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CONSTITUTIONAL RIGHTS OF CHILDREN: AN OVERVIEW

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Summary of Paper

The expansion of constitutional liberties achieved through judicial action in the 1960's and 1970's did not stop with the rights of adults. Children were held protected to some degree by the Constitution as well. Determination of what that degree is, however, is complicated by a line of Supreme Court cases holding that the interests of parents in guiding and directing their minor children are themselves protected by the Constitution. The cases so far decided involving claimed rights of children have for the most part not dealt with the conflict between parents and children in assertions of claimed rights but rather have turned upon the power of government to do certain things in certain ways to and with children. Thus, a series of cases has circumscribed governmental authority to act without observance of procedural regularity in juvenile delinquency proceedings and it seems clear that children in these circumstances enjoy considerable due process protection. With respect to the rights of students, they have been held to enjoy substantial rights of speech and press, at least until they reach the boundaries of disturbance of the educational process. What procedural protections students enjoy in terms of disciplinary actions by school authorities cannot be stated with any certainty; a landmark decision holding that "rudimentary" due process attaches may have now been undermined. The beginnings of an approach to parent-child conflicts is evident in cases dealing with parental-consent-to-abortion requirements and the access of minors to contraceptives and in a pending case that asks whether minors who are being institutionalized by their parents have any due process protections. It is concluded that no overall

constitutional challenge to the treatment of children as a special class is likely to succeed but that it is likely that a case-by-case approach is likely to see children accorded additional rights consistent with the recognition that they do in fact lack the full capacity of adults.

CONSTITUTIONAL RIGHTS OF CHILDREN: AN OVERVIEW

Introduction

During the 1960's there developed in the United States a variety of social trends that taken together constituted a rejection of settled and traditional ways of viewing social relationships. This development has had wide ramifications, including the altering of constitutional doctrine. Beginning with the School Desegregation Decision[1/] in 1954 the Supreme Court moved, at first haltingly, and then in impressively sweeping terms, to implement a substantive view of the equal protection clause of the Fourteenth Amendment. While the Brown decision represented but a modest extension of the intent of the framers and ratifiers of the Amendment and but little if any extension of the constitutional language itself,[2/] subsequent decisions are more problematical in these respects. Substantive equal protection[3/] was developed by the Court into the suspect classification - fundamental interest branch of the equal protection doctrine and through it the Justices required the reapportionment of the legislatures of all 50 States and of all legislative bodies having general governmental

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1/ Brown v. Board of Education, 347 U.S. 483 (1954).

2/ These propositions have recently been strongly attacked in R. Berger, Government by Judiciary - The Transformation of the Fourteenth Amendment (1977), but evaluation of the argument is beyond the scope of this paper.

3/ The phrase was originated in the classic article of Tussman & tenBroek, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341, 361-365 (1949). Its present currency was established in Karst & Horowitz, "Reitman v. Mulkey: A Telophase of Substantive Equal Protection," 1967 Sup. Ct. Rev. 39.

powers in the subunits of state governments, the redistricting in every State having more than one U.S. Representative of the congressional districts, and the opening up to both many hitherto excluded persons and movements of access to the political arena both as voters and as candidates. Wealth classifications, which were largely de facto, in the criminal law field were voided and a vaguely defined but potent right to travel doctrine upset numerous restrictions on newly-arrived citizens. Moreover, members of groups that had traditionally been disfavored in legal classifications began to assert claimed rights and in decision after decision were accorded doctrinal protection by being made the recipient of a suspect classification designation under which governmental restrictions had to be justified by compelling interests which in practice meant they could not be justified at all. Race was the paradigmatic suspect classification but nationality and alienage soon followed and gender and illegitimacy classifications have more recently been granted positions requiring somewhat less strict judicial scrutiny but nonetheless entitled to substantial judicial protection.[4/]

Simultaneously, the Supreme Court utilized the due process clauses of the Fifth and Fourteenth Amendments to require of governmental dealings with people the observance of a fairly high standard of procedural regularity before individuals may be disadvantaged. Here, again, traditionally

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4/ Documentation of these statements would overlengthen this paper but see The Constitution of the United States of American - Analysis and Interpretation, (hereinafter Constitution Annotated) Senate Document No. 92-82 (1972), 1470-1477, 1493-1527, and Senate Document No. 94-200 (1976 Supp.), S156-S182. In the last Term, the Court solidified its position with respect to gender and illegitimacy. See Craig v. Boren, 429 U.S. 190 (1976), and Califano v. Goldfarb, 430 U.S. 199 (1977) (gender); Trimble v. Gordon, 430 U.S. 763 (1977) (illegitimacy). For a largely successful effort to conceptualize the judicial formulation of doctrine, see L. Tribe, American Constitutional Law (1978), ch. 16.

disfavored groups, prisoners, involuntary inmates of institutions, welfare recipients, for example, were the beneficiaries of a judicial move to expand the circumstances under which due process had to be observed, primarily through the vitiation of the "right-privilege" distinction and the formulation of an "entitlements" doctrine under which state-fostered and justifiable expectations were accorded protection. Under the conjunction of the two elements, welfare recipients were thus to be accorded hearings before they were deprived of assistance and prisoners were afforded a somewhat truncated hearing before the imposition of disciplinary penalties.[5/] But, more important in some respects, the Court in more recent years has resurrected the formerly discredited doctrine of substantive due process that imposes not procedural regularity upon government but rather barriers to governmental action at all. The doctrine was originally developed to protect property rights against governmental regulation but it is now employed in the protection of certain personal rights, the parameters of which remain undefined, characterized in the group as basically familial but which gives some indication of spreading to a more general personal interest in privacy.[6/] Both elements of due process have had their applications to children.

5/ Constitution Annotated, op. cit., n. 4, 1429-1439, 1454-1455, and (Supp.), S136-S144, S149-S150. And see L. Tribe, op. cit., n.4, 501-522.

6/ Constitution Annotated, op. cit., n. 4, 1310-1335, 1403-1406, and (supp.), S126-S136; L. Tribe, op. cit., n. 4, 421-455, 886-990. For the recent manifestations, see Moore v. City of East Cleveland, 431 U.S. 494 (1977) (sanctity of family); Zablocki v. Redhail, 98 S. Ct. 673 (1978) (marriage); Whalen v. Roe, 429 U.S. 589 (1977) (intimations of protected privacy rights against governmental dissemination of personal information). But see Paul v. Davis, 424 U.S. 693 (1976). The most well known of the recent substantive due process decisions are of course the abortion cases. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

A third strand deserving of mention was the primacy accorded the First Amendment guarantees of speech and press by the Supreme Court during the 1960's. No attempt will be made here to characterize the case law but it must be noted that this line of cases had an inevitable effect upon decisionmaking with respect to children, especially in the educational context.

Any effort to delineate the cause and effect relationship between the social conditions of the decade of the 1960's and the judicial decisions briefly alluded to here would be complex and perhaps frustrating. What is important for our purposes is that for whatever reason and in whatever causative context, children began to assert claims of rights and these assertions were largely successful in the courts; moreover, there developed a school of thought that would have accorded to children rights largely equivalent to adult rights, that in effect and sometimes expressly denied the separate and unique status of childhood.[7/] That school of thought has had no observable effect in the courts and little likelihood exists of its judicial acceptance. But the children's rights cases in themselves raise interesting issues respecting the status of childhood and the traditional role of parental autonomy insofar as children are concerned.

7/ E.g., R. Farson, Birthrights (1974); J. Holt, Escape from Childhood (1974). Farson considers children as "powerless, dominated, ignored, invisible." His thesis is: "The move for children's rights comes from the realization on the part of lawyers and judges, psychiatrists and educators, social workers and political reformers, parents and children that freedom and democracy are not the rights of adults only. Concerned people in every institution are becoming aware of the heavy reliance on power and authority by which adults impose excessive and arbitrary controls on children. In the developing consciousness of a civilization which has for four hundred years gradually excluded children from the world of adults there is the dawning recognition that children must have the right to full participation in society, that they must be valued for themselves, not just as potential adults." Id., 2-3. But see contra, Hafen, "Children's Liberation and New Egalitarianism: Some Reservations About Abandoning Youth to Their 'Rights,'" 3 Brig. Young U.L. Rev. 605 (1976).

