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MINORS AND CONTRACEPTIVES: A CONSTITUTIONAL ISSUE

Despite recent United States Supreme Court decisions that have significantly reduced legal restrictions on the availability of abortions and contraceptives, minors have still not been accorded the benefits of these rulings. This Comment examines both the population control impact and the common law and statutory foundation for the present status of minors in this area. The author then reviews the major Supreme Court decisions dealing with the constitutional bases for obtaining contraceptives and abortions and indicates how the reasoning of those decisions can be extended to ensure contraception availability for minors as a matter of constitutional law.

In recent years environmentalists have become concerned about the impact of population growth on the quality of life, the availability of resources, and the ultimate survival of the human species. Some have suggested compulsory population control programs; most, however, are equally concerned about civil liberties and have stressed voluntary birth control programs to stabilize population growth. For voluntary programs to be effective soon enough to avert a major population crisis, legal restrictions on the availability and promotion of birth control programs must be removed.

In the last decade the Supreme Court, in four landmark decisions, has dramatically diminished the range of legal restrictions which may be imposed upon the availability of contraceptives and abortion. Despite these reforms, a significant segment of the population still has difficulty obtaining contraceptive services; minors have not been accorded the benefit of the legal protections announced in these decisions. This Comment will briefly examine the common law and statutes affecting minors’ access to medical treatment and the impact of this restriction on both the teenager and society. The balance of the Comment will focus on the constitutionality of existing legal restrictions.

1. See, e.g., Comment, Population Control—The Legal Approach to a Biological Imperative, 1 Ecology L.Q. 143 (1971).
CURRENT STATE LAW REGARDING ACCESS OF MINORS TO CONTRACEPTION

Under the common law, minors lack the capacity to consent to medical treatment; thus, the physician’s contact with the minor patient technically constitutes a battery.\(^3\) No harm need occur; even a harmless contact entitles one to an award of nominal damages.\(^4\) Several exceptions to the common law rule have been recognized by the courts. A legally emancipated minor may effectively consent to medical treatment.\(^5\) The emancipated minor, however, must request the treatment and understand its nature and consequences. Parental consent is also unnecessary for emergency treatment.\(^6\) In addition, the “mature minor” rule, which considers both the minor’s maturity and intelligence and the complexity and risk of the medical procedure, has been accepted in some jurisdictions. Although the cases are not uniform, generally the courts have held that when the medical procedure is relatively simple and for the minor’s benefit, and when the minor has sufficient intelligence and maturity to understand the nature and consequences of the procedure undertaken, his consent is not subject to disaffirmation even if parental consent was withheld.\(^7\)

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7. See, e.g., Younts v. St. Francis Hosp. & School of Nursing, Inc., 205 Kan. 292, 301, 469 P.2d 330, 337-38 (1970); Bakker v. Welsh, 144 Mich. 632, 635-36, 108 N.W. 94, 96 (1906), limited in Zoski v. Gaines, 271 Mich. 1, 10, 260 N.W. 99, 103 (1935); Gulf & S.I.R. Co. v. Sullivan, 155 Miss. 1, 10, 119 So. 501, 502 (1928). No case was found in any jurisdiction holding a physician liable for medical treatment of a minor without parental consent when the minor was over 15 years of age and the procedure was simple, beneficial, and performed with the minor’s consent. See Pilpel
Since contraceptive treatment is simple and beneficial to the patient and most sexually active minors are old enough to understand the nature and consequences of such treatment, the "mature minor" rule would seem to allow most minors to obtain contraceptives without parental consent. Many minors do fall into one of the exceptions to the common law rule noted above. Yet, in spite of the absence of any case law imposing liability for common law battery, many physicians and health departments will not provide contraceptive services to minors without their parents' consent.

Under the statutory law, all states but Vermont and Wisconsin have statutes which either allow general access to medical treatment without parental consent to particular classes of minors or permit all minors to have particular types of medical care. Twenty-nine states have granted those under 21 years of age the right to consent to medical treatment either by lowering the age of majority or by lowering the age of consent for medical treatment. Eight states recognize consent by emancipated minors. Marriage allows the minor to give


8a. Although no definitive study has been made of the number or percentage of health departments, hospitals or physicians who refuse to provide contraceptive services to minors without parental consent, officials administering federal funds for family planning services indicate that the practice is frequent among public agencies. An example is the State of Washington. In 1973, eight federally funded family planning projects in the state required parental consent for service to minors, despite federal guidelines requiring service on demand regardless of age. Interview with Vivian Lee, Staff Assistant, N.C.F.P.S., HEW Regional Office, Region X, in Seattle, Dec. 28, 1973.


10. ARIZ. REV. STAT. § 44-132 (1967); CAL. CIV. CODE § 34.6 (West Supp. 1973);
effective consent in 20 states.\textsuperscript{11} Three states sanction the consent of any minor parent;\textsuperscript{12} Pennsylvania recognizes high school graduation.\textsuperscript{13} Finally, Mississippi has statutorily acknowledged the "mature minor" rule.\textsuperscript{14}

A number of states have also passed statutes allowing minors to consent to certain types of treatment. Forty-six states and the District of Columbia permit minors to be treated for venereal disease without parental consent, but not necessarily without parental knowledge.\textsuperscript{15} Female minors can effectively consent to medical care related to pregnancy in 13 states.\textsuperscript{16} The California supreme court, in \textit{Ballard v. Ander-}

\begin{itemize}
  \item any minor who is living separate and apart from his parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of the duration of such separate residence, and who is managing his own financial affairs, regardless of the source or extent of his income, may give effective consent to medical, dental, mental and other health services for himself . . . .
\end{itemize}

\textbf{MINN. STAT. ANN.} § 144.341 (Supp. 1973).


14. An unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment may effectively consent. \textbf{MISS. CODE ANN.} § 41-41-3(h) (1972).

