Florida Law Review

Volume 29 | Issue 5 Article 9

October 1977

Constitutional Law: Minors' Access to Contraceptives--Freed from Future Restraints?

Elizabeth E. Hoyt

section 326 is no greater than that guaranteed to other media by the first amendment.[55]

Considering the lack of precedent for Tamm's position, other judges may find it difficult to believe that Congress intended to grant broadcasters greater freedom of speech than that provided to other media by the first amendment. In light of the unique characteristics of the broadcast medium, such as easy access by children,[56] other judges are more likely to agree with Chief Judge Bazelon's position or even with the Commission's view that the electronic media should be given less first amendment protection than the other media.[57] Furthermore, the fear that a literal reading of the censorship provision of section 326 will cause the airwaves to be flooded with obscenity may also make jurists hesitant to follow a departure from tradition.

The majority's decision in the instant case removes the deceptive techniques long employed by the FCC to evade the anti-censorship mandate of section 326. While this new freedom for broadcast programmers should enhance the quality and variety of program content, licensees still may fear reprisal for the broadcast of controversial programs because the scope of section 326 remains in doubt. The licensee making the wrong choice between Judge Tamm's literal reading of section 326 and Chief Judge Bazelon's view that the statute's censorship provision is limited to speech protected by the first amendment is faced with the possible revocation of his license.[58] To avoid this injustice, the FCC and the courts should clearly indicate which interpretation of section 326 will control future decisions. Their choice should favor the traditional position extending the coverage of section 326 only to language entitled to first amendment protection.

STANLEY C. BOLDEN

CONSTITUTIONAL LAW: MINORS' ACCESS TO CONTRACEPTIVES – FREED FROM FUTURE RESTRAINTS?
Carey v. Population Services International, 97 S. Ct. 2010 (1977)

Appellees, Population Planning Associates, Inc.,[1] sought declaratory and injunctive relief from enforcement[2] of section 6811(8) of the New York Education Law,[3] which proscribed the sale or distribution of contraceptives to minors

55. See note 44 *supra* and accompanying text.
56. See note 47 *supra*.
57. 556 F.2d at 16.
58. See note 10 *supra*.

1. Population Planning Associates, Inc. is a mail order retailer of nonmedical contraceptives. Based in North Carolina, the corporation advertised in New York periodicals and distributed its products to New York residents regardless of age. 97 S. Ct. 2010, 2015 (1977).

2. Appellants, defendants in the district court, were state officials responsible for enforcement of N.Y. EDUC. LAW §6811(8) (McKinney 1971). 97 S. Ct. at 2014.

3. N.Y. EDUC. LAW §6811(8) (McKinney 1971) read: "It shall be a class A misdemeanor for:
....

under sixteen years of age. A three-judge district court,[4] finding no substantial relation between the statute and its purported objective of deterring sexual activity among minors, declared that section 6811(8) violated the first and fourteenth amendment rights of minors and enjoined its enforcement.[5] The Supreme Court, on direct appeal, affirmed and HELD, the statute unconstitutionally burdened the privacy rights of minors because the state had failed to prove that its enforcement would further a significant state interest.[6]

Judicial declarations of the rights of minors typically have required reconciliation of three competing interests: those of the state, the parents, and the child.[7] While the state may regulate the child's conduct to further the societal interest in his development into a useful citizen,[8] the parents have the primary responsibility for guiding the upbringing of the child.[9] Furthermore, the child is entitled to his own constitutional rights.[10]

American courts have afforded greater latitude to the state to regulate the conduct of minors than the conduct of adults. In *Prince v. Massachusetts*,[11] the Supreme Court upheld a child labor law despite assertions of the child's religious freedom and the parents' primary responsibility in the child rearing

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy is hereby prohibited."

N.Y. EDUC. LAW §6807(b) (McKinney 1972) provided an exception for physicians who prescribed contraceptives for their patients. It read: "This article shall not be construed to affect or prevent:

. . . .

b. Any physician who is not the owner of a pharmacy, or registered store, or is not in the employ of such owner, from supplying his patients with such drugs as the physician . . . deems proper in connection with his practice . . . ."

"Drugs" as used in §6807(b) has been construed to include any contraceptive drug or device. Population Services Int'l v. Wilson, 398 F. Supp. 321, 329-30 & n.8 (S.D.N.Y. 1975).

