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Joshua A. Douglas

University of Kentucky College of Law, joshuadouglas@uky.edu

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**WHEN IS A “MINOR” ALSO AN “ADULT”? AN
ADOLESCENT’S LIBERTY INTEREST IN ACCESSING
CONTRACEPTIVES FROM PUBLIC SCHOOL
DISTRIBUTION PROGRAMS**

JOSHUA A. DOUGLAS*

INTRODUCTION

Imagine “Mary,” a sixteen-year-old junior in high school, who has been dating “John,” a seventeen-year-old senior, for three years in a serious relationship. Mary knows that she and John should practice safe sex, and she does not want to become pregnant or catch a sexually transmitted disease. However, she is concerned that her parents will not approve of her activities and will not help her in obtaining contraceptives. John also feels that he is mature enough to make the decision to have sex, yet he knows that his parents will want to consent before he can receive condoms from his high school. Mary and John believe that they are physically and emotionally mature enough to decide to have sex and to use contraceptives without their parents’ approval, and they could potentially obtain free condoms from their public high school’s health clinic. Both Mary and John’s parents, however, feel that a public school condom distribution program undermines their religious teachings to abstain from sex before marriage and weakens the moral values they are trying to impart to their children. Further, Mary and John’s parents believe that a school should not be able to override the education they provide to their children regarding fundamental questions of life and intimate relations.

This article will argue that if Mary and John’s school begins a condom distribution program, Mary and John should be able to obtain condoms with minimal burdens, and that any state-imposed obstacles

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that do not meet strict scrutiny review,¹ such as parental consent or opt-out provisions, are unconstitutional. While some courts have determined that, in general, public schools should be able to distribute condoms to their students, no court has stated that minors have a fundamental liberty interest in the area of sexual health that outweighs their parents' rights. Leaving this interest unprotected means that schools either will not distribute condoms or will include parental consent provisions in their condom distribution programs, which ultimately provides less safety for society. In particular, allowing (or even requiring) parental approval will hinder a state's efforts to curb the high rates of teenage pregnancy and sexually transmitted diseases because fewer teenagers will practice safe sex. Additionally, until a court formally delineates the scope of a minor's rights in this area, minors will not enjoy the entire protection of the Constitution.

What does it mean to be "mature enough" to make certain decisions about one's own sexual health? This article explores the interplay between a parent's right to determine whether public schools may distribute contraceptives to their children, the liberty interest of individual minors in deciding to avail themselves of condom distribution services, and the state's interest in promulgating programs that will reduce the rates of teenage pregnancy and sexually transmitted diseases. Thus, the clash is not only between the state's police power and the private rights of minors and their parents, but also between the asserted privacy rights themselves. The article argues that once a school condom distribution program exists, a student's liberty interest in obtaining contraceptives outweighs the right of parents to raise their children as they see fit. Further, the article suggests that states have a compelling interest in providing contraceptives to students without significant obstacles. Therefore, because it is sound policy for schools to distribute condoms, and because teenagers have a strong liberty interest in availing themselves of these services, the article concludes that courts should subject any burdens on that interest to strict scrutiny review.²

This article does not advocate for teenage sexual activity. To the

1. Strict scrutiny requires a compelling interest narrowly tailored to further the state's goals. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973).

2. This article does *not* argue that states have a legal *obligation* to provide condoms to its students. Instead, the article concludes that once a state does decide to promulgate a contraceptive distribution program, a court must subject any burdens on that program to strict scrutiny review. Additionally, the article suggests that it is sound policy for a state to encourage schools to distribute condoms to its students.

contrary, minors should choose *not* to engage in sexual activity until they are old and mature enough to handle the implications of making this adult decision. However, ignoring the reality that teenagers engage in potentially dangerous sexual encounters at alarmingly high rates would pose a great health risk to our society.³ While parents and schools should teach teenagers to wait to have sex and that abstinence is the only foolproof way to protect against pregnancy and sexually transmitted diseases, studies demonstrate that teenagers still will engage in sexual conduct.⁴ Additionally, the article acknowledges that even though minors may not be emotionally mature enough to make these decisions, they still have a liberty interest in deciding what to do with their bodies, especially because most teenagers are *physically* mature enough to have children. Far from condoning teenage sexual activity, therefore, the article instead accepts reality and seeks to protect minors when they do choose to engage in potentially harmful sexual conduct.

Part I of this article analyzes the problem of teenage sexual activity, highlighting the alarming rates of teenage pregnancy and sexually transmitted diseases ("STDs") such as HIV and AIDS. Part I also distinguishes condom distribution programs at public schools from those in public health clinics and concludes that providing condoms at public schools is the most effective method of reaching minors. Part II discusses the right of parents to raise their children as they wish, the liberty interest of minors as it relates to reproductive health, and the state's compelling interest in promoting public health through sex education and condom distribution. Part III examines the four reported contraceptive distribution cases. Part IV demonstrates that, in light of the reported opinions, courts should recognize a minor's fundamental liberty interest in making decisions about his or her own sexual health in any future condom distribution cases. Part IV also argues that schools should affirmatively act to provide condoms based on policy considerations, and that any state burden on access to condoms—once a school board has decided to offer them in

3. See Cynthia Dailard, *Legislating Against Arousal: The Growing Divide Between Federal Policy and Teenage Sexual Behavior*, 9 GUTTMACHER POL'Y REV. 12, 14 (2006), available at <http://www.guttmacher.org/pubs/gpr/09/3/gpr090312.pdf> ("Given current patterns of teenage sexual activity, it is probably safe to say that efforts to prevent teenagers—let alone all unmarried people—from engaging in anything potentially sexually stimulating are at best unrealistic. At worst, such efforts may have harmful public health consequences, by failing to prepare young people for the time they, almost inevitably, will become sexually active.").

4. See *infra* Part I.

public schools—must survive strict scrutiny review. Thus, Part IV concludes that recognizing the importance of adolescents' rights in this context (which necessarily must be at the expense of parents' rights when parents disapprove of the distribution programs) will vindicate minors' constitutional rights, further the state's compelling interest in decreasing the frequency of teenage pregnancies and STDs, and promote the promise of democracy that we value so highly as a country.

I. FACTUAL BACKGROUND: "GOING STEADY" THESE DAYS MEANS MORE THAN JUST HOLDING HANDS

A. The Problem: Increased Teenage Sexual Activity Has Led to Dangerous Levels of Teenage Pregnancy and STD Rates

Teenage sexual activity is extremely prevalent. Anecdotal evidence suggests that minors are engaging in more and more sexual acts: for example, a *Washington Post* article reported about an alleged "orgy" that occurred among several students in a high school's auditorium, and noted that many fellow students were not surprised by the activities of their classmates.⁵ A recent survey concluded that over half of teenagers aged 15-19 have engaged in oral sex.⁶ Additionally, data from the 2005 Youth Risk Behavior Surveillance System (YRBSS) survey indicate that among high school students, 46.8% have had sexual intercourse, 14.3% have had intercourse with four or more different people, and only 62.8% used a condom during their last intercourse.⁷

5. Tara Bahrapour & Ian Shapira, *Sex at School Increasing, Some Educators Say*, WASH. POST, Nov. 6, 2005, at C01 ("Perhaps the most shocking thing about students having sex in a high school auditorium was that other students didn't find it very shocking at all.").

6. See Laura Sessions Stepp, *Study: Half of All Teens Have Had Oral Sex*, WASH. POST, Sept. 16, 2005, at A07.

7. Centers for Disease Control and Prevention, *Youth Risk Behavior Surveillance—United States 2005, Surveillance Summaries*, June 9, 2006, at 19-21, available at <http://www.cdc.gov/mmwr/PDF/SS/SS5505.pdf>; Cf. Kaiser Family Foundation, *U.S. Teen Sexual Activity*, Jan. 2005, available at <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13521> (stating that "[o]ver the last decade, the percentage of all high school students (9-12th grade) who report ever having had sexual intercourse has declined. At the same time, among teens who are sexually active, rates of contraceptive use—including condom use—have increased. Both factors help to account for the decrease in teen pregnancy rates in recent years. Yet, despite these trends, about a third (34%) of young women become pregnant at least once before they reach the age of 20—about 820,000 a year, and approximately four million teens contract a sexually transmitted disease (STD) each year.").