15. \textit{E.g.}, \textbf{CAL. CIV. CODE} § 34.7 (West Supp. 1973); \textbf{IOWA CODE ANN.} § 140.9 (1972); \textbf{WASH. REV. CODE ANN.} § 70.24.110 (Supp. 1972). The only states lacking statutes to date are Tennessee, Vermont, Wyoming and Wisconsin. Three states require disclosure of treatment to parents. \textbf{HAWAI'I REV. STAT.} §§ 577A-2, 577A-3 (Supp. 1972) (if under 18); \textbf{IOWA CODE ANN.} § 140.9 (1972) (if it appears that the minor may communicate the disease to his family); \textbf{NEB. REV. STAT.} § 71-1120 (1971) (if under 16 or over 16 and unemancipated). Six states allow disclosure to parents. \textbf{GA. CODE ANN.} § 74-104.4 (Supp. 1972); \textbf{ILL. ANN. STAT.} ch. 91, § 18.5 (Supp. 1973); \textbf{LA. REV. STAT. ANN.} § 40:1065.1 (Supp. 1973); \textbf{MD. ANN. CODE ART.} 43, § 135 (Supp. 1972); \textbf{MO. ANN. STAT.} § 431.062 (Supp. 1972); \textbf{N.J. STAT. ANN.} § 9:17A-5 (Supp. 1973). Eight states have minimum age requirements, varying from 12 to 16 years of age, \textit{e.g.}, \textbf{ORE. REV. STAT.} § 109.610 (1971) (12 years and older); \textbf{WASH. REV. CODE ANN.} § 70.24.110 (Supp. 1972) (14 years and older); \textbf{IOWA CODE ANN.} § 140.9 (1972) (16 years and older).

son, interpreted the California statute to include effective consent to abortion without parental consent. At least eight states have statutes which authorize treatment for drug abuse or addiction without parental consent.

In the last five years, several states have enacted statutes which allow most or all minors to consent to contraceptive services. Five states and the District of Columbia permit any minor in need to give effective consent. Illinois and Tennessee have similar statutes which give the right of consent to a number of categories of minors into one of which almost any sexually active minor could fall. Three states empower health departments to serve anyone, and two furnish contraceptive services to all welfare recipients, regardless of age.

Under statutory law, then, ten states and the District of Columbia allow most minors to consent to contraceptive treatment; in the other 40 states, only certain classes of minors may consent. A physician who provides contraceptive services to one of the vast majority of minors who do not fall into one of these categories is subject to civil liability. These same minors, however, may effectively consent to treatment for venereal disease in 37 states, for pregnancy in eleven states and for drug addiction in six states. California has the distinction of

17. 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).
20. Ill. Ann. Stat. ch. 91, § 18.7 (Supp. 1973) (any minor who is married, a parent, pregnant, or who has parental or guardian consent, to whom failure to provide treatment would create a serious health hazard or who is referred by a physician, clergyman or a planned parenthood agency); Tenn. Code Ann. § 53-4607 (Supp. 1972) (any minor who is pregnant, or a parent, or married, or who has the consent of parent or guardian, or referred by another physician, clergyman, family planning clinic, school, state agency, or who requests and needs birth control).
22. Cal. Welf. & Inst'ns Code § 10053.2 (West 1972) (all former, current or potential welfare recipients of childbearing age regardless of marital status, age or parenthood); Wyo. Stat. Ann. § 35-508 (Supp. 1973). In 1971, California had the singular distinction of rejecting legislation which would have permitted all minors to obtain contraceptives without parental consent, while enacting the Welfare Reform Act of 1971 (of which Cal. Welf. & Inst'ns Code § 10053.2 is a part) which not only allowed minors on welfare to obtain contraceptives without parental consent, but provided the services at state expense.
being the only state which allows minors to consent to an abortion but not to contraceptive care.  

II

THE IMPACT ON MINORS AND SOCIETY

Despite both the common law and statutory exceptions to the parental consent rule, minors still have difficulty in obtaining contraceptive care from health departments and private physicians in many communities in the United States. Yet many of these same minors are sexually active without their parents' knowledge or consent. Thus, a large number of sexually active minors are not using any contraceptive method to prevent pregnancy.

The impact on society of the lack of contraceptive use among sexually active teenagers is dramatically demonstrated in California. California currently leads the nation in the rate of venereal disease, in the ratio of illegitimacy, and in the number of unwanted pregnancies among minors. In 1970, there were 45,000 illegitimate births in California, 45 percent of which were to teenage mothers. Other minors chose abortion, often because in California parental consent is not required. In 1970, 18,564 teenage girls had therapeutic abortions; in 1971, there were 29,636 abortions in this group, comprising 25.4 percent of the total therapeutic abortions in the state.

From 1965 to 1971 the number of reported cases of gonorrhea


25. For an extensive discussion of the problems of minors in California and the status of the statutory and case law see Comment, Minors and Contraceptives: The Physician's Right to Assist Unmarried Minors in California, 23 HASTINGS L.J. 1486 (1972).

26. Public Education and Research Committee of California [hereinafter cited as P.E.R.C.C.], Facts of Life in California—1972 (date of publication unknown) [hereinafter cited as Facts of Life]. From 1966 to 1970 the illegitimacy rate in California rose from 9.4% to 12.6%; the greatest increase was among unmarried whites, who accounted for 66% of the total.


28. Hearings on Legal Aspects of Sterilization, supra note 27.

in California had increased 132 percent compared to 78 percent nationwide. The State Department of Public Health estimates that one in five high school students will contract venereal disease before graduation; in some areas one-half of a student body will be infected. Only one in four girls treated for venereal disease in 1971 had used any type of contraceptive method, indicating minimal use of contraceptives among sexually active teenagers in California.