This paper attempts a very modest overview of the judicial developments of the past decade-and-a-half, a short look ahead, and a brief speculative raising of questions about the continued state of parent-child-governmental relationship.

The Legal Tradition

"The existing generation is master both of the training and the entire experience of the generation to come."[8/] When he uttered these words more than a century ago John Stuart Mill thought the expression both true and proper and so it was. The classic liberal thinkers provided the principles for alleviating the repressed social conditions of the slave, the serf, the woman, for, in effect, assertion of individualism and equality of opportunity. But children were not to be included within these principles. Sir Henry Maine was sure that "they do not possess the faculty of forming a judgment on their own interests; in other words ... they are wanting in the first essential of an engagement by Contract."[9/] And John Locke was clear that the limited capacity of children necessarily excluded minors from participation in the social contract. "Children ... are not born in this

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8/ J. Mill, On Liberty (D. Spitz ed. 1975), 77. Excepting children from the operation of the libertarian principle, Mill said: "It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own action as well as against external injury. ...Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion." Id., 13-14.

9/ H. Maine, Ancient Law (1st Amer. ed. 1870), 163-164.

state of equality, though they are born to it." Although Adam was "created" as a mature person, "capable from the first instant of his being to provide for his own support and preservation ... and govern his actions according to the dictates of the law of reason," children lacked a "capacity of knowing that law." Parents were therefore under an obligation of nature to nourish and educate their children to help them attain a mature and rational capacity, "till [their] understanding be fit to take the government of [their] will." "And thus we see how natural freedom and subjection to parents may consist together and are both founded on the same principle."[10/]

There is of course no unalterable legal boundary between childhood and adulthood. In different societies and at different times, young people have been accepted into adult society at different ages and children have been variously viewed,[11/] and law has differently regulated familial relations at different times. One writer has noted the changing from the early colonial days of this country to the present of the legal regulation of the assumption by the child of an adult economic role.[12/] Thus, from the early days till near the end of the 19th century, the economic needs of communities and families in America necessitated early entry of children into the work force. At first, these children were closely restrained by law and custom, whether they lived at home or in an apprentice system in a master's home, and they worked not for their own account but for the

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10/ J. Locke, The Second Treatise of Government, (P. Laslett ed., Two Treatises of Government, 1967), §§55-61.

11/ E.g., P. Aries, Centuries of Childhood (1962).

12/ Marks, "Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go," 39 L. & Contemp. Prob. 78 (1975).

account of family or master. Gradually, the law imposed upon parents some regard and consideration for the child's welfare, especially the obligation to prepare him for assumption of full adult responsibilities. But in the post-Civil War industrialization and the social dislocation accompanying it social custom and supporting law shifted to a greater requirement of retention of parental control over children for a longer period and to greater protection of family life. Three major institutional changes were legislatively implemented, the juvenile court system, the prohibition of child labor, and compulsory education, all looking toward "external support of the family as the ideal way additionally to prepare children to face life...: bolster the family, leave even the delinquent child in the family - where possible, shield the child from adult roles and responsibilities , and formally educate him, and upward movement could be expected."[13/]

The result was an "extension of childhood," with the state "enjoining longer supervision, more protracted education, and the postponed assumption of adult economic roles."[14/] The writer notes some elements of a reversal of the trend in the second half of this century in the context of the middle and late adolescent in particular. The waning of parental immunity from a personal tort action brought by an unemancipated child is one example and another is the passage by many States of medical emancipation laws

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13/ Id., 86.

14/ Id., 88.

by which minors are enabled to receive medical treatment without parental consent.[15/] These changes significantly have had some parallels in constitutional litigation and will be noted infra. But it is important to note that they reflect changes of degree, altering of the age limits at which the child for some matters is deemed to have the capacity to make informed judgments of his own, and do not constitute the more radical development of denial of childhood as a separate status.

Concomitant with the increased emphasis upon family control and responsibility, common law judges viewed parental rights "as a key concept, not only for the specific purposes of domestic relations law, but as a fundamental cultural assumption about the family as a basic social, economic, and political unit. For this reason, both English and American judges view the origins of parental rights as being even more fundamental than property rights."[16/] Parental power has been deemed primary, prevailing over the claims of the state, other outsiders, and the children themselves, unless there is some compelling justification for interference. The primary compelling justification is the protection of children from parental neglect, abuse, or abandonment; statutes proscribing various forms of parental

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15/ Id., 88-92. On parental tort immunity, see "Child v. Parent: Erosion of the Immunity Rule," 10 Hast. L. J. 201 (1967). With respect to parental consent, see T. H. v. Jones, 425 F. Supp. 873 (D. Utah, 1975) (state requirement of family consent before minor may receive birth control information under AFDC invalid under both Social Security Act and Constitution), aff'd 425 U.S. 986 (1976) (passing on Social Security Act conclusion only).

16/ Hafen, op. cit., n. 7, 615-616.

misconduct are found in every State.[17/] The power of government to protect children by removing them from parental custody has roots deep in American history; by the *parens patriae* doctrine, equity courts early in the 19th century assumed the power to remove a child from parental custody and to appoint a suitable person to act as guardian.[18/] The role of the state then was supplementary to that of the parents and supportive until there arose evidence of abuse of parental responsibility.

The Constitutional Primacy of the Parent

Starting point for an assessment of the constitutional rights of children must be, in light of the American tradition summarized above, with the constitutional rights of parents. A series of Supreme Court decisions appears in a number of contexts to accord primacy to parental rights *vis-a-vis* the power of the state to intervene in non-abuse situations to reorder or to deflect parental choice in child rearing. Exclusion of the state, however, does not, except to the extent that judicial rhetoric is suggestive, dispose of the issue of the conflict between parent and child; only recently has the Court addressed this conflict and its efforts at resolution are at best tentative.

17/ Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Family L. Q. 1 (1975).

18/ Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy," 39 L. & Contemp. Prob. 226, 240 (1975). See, e.g., 2 J. Story, *Commentaries on Equity Jurisprudence* (7th ed. 1857), 702. On the related doctrine of *in loco parentis* which gives government the authority and the responsibility of the parent during the time in which the child is in its care, as in, e.g., the schools, see Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 U. Pa. L. Rev. 373, 377-384 (1969).

In Meyer v. Nebraska,[19/] the Court struck down a state law forbidding the teaching in any school in the State, public or private, of any modern foreign language, other than English, to any child who had not successfully finished the eighth grade; in Pierce v. Society of Sisters,[20/] it declared unconstitutional a state law which required public school education of children aged eight to sixteen. Although both cases involved property rights which the Court deemed to be protected, those persons adversely affected in their property interests were permitted to represent the interests of parents and children in the assertion of other aspects of "liberty" of which they could not be denied.[21/] The right of parents to have their children instructed in a foreign language, the Court said in Meyer, was "within the liberty of the Fourteenth Amendment." Expressly noting the theory discussed in Plato's Republic in which family life would be replaced entirely by state child-rearing activities so pervasive that "no parent is to know his own child, nor any child his parent", the Court set its face against such a system.[22/]

19/ 262 U.S. 390 (1923).

20/ 268 U.S. 510 (1925).

21/ The "liberty" is that interest which the Fourteenth Amendment guarantees against state deprivation "without due process of law". The line of cases of which Meyer and Pierce are part do not mandate the observance of certain procedures to be followed in taking away interests but preclude altogether the deprivation. See supra n. 6. "Without doubt," Justice McReynolds said in Meyer, liberty "denotes not merely freedom from bodily restraint but also the right to the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Id., 262 U.S., 399.

