983) (discussing Planned Parenthood v. Danforth, 428 U.S. 52 (1976)); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("burden on . . . interests protected by the First Amendment . . . cannot [be] countenance[d] . . . unless the State asserts a counterbalancing interest of compelling importance that it cannot [otherwise] achieve"); *Carey v. Population Serv. Int'l*, 431 U.S. 678, 701-02 (1977) (applying the *Brandenburg* standard to contraceptive advertising); *id.* at 702 (White, J., concurring) ("[T]he State ha[d] not demonstrated that the prohibition . . . measurably contribute[d] to the . . . purposes which the State advance[d] as justification for the restriction."). The state bears this burden under any standard of judicial review. See, e.g., *Heckler v. Mathews*, 465 U.S. 728, 744 (1984) (intermediate scrutiny) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (intermediate scrutiny)); *Mathews v. Lucas*, 427 U.S. 495, 509-10 (1976) (minimal scrutiny or "rational relationship test"). Only when a law has its sole impact on matters of social or economic policy, do courts apply a modernized "presumption of constitutionality" and defer to the wisdom of the legislature. *Pension Benefit Guar. Corp. v. Gray & Co.*, 467 U.S. 717, 729 (1984); see *Mobile v. Bolden*, 446 U.S. 55 76 (1980) (Stewart, J., plurality) (delivering the opinion of the Court).

Of course in an operational challenge mounted as an affirmative defense or a habeas challenge by a criminal defendant to a law under which he has been convicted or sentenced, the burden of proof may be placed on the defendant instead of the state. See, e.g., *McCleskey*, 107 S. Ct. at 1775 (discussing fourteenth amendment claim) (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985)); *id.* at 1774 (discussing eighth amendment claim); see *infra* notes 240-41 and accompanying text.

ward with *evidence* demonstrating that the law in question narrowly serves the permissible interests asserted by the state in the particular case.²³³ Neither bare assertions²³⁴ nor "archaic and overbroad generalizations,"²³⁵ unsupported by evidence, are sufficient to meet the state's burden of proof.²³⁶

The state must come forward with such proof even though plaintiff's initial burden is minimal. In first amendment litigation, "it is

²³³ See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 796-806 (1983) (rejecting Ohio's proffered justification for its early filing deadline for presidential candidates, as the statute placed an unconstitutional burden on the voting and associational rights of a candidate's supporters); *Hogan*, 458 U.S. at 730-31 & n.16 ("the state has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective"); *Thomas v. Review Bd.*, 450 U.S. 707, 718-19 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Wengler v. Drug-Gists Mut. Ins. Co.*, 446 U.S. 142, 151-52 (1980) ("The burden . . . is on those defending the discrimination to make out the claimed justification . . ."); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 789-90 (1978) ("If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes . . . these arguments would merit our consideration."); *Carey*, 431 U.S. at 696 ("[W]hen a State . . . burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy."); *Craig v. Boren*, 429 U.S. 150, 200-02 (1976) (refusing to rely on statistics, introduced by Oklahoma to justify age-sex differentials, in an equal protection challenge).

²³⁴ See, e.g., *Wengler*, 446 U.S. at 151 ("It may be that there is empirical support for the proposition that men are more likely to be the principal supporters of their spouses and families, but the bare assertion of this argument falls far short of justifying gender-based discrimination on the grounds of administrative convenience." (citation omitted)); *Carey*, 431 U.S. at 696 (asserting that a state must provide supporting evidence for its assertion that the burdening of a fundamental right is a rational means to accomplish a significant state policy). "Neither a bare assertion that the burden[some regulation] is connected to a significant state policy, nor sentiment or folklore, will satisfy this burden." *Hodgson*, 648 F. Supp. at 772 (citations omitted).

²³⁵ *Hogan*, 458 U.S. at 730 n.16.

²³⁶ See generally *Shaman*, *supra* note 27, at 246 (government regulations will not be upheld on speculative or hypothetical fact). Moreover, even where the state introduces such evidence, courts consistently and fastidiously examine the record in evaluating whether the state has met its burden. For example, in *Craig v. Boren*, 429 U.S. 190 (1976), the Supreme Court reviewed the constitutionality of an Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 years of age, but prohibiting the sale of such beer only to females under age 18. On the assumption that the state's objective was to enhance traffic safety, the Court scrutinized pertinent arrest statistics for drunk driving, an Oklahoma City random roadside survey, and nationwide FBI data. It concluded that the evidence failed to establish a gender-based disparity in the incidence of drunk driving significant enough to justify the claim that the beer sale restriction would actually lead to better traffic safety. See *Craig*, 429 U.S. at 199-204; see also *Hogan*, 458 U.S. at 729-30 (Court examined statistics in determining whether the state had failed to demonstrate that women lacked opportunities in the nursing field and examined deposition testimony regarding the state's claim that the presence of men had an adverse effect on female students).

common to place the burden upon the Government to justify impingements on [protected] interests, [although] it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment . . . applies.”²³⁷ In the fourteenth amendment context, the Supreme Court has expressly rejected a requirement that a plaintiff claiming a violation of her right to privacy must demonstrate an “undue burden” on the exercise of that fundamental right.²³⁸ The Court has consistently indicated that *any* infringement on a fundamental right triggers strict scrutiny and, in turn, gives rise to the state’s burden to present evidence justifying the infringement under the appropriate standard.²³⁹

In an operational challenge, the burden of producing evidence is more rigorous for both parties than in other types of constitutional litigation. Neither party can rely upon unproven assertions about the costs and benefits of the challenged legislation. Particularly when facial validity has been previously adjudicated in a defendant’s favor, the plaintiff must make a *prima facie* evidentiary showing that the law has *in fact* burdened the exercise of rights without serving the state’s purported interests.²⁴⁰ When the plaintiff introduces such *prima facie* evi-

²³⁷ See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). The proponent of a first amendment claim can meet this burden so long as her contention is something more than “plausible”. *Id.* (“To hold otherwise would be to create a rule that all conduct is presumptively expressive.”).

²³⁸ Compare *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 453 (1983) (O’Connor, J., dissenting) (suggesting that a state need not justify a law that does not unduly burden a right with a compelling interest); with *id.* at 420 n.1 (Powell, J., for the Court) (rejecting Justice O’Connor’s argument as insufficiently protective of fundamental rights).

²³⁹ See *Nyberg v. City of Virginia*, 667 F.2d 754, 757 (8th Cir. 1982), *appeal dismissed*, 462 U.S. 1125 (1983); see, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2182 (1986) (striking down an omnibus abortion statute that, *inter alia*, raises only the “spectre” of public exposure); *Akron*, 462 U.S. at 420 n.1 (rejecting the undue burden standard put forth by the dissent); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (“[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’ . . . narrowly drawn to express only the legitimate state interests at stake”); *Planned Parenthood v. Board of Medical Review*, 598 F. Supp. 625, 634, (D.R.I. 1984) (to constitute a legally significant burden on a woman’s fundamental right triggering the compelling state interest test, the regulation “must merely have the potential to frustrate or delay a woman’s abortion decision”).

