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# SEX, DRUGS, AND FEDERALISM'S ROLE: REGULATION OF THE MORNING AFTER PILL ON PUBLIC COLLEGE AND UNIVERSITY CAMPUSES

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In March of 2005, students at the University of Wisconsin opened their student newspapers and found an unusual advertisement inside. The ad pictured a beaming college student on the beach next to a graphic that included the text “Spring Break Tip #1- Be Prepared.”<sup>1</sup> The advertisement encouraged women to prepare for their vacation getaways by calling the University’s health center, which would provide a dose of the morning after pill<sup>2</sup> in advance of their trips “without an appointment.”<sup>3</sup> Although the health center’s director claimed that student fees, not tax dollars, funded the advertisement,<sup>4</sup> the outcry that followed led to a failed attempt to ban the advertisement, sale, and distribution of the morning after pill on Wisconsin’s public college and university campuses.

This Note addresses attempts by the state legislatures in Virginia and Wisconsin to impose absolute bans on the morning after pill for their public college and university campuses. Although both measures failed to become law, it is important to consider the constitutional repercussions if another state passes a statute similar to those Virginia and Wisconsin recently attempted to enact. Virginia’s bill passed

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1. Nahal Toosi, *UW Ad Angers Abortion Critics*, MILWAUKEE JOURNAL-SENTINEL, March 12, 2005, at B1; UW Ad, *available at* <http://www.jsonline.com/news/state/mar05/308921.asp> (click on “enlarge ad”) (last visited Oct. 20, 2006).

2. The morning after pill is known by many names, including Plan B and emergency contraception. Because the question of whether the morning after pill is a contraceptive or a chemical abortifacient is disputed by some, this Note will simply refer to the drug as the morning after pill. An abortifacient is “a drug, article, or other thing designed or intended to produce an abortion.” BLACK’S LAW DICTIONARY 6 (8th ed. 2004).

3. UW Ad, *supra* note 1.

4. Toosi, *supra* note 1, at B1.

its assembly and is currently in committee in the state senate; the senate has taken no action since early 2004, indicating that the bill will not be revived.<sup>5</sup> Wisconsin's statute passed the state assembly and was tabled in the state senate.<sup>6</sup> On August 24, 2006, the Food and Drug Administration (FDA) made the morning after pill available without a prescription to individuals eighteen years of age and older.<sup>7</sup> Given the controversial nature of the drug, a future administration may decide to reverse the FDA's determination of over-the-counter status if more or different information became available in studies over the next several years.<sup>8</sup> With this in mind, it is not inconceivable that other states could take action on the morning after pill in the future.<sup>9</sup> The morning after pill raises many controversial issues concerning when life begins and the right of access to and funding of contraception and abortion.<sup>10</sup> Due to the sensitive nature of these topics, this Note will not address whether laws such as those proposed in these two states *should* have been enacted but whether they constitutionally *could* have been enforced. The Note will first give background on the legal history surrounding contraception and abortion, information necessary to understanding why the statutes in question are so controversial. Next, the Note will address the morning after pill, how it functions, and why pro-life and pro-choice individuals have such strong sentiments about its availability both on college campuses and to the public generally. Next, the proposed state statutes will be examined in order to determine what they do and do not prohibit. After examining the statutes, the constitutionality of the Virginia and Wisconsin measures will be assessed. Finally, this Note will discuss the FDA's recent decision to put the morning after pill over the counter, the role of the states in the regulation of public health, and the continuing relevance of the

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5. See discussion *infra* Part III.A.

6. See discussion *infra* Part III.B.

7. Food and Drug Administration, Prvt. Ltr. Ruling No. 21-0145/S-011 (Oct. 20, 2006), available at <http://www.fda.gov/cder/foi/appletter/2006/021045s011ltr.pdf> [hereinafter "FDA Approval Letter"].

8. This possibility and the continuing importance of the national debate over this drug will be more thoroughly described in Part V.

9. Recent debates on whether the Food and Drug Administration (FDA) should make the morning after pill available over the counter also contribute to the importance of this type of legislation. In 2004, the FDA denied applications to put the morning after pill over the counter, and some critics suspect that the decision was the product of political interference. See UNITED STATES GOVT. ACCOUNTABILITY OFFICE, FOOD AND DRUG ADMINISTRATION: DECISION PROCESS TO DENY INITIAL APPLICATION FOR OVER-THE-COUNTER MARKETING OF THE EMERGENCY CONTRACEPTIVE DRUG PLAN B WAS UNUSUAL (Nov. 2005), available at <http://www.gao.gov/new.items/d06109.pdf> [hereinafter GAO REPORT]; see also discussion *infra* notes 262–69 and accompanying text. On August 24, 2006, the FDA changed course and put Plan B over the counter for individuals eighteen and older while keeping it prescription for those seventeen and younger. FDA Approval Letter, *supra* note 7.

10. Unless otherwise indicated, the term "abortion" will refer to an induced abortion but for which a live birth would have been likely to take place. Spontaneous abortion, or miscarriage, may take place in about 20% of pregnancies, but will not be addressed here. See Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 281 (Sept. 1997). A therapeutic abortion is one performed to save the life or health of the mother. BLACK'S LAW DICTIONARY 6 (8th ed. 2004).

controversy surrounding this issue.

#### I. THE LEGAL HISTORY OF CONTRACEPTION, ABORTION, AND SEXUAL PRIVACY

Whether viewed as deriving from judicial legislating or from a constitutional right, the Supreme Court's decisions on matters concerning contraception and abortion invoke passionate opinions from all individuals involved.<sup>11</sup> The controversies surrounding contraception and abortion are important to the debate on the morning after pill because those who are pro-life and those who are pro-choice see the pill differently.<sup>12</sup>

##### A. "A Dirty, Filthy Book" and Contraception in the Nineteenth Century

The modern history of contraception dates back to a pamphlet by a self-taught American physician named Charles Knowlton,<sup>13</sup> who published his *Fruits of Philosophy: The Private Companion of Young Married People, by a Physician* in 1832.<sup>14</sup> The pamphlet advocated the use of a piece of sponge during intercourse<sup>15</sup> or the injection of a chemical mixture into the woman immediately thereafter to prevent conception.<sup>16</sup> Knowlton intended that impoverished couples have access to his information, lamenting that "the overcrowded poor injure each other morally, mentally, and physically."<sup>17</sup> Upon the pamphlet's publication, a Massachusetts court fined Knowlton fifty dollars plus costs and accused him of "making the world's oldest profession easy and devoid of its 'inconveniences and

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11. See, e.g., Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001 (May 2003) (stating that "[*Planned Parenthood v. Casey* is Public Enemy Number One on the list of the Supreme Court's crimes against the Constitution and against humanity") and Kelly Sue Henry, Note, *Planned Parenthood of Southeastern Pennsylvania v. Casey: The Reaffirmation of Roe or the Beginning of the End?*, 32 U. LOUISVILLE J. FAM. L. 93, 93 (Winter 1993-94) (stating that "a woman's right to an abortion is still under attack" following the *Casey* decision). See also Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 33 (Nov. 1992) (stating that pro-choice groups believed the *Casey* opinion left *Roe* "an empty shell"); see also RONALD DWORKIN, LIFE'S DOMINION 13 (Alfred A. Knopf 1993) (stating that the "scalding rhetoric of the 'pro-life' movement seems to presuppose the derivative claim that a fetus is . . . a full moral person with rights and interests . . . . But very few people . . . actually believe that, whatever they say"), but cf. Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 341 (1993) (reviewing both Dworkin and the Supreme Court's abortion jurisprudence and finding that "[a] deep prejudice against the unborn . . . underwrites *Roe*"). Despite Dworkin's apparent belief that "a responsible legal settlement of the controversy, one that will not insult or demean any group, one that everyone can accept with full self-respect, is indeed available," such a resolution seems anything but inevitable. DWORKIN, *supra* note 11, at 10-11.

12. Pro-life individuals often regard the morning after pill as an abortifacient, while pro-choice individuals regard it as an emergency contraceptive.

13. S. CHANDRASEKHAR, "A DIRTY, FILTHY BOOK" 21 (Univ. of California Press, 1981).

14. *Id.* at 23.

15. CHARLES KNOWLTON, THE FRUITS OF PHILOSOPHY: THE PRIVATE COMPANION OF YOUNG MARRIED PEOPLE, BY A PHYSICIAN, reprinted in CHANDRASEKHAR, *supra* note 13, at 137.

16. KNOWLTON, *supra* note 15, at 137-38.

17. *Id.* at 169.

dangers.”<sup>18</sup> Later that year, Knowlton was sentenced to three months of hard labor for distributing his pamphlet.<sup>19</sup>

Over forty years later, an Englishwoman by the name of Annie Besant revived Knowlton’s pamphlet for publication in England with the help of her friend and colleague, Charles Bradlaugh.<sup>20</sup> The two published the book with the intention of being arrested in order to bring the birth control issue before a judge.<sup>21</sup> The trial took place in 1877 before a an elderly gentleman who had already made a “dubious ruling” in a prior obscenity case.<sup>22</sup> At trial, Besant and Bradlaugh contended that Knowlton’s pamphlet was not obscene and pointed out that no statutory definition of the word “obscene” could be found.<sup>23</sup> Besant, in particular, argued that a difference of opinion on the question of contraception could not be taken as proof of obscenity,<sup>24</sup> and further commented that she published Knowlton’s pamphlet not out of agreement with his views or his methods, but to ensure that his voice was heard in public debate.<sup>25</sup> She echoed Knowlton’s concern for the poor, pointing out that children as young as three watched over younger babies at night due to England’s population explosion.<sup>26</sup> Besant concluded that a verdict against her and Bradlaugh would mean “it will not be safe for medical men, or for political economists, to discuss the question of population at all.”<sup>27</sup> Sir Hardinge Gifford, arguing for the prosecution, observed that Knowlton’s pamphlet was “a dirty, filthy book”<sup>28</sup> and commented that “no decently educated English husband would allow even his wife to have it.”<sup>29</sup>

The trial lasted five days in all;<sup>30</sup> the jury returned a verdict that the pamphlet was “calculated to deprave public morals”<sup>31</sup> but nonetheless acquitted the defendants of any corrupt motive in publishing it.<sup>32</sup> The judge demanded of Besant and Bradlaugh that they refrain from publishing the book, but the two refused.<sup>33</sup> In response, the judge sentenced both to six months in prison and heavy

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18. CHANDRASEKHAR, *supra* note 13, at 24 (internal quotation marks omitted); *see also* notes 309–14 and accompanying text.

19. *Id.* at 25.

20. *Id.* at 26.

21. *Id.* at 36. Besant and Bradlaugh were so surprised that they were not arrested within a few days of first selling the pamphlet that they “felt constrained to inquire why the police had not arrived to take them.” ROGER MANVELL, *THE TRIAL OF ANNIE BESANT* 48 (Horizon Press 1976).

22. MANVELL, *supra* note 21, at 52.

23. *Id.* at 74.

24. *Id.* at 79.

25. *Id.* at 84.

26. *See id.* at 98 (discussing what Annie Besant referred to as the “baby-farming” problem).

27. MANVELL, *supra* note 21, at 93.

28. CHANDRASEKHAR, *supra* note 13, at 39.

29. *Id.*

30. *Id.* at 38.

31. *Id.* at 40.

32. *Id.*

33. CHANDRASEKHAR, *supra* note 13, at 40.

finer.<sup>34</sup> The trial gave Knowlton's work enormous publicity,<sup>35</sup> and Besant went on to publish more controversial material<sup>36</sup> before her death in 1933.<sup>37</sup>

### B. An Uncommonly Silly Law

The debate over contraception and eventually abortion made its way to the Supreme Court in the mid-twentieth century. Although students and scholars commonly refer to *Griswold v. Connecticut*<sup>38</sup> as the first case establishing a constitutional right to privacy, the decision in that case was not handed down without some prior foundation. In *Poe v. Ullman*,<sup>39</sup> Pauline Poe<sup>40</sup> had given birth to three children with congenital defects who all died shortly after birth, and her doctor offered contraceptive options to prevent the psychological pain of becoming pregnant and losing another child.<sup>41</sup> Poe sued Ullman, the State's Attorney, asking for a declaratory judgment that Connecticut's statute forbidding the use of contraceptive devices was unconstitutional.<sup>42</sup> Ullman advanced a demurrer, pointing out that the statutes had been construed and sustained by the Supreme Court of Errors of Connecticut. The court granted Ullman's demurrer, securing Ullman's victory in the trial court.<sup>43</sup> Poe appealed,<sup>44</sup> and the Supreme Court of the United States noted probable jurisdiction.<sup>45</sup> Justice Frankfurter, speaking for a majority of the Supreme Court, declined for reasons of standing to reach the merits of Poe's claim.<sup>46</sup> The Court determined that the threat of criminal prosecution did not suffice to create an injury in fact that would confer standing because the mere existence of a criminal statute, especially one not enforced for the previous eighty years, did not compel the Court to decide the case.<sup>47</sup>

Although the Court did not decide the constitutionality of the provision in *Poe*, Justice Douglas wrote a vigorous dissent that foreshadowed the statute's eventual invalidation and the reasons for that nullification. He pointed out that the law was not a dead letter and said that the Connecticut legislature had reenacted the law outlawing contraceptive use as part of general statutory revisions since 1940.<sup>48</sup> Further, he said that because the statute made the use of contraceptives a crime, and not merely their sale or manufacture, the statute invaded the privacy of the

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34. *Id.* The sentence was later quashed on a technical ground. *Id.* at 40–41.

35. *Id.* at 45.

36. See MANVELL, *supra* note 21, at 157 (noting Besant's later pamphlet, *Is the Bible Indictable?*, which questioned whether the Bible came within the definition of obscene literature).

37. MANVELL, *supra* note 21, at 180.

38. 381 U.S. 479 (1965).

39. 367 U.S. 497 (1961).

40. This name is a pseudonym. *Id.* at 498 n.1.

41. *Id.* at 499.

42. *Id.* at 499–500.

43. *Id.* at 500.

44. *Poe v. Ullman*, 362 U.S. 987 (1960).

45. *Poe*, 367 U.S. at 501.

46. *Id.* at 501.

47. *Id.*

48. *Poe*, 367 U.S. at 512 (Douglas, J., dissenting).

marital home.<sup>49</sup> Justice Douglas concluded that a right of privacy should be recognized as emanating from “the totality of the constitutional scheme under which we live.”<sup>50</sup>

Justice Harlan also dissented in *Poe*, criticizing the majority for “do[ing] violence to established concepts of ‘justiciability’”<sup>51</sup> and leaving *Poe* “under the threat of unconstitutional prosecution.”<sup>52</sup> Justice Harlan said that the cause of action was ripe because the absence of a prosecution was not enough to make the case too remote for adjudication.<sup>53</sup> Further, Justice Harlan pointed out that *Poe*’s case was not “feigned, hypothetical, friendly, or colorable”<sup>54</sup> and that it was unfair to characterize the plaintiff as one not deterred by the threat of prosecution.<sup>55</sup> After discussing these standing issues, Justice Harlan analyzed the Connecticut law under the Due Process Clause of the Fourteenth Amendment. He began by acknowledging that the concern for marital privacy that he invoked could not be found from explicit constitutional language<sup>56</sup> and that the history of the Fourteenth Amendment was also unavailing.<sup>57</sup> Justice Harlan said, however, that because

[A]n identical provision limiting federal action is found among the first eight Amendments, applying to the Federal Government . . . due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions [of the text of the Fourteenth Amendment].<sup>58</sup>

Further, Justice Harlan said that although due process could not be reduced to any particular formula, the Court had consistently sought to strike a balance between the liberty of the individual and the demands of society.<sup>59</sup> The balance continued to evolve, Justice Harlan argued, and the scope of liberty could not be found in or limited to “the precise terms of the specific guarantees elsewhere provided in the Constitution.”<sup>60</sup> Therefore, every new claim for constitutional protection had to be considered in the context of constitutional purposes “as they have been rationally perceived and historically developed.”<sup>61</sup> Applying this reasoning, Justice Harlan said that Connecticut’s law regulated the area of sexual morality, an area which had “little or no direct impact on others.”<sup>62</sup> Further, he said, the Connecticut

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49. *Id.* at 520–21.

50. *Id.* at 521.

51. *Id.* at 522–23 (Harlan, J., dissenting).

52. *Id.* at 523.

53. *Id.* at 528.

54. *Id.*

55. *Id.* at 529.

56. *Id.* at 539 (Harlan, J., dissenting).

57. *Id.* at 540.

58. *Id.* at 542.

59. *Id.*

60. *Id.* at 543.

61. *Id.* at 544.

62. *Id.* at 546 (Harlan, J., dissenting).

statute affected “the privacy of the home in its most basic sense.”<sup>63</sup> Justice Harlan then said that the privacy interest embodied in the Fourth Amendment’s ban on unreasonable searches and seizures was part of the ordered liberty assured against state action by the Fourteenth Amendment.<sup>64</sup> By analogy, Justice Harlan concluded, the Court’s decisions protected the privacy of the home against “all unreasonable intrusion of whatever character.”<sup>65</sup> He concluded his dissent by noting that the Connecticut statute was unique from many others in that it made the use of contraceptives, and not their sale or manufacture, a crime.<sup>66</sup>

Four years later, Estelle Griswold<sup>67</sup> was convicted as an accessory to the use of a contraceptive device, the same Connecticut law at issue in *Poe*.<sup>68</sup> After the appellate and supreme courts of that state affirmed the judgment against her,<sup>69</sup> Griswold sought certiorari, claiming a violation of the Due Process Clause of the Fourteenth Amendment,<sup>70</sup> and the Supreme Court granted Griswold’s petition.<sup>71</sup> The Court overturned her conviction,<sup>72</sup> but the decision to do so generated three concurring opinions and two dissenting opinions, leaving open questions regarding the status of one’s right to personal and marital privacy.

Justice Douglas, speaking for the majority in *Griswold*, began by acknowledging that the Court was “met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment.”<sup>73</sup> He then said that “specific guarantees in the Bill of Rights have penumbras,<sup>74</sup> formed by emanations from those guarantees that help give them life and substance.”<sup>75</sup> He cited prior opinions concerning penumbral rights of the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>76</sup> Justice Douglas pointed out that in forbidding the use of contraceptives, rather than regulating their manufacture or sale, Connecticut sought to achieve its goal by means having a maximum destructive impact upon

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63. *Id.* at 548.

64. *Id.* at 549.

65. *Id.* at 550.

66. *Id.* at 554.