The costs to the state from illegitimate births, abortions and venereal disease are substantial. The public cost for venereal disease treatment in 1970 was $11,000,000. The state expenditure in 1970 for therapeutic abortion patients under the age of 21 was $1,772,320, an average of $176 per client. If the mother decides to bear the child the cost per patient is approximately $460 per patient for prenatal care and delivery. In 1970 the state paid $10,005,000 for Medical deliveries for minor women who gave up their babies to foster parents; adoption services consumed another $4,662,852. If the mother keeps the child, approximately $3,000 per year is required to maintain the mother and the child on welfare; 18 years on welfare totals $54,000. In 1970, California appropriated $302,400,000 for illegitimate children under the age of seven. In addition, unwanted children reared by an unwilling, ill-prepared parent or parents are frequently "battered children," then early residents of juvenile detention facilities and later adult prisons. The per capita cost of maintenance of an individual in a penal institution is over $4,710 per year. Based on 1970 figures, the State Department of Public Health estimated that if only 20 percent of eligible minors availed themselves of contraceptive services and only 10 percent of teenage pregnancies were prevented, the net savings to the state would be $2,329,207 in the first year.

30. Id.
31. Id.
32. Id.
34. Facts of Life, supra note 26.
35. G. Cunningham, California State Dep't of Public Health, Bill Analysis, May 7, 1971 (unpublished) [hereinafter cited as Cunningham].
36. Id.
37. Id.
38. Id.
40. Id.
41. Id.
42. Cunningham, supra note 35.
43. Id.
CONSTITUTIONALITY

A. Fundamental Right to Obtain Contraceptives

The United States Supreme Court has held unconstitutional two state statutes which restricted access of adults to birth control. In *Griswold v. Connecticut*,\(^{44}\) the director of the Planned Parenthood League of Connecticut and the League's medical director were arrested and convicted for giving information and medical advice to married couples about contraception in violation of the Connecticut statute which forbade the use of contraceptives.\(^{45}\) The Supreme Court, in the majority opinion by Justice Douglas, held the statute unconstitutional because its prohibition on contraceptive use unjustifiably invaded the married couple's right of privacy.\(^{46}\) This right of privacy Douglas found in the penumbra of the specific guarantees of the Bill of Rights, particularly the first, third, fourth, fifth and ninth amendments;\(^{47}\) thus it is protected by the fourteenth amendment. While the majority found the prohibition of contraceptive use unconstitutional, they reserved judgment on whether restriction of the manufacture or distribution would be likewise unconstitutional.\(^{48}\)

The Court next faced the issue of the constitutionality of anti contraceptive legislation in *Eisenstadt v. Baird*.\(^{49}\) In a lecture on contra-

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44. 381 U.S. 479 (1965).
45. *CONN. GEN. STAT.* § 53-32 (1958) provided that any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.
46. *Id.* at 484.
47. Section 54-196, under which Griswold was convicted, provided that anyone who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.
ception at Boston University, Baird, a layman, displayed various contraceptives and gave out free samples of Emko Foam. The Massachusetts statute under which he was prosecuted prohibited the exhibition, distribution or sale of contraceptives, except by a physician or pharmacist and then only to married persons. The appeal to the Supreme Court presented two novel issues: (1) whether Griswold should be extended to hold that prohibitions on distribution as well as use violate the fundamental right of privacy, and (2) whether that right of access belongs to the unmarried as well as the married. Justice Brennan's majority opinion avoided addressing either issue by using an equal protection rather than a due process analysis. The Court found it unnecessary to determine whether the Massachusetts statute impinged on any fundamental freedom because it did not even meet the minimum equal protection test of being "rationally related to a valid public purpose." In a surprisingly rigorous scrutiny of the alleged state interests underlying the statute, Brennan found that health and the deterrence of fornication could not reasonably be considered the purposes of the statute; therefore, the purpose was found to be prohibition of contraception per se. Since no valid interest warranted distinguishing between the married and the unmarried, the Court held that prohibition on distribution to the unmarried was inconsistent with the equal protection clause of the fourteenth amendment.

In dictum, Brennan implies that if Griswold can be interpreted to prohibit states from banning the distribution of contraceptives to married persons, then the states also may not ban distribution to unmarried persons.

It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted govern-

50. MASS. GEN. LAWS ANN. ch. 272, §§ 21, 21A (1970). Section 21, originally enacted in 1879, provided a maximum five-year sentence for whoever sells, lends, gives away, exhibits or offers to sell, lend, or give away... any drug, medicine, instrument or article whatever for the prevention of conception, except as provided in Section 21A. Section 21A set forth:

A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

51. 405 U.S. at 447 n.7 (emphasis in the original).

52. Id. at 452.

53. Id. at 454.

54. Id. at 453.
mental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.\textsuperscript{55}

A concurring opinion by Justices White and Blackmun points out that the Massachusetts court had not convicted Baird because he had distributed contraceptives to an unmarried person, but because he was not a licensed physician or pharmacist.\textsuperscript{56} Applying a "compelling interest" test to the statute, White found that the state could not sustain the burden of proving that the Emko Foam was a sufficient health hazard to merit restriction of rights under \textit{Griswold}, thereby implying that \textit{Griswold} guaranteed access to contraceptives as a fundamental right \textsuperscript{57}

The dictum in \textit{Baird} that single persons share in the rights protected in \textit{Griswold} was given support in the recent Supreme Court decisions invalidating, for both single and married persons, the Texas and Georgia abortion statutes under a "compelling interest" test.\textsuperscript{58} \textit{Roe v. Wade} held that the right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.\textsuperscript{59}

The Court then went on to apply a "compelling interest" test to the Texas and Georgia restrictions on abortions. Justice Stewart's concurring opinion specifically quoted Brennan's dictum in \textit{Baird},\textsuperscript{60} adding that the right to decide

\begin{quote}
whether to bear or beget a child . . . necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.\textsuperscript{61}
\end{quote}

\textit{Wade} clearly established that the right of privacy recognized in \textit{Griswold} inheres in the individual, whether married or unmarried. Also, while not addressing the question of prohibiting distribution of contraceptives, the holding in \textit{Wade} that a state may not prevent access to abortion without compelling reason would seem to make any analogous prohibition on access to contraceptives untenable.