²⁴⁰ Cf. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981) (discussing plaintiff’s required *prima facie* showing in a discrimination action under Title VII of the Civil Rights Act of 1964); *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973) (same). What constitutes the plaintiff’s ultimate burden in an operational challenge is a question of some importance. Does plaintiff have to show both that no actual application has been constitutional and that no application of the law could be constitutional? The plain answer is no. Operational validity may be established in part by proof that nearly every application of the law has been or will be unconstitutional, but such proof is not necessary. A statute may be unconstitutional in

dence of operational unconstitutionality, the state must rebut this proof with evidence that the law has actually achieved its purpose.²⁴¹

Unlike an ordinary "facial" challenge, but similar to many "as applied" challenges, the state cannot rely on speculative testimony about what the law might or could accomplish.²⁴² Thus, where a state

operation even when it has been applied permissibly in many cases. It need only be established that the very existence of the statutory system burdens the exercise of constitutional rights by substantial numbers of others while yielding no demonstrable benefit. For example, even if an occasional minor successfully navigates the judicial bypass option without trauma or delay, the facts in *Hodgson* reveal that the very existence of the statutory system leads untold numbers of other minors to forgo a constitutionally guaranteed reproductive option. As Justice Marshall has noted, "[i]t is the presence of the notice requirement, and not merely its implementation in a particular case, that signifies the intrusion." *H.L. v. Matheson*, 450 U.S. 398, 440 n.27 (1981) (Marshall, J. dissenting) (citing *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (finding the availability of a spousal veto of abortion, not its exercise, to be unconstitutional)). A statute is thus operationally invalid when plaintiffs can demonstrate a "risk that [the] exercise of personal freedoms may be chilled" although "the moving party's conduct" may not fall "within the protected core." *H.L.*, 450 U.S. at 427 n.2; see also *Thornburgh*, 106 S. Ct. at 2178 ("[t]he States are not free, under the guise of [their asserted interests] . . . to intimidate women into continuing pregnancies"); *id.* at 2182 (state requirements which "raise the spectre of public exposure and harassment of women who chose to exercise their personal, intensely private, right . . . to end a pregnancy" are unconstitutional even in absence of proof of actual exposure or harassment).

²⁴¹ See generally *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981). In *Metromedia*, the Court noted that a restriction on commercial speech may be upheld only if it "seeks to implement a substantial governmental interest," "directly advances that interest," and "reaches no further than necessary to accomplish the given objective." *Id.* (emphasis added); See *Carey v. Population Serv. Int'l*, 431 U.S. 678, 696 (1977) (rights infringing statute cannot be sustained "based on a conceded complete absence of supporting evidence" for state's asserted interest); *High Oil Times, Inc. v. Busbee*, 456 F. Supp. 1035, 1043 (N.D. Ga. 1978) (first amendment violated when state "has offered no evidence to demonstrate" that burden on speech "will foster the goal they envision"), *aff'd*, 621 F.2d 141 (5th Cir. 1980); *Shaman*, *supra* note 27, at 245 (rights-infringing regulation is invalid if it does not "in fact" serve the state's interest). Even under the less rigorous standards of review employed by the Court, the state has been required to come forward with evidence substantiating its arguments. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) ("the record does not reveal any rational basis for believing that [a home for the mentally retarded] would pose any special threat to the city's interests"); *id.* at 451-54 (Stevens J., concurring) (state justification of regulation was unconvincing and unacceptable); *Plyler v. Doe*, 457 U.S. 202, 224, 228 (1982) (denial of free public education to illegal alien children must further a substantial goal of the state, and no evidence supported state's claim that it did so).

²⁴² See *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

In the present cases we are not obliged to reason from the probable to the actual For the cases present the ordinances in actual operation Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, . . . the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74; see, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 n.16 (1981) (state failed to prove the necessity of gender-segregated nurses' training); *In re Gault*, 387 U.S. 1, 21-22, 29-30 (1966) (court used empirical evidence "candidly

seeks to restrict door-to-door solicitation, it must demonstrate that any such regulation does in fact reduce residential crime.²⁴³ To impose a residence requirement for parents or guardians of children seeking free public education, the school district must show that the requirement prevents and helps predict the fluctuation of student enrollment figures.²⁴⁴ To restrict access to contraceptives for minors, in the view of Justice White, the state must demonstrate that such a restriction "measurably contributes" to deterring premarital sexual activity.²⁴⁵ Likewise, a state may not impose a public school tuition charge on the children of undocumented aliens without demonstrating that such a charge will in fact restrict the flow of illegal immigrants.²⁴⁶ To permit a state to meet its heavy burden by relying on previously assumed facts when actual facts are available for judicial review and when the state fails to establish that its interests are in fact served by the law,²⁴⁷ would be "inconsistent with the principles of heightened scrutiny."²⁴⁸

[to] appraise[)]" a state's justification for a regulation and to dispel "mere verbiage . . . cliché").

²⁴³ See *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1256-60 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987).

²⁴⁴ See *Horton v. Marshall Pub. Schools*, 769 F.2d 1323, 1330-31 (8th Cir. 1985).

²⁴⁵ *Carey*, 431 U.S. at 702 (White, J., concurring).

²⁴⁶ See *Plyler v. Doe*, 457 U.S. 202, 228 (1982) (a tuition charge is a "ludicrously ineffectual" means of reducing the flow of illegal aliens); *id.* at 228 n.24 ("[t]he evidence demonstrates that undocumented persons do not immigrate in search for a free public education" (citing *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 578 (S.D. Tex. 1980))).

²⁴⁷ In some cases, the state might argue that the legitimacy and importance of its interest in rights-restrictive legislation, or the extent to which that interest is actually served, are matters inherently unprovable by testimonial or documentary proofs cognizable under the Federal Rules of Evidence. For example, a state may argue that it cannot be required to prove as a matter of fact that its amorphous concern with the public welfare or morality has actually been achieved because such matters are not amenable to proof.

This argument should not be permitted to relieve the state of its evidentiary burden in an operational challenge. To say that achievement of the state's interest cannot be proved is to necessitate one of two conclusions: either the statute has failed to promote the state's interest or the state does not know whether it has done so. It defies logic to accept the conclusion that a law can have a real and substantial beneficial effect on society or on individuals that is so elusive as to be inherently unprovable. See, e.g., *Hodgson*, 648 F. Supp. at 775 ("The court has considered the possibility that the statute's existence encourages immature, non-best interest minors to tell their parents, and that this intangible effect is not amenable to proof at trial. The court does not believe this to be the case."). Strict scrutiny cannot sustain a rights-infringing law when it fails to serve the state's interest. To uphold a law based on the unknown or unknowable is to defer to legislative judgment and to presume constitutionality. See *infra* notes 257-63.

