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Constitutional Law - Minors' Right of Privacy versus Parental Right of Control - Access to Contraceptives Absent Parental Consent - T H v. Jones

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Utah administered federal aid programs for family planning services through the Utah Planned Parenthood Association (UPPA). Pursuant to state regulations, UPPA was permitted to administer contraceptive services and supplies to a minor only with the permission of a parent or guardian. The minor plaintiff, who remains unnamed, applied to UPPA for contraceptives. Although her family qualified under federal aid programs, the plaintiff was denied assistance when she refused to obtain parental permission. She therefore sought a declaratory order that the state regulations violated her right of access to contraceptives under federal statutes and her right of privacy under the Fourteenth Amendment. A three-judge federal court held that the state regulations imposing parental consent requirements were

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1. Division of Family Services, State of Utah Dep’t of Social Services, Updated Direct Services Manual Material, Direct Service Section V, FPC 120-FPC 201 (Form B-75-24-S, 1975) states in pertinent part:

   Federal regulations authorize 90% federal matching under Medicaid for offering, arranging, and furnishing directly, or on a contract basis, family planning services for eligible persons who desire such services. In conformance with State Law, services to minors may be provided only with written consent of parents using the appropriate form.

2. The programs are Aid to Families with Dependent Children (AFDC) and Medicaid, which are subsidized by federal funds and regulated by the Social Security Act of 1935, 49 Stat. 620 (1935), as amended, 42 U.S.C. §§ 601-44, 1396 (1970). For pertinent provisions of the AFDC and Medicaid programs see note 3 infra.

3. The provision for families under the program is set out in 42 U.S.C. § 602(a)(15) (1970), which states in pertinent part that state plans must:

   [Provide (A) for the development of a program, for each appropriate relative and dependent child receiving aid under the plan . . . for preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life, and for implementing such program by assuring that in all appropriate cases (including minors who can be considered to be sexually active) family planning services are offered to them and are provided promptly . . . to all individuals voluntarily requesting such services.


   The term “medical assistance” means payment of part or all of the costs of the following care and services . . .

   (4)(C) family planning services and supplies . . . to individuals of childbearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies; . . .
void because (1) under the supremacy clause they conflicted with federal regulations that impose no such requirement, and (2) minors have, under the constitutional right of privacy, a right of access to contraceptives that cannot be abridged by a parental consent requirement.

I. Background

A. Contraceptives and the Right of Privacy

The United States Supreme Court first decided whether a state could prohibit contraceptive use by married persons in *Griswold v. Connecticut.* There, the executive and medical directors of the Planned Parenthood League of Connecticut were fined for violating state statutes making it a crime both to use and to assist another in the use of contraceptives. The Court held that

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4. 381 U.S. 479 (1965). The Court twice faced but did not decide the constitutionality of the Connecticut statute before *Griswold.* In *Tileston v. Ullman,* 318 U.S. 44 (1943), the Court found that the appellant, doctor for the potential users of the contraceptives, lacked standing. Later, in *Poe v. Ullman,* 367 U.S. 497 (1961), the Court found the case nonjusticiable because the appellants were suing to prevent the enforcement of the statute without violating it and therefore failed to bring the case within the "case or controversy" requirement of the Constitution.

*Griswold* was the first Supreme Court case to extend the right of privacy beyond unreasonable searches and seizures to personal activities. *Roe v. Wade,* 410 U.S. 113 (1973) and its companion case, *Doe v. Bolton,* 410 U.S. 179 (1973), extended the right of privacy beyond the use of contraceptives to a woman's decision to have an abortion. Although the right of privacy has not been explicitly held to cover other activities, the Supreme Court has indicated that this "guarantee of personal privacy" extends only to "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Roe v. Wade,* 410 U.S. 113, 152, citing *Palko v. Connecticut,* 302 U.S. 319, 325 (1937). The Court mentions several activities that would qualify under the standard: marriage, *Loving v. Virginia,* 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma,* 316 U.S. 535, 541-42 (1942); child rearing and education, *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925), *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923).

Some members of the Court have concluded that other activities may not be sufficiently "fundamental" or "implicit in the concept of ordered liberty" to be granted privacy protection. Justice Harlan, the first justice to recognize the marital privacy right, explicitly excluded homosexuality, fornication, adultery, and incest from protection by the right of privacy, "however privately practiced." *Poe v. Ullman,* 367 U.S. 497, 552-53 (1961) (dissenting opinion). Justice Goldberg, concurring in *Griswold* and joined by Chief Justice Warren and Justice Brennan, quoted Justice Harlan's language and likewise excluded "sexual promiscuity or misconduct" from protection. 381 U.S. 479, 498-99 (1965) (concurring opinion). Their position was undercut somewhat by *Eisenstadt v. Baird,* 405 U.S. 438 (1972). Though *Eisenstadt* was decided technically on equal protection grounds, note 10 and accompanying text *infra,* the case did inferentially grant some protection to extramarital sexual activities by striking down prohibitions on an unmarried person's right to use contraceptives.

the prohibition of use was an unconstitutional abridgment of the right of "privacy surrounding the marriage relationship" emanating from the "penumbras" of "specific guarantees in the Bill of Rights."" Despite the sweeping rationale of the case, the holding was narrow: as to married persons, there can be no wholesale prohibition against use. The Court expressly stated that it struck down only laws prohibiting the "use of contraceptives rather than [laws] regulating their manufacture and sale . . . ." Thus, it appears that a state may restrict access to contraceptives through laws validly designed to regulate their sale.

The right recognized in Griswold was extended to unmarried persons in Eisenstadt v. Baird. When he exhibited contraceptive articles and distributed a package of vaginal foam to a young adult unmarried woman, a college lecturer was convicted under a Massachusetts law that prohibited any unauthorized persons from distributing or selling contraceptive devices and that further restricted distribution by authorized dispensers to married persons. The Court struck down the statute because, "by providing dissimilar treatment for married and unmarried persons who are similarly situated, [the provisions of the statute] violate the Equal Protection Clause." While inferentially granting unmarried persons the right to use contraceptives, the Court again did not grant an unqualified right to obtain them, since it refused to say whether laws regulating distribution of contraceptives either to married or unmarried persons were permissible. Concurring and dissenting opinions both expressed the view that a state could restrict the distribution of contraceptives for precautionary health measures.