Over 750,000 young women, or approximately 34% of women under the age of twenty, become pregnant each year.⁸ Compared to other developed nations, the number of pregnant teens in the United States is extremely high: the U.S. teenage pregnancy rate is at least twice as high as the rate in England, Wales, or Canada, and up to nine times as high as the rate in the Netherlands or Japan.⁹ The number of female teenagers who become pregnant equates to 10% of all women aged 15-19 and 19% of women in that age group who have had sexual intercourse.¹⁰ While 82% of these pregnancies are "unplanned," almost one third end with an abortion.¹¹ The only possible good news about these statistics is that the high teenage pregnancy rate is preventable: at least 80% of the decline in the teenage pregnancy rate in the 1990s was due to increased contraceptive use.¹²

Further, statistics suggest that the rate of AIDS diagnosis in teens is increasing: in 2004, an estimated 7,761 young people were living with AIDS, a 42% increase since 2000.¹³ According to the Teen Care Center, three million teens acquire an STD every year, which represents one out of every four sexually experienced teenagers.¹⁴ Another study notes that while people aged 15-24 represent only one-quarter of the sexually active population, they account for nearly half of all new STD infections each year.¹⁵ The rapid spread of STDs is unsurprising given that "[i]n a single act of unprotected sex with an infected partner, a teenage woman has a 1% risk of acquiring HIV, a 30% risk of getting genital herpes and a 50% chance of contracting gonorrhea."¹⁶

8. Kaiser Family Foundation, *U.S. Teen Sexual Activity*, Jan. 2005, available at <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13521>; Guttmacher Institute, *Facts on American Teens Sexual and Reproductive Health*, Sept. 2006, available at http://www.guttmacher.org/pubs/fb_ATSRH.pdf.

9. Teen Care Center, *Sex and Choices: Teen Sexual Activity*, http://www.teencarecenter.org/factsheets/Teen_sex.pdf (last visited July 10, 2007).

10. *Id.*

11. Guttmacher Institute, *supra* note 8.

12. *Id.*

13. See Centers for Disease Control and Prevention, *HIV/AIDS Among Youth*, June 2006, available at <http://www.cdc.gov/hiv/resources/factsheets/PDF/youth.pdf>. While the CDC study did not separate out age groups within the 13-24 age range, the report stated that "[s]ome of the highest STD rates in the country are those among young people, especially those of minority races and ethnicities." *Id.*

14. Teen Care Center, *supra* note 9.

15. Guttmacher Institute, *supra* note 8.

16. Teen Care Center, *supra* note 9 (citing Guttmacher Institute, *Facts in Brief: Teen Sex and Pregnancy*, Sept. 1999).

These statistics demonstrate that high levels of teenage sexual activity are prevalent and that the dangers of unsafe sexual behavior among today's minors pose tremendous risks to our society. However, the problem can be fixed; condom distribution programs can help to protect our youth.

B. The Solution: Condom Distribution at Public Schools Can Help to Combat the Adverse Effects of Increased Teenage Sexual Activity

While many public high schools have recognized the problems inherent in teenage sexual activity and have engaged in ambitious sexual education programs, no uniform process has emerged.¹⁷ Studies show that supplying condoms in public schools greatly reduces the number of teenage pregnancies and STDs without increasing the level of teenage sexual activity.¹⁸ Some schools have imposed minimally-invasive requirements before a student can obtain condoms, such as attendance at a mandatory counseling session or other educational seminar.¹⁹ One of the most stringent conditions schools impose, however, is requiring students to obtain their parents' permission before availing themselves of the condom distribution programs.²⁰

States also have made condoms available to minors at public health clinics. Some states, such as Maryland and Virginia, specifically allow minors to obtain contraceptives from public health clinics without parental consent, while other states, such as Nevada, specifically forbid distribution in any venue without prior parental approval.²¹ The main distinction between public schools and public

17. Cf. Jesse R. Merriam, *Why Don't More Public Schools Teach Sex Education?: A Constitutional Explanation and Critique*, 13 WM. & MARY J. WOMEN & L. 539, 540 (2007) (noting that many schools do not even provide any formal sexual education).

18. See Advocates for Youth, *School Condom Availability*, <http://www.advocatesforyouth.org/publications/factsheet/fsschcon.htm> (last visited July 9, 2007); Marian Raab, *Condom Availability in High School Does not Increase Teenage Sexual Activity but Does Increase Condom Use*, Family Planning Perspectives, Jan/Feb 1998, available at http://www.findarticles.com/p/articles/mi_qa3634/is_199801/ai_n8793448.

19. See David Boyce, *Woodside High School Makes Condoms Available to Students*, The Almanac, Feb. 13, 2002, available at http://www.almanacnews.com/morgue/2002/2002_02_13.condoms.html.

20. See, e.g., *Parents United for Better Sch., Inc. v. School Dist. of Phila. Bd. of Educ.*, 148 F.3d 260, 262-64 (3d Cir. 1998).

21. See Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Medical Decision-Making*, 28 Am. J.L. & Med. 409, 418, 453, n. 57 (citing MD. CODE ANN., HEALTH-GEN. § 20-102(C)(5) (2000); VA. CODE ANN. § 54.1-2969(E)(2) (2002); NEV. REV. STAT. 430A.180 (2001)); see also Guttmacher Institute, *supra* note 8 ("Twenty-one states and

health clinics is that while the state easily can reach a minor at school due to compulsory education laws, there is no similar requirement for a minor to visit a public health clinic. For example, one-third of teen boys who responded to a survey stated that they had not received any health services at all in the past year, and of those who did receive health services, three-quarters reported that they received no counseling on birth control or STDs.²² Similarly, only half of teenage girls reported receiving health services, with the rates varying significantly based on race and ethnicity.²³ Additionally, it may be more difficult for a teenager to visit a public health clinic without parental assistance, as the minor will need to arrange transportation after school or on weekends.²⁴

Studies suggest that if a state requires prior parental approval before a minor may obtain contraceptives from a distribution program, many teenagers will forego availing themselves of this service. In one survey, 70% of teenagers said that if the law required parental notification, they would not visit a health clinic at all, and 20% stated that they would continue to have sex but would either rely on the withdrawal method or not use any contraceptives.²⁵ Only 1% of those surveyed who currently use sexual health services said that they would stop having sex if parental involvement was mandated before the adolescents received contraceptives.²⁶ As one commentator suggested, if curbing teenage pregnancy and STD levels is a compelling state interest, then public school condom distribution programs without parental intervention are the best option to reach the most students—and especially those students most at risk:

[D]enying parental involvement in the condom program might very well be necessary to effectuate the state's goals. First, the program is designed to protect all children from HIV infection, not

the District of Columbia explicitly allow all minors to consent to contraceptive services without a parent's involvement (as of August 2006). Two states (Texas and Utah) require parental consent for contraceptive services in state-funded family planning programs.").

22. TeenPregnancy.org, Adolescent Boys' Use of Health Services (2006), http://www.teenpregnancy.org/works/pdf/Science_Says_26_boys_health.pdf.

23. TeenPregnancy.org, Adolescent Girls' Use of Health Services (2006), http://www.teenpregnancy.org/works/pdf/Science_Says_28_girls_health.pdf.

24. Drug stores present a similar access problem, with the added burden that condoms must be bought and are not distributed for free as is most often the case at public schools and public health clinics. However, purchasing condoms at drug stores does not require parental approval.

25. Guttmacher Institute, *supra* note 8.

26. *Id.*

just those whose parents support the state's efforts. More importantly, the schools are in a unique position to address the AIDS crisis because—unlike drug stores and public health clinics—they are in direct contact with students on a daily basis. Moreover, the status quo is not working; teens have had access to condoms outside the schools but their use continues to stagnate while the AIDS crisis continues to destroy more lives. In sum, while neither argument is without merit, those calling for the exclusion of parents from their children's participation in school-based condom programs appear to be the most persuasive.²⁷

II. WHEN RIGHTS CLASH: THE LIBERTY RIGHTS OF PARENTS AND MINORS AND THE STATE'S COMPELLING INTEREST

Based on findings like those in the previous section, some school districts have sought to provide free contraceptives to teenagers. While condom use has decreased the dangers of pregnancy and STDs without resulting in a corresponding increase in sexual activity,²⁸ the simple fact is that many teenagers do not use condoms. There are a variety of reasons for this unfortunate reality: teenagers may not have the money to purchase condoms, the resources to access them from a public clinic or other location, or the knowledge of how to use them properly. By making condoms available for free in schools, accompanied by respectful instruction on how to use them (such as in a health class),²⁹ these factors can become nugatory.

