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Griswold at 40:
The State's Compelling Interest
in Banning Contraceptives

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Fides et Iustitia

COMMENT

**GRISWOLD AT 40:
THE STATE'S COMPELLING INTEREST
IN BANNING CONTRACEPTIVES**

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I. INTRODUCTION

The right to privacy just had its fortieth birthday. It has led a highly contentious life and, like many of the middle-aged, is currently going through a mid-life identity crisis.¹ The constitutional grandfather of the right to privacy—the right to contract—experienced a similar crisis and was summarily executed shortly after it reached its fortieth birthday.² The purpose of this paper is to explain why a similar fate should befall this illegitimate grandchild³—the right to privacy.

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1. See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 233 (Princeton U. Press 2004) (arguing that the Supreme Court has abandoned the right to privacy and substituted a “presumption of liberty”).

2. Many might assume that the “right to contract” originated with *Lochner v. N.Y.*, 198 U.S. 45 (1905). However, on March 1, 1897, the Court stated that the “‘liberty’ mentioned in [the fourteenth] amendment means . . . the right . . . to enter into all contracts which may be proper, necessary, and essential . . .” *Allgeyer v. La.*, 165 U.S. 578, 589 (1897). A little more than forty years later, on March 29, 1937, the Court stated that “[t]here is no absolute freedom to do as one wills or to contract as one chooses.” *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937). Although *West Coast Hotel* did not explicitly overrule *Lochner*, the Court indicated in 1992 that *West Coast Hotel* overruled the line of cases identified with *Lochner*. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 836 (1992). Both *West Coast Hotel* and *Lochner* identified *Allgeyer* as the first in the line of freedom of contract cases. *W. Coast Hotel*, 300 U.S. at 392 n.1; *Lochner*, 198 U.S. at 53.

3. Justice Douglas attempted to distance his opinion from *Lochner*'s paternity. *Griswold v. Conn.*, 381 U.S. 479, 482 (1965). However, his opinion relied upon at least two cases that had themselves relied ultimately on *Lochner*. *Id.* at 483 (citing *Pierce v. Socy. of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Neb.*, 262 U.S. 390 (1923)). Justice Black's dissenting opinion pointed out the majority's reliance upon the philosophy used in *Lochner* that was subsequently repudiated by the Court. *Id.* at 514-16 (Black & Stewart, JJ., dissenting). For another discussion of the majority's reliance upon *Lochner*, see Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 Ohio N.U. L. Rev. 511, 516-17 (1989).

Ironically, the right to privacy was created in response to a claim that a married couple had a right *not* to create.⁴ This announcement was originally known to but a few, as it was first expressed by a member of the U.S. Supreme Court in Justice Harlan's dissent in *Poe v. Ullman*.⁵ Some of the other justices in that case were not yet ready to recognize the right to privacy, essentially arguing on justiciability grounds that it would be premature to let it be born.⁶ Four years later, however, when the state of Connecticut subsequently enforced its laws prohibiting contraception, the Court delivered this new right in *Griswold v. Connecticut*.⁷ The right in *Griswold* focused on "notions of privacy surrounding the marriage relationship."⁸ Within twelve years, the right had been extended both to the unmarried⁹ and to minors.¹⁰

The theoretical right to privacy espoused by academics¹¹ was actualized by the Court in *Griswold* by means of a right to contraceptives. Thus, if one can show that the right to contraceptives can be banned due to compelling state interests, we could determine that other rights that the Court has enunciated by relying on *Griswold* would rest upon a similarly shaky foundation.

This paper will analyze the constitutionality of a hypothetical state-wide ban on contraceptives.¹² First, it will review the Court's jurisprudence relating to contraceptives and specifically articulate the protected right. Then, it will establish the standard of review the Court would probably use to determine the constitutionality of a state's complete ban on contraceptives. Finally, this paper will show that such a ban should be upheld because the use of contraceptives—first protected as a fundamental right of privacy in *Griswold*—causes injuries to persons and abuses the legally protected institution of marriage.

4. See *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting) ("the right of privacy [is] embraced in the 'liberty' of the Due Process Clause").

5. *Id.*

6. *Id.*

7. 381 U.S. 479.

8. *Id.* at 486.

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

10. *Carey v. Population Services Intl.*, 431 U.S. 678 (1977).

11. One of the most famous academic articles espousing a broad understanding of the right—though not a right to contraceptives—was published seventy-five years before *Griswold*. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). In his dissenting opinion in *Poe*, Justice Douglas buttresses his argument that the Connecticut law was unconstitutional by quoting Catholic theologian John Courtney Murray—who described the statute as "indefensible as a piece of legal draughtsmanship." 367 U.S. at 521 (Douglas, J., dissenting) (quoting John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* 157-58 (Sheed & Ward 1960)). It should be noted that Murray, nonetheless, considered the use of contraception to be a sin. *Id.*

12. This paper will *not* evaluate the public policy wisdom of enacting such a ban; rather, it assumes that a state has banned all contraceptives for the reasons provided and then evaluates the constitutional validity of such a ban. That is, the question analyzed is not whether a ban should be enacted, the question analyzed is whether an enacted ban would be constitutional.

II. IS THERE A FUNDAMENTAL RIGHT TO CONTRACEPTIVES?

In 1997, the Court noted that its established method in analyzing Fourteenth Amendment “substantive-due-process cases [required] a ‘careful description’ of the asserted fundamental liberty interest.”¹³ The right of privacy recognized in *Griswold* does not neatly fit into this method of analysis. The opinion relied strongly upon the institution of marriage for its rationale in declaring unconstitutional Connecticut’s law criminalizing the use or assistance in the use of “any drug, medicinal article or instrument for the purpose of preventing conception.”¹⁴ However, the Court refrained from stating that there was a fundamental right to use or assist in using contraceptives.¹⁵ Instead, it looked at a number of cases where state actors had restricted enumerated rights and concluded that the “cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”¹⁶ The average reader may understandably be confused by that description of the liberty interest, because seven years after *Griswold*, the Court itself was unclear whether *Griswold* prohibited a state from enacting a ban on contraception.¹⁷

A year after *Griswold*, Massachusetts attempted to comply with the decision by adding an exception to its ban on contraceptives. The exception allowed a married person to obtain, from a physician, a prescription for “drugs or articles intended for the prevention of pregnancy or conception.”¹⁸ However, in *Eisenstadt v. Baird*, the Court invalidated even this

13. *Wash. v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citation omitted).

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

15. *Id.* at 485 (“The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”).

16. *Id.* at 484.

17. *Eisenstadt*, 405 U.S. at 452-54. The Court passed on the question of whether the Massachusetts statute could be upheld “simply as a prohibition on contraception” by stating “[w]e need not and do not, however, decide that important question in this case because, 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.” *Id.* at 453.

18. *Id.* at 442 n. 2 (citing Mass. Gen. Laws ch. 272, § 21A (1966)). The entire text of footnote 2 reads:

Section 21 provides in full:

‘Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars.’

Section 21A provides in full:

‘A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist

amended Massachusetts law.¹⁹ The law prohibited, among other things, the distribution to the *unmarried* of any “instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument, or article whatever for the prevention of conception or for causing unlawful abortion.”²⁰ Using an equal protection analysis in comparing the rights of married and unmarried persons, the Court found that the statute was not rationally related to the state’s asserted dual purposes to both protect “the health of its citizens” and “to protect morals” by discouraging marital infidelity and premarital sex.²¹

The Court in *Eisenstadt* refused to conclude on the question of whether a state statute banning the distribution of contraception would be unconstitutional.²² However, it certainly signaled that it would hold that way if presented squarely with the question.²³ In dicta, the Court quoted the lower court’s opinion that legislation premised on the immorality of contraceptives would not only be “the very mirror image of sensible legislation; [it would] conflict[] with fundamental human rights.”²⁴ It then stated that “[i]f 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.”²⁵ Finally, although the opinion in *Griswold* could certainly be viewed as “no bar to a prohibition on the distribution of contraceptives,” the Court in *Eisenstadt* made no attempt to defend that view.²⁶ All of these words, however, were unnecessary to the Court’s holding that the law violated the equal protection clause.

actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

‘A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

‘This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device.’

19. *Id.* at 440.

20. *Id.* at 442 n. 2 (citing Mass. Gen. Laws ch. 272, § 21).

21. *Id.* at 442-43.

22. *Id.* at 453 (“[w]e need not and do not, however, decide that important question in this case because, 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”).

23. *Id.* at 452-54.

24. *Id.* at 453.

25. *Id.* The seemingly inapposite inclusion of the word “bear” in this sentence has long been speculated to be an attempt to lay a foundation for the Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* was first argued before the Court less than a month after *Eisenstadt* and three months before the *Eisenstadt* decision was handed down. See John T. Noonan, Jr., *A Private Choice: Abortion in America in the Seventies* 21 (The Free Press 1979).

26. *Eisenstadt*, 405 U.S. at 454.

A year after *Eisenstadt*, the Court in *Roe v. Wade* stated that the “right of privacy, [if] it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”²⁷ The Court concluded that the right of privacy was “not unqualified and must be considered against important state interests in regulation.”²⁸ The Court also stated that “[w]here certain ‘fundamental rights’ are involved . . . regulation limiting these rights may be justified only by a ‘compelling state interest,’ . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”²⁹

In 1977, when the Court addressed a New York state law regulating contraception, it wrote that “the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”³⁰ Although the Court discussed “the freedom to choose contraception,” it specifically rejected the holding that “there is an independent fundamental ‘right of access to contraceptives.’”³¹ However, it continued by stating that “such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*.”³²

According to the Court at that time, access to contraceptives was not a fundamental right, but denying access would infringe upon a broader fundamental right. Drawing such a fuzzy line, however, does not meet the subsequently stated “careful description” requirement of *Washington v. Glucksberg*.³³ Additionally, subsequent cases have indicated that *Griswold* and its progeny “afford[] constitutional protection” to “the decision to use contraception.”³⁴ As argued by one commentator, the Court is struggling

27. *Roe*, 410 U.S. at 153.

28. *Id.* at 154.

29. *Id.* at 155 (citation omitted).

30. *Carey*, 431 U.S. at 687.

31. *Id.* at 688.