In another case involving the same statute, Poe v. Ullman, Justice Harlan, dissenting in the dismissal, stated:

[C]onclusive in my view, is the utter novelty of this enactment. Although the Federal Government and many states have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime.

6. 381 U.S. at 484-86.
7. Id. at 485 (emphasis by the Court).
10. 405 U.S. at 454-55.
11. Id. at 453-54.
12. Id. at 460, 465 (White, J., concurring; Burger, C.J., dissenting). Justice White differentiated between sections 21 and 21A of the Massachusetts General Laws (1970) (21A excepts from prosecution registered physicians and pharmacists who dispense the same materials to married persons) and found no problem with Massachusetts' "legiti-
The leading abortion case, *Roe v. Wade*, may provide the logical nexus permitting extension of the right of privacy protections to the area of contraceptive access. In *Roe*, the state was required to show a compelling interest for regulating a pregnant woman’s procurement of an abortion. Since it would arguably mate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences.” *Id.* at 463, quoting Commonwealth v. Baird, 355 Mass. 746, 753, 247 N.E.2d 574, 578 (1969). The petitioner in this case had merely distributed harmless contraceptive foam. Justice White further stated:

Had Baird distributed a supply of the so-called “pill,” I would sustain his conviction under this statute. Requiring a prescription to obtain potentially dangerous contraceptive material may place a substantial burden upon the right recognized in *Griswold*, but that burden is justified by a strong state interest and does not, as did the statute at issue in *Griswold*, sweep unnecessarily broadly or seek “to achieve its goals by means having a maximum destructive impact upon” a protected relationship.

*Id.* at 463 (footnotes omitted). Chief Justice Burger likewise stated:

The choice of means of birth control, although a highly personal matter, is also a health matter in a very real sense, and I see nothing arbitrary in a requirement of medical supervision.

*Id.* at 470.


14. *Roe* granted a broad-based privacy right. As contrasted with *Griswold*, which at least tied the right to “penumbras” of the Bill of Rights, *Roe* rested its decision on the privacy right alone. 410 U.S. at 152-54. For a discussion of *Roe’s* impact on the privacy doctrine see *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 82-83 (1973) [hereinafter cited as *The Supreme Court, 1972 Term*].

*Roe* has provoked the outcry among many scholars that that decision (along with *Griswold*) represents a return to the discredited doctrine of “substantive due process” embodied in *Lochner v. New York*, 198 U.S. 45 (1905), and subsequently discarded by the Supreme Court beginning with *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) and culminating in *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

For criticisms of the decision see, e.g., Justice Rehnquist’s dissent in *Roe v. Wade*, 410 U.S. 113, 174-77 (arguing that, as in *Lochner*, the Court will have to “examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest is ‘compelling’”); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (arguing that *Roe* is of the *Lochner* tradition, but even less defensible); Note, *The Abortion Cases: A Return to Lochner, or a New Substantive Due Process?*, 37 ALB. L. REV. 776 (1973).

For defenses see, e.g., Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (arguing that the Supreme Court is not limited to interpretation only of the written text of the Constitution, but may also enforce “principles of liberty and justice when the normative content of those principles” is not within the Constitution); Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 BOST. UNIV. L. REV. 785 (1973) (defending both the decision and its approach); Tribe, *The Supreme Court, 1973 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (granting that *Roe* is a return to substantive due process but defending its approach as allocating the role of choice to the individual).

15. 410 U.S. at 162-64. The Court noted that “a state may properly assert interests in safeguarding health, in maintaining medical standards, and in protecting potential
be inconsistent to grant right of privacy protection to a woman's decision to terminate a pregnancy while at the same time allowing the state to control her decision whether or not to become pregnant, the state may yet be required to show a compelling state interest in its regulation of access to contraceptives. Should this reading of Roe be adopted, however, it appears that it would not ultimately resolve the issues raised by the instant case. First, neither Griswold, Eisenstadt, nor Roe deals with the extent of a state's power over minors. Second, even assuming that a compelling state interest test were applied to regulation of minors' access to contraceptives, that test may be easier to satisfy in the regulation of a minor's—as opposed to an adult's—activities.

B. Parental Rights

Historically, parents' rights to raise and train their children have been granted a status approaching, if not achieving, fundamentality. Consequently, the Supreme Court has carefully scrutinized state efforts to curtail parental rights. In Prince v. Massachusetts, the Court articulated the deference due parental rights in these terms:

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 these decisions have respected the private realm of family life which the state cannot enter.

life" in the second and third trimesters of pregnancy. Id. at 154. As to the third trimester, the Court gave the state expansive powers: "If the state is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." Id. at 163-64.


17. The Court in Roe reserved the issue as to minors. 410 U.S. at 165 n.67. For a discussion on the applicability of privacy rights to minors in an abortion context see Note, Privacy Rights of Minors, supra note 16, at 1006-11; Note, The Minor's Right to Abortion and the Requirement of Parental Consent, 60 Va. L. Rev. 305 (1974).


20. Id. at 166 (emphasis added) (citations omitted).
Although the state's interest prevailed in *Prince*, the courts have required other state interests, such as compulsory education, to yield to parental rights. In *Pierce v. Society of Sisters*, the Court struck down an Oregon law that attached criminal sanctions to parental refusal to send normal children between the ages of 8 and 16 to public schools. The law was held to be an unreasonable interference "with the liberty of parents and guardians to direct the upbringing and education of children under their control."*

In a more contemporary context, *Wisconsin v. Yoder* reaffirmed the fundamentality of parental rights. Although technically decided on free exercise of religion grounds, *Yoder* sustained the rights of Amish parents to withhold their children from

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21. The Court disallowed the Jehovah's Witness parents from having their children sell religious magazines on the street as against the state's legitimate interest in prohibiting child labor. *Id.* at 168-70. *But see Wisconsin v. Yoder, 406 U.S. 205* (1972), text accompanying notes 24-27 infra.

