

The Government's Interest in Protecting Minors¹

Local, state and federal governments have consistently asserted a compelling interest in protecting the well-being of minors.² Case law, statutes, findings, regulations, and city ordinances all confirm the government's interest in protecting youth and provide a myriad of reasons for such protection.

I. The Supreme Court and the State's Interest in Protecting Youth

The United States Supreme Court has asserted in several cases the concern for the welfare of America's youth justifies broader limitations on their exercise of freedom.³ According to the Supreme Court, the state "has an independent interest in the well-being of its youth,"⁴ and must "protect the welfare of children."⁵ "[I]t is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses,"⁶ for "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."⁷ The Court affirmed that, "[w]hile the supervision of children... may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation [on behalf of] them."⁸

Under the common law persons below a statutory age suffer a legal disability—minority.⁹ Minors are legally restricted in managing their own affairs, making decisions, and enjoying the civic rights afforded adults.¹⁰ In a plurality opinion, Justice Powell articulated three reasons that children are considered differently than adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.¹¹ A New York court explained:

Infancy, since common-law times and most likely long before, is a legal disability and an infant, in the absence of evidence to the contrary, is universally considered to be lacking in judgment, since his or her normal condition is that of incompetency. In addition, *an infant is deemed to lack the adult's knowledge of the probable consequences of his or her acts or omissions and the capacity to make effective use of such knowledge as he or she has*. It is the policy of the law to look after the interests of infants, who are considered incapable of looking after their own affairs, to protect them from their own folly and improvidence, and to prevent adults from taking advantage of them.¹²

The restrictions on minors extend to constitutional rights. The Supreme Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."¹³

The compelling interest of the state in protecting minors even limits free expression.¹⁴ In *Ginsberg v. New York*, the Supreme Court affirmed a statute that included special standards in regulating the sale of pornography to children, even though these standards were "broader than those embodied in legislation aimed at controlling dissemination of such material to adults."¹⁵ For example, the government is justified in

according minors “a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see.”¹⁶ This is because “a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”¹⁷ The Supreme Court even counseled local and state governments to utilize legislation aimed “specifically at preventing distribution of objectionable material to children.”¹⁸

II. The State’s Active Interest in Protecting Minors

Because of the interest in protecting minors, the state has traditionally taken an active interest in shielding those under the age of adulthood from all kinds of risky or mature decisions, situations, and choices. Many kinds of legislation are enacted to protect minors, both from the dangers of the adult world and from themselves. For instance, states have regulations to restrict minors’ access to cigarettes,¹⁹ and some have published findings regarding the danger of cigarettes/tobacco to minors. For instance, the Legislature of California noted that minors face risks when exposed to cigarettes and cigarette advertising.²⁰ One Washington State law declares that “[i]t is imperative to effectively reduce the sale, distribution, and availability of tobacco products to minors.”²¹

States also restrict the access of minors to alcohol.²² A restrictive ordinance in Baltimore, Maryland states that the “ordinance is necessary for the promotion of the welfare and temperance of minors.”²³ Retail stores face stiff enforcement and penalties for providing alcohol to minors.²⁴ California adds civil liability to those who serve alcohol to an intoxicated minor who then causes injury,²⁵ prohibits advertisements appealing to minors,²⁶ and provides criminal enforcement and penalties for the sale of alcohol to a minor.²⁷ Peace officers are statutorily authorized to use individuals under the age of 21 to aid in the apprehension of store owners who sell alcohol to anyone under 21.²⁸ This demonstrates that minors are not free to choose for themselves whether to drink alcohol and that parents are not required to shoulder the entire burden of making sure minors do not have easy access to it.

Similarly, the Second Amendment does not extend to minors the right to bear arms and adults may be required by the state to carry the burden of keeping children from guns. For instance, gun owners and other adults who provide access to minors to firearms are liable for injuries suffered by victims of the minors’ violence.²⁹ In California, a parent or guardian is civilly liable for any injury to person or property by the discharge of a firearm by a minor if the parent or guardian either permitted a minor to have a firearm or left the firearm in an accessible place.³⁰ In Texas, a gun owner is criminally negligent if a child gains access to a readily dischargeable firearm and the gun owner failed to secure the firearm or left it in a place where the owner should have reasonably known that the child could gain access.³¹ The gun owner is guilty of a class C misdemeanor, or, if a person is killed or seriously injured, a class A misdemeanor.³² In Utah, it is a class A misdemeanor to provide a firearm to a youth convicted of a violent felony.³³ In all of these cases, although the minor is causing the injury, liability for the injury is imputed to the adult that allowed the minor access to the gun.

