Parents' Rights vs. Minors' Rights Regarding the Provision of Contraceptives to Teenagers

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I. INTRODUCTION

The provision of contraceptive information, products, and services to teenagers is the subject of an intense, growing controversy in the United States. For more than a decade, the public policy of the United States government has been to encourage sexually active teenagers to use contraceptives by providing a substantial amount of public funds

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to facilitate access by all teenagers to contraceptive information, services, and products. To promote the use of contraceptives by sexually active teenagers, Congress has adopted a policy of confidentiality whereby federally funded family planning clinics are supposed to encourage parental involvement, but which are required to guarantee confidentiality to teenagers who receive contraceptive services and products. This policy has provoked substantial controversy. Another alternative, a small-scale sex education grant scheme authorized by Congress in 1981 to fund family planning programs designed to encourage teenagers to abstain from premarital sex, also has been very controversial. More recently, the establishment in some public schools of "School-Based Clinics" to facilitate access by sexually active or potentially sexually active teenagers to contraceptives and contraceptive services has generated further controversy. The AIDS crisis appears to be the latest addition to the growing controversy about the provision of contraceptive information, services, and products to teen-

1. Weed, Curbing Births, Not Pregnancies, Wall St. J., Oct. 14, 1986, at 36, col. 4. ("In 1971 the annual national expenditure (federal, state and local money) for [family-planning] clinics was $11 million, and 300,000 of their clients were teenagers. By 1981, the numbers were $442 million and 1.5 million clients."). See also Olsen & Weed, Effects of Family-Planning Programs for Teenagers on Adolescent Birth and Pregnancy Rates, 20 Fam. PERSP. 153, 154 (1986)(between 1969 and 1980 the number of white teenagers receiving family planning services rose nearly 1,700 percent, and the number of black teenagers receiving family planning services rose nearly 300 percent).

2. See infra Part V (discussing "squeal rule" cases).


5. In 1988 it was reported that 138 school-based clinics were in operation in 30 states and in the District of Columbia (up from 14 in 1985), and that at least 65 more were being planned. Dryfoos, School-Based Clinics: Three Years of Experience, 20 Fam. Plan. Persp. 193 (1985). See also Comment, The Dissemination of Family Planning Services and Contraceptives in Public Schools, 8 J. Legal Med. 357, 588 (1987). See generally Glasow, School-Based Clinics Promote Abortion, in Window on the Future 121 (D. Andrusko ed. 1987); Kenney, School-Based Clinics: A National Report, 18 Fam. Plan. Persp. 44 (1986); Zabin, Hirsch, Smith, Streett & Hardy, Evaluation of Pregnancy Prevention Program for Urban Teenagers, 18 Fam. Plan. Persp. 119 (1986); Sex and Schools, TIME, Nov. 24, 1986, at 54; L.A. Times, Mar. 19, 1988, at II8, col. 1; L.A. Times, Jan. 29, 1988, at 122, col. 1.
agers as debate over the promotion of condom use (by teens and others) to prevent the spread of AIDS intensifies.6

The policy differences among the various participants in the debate about teenage access to contraceptives are clear. Both sides express alarm at the high and increasing incidence of teen pregnancy in America. Proponents of confidential teenager access to contraceptives see sex education and use of contraceptives as the logical, necessary remedies for the problem. Since parental notification or consent requirements deter teenagers' use of contraceptives,7 proponents oppose mandatory parental involvement requirements. Opponents view the liberal provision of contraceptives to minors as part of the cause of the problem and decry the subversion of parental authority and family integrity that confidential teenager access to contraceptives seems to entail.

Inevitably, the disputants have asserted their claims in court.8 Also inevitably, both sides claim that constitutional rights are involved. The issue is of such personal and social importance, and feelings about it are so strong that many people assume it must be a constitutional question. Many parents believe that the provision of contraceptive information, products, or services to their children infringes upon their constitutionally guaranteed rights to raise their children; yet many advocates of family planning programs argue that the Constitution protects the right of minors to obtain contraceptives confidentially without parental involvement.

A doctrine of constitutional law relates to the provision of contraceptives to minors—the doctrine of "privacy." However, the privacy decisions of the United States Supreme Court support certain claims of both parents' rights and minors' rights; on the issue of contraceptive


7. Nearly half of all the teenage contraceptive recipients reported that their parents did not know that they were obtaining contraceptives, including more than one-third of the girls age 15 or younger. Torres, Forrest & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 FAM. PLAN. PERSP. 284 (1980). Other studies have consistently confirmed that approximately one-half of all teens who seek birth control services do not tell their parents. See R. MNOOKIN, IN THE INTEREST OF CHILDREN 158 (1985)("over one-half" got secret abortions); Rosen, Benson & Stack, Help or Hinderance: Parental Impact on Pregnant Teenagers' Resolution Decisions, 31 FAM. REL. 271 (1982) (43 percent secret abortions). Nine out of 10 contraceptive providers do not require parental notification before providing contraceptives to 17-year-olds, and 80 percent of them do not even require parental notification if the teenager recipient is 15 years old or younger. Torres, Forrest & Eisman, supra.

8. See generally H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 309 (2d ed. 1988). See also R. MNOOKIN, supra note 7 ("over one-half" get secret abortions); Rosen, Benson & Stack, supra note 7.
access for minors, those competing privacy claims unavoidably con-

flict. Moreover, while many commentators have read the privacy deci-
sions very broadly to define large, generic "zones" of privacy, and

while occasional dicta in some judicial opinions invite such broad in-
terpretation, the actual holdings of the Supreme Court, and most of
the decisions of the lower courts as well, have been relatively narrow.
To date, the debate about the respective rights and roles of parents
and children regarding the provision of contraceptives to minors has

evaded "constitutionalization."  

This Article offers a framework for analyzing the extent to which
the policy dispute regarding the provision of contraceptives to minors
implicates the constitutional rights of parents and minors. Part II re-
views the conceptual context of the conflict between the legal rights of
parents and teenage minors. The cases supporting and arguments for
the parents' rights position are reviewed in Part III. In Part IV, the
cases supporting and arguments for the minors' rights position are re-
viewed. Recent decisions of the federal courts regarding the provision
of contraceptives to minors are examined in Part V. In Part VI, the
conceptual failings of privacy analysis to resolve the teenage-access-to-
contraceptives issues are examined and an alternative constitutional
analysis is proposed. The constitutional solution is systemic or proce-
dural; the Constitution affords a way to establish legislative policy, not
a substitute for it.

II. THE DILEMMA OF MINORITY IN LEGAL THEORY

Conceptually, the broad "dilemma of minority" which lies at the

heart of the controversy concerning the provision of contraceptives to
minors results from two factors. The first is a biological fact: All chil-
dren are born totally dependent and incompetent. They are incapably
of providing for themselves or of making responsible decisions for
many years. Over a period of time, however, they gradually become
independent and competent. By the time they have reached legal
"majority" (twenty-one years after birth at common law, and eighteen
years in most states today), most persons have become about as in-
dependent and rational as they are going to become. But the process
of maturation is very individualized—some persons achieve general in-
dependence and judgmental maturity while they are young adoles-
cents, while other persons remain dependent and show immature
judgment long after they legally become adults.

The other factor contributing to the dilemma of minority is that
our legal system is predicated on individual independence and compe-
tence as the moral basis for personal liberty and accountability. The
classic explanation of this premise was made by John Stewart Mill in
his treatise, *On Liberty*. After describing his general principle of "Liberty", Mill then qualified it by excluding minors:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. . . . Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.

Twenty years earlier, Jeremy Benthan had stated essentially the same thing:

> The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical power takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws . . .

Even earlier, in his summary of the common law of England, Blackstone endorsed essentially the same principle as "a principle of natural law" imposed by nature itself.

Thus, while children are "persons" in the eyes of the law from the moment of birth, their parents are considered to be their natural legal guardians, and Anglo-American law traditionally has adhered to a nearly irrebuttable presumption that parents have the legal right and duty to act for their children. The exceptions which have generally been recognized traditionally are specific and narrow. These exceptions include: (1) "emergencies"—when waiting for parental consent would cause immediate and irreparable harm to the child; (2) "emancipation"—when the parent and the child mutually agree by their actions that the child is no longer in need of parental support or direction; or (3) "extraordinary public policy"—when the requirement of parental consent might thwart a strong public policy (usually a health policy) designed to foster the best interests of children.

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10. "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." *Id.*
11. *Id.*
14. In recent years, the number of these "extraordinary public policies" has multiplied, and today there are numerous statutes authorizing specific exceptions to the general rule of parental guardianship (e.g., for drug treatment, pregnancy treatment, venereal disease treatment, abortion, and contraception use). See generally Brinig, *Noneconomic Consequences of the Parent-Child Relationship*, in II
Thus, the transition from dependence and incompetence to individual independence and competence creates the dilemma of minority and minors' rights and the law. Though the transition is a complex, highly individualized process, the law has created only two categories to deal with it: incompetence (minority) and competence (majority). Of course, the law could deal with the highly variable and individualized nature of the transition from incompetence to competence on a case-by-case basis. But this approach presents four problems. First, no clear consensus has established a standard or definition for determining maturity or legal competence. Second, even if an accepted standard or definition of maturity existed, no test is generally recognized for measuring maturity. Third, no consensus exists to solve the problem of who should decide the question. Families are obviously in the best position, but it is against families that the individual minors are asserting the claim of maturity and independence. Finally, the expense and burden that would be involved if a public agency were to make such a determination would render such an individualized process impractical, if not financially impossible, or at least would guarantee that it would be merely a token bureaucratic exercise. Thus, the law has historically taken a categorical approach—setting a specific age and following the general presumption that before that age all minors are incompetent, while after that age they are competent. Such age distinctions, however, are unavoidably arbitrary.

As Lord Denning once observed: "[T]he legal right of a parent to the custody of a child...is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of

15. For a discussion of the problems of indeterminacy in this and similar contexts, see Mnookin, Child Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. 226 (1975); Wald, supra note 12, at 268 n.55.

16. As Justice Powell noted:

[The] problem of determining 'maturity' makes clear why the State generally may resort to objective, though inevitably arbitrary, criteria such as age limits...for lifting some or all of the legal disabilities of minority. Not only is it difficult to define, let alone determine, maturity, but the fact that a minor may be very much of an adult in some respects does not mean that his or her need and opportunity for growth under parental guidance and discipline have ended.

Bellotti v. Baird, 443 U.S. 622, 644 n.23 (1979)(Powell, J., plurality opinion). The tremendous changes that have occurred in recent years in the field of mental health law further attest to the confusion that exists regarding the proper standard for measuring maturity and competence.


