

# “The Sexual Freedom Cases”? Contraception, Abortion, Abstinence, and the Constitution

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## Introduction

One of the most important constitutional cases in recent Supreme Court history is *Griswold v. Connecticut*,<sup>1</sup> the 1965 decision holding that a law forbidding the use of contraceptives violated married couples' constitutional “right of privacy.”<sup>2</sup> *Griswold* is widely viewed as the decision that inaugurated the Court's modern protection of fundamental rights under the Due Process Clause of the Fourteenth Amendment,<sup>3</sup> including the controversial abortion right. It has occasioned symposia and numerous law review articles and played a role in the political arena. Refusal to endorse *Griswold* may have cemented the downfall of Robert Bork, Ronald Reagan's nominee to the Supreme Court.<sup>4</sup>

*Griswold* is also the foundation for a series of Supreme Court decisions invalidating anticontraception and antiabortion laws—cases once referred to by Richard Posner as “[t]he sexual-freedom cases.”<sup>5</sup> The im-

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<sup>1</sup> 381 U.S. 479 (1965).

<sup>2</sup> See *id.* at 486.

<sup>3</sup> See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 33 (1999) (“*Griswold* was the birth of this controversial constitutional right [to privacy].”). As Dan Conkle and others have noted, the Court's 1942 decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), invalidating a state law providing for castration of certain repeat offenders, resonates with substantive due process overtones, even while it is articulated in equal protection terms. See, e.g., Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 219 n.28 (1987).

<sup>4</sup> See, e.g., DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 670–71 (1994).

<sup>5</sup> Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 214. More recently, Judge Posner has dubbed these decisions “the sexual liberty cases.” RICHARD A. POSNER, SEX AND REASON 339 (1992) [hereinafter POSNER, SEX AND REASON].

port of such cases as *Griswold*, *Eisenstadt v. Baird*,<sup>6</sup> and *Carey v. Population Services International, Inc.*,<sup>7</sup> which invalidated anticontraception laws as applied to unmarried individuals and minors, *Roe v. Wade*,<sup>8</sup> which recognized a constitutional right to choose an abortion, and more recent abortion decisions, such as *Planned Parenthood v. Casey*,<sup>9</sup> remains unsettled to this date. On the one hand, the Supreme Court denied certiorari in *Post v. Oklahoma*,<sup>10</sup> a case holding that the constitutional right of privacy included the right to select consensual adult sex partners and, thus, that the state's crimes-against-nature statute could not constitutionally apply to private, consensual acts of anal intercourse and fellatio between a man and a woman. On the other hand, less than four months before denying certiorari in *Post*, a majority of the Court had decided in *Bowers v. Hardwick*<sup>11</sup> that there was no fundamental right to commit "homosexual sodomy"<sup>12</sup> and facially upheld Georgia's law criminalizing oral and anal sex. Thus, *Post* dramatically poses the questions, which *Hardwick* may or may not answer, of whether the Constitution protects choices to engage in sexual activity generally and whose and which specific choices are protected.

*Hardwick* notwithstanding, many constitutional scholars take the Court's sexual freedom decisions to dictate logically the existence of a constitutional right to engage in sexual activities for purposes other than procreation, relying on an argument that I am terming the *abstinence gap*. In brief, the abstinence gap argument contends that the Supreme Court's contraception and abortion cases could not have been solely about protecting people's rights to bodily integrity or reproductive autonomy. These cases must embody constitutional protection of a right to engage in sexual activity for purposes other than procreation, since people can prevent reproduction by abstaining from peno-vaginal intercourse.

While this "right to sex" account is a plausible interpretation of the Supreme Court's so-called sexual freedom cases, there is a wide range of scholarly views of the propositions for which *Griswold* and subsequent decisions stand. Other constitutional commentators advocate competing interpretations of the sexual freedom cases in apparent efforts to help keep the Court out of "the never-never land of sexual privacy for unmar-

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<sup>6</sup> 405 U.S. 438 (1972).

<sup>7</sup> 431 U.S. 678 (1977).

<sup>8</sup> 410 U.S. 113 (1973).

<sup>9</sup> 505 U.S. 833 (1992).

<sup>10</sup> 715 P.2d 1105 (Okla. Crim. App. 1986), *cert. denied*, 479 U.S. 890 (1986). Because this constitutional challenge arose in the context of a rape prosecution, where the defendant was acquitted of rape but convicted of violating the crime-against-nature statute, the actual conduct protected by the court's holding may be better characterized as not having been proven nonconsensual.

<sup>11</sup> 478 U.S. 186 (1986).

<sup>12</sup> *Id.* at 191.

ried couples.”<sup>13</sup> Some reject the notion that the foundational contraception cases involved any fundamental rights at all, instead contending that they merely involved laws that failed the minimum constitutional requirements of legislative rationality.<sup>14</sup> Others justify the foundational contraception decisions as predicated on the archaic roots of, and the lack of contemporary democratic support for, the invalidated statutes.<sup>15</sup> Still other commentators point to spatial privacy and a condemnation of intrusive government searches as the animating principles.<sup>16</sup> Paradoxically enough, some claim to see in the sexual freedom cases constitutional protection of “traditional” families,<sup>17</sup> and one respected view grounds these cases in antitotalitarianism, a constitutional prohibition of too thorough direction of individuals’ lives, such as is wrought when the government compels motherhood.<sup>18</sup>

To determine whether one ought to accept the “right to sex” account of the sexual freedom cases, it is necessary first to determine whether this view is a plausible interpretation of these decisions and then to assess whether any sufficiently plausible competing interpretations adequately respond to the “right to sex” account’s abstinence argument. This Article analyzes the aforementioned scholarly interpretations of the Supreme Court’s contraception and abortion decisions, seeking to assess their coherence and persuasiveness. The *Post*-type situation in which a state law forbids a mixed-sex couple from engaging in oral or anal sex, serves as a reference point, highlighting practical consequences of different constitutional analyses for this one particular type of sexual regulation.

This Article concludes that many constitutional scholars are wrong: the sexual freedom cases are not best understood as cases about poorly drafted statutes, moribund laws, government snooping, traditional family values, or coerced production of motherhood. These views should be ruled out as eligible interpretations of the sexual freedom cases because of their inability to justify the results of those decisions and because of the unattractiveness of some of their putative constitutional principles.

Other accounts show more promise in that they do not conflict with the holdings in the so-called sexual freedom cases. Views that treat those cases as protecting the equal citizenship status of men and women,<sup>19</sup> individuals’ bodily integrity,<sup>20</sup> or procreative autonomy<sup>21</sup> fare much better on the dimensions of fit and justification and would seem to present vi-

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<sup>13</sup> Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 538 (1983).

<sup>14</sup> See *infra* Part III.A.

<sup>15</sup> See *infra* Part III.B.

<sup>16</sup> See *infra* Part III.C.

<sup>17</sup> See *infra* Part III.D.

<sup>18</sup> See *infra* Part III.E.

<sup>19</sup> See *infra* Part IV.A.

<sup>20</sup> See *infra* Part IV.B.

<sup>21</sup> See *infra* Part IV.C.

able alternatives to the "right to sex" account of the sexual freedom cases. However, these accounts are still vulnerable to the abstinence gap, leaving the "right to sex" account, by default, as the best interpretation of the sexual freedom cases.

These interpretations are not, however, fatally flawed. Principles of robust gender equality, bodily integrity, or procreative autonomy can bridge the abstinence gap if they are supplemented with an additional constitutional principle heretofore unarticulated in the cases: a nonconsequential side constraint forbidding government from using the threat either of physical harm or of the creation of new persons as a means of controlling citizens' behavior. While these principles are somewhat innovative, neither of these restraints on governmental means is without foundation in existing constitutional law. Supplemented in this fashion, the gender equality, bodily integrity, and procreative autonomy accounts are reasonably plausible interpretations of the sexual freedom cases. Although this move to an impermissible means principle does require treating the contraception cases and the abortion cases as implicating somewhat different constitutional guarantees, the "right to sex" account must abandon its claim to logical necessity.

Part I describes this Article's motivation and methodology and surveys *Griswold* and the Supreme Court's other sexual freedom cases. After a brief discussion of some of the potential issues arising under the view that these cases protect a constitutional right to sexual autonomy, Part II explicates the precedential argument that the sexual freedom cases do indeed protect a right to sex and examines the fit of this interpretation with Supreme Court precedents. Part III then examines several alternative accounts of these precedents. It discusses the effect of each view with respect to the situation in *Post*—a challenge to the constitutionality of a statute prohibiting a mixed-sex couple from engaging in oral sex—and examines the persuasiveness of these approaches. This Part concludes that each of these accounts is, in the end, sufficiently unpersuasive that it should not be considered a potential threat to the "right to sex" view of *Griswold* and the other sexual freedom cases. Part IV turns to three more promising interpretations of the sexual freedom cases, arguing that the gender equality, bodily integrity, and reproductive autonomy readings fall short of fully justifying the decisions for which they purport to account because they do not effectively respond to the abstinence gap. Finally, Part V suggests how these interpretations might be supplemented by independent constitutional restrictions on governmental use of the threat either of physical harm or of the creation of persons as a means of modifying people's behavior. The Article then considers the effect of such extensions on the mixed-sex sodomy scenario under consideration. Part V concludes that the Supreme Court's unitary treatment of the constitutional rights protected in the sexual freedom cases may misleadingly elide important differences in their constitutional predicates. The sexual



freedom canon perhaps should be cleaved and the contraception decisions understood as grounded in principles not wholly identical to those underlying the abortion decisions. Once this is done, the bodily integrity, procreative autonomy, and perhaps gender equality accounts should be seen as dethroning the "right to sex" view's claim to logical necessity. Advocates of the right-to-sex interpretation must, therefore, return to less precedent-driven, more normative arguments in favor of the claim that the Constitution protects a right to sex.

### I. Seeking to Understand the Sexual Freedom Cases

This Article deals with one argument for the proposition that the Constitution specially protects a right to sex, understood as a right to engage in sexual activities for purposes other than procreation. The argument maintains that the series of Supreme Court decisions dubbed the sexual freedom cases necessarily protects the right to sex, given that the ability to abstain from potentially procreative sex acts would have allowed people adequately to avoid the bite of the anticontraception or antiabortion laws invalidated in those precedents. Section A of this Part briefly explains the task that the Article undertakes, and Section B sounds a cautionary note about the Article's ambition. Finally, Section C describes the sexual freedom cases themselves so that Parts II through V may concentrate on interpretations of those decisions.

#### A. *The Interpretive-Constructive Project*

The ultimate aim of this Article is to explore the questions of whether and to what extent the Constitution specially protects sexual autonomy. These are exquisitely complicated questions, and this Article focuses primarily upon one piece of the puzzle: whether the Supreme Court decisions in the key contraception and abortion cases really should be understood to establish that the Constitution specially protects sexual freedom.<sup>22</sup> Resolution of the status of a putative constitutional right to sex requires a preliminary search of various scholarly views of these precedents for a principle or principles that might persuasively explain and justify them and answer the question of whether they are best understood as sexual freedom cases.