32. *Id.* at 688-89. I’m unable to let that quote pass without comment. Neither the *Griswold* nor the *Eisenstadt* opinions indicated that the “right of decision in matters of childbearing [was] the underlying foundation” of their holdings. As one commentator has pointed out, even plaintiff’s counsel in *Griswold* disavowed that understanding at oral argument. “The Court specifically asked [counsel] whether his theory would not invalidate state regulation of abortion. He replied that it would not since, unlike the contraception issue in *Griswold*, abortion is less likely to take place within the sanctity of the home, and a life in being apart from the married couple is affected.” Bloom, *supra* n. 3, at 533 n. 201. The Court in *Eisenstadt* explicitly grounded its holding on the equal protection clause. Although it may be impertinent of me to suggest that the Court was being dishonest either in the earlier cases or in *Carey*, this kind of hide-the-ball jurisprudence is beneath the Court.

33. 521 U.S. at 720-21.

34. *Carey*, 505 U.S. at 852; see *Glucksberg*, 521 U.S. at 763 (1997) (Souter, J., concurring in judgment).

with two competing premises.³⁵ On the one hand, the Court is interested in maintaining a presumption of constitutional validity for legislative enactments that do not implicate fundamental rights.³⁶ On the other hand, the Court views itself as the protector of individual liberty, which encompasses more than just enumerated rights. As a result, the Court speaks of “liberty interests,” but does not announce whether the particular liberty interest should be afforded fundamental rights status.³⁷

Nonetheless, it appears likely that in reviewing our hypothetical state ban on contraceptives, the Court would begin with the presumption that the ban infringed upon a fundamental right. Regardless of the specific articulation, the Court has held that a state regulation of contraceptives could only be justified by a compelling interest “and must be narrowly drawn to express only those interests.”³⁸ Such an analysis is often described as “strict scrutiny.”³⁹

III. A FRAMEWORK FOR ANALYZING A STATE BAN ON CONTRACEPTIVES: A PROPOSAL BASED ON THE LESSONS LEARNED FROM STUDENT DIVERSITY, BAITFISH HEALTH, AND HOMOSEXUAL SODOMY

Recently, the Court wrote that “[s]trict scrutiny is not ‘strict in theory, but fatal in fact.’”⁴⁰ That is, there *are* some circumstances in which state action subjected to strict scrutiny will nonetheless be considered constitutional. Outside of abortion cases, however, where the Court has created the one-of-a-kind “undue burden” standard,⁴¹ the Court has provided little guidance on how to analyze the constitutionality of state actions affecting substantive due process rights. As a result, it is necessary to review other regions of the Court’s jurisprudence in order to come up with a framework for analyzing a hypothetical state ban on contraceptives. Unfortunately, there are very few cases where the Court’s scrutiny was not “fatal in fact” to the state action. A review of two of those cases will help provide a framework for predicting how the Court would analyze a state law banning contraceptives. Finally, the Court’s recent decision in *Lawrence v. Texas* may confirm that the proposed framework is the correct one.⁴²

35. Barnett, *supra* n. 1, at 224-69.

36. *Id.* at 232-34 (referencing *U.S. v. Carolene Prod. Co.*, 304 U.S. 144, 152 n. 4 (1938) and describing the analysis as “Footnote Four-Plus”).

37. *Id.* at 254.

38. *Carey*, 431 U.S. at 686.

39. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

40. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand*, 515 U.S. at 237).

41. *See Casey*, 505 U.S. at 988 (Rehnquist, C.J., White, Scalia & Thomas, JJ., concurring in the judgment in part and dissenting in part) (“The ‘undue burden’ standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for these cases, to preserve some judicial foothold in this ill-gotten territory.”).

42. 539 U.S. 558 (2003).

A. *The Equal Protection Clause Test: The Compelling Interest in Law School Student Diversity*

The University of Michigan Law School takes into account the race of a student applicant in evaluating whether to admit the student into the law school.⁴³ As the Court had previously explained, “whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.”⁴⁴ However,

[w]hen race-based action is necessary to further a compelling government interest, such action does not violate the constitutional guarantee of equal protection so long as the [action is narrowly tailored to meet the government’s interest].⁴⁵

Considering that racial discrimination was the primary evil that the Fourteenth Amendment was intended to combat, it appears logical that a contraceptive ban should not be held to a higher level of scrutiny than state-sponsored racial discrimination. Thus, if we substitute “a ban on contraceptives” for “race-based action” in the rule expressed in *Grutter v. Bollinger*, we have the strictest articulation of the level of review that the Court would use.⁴⁶

The Court indicated that the school’s asserted compelling interest was “the educational benefits that flow from a diverse student body.”⁴⁷ It then listed a number of those benefits, such as “cross-racial understanding,” promotion of “learning outcomes,” and professional preparation of “students for an increasingly diverse workforce and society.”⁴⁸ The Court determined that these benefits were compelling and concluded its analysis by stating that “[t]he Law School has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”⁴⁹

The Court then turned to an analysis of whether the law school’s admission plan was narrowly tailored. In finding that it was, the Court explained that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”⁵⁰ The district court had found that the admissions plan was not narrowly tailored, partly because of the law school’s refusal to reduce its emphasis on LSAT scores and undergraduate

43. *Grutter*, 539 U.S. at 314.

44. *Id.* at 327 (quoting *Adarand*, 515 U.S. at 229-30).

45. *Id.*

46. *Id.*

47. *Id.* at 328.

48. *Id.* at 330.

49. *Id.* at 333.

50. *Id.* at 339.

GPA.⁵¹ However, the Court rejected this argument because narrow tailoring does not “require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”⁵²

The state’s asserted compelling interest had not been previously recognized as such by the Court.⁵³ Additionally, the Court’s reluctance to require exhaustion of every conceivable alternative appears to be original to the Court’s historical strict scrutiny jurisprudence. Although the newness of the Court’s analysis led the dissent to conclude that the Court’s scrutiny was not all that strict,⁵⁴ it likely would be a mistake to believe that the Court would be as lenient with a state’s asserted interest and tailoring of a ban on contraceptives. Additionally, because the equal protection clause is not the same as the due process clause, the Court could articulate a different rule for reviewing a state’s ban on contraceptives. One possible framework would be the test used by the Court to determine whether a state has violated the dormant commerce clause.

B. The Dormant Commerce Clause Test: The Legitimate Interest in Baitfish Health

In 1986, the State of Maine’s criminal ban on the interstate importation of baitfish was brought before the Court.⁵⁵ The defendant, Robert J. Taylor, argued that Maine’s ban violated the principle of the dormant commerce clause—that a state can’t “erect barriers against interstate trade.”⁵⁶ Although the district court ruled against him, the Court of Appeals for the First Circuit found the statute to be unconstitutional.⁵⁷ In reviewing the statute, the Supreme Court placed the burden of proof “on the State to demonstrate both that the statute ‘serves a legitimate local purpose,’ and that this purpose could not be served as well by available nondiscriminatory means.”⁵⁸ Importantly, the Court affirmed that the standard of proof for the trial court to apply was by a preponderance of the evidence.⁵⁹

In analyzing the state’s interest, the Court subjected it to “the strictest scrutiny.”⁶⁰ The Court upheld the district court’s finding that Maine

51. *Id.* at 340.

52. *Id.* at 339.

53. Justice Powell opined that diversity could be a compelling interest, but he was the only Justice to argue that before *Grutter*. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978).

54. *Grutter*, 539 U.S. at 350 (Thomas, J., dissenting).

55. *Me. v. Taylor*, 477 U.S. 131 (1986).

56. *Id.* at 137 (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980)).

57. *Id.* at 133.

58. *Id.* at 138.

59. *Id.*

60. *Id.* at 144. As noted *supra* part III, there are very few cases where the Court has upheld legislation that was subjected to strict scrutiny. As a result, it is difficult to predict whether it would follow the same evidentiary standard and fact finder deference in a substantive due process

“‘clearly has a legitimate and substantial purpose in prohibiting the importation of live baitfish,’ because ‘substantial uncertainties’ surrounded the effects that baitfish parasites would have on the State’s unique population of wild fish, and the consequences of introducing nonnative species were similarly unpredictable.”⁶¹ That is, the state’s interest in protecting fish health was strong enough to overcome “the strictest scrutiny.” Additionally, the Court upheld the district court’s conclusion that “less discriminatory means of protecting against these threats were currently unavailable.”⁶²

In addition to the importance the Court placed upon protecting fish health, the case is also striking for the Supreme Court’s reliance upon the district court for the “empirical component” of the strict scrutiny analysis.⁶³ Specifically, it held that “findings of fact made by the trial judge ‘shall not be set aside unless clearly erroneous.’”⁶⁴ It further noted “that no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case.”⁶⁵ Finally, the Court agreed that the state had “a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible.”⁶⁶

Thus, if the state were to assert an interest at least as compelling as protecting the health of fish, and a trial judge were to find by a preponderance of the evidence that a ban on contraceptives accomplished those interests, the factual finding would not be set aside by the Court unless the finding was clearly erroneous. Additionally, based on the Court’s analysis in this case, if a ban on contraceptives was the only means of protecting against the threats posed by contraceptives, the ban would not be overturned.

Both of the standards of review used by the Court for equal protection clause cases and dormant commerce clause cases provide guidance for predicting the Court’s methodology for reviewing a state ban on contraceptives. Additionally, the Court’s plurality opinion in a part of *Carey v. Population Services International*⁶⁷ and its recent decision in *Lawrence v. Texas*⁶⁸ may solidify our confidence in predicting how the Court would approach a constitutional challenge to a statewide ban on contraceptives.

case as it did in a dormant commerce clause case. However, the Court did say that it was employing “the strictest scrutiny” in this dormant commerce clause case. If there is a level higher than “strictest” that is reserved specifically for substantive due process cases, the Court hasn’t announced it yet.

61. *Id.* at 142-43 (quoting *U.S. v. Taylor*, 585 F. Supp. 393, 397 (D.C. Me. 1984)).

62. *Id.* at 143.

63. *Id.* at 144.

64. *Id.* at 145 (quoting Fed. R. Civ. P. 52(a)).

65. *Id.* at 145.

66. *Id.* at 148.

67. 431 U.S. 678.

68. 539 U.S. 558.

C. *A Proposal for a Substantive Due Process Test*

In the last of the three contraception cases, a plurality of the Court gave the most specific exposition of how it would analyze a state ban on contraceptives under the due process clause. The Court wrote,

It is enough that we again confirm the principle that when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.⁶⁹

Although the *judgment* in this part of the decision was joined by a majority of the Court, the *opinion* garnered only a plurality. However, none of the Justices advocated a more stringent standard of review; they instead argued that the standard should be *less* strict.⁷⁰ This section of the Court's decision may therefore provide an outer boundary for the "strictness" of the scrutiny that the Court would employ in analyzing a state's interest in banning contraceptives.