For purposes of this discussion, the language of *Prince* is more important than the holding, because the holding does not directly apply. *Prince* involved two important rights—the state interest in regulating child labor and the parents' right to direct the child—which were balanced against each other. But in the instant case both state and parental rights are allied against a minor's right to privacy. *Prince* does illustrate, however, the deference due parental rights even when balanced against a legitimate state interest.

Also, while *Prince* allowed the state to encroach upon parents' rights for the child's protection, it cannot be read as an expansion of minors' rights. Since the "power of the state to control the conduct of children reaches beyond the scope of authority over adults," the state was allowed to curtail the minor's claim of free exercise of religion for what the state deemed to be the minor's own protection. 321 U.S. 158, 170 (1944).


The *Meyer* Court noted that although "liberty" under the Fourteenth Amendment had not been given precise definition, certain freedoms included therein were capable of precise statement:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399 (emphasis added) (citations omitted).

23. 268 U.S. at 334-35.


school beyond the eighth grade. The Court declared that the parents’ duty to prepare the child for “additional obligations” includes “the inculcation of moral standards, religious beliefs, and elements of good citizenship.” In this context, the Court viewed the Pierce case “as a charter of the rights of parents to direct the religious upbringing of their children.”

The status of parental rights, of course, determines the constitutional test applied when those rights are limited and the limitation is subsequently challenged. Since fundamental rights may be curtailed only by a compelling state interest, the question arises whether parental rights are accorded fundamentality. In Stanley v. Illinois, the Court upheld a father’s right to his illegitimate children, stating that a parent’s “private interest” in his children must be protected, “absent a powerful countervailing interest.” Other members of the Court would apply a stricter test. Justice Harlan, dissenting in Poe v. Ullman, declared that “the integrity [of family life] is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.” In Griswold, Justice Goldberg said that the “rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.” It appears, therefore, that a state may curtail parental rights only to further, at least, a “powerful countervailing interest,” if not a compelling one.

C. Minors’ Rights and the Question of Capacity

At common law, minors had very few legal rights apart from

27. Id. at 233-34.
30. Id. at 651.
31. 367 U.S. 497 (1961). Justice Harlan dissented from the majority’s decision to dismiss the case on grounds of nonjusticiability. In that extensive dissent, he also took the opportunity to expound his views on the right of privacy. As such, his comments quoted in the text above do not necessarily constitute a minority view on the right of privacy issue. In fact, right of privacy protection was finally granted against the same Connecticut statute in Griswold v. Connecticut, decided 4 years later. Justice Harlan, concurring in Griswold, reaffirmed his stance taken in Poe v. Ullman.
their families. The underlying, if not explicit, justification for denying children the legal ability to act on their own was—and continues to be—the need to protect them from their own incapacity.

In the areas of health care and contracts, for example, there is a presumption of incapacity except for certain narrowly applied exceptions. The doctrine of informed consent, long a prerequisite of a physician’s right to treat his patient, is an apt

34. See Katz, Schroeder & Sidman, Emancipating Our Children—Coming of Legal Age in America, 7 FAMILY L.Q. 211, 212-14 (1973) [hereinafter cited as Katz]. Children were treated more as servants than as individuals with separate rights. See generally Kleinfield, The Balance of Power Between Infants, Their Parents and the State, 4 FAMILY L.Q. 320 (1970).

35. See, e.g., Dixon v. United States, 197 F. Supp. 798, 803 (W.D.S.C. 1961), wherein the court states:

At common law infants do not possess the power to exercise the same legal rights as adults. The disabilities of infants are really privileges, which the law gives them, and which they may exercise for their own benefit, the object of the law being to secure infants from damaging themselves or their property by their own improvident acts or prevent them from being imposed on by others. The rights of infants must be protected by the court, while adults must protect their own rights.

. . . Minority . . . is in itself a recognized badge of incompetency of an infant to handle his own affairs.

Capacity in legal terms is more generally thought to be emotional or judgmental, rather than physical, capacity. Physical incapacity is a limit in itself, without the necessity of legally imposed limits. An adult paraplegic, or one afflicted with a physically debilitating disease such as multiple sclerosis, is not precluded from acting as any other mentally normal adult, and may, in some circumstances, be granted license to participate in activities with physical counterparts, such as driving. On the other hand, a 13-year-old child may be physically able to drive a car yet is denied a license because of his presumed judgmental incapacity.

The emotional maturity factor involves more than the simple power of cognition. This cognitive power is basically established by age 16. See Elkin, Egocentrism in Adolescence, 38 CHILD DEVELOPMENT 1025, 1032 (1967). But judgmental skill and emotional maturity necessary to sort out complex moral variables are largely functions of age and experience. See A. Kay, Moral Development 179-83 (1968).


38. See, e.g., Schloendoff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914). A doctor who performs services upon a patient without his informed consent has technically committed a battery. See Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941). But see Pilpel, Minor’s Right to Medical Care, 36 ATL. L. REV. 462, 466 (1972), noting that while doctors remain fearful of the consequences of treating minors without parental consent, no case has been found where liability was imposed on a physician treating a
illustration. A minor is presumed incapable of giving informed consent unless the circumstances show his emancipation or his status as a "mature minor." Both the emancipation and "mature minor" exceptions rebut the presumption of incapacity. Voting provides a further illustration of the operation of the incapacity concept. Although it constitutes a fundamental constitutional right, children may properly be denied the right to vote. Restrictions on exercise of certain constitutional rights as well as on certain other activities such as driving, drinking, and marrying are also premised on the incapacity concept.

Although in recent years much sentiment has been marshaled for the extension of children's rights, the cases viewed

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In addition to the mature minor and emancipated minor exceptions to the informed consent doctrine, "emergency" constitutes a third exception to the informed consent rule. See, e.g., Wells v. McGehee, 39 So. 2d 196, 202 (La. App. 1949) (doctor released from liability for death of child incurred in treatment without the parent's consent because immediate action necessary for preservation of health of the child); Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912) (amputation performed without consent on comatose patient justified as necessary to save life); Sullivan v. Montgomery, 155 Misc. 448, 279 N.Y.S. 575, 577-78 (N.Y.C. Civ. Ct. Bronx County 1936) (administration of anesthesia with minor's but without parent's consent justified under emergency conditions). The question of a minor's capacity, however, is generally irrelevant to the emergency exception.