18. Dodson, supra note 14, at 117; Wald, supra note 12, at 267.
control and ends with little more than [a right to give] advice."

Thus, the legal role and status of children and families in society raise extremely perplexing questions. The claim that minors have a right to obtain and use contraceptives without parental knowledge or direction challenges some fundamental premises of our legal system. "Most legal and social policy is based on the beliefs that children lack the capacity to make decisions on their own and that parental control of children is needed to support a stable family system, which is crucial to the well-being of society."^20

Not surprisingly, no consistent, coherent legal theory has provided a framework of understanding for the rights of minors in transition between dependent childhood and independent adulthood.^21 When courts are forced to address questions involving claims of legal rights of minors, they respond by applying "largely ad hoc analysis."^22

III. THE CONSTITUTIONAL RIGHTS OF PARENTS

A. Parents' Rights in General

It would have been impossible to speak of the "constitutional rights" of parents to direct the upbringing and raising of their children prior to the twentieth century. The concept of the parent-child relationship was not generally perceived in legal terms until late in the nineteenth century, and the notion that the parent-child relationship involves constitutional rights is of an even more recent ideological evolution.^23 At the time the Constitution was drafted, and during most of the time since then, a different theory of "rights" prevailed.^24

This is not to say, however, that parent-child relations were without constitutional significance until this century. Though the Constitution of the United States does not explicitly mention parents' rights,

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^20. Wald, supra note 12, at 259 (footnotes omitted).
^23. See generally Horowitz, Children's Rights: A Look Backward and A Glance Ahead, in LEGAL RIGHTS OF CHILDREN 1, 3-4 (R. Horowitz & H. Davidson ed. 1984); infra note 66 and accompanying text.
^24. For instance, de Montesquieu emphasized the distinction between "manners" or "customs" on the one hand and "laws" on the other, and emphasized that matters of custom and manner were inappropriate subjects for legal regulation. II C. DE SECQNDAT (BARON DE MONTESQUIEU), THE SPIRIT OF LAWS 23:14 (T. Nugent transl. 1873). de Montesquieu was the most influential, most frequently quoted non-biblical writer in America during the period of 1760-1805, particularly during the decade of 1780 when the Constitution was being drafted and debated. Lutz, The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought, 78 AM. POL. SCI. REV. 189-97 (1984).
the "domestic habits" of the American people, including the tradition of parental authority and family integrity, were considered by the drafters of the Constitution necessary "preconditions" for maintaining the constitutional republic. The founders were convinced that public virtue was an essential prerequisite for a successful democratic government and that virtue was to be generated, nurtured, and fostered first in the homes of America.26 Alexis de Tocqueville emphasized that "the American derives from his own home that love of order which he afterward carries with him into public affairs."26 His contemporary, Francis Grund, likewise emphasized the political significance of the domestic habits in America.

I consider the domestic virtue of the Americans as the principal source of all their other qualities. . . . No government could be established on the same principle as that of the United States with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government.27

Thus, the Supreme Court in modern times has noted that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."28

The Supreme Court has long recognized that parents are entitled to very broad latitude in raising their children. More than sixty years ago, the Supreme Court of the United States in Meyer v. Nebraska29 held that the authority of parents to rear their children free of coercive state supervision is one of the unwritten "liberties" protected by the due process clause of the fourteenth amendment. In 1919, the Ne-

28. Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977). See Maynard v. Hill, 125 U.S. 190, 205 (1888) (Marriage creates "the most important relation in life, . . . having more to do with the morals and civilization of a people than any other institution."); Gaines v. Relf, 53 U.S. 472, 534 (1851) ("The great basis of human society throughout the civilized world is founded on marriages . . . ."); Sexton v. Wheaton, 21 U.S. 229, 239 (1823) ("[T]he sweetness of social intercourse, the harmony of society, the happiness of families, depend on that mutual partiality which they feel, or that delicate forbearance which they manifest towards each other."); See also Wisconsin v. Yoder, 406 U.S. 205, 223 (1972); Andrews v. Andrews, 188 U.S. 14, 30 (1903); Murphy v. Ramsey, 114 U.S. 15, 45 (1885); Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U.S. 457, 461 (1876).
29. 262 U.S. 990 (1923).
Nebraska Legislature enacted a law prohibiting any person from teaching subjects in any language other than English or from teaching any modern language other than English to students who had not passed the eighth grade. Meyer, a teacher in a school run by the Zion Evangelical Lutheran Congregation, was convicted of violating the law by teaching German (using Bible stories) to a ten-year-old boy who had not passed the eighth grade.  

The United States Supreme Court reversed the conviction. The opinion of the Court did not emphasize the rights that Meyer had as a teacher or private citizen to teach German. It instead focused on the rights of the parents to direct the education of their children and the protection Meyer enjoyed because he was acting as the agent of the parents. Justice McReynolds, writing for the Court, declared that "[w]ithout doubt" among the undefined liberties protected by the fourteenth amendment are the rights "to marry, establish a home and bring up children." Corresponding to this right of control, "it is the natural duty of the parent to give his children education suitable to their station in life." While Plato and others throughout history have advocated that the state rather than the parents should assume the responsibility of raising children, the Court concluded: "Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest" and it could not be doubted "that any Legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution."

Two years later, in Pierce v. Society of Sisters, the Supreme Court again underscored constitutional protection for parental rights when it affirmed the unconstitutionality of an Oregon law which required parents to send children between the ages of eight and sixteen to public school for instruction. A private military academy and a religious order which operated an orphanage and private school successfully challenged the law in federal court. Justice McReynolds, again writing for the Court, reemphasized the rights of parents as he vindicated the position of the private schools.

We think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those

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30. Today the fact that he taught from the Bible would be more disturbing to some.
32. Id. at 400.
33. Id. at 402.
34. 268 U.S. 510 (1925).
who nurture him and direct his destiny have the right, coupled with the high
duty, to recognize and prepare him for additional obligations.\textsuperscript{35}

The next major case was decided in 1944. In \textit{Prince v. Massachusetts},\textsuperscript{36} the Court extended great rhetorical respect for parental prerogatives in child rearing, but upheld the conviction under Massachusetts child labor laws of a woman who allowed her nine-
year-old niece to join her in selling religious tracts on public sidewalks. Justice Rutledge, writing for the Court, emphasized family privacy, stating:

It is cardinal with us that the custody, care and nurture of the child reside first
in the parents, whose primary function and freedom include preparation for
obligations the state can neither supply nor hinder. . . .

And it is in recognition of this that \textit{[Meyer and Pierce]} have respected the
private realm of family life which the state cannot enter.\textsuperscript{37}

"However," the Court added, "the family itself is not beyond regulation
in the public interest."\textsuperscript{38} Finding substantial risks of physical and
other harm to children from selling religious tracts on busy public
streets, the Court upheld the conviction.

In 1972 the Supreme Court reaffirmed the principle of parental
freedom from state compulsion when it decided matters involving the
education and religion of older adolescents in \textit{Wisconsin v. Yoder.}\textsuperscript{39}
Three Amish parents who refused to send their fourteen- and fifteen-
year-old children to school after they graduated from the eighth grade
were convicted of violating Wisconsin's compulsory education law,
which required parents to keep children in school until the age of sixteen.
Attendance at high school was contrary to Amish beliefs and to
the Amish way of life. The Wisconsin Supreme Court reversed the
convictions, holding that they violated the first amendment's guaran-
tee of freedom of religion.

The U.S. Supreme Court affirmed that the convictions were invalid,
emphasizing parents' rights as well as freedom of religion. Chief
Justice Burger, writing for the Court, explained:

There is no doubt as to the power of a State, having a high responsibility
for education of its citizens, to impose reasonable regulations for the control
and duration of basic education. . . . [Likewise,] the values of parental direction
of the religious upbringing and education of their children in their early and
formative years have a high place in our society. . . . Thus, a State's interest in
universal education, however highly we rank it, is not totally free from a bal-
ancing process when it impinges on fundamental rights and interests, such as
. . . the traditional interest of parents with respect to the religious upbringing
of their children so long as they, in the words of \textit{Pierce}, "prepare [them] for

\textsuperscript{35} Id. at 534-35.
\textsuperscript{36} 321 U.S. 158 (1944).
\textsuperscript{37} Id. at 168.
\textsuperscript{38} Id.
\textsuperscript{39} 406 U.S. 205 (1972).
additional obligations."

The Court found that the effect of two additional years of mandatory schooling would contravene the freedom of religion of both the Amish parents and their children "by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, ... at the crucial adolescent stage of development." After finding that the Amish were remarkably self-reliant, industrious, good citizens and that the effect of one or two additional years of education would not substantially further any legitimate state interest, the Court returned to parental prerogatives.

"This case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. . . . To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case [they do not]."

Likewise, in Moore v. City of East Cleveland, the Supreme Court held that zoning laws could not be written or applied in a way that prevented children and grandchildren from residing in the home of their mother and grandmother. The Court reversed the conviction of a woman for violating the housing ordinance of the City of East Cleveland. Writing for a plurality, Justice Powell stated:

A host of cases . . . have consistently acknowledged a "private realm of family life which the state cannot enter." . . . Of course, the family is not beyond regulation. . . . But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

The Supreme Court also has held that states may not deprive parents of their parental rights in judicial proceedings without observing substantial procedural protections. These include adherence to the "clear and convincing" standard of proof to terminate parental rights, providing a hearing before terminating the rights of a father who had lived with and raised his illegitimate child, and substantial jurisdictional basis for exercising custody jurisdiction.

40. Id. at 213-14 (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)).
41. Id. at 218.
42. Id. at 232, 233-34.
44. Id. at 499 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
B. Parents' Rights vs. Minors' Rights in General

The foregoing cases declared and protected the fundamental right of parents to make certain child-rearing decisions free from state restriction. However, each case only involved a parent versus state conflict. These cases could be read as establishing limits to governmental authority as readily as they could be read as constitutionally establishing the "rights" of parents generally. And while they can be read as supporting parents' rights over the rights of their minor children,48 these cases did not involve, nor did the Court decide, a parent versus child conflict.

Very few cases have come before the United States Supreme Court involving direct conflicts between the rights of parents to raise their children and the rights of children to be free of parental control. As a general rule, however, the Court has recognized parental authority even when it conflicts with the opposing desires of the children. For instance, in *Ginsberg v. New York*,49 the Supreme Court upheld the conviction of a magazine seller for violating a state statute prohibiting the sale of "girlie" magazines to minors under seventeen years of age, even though the magazines were not technically obscene and adults could buy them. While the legal dispute was between the police and a seller of sexually explicit magazines, obviously the minor purchasers wanted to buy the magazines without parental permission and presumably the parents were opposed. (If not, *they* could have purchased the magazine for their son.) The Court suggested the state could ban the sale because the state was, in a sense, acting as the agent of parents.