22/ Id., 401-402.

> Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

Meyer was followed by Pierce with the Court concluding that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." This followed because "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 23/

While economic due process did not survive the "revolution of the 1930's" in constitutional law, Meyer and Pierce have not only survived but have been extended; additionally, other strands of constitutional doctrine have come together to enforce them. Thus, in West Virginia State Bd. of Educ. v. Barnette, 24/ the Court struck down as a free speech violation the compulsion of school children to salute the flag; but insofar as the opinion of the Court permits a judgment it was the free speech rights of the parents which were being protected. 25/ And in

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23/ Id., 268 U.S., 534-535.

24/ 319 U.S. 624 (1943).

25/ While the Court did not identify the persons whose rights had been invaded the suit had been brought by the parents for themselves, not in behalf of the children, complaining that the salute requirements restricted the "liberty of the parents' choice and direction in the upbringing of their children." Record at 11, West Virginia State Bd of Educ. v. Barnette, supra. Justice Frankfurter, dissenting, framed the issue as a conflict between the parents and the state. Id., 657. But note that in Tinker v. Des Moines Ind. Community School Dist., 339 U.S. 503, 506-507 (1969), the court viewed Barnette

Wisconsin v. Yoder,[26/] the Court combined parental rights and religious freedom into a powerful barrier against enforcement of compulsory attendance laws to require Amish children to be sent to public schools after they graduated from the eighth grade but before they turned sixteen.[27/]

> [I]t seems clear that if the State is empowered, as parens patriae, to "save" a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. ...[T]his case involves the fundamental interest of parents as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary rule of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.
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> [T]he court's holding in Pierce stands as a charter of the right of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment.

For the first time in a parental rights case, someone raised the question of the rights of the children involved in the case. Justice Douglas protested that the desires of the children might not coincide with

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25/ (cont'd.) as having been about the children's First Amendment rights. For a suggestion that Tinker too is really about the rights of parents, see Burt, "Developing Constitutional Rights of, in, and for Children," 39 L. & Contemp. Prob. 118, 122-124 (1975).

26/ 406 U.S. 205 (1972).

27/ Id., 232-233.

those of the parents and the rights of the children should be protected.[28/]

> On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. ...
> It is the future of the student, not the future of the parents, that is imperiled in today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. .. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.

Chief Justice Burger for the Court responded that nothing in the record indicated a divergence between parents and children and observed that it was the interests of the parents that were being protected because the parents were subject to criminal prosecution under the attendance laws. But the Court did not stop there.[29/]

Removal of the religious context does not alter the court's conclusion. When Illinois provided that upon the death of the mother illegitimate children became the wards of the State and their father had no right to

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28/ Id., 244-245 (dissenting in part).

29/ "Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in Pierce v. Society of Sisters ...." Id., 231-232.

custody and no say in the State's treatment of the children, the court struck the statute down and held that before a father of illegitimate children could be deprived of his parental interest the State would have to give him a fitness hearing, just as it would have been required to under state law for the father of legitimate children.[30/]

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

The reach of the principle may be observed in Justice Powell's plurality opinion for the court in Moore v. City of East Cleveland.[31/] There, the city had zoning regulations imposing definitional limitations upon extended families as one device of limiting the number of persons in a household. The ordinance precluded having the children of more than one child of the head of a household in the house and when a grandson of Mrs. Moore came to live with her upon the death of his mother she came in violation of the ordinance because another son and his son were already dwelling in the house. Meyer, Pierce, Stanley, and Yoder were

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30/ Stanley v. Illinois, 405 U.S. 645 (1972). The quoted passage is at Id., 651. Stanley and the children's mother had lived together for 18 years and he had always assumed responsibility for their support. When, however, the father's relationship has been significantly different the State has greater leeway. E.g., Quilloin v. Walcott, 98 S. Ct. 549 (1978) (father who has never lived with children and has only intermittently supported them has no protected right to object to their adoption by mother's husband who has supported them).

31/ 431 U.S. 494 (1977).

relied on as establishing that state interference with the family required a compelling justification; to the argument that a grandmother could not take advantage of this line of cases Justice Powell was unsympathetic. 32/

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. ...
> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household with parents and children has roots equally venerable and equally deserving of constitutional protection. ...
> [T]he choice of relatives in this degree of kinship to live together may not lightly be denied by the State.

While all aspects of entry into marriage and the family are protected from noncompelling governmental interference, and frequently in cases with strong rhetorical flourishes, 33/ the protection is not absolute. Thus, in Prince v. Massachusetts, 34/ the Court sustained the conviction of a Jehovah's Witness for violating a law prohibiting street solicitation by minors

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32/ Id., 503, 504, 505-506. Justice Stevens concurred in the Court's decision on alternate grounds, id., 513, and there were four dissents, three of them denying that the liberty interest found by the Court extended this far. While the Court was substantially divided on the application and meaning of "familial liberty" in this case, each of the Justices, except for Justice Rehnquist, has joined opinions containing the same rhetoric of Justice Powell's opinion, indicating the general principle is firmly established. E.g., Zablocki v. Redhail, 98 S. Ct. 673 (1978); Smith v. Organization of Foster Families, 431 U.S. 816 (1977). See also Cook v. Hudson, 429 U.S. 165, 166 (1976) (Chief Justice Burger).

33/ E.g., Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 98 S. Ct. 673 (1978) (right to marry); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (procreation); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (employment disabilities visited upon pregnant teachers); Roe v. Wade, 410 U.S. 113 (1973) (termination of pregnancy).

34/ 321 U.S. 158 (1944).

because she permitted her nine-year old niece, who desired to accompany her, to help her sell religious literature on the street. Acknowledging the conflict between the governmental claims and the "sacred private interests" associated with Mrs. Prince's claims, the Justices pointed to the government's duty to limit parental control by requiring school attendance, regulating child labor, and otherwise protecting children against the evils of employment and other activity in public places. 35/

> The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, expecially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Constitutional Rights of Children

A. Juvenile Delinquency Process

In all the States of the Union and the District of Columbia there is provision made for treating with persons under a certain age who have allegedly committed an offense which if committed by an adult would be criminal or who have become delinquent in a sense not recognizable under laws dealing with adults, such as statutory provisions relating to habitual truancy, deportment endangering the morals or health of the juvenile or

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35/ Id., 166, 170.

others, or consistent disobedience making the juvenile uncontrollable by his parents. The reforms of the early part of this century provided not only for segregating juveniles from adult offenders in the adjudication, detention, and correctional facilities, but they also dispensed with the substantive and procedural rules surrounding criminal trials which were mandated by due process. Justification for this abandonment of constitutional guarantees was offered by describing juvenile courts as civil not criminal and as not dispensing criminal punishment and offering the theory that the state was acting as parens patriae for the juvenile offender and was in no sense his adversary. Disillusionment with the results of juvenile reforms coupled with judicial emphasis of constitutional protection of the accused led in the 1960's to a substantial restriction of these elements of juvenile jurisprudence.[36/]

Constitutional restraints have been imposed upon the juvenile delinquency process in the last ten years but the Court has been very conscious that it has been dealing with an institutional arrangement necessitated by the special status of the young and reflecting both the interests of the young and society. It has not, however, achieved any unified view of what the process is in very concrete terms.

Observing that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone", the Court imposed substantial due process observance

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36/ See The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967); for a review of the Supreme Court's response through its decision making, see Schultz & Cohen, "Isolationism in Juvenile Court Jurisprudence," in M. Rosenheim (ed.), Pursuing Justice for the Child (1976), 20.

on a delinquency proceeding in its first encounter with the constitutional aspects of the juvenile delinquency process.[37/] The application of due process to juvenile proceedings would not endanger the good intentions vested in the system nor diminish the features of the system which were deemed desirable - emphasis upon rehabilitation rather than on punishment, a measure of informality, avoidance of the stigma of criminal convition, the low visibility of the process - but the consequences of the absence of due process standards made their application necessary, the Court found, especially in a case where the judgment of wrongdoing was arrived at cavalierly.[38/]

> [W]e confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence - and of limited practical meaning - that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistically the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. ...
> In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court.