67. Estelle Griswold was the executive director of the Planned Parenthood League of Connecticut. *Griswold v. Conn.*, 381 U.S. 470, 480 (1965). Her codefendant, Dr. C. Lee Huxton, was the New Haven Planned Parenthood clinic’s co-founder and a professor at the Yale School of Medicine. Wikipedia, *Griswold v. Connecticut*, [http://en.wikipedia.org/wiki/Griswold\\_v.\\_Connecticut](http://en.wikipedia.org/wiki/Griswold_v._Connecticut) (last visited Sept. 27, 2006).

68. *Griswold*, 381 U.S. at 480.

69. *Id.*

70. *Id.* at 481.

71. *Id.*

72. *Id.* at 486.

73. *Id.* at 481.

74. A penumbra is “a surrounding area or periphery of uncertain extent. In constitutional law, the Supreme Court has ruled that the specific guarantees in the Bill of Rights have penumbras containing implied rights, esp[ecially] the right of privacy.” BLACK’S LAW DICTIONARY 1170–71 (8th ed. 2004).

75. *Griswold*, 381 U.S. at 484.

76. *See id.* at 482–85.

marriage as a private relationship.<sup>77</sup> The Court overturned Griswold's conviction and concluded that the statute "concern[ed] a relationship lying within the zone of privacy created by several fundamental constitutional guarantees,"<sup>78</sup> but did not rest its holding on any single provision of the Constitution.

Justice Goldberg, joined by Chief Justice Warren and Justice Brennan,<sup>79</sup> joined Justice Douglas's majority opinion but added different reasoning to the majority's privacy analysis. The concurring justices stated that "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."<sup>80</sup> Rather, they said, the text and language of the Ninth Amendment<sup>81</sup> protects additional fundamental rights from government invasion, rights that were not mentioned in the first eight constitutional amendments.<sup>82</sup> Justice Goldberg did not believe that the use of this rarely-invoked constitutional provision<sup>83</sup> would create an independent source of rights and therefore denied that the Court would exploit his reasoning in *Griswold* to arrogate enormous power to itself.<sup>84</sup> Instead, Justice Goldberg, using language previously employed by Justice Sutherland, laid out a standard to determine whether a right was one deeply rooted in history or tradition and thus protected under the Ninth Amendment: "whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."<sup>85</sup> Justice Goldberg concluded his analysis by stating that the right of privacy in marriage was a fundamental and basic right protected by the Ninth Amendment.<sup>86</sup>

Justice Harlan and Justice White offered separate concurring opinions. For Justice Harlan, the majority's analysis of the privacy right was overly broad because the Due Process Clause of the Fourteenth Amendment stood "on its own bottom."<sup>87</sup> The proper constitutional inquiry was "whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values implicit in the concept of ordered liberty,"<sup>88</sup> and the Court did not need to look further than the Fourteenth Amendment to determine that, in this case, the law violated the right of privacy, a "basic value[]

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77. *Id.* at 485.

78. *Id.*

79. *Id.* at 486 (Goldberg, J., concurring).

80. *Id.*

81. The Ninth Amendment provides that, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

82. *Griswold*, 381 U.S. at 488 (Goldberg, J., concurring).

83. *See generally* BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER SOCIAL CONDITIONS OF TODAY* (1955).

84. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring).

85. *Id.* at 493 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

86. *Id.* at 499.

87. *Id.* at 500 (Harlan, J., concurring).

88. *Id.*

that underlie[s] our society.”<sup>89</sup> Justice White, on the other hand, stated that the Connecticut statute would violate the Fourteenth Amendment if it was not reasonably necessary for the effectuation of a legitimate and substantial state interest or arbitrary and capricious in its application.<sup>90</sup> According to Justice White, Connecticut’s ban on the use of contraceptives could not further the state’s goal of preventing illicit sexual relationships, and the law should be invalidated under the Due Process Clause for that reason.<sup>91</sup> He also pointed out that the state’s policy denied those Connecticut citizens who did not have enough money to attend private counseling the right to make an informed decision about modern methods of birth control.<sup>92</sup>

Justice Black and Justice Stewart dissented from the judgment of the Court, and each supported the other in his separate dissent. Justice Black stated that although the law was “every bit as offensive”<sup>93</sup> to him as it was to the justices in the majority, the statute withstood constitutional scrutiny. He did not agree with the majority’s contention that a right of privacy could be found in the Constitution, the Bill of Rights, or the penumbras of the first ten constitutional amendments.<sup>94</sup> Justice Black feared that the reasoning from those in the majority, whether through the Due Process Clause or through the Ninth Amendment, would “claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive,”<sup>95</sup> a judgment that the Constitution reserves for the legislative branch.<sup>96</sup> Justice Black concluded that Connecticut’s law did not offend any provision of the federal Constitution.<sup>97</sup>

Justice Stewart also dissented, stating that Connecticut’s “uncommonly silly law”<sup>98</sup> was unenforceable as a practical matter but nonetheless constitutionally valid.<sup>99</sup> He observed that the Court referred to six constitutional amendments in its opinion: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth.<sup>100</sup> Of these six, however, the Court did not indicate which of the Amendments were infringed by the Connecticut law,<sup>101</sup> and Justice Stewart could not find a violation of any of the provisions in question. He also expressly disclaimed a general right of privacy in the Bill of Rights, the remainder of the Constitution, and any prior decisions of the Supreme Court.<sup>102</sup>

The opinions in *Griswold* did not answer all questions concerning

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89. *Id.* at 501 (Harlan, J., concurring).

90. *See id.* at 504 (White, J., concurring).

91. *Id.* at 505.

92. *Id.* at 503.

93. *Id.* at 507 (Black, J., dissenting).

94. *See Griswold*, 381 U.S. at 508 (Black, J., dissenting).

95. *Id.* at 511.

96. *See id.* at 521 (discussing the separation of governmental powers).

97. *Id.* at 527.

98. *Id.* (Stewart, J., dissenting).

99. *Id.* at 527 (Stewart, J., dissenting).

100. *Id.*

101. *Id.* at 528.

102. *Id.* at 530.

contraception. Seven years after the decision, the Court handed down another decision invalidating a contraception law, this time in Massachusetts. In *Eisenstadt v. Baird*,<sup>103</sup> William Baird was arrested, convicted, and jailed after delivering a lecture at Boston University during which he exhibited contraceptives in direct violation of a Massachusetts statute<sup>104</sup> and handed out a package of vaginal contraceptive foam to a woman in attendance.<sup>105</sup> The law barred the distribution of contraceptives except by a qualified physician or pharmacist and limited the distribution or prescription of contraceptives to married couples.<sup>106</sup> Baird appealed his conviction under the statute to the Massachusetts Supreme Judicial Court, which set aside the conviction for exhibiting the contraceptives, but upheld the conviction for distributing the foam.<sup>107</sup> Baird filed a petition for a federal writ of habeas corpus in the District Court for the District of Massachusetts, which was dismissed.<sup>108</sup> The Court of Appeals for the First Circuit reversed the dismissal with an order to discharge Baird from prison,<sup>109</sup> and the Sheriff of Suffolk County, which includes the city of Boston, appealed to the Supreme Court from the order demanding Baird's release.<sup>110</sup>

The Supreme Court, speaking through Justice Brennan, invalidated the law under the Equal Protection Clause of the Fourteenth Amendment.<sup>111</sup> The Court first determined that William Baird could sue on behalf of unmarried individuals who were denied contraceptives, noting that he "plainly ha[d] an adequate incentive" to do so.<sup>112</sup> Justice Brennan then analyzed the potential reasons behind the state legislature's decision to enact the law and decided that the deterrence of premarital sex could not reasonably be regarded as the purpose of the statute's distinction between single individuals and married couples,<sup>113</sup> in part because Massachusetts did not "attempt to deter married persons from engaging in illicit sexual relations with unmarried persons."<sup>114</sup> The Court then extended its *Griswold* ruling to unmarried people, saying that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."<sup>115</sup> Justice Brennan acknowledged the difference between the statute at issue in *Griswold* and the law addressed in *Eisenstadt* with the following:

It is true that in *Griswold* the right of privacy in question inhered in the

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103. 405 U.S. 438 (1972).

104. MASS. GEN. LAWS ANN. ch. 272, § 21 (West 1920). The statute provides that "whoever . . . exhibits . . . an instrument or other article . . . for the prevention of conception . . . shall be punished by imprisonment . . ." *Id.*

105. *Eisenstadt*, 405 U.S. at 440.

106. *See id.* at 440–41.

107. *Id.* at 440.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 443.

112. *Id.* at 446.

113. *Id.* at 448.

114. *Id.* at 449.

115. *Id.* at 453.

marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>116</sup>

The Court concluded that “nothing opens the door to arbitrary action so effectively as to allow [state] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected”<sup>117</sup> and held that the Massachusetts statute violated the Equal Protection Clause.<sup>118</sup> Given that *Eisenstadt* expands the privacy penumbra from married couples to individuals, it is remarkable that the case has seen little independent scholarship compared to *Griswold* and *Roe*.<sup>119</sup>

### C. From Contraception to Abortion: *Roe* and *Doe*

In the term following the *Eisenstadt* decision, the Supreme Court decided *Roe v. Wade*.<sup>120</sup> The Supreme Court first heard oral argument in *Roe* during the same term in which *Eisenstadt* was heard and decided.<sup>121</sup> *Roe* was heard for a second time in October of 1972.<sup>122</sup> The Texas abortion statute at issue was typical of many states at the time,<sup>123</sup> in that the statute made it a crime to procure an abortion or to attempt an abortion, except for the purpose of saving the life of the mother.<sup>124</sup> Jane Roe,<sup>125</sup> a pregnant woman, challenged the statute as unconstitutional on its face and sought both a declaratory judgment to that effect and an injunction against

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116. *Id.*

117. *Id.* at 454 (quoting *Ry. Express Agency v. N.Y.*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring)).

118. *Id.* at 454–55.

119. A few scholars do recognize the *Eisenstadt* decision’s importance to the debate over contraception, abortion, and privacy generally. See generally JOHN T. NOONAN, JR., *A PRIVATE CHOICE* (1979); see also Jim Chen, *Midnight in the Courtroom of Good and Evil*, 16 CONST. COMMENT. 499, 500 (1999) (stating that “*Eisenstadt*, truth be told, could have and arguably should have confined *Griswold v. Connecticut* to contraceptive use by married couples” and that the case “thus reimagined would have dictated the opposite outcome in *Roe*”) (internal citation omitted); Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1521 (1994) (arguing that the *Eisenstadt* decision is “singularly important” to changes in the American family); Andrea M. Sharrin, Note, *Potential Fathers and Abortion: A Woman’s Womb is Not a Man’s Castle*, 55 BROOK. L. REV. 1359, 1394 n.173 (1990) (defending *Eisenstadt* as an important application of *Griswold* for giving more rights to individuals).

120. 410 U.S. 113 (1973).

121. *Id.* at 113 (argued for the first time on December 13, 1971); *Eisenstadt*, 405 U.S. at 438 (argued on November 17 and 18, 1971).

122. *Id.*

123. *Id.* at 116.

124. *Id.* at 117–18.

125. Jane Roe is a pseudonym. *Id.* at 120 n.4. Roe’s real name is Norma McCorvey.

its enforcement.<sup>126</sup> She alleged that the Texas statute violated the right to personal privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.<sup>127</sup> The federal district court for the Northern District of Texas found that the “essence of the interest sought to be protected here [was] the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals”<sup>128</sup> and held that the statutes constituted an overbroad infringement of her Ninth Amendment rights.<sup>129</sup> The court, however, denied injunctive relief<sup>130</sup> because the Texas abortion statutes did not involve freedom of expression and because Roe did not allege that the statute had been deliberately applied to discourage a protected activity, two areas of the law in which the federal courts’ reluctance to interfere in state criminal procedure did not apply.<sup>131</sup> Roe appealed from the denial of the injunction.<sup>132</sup>

On appeal, the Supreme Court began its analysis with an overview of ancient Greek and Roman medicinal practices and the history of abortion in the United States,<sup>133</sup> acknowledging that “the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage.”<sup>134</sup> Speaking for the majority, Justice Blackmun said that the ancient Greeks and Romans accorded little protection to the unborn,<sup>135</sup> in spite of the existence of the Hippocratic Oath, which explicitly prohibited abortion.<sup>136</sup> The Court referred to a theory that the Oath originated in a group representing only a small segment of Greek opinion<sup>137</sup> and therefore should be accepted in that limited historical context. At common law, abortion prior to “quickening”<sup>138</sup> was not considered a criminal offense,<sup>139</sup> a position that American courts adopted.<sup>140</sup> Justice Blackmun then reviewed the opinions of early legal scholars of the common law, including Bracton, Blackstone, and Coke,<sup>141</sup> and found that of the three, only Bracton believed abortion to

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126. *Id.* at 120.

127. *Id.*

128. *Roe v. Wade*, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970).

129. *Id.*

130. *Id.* at 1225.

131. *Id.* at 1224.

132. *Roe v. Wade*, 410 U.S. 113, 122 (1973).

133. *Id.* at 129–40.

134. *Id.* at 129.

135. *Id.* at 130.

136. Hippocrates (460–377 B.C.) composed the famous oath that bears his name. It provides, in part, “I will give no deadly medicine to any one if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion.” See BERNARD S. MALLOY, M.D., *THE SIMPLIFIED MEDICAL DICTIONARY FOR LAWYERS* 291–92 (2d ed. 1951).

137. *Roe*, 410 U.S. at 132.

138. Quickening is the first motion the mother feels from the fetus in the womb, typically around the middle of the pregnancy. See *BLACK’S LAW DICTIONARY* 1282 (8th ed. 2004).

139. *Roe*, 410 U.S. at 132.

140. See *id.* at 134.

141. *Id.* at 134–35.

constitute homicide.<sup>142</sup> The opinion went on to discuss the earliest American abortion statutes, the first of which was enacted in Connecticut in 1821.<sup>143</sup> Abortion prior to quickening was first made a crime in 1860, also in Connecticut.<sup>144</sup> After the Civil War, legislation began to replace the common law,<sup>145</sup> and over time the quickening distinction disappeared.<sup>146</sup> By the end of the 1950s, abortion was banned in a large majority of states in all cases except to save the life of the mother.<sup>147</sup> The Court thus concluded that “at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19<sup>th</sup> century, abortion was viewed with less disfavor than under most American statutes currently in effect.”<sup>148</sup>

Justice Blackmun’s majority opinion then proceeded to say, as Justice Goldberg’s concurrence had in *Griswold* before it, that the “Constitution does not explicitly mention any right of privacy.”<sup>149</sup> The opinion noted that a series of decisions “recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”<sup>150</sup> The Court observed that these situations included rights secured in the First Amendment,<sup>151</sup> the Fourth and Fifth Amendments,<sup>152</sup> the Ninth Amendment,<sup>153</sup> the penumbras of the Bill of Rights generally,<sup>154</sup> and the “first section of the Fourteenth Amendment.”<sup>155</sup> Following this analysis, the Court went on to say that:

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.<sup>156</sup>

Justice Blackmun then explained the legitimate interests of the state and the pregnant woman in the abortion decision,<sup>157</sup> concluding that “the right of personal

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142. *Id.*

143. *Id.* at 138.

144. *Id.*

145. *Id.* at 139.

146. *Id.*

147. *Id.*

148. *Id.* at 140.

149. *Id.* at 152.

150. *Id.*

151. *Stanley v. Ga.*, 394 U.S. 557, 564 (1969) (prohibiting a state from making the possession of obscene material in one’s own home a crime).

152. *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968) (limiting law enforcement searches in traffic stops).

153. *Griswold v. Conn.*, 381 U.S. at 486 (Goldberg, J., concurring) (striking down a law banning use of contraceptives between married couples).

154. *Id.* at 484–85.

155. *Roe*, 410 U.S. at 152 (citing *Meyer v. Neb.*, 262 U.S. 390, 399 (1923)) (striking down a state law demanding that all school subjects be taught in English).

156. *Id.* at 153.

157. Justice Blackmun’s opinion notes that “additional offspring, may force upon the woman

privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation.”<sup>158</sup> The Court conceded that the State may regulate abortions so that they are performed “under circumstances that insure maximum safety for the patient.”<sup>159</sup> According to the Court, the State’s interest in protecting potential human life could not save the statute because a person, as defined by the Fourteenth Amendment, does not include an unborn child.<sup>160</sup>

The Court then set up a trimester framework to determine the appropriate points at which to balance the interests of the woman seeking an abortion and of the state in protecting prenatal life and the health of the pregnant woman. The majority opinion noted that the state’s interest “grows in substantiality as the woman approaches term and, at a point during pregnancy, each [interest] becomes compelling.”<sup>161</sup> The framework that the Court established provided that during the first trimester, the abortion decision is left to the “medical judgment of the pregnant woman’s attending physician.”<sup>162</sup> From the end of the first trimester until the point of viability,<sup>163</sup> the state may regulate abortion in ways that are “reasonably related to maternal health.”<sup>164</sup> Finally, the Court held that after viability the state may “regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”<sup>165</sup> The Court’s holding splits the interests of the woman and the state into three relatively concrete, time-determined categories and resembles a statutory construction.<sup>166</sup> Justice Blackmun then concluded that “the Texas abortion statutes, as a unit, must fall.”<sup>167</sup>

The same day that the Supreme Court decided *Roe v. Wade*, it also handed down its opinion in *Doe v. Bolton*.<sup>168</sup> Mary Doe<sup>169</sup> sued for declaratory relief and an injunction against the enforcement of Georgia’s abortion statute,<sup>170</sup> which was modeled on the American Law Institute’s Model Penal Code.<sup>171</sup> In her complaint,

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a distressful life and future.” *Id.* at 153. At the same time, the state’s interest in protecting life and health and ensuring proper procedures for that purpose should be considered. *See id.* at 150.

158. *Id.* at 154.

159. *Id.* at 150.

160. *Id.* at 158.

161. *Id.* at 162–63 (internal quotation marks omitted).

162. *Id.* at 164.

163. A child is viable if it is “capable of living, esp[ecially] outside the womb.” BLACK’S LAW DICTIONARY 1597 (8th ed. 2004).

164. *Roe*, 410 U.S. at 164.

165. *Id.* at 165. The emphasis on viability surprised one scholar, who noted that the “modern trend . . . has been to reject the viability distinction.” David W. Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 241 (1969).

166. *See* Paulsen, *supra* note 11, at 1008; *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926 (1973).

167. *Roe*, 410 U.S. at 166.

168. 410 U.S. 179 (1973).

169. This name, like Jane Roe and Pauline Poe, is a pseudonym. *Doe*, 410 U.S. at 184 n.6.

170. *Id.* at 185.