42. In Oregon v. Mitchell, 400 U.S. 112 (1970) (no majority opinion), the Supreme Court sustained the law reducing the age at which persons may vote in a national election from 21 to 18, but allowed states to maintain higher age limits for local elections.

43. In First Amendment areas, for instance, American courts have allowed differential treatment of children and adults:

The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way applicable to adults.


44. See, e.g., UTAH CODE ANN. § 30-1-2 (1969) (requiring parental consent for minors to marry).

45. See, e.g., Foster & Freed, A Bill of Rights for Children, 6 FAMILY L.Q. 343 (1972);
as extending children's rights seem not to disturb the basic presumption of incapacity. The courts in those cases either presumed incapacity or deemed the concept irrelevant to resolution of the issues. Children's criminal rights cases provide one example. The landmark decision, In Re Gault, explicitly granted children rights not recognized before, including rights to notice of charges, hearing, counsel, confrontation of witnesses, and the privilege against self-incrimination. In the process of granting these rights, however, the Court acknowledged the minor's inherent incapacity. The abysmal lack of due process in Gault's and other minors' cases convinced the Court that if adults are granted certain procedural safeguards, a fortiori children, because of limitations due to their age (that is, their incapacity), should likewise be protected. Realizing that "admissions and confessions of juveniles require special caution" as to reliability and voluntariness, and that "special problems may arise with respect to waiver of the privilege [against self-incrimination] by or on

Forer, Rights of Children: The Legal Vacuum, 55 A.B.A.J. 1152 (1969); Katz, supra note 34.

46. 387 U.S. 1 (1967).
47. Id. at 31-57.
48. The creation of a separate criminal system for children was motivated by a desire to rehabilitate the child through nonadversary means rather than through criminal strictures. At the same time, a notion of longstanding currency that children are entitled "not to liberty but to custody," 367 U.S. at 17, gave a great deal of discretion to juvenile court officials and led inevitably to abuses. Justice Fortas stated the problem in Gault:

[The highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. . . . [T]he results have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.

Id. at 17-18.

In another children's criminal rights case, Kent v. United States, 383 U.S. 541, 555 (1966), the Court stated that "studies and critiques of recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of Constitutional guarantees applicable to adults." See generally Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7.

49. The problems of minors placed in a criminal setting drew this comment from Justice Douglas:

Age 15 is a tender and difficult age for a boy . . . . He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.

50. 387 U.S. at 45.
behalf of children," the Court accorded to juveniles the "adult" rights listed above.52

_Tinker v. Des Moines School District_53 is representative of another line of cases, dealing with students in public school systems, considered to have expanded children's rights.54 The Court, without mentioning the incapacity concept, upheld the right of students to wear armbands in opposition to the Vietnam war as an exercise of their First Amendment rights: "Students... are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."55 Failure to mention the question of capacity in _Tinker_ and other similar cases may stem from either of two assumptions. First, minors possess the requisite capacity,56 or perhaps more accurately,
child's capacity, though limited, is adequate to the symbolic expression of political views. Second, even though the child lacks capacity, the unique nature of the child's situation in the public school system demands free expression nonetheless. The Supreme Court has indicated its apprehension that students may become, through state efforts to mold "the free mind at its source,"57 "closed circuit recipients of only that which the State chooses to communicate."58

Because of the child's presumed incapacity, the state and the parent have been placed in commanding positions as protectors of children. Ginsberg v. New York,59 for example, upheld New York's right to curtail sales of pornographic literature to persons under 17 because of the material's allegedly harmful impact upon minors. The state's rationale, that minors' contact with pornography "impair[s] the ethical and moral development of our youth,"60 assumed the minor's inability to handle explicit sexual material. The Court accepted that assumption and did not require "scientifically certain criteria of legislation,"61 content that if the assumption had not been demonstrated at least it had not been disproved.62 Further, unlike cases dealing with the First Amendment rights of adults, where only a compelling state interest may justify abridgment, Ginsberg required only that the legislature's purpose be "not irrational."63 In deferring to the state, the Court "recognized that even where there is an invasion of protected freedoms, 'the power of the state to control the conduct of children reaches beyond the scope of authority over adults . . . .'"64

60. Id. at 641.
63. Id. at 641.
64. Id. at 638, quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944). This differential treatment appears justified by the fact that "[c]hildren have a very special place in the law which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).
II. INSTANT CASE

The court granted the minor plaintiff the right of access to contraceptives on two bases. First, since the Utah regulations explicitly required parental consent before minors could procure contraceptives from the UPPA, the state engrafted a condition of eligibility not required by the governing federal statutes and regulations. The state regulations, therefore, conflicted with the federal scheme and were required to give way under the supremacy clause. Second, the condition of parental consent placed an impermissible burden on the minor’s constitutional right of privacy. The court relied on Roe v. Wade to find that the right of

65. T — H — v. Jones, Civil No. C 74-276 (D. Utah, July 23, 1975), at 10. The dissent argued that there was no conflict with federal statutes, placing emphasis on the phrases “in all appropriate cases,” 42 U.S.C. § 602(a)(15) (1970) and “who are eligible under the State plan,” 42 U.S.C. § 1396d(a)(4)(C) (1970) as showing the extent of the discretion given the state plan. Jones, supra, dissent at 2-3. The dissent also pointed to the federal regulations denoting the family, not merely the individual members of the family, as having the right to accept or reject such plans, 45 C.F.R. § 220.16(c) (1974). Jones, supra, dissent at 3-4. Finally, the dissent quoted 42 U.S.C. § 601 (1970), which states the objective of the act:

[To help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . .

Id. at 6 (emphasis by the dissent).