²⁴⁸ *Shaman*, *supra* note 27, at 245; see *supra* notes 2-39 and accompanying text; *infra* notes 257-63 and accompanying text.

*C. The Effect of Facial Precedent on
the Result of an "Operational Challenge"*

This Section examines the precedential effect of a prior holding of facial constitutionality on the result of an operational challenge to a statute that is pending in a lower court or in the same court. Adjudicative or legislative assumptions of fact made in the course of facial review should not bind subsequent courts presented with a full operational factual record when heightened scrutiny is required. To the extent that rules of law are based on assumed legislative fact, a subsequent court should be free to modify these rules, at least when failing to do so would result in ongoing infringement of constitutional rights. Thus, while the standard of scrutiny employed by the earlier court does have precedential effect, applying that standard to legislative facts that have been materially modified by time, circumstances, science, or better factfinding can and should compel a subsequent court to enunciate a different constitutional rule. This position is consistent with basic jurisprudential principles and with the commonplace, though ill-articulated, manner in which courts have treated the existence or subsequent development of operational facts.²⁴⁹

As to jurisprudential philosophy, it has been asserted that a "principal justification for giving the independent review of legislation to the judiciary lies in the ability of a court to weigh constitutional claims on the basis of experience which was not available when the legislature acted."²⁵⁰ To deprive a court of the power to invalidate a law at the precise time that such an action becomes necessary undermines "the very essence of judicial duty."²⁵¹ Moreover, to sustain a statutory scheme in the presence of a factual record that conclusively proves that rights are infringed, that great harm is inflicted, and that no benefit is gained, transforms the requisite exacting standard of review into one of minimal scrutiny.²⁵²

For these reasons, legislative facts previously assumed by the Supreme Court²⁵³ should not preclude modification of the law by a subse-

²⁴⁹ See *infra* note 278.

²⁵⁰ Karst, *supra* note 26, at 76-77 (citing H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 77-79, 93 (1953)).

²⁵¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (discussing judicial review of legislation that conflicts with the Constitution).

²⁵² See Shaman, *supra* note 27, at 245-47. Such a low level of scrutiny is unknown even to judicial review of economic or commercial legislation that has no impact on fundamental constitutional guarantees.

²⁵³ See, e.g., *supra* notes 74-92 and accompanying text (discussing facts assumed by the Court regarding minors' maturity levels and family relationships, the abortion procedure, and the impact of a judicial bypass procedure).

quent court when operational facts disprove the assumptions made previously.²⁵⁴ If subsequent courts were bound in this fashion, findings of legislative fact would be elevated to the status of Blackstonian rules of law, and the concept of "precedent" as so defined would anchor rules of law to the facts of the past, precluding judicial cognizance of a changing empirical world.²⁵⁵ Deference to previously assumed facts thus undermines the essential function of a reviewing court in the protection of fundamental rights, effectively resurrects the "presumption of constitutionality,"²⁵⁶ and threatens to push constitutional jurisprudence back into the nineteenth century.

Scholars have recognized that meaningful judicial scrutiny of legislation cannot be performed absent an independent²⁵⁷ and searching consideration of all relevant facts.²⁵⁸ Likewise, it has been noted that simply because a judicial ruling of facial constitutionality has been rendered, "not all that the court decides is 'law,' or at least generically different from fact to the extent that it is incapable of being checked and verified by ordinary observation of external facts or scientific study"²⁵⁹ or experience.²⁶⁰ The purported burdens and benefits of legislation, which are integral to applying any rigorous standard of review, are facts, and once found, they are the foundation of any conclusion of constitutionality.²⁶¹ "Constitutional facts" are not defined as in their nature "unprovable," but simply as those "decisive of constitutional rights."²⁶² As facts, these underpinnings of constitutional principle are

²⁵⁴ See *infra* notes 280-88; see, e.g., *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1257 (3d Cir. 1986) (invalidating, based on factual findings, a door-to-door solicitation ordinance similar to one upheld by a different panel of the circuit based on assumed facts), *cert. denied*, 107 S. Ct. 1336 (1987).

²⁵⁵ This is precisely what defendants in the *Hodgson* case asked the court to do. See *supra* notes 164-74 and accompanying text; *supra* notes 2-6 and accompanying text.

²⁵⁶ See *Shaman*, *supra* note 27, at 246; cf. *Biklé*, *supra* note 19, at 19 ("[T]he legislative finding as to the fact upon which the validity of the legislation depends cannot be allowed to be binding upon the courts, since this would furnish a simple means of preventing judicial review of such legislation . . .").

²⁵⁷ See *Biklé*, *supra* note 19, at 19.

²⁵⁸ "[C]onstitutional litigation demands fact analysis of the most particularized kind . . ." Karst, *supra* note 26, at 75, *quoted in New Jersey Citizen Action*, 797 F.2d at 1259.

²⁵⁹ Isaacs, *supra* note 12, at 13.

²⁶⁰ See Karst, *supra* note 26, at 84; *supra* note 37 and accompanying text.

²⁶¹ See generally Karst, *supra* note 26, at 84 (outlining the questions of legislative fact that are answered by any judge in reviewing legislative action).

²⁶² *New Jersey Citizen Action*, 797 F.2d at 1259; see *supra* notes 25-34 and accompanying text (discussing legislative or constitutional facts); *supra* note 247 (discussing the argument that some factual issues may be inherently unprovable).

subject to change and, inevitably, to repeated challenge.²⁸³

For this reason, courts frequently note that facial validity leaves open the question of whether the law may be unconstitutional in operation based on a more fully developed factual record. For example, in *Buckley v. Valeo*,²⁸⁴ the Supreme Court was presented with a challenge to an election campaign financing law on the ground that it discrimi-

²⁸³ Thus,

[w]here the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice . . . the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938); see *Batson v. Kentucky*, 106 S. Ct. 1712, 1719 (1986) (“[c]ourt[s] . . . [are] repeatedly . . . [required] to review the application of [constitutional] principles to particular facts”); see, e.g., *In re Gault*, 387 U.S. 1, 17-31 (1967) (noting that the theoretical basis underlying the criminal justice system’s decision to apply different due process norms to juveniles was no longer accurate); *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing several studies that documented the psychological effects of segregation, thereby discrediting the “separate but equal” doctrine developed in prior cases). See generally *infra* notes 295-321 and accompanying text (discussing a critique of this principle from the civil rights standpoint). In general, the doctrine of stare decisis does not apply to findings of fact by a prior court. See 1B MOORE’S FEDERAL PRACTICE ¶ 0.402[2].