171. *Id.* at 182.

Mary Doe alleged that she was an impoverished former mental patient who had been advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she carried.<sup>172</sup> She contended that the state's abortion statute violated her rights under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution, as well as her right to privacy and liberty in matters relating to childbearing.<sup>173</sup> The particular provisions challenged included the limitation of abortions to specific situations enumerated in the statute, a rape certification requirement, the requirement that abortions be performed in accredited hospitals, the requirement of approval by a hospital abortion committee, the need for the opinion of two independent physicians, and the requirement that the woman be a Georgia resident.<sup>174</sup> In the district court, a three-judge panel granted declaratory relief and struck down the limitation of abortion to the three situations enumerated in the statute<sup>175</sup> and invalidated the rape certification requirement, but permitted the remainder of the statute to stand and denied the request for an injunction.<sup>176</sup>

Mary Doe took a direct appeal to the Supreme Court.<sup>177</sup> Justice Blackmun wrote the majority opinion reversing the denial of the injunction, saying that the "hospital provision and the requirements as to approval by the hospital abortion committee, as to confirmation by two independent physicians, and as to residence in Georgia are all violative of the Fourteenth Amendment."<sup>178</sup> The Court referred to its decision in *Roe* for much of the background on the abortion right<sup>179</sup> and proceeded to strike down four statutory provisions. First, the Court held that a hospitalization requirement must fall because the state had not proven that only the full resources of a licensed hospital would satisfy the health concerns surrounding the abortion procedure and because the law failed to exclude the first trimester of pregnancy from its scope.<sup>180</sup> Second, the Court invalidated the requirement of approval from an abortion committee before the procedure was to take place because imposing this requirement substantially limited a woman's right to receive medical care in accordance with her physician's best judgment.<sup>181</sup> Third, the majority opinion struck down the requirement that two doctors concur in the decision of the woman's physician that an abortion was in her best interest.<sup>182</sup> Justice Blackmun noted that the state had cited "no other voluntary medical or

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172. *Id.* at 185.

173. *Doe*, 410 U.S. at 185–86.

174. *Id.* at 202–05.

175. *Id.* at 186.

176. *Id.* at 186–87. The district court did not expressly acknowledge which constitutional provisions, if any, that the statute violated in addition to the right of privacy discussed in *Griswold*. See *Doe v. Bolton*, 319 F. Supp. 1048, 1054–55 (N.D. Ga. 1970).

177. *Doe*, 410 U.S. at 187.

178. *Id.* at 201.

179. See *supra* text accompanying notes 120–167. The Court also took care of jurisdictional issues such as standing with references to the *Roe* opinion. See *Doe*, 410 U.S. at 187–88.

180. *Doe*, 410 U.S. at 195.

181. *Id.* at 197.

182. *Id.* at 199.

surgical procedure for which Georgia requires confirmation by two other physicians” to the Court.<sup>183</sup> Fourth, the Court stated that the residency requirement in the statute could not withstand scrutiny because it was “not based on any policy of preserving state-supported facilities for Georgia residents” in its application to private as well as public hospitals.<sup>184</sup> Additionally, the Court stated that upholding this requirement meant “that a State could limit to its own residents the general medical care available within its borders.”<sup>185</sup> Consequently, the Supreme Court modified the district court’s judgment on the basis of the Fourteenth Amendment.<sup>186</sup> The Court did, however, retain the district court’s broad definition of “health,” which it said could include any combination of mental, physical, emotional, and psychological factors and that these factors should leave the physician the “room he needs to make his best medical judgment.”<sup>187</sup>

The *Roe* and *Doe* decisions initiated political and social reaction, but they also created an important new topic for scholars in the academic community to debate. In particular, Professor John Hart Ely criticized the Court’s decision in *Roe* in a 1973 article.<sup>188</sup> Although he said that he would vote in a legislative capacity for a statute like the one the Court outlined in *Roe*,<sup>189</sup> Ely nonetheless said that *Roe* was “a very bad decision.”<sup>190</sup> He noted that the Court ordinarily did not second-guess legislative judgments when a constitutional provision did not mandate special protection for one of the values in conflict over the other.<sup>191</sup> The Court could not simply conclude that personal privacy was the beginning and the end of the issue, according to Ely, because abortion affects more than the woman making the choice.<sup>192</sup> He further stated that even if one does not consider a fetus to be a child, “it is certainly not nothing,”<sup>193</sup> and the Supreme Court’s response to the argument that more than the woman’s interest is involved in the abortion decision was simply inadequate.<sup>194</sup> When the Court balanced interests in the past, it had been the Court’s policy to side with a group that is litigating to secure more rights than it can obtain politically, such as racial minorities;<sup>195</sup> in the abortion context, the group seeking to secure rights would be the unborn.<sup>196</sup> In so stating, Ely referred to the famous footnote from *United States v. Carolene Products Company*,<sup>197</sup>

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183. *Id.*

184. *Id.* at 200.

185. *Id.*

186. *Id.* at 201.

187. *Id.* at 192.

188. See generally Ely, *supra* note 166.

189. *Id.* at 926.

190. *Id.* at 947.

191. *Id.* at 923.

192. *Id.* at 924.

193. Ely, *supra* note 166, at 931.

194. *Id.* at 924.

195. *Id.* at 934.

196. As Ely himself states, “no fetuses sit in our legislature.” *Id.* at 933 (emphasis in original).

197. 304 U.S. 144 (1938).

where Justice Stone implied that the protection of certain “discrete and insular minorities”<sup>198</sup> could require a more searching judicial inquiry than would be otherwise necessary.<sup>199</sup> The question of whether the Court should lend special support to the unborn as a discrete and insular minority would not even be at issue if the Court had not interfered with “a question the Constitution has not made the Court’s business,”<sup>200</sup> Ely said. Ely was not disenchanted with the *Roe* Court because he disagreed with the result, but rather because “this super-protected right [to an abortion] is not inferable from the language of the Constitution”<sup>201</sup> and he thus believed that the decision was bad “because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”<sup>202</sup>

Other scholars, such as Donald H. Regan, fully supported the Supreme Court’s involvement and decision in *Roe* but offered different reasoning.<sup>203</sup> Regan viewed abortion legalization through the lens of the Equal Protection Clause of the Fourteenth Amendment,<sup>204</sup> but did not take the approach that abortion regulations treated pregnant women in a way different from another class of individuals.<sup>205</sup> Rather, Regan saw an unexpected or unwanted pregnancy as a problem in samaritanism law.<sup>206</sup> Regan gave a history of the law of samaritanism<sup>207</sup> in the United States<sup>208</sup> and concluded that American law generally does not require an individual to volunteer aid to another individual who is in danger or in need of assistance.<sup>209</sup> According to Regan, abortion regulations put a greater burden on pregnant women than any other “good Samaritan” laws.<sup>210</sup> As a result, Regan says that the burden, combined with the fact that these statutes affect women as a class,<sup>211</sup> mandates that abortion regulations be struck down.<sup>212</sup> Regan offers a

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198. *Id.* at 153 n.4.

199. *Id.*

200. Ely, *supra* note 166, at 943.

201. *Id.* at 935.

202. *Id.* at 947 (emphasis in original).

203. *See generally* Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1978) (suggesting an approach to abortion legalization using the Equal Protection Clause instead of the Due Process Clause). *See also* Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

204. *See* U.S. CONST. amend. XIV (providing that “No State shall . . . deny to any person within its jurisdiction the equal protection of its laws”).

205. Regan, *supra* note 203, at 1570.

206. *Id.* at 1569. Regan defines the law of samaritanism as the law concerning obligations imposed on individuals to give aid to others. *Id.*

207. Regan refers to the Biblical parable of the Good Samaritan. *See Luke* 10:25–37 (King James) (describing how a member of a despised group in society took affirmative steps to help a stranger in need when others failed to do so).

208. *See* Regan, *supra* note 203, at 1570–79.

209. *Id.* at 1569.

210. *See id.* at 1572 (stating that “[t]here is *no* other potential samaritan on whom burdens are imposed which are as extensive and as physically invasive as the burdens of pregnancy and childbirth”).

211. *See id.* at 1631 (acknowledging that the persons “singled out for specially burdensome treatment” by abortion statutes “given human physiology, [must] be female”).

212. *Id.* at 1632 (urging heightened scrutiny of abortion regulations under the Equal

different approach to the Supreme Court's chosen path, but it has never been adopted.<sup>213</sup>

D. After *Roe* and *Doe*

Following *Roe* and *Doe*, the Court further limited the power of the states to regulate abortion. In 1983, the Court invalidated an Ohio abortion regulation in *City of Akron v. Akron Center for Reproductive Health*.<sup>214</sup> Corporations that operated abortion clinics and a physician at one such clinic challenged in federal district court the city's regulations that required all second-trimester abortions to be performed in hospitals, parental consent to an unmarried minor's abortion, informed consent of the patient, a twenty-four hour waiting period before abortions, and the disposal of fetal remains in a respectful manner.<sup>215</sup> The district court invalidated the parental consent, informed consent, and disposal provisions while upholding the hospitalization requirement, the disclosure of particular risks of abortion, and the waiting period.<sup>216</sup> On appeal, the Sixth Circuit affirmed in part and reversed in part, upholding the hospitalization requirement while striking down the disclosure of abortion risks and the waiting period as unconstitutional.<sup>217</sup> The Supreme Court granted certiorari to both the abortion clinic and the city of Akron.<sup>218</sup>

Speaking for the majority of the Court, Justice Powell's opinion noted that the *Roe* Court had recognized two state interests, the "legitimate interest in protecting the potentiality of human life" and a "legitimate concern with the health of women who undergo abortions."<sup>219</sup> For the hospitalization requirement, the Court reaffirmed "that a State's interest in health regulation becomes compelling at approximately the end of the first trimester,"<sup>220</sup> but insisted that "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered."<sup>221</sup> Justice Powell said that the hospitalization requirement placed "a significant obstacle in the path of women seeking an abortion,"<sup>222</sup> because of the added financial

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Protection Clause because women "have suffered from a history of discrimination in our society").

213. Regan himself is unsure that his analysis is an "adequate constitutional justification of the result in *Roe*." Regan, *supra* note 203, at 1646. His main dissatisfaction with his the Equal Protection argument is that abortion must be treated as an omission, not an act, in order for his argument to carry the day. *Id.*

214. 462 U.S. 416 (1983).

215. *Id.* at 422-25.

216. *Id.* at 425.

217. *Id.* at 426.

218. *Id.*

219. *Id.* at 428.

220. *Id.* at 434.

221. *Id.* The Court concluded that the second trimester hospitalization requirement "places a significant obstacle in the path of women seeking an abortion." *Id.* Although the state has a legitimate interest in protecting the health of the mother, requirements must be narrowly tailored to achieve this interest. *See id.*

222. *Id.* at 434.

burden.<sup>223</sup> The Court therefore reversed the Sixth Circuit decision upholding the hospitalization requirement but affirmed the decision to strike down the parental consent provision, the informed consent provision, the requirement for a waiting period, and the requirement for respectful disposal of fetal remains.<sup>224</sup>

The Court affirmed the invalidation of the remaining statutory requirements in *Akron* for several reasons. Justice Powell did not strike down the parental notification provision because notification in the case of minors is invalid under the Constitution or *Roe*,<sup>225</sup> but rather because the Akron ordinance did not provide for a judicial alternative to parental consent.<sup>226</sup> Additionally, the Court struck down the ordinance's informed consent provision, which mandated that no abortion could be performed before the woman received information from her physician of the risks attendant to the procedure and the current status of her pregnancy.<sup>227</sup> Justice Powell said that a state does not have "unreviewable authority to decide what information a woman must be given before she chooses to have an abortion"<sup>228</sup> and that the ordinance at issue was "designed not to inform the woman's consent but rather to persuade her to withhold it altogether,"<sup>229</sup> an impermissible goal of any abortion statute.<sup>230</sup> Next, the Court struck down the twenty-four hour waiting period provision because Akron could produce "no evidence suggesting that the abortion procedure [would] be performed more safely" with the introduction of a waiting period.<sup>231</sup> Therefore, Justice Powell said, the regulation was not reasonably related to any legitimate state interest in protecting the health of the woman and the provision could not withstand judicial scrutiny.<sup>232</sup> Finally, the Court invalidated the ordinance's requirement that fetal remains be disposed of in a "humane and sanitary manner"<sup>233</sup> as unconstitutionally vague because the word "humane" could be construed in a number of ways.<sup>234</sup> The statute carried criminal liability, thereby entitling the public to notice of what specific conduct it prohibited,<sup>235</sup> so the Court concluded its opinion by striking down the disposal provision.<sup>236</sup>

The abortion right reached its apex when the Supreme Court decided

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223. *Id.* at 434–35.

224. *Id.* at 426.

225. *See id.* at 439 (stating that in a prior case "a majority of the Court indicated that a State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial").

226. *Id.* at 439–40.

227. *Id.* at 442.

228. *Id.* at 443.

229. *Id.* at 444.

230. *Id.* at 443–44.

231. *Id.* at 450.

232. *Id.*

233. *Id.* at 451.

234. *Id.*

235. *Id.*

236. *Id.* at 452.

*Thornburgh v. American College of Obstetricians and Gynecologists*<sup>237</sup> in 1986. The statute in question was the Pennsylvania Abortion Control Act, which the Court invalidated by a 5-4 vote.<sup>238</sup> The six provisions at issue were the informed consent provision, a printed materials provision requiring distribution of a form stating that there were agencies available to assist the mother in carrying the child to term, reporting requirements, the determination of viability, the degree of care required in post-viability abortions, and a requirement that a second physician be present if the point of viability may have passed.<sup>239</sup> Justice Blackmun, the author of *Roe* and *Doe*, also wrote the majority opinion in *Thornburgh*.<sup>240</sup> The opinion invalidated all of the statutory provisions, basing much of its analysis on its earlier holding in the *Akron* case.<sup>241</sup> The Court concluded its opinion striking the challenged statutory provisions by stating that a “woman’s right to make th[e] choice [whether to have an abortion] freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.”<sup>242</sup> Justice Blackmun acknowledged that “controversy over the meaning of our Nation’s most majestic guarantees frequently has been turbulent.”<sup>243</sup> Four justices dissented, including Chief Justice Burger, who feared the Court “may have lured judges into ‘roaming at large in the constitutional field’”<sup>244</sup> with its earlier rulings regarding “constitutional infirmities in state regulations of abortion.”<sup>245</sup> The Chief Justice was concerned that the majority’s ruling meant a state could “not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks” of the procedure.<sup>246</sup> Justice White, who dissented in *Roe*,<sup>247</sup> wrote a separate dissent criticizing the Court for “engag[ing] not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences.”<sup>248</sup>

The Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>249</sup> confirmed the Court’s chosen path in *Roe* but limited its

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237. 476 U.S. 747 (1986).

238. *Id.* at 749.

239. *Id.* at 747–48.

240. *Id.* at 749.

241. *See id.* at 759–66, 772 (striking provisions concerning determination of fetal viability and informed consent through printed materials with specific references to *Akron*, 462 U.S. 416).

242. *Thornburgh*, 476 U.S. at 772.

243. *Id.* at 771.

244. *Id.* at 785 (Burger, C.J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (Harlan, J., concurring)).

245. *Thornburgh*, 476 U.S. at 785 (Burger, C.J., dissenting). It should be noted that Chief Justice Burger joined the Court’s original opinion in *Roe v. Wade*. *Roe v. Wade*, 410 U.S. 113, 115 (1973).

246. *Thornburgh*, 476 U.S. at 783. The Chief Justice further pointed out that doctors routinely give similar information to patients undergoing less hazardous procedures and risk malpractice lawsuits if they fail to do so. *Id.*

247. *Roe*, 410 U.S. at 115 (White, J., dissenting).

248. *Thornburgh*, 476 U.S. at 794 (White, J., dissenting).

249. 505 U.S. 833 (1992).

decisions in *Akron* and *Thornburgh*.<sup>250</sup> Five abortion clinics and one physician challenged provisions of a Pennsylvania statute requiring the woman's informed consent before an abortion, requiring the distribution of information twenty-four hours before the procedure, requiring minors to obtain parental consent or a judicial bypass, and requiring spousal consent to an abortion if the pregnant woman is married.<sup>251</sup> The plaintiffs sought declaratory and injunctive relief, and the District Court for the Eastern District of Pennsylvania held all of the provisions facially unconstitutional.<sup>252</sup> The Court of Appeals for the Third Circuit affirmed in part and reversed in part, deciding that all of the regulations except for the spousal notification requirement passed scrutiny.<sup>253</sup>

Justice O'Connor's opinion for the Supreme Court<sup>254</sup> famously opens, "Liberty finds no refuge in a jurisprudence of doubt."<sup>255</sup> The Court reaffirmed *Roe* as a decision deriving from the Due Process Clause of the Fourteenth Amendment,<sup>256</sup> stating that neither "the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."<sup>257</sup> Justice O'Connor acknowledged that "[s]ome of us as individuals find abortion offensive to our most basic principles of morality,"<sup>258</sup> but that the "destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."<sup>259</sup> The plurality opinion then stated that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with

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250. *Id.* at 870 (stating that the Court "must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn"). Specifically, the Court acknowledged that the two cases "go too far" in their prohibition of the dissemination of truthful information. *Id.* at 882.

251. *Id.* at 833. The statute exempts compliance with these requirements in the event of a medical emergency. *Id.*

252. *Id.* at 845.

253. *Id.*

254. The *Casey* decision consists of four separate opinions. Justice O'Connor delivered the opinion of the Court with respect to parts I–III (reaffirming the essential holding of *Roe*, describing the development of abortion jurisprudence since *Roe*, and determining that *stare decisis* demands the retention of *Roe*), V–A (upholding medical emergency exception as sufficiently broad), V–C (invalidating spousal notification requirement), and VI (conclusion). Justice Stevens and Justice Blackmun joined Justices O'Connor, Kennedy, and Souter to create a five-justice majority for these portions of the opinion. Parts IV, V–B, and V–D, which limited some post-*Roe* cases such as *Akron* and *Thornburgh*, received the support of those in favor of overturning *Roe* but did not result in their joining the O'Connor opinion. See generally *Casey*, 505 U.S. at 944–79 (Rehnquist, C.J., concurring in part and dissenting in part); *id.* at 979–1002 (Scalia, J., concurring in part and dissenting in part). Both the Rehnquist and Scalia opinions, each receiving four votes, would have upheld the Pennsylvania statute in its entirety. *Id.*

255. *Casey*, 505 U.S. at 844 (majority opinion).