4. The three-judge district court was impaneled in compliance with 28 U.S.C. §§2281, 2284 (1970) pursuant to an order by district court Judge Pierce. Population Services Int'l v. Wilson, 383 F. Supp. 543 (S.D.N.Y. 1974).

5. Population Services Int'l v. Wilson, 398 F. Supp. 321 (S.D.N.Y. 1975). The change in style occurred because the three-judge court determined that Population Planning Associates, Inc., one of seven plaintiffs in the original action, had standing to challenge all provisions of the statute.

6. The Court also held that: (1) Population Planning Associates, Inc. had requisite standing to challenge N.Y. EDUC. LAW §6811(8) in its own right and on behalf of its potential customers, 96 S. Ct. at 2015-16; (2) the statute's choice of pharmacists as the sole distributors of nonhazardous contraceptives to adults, in the absence of a compelling state interest, was an unconstitutional burden on access to contraceptives, *id.* at 2017-20; and (3) total suppression of contraceptive advertisements was unconstitutional, *id.* at 2024-25.

7. Commentators have accused the courts of attempting to unravel the respective rights of the state, the parents, and the child by applying ineffective labels rather than substantive standards. *See, e.g.*, Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974).

8. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

9. *Id.* at 166.

10. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

11. 321 U.S. 158 (1944).

process.[12] Similarly, the Court found in *Ginsberg v. New York*[13] that the societal interest in protecting children from sexually explicit publications justified restrictions that would have violated the first amendment rights of adults.[14]

In other cases, however, the state's latitude in governing the conduct of minors has been circumscribed by protection of the parents' role in guiding the religious and educational development of their children.[15] In one Supreme Court decision the due process clause protected the right of parents to engage foreign language teachers for their children.[16] Similarly, in *Pierce v. Society of Sisters*,[17] a state attempt to bar all private education violated the freedom of parents to direct the raising of their children. This deference to parental prerogatives subsequently permitted parents to defy a state compulsory education law.[18]

In addition to securing for parents freedom to guide their children, the courts have allowed minors to assert their own constitutional rights.[19] Legislation that compelled children to pledge allegiance and salute the flag, aimed at promoting national unity, was found to infringe upon a minor's freedom of "intellect and spirit."[20] Moreover, to suspend a student for war protest that did not disrupt normal classroom routine violated his first amendment freedom of expression.[21] The Supreme Court has correspondingly advanced the due process

12. In *Prince* the child and her guardian, both Jehovah's Witnesses, were offering pamphlets for sale on the public streets of Boston. Their activity violated a state statute prohibiting minors from selling periodicals and other articles of merchandise upon the streets or in public places. The statute also proscribed furnishing minors with any articles for that purpose. *Id.* at 160-63. The Court upheld the legislature's purported purpose to protect children from "harms arising from other activities subject to all the diverse influences of the street." *Id.* at 168.

13. 390 U.S. 629 (1968).

14. In *Prince* the parents' and the state's interest in the child were in opposition; in contrast, the *Ginsberg* Court thought the state assisted the parents in proper child raising by restricting direct distribution of sexually oriented materials to minors. *Id.* at 639. In both cases, however, the societal stake in the child's development prevailed over the exercise of his first amendment rights. *Compare* Ginsberg v. New York, 390 U.S. at 640-43 *with* Prince v. Massachusetts, 321 U.S. at 165-67.

15. *See generally* Note, *supra* note 7.

16. Meyer v. Nebraska, 262 U.S. 390 (1923).

17. 268 U.S. 510 (1925).

18. Wisconsin v. Yoder, 406 U.S. 205 (1972). When religious freedom of Amish children and the interests of parents in their children's development met with state interference, more than a showing of a reasonable relationship to a state aim was required. *Id.* at 235-36. For failing to meet this higher burden of proof, the state's convictions of the Amish parents who refused to send their children to public school beyond the eighth grade were reversed. *Id.* Justice Douglas, dissenting in part, noted the majority's failure to consider the children's right to choose whether to follow their families' guidance in the Amish tradition or to pursue a career that would require furtherance of their formal education. *Id.* at 244.

19. *In re* Gault, 387 U.S. 1, 14-17 (1967). *See generally* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 173.

20. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

21. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). Similarly, in the landmark case of Brown v. Board of Educ., 347 U.S. 483 (1954), a Negro child successfully challenged a state segregation statute.

rights of minors in the juvenile justice system.[22] Rejecting a total incorporation of adult criminal procedural protections,[23] the Court in a case-by-case review extended to the juvenile those due process rights necessitated by "fundamental fairness."[24] Limitations on state control through procedural safeguards for minors also developed in the educational system.[25]

Together with this judicial extension to minors of traditional constitutional guarantees, a new constitutional right was emerging that would later be asserted on behalf of minors. This right was the freedom to decide whether to bear a child,[26] a privacy right found within the penumbra of the guarantees of the Bill of Rights.[27] In recognizing zones of privacy,[28] the Supreme Court protected from state interference procreational decisions[29] arising in two contexts,

---

22. Breaking from the common law practice of treating a child of seven years of age or more as fully accountable for his criminal conduct, the juvenile court shifted emphasis from the conduct of the youth to a more general appraisal of the child's needs in order to facilitate his rehabilitation. *In re* Gault, 387 U.S. 1, 15-16 (1967). Theoretically the state and the courts were protecting and providing for the misguided child at juvenile hearings, not punishing him. Thus procedural safeguards found in the criminal system were deemed misplaced and unnecessary in this nonadversary climate. This ideology yielded in the face of inadequate protection of minors, and the juvenile court necessarily became a forum for judicial delineation of the scope of the state's regulatory functions and the minors' constitutional rights. *See generally* Note, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

23. *In re* Gault, 387 U.S. 1 (1967). The Court expressly refused to consider the effect of the fourteenth amendment upon the totality of the relationship between the youth and the state. Its opinion was restricted to the judicial stages of the juvenile process presented by the facts of the case. *Id.* at 13.

24. McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). *In re* Gault, 387 U.S. 1 (1967), the landmark case recognizing minors' due process rights, extended to juveniles in delinquency hearings the requirements of notice of the charge, right to counsel, right to confront and cross-examine witnesses, and the privilege against self-incrimination. *Cf.* Breed v. Jones, 421 U.S. 519 (1975) (state criminal proceedings following juvenile delinquency adjudication based on the same conduct held a violation of double jeopardy); *In re* Winship, 397 U.S. 358 (1970) (criminal rather than civil standard of proof required in juvenile proceedings). *But cf.* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (trial by jury not mandated in juvenile court proceedings). The Court of Appeals for the Fifth Circuit observed that, "[i]n none of the cases involving minors' rights has the Court proposed a universal analytical framework for the evaluation of the minor's claim." Poe v. Gerstein, 517 F.2d 787, 790 (5th Cir. 1975).

25. *See* Wood v. Strickland, 420 U.S. 308, 313-22 (1975) (school officials stripped of their qualified immunity if they knew or should have known that due process rights of the students were being violated either substantively or procedurally); Goss v. Lopez, 419 U.S. 565 (1975) (high school students in a civil rights action successfully challenged an Ohio statute that allowed school suspension for ten days without notice or a preliminary hearing). *See also* Young, *Due Process in the Classroom*, 1 J. LAW & EDUC. 65 (1972) (emphasis on higher education).

26. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

27. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

28. Roe v. Wade, 410 U.S. 113, 152 (1973).

29. In Whalen v. Roe, 97 S. Ct. 869, 876 (1977), the Court acknowledged the individual's freedom to make certain decisions. *Cf.* Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Prince v. Massachusetts, 321 U.S. at 166 (family relationships); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation). *See also* Lawson, *The Right to Decide — Individual Liberty Versus State Police Powers*, 18 ARIZ. L. REV. 207 (1976).

contraception[30] and abortion.[31] First attaching this privacy right to the married couple,[32] the Court subsequently viewed it as belonging to the woman alone since she would ultimately bear the child and customarily assume a critical role in his upbringing.[33] The courts deemed the decision concerning procreation to be protected by a fundamental right.[34] Thus, the state was required to show a compelling state interest to justify invasion of this right. Statutes attempting to regulate abortion or contraception must be narrowly drawn to further specific state interests.[35]

The Supreme Court first considered whether a minor was entitled to this fundamental constitutional protection in an abortion case, *Planned Parenthood v. Danforth*.[36] In that case, the Court reaffirmed its commitment to two propositions: that minors have constitutional rights, including the right to decide whether to bear a child, and that the state has greater latitude with these constitutional rights than with the rights of adults.[37] Therefore, the state was not required to show a compelling state interest when legislation encroached upon the minor's right to privacy. Instead the Court demanded compliance with a less stringent standard: the state must prove that legislation regulating abortions for minors serves a significant rather than compelling state interest.[38] In *Planned Parenthood,* the Supreme Court struck down a state statute granting parents an absolute veto over the minor's abortion decision because the statute failed to serve a significant state interest.[39]

In *Bellotti v. Baird,*[40] the companion case to *Planned Parenthood,* a Massachusetts statute[41] prescribing parental consultation before a minor obtained an

30. *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Poe v. Ullman, 367 U.S. 497 (1961).