The Court may have recently provided a more definitive framework for substantive due process review. In *Lawrence*, the Supreme Court invoked the privacy right and gave it a much longer name—"the due process right to demand respect for conduct protected by the substantive guarantee of liberty."⁷¹ In finding Texas's same-sex sodomy prohibition unconstitutional, the Court quoted from Justice Stevens's dissent in *Bowers v. Hardwick*,⁷² and indicated that Stevens's analysis "should control here."⁷³ The Court quoted these lines from Stevens's dissent:

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, *even when not intended to produce offspring*, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.⁷⁴

69. *Carey*, 431 U.S. at 696 (plurality).

70. *See e.g. id.* at 703 (Powell, J., concurring in part) ("I am not persuaded that the Constitution requires the severe constraints that the Court's opinion places upon legislative efforts to regulate the distribution of contraceptives, particularly to the young.").

71. 539 U.S. at 575.

72. 478 U.S. 186 (1986).

73. *Lawrence*, 539 U.S. at 578.

74. *Id.* at 577-78 (emphasis added) (quoting *Bowers v. Hardwick*, 478 U.S. at 216) (Stevens, J., dissenting).

Even after *Lawrence*, however, the Court apparently still believes that “[t]here is no absolute freedom to do as one wills.”⁷⁵ The limit to this freedom is nonetheless difficult to ascertain. But the Court did indicate that, “as a general rule, [it] counsels against attempts by the State, or a court, to define the meaning of [a personal] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”⁷⁶ Arguably then, a fundamental right founded upon substantive due process liberty can be restricted by the state, at the least, if the exercise of that right causes either an injury to a person or abuses an institution the law protects. Although this “harm principle” has been strongly criticized by many commentators,⁷⁷ it appears to at least set an outer limit for an individual’s exercise of liberty.

In summary, based on its own decisions, the Court would analyze a state ban on contraceptives in the following manner. First, individuals have a fundamental right to contraceptives. A state ban would obviously infringe upon that right. Therefore, the state has the burden of proving, by a preponderance of the evidence, that the ban advances a compelling state interest. If the purpose of the ban is to prevent harm to persons and prevent abuse to the institution of marriage, either interest is compelling. Further, the ban must be narrowly tailored to accomplish those interests. Using this framework, we can now analyze a state’s compelling interests in banning contraceptives.

IV. THE STATE’S COMPELLING INTEREST IN BANNING CONTRACEPTIVES

The Court’s decisions more than twenty-five years ago relied upon the understanding that “not all contraceptives are potentially dangerous.”⁷⁸ This conclusion arose without the presentation of evidence to that effect at either the state or federal court trial level. Instead, it appears to have been arrived at by the First Circuit Court of Appeals purely from the panel’s own understanding of the medical question. The Supreme Court “joined” the court of appeals in taking judicial “notice” that the condom had been around for centuries and that they had “never heard criticism of it on the side of health.”⁷⁹ The Court “believe[d] that the same could be said of

75. *W. Coast Hotel*, 300 U.S. at 392.

76. *Lawrence*, 539 U.S. at 567 (emphasis added).

77. John Stuart Mill wrote, “The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” John Stuart Mill, *On Liberty* 9 (Elizabeth Rapaport ed., Hackett Publ. Co. 1978). Mary Ann Glendon has criticized the use of this quote to advance a philosophy of relativism that Mill himself strongly rejected. Mary Ann Glendon, *Abortion and Divorce in Western Law* 121-25 (Harv. U. Press 1987). Hadley Arkes has criticized this understanding of natural rights in a recent book. See generally Hadley Arkes, *Natural Rights and the Right to Choose* (Cambridge U. Press 2002).

78. *Carey*, 431 U.S. at 690 n. 8 (quoting *Eisenstadt*, 405 U.S. at 451).

79. *Eisenstadt*, 405 U.S. at 452 n. 9 (quoting *Baird v. Eisenstadt*, 429 F.2d 1398, 1401 (1st Cir. 1970)).

certain other products.”⁸⁰ Underlying this belief was the Court’s historical understanding that the contraceptive ban was enacted because the Commonwealth of Massachusetts morally disapproved of contraceptives. That is, the intent of the people was not to protect the medical health of its citizenry, but to protect its morality. The Court’s understanding was predicated upon the belief that the state’s historical concern about sexual “morality” was in opposition to its concern for health,⁸¹ a historical premise that this paper will not endeavor to disprove. However, a review of the medical evidence will show that in the case of contraceptives, the traditional belief in the immorality of contraceptive use, enacted into law, protected the health of the citizenry. That is, the state’s prohibition on contraceptives for moral reasons furthered—rather than opposed—its interest in health.

A separate review of the sociological evidence will also show that a strong case can be made for linking the increased use of contraceptives to an abuse of the institution of marriage. Relying upon the Court’s own emphasis on the importance of this institution to society, evidence proving that contraception has a devastating impact upon marriage should, in and of itself, be enough for the Court to find that the state has a compelling interest in banning contraceptives.

This paper, however, is not an attempt to prove or disprove, to a scientific certainty, the accuracy of every medical and sociological study regarding the use of contraceptives. Instead, what is provided here is a summary of what the state could provide in proving, by a preponderance of the evidence, the state’s health interest in banning contraceptives. Assuming that a fact finder found the evidence to be credible, a complete ban should then be upheld.

A. *The Harmful Health Effects from the Use of Contraceptives*⁸²

The Court has repeatedly said that the state has a compelling interest in protecting the health of its citizenry.⁸³ This is one of the inherent police

80. *Id.*

81. See *Baird*, 429 F.2d at 1401 (“[I]t is impossible to think of the [ban] as intended as a health measure The legislature intended just the opposite.”). To be fair to the court of appeals, this may have been inartful drafting. The court’s main point was that the intent of the legislature was to morally disapprove of contraceptives. Nonetheless, it is clear that both the First Circuit and the Supreme Court appeared to believe that prohibiting contraceptives would be *harmful* to health, rather than salutary, as the judicial fact finder actually found. *Baird v. Eisenstadt*, 310 F. Supp. 951, 954 (D. Mass. 1970) (“It is a matter of common knowledge that contraceptive substances may have harmful effects on the health of those who use them. . . .”).

82. Chris Kahlenborn and Ann Moell have compiled a summary of some of the medical research in this area into a pamphlet titled *What a Woman Should Know about Contraceptives* that can be accessed at <http://www.omsoul.com/pamphlet160.What-a-Woman-Should-Know-about-Contraception.html> (accessed Nov. 14, 2005). Much of the outline of this section was inspired by that pamphlet.

83. See e.g. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 279 (2000) (“[T]he ordinance is within Erie’s constitutional power to enact because the city’s efforts to protect public health and safety are clearly within its police powers.”).

powers of the state that justifies its regulation of such things as food, drugs, pollution, and nuclear energy. If a state were to prove by a preponderance of the evidence that all contraceptives present a risk of harming individual health, the Court should uphold the state's ban on contraceptives. This unquestionably would be a much more difficult analysis for a court to perform than to simply conclude that "not all contraceptives are potentially dangerous."⁸⁴ However, that is the constitutional duty of the Court, to decide particular "cases and controversies."⁸⁵

Before analyzing the unintended health consequences of contraceptives, the argument can be made that most contraceptives (though arguably not barrier contraceptives) are *intended* to make a person unhealthy. That is, if they work as intended in destroying either a woman's or a man's fertility, they are intended to cause a person to be *less* healthy than they were before the use of the contraceptive. This argument relies upon a determination that infertility is *objectively* unhealthy. As such, the state has a compelling interest in banning contraceptives if they function as intended. Under this argument, fertility is healthy and the "natural" or normal purpose of human sexuality is procreation.⁸⁶ While some reject this natural law view, it is notable that few, if any, would argue that the primary purpose of insect sexuality is anything but procreation. The natural law has been the underlying conceptual foundation of such great philosophers as Aristotle, Augustine, and Aquinas.⁸⁷ An acceptance of it is evident in the Declaration of Independence.⁸⁸ There is much to commend in this argument based on natural law. In contemporary society, the extraordinary medical effort made to make persons fertile is just one item in support.

However, this argument may rely, for some, too much on the natural law premise that fertility is the "normal" state of health for humans. Resistance to this argument is highly ingrained in our culture, where pregnancy is treated as a disease to cure⁸⁹ and "reproductive health rights" becomes an Orwellian rallying cry supporting the legal right to impair fertility and cause abortions.⁹⁰ Under this cultural construct, "health" is whatever the individual person thinks it is. That is, the determination of whether fertility is healthy or unhealthy is purely subjective. There is some jurisprudential

84. *Carey*, 431 U.S. at 690 n. 8 (quoting *Eisenstadt*, 405 U.S. at 451).

85. U.S. Const. art. III, § 2.

86. See Janet E. Smith, *Humanae Vitae: A Generation Later 73-83* (Cath. U. of Am. Press 1991).

87. See generally J. Budziszewski, *What We Can't Not Know: A Guide* (Spence Publ. Co. 2003).

88. See The Avalon Project, *Declaration of Independence*, <http://www.yale.edu/lawweb/avalon/declare.htm> (last updated Sept. 20, 2005) ("the laws of nature and of nature's God").

89. Helen M. Alvaré, *Catholic Teaching and the Law Concerning the New Reproductive Technologies*, 30 *Fordham Urb. L.J.* 107, 112 (2002).

90. See e.g. Barbara Mikulski, *Providing Women with the Support They Need* (available at http://www.senatorbarb.com/site/PageServer?pagename=issues_women) (accessed May 6, 2004) (describing contraception and abortion as "reproductive health").

support for this view in the Court's "famed sweet-mystery-of-life passage"⁹¹ from *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹²: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁹³ Such a construct would require that a state's determination of what health *means* could always be overridden by what an individual views health to *mean*, a construct that would eliminate health as a compelling state interest that could ever override an individual's liberty.

The *Casey* mystery passage has not been used by the Court to support such a purely subjective understanding of health. Nonetheless, this paper recognizes that arguments premised upon the nature and purpose of humans and their sexuality would be starting from a premise that many, including the Court, possibly reject. Thus, we turn to the other health consequences of using contraceptives.