256. *Id.* at 846.

257. *Id.* at 848.

258. *Id.* at 850.

259. *Id.* at 852.

the force of *stare decisis*.”<sup>260</sup> Justice O’Connor recognized that *Roe* was far from a unanimous statement of public opinion, but would not reexamine the decision because it “ha[d] in no sense proven ‘unworkable’”<sup>261</sup> and because “for two decades of economic and social developments”<sup>262</sup> afforded women the “ability to control their reproductive lives.”<sup>263</sup>

The *Casey* decision further noted that advances in medicine had negated some of *Roe*’s factual underpinnings.<sup>264</sup> Therefore, Justice O’Connor’s plurality opinion upheld the central holding of *Roe* as “a rule of law and a component of liberty we cannot renounce,”<sup>265</sup> but discarded the trimester framework that characterized *Roe*, *Doe*, and the decisions that followed those two cases.<sup>266</sup> Justice O’Connor’s replacement standard provided that “[o]nly where state regulation imposes an undue burden on a woman’s ability to make [the abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”<sup>267</sup> Justice O’Connor said that unless a regulation “has that effect on [a woman’s] right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.”<sup>268</sup> She then applied the undue burden standard to the statutory provisions at issue and determined that the information distribution requirement was constitutional, even if the material distributed concerning the consequences to the fetus have no direct relation to the woman’s health.<sup>269</sup> Justice O’Connor also upheld the informed consent provision of the statute, in spite of the Court’s earlier holding in *Akron*,<sup>270</sup> because there was no evidence that requiring a doctor to give the woman information prior to her consent to the abortion procedure would cause an undue burden to the woman in exercising her right of choice.<sup>271</sup> The opinion also stated that the *Akron* Court’s conclusion that the twenty-four hour waiting period had no substantial bearing on the woman’s health was “wrong,”<sup>272</sup> saying instead that “important decisions will be more informed and deliberate if they follow some period of reflection.”<sup>273</sup> Next, the opinion turned to the spousal notification requirement and determined that it was “likely to prevent a significant number of

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260. *Casey*, 505 U.S. at 853.

261. *Id.* at 855 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

262. *Casey*, 505 U.S. at 856.

263. *Id.*

264. *Id.* at 860 (noting that abortions can take place safely at a later point in pregnancy than was safe in 1973 and that the point of viability is earlier than that recognized in 1973).

265. *Id.* at 871.

266. *Id.* at 872. The plurality stated that a trimester framework “of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State’s permissible exercise of its powers.” *Id.*

267. *Id.* at 874.

268. *Id.* at 878.

269. *Id.* at 882.

270. *See supra* notes 214–35 and accompanying text.

271. *Casey*, 505 U.S. at 884–85.

272. *Id.* at 885.

273. *Id.*

women from obtaining an abortion.”<sup>274</sup> Justice O’Connor said that “state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s”<sup>275</sup> and that because “a husband has no enforceable right to require a wife to advise him before she exercises her personal choices,”<sup>276</sup> the requirement could not stand without giving him unwarranted power over his wife. Finally, the Court reaffirmed its prior holdings concerning parental notification requirements; Justice O’Connor said that “a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.”<sup>277</sup> Pennsylvania provided adequate procedures in its statute, and therefore the plurality upheld the notification provision.<sup>278</sup> Justice O’Connor concluded the *Casey* opinion with a reminder of the Court’s “responsibility not to retreat from interpreting the full meaning of the covenant [of the Constitution] in light of all of [its] precedents.”<sup>279</sup>

The *Casey* opinion did not settle the abortion question because the case reflected a deep split in the Supreme Court. Few justices on either side of the abortion issue were satisfied with the joint opinion. For example, Justice Blackmun concurred in part and dissented in part. Although he believed the joint opinion to be “an act of personal courage and constitutional principle,”<sup>280</sup> he said that he could not “remain on this Court forever,”<sup>281</sup> apparently fearing the end of abortion rights for women upon his death. On the other side of the spectrum, Chief Justice Rehnquist wrote an opinion joined by justices Scalia, White, and Thomas stating that *Roe* “can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”<sup>282</sup> The *Casey* opinion has been discussed as a setback for both pro-life and pro-choice groups.<sup>283</sup>

The Supreme Court’s decision in *Lawrence v. Texas*<sup>284</sup> examined another aspect of the sexual privacy debate: homosexual conduct. In *Lawrence*, the Court struck down a criminal statute that made deviate homosexual intercourse a misdemeanor.<sup>285</sup> In *Lawrence*, Houston police had entered the home of John

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274. *Id.* at 893.

275. *Id.* at 896.

276. *Casey*, 505 U.S. at 898.

277. *Id.* at 899.

278. *Id.*

279. *Id.* at 901.

280. *Casey*, 505 U.S. at 923 (Blackmun, J., concurring in part and dissenting in part).

281. *Id.* at 943.

282. *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting).

283. See Kathleen A. Cassidy Goodman, *The Mutation of Choice*, 28 ST. MARY’S L.J. 635, 645 (1997) (stating that “*Casey* has largely been viewed as a setback for pro-choice advocates”); *but cf.* Paulsen, *supra* note 11 (decrying the *Casey* decision as the worst of all time, including *Roe*). See also Valerie J. Pacer, Note, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 295 n.4 (1995) (stating that “pro-choice and pro-life leaders viewed the *Casey* decision as a loss for their side”).

284. 539 U.S. 558 (2003).

285. *Id.* at 563.

Geddes Lawrence after a report of a weapons violation on the property; inside, they found Lawrence and another man, Tyron Garner, engaging in a sexual act.<sup>286</sup> The police arrested the two men and charged them with deviate sexual intercourse with a member of the same sex.<sup>287</sup> After their conviction before a magistrate, the two requested a trial *de novo*.<sup>288</sup> Lawrence and Garner challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and the corresponding equal protection provision of the Texas constitution,<sup>289</sup> but this argument did not succeed in the trial court, where the two men were each fined \$200 plus costs.<sup>290</sup> The Court of Appeals for the Texas Fourteenth District then considered Lawrence's equal protection argument and considered whether the statute violated the Due Process Clause of the Fourteenth Amendment, but affirmed the convictions.<sup>291</sup> Lawrence and Garner sought certiorari, which the Supreme Court granted.<sup>292</sup>

The Court, in an opinion by Justice Kennedy, held 6-3 that the Texas statute was unconstitutional and that an earlier decision of the Court, *Bowers v. Hardwick*,<sup>293</sup> should be overruled. Justice Kennedy phrased the issue as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."<sup>294</sup> The majority opinion began its analysis in a manner similar to the Court's opinion in *Roe v. Wade*; namely, Justice Kennedy traced the modern history of substantive due process, this time beginning with *Griswold*, in order to determine the scope of the liberty guaranteed by the Fourteenth Amendment's Due Process Clause.<sup>295</sup> As in *Roe*, the Court said that states did not have a long history of regulating or prohibiting homosexual conduct as a distinct matter.<sup>296</sup> The Court further said that punishing sexual acts was not often discussed in early legal literature, and "infer[red] that one reason for this was the very private nature of the conduct."<sup>297</sup> Justice Kennedy concluded his historical analysis by saying that the "historical premises [for forbidding homosexual acts] are not without doubt and, at the very least, are overstated."<sup>298</sup>

The majority then turned to the Court's earlier decision in *Bowers* and, while acknowledging that "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family"<sup>299</sup> are important to many people,

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286. *Id.*

287. *Id.*; TEX. PENAL CODE ANN. § 21.06(a) (West 2003).

288. *Lawrence*, 539 U.S. at 563.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 564; *Lawrence v. Texas*, 537 U.S. 1044 (2002).

293. 478 U.S. 186 (1986) (finding laws criminalizing sodomy constitutional).

294. *Lawrence*, 539 U.S. at 564.

295. *Id.* at 564-71.

296. *Id.* at 568.

297. *Id.* at 570.

298. *Id.* at 571.

299. *Id.*

the Court's obligation is "to define the liberty of all, not to mandate [its] own moral code."<sup>300</sup> The *Bowers* decision upheld a Georgia statute criminalizing homosexual conduct and traced the history of homosexuality in Western civilization while taking account of Judeo-Christian moral and ethical standards<sup>301</sup>; the majority in *Lawrence* rejected the earlier analysis and found that the "laws and traditions in the past half century [we]re of most relevance" to the *Lawrence* case.<sup>302</sup> The majority pointed that recent laws gave "substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>303</sup> Justice Kennedy then looked to the laws of European countries, which had dropped their prohibitions on sodomy and homosexual activity.<sup>304</sup> Relying on the Court's analysis in *Casey*, Justice Kennedy said that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."<sup>305</sup> The *Lawrence* majority concluded that *Bowers* "demeans the lives of homosexual persons"<sup>306</sup> and should be overruled. Justice Kennedy concluded that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."<sup>307</sup>

Justice O'Connor wrote a concurring opinion in which she found that the Texas statute banning same-sex sodomy violated the Equal Protection Clause, but that *Bowers* should not be overruled.<sup>308</sup> She said that the sodomy law "brand[ed] all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."<sup>309</sup> Justice O'Connor said that the issue in *Lawrence* was different than that in *Bowers* because the latter treated only the question of whether the prohibition on homosexual sodomy violated the Due Process Clause.<sup>310</sup> She concluded that while Texas's law violated the Equal Protection Clause, that determination did "not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review."<sup>311</sup>

Three justices dissented from the *Lawrence* decision with two opinions. First, Justice Scalia accused the majority of manipulation in its decision to adhere to *stare decisis* in *Casey* but failing to do so in *Lawrence*.<sup>312</sup> He pointed out that the

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300. *Id.* (quoting *Casey*, 505 U.S. at 850).

301. *Lawrence*, 539 U.S. at 559.

302. *Id.* at 571–72.

303. *Id.* at 572.

304. *See id.* at 572–73 (examining England's decision to repeal laws punishing homosexual conduct and a 1981 decision from Northern Ireland invalidating similar laws under the European Convention on Human Rights).

305. *Id.* at 574 (citing *Casey*, 505 U.S. at 551).

306. *Lawrence*, 539 U.S. at 575.

307. *Id.* at 579.

308. *Id.* (O'Connor, J., concurring).

309. *Id.* at 581.

310. *Id.* at 582.

311. *Id.* at 585.

312. *See id.* at 586–87 (Scalia, J., dissenting) (stating that Scalia does not "believe in rigid

majority's analysis in *Lawrence* was inconsistent with its analysis of *Roe* in the *Casey* case less than a decade earlier; while the criticism of *Roe* had served as a reason for the Court to uphold abortion as a legal right in *Casey*, Justice Scalia said, similar criticism of the *Bowers* decision now gave the Court a reason to overturn its precedent.<sup>313</sup> He then said that the Texas law undoubtedly constrained liberty, but that laws prohibiting prostitution, heroin use, or working more than sixty hours in a bakery did as well.<sup>314</sup> The Due Process Clause, Justice Scalia said, prohibits state interference with fundamental liberty interests, defined by the Court in *Washington v. Glucksberg*<sup>315</sup> as those which are "deeply rooted in this Nation's history and tradition,"<sup>316</sup> of which homosexual sodomy is not one.<sup>317</sup>

Justice Scalia further accused the majority of creating an opinion that "is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda."<sup>318</sup> He then said that he had "nothing against homosexuals, or any other group, promoting their agenda through normal democratic means"<sup>319</sup> but that decisions imposed upon the population in the absence of a democratic majority were unacceptable.<sup>320</sup> Justice Scalia concluded by saying that the opinion "dismantle[d] the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as marriage is concerned."<sup>321</sup> Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissent, and Justice Thomas wrote separately to decry the Texas statute as "uncommonly silly"<sup>322</sup> and noting that he would vote to repeal it.<sup>323</sup> Justice Thomas concluded that he could not join the majority opinion because the problem

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adherence to *stare decisis* in constitutional cases" but does believe that the Court "should be consistent rather than manipulative in invoking the doctrine").

313. See *id.* at 587 (noting that "when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to *reaffirm* it . . . . Today, however, the widespread opposition to *Bowers* . . . is offered as a reason in favor of *overruling* it.").

314. *Id.* at 592. Justice Scalia's mention of the hours limitation is a reference to *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Supreme Court found that the Fourteenth Amendment's Due Process Clause prevented the state from interfering with an employee's right to contract with his employer through laws limiting the number of hours an individual could work. The decision was widely criticized and eventually overruled, signaling the end of substantive due process until the *Griswold* decision in 1965 with few exceptions. See, e.g., *Meyer v. Neb.*, 262 U.S. 390, 399 (1923) (striking down requirement that teachers only use English in schools because the Due Process Clause of the Fourteenth Amendment guarantees, among other things, the right to "establish a home and bring up children"). The *Meyer* decision was not overturned when *Lochner* was. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Meyer* in support of decision).

315. 521 U.S. 702 (1997).

316. *Id.* at 721.

317. *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting).

318. *Id.* at 602.

319. *Id.* at 603.

320. *Id.*

321. *Id.* at 604.

322. *Id.* at 605 (Thomas, J., dissenting) (quoting *Griswold v. Conn.*, 381 U.S. 527 (1965)).

323. *Id.* at 605.

should be solved by the democratic process instead of by the Court's order.<sup>324</sup>

## II. THE MORNING AFTER PILL: WHAT IT IS, WHAT IT DOES, AND WHY THE SEXUAL PRIVACY DEBATE IS RELEVANT TO ITS USE

The legal history of sexual privacy is necessary to this discussion because of the nature of the morning after pill. Whether one categorizes the morning after pill as an abortifacient or a contraceptive depends heavily upon the point at which one believes life begins. The divide also makes the issue of the morning after pill's availability more controversial than the availability of ordinary forms of contraception,<sup>325</sup> such as condoms or the standard birth control pill.

The morning after pill is a combination of hormones that prevents a fertilized embryo from implanting in the uterus, or that causes the uterine wall to deteriorate if the embryo is already implanted there.<sup>326</sup> The morning after pill is essentially a large, post-coital dose of birth-control hormones; the most common combination during the first decades of availability was diethylstilbestrol, or DES.<sup>327</sup> The principal hormone in DES was estrogen, heavy amounts of which can cause severe nausea and vomiting in those women that take it.<sup>328</sup> Between 1948 and 1971, doctors prescribed DES to women who were believed to need more estrogen during the terms of their pregnancies.<sup>329</sup> The use of DES during pregnancy led to a birth defect causing a rare form of vaginal cancer later in life for daughters exposed to the drug while in the womb.<sup>330</sup> The FDA changed the labeling on the drug in 1971 to warn women not to take DES during pregnancy.<sup>331</sup> Other possible combinations, tested in other countries but not earning FDA approval in the United States, use less estrogen and instead focus on blocking progesterone. This process, in turn, causes the uterine wall to deteriorate and either expels the embryo or prevents it from implanting so that it will be expelled.<sup>332</sup>

As of August 2006, two combinations of medications have been approved by the FDA for use as morning after pills, Preven and Plan B.<sup>333</sup> Preven, which is not

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324. *See id.* (noting that "as a member of this Court [Justice Thomas was] not empowered to help petitioners and others similarly situated").

325. Individuals that oppose contraception altogether would not see the morning after pill as any more controversial than typical methods of contraception. *See, e.g.,* William F. Colliton, Jr., M.D., *Contraception and Abortion: Is There a Connection?*, 13 ST. LOUIS U. PUB. L. REV. 315, 316 (1993) (stating that "the only logical mind-set for positing a contraceptive is anti-life"). Colliton's position represents one endpoint of a spectrum of viewpoints concerning the availability of contraception and abortion.

326. Mindy J. Lees, Note, *I Want a New Drug: RU-486 and the Right to Choose*, 63 S. CAL. L. REV. 1113, 1117 (May 1990).

327. Dr. Sheldon Segal, *Contraceptive Update*, 23 N.Y.U. REV. L. & SOC. CHANGE 457, 463 (1997).

328. *Id.* *See also* Lees, *supra* note 326, at 1119.

329. FDA Milestones in Women's Health: Looking Back as We Move Into the New Millennium, available at <http://www.fda.gov/womens/milesbro.html> (last visited Oct. 23, 2006).

330. *Id.*

331. *Id.*

332. Segal, *supra* note 327, at 464; Lees, *supra* note 326, at 1116-17.

333. GAO REPORT, *supra* note 9, at 11. Plan B is the first drug in its class to go through the

under consideration for over-the-counter status,<sup>334</sup> is a “dedicated . . . ECP [emergency contraceptive]” containing estrogen and progestin.<sup>335</sup> A dedicated emergency contraceptive is a device intended for the use as an emergency contraceptive after intercourse.<sup>336</sup> Estrogen is responsible for cyclical changes in the female reproductive system and progestin is a hormone that prepares the endometrium for implantation of a fertilized egg.<sup>337</sup> The combination of these two hormones suppresses ovulation,<sup>338</sup> making conception less likely. Plan B is also a dedicated emergency contraceptive containing only levonorgestrel,<sup>339</sup> a synthetic form of progestin.<sup>340</sup> Levonorgestrel-only formulations tend to reduce the side effects of taking the morning after pill, including nausea and vomiting.<sup>341</sup> Plan B’s packaging says that the pills work “mainly by preventing ovulation (egg release).”<sup>342</sup> Alternatively, Plan B “may also prevent fertilization of a released egg (joining of sperm and egg) or attachment of a fertilized egg to the uterus (implantation).”<sup>343</sup> The pills will “not do anything to a fertilized egg already attached to the uterus. The pregnancy will continue.”<sup>344</sup>

It is clear from the descriptions of the function of the morning after pill that an individual who believes that life begins at fertilization, or someone who is against contraception altogether, will look upon the question of availability of the morning after pill differently from someone who believes that life begins at implantation, at the point of viability, or after the child has exited the birth canal. The pill’s function of preventing pregnancy by blocking implantation makes this a close call for individuals without a strong stance for, or against, abortion.<sup>345</sup> There is a significant difference between the French drug RU-486, designed to stop the pregnancy at any time up to nine weeks after conception, and the morning after pill, typically taken within 72 hours of intercourse.<sup>346</sup>

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review process for over-the-counter status. *Id.*

334. Preven is no longer on the market, but was approved for sale as an emergency contraceptive with a prescription. See Tom Strode, *FDA Approves ‘Morning-After Pill’ Without Prescription*, BAPTIST PRESS, Aug. 24, 2006, available at <http://www.bpnews.net/bpnews.asp?ID=23845>.

335. GAO REPORT, *supra* note 9, at 11 n.23.

336. *Id.*

337. *Id.* at 11 n.24.