Thus, the Court required that notice of charges be given in time for the juvenile to prepare a defense, required a hearing in which he could

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37/ In re Gault, 387 U.S. 1 (1967). the quoted phrase is at id., 13.

38/ Id., 27-28. Earlier, the Court had held that before a juvenile could be "waived" to an adult court for trial, there had to be a hearing and findings of reasons, a result based on statutory interpretation but apparently constitutionalized in Gault. Kent v. United States, 383 U.S. 541 (1966), noted on this point in id., 387 U.S., 30-31.

be represented by retained or appointed counsel, required observance of the rights of confrontation and cross-examination, and required that the juvenile be protected against self-incrimination. Subsequently, it was held that the "essentials of due process and fair treatment" required that a juvenile could be adjudged delinquent only on evidence sufficient to satisfy the reasonable doubt standard when the offense charged would be a crime if committed by an adult,[39/] but the Court declined to hold that jury trials were constitutionally required in juvenile proceedings.[40/] The most recent decision leaves the field in a state of some confusion. California had established a system under which juvenile offenders who were found to be beyond the benefit of the juvenile court system could be transferred to adult courts of general criminal jurisdiction; the transfers were accomplished after an adjudicatory juvenile hearing at which the children were found to be delinquent. But the Court, speaking through Chief Justice Burger, held that the subsequent prosecution in criminal court following the adjudicatory proceeding in juvenile court violated the Fifth Amendment's double jeopardy clause.[41/] Jeopardy, the Court said, denotes risk, a "risk that is traditionally associated with a criminal

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39/ In re Winship, 397 U.S. 358 (1970).

40/ McKeiver v. Pennsylvania, 403 U.S. 508 (1971). No opinion was concurred in by a majority of the Justices. A plurality of four reasoned that a juvenile proceeding was not "a criminal prosecution" within the terms of the Sixth Amendment, so that jury trials were not automatically required; instead, a test of "fundamental fairness" should be used and in that regard a jury was not a necessary component of fair factfinding while its use would have serious repercussions on the rehabititative and protective functions of the juvenile court. Two Justices concurred on other grounds and three dissented.

41/ Breed v. Jones, 421 U.S. 519 (1975).

prosecution". The child faced in the juvenile adjudication the risks of the stigma inherent in the determination of delinquency and the deprivation of liberty for many years. Further, the Court found little to distinguish the potential consequences involved in juvenile adjudicatory hearings and in criminal proceedings. Given the identity of risks faced in the juvenile court and in subsequent criminal prosecution, the Court ruled that the task of twice marshaling resources and twice being subjected to the heavy personal strain of trial was constitutionally forbidden.[42/] But since under Gault the juvenile must be given a hearing before being transferred to adult proceedings, the Court did observe that "nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding."[43/]

There at present the matter rests, presumably awaiting further elaboration by the Court of the procedural protections to be observed in juvenile proceedings adjudicating questions that would in the adult world be criminal proceedings. But still to be considered at all by the Court are such questions as the substantive and procedural guarantees to be applied

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42/ Id., 528-531. The conclusion that the juvenile adjudicatory proceeding is akin to a criminal proceeding for double jeopardy purposes is manifestly inconsistent with the plurality opinion's conclusion in McKeiver that a juvenile adjudicatory proceeding is not akin to a criminal proceeding for jury trial purposes, an opinion which the Chief Justice joined. The Court's effort to distinguish McKeiver was unpersuasive. "We deal here, not with 'the formalities of the criminal adjudicative process,' McKeiver v. Pennsylvania, 403 U.S., at 551 (opinion of Blackmun, J.), but with an analysis of an aspect of the juvenile court system in terms of the kind of risk to which jeopardy refers." Id., 531.

43/ Id., 538 n. 18.

in proceedings when the matter at issue is not essentially criminal-like conduct but misbehavior or uncontrollability requiring application of legal sanctions. Being labeled a PINS, a MINS, or a CHINS[44/] or unruly child is probably only marginally less stigmatizing than being adjudicated a delinquent and the disposition of such persons in the system usually involves the same restraints upon liberty. Reformers have argued that laws permitting courts to enter orders seriously interfering with children's freedom on the basis of noncriminal misbehavior are overbroad, punish a status rather than an act, and deny children the equal protection of the laws. The case laws is yet in a very primitive state and it may be some time before the Supreme Court is ready to deal with these issues.[45/]

B. The Speech and Press Rights of Children

Not surprisingly, the speech and press issues involving children have arisen in the educational context and, while the Court has recognized legitimate institutional interests in preserving discipline and order, students generally have been accorded wide-ranging protection, certainly at the college level and increasingly in the high schools.

Standards of the First Amendment expression guarantees against curtailment by school authorities were first enunciated by the Court in *Tinker* v. *Des Moines Ind. Community School Dist.*,[46/] in which high school

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44/ I.e., person, minor, or child in need of supervision.

45/ But see *Gesicki* v. *Oswald*, 336 F. Supp. 371 (D.S.D.N.Y. 1971), *aff'd* 406 U.S. 913 (1972) (voiding a law permitting the state courts to commit so-called wayward minors to *adult* prisons).

46/ 393 U.S. 503 (1969). No doubt exists that the children were reflecting the views of their parents, see *supra*, n. 25, but the opinion broadly addresses the rights of the *children*.

principals had banned the wearing of black arm-bands by students in school as a symbol of protest against United States actions in Viet Nam. Reversing the refusal of lower courts to reinstate students who had been suspended for violating the ban, the Court set out the balance to be drawn.47/

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate. ...On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.

Restriction on expression by school authorities is only permissible to prevent disruption of educational discipline.48/

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the schools," the prohibition cannot be sustained.

Tinker was reaffirmed in Healy v. James,49/ in which it was held that the withholding of recognition by a public college administration from a

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47/ Id., 506, 507.

48/ Id., 509.

49/ 408 U.S. 169 (1972). An associated right is that of hearing controversial speakers who may be banned from campus. These bans have generally been invalidated. E.g, Snyder v. Bd. of Trustees, 286 F. Supp. 927 (N.D. Ill. 1968); Brooks v. Auburn Univ., 296 F. Supp. 188 (M.D. Ala.), aff'd, 412 F. 2d 1171 (C.A. 5, 1969); Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969).

student organization violated the students' right of association which is a construct of First Amendment liberties. Denial of recognition, the Court held, was impermissible if it had been based on the local organization's affiliation with the national SDS or on disagreement with the organization's philosophy, or on a fear of disruption with no evidentiary support.[50/]

> First Amendment rights must always be applied "in light of the special characteristics of the ... environment" in the particular case. ... And, where state-operated educational institutions are involved, this Court has long recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." ... Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." ... The college classroom with its surrounding environs is peculiarly the "market place of ideas" and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

But a college could impose reasonable regulations to maintain order and preserve an atmosphere in which learning may take place and it may impose as a condition of recognition that each organization affirm in advance its willingness to adhere to reasonable campus law.[51/] But no matter how tasteless the expression, the mere dissemination of ideas in

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50/ *Id.*, 408 U.S., 180.