I assume a position close to, if somewhat more modest than, Ronald Dworkin's "law as integrity" approach, which "asks judges to assume, so far as this is possible, that the law is structured by a coherent set of prin-

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<sup>22</sup> A judgment that these decisions alone do not establish that the Constitution protects sexual autonomy rights need not dictate that the Constitution does not protect sexual autonomy. Rather, the precedents to date may underdetermine the issue, and recourse to less precedent-grounded analyses may be necessary to arrive at a sound conclusion.

ciples about justice and fairness and procedural due process.”<sup>23</sup> Albeit contested,<sup>24</sup> Dworkin’s approach offers a normatively attractive vision of the role of constitutional law in the United States, doing honor to our “ambition to be a community of principle.”<sup>25</sup> Moreover, insofar as the “right to sex” account that I am assessing rests on ostensibly principled inferences from the sexual freedom cases, its claims can be evaluated only by taking those cases as a starting point and searching for alternative principles that can “impose purpose over the [cases] being interpreted.”<sup>26</sup>

To emphasize principle is not, however, to be in the grip of what Professor Eisgruber has termed “the Aesthetic Fallacy,” which holds “that the Constitution is like a poem, a symphony, or a great work of political philosophy. Each word and every phrase must come together to form a harmonious and pleasing composition.”<sup>27</sup> The quest to identify principles that may account for the sexual freedom cases need not treat the entire Constitution as a hyperidealized, pervasively coherent body of law for some utopia (which the United States clearly is not).<sup>28</sup> This Article simply examines a set of decisions that the Court has treated as explicating a possibly unitary constitutional right of privacy that might profitably be regarded as attempts to give content to the “liberty” protected by the Fifth and Fourteenth Amendments and whose import has divided many commentators for years. Within that compass, the search for coherence is eminently reasonable and, I suggest, a proper way to approach the sexual freedom cases.<sup>29</sup>

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<sup>23</sup> RONALD DWORKIN, *LAW’S EMPIRE* 243 (1986).

<sup>24</sup> See, e.g., Ken Kress, *Why No Judge Should Be a Dworkinian Coherentist*, 77 TEX. L. REV. 1375 (1999).

<sup>25</sup> DWORKIN, *supra* note 23, at 243.

<sup>26</sup> *Id.* at 228. Of course, one could disagree with the legitimacy of any of the sexual freedom cases and, thus, scorn the entire enterprise of trying to make sense of those cases. I prefer to think that generations of constitutional law scholars have not been wasting their time searching for principled interpretations of those decisions.

<sup>27</sup> Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611, 1617–18 (1997). Those that succumb to this fallacious view of the Constitution are virtually impelled “to look for hidden harmonies among its provisions.” *Id.* at 1618.

<sup>28</sup> I accept that “[t]he Constitution is a practical political institution, fraught with compromise and experimentation and human error, rather than a quasi-divine artwork or philosophical composition.” *Id.* The present project is not an Ely-sian *Democracy and Desire*, attempting a grand synthesis of sundry provisions of the Constitution, however interesting and valuable such an undertaking might be.

<sup>29</sup> Despite the parameters just mentioned, the project should not be confused with the narrower issue of what a court would or should hold when confronted with constitutional litigation challenging sexual regulations. This Article arises primarily from concern with a broader question of constitutional meaning: whether the Constitution, as it is best understood by anyone, protects rights of sexual autonomy. There is a difference between constitutional meaning and constitutional adjudication; the interpretations adopted by courts in the latter do not exhaust the former. One highly significant reason for this gap between the Constitution and its judicial implementation lies in the notion of underenforcement of constitutional norms. As Professor Lawrence Sager has argued, felt institutional con-

The task of this Article, then, is to examine different treatments of the sexual freedom cases, exploring the "right to sex" account and several alternatives. I take the sexual freedom cases as settled, despite the obvious controversial nature of some of them.<sup>30</sup> In assessing the persuasiveness of various accounts of the sexual freedom cases, it may be that some fare so poorly as interpretations that they fail to fit the fundamental contraception and abortion decisions and, therefore, that they should not qualify as "eligible readings" of the cases that they purport to explain or justify.<sup>31</sup>

### B. On Theory, Hubris, and Humility

Indeed, as Part III shows, many of the scholarly accounts of the Supreme Court's sexual freedom cases are seriously flawed. Part of the reason for this may lie in the political or jurisprudential commitments of the commentators, which could lead people to distort their descriptions of extant case law to favor what they view as the desirable approach. While I emphatically agree that part of the process of constitutional interpretation involves construction, and I recognize the ease of distortion (which I myself may have performed in this Article), this inclination may justify condemnation of precedent but it does not excuse misdescription.

Another reason for the weaknesses of the prevailing constitutional accounts may be an overreaching desire for simplicity where complexity and ambiguity necessarily reign. Some scholars may try to embrace too much Supreme Court jurisprudence or too many possible constitutional principles within an overarching, unitary theoretical framework.<sup>32</sup> While a coherent principled account of the sexual freedom cases would prove most helpful to citizens, legislators, and judges seeking to understand the present state of constitutional law, insistence on too great a degree of coherence could sidetrack someone seeking to offer a descriptive account of these decisions. Constitutional scholars, therefore, should distinguish between ambition and hubris, between the sincere desire to interpret

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straints may preclude a court from adopting constitutional interpretations or doctrines that best reflect the full reach of constitutional principles. See, e.g., Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). Nonetheless, Supreme Court decisions constitute important data in any analysis of constitutional meaning. See, e.g., Lawrence G. Sager, *The Domain of Constitutional Justice*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 235, 238 (Larry Alexander ed., 1998) (summarizing five institutional reasons why the Court's decisions may offer good guidance to the best understanding of the Constitution's principles).

<sup>30</sup> See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (criticizing *Roe v. Wade*, 410 U.S. 113 (1973)).

<sup>31</sup> See, e.g., DWORKIN, *supra* note 23, at 231 (discussing "eligible readings"); *id.* at 387 (discussing "eligible interpretations").

<sup>32</sup> Cf. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1432, 1499-1500 (1992) (criticizing Frank Michelman's and Jed Rubenfeld's treatments of *Bowers v. Hardwick*, 478 U.S. 186 (1986), for their "methodological globalism").

precedents in the best possible light and an insistence that coherence must exist.

"[T]he ambition to be a community of principle"<sup>33</sup> is noble, attractive, and often positively productive, yet it ought not delude us into thinking that we have discovered more coherence, more principle, more justice even than our decisional law currently achieves. One "might not find any interpretation that flows through the text, that fits everything the material [one has] been given treats as important. [One] must lower [one's] sights . . . by trying to construct an interpretation that fits the bulk of what [one takes] to be . . . most fundamental in the text."<sup>34</sup>

With these caveats in place, it is time to turn to the sexual freedom cases. Before one can assess any interpretation of these decisions, either the "right to sex" account or any of the competing accounts described in Parts III and IV, one needs at least some detail about the precedents that these interpretations purport to explain.

### C. *The Sexual Freedom Cases*

This section describes the Supreme Court's foundational abortion and contraception decisions,<sup>35</sup> the key precedents said to establish a constitutional right to sex. In addition, I include a discussion of the lead abortion funding decisions<sup>36</sup> and the 1992 decision refusing to overrule *Roe* tout court,<sup>37</sup> for they shed light on the Court's understanding of the constitutional right to choose an abortion.<sup>38</sup> Collectively, I treat these precedents as the "sexual freedom cases," the chief objects of inquiry in this Article.

I focus upon these cases because, according to many constitutional scholars, they logically establish the constitutional stature of the right to

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<sup>33</sup> DWORKIN, *supra* note 23, at 243.

<sup>34</sup> *Id.* at 237. Even commentators that are not seduced by a yearning for totalizing theory may still seek too much unity within a single case, presupposing "that precedents necessarily have a single 'principle.'" Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1287 (1997). Constitutional decisions may be supported by more than one principle, each of which might be necessary or sufficient—or neither—in a given case. Interpretations of the sexual freedom cases may rely on "competitive rather than contradictory principles." DWORKIN, *supra* note 23, at 241. *See also id.* at 269–71 (providing example of judge working through competitive accounts of particular body of law).

<sup>35</sup> *See* *Carey v. Population Servs. Int'l, Inc.*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>36</sup> *See* *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>37</sup> *See* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>38</sup> It remains to be seen whether the Court will change its understanding of the abortion right in the late-term "dilation and evacuation" case before it during the October 1999 term, *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000).

engage in sexual activity for nonprocreative purposes. Scholars rejecting the "right to sex" view offer competing interpretations of these same decisions. In addition, *Griswold* and its progeny form the keystone of the right of privacy and modern substantive due process law, making them crucially important cases and the target of attacks by constitutional minimalists such as Robert Bork.<sup>39</sup> A good interpretation (as opposed to an external criticism) of the sexual freedom cases, thus, should ideally account for all of these decisions. An account that explains *Griswold*'s protection of marital contraception use but not the extension of *Griswold*'s protection to the unmarried, minors, and abortion choice might have counted as an acceptable interpretation of *Griswold* circa 1966, but it would be woefully inadequate as an interpretation of the dynamic precedent that has come down to us today more than three decades later.<sup>40</sup> Similarly deficient are modern-day interpretations that fail to account even for *Griswold*.

*Griswold* and the other sexual freedom cases are not the only ones that matter. Properly evaluating interpretations of these decisions should not occur in jurisprudential isolation, but should involve some inquiry about consistency with other areas of constitutional law. In assessing the "fit" of a proposed interpretation of the sexual freedom cases, local priority ought to be given to these decisions themselves, while some, albeit lesser, weight should be given to other substantive due process decisions.<sup>41</sup> The sexual freedom decisions themselves should, however, always remain the focus, so long as the goal is to adjudicate among competing interpretations of them.

The first of the sexual freedom cases was decided in 1965, when the Supreme Court inaugurated<sup>42</sup> its modern protection of privacy rights by invalidating a state law prohibiting the use of contraceptives in *Griswold v. Connecticut*.<sup>43</sup> The case arose when directors of the state Planned Parenthood chapter, which ran a family planning center in New Haven, were arrested and convicted for distributing contraceptives to married women. This conduct amounted to criminal abetting of violations of Connecti-

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<sup>39</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 95–100 (1990); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971).

<sup>40</sup> This position is consistent with Michael McConnell's insistence that "[s]ometimes precedents are extended. Sometimes, upon reflection in light of a new case, precedents are narrowed or reinterpreted in a different way. Sometimes precedents are overruled. All of these ways of dealing with precedent are both common and legitimate. All can be 'principled.'" McConnell, *supra* note 34, at 1288.

<sup>41</sup> See generally DWORKIN, *supra* note 23, at 250–54 (discussing these interpretive ideas).

<sup>42</sup> See *supra* note 3 and accompanying text.

<sup>43</sup> 381 U.S. 479 (1965). The Court had earlier rejected challenges to Connecticut's law for lack of standing, in *Tileston v. Ullman*, 318 U.S. 44 (1943), and lack of ripeness, in *Poe v. Ullman*, 367 U.S. 497 (1961).

cut's law against contraceptive use, which made no distinction between married and unmarried users.<sup>44</sup>

Justice Douglas's opinion for the Court held that the directors had "standing to raise the constitutional rights of the married people with whom they had a professional relationship"<sup>45</sup> and that Connecticut's anti-contraception law violated those rights.<sup>46</sup> Besides extolling the virtues of marriage, Douglas's opinion relied on the penumbras of various provisions in the Bill of Rights to conclude that the Constitution protected a right of privacy, which the ban on contraceptive use violated.<sup>47</sup>

<sup>44</sup> See CONN. GEN. STAT. § 53-32 (1958) ("Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than 50 dollars or imprisoned not less than 60 days nor more than one year or be both fined and imprisoned.") (quoted in *Griswold*, 381 U.S. at 480); § 54-196 ("Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.") (quoted in *Griswold*, 381 U.S. at 480).