338. *Id.*

339. *Id.* at 12.

340. *Id.* at 11 n.23.

341. *Id.* at 12.

342. DURAMED PHARMACEUTICALS, LABELS FOR PLAN B EMERGENCY CONTRACEPTIVE 1 (Aug. 2006), available at <http://www.fda.gov/cder/foi/label/2006/021045s011lbl.pdf> [hereinafter Plan B Labels].

343. *Id.*

344. *Id.* at 5.

345. See Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 25 (2005) (claiming that the morning after pill “does not cause the destruction of a developing embryo, but prevents a fertilized egg from becoming an embryo in the first place” and therefore does not cause an abortion).

346. See Lees, *supra* note 326, at 1117; see also Segal, *supra* note 327, at 463–64.

A recent, contentious issue relating to the morning after pill has been whether the FDA should approve the morning after pill for over-the-counter use. Prior to the FDA's recent decision to do so, at least one state had already moved in this direction.<sup>347</sup> In February of 1997, an FDA panel approved the conclusion that use of large amounts of contraceptives after intercourse is "both safe and effective,"<sup>348</sup> but the approval of drugs for such a purpose has been described as costly, both monetarily and politically. The estimated cost of approving an already-existing drug is at least six million dollars, and costs go up from there.<sup>349</sup> Conflict over whether a medication like the morning after pill is an abortifacient adds to the cost of approvals<sup>350</sup> because some consumers and medical professionals have strong beliefs on the abortion issue that could reduce market potential for the product or endanger its approval. Although about one in four pregnancies in the United States each year ends in an induced abortion, offering "a potentially enormous market for the drug,"<sup>351</sup> there are concerns that women may become more careless in their sexual behavior or choose to use abortion as a method of birth control.<sup>352</sup> Additionally, certain contraceptives and the morning after pill can cause significant health problems.<sup>353</sup> The concern over women's safety and the use of contraception is not limited to a politicized sect of American medical professionals.<sup>354</sup>

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347. See Scott S. Greenberger, *Eyes on Romney as Morning-After Pill OK'd: House Approves Bill Increasing Access*, BOSTON GLOBE, July 7, 2005, at A1, B8 (discussing Massachusetts's effort to make the morning after pill available over the counter).

348. Segal, *supra* note 327, at 464 n.43.

349. Lees, *supra* note 326, at 1120. The cost of obtaining approval for a new drug is about \$50 million. *Id.* The morning after pill falls into the prior category because it consists of a larger dose of previously approved contraceptives. A drug never before introduced in this country falls into the latter category.

350. *Id.*

351. *Id.*

352. *Id.* at 1115. See also BRIT. MED. J., IMPACT ON CONTRACEPTIVE PRACTICE OF MAKING EMERGENCY HORMONAL CONTRACEPTION AVAILABLE OVER THE COUNTER IN GREAT BRITAIN: REPEATED CROSS SECTIONAL SURVEYS 1 (July 2005) [hereinafter BMJ STUDY] (acknowledging that "opponents [of making the morning after pill available over the counter in the United States] say that over the counter availability will encourage unprotected sex"), available at <http://bmj.bmjournals.com/cgi/reprint/331/7511/271>.

353. See Meredith Blake, *Welfare and Coerced Contraception: Morality Implications of State Sponsored Reproductive Control*, 34 U. LOUISVILLE J. FAM. L. 311, 332-33 (1995-96) (listing, among other side effects of the Norplant birth control device, irregular or prolonged bleeding, skin disease, and depression for women generally and an increased chance of diabetes, hypertension, and kidney disease for African American women already at higher risk for these ailments); see also AMERICAN LIFE LEAGUE, EMERGENCY CONTRACEPTION: THE MORNING AFTER PILL, <http://www.all.org/article.php?id=10130> (last visited Sept. 15, 2006) (describing side effects including vomiting, nausea, blood clots, and ectopic pregnancy). An ectopic pregnancy occurs when a zygote develops outside of the uterus, typically in the fallopian tube. Michael J. Brooks, Comment, *RU 486: Politics of Abortion and Science*, 2 J. PHARMACY & L. 261, 275 (1994).

354. See Carmel Williams, *New Zealand Doctors Resist Emergency Contraception*, BRIT. MED. J., Feb. 24, 1996, at 463 (stating that the New Zealand Medical Association had "serious reservations about emergency contraception . . . being freely available [over the counter]" while noting that the morning after pill generally "could reduce abortions").

In addition to the problems faced in obtaining approval from the FDA, pharmaceutical companies that choose to manufacture and market the morning after pill could face boycotts from individuals and associations that oppose Plan B's availability. These boycotts often add to the costs the drug companies incur in obtaining approvals because customers may boycott *all* of the company's products in order to make their opposition heard.<sup>355</sup> Proponents of the pill claim that its opponents' attempts to boycott drug companies unfairly add to the costs of approval while offering fewer options to pregnant women.<sup>356</sup> Boycotts, however, may not be the only reason that drug companies have chosen not to market the morning after pill more aggressively; concerns over potential tort liability and political considerations can be factors as well.<sup>357</sup>

Despite the high cost of drug approvals, Dr. Joseph Carrado<sup>358</sup> made two supplemental new drug applications to the FDA in 2003 to make the morning after pill available over the counter for women sixteen years of age and older and to make the morning after pill available without a prescription to anyone, regardless of age.<sup>359</sup> In May of 2004, the FDA denied both applications, leading to outcry among the morning after pill's supporters.<sup>360</sup> The Government Accountability

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355. See Lees, *supra* note 326, at 1122–24. On one occasion, a two-year boycott of Upjohn, a pharmaceutical company marketing drugs to induce abortion, included all of its products, including the commonly-used Nuprin and Motrin lines. *Id.* at 1122. Upjohn eventually stopped marketing and research on abortifacients, though it claimed that its decision was not influenced by the boycott. *Id.*

356. See *id.* at 1115 (characterizing the pro-life opponents of drugs such as RU-486 as a “highly vocal minority [that] should not be mistaken for the voice of the nation”).

357. See Sylvia A. Law, *Tort Liability and the Availability of Contraceptive Drugs and Devices in the United States*, 23 N.Y.U. REV. L. & SOC. CHANGE 339, 392 (1997) (stating that “the risks of liability are too great” for pharmaceutical companies if they advocate the use of traditional birth control hormones for post-coital use); see also ANNA GLASIER, M.D. & DAVID BAIRD, D.S.C., THE EFFECTS OF SELF-ADMINISTERING EMERGENCY CONTRACEPTION I (July 2, 1998), available at <http://content.nejm.org/cgi/content/abstract/339/1/1> [hereinafter GLASIER & BAIRD] (stating that “[p]harmaceutical companies worry about litigation”). Sylvia Law does not discount the influence of politics; she states that “the key development occurred when the conservative wing of the Republican Party perceived that support for ‘traditional family values’ and opposition to abortion provided a politically attractive centerpiece for political action.” Law, *supra* note 357, at 403.

358. Joseph Carrado is the Senior Director of Regulatory Affairs for Barr Research, Inc. See FDA Priv. Ltr. Rul. NDA 21–045/S–011 (Oct. 23, 2004), available at [http://www.fda.gov/cder/drug/infopage/planB/planB\\_NALetter.pdf](http://www.fda.gov/cder/drug/infopage/planB/planB_NALetter.pdf) [hereinafter “FDA Denial Letter”]. He joined Barr as the Senior Director for Clinical Regulatory Affairs and had previous experience in pharmaceutical regulation at Aventis Pharmaceuticals. Barr Pharmaceuticals, Biography, <http://phx.corporate-ir.net/phoenix.zhtml?c=60908&p=irol-govBio&ID=146396> (last visited Oct. 23, 2006).

359. FDA Denial Letter, *supra* note 358. The FDA Denial Letter indicated that before Dr. Carrado's supplementary application requesting over-the-counter status for Plan B for women over sixteen years of age and a prescription-only status for the drug for those women under sixteen, could be approved, he “would have to provide data demonstrating that Plan B can be used safely by women under 16 years of age without the professional supervision of a practitioner licensed by law to administer the drug.” *Id.* at 2.

360. See, e.g., Kristen Lombardi, *If the Morning After Never Comes: The Bush Administration is Set to Keep Emergency Contraception Out of Reach*, THE VILLAGE VOICE,

Office acknowledged in a report that the FDA's decision process regarding the morning after pill was unusual.<sup>361</sup> Assuming the correctness of the GAO report, it does not follow that Steven Galson, the Acting Director, violated law or procedure because federal law gives him discretion to approve or not approve medications for over the counter use.<sup>362</sup>

In 2004, the FDA said that it had not approved the switch from prescription-only to over-the-counter status for the morning after pill in 2004 for two reasons: the possibility of moral hazard<sup>363</sup> and the lack of empirical data for certain age groups.<sup>364</sup> The moral hazard argument states that if society relaxes its laws to permit an activity that reduces some, but not all, of the attendant risks of another activity, more people may engage in the second activity due to the increased risk. As an example, X may avoid skydiving because of the risks involved. If Y Insurance Company sells a policy covering injuries or death resulting from skydiving for \$100, X may purchase the policy and attempt skydiving. Although X will not bear the cost in hospital bills if he is injured, the insurance policy does not actually prevent any injury and therefore some of risks of skydiving not covered in the policy remain. Relaxing the laws does not eliminate all of the risks of the second activity, and therefore the increase in the second activity is a harm to society. As another example, society could relax its laws to permit the use of certain drugs that are currently illegal. Doing so would eliminate some of the risk involved in illegal drug use (namely, fines or prison time). Changing the law, however, would not eliminate the health risks involved for the drug user, including the potential for addiction or overdose. Therefore, legalizing drugs creates a moral hazard because while the risk of punishment for drug use would be eliminated, more people may turn to drugs and cause themselves and society harm. In much the same way, both abortion and the morning after pill may be seen as moral hazards. The availability of either eliminates the risk of unwanted pregnancy

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Dec. 6, 2005, at 2 (accusing the FDA under President George W. Bush of "play[ing] politics with women's reproductive health").

361. GAO REPORT, *supra* note 9, at 1.

362. See 21 U.S.C.A. § 353(b)(3) (West Supp. 2006) (stating that the Secretary of Health and Human Services "may by regulation remove drugs subject to section 355 of this title from the requirements of paragraph (1) [covering drugs available by prescription only]" (emphasis added)) and 21 U.S.C. § 355(g)(2) (2000) (providing that "[n]othing in this subsection shall prevent the Secretary [of Health and Human Services] from using any agency resources of the Food and Drug Administration necessary to ensure adequate review of the safety . . . of an article"). The Secretary of Health and Human Services delegates this authority to the Commissioner of the Food and Drug Administration, who in turn delegates the approval authority to lower levels within the agency. This system "allows decisions to be made at lower levels within the agency but assumes that management agrees with these decisions." GAO REPORT, *supra* note 9, at 11.

363. A moral hazard is one that "has its inception in mental attitudes." BLACK'S LAW DICTIONARY 736 (8th ed. 2004). See also RICHARD A. IPPOLITO, ECONOMICS FOR LAWYERS, 350-54 (Princeton Univ. Press 2005) (explaining moral hazard and its effect on behavior).

364. See GAO REPORT, *supra* note 9. Studies completed on the behavioral effects, if any, of the morning after pill have not included samples of women younger than sixteen years of age. See, e.g., GLASIER & BAIRD, *supra* note 357, at 1 (women studied were between sixteen and forty-four years of age).

associated with unprotected sexual activity. As a result, more women may engage in unprotected sexual activity, take sexual risks that they would not otherwise take, and obtain more abortions.<sup>365</sup> Yet, the availability of abortion and the morning after pill does not eliminate the possibility that men and women will contract sexually transmitted diseases from unprotected sexual activity, and so the availability of abortion and the morning after pill could increase the frequency of these conditions.<sup>366</sup>

Medical researchers spanning several countries have examined different aspects of the morning after pill's safety and efficacy, along with the correlation with other related behavior, including having an abortion or taking more sexual risks.<sup>367</sup> Although most health experts do not doubt the morning after pill's safety,<sup>368</sup> its effects on the health and behavior of women under sixteen years of age have not been tested.<sup>369</sup> The requirement that a pharmaceutical company present evidence

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365. See Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85, 118 n.170 (2005) (noting that the decline in births following *Roe* did not decline in the same proportion as the number of abortions, suggesting that the number of conceptions increased substantially with the wider availability of abortion). See also CENTER FOR DISEASE CONTROL, ABORTION SURVEILLANCE (Nov. 25, 2005), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5407a1.htm> (noting that the national legal induced abortion rate nearly doubled between 1970 and 1980).

366. See Forsythe & Presser, *supra* note 365 (discussing a 2003 study that noted an increase in sexually transmitted diseases such as Chlamydia and pelvic inflammatory disease and observing "that the availability of abortion might be seen to provide 'insurance' against unwanted pregnancy"); see also Jonathan Klick & Thomas Stratmann, *Abortion Access and Risky Sex Among Teens: Parental Involvement Laws and Sexually Transmitted Diseases* (Oct. 3, 2005) (indicating that parental involvement laws would increase the cost of obtaining abortions, making teenagers less likely to engage in risky sexual behavior or at least encouraging teenagers to use standard methods of birth control), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=819304](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=819304). See also K. Edgardh, *Adolescent Sexual Health in Sweden*, 78 SEXUALLY TRANSMITTED INFECTIONS 352, 354 (2002) (finding that abortions are on the rise in Sweden despite the wide availability of emergency contraception).

367. See generally Anna Glasier et al., *Advanced Provision of Emergency Contraception Does Not Reduce Abortion Rates*, 69 CONTRACEPTION 361 (2004) [hereinafter *Scotland Study*] (studying the morning after pill and its effect on abortion rates in Scotland); GLASIER & BAIRD, *supra* note 357 (studying women's behavior in the United Kingdom when given a supply of the morning after pill prior to unprotected intercourse); David Paton, *Random Behaviour or Rational Choice? Family Planning, Teenage Pregnancy, and STIs*, 6 SEX ED. 281 (Aug. 2006) (finding a link between increases in availability of youth family planning clinics and sexually transmitted diseases in England). See also K. Edgardh, *supra* note 366, at 354.

368. See GAO REPORT, *supra* note 9, at 26 (stating that "members of the [FDA] joint advisory committee voted 27 to 1 that the actual use study demonstrated that consumers could properly use Plan B as recommended by the label").

369. Several of the studies acknowledge that few or no adolescents participated in the clinical trials. See, e.g., *Scotland Study*, *supra* note 367, at 362 (women in the study were aged sixteen through twenty-nine); BMJ STUDY, *supra* note 352, at 3-4 (conceding that "the sample of teenage women is relatively small" and listing the fact that no women under sixteen were assessed in the study as a "weakness"). Although some are skeptical of this reasoning for denying over-the-counter status for the morning after pill in the United States, see GAO REPORT, *supra* note 9, at 6 (stating that "the Acting Director's rationale for denying the application was novel and did not follow FDA's traditional practices"), the minutes of the FDA's meeting indicate that there was concern that "counseling by a learned intermediary might be beneficial

of the drug's effects on women under the age of sixteen to the FDA to obtain approval exposes a moral quandary; some studies offer, in addition to counseling about the drug, doses of the morning after pill in advance of sexual intercourse.<sup>370</sup> The same individuals who oppose the morning after pill on moral hazard grounds would likely oppose such a study of women under the age of sixteen.

One of the primary applications for the morning after pill for women of all age groups is its use to prevent unwanted pregnancies following rape.<sup>371</sup> Indeed, at least one commentator believes that the morning after pill's availability to rape victims in emergency rooms across the country, including private and religious hospitals, should be mandated by statute for this purpose.<sup>372</sup> Rape is a crime that carries psychological as well as physical scars,<sup>373</sup> and women on college and university campuses experience its effects acutely. Victims often fear reporting rape or attempted rape to the police.<sup>374</sup> Although there may be upsides of making the morning after pill available over-the-counter as a "quick and private decision"<sup>375</sup> for rape victims, such as preventing the trauma of undergoing an abortion later in term if the victim becomes pregnant, it is also possible that making the pill available over the counter could lead to victims who are even less inclined to report their assaults to the police. Statistics for rape, like many crimes,

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[for users of the morning after pill], particularly for adolescents." GAO REPORT, *supra* note 9, at 18.

370. See, e.g., GLASIER & BAIRD, *supra* note 357, at 2 (stating that participants in the treatment group of the study "were given one packet of emergency hormonal contraceptive tablets to keep at home").

371. Rape on college and university campuses is a complex problem too broad for the scope of this Note. For more information on this problem, see Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1011–12 (2004) (discussing the problem of required reporting and the image of colleges and universities); Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 395 (2005) (indicating that women in colleges and universities "face a rate of sexual assault that is significantly higher than the general population").

372. See generally Yuliya Fisher Schaper, *Emergency Contraception for Rape Victims: A New Face of the Old Battleground of Legal Issues in the Bipartisan Abortion Politics in the United States*, 29 RUTGERS L. REV. 1 (2005).

373. Statistics vary as to how many women are victims of rape and attempted rape each year, and as to how many of these crimes are reported. Some studies set the rate of rape and attempted rape at as high as forty-four percent of women. See Neil Gilbert, *Advocacy Research and Social Policy*, 22 CRIME & JUST. 101, 120 (discussing study conducted in San Francisco by Diana Russell). However, analysis of such studies indicates that flaws may inflate that figure. See *id.* at 121–22 (stating that the "fact that only 31 percent of the women in Russell's sample were married compared to a 63 percent marital rate nationally is one of many reasons that this national estimate . . . is not simply highly speculative but scientifically groundless"). Analysis like Gilbert's does not require that scholars dismiss the studies, however. See Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1339 (1994) (stating that "[r]ape statistics vary tremendously, but that does not necessarily mean that they contradict each other or should be dismissed altogether").

374. See, e.g., Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 40 (1991) (author "did not report [her] attempted rape to the police because [she] was afraid that too many people would believe common misconceptions, and not [her]").

375. Schaper, *supra* note 372, at 13.

may be flawed due to gaps in reporting.<sup>376</sup> Easy access to the morning after pill, while potentially easing some of the stress and shame from rape victimization, may also lead to fewer reports and fewer convictions for those who committed the crime in the first place.<sup>377</sup>

On August 24, 2006, the FDA approved Plan B for over-the-counter status for women aged eighteen and over.<sup>378</sup> The FDA said that Duramed, the maker of the drug, must engage in “a rigorous labeling, packaging, education, distribution and monitoring program” for the drug and that Plan B would remain a prescription-only drug for women aged seventeen and younger.<sup>379</sup> Reaction from interest groups following the FDA’s decision was mixed.<sup>380</sup> Even given the FDA’s recent decision, the controversy surrounding the morning after pill is far from over, and if the FDA should ever reverse its decision to make Plan B available over-the-counter, states could once again regulate in the area.