It is of course true that some constitutional conclusions are more heavily predicated on so-called “constitutional fact” than others. Moreover, some of the factual underpinnings of law may be more susceptible to change or at least to proof of change than others. So, for example, when the Supreme Court decided that minors are not excluded from the protection afforded adults under the fourteenth amendment guarantee of due process, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (substantive right to choose abortion); *In re Gault*, 387 U.S. at 30-31 (procedural fairness in criminal/delinquency proceedings), it implicitly relied upon a wide range of facts about the needs and competencies of minors in relation to their parents and to social institutions generally. Such facts do not tend to change rapidly and, if change occurs at all, it may be difficult to demonstrate in a courtroom setting. When the Court decided, however, that mandatory parental notification or consent for an abortion would be permissible in certain circumstances, see generally *supra* notes 56-70 (overview of case law), the facts relied upon and assumed by the Court, see *supra* text accompanying notes 74-92 (discussing Court’s assumptions about competence to make treatment decisions, risks of abortion, effect of compelling notification) are somewhat more amenable to research, change and disproof. See generally *supra* text accompanying notes 93-142 (Minnesota and Massachusetts experience); *supra* notes 143-63 (social science, medicine, professional opinion). Also more amenable to change and challenge are facts such as those regarding the judicial bypass procedure in Minnesota, e.g., *supra* text accompanying notes 129-42, which pertain to the operating effects of a law in a particular geographical, cultural, and institutional context. Such facts may not be universal and may necessarily change when these external factors are modified in a material manner. But see *supra* note 240 (discussing extent to which the very existence of a notice requirement and bypass system constitute the constitutional violation). For these reasons, the nature and importance of factual underpinnings to a facial conclusion of law will affect the availability and frequency of subsequent operational challenges. For further discussion, see *infra* text accompanying notes 287-88.

²⁸⁴ 424 U.S. 1 (1976) (per curiam).

nated against "minor and new" political parties.²⁶⁵ While upholding the challenged provisions, the Court specifically held that a finding of facial validity would not preclude a future finding of invidious discrimination based on "factual proof that the scheme is discriminatory in its effect."²⁶⁶ Likewise, in a challenge of a state law that prescribed prerequisites for independent candidates to obtain a position on the ballot, the Supreme Court found that "[o]n its face, the statute would not appear to require an impractical undertaking" but remanded for factfinding on whether the law actually imposed "too great a burden."²⁶⁷ Finally, in a challenge to a parental consent for abortion law not unlike that at issue in *Hodgson*, the First Circuit ruled that "a requirement unduly burdensome in operation will be struck down even if not clearly invalid on its face."²⁶⁸

The implication of these cases is that the entire statutory scheme may yet be invalidated upon a full factual record.²⁶⁹ In so holding, these courts correctly understood and referred to the principle that legal standards developed under one set of facts can and often should lead to different legal results when applied to a different set of facts.²⁷⁰ In not-

²⁶⁵ *Id.* at 97.

²⁶⁶ *Id.* at 97 n.131.

²⁶⁷ *Storer v. Brown*, 415 U.S. 724, 740 (1974).

²⁶⁸ *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1011 (1st Cir. 1981) (review of preliminary injunction "on a record [as yet] undeveloped as to the actual operation of the judicial approval procedure"), *amended complaint dismissed in part*, No. 80-1166-MA, slip op. (D. Mass. filed July 11, 1986) (dismissing claim that the judicial bypass provision was unconstitutional "as applied" on abstention grounds), *dismissed*, No. 80-1166-MA, slip op. (D. Mass. filed Nov. 2, 1987); *see Wilder v. Sugarman*, 385 F. Supp. 1013, 1029 (S.D.N.Y. 1974) (New York laws regulating foster care placement constitutional on face but question of constitutionality as implemented left open), *modified sub nom. Wilder v. Bernstein*, 645 F. Supp. 1292, 1354 (S.D.N.Y. 1986) (settlement approved subject to certain conditions; to date this case is pending); *see also Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 462 (1945) (review of constitutionality of statute not proper "in advance of its application and construction . . . and without reference to some precise set of facts to which it is to be applied"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 396-97 (1926) (general zoning ordinance provisions upheld without foreclosing future challenges to the application of specific provisions); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (ordinance invalidated based on its actual operation as indicated by the facts presented to the Court).

²⁶⁹ Whether under some circumstances the appropriate remedy would be something short of across-the-board invalidation is not addressed by this Article. It is, of course, conceivable that an appropriate interim remedy could in some cases be a mandatory injunction to implement the law in a constitutional manner. Such a remedial option would not, of course, be available when it is the very existence of the law and not its implementation that offends the Constitution. *See supra* note 240.

²⁷⁰ *See supra* note 263; *see, e.g., McAdory*, 325 U.S. at 462 ("A law which is constitutional as applied in one manner may . . . violate the Constitution when applied in another."). This is one of the reasons that the Supreme Court consistently takes pains to emphasize that its decisions are limited to the facts on the record presented.

ing that subsequent lower courts could come to different conclusions based on facts not previously known, these courts nowhere contemplated that in so doing the lower court would be considered to be overruling precedent²⁷¹ or that lower court freedom in this regard would be precluded if no explicit reference to the possibility of modification due to new facts was made in the prior case.

The only court to have squarely faced these issues is the Third Circuit Court of Appeals in *New Jersey Citizen Action v. Edison Township*,²⁷² a case involving a first amendment challenge to several door-to-door solicitation ordinances.²⁷³ The townships seeking to re-

See, e.g., *Turner v. Safley*, 107 S. Ct. 2254, 2266 (1987) (conclusion that law was facially invalid closely linked to the facts developed on the record); *United States v. National Bank of Commerce*, 472 U.S. 713, 726 n.10 (1985) ("narrow holding" limited to particular facts).

²⁷¹ As a general matter, it is of course true that lower courts are bound by legal precedent set by higher courts. See, e.g., *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) ("Needless to say, only [the Supreme Court] may overrule one of its precedents."); *Jaffree v. Board of School Comm'rs*, 459 U.S. 1314, 1316 (Powell, Circuit Justice 1983) ("Unless and until [the Supreme Court] reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them.").