As could be expected, providing condoms in schools has sparked tremendous criticism. The debate surrounding public school contraceptive distribution is particularly interesting because it presents several competing constitutional claims. Generally, three interests are involved: the objecting parents' right to raise their children as they wish, the minors' liberty and privacy rights to obtain condoms at school without obstacles, and the state's interest in protecting minors and reducing the rates of teenage pregnancy and STDs. Thus, minors who seek unfettered access to condom distribution in schools and states that promulgate these programs argue that the programs are constitutionally valid, while parents who object to condom distribution believe that these programs are unconstitutional.

27. Karl J. Sanders, Comment, *Kids and Condoms: Constitutional Challenges to the Distribution of Condoms in Public Schools*, 61 U. CIN. L. REV. 1479, 1508 (1993).

28. See *supra* Part I.

29. See Merriam, *supra* note 17, at 590.

A. The Competing Rights of Parents and Minors

It is a fundamental constitutional premise that parents have a liberty interest in raising their children as they see fit. The United States Supreme Court first articulated this principle in *Meyer v. Nebraska*, where the Court ruled that an educator has a liberty interest in teaching the German language, and by inference suggested that parents have a liberty interest in determining the type of instruction their children receive.³⁰ Two years later, the Supreme Court bolstered the idea that parents have a fundamental right to determine their children's upbringing.³¹ In *Pierce v. Society of Sisters*, the Court ruled that an Oregon statute requiring all children between the ages of eight and sixteen to attend public school unreasonably interfered with the liberty of parents to direct the education of their children and choose alternative instruction.³²

More directly, in *Prince v. Massachusetts*, the Court stated that "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."³³ Similarly, as Justice O'Connor stated for the majority in *Troxel v. Granville*, the "extensive" precedents establishing the right of parents to raise their children as they wish without state intervention demonstrate that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."³⁴

The rights of parents may not be absolute, however, especially as

30. 262 U.S. 390, 399 (1923) ("While this Court has not attempted to define with exactness the liberty [guaranteed by the Due Process Clause of the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it 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, to 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.") (emphasis added).

31. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

32. *Id.*

33. 321 U.S. 158, 166 (1944).

34. 530 U.S. 57, 66 (2000); see, e.g., Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345 (1997) (discussing the evolution of parent-child law).

they relate to the rights of their children.³⁵ In *Wisconsin v. Yoder*, Justice Douglas argued in dissent that an Amish child who is mature enough to make the decision to attend public high school should be afforded that right and may “well be able to override the parents’ religiously motivated objections.”³⁶ Justice Douglas further reasoned that “[w]here the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views.”³⁷ Similarly, in *Brown v. Hot, Sexy and Safer Productions, Inc.*, the First Circuit affirmed the district court’s dismissal of a parent’s complaint about a mandatory sexual education program that contained an extremely explicit skit, ruling that the program did not deprive parents of the right to privacy or the free exercise of their religion because “the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.”³⁸

Courts expressly have held that United States citizens enjoy liberty and privacy rights regarding their sexual activities, first recognizing these rights in adults and then extending the rationale to minors. In *Griswold v. Connecticut*, the Supreme Court concluded that a state cannot prohibit the distribution of contraceptives to married couples,³⁹ and in *Eisenstadt v. Baird* the Court subsequently broadened that ruling to protect the liberty and privacy interests of unmarried people.⁴⁰ The Court applied this rationale to minors in *Carey v. Population Services International*, striking down a New York law that made it a crime to sell or distribute contraceptives to minors under the age of sixteen.⁴¹ In that case, the Court stated that the constitutional right to privacy, insofar as it encompasses the decision to procreate, applies both to minors and adults.⁴² Similarly, in *Doe v. Irwin*, the Sixth Circuit ruled that a family planning center’s practice of distributing contraceptives to minors without notifying the

35. See, e.g., *Prince*, 321 U.S. at 166 (stating that the “family itself is not beyond regulation in the public interest, as against a claim of religious liberty . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation.”).

36. 406 U.S. 205, 242 (1972) (Douglas, J., dissenting).

37. *Id.*

38. 68 F.3d 525, 534 (1st Cir. 1995). see also Ross, *infra* note 159.

39. 381 U.S. 479, 482 (1965).

40. 405 U.S. 438, 454 (1972).

41. 431 U.S. 678 (1977).

42. *Id.*

minor's parents did not infringe the parents' constitutional rights, especially because a parent still can counsel his or her child about the child's sexual practices.⁴³

As far back as 1975, a federal district court in Utah invalidated a state regulation that mandated parental consent before a clinic could provide family planning services to a minor.⁴⁴ In holding the regulation invalid, the court expounded upon the fundamental importance of the liberty and privacy rights of individuals—regardless of whether they have reached their eighteenth birthday—and reasoned that the state's compelling interest in the prevention of pregnancy and disease is not affected by any minor/adult distinction:

[W]e perceive no developmental differences between minors and adults that may affect the gravity of the right asserted by sexually active minors to family planning services and materials. The interest of minors in access to contraceptives is one of fundamental importance. The financial, psychological and social problems arising from teenage pregnancy and motherhood argue for our recognition of the right of minors to privacy as being equal to that of adults.⁴⁵

In another Utah case striking down a parental notification requirement for family planning clinics, the district court recognized the similarity between contraceptive distribution and abortion, stating that "parental notification laws in the abortion context support the conclusion that the state may not impose a blanket parental notification requirement on minors seeking to exercise their constitutionally protected right to decide whether to bear or to beget a child."⁴⁶

Similarly, the Supreme Court's decision in *Planned Parenthood of Central Missouri v. Danforth* extended to minors the "right of personal privacy" inherent in the Due Process Clause that the Court first explicated in the context of abortion:⁴⁷ "Minors, as well as adults, are protected by the Constitution and possess constitutional rights . . . [A state] may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for

43. 615 F.2d 1162, 1168 (6th Cir. 1980).

44. See *T.H. v. Jones*, 425 F. Supp. 873, 881 (D. Utah 1975).

45. *Id.*

46. *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F.Supp. 1001, 1009 (D. Utah 1983).

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

abortion of an unmarried minor”⁴⁸ The Court also ruled that states may require parental consent for a minor’s abortion only if the state also allows for a judicial bypass procedure in lieu of parental permission.⁴⁹

B. The Compelling State Interest

States have a compelling interest in protecting their citizens and teaching minors to be successful and productive contributors to society.⁵⁰ While states almost always require schools to stress abstinence in their sex education classes as the only sure way to avoid a pregnancy or STD,⁵¹ statistics demonstrate that teenagers still engage in sexual activity.⁵² Abstinence-only education does not stop minors from partaking in potentially high-risk behavior, demonstrating that a state has a compelling interest in doing more to protect its youth from the public health dangers inherent in unsafe sexual practices. Indeed, the results from a national Congressional study suggest that abstinence-only sex education has done nothing to curtail the rates of teenage sexual activity.⁵³ Therefore, by distributing condoms in schools, states have recognized that minors, while physically mature enough to have sex, may not be mature enough to make smart decisions about safe sex if condoms are not easily accessible.

The compelling state interest in stopping teenagers from engaging in unprotected sexual intercourse has facilitated the promulgation of condom distribution programs in public schools. The goal of these programs is to encourage sexually active teenagers to engage in safe sex, thereby curbing teenage pregnancy and STD rates. Teenage pregnancies burden the state because many teenagers must rely on state funding to support the child. Similarly, teenage pregnancies encumber state adoption agencies by requiring those

48. 428 U.S. 52, 74 (1976).

49. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992).

50. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 683 (2004).