[C]onstitutional interpretation has consistently recognized that parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.50

The Court also acknowledged that adequate parental supervision cannot always be provided and that "[t]he state also has an independent interest in the well-being of its youth."51

Four years later, when the issue of the separate wishes of minors

48. The potential for conflict between parents and children has been present in most parents' rights cases. That is, the children in *Meyer* may not have wanted to learn German, the children in *Pierce* may not have wanted to attend public schools, and so forth. The fact that for half a century the Court never addressed the potential conflict underscores the pervasiveness of the assumption of parental prerogatives. See infra note 56 and accompanying text.

49. 390 U.S. 629 (1968).
50. *Id.* at 639.
51. *Id.* at 640.
was raised in *Wisconsin v. Yoder*, the Court brushed it aside as inconsequential. Justice Douglas, in a separate opinion, dissenting in part, argued that if the Amish youngsters wanted to go to school beyond the eighth grade and their parents were keeping them home against their will, the parents could be convicted of violating the compulsory school attendance law. While the majority did not think it necessary to decide that question, the Court clearly expressed its unwillingness to endorse the idea that children could be freed from parental direction in matters of education or religion.

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce v. Society of Sisters* . . . .

In 1979 the Supreme Court directly considered and unequivocally decided a case involving a clear conflict of parents' and minors' choices when it reversed a federal district court ruling that parents could not commit their children to state mental health facilities for treatment without an adversarial hearing before a formal tribunal. In *Parham v. J.R.*, the Court held that ordinary commitment procedures in which a doctor must approve the parental decision to commit the child are constitutionally sufficient. The Court underscored the general priority of parents' rights when it acknowledged that some minors may object to being committed by their parents for mental treatment and further admitted that such commitment could detrimentally stigmatize the children. Yet the Court affirmed parental rights in this clear and unavoidable clash of potential interests. Chief Justice Burger's opinion explained the Court's reasoning:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course . . . . Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children . . . .

> That some parents "may at times be acting against the interests of their

53. *Id.* at 231-32.
children"... creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.55

Addressing the argument that the earlier Supreme Court parents' rights decisions had involved state-parent conflicts only and not parent-child conflicts, the Parham court declared:

We cannot assume that the result in Meyer v. Nebraska, and Pierce v. Society of Sisters, would have been any different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.56

Justice Stewart's concurring opinion summarized the basic rule succinctly: "For centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it."57

Parental authority over minor children is not absolute, however. It is clear that children enjoy some substantive rights or interests which they may assert against their parents and over parental objection. Categorically the right or interest which children may assert against their parents is freedom from substantial and immediate risk to their lives or health.

In Prince v. Massachusetts58 the Court explained: "It is [in] the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."59 The Court went on to say: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."60

Subsequently, in Wisconsin v. Yoder61 the Court declared: "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."62 In Parham v. J.R.63

55. Id. at 602-03.
56. Id. at 603-04.
57. Id. at 621 (footnotes omitted).
59. Id. at 165.
60. Id. at 170.
62. Id. at 233-34. (Might not some people view parental refusal to allow a sexually
the Supreme Court noted that past decisions had frequently "recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." Therefore, minors do have a right to life and health which may be asserted by or for them against and over the opposition of their parents. But presumably the state could act to protect the life or health of a minor even if both she and her parents objected. These Supreme Court cases do not confer on minors a general right to choose (i.e., exercise judgment, preference, or free will) to behave contrary to parental supervision. Rather, they protect the minors' potential to become independent, mature, and competent enough to exercise judgment, choice, preference, and free will.

The only other significant limitation on the constitutional rights of parents to supervise their minor children has been in abortion cases. While conceptually these cases could provide the foundation for far-reaching reformulation of the balance between parents' and minors' constitutional rights because they involve the potentially expansive right of privacy, the Supreme Court has deliberately narrowed the holdings, treating the abortion decision as a unique exception to the general rule of parental authority.

IV. THE CONSTITUTIONAL RIGHTS OF MINORS

A. Minors' Rights in General

The notion that minors have constitutional rights is of even more recent vintage than the concept that parents have constitutional rights. "The idea of children having rights is, in many ways, a revolutionary one." Not until this century could it accurately be stated that children had personal legal rights, much less constitutional rights. Previously, they had been entitled to special state "protections" instead of "rights."

During the late 1960s and early 1970s the United States underwent a great movement to ease the restrictions upon, and increase the legal rights of, young Americans. Many young men were being drafted to fight in Vietnam and sentiment was widespread to extend to them and

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63. 442 U.S. 584, 603 (1979)(citation omitted).
64. See infra notes 111-13 and accompanying text.
65. Wald, supra note 12, at 256.
their peers the full privileges, as well as the burdens, of citizenship. At the same time, concern was growing over equality of women under the law. As a result, many restrictions upon minors, which traditionally had extended until age twenty-one for men, and in some states also for women, were altered. The modern era in which the Supreme Court has applied "constitutional rights" analysis to minors is generally said to have begun with the 1967 decision of the Supreme Court in *In re Gault*. And it was not until 1969 that the Supreme Court definitively declared that children (students) "are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect."

Nevertheless, whether conceptualized as "special protections or benefits" or "individual rights," American law has long recognized the "personhood" of minors, even if not in the full sense of being the subject of all the legal rights and duties of competent adults. Three separate categories of cases have addressed the subject of the "personhood" or "rights" of minors.

The first, and oldest, category of cases are those dealing with state discrimination against "illegitimate" children. The United States Supreme Court historically was more humane in protecting children born out of wedlock than was the common law. The modern period which recognized the legal personhood of children born out of wedlock began in 1968 when the Court decided *Levy v. Louisiana*, and its companion case, *Glona v. American Guarantee & Liability Insurance Co.* In *Levy* Justice Douglas declared: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within...

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67. For instance, the twenty-sixth amendment, which extended the right to vote to all persons age 18 and older, was submitted to the states for ratification in March 1971 and was ratified three months later by three-fourths of the states. G. GUN- THER, CONSTITUTIONAL LAW A-14 (11th ed. 1986).

68. See generally Horowitz, supra note 23; Wardle, Rethinking Marital Age Restrictions, 22 J. FAM. L. 1 (1983).


73. 391 U.S. 68 (1968).

74. 391 U.S. 73 (1968).
the meaning of the Equal Protection Clause of the Fourteenth Amendment." Since then the Court frequently has wrestled with the question of the constitutionality of laws providing disparate treatment for children born out of wedlock or for their parents.

The second category of cases involves school rules and disciplinary proceedings. For instance, in *West Virginia State Board of Education v. Barnette,* the Court invalidated a state statute which required all school children to salute the flag. The statute was challenged by Jehovah's Witnesses whose church doctrine holds flag saluting as idolatrous and violative of one of the Ten Commandments. The Court concluded: "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control." A decade later *Brown v. Board of Education* established black children's rights to be free from racial discrimination in public educational opportunities. Likewise, in *Tinker v. Des Moines School District,* the Court found that the first amendment rights of three public school students had been violated when they were summarily suspended for wearing black armbands to school to protest the Vietnam war. The Court declared: "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." In *Goss v. Lopez,* the Court held that students facing suspension from a state-run school are entitled to certain procedural protections such as prior notice and an opportunity for a hearing.

The third category of cases holds that children are entitled to basic procedural protections against deprivations of their life, liberty, and property by judicial or quasi-judicial state tribunals. "[T]here is noth-

77. 319 U.S. 624 (1943).
78. *Id.* at 642. Note, however, that in this case the Court did not specify whose "sphere of intellect and spirit" was protected by the first amendment. Because minor students were the direct objects of the flag salute law, it is obvious to assume that they were the persons the Court had in mind. But it is also possible that the Court was thinking of the parents and their liberty to raise their children and control their religious observances.
81. *Id.* at 511.
82. 419 U.S. 565 (1975).
ing about juvenile or minority status . . . that justifies a . . . failure to provide the most basic protective safeguards inherent in procedural due process.”

Thus, in 1967 the Supreme Court held in In re Gault that minors may not be deprived of basic procedural protections in juvenile court proceedings. Three years later, in In re Winship, the Court held that proof beyond a reasonable doubt is constitutionally required at the adjudicatory stage of delinquency proceedings. In Breed v. Jones, the Supreme Court held that it would violate the double jeopardy provision of the Constitution to transfer a child to a criminal court for prosecution after a juvenile court adjudicatory hearing.

However, minors do not always enjoy the same procedural or substantive rights as adults. For instance, in Ingraham v. Wright the Court held that common law restraints upon the infliction of “moderate correction” by means of corporal punishment in school are sufficient and more formal procedural protections such as notice and prior hearing are not necessary. In New Jersey v. T.L.O., the Court held that under the less rigorous standards in juvenile court delinquency proceedings, the probable cause requirements of the fourth amendment do not require exclusion of evidence taken by a school official from a student’s purse. Likewise, in Prince v. Massachusetts, the Court held that “[t]he state’s authority over children’s activities is broader than over like actions of adults.” While recognizing the right of a child to practice her religion, the Court justified the application of a child labor law to prevent a minor adherent of the Jehovah’s Witnesses from engaging in public proselyting activities (selling religious tracts), noting:

It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not

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84. 387 U.S. 1 (1967).
86. 421 U.S. 519 (1975).
89. Id. at 682.
93. Id. at 168.
affecting adults. ... What may be wholly permissible for adults therefore may
not be so for children, either with or without their parents' presence.

... We think that with reference to the public proclaiming of religion, upon
the street and in other similar public places, the power of the state to control
the conduct of children reaches beyond the scope of its authority over adults,
as is true in the case of other freedoms, and the rightful boundary of its power
has not been crossed in this case.94

In *Bethel School District No. 403 v. Fraser*,95 the Supreme Court
held that minors do not enjoy the same latitude of expression under
the first amendment as adults.96 Finally, in *Ginsberg v. New York*,
the Supreme Court suggested that if the state is acting as the agent of
the parents, it may have more authority to regulate and restrict the
actions of minors than it would otherwise have.97

Like the parents' rights cases, these minors' rights cases involved
"state versus individual" conflicts. They did not involve conflicts be-
tween parents and children. Thus, like the parents' rights cases, the
minors' rights cases tell us about the limits of state authority, not
about the rights of minors vis à vis their parents.