66. Only a handful of cases have yet treated the issue of the minor’s right of privacy. Only one other case besides the instant case has been found where the court treats the issue of the minor’s right of access to contraceptives via the right of privacy. Population Services Int’l v. Wilson, 398 F. Supp. 321 (S.D.N.Y. 1975) was decided approximately 2 weeks prior to Jones. In Population Services, although not concerned with the parental consent requirement, the court granted injunctive relief against a New York law which prohibited the sale or distribution of contraceptives to children under 16 by one other than a licensed pharmacist and disallowed the advertisement of contraceptive devices. The court held that the statute infringed on the right of privacy and enjoined enforcement of the provision prohibiting the distribution of contraceptives to persons under the age of 16.

Although Population Services granted the minor the right of access to contraceptives, that decision differed from the instant case in several ways. First, unlike Jones, the state asserted no interest in enforcing the parental right. Second, the decision referred only to non-prescription contraceptive devices, id. at 325, whereas in Jones no such distinction was made. Third, despite the holding invalidating the law as “overly restrictive,” id. at 336, the court recognized countervailing state interests, even though not asserted by the state:

The State may well have legitimate interests, not asserted in this action, e.g., promoting quality control and sanitary delivery of these products, or protecting the health and safety of those citizens who use them, which would be substantially furthered by other limitations on distribution.

Id. The court therefore stayed the injunction against enforcement of the law for 120 days, to “give the state legislature opportunity to enact narrower provisions, if it chooses to, which reflect appropriate constitutional concerns, without depriving the State of all legis-
privacy protecting the right to an abortion likewise assured an adult the right of access to contraceptives: "If, as Roe teaches, the fourteenth amendment protects a woman's right to decide whether she will terminate her pregnancy, it must also, we believe, protect her right to take measures to guard against pregnancy." The Supreme Court's recognition, however, that a "state may legitimately curtail the rights of children where it protects them from their own incapacity to fend for themselves," necessitated that the requisite capacity be found before this same right could be extended to minors. The court found that adequate protections already existed to protect minors from their own incapacity in the fact that the family aid program provided for the presence of trained personnel to advise children in the use of birth control devices. Further, in view of the multifaceted problems facing an unwed teenage mother, no "developmental differences" distinguished minors and adults so as to render the right of access less important to minors. The incapacity concept therefore could not prevent extension to minors of a right of access to contraceptives.

The court did not find the interests advanced by the state sufficiently compelling to curtail the minor's right. The state interest in protecting the minor from the effects of actions inimical to the mores of society was deemed inadequate to sustain the restrictions embodied in the regulations since those restrictions affected only poor families qualifying for federal aid. The state's failure to apply the requirements equally to affluent minors undercut its claim of a compelling interest. The court, without elaboration, dismissed the state's interest in enforcing parental prerogatives. Those prerogatives "are enti-
tled to considerable legal deference”71 but nevertheless must, in some circumstances, give way to valid state interests. In the same manner, “the state’s interest in enforcing parental prerogatives must yield to the fundamental rights of minors.” Consequently, “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 devices.”72

III. Analysis

This case note does not analyze the court’s treatment and resolution of the supremacy clause issue. Rather, it focuses on the second rationale for the court’s decision: the constitutional right of privacy protects a minor’s right of access to contraceptives. In this context, the case note examines the court’s creation of that right in light of traditional concepts of capacity. Further, it analyzes the intersection of the minor’s purported right with parental rights of control and state interests in enforcing parental prerogatives.

This restriction of the scope of the analysis appears justified by the fact that the instant case undoubtedly extended constitutional concepts of privacy while at the same time significantly undermining traditional concepts of incapacity and parental rights. To reach its holding, the court (1) granted to adults an unprecedented right of access to contraceptives on the strength of Roe v. Wade; (2) found that minors have the requisite capacity to share that right coequally with adults; and (3) secured the primacy of the minor’s right without seriously balancing it against either the parents’ right of control or the state’s interest in enforcing parental control. The first aspect of the court’s decision—use of Roe v. Wade to grant adults the right of access to contraceptives—is not challenged here, although the court unquestionably enlarged the individual’s right of access.73 The

71. Id. at 14.
72. Id. at 15.
73. The court admitted this point:

The Supreme Court has never determined whether the Constitutional right of privacy developed in Griswold v. Connecticut, 381 U.S. 479, and succeeding cases includes the right to obtain family planning services and materials free from unjustified government interference. In Eisenstadt v. Baird, 405 U.S. 438, the Court expressly refused to decide whether individuals have a right of access to contraceptives.

Jones, supra at 10. See also notes 4-12 and accompanying text supra.
court's use—or arguably, abuse—of principles of incapacity, however, merits critical examination.

A. The Court's Treatment of Minors' Incapacity

To assume that Roe can be fairly read to grant to adults a right of access to contraceptives does not resolve whether the same right must be extended to children. Prior to that determination, a court must find, as the majority in the instant case recognized, the requisite capacity.

The court's failure to define what it meant by "capacity" creates a troublesome ambivalence in the instant case. On the one hand, the court's statement that the minor's "incapacity to fend for himself" is remedied by the presence of trained personnel suggests precisely that the minor does not possess the requisite capacity. By relying on the presence of social workers in the family assistance program to rebut the incapacity argument raised by the state, the court in effect recognized that children are incapable of making the contraception decision without adult guidance. In other words, rather than establishing capacity, and hence a basis for the extension of a right of access, the court concedes, perhaps unwittingly, the absence of that requisite capacity. There appears, therefore, under this aspect of the court's own approach, no valid reason for disregarding the limitations that the incapacity concept has traditionally imposed on minors' rights.

On the other hand, the second argument raised by the court to resolve the incapacity issue—that "no developmental differences" distinguish minors from adults—confuses capacity with need. This approach assumes that reproductive ability coincides with the judgmental maturity necessary to sustain a right of access to contraceptives. Although this approach presents a simple administrative solution, it is doubtful whether the approach's underlying assumption can withstand challenge. The fact that a 9-year-old may be physically capable of operating an automobile does not in itself justify granting him a license, absent some analysis of his judgmental powers. It is likewise erroneous to assume that physical capacity to reproduce necessarily brings the

74. This is the solution to the age requirement used by State v. Koome, 84 Wash. 2d 901, 911, 530 P.2d 260, 267 (1975), in which the Washington Supreme Court upheld an unmarried minor's right to obtain an abortion without parental consent. In considering the age of consent, the court stated: "The age of fertility provides a practical minimum age requirement for consent to abortion, reducing the need for a legal one." Id.
emotional maturity necessary for wise resolution of the contraception decision. In any event, broad factual determinations concerning the capacity of minors as a class is arguably best left to the legislature, with its superior ability to resolve such questions of fact. Little justification appears for the court’s substitution in the present case of its own judgment on this broad question of fact for that of the legislature. This is especially true in light of the ipse dixit fashion in which the court asserted its factual conclusion.