31. *See, e.g.,* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). The Court has viewed both contraception and abortion as rights to personal privacy, ignoring whether the decision is made before or after conception. *But see* 97 S. Ct. at 2031 (Stevens, J., concurring).

32. Griswold v. Connecticut, 381 U.S. 479 (1965).

33. Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court, employing equal protection analysis, rejected as inappropriate and untenable the state's assertion that a ban on distribution of contraceptives to single women would protect their morals and their health, and found no rational reason for treating single women differently from married ones. *Id.* at 447-53.

34. *Id.* at 453.

35. Roe v. Wade, 410 U.S. 113, 155 (1973). Significantly, the Court applied a test of rationality or reasonableness when striking down procedural requirements in Doe v. Bolton, 410 U.S. 179, 194 (1973), decided with *Roe. See also* 97 S. Ct. at 2026 (Powell, J., concurring).

36. 428 U.S. 52 (1976).

37. *Id.* at 74.

38. *Id.* at 75.

39. In *Roe* the Court extended its restraint upon the power of the state to prohibit abortions in the first three months of pregnancy to preclude parents from exercising a veto power over the minor's abortion decision, which necessarily is made with her physican's guidance. The state had asserted that the parental veto served as a safeguard to the family unit and parental authority. Rejecting this argument, the Court found that the statute's provision would not repair a fractured family unit and that independent interests of parents were of no greater importance than the privacy rights of minors. *Id.*

40. 428 U.S. 132 (1976).

41. MASS. ANN. LAWS ch. 112 §12P (Michie/Law. Co-op 1974): "1) If the mother is less

abortion was susceptible to an interpretation less stringent than *Planned Parenthood's* absolute veto. Under that construction of the statute, a parental refusal to give consent could be countermanded by an adjudication determining that the pregnant minor was mature enough to give her own informed consent to an abortion.[42] Furthermore, a minor not mature enough to consent could obtain an abortion by showing good cause, notwithstanding parental disapproval. The Supreme Court abstained from interpreting Massachusetts' ambiguous abortion law, remanding for an authoritative construction by the state's highest court.[43] Thus, the Court's opinion in *Bellotti* left open the question whether some parental control of the minor's abortion decision could withstand judicial scrutiny.[44]

The tension between a minor's privacy right and a state legislative attempt to limit that right divided the Court in the instant case.[45] While *Planned*

---

than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient." *See generally* Note, *An Analysis of the 1974 Massachusetts Abortion Statute and a Minor's Right to Abortion*, 10 NEW ENGLAND L. REV. 417 (1975).

42. For further discussion of the common law "mature minor" rules and "emancipated minor" statutes, see Dunn, *The Availability of Abortion, Sterilization and Other Medical Treatment for Minor Patients*, 44 U.M.K.C. L. REV. 1, 4-7 (1975).

43. The Massachusetts Supreme Judicial Court answered questions certified by the United States District Court for the District of Massachusetts concerning the abortion statute's parental consent provision, MASS. ANN. LAWS ch. 112, §12P (Michie/Law. Co-op 1974). See note 41 *supra*. Baird v. Attorney Gen., 360 N.E.2d 288 (Mass. 1977). Mindful of legislative intent, Massachusetts' highest court found that the statute required parental consultation prior to an abortion except in an emergency or when neither parent was available. The district court has not yet ruled on the constitutionality of the law as construed by the state court, but in granting a stay enjoining operation of the statute pending clarification, the court expressed serious doubts about its survival. Baird v. Bellotti, 428 F. Supp. 854 (D. Mass. 1977). The federal distirct court stated its concern that: (1) although so construed by the state court, the requirement that parents and the court consider only the best interests of the child in their resolution of the minor's abortion question was not expressed on the face of the statute; (2) even if instances arose in which the child's best interest would be served by withholding information concerning her pregnancy from her parents, the state court's interpretation would foreclose any such option if the parents were available; the court saw this as a tendency toward the unconstitutional burden found in *Planned Parenthood*; and (3) even a mature minor could be overruled by her parents or the court in her decision to abort. The Supreme Court had counseled the district court to weigh the extent of the burden imposed on minors' rights against the statute's justification. Refusing to enjoin enforcement of selected portions of the statute, the district court granted plaintiff's motion to enjoin enforcement of the statute in its entirety. Although not conclusive, the district court's opinion cast doubt upon the future of §12P in Massachusetts.