94. *Id.* at 169-70.
95. 478 U.S. 675 (1986).
96. *Id.* at 681-84 (upholding suspension of high school student for speech nominating
student body office candidate filled with offensive sexual innuendos). *See also*
Board of Educ. v. Pico, 457 U.S. 853 (1982)(interpreted as holding that "all mem-
ers of the court, otherwise sharply divided, acknowledged that the school board
has the authority to remove [from a school library] books that are vulgar." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)).
the Court limited the parental delegation doctrine. In *T.L.O.*, a teacher found a
14-year-old girl smoking in a restroom at school. The girl was taken to the prin-
cipal's office where she denied using cigarettes at all. Over her objections, her
purse was taken and searched by an assistant vice principal. In addition to ciga-
rettes, the purse contained a quantity of marihuana, a pipe, plastic bags, many one
dollar bills, a list of students who owed her money, and two incriminating letters.
This evidence was admitted in a juvenile court delinquency proceeding against
her. The New Jersey Supreme Court reversed her adjudication as a delinquent
because the search of her purse violated the fourth amendment. The United
States Supreme Court reversed and held that the probable cause requirements of
the fourth amendment do not apply as strictly to children at school as in other
contexts. The Court flatly rejected the school's sweeping argument that the
fourth amendment did not apply at all because the school officials were merely
acting as agents of parents.

[Public school officials do not merely exercise authority voluntarily con-
ferred on them by individual parents; rather, they act in furtherance of
publicly mandated educational and disciplinary policies. ... In carrying
out searches and other disciplinary functions pursuant to such policies,
school officials act as representatives of the State, not merely as surro-
gates for the parents, and they cannot claim the parents' immunity from
the strictures of the Fourth Amendment.]

B. Minors’ Abortion Privacy Rights

Despite general deference to parental authority in parent-child disputes, the Supreme Court in recent years has recognized the constitutional right of minors to make at least one specific, profoundly important decision over parental objection and against parental opposition—the abortion decision.

In *Roe v. Wade*, the Supreme Court held that the Constitution shelters an unwritten but fundamental right of privacy which is broad enough to encompass a woman’s decision to have an abortion. Applying strict scrutiny, the Court invalidated a Texas statute that prohibited all abortions except those necessary to save the life of the mother, indicating that all non-medically essential regulations of abortion, at least before viability, are unconstitutional. In a concluding footnote, the Court specifically reserved for another day the issue whether parental consent requirements were permissible.

Three years later, in *Planned Parenthood v. Danforth*, the Supreme Court answered that question when it struck down a Missouri statute that required unmarried minors to obtain parental consent before submitting to an abortion. The majority, per Justice Blackmun, reasoned:

> [T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. Recognizing that “the State has somewhat broader authority to regulate the activities of children than adults,” the Court rejected the asserted state justification for its “parental veto” statute. The Court did not believe the statute would strengthen the family unit by giving parents absolute power to overrule a decision made by a daughter and her doctor to have an abortion. “Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.”

Four justices refused to join in this opinion, and two others (Justices Stewart and Powell) who subscribed to the majority
opinion added their concurring opinions, emphasizing that the primary defect of the statute was "its imposition of an absolute limitation on the minor's right to obtain an abortion." 106

Three years later in Bellotti v. Baird, 107 the Supreme Court affirmed the judgment of a federal district court holding unconstitutional a Massachusetts statute which required a minor to seek parental consent for abortion and which provided that a state court could override a parent's refusal to consent to the abortion only if it found the abortion to be in the best interests of the minor. If the minor was mature, she would still be obligated to convince the state court that the abortion was in her best interest. While eight members of the Court agreed that the statute was invalid under the Danforth doctrine, a majority could not agree on the reasoning for this invalidity.

Justice Powell, writing for a plurality of four justices, carefully reviewed the Supreme Court precedents regarding minors' rights. He then identified 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." 108 The extension to minors of procedural protections, including special proceedings in juvenile courts, was based on the unique vulnerability of minors. 109

[T]he Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. 110

The deeply-rooted tradition of respect for parental authority also was underscored.

While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society..." 111

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal 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

106. Id. at 90.
108. Id. at 634.
109. Id.
110. Id. at 635.
But the uniqueness of the abortion dilemma necessitated that an exception be made to the general rule of parental control.

The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.

Thus, Justice Powell's plurality concluded that the Massachusetts statute was defective because it required all minors seeking abortions to try to obtain parental consent first.

Justice Stevens, writing for four other members of the Court, however, disagreed with this last point. The Stevens' plurality would not go so far as to say that parental notification could not be required. Rather, they reasoned that the Massachusetts statute was defective because it gave the state court judge "an absolute veto over the minor's decisions, based on his judgment of her best interests."

In 1981 the Supreme Court upheld a Utah statute requiring doctors to notify "if possible" the parents of minors seeking abortions. In *H.L. v. Matheson,* the Court repeated and endorsed Justice Powell's analysis in *Bellotti (II)* of the general constitutional validity of "parental notice and consent" requirements; underscored that the case at bar did not involve a "mature and emancipated" minor; and emphasized that mere notice, giving parents an opportunity to counsel their daughters and consult with their physicians, did not constitute a "veto" of the minor's abortion decision. The Court held that just because the "requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute." Justice Stevens added a concurring opinion specifically endorsing the requirement of parental notice even for "mature" minors.

Two years later, in *Planned Parenthood Association v. Ashcroft,* the Supreme Court upheld a Missouri statute requiring parental or

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111. *Id.* at 638-39 (citations omitted).
112. *Id.* at 642.
113. *Id.* at 647-48.
114. *Id.* at 654. Inasmuch as the ninth justice, Justice White, dissented, finding no constitutional impediment in the Massachusetts law, i.e., that the statute was not constitutionally defective because it required parental participation, that would appear to be the position endorsed by the majority of the Court. *Id.* at 656-57.
116. *Id.* at 411.
117. *Id.* at 413.
118. *Id.* at 425.
judicial consent for abortions performed on minors. For a plurality of two, Justice Powell wrote:

[T]he legal standards with respect to parental-consent requirements are not in dispute. . . . A State’s interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that “the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.”

Applying the general principle that “courts should construe a statute to avoid a danger of unconstitutionality,” Justice Powell concluded that the Missouri statute conformed to the constitutional standard. Three other Justices agreed that this provision was valid simply “because it imposes no undue burden on any right that a minor may have to undergo an abortion.”

In a companion case, City of Akron v. Akron Center for Reproductive Health, Inc., however, the Court clearly signalled that it was not yet ready to retreat from the position or reasoning of Planned Parenthood v. Danforth, though it was still committed to extending its logic. In Akron, the Court invalidated a city ordinance that required all minors aged fourteen or younger to obtain parental or judicial consent prior to obtaining an abortion. The majority, per Justice Blackmun, reasoned that the city could not presume that all minors under the age of fifteen were too immature to make an abortion decision or that abortion may never be in their best interest without parental approval.

In 1987 the Court faced another case dealing with the abortion rights of minors. Hartigan v. Zbaraz involved an Illinois statute which generally required a twenty-four hour delay between the actual or constructive notification of a parent of a minor’s decision to have an abortion and the performance of the abortion unless the parent agreed in writing to the abortion (or unless other exceptional circumstances existed). The purpose of the statute was to provide a minimum opportunity for actual parent-child consultation, which could be waived by the parent or in other exceptional circumstances. In Akron, the Supreme Court had held that general “waiting period” requirements were unconstitutional as applied to adult women seeking abortions. In H.L., however, the Court had upheld a requirement of parental no-

120. Id. at 490-91.
121. Id. at 493.
122. Id. at 505 (O’Connor, J., concurring in part joined by White, J., and Rehnquist, J.).
124. Justice O’Connor, writing for three dissents, disagreed. Id. at 468-70.
tification on the express understanding that it would facilitate parental consultation, which obviously may cause some delay.\textsuperscript{127} By a two-to-one vote, a Seventh Circuit appellate court in \textit{Hartigan} affirmed a district court judgment holding the Illinois law unconstitutional under \textit{Akron}.\textsuperscript{128} The United States Supreme Court affirmed without explanation by an equally divided vote.

Obviously, the cases dealing with minors' rights to abortions are very controversial and are subject to widely varying interpretations. It appears, however, that at least three tentative conclusions may be drawn. First, the minor's right to abortion privacy, which she may exercise against parental opposition, is substantially related to the uniqueness of the abortion decision, which involves an existing pregnancy and a relatively brief period of time in which an abortion may safely be performed. Second, all of the abortion cases involving minors have involved challenges to state laws restricting the pregnant minor. While some of the laws have assumed the form of mere regulations to support parental authority (like the Utah law upheld in \textit{H.L.}), most of them have been viewed by a majority of the Court in a different light—as thinly disguised direct attempts by the state to prevent a vulnerable group of individuals from exercising their valuable, but unpopular, right to choose to have an abortion. The importance of the "state delegation" language in \textit{Danforth} cannot be overstated: the Court deemed the parental consent statute to be an attempt by the state to veto minors' abortions by delegating unlawful authority to persons who might oppose the abortion—the parents. Finally, except in the case of "mature minors,"\textsuperscript{129} or when it actually would be harmful to the minor, parental participation in the abortion decision of a minor may constitutionally be required. The Court has strongly endorsed the principle of parental consultation to the extent it does not involve an absolute parental veto.\textsuperscript{130}

V. CASES CONSIDERING CONSTITUTIONAL CLAIMS ABOUT THE PROVISION OF CONTRACEPTIVES TO MINORS

A. Supreme Court Cases

In several cases the Supreme Court has recognized a right of adults to have access to contraceptives. In 1965 the Supreme Court invalidated a Connecticut law prohibiting the use of contraceptives by mar-


\textsuperscript{128} Hartigan v. Zbaraz, 763 F.2d 1532 (7th Cir. 1986), \textit{aff'd} 584 F. Supp. 1452 (N.D. Ill. 1984).

\textsuperscript{129} Interestingly, even Justice Powell, who championed the "mature minor" notion, admitted he was not sure how the term should be defined. See \textit{Bellotti v. Baird}, 443 U.S. 622, 643 n.23 (1979) (Powell, J., plurality opinion).

ried adults. In *Griswold v. Connecticut*, Justice Douglas, writing for the Court, explained that the law infringed upon a right of marital privacy which was found to emanate from the "penumbras" of certain specific guarantees of the Bill of Rights. The focus of the majority opinion was the need to protect the most "enduring," "sacred," and "noble" institution of society, the "intimate relation of husband and wife" from "destructive" and "repulsive" state intrusion. Four justices (including two dissenters) refused to endorse Justice Douglas' "penumbra" privacy analysis.