### III. RECENT LEGISLATIVE EFFORTS TO BAN THE MORNING AFTER PILL ON PUBLIC COLLEGE AND UNIVERSITY CAMPUSES

Two states, Virginia and Wisconsin, recently debated legislation that would have banned the advertisement, distribution, and sale of the morning after pill on their public college and university campuses.<sup>381</sup> Before analyzing whether either scheme would have been constitutional if enacted, it is important to note the content and context of the two statutes. Although the FDA’s decision to put the morning after pill over-the-counter effectively preempts either of the attempts at

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376. See, e.g., Kathleen F. Cairney, *Recognizing Acquaintance Rape in Potentially Consensual Situations: A Reexamination of Thomas Hardy’s Tess of the D’Urbervilles*, 3 AM. U. J. GENDER & L. 301, 317 n.128 (Spring 1995) (stating that of acquaintance rapes in 1987, only five percent were reported to the police); *but cf.* REPORTED DECREASE IN RAPE PROMPTS DEBATE, UNITED PRESS INTERNATIONAL (June 18, 2006) (reporting an eighty-five percent decrease in rapes since the 1970s while other violent crimes have been on the rise). Rape, much like assault, robbery, and other violent crimes, may go underreported, making all such statistics somewhat suspect.

377. See Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 LAW & SOC’Y REV. 343, 345–46 (1992) (stating that deterrence theory “would predict, much like other offenses, the motivation to commit sexual assault is affected by the perceived costs of the crime”). If deterrence theory is followed to its logical conclusion, the costs to the rapist of a possible pregnancy as a consequence of his actions would be reduced by introduction of the morning after pill as an easily obtainable measure, thereby decreasing the rapist’s overall cost of committing the crime and the corresponding chance that the rapist will avoid committing it.

378. Press Release, U.S. Food and Drug Administration, FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older (Aug. 24, 2006), *available at* <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html>.

379. *Id.*

380. See, e.g., Amanda Gardner, “Morning-After” Pill Approval Prompts Mixed Reactions, <http://www.medicinenet.com/script/main/art.asp?articlekey=63744> (last visited Nov. 10, 2006) (noting Planned Parenthood’s opposition to the age restriction and Concerned Women for America’s opposition to Plan B’s over the counter availability).

381. The Virginia statute does not ban the advertisement of the morning after pill on its campuses. See *infra* note 383.

state regulation for the time being, the proposed statutes raise important questions regarding the role of states today in the regulation of public health, particularly with respect to the most hotly contested issues.<sup>382</sup>

#### A. The Virginia Statute

In February of 2004, the lower house of the Virginia legislature passed a statute entitled “Prohibition on the morning-after pill,” which provides that “No public institution of higher education in the Commonwealth shall, in its delivery of health care services to students, in any way sell, give or otherwise dispense to students any hormonal medication or combination of medications, administered only after intercourse for the post-coital control of fertility.”<sup>383</sup> This formulation is the second version of the bill that Representative Robert G. Marshall presented to the state house. The first version also required parental consent for minors for receiving the morning after pill and provided a mechanism for minors whose parents or guardians were unavailable or out of state to obtain consent for certain medical and surgical procedures.<sup>384</sup> A consent provision in the bill required the prescribing pharmacist “to give notice of intent” to prescribe the morning after pill and further compelled the prescribing doctor to indicate that “it may inhibit implantation of a live human embryo” and to describe the potential side effects of taking the drug.<sup>385</sup> This more detailed bill was replaced instead with the simple ban on the morning after pill (also referred to as “Plan B”).<sup>386</sup> The ban passed through committee and won approval in the state house by a vote of 52 to 47.<sup>387</sup> It has since been passed by indefinitely in the state senate’s committee on education and health. No action has been taken on the bill since February 26, 2004.<sup>388</sup>

As written, the Virginia statute places a blanket ban on dispensing or prescribing any sort of morning after pill on the state’s college campuses. The statute would affect the University of Virginia, where over 20,000 students are currently enrolled,<sup>389</sup> and fifteen other public colleges and universities in the

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382. *See infra* Part V.

383. H.R. 1414, 2004 Gen. Assem., Reg. Sess. (Va. 2004) [hereinafter Proposed Virginia Statute].

384. H.R. 1403, 2004 Gen. Assem., Reg. Sess. (Va. 2004).

385. VA. DEPT. OF PLANNING & BUDGET, 2004 FISCAL IMPACT STATEMENT FOR HOUSE BILL 1403 at 1, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?041+oth+HB1403F122+PDF> (last visited Nov. 10, 2006). The provision requiring the instruction regarding a live human embryo vaguely resembles the requirement to inform the pregnant woman of the status of her pregnancy and the development of the fetus that the Supreme Court invalidated in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 442.

386. LIS > Bill Tracking > HB 1414 > 2004 Session, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=041&typ=bil&val=hb1414> (last viewed Nov. 10, 2006) [hereinafter Virginia Legislative History].

387. *Id.*

388. *Id.*

389. University of Virginia, Enrollment: U. Va. Facts at a Glance, [http://www.virginia.edu/Facts/Glance\\_Enrollment.htm](http://www.virginia.edu/Facts/Glance_Enrollment.htm) (last visited Oct. 23, 2006).

state.<sup>390</sup> It prevents the university's health care program from administering the morning after pill to students, though it makes no mention of whether a private chain located on or near university property could dispense it.<sup>391</sup> The proposed Virginia statute does not prohibit advertising of the morning after pill,<sup>392</sup> and is in this regard a narrower ban than the proposed Wisconsin statute.

#### B. The Wisconsin Statute

Advertisements appeared in the student papers for the University of Wisconsin during early spring of 2005 encouraging women going on spring break to pack the morning after pill.<sup>393</sup> The University's health clinic offered the morning after pill as a medication to have on hand and did not require a prescription or a doctor's appointment to obtain a dose.<sup>394</sup> The University's health clinic sponsored an advertisement that promised a dose of the morning after pill over the phone without an appointment to see a doctor or nurse.<sup>395</sup> When word of this development reached members of the state assembly, Representative Dan LeMathieu presented the proposed Wisconsin statute.<sup>396</sup> Despite the fear of one representative that the bill would "drag some of us kicking and screaming back to the 1960s,"<sup>397</sup> before *Griswold* and *Roe* were decided, and the fear expressed by one editorialist that the bill would "embarrass[]" Wisconsin by "discriminat[ing] against women,"<sup>398</sup> the bill passed the state assembly by a vote of 49-41.<sup>399</sup> It was then referred to the state senate's committee on health, children, and families, where no further action was taken.<sup>400</sup> Democratic governor James Doyle vowed to veto the measure if it reached his desk.<sup>401</sup>

Wisconsin's proposed statute provides that employees of the University of Wisconsin, including its health care department, may not advertise, fill prescriptions for, or distribute the morning after pill on the University's

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390. See JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION OF THE VIRGINIA GENERAL ASSEMBLY, SPECIAL REPORT: TENURE AND POST-TENURE REVIEW POLICIES AT VIRGINIA PUBLIC COLLEGES AND UNIVERSITIES, 1 (July 12, 2004), available at <http://jlarc.state.va.us/Meetings/July04/tenure.pdf>.

391. For example, the statute does not address whether a private, national pharmacy chain such as Walgreen's or Osco could set up shop on the university's campus and sell or distribute the morning after pill.

392. See Proposed Virginia Statute, *supra* note 383.

393. UW Ad, *supra* note 1.

394. Stacy Forster, *Pill Ban at UW Moves Ahead*, MILWAUKEE JOURNAL-SENTINEL, June 17, 2005, at B1.

395. *Id.*

396. *Id.*

397. *Id.* (quoting Representative Sondy Pope-Roberts).

398. Lois Moore, *Protect Women's Reproductive Rights*, MILWAUKEE JOURNAL-SENTINEL, July 2, 2005, at A15.

399. *Wisconsin Lawmakers Vote to Ban Morning-After Pill at State Universities*, June 17, 2005, [http://news.minnesota.publicradio.org/features/2005/06/17\\_ap\\_contraceptiveban/](http://news.minnesota.publicradio.org/features/2005/06/17_ap_contraceptiveban/).

400. 2005 Regular Session Assembly Bills, available at [http://www.legis.state.wi.us/2005/data/ab\\_list.html](http://www.legis.state.wi.us/2005/data/ab_list.html) (last visited Nov. 20, 2006).

401. Forster, *supra* note 3954, at B1.

campuses.<sup>402</sup> The proposed Wisconsin statute is considerably broader than the proposed Virginia statute in what it prohibits. The ban on advertising of the morning after pill does not appear in the proposed Virginia statute,<sup>403</sup> and the extension of the prohibition on advertising, prescribing, and dispensing the morning after pill to parties employed by the board or “with whom the board contracts”<sup>404</sup> indicates that the proposed Wisconsin prohibition is tougher on the morning after pill than its Virginia counterpart.<sup>405</sup> The University of Wisconsin system, when all campuses are taken into account, includes 160,895 students who would feel the impact of a ban on the morning after pill.<sup>406</sup>

Both the proposed statutes are narrow with regard to the panoply of birth control devices they could address. Traditional methods such as the standard birth control pill, condoms, diaphragms, and other devices are not covered by the statutes. Standard abortion procedures, whether early or late in term, are not covered in these statutes either. With these facts in mind, I now turn to the constitutionality of statutes of this type.

#### IV. FEDERAL CONSTITUTIONAL QUESTIONS ARISING FROM THE PROPOSED VIRGINIA AND WISCONSIN STATUTES

The decisions in *Griswold* and *Roe* and their progeny made the debate surrounding laws limiting contraception and abortion into a federal constitutional debate. However, if any state had chosen to enter the fray with statutory attempts to limit access to the morning after pill, it would be wrong to assume that federal statutes and Supreme Court cases are the only authorities to consider. The Supreme Court recognized in *Dalton v. Little Rock Family Planning Services*<sup>407</sup>

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402. ASSEMB. B. 343, 2005 WIS. SESS. LAWS 343 [hereinafter PROPOSED WISCONSIN STATUTE]. The statute’s language provides:

(b) No person whom the board [of regents of the University of Wisconsin] employs or with whom the board contracts to provide health care services to students registered in the system may advertise the availability of, transmit a prescription order for, or dispense a hormonal medication or combination of medications that is administered only after sexual intercourse for the postcoital control of fertility to a registered student or to any other person entitled to receive university health care services.

(c) In addition to the prohibition under par. (b), no person may advertise, prescribe, or dispense a hormonal medication or combination of medications that is administered only after sexual intercourse for the postcoital control of fertility on [University of Wisconsin] system property, except for property leased under s. 233.04(7).

*Id.* The property referred to at the close of paragraph (c) is any property that the University of Wisconsin Board of Regents owns but leases to other parties.

403. See Proposed Virginia Statute, *supra* note 383.

404. PROPOSED WISCONSIN STATUTE, *supra* note 402.

405. The construction of the statute is somewhat confusing in this regard. Although the law provides an exception to the prohibition for parties to whom the Board leases its land or facilities, it would seem that the prohibition on distribution still applies because the lessee is a party “with whom the Board contracts.” *Id.*

406. University of Wisconsin, Learn About the University of Wisconsin System, <http://www.wisconsin.edu/quick/aboutuw.htm> (last visited Oct. 23, 2006).

407. 516 U.S. 474, 476 (1996) (per curiam). The respondents in *Dalton* challenged an Arkansas state constitutional provision that prohibited public funding for abortions, except those

that a state law will be preempted by federal law “only to the extent that it actually conflicts with federal law.”<sup>408</sup> Further, in *Gonzales v. Oregon*,<sup>409</sup> the Supreme Court recognized that Congress does not have exclusive control over the regulation of health and wellness in the United States. Therefore, it is important in examining statutes like those proposed in Wisconsin and Virginia to determine whether there is any Supreme Court precedent directly on point and whether other sources of law could be a factor. Where there is a Supreme Court precedent directly on point, the determination is easy and the state cannot preempt the federal law. Where there is not such a clear connection, the facial constitutionality of the statute in question becomes more difficult to determine. Because neither of the proposed statutes was passed, courts did not have the opportunity to review their constitutionality. Consequently, the following analysis is somewhat tentative.

#### A. Advertising Provision and the First Amendment

The issue of whether a state may constitutionally ban advertising of the morning after pill is unique to the proposed Wisconsin statute.<sup>410</sup> The statute prohibits the advertisement of any combination of medications that is to be used to prevent pregnancy after intercourse.<sup>411</sup> Presumably, the advertisements described at the outset of this Note triggered the proposed publicity restriction; advertisements in the student paper promised the morning after pill to any of its students at the University of Wisconsin health center without a prescription or a doctor’s appointment.<sup>412</sup>

A blanket ban on advertisement of certain products raises serious First Amendment concerns.<sup>413</sup> Although phrased in absolute terms, the First Amendment’s free speech protections are not unlimited.<sup>414</sup> The Supreme Court has always accorded a higher level of protection to political speech than it has to commercial speech,<sup>415</sup> but there is nonetheless legitimate concern over a content-

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necessary to save the mother’s life. *Id.* The Court overturned a preliminary injunction and allowed the provision to stand. *Id.*

408. *Id.* at 476 (internal quotation marks omitted). The Court further stated that “the rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.” *Id.* (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)).

409. 126 S. Ct. 904 (2006).

410. Virginia’s statute does not include such a provision, most likely because its creation did not come as a result of such advertising. See Proposed Virginia Statute, *supra* note 383.

411. PROPOSED WISCONSIN STATUTE, *supra* note 402.

412. See text accompanying *supra* note 1.

413. The First Amendment to the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I. An analysis of the Supreme Court’s free speech jurisprudence is beyond the scope of this Note.

414. See, e.g., *Dennis v. United States*, 341 U.S. 494, 503 (1951) (stating that speech is “not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations”).

415. See, e.g., *Nixon v. Shrink Mo. Gov’t. PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (stating that “protection [of political speech] lies at the heart of the First Amendment”); *cf.* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433 (1993) (describing a line of cases that accorded commercial speech an “intermediate amount of

based ban on the advertisement of a device that is not illegal.<sup>416</sup> As long as the information concerns a lawful activity and is not misleading, commercial speech should generally be permitted.<sup>417</sup> The information in the Wisconsin advertisements certainly made some individuals angry, but since it was true and referred to obtaining a legal medication, the advertisements should not, as a matter of constitutional principle, be banned.

The Supreme Court of the United States has answered the advertising question in a case with a substantially similar factual basis. In *Carey v. Population Services International*,<sup>418</sup> distributors of contraceptives challenged a New York statute that prohibited the advertisement and display of contraceptives.<sup>419</sup> A mail-order retailer of “nonmedical contraceptive devices,” was advised that its activities violated the law,<sup>420</sup> so the retailer sued Hugh L. Carey, the governor of New York, for injunctive relief. A three-judge panel for the Southern District of New York struck down the statute as a violation of the First and Fourteenth Amendments to the Constitution as it applied to nonprescription contraceptives.<sup>421</sup> The state appealed, and the Supreme Court accepted the case. Justice Brennan’s majority opinion affirmed the decision to strike down the statute’s ban on advertising, stating that a state “may not completely suppress the dissemination of concededly truthful information about entirely lawful activity, even when that information could be categorized as commercial speech.”<sup>422</sup> Additionally, the Court noted that the “information suppressed by this statute related to activity with which, at least in some respects, the State could not interfere.”<sup>423</sup>

This Supreme Court mandate conflicted somewhat with Wisconsin law during the mid-1970’s, when the *Carey* case was handed down. The year before the *Carey* decision, the Wisconsin Supreme Court upheld a state statute prohibiting the public exhibition and display of contraception and abortion devices.<sup>424</sup> In order to save the statute, as is a reviewing court’s obligation when the question of a

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constitutional protection,” but not because it was “of less constitutional moment than other forms of speech”) (internal quotation marks omitted).

416. See *United States v. Playboy Entm’t Group*, 529 U.S. 803, 818 (2000) (stating that it “is rare that a regulation restricting speech because of its content will ever be permissible”).

417. See, e.g., *This That and the Other Gift & Tobacco, Inc. v. Cobb County*, 285 F.3d 1319, 1323 (11th Cir. 2002) (challenging a ban on advertising sexual devices as violating First Amendment because information was legal and not misleading and the government had made the ban on the devices overly broad).

418. 431 U.S. 678 (1977).

419. The statute required that pharmacists keep contraceptives behind the counter instead of on display in the drug store and forbade their advertisement. *Id.* at 681 n.1.

420. *Id.* at 682. The law prohibited the sale of contraceptives to individuals under sixteen years of age, but “[n]either the advertisements nor the order forms accompanying them limit availability of [the plaintiff’s] products to persons of any particular age.” *Id.*

421. *Id.* at 681–82. It should be noted that prescription contraceptives, including items such as the traditional birth control pill, were not included in the decision to enjoin enforcement of the statute.

422. *Id.* at 700 (internal quotation marks and citations omitted).

423. *Id.* at 701 (internal quotation marks and citation omitted).

424. *Baird v. La Follette*, 239 N.W.2d 536 (Wis. 1976).

statute's repugnancy to the Constitution is unclear,<sup>425</sup> the court employed the doctrine of constitutional doubt.<sup>426</sup> The court interpreted the statute as prohibiting only purely commercial displays of the devices.<sup>427</sup> It held that educational displays of information regarding abortions and contraception options were permissible and permitted the statute to stand on that interpretation.<sup>428</sup>

Whether the two cases are directly on point with one another, or more importantly whether either is directly on point with the proposed statute banning the morning after pill, seems a relatively simple question to answer. Justice Brennan's opinion in *Carey* acknowledged that the statute in question was content-based, specifically prohibiting displays and advertisements of contraceptives, and did not address time, place, or manner restrictions on the advertising.<sup>429</sup> Therefore, if the Wisconsin statute banning advertisement of the morning after pill is a content-based restriction, the *Carey* case applies. If, on the other hand, it is a time, place, or manner restriction, the *Carey* case does not directly apply. If the statute is both a content restriction and a time, place, or manner restriction, a reviewing court would scrutinize the regulation to determine whether an otherwise permissible time, place, or manner restriction is based on the content or the subject matter of the speech;<sup>430</sup> if the court finds that the statute's restrictions are based on the content, the statute would be held unconstitutional.