Even if a modification of a rule of law based on new facts is properly conceptualized as "overruling," there is "some precedent for a lower court engaging in the anticipatory overruling of a higher court decision where that decision is predicated on an empirical circumstance that has changed over time." *Monahan & Walker, supra* note 2, at 516 n.130. In fact, commentators have argued that "lower court[s] *should* be able to reach empirical conclusions that differ from those of an appellate court when [they have] obtained new research not previously before the reviewing court." *Id.* at 516 (emphasis added); see also P. BREST, *supra* note 24, at 950 n.22 (lower courts may overrule precedent that is no longer good law). Of course, the Supreme Court itself has distinguished or overruled constitutional precedent in cases in which it found that legislative facts previously relied upon were no longer applicable. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670-74 (1981) (concluding that the Iowa truck-length limitations unconstitutionally burdened interstate commerce based on statistical evidence generated since a related previous case was decided, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978)); *Mapp v. Ohio*, 367 U.S. 643, 650-52 (1961) (discussing factual considerations upon which the Court in *Wolf v. Colorado*, 338 U.S. 25 (1949), based its decision *not* to impose the exclusionary rule on the states as an essential element of the right of privacy); *Brown v. Board of Educ.*, 347 U.S. 483, 492-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), because, inter alia, public education institutions and society in general had evolved subsequent to *Plessy*); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (constitutionality of a statute based on a state of facts may be challenged upon a showing that those facts no longer exist). The Court has also noted the necessity of heeding "the lessons of experience," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting), in order to depart from precedent when circumstances have changed. See *United States v. Scott*, 437 U.S. 82, 86-87 (1978); *Erie R.R. v. Tompkins*, 304 U.S. 64, 74-80 (1938). For a general discussion of the criteria for overruling precedent, see P. BREST, *supra* note 24, at 1118-20; Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 219-29.

²⁷² 797 F.2d 1250 (3d Cir. 1986), cert. denied, 107 S. Ct. 1336 (1987).

²⁷³ *Id.* at 1252.

strict solicitation and the dissenting Third Circuit judge, Judge Weis, argued that prior decisions of the Third Circuit and of the Supreme Court had assumed, or, on a limited factual record, had decided, that such restrictions furthered the state's interest in crime prevention and that to hold otherwise even on a different record would be to overrule those precedents. After a lengthy factual hearing, the district court found that the challenged ordinances did not *in fact* deter or prevent crime.²⁷⁴ The Third Circuit held that neither factual assumptions in prior Supreme Court cases, nor the "meager record" in a prior case decided by that circuit could "be considered to have foreclosed all future litigation anywhere else . . . on this issue no matter how compelling the facts produced by the challengers" of a comparable ordinance.²⁷⁵ In so holding, the court questioned "whether 'assumptions and widely-held beliefs' have a[n]y role to play" in judicial analysis of a constitutional claim.²⁷⁶

The Third Circuit understood that its approach could lead to inconsistency and increased litigation.²⁷⁷ It nevertheless concluded that when fundamental rights are "patently burdened, the district court not only is free to but indeed is required to overturn regulations that are premised on legislative assumptions contradicted by facts in the record."²⁷⁸ It further noted that "an appellate court must take the record as it comes" and order the result compelled by the facts judged by the appropriate standard of review.²⁷⁹

The approach adopted by the Third Circuit in *New Jersey Citizen Action* is appealing in its simplicity and yet disconcertingly broad in its potential application. To permit every lower court to reevaluate precedent based on what it perceives to be "new facts" would threaten civil liberties as well as the consistency of federal constitutional principle. There is, however, a more limited and acceptable articulation of the basis for lower court freedom to grant relief in cases such as *New Jersey Citizen Action* and *Hodgson*. The limiting principles of lower court freedom to stray from precedent in an operational challenge are outlined below.

²⁷⁴ See *id.* at 1253.

²⁷⁵ *Id.* at 1259-60.

²⁷⁶ *Id.* at 1259.

²⁷⁷ See *id.* at 1260.

²⁷⁸ *Id.* at 1257.

²⁷⁹ *Id.* at 1260.

D. *Proposed Requirements for a Successful Operational Challenge*

New Jersey Citizen Action and *Hodgson* were both operational challenges as defined in Section A of Part III. The facts pertinent to constitutional review were available and proven in evidentiary trials.²⁸⁰ In both cases, the district courts found that the statute or ordinance in question did not *in fact* serve any of the purposes proffered by the governmental defendants in support of the regulation.²⁸¹ In short, these courts found that defendants had failed to meet the heightened burden of production required to sustain an operating law against operational challenge.²⁸² Earlier cases deciding similar issues had assumed facts or made conclusions to the contrary based on a limited or non-existent factual record.²⁸³ The district courts felt compelled, even after more complete factfinding, to reject the operational challenges posed.²⁸⁴ Both operational challenges were initially rejected despite the fact that heightened scrutiny of the factual record was required²⁸⁵ and despite the fact that the courts previously addressing the question of constitutionality had not sought to preclude reevaluation of the rule of law espoused in light of changing facts.²⁸⁶

Plaintiffs should prevail in an operational challenge when, as in *Hodgson* and *New Jersey Citizen Action*, the following factors are present: 1) the plaintiff has presented comprehensive evidence of the *real* effects of the law in operation; 2) the state defendant has failed to meet

²⁸⁰ See *New Jersey Citizen Action*, 797 F.2d at 1253; *Hodgson*, 648 F. Supp. at 759, 761-70. See generally *supra* notes 187-226 and accompanying text (discussing the relevance of factfinding to an operational review).

²⁸¹ See *New Jersey Citizen Action*, 797 F.2d at 1256; *Hodgson*, 648 F. Supp. at 775.

²⁸² See *supra* notes 227-48 and accompanying text.

²⁸³ See, e.g., *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91 (1983) (Powell, J., plurality) ("A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial."); see also *Pennsylvania Alliance for Jobs & Energy v. Council of the Borough of Munhall*, 743 F.2d 182, 187 (3d Cir. 1984) (noting the "well known" fact that "unregulated canvassing poses a risk of crime"); *supra* text accompanying notes 74-92 (discussing the assumed facts in *Bel-lotti II*, 443 U.S. 622 (1979), *H.L. v. Matheson*, 450 U.S. 398 (1981), *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Ashcroft*).

²⁸⁴ See *New Jersey Citizen Action*, 797 F.2d at 1253; *Hodgson*, 648 F. Supp. at 776-77. Of course, as noted above, the Court in *Hodgson* found alternative bases for enjoining Minnesota's law, see *Hodgson*, 648 F. Supp. at 773, 778-81, and the district court in *New Jersey Citizen Action* was reversed by the Third Circuit, see *New Jersey Citizen Action*, 797 F.2d at 1266. Had this not been so, plaintiffs in both cases would have been subjected to continuing violation of their constitutional rights either pending higher court review or indefinitely.

²⁸⁵ See *New Jersey Citizen Action*, 797 F.2d at 1256; *Hodgson*, 648 F. Supp. at 770.

²⁸⁶ See *infra* notes 295-321 and accompanying text.

its heightened burden of coming forward with evidence demonstrating that the law *in fact* achieves or even furthers any legitimate state interest; 3) there has been no previous operational challenge relying upon a comparable body of facts²⁸⁷ or, judicial examination of the factual record of the effect of the law in operation;²⁸⁸ 4) a fundamental right or other recognized basis for requiring courts to apply strict or elevated scrutiny to the record and to the state's claimed interests is involved; and, 5) there is a potential for irreparable violation of that right, even pending review by a higher court.