<sup>45</sup> 381 U.S. at 481.

<sup>46</sup> See *id.* at 485-86.

<sup>47</sup> See *id.* at 484-86. Among those penumbral rights were the right to educate one's children as one chooses, recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1923), and the right to study the German language in a private school, recognized in *Meyer v. Nebraska*, 262 U.S. 390 (1925). *Griswold* treated *Pierce* and *Meyer* as protecting penumbral First Amendment rights. See *Griswold*, 381 U.S. at 482-83. Those cases, however, were expressly predicated upon the substantive due process approach to the Fourteenth Amendment so sternly repudiated in Douglas's *Griswold* opinion, see *id.* at 481-82, so there is some irony in his conclusion that "we reaffirm the principle of the *Pierce* and the *Meyer* cases." *Id.* at 483.

Justice Goldberg, along with Chief Justice Warren and Justice Brennan, joined the Court's opinion but also wrote a concurring opinion maintaining "that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy," *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring), an aspect of liberty protected by the Fifth and Fourteenth Amendment Due Process Clauses, which, as the Ninth Amendment confirms, embraced more rights than those mentioned expressly in the constitutional text. At the end of their opinion, these Justices asserted that the Court's holding "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct," *id.* at 498-99, and they endorsed Justice Harlan's earlier apparent view that states may regulate "extra-marital sexuality," presumably meaning "[a]dultery, homosexuality and the like." *Id.* at 499 (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)). Quite flatly, Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, stated that "[t]he State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication." *Id.* at 498. Justice White, however, "wholly fail[ed] to see how the ban on the use of contraceptives by married couples in any way reinforces the state's ban on illicit sexual relationships." *Id.* at 505 (White, J., concurring).

Justice Harlan concurred in the judgment on the ground that Connecticut's law "infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values implicit in the concept of ordered liberty." *Id.* at 500 (Harlan, J., concurring) (internal quotation marks omitted). He did not join the Court's opinion, however, because he objected to its penumbral approach: "While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom." *Id.* Justice White, also concurring in the judgment, agreed with the other concurring Justices that Connecticut's use ban "as applied to married couples deprives them of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment." *Id.* at 502. In his view, "the right invoked in this case" was the right "to be free of regulation of the intimacies of the marriage relationship," *id.* at 502-03,

"The generative potential of the *Griswold* decision became clear seven years later with the decision in *Eisenstadt v. Baird*."<sup>48</sup> *Eisenstadt* arose from a prosecution of William Baird for violating Massachusetts laws limiting contraception distribution to physicians (and pharmacists acting on prescription) and prohibiting distribution to unmarried persons to prevent pregnancy (as opposed to disease).<sup>49</sup> Baird had been convicted for giving contraceptive foam to a woman at the end of a lecture on contraception that he delivered to students. In an opinion by Justice Brennan, the Supreme Court held this conviction to be an unconstitutional violation of the equal protection rights of unmarried persons: "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."<sup>50</sup>

The Court declined to decide whether bans on contraception distribution, as opposed to mere use of contraception, infringed upon the fundamental right recognized in *Griswold*.<sup>51</sup> Instead, purporting to apply rational basis review, it concluded that the statute was not supported by any "ground of difference that rationally explains the different treatment accorded married and unmarried persons . . . ."<sup>52</sup> While in *Griswold* "the right of privacy in question inhered in the marital relationship,"<sup>53</sup> the Court in *Eisenstadt* treated the presence of a marital relationship as an inessential feature of the *Griswold* decision, an incidental aspect of the facts in that case, and it adopted instead an aggressively individualistic view of constitutional rights.<sup>54</sup> Rejecting defenses of the statute as per-

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which sounds like a euphemistic phrasing for a right to sex within marriage. Compare WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 17 (1997), noting that:

[T]he Court employs numerous euphemisms referring to sexual relations. The opinion stops just short of holding that the right to sexual relations within marriage is a fundamental right. Indeed, explicitness may be part of the problem. Perhaps one reason *Griswold* is so frustratingly vague is that the Court could not bring itself to be sexually explicit.

<sup>48</sup> POSNER, *SEX AND REASON*, *supra* note 5, at 329.

<sup>49</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972).

<sup>50</sup> *Id.* at 453.

<sup>51</sup> See *id.* at 453-54. Intriguingly, the Supreme Court later may have come to view *Eisenstadt* as protecting precisely what *Carey v. Population Services International, Inc.*, 431 U.S. 678 (1977), said the Court was not protecting. In *Carey*, the Court disclaimed recognizing "an independent fundamental 'right of access to contraceptives.'" *Id.* at 688. Later, in *Washington v. Glucksberg*, the Court claimed that *Eisenstadt* stood for the proposition that "the 'liberty' specially protected by the Due Process Clause includes the right[ ] . . . to use contraception . . ." 521 U.S. 702, 720 (1997) (citing *Griswold* and *Eisenstadt*).

<sup>52</sup> *Eisenstadt*, 405 U.S. at 447.

<sup>53</sup> *Id.* at 453.

<sup>54</sup> Justice Brennan wrote:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the in-

missibly "discourag[ing] premarital sexual intercourse"<sup>55</sup> or safeguarding health,<sup>56</sup> the Court insisted that "[i]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under Massachusetts law."<sup>57</sup> Consequently, the Court invalidated the ban on distribution of contraceptive devices.

Five years later, in *Carey v. Population Services International, Inc.*,<sup>58</sup> the Court answered the question on which it had reserved judgment in *Eisenstadt*. The court held that the argument that *Griswold* only invalidated a ban on contraceptive use was insufficient to uphold provisions of a New York law that prohibited anyone other than licensed pharmacists from distributing even nonmedical contraceptives to persons sixteen years of age or older and that completely prohibited distribution of contraceptives to persons under the age of sixteen.<sup>59</sup> According to the Court,

*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny [*Eisenstadt* and *Roe v. Wade*], the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.<sup>60</sup>

In contrast to the ostensible rational basis review of *Eisenstadt*, here the Court held that strict scrutiny was the measure of constitutionality:

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dividual, 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.

*Id.* See also, e.g., Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1543-46, 1552-56 (1994) (emphasizing individualistic thrust of *Eisenstadt*). Cf. Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 80-82 (1986) (arguing that "constitutional rights apply to individuals as individuals and not to groups" and that privacy rights do not inhere in marriage).

The Court's constitutional individualism might be compared to that expressed in equal protection cases rejecting the supposed lack of demand by African Americans as a permissible excuse for a state to fail to provide equal educational facilities for those few (or one) persons that did want to take advantage of a state-conferred opportunity. See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938) ("Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites.").

<sup>55</sup> *Eisenstadt*, 405 U.S. at 448. Moreover, the Court argued that "[e]ven on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is . . . so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim." *Id.* at 449.

<sup>56</sup> See *id.* at 452.

<sup>57</sup> *Id.* at 448.

<sup>58</sup> 431 U.S. 678 (1977).

<sup>59</sup> *Id.* at 681-82.

<sup>60</sup> *Id.* at 687.



"where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."<sup>61</sup> The prohibition of nonmedical contraceptive distribution by nonpharmacists failed that test.<sup>62</sup>

In the wake of *Griswold* and *Eisenstadt*, the Supreme Court, for the first time, in *Roe v. Wade*,<sup>63</sup> recognized a constitutional right of women to choose to have an abortion. In this landmark decision, the Court held unconstitutional Texas's laws that criminalized all abortions unless necessary to save the pregnant woman's life.<sup>64</sup> The Court noted that it "ha[d] recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."<sup>65</sup> The Court observed vaguely that this right of privacy "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education."<sup>66</sup> It then concluded, with little further analysis, that this privacy right "is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant."<sup>67</sup>

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<sup>61</sup> *Id.* at 686 (citing *Roe v. Wade*, 410 U.S. at 155–56). The Court reasoned, in *Carey*, that the constitutional right of privacy is an "aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment" extending to "personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" *Id.* at 684–85 (internal citations omitted) (quoting *Roe*, 410 U.S. at 152–53). The Court further added that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." *Id.* at 685.

<sup>62</sup> *See id.* at 690–91. Justice Powell, concurring in the Court's judgment, argued that "the present statute even prohibits distribution [of contraception] by mail to adults. In this respect, the statute works a significant invasion of the constitutionally protected privacy in decisions concerning sexual relations." *Id.* at 711 (Powell, J., concurring in part and concurring in the judgment). The plurality expressly agreed with this conclusion. *See id.* at 689 (asserting that "the prohibition of mail-order sales of contraceptives, as practiced by [Population Planning Associates], is a particularly 'significant invasion of the constitutionally protected privacy in decisions concerning sexual relations'" (quoting Justice Powell's concurrence)).

The Court also rejected the state's argument that the ban on distribution of contraceptives to persons under the age of sixteen was justified "because free availability to minors of contraceptives would lead to increased sexual activity among the young, in violation of the policy of New York to discourage such behavior." *Id.* at 694 (plurality opinion). Writing for four Justices on this point, Justice Brennan's opinion characterized this justification as asserting "that minors' sexual activity may be deterred by increasing the hazards attendant on it." *Id.* Quoting the language from *Eisenstadt* about the unreasonableness of assuming that the state had prescribed pregnancy as punishment for fornication, *see supra* text accompanying note 57, the plurality stated: "We remain reluctant to attribute any such 'scheme of values' to the State." *Id.* at 695 (plurality opinion) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972)).

<sup>63</sup> 410 U.S. 113 (1973).

<sup>64</sup> *See id.* at 117–18 & n.1 (quoting excerpts from TEX. PENAL CODE ANN. §§ 1191–1194, 1196 (West 1994)).

<sup>65</sup> *Id.* at 152.

<sup>66</sup> *Id.* at 152–53 (internal citations omitted).

<sup>67</sup> *Id.* at 155.

As a result, the Court established the (in)famous trimester framework: in the first trimester of pregnancy, states generally could not regulate abortions; in the second trimester, states could adopt reasonable regulations designed to protect maternal health; and, in the third trimester, states could, if they chose, prohibit abortions except those necessary to protect the life or health of the pregnant woman.<sup>68</sup>

Decisions subsequent to *Roe v. Wade* made clear that the Court considered the abortion right a limited, negative right against outright governmental interference, not a positive right of access to abortions. In particular, the opinions in *Maher v. Roe*<sup>69</sup> and *Harris v. McRae*<sup>70</sup> rejected indigent women's claims that their constitutional abortion and equal protection rights were violated by a state's exclusion of "nontherapeutic" abortions (those judged not to be "medically necessary") from its Medicaid coverage and by the Hyde Amendment, which prohibited the use of federal funds to cover even medically necessary abortions except in very limited circumstances.<sup>71</sup>

The Court majorities in these decisions treated differential state funding of childbirth and abortion as merely expressing a "value judgment favoring childbirth over abortion."<sup>72</sup> A woman's poverty was her problem, not an obstacle to abortion for which the government bore re-

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<sup>68</sup> See *id.* at 164-65. Despite these precise implementing rules, the Court remained less than clear about the substantive basis for its holding that the right to choose an abortion was constitutionally protected. Indeed, it seemed only to insinuate that the right to choose an abortion is a fundamental right. See *id.* at 155-56 (noting that "[w]here certain fundamental rights are involved, the Court has held that 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," and further noting that recent lower court decisions on the constitutionality of restrictive abortion laws "have recognized these principles") (internal quotation marks and citations omitted). After announcing that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *id.* at 153, the Court remarked upon the obviousness of the harms of denying women abortions:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, . . . the additional difficulties and continuing stigma of unwed motherhood may be involved.