\textbf{B. Minors' Rights to Obtain Contraceptives}

In \textit{Baird}, the Supreme Court extended \textit{Griswold}'s protection of pri-
vacancy to the unmarried; however, the person whose access to contraceptive services is most frequently restricted by state action is the minor.\(^\text{62}\)

In the last ten years, the Supreme Court has increasingly recognized that minors are “persons” within the meaning of the Constitution and thus are protected by constitutional amendments. In re Gault held that even in the nonadversary juvenile court proceedings a minor has the rights of due process guaranteed by the fourteenth amendment.\(^\text{63}\) In the majority opinion Justice Fortas put it bluntly: “Neither the Fourteenth Amendment nor the Bill or Rights is for adults alone.”\(^\text{64}\) The Court extended the Gault holding in In re Winship, applying the requirement of proof beyond a reasonable doubt to juvenile proceedings.\(^\text{65}\) The first amendment rights of minors were affirmed in Tinker v. Des Moines School District, which held that students could wear armbands in protest of the Vietnam War.\(^\text{66}\) Minors also enjoy the first amendment protection against establishment of religion.\(^\text{67}\) and

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\(^{62}\) The timeliness of the problem is illustrated by the case of Doe v. Planned Parenthood of Utah, 29 Utah 2d 356, 510 P.2d 75, cert. denied, 94 S. Ct. 138 (1973). A Utah district court issued an injunction against PPAU, an O.E.O.-funded family planning agency, ordering it to serve all minors without requiring the knowledge or consent of their parents. Judge Hansen found that PPAU’s federal contract required it to serve minors, and that there was no law in Utah which supported the refusal; even if Utah had such a law, it would be invalid under the ninth and fourteenth amendments of the U.S. Constitution. The trial court set age limits of 14 for females and 16 for males, the minimum ages for marriage. Utah Code Ann. § 30-1-2(4) (1969).

The trial court decision was overturned by the Utah supreme court in a decision reflecting its Mormon viewpoint:

The name of the defendant indicates that its service should be available to those couples who desire to control the size of their family. [sic] It is not intended to make strumpets and streetwalkers out of minor girls.

29 Utah 2d at 356, 510 P.2d at 75. The court held that the legal basis for PPAU’s refusal to serve minors without parental consent was the state’s prohibition against contributing to the delinquency of minors by encouraging fornication and statutory rape. (Sexual relations with a female under the age of 18 with or without her consent constitutes a felony). Utah Code Ann. § 76-53-19 (1953). The majority opinion does not reflect a thorough reading of Griswold or Baird; in fact, neither case is mentioned in the opinion. The court stated that it failed to find anything in either the ninth or fourteenth amendment to sustain the trial court’s findings. It also defended the state’s distinction between married and single persons (rejected in Baird):

We think there is a vast difference between married people as a class who plan the number of children they wish to raise and single people who may likewise wish to plan the number of children which they do not wish to pro-create.

29 Utah 2d at 357, 510 P.2d at 76. Despite the obvious failure of the Utah court to grapple with the serious constitutional issues raised by the case, the U.S. Supreme Court denied certiorari with only Justice Douglas dissenting. 94 S. Ct. 138 (1973).

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\(^{63}\) 387 U.S. 1 (1967).

\(^{64}\) Id. at 13.


may not be discriminated against on the basis of race or illegitimacy under the equal protection clause of the fourteenth amendment. Therefore, apart from alleged compelling state reasons for restricting the rights of minors in particular situations, it is clear that minors are "persons" within the meaning of the fourteenth amendment and as such have the same right of privacy as adults under Griswold. Since that right of privacy includes the freedom to choose whether or not to procreate, in so far as it protects access to contraceptives, the right must attach at that time in a person's life when he or she becomes fertile.

The conclusion that the right of privacy extends to minors was announced in a recent decision in the Superior Court of the District of Columbia, In re P.J. Judge Alfred Burka ordered that an abortion be performed on a 17-year-old who had requested the operation but whose mother had refused to consent. He asserted that chronological age alone is not sufficient reason to deny a minor the right to an abortion. Other criteria were suggested which might justify the refusal to intervene in a different case. These will be examined below in the discussion of state interests.

C. State Interests

In his concurring opinion in Griswold v. Connecticut, Justice White disagreed with Justice Douglas' failure to examine the state's justification for invading the right of marital privacy. He pointed out that when a statute regulates sensitive areas of liberty it must be subjected to strict scrutiny and "must be viewed in the light of less drastic means for achieving the same basic purpose." White quoted the Bates test that "the State may prevail only upon showing a subordinating interest which is compelling." He found legitimate Connecticut's stated purpose of preventing illicit sexual relationships, both premarital and extramarital, but could not agree that the statute actually furthered that purpose. Since the statute barred only the use and not the sale or possession of contraceptives, and since contraceptives could be purchased

(Bible readings in public schools held unconstitutional); Engel v. Vitale, 370 U.S. 421 (1962) (prayer in school held unconstitutional).
71. See text accompanying note 134 infra.
73. Id. at 504, quoting from Shelton v. Tucker, 364 U.S. 479, 488 (1960).
75. Id. at 505-06.
legally to prevent disease, White could not perceive how the statute would prevent illicit sex.\textsuperscript{76} He concluded that the broad ban on use was, at best, of marginal utility in deterring illicit sex and therefore could not be justified in light of its invasion of marital liberty.

Although Justice Brennan used an equal protection rather than a due process analysis in \textit{Baird},\textsuperscript{77} he made reference to the "compelling interest" test by stating that if the Massachusetts statute impinged upon fundamental rights, the statutory classification would have to be "necessary to the achievement of the compelling state interest."\textsuperscript{78} He found it unnecessary to explore that issue because the statute could not meet even the minimal equal protection test.