As illustrated in Part III, these factors are present in *Hodgson*,²⁸⁹ and they were present in many of the cases consolidated in *Brown v. Board of Education*.²⁹⁰ The lower courts in all of these cases should have been free to grant the relief compelled by the facts. In *Hodgson* and *Belton v. Gebhart*,²⁹¹ for example, the trial courts' findings of fact demonstrated that the true effects of a law in operation may be obscured by or unknowable based on the facial logic and subjective as-

²⁸⁷ Operational facts may also change and thus the result of an operational challenge is itself subject to relitigation and testing in the courts. The possibility of successive operational challenges after an initial examination of the facts assumed in facial precedent is, however, self-limiting. If, for example, plaintiffs were to mount a successful operational challenge to a law, there could be no subsequent challenge (at least in the same jurisdiction) until the legislature re-enacted a comparable statute similarly infringing upon fundamental rights. Re-enactment should not lead a court applying strict scrutiny to assume that facts have changed; the legislature may just be trying again! In subsequent litigation, plaintiffs should be able to obtain summary judgment invalidating the newly enacted law unless the state is able to convince the court that the facts have materially changed in ways not previously considered or known. Similarly, a previous operational challenge which was unsuccessful could not be relitigated or re-opened without being subject to summary dismissal unless plaintiff could meet a comparable burden of proof. In sum, any subsequent challenge would require a district court to determine whether assertedly new facts were in fact new and material under the appropriate standards. Cf. Uniform Post-Conviction Procedure Act § 1 (11 U.L.A. 485 (1968)) (providing a remedy to attack the validity of a criminal conviction if there exists "evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence in the interest of justice"); *supra* note 263 (discussing varying degrees of amenability to change and disproof of different categories of constitutional facts).

²⁸⁸ Thus, a prior facial challenge could not preclude an operational challenge because the facial challenge would, by definition, have failed to involve judicial scrutiny of the actual effects of the operation of the statute. See *supra* notes 189-96 and accompanying text.

²⁸⁹ See *supra* notes 93-142, 164-85 and accompanying text. These arguments also require the Supreme Court to reconsider its own assumed facts, such as those made in *Bellotti II*, 443 U.S. 622 (1979), *H.L. v. Matheson*, 450 U.S. 398 (1981), *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). See *supra* notes 74-92; see also *supra* note 65.

²⁹⁰ 347 U.S. 483 (1954); see *supra* notes 40-47 and accompanying text.

²⁹¹ 32 Del. Ch. 343, 87 A.2d 862 (Del. Ch.), *aff'd*, 33 Del. Ch. 144, 91 A.2d 137 (Del. 1952), *aff'd sub. nom.* *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

sumptions of courts.²⁹² Moreover, they illustrate the manifest injustice of permitting a factually unconstitutional law to remain in operation, for any length of time, in blind reliance on precedent established without the benefit of experience. As Oliver Wendell Holmes said: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."²⁹³

The factors enumerated above will not occur together often. When they do, however, even a lower court should be free to provide plaintiffs with relief from an ongoing violation of constitutional rights. No other result will protect fundamental rights from infringement, and the risk of error in this regard is appropriately placed on the defending governmental entity, either pending Supreme Court review, or indefinitely once review is denied.²⁹⁴

IV. IMPLICATIONS FOR CIVIL LIBERTIES AND FOR LITIGANTS

The position advanced in the preceding Section is not without troubling implications for civil liberties in general and for litigants seeking to vindicate constitutional rights in the courts. Recognition of the factual nature of questions such as "does the statute serve the state's asserted interest?" necessarily increases the burden of proving facts through discovery and trial on both parties.²⁹⁵ For a law upheld on its face to be held unconstitutional in operation requires a comprehensive presentation of facts gained from experience, expert testimony, and research. An operational challenge is thus substantially more resource-intensive than other sorts of constitutional litigation; this translates into money, time, and staff.

The potential for inconsistency and relitigation of apparently established constitutional principles is also troubling. The argument that lower courts may deviate from precedent in certain circumstances appears at once to permit successive challenges to laws that burden the exercise of fundamental rights as well as to precedential cases protecting such rights.

²⁹² The facts in *Belton* are discussed above. See *supra* notes 43-47 and accompanying text.

²⁹³ Holmes, *supra* note 8, at 469.

²⁹⁴ See *infra* note 319.

²⁹⁵ See *supra* note 219; *supra* notes 240-48 and accompanying text. Moreover, recognition of the factual component of questions routinely asked by courts applying heightened scrutiny could place a greater burden on litigants even in a facial challenge to a statute. For example, in some areas such as "overbreadth," the willingness of courts to assume facts pertinent to facial review has proven to be advantageous to litigants pressing constitutional claims, making it easier to prevail and easier to obtain summary judgment or preliminary injunctive relief. See *supra* notes 192-93.

It is of course clear that "the fundamental aspiration of judicial decisionmaking . . . [is the] application of neutral principles 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time'"²⁹⁶ The modification of legal rules based on changing facts jeopardizes ideals of Blackstonian constancy while subjecting hard won constitutional rights to continual attack and defense in the courts. For this reason, some commentators have criticized the Supreme Court for basing constitutional principles on the shifting sands of empirical knowledge. They have argued, for example, that the principle of equality espoused in *Brown v. Board of Education*²⁹⁷ neither was nor should have been grounded on social science or empirical study.²⁹⁸

Perhaps the most provocative question that can be asked is whether district courts, under the factors enumerated in Section D of Part III of this Article, would have been permitted to disregard *Brown* based on what they believed to be "new facts" developed in subsequent litigation. The answer to this question illustrates the limits of the operational challenge and, in particular, the limits of its potential for success in a lower court.

In *Brown*, the Supreme Court was asked to decide whether racial segregation in public schools deprived minority children of equal educational opportunity even in the presence of apparent factual equality in educational facilities. Years of experience with segregation, expert testimony,²⁹⁹ and social science,³⁰⁰ led the Court to conclude:

Segregation of white and colored children in public schools

²⁹⁶ *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (quoting A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 114 (1976)); see Wechsler, *supra* note 15, at 19 ("A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.").

²⁹⁷ 347 U.S. 483 (1954).

²⁹⁸ For example, Professor Edmund Cahn believed that *Brown* was not and should not be based on sociological data because "the constitutional rights of Negroes—or of other Americans—[should not] rest on any such flimsy foundation as some of the scientific demonstrations [contained] in . . . [the *Brown*] records." Cahn, *supra* note 22, at 157-58. Professor Cahn also expressed a fear of having "fundamental rights rise, fall, or change along with the latest fashions of psychological literature," *id.* at 167, and noted the "ominous" possibility that "constitutional safeguard[s] might be seriously restricted" if in future equal protection cases, the Supreme Court were to hold that *Brown* was a factual determination as opposed to a conclusion of law. *Id.* at 168. But see Ball, *Law and Social Scientists—Guiding the Guides*, 5 VILL. L. REV. 215, 220-21 (1959-60) ("In *Brown* . . . [t]he Court used sociological data as a means of proving its proposition that 'separate' could never be 'equal.' This, it seems to me, was most commendable and most desirable.").