B. Alternative Standards of Judicial Scrutiny

If minors lack sufficient capacity to exercise properly the right of access to contraceptives absent adult guidance, the court’s recognition of such a right as fundamental appears erroneous. That recognition places the court in the tenuous position of asserting that a significant class is possessed of a fundamental right it is ill-equipped to handle. Further, since the curtailment of a fundamental right triggers application of a strict or compelling state interest standard of judicial scrutiny, the court’s use of that rigorous standard in the present case is necessarily unwarranted.

75. Whether a minor is physically capable of sexual reproduction or not in other contexts appears to be wholly irrelevant if emotional maturity is not found. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968), where a minor was denied the privilege to purchase pornography because of its allegedly harmful impact on him. A minor is not permitted to enter certain movies for the same reason. See, e.g., Note, "For Adults Only": The Constitutionality of Governmental Film Censorship by Age Classification, 69 YALE L.J. 141 (1959).

76. The decision involves exceedingly complex social problems which the court is simply ill-equipped to assess and determine. Such questions deserve thorough empirical studies and evaluations which the legislature is best equipped to make. See note 78 infra.

Assumptions need to be tested. One implicit assumption which the court indulges in is that free access to contraceptives will effect a significant curtailment of illegitancies. Factors which would tend to undermine that assumption are the sporadic and unplanned nature of teenage sexual activity, ignorance of birth control methods, inadequate motivation to use the available devices (see, e.g., STATE OF UTAH DEP’T OF SOCIAL SERVICES, 1970 ANNUAL REPORT OF UTAH VITAL STATISTICS 30 (1973) (indicating that even adult women in Utah bearing illegitimate children could have avoided pregnancy by availing themselves of the contraceptive services offered)), failure of the devices through improper application or continuation, and increases in sexual activity. See Westoff, Coital Frequency and Contraceptives, 6 FAMILY PLANNING PERSPECTIVES 136, 141 (1974) (documenting an increase in intercourse among married people using contraceptives of approximately 14 percent in corrected figures).

On the other hand, certain costs to society need to be evaluated, such as the possible effects of free access to contraceptives on promiscuity among minors, venereal disease, and family solidarity. Such problems do not lend themselves to facile determination. The legislature could well determine that the social costs far outweigh the possible benefits. 77. See note 28 supra.
Rather than apply the rigorous and interventionist compelling state interest standard, strong arguments appear that the court should have applied a Ginsberg-type rational basis test. Ginsberg v. New York allows a state to protect its children from their own incapacity, even though state-imposed limitations may infringe on what otherwise are "protected areas" of minors' rights. The Court stated that the "well-being of children is of

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78. Upon a court's decision that an interest may be abridged only by a "compelling state interest," the court has essentially determined that the particular interest must prevail. One commentator has noted that the standard imposes such a severe burden of justification on the state as to be a "statement of a conclusion rather than a measure of constitutionality. The issue in those cases is resolved in the determination whether a fundamental interest is adversely affected." Kurland, The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses, 75 W. Va. L. Rev. 213, 232 (1973). See generally Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). Chief Justice Burger similarly noted:

Some lines must be drawn. To challenge such lines by the "compelling state interest" standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.


The imposition of a compelling interest standard in the instant case substituted the court's judgment for that of the legislature. Mr. Justice Frankfurter, long adverse to an interventionist stand by the courts, would repose that responsibility with the legislature when competing interests are involved:

How are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustments? . . . Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. . . . Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches us that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. . . . We are to set aside the judgments of those whose duty it is to legislate only if there is no reasonable basis for it.

Dennis v. United States, 341 U.S. 494, 525 (1951) (concurring opinion).


80. See notes 59-64 and accompanying text supra. It is clear in the present context that a state may protect its youth from what it deems morally undesirable elements. In Miller v. California, the Court "recognized that the States have a legitimate interest in prohibiting dissemination of obscene material when the mode of dissemination carries with it a significant danger . . . of exposure to juveniles." 413 U.S. 15, 18-19 (1973).

Justice Harlan, dissenting in Poe v. Ullman, 367 U.S. 497, 546 (1961), argued that a state does have an interest in the moral welfare of its citizenry:

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to
course a subject within the State’s power to regulate,”81 and “two interests justify the limitations” on minor’s activities. First, “constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic to the structure of our society.” Thus, 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.”82 Second, the “State also has an independent interest in the well-being of its youth.”83 The Court stated that, in view of these interests, to exclude the material required only “that we be able to say it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.”84 Further, in the application of this “not irrational” standard, the state’s position was not hindered by lack of proof of the assumptions underlying the state-imposed restrictions since the Court would not demand “scientifically certain criteria of legislation.”85

The instant case involves interests and rights similar, if not identical, to those considered in Ginsberg: a state interest in the well-being of its youth and in parents’ rights to direct the upbringing of their children poised against the minor’s assertedly unqualified right to engage in certain activities.86 Both cases in-

lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

81. 390 U.S. at 639.
82. Id.
83. Id. at 640.
84. Id. at 641.
85. Id. at 643.
86. Of course, parental rights and minors’ best interests ideally will coincide. Yet even if those interests are not in every instance served by parental choices, the child ultimately shares an interest in preserving parental rights, as enforced by the state in the instant case. One commentator has observed:

[Parental] interests are entitled to “special safeguards” and may be so entwined in “[t]he entire fabric of the Constitution” as to warrant ninth amendment protection. The parent even has a right to be wrong concerning the child’s best interests. As a constituent of the family, the child shares an interest in preservation of that right, even if the parent is sometimes mistaken about optimal choices. Indeed, the explanation for the parental right is largely the intimacy of the family unit and the beneficial effects of the family on the child’s development.