Seven years later in *Eisenstadt v. Baird*, the Court invalidated a Massachusetts law which made it a felony for anyone other than a registered doctor or pharmacist to dispense contraceptives, and which allowed doctors and pharmacists to distribute contraceptives only to married persons, except when necessary to prevent the spread of disease. A doctor convicted of violating the law when he gave a contraceptive to a young unmarried college woman successfully challenged the law. Without stating that single persons have any fundamental right to engage in nonmarital sexual activity or to use contraceptives, the Court held that the Massachusetts law violated the equal protection clause of the fourteenth amendment. Writing for the four-member majority, Justice Brennan rejected as unfounded and unproven the state's claim that the law deterred premarital or illicit sex and furthered public health interests of the state. He also declared:

> [W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Despite this language, the extent to which single adults have a constitutionally protected right of privacy to put contraceptives to their intended use—to engage in consensual, extramarital sexual relations—is "somewhat unclear." Prior to the Supreme Court's decision in *Bowers v. Hardwick*, several lower courts held that consensual sexual intercourse between unmarried persons was protected by the constitutional right of privacy. However, in *Bowers*

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132. *Id.* at 486.
133. *Id.* at 482.
134. *Id.* at 499 (Harlan, J., concurring); *id.* at 502 (White J., concurring); *id.* at 507 (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting).
136. *Id.* at 453.
137. 3 PRIVACY LAW AND PRACTICE ¶ 20.02[2], at 20-83 (G. Trubow ed. 1988) [hereinafter PRIVACY LAW].
the Supreme Court rejected a constitutional privacy-based challenge to a Georgia sodomy law, indicating that it was not receptive to an expansive reading of its substantive due process (privacy) precedents and emphasizing that those cases involved protection of basic relationships of family ("family, marriage or procreation")\textsuperscript{140} by means of social practices having "ancient roots."\textsuperscript{141} Bowers suggests that "privacy rights might not encompass private sexual intercourse between consenting unmarried persons."\textsuperscript{142} Nevertheless, the Eisenstadt ruling that state laws may not prohibit contraceptive sales to unmarried adults remains firmly embedded in current constitutional doctrine.\textsuperscript{143}

The Supreme Court has only once discussed a statute restricting the use of or access to contraceptives by minors. In 1977, the Supreme Court invalidated a New York statute making it a crime for anyone but a pharmacist to distribute contraceptives to persons sixteen or over; for anyone to advertise or display contraceptives; or for anyone to distribute contraceptives to minors under sixteen years of age. In Carey v. Population Services International,\textsuperscript{144} Justice Brennan, writing for a majority, found the prohibition against advertising and the restriction that only pharmacists distribute contraceptives to be unconstitutional under the plain principles of Griswold and Eisenstadt.\textsuperscript{145} But he could not muster a majority to support his analysis of the invalidity of the provision forbidding the sale of contraceptives to minors under sixteen years of age. Writing for only four members of the Court, Justice Brennan reasoned that "the right of privacy in connection with decisions relating to procreation extends to minors as

\begin{thebibliography}{9}
\bibitem{105} 105 S. Ct. 2841, 2844 (1986).
\bibitem{141} \textit{Id.}
\bibitem{142} \textit{See} Privacy LAW,\textit{ supra} note 137, at 20-85. \textit{See also} supra note 137 and accompanying text. Likewise, in Zablocki v. Redhail, 434 U.S. 374, 386 (1977), the majority justified its holding that a Wisconsin law restricting marriage by persons with unpaid child support obligations was unconstitutional because \textit{inter alia} the state allowed sexual relations legally to take place only within marriage. Wisconsin's fornication statute was cited with approval. \textit{Id.} at n.11. Truly, "[t]he right of privacy as a constitutional guarantee is at once ubiquitous and elusive. . . . Although courts and commentators agree on the moral and legal principles on which the right is based, they disagree on its definition and application." Privacy LAW,\textit{ supra} note 137 at \textsuperscript{19.01}.
\bibitem{144} 431 U.S. 678 (1977).
\bibitem{145} \textit{Id.} at 689-91.
\end{thebibliography}
well as adults.” He further rejected the idea that a state could adopt a policy imposing unwanted teenage pregnancy as a punishment for fornication. And since the state had conceded that “there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives,” he rejected the argument “that juvenile sexual activity will be deterred by making contraceptives more difficult to obtain.”

However, a majority of the Supreme Court refused to endorse either Justice Brennan’s analysis of this issue generally or his declaration that the constitutional rights of procreative privacy recognized by the Court in cases involving adults extend to minors also. Justices White and Stevens separately agreed that the prohibition against distribution of contraceptives was unconstitutional, emphasizing (with apparent reference to the state’s concession) that the state had failed to prove that the prohibition against distribution of contraceptives to minors deterred any minors from engaging in sexual relations. However, they explicitly rejected as “frivolous” the idea that minors had a constitutional right “to put contraceptives to their intended use.”

Justice Stevens also emphatically distinguished the abortion cases. Justice Powell likewise separately agreed that the law restricting sale of contraceptives to minors under sixteen was unconstitutional. He, like Justice Stevens, found the law to be defective because it would even prevent parents from distributing contraceptives to their own children. But Justice Powell strongly endorsed other state regulations, including parental consultation requirements.

Chief Justice Burger and Justice Rehnquist dissented, the latter filing an opinion unequivocally endorsing the propriety of state legislation designed to “discourage unmarried minors under sixteen from having promiscuous sexual intercourse with one another.”

The multiple opinions in Carey have spawned a kaleidoscope of theories and approaches, but no clear constitutional doctrine. In
the decade since Carey was decided, the Supreme Court has not considered further the question of minors' rights regarding the use of contraceptives. In 1981, however, the Court decided a related case that has some bearing upon the issue. In Michael M. v. Superior Court,157 the Court upheld a California "statutory rape" criminal law against an equal protection challenge alleging gender discrimination. The California law, like laws in many states, provided a criminal penalty for males, but not females, who violated the prohibition against sexual intercourse by males with underage girls. While the Court had no single opinion, a clear majority of the Justices explicitly expressed their belief that states constitutionally have the authority to prohibit and punish sexual intercourse among teenagers.158

B. Lower Court Cases

While a majority of the Supreme Court has never held that the Constitution protects the right of minors to obtain or to use contraceptives without parental involvement, the issue of parental notification of, or participation in, the provision of contraceptives to their minor children has been addressed by the lower federal courts in thirteen reported decisions since 1975.159 However, in eight of the thirteen decisions, the federal courts based their judgments exclusively on statutory grounds, ignoring the alleged constitutional issues.160 In two

158. Id. at 472 n.8 (Rehnquist, J., plurality opinion for four justices); id. at 497 (Stevens, J., dissenting opinion expressing "no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse."). The dissenting opinion of Justice Brennan, which was joined by Justices Marshall and White, however, noted that the prior decisions of the Court would not foreclose a challenge to such a statute. Id. at 491 n.5. Actually, even though Justice White joined Brennan's dissent, the carefully phrased Brennan footnote should not be read to suggest that Justice White would be prepared to hold that states constitutionally cannot prohibit sexual activity by teenagers; in Carey he emphatically suggested that such regulation would be permissible. Carey v. Population Servs. Int'l, 431 U.S. 684, 702, 703 (1977).
159. The issue also has arisen in some state courts. See, e.g., Doe v. Planned Parenthood Ass'n, 29 Utah 2d 356, 510 P.2d 75, appeal dismissed and cert. denied, 414 U.S. 805 (1973)(rejecting claim of teenager and her class that government-funded planning clinic must provide contraceptives to minors without parental notice or consent). The same statutes were involved in federal litigation later. See supra note 135 and accompanying text.
160. In addition to the four "squeal rule" cases described infra, notes 163-97, see Jane Doe's 1 Through 4 v. Utah Dep't of Health, 776 F.2d 253 (10th Cir. 1985)(affirming injunction against enforcement of Utah parental consent requirement as violative of Title X (public health service family planning)); Planned Parenthood Ass'n v. Dandoy, 635 F. Supp. 184 (D. Utah 1986)(holding Utah law requiring prior written consent of minor's parent or guardian before contraceptive services are provided to unmarried minors is violative of and is preempted by Title XIX (Medicaid)), aff'd, 810 F.2d 984 (10th Cir. 1987) (Utah parental consent requirement violates and is preempted by Title XIX (Medicaid)); Doe v. Picket, 480 F. Supp. 1218 (S.D.
other cases, the courts based their decisions on both statutory and constitutional grounds. In only three of the reported decisions did the lower federal courts base their judgments solely upon constitutional grounds. Most courts that have reached the privacy issue have approved of some parental involvement in the decision of whether to allow minors access to contraceptives. Most courts have distinguished parental consent requirements from parental notice requirements, usually indicating that mandatory parental notification is constitutionally permissible, while parental consent is not.

The most prominent parental notice cases involved the so-called “squeal rules” promulgated in January 1983 by the Department of Health and Human Services (DHHS). Those regulations required parental notification when prescription contraceptives were provided to minors by federally funded family planning clinics. Within two weeks the regulations were enjoined by two federal district courts for essentially the same reasons, and by the end of the year, both injunctions had been affirmed by two federal courts of appeals.

The decisions of the four federal courts in the “squeal rule” cases are typical of most federal court decisions that have addressed this issue because they were predicated solely on statutory grounds. All four courts held that the regulations were invalid because they were

W.Va. 1979)(holding West Virginia Department of Health policy of denying contraceptive services to minors who do not have parental consent violative of and preempted by Title X (family planning), Title IV-A (A.F.D.C.), Title XIX (Medicaid), and Title XX (family planning)).

161. See Planned Parenthood Ass’n v. Matheson, 582 F. Supp. 1001 (D. Utah 1983)(holding Utah law requiring parental notification before provision of contraceptives to minors inconsistent with and preempted by Title IV-A (AFDC), Title X (public health family planning), Title XIX (Medicaid), and also violative of minors’ rights of privacy); T.H. v. Jones, 425 F. Supp. 873 (D. Utah 1975)(holding Utah regulations requiring parental consent for the provision of contraceptives to minors violative of and preempted by federal law—Title IV-A (AFDC) and Title XIX (Medicaid)—as well as unconstitutionally infringing on the privacy of minors), aff’d on statutory grounds only, 425 U.S. 986 (1976).