A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that persons similarly circumstanced shall be treated alike.'\textsuperscript{79} Brennan examined the two state interests proffered by the Massachusetts Supreme Judicial Court—health and deterrence of fornication—in terms of the reasonableness of their relationship to the statute. He concluded that while deterrence of fornication was a legitimate legislative purpose, it could not reasonably be regarded as the purpose of the statute.\textsuperscript{80} Quoting from Justice Goldberg's and Justice White's opinions in \textit{Griswold},\textsuperscript{81} he pointed to the inconsistency between the availability of contraceptives for prevention of venereal disease and the statute's stated purpose; he further noted the discrepancy between the penalty for fornication (90 days in jail or 30 dollars) and the penalty for distribution of contraceptives (five years in prison).\textsuperscript{82}

Brennan also ruled that the alleged legislative purpose of protecting health by preventing the distribution of potentially dangerous articles, while legitimate, could not be reasonably regarded as a purpose of the statute.\textsuperscript{83} Brennan discounted health as a purpose because: (1) before the 1966 amendment the statute clearly had only an ethical purpose and the legislature's sudden interest in health so quick upon the heels of \textit{Griswold} seemed improbable;\textsuperscript{84} (2) if health were the rationale, the statute would be overbroad and discriminatory because (a) if physi-
cians can adequately protect the health of married persons, they can do as well for the unmarried, and (b) not all contraceptives are dangerous; 88 and (3) existing state and federal laws regulating the distribution of harmful drugs provided sufficient protection. 88 Only prohibition of contraception per se appeared to be the actual purpose of the statute and such a purpose was invalid under Griswold. 87

Despite Brennan's avowed intent to apply the minimal equal protection test, his close scrutiny of the statute seems more appropriate for a "compelling interest" test. He first reviewed two legislative purposes asserted by the highest court of Massachusetts and dismissed them as not being the purposes of the statute at all. He then imputed to the statute a purpose not proposed by the state, which he knew would run against the grain of Griswold, enabling him to find no legitimate reason for distinguishing between the married and single, and thereby to avoid reaching the question of the right of access to contraceptives by the unmarried.

The rigor of Brennan's analysis is more understandable when viewed in the context of the recent trend in the Supreme Court's equal protection decisions. 88 In its application of the traditional equal protection test where no fundamental right or suspect classification was involved, the Warren Court found any statute constitutional which was at all reasonably related to a legitimate legislative purpose; where none was offered, the Court used its imagination to conceive one. 89 The Burger Court has been reluctant to find new fundamental interests. 90 Therefore, in recent decisions, such as Reed v. Reed, 91 it has applied a revitalized "rational relationship" test. While still accepting a wide range of legislative purposes, the Court has focused more critically on the reasonableness of the means used to further these purposes and has considered only purposes which "have substantial basis in actuality, not merely conjecture." 92

Such an invigorated rationality test seems to be operative in the Brennan opinion in Baird. 93 He accepted both of the asserted state

85. Id. at 451.
86. Id. at 452.
87. Id.
88. For an extensive analysis of the changing trend in Supreme Court equal protection decisions see Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972) [hereinafter cited as Gunther].
89. See, e.g., McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); see also Gunther, supra note 88, at 21.
90. See Gunther, supra note 88, at 12.
purposes as legitimate, but upon examining the statute as a means, he could not find that the statute reasonably furthered those purposes. Also typical of the new approach was Brennan’s refusal to speculate on possible reasonable relationships between the asserted purposes and the statute not available through the briefs, the Massachusetts court’s opinions, or reasonable judicial notice. However, Brennan’s opinion seems to go beyond the rational relationship model even in its more vigorous form. His treatment of the purposes of the statute asserted by the state closely resembles the strict scrutiny typical of the “compelling interest” test and his hand is tipped also by his strongly stated dictum about the right of privacy inhering in the individual.

In Roe v. Wade, Justic Blackmun cautioned that the right of a woman to terminate her pregnancy “is not unqualified and must be considered against important state interests in regulation.” He reiterated the strict due process norm that limitations on fundamental rights can be justified only by a compelling state interest and “legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.” After determining that the fetus is not a “person” within the language and meaning of the fourteenth amendment and therefore not constitutionally protected, Blackmun found two state interests to be dominant: health and potential life. In order to justify state intervention, health becomes a compelling interest at the end of the first trimester and potential life at viability.

The novel aspect of Blackmun’s treatment of state interests is his detailed and scientific weighing of their importance vis-à-vis the woman’s right to terminate her pregnancy. He not only set time limits on the intrusion of the interests but rigorously analyzed the means

94. Chief Justice Burger’s dissent contrasted markedly with Brennan’s approach. 405 U.S. at 470 (Burger, C.J., dissenting). Burger speculated that the medical supervision required by the statute, for instance, could be reasonable because of the need for sound medical advice when choosing and using contraceptives and complained that the majority opinion... [p]uts the statutory classification to an unprecedented test: either the record must contain evidence supporting the classification or the healthy hazards of the particular contraceptive must be judicially noticeable. This is indeed a novel constitutional doctrine and not surprisingly no authority is cited for it. Id. at 469.

95. In contrast, Justice White, in a concurring opinion, chose to use the “compelling interest” test because he felt the statute directly impinged on those married persons’ interests protected by Griswold. Id. at 463-65 (White, J., concurring in the result).

96. 410 U.S. 113 (1973).
97. Id. at 154.
98. Id. at 155.
99. Id. at 158.
100. Id. at 162.
101. Id. at 163.
prescribed by the Texas and Georgia statutes. For instance, he rejected the Georgia statute's requirement that the physician who is to perform the abortion obtain the concurrence of at least two other physicians. Since this requirement was not imposed for any other medical or surgical procedure, Blackmun determined that it could not be considered a health protection measure. Blackmun's analysis of the abortion statutes, while directly in the stream of substantive due process, since it involved fundamental rights, also reflected the more means-related scrutiny evidenced in Brennan's Baird opinion.