The state has the legal right to assume that minors are more at risk for falling prey to unlawful conduct. A Charlottesville, Virginia curfew ordinance gives as its purpose, among other things, the need to “promote the safety and well-being of the City’s youngest citizens, persons under the age of seventeen (17), whose inexperience renders

them particularly vulnerable to becoming participants in unlawful activities, particularly unlawful drug activities, and to being victimized by older perpetrators of crime.”³⁴ The city’s curfew was important because “streets afford dangers for [children] not affecting adults.”³⁵ Certainly, because “children are peculiarly vulnerable . . . a state’s interest in protecting its children is strong.”³⁶ This is both because they lack the experience necessary to make informed decisions, and because minors are, under the law, “charges of the family and state and legally unable to act for themselves.”³⁷

Minors are considered unable to provide effective, legally binding consent in any context from rape to contract cases.³⁸ The “infancy law doctrine exists to protect the inexperienced and improvident minor from the consequences of dealing with others.”³⁹ Thus, a minor’s “release or waiver is of no effect since it is conclusively presumed that infants do not have the mental capacity and discretion to protect themselves from the artful designs of adults.”⁴⁰

III. Balancing State Interests with Parental Interests

Even though the government asserts such an interest in children, it does so on behalf of and in addition to parents, not in place of them. In *Ginsberg*, the Supreme Court stated that “constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”⁴¹ In *Prince*, the Supreme Court added that it “is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”⁴² The state respects parents’ decisions regarding placing their children in private sectarian schools rather than public schools,⁴³ placing them in schools that teach in languages other than English,⁴⁴ and, at times, taking them out of school altogether.⁴⁵ Parents “should be the ones to choose whether to expose their children to certain people or ideas.”⁴⁶

To assist parents, the state must offer the “support of laws designed to aid discharge of [parental] responsibility.”⁴⁷ Further, the government has a duty to protect the morals of children, not in a way that imposes morality on children, but in a way that supports “the right of parents to deal with the morals of their children as they see fit.”⁴⁸

Footnotes:

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2. Or, as the Supreme Court has put it, a *parens patriae* interest. See *Santosky v. Kramer*, 455 U.S. 745, 746 (1982).
3. See *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). See *Generally*, Comment, *Exclusion of Children from Violent Movies*, 67 Col. L. Rev. 1149, 1159 (1967).
4. *Ginsberg v. New York*, 390 U.S. 629, 640 (1968). Further:

constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.... The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.

- Id.* at 369
5. Prince v. Massachusetts, 321 U.S. 158, 165 (1944).
 6. *Id.*
 7. *Id.* at 168.
 8. Ginsberg, 390 U.S. at 640, (*quoting* People v. Kahan, 15 N.Y.2d 311, 312 (N.Y. 1965) (Fuld, J., concurring)).
 9. *See In re* Davidson’s Will, 26 N. W. 2d 223 (Minn. 1947).
 10. *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979).
 11. *See id.*
 12. City of New York v. Stringfellow’s of New York, Ltd., 253 A.D.2d 110, 119 (N.Y. App. Div. 1999) (emphasis added). In this case, an adult establishment attempted to skirt the city’s zoning ordinances by allowing children to enter if they signed a waiver releasing the establishment from any liability for any damage caused to the infants by viewing uncovered female breasts. *Id.*
 13. New York v. Ferber, 458 U.S. 747, 757 (1982).
 14. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 939 (1963). “The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules.” *Id.*
 15. 390 U.S. at 640. These standards are constitutional as long as the state can demonstrate a compelling interest and execute the interest through the least restrictive means possible. *See e.g.*, F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978); Schleifer v. City of Charlottesville, 992 F. Supp. 823, 825 (W.D. Va. 1997).
 16. *Id.* at 637.
 17. *Id.* at 650 (Stewart, J., concurring).
 18. Jacobellis v. State of Ohio, 378 U.S. 184, 195 (1964).
 19. *See e.g.*, CAL HEALTH & SAFETY CODE §§ 118950 & 104350 (2006); CAL. BUS. & PROF. CODE § 22951 (2006); 720 ILL. COMP. STAT. ANN. 675/2 (2006); MASS. ANN. LAWS ch. 64C § 10 (2006).
 20. WASH. REV. CODE ANN. § 70.155.005 (*Findings*) (2006).
 21. *See e.g.*, N.Y. ALCO. BEV. CONT. § 100 (2006); N.Y. PENAL § 260.20 (2006). Federal law also regulates alcohol advertisement in interstate commerce. *See* 27 U.S.C. § 205 (2000).
 22. *See e.g.*, N.Y. ALCO. BEV. CONT. § 100 (2006); N.Y. PENAL § 260.20 (2006). Federal law also regulates alcohol advertisement in interstate commerce. *See* 27 U.S.C. § 205 (2000).
 23. MD. ANN. CODE ART 2B, § 21-105 (2006). This statute was held to be constitutional in Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City, 855 F. Supp. 811 (D. Md. 1994).
 24. *See, e.g.*, 235 ILL. COMP. STAT. ANN. 5/6-16 (2005); MASS. ANN. LAWS ch. 64C § 10 (2006).
 25. *See* CAL. BUS. & PROF. CODE § 25602.1 (2006). The relevant text states:

A cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed ... who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage, and any other person who sells, or causes to be sold, any alcoholic beverage, to any obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person.

- Id.*
26. *See* CAL. BUS. & PROF. CODE § 25664 (2006) (“The use, in any advertisement of alcoholic beverages, of any subject matter, language, or slogan addressed to and intended to encourage minors to drink the alcoholic beverages, is prohibited.”).
 27. *See* CAL. BUS. & PROF. CODE § 25658 (2006) (“Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.”).
 28. *See id.*
 29. *See, e.g.*, CAL. CIV. CODE § 1714.3 (2006); TEX. PENAL CODE ANN. § 46.13 (2006).
 30. *See* CAL. CIV. CODE § 1714.3 (2006).
 31. *See* TEX. PENAL CODE ANN. § 46.13 (2006).

32. *See id.*
33. *See* UTAH CODE ANN. § 76-10-509.6 (2006).
34. *Schleifer v. City of Charlottesville*, 992 F. Supp. 823, 846 (W.D. Va. 1997). The curfew withstood judicial scrutiny because those “enumerated purposes represent[ed] important and compelling government interests.” *Id.* at 847. Further, the city’s “strong interest in fostering the welfare of children and protecting the youngest members of society from harm is well-established.” *Id.* at 848.
35. *Id.* (quoting *Prince*, 321 U.S. at 634).
36. Comment, *Exclusion of Children from Violent Movies*, 67 Col. L. Rev. 1149, 1159 (1967). In *New York v. Ferber*, 458 U.S. 747 (1982), the Supreme Court adopted the position of the state court’s dissent. The dissent articulated various examples of protections of minors:

The State's overriding interest in the welfare of children has been recognized in many contexts and is often relied upon by the Legislature to protect children from their own inexperience or as a basis for denying adults rights which they might otherwise have because the exercise of those rights might cause harm to children. For example, the child labor laws restrict the ability of adults to engage children in certain occupations or to employ them at certain times. We limit the applicability of contract law in relation to infants and soften the impact of the criminal law upon them. The law restricts a child's right to marry. We restrict a child's ability to drive a car. All this we do to protect our children. The well-being of children is a subject long recognized as within a State's constitutional power to regulate.

- 52 N.Y.2d 674, 683 (N.Y. 1981), rev’d *New York v. Ferber*, 458 U.S. 747 (1982) (Jasen, J. dissenting), (internal citations omitted).
37. 904 S.W.2d at 717
38. *See e.g.*, *In re Gault*, 387 U.S. 1, 17 (1967); *Powers v. Floyd*, 904 S.W.2d 713, 718 (Tex. App. 1995).
39. *Sheller by Sheller v. Frank’s Nursery & Crafts, Inc.*, 957 F. Supp 150, 153 (N.D. Ill. 1997) (“The contract of a minor is voidable and may be repudiated by the minor during minority or within a reasonable time upon achieving majority absent a ratification.”) *See also MacGreal v. Taylor*, 167 U.S. 688, 698 (1897).
40. 253 A.D.2d at 119.
41. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).
42. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).
43. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
44. *See Meyer v. Nebraska*, 262 U.S. 390 (1923).
45. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *School Dist. v. Ball*, 473 U.S. 373 (1985).
46. *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (quoting *In re Custody of Smith v. Stillwell*, 969 P.2d 21, 31 (1998)).
47. *Ginsberg*, 390 U.S. at 639.
48. *Id.*