²⁹⁹ See generally *Belton v. Gebhart*, 32 Del. Ch. 343, 87 A.2d 862 (Del. Ch.),

has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.³⁰¹

The Court thus held that the "doctrine of 'separate but equal' [had] no place" in the public education system and that "[s]eparate educational facilities [were] *inherently* unequal."³⁰²

Several years after the Supreme Court's decision in *Brown*, litigants in Georgia mounted what could be called an operational-style challenge to the principle of integration mandated by *Brown* in *Stell v. Savannah-Chatham County Board of Education*.³⁰³ In that case, the district court held that *Brown* could not have created a conclusive presumption of injury to black schoolchildren due to segregation because *Brown*, the court found, set forth only findings of fact, not conclusions of law, and thus the *Brown* decision had no binding authority over subsequent courts.³⁰⁴ After a lengthy evidentiary trial, the court stated

aff'd, 33 Del. Ch. 144, 160-61, 91 A.2d 137, 146 (Del. 1952) (discussing evidence produced by plaintiffs' expert witnesses), *aff'd sub. nom.* *Brown v. Board of Educ.*, 349 U.S. 294 (1955); R. KLUGER, *supra* note 22, at 439-50 (discussing the use of expert testimony in *Brown*).

³⁰⁰ See, e.g., *Brown*, 347 U.S. at 494-95 n.11 (listing social science sources in support of the Court's opinion).

³⁰¹ *Id.* at 494.

³⁰² *Id.* at 495 (emphasis added).

³⁰³ 220 F. Supp. 667 (S.D. Ga. 1963), *rev'd*, 333 F.2d 55 (5th Cir. 1964).

³⁰⁴ The court stated:

The binding effect of any decision is legally a problem of privity of party or precedent, of prior adjudication or estoppel. Under the principles of *res judicata* and *stare decisis* fall most of the rules which govern these concepts.

Since intervenors were not parties to nor members of any class represented by defendants in *Brown*, it follows that *Brown* does not bind them under the doctrine of *res judicata*.

While *res judicata* applies to decisions of both law and fact, *stare decisis* is applicable only on questions of law and related generally to all causes subsequently arising in the same or an inferior court. It applies as well to strangers as to privies. Under this principle therefore this Court is bound by the decision in *Brown v. Board of Education* to the extent that it states rules of law. It has no application to any determinations of fact in that case.

....

that the *Stell* expert testimony had a "somewhat stronger indicia of truth" on the question of injury due to segregation than the evidence examined in *Brown*.³⁰⁵ The court then concluded that, on the record before it, segregation had not been shown to cause harm to black schoolchildren and, therefore, held that Georgia's segregated school system was constitutional.³⁰⁶ Predictably, the district court was reversed on appeal.³⁰⁷

The question posed is whether the limiting principles enumerated in Section D of Part III³⁰⁸ were present in *Stell*, thus permitting the district court's decision to stand under the analysis set forth in Section C of Part III. A careful analysis of the circumstances reveals that they were not. *Stell* was indeed an operational-style challenge presenting facts and expert testimony regarding the operational or actual effects of segregated schools in Georgia.³⁰⁹ However, the precedent from which

The Court holds that the existence or non-existence of injury to white or black children from integrated or segregated schooling is a matter of fact for judicial inquiry and was so treated in *Brown*.

Stell, 220 F. Supp. at 676-78 (citations omitted).

³⁰⁵ *Id.* at 680.

³⁰⁶ The Court stated:

Plaintiffs' assumption of injury to Negro students by the continuance of segregated schools is not supported by any evidence in this case. Whatever psychological injury may be sustained by a Negro child out of his sense of rejection by white children is increased rather than abated by forced intermixture

. . . Each study presented to the Court, confirmed by the opinions of the witnesses showed that the damaging assumptions of inferiority increase whenever the child is brought into forced association with white children. The principal author of the studies relied on by the Supreme Court in the *Brown* case came to the conclusion that compulsory intermixture rather than racial separation in school was the principle source of damaging loss of race identification.

Id. at 684.

³⁰⁷ The court of appeals held as follows:

[N]o inferior federal court may refrain from acting as required by [*Brown*] even if such a court should conclude that the Supreme Court erred either as to its facts or as to the law

. . . We do not read the major premise of the decision of the Supreme Court [in *Brown*] as being limited to the facts of the cases there presented. We read it as proscribing segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal. This being our interpretation of the teaching of that decision, it follows that it would be entirely inappropriate for it to be rejected or obviated by this court.

Stell v. Savannah - Chatham County Bd. of Educ., 333 F.2d 55 61 (5th Cir. 1964).

³⁰⁸ See *supra* notes 287-88 and accompanying text.

³⁰⁹ Although operational in its factual record, *Stell* is distinguishable in one important respect: the court in *Stell* found constitutional what the Supreme Court had found unconstitutional instead of the reverse. As the following discussion will show, the

the court believed itself free was not a facial challenge. Likewise, the *Stell* court was not presented with new or previously unknown facts.³¹⁰ The *Brown* court was reviewing the factual record from five cases combined for review in light of the "full development and . . . present place [of public education] in American life throughout the Nation."³¹¹ In addition, "[a]s Thurgood Marshall sought to convince the Supreme Court to sweep aside the conniving legalisms of past decisions upholding Jim Crow law, he . . . [presented] a half-century evolution in the social sciences that declared segregation to be both a cause and a result of the victimization of black America."³¹² It can hardly be said, then, that *Brown* was based on assumed or speculative facts and that it should be accorded less precedential importance in the face of a subsequent operational challenge.³¹³ Moreover, the Supreme Court's conclusion that separate schools were "inherently unequal"³¹⁴ can be read as more akin to a rule of law³¹⁵ than a finding of legislative fact, thus precluding re-evaluation of the *Brown* result by a lower court based on findings of operational facts. This is precisely how the Fifth Circuit read *Brown* in reversing *Stell*.³¹⁶ Alternatively, it can be read as a legal

former is a much more difficult result to support.

³¹⁰ The *Stell* court was presented with expert testimony in simple disagreement with the expert testimony presented in *Brown*. See *Stell*, 220 F. Supp. 680 ("The Court . . . accepts the evidence given in the present case as having somewhat stronger indicia of truth than that on which the findings of potential injury were made in *Brown*"). It was not presented with either new methods of evaluating material facts or with a changed set of circumstances not presented to the *Brown* court. Thus, the third factor from Section D of Part III was not satisfied.

³¹¹ 347 U.S. at 492-93.

³¹² R. KLUGER, *supra* note 22, at 314.