Arguments exist that the Wisconsin statute regulates content (because the statute specifically mentions medication or a combination of medications that prevent pregnancy after sexual intercourse), that it is a place restriction (because the regulations only apply to advertising of such medications on the public campuses of the University of Wisconsin system), or that the statute is a hybrid of the two types of regulations. Although all three interpretations are plausible, the

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425. *Id.* at 538 (stating that "[w]here there is serious doubt of constitutionality, we must look to see whether there is a construction of the statute which is reasonably possible which will avoid the constitutional question"). The Supreme Court of the United States has applied the doctrine of constitutional doubt to "effectuate . . . congressional intent [ ] by giving ambiguous provisions a meaning that will avoid constitutional peril." *INS v. St. Cyr*, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting) (emphasis omitted).

426. The doctrine of constitutional doubt can be traced back to at least 1819, when the Supreme Court decided *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). The doctrine is based upon the belief that the question of whether a law is unconstitutional "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Id.* at 606.

427. *Baird*, 239 N.W.2d at 539.

428. The court noted, "A good-faith educational presentation of general information regarding contraception and abortion cannot constitutionally be banned, even if it is 'mixed' with commercial information." *Id.* at 539 (citation omitted).

429. *Carey*, 431 U.S. at 702 n.29 (acknowledging that the Court did "not have before [it], and therefore express[ed] no view on, state regulation of the time, place, or manner of such commercial advertising based on these or other state interests").

430. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980) (permitting controversial public policy inserts in monthly utility bills under the First and Fourteenth Amendments because government regulation based on the content of the speech "slips from the neutrality of time, place, and circumstance into a concern about content" (internal quotation marks omitted)).

context from which the bill was generated indicates that the state wanted to ban the advertisement of the morning after pill in particular.<sup>431</sup> The bill does not prohibit *all* advertising on campus property to a similar degree.<sup>432</sup>

For these reasons, a court would likely find that the proposed Wisconsin statute is a content-based restriction of the type prohibited by the Supreme Court in *Carey*. Therefore, it is highly unlikely that Wisconsin, or any other state, can constitutionally prohibit all advertisement of the morning after pill's availability on its college campuses. This is not to say that the state has to fund such advertising; there is a "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."<sup>433</sup> Wisconsin could, for example, choose to fund with public monies advertisements promoting *any* or none of the following family planning policies: abstinence, traditional birth control methods such as condoms, the morning after pill, abortion, or carrying the child to term.<sup>434</sup> The Supreme Court has stated that the government can "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."<sup>435</sup> In its current form, however, Wisconsin's statute banning the advertisement of the morning after pill on the state's public college and university campuses would probably not withstand judicial scrutiny.

#### B. Equal Protection Analysis

A common attribute of the Virginia and the Wisconsin statutes is their ban on access to the morning after pill from campus health clinics. Both states propose to ban the prescription, sale, and distribution of the morning after pill completely on their public college and university campuses, effectively eliminating the medication from student life unless the students choose to obtain it from a family physician or other off-campus source. A reasonable place to begin when challenging statutes such as those proposed in Virginia and Wisconsin is with an analysis under the Equal Protection Clause. The first determination that must be made under such an analysis is whether there is "some ground of difference that

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431. See *supra* Part III.B and the introduction to this Note.

432. See PROPOSED WISCONSIN STATUTE, *supra* note 402.

433. *Maier v. Roe*, 432 U.S. 464, 475 (1977).

434. See *id.* at 474 (stating that an indigent woman does not suffer a disadvantage if Connecticut funds childbirth but not elective abortion). The advertisements would probably not be specific to college and university campuses because Wisconsin law gives the board of regents of the university system the authority to create a budget for each public college or university. See WIS. STAT. § 36.09(3)(h) (West 2006).

435. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). Chief Justice Rehnquist bases this statement on the Court's prior statement that "abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy." *Maier*, 432 U.S. at 468 (quoting *Roe v. Norton*, 408 F. Supp. 660, 663 n.3 (D. Conn. 1975)). In much the same way, funding childbirth over abortion and funding neither are two ways of dealing with the same issue.

rationality explains the different treatment.”<sup>436</sup> Statutes that are subject to suspicion under the Equal Protection Clause include regulations that apportion benefits or penalties to groups that have been “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.”<sup>437</sup> A challenge by a plaintiff representing women as a class would present the most successful case against the statutes at issue for the purposes of the Equal Protection Clause. Other potential groups that could claim unequal treatment under the proposed statutes are pregnant women, university students, and sexually active individuals. However, none of these classifications are likely to be recognized as a suspect class for the purposes of equal protection, as women are.<sup>438</sup>

As a starting point, it is important to recognize that there is no right of access to contraceptives, in spite of the decisions in *Griswold*, *Eisenstadt*, and *Roe*,<sup>439</sup> meaning that individuals or groups seeking to challenge regulations like those proposed in Wisconsin or Virginia cannot rely solely on these Supreme Court decisions. States may regulate the business of manufacturing and selling contraceptives, even to the point of burdening women’s reproductive choice, provided that the government can make the difficult showing that it has a compelling state interest in doing so.<sup>440</sup> Although the rights the Supreme Court has delineated in the areas of contraception and abortions are broad for the individual and narrow for the state, it does not follow that a state may never regulate the use or distribution of contraceptives or the procedural requirements of abortion, such as requiring that a licensed physician perform the procedure.<sup>441</sup>

The most important factor in evaluating whether a statute violates the Equal Protection Clause is the scrutiny a reviewing court must apply to the legislation. Prior to 1996, classifications based on gender were subject to intermediate scrutiny, requiring that the government show a substantial governmental interest and that the government prove that the state’s prohibition or regulation be reasonably related to that substantial government interest.<sup>442</sup> In 1996, the Supreme Court applied a more stringent standard to state action in its *United States v.*

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436. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

437. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

438. See *infra* notes 435–54 and accompanying text.

439. See *Carey v. Population Serv. Int’l*, 431 U.S. 678, 688–89 (1977) (striking down the regulation “not because there is an independent fundamental ‘right of access to contraceptives,’ but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing”). Thus, while the Supreme Court has stated that laws in cases such as *Griswold* and *Carey* violated the Constitution, the Court did not do so because states have no right to regulate in the area. Rather, the statutes at issue did not address a sufficiently compelling governmental interest in preserving women’s health or were not tailored to accomplish their purpose without undue burden to women. *Id.*

440. *Id.* at 685–86 (stating that “the constitutionally protected right of privacy extends to an individual’s liberty to make choices regarding contraception [but] does not . . . automatically invalidate every state regulation in this area”). See also *Roe v. Wade*, 410 U.S. 113, 150 (1973).

441. *Carey*, 431 U.S. at 685–86.

442. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

*Virginia* decision.<sup>443</sup> In that case, a female high school student sought admission to the all-male Virginia Military Institute (VMI), was denied admission because she was a woman, and filed a complaint with the Attorney General of the United States alleging that the school's single-sex admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.<sup>444</sup> VMI required rigorous physical and mental discipline of its male cadets,<sup>445</sup> and Virginia argued that admitting women would lead to changes in the school because "the adversative environment could not survive unmodified" with the presence of both sexes.<sup>446</sup> The district court agreed, acknowledging that some women would attend the school if they had the opportunity, but rejecting the equal protection challenge.<sup>447</sup> Although the court agreed that women were denied the benefits of attending VMI, the court concluded that the single-gender environment "yield[ed] substantial benefits" and should be preserved.<sup>448</sup> The Fourth Circuit disagreed and vacated the district court's judgment, saying that Virginia did not have a reason to deny VMI's benefits to men and not to women.<sup>449</sup>

In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women known as the Virginia Women's Institute for Leadership (VWIL).<sup>450</sup> The VWIL program would not have a military format, but would instead use "a cooperative method which reinforces self-esteem."<sup>451</sup> Virginia returned to the district court for approval of the parallel plan, and the district court permitted the program, saying that the guiding legal principles did not require Virginia to provide a mirror image of VMI for women.<sup>452</sup> The Fourth Circuit affirmed the district court's judgment, approving single-gender education generally and examining the program to determine whether the men at VMI and the women at VWIL would obtain comparable benefits at their respective institutions.<sup>453</sup> The court determined that the two schools were sufficiently comparable while acknowledging that the VWIL degree lacked the historical prestige of a VMI degree.<sup>454</sup> The United States sought certiorari, which the Court granted to determine whether VMI's exclusion of women violated the Equal Protection Clause of the Fourteenth Amendment.<sup>455</sup>

Justice Ginsburg's majority opinion noted that the United States and individual

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443. 518 U.S. 515 (1996).

444. *Id.* at 523.

445. *Id.* at 522 (describing the "adversative model" that defines a VMI education, including life in "[S]partan barracks where surveillance is constant and privacy nonexistent" and a "stringently enforced" honor code).

446. *Id.* at 524.

447. *Id.* at 523.

448. *Id.* at 524.

449. *Id.* at 524–25.

450. *Id.* at 526.

451. *Id.* at 527.

452. *Id.* at 528.

453. *Id.* at 528–29.

454. *Id.* at 529.

455. *Id.* at 515.

states had a long history of denying women legal, educational, and economic opportunities solely on account on their gender.<sup>456</sup> The Court then held that courts must determine whether the government's justification for its gender classification "is 'exceedingly persuasive.' The burden is demanding and it rests entirely on the State."<sup>457</sup> Justice Ginsburg noted that this heightened scrutiny "does not make sex a proscribed classification" in all instances.<sup>458</sup> As applied to the VMI, the Court decided that state actors "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"<sup>459</sup> Consequently, the majority held by a margin of seven to one<sup>460</sup> that "the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords."<sup>461</sup>

Applying the Court's standard in *VMI*, a plaintiff alleging a violation of the Equal Protection Clause based on sex shifts the burden of proof to the state government to supply an exceedingly persuasive justification for its ban on the morning after pill. As Justice Ginsburg acknowledged in *VMI*, the burden is a heavy one.<sup>462</sup> The state's justifications would probably include concern for the health of the state's women, the regulation of the distribution of medications, and the concern that rape victims, who often seek use of the morning after pill,<sup>463</sup> will be even less inclined to report the crime to authorities if it is readily available. Given the standard in *VMI*, a reviewing court would probably not find the reasoning "exceedingly persuasive" and would strike down a ban on the sale, distribution, or advertisement of the morning after pill on public college and university campuses as a violation of the Equal Protection Clause of the Fourteenth Amendment.

### C. Due Process

Finally, the most obvious legal challenge to the proposed bans on the morning after pill on Wisconsin's and Virginia's public college and university campuses is based on the right of privacy. In cases including *Griswold*, *Eisenstadt*, *Roe*, *Casey*, and *Lawrence*,<sup>464</sup> the Supreme Court has stated that the right of privacy derives

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456. See *id.* at 531–32 (noting that *United States v. Virginia* "responds to volumes of history" and describing the "prevailing doctrine" of the Supreme Court in earlier days when both federal and state governments "could withhold from women opportunities accorded men so long as any basis in reason could be conceived for the discrimination" (internal quotation marks omitted)).

457. *Id.* at 532 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). The *Hogan* case concerned admission of men to a nursing program at a single-sex college for women. *Id.*

458. *Id.* at 533.

459. *Id.* at 541 (quoting *Hogan*, 458 U.S. at 725).

460. Justice Thomas did not participate in the consideration or decision of the case; Justice Scalia wrote the lone dissent. *Id.* at 518.

461. *Id.* at 519.

462. *Id.* at 532.

463. See generally Schaper, *supra* note 372 (supporting the passage of a federal bill to make emergency contraception available in all hospital emergency rooms for rape victims).

464. See *supra* Part I.

from the Fourteenth Amendment to the Constitution.<sup>465</sup> In its earliest form, Justice Douglas's majority in *Griswold* also alluded to the privacy right's derivability from the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution, taken together.<sup>466</sup>

The joint opinion in *Casey* held that only "where state regulation imposes an undue burden on a woman's ability to make [the abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."<sup>467</sup> Thus, if a law "serves a valid purpose, one not designed to strike at the right itself, [but] has the incidental effect of making it more difficult or more expensive" to get an abortion, the Supreme Court would not necessarily invalidate it.<sup>468</sup> Known as the undue burden test,<sup>469</sup> this new standard replaced the rigid trimester framework in *Roe*.<sup>470</sup> As regards contraception, the basis of the due process argument is that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly."<sup>471</sup> Thus, the argument goes that no state may impose its power on the women who attend public colleges and universities in it so as to prevent them from obtaining the morning after pill, because doing so invades the privacy of those women.<sup>472</sup> This argument does not, however, preclude reasonable regulation of pharmaceuticals such as the conventional birth control pill or the morning after pill.

D. The Current Proposed Bans on the Morning After Pill Were Likely to Face Invalidation by Courts if Enacted Elsewhere, Even If the FDA Had Not Put Plan B Over the Counter for Individuals Over Seventeen Years of Age

The statutes proposed in Wisconsin and Virginia may address contraception and not abortion,<sup>473</sup> but this distinction is unlikely to matter to a court. In either case, the statutes forbid a doctor from using his or her professional medical judgment in

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465. See *supra* notes 244–79 (discussing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

466. See *Griswold v. Conn.*, 381 U.S. 479, 484–85 (1965) (describing past cases involving the right of "privacy and repose" and concluding that the law banning contraceptives "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees"); see also discussion of the majority opinion in *Griswold*, *supra* notes 69–74.

467. *Casey*, 505 U.S. at 874.

468. *Id.*

469. See, e.g., Pacer, *supra* note 283.

470. See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (summarizing the Court's holding as it relates to trimesters).

471. *Griswold*, 381 U.S. at 485 (quoting *NAACP v. Ala.*, 377 U.S. 288, 307 (1964)).

472. *Id.* at 485–86 (stating that the "very idea" that the government could enforce the law banning contraceptives by hunting through a married couple's bedroom "is repulsive to the notions of privacy" surrounding the intimacies of married life). See *supra* notes 103–119 discussing *Eisenstadt v. Baird*, 405 U.S. 438 (1972) in which the Court held that the Equal Protection Clause demanded that the same opportunities and restrictions on contraceptives be applied to married and unmarried couples.

473. See *supra* note 12 and accompanying text.

the care of his or her patients. The Supreme Court stated in *Roe* that, at least prior to the second trimester of pregnancy, the decision whether or not to terminate the pregnancy is within the physician's discretion.<sup>474</sup> Under the standards laid out in *Roe* and *Casey*, if a doctor determines that the morning after pill is in the best interest of a certain patient, the legislature cannot summarily replace his or her judgment with that of lawmakers removed from the circumstances of the case. This argument strikes at the Virginia statute in particular when one considers that Virginia did not have the same context as Wisconsin did in enacting its bill. While Wisconsin would not negate a doctor's judgment through its statute,<sup>475</sup> Virginia almost certainly would do so with the passage of its law.

No state may constitutionally place an absolute ban on the distribution, sale, and prescription of the morning after pill at their public universities. There are other approaches that states may take to regulate the medication, but these alternatives must be more limited in scope than the bans currently proposed.

#### V. FEDERALISM CONCERNS AND THE MORNING AFTER PILL

The FDA's recent decision to put the morning after pill over the counter raises questions about the role of federal and state government in the regulation of public health and safety. The remainder of this Note will discuss the implications of this development; the FDA's decision to make Plan B available over the counter to women eighteen and older, including the college-age population, does not mean that the states have no role in health regulation.

##### A. The *Glucksberg* and *Gonzales* Decisions

Two recent Supreme Court cases addressing state policies regarding physician-assisted suicide illustrate the Court's decision to allow states to determine their own public health policies in this area. In *Washington v. Glucksberg*,<sup>476</sup> the Supreme Court addressed a physician's challenge to Washington's ban on physician-assisted suicide. In *Glucksberg*, Chief Justice Rehnquist, speaking for a five-justice majority, upheld the state's ban on the practice. He acknowledged that some states, such as California, had rejected referenda to legalize physician-assisted suicide,<sup>477</sup> while Oregon had chosen to legalize the practice in 1994.<sup>478</sup> The physicians claimed that the ban violated an individual's liberty under the Due Process Clause of the Fourteenth Amendment.<sup>479</sup> The Court rejected this claim,<sup>480</sup>

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474. *Roe*, 410 U.S. at 163 ("for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State" whether an abortion is necessary or in the best interests of the patient) (emphasis added).

475. According to the advertisements that spurred the proposed Wisconsin statute, students did not have to receive a doctor's advice or prescription to obtain the morning after pill. See UW Ad, *supra* note 1.

476. 521 U.S. 702 (1997).

477. *Id.* at 717.

478. *Id.*

479. *Id.* at 705-06.

finding that a right to physician-assisted suicide is not a fundamental right “deeply rooted in history in this Nation’s history and tradition”<sup>481</sup> and therefore not entitled to protection from state regulation under the Fourteenth Amendment. The Court sought to “rein in the subjective elements that are necessarily present in due-process judicial review”<sup>482</sup> before requiring more than a reasonable relation to a legitimate state interest to justify legislative action.<sup>483</sup> Because the state has an interest in preserving life,<sup>484</sup> in protecting individuals in vulnerable groups,<sup>485</sup> in protecting the integrity of the medical profession,<sup>486</sup> and preventing involuntary euthanasia,<sup>487</sup> Chief Justice Rehnquist said that Washington’s ban on assisted suicide was “at least reasonably related to” these interests and therefore permissible.<sup>488</sup>

The Supreme Court’s recent decision in *Gonzales v. Oregon*<sup>489</sup> further illustrates the current balance between federal and state power in health care and drug regulation. Oregon became the first state to legalize assisted suicide by referendum in 1994.<sup>490</sup> In *Gonzales*, the State of Oregon, along with a physician, a pharmacist, and a number of terminally ill patients challenged in federal court Attorney General John Ashcroft’s<sup>491</sup> 2001 Interpretive Rule, which said that assisting suicide could not be a legitimate medical purpose within the meaning of the Controlled Substances Act (CSA).<sup>492</sup> The district court entered a permanent injunction against the enforcement of the Interpretive Rule.<sup>493</sup> After granting a petition for review, the Court of Appeals for the Ninth Circuit affirmed; the court reasoned that criminalizing a medical procedure authorized under Oregon law tampered with the federal-state balance.<sup>494</sup> The United States government petitioned for certiorari, which the Supreme Court granted.<sup>495</sup>

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480. *Id.* at 706.

481. *Id.* at 721 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

482. *Id.* at 722.

483. *Id.*

484. *Id.* at 728.