Contraceptives can be categorized into five broad categories: hormonal, barrier, spermicidal, intrauterine devices (IUDs), and sterilization. Some products are a combination of two of these categories, such as IUDs that release hormones. The three most common types of contraceptive techniques among women in the United States are hormonal (used by more than 31% of contracepting women), barrier methods (more than 22%), and sterilization (more than 38%).⁹⁴ This paper will analyze each in turn as well as IUDs and spermicides.

1. *The Pill and Other Hormonal Contraceptives*

"Had Baird [the defendant in *Eisenstadt*] distributed a supply of the so-called 'pill,' I would sustain his conviction under this statute."⁹⁵ Instead, Baird had distributed spermicidal foam, which the Court implicitly found to be harmless. Justice White's concurring opinion acknowledged explicitly what the majority opinion implicitly acknowledged. All of the Justices were on "judicial notice" that some contraceptives were potentially dangerous. By 1972, "[t]he Food and Drug Administration ha[d] made a finding that birth control pills pose possible hazards to health."⁹⁶ Since that time, hormonal contraceptives have been reformulated and reconstituted in so many different ways that it is impossible to prove at any one time that a particular pill or device is 100% safe. As a result, all of the more than forty hormonal contraceptive brands recently on the market include warnings of

91. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

92. 505 U.S. 833, 851 (1992).

93. *Id.*

94. The Alan Guttmacher Inst., *Contraceptive Use: Facts in Brief*, http://www.guttmacher.org/pubs/fb_contr_use.html (accessed Sept. 20, 2005).

95. *Eisenstadt*, 405 U.S. at 463 (White & Blackmun, JJ., concurring in result).

96. *Id.* at 463 n. 4.

their possible side effects.⁹⁷ In addition to the side effects recognized by the FDA, there are numerous conflicting studies of other possible health consequences arising from the use of hormonal contraceptives.

a. High Blood Pressure, Blood Clots, Stroke, Heart Attack

One of the most popular oral contraceptives, Ortho Tri-Cyclen, notes in its informational materials that high blood pressure, blood clots, stroke, and heart attack are all possible side effects from using the product.⁹⁸ Other side effects indicated in Ortho Tri-Cyclen's materials include nausea, vomiting, and stomach pain.⁹⁹ These additional side effects are not unique to the Ortho Tri-Cyclen brand, nor are they unique to the current formulation of the pill. Each of these other side effects was also noted in the original trials of the pill when it was tested on women in Puerto Rico in 1956.¹⁰⁰ Although three young women died in the original Puerto Rico trials, the deaths were never investigated,¹⁰¹ and the pill was approved for contraceptive use in 1960.¹⁰²

The year 2000 was a bad year for promoters of hormonal contraceptives. The *British Medical Journal* reported a study linking hormonal contraceptives containing desogestrel or gestodene to a 230% increase in the risk of blood clots.¹⁰³ A New Zealand study indicated that hormonal contraceptives may cause a nearly 1000% increase in the risk of developing a fatal pulmonary embolism.¹⁰⁴ Another study published in 2000 indicated that hormonal contraceptives led to increased stroke risk.¹⁰⁵ These studies just continued a long-standing pattern of indications for these dangerous side effects. They are noteworthy in that they continue to show that the risks of hormonal contraceptives are present even with the continuing modifications to dosages.

97. *Matthew Bender & Co.'s Attorneys' Textbook of Medicine: Hormonal Contraceptives* ch. 18 pt. 311A.10 (3d ed., LexisNexis Group 2004).

98. Ortho-McNeil Pharm., Inc., *Ortho Tri-Cyclen Prescribing Information* 4-5, <http://www.ortho-mcneil.com/products/pi/pdfs/cycltri.pdf> (Mar. 2001).

99. *Id.* at 3-5.

100. Suzanne White Junod & Lara Marks, *Women's Trials: The Approval of the First Oral Contraceptive Pill in the United States and Great Britain*, 57 *J. History Med.* 117, 124 (Oxford U. Press 2002).

101. *American Experience*, "The Pill" (PBS 1999) (motion picture, transcr. available at <http://www.pbs.org/wgbh/amex/pill/filmmore/pt.html>).

102. Junod & Marks, *supra* n. 100, at 133.

103. Hershel Jick et al., *Risk of Venous Thromboembolism among Users of Third Generation Oral Contraceptives Compared with Users of Oral Contraceptives with Levonorgestrel Before and After 1995: Cohort and Case-Control Analysis*, 321 *British Med. J.* 1190 (Nov. 11, 2000).

104. Lianne Parkin et al., *Oral Contraceptives and Fatal Pulmonary Embolism*, 355 *The Lancet* 2133 (June 17, 2000).

105. J. F. Albuher et al., *Serum Lipids in Young Patients with Ischaemic Stroke: A Case-Control Study*, 69 *J. Neurology, Neurosurgery & Psych.* 29, 32 (July 2000).

b. Cancers

The National Cancer Institute published a summary report on “Oral Contraceptives and Cancer Risk” that made the following points:

- There is evidence of an increased risk of breast cancer for women under age 35 who are recent users of [oral contraceptives (OCs)].
- There is evidence that long-term use of OCs may increase the risk of cancer of the cervix.
- There is some evidence that OCs may increase the risk of certain cancerous liver tumors.¹⁰⁶

There have been hundreds of studies looking for a link between hormonal contraceptives and cancer. There is no consensus on the impact. However, a state’s burden of proof would be a preponderance of the evidence, not proof to a scientific certainty. For example, if one researcher’s meta-analysis is to be believed, “[e]ighteen of the twenty-one research studies done since 1980 on the connection between the Birth Control Pill and breast cancer showed that Pill users have a higher risk of breast cancer than non-users.”¹⁰⁷ Absent complete rebuttal of every one of those eighteen studies, a fact finder could find that a state has a compelling interest in banning oral contraceptives. That is, a showing of *any* increased risk of a serious health detriment to *one* woman would be enough for a state to have a compelling interest.

This statement is true because there is no articulated balancing test of how many women must die before the state is allowed to infringe on the right to contraceptives. Based on the Court’s holdings that regulation of health falls clearly within a state’s constitutional authority, and the Court’s holding that baitfish health is a compelling interest, it appears reasonable to conclude that women’s health is a compelling state interest that need not be balanced against the loss of the right to contraceptives.

The argument could be made, however, that a state’s interest in eliminating the risk of one woman dying from cancer should not result in precluding all other women from using oral contraceptives. In fact, Justice Souter’s concurring opinion in *Washington v. Glucksberg* suggests that

106. Natl. Cancer Inst., *Oral Contraceptives and Cancer Risk*, http://cis.nci.nih.gov/fact/3_13.htm (Nov. 3, 2003). The other key point was, “Studies have consistently shown that using OCs reduces the risk of ovarian cancer.” This paper does not reject the possibility that contraceptive use may have salutary health effects. However, the Court has acknowledged that the political branches are better suited to weighing health benefits against health risks than the judiciary, and that the Court’s review of the legislative judgment on the balancing will use a reasonableness standard. See *Glucksberg*, 521 U.S. at 752-89 (Souter, J., concurring).

107. Chris Kahlenborn, *Breast Cancer, Its Link to Abortion and the Birth Control Pill* 245 (One More Soul 2000); see The Polycarp Research Inst., *Overview: Breast Cancer and Oral Contraceptives*, <http://www.polycarp.org/overviewbreastcanceroralcontraceptives.htm> (accessed May 9, 2004).

such a balancing analysis would have to be performed.¹⁰⁸ Citing Justice Harlan's dissent in the first contraceptive case¹⁰⁹ as authority, he thought it a "requirement that [the] Court balance 'the liberty of the individual' and 'the demands of an organized society'" when conducting substantive due process analysis.¹¹⁰ He indicated that although a balancing must be done by the Court, "judicial review still has no warrant to substitute one reasonable resolution of the contending positions for another, but [instead the Court has] authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable."¹¹¹ The Court appears to be more likely to overturn, as unreasonable, "laws singling out a certain class of citizens for disfavored legal status or general hardships"¹¹² Presumably, if the democratic process resulted in a majoritarian decision to ban contraceptives for everyone, *including the majority itself*, the Court would consider the balance struck to be reasonable.¹¹³

Even if that presumption is incorrect, the Court simply has not articulated how to balance these different interests.¹¹⁴ As Justice Scalia wrote regarding the balancing test used for dormant commerce clause cases, "[i]t

108. *Glucksberg*, 521 U.S. at 752-89 (Souter, J., concurring).

109. *Poe*, 367 U.S. at 551 (Harlan, J., dissenting).

110. *Glucksberg*, 521 U.S. at 756 n. 4 (Souter, J., concurring) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982)).

111. *Glucksberg*, 521 U.S. at 764 (Souter, J., concurring).

112. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

113. This analytical principle was probably best announced by Justice Jackson in his concurring opinion in *Ry. Express Agency v. N.Y.*, 336 U.S. 106, 112-13 (1949):

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those 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. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

114. The Supreme Court of Connecticut obliquely addressed whether a state was required to balance health against other factors six years before *Griswold* invalidated the state statute. *Buxton v. Ullman*, 156 A.2d 508, 514 (Conn. 1959). However, it determined that potential negative health consequences from a ban on contraceptives could be ignored if there were other alternatives that would eliminate the health risk. Accepting that contraceptives may be "the best and safest preventative measure" for a woman who would have a serious health risk from becoming pregnant, the Court nonetheless refused to overturn the Connecticut law. *Id.* The Court's rationale was fairly simple. The woman continued to have "another alternative, abstinence from sexual intercourse." *Id.* For a contrary view that this was not a rational alternative, see Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 Iowa L. Rev. 915, 938 (1991) ("women in Connecticut [were] still unnecessarily dying because of the statute") (quoting Buxton, *Birth Control Problems in Connecticut: Medical Necessity, Political Cowardice and Legal Procrastination*, 28 Conn. Med. 581, 583 (Aug. 1964)).

is more like judging whether a particular line is longer than a particular rock is heavy.”¹¹⁵

c. *Depression, Loss of Fertility, Reduced Libido, Weight Gain, Migraines, and Other Side Effects*

Depression, loss of fertility, reduced libido, weight gain, and migraines are all commonly disclosed as potential side effects by manufacturers in the medical information sheet that accompanies hormonal contraceptives.¹¹⁶ Additionally, two studies published in 2001 linked hormonal contraceptives to lower bone mineral density¹¹⁷ and a reduced ability to build spinal bone strength.¹¹⁸ The Court has clearly indicated that “health” is within the constitutional interests of the state.¹¹⁹ There has been no indication made by the Court that these side effects *alone* would not be a compelling enough health consequence for the state to decide to ban hormonal contraceptives. In fact, Justice White’s concurrence in *Eisenstadt* indicated that a “finding that birth control pills pose possible hazards to health” would be sufficient justification to uphold a ban on them.¹²⁰ Because these admittedly adverse health consequences are conceded, there would be no need for a state even to prove its case. The state could therefore ban hormonal contraceptives under the Court’s currently enunciated framework.

d. *Increased Susceptibility to HIV Transmission Risk*

A study of HIV-infected women published in the British Journal *The Lancet* indicated that women taking oral contraceptives are much more likely to have a detectable virus in the cervix or vagina than women who do not—leading to an increased risk of infection for their partners.¹²¹ Another study published in 1996 showed that women have a 240% increase in the risk of contracting the HIV virus when they use an injectable progestin (like Depo-Provera) for contraception.¹²² A cohort study, reported in 2004, indi-

115. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

116. Ortho-McNeil Pharm., Inc., *Ortho Tri-Cyclen Prescribing Information*, <http://www.ortho-mcneil.com/products/pi/pdfs/cycltri.pdf> (accessed Sept. 9, 2005).