51. See, e.g., *infra* notes 64, 96, 115.

52. See *supra* notes 6-7.

53. Laura Sessions Stepp, *Study Casts Doubt on Abstinence-Only Programs*, WASH. POST, April 14, 2007, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/13/AR2007041301003.html>. While a top official in the Department of Health and Human Services said that the study was not “rigorous enough to show whether or not [abstinence-only] education works,” an official at the Sexuality Information and Education Council of the United States said, “Abstinence-only was an experiment and it failed.” *Id.*

agencies to find homes for children born from unplanned pregnancies. High rates of unsafe sexual conduct also may lead to an increase in abortions. Statistics further demonstrate that a high teenage pregnancy rate hampers a state's health resources: Planned Parenthood Federation of America, Inc. notes that teenage pregnancies "pose[] a substantial financial burden to society, estimated at \$7 billion annually in lost tax revenues, public assistance, child health care, foster care, and involvement with the criminal justice system."⁵⁴ Additionally, a teenage mother often has difficulty completing high school, thus hindering her ability to be a productive member of society and potentially disrupting the educational environment while she is in school.⁵⁵ Teenagers who contract an STD such as HIV often have a lower life expectancy: as of 2004, only 76% of 13–24 year-olds with HIV were alive nine years after receiving the diagnosis.⁵⁶ Thus, the state's interests go to the heart of protecting minors in questions of life and death and to preserving state resources.

Condom distribution programs in public schools address the state's compelling interest because these programs are the most effective way to reach minors—especially those minors who are most likely not to use or be able to obtain contraceptives because their parents object to their activities.⁵⁷ Under compulsory education laws, children are required either to attend public school or complete comparable private or home schooling.⁵⁸ Because most minors are already at a public school, a condom distribution program will allow students to obtain contraceptives discreetly should they decide to engage in sexual activity. Thus, many more students will be able to access condoms under such a program than if minors have to rely on off-school public health clinics or drug stores as the primary distributors, likely leading to increased condom use among those students who are already sexually active. Additionally, studies have demonstrated that condom availability in public schools does not lead

54. See Planned Parenthood Affiliates of California, Inc., Reducing Teenage Pregnancy, <http://www.ppacca.org/site/pp.asp?c=kuJYJeO4F&b=139529> (last visited July 9, 2007).

55. *Id.*

56. See Centers for Disease Control and Prevention, *HIV/AIDS Among Youth*, Jun. 2006, available at <http://www.cdc.gov/hiv/resources/factsheets/PDF/youth.pdf>.

57. Adolescents face "many obstacles" to obtaining and using condoms, including "confidentiality, cost, access, transportation, embarrassment, objection by a partner, and the perception that the risks of pregnancy and infection are low." See Advocates for Youth, *supra* note 18.

58. See, e.g., N.Y. EDUC. LAW § 3205 (McKinney 2006).

to earlier or increased sexual activity among teenagers.⁵⁹ Condoms are extremely effective at preventing pregnancy and the spread of STDs, and because the state has a compelling interest in ensuring that teenagers use condoms when they decide to engage in sexual activity, the state has a compelling interest in making condoms more accessible for its youth.

III. COURTS WEIGH IN ON THE DEBATE: THE THREE COMPETING INTERESTS IN THE PUBLIC SCHOOL CONTRACEPTIVE DISTRIBUTION CASES

What happens when a person under the age of eighteen wishes to assert a right to obtain contraceptives from a public school without extra burdens such as parental consent, but his or her parent objects to the contraceptive distribution? Does the parents' interest in raising their child as they see fit outweigh the minor's liberty interest in obtaining contraceptives? Or, as Justice Douglas might assert based on his dissent in *Wisconsin v. Yoder*,⁶⁰ should a "mature enough" teenager be allowed to make that decision for him or herself and override the parents' objections? Further, does the state's interest in reducing teenage pregnancy and STD rates minimize the wishes of parents who object to these programs? Only four reported cases have explored these issues, with varying levels of analysis of the underlying constitutional rights involved.

The four public school contraceptive distribution cases demonstrate that courts are not uniform as to whether parental consent is required, although the trend has been to uphold condom distribution programs even if they lack a parental consent or opt-out component. None of the courts explicitly ruled that minors have a fundamental liberty interest that actually outweighs that of their parents regarding condom distribution in the public schools, but the implication of these decisions is that the rights of minors are paramount in this setting.⁶¹

Parents challenged the contraceptive distribution programs as violating their constitutional rights. The parents asserted that the programs undermined the right to raise their children as they saw fit

59. See *Advocates for Youth*, *supra* note 18.

60. See *supra* notes 36-37.

61. Cf. Pilar S. Ramos, Comment, *The Condom Controversy in the Public Schools: Respecting a Minor's Right of Privacy*, 145 U. PA. L. REV. 149, 186 (stating that school boards should "strive to keep an open ear to the minors involved and earnestly listen to their experiences and needs" when debating condom distribution).

without state interference. This argument was successful in the earliest condom distribution case, but in the later cases the courts upheld the programs and rejected these challenges based on the minor’s liberty interest and the state’s compelling interest in reducing the incidence of teenage pregnancies and STDs. Plaintiffs also argued that the programs violated the Free Exercise Clause of the First Amendment. The parents contended that the programs undermined the religious instruction the parents provided to their children to abstain from premarital sex and were coercive due to the state’s requirement that minors attend school. All of the courts rejected the parents’ Free Exercise Clause arguments because the contraceptive distribution programs were voluntary, thereby inherently lacking the required element of coercion.

*A. New York—Alfonso v. Fernandez*⁶²

The first challenge to public school condom distribution arose out of the 1991 New York City HIV/AIDS Education Program.⁶³ The program included mandatory classroom instruction about STDs, with an emphasis on abstinence from sexual activity as the most appropriate and effective means of preventing disease and pregnancy.⁶⁴ The HIV/AIDS Education Program also allowed students to request condoms from a public high school’s health resource room, but required students to complete counseling on the proper use of condoms and the consequences of their misuse before receiving the condoms.⁶⁵ Parents were allowed to opt out their minor children from the mandatory classroom instruction so long as the parents assured the school that the student would receive similar instruction at home.⁶⁶ However, the condom distribution portion of the HIV/AIDS Education Program did not contain an analogous parental consent or opt-out provision.⁶⁷ Parents of New York City public school students brought suit, specifically challenging the lack of a parental consent requirement or opt-out policy and also claiming

62. 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

63. *Id.* at 261.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The court did not address why the school district deemed an opt-out provision appropriate for the classroom portion but not the condom distribution component of the program. It is presumable that the school district recognized the compulsion inherent in classroom instruction, which, as later courts concluded, does not exist for condom distribution.

that the program violated their Free Exercise Clause rights.⁶⁸

The New York Supreme Court, Appellate Division, ruled that the City's decision to make condoms available in public schools violated the substantive due process rights of parents, who may not have wanted their children to have easy access to contraceptives.⁶⁹ The majority characterized its decision as a refusal to take the decision about condom availability away from parents and place it with the school district.⁷⁰ Additionally, the court found no compelling state interest to justify the state's infringement upon the fundamental right of parents to raise their children as they wish, as condoms were still available at many other public places such as drug stores and public clinics.⁷¹ Finally, the court distinguished *Doe v. Irwin*,⁷² where the Sixth Circuit upheld the right of a public clinic to distribute condoms to minors without parental consent, by reasoning that in *Irwin*, the distribution program was not located inside a school or other building where the government required parents to send their children.⁷³

The majority also determined that parental consent is required for a condom distribution program because it is a "health service," and New York law mandates parental consent for all but a few enumerated health services that minors receive.⁷⁴ The court reasoned that handing out condoms is not part of a school's "health education" because it is a "means of disease prevention" instead of an "aspect of education in disease prevention."⁷⁵ The court declared that "[s]upplying condoms to students upon request has absolutely nothing to do with education, but rather is a health service occurring after the educational phase has ceased."⁷⁶ Therefore, permitting the school to provide this "health service" without prior parental consent violated

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 266-67.

72. 615 F.2d 1162, 1168 (6th Cir. 1980).

73. *Alfonso*, 606 N.Y.S.2d at 266.