51/ *Id.*, 193

a college campus newspaper cannot be made the subject of suppression nor the disseminators punished. 52/

As the case law shows, the idea of a wide continuum of student free expression is not an accepted fact among school administrators but the courts have voided far many more restraints than they have accepted. Save for some expectable grotesqueries, 53/ the cases show a generally responsible exercise of rights of expression and a fair measure of accommodation between students and school administrators. But significant issues remain and perhaps the most uncertain involves the extent to which high school students are as protected as college students, especially in the context of the high school press. 54/

52/ Papish v. Bd. of Curators, 410 U.S. 667 (1973). The decision is a formal recognition by the Court of the equivalence of the college student press with the adult counterpart. It upset the dismissal of a graduate student for distributing on campus a newspaper with a cartoon showing policement raping the Statue of Liberty and peppered with the usual vulgarisms of the student protestors. For somewhat more serious journalistic efforts being protected, see, e.g., Joyner v. Whiting, 477 F. 2d 245 (C.A. 4, 1973); Bazaar v. Fortune, 476 F. 2d 570 (C.A. 5), modified en banc, 489 F. 2d 225 (C.A. 5, 1973), cert. den. 416 U.S. 995 (1974).

53/ E.g., State v. Van Slyke, 489 S. W. 2d 590 (Ct. Crim. App. Tex. 1973), appeal dismd. for want of substantial federal question, 418 U.S. 907 (1974) (conviction under flag desecration statute of one who, with no apparent intent to communicate, but in course of "horseplay", blew his nose on a flag, simulated masturbation on it, and finally burned it). And see Yench v. Stockmar, 483 F. 2d 820 (C.A. 10, 1973) (expulsion of student for wearing Mickey Mouse cap to graduation; remanded for hearing on whether wearing Mickey Mouse cap is expressive activity).

54/ E.g., Jacobs v. Bd. of School Comrs., 349 F. Supp. 605 (S.D. Ind. 1972), aff'd, 490 F. 2d 601 (C.A. 7, 1973), vacated as moot, 420 U.S. 128 (1975) (right to print, sell, and distribute underground newspaper containing anonymous articles). A pressing issue is the validity of regulations requiring submission of student material to a school official prior to publication. The courts are divided. Compare Fujishima v. Bd. of Educ., 460 F. 2d 1355 (C.A. 7, 1972), and Riseman v. School Committee, 439 F. 2d 148 (C.A. 1, 1971) (voided),

Aside from speech and press rights, students have achieved at most a mixed record in asserting other substantive rights. The most disputed, and still unsettled, assertion has been with respect to student dress codes, particularly in terms of hair length standards, which has involved an incredible amount of court time, has divided the courts of appeals, 55/ and has failed to get the attention of the Supreme Court. 56/

D. Due Process Rights of Students Facing Discipline

Again, in discussing the constitutional rights of children, we are drawn to narrow the class to students and consider what rights to procedural due process and perhaps to substantive due process they have

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54/ (cont'd.) with Eisner v. Stamford Bd. of Educ., 440 F. 2d 803 (C.A. 2, 1971) (upheld but promulgation of narrow standards and expeditious review required). The newest issue apparently concerns the the propriety of schools halting the taking and publishing of surveys of student sex attitudes. Compare Gambino v. Fairfax Co. Bd. of Educ., 429 F. Supp. 781 (E.D. Va.), aff d, 564 F. 2d 157 (C.A. 4 1977), with Trachtman v. Anker, 563 F. 2d 512 (C.A. 2, 1977), cert. den., No. 77-1054 (March 20, 1978).

55/ Compare Richards v. Thurston, 424 F. 2d 1281 (C.A. 1, 1970); Massie v. Henry, 455 F. 2d 779 (C.A. 4, 1972); Breen v. Kahl, 419 F. 2d 1034 (C.A. 7, 1969), cert. den. 398 U.S. 937 (1970), with Karr v. Schmidt, 460 F. 2d 609 (C.A. 5) (en banc), cert. den. 409 U.S. 989 (1972); King v. Saddleback Junior College Dist., 445 F. 2d 932 (C.A. 9), cert. den. 404 U.S. 979 (1971); Freeman v. Flake, 448 F. 2d 258 (C.A. 10), cert. den. 405 U.S. 1032 (1971). The courts have been unable to decide whether the claimed right should be characterized as expressive conduct protected by the First Amendment or a liberty interest protected by due process, but see infra, n. 56. See L. Tribe, op. cit., n. 4, 958-965.

56/ In Kelley v. Johnson, 425 U.S. 238 (1976), the Court held that policemen could be held to a much higher standard of dress than could other citizens in sustaining a hair length regulation. The Court assumed without deciding that there is some sort of liberty interest in matters of personal appearance. Id., 244, 245.

when faced with discipline by school authorities. The seminal decision here is *Gross* v. *Lopez*.[57/] Prior to *Goss*, lower courts were virtually unanimous in holding that expulsions and lengthy suspensions must be accompanied by procedural due process.[58/] *Goss* was both an affirmance of this case law and an extension, striking down an Ohio statute that authorized school authorities to suspend students for up to ten days without notice or hearing. Suspension, even for such a short period, the Court found to affect "property" and "liberty" interests protected by the Fourteenth Amendment and that public school students were protected in the enjoyment of both.[59/] Inasmuch as due process is a flexible concept, to be applied as interests balance differently, the Court, in recognition of the nature of the educational situation, did not require the application of the full panoply of due process rights but rather "rudimentary" procedural protections necessitated "*some* kind of notice" and "*some* kind of hearing." Thus, there was to be no necessary "delay between the time 'notice' is given and the time of the hearing." The notice need only identify the offending conduct so that the student would have "an opportunity to explain his version of the facts," but need not accord him an opportunity for preparation. The hearing procedure was not required to be encumbered by the customary accouterments of a fair hearing; it was rather more like a "discussion". The Court observed that the

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57/ 419 U.S. 565 (1975), The decision was 5-to-4 and accompanied by a sharp and vigorous dissent written by Justice Powell.

58/ *Id*., 576 n. 8 (citing and characterizing cases). The leading case had been *Dixon* v. *Alabama State Bd. of Educ*., 294 F. 2d 150 (C.A. 5), *cert. den* 368 U.S. 930 (1961).

59/ *Id*., 419 U.S., 572-576.

procedure followed in one of the schools involved in the case was "remarkably similar to that we now require." Under it, a teacher observing misconduct would complete a form describing the occurrence and send the student, with the form, to the principal's office. There, the principal would obtain the student's version of the event and, if it conflicted with the teacher's written description, would send for the teacher to hear the teacher's own version, apparently in the presence of the student. If a discrepancy still existed, "the teacher's version would be believed and the principal would arrive at a disciplinary decision based on it." 60/

In light of the minimal requirements imposed upon school disciplinary proceedings, it is a little difficult to appreciate the forcefulness of Justice Powell's dissent, although the principles generally urged are perfectly understandable. Basically, the Justice argued that because children lacked the capacity of adults it was the obligation of school authorities to protect and guide student interests, that essentially the relationship was a paternalistic not an adversary one, and to impose what was an adversary relationship through due process would destroy the role and responsibilities of school officials without accomplishing anything constructive in return. 61/ Additionally, the Justice feared that academic decisions would be similarly subject to judicial review. 62/

60/ Id., 570-584, and 568 n. 2. For the differences between this "rudimentary" form and the ordinary requirements, see Constitution Annotated, op. cit., n. 4, 1436-1439. For a students' rights advocate's view of Goss, see Letwin, "After Goss v. Lopez: Student Status as Suspect Classification," 29 Stan. L. Rev. 627 (1977). For an early discussion see Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," 119 U. Pa. L. Rev. 545 (1971).

61/ Id., 419 U.S., 584.

62/ Id., 597.

That fear is apparently unfounded. In its most recent decision, the Court in an opinion joined by five Justices indicated in strong dicta, that a significant difference inheres between school decision determining a failure of a student to meet academic standards and such decisions based on student violations of valid rules of conduct, and that difference justifies dispensing with any due process requirements, such as a hearing. 63/

> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full hearing requirement. In Goss, the school's decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances "provide a meaningful hedge against erroneous action." ... The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual quesions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

63/ Board of Curators v. Horowitz, 98 S. Ct. 948 (1978). The quotation is at p. 11 id., 955. Four Justices either disagreed or argued that the Court should not reach out to decide an issue not before it. The Court's actual holding was that Horowitz had been accorded all the protection the Constitution required because of extensive discussion and consultation with faculty and others, a point on which all nine Justices agreed; nonetheless, the major portion of the opinion of the Court is concerned with establishing the proposition that she was not entitled to any such rights at all and little doubt exists that a majority subscribes to that point of view.