How, then, do Griswold, Baird, and Wade-Bolton compare in the handling of state interests? In Griswold and Wade-Bolton the Court applied a substantive due process analysis, finding fundamental rights involved and requiring compelling state interests to limit those rights. However, Justice Douglas in Griswold barely touched on state interests, while Justice Blackmun in Wade and Bolton subjected the state interests to detailed balancing against the protected right. This difference in approach can be explained both by the difference in judicial temperament and the fact that the state interests in Wade were compelling within narrowly drawn boundaries. In Baird, the Court ostensibly applied a rigorous "rational relationship" test, but it borders on being a "compelling interest" test because of its ultimate rejection of two express state purposes.

From these and other cases, one can generalize that where the state seeks to impose a valid restriction on activity involving a clear fundamental right, the state interest must be very strong, the statute must be narrowly drawn, and a less drastic alternative must be unavailable. In contrast, if the restricted activity does not involve a fundamental freedom, there is no due process question nor is equal protection violated unless the statutory classification is arbitrary and irrational. However, in more recent decisions the Court seems to hold that if the restricted activity is closely related to a fundamental freedom (for example, access to contraceptives as related to the use of contraceptives), a closer analysis of reasonableness will be made, less critical of legislative purpose but more critical of the means chosen to further that purpose.

D. State Interests in Parental Consent

While Griswold established that the constitutional right of privacy includes the right to use contraceptives, Baird and Wade-Bolton

103. Id. "Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice."
104. See Gunther, supra note 88.
made it clear that this right belongs to the individual whether married or single. Although *Baird* avoids the issue of access to contraceptives as a constitutionally protected right, the abortion decisions found a fundamental right of access to abortion, and thus the fundamental right of access to contraceptives seems logically inescapable.

One of the arguments most frequently advanced in opposition to allowing minors to consent to contraceptive services is that it would encourage premarital sexual activity. Governor Reagan of California typified this attitude in his remark that "birth control should begin with—prior to marriage—saying no." Thus deterrence of fornication is strongly asserted as a legitimate state purpose for the current law.

This purpose, as applied to minors, is subject to the same criticism made in *Griswold* and *Baird* in the case of adults. If the means-focused interest test alone is used, it is difficult to demonstrate that parental consent requirements actually deter premarital sexual activity. The standard argument is that removing the parental consent requirement would increase the use of contraceptives, thereby decreasing the risk of pregnancy; and without the risk of pregnancy, premarital sexual activity would increase. However, most states either do not prohibit the use of prophylactics by minors or have only loose restrictions. The accessibility of prophylactics reduces the risk of pregnancy and thus subverts the asserted state purpose. The statutes in all but four states which allow treatment for venereal disease without parental consent also undermine the asserted purpose by removing the risk of disease resulting from sexual contact. No study to date has established a relationship between the amount of sexual activity and the availability of contraceptives. In addition, studies in clinics treating minors without parental consent have shown that almost all their patients were sexually active before requesting services. Therefore, deterrence of fornication cannot stand as a state interest legitimizing the restriction of minors' access to contraceptives because the law does not substantially further that interest.

Nor can health be asserted as an interest which justifies the requirement of parental consent. If a doctor can provide contracep-

107. See text accompanying note 15 supra.
108. Gordis, Fasset, Finkelstein, & Taybuck, Adolescent Pregnancy: A Hospital-Based Program for Primary Prevention, 58 AM. J. OF PUBLIC HEALTH 849, 855 (1968) [hereinafter cited as Gordis].
tive services to adults or to minors with parental consent without substantial risk to their health, there is no medical evidence that they cannot do as well for minors who lack parental consent. As pointed out in *Bolton*, the sanctions of the medical profession are adequate remedies.  

Similarly, the risk of using contraceptives, such as oral contraceptives or intra-uterine devices, are no greater for minors than for adults, while the physiological risks of pregnancy to both herself and the child are much greater for the adolescent than for the young adult, not to mention the psychological and social risks. The need for medical advice is irrelevant since those contraceptives involving any substantial risk are available only upon prescription.

Another state interest frequently asserted as justification for the requirement of parental consent is the preservation of parental control over children. Governor Reagan of California in his veto message of a bill which would have abolished the consent rule charged that the bill represented the unwarranted intrusion into the prerogatives of parents . . . [and would] endanger the traditional vital role of the family structure in our society . . . . If this bill were to become law, I believe it could establish yet another opening wedge into the ultimate removal [sic] of parental authority and prerogatives in any number of areas.

The Supreme Court has protected the parental right to control children when that right was infringed by the state. In *Pierce v. Society of Sisters* and *Meyers v. Nebraska*, the Court upheld parents' right to educate their children as they saw fit, provided that the children received an education. The Massachusetts Supreme Judicial Court affirmed parents' right to discipline their children for disobeying reasonable orders in *Commonwealth v. Brasher*. A California appellate court indirectly advanced parental rights when it ruled that school officials acting in *loco parentis* could search a student's locker. Courts have also enforced parental control over children as in the case of *Roe v. Doe*. There the court decided that a father has a right to set conditions on the support of a college age child:

[T]he father in return for his maintenance and support is entitled to set reasonable standards, rules and regulations for his child.

111. See section II supra.
113. 268 U.S. 510 (1925).
114. 262 U.S. 390 (1923).
118. Id. at 193, 324 N.Y.S.2d at 75, 272 N.E.2d at 570.
However, the protection from state regulation is not absolute. In *Prince v. Massachusetts*, the Supreme Court, in upholding the application to Jehovah's Witnesses of a state statute which prohibited children from selling periodicals on the street, stated:

"[T]he state as *parens patriae*, may restrict parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."