*Id.* Based on such elements, the Court concluded simply "that the right of personal privacy includes the abortion decision." *Id.* at 154.

<sup>69</sup> 432 U.S. 464 (1977).

<sup>70</sup> 448 U.S. 297 (1980).

<sup>71</sup> When the Court decided *McRae*, the Hyde Amendment allowed funding only for abortions necessary to save the life of the pregnant woman or where the pregnancy was the result of a promptly reported rape or incest. See *id.* at 302 (quoting the applicable version of the Hyde Amendment, Pub. L. No. 96-123, 93 Stat. 923, 926 (1979)).

<sup>72</sup> *Maher*, 432 U.S. at 474; *McRae*, 448 U.S. at 314 (quoting *Maher*).

sponsibility.<sup>73</sup> It was, therefore, irrelevant whether the abortion that an indigent woman could not afford was necessary to protect her health.<sup>74</sup> The *McRae* majority implied that the protection of liberty in the Due Process Clauses, from which the right to choose abortion stems, was a protection of negative liberty, not an affirmative guarantee of government services.<sup>75</sup>

Notwithstanding the limited scope of the abortion right, a string of split decisions ensued, punctuated by calls to overrule *Roe*. Nevertheless, the Court expressly considered and rejected that course in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>76</sup> although the *Casey* Court did qualify *Roe* in significant ways. *Casey* abandoned *Roe*'s trimester scheme<sup>77</sup> and substituted an "undue burden" standard, whereby regulations that do not completely prohibit abortions prior to fetal viability will be upheld as long as they do not have the purpose or effect of imposing a substantial burden on women seeking abortions.<sup>78</sup> Pursuant to this standard, the joint opinion upheld most of the challenged restrictions,<sup>79</sup> including a twenty-four-hour waiting period for abortions, thus flatly overruling Supreme Court precedent.<sup>80</sup> The Court did, however, invalidate Pennsylvania's requirement that married women notify their husbands before undergoing an abortion on the ground that such a requirement would impose a substantial burden on women because domestic violence is sometimes exacerbated or sparked when a woman does not want to continue a pregnancy.<sup>81</sup>

*Casey* is significant not only for its substantive holdings about the scope of the right to choose abortion, but also because it offers a better

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<sup>73</sup> See *Maier*, 432 U.S. at 474; see also *McRae*, 448 U.S. at 316–17.

<sup>74</sup> See *McRae*, 448 U.S. at 316–18.

<sup>75</sup> See *id.* at 317–18.

<sup>76</sup> 505 U.S. 833, 846 (1992). The transitional cases between *Roe* and *Casey* are most relevant for their explanation of the particular contours of the right under *Casey* to be free of undue burdens on one's abortion decisions; this Article does not focus on the specific nature of that right, but on these cases' views of liberty and sex.

<sup>77</sup> The controlling joint opinion resisted characterizing the abortion right as fundamental. See *id.* at 954 (Rehnquist, C.J., joined by White, Scalia, & Thomas, JJ., concurring in the judgment in part and dissenting in part). It also did not hold that strict scrutiny was the proper standard for testing abortion regulations that were not per se invalid under *Roe*. See *id.*

<sup>78</sup> See *id.* at 876–78 (joint opinion) (articulating undue burden standard); see also *id.* at 954 (Rehnquist, C.J., joined by White, Scalia, & Thomas, JJ., concurring in the judgment in part and dissenting in part) ("*Roe* decided that abortion regulations were to be subjected to 'strict scrutiny' and could be justified only in the light of 'compelling state interests.' The joint opinion rejects that view.>").

<sup>79</sup> See *id.* at 837–39 (Syllabus prepared by the Reporter of Decisions) (summarizing conclusions of the controlling joint opinion); *id.* at 879 (joint opinion) ("The Court of Appeals . . . upheld each of the provisions except for the husband notification requirement. We agree generally with this conclusion . . .").

<sup>80</sup> See *id.* at 885–87 (joint opinion) (overruling in part *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983)).

<sup>81</sup> See *id.* at 892–95.

explication of that right's constitutional foundation.<sup>82</sup> The decision explained that "[it] is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."<sup>83</sup> The controlling joint opinion then adopted Justice Harlan's view that "liberty" protected by the Due Process Clause is "a rational continuum."<sup>84</sup> In short, the opinion summarized, "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."<sup>85</sup> More broadly, the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."<sup>86</sup>

Moreover, the Court reasoned that choices about abortion share "critical"<sup>87</sup> features with the choices constitutionally protected by the decisions in *Griswold*, *Eisenstadt*, and *Carey*. These cases all "involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it."<sup>88</sup> While "reasonable people will have differences of opinion about these matters," such beliefs "are intimate views with infinite variations, and their deep, personal character underlay [the Court's] decisions in *Griswold*, *Eisenstadt*, and *Carey*."<sup>89</sup>

<sup>82</sup> The Court began its analysis with the clear statement that "[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment." *Id.* at 846.

<sup>83</sup> *Id.* at 847.

<sup>84</sup> *Id.* at 848 (internal quotation marks omitted). The opinion read:

As the second Justice Harlan recognized: . . . "This liberty is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."

*Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

<sup>85</sup> *Id.* at 849.

<sup>86</sup> *Id.* at 851. The opinion proceeded to recognize that abortion is conduct, "an act fraught with consequences for others." *Id.* at 853. However, it may not be completely forbidden by a state,

because the liberty of a woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

*Id.*

<sup>87</sup> *Id.* at 852.

<sup>88</sup> *Id.* at 853.

<sup>89</sup> *Id.*

According to *Casey*, "[i]t was this dimension of personal liberty that *Roe* sought to protect."<sup>90</sup>

These are the important sexual freedom cases—three decisions holding contraception laws unconstitutional and establishing the chief contours of the constitutional right to choose an abortion. The question remains, for what principles (if any) do these cases stand?

## II. A Right to Sex?

As I have mentioned, numerous constitutional scholars believe that the Supreme Court's decisions in the contraception and abortion cases must be predicated upon a right to sex, some sort of constitutional right to engage in sexual activities for purposes other than reproduction. Such a right could be formulated in numerous ways, with different ramifications for various sexual regulations. A very narrow conception of a right to sex could mean simply a right to engage in peno-vaginal copulation for purposes other than (or in addition to) procreation. At the other extreme, a constitutional right to sex could embrace anything and everything that sexually gratifies a given person, much as the prevailing understanding of the constitutional right to free exercise of religion up until 1990 was that it extended to any activities that a person engaged in for religious reasons.<sup>91</sup> A more likely middle position would draw the circle of constitutional protection around consensual sexual activity,<sup>92</sup> perhaps

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<sup>90</sup> *Id.*

<sup>91</sup> See generally *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). This description ignores the distinction between actions motivated by a person's religious beliefs and actions mandated (or prohibited) by such beliefs. Some courts had held that only actions that were religiously required or forbidden were protected by the constitutional right to free exercise of religion. See, e.g., *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (*per curiam*).

The description also does not address the issue of the degree of governmental interference necessary to trigger heightened judicial scrutiny. In the free exercise area, pre-1990 case law required a governmental action to impose a "substantial" burden on a person's exercise of religion before heightened scrutiny was due. See, e.g., Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 265–74 (1994). The issue of the threshold of interference necessary for heightened judicial scrutiny is conceptually separable from the issue of the activities which are constitutionally protected against such interferences.

<sup>92</sup> Cf. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 104 (1998) ("As a core interest of every free person, the right to sexual autonomy deserves to stand at the center of attention, protected directly and comprehensively for its own sake."); *id.* at 99 ("Sexual autonomy, like every other freedom, is necessarily limited by the rights of others. My freedom to swing my arm stops at the tip of your nose. For sexual acts that involve another person, autonomy cannot entail the freedom to have sex whenever and with whomever one wants."). One arguable advantage of this view is that it treats criminal rape laws, which forbid some sexual encounters, as things that need not be subjected to strict scrutiny—even though they would certainly be sustained—instead insisting that the scope of a right to sex be equal for all, so that consensuality is key and rape simply falls outside of the scope of the constitutional right.

with an additional condition that it occur in private.<sup>93</sup>

Many sorts of sexual regulations might be implicated by recognition of a constitutional right to have sex. Perhaps prisoners would be able to invoke the right to challenge restrictions on conjugal visits,<sup>94</sup> whether those restrictions took the form of outright bans,<sup>95</sup> limitations on frequency,<sup>96</sup> or refusals to allow such visits with anyone other than a civil spouse.<sup>97</sup> Criminal adultery laws and laws forbidding unmarried persons to engage in sexual activities<sup>98</sup> would certainly place burdens upon a constitutional right to sex to the extent that such laws restrict consenting adults' choices about sexual partners.<sup>99</sup> Similarly, a law prohibiting cohabitation of unmarried persons in a sexual relationship would certainly be a significant burden on a right to have sex with consenting adults of one's choice.<sup>100</sup> Likewise, *sodomy laws* (laws prohibiting partners from

<sup>93</sup> Cf. Claudia Tuchman, *Does Privacy Have Four Walls? Salvaging Stanley v. Georgia*, 94 COLUM. L. REV. 2267, 2300-02 (1994) (arguing that unwanted public displays of obscenity are properly restricted by government).

<sup>94</sup> Even if sexual contact falls within the scope of the right, practical considerations seem likely to preclude implementation of a right to as much sex as a prisoner would like and might also support restrictions on frequency of visits. Given how little weight even highly regarded First Amendment rights receive in prisons, see, e.g., *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."), sexual contact is not likely to be more protected, and, indeed, denial of such intercourse might be seen as one component of prisoners' punishment.

<sup>95</sup> See, e.g., *Lyons v. Gilligan*, 382 F. Supp. 198 (N.D. Ohio 1974) (rejecting argument that ban on conjugal visits infringes right of privacy recognized by *Griswold*).

<sup>96</sup> See, e.g., *Block v. Rutherford*, 468 U.S. 576, 588 (1984) (holding prison's absolute denial of contact visits "an entirely reasonable, nonpunitive response to . . . legitimate security concerns" and so rejecting pretrial detainees' constitutional challenge); *Rigsby v. Lewis*, 884 F.2d 1395 (9th Cir. Aug. 31, 1989) (mem.) (unpublished table decision) ("Even if *Griswold* could be characterized as giving a fundamental right to conjugal visits, security in prison is a compelling state interest sufficient to encroach [sic] that right.").

<sup>97</sup> Cf. *Doe v. Coughlin*, 518 N.E.2d 536, 538 (N.Y. 1987) (observing that state's "Family Reunion Program allows selected inmates to spend a period of days with their spouses or various enumerated relatives in a private trailer located within the prison complex") (emphases added). If a right to sex is a right to sex with consenting adults of one's choice, then allowing married prisoners conjugal visits but refusing to let prisoners have sexual contact with persons other than their spouse seem likely to be a significant burden on a right to sex.