162. See Doe v. Irwin, 428 F. Supp. 1198 (W.D. Mich. 1977)(holding that the distribution under color of state law of contraceptive devices to minors without parental knowledge or consent violates the constitutional rights of parents), vacated and remanded for reconsideration, 559 F.2d 1219 (6th Cir. 1977), judgment reentered and confirmed, 441 F. Supp. 1247 (W.D. Mich. 1977)(again concluding that the provision of contraceptives to minors without notification or consent of parents violates the constitutional rights of parents), rev’d, 615 F.2d 1162 (6th Cir. 1980)(holding that the voluntary provision to willing minors of contraceptives without parental notification does not violate any constitutional rights), cert. denied, 449 U.S. 829 (1980).


inconsistent with the congressional language and intent of Title X.165 The courts found that the language of the statute and its legislative history indicated that while Congress wanted minors to be encouraged to consult with their parents concerning contraceptives, it had rejected amendments to require parental notification.166

In both cases the courts found that the primary effect of the proposed “squeal rules” would be to deter adolescents from using family planning clinics and to increase significantly the incidence of teenage pregnancies, abortions, and births in America, thus frustrating the intent of the legislation.167 These factual findings rested upon the failure of the DHHS to factually support its position and upon “substantial statistical and medical documentation”168 provided by Planned Parenthood and state family planning agencies.169 Since the DHHS was only authorized to enact regulations consistent with congressional legislation, the “squeal rule” regulations were invalid. None of the four courts analyzed whether the parental notice requirement would violate any constitutional privacy rights of minors; the sole basis for the opinion and judgment in each case was congressional intent.

Lower federal courts twice have invalidated on constitutional grounds state statutes or regulations protecting parental participation when contraceptives are provided to minor children.170 Both cases were decided by the Utah District Court. But in both cases, the courts had already found the state statutes to be invalid because they were preempted by federal statutes or regulations. In one of these cases,

the court gratuitously opined that parental notification did not violate the constitutional privacy rights of minors.

In *T.H. v. Jones*, the three-judge federal district court held that a Utah welfare regulation requiring written parental consent before government-funded family planning agencies could distribute contraceptives to minors was preempted by federal law when applied to federal family planning programs. This holding was based on arguments similar to those used in the "squeal rule" cases reviewed above. The three-judge district court also found the Utah parental notification regulation to be unconstitutionally violative of the privacy rights of minors.

Reviewing the contraceptive and abortion decisions of the Supreme Court, as well as the decisions recognizing the entitlement of minors to certain constitutional protections against the state, the court was convinced that the Utah regulation affected conduct protected by the constitutional right of privacy. "More importantly," the court could perceive "no developmental differences between minors and adults that may affect the gravity of the right asserted by sexually active minors to family planning services and materials." The state's assertion of substantial interests in protecting minor females and in supporting parental authority within the family was rejected as un-compelling (less-than-substantial state interest) because the regulation only affected the access of indigent minors to contraceptives, because a teenager's decision to use contraceptives is not irrevocable, and because such a decision does not preclude continuing parental guidance. But the court also suggested that parental notification would not violate the right of privacy of minors. One of the mem-

172. *Id.* at 882.
173. *Id.* at 880-82.
174. *Id.* at 880.
175. *Id.* at 881.
176. *Id.* at 882.
177. [We hold that the state may not enforce the choice of parents in conflict with a minor's constitutional right of free access to birth control information and services. This is not to say, of course, that the state may not require notification to parents or guardians before minors receive such services.

*Id.* at 882. It may have been improper for the three-judge district court in *T.H.* to reach the constitutional issue. Previously, the same statute had been attacked by the same class in a state court, and the statute had been upheld against claims of privacy by the state's supreme court. *Id.* at 876 (citing *Doe v. Planned Parenthood Ass'n*, 29 Utah 2d 356, 510 P.2d 75 (1973), *appeal dismissed*, 414 U.S. 805 (1973)). Even if the privacy rights claim was not expressly raised in that case, the doctrine of claim preclusion would prevent the parties in the first case (and those in privity with them) from "splitting" his or their cause of action and challenging the same statute on another theory a little later.
bers of the three-judge panel strenuously dissented from the conclusion of the majority that even parental consent was unconstitutional. The Supreme Court subsequently affirmed the judgment solely on statutory grounds, explicitly declining to endorse the lower court's suggestions that mandatory parental consent prior to the provision of contraceptives to minors is unconstitutional.

Eight years later in Planned Parenthood Association v. Matheson, another federal district judge in Utah invalidated a Utah statute requiring parental notification before the provision of contraceptives to minors. On the basis of arguments and legislative history similar to that found persuasive in the "squeal rule" cases and in the T.H. decision, the district court found the Utah law to be superseded by the federal statutes and regulations favoring confidentiality. Additionally, reviewing the contraception and abortion decisions, the court rejected any distinction between parental notification and parental consent because, functionally, both had a chilling effect on teenage access to contraceptives. The court also rejected the distinction between abortion and contraceptive use by minors because both decisions were "among the most private and sensitive" a person could make, and because of the risk of harm (pregnancy) that faces the sexually active minor denied access to contraceptives.

Four lower court decisions indicate that mandatory parental notification would not violate the constitutional rights of a minor seeking contraceptives. In addition to the dicta of the three-judge district court in T.H. distinguishing parental notification from parental consent, a federal district court in Michigan twice upheld the claims of and granted relief to parents who urged that the practice of state and state-funded family planning clinics of distributing contraceptives to minors without parental notification or consent violated the fundamental constitutional rights of parents. On appeal, the Sixth Circuit held that the Constitution does not mandate or prohibit either parental notification or teenager confidentiality.

In March of 1977, the district court in Doe v. Irwin thoroughly considered the claim to privacy rights of minors as well as the interests of the state and the rights of parents, concluding that the failure of state family planning agencies to notify parents before providing contraceptives to minors unconstitutionally infringed parents' rights. The case involved a suit by parents whose minor, unemancipated

178. Id. at 882 (Anderson, J., dissenting).
181. Id. at 1004-07.
182. Id. at 1008 (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)).
183. Id. at 1008-09.
daughter was given without their knowledge or consent prescriptive and nonprescriptive contraceptives by a state-funded, county-administered family planning clinic. The parents sought a declaratory judgment that the clinic policy of distributing contraceptives to minors without parental notification or consent violated the constitutional rights of the parents. They also sought an injunction against enforcement of the policy. The district court concluded that “parents have a constitutionally protected right to participate in the very important decisions of their minor, unemancipated children as to whether or not to initiate sexual activity or to undertake the substantial medical risks of certain contraceptives.” The district court considered the center's practice of not notifying parents to be tantamount to “totally excluding the parents of the child from . . . a momentous decision.” Accordingly, it granted the relief sought by the parents.

After the Supreme Court decided Carey, the United States Court of Appeals for the Sixth Circuit vacated and remanded Irwin for reconsideration in light of Carey. A few months later, the district court rendered another opinion reaffirming and readopting the earlier order and opinion and reemphasizing that the constitutional rights of privacy of parents prohibited state actors from providing contraceptives to minors without parental notification.

Reviewing the Supreme Court decisions protecting parental authority, the court emphasized that the right of parents to be notified prior to the provision of contraceptives to their minor children by a state agency lay “at the heart of our nation’s traditions and collective conscience . . . [and our] fundamental rights protected by the First, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution.” The fact that the state-supported family planning clinic “surreptitiously interacts with the child and secretly provides the child with prescriptive, potentially hazardous, contraceptives, has the practical result of restricting parents' alternatives both in the exercise of authority in their own households and of responsibility to direct the rearing of their children.” The denial of notification to parents deprived them of the opportunity to relate general moral teachings they may have given their children to particular situations which the children may be personally facing.

The court distinguished protective or procedural constitutional rights which have been extended to minors from “choice” rights
which have largely not been extended to minors. Carey was distinguished because the statute in that case prohibited any distribution of non-prescriptive, non-hazardous contraceptives to any minors, even by their own parents, whereas in Irwin, parents were seeking to vindicate their rights against the interference of a state agency.\(^ {192} \)

In 1980, a unanimous panel of the Court of Appeals for the Sixth Circuit reversed the district court decision in Irwin in a concise and decisive opinion.\(^ {193} \) The court acknowledged that parents have a constitutional right to raise their children, including the right to inculcate moral values. The court further noted that while the Supreme Court had not indicated whether parental notification regarding the provision of contraceptives was constitutionally permissible, at least one other district court, in addition to the court below, had concluded that it was allowable.\(^ {194} \) But the key to the disposition of the case at bar was the absence of state compulsion. In Meyer, Pierce, Yoder, and Prince, the states actually had required or prohibited certain conduct. But in Irwin Michigan had imposed no compulsory requirements or prohibitions; parents in Michigan “remain[ed] free to exercise their traditional care, custody and control over their unemancipated children.”\(^ {195} \) The court noted:

There was no evidence that parents are excluded from any decisions or supplanted by the activities of the [state-funded family planning clinic]. The uncontradicted evidence was that personnel of the Center encourage minors to involve their parents in their decisions concerning sexual activity and birth control, and even offer to help bring the parents into discussions of these subjects.\(^ {196} \)

The court of appeals emphasized that the question was not whether a state could require or prohibit parental notification, the state in this case did neither. “Rather, it is whether the Constitution requires such a condition. . . . [I]t is clearly a matter for the state to determine whether such a requirement is necessary or desirable . . . . There is no basis for a federal court to impose conditions in the absence of an overriding constitutional requirement.”\(^ {197} \)

Thus, to date neither the advocates of parental rights nor the advocates of minors’ rights have been very successful in persuading courts that the controversy regarding parental involvement in the provision of contraceptives to minors is primarily a constitutional issue. The Supreme Court has summarily rebuffed a lower court holding that minors have a constitutional right to confidential access to contracept-

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192. Id. at 1237-60.
194. Id at 1167-68 (referring to the T.H. decision discussed supra notes 171-78 and accompanying text).
195. Id. at 1168.
196. Id. at 1168 n.2.
197. Id. at 1169.
tives; the Sixth Circuit has rejected the claim that parents always have a constitutional right to participate; and most cases have been decided on statutory, not constitutional, grounds.

VI. CONSTITUTIONAL SYSTEM VS. CONSTITUTIONAL RIGHTS

A. The Limitations of Parents’ Rights and Minors’ Rights Analysis

Even accepting reasonable extensions of the parents’ rights and minors’ rights cases, it is difficult to conclude that the policy dispute regarding parental involvement when contraceptives are provided to children generally is or should be controlled by either of the constitutional privacy doctrines. Comparing the two doctrines and balancing them against each other in the abstract, it is apparent the parental rights doctrine is the more fully developed in terms of both case precedents and legal and social history and would be given priority in any general comparative discussion of relative rights. But that is of little practical analytical benefit; what matters is not abstract analysis but specific application of precise aspects of these broad doctrines to the concrete facts of the particular case.