44. Bellotti v. Baird, 428 U.S. at 147.

45. Members of the Court disagreed sharply as to Part IV of Justice Brennan's opinion concerning the provision of the New York statute dealing with minors' access to contraceptives. Justices Stewart, Marshall, and Blackmun joined in the Court's opinion while Justice Powell

Parenthood and *Bellotti* examined state regulation of abortions, the statute attacked in the instant case sharply limited the distribution and sale of contraceptives to minors.[46] Analogizing this prohibition to the absolute parental veto of abortions struck down in *Planned Parenthood,* the plurality found that case dispositive. If state concern for the health of the pregnant minor and the protection of her unborn child was not significant enough to excuse interference with the minor's private decision to abort,[47] it followed that the state's interest in the sexual activity of minors in the instant case was still less significant.

The means selected for the achievement of the state's purported objectives were also found constitutionally deficient. The Court rejected as unreasonable the state's argument that increasing the hazards of teenage sexual activity would deter that behavior. First, this logic would endorse bans on abortion and contraception for unmarried adults since their sexual activities were also contrary to many state policies, a direction already rejected by the Court in its previous decisions.[48] In addition, the Court refused to attribute to the New York legislature an intent to punish teenage fornication by subjecting minors to the attendant hazards of pregnancy and venereal disease.[49] Finally, the state had offered no proof that a prohibition of contraceptives would reduce minors' sexual activity.[50] Thus, the state had failed to show a reasonable means to accomplish a significant state interest. For the plurality in the instant case, this failure compelled the conclusion that New York's intrusion on minors' privacy rights was unconstitutional.[51]

Concurring in the result, Justice Powell objected that the significant state interest standard applied by the Court was unnecessarily demanding on legisla-

---

concurred only in the judgment. 97 S. Ct. at 2014, 2026. Justice White joined in the result, charging the state with failure to show that a prohibition on distribution of contraceptives to minors would deter teenage sexual intercourse. *Id.* at 2025. Justice Stevens, also joining in the result, saw the statute as denying married minors and parents of unmarried minors the option to purchase contraceptives to prevent venereal disease and unwanted pregnancies. *Id.* at 2030-32. The Chief Justice dissented without opinion, *id.* at 2025, while Justice Rehnquist accused the Court of frustrating the New York legislature's attempt to deal with problems of teenage promiscuity and charged the Court with overextending principles originally formulated for different factual situations. *Id.* at 2033-34.

46. The statute prohibited all distribution and sale of contraceptives to minors unless contraceptives were prescribed by a physician. *See* N.Y. EDUC. LAW §§6807(b), 6811(8) (McKinney 1971). See note 3 *supra.*

47. Planned Parenthood v. Danforth, 428 U.S. at 75.

48. 97 S. Ct. at 2021. *See, e.g.,* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972).

49. 97 S. Ct. at 2022.

50. *Id.* Appellees cited numerous authorities to prove that no deterrent effect would occur. *See e.g.,* Reiss, *Contraceptive Information and Morality,* 2 J. SEX RESEARCH 51 (1966). *See generally* Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy,* 88 HARV. L. REV. 1001, 1010 (1975).

51. The Court also found the physician exception provided by N.Y. EDUC. LAW §6807(b) inadequate to save the statute. The burden placed on minors' access to contraceptives by requiring a physician as intermediary did not further a significant state interest. Since his medical advice was unnecessary to dispense nonhazardous contraceptives, reliance upon the doctor as moral counselor would lead to arbitrary results wholly ineffective to implement the state's objective. 97 S. Ct. at 2023-24. See note 3 *supra.*

tors and unsupported by precedent.[52] He viewed this standard as one "that for all practical purposes approaches the 'compelling state interest' standard."[53] He would have preferred a more lenient level of scrutiny, specifically "whether the restriction rationally serves valid state interests."[54] In his view the present statute had failed because it denied access to contraceptives for married minors and prohibited parents from guiding their children in decisions concerning sexual activity.[55] Relying on the *Bellotti* suggestion that a limited parental control provision, in contrast to the absolute veto provision struck down in *Planned Parenthood,* would present a substantially different constitutional issue,[56] Powell encouraged New York legislators to redraft their statute. He reasoned that they could further the legitimate state aim of discouraging teenage sexual activity and decisionmaking without guidance while remaining within the limits imposed by the privacy rights of minors.[57]