volve incursions on "protected areas" of minors' rights for what the state deems to be the best interests of the child. Also, both cases involve state-created restrictions designed to aid parents in the discharge of their responsibility to insure the well-being of their children. Given this significant correlation between *Ginsberg* and the present case, therefore, the standard of judicial scrutiny articulated in the former appears wholly appropriate for application in the latter. If the *Ginsberg* test were applied, Utah's parental consent requirement would almost certainly be sustained. The reasoning underlying that requirement—that parental guidance in the contraception decision is necessary to both the moral development of minors and protection of their health—^87 is clearly not irrational. Even if the state's reasoning admits of no

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87. The state may have felt, in view of an appraisal of its citizenry, that parental guidance and control of children's use of contraceptives would assure greater protection and more personal supervision of contraceptive use. It is undeniable that the use of contraceptives presents a growing health problem. One study based on California data estimates that there are at least 3,000 deaths of young women per year and 30,000 serious non-fatal illnesses from the use of oral contraceptives. H. Williams, *The Pill in New Perspective* 16, 131-38 (1969). Some researchers have presented evidence that the death rate from contraceptives is as high as from induced hospital abortions. B. Sarvis & H. Rodman, *The Abortion Controversy* 150 (1973). The birth control pill increases the risk of thromboembolic disorders by nine times, according to one research team. Vessey & Doll, *Investigation of Relation between Use of Oral Contraceptives and Thromboembolic Disease*, *British Medical J.*, April 27, 1968, at 199, 205. The official FDA study on oral contraceptives lists the risk of complication from blood-clotting disorders as six times greater among users than among nonusers. In addition, anyone with liver problems, breast cancer, kidney disease, high blood pressure, diabetes, epilepsy, asthma, fibroids of the uterus, migraine headaches or mental depressions are advised against the use of the pill without expert medical supervision. For a detailed report on the effects of contraceptive use see FDA, *Report on Oral Contraceptives by the Advisory Comm. on Obstetrics and Gynecology* (1966). Other studies indicate correlations with gall bladder and gallstone problems at double the rate of nonusers. See Connell, *The Pill Revisited*, 7 *Family Planning Perspectives* 62, 64-65 (1975) (also documenting the increased incidence of cardiac and multiple congenital abnormalities of the VACTRL type (vertebral, anal, cardiac, tracheoesophageal, renal and limb defects)). In addition, see *Hormones Linked to Birth Defects*, 106 *Sci. News*, Oct. 26, 1974, at 261-62. See generally Note, *Liability of Birth Control Manufacturers*, 23 *Hastings L.J.* 1526 (1972).

The risks associated with other forms of contraceptives, e.g., the intra-uterine device (IUD), are likewise not immune from controversy. See *Drug Firm and FDA Suspend IUD Sales*, 106 *Sci. News*, July 13, 1974, at 22 (result of fatalities from device known as Dalkon Shield). Although the risk is slight in relation to the magnitude of use, the parents' interests may well be represented by one commentator's statement relating especially to birth control pills:

After all, we are dealing with only a few deaths per hundred thousand users, which does not sound like very much until your wife, lover, or daughter is the one who dies from it, or until you take into account that many millions are now swallowing it regularly and that the number of fatalities continues to rise.

categorical proof, under Ginsberg the lack of empirical certainty provides no grounds for invalidation of the regulations.\textsuperscript{88}

\section*{C. Parental Rights and State Interests}

The most significant flaw in this decision arises from the court's failure fully to recognize and vindicate both parental rights of control and the state's interest in insuring the exercise of those rights. Essentially, the court failed adequately to balance parental rights and the state's concomitant interest against the minor's newly recognized right of access to contraceptives.\textsuperscript{89} Rather than engaging in a careful balancing process, the court relied upon cases and statutes that demonstrate instances of state encroachment on parental rights.\textsuperscript{90} These authorities, however, are of doubtful applicability to the issues of the present case.

The court's authorities demonstrate that, in some contexts, the state's interest in protecting minors outweighs parental rights; in each context, a valid state interest prevails against the parent. That result, however, does little or nothing to establish that, when a conflict exists between parents' and minors' rights, the latter must necessarily prevail. At most, the authorities cited by the court demonstrate the fact that parental rights are not absolute—leading only to the conclusion that the rights of parents must be carefully balanced one against the rights of children when those rights unavoidably conflict. The fact that parental rights are not unlimited does not, as the court appears to assume, dictate the conclusion that the rights of children must prevail.

If the state and parental interests identified in the present case were carefully balanced against a minor's right of access to contraceptives, the former would almost certainly prevail. Although the right of privacy, the basis of the minor's claim, has been accorded fundamental status, that fundamentality becomes attenuated in areas where the application of the right itself is

\textsuperscript{88} See notes 61-63 and accompanying text supra. See also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 52 (1973), wherein the Court states:

The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.

\textsuperscript{89} Before such a balancing test could occur, that right of access to contraceptives would have to be recognized and extended to the minor, as was done in this case.

\textsuperscript{90} The court gives as examples of situations where "valid state interests" have encroached upon parental rights: enforcement of compulsory education, regulating child labor, preventing parental neglect, and providing for the general health. Jones, supra at 14.
tenuous. Such an application arguably occurred in the instant case. The court, without precedent, created in adults a right of access to contraceptives, then again without precedent and seemingly in disregard of well-established concepts of capacity extended that right to minors. On the other hand, parental rights have consistently been accorded fundamental status. Further, the state’s Department of Social Services necessarily confronted the conflict between parental rights of control and the interests of minors in unimpeded access to contraceptives when it promulgated the regulations challenged in the instant case. It opted for the former and included the parental consent requirement in the regulatory scheme. That decision, given the expertise of the Department in the area, merits some, and perhaps substantial, deference.