Parental rights advocates are undoubtedly correct in their assertion that the provision of contraceptive instruction, products, or services to a minor is precisely the kind of a decision that comes within the constitutionally protected right of parents to supervise. It is fraught with enormous moral, religious, health, and educational significance. And it is the kind of practical and personal decision for which immediate and personal parental direction is especially appropriate during “the crucial adolescent stage of development,”198 and for which the past teaching of abstract principles alone may not provide sufficient guidance.199

The primary flaw with application of “parental rights” analysis to resolve disputes regarding the provision of contraceptive services to minors is that the Constitution only secures rights of individuals against government intrusion. The Constitution secures few, if any, rights against private invasion.200 Just as constitutional rights of free speech are not infringed by purely private heckling, the constitutional rights of parents are not violated by purely private acts of private parties.

200. Arguably, the thirteenth amendment (abolition of slavery) and the eighteenth amendment (prohibition of manufacture, sale, or commerce of intoxicating liquors) could reach even private conduct. But the eighteenth amendment was repealed, and the thirteenth amendment has had very little adjudicatory history. As for state constitutional responsibility for privately inflicted injuries, see DeShaney v. Winnebago County Dept. of Soc. Servs., 109 S. Ct. 998 (1989).
Moreover, even when the state is involved in the provision of contraceptives to minors, the manner and degree of state involvement is of enormous significance to the constitutional analysis. If the state requires or prohibits the provision of contraceptive instruction, service, or products to minors, infringement of the constitutional protection of parental authority is direct and unavoidable. Then, the state action could be sustained only if it substantially furthered a significant state interest.

With respect to the mandatory secret provision of contraceptives to minors, it is unlikely that the state could identify any sufficiently important state interest that would be so directly threatened by parental involvement or that could not be secured by some other means while accommodating parental concerns. Thus, for example, it is generally established that mandatory public school sex education programs or requirements must excuse students whose parents request that their children not be exposed to that type of teaching or material. One commentator noted:

Although the state has legitimate interests in preparing youth for citizenship, for a vocation, and for a satisfactory personal life, the potential for indoctrination of children in the public schools in values which conflict with those of their parents necessitates limitations on the power of the state to require instruction. Such potential indoctrination conflicts with the First Amendment's protection of freedom of speech, its implicit protection of freedom of thought and the "marketplace of ideas," and the general principle that our government is a government by consent of the governed. To avoid possible indoctrinative effects, parents must have a constitutionally protected right to excuse their children from instruction which conflicts with the parents' values.

Likewise, a state prohibition of parental participation in the provision of contraceptives to minors would be unconstitutional. A critical defect of the New York statute struck down in Carey was that it prohibited even parents from distributing contraceptives to their minor children. Thus, it clearly violated parental rights as well as arguably violated the privacy rights of minors.

On the other hand, if minors' participation in a state program is actually nonmandatory (as a practical, realistic matter, considering the situation and circumstances, and not merely "formally volun-


The constitutional rights of parents may not be infringed. The Constitution does not guarantee that parents can raise their children free from all competing teachers, influences, and world views. Nor does constitutional protection for parental rights prevent the state from taking a position or expressing a policy on a controversial subject. The state could balance the competing privacy interests of parents and minors and support one or the other in a constitutional manner.

"Minors' rights" privacy analysis of the issue of teenager access to contraceptives is clearly the overwhelming favorite of law review writers. Nevertheless, advocates of minors' rights analysis encounter the same initial problem as advocates of parents' rights: the Constitution only guarantees individual rights against state infringement. It does not guarantee that minors can be free from parental control; parents are, after all, private parties.

Even when state involvement is present, the type and manner of that involvement is critical. For instance, a profound difference exists between a state law prohibiting the provision of contraceptive instruction, products, or services to minors and a law requiring parental consent. The former involves state action directly restricting the arguable...

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203. The "voluntariness" of programs that promote or provide contraceptives at public schools may require careful evaluation.

The atmosphere of the public school intensifies the coercion of its teaching. As Dean Yudorf has said: "In some ways, public schools are a communications theorist's dream: the audience is captive and immature; ... the messages are labeled as educational (and not as advertising) ... and a system of rewards and punishments is available to reinforce the messages."

Dent, supra note 202, at 892.

204. In City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), the Court did strike down the city ordinance requiring disclosure of an official policy against abortion to women seeking an abortion. Id. at 444. See also Thornburg v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986). The Court interpreted the Constitution as prohibiting the state from adopting a theory of when life begins. Id. Because this is a privacy decision, advocates of parents' or minors' rights might rely on it to argue that the state may not even take a position regarding contraception. However, Akron can be distinguished because that case involved the right of abortion privacy, and the Court's decisions in the abortion cases have been sui generis because abortion is a unique controversy and procedure. Moreover, the unique "logic" of this Akron ruling has not been applied in any other contexts by the Court.

constitutional interest of minors. The latter merely balances competing private interests and defers to the "natural guardians"—a balanced procedural, not substantive, approach; it is a recognition of priority among competing private interests, not a creation or delegation of state power.206

Another problem that advocates of minors' rights encounter is that the Court explicitly and repeatedly has declined to rule that unmarried minors have a constitutional right to put contraceptives to their intended use. Indeed, a majority of the Court consistently has indicated that states constitutionally may prohibit sexual intercourse by unmarried minors. Even if minors have a constitutional right to use contraceptive instruction and materials, it is not the kind of right which cannot be postponed. On this basis the abortion decision may be distinguished from the contraceptive decision (just as the marriage decision can be postponed until majority, contraceptive use also can be postponed).207 If the minor chooses to engage in sexual intercourse anyway, that decision cannot be attributed to or blamed on the state.

Moreover, from the perspective of general constitutional theory, the argument that minors have an unwritten, fundamental right of access to or use of contraceptives is very tenuous. The Court has generally followed two tests for determining what "unwritten liberties" are protected by the due process clauses of the Constitution. One is that the asserted right is "implicit in the concept of ordered liberty,"208 or "essential to the orderly pursuit of happiness by free men,"209 or "basic in our system of jurisprudence."210 The other test for determining unwritten fundamental rights is that the alleged right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"211 or determined by a "balance struck by this country, having regard . . . [for] what history teaches are the traditions from which it developed as well as the traditions from which it

206. A state requirement of parental consent for an activity may represent an effort to enforce a state policy by delegating state enforcement authority to the parent. In Planned Parenthood the Court evaluated the Missouri parental consent to abortion statute from this perspective. See supra note 103 and accompanying text. But parental consent requirements also may represent a state recognition of parents' own private interests in the matter and a decision to defer to and support the parents' interests. See supra note 97 and accompanying text; supra note 110 and accompanying text. If the parental consent requirement is justified to protect the parental interest, it would be valid even if it could not be justified to protect (as a delegation of) the state interest.


broke,”212 or “respect for the teachings of history, [and] solid recognition of the basic values that underlie our society.”213 Confidential access by unmarried minors to contraceptive instructions or products is neither essential to the preservation of our democratic republic nor deeply rooted in the basic values or traditional practices of our nation’s history.214

Finally, advocates of minors’ rights analysis encounter significant empirical difficulties in their effort to establish that use of contraceptives by minors is essential to achieving the laudable public interest they assert—reduction of teenage pregnancy. The logic of their argument is direct and obvious: contraceptives are designed to prevent pregnancy when sexual intercourse occurs; therefore, it seems that individual teenagers would be less likely to become pregnant while using contraceptives than while not using them. In addition, minors are more likely to use contraceptives if parental involvement is not required.215

This simple logic ignores the more complex reality on an individual

214. Six points probably will ultimately prove to be essential to the constitutional doctrine of minors’ privacy rights regarding contraceptives:
1. Regardless of whether minors have a constitutional right to engage in sexual activity, some of them are going to do so, and the Court will assess the reasonableness of any restriction as against this group of teens.
2. The Court is very concerned about the injuries (unintended pregnancies) these teens will incur if denied access to contraceptives. Justice Stevens compared denying teens the use of contraceptives to denying them the use of motorcycle helmets. “One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.” Carey v. Population Servs. Int’l, 431 U.S. 678, 715 (1977) (Stevens, J.).
3. Development of empirical data strongly supporting the relationship between increased teenage pregnancy and access of teens to contraceptives is imperative for opponents of confidential access by teenagers to contraceptives. Without such data it will be difficult to distinguish Carey. So critical is such quantitative proof that it was mentioned in that case in three separate opinions. Id. at 685 (Brennan, J.); id. at 702 (White, J., concurring); id. at 715 (Stevens, J., concurring).
4. The test for determining whether a law restricting the sexual privacy rights of teenagers is constitutional “is apparently less rigorous than the ‘compelling state interest’ test applied to restrictions on the privacy rights of adults.” Even Justice Brennan so acknowledged. Id. at 693 n.15 (Brennan, J.).
5. There may be greater constitutional protection for the privacy of a pregnant teen seeking an abortion than for an unpregnant teen seeking to use contraceptives. “The options available to the already pregnant minor are fundamentally different from those available to nonpregnant minors.” Id. at 713 (Stevens, J., concurring).
6. Parental notice and consultation is much more likely to be upheld than broad parental consent requirements. Some Belotti-type alternatives to parental consent may be deemed necessary for the same practical reasons Justices Powell and Stevens alluded to in Belotti.
215. See supra note 167 and accompanying text.
as well as social-system level. Individually, it assumes regular, proper use of contraceptives by minors, an assumption that is demonstrably unrealistic.\textsuperscript{216} To the extent that availability of contraceptives encourages the incidence of sexual activity by individual teenagers who are not consistent in using contraceptives or who do not use them properly, thus increasing the likelihood for contraceptive failure, the provision of contraceptives may increase the risk of pregnancy by creating a false sense of security. More importantly, however, even if the argument for reduced risk of pregnancy is valid for some individual teenagers, it ignores the group or sociological effect on teenagers as a whole caused by promoting or providing contraceptives. Making contraceptive instruction or products available to all minors generally conveys a message about social expectations and the parameters for acceptable behavior. It also generates peer pressures to use them, at a time that they are very susceptible to peer pressure, and that appears to increase the incidence of sexual activity, pregnancy, and abortion by teenagers.

The possibility that providing contraceptives to teenagers might actually lead to more, not fewer, teenage pregnancies has received substantial attention recently. The compelling statistical studies by Stan Weed and Joseph Olsen have demonstrated, at least, that teen-directed family planning programs have been ineffective in reducing teenage pregnancy and abortion.\textsuperscript{217} Their data strongly suggest that the provision of contraceptives to teenagers is directly and powerfully associated with increases in both pregnancies and abortions among teenagers.\textsuperscript{218}

\textsuperscript{216} "Studies indicate that teenagers are poor contraceptors . . . . When teenagers do use any method of birth control it is often sporadic and ineffectual." Averbach, Nathan, O'Hale & Benedicto, \textit{Impact of Ethnicity}, \textit{23} Society 35 (1985).