Moreover, another recent decision raises serious implications for the continuing vitality of Goss.[64/] There, the Court held that a school system need not afford students any form of hearing prior to administering corporal punishment, not because the students' interest in being free from wrongfully administered corporal punishment was not a liberty interest safeguarded by the due process clause, the Court expressly held that it is, but rather because under state law persons who have been wrongly, erroneously, or excessively punished by teachers and school officials have a common-law tort remedy. The existence of this remedy not only afforded such students relief when they were wronged but it operated as well to deter the imposition of such punishment, which was the same purpose a pre-infliction hearing would achieve.[65/]

> In view of the low incidence of abuse, the openness of our schools, and the common-law safeguards that already exist, the risk of error that may result in violation of a schoolchild's substantive rights can only be regarded as minimal. Imposing additional administrative safeguards as a constitutional requirement might reduce that risk marginally, but would also entail a significant intrusion into an area of primary educational responsibility. We conclude that the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law.

If the due process clause is satisfied by the existence of state remedies in terms of preventive guarantees, it may very well be satisfied

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64/ Ingraham v. Wright, 430 U.S. 651 (1977). The holding was another 5-to-4 which paralleled the line-up in Goss, Justice Stevens taking Justice Douglas' position, with the exception of Justice Stewart who joined the Goss dissenters. Ingraham also rejected a claim that corporal punishment implicated the cruel and unusual punishment clause of the Eighth Amendment.

65/ Id., 672-682. The quotation is at id., 682.

in terms of remedial guarantees, such as damage actions, as well, which would constitute an enormous alteration of civil rights jurisprudence and extend far beyond the area of students rights.[66/] In any event, the holding in Ingraham is almost unprecedented and has considerable implications for the assertions of federal constitutional rights in federal courts. The constitutional standards here must then be pronounced unsettled.

D. Constitutional Conflict: Parents and State

Only recently has the Supreme Court dealt with cases in which the asserted constitutional rights of children came into conflict with parental rights and interest and the Court has yet to settle upon any consistent doctrinal approach to these kinds of conflict.

In holding that the imposition of an absolute requirement of parental consent on a pregnant minor's decision to have an abortion is unconstitutional,[67/] the Court failed to analyze the matter beyond a fairly cursory statement of the holding and rejection of the proferred state

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66/ In Wood v. Strickland, 420 U.S. 308 (1975), the same Court lineup as in Goss held that school officials in appropriate circumstances could be held liable in damages for denial of student constitutional rights. The rule that the existence of state judicial remedies is irrelevant for purposes of federal judicial remedies was enunciated in the present context in Monroe v. Pape, 365 U.S. 167 (1961), but its antecedents are much older. See Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). The divergence of approach between Strickland, and perhaps Goss, and Ingraham was not narrowed, or even referred to, in Carey v. Piphus, No. 76-1149 (decided March 21, 1978).

67/ Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976). The decision in this respect was 5-to-4 and two of the Justices in the majority also concurred in an opinion that was not entirely in agreement with everything said in the opinion of the Court. Id., 89, 90-91 (Stewart and Powell).

interests. Because the State had no power to veto the decision of a woman and her physician with respect to an abortion the State had no power to delegate to "a third party an absolute, and possibly arbitrary, veto" over the decision. Children are protected by the Constitution, the Court said, but it was true that state power to regulate minors was somewhat broader than its power to regulate adults; however, no significant state interest justified this exercise of the power. 68/

> One suggested interest is the safeguarding of the family unit and of parental authority. ...It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by a physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

Approved in principle, however, was a statute from another State that required consultation between parents and minor pregnant daughter on the question of abortion but conferred no veto and afforded the minor an expeditious avenue to obtain authorization for an abortion after consultation, irrespective of the parents wishes. 69/

Nor were standards developed in a case in the following Term in which the Court, inter alia, struck down a statute which barred anyone from selling

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68/ Id., 75.

69/ Id., 75, and 90-91 (Stewart); see also Bellotti v. Baird, 428 U.S. 132 (1976).

or distributing contraceptives to a minor under 16 years of age.[70/]
The plurality opinion relied upon Planned Parenthood, finding that the right to privacy in decisions affecting procreation extended to minors as well as adults. It nevertheless declined to apply the compelling state interest test, applied elsewhere in the opinion in the case of adults, to intrusions upon the privacy of minors. Instead, Justice Brennan reasoned, the government's "greater latitude to regulate the conduct of children," and the minor's "lesser capability for making important decisions" led to the conclusion that "any significant state interest ... not present in the case of an adult" would justify narrowly drawn infringements on the minor's right to privacy.[71/]

But none of the goals advanced by the State met this more deferential test. The state interest in the physical and mental health of the minor was only slightly implicated by a decision to use a nonhazardous contraceptive. Deterring teenage sexual activity was probably a legitimate governmental interest, but it was not served by a state policy that in effect prescribed a venereal disease or an unwanted pregnancy or abortion as punishment for fornication.[72/] The three concurring Justices took varying tacks. Justice White argued that the significant state interest in prohibiting extramarital sexual relationships of both minors and adults was not measurably furthered by the statute. Justice Stevens thought it

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70/ Carey v. Population Services International, 431 U.S. 678, 691-699 (1977) (plurality opinion). See also id., 702 (Justice White), 707 (Justice Powell), 713 (Justice Stevens).

71/ Id., 693 n. 15, 694-695.

72/ Id., 696. The analysis tracked closely Justice Brennan's opinion for the Court in Eisenstadt v. Baird, 405 U.S. 438 (1972), voiding a law that denied contraceptives to the unmarried.

a legitimate governmental interest to deter sexual conduct by minors but it was "irrational and perverse" to seek to accomplish that interest through denial of contraceptives. Justice Powell's concurrence was much more narrow, faulting the statute because it denied contraceptives to married minors and because it prohibited parents from giving contraceptives to their minor children.73/

Whatever the doctrinal shortcomings in the foregoing cases, it can be hoped that the issues involved in a case currently before the Supreme Court will enable the Justices to agree upon a reasonably formulated constitutional standard to be applied when children seek rights that would undeniably be theirs if they were only adults. Lacking are those aspects that perhaps skew the line drawing, such as abortion and contraceptives access, that were present in Danforth and Carey; but there is present a potentially disruptive and skewing factor, the existence of parental rights previously deemed by the Court to be entitled to constitutional protection also.

The case74/ concerns the due process standards to be applied when the state affords procedures by which parents or guardians may commit minor

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73/ Supra, n. 71. The Chief Justice dissented without opinion and Justice Rehnquist dissented in an opinion of notable brevity. Id., 717. See "the Supreme Court, 1976 Term," 91 Harv. L. Rev. 70, 146-152 (1977).