<sup>98</sup> Marriage is a tremendous commitment, even today when a large proportion of marriages end in divorce, and, for government to extract that commitment as the price of having sex, is to seriously burden a right to sex.

<sup>99</sup> Applying criminal adultery laws to unmarried persons should then require whatever degree of justification the right to sex entailed, although there is an argument that this need not be done for married persons, who might be seen as constructively and irrevocably refusing to consent to have sex with persons not a party to their marriage. Of course, there might then be a question of whether such a governmental exaction of sexual exclusivity would constitute an unconstitutional condition on one's right to sex (or one's right to marry).

<sup>100</sup> Presumably, two roommates would be allowed to live together; even the restrictive zoning ordinance upheld in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), allowed this. However, if they had a sexual relationship without being married to each other, a cohabitation law would have prohibited them from living together. Such a contingent restriction on use of private property ought to be seen as a burden on a right to sex sufficient to

engaging in anal or oral sex) would run into conflict with a right to sex.<sup>101</sup> Thus, determining whether the Constitution protects a right to sex is not merely important to constitutional scholars but also to many people living in the United States today.<sup>102</sup>

What reasons are there to interpret the Constitution as protecting a right to sex? According to Richard Posner, "[i]n a series of decisions between 1965 and 1977, the Supreme Court created a constitutional right of sexual or reproductive autonomy, which it called privacy."<sup>103</sup> This widely shared interpretation of the cases provides both the object of inquiry in this Article and their designation as the "sexual freedom cases."

According to the "right to sex" view, an interpretive position shared by people that disagree about the desirability of recognizing such a right, the Supreme Court's decisions in its contraception and abortion cases do

trigger whatever heightened scrutiny is due to such a right.

<sup>101</sup> If the right were simply a right to peno-vaginal copulation for whatever purposes one desires, then sodomy laws would not burden the right. However, it is not clear to me what basis there might be for so limiting a constitutional right to sex. If, instead, a constitutional right to sex embraced (only) a right to some "reasonable" sexual opportunities, sodomy laws would, at least in some instances, run afoul of such a right. Because heterosexually identified persons would retain the alternative of peno-vaginal copulation, the satisfaction of heterosexually identified persons might suffice to render the peno-vaginal option reasonable, insofar as such persons are concerned, if the notion of some reasonable sexual outlet were somewhat majoritarian in nature. However, even under the some-reasonable-sexual-opportunities approach, the option of peno-vaginal intercourse ought not to be considered reasonable for gay and lesbian persons. The question, with respect to bisexual persons, might be whether someone is allowed some reasonable outlet if the state were so severely to limit the sexual activities in which she or he might engage with half of the population.

<sup>102</sup> Prohibitions on polygamy and age of consent laws could also implicate a constitutional right to sex. For a probing examination of polygamy bans, see, for example, Maura Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. Rev. 1501 (1997).

As for age-of-consent laws, a right to sex, whether a right to have sex with consenting persons, simpliciter, or a right to some opportunity to have sex with a consenting person, presupposes an agent capable of rendering consent. In law, this capability is recognized at the age of (legal) majority. Even though an unemancipated legal minor might be mature enough to give consent, she or he is generally not recognized as having that competence, and vaguely reasonable laws setting the age of legal majority are generally not viewed as posing constitutional issues. Thus, for example, even though voting has been treated as a fundamental right by the Supreme Court, laws limiting the vote to persons of the age of 18 or greater are not generally viewed as problematic.

The most prominent legally recognized exception to the constitutionality of legal majority laws appears to be the right to seek an abortion. The Constitution precludes government from flatly denying access to abortions to all minor women, instead requiring that minors adjudged mature enough to determine their own best interests be allowed to procure an abortion. *See, e.g.,* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510–19 (1990). This singular exception might well be distinguished from age-of-consent laws on the grounds of the nature of the irrevocable consequences for the minors involved. A pregnant young woman forbidden an abortion is compelled to carry a fetus to term, support it with her body, and endure the pains of childbirth. In contrast, a young person denied sex with others until the age of 18 might not be adequately mature to make a decision about whether to engage in sexual activities and, at most, must spend a few years in enforced abstinence.

<sup>103</sup> POSNER, SEX AND REASON, *supra* note 5, at 324.

establish a constitutional right to sexual autonomy. Thus, Robin West—a scholar that does not find a constitutional right to sex normatively attractive<sup>104</sup>—argues that “[w]hat *Griswold* and *Eisenstadt* protected for both married and unmarried individuals was the freedom to engage in heterosexual intercourse without fear of familial and reproductive consequences.”<sup>105</sup> Similarly, Richard Mohr, an avid proponent of a constitutional right to sex, argues that “[t]he principle that holds these cases together is that privacy affords one the right to guide one’s sex life by one’s own lights.”<sup>106</sup>

How do litigants, courts, and scholars arrive at the conclusion that decisions concerning restrictive contraception and antiabortion laws protect a general right to engage in sexual activities? Three types of argument seem common. One quite broad argument holds that these decisions recognizing constitutional privacy rights protect intimate and personal activities and that sex is, therefore, protected. To the extent that constitutional principles or decisions should not be understood more broadly than necessary,<sup>107</sup> this account may be vulnerable to criticism. A second, narrower, but ultimately unsatisfactory, argument contends that these decisions protecting choices about sex and reproduction necessarily protect choices about sexual activities. A third, also narrow, but much more persuasive, argument insists that, because of the alternative of abstinence from potentially reproductive sexual activities, the Court’s decisions protecting contraception and abortion implement not merely a right to reproductive control but also a right to engage in sexual activities for purposes other than reproduction.

Proponents of the first, intimacy-personhood approach to the sexual freedom cases rely on the Supreme Court’s decisions for intimate and personal activities for general support. Thus, Carl Schneider once concluded that “[t]he recurring concern in constitutional interpretation for individual autonomy in intimate and personal decisions reinforces [the] conclusion that the right of sexual privacy is among the ‘basic values ‘implicit in the concept of ordered liberty’” and is therefore fundamental.”<sup>108</sup> This theme of constitutional protection for deeply intimate or personal activities was perhaps most triumphantly sounded in the Court’s

<sup>104</sup> Interview with Robin West (Nov. 29, 1999).

<sup>105</sup> Robin West, *Integrity and Universality: A Comment on Ronald Dworkin’s Freedom’s Law*, 65 *FORDHAM L. REV.* 1313, 1325 (1997).

<sup>106</sup> Mohr, *supra* note 54, at 80. Mohr proceeds to criticize *Hardwick*: “It follows, by the force of precedent alone, that sex between partners of the same gender ought to be constitutionally protected.” *Id.*

<sup>107</sup> Compare SUNSTEIN, *supra* note 3 (advocating narrow constitutional decisions) with RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION* 7 (1996) (arguing for the broadest possible interpretation of constitutional principles).

<sup>108</sup> Carl E. Schneider, Note, *Fornication, Cohabitation, and the Constitution*, 77 *MICH. L. REV.* 252, 296 (1978) (footnote omitted) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).



1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>109</sup> The *Casey* joint opinion declared:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "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." Our precedents "have respected the private realm of family life which the state cannot enter." *These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.* 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>110</sup>

In part based on this language, which Traci Shallbetter Stratton has characterized as "seemingly limitless dicta embracing an individual's right to make decisions about intimate and personal matters,"<sup>111</sup> Ronald Dworkin argues that the constitutional foundation of *Eisenstadt* is the principle "that government may not limit liberty in matters of choice that have momentous personal consequences when it must rely, as justification for forcing one choice on everyone, on a controversial ethical—as distinct from moral—thesis."<sup>112</sup>

The Supreme Court, however, in *Washington v. Glucksberg*,<sup>113</sup> asserted that the quoted passage from *Casey* simply "described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered

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<sup>109</sup> 505 U.S. 833 (1992).

<sup>110</sup> *Id.* at 851 (emphasis added, internal citations omitted) (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) and quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

<sup>111</sup> Traci Shallbetter Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 777 (1998).

<sup>112</sup> Ronald Dworkin, *Reflections on Fidelity*, 65 FORDHAM L. REV. 1799, 1817 (1997). See also Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 479 n.1 (1989) ("Ethics, as I use the term, includes convictions about which kinds of lives are good or bad for a person to lead, and morality includes principles about how a person should treat other people.").

<sup>113</sup> 521 U.S. 702 (1997) (holding that the Constitution does not protect a fundamental right to physician-assisted suicide).

liberty, that they are protected by the Fourteenth Amendment.”<sup>114</sup> While the *Casey* language is certainly an odd way to state what *Glucksberg* claimed it meant,<sup>115</sup> it nevertheless remains the case that *Glucksberg* held that not “all important, intimate, and personal decisions”<sup>116</sup> are specially protected under the Due Process Clause. Moreover, incorporating into our constitutional understanding a principle as sweeping as Dworkin’s could require the repudiation of a great deal of Supreme Court jurisprudence.

Candidates for overruling could include *Paris Adult Theater I v. Slaton*,<sup>117</sup> *Bowers v. Hardwick*,<sup>118</sup> and *Glucksberg*. In *Paris*, a five-to-four majority of the Court held that the Constitution did not protect the public, commercial exhibition of obscene films even when restricted solely to consenting adults. The decision could run afoul of Dworkin’s rule against reliance on controversial ethical theses, for *Paris* offered no moral principle that a legislative ban on commercial exhibition of obscene films might implement. Instead, the Court merely asserted that Georgians were acting to protect “decency.”<sup>119</sup> In *Hardwick*, another majority of five held that there was no fundamental right “to commit homosexual sodomy” and upheld Georgia’s law criminalizing oral and anal sex against a facial challenge.<sup>120</sup> Like *Paris*, *Hardwick* offered no moral reason, no principle of morality, that the sodomy law might be thought to support. Instead, the Court accepted a naked and “presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.”<sup>121</sup> And the *Glucksberg* majority, although relying on genuine moral

<sup>114</sup> *Id.* at 727.

<sup>115</sup> See, e.g., Jay Alan Sekulow & Alan Tuskey, *Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 *BYU J. PUB. L.* 309, 328 (1998) (describing *Glucksberg*’s characterization of the *Casey* language as “perhaps somewhat disingenuous[ ]”).

<sup>116</sup> *Glucksberg*, 521 U.S. at 727.

<sup>117</sup> 413 U.S. 49 (1973).

<sup>118</sup> 478 U.S. 186 (1986).

<sup>119</sup> See *Paris*, 413 U.S. at 57 (“[T]he primary requirements of decency may be enforced against obscene publications.”) (quoting *Near v. Minnesota*, 283 U.S. 697, 716 (1931)) (internal quotation marks omitted); *id.* at 59 (“[T]here is a right of the Nation and of the States to maintain a decent society . . .”) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964)) (internal quotation marks omitted); see also *id.* at 60–61:

Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect “the social interest in order and morality.”

(quoting *Roth v. United States*, 354 U.S. 476, 485 (1957) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

<sup>120</sup> *Hardwick*, 478 U.S. at 196 (1986) (Burger, C.J., concurring).