117. Jerilynn C. Prior et al., *Oral Contraceptive Use and Bone Mineral Density in Premenopausal Women: Cross-Sectional, Population-Based Data from the Canadian Multicentre Osteoporosis Study*, 165 *Canadian Med. Assn. J.* 1023 (Oct. 16, 2001).

118. Connie M. Weaver et al., *Impact of Exercise on Bone Health and Contraindication of Oral Contraceptive Use in Young Women*, 3:6 *Med. & Sci. in Sports & Exercise* 873 (June 2001).

119. *City of Erie*, 529 U.S. at 279.

120. *Eisenstadt*, 405 U.S. at 463 n. 4 (White & Blackmun, JJ., concurring in result).

121. Sara B. Mostad et al., *Hormonal Contraception, Vitamin A Deficiency, and Other Risk Factors for Shedding of HIV-1 Infected Cells from the Cervix and Vagina*, 350 *The Lancet* 922 (Sept. 27, 1997).

122. See Kumnuan Ungchusak et al., *Determinants of HIV Infection among Female Commercial Sex Workers in Northeastern Thailand: Results from a Longitudinal Study*, 12 *J. Acquired Immune Deficiency Syndromes & Human Retrovirology* 500 (1996).

cated that the contraceptives decrease peroxide-producing bacteria that help protect a woman from acquiring HIV.¹²³ In light of the \$15 billion that the federal government has committed “to fight AIDS abroad,”¹²⁴ it is clear that the political branches believe that the state has a strong interest in reducing HIV transmission risk—a risk that these studies indicate is increased as a result of hormonal contraceptives.

There are a number of demonstrated adverse health consequences from the use of hormonal contraceptives. At least two members of the Court have indicated that a state’s ban on them for health reasons would be upheld by the Court.¹²⁵ A ban on other contraceptives for health reasons, however, would require a rationale that the Court has not heard. That argument is presented *infra*.

2. Barrier Methods

In addition to their demonstrated imperfect effectiveness as contraceptive devices,¹²⁶ the availability of condoms and other barrier methods can have devastating health impacts. As explained in section IV.B.2 *infra*, there is a strong correlation between the availability of contraceptives and an increase in non-marital sexual intercourse. An increase in non-marital sexual intercourse generally results in sexual activity with multiple partners. Because non-monogamous sexual activity, for at least one of the partners, is required for transmission, the increased availability of contraceptives should also have a strong correlation with an increase in sexually transmitted diseases (STDs). Unsurprisingly, the evidence supports this as well. For example, between 1960 and 1970, the rate at which teenage females contracted gonorrhea tripled and the rate for teenage males doubled.¹²⁷ Researchers attributed this increase, at least in part, to increased sexual activity among youth over the time period.¹²⁸

However, as skeptics are fond of saying, “correlation does not prove causation.” What the skeptics forget to acknowledge, however, is that correlation *indicates* causation. That is, when two things are correlated, the correlation is *evidence* (but not proof) of causation. Because the Court has held that the standard of proof under a strict scrutiny analysis is a prepon-

123. See Ludo Lavreys et al., *Hormonal Contraception and Risk of HIV-1 Acquisition: Results of a 10-year Prospective Study*, 18 AIDS 695 (Mar. 2004).

124. White House Press Release, *President Signs HIV/AIDS Act* (May 27, 2003) (available at <http://www.whitehouse.gov/news/releases/2003/05/20030527-7.html>).

125. *Eisenstadt*, 405 U.S. at 463 (White & Blackmun, JJ., concurring in result).

126. The Alan Guttmacher Inst., *supra* n. 94 (accessed Sept. 27, 2005) (condom failure rate in first year of use is 15%; diaphragm, cervical cap, and sponge failure rates in first year range from 16% to 30%).

127. Laurene Mascola et al., *Gonorrhea and Salpingitis among American Teenagers, 1960-1981*, (Centers for Disease Control 1983) (available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001717.htm>).

128. *Id.*

derance of the evidence, the fact that there is no scientific study “proving” that the increased availability of contraceptives has led to an increase in STDs does not mean that a fact finder could not conclude that contraceptive availability has been one of the causes of STD growth in this country over the last forty years. That is, the fact finder could reasonably conclude that barrier contraceptives act as an inducement to participate in sexual activity that will have unhealthy consequences—consequences that the state has a compelling interest in preventing.

Where the Court would end up on this question appears to depend almost entirely on where it begins. If the Court presumes, as it did in *Carey*, that the availability of contraceptives plays no part in the decision to have sex, then it is reasonable to conclude that denying barrier contraceptives to people will lead to an increase in STDs. Although the sexual activity would not be risk-free, it would be less risky than without a condom. In more conventional terms, “condoms are safe sex.” But such an underlying premise is seen as faulty by many:

Professionals and the public alike have been misled into believing that sex with a condom is safe We consider it irresponsible to suggest to anyone that condoms are entirely safe . . . advising persons that it is safe to have sex with condoms is false, provides an erroneous sense of security and can kill partners.¹²⁹

Although medical journals have been reporting this for almost twenty years with regard to AIDS, and even longer with regard to other STDs,¹³⁰ the perception that condoms provide “safe sex” persists.

What may be most troubling about the continued promotion of condoms as “safe sex” is that there is a cheaper, safer, and more effective alternative—periodic abstinence. Although abstinence is discussed in more detail in section V *infra*, there is a striking case study that directly links abstinence to lowered HIV transmission and implicitly rejects the condom as safe sex.

a. What Happened in Uganda?

In 1986, Uganda’s new president Yoweri Museveni and his wife Janet Museveni spearheaded a campaign to combat a growing AIDS epidemic in the country. Known as “ABC,” the campaign was simple: “Abstain, Be Faithful, and, if necessary, use a Condom.”¹³¹ One of the most striking

129. Am. Life League, *The Condom: False Savior*, in *The Pro-Life Ency.* 100 (1996) (available at <http://www.ewtn.com/library/PROLENC/ENCYC100.htm>).

130. See Nicholas J. Fiumara, *Effectiveness of Condoms in Preventing V.D.*, 285 *New Eng. J. Med.* 972 (Oct. 21, 1971) (Massachusetts Department of Public Health doctor stating that “the condom [is] useless as a prophylactic against gonorrhoea, and even under ideal conditions against syphilis”).

131. Dr. Anne Peterson, USAID Assistant Administrator for Global Health, Testimony, *Before the Subcommittee on African Affairs, Committee on Foreign Relations* (May 19, 2003) (available at <http://www.usaid.gov/press/speeches/2003/ty030519.html>).

elements of the campaign was the minimization of condom marketing to all but a small minority of the population (in particular, sex industry workers and their clients). For the rest of the population, the emphasis was on abstaining outside of marriage and being faithful within marriage. As a result, the percentage of males aged 15-19 years who were virgins rose from 32% in 1989 to 55% in 1995.¹³² The percentage of females aged 15-19 years who were virgins rose from 28% to 45%.¹³³ Additionally, the number of males reporting having at least one “casual” sex partner in the past twelve months dropped from 35% to 15% in the same six-year period.¹³⁴ The corresponding drop for women was from 16% to 6%.¹³⁵ The resulting decrease in HIV prevalence among adults was similarly dramatic. Peaking at 15% in 1991, the HIV prevalence had dropped to 5% by 2001.¹³⁶

Although condoms were part of the program, the USAID study acknowledged that “[n]early all of the decline in HIV incidence (and much of the decline in prevalence) had already occurred by” the time more than 20% of the adult population ever used condoms.¹³⁷ Although each society is different, surrounding nations such as Zimbabwe, South Africa, Botswana, and Kenya have seen almost no change in their level of HIV incidence. In all of those countries, condom distribution was heavily emphasized. Contrastingly, until the mid-1990s in Uganda, “there was resistance on the part of the President and some religious leaders to promoting condom use”¹³⁸ Although none of this proves to a scientific certainty that condom distribution actually leads to an *increase* in the prevalence of HIV, scientific certainty is not the standard of proof required for strict scrutiny analysis. As discussed previously, if a fact finder concluded by a preponderance of the evidence that the availability of barrier contraceptives leads to an increase in the incidence of STDs, the state’s compelling interest in preventing STDs would be enough for the Court to uphold a statewide ban.

The conclusion that increased availability of barrier contraceptives leads to an increase in STDs is largely based on a sociological understanding that the availability of contraceptives leads to sexual promiscuity. However, there has been at least one study that linked the use of barrier contraceptives directly to an increased risk for women of developing adverse health effects—specifically, the development of pre-eclampsia during

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. USAID, *Project Lessons Learned Case Study: What Happened in Uganda? Declining HIV Prevalence, Behavior Change, and the National Response* 8 (Janice A. Hogle ed., Sept. 2002). In 1995, when HIV incidence leveled off, only 16% of males had *ever* used a condom. The rate for females was even lower, only 6%. *Id.*

138. *Id.*

pregnancy.¹³⁹ Pre-eclampsia is a syndrome of high blood pressure, fluid retention, and kidney damage that can lead to prolonged seizures and comas.¹⁴⁰ Another study gives the explanation for this link—repeated exposure to semen increases a woman’s immune capabilities.¹⁴¹ An obvious rejoinder to using this study to support a ban on condoms is that there is no health risk unless the woman becomes pregnant. However, the rejoinder fails because, as discussed *supra*, the condom is not 100% effective in preventing pregnancy. Because of this fact, the use of a condom can be shown to be the direct cause of an increased risk of harmful health effects—pre-eclampsia.