74. *Id.* at 263. The statute allows a pregnant person to provide consent to prenatal medical services, and provides a "catch-all" exception for a physician to provide medical, dental, health, and hospital services to a minor without parental consent if, "in the physician's judgment an emergency exists and the person is in immediate need of medical attention and an attempt to secure consent would result in delay of treatment which would increase the risk to the person's life or health." N.Y. PUB. HEALTH LAW § 2504 (McKinney 2007).

75. *Alfonso*, 606 N.Y.S.2d at 263.

76. *Id.*

New York State's health laws.⁷⁷ The court ruled that none of the exceptions to the parental consent requirement for health services covered condom distribution.⁷⁸ Further, the court found that it is not the role of the State Commission of Education or the Board of Education to provide an exception to the general presumption that parental consent is required for medical decisions.⁷⁹ Finally, the majority distinguished *Carey v. Population Services International*⁸⁰ by stating that a parental consent requirement does not completely preclude a minor from obtaining condoms, as condoms are still available without parental consent from other sources such as a drug store or public health clinic.⁸¹

The court, however, rejected the parents' Free Exercise Clause claim.⁸² The parents argued that the condom distribution program might "tempt their children to stray from [the children's] religious beliefs" and promote promiscuity in the place of abstinence.⁸³ The court ruled that the program did not violate the Free Exercise Clause because no coercion was involved; those who did not want to participate in the program and never visit the health clinic did not suffer any sanction, were not criminally liable, and were not denied any benefits.⁸⁴ Additionally, citing the premise from *Epperson v. Arkansas*⁸⁵ that schools cannot tailor their education to the religious requests of every single parent, the court ruled that the school's program did not prohibit parents from practicing their religion.⁸⁶

Justice Eiber wrote a strongly-worded dissent in which she faulted the majority for not recognizing how an opt-out provision might significantly harm the very students the program was intended to reach.⁸⁷ She reasoned that students whose parents opt them out of the program are the same students that need a place where they can receive condoms without having to account for their whereabouts or

77. *Id.*

78. *Id.*

79. *Id.* at 264.

80. 431 U.S. 678 (1977) (striking down a New York law which made it a crime to sell or distribute a contraceptive to a minor under sixteen years of age).

81. *Alfonso*, 606 N.Y.S.2d at 264-65.

82. *Id.* at 267.

83. *Id.*

84. *Id.*

85. 393 U.S. 97, 106 (1968).

86. *Alfonso*, 606 N.Y.S.2d at 268.

87. *Id.* at 269 (Eiber, J., dissenting).

expenditures.⁸⁸ Further, the dissent noted that an opt-out requirement would destroy confidentiality for all students that visit the school's health clinic, as everyone must identify themselves and be checked against a list of students whose parents have objected to their child's participation in the program.⁸⁹ Finally, Justice Eiber stated that because there was no compulsion inherent in the program, the school was not supplanting parental control.⁹⁰

New York City did not appeal this decision. Instead, the city complied with the ruling by adding a parental opt-out provision to the condom distribution portion of its HIV/AIDS Education Program.⁹¹

*B. Massachusetts—Curtis v. School Committee of Falmouth*⁹²

In January 1992, the Falmouth, Massachusetts School Committee authorized a new condom distribution program.⁹³ Upon requesting condoms, junior high students received the contraceptives, along with a counseling session from the school nurse and pamphlets on AIDS and other sexually transmitted diseases.⁹⁴ High school students were allowed to request condoms from the nurse or purchase them from vending machines located in the boys' and girls' restrooms.⁹⁵ Additionally, a memorandum sent to the seventh through twelfth grade teaching staff stated that the Superintendent's presentation of the condom distribution program to students would stress abstinence as the only effective way to avoid pregnancy or STDs.⁹⁶

Parents of students enrolled in the school system challenged the condom distribution program as violating their fundamental parental rights.⁹⁷ As an alternative to terminating the program altogether, the parents suggested that the condom distribution program include a

88. *Id.*

89. *Id.*

90. *Id.* at 272.

91. See Kristen S. Rufo, Note, *Public Policy vs. Parent Policy: States Battle over Whether Public Schools can Provide Condoms to Minors Without Parental Consent*, 13 N.Y.L. SCH. J. HUM. RTS. 589, 590 n.10 (1997). No data is available to determine whether the addition of the parental opt-out provision has hindered the effectiveness of the New York City HIV/AIDS Education Program.

92. 652 N.E.2d 580 (Mass. 1995).

93. *Id.* at 582.

94. *Id.* at 582-83.

95. *Id.* at 583.

96. *Id.*

97. *Id.*

parental consent component.⁹⁸

The Supreme Judicial Court of Massachusetts affirmed the lower court's grant of summary judgment for the defendant school district and upheld the school's condom distribution activities.⁹⁹ Writing for a unanimous court, Chief Justice Liacos determined that the program did not infringe upon any constitutional right the parents had asserted, thereby ending the inquiry before even considering the state's interest in promulgating the program or the parents' proposal to require a consent or veto provision.¹⁰⁰ The court agreed with the plaintiffs that parents have a fundamental right of familial privacy in child rearing, but ruled that the condom distribution program did not infringe this right because the school did not compel or coerce the students to participate in the program against their parents' wishes.¹⁰¹ The court stated that "[t]he program does not supplant the parents' role as advisor in the moral and religious development of their children."¹⁰² Additionally, the court reasoned, the school's practice did not supplant the instruction parents provided to their children because classroom participation was not required as part of the distribution plan.¹⁰³ The court noted that "mere exposure to programs offered at school does not amount to unconstitutional interference with parental liberties without the existence of some compulsory aspect to the program."¹⁰⁴ Further, the court emphasized that the program was completely voluntary, as a student faced no penalty or threat of disciplinary action should the student decide not to request condoms.¹⁰⁵

The parents also argued that the condom distribution program violated their Free Exercise Clause rights.¹⁰⁶ The court similarly rejected this claim, ruling that the condom distribution program imposed no substantial burden and lacked a coercive or compulsory component.¹⁰⁷ Further, the court determined that the program did not penalize students or parents for their religious beliefs and did not

98. *Id.*

99. *Id.*

100. *Id.* at 583 n.5.

101. *Id.* at 585.

102. *Id.* at 586.

103. *Id.* at 587.

104. *Id.* at 586.

105. *Id.*

106. *Id.* at 583.

107. *Id.* at 588.

condition the receipt of benefits on any particular religious ideology.¹⁰⁸ Chief Justice Liacos concluded that “[a]lthough the program may offend the religious sensibilities of the [parents], mere exposure at public schools to offensive programs does not amount to a violation of free exercise. Parents have no right to tailor public school programs to meet their individual religious or moral preferences.”¹⁰⁹

*C. Pennsylvania—Parents United for Better Schools, Inc. v. School District of Philadelphia Board of Education*¹¹⁰

On June 24, 1991, the Philadelphia School Board of Education adopted Policy Number 123, entitled “Adolescent Sexuality,” which enunciated a “broad purpose” to “promote more wholesome family and interpersonal relationships; to help young people understand their sexuality at all levels of development; and to develop healthy habits and moral values regarding human sexuality.”¹¹¹ In promulgating the policy, the Board stated that “adolescent pregnancy, sexually transmitted diseases, and HIV infection are epidemic among school age youth The Board recognizes that schools, in concert with all segments of the Philadelphia community, have an obligation to promote a healthy lifestyle for all adolescents.”¹¹² The program’s main goal was to promote abstinence, but the school also sought to provide easier access to condoms for its high school students.¹¹³

The Adolescent Sexuality program consisted of classroom curricula and condom distribution.¹¹⁴ Students who requested condoms from one of the school’s health resource centers had to complete a counseling session and attend a “lecture” on the merits of abstinence and the proper use of condoms.¹¹⁵ Further, parents had an “absolute right to veto” their child’s participation in the program by returning an opt-out form that the school district mailed to all parents before the program began.¹¹⁶

108. *Id.* at 589.

109. *Id.* (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

110. 148 F.3d 260 (3d Cir. 1998).

111. *Id.* at 262-63.

112. *Id.* at 262.