<sup>121</sup> *Id.* at 196 (emphasis added). For criticism of reliance on assertions of morality that lack observable connection to public welfare, see generally Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of “Public Morality” Qualify as Legitimate Gov-*

concerns about unwanted euthanasia in denying the claimed right of terminally ill persons to the assistance of a willing physician to end their lives, refused even to recognize a fundamental right that such concern might have overcome.<sup>122</sup> This approach sits uneasily with Dworkin's belief that the Constitution specially protects "matters of choice that have momentous personal consequences."<sup>123</sup>

Thus, even if Dworkin's grand principle would fit, so as to justify the sexual freedom cases, once one broadens the field of inquiry to decisions like those just described, the degree of fit diminishes substantially. This is not to maintain that all Supreme Court decisions are so constitutionally just as to be beyond even sweeping criticism. However, one should recognize that some interpretations of constitutional decisions, such as the intimacy-personhood view, fit extant jurisprudence less well than others. If, then, other principles can account for the sexual freedom cases, they may be preferable as interpretations of the constitutional law that we have today, whatever one's ultimate conclusions about how the Constitution should ideally be interpreted.

What, then, of the narrower argument that the Supreme Court's recognition of a constitutional right to control the consequences of engaging in (potentially reproductive) sexual activity includes a concomitant constitutional right to engage in (potentially reproductive) sexual activity?<sup>124</sup> For example, according to the New York Court of Appeals' pre-*Hardwick* decision invalidating that state's sodomy law, *Griswold* protected a constitutional right "to make decisions with respect to the consequence of sexual encounters *and, necessarily, to have such encounters.*"<sup>125</sup> In *Williams v. Pryor*,<sup>126</sup> a recent case challenging Alabama's ban on the sale of devices designed primarily to stimulate human genitals, the federal district court summarized the plaintiff's argument:

[t]he basic premise undergirding this argument is that protection for decisions concerning abortion and the use of contraceptives *presupposes* protection for the decision to engage in sexual ac-

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*ernment Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998).

<sup>122</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

<sup>123</sup> See *supra* text accompanying note 112.

<sup>124</sup> This argument is different from the supposed argument, criticized by Bruce Hafen, "that if there is a constitutional right to *prevent* conception, there must be a right to *cause* conception; and hence, the freedom to have sexual relations must be implied, since otherwise no conception is possible." Hafen, *supra* note 13, at 530-31. Professor Hafen's objection is that "[c]ontraception and sexual relations are simply two different things, one of which can be given legal protection without protecting the other." *Id.* at 531. Hafen's objection seems to be against "characteriz[ing] the *Skinner-Griswold-Eisenstadt* line of cases as protecting a 'right of procreative autonomy.'" *Id.* My point, rather, is that even an affirmative right to procreate needs, at most, to imply a right to procreate via peno-vaginal copulation and does not need to include a right to copulate for nonprocreative purposes.

<sup>125</sup> *People v. Onofre*, 415 N.E.2d 936, 940 (N.Y. 1980) (emphasis added).

<sup>126</sup> 41 F. Supp. 2d 1257 (N.D. Ala. 1999).

tivity in the first instance. Or, as plaintiffs phrase it: "That the Constitution provides the freedom to make the second decision necessarily means that the right to make the first one is protected." Indeed, one could factually assert that the "decision *whether* to bear *or beget* a child," necessarily presupposes the right of two consenting, heterosexual partners to engage in the act of sexual intercourse.<sup>127</sup>

However, a general right to engage in sexual activities, or even a more narrow but general right to engage in peno-vaginal intercourse, is not a logically necessary consequence of a broad right of procreative control. Even presuming the inadequacy of assisted conception techniques as a general substitute for peno-vaginal intercourse as a means to childbearing, one could, at most, infer from a right of procreative decision a right to engage in sexual activity for the purpose of procreating. That right would find support in other decisions of the Supreme Court, such as *Zablocki v. Redhail*,<sup>128</sup> which struck down a state law restricting the circumstances under which a divorced person might remarry. The Court's suggestion that people might have some constitutional right to engage in sexual activities was expressly motivated by concern about reproduction: "if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."<sup>129</sup> Thus, *Zablocki* seemingly recognized a (perhaps limited) right to engage in sexual activity for the purpose of procreating, but not a general constitutional right to engage in sexual activities. The court in *Williams*, therefore, correctly rejected this mistaken argument about the consequences of the Supreme Court's sexual freedom cases.

There is, however, a third and far better argument deriving a right to engage in sexual activities from those decisions. Commentators have argued that *Roe v. Wade* and its subsequent doctrinal variations through *Planned Parenthood v. Casey* may be understood as protecting a constitutional right to sex.<sup>130</sup> In the vast majority of cases, especially at the time that *Roe* was decided, pregnancy occurs only after peno-vaginal intercourse. If a woman did not wish to bear the burdens of continuing a pregnancy to term and giving birth to a child, or if a couple did not want

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<sup>127</sup> *Id.* at 1277 (internal citations omitted) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (second emphasis added)). See also Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 88 n.31 (1980) (recounting fallacious argument that "the Constitution protects free choice about child-bearing arise only for those that have sex; therefore the Constitution protects free choice about sex for the unmarried").

<sup>128</sup> 434 U.S. 374 (1978).

<sup>129</sup> *Id.* at 386.

<sup>130</sup> See, e.g., Mohr, *supra* note 54, at 83 ("though the Court has failed to acknowledge the logical conclusion to its privacy decisions, [they] protect the right to have sex").

to risk a pregnancy, she could forgo such intercourse.<sup>131</sup> The availability of this alternative means that most women, at least so far as statutory prohibitions or commands are concerned, could avoid the restrictions imposed by abortion bans, such as the one struck down in *Roe*, by giving up one kind of sex. Thus, unless one has a specially constitutionally protected interest in engaging in (peno-vaginal) sex, the burden imposed by abortion bans might, in most cases, be seen as a constitutionally permissible restriction of sexual activity.

Similarly, some scholars understand *Griswold* and the Court's subsequent cases striking down contraception laws to reflect a constitutional right to sex.<sup>132</sup> If the choice to engage in nonprocreative sexual activity were not constitutionally protected, the argument goes, then laws burdening that choice would not be subjected to any special constitutional protection and should be judicially upheld if they survive rational basis review. Anticontraceptive laws, according to Laurence Tribe and others, may be obeyed with minimal risk of pregnancy by abstinence from peno-vaginal intercourse.<sup>133</sup> They do not, then, really deprive someone of procreative control, for there remains the alternative of avoiding this one type of sexual act. This is not to deny that the restrictions of anticontraceptive laws were painful for some, perhaps many, people. As one Connecticut woman wrote prior to *Griswold*,

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<sup>131</sup> Clearly, that would not be the case for women that become pregnant as the result of being raped. Moreover, the dynamics of male power in U.S. society may pose obstacles, in many relationships, to a woman choosing to eschew intercourse if her male sexual partner did not agree with that choice.

<sup>132</sup> See, e.g., Mohr, *supra* note 54, at 83 ("The contraception cases do not provide simply the *opportunity* not to procreate. For everyone, save women raped by men, have that option through abstinence. Contraceptives are covered by privacy, then, *because* privacy covers in general one's ability to control one's sex life"); West, *supra* note 105, at 1324-25:

*Griswold* and *Eisenstadt* are . . . cornerstones of a quite general right of decisional autonomy. *Griswold* and *Eisenstadt* did indeed essentially lower a constitutional cloak of privacy around the individual's right to engage in that reexamination of sexual mores and to engage in it unimpeded by the burden of the contrary deliberations of the collectivity, and then to act accordingly on those decisions.

<sup>133</sup> See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-21, at 1423 (2d ed. 1988):

[T]he right to control the size of one's family can be vindicated, without any resort to contraceptives, by simply refraining from sexual intercourse—"just saying 'No.'" No law of any of the states involved in *Griswold v. Connecticut*, *Eisenstadt v. Baird*, or *Carey v. Population Services Int'l* prohibited celibacy or abstinence as methods of avoiding childbirth.

(citations omitted).

for two years I have not allowed my husband a natural embrace for fear of another pregnancy which I feel I can never live through. You can readily guess that keeping my husband away from me thus is having its effect on the ideally happy home which was ours before . . . So can you help me and tell me how to bring back the happiness to our home? Or at least give me a hint . . . ?<sup>134</sup>

However, if a state has some legitimate interest in deterring people from engaging in sex, anticontraceptive laws should pass muster, for these pains from denial of this form of physical intimacy would not be constitutionally significant.<sup>135</sup> Therefore, since anticontraceptive laws were not upheld, the Constitution must be protecting a right to sex.<sup>136</sup> Robin West, for example, concludes that "the only true principle behind *Griswold* and *Eisenstadt* [is] the principle that married and single people have a constitutionally protected right to engage in affectionate non-reproductive sex."<sup>137</sup>

This abstinence alternative argument for the "right to sex" interpretation succeeds fairly well at fitting Supreme Court precedent. It is arguably quite consistent with the rulings in the sexual freedom cases themselves. *Griswold*, *Eisenstadt*, *Carey*, *Roe*, and *Casey* all protected access to contraceptives or abortion in the name of procreative control, although, in most circumstances, control could be maintained by abstaining from potentially reproductive sex. One might object that those decisions did not state that they were protecting a constitutional right to engage in sex without procreation, and, all else being equal, one may prefer an interpretation that has been articulated in the opinions being

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<sup>134</sup> Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 IOWA L. REV. 915, 918 (1990) (quoting MARGARET SANGER, *THE NEW MOTHERHOOD* 102, 109-10 (1922)).

<sup>135</sup> If there is no constitutionally protected right to sex, then the state law would be subject to rational basis review, under which it might well be permissible for the state to choose to deter peno-vaginal intercourse via a ban on contraceptive use even if not deterring other forms of sexual intercourse.

*Roe v. Wade* offers one further sign of the possible constitutional insignificance of inability to engage in peno-vaginal intercourse (absent a right to sex), for there the Court, believing the alleged injury too speculative, denied standing to "a married couple who have, as their asserted immediate and present injury, only an alleged 'detrimental effect upon [their] marital happiness' because they are forced to 'the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy.'" 410 U.S. 113, 128 (1973).

<sup>136</sup> Cf. *Schneider*, *supra* note 108, at 295 ("There remains the logical inference from the decisions banning state interference with the use of contraceptives and abortion: What is the point of a right to use contraceptives and have abortions without the right to sexual intercourse?"). Why else should access to contraceptives be deemed "essential to exercise of a fundamental right," *Carey v. Population Servs. Int'l*, 431 U.S. 678, 696 n.22 (1977) (plurality opinion), given the alternative of abstinence as a way of making decisions about matters of childbearing, and indeed, a more reliable way?

<sup>137</sup> West, *supra* note 105, at 1325.

interpreted.<sup>138</sup> This shortcoming, however, should not be considered a significant shortcoming, for the "right to sex" interpretation is expressly grounded on what are taken to be the logical implications of these decisions; the interpretation does not stem merely from statements of the Court, which, in light of the abstinence gap in the expressed rationales, are inadequate to justify the cases' outcomes.<sup>139</sup> To the extent that *Maier* and *McRae* were premised on a denial of the claim that selective refusals of the government to fund abortions imposed any burden on indigent women,<sup>140</sup> they too are consistent with the "right to sex" approach.