485. *See id.* at 729 (noting that individuals who attempt suicide “often suffer from depression or other mental disorders”); *see also id.* at 731 (citing the “the poor, the elderly, and disabled persons” as potential targets for “abuse, neglect, and mistakes”).

486. *Id.* at 731.

487. *Id.* at 732.

488. *Id.* at 735.

489. 126 S. Ct. 904 (2006).

490. *Id.* at 911.

491. John Ashcroft stepped down as Attorney General in 2005. Alberto Gonzales succeeded him in that position and was substituted as a party.

492. *Gonzales*, 126 S. Ct. at 913–14. Congress first enacted the CSA in 1970, creating a “comprehensive, closed regulatory regime” criminalizing the manufacture, distribution, dispensing, and possession of controlled substances. Congress placed controlled substances into one of five categories. The drugs that doctors prescribed to terminally ill patients fell under Category II as generally available only by a one-time written prescription. *Id.* at 911–12.

493. *Id.* at 914.

494. *Id.*

495. *Id.*

Justice Kennedy, writing for the six-justice majority, first examined the possible levels of deference that the Attorney General was entitled to in his interpretation of the CSA. The Court noted that an “administrative rule may receive substantial deference if it interprets the issuing agency’s own ambiguous regulation”<sup>496</sup> and that an “interpretation of an ambiguous statute may also receive substantial deference”<sup>497</sup> from courts. Justice Kennedy, however, elected not to defer to the Attorney General’s interpretation, reasoning that an agency “does not acquire special authority to interpret its own words when instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”<sup>498</sup> Thus, while Congress did delegate power to the Attorney General to formulate rules under the CSA,<sup>499</sup> Congress delegated only limited powers to “promulgate rules and regulations and to charge reasonable fees relating to the registration and control of . . . controlled substances and to listed chemicals”<sup>500</sup> and to “promulgate and enforce any rules, regulations, and procedures which he [sic] may deem necessary and appropriate for the efficient execution of his [sic] functions under this subchapter.”<sup>501</sup> Justice Kennedy noted that “Congress did not delegate to the Attorney General authority to carry out or effect all provisions of the CSA.”<sup>502</sup> He further stated that the Attorney General could not define the substantive standards of medical practice as part of his responsibilities under the CSA because doing so would put the statute “in considerable tension with the narrowly defined delegation concerning control and registration”<sup>503</sup> of controlled substances; the CSA, he said, envisioned an expansive role for states in the regulation of controlled substances.<sup>504</sup>

After determining that the Attorney General had exceeded his authority under the CSA, the Court examined whether the CSA could be read to prohibit physician-assisted suicide.<sup>505</sup> Justice Kennedy said that Congress regulates the medical profession to the extent that it bars doctors from engaging in illicit drug trafficking, but that Congress had not expressed an intent to regulate medicine generally.<sup>506</sup> Rather, the “structure and limitations of federalism”<sup>507</sup> enable the states to retain control over the medical community through the police power. Had Congress sought to regulate or ban physician-assisted suicide, it would have done

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496. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997)).

497. *Id.* at 914 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

498. *Id.* at 916.

499. *See id.* (acknowledging that the Attorney General “has rulemaking power to fulfill his duties under the CSA”).

500. *Id.* (quoting 21 U.S.C.A. § 821 (Supp. 2005)).

501. *Id.* at 917 (quoting 21 U.S.C.A. § 871(b) (2000)).

502. *Id.* at 917.

503. *Id.* at 920.

504. *See id.* at 912 (noting that the CSA “explicitly contemplates a role for the States in regulating controlled substances”).

505. *Id.* at 922.

506. *Id.* at 923.

507. *Id.*

so by explicit language in the CSA, he said.<sup>508</sup> The structure of the CSA, which contemplates a broad role for the states, “belie[s] the notion” that Congress would grant the Attorney General authority “to regulate areas traditionally supervised by the States’ police power.”<sup>509</sup> The majority concluded that “the text and structure of the CSA show that Congress did not have . . . [the] intent to alter the federal-state balance and the congressional role in maintaining it”<sup>510</sup> and affirmed the judgment of the Ninth Circuit.<sup>511</sup>

Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, dissented. First, Justice Scalia said, the majority failed to properly defer to the Attorney General’s interpretation because “the [Interpretive Rule] purported to interpret the language of the Regulation”<sup>512</sup> and therefore the case “call[ed] for the straightforward application of [the Court’s] rule that an agency’s interpretation of its own regulations is ‘controlling unless plainly erroneous or inconsistent with the regulation.’”<sup>513</sup> Justice Scalia rejected the majority’s conclusion that the Attorney General had merely parroted statutory language because the regulation interpreted the word “prescription” as used in the CSA.<sup>514</sup> The dissenting justices then said that the justices in the majority erred when they determined that the Attorney General’s duty of registration and control did not encompass control over the processes of manufacture, distribution, and dispensing of controlled substances,<sup>515</sup> including the establishment of what constitutes a valid medical purpose for prescriptions. Thus, Justice Scalia said, the Attorney General’s decision not to interpret physician-assisted suicide as a legitimate medical purpose was “perfectly valid.”<sup>516</sup> Furthermore, Justice Scalia said that even if the Court afforded the Attorney General no deference, “[v]irtually every relevant source of authoritative meaning”<sup>517</sup> confirms the Attorney General’s directive that assisting suicide is not a legitimate medical purpose. Finally, Justice Scalia said that the statute explicitly granted the Attorney General the power to register and deregister physicians, and that he may choose to do so when the physician engages in conduct that threatens the public interest;<sup>518</sup> the Attorney General’s interpretations of what is done for the public health and safety are, Justice Scalia said, subject to *Chevron* deference.<sup>519</sup>

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508. *Id.* at 924.

509. *Id.* at 925.

510. *Id.*

511. *Id.* at 926.

512. *Id.* at 927 (Scalia, J., dissenting). The regulation at issue was the Attorney General’s interpretation of what constituted a “legitimate medical purpose.” See 21 C.F.R. § 1306.04 (2005).

513. *Gonzales*, 126 S. Ct. at 927 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

514. *Id.* at 927 (Scalia, J., dissenting).

515. *Id.* at 929–30.

516. *Id.* at 931 (reasoning that the Court should defer to the Attorney General’s interpretation because, under *Bowers v. Seminole Rock & Sand Company*, 325 U.S. 410 (1945), the Attorney General’s construction is not plainly erroneous or inconsistent with the regulation, and under *Chevron*, 467 U.S. 837 (1984), it is “not beyond the scope of ambiguity in the statute”).

517. *Id.*

518. *Id.* at 935–36.

519. *Id.* at 938. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467

Justice Thomas also dissented, reasoning that the majority improperly applied its earlier decision in *Gonzales v. Raich*,<sup>520</sup> in which the Court had also examined the CSA. He said that in *Raich* the majority had interpreted the CSA broadly when it determined that the CSA applied to the intrastate possession of marijuana for medical purposes.<sup>521</sup> Justice Thomas also indicated that while he agreed with the interpretation of the CSA “in a manner consistent with the principles of federalism and our constitutional structure,”<sup>522</sup> the Court had already struck that balance in *Raich* and considering the federal-state balance at this stage was “water over the dam.”<sup>523</sup> He concluded that the majority’s decision to rely on principles it had rejected only months earlier was “perplexing to say the least.”<sup>524</sup>

B. *Glucksberg, Gonzales, and the Decision to Put the Morning After Pill Over the Counter*

The application of the *Gonzales* decision to the FDA’s recent decision to put the morning after pill over the counter is relatively straightforward from a strictly legal standpoint. The FDA came into being with the passage of the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA).<sup>525</sup> As the federal agency charged with ensuring the safety of food and pharmaceuticals, the FDA has discretion in deciding whether or not to approve a drug for prescription or over the counter use. Unlike the Attorney General’s Interpretive Rule in *Gonzales*, where the official’s capacity to make the decision was subject to doubt, the FDA was undoubtedly within its province when it approved “OTC availability of Plan B for consumers 18 years and older” on August 24, 2006.<sup>526</sup> By the terms of the federal statute, an application for new drug approval should be approved if none of seven conditions for refusal are met.<sup>527</sup> Accordingly, the application for Plan B was approved

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U.S. 837, 842-43 (1984)). Commonly known as *Chevron* deference, this low standard of judicial review for government agency regulations has come under scrutiny in recent years. See, e.g., Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203, 209 (Spring 2004) (stating that some statutory interpretations by agencies “raise substantial questions about whether it is appropriate to apply the principle of *Chevron* deference to a self-interested agency interpretation”). The Supreme Court has narrowed the application of *Chevron* in certain contexts in an effort to cut back on the breadth of the *Chevron* doctrine. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding that not all federal agencies are entitled to *Chevron* deference).

520. 545 U.S. 1 (2005) (holding that application of the CSA to the purely intrastate activity of growing marijuana for medicinal purposes was a valid exercise of the commerce power).

521. *Gonzales*, 126 S. Ct. at 940 (Thomas, J., dissenting).

522. *Id.* at 941.

523. *Id.*

524. *Id.*

525. See 21 U.S.C.A. §§ 301–399 (West 2000 & Supp. 2006) (requiring, among other things, the registration of pharmaceutical manufacturers, an approval process for new drugs, and penalties for the misbranding or adulteration of drugs).

526. FDA Approval Letter, *supra* note 7, at 2.

527. 21 U.S.C. § 355(d) (2000). The seven grounds for dismissal are inadequate testing of the product, test results indicative that the product is unsafe, inadequate or impure manufacturing methods, insufficient information on the drug’s safety in certain conditions, lack of substantial evidence that the drug will have the purported effect, failure of the application to contain relevant

pursuant to certain conditions, including the evaluation of possible correlation between its use and any increase in sexually transmitted diseases and the creation of an anonymous shopper program to ensure that the product is not sold over the counter to individuals under eighteen years of age.<sup>528</sup> In its decision to put the morning after pill over the counter, the FDA followed its own procedures, including having a public comment period<sup>529</sup> and meeting with the drug's manufacturer to discuss enforcement of the age restriction required by the final order,<sup>530</sup> before it made its decision.

The FDA's decision to put Plan B over the counter has some positive effect on women enrolled in colleges and universities. Rape victims who may otherwise become pregnant through no fault of their own may be spared the trauma of later obtaining an abortion or choosing to have a child alone because Plan B is now available without having to obtain a prescription.<sup>531</sup> Individuals whose efforts to practice safe sex fail, as might happen if a condom breaks during sex, will have a further method of protection against an unplanned pregnancy. Young women who make an imprudent choice may avoid the life-altering possibility of pregnancy through Plan B.

Along with these benefits, however, come concerns with the role of the states in regulating public health and safety. Writing for the majority in *Gonzales*, Justice Kennedy emphasized the "great latitude [that the states have under their] police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons"<sup>532</sup> and stressed that the federal-state balance that Congress struck in the original CSA should not be disturbed.<sup>533</sup> The question of the extent to which federal law and federal regulations should preempt efforts at state regulation through statutes and the development of common law is highly debated one.<sup>534</sup>

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patent information, and false or misleading product labeling.

528. FDA Approval Letter, *supra* note 7, at 2.

529. *See id.* at 1 (noting that the comment period closed in November of 2005 after the agency received about 47,000 comments from the public).

530. *Id.* at 2.

531. *See supra* notes 371–377 and accompanying text.

532. *Gonzales v. Oregon*, 126 S. Ct. 904, 923 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)) (internal quotation marks omitted).

533. *See id.* at 925 (noting that the statute is structured with "careful allocation of decisionmaking powers" in mind and doubting that "Congress would use such an obscure grant of authority [to the Attorney General] to regulate areas traditionally supervised by the States' police power").

534. *See generally* Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763 (2006) (concluding that values attributed to federalism, such as preventing tyranny and preserving the states as laboratories, have nothing to do with the Rehnquist Court's decisions in this area); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (noting that claims of state sovereignty can pose risks to other states in the form of externalities and tracing the development of federal standards as a response to the need for uniform control of a national market); Marilyn P. Westerfield, Comment, *Federal Preemption and the FDA: What Does Congress Want?*, 58 U. CIN. L. REV. 263 (1989) (finding preemption case law inconsistent but concluding that the FDA's complete preemption of state law in the area of drug labeling and regulation is undesirable because it would grant pharmaceutical companies immunity from suit if in compliance with the FDA's requirements).

The Supreme Court has experimented with various formulations of the federal-state balance over the last century,<sup>535</sup> with its interpretation of the CSA in *Gonzales* only the latest.

Although the Court's federalism jurisprudence has changed as much as, or more often than, the Court's composition over the years, no decision has seriously suggested that there is no longer a viable role for the states in the American system. However, the FDA's recent action prevents any serious form of state regulation of the morning after pill, even setting aside the proposed campus-wide bans of Plan B. Given the intense debate surrounding the drug, states should be given more opportunity to legislate in the area due to the consequences of a federal decision.

One potential consequence of the FDA's decision to put the morning after pill over the counter while the standard birth control pill remains prescription only is that the pharmaceutical company producing Plan B may have to meet only the FDA's minimal standards for packaging and labeling to avoid tort liability. States that wish to permit causes of actions against the drug company on a theory of products liability will likely see such causes of action preempted by the FDA's decision, which could shield the company from liability if Plan B is later found to be unsafe.<sup>536</sup> The federal regulation could immunize the manufacturer from liability in that any state law imposing additional obligations on the manufacturer would be nullified.<sup>537</sup> If states had been given the opportunity to regulate in this

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535. See, e.g., *United States v. Lopez*, 514 U.S. 549, 576 (1995) (striking down federal statute prohibiting possession of a firearm within 1,000 feet of a school as outside the scope of the commerce power and stating that "it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (overruling *National League of Cities* and finding that the states have authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government"); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 845 (1976) (finding that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority . . . but because the Constitution prohibits it from exercising the authority in that manner"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

536. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding state common law tort action based on absence of driver's side airbag preempted by Department of Transportation's order demanding installation of airbags in some, but not all, 1987 automobiles); *Bravman v. Bayer Healthcare Corp.*, 842 F. Supp. 747, 755 (S.D.N.Y. 1994) (noting state law tort claim for FDA-approved heart valve was preempted "when the Food and Drug Administration has established specific counterpart regulations or there are other specific requirements applicable . . . making any existing divergent State or local requirements applicable to the device different from, or in addition to, the specific Food and Drug Administration requirements").

537. Westerfield, *supra* note 534, at 280; see also Wilfred P. Coronato et al., *The Fracture That Will Not Heal: The Landscape of Federal Preemption in the Fields of Medical Devices, Prescription and Over-the-Counter Drugs Ten Years After Medtronic, Inc. v. Lohr*, SL038 A.L.I.-A.B.A. 365, 380-82 (Aug. 2005) (tracing several cases in which federal regulation preempted state law claims); Issacharoff & Sharkey, *supra* note 534, at 1372-73 (raising and challenging the argument that "preemption is simply a tool to disable regulation and give potential tortfeasors a

area, more effective safety measures could have been put in place, more studies could have been conducted, and the democratic process could have provided a number of different solutions, as in the assisted suicide debate. For example, the majority of states ban physician-assisted suicide in order to avoid concerns with exploitation of certain groups and to avoid damaging the integrity of the medical profession.<sup>538</sup> Oregon chose, however, to alleviate those concerns in another way while permitting the practice; the state's regulations of physician-assisted suicide contain features that address these problems without requiring a ban on physician-assisted suicide.<sup>539</sup> The country is "engaged in an earnest and profound debate about the morality, legality, and practicality"<sup>540</sup> of the morning after pill, just as it continues to debate the merits of physician-assisted suicide.

## VI. CONCLUSION

The FDA's decision mandates a uniform national policy, but it does not end the debate over Plan B's merits, particularly in situations like the one found on the University of Wisconsin's campus in 2005.<sup>541</sup> Presumably, even the manufacturer of Plan B would discourage its distribution as a form of "preparation"<sup>542</sup> for unprotected sex.<sup>543</sup> Given the wide range of college experiences across the states, states might have developed innovative policies to provide better education on the proper use of Plan B to students and the public generally and better training to pharmacists who are required to enforce the age restriction. As it currently stands, Plan B's manufacturer has agreed to participate in an anonymous shopper program to ensure compliance with the age restriction,<sup>544</sup> but there are no other safeguards in place and any state's attempts to buttress enforcement are preempted by the terms of the FDA's decision. The FDA's decision to put the morning after pill over the counter has sacrificed a range of possible actions for educating young women and protecting their health in favor of a policy that gives all college-aged

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wider berth in which to act").

538. See *Washington v. Glucksberg*, 521 U.S. 701, 710 n.8 (quoting *Compassion in Dying v. Washington*, 79 F.3d 790, 847 (9th Cir. 1996)) (noting that forty-four states and the District of Columbia have outlawed or condemned assisted suicide).

539. See, e.g., OR. REV. STAT. ANN. § 127.520 (West 2006) (prohibiting attending physician from serving as attorney-in-fact for patient); OR. REV. STAT. ANN. § 127.085 (West 2006) (requiring residency in the state of Oregon and a voluntary expression of the desire to die); OR. REV. STAT. ANN. § 127.810 (West 2006) (permitting physician-assisted suicide only if at least two witnesses "attest that to the best of their knowledge and belief the patient is capable, acting voluntarily, and is not being coerced to sign the request").

540. *Glucksberg*, 521 U.S. at 735.

541. See *supra* Introduction.

542. See *UW Ad*, *supra* note 1.

543. Duramed's proposed packaging for Plan B notes that the drug should not be used for regular birth control. DURAMED PHARMACEUTICALS, LABELS FOR PLAN B 5 (Aug. 2006), available at <http://www.fda.gov/cder/foi/label/2006/021045s011lbl.pdf>. The company's labels also recommend that women "use routine pregnancy protection" rather than relying on Plan B. *Id.* at 14. Furthermore, the company warns that its product will not protect women who have unprotected sex from sexually transmitted diseases. *Id.* at 10.

544. See FDA APPROVAL LETTER, *supra* note 7, at 2-3.

women over-the-counter access to a stronger dose of birth control than is currently available only by prescription. Although the proposed statutes in Wisconsin and Virginia would not have withstood constitutional scrutiny, the current national debate over Plan B's availability indicates that the issue should have been left to state regulation, as in *Glucksberg* and *Gonzales*.

The contentious debate over the morning after pill's availability and the likelihood of future studies concerning issues of moral hazard and the morning after pill's affect, if any, on the rate of abortion, indicates that a reversal of the decision is possible. If such a reversal occurs, the issues imputed by the proposed Wisconsin and Virginia statutes will once again be at the forefront of the national debate and public colleges and universities could once again be of special concern for state legislators.