³¹³ It is true that a district court may depart from fact-based precedential decisions in certain circumstances. However, it should not do so without a finding that facts have changed or were unavailable to the higher court. Disagreement with the conclusions of a prior court based on a like factual record does not meet this standard. See *supra* note 287.

³¹⁴ *Brown*, 347 U.S. at 495.

³¹⁵ See *Stell*, 333 F.2d at 61; *supra* notes 297-302 and accompanying text. It is recognized that all "rules of law" are, at some level of generality, informed by fact. See *supra* note 263. At a minimum, the constitutional requirement of a "case or controversy," see 1 TREATISE ON CONSTITUTIONAL LAW, *supra* note 2, § 2.13, guarantees that all federal court decisions will be grounded in the facts of specific cases. In addition, some rules of law are more fact-based than others and some facts are more susceptible to challenge than others. See *supra* note 263.

³¹⁶ The court stated:

We do not read the major premise of the decision of the Supreme Court in the first *Brown* case as being limited to the facts of the cases there presented. We read it as proscribing segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal.

Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55, 61 (5th Cir. 1964); see also Cahn, *supra* note 22, at 159 (arguing that the holding of *Brown* was not based on

directive that certain facts about harm due to segregation or the lack thereof would henceforth be immaterial to constitutional review of segregated school systems.³¹⁷

Finally, and in some sense most importantly, the district court's holding in *Stell* perpetuated ongoing violations of fundamental guarantees in the period pending appellate review.³¹⁸ The risk of district court error should be placed upon the governmental entity seeking to defend its practices and *not* on the litigants of claims of constitutional right.³¹⁹ Lower courts should be permitted only the latitude of departing from precedent on the basis of new facts where necessary to prevent harm of constitutional magnitude.³²⁰ When faced with the prospect of ongoing violation of fundamental rights, however, it is not only within their equitable discretion to so rule, it is their duty.³²¹

factual data, but on common sense notions "(1) that racial segregation under government auspices inevitably inflicts humiliation, and (2) that official humiliation of innocent, law abiding citizens is especially injurious and morally evil").

³¹⁷ This is essentially how the *Hodgson* district court attempted to read the Supreme Court's decision in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). See *supra* note 184.

³¹⁸ Thus, the fifth factor (potential for irreparable violation of the fundamental right) from Section D of Part III, *supra* notes 289-94 and accompanying text, was not present.

³¹⁹ Likewise, in the area of criminal law, the due process clause of the Constitution places the risk of loss on the state rather than the defendant by requiring that an offense be proven "beyond a reasonable doubt." See *In re Winship*, 397 U.S. 358, 364 (1970); *id.* at 371-72 (Harlan, J., concurring). Placing the risk of error on the alleged offender of constitutional rights ensures that error will never be at the expense of constitutional guarantees.

³²⁰ The concept of permitting special latitude where necessary to protect rights but not where the effect would be a retraction of rights is not new to the law. Cf. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (a state constitution may grant more expansive protection of rights than the federal constitution, but not less protection); *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) (Congress has the power to expand rights under the fourteenth amendment, but not to "restrict, abrogate, or dilute" those rights); Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 332 n.134 (1984) ("[T]he Court, like Congress, may in certain instances expand the scope of constitutional rights, but under no circumstances may either reduce those rights below the constitutionally required minimum."). See generally *supra* notes 231-48 and accompanying text.

³²¹ B. CARDOZO, *supra* note 4, at 112-133.

The social interest served by symmetry or certainty must . . . be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set upon their journey.

Id.

CONCLUSION

Rigid application of precedent to a new or changing reality unnecessarily restricts the evolution of constitutional principle. Such a fact-blind process of adjudication as much as guarantees that constitutional law will at times be entirely out of step with what is fair, right, or just.

For this reason, the protection of basic civil liberties requires recognition of the factual component of the standards governing judicial determinations of constitutionality. The answers to questions such as whether a statute burdens a fundamental right or serves an asserted state interest may at first be logically ascertained; upon examination of an operating law, however, such deductions may be established or disproved as a matter of fact.

Adherence to precedent should never preclude meaningful judicial review and relief. Speculation by a prior court that a law may in theory achieve a purported state interest, should for no amount of time be permitted to justify legislation in the presence of operational proof that a law has failed to accomplish even the most laudable of state goals. Thus, where laws such as those permitting segregated schools,³²² requiring parental notification for abortion,³²³ regulating door-to-door solicitation,³²⁴ or setting up procedural safeguards for the imposition of capital punishment³²⁵ are shown to fail in their intended goal, a court must be free to re-evaluate the assumptions and principles of prior cases and to enter the appropriate constitutional result. Just as the Supreme Court has itself recognized that precedent must "at times be re-examined,"³²⁶ so, too, lower courts should be free to fulfill their essential judicial duty.³²⁷

³²² See *supra* notes 40-47, 290-93, 300-303, 311-15 and accompanying text (discussing cases consolidated in *Brown*).

³²³ See *supra* notes 164-85 and accompanying text (discussing *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *petition for cert. before judgment in the Court of Appeals denied*, 107 S. Ct. 1333 (1987) (this petition attempted to consolidate the case with *Hartigan v. Zbaraz*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided court*, 56 U.S.L.W. (U.S. Dec. 14, 1987)), *aff'd*, 827 F.2d 1191 (8th Cir. Aug. 27, 1987) (amended for technical corrections Sept. 2, 1987), *vacated and reh'g granted*, Nos. 86-5423-MN/86-5431-MN, (8th Cir. Nov. 13, 1987) (rehearing held in abeyance pending Supreme Court decision in *Zbaraz*) (Minnesota)).

³²⁴ See *supra* notes 272-86 and accompanying text (discussing *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987)).

³²⁵ See *supra* notes 211-26 and accompanying text (discussing *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987)).

³²⁶ See *supra* note 271 (discussing decisions in which the Supreme Court has overruled itself).

³²⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169-71 (1803). In realist and post-realist times, the "ageless process of testing and retesting" of legal principle is,

Judicial cognizance of a changing world can indeed occur only at some expense to the uniformity and constancy of law. Lower courts may sometimes reach different results based on materially different factual records, and constitutional principles, once litigated, may periodically be defended or challenged anew. Although limits on lower court latitude can minimize the problem,³²⁸ the preservation and protection of the most fundamental of constitutional rights comes at no lesser cost. "Eternal vigilance is," it is said, "the price of liberty."³²⁹ Lower courts thus must be free to depart from precedent to declare operationally unconstitutional laws invalid.

quintessentially, the duty of the courts. See B. CARDOZO, *supra* note 4, at 129.

³²⁸ See *supra* notes 280-94 and accompanying text.

³²⁹ J. BARTLETT, *FAMILIAR QUOTATIONS* 397 n.8 (15th ed 1980) (paraphrased quotation of John Philpot Curran (1750-1817)).