To fulfill Powell's prophecy that a parental guidance restriction could survive the scrutiny of the present Court, the redrafted statute would need to comport with the judicial standard endorsed in *Planned Parenthood*[58] and the instant case.[59] A showing of both a significant state interest and a reasonable means to attain that interest is required. Applying the first test, the Court could view problems of teenage sexual activity as involving a significant state interest. It has repeatedly acknowledged the legitimate state concern for the health and morals of its minor citizens[60] as well as the interest in the consequences of teenage sexual activity.[61] In addition, the state's interest in promoting parental guidance of teenage decisions concerning sexual intercourse could be considered constitutionally significant. The Court has consistently emphasized the parental role in the upbringing and direction of minors.[62] Moreover, Justice Powell has not been the sole advocate of parental involvement in decisions of children concerning sexual matters. In *Planned Parenthood,* six Justices indi-

52. In contrast to a mere rationality standard, which places the burden of proof on the challenger of a statute, the significant state interest test shifts this burden of proof to the state. Justice Powell cited with approval the Court's use of the rationality standard in its endorsement of state statutes restricting minors' activities in Prince v. Massachusetts, 321 U.S. at 165, and Ginsberg v. New York, 390 U.S. at 639. 97 S. Ct. at 2028. Justice Powell also favors rational basis scrutiny of gender-based discrimination. *See* Craig v. Boren, 97 S. Ct. 451, 464 (1977) (Powell, J., concurring); Comment, *Gender-Based Discrimination and Equal Protection: The Emerging Intermediate Standard,* 29 U. FLA. L. REV. 582, 590 (1977).

53. 97 S. Ct. at 2027-28.

54. *Id.* at 2028.

55. *Id.*

56. Bellotti v. Baird, 428 U.S. at 147.

57. "I have no doubt that properly framed legislation serving this purpose would meet constitutional standards . . . ." 97 S. C. at 2028 (Powell, J., concurring).

58. Planned Parenthood v. Danforth, 428 U.S. at 75.

59. 97 S. Ct. at 2021.

60. *See, e.g.,* Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944).

61. 97 S. Ct. at 2022 & n.21.

62. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *See generally* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights",* 1976 B.Y.U. L. REV. 605; Levy, *The Rights of Parents,* 1976 B.Y.U. L. REV. 694.

cated approval of some form of legislative prescription of parental assistance in the minor's determination to have an abortion.[63] Similarly, there were strong indications in the instant case that a qualified parental assistance provision might be favorably received by a majority of the Court.[64] Promoting parental discussion of not only the decision to have sexual intercourse but also sexually related subjects such as venereal disease and the merits of available birth control methods could also be of significant value. Thus, a state probably could advance an interest in the health and morals of its minors or an interest in promoting parental guidance sufficient to meet the test of significance.

Assuming that a significant policy interest justifies statutory regulations, the state must also demonstrate that those regulations are a rational means to fulfill the state's purpose.[65] Thus, the state must prove that a qualified parental consent requirement would either deter teenage sexual activity or encourage parental consultations before minors decide to engage in sexual intercourse. In the instant case the Court rejected the contention that restrictions on minors' access to contraceptives would deter sexual conduct. A parental guidance stipulation, manifestly a lesser impediment than a flat prohibition, would not offer a greater deterrent to promiscuity and thus could not increase the rationality of such a statute. Statistics indicate that teenagers usually do not seek contraceptives until after their sexual habits have been formed.[66] Thus, assuming that a legislative mandate would increase parental consultation with minors, at that stage the decision to engage in sexual intercourse has already been made in many instances, and parents' efforts to dissuade their children would likely be ineffective.[67]

The statute would also fail as a reasonable means to promote parental discussion with teenagers. As a practical matter, many teenagers would not face a direct confrontation with parents to gain access to nonhazardous contraceptives.[68] Furthermore, teenagers who would seek the advice required by the statute may be more likely to talk to their parents about sexually related sub-

---

63. Planned Parenthood v. Danforth, 428 U.S. at 91 (Stewart & Powell, JJ., concurring); *id.* at 95 (White, Rehnquist, JJ. & Burger, C.J., dissenting in part); *id.* at 102 (Stevens, J., dissenting in part). *But see* Baird v. Bellotti, 428 F. Supp. 854, 855 n.1 (D. Mass. 1977).