Also, it appears that the court’s failure to balance the competing interests involved must give rise to undesirable consequences. First, if the minor’s asserted right of access to contraceptives can prevail over parental rights of control, a court will be compelled, in order to avoid an untenable inconsistency, to sustain that right in the event a state-employed social worker, whose judgment has been substituted for that of the parent, determines that a child in a particular case should not receive contraceptives. Thus, the state will be deprived of the opportunity to operate one of its programs in a manner that, in its judgment, best insures the well-being of program beneficiaries. Second, in apparent fear that some parents, contrary to the seeming best interests of the child, may unreasonably withhold consent from their children to obtain contraceptives, the court wholly abrogated all parents’ rights of binding control in their child’s contraception decision. Such an abrogation seems no more justified than removing custody of children from all parents because of the possibility that some parents may abuse or neglect their children. A better solu-

91. See note 73 supra.

92. Although there is some lower court precedent wherein the minor’s right of privacy has been recognized, see note 66 supra, the Supreme Court has never recognized a right of privacy in minors. See Note, Privacy Rights of Minors, supra note 16, at 1009; Note, The Minor’s Right to an Abortion and the Requirement of Parental Consent, 60 VA. L. REV. 305, 316-17 (1974).

93. See notes 32-34 and accompanying text supra.

94. Even in the cases where custody of the child is taken from neglectful or abusive parents, there is continuing debate whether the child is better off under poor parents or traditionally inept state agencies. See, e.g., THE KNOWN AND UNKNOWN IN CHILD WELFARE RESEARCH: AN APPRAISAL (M. Norris & B. Wallace eds. 1965); Soifer, Parental Autonomy, Family Rights and the Illegitimate: A Constitutional Commentary, 7 CONN. L. REV. 1
tion, consonant with proper recognition of both children's and parents' rights, would be a determination on a case-by-case basis whether retention of parental consent is justified.

IV. CONCLUSION

The court, without apparent need or constitutional justification, extended a fundamental right of access to contraceptives passim (1974); Symposium—The Relationship between Promise and Performance in State Intervention in Family Life, 9 COLUM. J.L. & SOC. PROB. 28 passim (1972).

95. The court could have disposed of the case on two narrower grounds, although neither passes without argument. First, the court could have disposed of the case on supremacy clause grounds alone. For the dissent's rebuttal see note 65 supra. Second, it could have disposed of the case on equal protection grounds, as did the United States Supreme Court in Eisenstadt v. Baird, note 10 and accompanying text supra. While not basing its decision on equal protection analysis, the Court mentioned that since the requirement of parental consent explicitly applied only to indigent minors whose families qualified for federal aid, the regulations would not withstand equal protection analysis.

The latter statement seems faulty on two grounds. First, the dissent argued that since an indigent minor could obtain the same services with the requisite means, then the only classification is based on wealth, which the Supreme Court in San Antonio Independent School Dist. v. Rodriguez, 422 U.S. 1, 18-28 (1973) held not to be a suspect classification and therefore not subject to the strict scrutiny applied in other contexts. Jones, supra, dissent at 15. Thus, the only test required was the deferential "reasonable basis" test that was satisfied by the state's desire "not to be involved in the distribution of contraceptives to minors." Id. This is reasonable, argued the dissent, because "state statutes condemn sexual relations with minors" as well as fornication. Id. See Utah CODE ANN. § 76-53-19 (sexual relations with a female under 18 years, with or without consent, is a felony) and § 76-53-5 (1953) (fornication classified as misdemeanor).

Second, although the statutes do not explicitly reach affluent minors, the Supreme Court has recognized that the mere underinclusiveness of a statute is not grounds in itself for invalidation. See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483, 488-89 (1955); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937); Mutual Loan Co. v. Martell, 222 U.S. 225, 225-36 (1911). See generally Note, Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065, 1084-87 (1969). This principle is pertinent, especially in light of the fact that affluent minors by common law likewise appear to be precluded from obtaining contraceptives without parental consent. Since an affluent minor could not obtain contraceptives except through his physician, he would fall within the category of "medical care," which the physician cannot legally administer without informed consent. See note 38 supra. Since minors rich and poor lack the ability to give informed consent absent specific exceptions equally applicable to rich and poor minors, notes 38-39 supra, all minors are affected equally. Further, Utah statutes imply a general parental consent requirement by specifically excusing the requirement in the treatment of a minor's venereal disease. Utah CODE ANN. § 26-6-39.1 (Supp. 1973). Other statutes specifically enforce parental consent requirements. See, e.g., Utah CODE ANN. § 76-7-304(4) (Supp. 1973) (requiring parental consent for single minor girls to procure abortions) and § 30-1-2 (1969) (requiring parental consent for males under 16 and females under 14 to marry). Other statutes express legislative opprobrium of teenage sexual activity. See, e.g., Utah CODE ANN. § 50-19-9 (Supp. 1973) (prohibiting sale of "prophylactics" to persons under 18).

96. According to long-recognized canons of constitutional interpretation, a court should dispose of the case on the narrowest possible grounds. Instead of disposing of the case on either the supremacy clause or equal protection grounds, the court continued to
to minors which it implicitly recognized the minor is ill-equipped to exercise. In doing so, the court failed to recognize longstanding parental rights and the state’s interest in reinforcing those rights as interests against which the minors’ nascent rights should have been balanced. In view of the foregoing, extension of the right of access to contraceptives to minors in the instant case appears to have been unjustified.

the right of privacy, recognizing an unprecedented fundamental right of access to contraceptives both in adults and minors. The disposition of the case is thus in contrast with accepted rules of constitutional interpretation. Justice Brandeis laid out, in Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (concurring), a series of rules “for its own governance,” which were subsequently followed by the Supreme Court in deciding constitutional issues. Among the rules are that the Court will not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,” quoting Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Comm’rs, 113 U.S. 33, 39 (1885), and that “the Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.” Accord, Rescue Army v. Municipal Court, 331 U.S. 549 (1947) and Poe v. Ullman, 367 U.S. 497, 503 (1961) (Court will not adjudicate constitutional issues unless unavoidable). The plaintiff in the instant case did not show that she was injured by the operation of the regulations. She was not denied contraceptives because she could not obtain parental consent, but because she refused to do so. Jones, supra at 2.