3. “Permanent” Sterilization

The discussion in section III.A. *supra* regarding infertility as objectively unhealthy applies most forcefully in regard to sterilization. If a healthy reproductive system directed toward its purpose results in the procreation of children, then sterilization would render that system unhealthy. This idea becomes obvious and non-controversial if we reformulate the previous sentence to refer to a “healthy ocular system” instead of a “healthy reproductive system.” That is, if a healthy ocular system directed towards its purpose results in seeing, blinding a person would render that system unhealthy. If the state has a compelling interest in prohibiting health professionals from blinding people who want to be blinded, the state would have the same interest in prohibiting health professionals in participating in sterilizations.

Interestingly, the desire to permanently have oneself sterilized can be analogized to another desire that is currently viewed as a mental disorder—body integrity identity disorder (BIID). Both situations involve the desire to take a normally functioning body and, through surgery, not have a part of the body function anymore. However, BIID—which was originally known as apotemnophilia from the Greek word meaning “to cut off,”—is the desire to amputate a healthy limb.¹⁴² Although not yet addressed by the Supreme Court, it currently seems unlikely to this author that such a desire is a constitutionally protected right.¹⁴³ As discussed *supra*, this paper recognizes that others may think differently, especially with regard to sterilization.

139. Hillary S. Klonoff-Cohen et al., *An Epidemiologic Study of Contraception and Preeclampsia*, 262 J. Am. Med. Assn. 3143 (1989).

140. Kahlenborn & Moell, *supra* n. 82.

141. Sarah A. Robertson et al., *Seminal ‘Priming’ for Protection from Pre-Eclampsia: A Unifying Hypothesis*, 59 J. Reprod. Immunology 253 (Aug. 2003).

142. For a sympathetic and informative take on BIID, see *Body Integrity Identity Disorder*, <http://www.biid.org> (accessed Sept. 15, 2005).

143. Others are less sanguine about the constitutional prospects of such a right. See e.g. Wesley J. Smith, *Taking Requests, Doing Harm*, <http://www.nationalreview.com/comment/comment-smith072303.asp> (July 23, 2003) (Natl. Rev. Online).

Thus, a discussion of the unintended adverse health consequences of sterilization is necessary.

Tubal ligation is not 100% effective as a contraceptive.¹⁴⁴ If a pregnancy does occur, tubal ligation is correlated with a much higher incidence of ectopic pregnancy,¹⁴⁵ and is the leading cause of maternal death in the first trimester of pregnancy.¹⁴⁶ Additionally, the surgical procedure itself is subject to many adverse consequences. Included among these complications are bladder puncture, bleeding, and cardiac arrest.¹⁴⁷ Finally, tubal ligation can lead to a syndrome that causes the woman to experience intermittent vaginal bleeding associated with severe cramping pain in the lower abdomen.¹⁴⁸

There are also studies indicating that vasectomies have adverse health consequences. Several studies have linked vasectomies to an increased long-term risk of prostate cancer.¹⁴⁹ At least one other study found a higher-than-normal rate of vasectomies in men who had died from prostate cancer.¹⁵⁰ Additionally, nearly half of the men who have the operation will develop anti-sperm antibodies.¹⁵¹ That is, the man's body will develop cells that attack other cells in the body. Some have theorized that this may lead to a higher incidence of autoimmune disease.¹⁵²

4. IUD

One of the most popular brands of IUDs, the Dalkon Shield, was removed from the market in the 1970s. Its manufacturer declared bankruptcy as a result of massive tort litigation claiming adverse health effects, including death.¹⁵³ Although newer forms of IUDs purportedly do not have the same effects, a state could reasonably be wary of the health consequences

144. The Alan Guttmacher Inst., *supra* n. 94 (0.7% failure rate).

145. Theodore J. Gaeta et al., *Atypical Ectopic Pregnancy*, 11 Am. J. Emerg. Med. 233 (May 1993).

146. Centers for Disease Control & Prevention, *Female Sterilization: Risk of Ectopic Pregnancy after Tubal Sterilization: Fact Sheet*, http://www.cdc.gov/reproductivehealth/UnintendedPregnancy/EctopicPreg_factsheet.htm (accessed Sept. 26, 2005).

147. H. P. Dunn, *Unexpected Sequelae of Sterilization*, 1:4 Intl. Rev. Nat. Fam. Plan. 318 (Winter 1977).

148. Duane E. Townsend et al., *Post-Ablation-Tubal Sterilization Syndrome*, 82 Obstetrics & Gynecology 422, 423 (Sept. 1993).

149. Edward Giovannucci et al., *A Retrospective Cohort Study of Vasectomy and Prostate Cancer in U.S. Men*, 269:7 J. Am. Med. Assn. 878 (Feb. 17, 1993); Richard B. Hayes et al., *Vasectomy and Prostate Cancer in U.S. Blacks and Whites*, 137:3 Am. J. Epidemiology 263 (1993); Lynn Rosenberg et al., *Vasectomy and the Risk of Prostate Cancer*, 132:6 Am. J. Epidemiology 1051 (1990).

150. Edward Giovannucci et al., *A Long-Term Study of Mortality in Men Who Have Undergone Vasectomy*, 326 New Eng. J. Med. 1392 (May 21, 1992).

151. Rosenberg, *supra* n. 149, at 1055.

152. Kahlenborn & Moell, *supra* n. 82.

153. See William M. Brown, *Déjà vu All Over Again: The Exodus from Contraceptive Research and How to Reverse It*, 40 Brandeis L.J. 1, 24 (2001).

arising from their continued use. Many current IUDs release hormones, making the IUD a hormonal contraceptive susceptible to the same health consequences arising from other hormonal contraceptives.¹⁵⁴ IUDs have also been associated with an increased incidence of pelvic inflammatory disease (PID).¹⁵⁵ Thus, IUD manufacturers disclose this risk in their literature.¹⁵⁶ There are a host of adverse health consequences that have been linked to PID, including cramping, dyspareunia (painful intercourse), dysmenorrhea (painful menstrual cycles), and infertility.¹⁵⁷

5. Spermicides

A spermicidal foam was the contraceptive that Mr. Baird wanted to distribute in *Eisenstadt v. Baird*.¹⁵⁸ In overturning the state's ban on all contraceptives, a strong underlying theme of the Court's opinion was the belief that "not all contraceptives are potentially dangerous."¹⁵⁹ However, there is little discussion in any of the *Eisenstadt* line of cases about the health impact of contraceptives in general and spermicides in particular. Although *Eisenstadt* asserted that the spermicide he distributed was "a safe and medically approved article," the district court stated that "[n]o such finding was made by the State courts [and] there is no basis in the record for such a finding by this Court."¹⁶⁰ Both the First Circuit and the Supreme Court, without taking any additional evidence or remanding to the district court, implicitly made the very finding that the district court had rejected.¹⁶¹ Neither of the courts explained why the district court's findings should be ignored, but Justice White's concurrence implicitly argued that the state had the burden of proof¹⁶²—not the plaintiff, as the district court had found.¹⁶³

154. See e.g. Berlex Laboratories, *MIRENA Patient Information*, http://www.mirena-us.com/pdf/mirena_ppi.pdf (2003).

155. 2005 *Physician Desk Reference* 1936-39 (Thomson Healthcare 2004); Stephen D. Mumford & Elton Kessel, *Was the Dalkon Shield a Safe and Effective Intrauterine Device? The Conflict between Case-Control and Clinical Trial Study Findings*, 57:6 *Fertility & Sterility* 1151 (June 1992).

156. Berlex Laboratories, *supra* n. 154.

157. *Id.*

158. 405 U.S. at 440.

159. *Id.* at 451.

160. *Eisenstadt*, 310 F. Supp. at 954 n. 4 (D. Mass. 1970).

161. *Baird*, 429 F.2d at 1401 (1st Cir. 1970) ("we must take notice that not all contraceptive devices risk 'undesirable . . . [or] dangerous physical consequences'" (internal quotation not cited in original)).

162. *Eisenstadt*, 405 U.S. at 464 (1972) (White & Blackmun, JJ., concurring in result) ("to sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right"). Chief Justice Burger, in dissent, pointed out that White's requirement upon the state to prove the health hazards in order to justify the contraceptive ban had "never been placed in issue in the state or federal courts." *Eisenstadt*, 405 U.S. at 469-470 (Burger, C.J., dissenting).

163. *Eisenstadt*, 310 F. Supp. 951.

As a result, the adverse health consequences arising from spermicides were never actually presented to a fact finder.

Since that time, there has been at least one study linking spermicides to a doubled increase in the risk of birth defects and the rate of miscarriage for women who conceive within a month of using a spermicide.¹⁶⁴ Additionally, Toxic Shock Syndrome has been associated with the spermicidal sponge.¹⁶⁵ The risk of these extremely serious health consequences, if proven by a preponderance of the evidence, would certainly be enough to meet the compelling interest standard and overcome the Court's implicit presumption that all contraceptives are healthy unless proven otherwise.

Many risks of serious health consequences have been associated with all five general categories of contraceptives. Some of these risks were either unknown or not brought before the Court when it decided the contraception cases. If a state were to now reenact a complete ban on contraceptives, it could present this evidence in support of its compelling interest in protecting its citizens' health. Assuming that the fact finder determined that the evidence showed that these health risks were real, then the Court would have to uphold the state's ban on contraceptives.

B. Contraceptive Use Abuses the Institution of Marriage

In June of 2003, the Court intimated that the state can act to restrict an individual's liberty when that individual's action injures a person or abuses an institution the law protects.¹⁶⁶ As discussed *supra* in Section IV.A., the use of contraceptives injures a person. This section will show that the use of contraceptives abuses the institution of marriage, an institution the law has long protected.

Over a century ago, the Court described marriage as "the most important relation in life."¹⁶⁷ It went on to characterize it as "the foundation of the family and of society, without which there would be neither civilization nor progress."¹⁶⁸ In the earliest cases relied upon by the Court in *Griswold*,¹⁶⁹ the Court stated that the right "to marry, establish a home and bring up children" is a liberty guaranteed by the due process clause of the Fourteenth Amendment.¹⁷⁰ Although the Justices in *Griswold* were careful to keep the three elements—marriage, home, and children—of the *Meyer* Court's formulation together, subsequent cases began to treat them sepa-

164. Hershel Jick et al., *Vaginal Spermicides and Congenital Disorders*, 245 J. Am. Med. Assn. 1329 (1981).

165. G. Faich et al., *Toxic Shock Syndrome and the Contraceptive Sponge*, 255 J. Am. Med. Assn. 216 (1986).

166. *Lawrence*, 539 U.S. at 567.

167. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

168. *Id.* at 211.

169. *Griswold*, 381 U.S. at 481-83.

170. *Meyer v. Neb.*, 262 U.S. 390, 399 (1923).

rately.¹⁷¹ In so doing, the Court has undermined the rationale for why marriage is “fundamental to the very existence and survival of the race”—and that rationale is the raising of children.¹⁷²

If the raising of children is separated from the institution of marriage, it is hard to understand why marriage would still be important to society. The Court in *Lawrence* indicated that the state does not have an interest in favoring one sort of consensual adult relationship over another.¹⁷³ Although the Court implicitly disclaimed the conclusion that same-sex marriages must be allowed,¹⁷⁴ Justice Scalia forcefully rejected the argument that the Court’s reasoning could lead to any other conclusion.¹⁷⁵ But Justice Scalia is wrong. Although “the promotion of majoritarian sexual morality” may not be “a legitimate state interest,”¹⁷⁶ the Court never claimed that the raising of children is not. As a result, it could be argued that the only reason society still has a “legitimate” interest in marriage is because society still has an interest in how children are raised. But contraception intentionally separates marriage from children, by separating sex from the procreation of children. And the result of that separation has led to a degradation of marriage.

Sex is like nuclear energy.¹⁷⁷ Properly channeled and regulated, it produces abundant good for humanity. Predominant among those many goods of sex is the creation of children—creation that is required for our very existence and survival. However, it also has great potential to do harm. When left unregulated, it can cause all sorts of damage, which is why there have been laws criminalizing fornication, bigamy, adultery, adult incest, bestiality, and obscenity throughout our nation’s history.¹⁷⁸ For this same reason, societies throughout history have channeled sex into marriage and then regulated that relationship. To suggest that private, consensual sex can be decoupled from marriage is akin to suggesting that private use of nuclear energy should be unregulated. Hardly anyone would contest the regulation of nuclear energy. However, the Court’s action in *Griswold* not only contested such a regulation of marriage, it prohibited it. That prohibi-

171. *Zablocki v. Redhail*, 434 U.S. 374, 384-86 (1978) (citing *Griswold*, *Eisenstadt*, and *Carey* to support the conclusion that there is a fundamental “right to marry” and that there are separate fundamental rights in “decisions relating to procreation, childbirth, child rearing, and family relationships”).

172. *Skinner v. Okla.*, 316 U.S. 535, 541 (1942).

173. *Lawrence*, 539 U.S. at 578 (“[Petitioners’] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

174. *Id.* (“[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

175. *Id.* at 604 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting) (responding to majority’s comment quoted *supra* n. 174 with the statement: “Do not believe it.”).

176. *Id.* at 599 (italics omitted).

177. Jordan Lorence, litigator for the Alliance Defense Fund, is the first person that I heard make this analogy.

178. *Lawrence*, 539 U.S. at 590 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting).

tion has had devastating effects on society in general, and the institution of marriage in particular.

In 1968, Pope Paul VI issued his encyclical on the regulation of birth entitled *Humanae Vitae* (Human Life).¹⁷⁹ In it, he confirmed the Church's ancient and consistent teaching that contraceptive sex "contradicts the moral order" and is "intrinsically wrong."¹⁸⁰ Additionally, he warned of the "consequences of artificial methods" that would result if the Church's teaching was rejected.¹⁸¹ These consequences have been described as "predictions" by many authors,¹⁸² and this paper will show that they have largely come true.

1. *Contraception and an Increase in Divorce*

More than one study has linked contraceptive availability to an increase in the divorce rate. In 1977, a researcher at Stanford University released a preliminary study for the National Bureau of Economic Research.¹⁸³ Studying divorce rates from 1920 to 1974, the empirical data showed that divorce rates had gradually increased over the first forty-five years of the study and then doubled over the final ten years beginning in 1965, the year *Griswold* was decided.¹⁸⁴ The paper went on to predict that the divorce rate would flatten in the future,¹⁸⁵ a prediction that has been largely accurate.¹⁸⁶ The study attributed about 47% of the increase in di-

179. Pope Paul VI, *Humanae Vitae* (July 25, 1968) (available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html).

180. *Id.* at § 14.

181. *Id.* at § 17. The first paragraph of § 17 reads in full:

Responsible men can become more deeply convinced of the truth of the doctrine laid down by the Church on this issue if they reflect on the consequences of methods and plans for artificial birth control. Let them first consider how easily this course of action could open wide the way for marital infidelity and a general lowering of moral standards. Not much experience is needed to be fully aware of human weakness and to understand that human beings—and especially the young, who are so exposed to temptation—need incentives to keep the moral law, and it is an evil thing to make it easy for them to break that law. Another effect that gives cause for alarm is that a man who grows accustomed to the use of contraceptive methods may forget the reverence due to a woman, and, disregarding her physical and emotional equilibrium, reduce her to being a mere instrument for the satisfaction of his own desires, no longer considering her as his partner whom he should surround with care and affection.

182. See e.g. Janet E. Smith, *Paul VI as Prophet in Why Humanae Vitae was Right: A Reader* 519 (Janet E. Smith ed. Ignatius Press 1993).

183. Robert T. Michael, *Two Papers on the Recent Rise in U.S. Divorce Rates*, NBER Working Paper No. W0202 (Sept. 1977).

184. Michael, *Anatomy of the Divorce Rate: 1960-1974* in *Two Papers on the Recent Rise in U.S. Divorce Rates*, *supra* n. 183, at 6A, tbl. 1.

185. Michael, *Why Has the U.S. Divorce Rate Doubled Within the Decade?* in *Two Papers on the Recent Rise in U.S. Divorce Rates*, *supra* n. 183, at 22-23.

186. The "divorce rate" is a very elusive number, because of the difficulty of tracking individual marriages over time. However, the census bureau has been tracking the number of reported divorces in a single year since at least 1950. In 1950, the rate was 2.6 divorces per 1,000 population. In 1965, it was 2.5. By 1975, it had nearly doubled to 4.8. It remained within a narrow

orce rates between 1965 and 1974 to the technological improvement and societal diffusion of contraceptives, particularly the pill and IUDs.¹⁸⁷

In 1960, only four years after the pill was first tested on humans, researchers found that marriages in which contraceptives were used were twice as likely to end in divorce as marriages in which there was no contraceptive use.¹⁸⁸ Other anecdotal evidence suggests that couples using a non-contraceptive method of birth control are as much as five times more likely to have never divorced.¹⁸⁹

Another social scientist, Francis Fukuyama, has written on the impact of birth control in causing “The Great Disruption” in western society.¹⁹⁰ Citing “the breakdown of the nuclear family after the 1960s in the West” as one aspect of the great disruption,¹⁹¹ he concludes that two related factors, birth control and the movement of women into the labor force, are largely responsible for the breakdown.¹⁹² Fukuyama does not argue that either women or men are primarily responsible for this breakdown, but does argue that the pill and the sexual revolution dramatically altered male behavior.¹⁹³ In particular, he argues that men have changed their traditional calculation of trading something they were reluctant to partake in—marriage and fatherhood—for something that they have always wanted—sexual satisfaction.¹⁹⁴ As a result of this changed calculation, marriage is less likely to occur because of pregnancy and also less likely to be maintained.¹⁹⁵

Pope Paul VI predicted this consequence. In 1968, he wrote,

A man who grows accustomed to the use of contraceptive methods may forget the reverence due to a woman, and, disregarding her physical and emotional equilibrium, reduce her to being a mere instrument for the satisfaction of his own desires, no longer considering her as his partner whom he should surround with care and affection.¹⁹⁶

range of 4.7 to 5.3 for the next twenty years. U.S. Census Bureau, *2003 Statistical Abstract of the U.S.: Table 83*.

187. Michael, *supra* n. 184, at 16B, tbl. 5 (3.728 ÷ 7.978 = 46.73%).

188. See generally Ellen Grant, *Sexual Chemistry: Understanding Our Hormones, the Pill and HRT* (William Heinemann Ltd. 1996).

189. Mercedes Arzú Wilson, *The Practice of Natural Family Planning Versus the Use of Artificial Birth Control: Family, Sexual and Moral Issues* in *Catholic Social Science Review*, 7 *Catholic Soc. Sci. Rev.* 185, 200 (Nov. 2002) (available at <http://www.familyplanning.net/index-home.html>; select Important New Study on NFP Published by the *Catholic Social Science Review*).

190. Francis Fukuyama, *The Great Disruption: Human Nature and the Reconstitution of Social Order* (Free Press 1999).

191. *Id.* at 95.

192. *Id.* at 101.

193. *Id.* at 102.

194. See *id.*

195. *Id.* at 102-03.

196. Pope Paul VI, *supra* n. 179, at § 17.

There can be no greater abuse of the institution of marriage than to take actions that lead to its dissolution. The strong scientific, sociological, and philosophical evidence that contraception abuses the institution is a compelling reason for why a contraceptive ban should be upheld by the Court. Even with this evidence, however, the Court may be unwilling to uphold a ban because it does not understand why contraception leads to divorce. But there is ample evidence that explains the link—specifically, the evidence that contraceptive availability leads to extramarital sex.

2. *Contraception and the Increase in Premarital and Extramarital Sex*

It is futile to hope that the use of contraceptives will be restricted to the mere regulation of progeny. There is hope for a decent life only so long as the sexual act is definitely related to the conception of precious life. This rules out perverted sexuality and to a lesser degree promiscuity. Divorce of the sexual act from its natural consequences must lead to a hideous promiscuity and to condoning if not endorsing natural vice.

—Mohandas Gandhi¹⁹⁷

Responsible men can become more deeply convinced of the truth of the doctrine laid down by the Church on this issue if they reflect on the consequences of methods and plans for artificial birth control. Let them first consider how easily this course of action could open wide the way for marital infidelity and a general lowering of moral standards. Not much experience is needed to be fully aware of human weakness and to understand that human beings—and especially the young, who are so exposed to temptation—need incentives to keep the moral law, and it is an evil thing to make it easy for them to break that law.