\textsuperscript{217} See Olsen & Weed, \textit{supra} note 1; Weed & Olsen, \textit{Effects of Family-Planning Programs on Teenage Pregnancy—Replication and Extension}, \textit{20} Fam. Persp. 173 (1985); Weed, \textit{supra} note 1, at 36, col. 4. Access to family planning services increased the incidence of teenage pregnancy, but modestly lowered the rate of childbirth by significantly increasing the rate of teenage abortion. \textit{Id.}

\textsuperscript{218} Olsen and Weed's initial analysis of 1978 birth and pregnancy rates showed that rather than the family planners' predicted 200 to 300 fewer pregnancies for every 1,000 teenagers involved in family planning programs, there was an increase of about 120 pregnancies for every 1,000 teenage family planning clients. Olsen & Weed, \textit{supra} note 1, at 160, 161. Instead of the predicted reduction of over 150 teenage abortions per 1,000 teenagers receiving family planning services, the number of abortions increased by nearly that number. Weed, \textit{supra} note 1, at 36, col. 4. The number of births to teenagers did drop (apparently due to the increase in abortions) about 20 fewer births per 1,000 teenage family planning clients. Olsen & Weed, \textit{supra} note 1, at 160. The authors' replication study for 1980, and for other time periods, confirmed the strong statistical associations between provision of family planning services to teenagers and increases in teen pregnancy and abortion rates. Weed & Olsen, \textit{supra} note 217, at 183, 184, 190. See Moore, \textit{Teenage Childbearing: Unresolved Issues in the Research/Policy Debate}, \textit{22} Fam.
Even advocates of the confidential provision of contraceptives to minors have acknowledged a potential problem. The authors of one article in *Family Planning Perspectives* admitted that “prior exposure to a sex education course is positively and significantly associated with the initiation of sexual activity at ages fifteen and sixteen.” These authors also noted: “Adolescent women who have previously taken a sex education course are somewhat more likely than those who have not to initiate sexual activity at ages 15 and 16 (though they are no more likely to do so at ages 17 and 18).” Even before the Weed and Olsen studies were published, the authors of the highly publicized National Research Council study, *Risking the Future*, acknowledged a cause for concern and further investigation. Thus, the “nexus” between laudable social ends of preventing teen pregnancy and the means of providing general access by teens to contraceptive instruction and products is tenuous.

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220. Marsiglio & Mott, supra note 219, at 158.

221. Critics of family planning programs suggest that the availability of contraceptive service has caused higher rates of sexual activity, unintended pregnancy, abortion, and births to unmarried teenagers. Indeed the period of significant increase in teenage sexual activity during the 1970s was paralleled by significant growth of the availability of contraceptive services for both adult women and adolescents. However, whether there is a causal connection or whether both trends were responses to the same changing social context and mores is unclear. Using data for California, Kasun (1982) concluded that increased spending on contraceptive services led to increased levels of sexual activity and, as a result, increased pregnancies, abortions, and births outside marriage. However, as Hofferth (Vol. II: ch. 9) points out, associations do not show causation, and Kasun (1982) did not control for initial differences between California and the rest of the United States.

In contrast, Moore and Caldwell (1977) found no association between the availability of family planning services and the probability that an adolescent girl would initiate sexual intercourse, net of other factors (age, socioeconomic status, family structure, urban/rural residence, religiousness, birth cohort). However, as Hofferth (Vol. II: ch. 9) concludes, more research is needed on this issue.

222. A majority of the Supreme Court has indicated that prevention of teenage pregnancy out of wedlock is of compelling state interest. Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 470-73; id. at 490 (Brennan, J., Marshall, J., and White, J., dissenting); id. at 497 (Stevens, J., dissenting).
B. A Constitutional Solution That Does Not Depend Upon Privacy Analysis

The United States Constitution protects certain fundamental rights that are not spelled out in detail in the text of the Constitution or its amendments. A constitutional right of privacy protecting certain specific acts, decisions, and certain basic relationships and choices has long been recognized, even though the term "privacy" and many of those acts or relationships are not described specifically anywhere in the text of the Constitution or its amendments. The privacy doctrine or some equivalent constitutional doctrine protecting "unwritten" fundamental rights unquestionably is necessary to maintain as operative and viable today some principles or values which, in the eighteenth and nineteenth centuries, were considered nonlegal but necessary prerequisites for constitutional government. Because our conception of "rights" has changed during the past two hundred years, it is necessary today to transform those fundamental eighteenth-century nonlegal principles into the language of twentieth-century constitutional rights in order to preserve in full measure the constitutional system that was established two centuries ago.

The greatest problem with the right of privacy as an operative constitutional doctrine is that it means all things to all people. When judges are asked to apply the unwritten, vaguely defined right of privacy to strike down state legislation concerning currently controversial topics, a great risk of overreaching occurs—i.e., reading into the Constitution the judges' own policy preferences in the name of identifying and defending unwritten constitutional rights. Application of the privacy doctrine entails the substantial risk that judges may go beyond their constitutionally authorized judicial function of interpreting the Constitution and get into the legislative function of establishing public policy on contemporary controversial issues. For this reason the Supreme Court, especially recently, has insisted on taking a cautious, restricted approach to avoid extension of the privacy doctrine whenever possible.

Judicial reluctance to resolve the controversy over the provision of contraceptives to minors by application of the starkly individualistic "privacy rights" analysis exists for a good reason.

224. "The right of privacy as a constitutional guarantee is at once ubiquitous and elusive. . . . Although courts and commentators agree on the moral and legal principles on which the right is based, they disagree on its definition and application." Id. at ¶ 19.01.
We typically pay attention to the rights of individuals in order to stress their moral independence. In other words, the language of rights typically helps us to sharpen our appreciation of the moral boundaries which separate people.

Ideally, the relationship between parent and infant involves an awareness of a kind of union between people which is perhaps more suitably described in poetic-spiritual language than in analytic moral terminology. We share ourselves with those with whom we are intimate and are aware that they do the same with us. Traditional moral boundaries, which give a rigid shape to the self, are transparent to this kind of sharing.

The danger of talk about rights of children is that it may encourage people to think that the proper relationship between themselves and their children is the abstract one which the language of rights is forged to suit. In other words, the risk of forcing a "privacy rights" analytical framework upon disputes about a provision of contraceptives to adolescents not only is that it may be like trying to force a square peg into a round hole, but it may unintentionally and irreparably damage the value or relationship it seeks to preserve.

Additionally, constitutionalizing the issue of parent-minor responsibility in the provision of contraceptives to teenagers would erode the long established principle that the regulation of family relations is "a virtually exclusive province of the States." Constitutionalizing family law would be unwarranted and unwise. Lacking any national constitutional consensus on this controversial issue, it is best dealt with at the state level.

Some people who are genuinely upset by one or another of the judicial decisions regarding whether parents must or may be involved before contraceptive instruction, products, or services are provided to unmarried minors have been drawn into a constitutional tug-of-war regarding what the policy of the law should be. They see the contest to be how the courts should interpret the Constitution to set public policy on this important contemporary issue. However, they fail to appreciate the more important preceding question—whether the courts should be setting policy at all. Ironically, by overlooking the question of which branch of government should set the policy and by

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focusing instead on what they believe the policy should be—and arguing for that policy to be judicially implemented as a constitutional right—they have legitimated the very mistake of the judicial decisions they find to be so objectionable. They fail to realize that the solution to what they perceive to be bad judicial legislation is not more judicial legislation.

However, a valid constitutional framework exists for resolving the issue. The constitutional system of checks and balances allocates to the politically accountable branches of government the responsibility to establish public policy on such issues as the provision of contraceptives to minors. And the constitutional principle of federalism limits the role of the federal government and gives priority to state policy makers on matters concerning parent-child relations. The limited but powerful role of federal courts to ascertain and protect constitutional rights not expressly identified in the Constitution should not be misappropriated to achieve a short-cut advantage in settling policy questions like this. Ultimately, the solution that the Constitution provides for this controversy is structural, not substantive. It is self-government; participatory democracy. That solution puts the burden on the people to make the law be what they believe it should be by persuading their elected representatives to require or restrict parental notification or by replacing them with persons who will do so. The constitutional solution thus is political responsibility, not judicial irresponsibility.

This is the approach taken by the Court of Appeals in *Doe v. Irwin.* Perhaps the most notable thing about the Sixth Circuit opinion in *Irwin* is its subsequent history. Because it deals directly both with an issue that has been very controversial and with a subject that has been written about so extensively and litigated rather frequently in the nine years since the opinion was rendered, it is surprising to find that the opinion has never been cited by another federal court. Obviously, parties on both sides of the controversy—those who argue for a constitutional right of minors to get contraceptives without parental participation as well as those who argue for a constitutional right of parents to be notified of the provision of contraceptives to their minor children—are dissatisfied with this Court of Appeals opinion which says quite plainly that this is not a controversy for which the Constitution necessarily mandates any particular resolution. While this analysis clearly is not popular with advocates of expansive parents' or minors' rights, it is the correct analysis.

**VII. CONCLUSION**

The issue of parental notification of the provision of contraceptive

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information and services to teenagers is of profound importance to our country, its future, its families, and its teenagers. But the Constitution does not provide the answers to all the important questions. Just because the issue is of compelling importance does not necessarily mean that the Constitution compels any particular resolution of the controversy. The fact that some resolutions would violate the Constitution (for example, if contraceptives were provided by the state only to black teenagers but not to white teenagers, or if the state mandated the secret provision of contraceptive information, services, or products to teenagers) does not mean that the Constitution mandates a specific resolution to the policy issue. Parental involvement in the noncoercive provision of contraceptive instruction, services, or products to minors is neither mandated nor prohibited by the Constitution.

It would be unwise and unwarranted to interpret the Constitution as either mandating or prohibiting parental participation at this time. Until the evidence of the effects, both intended and unintended, of the current policy of not requiring parental notification of the provision of contraceptives to minors is evaluated,230 it would be foolish and premature to set public policy in constitutional cement. Moreover, until a real constitutional consensus (i.e., sustained, super-majoritarian) for a public policy for or against parental involvement notification is established—that is, until the constitutional text is duly amended, or a firmly established tradition clearly demonstrates genuine and permanent constitutional consensus on the issue—it would be irresponsible for courts to interpret the Constitution to dictate a particular public policy on the matter.

230. See supra notes 218-21 and accompanying text.