In addition, this interpretation of the sexual freedom decisions is quite consistent with *Stanley v. Georgia*,<sup>141</sup> at least as Richard Mohr reads that case. In *Stanley*, the Court held it unconstitutional for a state to criminalize an adult's possession of obscenity in his own home. According to Professor Mohr, "[p]ornography is protected because sex is protected; pornography affords one an alternative way of conducting one's sex life by one's own lights. Such conduct is what *Stanley* should be seen as protecting generally."<sup>142</sup>

<sup>138</sup> Cf. DWORKIN, *supra* note 23, at 248 ("The political history of the community is *pro tanto* a better history, [Dworkin's mythical judge Hercules] thinks, if it shows judges making plain to their public, through their opinions, the path that later judges guided by integrity will follow . . ."). But cf. *id.* at 247-48 ("Others reject this constraint and accept that the best interpretation of some line of case may lie in a principle that has never been recognized explicitly but that nevertheless offers a brilliant account of the actual decisions, showing them in a better light than ever before.").

<sup>139</sup> Moreover, at least in *Eisenstadt* and *Carey*, the Court represented that the question of the extent to which the Constitution protects decisions to engage in sexual activities was largely open. See, e.g., *Carey*, 431 U.S. at 688 n.5 (1977) ("the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults, and we do not purport to answer that question now") (internal quotation marks and cross-reference omitted); *Eisenstadt v. Baird*, 405 U.S. 438, 447 & n.7 (1972) (declining to address whether Massachusetts's anticontraception law "impinges upon fundamental freedoms under *Griswold*"); *id.* at 453 (reserving question of constitutional adequacy of governmental conclusion of immorality of contraception use). Although the Court, thus, thought that its holdings did not dictate (or foreclose) a right to sex, there is no particular reason to privilege its understandings of the logical implications of its own underreasoned decisions.

<sup>140</sup> See *supra* text accompanying notes 69-75.

<sup>141</sup> 394 U.S. 557 (1969).

<sup>142</sup> Mohr, *supra* note 54, at 84. See also Grey, *supra* note 127, at 89 (noting that Court, in *Stanley*, gave "constitutional protection to private enjoyment of pornography, which is a sort of sexual practice disapproved by the traditional sexual ethic").

It is not clear, however, whether this approach would also require overruling of the Supreme Court's post-*Stanley* obscenity decisions, such as those in *United States v. Reidel*, 402 U.S. 351 (1971) (upholding constitutionality of federal statute prohibiting use of mails knowingly to distribute obscene matter as applied to vendor selling booklet about pornography to customers willing to state they were 21 years or older), and *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) (upholding prohibition against movie theaters showing obscenity); see *supra* text accompanying notes 117-119. Certainly, even if a right to sex could be reconciled with the Court's precise holdings that various restrictions on obscenity were constitutionally permissible, see, e.g., *United States v. 12 200-ft Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), Mohr's suggestion that pornography use

The abstinence gap argument for the "right to sex" reading is at least arguably inconsistent with *Bowers v. Hardwick*.<sup>143</sup> Strictly speaking, *Hardwick* does not hold that there is no fundamental right to engage in consensual sex, for this question was neither presented to, nor addressed by, the Court. Nonetheless, the majority's decision in *Hardwick* presents logical and methodological obstacles to recognition of a constitutional right to sex.

If the Constitution did specially protect a right to sex, then Georgia's sodomy law would likely have infringed upon that right<sup>144</sup> and should have been subject to heightened judicial scrutiny—which it was not. This objection should not, however, be held to invalidate the "right to sex" interpretation based on the abstinence alternative. First, the "right to sex" approach does not purport to be purely descriptive. Its proponents generally hold that *Hardwick* was wrongly decided, so its inconsistency with *Hardwick* might be seen as a count against *Hardwick* rather than against the "right to sex" interpretation. Second, the *Hardwick* Court did not ask the general question of whether there was a constitutional right to sex, but asked, instead, the more specific question of whether there was a constitutional right to engage in particular sexual activities. The Constitution might include a more broadly formulated right while not including a more narrowly formulated one if the abstract specification names a constitutionally protected value while the more concrete specification does not.

However, this then raises a methodological issue. Justice White's opinion for the Court rejected the constitutional status of a right to engage in "homosexual sodomy" in large part on the ground that there was no history of legal protection of this putative right in the United States and, indeed, on a history of legal restriction.<sup>145</sup> If one applied the "traditions and history" methodology to the putative right to sex, one would see that, for a long time, most states have restricted rights to engage in sex in various ways. Thus, the traditions-and-history approach to sub-

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is constitutionally protected as a means of conducting one's sex life would appear at least somewhat in tension with the Court's insistence that obscenity is beyond all constitutional protection once it is outside the home.

<sup>143</sup> 478 U.S. 186 (1986). See *supra* text accompanying notes 118–121.

<sup>144</sup> Granted, there is an inverse relationship between the scope of a claimed right and the extent to which a particular restriction burdens that right. However, if the constitutional right to sex were understood narrowly as a right to some opportunity for sexual satisfaction, the prohibition of oral and anal sex, coupled with the dissatisfying or less satisfying character of peno-vaginal intercourse for lesbians and gay men, might infringe that right. On the other hand, if the right to sex were a right to engage in whatever consensual sexual activities one wishes, then a prohibition on specified consensual sexual acts clearly interferes with the exercise of that right. One ought not insist on a substantiality threshold for such direct restrictions on constitutional rights, as opposed to "mere" incidental restrictions. See generally Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).

<sup>145</sup> See *Hardwick*, 478 U.S. at 192–94.



stantive due process rights would support the notion that there is no specially protected constitutional right to sex.

This interpretive methodology lies at the heart of the problems with *Hardwick*, for it would conclude that one's freedom to choose abortion is not constitutionally protected. At the time of *Hardwick*, however, the right of abortion choice was treated by the Court as a fundamental constitutional right subject to strict scrutiny. Thus, the Court's use of this substantive due process methodology in *Hardwick* was inconsistent with its approach in other important cases, including cases distinguished in *Hardwick*.<sup>146</sup> Therefore, the approach should not have been regarded as mandatory or necessary for a fundamental right to exist, as Justices O'Connor and Kennedy (as well as many others) recognized in *Michael H. v. Gerald D.*<sup>147</sup> For reasons like this, *Hardwick* represents an "aberrant" decision.<sup>148</sup>

In addition, the Court's 1996 decision in *Romer v. Evans*<sup>149</sup> may indicate that *Hardwick* is on its way to being overruled or distinguished into practical oblivion. *Romer* held that Colorado's Second Amendment to its state constitution,<sup>150</sup> which repealed existing municipal ordinances against sexual orientation discrimination and precluded any level of government from adopting such antidiscrimination policies, violated the Equal Protection Clause.<sup>151</sup> Notably, Justice Kennedy's opinion for the six-member majority in *Romer* did not mention *Hardwick*, despite Justice Scalia's central reliance on that case in his dissent.<sup>152</sup> Some, though not all,<sup>153</sup> scholars have concluded that "the two decisions are inconsistent . . . and as a result not much is left of [*Hardwick*]."<sup>154</sup> Similarly, some judges have predicted confidently that, "[o]f course, *Hardwick* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*."<sup>155</sup>

<sup>146</sup> See *id.* at 190–91 (distinguishing various precedents, including *Roe v. Wade*).

<sup>147</sup> 491 U.S. 110 (1989).

<sup>148</sup> *Compassion in Dying v. Washington*, 79 F.3d 790, 813 n.65 (9th Cir. 1996) (en banc), *rev'd sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>149</sup> 517 U.S. 620 (1996).

<sup>150</sup> See COLO. CONST. art. II, § 30b.

<sup>151</sup> See *Romer*, 517 U.S. at 623.

<sup>152</sup> See *id.* at 639–43 (Scalia, J., dissenting).

<sup>153</sup> See, e.g., Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387, 398–99 (1997).

<sup>154</sup> Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 374 (1997).

<sup>155</sup> *Nabozny v. Podlesny*, 92 F.3d 446, 458 n.12 (7th Cir. 1996). *But cf.* *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292–93 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (adhering to prior decision predicated upon the conclusion that sexual orientation classifications are subject only to rational basis review "under *Bowers v. Hardwick* . . . because the conduct which defined them as homosexuals was constitutionally proscribable."). See *Equality Found. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996).

In sum, the "right to sex" interpretation of the sexual freedom cases, in relying on the abstinence gap argument, treats the Supreme Court's sexual freedom decisions as establishing a right to engage in sexual activities for reasons other than procreation. This interpretation is consistent with notions of the constitutional value of deeply personal activities, provides an eminently plausible understanding of why the ability to forgo peno-vaginal intercourse was not enough to save the contraceptive and antiabortion laws invalidated in the sexual freedom decisions, and fits much (though not all) of the Court's decisions on sexual regulations.

### III. Unsuccessful Alternative Approaches

Scholars of the Court's sexual freedom cases have offered a variety of alternative accounts that reject the right-to-sex implications from the abstinence gap argument. This Part of the Article considers, and ultimately rejects, five interpretations of *Griswold v. Connecticut* and the other sexual freedom cases that have enjoyed significant popularity in the scholarly literature. If they are to provide a plausible alternative to the "right to sex" account, these interpretations must justify the sexual freedom cases and, in particular, *Griswold*.<sup>156</sup> All of these approaches, however, fail to justify the decisions that they purport to explain, not simply because of their failure to address the abstinence gap argument, but more fundamentally because they fail to account for, and in some cases are affirmatively inconsistent with, one or more of the sexual freedom cases. Therefore, because the following interpretations are seriously flawed—although some still contain important partial insights—Part IV examines the approaches that hold more promise.

#### A. *Fundamental Dicta and Government Irrationality*

One minimalist view of the Supreme Court's sexual freedom cases dismisses their discussion of fundamental rights as dicta. This view holds that the invalidated statutes simply failed rational basis review of the sort to which all governmental actions are subjected under the Due Process or Equal Protection Clauses. If this were the weight of the sexual freedom cases, then a *Post*-type statute prohibiting a mixed-sex couple from having oral sex would likely be sustained upon a minimally rational basis, such as a desire to curb the spread of sexually transmitted diseases through activities not necessary for reproduction or, taking a page from

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<sup>156</sup> In this Article, I assume consistency with *Griswold* to be a necessary condition that a constitutional interpretation must satisfy to count as an eligible reading of the constitutional precedents. Thus, this Part also considers some famous accounts of *Griswold* that do not purport to justify all of the contraception and abortion decisions, in order to show that such accounts do not provide even the beginnings of a satisfactory alternative treatment of the sexual freedom cases.

the majority opinion in *Bowers v. Hardwick*, the presumed moral beliefs of a majority of a state's population. Despite some foundation in the opinions of the Court, this view is mistaken in any ordinary understanding of the degrees of judicial scrutiny and should, therefore, be discarded.

One theorist in the irrationality camp, Gerard Bradley, contends that "[t]he simplest interpretation of *Griswold* is that" Connecticut's ban on contraceptive use, defended on the "ground that it furthered laws against fornication and adultery[,] . . . failed the rational basis test."<sup>157</sup> Taking a slightly different tack, constitutional litigator and conservative pundit Bruce Fein focuses on the state's enforcement policies and contends that "Connecticut lacked any rational basis for prosecuting as accessories birth control operators whose activities furthered conduct that Connecticut de facto treated as lawful."<sup>158</sup>

Similarly, Cass Sunstein takes the pronouncements of the Court in *Eisenstadt v. Baird* at face value<sup>159</sup> and reports that "the Court struck down *as irrational* a law forbidding the distribution of contraceptives to unmarried people."<sup>160</sup> The Court, Sunstein continues, "said that it was irrational to prohibit the distribution of contraceptives among unmarried people if such distribution was not prohibited to married people."<sup>161</sup> Likewise, Traci Shallbetter Stratton asserts that, in *Eisenstadt*, the Court "decided that the statute's differential treatment of married and unmarried persons was arbitrary, and hence a violation of the Equal Protection Clause."<sup>162</sup> To like effect, Professor Bradley bluntly asserts: "The simple interpretation of *Eisenstadt* is the simple interpretation of *Griswold*. The statute lacked a rational basis. That test presupposes no fundamental right at all."<sup>163</sup> Bradley does not purport to be providing a new, recon-

<sup>157</sup> Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 351 (1993).