64. See note 46 *supra*. Rejecting the necessity of a *laissez-faire* approach to minors' decisionmaking by legislators, Justice Stevens described as "frivolous" appellees' argument "that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State." 97 S. Ct. at 2031. *See also id.* at 2026 (cited with approval by White, J.).

65. *Id.* at 2022.

66. A recent Los Angeles study of teenage girls seeking contraceptive assistance for the first time revealed that "96 percent of the girls were already sexually active when they came for contraception and 58 percent had been active for over a year. The inescapable inference from this data is that the request for contraception follows established sexual practices and does not stimulate it." Brief for American Civil Liberties Union as Amicus Curiae at 14, 97 S. Ct. 2010 (1977). *See also* Wilkins, *Children's Rights: Removing the Parental Consent Barrier to Medical Treatment of Minors*, 1975 ARIZ. ST. L.J. 31, 68.

67. *See* Wilkins, *supra* note 66, at 68; Brief for American Civil Liberties Union as Amicus Curiae at 14, 97 S. Ct. 2010 (1977) (citing R. SORRENSON, ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA 166 (1973)).

68. *See* Wilkins, *supra* note 66, at 37.

jects irrespective of legislative mandates. In those families in which few sexual discussions occur, legislative attempts to encourage consultation prior to contraceptive purchases will more likely result in sexually active teenagers forgoing contraception.

Similarly, the adjudicatory proceeding suggested in *Bellotti* to determine whether a minor is sufficiently mature to make her own decision concerning abortion is less workable in the contraceptive setting. Delay, expense, and infringements on privacy that accompany a public hearing render impractical this approach.[69] Accordingly, it seems unlikely that the state can demonstrate that a parental consultation requirement is a reasonable means to advance its interest in the welfare of children or in improving parent-child communication. Thus, the statute must fall as an unjustified infringement of the privacy rights of minors.

This analysis may well survive an eventual validation of the qualified parental consent clause at issue in *Bellotti*.[70] Presented with a reframed section 6811(8), the Court might acknowledge significant differences between legislation dealing with abortion, as in *Planned Parenthood* and *Bellotti*, and legislation dealing with contraception.[71] If a parental guidance provision in an abortion statute were upheld, a minor, unless she obtains an illegal abortion or miscarries, faces the certainty that her parents will discover her pregnancy. Furthermore, for health reasons, a pregnant minor cannot postpone her choice and will be compelled to consult her parents early in her pregnancy. Thus, the effect of a prior parental consultation provision in *Bellotti* would be to accelerate an inevitable confrontation between the parents and the pregnant minor. In contrast, a teenager who is not pregnant may delay or even forgo consulting with parents to obtain contraceptives because she fears the conflicts that may arise from disclosure of her activities. With contraceptives unavailable and abstention an unrealistic atlernative,[72] the inevitable consequence may be disease and unwanted pregnancy,[73] the very evils legislators purport to remedy.

The principles enunciated in the instant case will not permit restriction of a minor's access to contraceptives through a prior parental consultation provision. Justice Powell and a majority of the Court have indicated that a state has a significant interest in protecting the physical and moral well-being of minors. Similarly, the Court has viewed as significant the promotion of parent-teenager communication concerning sexual matters. Statutory insistence upon parental consultation before allowing minors access to contraceptives, however, is an irrational and ineffective means to achieve the state's objectives. Legislating that teenagers and their parents discuss sexual matters will not bring about conferences; it will instead result in teenage sexual intercourse without con-

69. *See* Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) (to make judicial proceedings to gain consent part of the public record invaded minors' right to privacy); *cf.* Wilkins, *supra* note 66, at 49 (delay as a factor in mature minor adjudications).

70. See note 43 *supra*.

71. See note 31 *supra*.

72. 97 S. Ct. at 2032 (Stevens. J., concurring).

73. 97 S. Ct. at 2022.