113. *Id.* at 263. The School Board did not fund the condom distribution portion of the program, but relied on private and non-school district sources. *Id.* at 264.

114. *Id.* at 263.

115. *Id.* at 268.

116. *Id.*

Despite the parental opt-out safeguard, parents of students sued the school district for violating their substantive due process rights by interfering with their “unfettered discretion in raising their children.”¹¹⁷ The parents contended that classroom education about safe sex, combined with distribution of condoms (which the parents believed assisted students in having sex), supplanted parental authority because it undermined the values of abstinence that the parents imparted to their children.¹¹⁸ The parents asked the court to require the school district to obtain prior consent from each parent before distributing condoms to that parent’s child.¹¹⁹ The parents argued that a consent requirement prior to distribution for each student would cure the alleged constitutional defect by creating a presumption against participation, requiring parents who approved of the program affirmatively to acquiesce.¹²⁰ Thus, the parents claimed, a student should be able to obtain condoms from a school only if his or her parent formally assents, and not if the parent simply failed to fill out and send in the opt-out form.¹²¹

The Third Circuit, per Judge Scirica, ruled that the Philadelphia School Board acted within its statutory and regulatory authority in implementing the Adolescent Sexuality policy’s condom distribution program.¹²² The court first noted that distribution of condoms is not a medical treatment but instead is a “health service” that does not require parental consent for minors.¹²³ Judge Scirica then determined

117. *Id.* at 265.

118. *Id.* at 274.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 262.

123. *Id.* at 268-70 (quoting lower court: “When used properly, condoms serve as a barrier for germs, bacteria and viruses, thus keeping contagious little disease generators from passing from one person’s body into another’s, thereby infecting, perhaps fatally, the other person Because condom usage may help to preserve health, their distribution is a health service, within the ordinary meaning of that term. Impact upon health, however, does not transform a health service into a medical treatment. Health services, by definition, encompass far more than medical treatment.”). In *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993), the court ruled that distributing condoms was a “health service” and not “health education,” requiring parental consent under state law. In contrast, the Third Circuit in *Parents United for Better Schools, Inc.* ruled that because providing condoms is a “health service” and not a “medical service,” it does *not* fall under the common law rule requiring parental consent for medical services provided to minors. 148 F.3d at 268-70. Thus, a “health service” under New York law, which would require parental consent, is the same as a “medical service” in Pennsylvania, while a “health service” in Pennsylvania, such as the condom distribution program at issue in *Parents United for Better Schools, Inc.*, does not require prior parental

that the program did not coerce parents or students because student use of the health resource center to obtain condoms was completely voluntary.¹²⁴ Additionally, the court found that by passing the policy, the School Board fulfilled its educational mandate to educate students and prevent disease.¹²⁵ The court also compared the condom distribution program to the situation of a minor's abortion, noting that "access to contraceptives may be just as important as access to abortions"¹²⁶ because "the decision whether to use contraceptives is as intimate and personal as, and involves risks to the individual which are comparable to, those raised by the decision whether to have an abortion."¹²⁷

The crux of Judge Scirica's opinion, however, was the availability of the parental opt-out form.¹²⁸ The court ruled that the opt-out provision actually supported—instead of burdened—parental rights, because it allowed parents to determine whether condoms could be available to their children.¹²⁹ The court therefore rejected the parents' proposal for a prior consent requirement because the opt-out provision sufficiently protected parental rights.¹³⁰ The court quoted the lower court's decision to note that:

Parents are free to instruct their children not to use the program, and may even actively prevent their children's participation by sending an opt-out letter to the school. In fact, the opt-out provision encourages parental involvement by notifying them of the school program and permitting them to forbid their children to use it. Because it allows parents to restrict children's in-school access to condoms, the provision gives parents more authority to control their children Parents thus remain free to exercise their traditional care, custody and control over their emancipated children.¹³¹

The court ruled that the inclusion of an opt-out provision

approval. *Id.*

124. *Parents United for Better Sch.* 148 F.3d at 270.

125. *Id.* at 273.

126. *Id.* at 270 (citing *Parents United for Better Sch. v. School Dist. of Phila. Bd. of Educ.*, 978 F. Supp. 197, 209 (E.D. Penn. 1997)).

127. *Id.* (citing *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. 1001, 1009 (D. Utah 1983)).

128. *Parents United for Better Sch.*, 148 F.3d at 275.

129. *Id.* at 270.

130. *Id.*

131. *Id.* at 270 (citing *Parents United for Better Sch.*, 978 F. Supp. at 211.

rendered the program constitutional.¹³² Importantly, however, the court specifically stated that it would not reach the question as to whether minors have a privacy right to receive contraceptives or whether that right might outweigh their parents' rights.¹³³ This article therefore fills the void that the Third Circuit left in this case.

*D. Tennessee—Decker v. Carroll Academy*¹³⁴

Amy Decker was a fourteen-year-old girl enrolled at Carroll Academy, where she participated in a sex education class.¹³⁵ During the class, she asked for information about birth control, indicated that she was sexually active, and stated that she might have been exposed to a venereal disease.¹³⁶ Based on this information, and pursuant to a state law that allowed physicians to provide birth control voluntarily to a minor when a school refers a student, an employee at Carroll Academy took Amy to the County Health Department.¹³⁷ At the Health Department, Amy underwent a pap smear and received birth control pills.¹³⁸ Neither the school nor the Health Department notified Amy's mother, who later found Amy's birth control pills and brought suit against the school.¹³⁹

Amy's mother alleged that the statute authorizing a school to refer a minor to a physician for contraceptive distribution without parental consent was unconstitutional because it violated her right to direct the upbringing and education of her child.¹⁴⁰ The Tennessee Court of Appeals rejected this argument and upheld the statute based on the previous case law, the lack of compulsion (because Amy would not have faced any sanctions for not going with the school employee to the Health Department), and the minor's voluntary decision to seek birth control.¹⁴¹ The court stated that under Tennessee law, "[t]he right of procreation is a vital part of an individual's right to privacy" and that "the parent and the minor each

132. *Id.* at 277.

133. *Id.*

134. No. 02A01-9709-CV-00242, 1999 WL 332705 (Tenn. Ct. App., May 26, 1999).

135. *Id.* at *1.

136. *Id.*

137. *Id.* It is not clear what position the employee, Jennifer Salyer, held at Carroll Academy.

138. *Id.*

139. *Id.*

140. *Id.* at *1, *3.

141. *Id.* at *10.

have constitutionally protected privacy interests to consider.”¹⁴² The court noted that the legislature did not confer any right of parental approval under this statute, signifying that there was no conflict between the important parental rights that Amy’s mother asserted and a minor’s constitutional right to “procreational autonomy.”¹⁴³

The court also rejected the plaintiff’s Free Exercise Clause claim.¹⁴⁴ While Amy’s mother argued that the statute encouraged adolescents to engage in premarital sex in violation of a parent’s religious beliefs, the court determined that the statute did not impose a substantial burden on religion because there was no coercion or compulsion involved.¹⁴⁵ The court ruled that the statute had a secular purpose, and that the state’s primary objective of protecting minors neither advanced nor inhibited a parent’s religious beliefs or the ability to communicate those beliefs to a minor child.¹⁴⁶ The court further determined that the statute imposed no excessive government entanglement with religion¹⁴⁷ and passed Justice O’Connor’s “endorsement” test,¹⁴⁸ which the people of Tennessee had adopted in their state Constitution.¹⁴⁹

IV. IMPLICATIONS OF THE CONTRACEPTIVE DISTRIBUTION CASES

A. A Minor’s Liberty Interest in Making Decisions Regarding Sexual Health is a Fundamental Right that Outweighs a Parent’s Constitutional Rights in this Context

Because the condom distribution cases involve inherently competing constitutional rights between minors and parents, one interest must yield to the other.¹⁵⁰ Courts implicitly have suggested

142. *Id.* at *7, *11.

143. *Id.* at *14.

144. *Id.* at *3.

145. *Id.* at *6.

146. *Id.*

147. *See* *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

148. *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring). Justice O’Connor proposed a test that would invalidate any direct government action endorsing religion or a particular religious practice. *Id.*

149. *Carroll*, 1999 WL 332705, at *6.