74/ J.L. v. Parham, 412 F. Supp. 112 (M.D.Ga. 1976), prob. juris. noted, 431 U.S. 936 (1977), restored to calendar for reargument, 98 S. Ct. 761 (1978). The Court previously had an almost identical case before it but legislative alteration of the statute mooted the challenge. Bartley v. Kremens, 402 F. Supp. 1039 (E.D.Pa. 1975), dismd. as moot, 431 U.S. 119 (1977).

children to institutions.[75/] Distinguishable from the involuntary commitment process that the Court has only recently surrounded with constitutional safeguards is the "voluntary admission", the procedure used to enter a mental or other facility that is commenced by the affirmative action of the patient himself or by one empowered by law to act in the patient's behalf. In the case of an unemancipated minor, application may be made only by a parent, guardian, or individual standing _in loco parentis_ to the potential patient; no child acting on his own may initiate the admission for himself. In most States children can be admitted without any form of judicial involvement. Typically, a legal hearing is not required and representation for the child is not provided. There is virtually no opportunity for judicial review once the child is institutionalized. Moreover, the child seeking his own release will quickly discover that he cannot be discharged without the authorization of the parent who originally admitted him. A parent's success in institutionalizing the minor hinges solely on being able to convince an admitting physician that the child is in need of treatment, and in many States the physician may not be a psychiatrist.[76/]

75/ The Constitution is of course only implicated by state involvement to some degree in the controverted action. _Constitution Annotated_, _op. cit._, n. 4, 1460-1469, and (Supp.), S151-S156. One would have thought that the state involvement here was sufficient but taking the case the Court specifically asked the parties to argue the question: "Whether, where the parents of a minor voluntarily place the minor in a state institution, there is sufficient 'state action,' including subsequent action by the state institution, to implicate the Due Process Clause of the Fourteenth Amendment." _Parham_ v. _J.L._, 431 U.S. 936 (1977).

76/ Panneton, "Children, Commitment and Consent: A Constitutional Crisis," 10 Fam. L. Q. 295 (1977); Ellis, "Volunteering Children: Commitment of Minors to Mental Institutions," 62 Calif. L. Rev. 840 (1974). The commitment of adults has been surrounded with strict standards. _Humphrey_ v. _Cady_, 405 U.S. 504 (1972); _Jackson_ v. _Indiana_, 406 U.S. 715 (1972). See _O'Connor_ v. _Donaldson_, 422 U.S. 563 (1975) ("State cannot constit-

In its appeal the State of Georgia argues that to impose due process requirements upon the decision of parents, concurred in by a physician, to cause their children to receive treatment in state institutions, to subject that decision to the adversarial proceeding, would so narrow the scope of the parents' responsibilities to and authority over their children in a fashion which is inconsistent with the Court's prior decisions; the State also argues that such a process would be inconsistent with the deference owing to the judgment of physicians.[77/] Rejecting this argument below and declaring the statute unconstitutional, the district court said:[78/]

> The defendants' contention that through this statute the state as parens patriae merely assists parents in the performance of their traditional parental duty of providing for the "maintenance, protection and education of his children," ... and is nothing more than a statutory confirmation of the liberty that parents and guardians have to direct the upbringing of children under their control ... suggests that this statute gives to parents only the authority that they genuinely need to hospitalize their children and thus supplies the due process that their situation demands. This contention overlooks the age-old principle that "the touchstone of due process is protection of the individual against arbitrary action of government." ... Most parents accept and faithfully perform their parental duties and given this unlimited statutory authority to admit their children to a mental hospital would use that authority only when it is genuinely necessary to do so. Unfortunately ... there are some parents who abuse that authority and who under the guise of admitting a child to a mental hospital actually abandon their child to the state. ...

76/ (cont'd.) utionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.").

77/ Brief for Appellants, Parham v. J.L., No. 75-1690, 12-21.

78/ J.L. v. Parham, 412 F. Supp., 137-138.

> By this statute the state gives to parents the power to arbitrarily admit their children to a mental hospital for an indefinite period of time. Where "the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process," ... and this necessarily includes procedural safeguards to see that even parents do not use the power to indefinitely hospitalize children in an arbitrary manner.

Properly viewed, therefore, the principle which the district court adhered to was not a denial of overriding parental interest but rather a constitutional recognition of the State's assumed responsibility to safeguard children from neglect and abuse which is activated when the State furnishes additional authority and the facilities by which in some cases abuse and neglect may be accomplished.

The Future of Children's Constitutional Rights

"Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[79/] "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[80/] Recognition of this principle, however, is but the beginning of analysis. In a vast number of ways, government distinguishes between the adult and the minor.[81/]

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons

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79/ Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

80/ In re Gault, 387 U.S. 1, 13 (1967).

81/ Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (Justice Stevens dissenting).

> below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.

Nothing in the case law suggests that the dreams of the "childrens' liberation" proponents 82/ are likely to be realized through constitutional jurisprudence. In even the cases most strongly supportive of independent constitutional status of minors in particular instances there is express recognition that the law properly regards minors as having a lesser capacity for making decisions than adults have with the consequent result of the State having much greater latitude to regulate the conduct of children than it has with respect to adults. 83/ Combined with the constitutional status of parental rights to guide, direct, and control their children, this recognition suggests that the Constitution will not be deemed to enact the views of these proponents. 84/

"[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults." 85/ For example,

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82/ Op. cit., n. 7.

83/ Carey v. Population Services International, 431 U.S. 678, 693 n. 15 (1977) (plurality opinion).

84/ Cf. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Justice Holmes dissenting). Of course, when Holmes wrote, the Amendment in effect did.

85/ Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

minors can be denied access to books, magazines, and motion pictures that may not be obscene under constitutional standards and thus are accessible to adults, without a showing that children would necessarily be harmed by such exposure.[86/] Whatever degree of protection the Court eventually holds adults entitled to with respect to governmental regulation of their private sex lives, it seems clear that minors may be barred from extramarital sexual activity legitimately enforced.[87/] And, furthermore, the Danforth holding voiding parental consent preconditions to minors' rights to abortion cautioned that no suggestion was warranted "that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."[88/]

It would not be useful to prolong the paper by multiplying the examples of the way the state may permissibly treat minors differently than adults. Suffice it to say, the Court has recognized that

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86/ Ginsberg v. New York, 390 U.S. 629 (1968); Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975). And see Paris Adult Theatre v. Slaton, 413 U.S. 49, 103-108 (1973)(Justice Brennan dissenting). But "minors are entitled to a significant measure of First Amendment protection" and government may not bar them from any and all sexually related material. Erznoznik, supra, 212-213; Interstate Circuit v. City of Dallas, 390 U.S. 676, 690 (1968).

87/ In Carey v. Population Services International, 431 U.S. 678, 694 n. 17 (1977), the Court purported not to decide the question of the respective rights of adults and minors in this regard but the concurring and dissenting Justices were clear that minors had no right to be free of such state regulation. Id., 702-703 (Justice White), 705-707 (Justice Powell), 713 (Justice Stevens), 718 n. 2 (Justice Rehnquist).

88/ Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

it is legitimate to consider minors as being less capable than adults to engage unrestrictedly in adult life. Therefore, the question becomes one, really, of the permissibility of the lines that are drawn. Two issues are involved in this question.

First, the case law we have reviewed has approached the question in terms of particular rights and interests rather than in general terms. Necessarily, this is the result of the case or controversy precondition to the exercise of federal jurisdiction under Article III of the Constitution. And the raising of such particularized assertions of rights - access to abortions or contraceptives, the right to free speech and press, for example, - tends to focus the case law upon a narrow consideration of the interest asserted by the minor as balanced against the governmental interests asserted to sustain the restriction. That kind of analysis is pervasive in the abortion and contraceptive cases reviewed and is a substantial part of the other cases reviewed. This makes, of course, for highly particularistic decisionmaking and very few broad generalizations.

Second, if the linedrawing process is itself legitimate, there would seem to be two approaches to take in asserting the invalidity of the place any line is drawn, an equal protection attack and a due process attack using what is known as the irrebutable presumption doctrine.