—Pope Paul VI¹⁹⁸

Contrary to Gandhi and Pope Paul VI, the Supreme Court has expressed its belief that “there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives.”¹⁹⁹ In one sense, the Court was absolutely correct: there was no evidence *presented* to it that linked the availability of contraceptives to increased extramarital sexual activity. Although the Court could have taken judicial notice of the common sense understandings articulated by two of the most prominent persons of the twentieth century who addressed the topic, they

197. Quoted by Philip F. Lawler, *The Price of Virtue*, 7 *Catholic World Rpt.* 55 (July 1997).

198. Pope Paul VI, *supra* n. 179, at § 17.

199. *Carey*, 431 U.S. at 695 (Brennan, J., plurality in part IV).

did not. The failure to take such judicial notice, however, does not mean that there is no evidence. It just means that none was presented.

It is likely that the Court could be persuaded that extramarital affairs lead to divorce. The link appears obvious. In a 1998 poll, only 12% of adults agreed with the statement: "Extramarital love affairs are acceptable under certain circumstances."²⁰⁰ In the same poll, 64% agreed that "divorce is an acceptable solution if two people are unhappy in marriage." A huge majority believe that affairs are unacceptable. If "unacceptable" behavior by one partner leads to unhappiness in marriage, then a nearly 2 to 1 majority would see divorce as a solution to the extramarital love affair. But perhaps such plodding, methodical logic is unnecessary. Simply ask most married persons the following question: "If your spouse had an extramarital affair, would that make you unhappy?" The overwhelming majority would essentially answer, though perhaps more colorfully, "Yes." Assuming that the Court would agree that extramarital affairs lead to divorce, it should be convinced that contraceptives lead to divorce if contraceptives also lead to extramarital affairs.

The Court may be persuaded of that conclusion by the writings of a former academic and current Seventh Circuit Court of Appeals judge Richard Posner. Directly contradicting the opinion in *Carey*, Posner wrote that contraceptive "availability increases the frequency of intercourse by teenagers"²⁰¹ In the same book, which was cited by the Court alternatively in both the majority and the dissenting opinions in *Lawrence*,²⁰² Posner cited "evidence that the availability of contraceptives indeed increases the amount of non-marital sex."²⁰³ One of the sources he cited found that "there appears to be clear evidence of an increase in coital frequency between 1965 and 1970."²⁰⁴

A more comprehensive study of sexual behavior in the United States was published in 1994. The researchers determined that there were a number of statistically significant correlations. The study indicated that "men and women who had a sex partner before age eighteen were more likely to form an informal cohabitational relationship than a formal marriage."²⁰⁵ It then showed that "[t]hose who began their partnership as a cohabitation and then converted it to a formal marriage had a much higher likelihood of separation . . . than those who did not begin their partnership with a cohabi-

200. Humphrey Taylor, *The Harris Poll #14: Differences in American and Japanese Attitudes to Extramarital Sex, Divorce—and Princess Diana*, http://www.harrisinteractive.com/harris_poll/index.asp?PID=193 (Mar. 11, 1998).

201. Richard A. Posner, *Sex and Reason* 270 (Harv. U. Press 1994).

202. *Lawrence*, 539 U.S. at 576, 589.

203. Posner, *supra* n. 201, at 265 n. 7.

204. Charles F. Westoff, *Coital Frequency and Contraception*, 6:3 *Fam. Plan. Perspectives* 136 (Summer 1974).

205. Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* 493 (U. of Chi. Press 1994).

tation.”²⁰⁶ Linking all these findings together, there is evidence that contraceptives lead to a higher frequency of teenage sexual activity, which leads to an increase in cohabitational partnerships, which leads to a much higher likelihood of divorce. In short, contraceptive availability leads to divorce.²⁰⁷

None of this evidence conclusively proves, to a scientific certainty, that increased contraceptive availability leads to divorce and an abuse of the institution of marriage. But the state’s actions are not held to that standard of proof. Instead, the standard of proof is a preponderance of the evidence. Both science and philosophy support the conclusion. A reasonable fact finder certainly could as well.

V. NATURAL FAMILY PLANNING AS A BETTER ALTERNATIVE: WHY A BAN ON CONTRACEPTIVES WOULD BE NARROWLY TAILORED AND THE LEAST RESTRICTIVE MEANS

The bulk of this paper is devoted to showing that the state has a compelling interest in banning contraceptives. In most respects, the analysis of whether a state law banning all contraceptives is narrowly tailored or the least restrictive means available is dependent upon the conclusions reached about the state’s interests. That is, if the premise were accepted that the political branches have the authority to determine whether the health risks from a certain contraceptive product are enough to prohibit its distribution, then a ban on those products shown to be a health risk would be narrowly tailored. The ban would be neither over- nor under-inclusive; instead, the ban would exactly meet the state’s interest in protecting health. Similarly, if the political branches have a separate compelling interest in protecting the institution of marriage, and those branches found that all contraceptives are an abuse of that institution, then a ban would perfectly meet the state’s asserted interest in protecting marriage.

Undoubtedly, however, there would be objections. First, one could argue that the determination that citizen health and protection of marriage are compelling interests is not the end of the analysis. Rather, we should accept Justice Souter’s contention that substantive due process analysis involves a weighing of the state’s compelling interest against an individual’s asserted liberty right.²⁰⁸ However, even if we were to accept that contention, Justice Souter would adopt a highly deferential standard toward the state’s compelling interest—as long as the balance struck by the political branches is reasonable, the law should be upheld. As discussed *supra* in

206. *Id.* at 501.

207. Note that the study did not evaluate nor conclude, to a scientific certainty, that contraceptive availability leads to divorce. Instead, it concluded that each of the steps in one of my hypothesized chains of causation was proved to a scientific certainty. The U.S. Constitution, of course, does not require a scientific certainty.

208. *Glucksberg*, 521 U.S. at 752-89 (Souter, J., concurring).

Part IV.A.1.b., the Court is reluctant to overturn, as unreasonable, laws applied equally to everyone.²⁰⁹

Another objection to a comprehensive ban would be the lack of an exception for health reasons. For example, if a married woman risked severe health consequences from becoming pregnant, a ban would arguably be unreasonable for her because she would be at a much higher health risk from getting pregnant than from the contraceptive itself. The Supreme Court of Connecticut addressed this objection in a state challenge to the law eventually overturned in *Griswold*. In *Buxton v. Ullman*, the Court rejected the objection by telling the plaintiff that she had an alternative—abstinence.²¹⁰ Although this may seem overly harsh upon first reading, periodic abstinence is the basis of a safe, free, effective, and marriage-building alternative available to everyone, and it is called natural family planning (NFP).

A comprehensive discussion of NFP is beyond the scope of this article. However, it can be summarized fairly simply. A woman's body undergoes changes at the time of ovulation. Two easily observable changes are the woman's body temperature and the consistency and quantity of her cervical mucus. By consistently charting these changes on a daily basis, a woman can accurately predict whether she is fertile on a given day. If she wants to avoid pregnancy on a day that she is fertile, she is abstinent. One study found an applied effectiveness rate of over 99.5% for NFP.²¹¹ The participants in the study were the poor women in the slums of Calcutta. Uneducated and impoverished, they were taught NFP for virtually no cost. Numerous other studies have shown an effectiveness rate over 99%.²¹² There also is anecdotal evidence that NFP users get divorced at a much lower rate than non-users.²¹³

In short, the availability of NFP and the "perfect fit" between a comprehensive ban on contraceptives and the state's compelling interest in both health and marriage makes a ban both narrowly tailored and the least restrictive means to meet the state's interest. Any exception would subject citizens to health risks the state reasonably wants to avoid. Additionally, any exception would lead to an abuse of the institution of marriage, because

209. See *Lawrence*, 539 U.S. at 579-80 (O'Connor, J., concurring).

210. 156 A.2d at 514.

211. A. K. Ghosh, S. Saha & G. Chatterjee, *Sympto-thermia vis-à-vis Fertility Control*, 32 J. Obstetrics Gynue India 443 (1982); R. E. J. Ryder, "Natural Family Planning": *Effective Birth Control Supported by the Catholic Church*, 307 British Med. J. 723 (1993).

212. See John Kippley, *The Effectiveness of Natural Family Planning, Part 2—Method Effectiveness*, <http://ccli.org/nfp/basics/effectiveness-p02.php> (accessed Nov. 21, 2005) (referencing five different studies).

213. The Couple to Couple League, *Marital Duration and Natural Family Planning*, <http://ccli.org/nfp/marriage/maritalduration.php> (accessed Sept. 22, 2005); Elzbieta Wojcik, *Natural Regulation of Conception and Contraception in Why Humanae Vitae was Right: A Reader*, *supra* n. 182, at 431-32.

the state can reasonably conclude that the availability of contraceptives leads to a higher incidence of divorce.

VI. CONCLUSION

The constitutional case for a complete state ban of contraceptives is strong. Given the demonstrable adverse health consequences that can be either directly or indirectly attributed to them, a ban should be upheld. A separate case for a ban based on the state's interest in protecting marriage due to the strong correlation between the availability of contraceptives and the rapid breakdown of the institution of marriage is equally compelling. If a state were to enact a comprehensive ban on contraceptives for the reasons set forth in this article, the Court should uphold the judgment of the people's democratically elected representatives.²¹⁴

However, this author does not harbor any illusions about the current prospects of passing such a statewide ban on contraceptives. There are simply too many people at this time that "want their MTV"²¹⁵ and are not willing to give up their Court-provided license to have sex divorced from its procreative nature. But as the increasingly severe natural consequences of that divorce become clearer, opinion will change. When that time comes, the Supreme Court should be willing to hear the facts, and allow the people—acting through the political branches—to rule themselves.

214. Just because the Court should, however, doesn't mean that it would. It might decide that because there are so many "people who have ordered their thinking and living around that case," it can't be overturned. *Casey*, 505 U.S. at 856. Such a strong devotion to *stare decisis*, however, appears to have been recently abandoned by the Court in *Lawrence v. Texas*. 539 U.S. at 586-87 (Scalia, J., dissenting). For a humorous take on how another case would have been decided if the Court actually believed that reliance interests required the Court to uphold unconstitutional acts, see Michael Stokes Paulsen & Daniel N. Rosen, Brown, *Casey-Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. Rev. 1287 (1994).

215. One of the most popular videos in the early period of MTV was created by the band Dire Straits. In the background of the video could be heard the line, repeated over and over, "I want my MTV." That background line has become a euphemistic substitute for another line in the song, "Money for nothin' and chicks for free." Dire Straits, *The Videos: Money for Nothing* (Warner Bros. 1993) (music video).