150. All courts that have considered the subject determined that public school condom distribution programs do not violate the Free Exercise Clause. *See supra* Part III. Therefore, there is little debate about this issue: the programs simply do not implicate a parent’s Free Exercise Clause rights, regardless of the scope of a minor’s constitutional protections. Thus, there is no clash of privately asserted rights in this context and no need for additional analysis.

that minors possess a liberty interest in making their own decisions about sexual health without parental approval and have recognized the state’s goal of combating the effects of unsafe sex.¹⁵¹ The only court to hold to the contrary was the first tribunal to consider the issue.¹⁵² As the dissent in that case pointed out, the majority employed flawed reasoning by failing to consider the constitutional rights of minors and the negative effects of including a parental consent provision.¹⁵³ But no court explicitly has reconciled a minor’s right to make sexual decisions with a parent’s right to raise a child as the parent wishes, and it is unclear how the state’s compelling interest in reducing teenage pregnancy and STD rates fits into the analysis. The result is that the scope of minors’ rights in this area is ambiguous, providing uncertainty to a school district that might wish to promulgate a condom distribution program and diminishing minors’ constitutional protections in the process. Therefore, courts should vindicate the rights of minors in any future condom distribution case.

The condom distribution cases demonstrate that minors have an independent liberty and privacy interest in their sexual health. Although none of the courts explicitly stated that this liberty interest is fundamental under the Due Process Clause of the Fourteenth Amendment, the underlying premise of these decisions is that minors have a right to make fundamental sexual decisions about their bodies. One commentator already suggested this rationale—without calling the right “fundamental”—in the public school condom distribution context by calling for a “child-centered perspective” to infuse the debate.¹⁵⁴ However, a minor’s right to liberty and privacy in decisions regarding sexual health, procreation, and contraception is in fact a *fundamental right* based on the Due Process Clause of the Fourteenth Amendment,¹⁵⁵ and courts should recognize this right in the condom

151. See *Parents United for Better Sch., Inc. v. School Dist. of Phila. Bd. of Educ.*, 148 F.3d 260, 270 (3d Cir. 1998).

152. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

153. See *id.* at 269 (Eiber, J., dissenting). In particular, the majority failed to consider the nature of the student’s rights and mischaracterized the program as not being part of “health education.” *Id.* The court also did not recognize that the lack of confidentiality in the program might greatly hinder the state’s efforts in combating teenage pregnancies and STDs. *Id.*

154. Ramos, *supra* note 61, at 186.

155. See *Carey v. Population Servs. Intl.*, 431 U.S. 678, 693 (1977) (stating that the “right to privacy in connection with decisions affecting procreation extends to minors as well as to adults”).

distribution context irrespective of parents' rights.¹⁵⁶

Indeed, the cases show that, as an extension of *Carey v. Population Services International*, minors should have a fundamental right to make these types of sexual and reproductive decisions about their own bodies without parental approval.¹⁵⁷ More specifically, the trend of the cases reveals that public schools generally should be able to implement condom distribution programs with little interference from opposing parents.¹⁵⁸ A true appreciation of the clash between the asserted interests shows that the rights of minors to access contraceptives are paramount, even if a parent objects. That is, a minor's constitutional protections outweigh the fundamental parental right to raise a child without interference based on the nature of the respective rights, because decisions about sexual and reproductive health are perhaps the most personal and intimate choices a person can make in his or her life. While parental rights certainly are important, they cannot outweigh an individual's decision regarding sexual matters involving the individual's own body—regardless of the person's age.¹⁵⁹ Therefore, instead of declining to reach this issue,¹⁶⁰ courts should affirmatively recognize minors' sexual autonomy as a fundamental liberty interest under the Due Process Clause of the Fourteenth Amendment.

By extension, the scope of a parent's liberty interest to raise a child as the parent sees fit is restricted in the framework of the sexual decisions a minor makes regarding public school condom distribution. Parents do have a fundamental interest in directing the upbringing of their children, which normally will override any interest of a minor or the state. However, condom distribution is different because of the minor's fundamental right to make decisions about sexual health and

156. A court also could analyze the issue under the lens of equal protection: a school board may decide (even at parental urging) not to have a condom distribution program, but if the school board does adopt such a program, the school must not structure this governmental benefit so that some minors have access and others do not due to a parental consent or opt-out provision.

157. *Id.*

158. Indeed, the only case specifically to reject this proposition was the very first condom distribution case, and the dissent's reasoning has been echoed in the subsequent cases. *See supra* Part III.A.

159. *Cf.* Catherine J. Ross, *An Emerging Right for Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 224 (1999) (arguing that minors have a right to receive information in some circumstances, including information about their sexual health, regardless of the limitations their parents might try to impose).

160. *See Parents United for Better Sch., Inc. v. School Dist. of Phila. Bd. of Educ.*, 148 F.3d 260, 277 (3d Cir. 1998).

the state's compelling interest in reducing teenage pregnancy and STD rates. Recognizing that minors have a fundamental right to their own sexual well-being acknowledges that parents cannot unilaterally prohibit their children from engaging in sexual activity. Indeed, as the cases accept and the teenage sexual activity statistics reveal, this is the reality of today's society.¹⁶¹ Thus, future contraceptive distribution cases should recognize that the wishes of parents cannot trump opposing views of teenagers who must make these decisions about their own bodies.

The state's interest also shows that in this specific context, the need to provide sexually active teenagers with easier condom access necessarily minimizes the rights of parents. Teenage pregnancies and STDs have tremendous adverse affects on society, and public schools are the best mechanism for the state to reach minors and address these problems—especially for students who may have no other way to obtain condoms. Additionally, condom distribution programs are not initiated in a vacuum, as school districts notify parents of the availability of condoms in their schools. Parents are still able to counsel their children about sexual matters and can direct their children not to obtain condoms from the school. Condom distribution programs thus help to further the state's legitimate interest in enhancing teenage sexual health without taking away the important role of parents, who are free to impart morals and values to their children. That is, parents still can direct the care, custody, and control of their children even in the face of condom distribution programs at public schools.

B. Given the Competing Interests, a Parental Consent Provision Will Fail Strict Scrutiny Review

Once a school district decides to initiate a condom distribution program, courts should view any restrictions placed upon students using the program under the lens of strict scrutiny. This standard is most appropriate because minors have a fundamental right in decisions regarding their sexual health and because states have an overriding concern in ensuring that condom distribution programs are as effective as possible. Indeed, once courts recognize that minors' interests are paramount in this context, strict scrutiny review

161. See *supra* notes 6-7.

provides the best mechanism to vindicate those rights.¹⁶² Under strict scrutiny, a state can impose minimal burdens on a student's access to condoms if those burdens advance a compelling state interest. However, requiring parental approval would be unconstitutional because it would not be narrowly tailored to any prevailing state goal.

For example, a school might require that all students who request condoms first complete a counseling session to learn the proper and safe way to use a condom. This minimal burden would meet the compelling state interest of ensuring that condom use is effective and actually helps to reduce teenage pregnancy and STD rates. Additionally, states can require a counselor to stress abstinence as the only effective way to prevent pregnancy and disease to promote the compelling state interest of educating youth about the value of abstinence, as long as there is no significant burden placed on the availability of condoms. Requiring parental consent or offering an opt-out form, however, advances no compelling state interest and is too burdensome for students whose parents object to them obtaining condoms.

Condom distribution programs without parental consent or opt-out provisions are the most effective means of ensuring that minors have the ability to access contraceptives. Any provision that involves parents automatically takes away the confidentiality necessary for a successful condom distribution program. A prior parental consent requirement forces minors to ask their parents for permission to obtain condoms, while an opt-out form such as the one used in the Philadelphia case requires students to identify themselves to the personnel distributing the condoms so they can be checked against the list of students whose parents have opted-out of the program.¹⁶³ Thus, while an opt-out provision may be less invasive for a student because he or she does not specifically have to ask a parent for permission prior to accessing the condoms, it is still intrusive because it removes student confidentiality.¹⁶⁴ As Justice Eiber wrote in her dissent in the New York condom distribution case, an opt-out provision "would so

162. Cf. *Carey v. Population Servs. Intl.*, 431 U.S. 678, 686 (1977) (requiring a "sufficiently compelling state interest" to override minors' rights to purchase condoms).