The Supreme Court has never considered a case where there was a conflict between the constitutional rights of children and the control of their parents. Where the Court has touched upon the issue tangentially, it has shown a reluctance to curtail the exercise of the minor's rights. In *Rowan v. U.S. Post Office Dep't*, Justice Brennan noted that the challenged statute permitted parents to cull from their children's mail political, religious, or other material which they found offensive. The decision did not address the question of the right of older children to receive material without governmental interference, but Brennan indicated that he felt that portion of the statute was "not without constitutional difficulties." The first amendment free exercise of religion clause was construed in *Wisconsin v. Yoder* to give Amish parents the right to violate compulsory education laws by refusing to enroll their children in high school. Chief Justice Burger expressly reserved the question of competing interests between child and parent. Burger also noted that the power of the parent, even when linked to the 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 potential for significant social burdens.

Thus, while parental rights have been held constitutionally protected from state interference, the state may intervene where the health or safety of the child is jeopardized or where the social burden will be too great. The Court has never upheld state enforcement of parental control in face of the child's exercise of its own constitutional rights and in dictum has indicated that it would not do so without additional justifying interests.

120. Id. at 166.
122. Id. at 741.
124. Justice Douglas dissenting in part because he felt that the free exercise of religion right is the child's and not the parents' in this case. Id. at 241 (Douglas, J., dissenting). Burger dismissed Douglas' dissent by noting that the child's rights were not at issue since there was no evidence of conflict between parents and children. Id. at 231.
125. Id. at 231.
126. Id. at 233.
127. In a case involving waiver of rights in a juvenile proceeding, the District
Since the Court appears reluctant to assert parental interest over children's protected rights, it is unlikely to view maintenance of parental control by itself as an interest sufficient to deny access to birth control. In the first place, it is questionable that the parental consent rule actually preserves parental power. Many children become sexually active without benefit of contraceptives, thus demonstrating lack of parental direction of their sexual expression despite parental power to withhold contraceptives. For such children lack of consent fails to enhance parental authority and results only in unprotected sexual activity. Second, most states' claim of strong interest in parental control lack persuasiveness since many have already disregarded that interest by allowing certain types of medical care, such as treatment for venereal disease and pregnancy.

In most states, the legal availability of prophylactics without parental consent further accentuates the states' willingness to compromise parental influence even where the result is to afford children substantial control over the risk of pregnancy. By enacting such statutes, the states presumably exercised their right under Prince to intervene on behalf of the child's health. In the case of contraception, the parent's refusal to consent jeopardizes the sexually active child's health because of the danger of pregnancy and its attendant risks for minors. The parent's refusal also creates a significant social burden because of serious risks of unwanted pregnancy, consequent abortions, and illegitimate children, welfare costs and population growth. With these strong competing social interests at stake, as well as children's constitutionally cognizable interest in access to contraception, it is unlikely that the states' interest in parental control, which they willingly sacrifice in related contexts, will appear compelling.

Another asserted state interest is the protection of the child from his own improvident judgment, the historical purpose of the common law rule regarding the inability of minors to contract in general and to consent to medical treatment in particular. If, however, the state recognizes that minors are capable of giving competent con-

of Columbia Court of Appeals commented that the lower court would be "well advised to consult the child's parents or guardian where their interest are not adverse." Shiotaken v. District of Columbia, 236 F.2d 666, 670 n.26 (D.C. Cir. 1956) (emphasis supplied). The same court in a later case held that the waiver of rights by the parent alone was insufficient without further justification, adding that obviously not all minors are capable of making a waiver. Where the court finds for any reason the minor is not capable of a waiver the parent may so waive provided the court also finds there is no conflict of interest between them. MacBride v. Jacobs, 247 F.2d 595, 596 (D.C. Cir. 1957).

See text accompanying note 24 supra.

See notes 15-17 and accompanying text supra.

See text accompanying note 82 supra.
sent to treatment for pregnancy or venereal disease, it implicitly recognizes the ability of minors who are sexually active to make informed decisions regarding medical care.

Courts have also recognized the ability of minors to make informed decisions. Justice Douglas articulated the mature minor rule in *Yoder*:

> [W]here the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.\(^{131}\)

In *People v. Lara*\(^{132}\) the California supreme court established that a minor can competently waive his rights to a juvenile proceeding under some circumstances. Age alone does not disqualify his waiver; other factors must be considered such as intelligence, education, ability to understand the meaning and the effect of the waiver. The ability to waive is a question of fact not law.\(^{133}\) *In re P.J.*\(^{134}\) held that age alone is not a sufficient reason to deny a minor the right to consent to her own abortion when parental consent is refused; the test is whether the minor possesses the degree of maturity and knowledge necessary to understand the nature and consequences of an abortion.

Both statutory and common law have recognized the competence of adolescents to make informed decisions regarding their own health. One must ask whether the parental consent rule does in fact protect minors from improvident judgment when it is applied to contraceptive services. The risks to the minor from the medical procedures and treatment involved in contraception are not great, and are considerably less than the risks involved in an unwanted pregnancy. The parental consent rule does not protect the sexually active minor from an unwanted pregnancy; rather, it often prevents the minor from protecting herself, from exercising responsibility for her own sexuality and over the ability to conceive another human being at a critical stage in her own development. The child, not the parents, will have to live with the consequences of the parents' choice, by bearing the child or having an abortion. Therefore, if a minor is knowledgeable and mature enough to understand the nature and consequences of contraception, the state's interest in protecting her from her own improvident judgment is no longer valid enough to warrant denying the adolescent the right to decide whether or not to conceive. Under this rule, the law in most states is overbroad and therefore unconstitutional.

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133. *Id.* at 383, 432 P.2d at 215, 62 Cal. Rptr. at 599.
The requirement of parental consent for minors to receive contraceptive care is also vulnerable under the equal protection clause of the fourteenth amendment. The due process analyses in *Griswold* and *Wade-Bolton* were based on findings of fundamental rights. Brennan did not want to reach that issue in *Baird*, so he fell back on equal protection for an alternative, less controversial holding and applied the more vigorous form of the traditional equal protection test. Should the Supreme Court find that minors do not have a fundamental right to obtain contraceptives, it would probably be reluctant to apply a vigorous "rational relationship" test as part of a due process analysis because of the taboo about the use of substantive due process in areas not involving clear fundamental rights. But the Court has used the "rational relationship" test in several equal protection cases, specifically *Reed v. Reed*, and would likely do so here. The issue would be whether the state's classification substantially furthers the state's asserted interests.