The Fourteenth Amendment guarantee of equal protection is a particularly troublesome provision. It does not state an intelligible principle on its face. Thus, a demand for equal protection cannot be a demand that laws apply universally to all persons. All laws classify, make distinctions. The legislature if it is to act at all must impose burdens upon or grant benefits to groups or classes of individuals. The demand for

equality confronts the right to classify. "It is of the essence of classification that upon the class are cast ... burdens different from those resting upon the general public.... Indeed, the very idea of classification is that of inequality...."[89/] Resolution of this dilemma is the doctrine of reasonable classification. The Constitution does not require that things different in fact be treated in law as though they were the same, only that those who are similarly situated be similarly treated. What is therefore barred are "arbitrary" classifications or discriminations. Determination of "arbitrariness" is primarily a two-step process: (1) the identity of the discrimination is determined by the criterion upon which it is based, and (2) the discrimination is arbitrary if the criterion upon which it is based is unrelated to the state purpose. But unrelatedness is not a dichotomous quality; the question is not whether criterion and end are related or unrelated, but rather how well they are related or how poorly.[90/]

This brief description is of the "traditional" doctrine of equal protection analysis. It is the analysis used to review most classifications made by government and it is unusually easy to pass. So long as there is some reasonable basis for the classification, the equal protection clause is not offended because the classes are not exactly corresponsive with the criterion used or because there results some inequality. "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground

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89/ Atchison, T. & S.F.R. v. Matthews, 174 U.S. 96, 106 (1899).

90/ Constitution Annotated, op. cit., n. 4, 1470-1477. See P. Brest, Processes of Constitutional Decisionmaking (1975), ch. 5.

of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."[91/] Inasmuch as minors are universally recognized as having less capacity than adults have, a governmental decision to draw a line for particular purposes at 17, or 18, or 21 may well have little difficulty in passing this traditional test.

In recent years, the Court has developed a doctrine of "suspect classifications" which merits active review when challenged. That is, the Court exercises "strict scrutiny" and government must demonstrate a high degree of need on its part to so classify, resulting in the reversal of the traditional presumption in favor of the validity of the governmental action. The principal characteristic of a "suspect class" is that it constitutes a "discrete and insular" minority peculiarly susceptible to disadvantaging by the predominant majority in society and with a record of having been disadvantaged. Race and alienage are primary examples of suspect classifications and women and illegitimates have been accorded only slightly less favored judicial status.[92/] If minors could be so denominated, if age

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91/ F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). See City of New Orleans v. Dukes, 427 U.S. 297 (1976).

92/ E.g., McLaughlin v. Florida, 379 U.S. 184, 192, 194 (1964)(race); Graham v. Richardson, 403 U.S. 365, 371-372 (1971)(aliens); Craig v. Boren, 429 U.S. 190 (1976)(gender); Trimble v. Gordon, 430 U.S. 762 (1977)(illegitimates). The quoted phrase in the text is from United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938). In San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), the Court said that a suspect class is one "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." While superficially the description may fit minors, the recognized limitation of capacity of minors makes it unwise so to place them.

classifications were suspect, government would be required to draw age lines more finely, to evaluate with care and diligence the determination of minority status and to refrain from broad and general classifications affecting all minors. But it does not appear that age may be so denominated. In a case dealing with the mandatory retirement of police officers at age 50, the Court held that the aged or older persons did not qualify as a "discrete and insular" group and indicated rather strongly that age classifications were not suspect. 93/ While there are significant differences, of course, between minors and persons at the other end of the age scale, it does not seem likely that, given the context of judicial cognizance of the incapacity of minors, children will be held to constitute either a suspect class or a group entitled to intermediate scrutiny. 94/ Applying equal protection standards vigorously, either through strict scrutiny or an intermediate one, would lead toward a "child-blind" society that would not only cause the removal of some undoubted injustices but would also deny the undoubted distinctiveness of children.

The irrebutable presumption doctrine of due process analysis sprang to life almost entirely during the early 1970's and was sharply reined in within a quite short time. Briefly stated, the doctrine requires

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93/ Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-314 (1976).

94/ The result in Oregon v. Mitchell, 400 U.S. 112 (1970), necessarily must stand for the proposition that age classifications affecting minors are not suspect. It is of course true that some such age classifications have been struck down but only in the context of differential age settings for males and females. Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975). But see L. Tribe, op. cit., n. 4, 1077-1082; Tribe, "Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles," 39 L. & Contemp. Prob. 8 (1975).

that when the legislature confers a benefit or imposes a detriment depending for its application upon the establishment of certain characteristics, the legislature may not conclusively presume the existence of those characteristics upon a given set of facts to disqualify someone from the benefit or to subject someone to the detriment, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that it was the purpose of the legislature to reach. The operation of the principle can be simply illustrated. Thus, while a State may require that nonresidents must pay higher tuition charges at state colleges than residents pay, and while it can be assumed that a durational residency requirement would be permissible as a prerequisite to a new resident to qualify for the lower tuition, it was impermissible for the State to presume conclusively that because the legal address of a student was outside the State at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student; due process requires that the student be afforded the opportunity to show that he is or has become a bona fide resident entitled to the lower tuition.[95/]

As applied to minors, the doctrine would insist that if age distinctions are premised on the assumption of incapacity of minors, then some minors of a certain age will not be so lacking in capacity as others and government is required to give each person so affected the opportunity to

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95/ Vlandis v. Kline, 412 U.S. 441 (1973). See also Dept. of Agriculture v. Murry, 413 U.S. 508 (1973)(denying food stamps to any household containing a member over 18 who had been claimed the previous year as a tax dependent by one not eligible for food stamps); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974)(requiring pregnant teachers to take maternity leave on presumption of incapacity to work). Forerunner of the doctrine was Carrington v. Rash, 380 U.S. 89 (1965).

rebut the presumption of incapacity.[96/] To presume that this 17 year old is unfit to vote, to work, to choose his own school because most persons of like age have certain characteristics is to class by statistical stereotype.

Two responses can be made to such an argument. First, the Court has sharply curtailed the doctrine, warning that extension of it to all governmental classifications would "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments", and limiting its application to those areas which involve fundamental rights or suspect classifications that would in equal protection analysis give rise to strict and perhaps intermediate scrutiny.[97/] It may thus be that the equal protection analysis suggested above and the analysis of such cases as the abortion parental consent and the access to contraceptives decisions will be susceptible to some form of irrebutable presumption analysis.

Second, it cannot be overlooked what as a practical matter would be the burden of ascertaining in what would undoubtedly be millions of instances who has the characteristics generally associated with a particular age and who does not. Further, to tailor all determinations to the individual case would be to encourage the danger of arbitrary choices, that depart from the goal of treating similar cases similarly, and choices that could well conceal substantively impermissible grounds of decision. And to an uncertain degree the privacy of many would necessarily

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96/ Tribe, _op. cit._, n. 94; L. Tribe, _op. cit._, n. 4, 1077-1082, 1092-1097.

97/ _Weinberger_ v. _Salfi_, 422 U.S. 749 (1975). The quoted phrase is _id._, 772. See also _Usery_ v. _Turner Elkhorn Mining Co._, 428 U.S. 1, 23-24 (1976).

have to give way to the requisite degree government would have to be informed to decide individually.[98/] Little doubt exists that extension of the doctrine very far could make substantial inroads on the rule of law itself.[99/]

> Hundreds of years ago in England, before Parliament came to be thought of as a body having general law-making power, controversies were determined on an individualized basis without benefit of any general law. Most students of government consider the shift from this sort of determination, made on an *ad hoc* basis by the king's representative, to a relatively uniform body of rules enacted by a body exercising legislative authority to have been a significant step forward in the achievement of a civilized political society. It seems to me a little late in the day for this Court to weigh in against such an established consensus.

Conclusion

We have seen that the Supreme Court has been groping toward some doctrinal enunciation for the treatment of children's rights cases. For the most part, however, the decisions are still best analyzed in terms of the underlying right claimed than as a separate children's issue, and it may well be that this is the most we can hope for. Childhood is a separate and unique status and the place of children in this society perhaps does not admit of an overall synthesizing theory. But if the Court does continue in cases involving substantial claims, most especially those of speech and the guarantees of procedural regularity, to decide to a great extent by balancing the interests claimed against the governmental assertions of justification in restricting them, a fairly high standard of justice and fairness can be attained even in the absence of a unifying theory.

98/ L. Tribe, *op. cit.*, n. 4, 1078, 1097.

99/ *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 657-658 (1974) (Justice Rehnquist dissenting).