163. A consent or opt-out option also precludes the school from leaving a basket of condoms unattended in a school health clinic or installing condom vending machines.

164. The Third Circuit largely overlooked this distinction in *Parents United for a Better School, Inc. v. School District of Philadelphia Board of Education*, 148 F.3d 260 (3d Cir. 1998). See discussion *supra* Part III.C; *supra* notes 110-133.

seriously limit participation in the program as to make it ineffective in reaching many of those students who most need it."¹⁶⁵

Therefore, it is sound policy for a school district to enact a condom distribution program without a parental consent provision to combat the negative consequences of widespread teenage sexual activity and to protect both teenagers and society from the potential adverse effects of unsafe sex. These types of programs, combined with comprehensive sex education that also emphasizes abstinence, should be a part of the curricula that schools provide to today's youth.¹⁶⁶ As one court stated:

[T]he State has a compelling interest in controlling AIDS, which presents a public health concern of the highest order. Nor can there be any doubt as to the blanket proposition that the State has a compelling interest in educating its youth about AIDS. Education regarding the means by which AIDS is communicated is a powerful weapon against the spread of disease and clearly an essential component of our nationwide struggle to combat it.¹⁶⁷

Similarly, as Justice Eiber noted, school districts must recognize the reality of teenage sexual activity: "In view of the public policy interest in slowing the spread of the HIV virus, the condom distribution program is not inconsistent with the educational mission of the public schools."¹⁶⁸ Finally, once a school begins to offer condoms to its students, a constitutional analysis reveals that the school cannot require a student first to obtain his or her parent's consent, because this type of condition would fail strict scrutiny review given the importance of a minor's liberty and privacy rights in this area.

If a court were to reject the argument that a minor's fundamental right to make decisions about his or her own sexual health trumps parental rights, then a condom distribution program might still exist with a parental consent or opt-out provision, so long as there is also a consent bypass procedure.¹⁶⁹ For example, a school's health counselor or a minor's own physician might determine that child is "mature

165. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 269 (N.Y. App. Div. 1993) (Eiber, J., dissenting) (internal quotations omitted).

166. *See Merriam*, *supra* note 17, at 590.

167. *Ware v. Valley Stream High School Dist.*, 75 N.W.2d 114, 128 (N.Y. App. Div. 1989).

168. *Alfonso*, 195 N.Y.S.2d at 274 (Eiber, J., dissenting).

169. *Cf. Bellotti v. Baird*, 443 U.S. 622, 642-44 (1979) (plurality opinion) (protecting the right of mature minors to bypass a law requiring parental consent before undergoing an abortion).

enough”¹⁷⁰ to make sexual health decisions without parental consent, and could provide the same sort of “permission” a parental consent provision would require.¹⁷¹ While this alternative seems to place a severe burden on students who seek to use the school’s condom distribution program but whose parents object, it may be the most politically feasible solution in a community that, in lieu of a parental consent or opt-out provision, will choose not to have any condom distribution program in their schools.¹⁷² A bypass procedure, much like the judicial bypass procedure available to minors who seek an abortion without parental consent,¹⁷³ at least would provide students whose parents object with an alternative so that the students still can obtain condoms from the school by following the proper procedures. Additionally, implementing a distribution program with a bypass procedure will provide unhindered access for students whose parents support the school’s efforts to protect today’s teenagers.

C. Protecting the Promise of Democracy

The foregoing analysis has even broader implications under our Constitution. While recognizing a minor’s liberty interest regarding sexual decisions in the school condom distribution context will help to protect society from the currently high teenage pregnancy and STD rates, it also will enhance the promise of democracy for all citizens. The Supreme Court stated over thirty years ago that “constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”¹⁷⁴ Allowing parents to veto their children’s decisions to avail themselves of school condom distribution programs would violate this very concept. Minors physically can engage in sexual activity, and therefore the state

170. The Supreme Court has suggested that minors may be “mature enough” to make informed decisions, but has not delineated a definition of “mature.” See *Bellotti*, 443 U.S. at 640-43; cf. Ross, *supra* note 159, at 246 n.116 (“Factors used by lower courts include the ability to comprehend the significance and consequences of choices, age, work experience, living experience, intelligence, responsibility and freedom from undue influence.”).

171. See Ramos, *supra* note 61, at 188 (“Many schools have health professionals or administrators who could serve the function that the judge serves in an abortion petition.”). Indeed, a trained professional will likely be knowledgeable about a minor’s “maturity.”

172. See Karl J. Sanders, Comment, *Kids and Condoms: Constitutional Challenges to the Distribution of Condoms in Public Schools*, 61 U. CIN. L. REV. 1479, 1510-1511 (1993) (advocating for an opt-out provision in condom distribution programs as a matter of local politics and practicality).

173. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

174. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

should not hinder these citizens' fundamental rights involving their own sexual choices, regardless of their age. Because minors' rights to sexual well-being outweigh general parental rights, failing to recognize the importance of minors' rights would reduce minors' worth as citizens in our democracy. Protecting these liberty and privacy interests thus has far-reaching implications regarding the meaning of fundamental constitutional rights for all Americans. If our Constitution is supposed to protect state encroachment into fundamental liberties for everyone, then minors must be included. More broadly, requiring prior parental consent sends the message that society does not value the rights of minors:

[T]he concept of rights also marks the minimum essential protections that all persons owe to each other in our society. Children are humans, too; they live, breathe, and have their being. If we exclude any human beings from our system of rights, we violate one of the fundamental principles on which our constitutional system of laws, and our very society, is established—the principle of equal worth under law of all humanity. If rights do not apply to all humanity, we all may suffer the stifling consequences.¹⁷⁵

Therefore, if a school promulgates a condom distribution program, minors must be allowed unfettered access, not only to preserve their fundamental constitutional rights, but also to realize the promise of democracy for all of society.

CONCLUSION

Minors have a liberty interest in receiving condoms from a public school once a school district makes the sound policy decision to offer condoms to its students. Indeed, minors have a right to make fundamental decisions about their sexual health without interference from their parents. Further, a state has a compelling interest in teaching safe sex in schools and in providing the means for those who are going to engage in sexual activity to do so safely, while still emphasizing abstinence. In the face of this fundamental right of minors and state compelling interest, schools should enact condom distribution policies that do not provide for parental consent or opt-out. Courts should recognize that public school condom distribution programs implicate a minor's fundamental right to make decisions

175. Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 338 (1996).

regarding his or her own body and sexual health, which a school can burden only through a program that is narrowly tailored to a compelling state interest. Because all healthy minors undergo a normal physical and emotional maturation process, they all face innate choices about their own lives and bodies.¹⁷⁶ In the special circumstances of sexual health, reproduction, and intimacy, the rights of adolescents are stronger than the rights of their parents. School condom distribution programs demonstrate that teenagers' constitutional rights are at their apex when the state, through its schools, seeks to provide minors with the ability to make safe choices about their sexual activities.

Mary and John, the hypothetical high school couple from the introduction, have a liberty interest in obtaining condoms from their school once the school promulgates a condom distribution program, even if their parents object. While Mary and John's parents might present a persuasive argument that a school should not be able to replace their guidance regarding such an important aspect of becoming an adult, offering condoms in a school does not supplant the parents' ability to teach and influence their children. Mary and John's parents still can counsel their children about the parents' religious morals and the value of abstinence. Additionally, the school can require Mary and John to attend a counseling session that stresses the virtues of abstinence before distributing condoms, so long as the school does not enact procedures that place an unconstitutional burden on condom distribution. If Mary and John decide to disobey their parents and have sex, however, the state should not be allowed to require parental approval before the students can obtain condoms from the school, especially when the state has made the correct determination that safe sex—when abstinence simply will not occur—is in the best interest of both minors and society. Anything less will ignore the need to safeguard society and will fail to afford all citizens the full protection of the Constitution.

176. Cf. Ross, *supra* note 159, at 257 (noting that “[f]ascination with romance, sexuality and sex are undeniably part of normal adolescent development . . .”).