The most obvious classification is the distinction between adults and minors. *Baird* held that all adults, married or unmarried, have a right to use contraceptives. No state any longer restricts that right; yet most states restrict minors by requiring parental consent. The analysis of state interests made above revealed that the parental consent requirement did not substantially further those interests. Without a rational relationship between the interests and the classification, the classification would not withstand equal protection attack.

Some states impose other classifications which are equally unreasonable. In most states, for instance, the law allows minors to purchase prophylactics, suitable for use only by males. In effect the law in these states allows male minors to a contraceptive method while denying female minors, who must bear the consequences of unprotected intercourse. Deterrence of fornication is not promoted by this distinction because sexual activity usually involves both sexes and if the male takes responsibility, contraception will be affected. That prophylactics pose no medical risk while oral contraceptives and intrauterine devices do raises an issue of health protection. The requirement of a doctor's examination and prescription, however, affords that protection and the requirement of parental consent adds nothing further. Neither the interest in parental control nor protection from improvident judgment warrants distinction between sexes. Therefore, those states which allow minors to purchase prophylactics cannot, con-

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136. See subsection D *supra*.
sistent with the equal protection clause, deny minors the right to con-
sent to contraceptive services. Similar analyses are applicable to those
states which allow contraceptive services to welfare recipients and to
those which provide treatment for venereal disease.

CONCLUSION

Although there have been cases in which the constitutional right
of minors to consent to contraceptive care was at stake, the likeli-
hood of the question coming before the Supreme Court in the near
future is remote. In the meantime many doctors and clinics continue
to refuse care to minors who cannot obtain their parents' consent.

The costs to society of this lack of contraceptive services are
great, but the cost to the minor herself is greater. Without access
to contraceptives, many sexually active minors become pregnant, leave
home to obtain access to contraceptives, or contract venereal disease.
If a minor becomes pregnant, she has several options: (1) have an
abortion, (2) enter into a forced marriage, (3) bear the child and put
it up for adoption, or (4) bear the child and keep it.

If she opts for abortion, in most states she will face the same par-
etal consent problem that she faces with contraceptive care. There-
fore, she must either tell her parents and hope that they will consent
or seek an illegal abortion. If she chooses an illegal abortion, she
faces criminal penalties and substantially increased risks to her
health. In either case, she is likely to experience feelings of guilt
or other adverse psychological reactions and incur social disapproval
of her decision. Should she choose to bear the child out-of-wed-
lock, as an adolescent mother she faces a higher risk of pregnancy
complications, prematurity, infant mortality and birth defects.
There is also a strong statistical likelihood that she will have addition-
al illegitimate children. In addition, pregnancy is the single largest
cause of school dropouts among teenagers in the lower economic
classes. Bearing the child will often prove to be a cause of aliena-
tion and division in the girl's family because of the embarrassment

137. See note 62 supra.
138. Where the Action Is, FAMILY PLANNING PERSPECTIVES (April, 1972).
140. See Tietze, Mortality with Contraception and Induced Abortion, STUDIES IN
FAMILY PLANNING 6 (1969). The mortality rate from illegal abortions is 33 times
higher than the rate from legal abortions. Id.
142. Cunningham, supra note 35.
143. Gordis, supra note 108, at 855.
144. Hearings on S. 2108 and S. 3219 before the Subcomm. of the Comm. on
Labor and Public Welfare, 91st Cong., 1st & 2nd Sess., at 69 (1970) (testimony of
D. Beasley).
and cost of an unwanted pregnancy. If she gives the child up for adoption, the state will have to bear the adoption costs. Both she and the child are likely to be a welfare burden to the state if she decides to keep it.

Marriage to legitimize the child does not reduce the health hazards of pregnancy, and the mother is just as likely to drop out of school. The parents are usually too immature to handle the responsibility of marriage and parenthood, much less the guilt and resentment attendant to a forced wedding. The union will probably dissolve quickly, leaving a one-parent family permanently dependent on welfare or parent support. The mother's youthfulness may prevent the formation of an adequate mother-child relationship. Even if the marriage lasts, the child will likely be raised in an inadequate and unstable home environment.

Besides the harm to the girl, her child, and her parents and the consequent cost to society, illegitimacy increases the population pressure significantly. Seventeen percent of the annual increase in population in the United States represents the offspring of unwed minors; an additional number are conceived out-of-wedlock but born to teenage parents subsequently married.

For those who hope to stem the rapid growth of population by promoting voluntary birth control programs, the rate of teenage conception poses a serious obstacle. Adolescents in American culture are only beginning to cope with their own sexuality and sexual identities, as well as to adjust to the demands and realities of their society. These years of flux and transition are a crucial time for inculcating in them a sense of responsibility for the biological outcome of their awakening sexual powers. State laws restricting teenage contraception are barriers to the advice of sympathetic adults who would help adolescents development such responsible habits.

Therefore, it is incumbent upon state legislatures to take responsibility for revising the common law rule (which has outlived its usefulness) by enacting legislation which will allow minors to consent to contraceptive services. If legislatures cannot pass bills such as SB 433 (vetoed last year in California) which would create a blanket exception for sexually active minors, then the more complicated but adequate statutes, such as Tennessee's, are available as alternative models. The

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146. Cunningham, supra note 35.
147. Id.; see also Gordis, supra note 45 at 849.
148. Gordis, supra note 45 at 849.
149. 350,000 out of 6 million; Young, Alverson, Young, Court-Ordered Contraception, 55 A.B.A.J. 223 (1969).
urgency of the population crisis, as reflected in part by the food and energy shortages of the last year, requires more immediate and decisive measures than can be expected through litigation and judicial action. If legislatures fail to act soon by removing obstacles to the success of voluntary programs, compulsory population control may become inevitable.

Neil Bodine