<sup>158</sup> Bruce Fein, *Griswold v. Connecticut: Wayward Decision-making in the Supreme Court*, 16 OHIO N.U. L. REV. 551, 556 (1989).

<sup>159</sup> In *Eisenstadt*, the Court framed its task as follows:

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under Massachusetts General Laws Ann., c. 272, §§ 21 and 21A. For the reasons that follow, we conclude that no such ground exists.

405 U.S. 438, 447 (1972) (footnote omitted). The Court expressly noted that, if Massachusetts's law violated a fundamental right, it would have to survive strict scrutiny, but that this did not need to be decided since the statute failed "even the more lenient equal protection standard." *Id.* at 447 n.7.

<sup>160</sup> SUNSTEIN, *supra* note 3, at 105 (emphasis added).

<sup>161</sup> *Id.*

<sup>162</sup> Stratton, *supra* note 111, at 775. Either by mistake or in an attempt to minimize its significance, Stratton actually characterizes the opinion of the Court in *Eisenstadt* as a "plurality" decision. *See id.* Yet, because Justices Powell and Rehnquist did not participate in the decision of the case, *see Eisenstadt*, 405 U.S. at 455, Justice Brennan's opinion for four members of the Court constituted a majority opinion.

<sup>163</sup> Bradley, *supra* note 150, at 357.

structive justification for these cases; rather, he claims that they were "apparently decided on 'rational basis' grounds, which means that talk of any fundamental rights at all is dictum."<sup>164</sup>

It is, however, sheer fantasy to think that *Griswold* actually rested on a judicial view that Connecticut's ban on contraceptive use was irrational, and it is untenable to hold that it could have been decided that way on grounds of irrationality—at least as that term is presently understood in constitutional discourse.<sup>165</sup> Although Justice White, concurring in the judgment in *Griswold*, insisted that he "wholly fail[ed] to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships,"<sup>166</sup> the Court's opinion made no intimations that the statute suffered from constitutional irrationality. Rather, it relied on "the zone of privacy created by several fundamental constitutional guarantees,"<sup>167</sup> and it quoted *NAACP v. Alabama*<sup>168</sup> for the proposition that "a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"<sup>169</sup> This shows that the decision was not expressly justified at the time in terms of irrationality. The assessment of means/ends fit reflected in this passage was considerably more stringent than the merely rational relationship demanded by rational basis review and was much closer to the narrow-tailoring requirement of strict scrutiny for laws significantly infringing upon fundamental rights. Similarly, a prosecutorial choice to pursue only birth control clinic operators and not principal violators of Connecticut's anticontraceptive law could be defended, under rational basis review, as a way of respecting privacy (in the sense of secrecy or confidentiality) of married couples' sexual activities. Since the Court insists under rational basis review that legislatures may proceed "one step at a time" in attacking perceived problems,<sup>170</sup> this defense might be judged adequate to establish the constitutional rationality of the law invalidated in *Griswold*.

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<sup>164</sup> *Id.* See also Hafen, *supra* note 13, at 541 (claiming that "it is clear that" the majority opinion in *Eisentratt* "relied on the rational basis test") (emphasis added). Fein, at least, makes clear that he is articulating a different grounding for *Griswold* than that adopted by the Court. See Fein, *supra* note 158, at 555 ("The Court could also have obviated the right of privacy pronouncement by reliance on the equal protection clause. Invidious or arbitrary enforcement of a criminal statute is unconstitutional.").

<sup>165</sup> Since contemporary commentators, such as Bradley, are writing for current (and perhaps future) audiences, those are the readers whose understandings of concepts like rational basis review should be taken as relevant.

<sup>166</sup> *Griswold v. Connecticut*, 381 U.S. 479, 505 (1965) (White, J., concurring in the judgment).

<sup>167</sup> *Id.* at 485.

<sup>168</sup> 377 U.S. 288, 307 (1964).

<sup>169</sup> *Griswold*, 381 U.S. at 485 (emphasis added).

<sup>170</sup> *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

*Eisenstadt* presents a somewhat better case for the irrationality position, although it too ultimately ought not to be interpreted or defended as a rational basis holding. The majority opinion did assert that Massachusetts's ban on distribution of contraceptives only to unmarried persons rested on no "ground of difference that rationally explains the different treatment."<sup>171</sup> Yet, as Sunstein acknowledges, "the state's decision [to bar distribution of contraceptives to unmarried people, which the Court invalidated in *Eisenstadt*,] was hardly irrational in the technical sense."<sup>172</sup> Indeed, Judge Posner maintains that the ban would "deter some [fornication]. Indeed, it will deter a good deal more than a statute, unenforceable as a practical matter, making fornication a misdemeanor—the statute whose constitutionality was not questioned [in *Eisenstadt*]."<sup>173</sup>

Part of the problem lies in the evolution of the modern doctrine of rational basis review. Today, as the majority opinions in cases such as *FCC v. Beach Communications, Inc.*<sup>174</sup> and *Heller v. Doe*<sup>175</sup> emphasize, the Supreme Court's doctrine treats rational basis review as tantamount to no review.<sup>176</sup> In 1972, when *Eisenstadt* was decided, however, the terminology had not yet acquired this rigid meaning. Thus, Justice Brennan's majority opinion in *Eisenstadt* quoted the previous year's decision in *Reed v. Reed*<sup>177</sup> for the standard of review under the Equal Protection Clause: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"<sup>178</sup> *Reed* is widely recognized today as subjecting

<sup>171</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

<sup>172</sup> SUNSTEIN, *supra* note 3, at 105.

<sup>173</sup> POSNER, SEX AND REASON, *supra* note 5, at 330. Posner adds: "Since the Court could find no rational basis for the withholding of contraceptives from unmarried persons, it concluded that the Massachusetts statute denied the equal protection of the laws." *Id.* Yet, this too takes the *Eisenstadt* opinion's words and treats them as bearing the meaning of today's terms of art when the opinion clearly did not use today's notions.

<sup>174</sup> 508 U.S. 307 (1993).

<sup>175</sup> 509 U.S. 312 (1993).

<sup>176</sup> As Justice Stevens has stated:

The Court states that a legislative classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and that "where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'" In my view, this formulation sweeps too broadly, for it is difficult to imagine a legislative classification that could not be supported by a "reasonably conceivable state of facts." Judicial review under the "conceivable set of facts" test is tantamount to no review at all.

*Beach Communications*, 508 U.S. at 323 n.3 (Stevens, J., concurring in the judgement) (citations omitted).

<sup>177</sup> 404 U.S. 71 (1971).

<sup>178</sup> *Eisenstadt*, 405 U.S. at 447 (quoting *Reed*, 404 U.S. at 75–76 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920))).

the law challenged therein to heightened scrutiny without having developed terminology to reflect such scrutiny.<sup>179</sup>

What *Eisenstadt* says, and what it (in part) holds, is that "[i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible."<sup>180</sup> The Court continued:

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.<sup>181</sup>

The Court's statement that, with respect to both married and unmarried persons, "the evil . . . would be identical" may refer to the argument that the purpose of the Massachusetts statute was to prevent immoral activity—contraception per se.<sup>182</sup> However, if access to contraceptives is not a substantive right demanding heightened due process scrutiny, the Massachusetts law would likely be constitutional under minimal rational basis review and the Court's one-step-at-a-time approach, since marital status classifications also generally have not been subject to heightened equal protection scrutiny.<sup>183</sup> Perhaps<sup>184</sup> the state was primarily interested in reducing casual sex, in which case restrictions limited to nonmarital sexual activities—or unmarried persons—might be at least rationally related (as rational basis review is presently understood) to what, for sake of argument, is presumed to be a legitimate governmental purpose. This is true even if one accepts Fein's claim about the general availability of contraceptives in pre-*Griswold* Connecticut, since what was available were condoms, which, although usable for contraceptive purposes (and

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<sup>179</sup> See, e.g., Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 32–34 (1972).

<sup>180</sup> *Eisenstadt*, 405 U.S. at 453 (emphasis supplied).

<sup>181</sup> *Id.* at 454.

<sup>182</sup> See *id.* at 452–53.

<sup>183</sup> It is also unclear that the state's law would have been considered a burden on the right to marry, held fundamental in *Loving v. Virginia*, 388 U.S. 1 (1967), for the state denied unmarried persons access to contraceptives in *Eisenstadt*.

<sup>184</sup> Current rational basis doctrine allows (indeed virtually commands) courts to posit hypothetical governmental purposes that might suffice to provide a rational basis for challenged laws. See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993) (repeating that, under rational basis review, "a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification'" (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993))); *id.* (reiterating that, under rational basis review, "a legislature that creates [statutory] categories need not 'actually articulate at any time the purpose or rationale supporting its classification'" (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992))).

probably used primarily for that purpose), could also be used for disease prevention. This makes condoms rationally distinguishable from non-disease-preventing devices, such as diaphragms, then available almost solely at birth control clinics, in that the state might have excepted health protection devices from its anticontraceptive policy.<sup>185</sup>

Finally, one should note that, whatever the status of *Griswold* and *Eisenstadt*, the Supreme Court expressly adopted strict scrutiny in *Carey v. Population Services International, Inc.*<sup>186</sup> One provision of the challenged New York laws prohibited anyone except licensed pharmacists from distributing nonmedical contraceptives. The Court declined to subject this restriction on contraceptive access to mere rational basis review "because 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*."<sup>187</sup>

The view of the sexual freedom cases as merely reflecting the failure of the challenged statutes to survive rational basis review is unpersuasive. Whether as an interpretation of the actual basis for the Court's decisions or as an alternative basis, it should be rejected. Another approach is, therefore, necessary in order to reject the "right to sex" interpretation's claim to logical necessity.

### *B. Archaic Laws and Representation Reinforcement*

One view of the foundational contraception cases beginning with *Griswold v. Connecticut* holds that they are best understood as invalidations of archaic laws lacking contemporary democratic support and, thus, judicially voidable under a procedural due process desuetude approach. In light of the rampant nonenforcement of sodomy laws against mixed-sex couples, this view of the sexual freedom decisions might well hold that a *Post*-type statute barring mixed-sex couples from engaging in oral sex should likewise be judicially invalidated. This desuetude view, however, has several serious faults, including a lack of express basis in the Court's sexual freedom opinions, conceptual problems that render desuetude doctrines undesirable or potentially unworkable, and (most damningly) the failure of the facts of the sexual freedom cases to satisfy common understandings of desuetude.

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<sup>185</sup> The fact that contraceptives qua contraceptives would have protected some women's health would have made such an exception underinclusive. However, substantial underinclusivity is tolerated under rational basis review. *See, e.g.*, *New York City Transit Author. v. Beazer*, 440 U.S. 568 (1979).

<sup>186</sup> 431 U.S. 678 (1977).

<sup>187</sup> *Id.* at 688-89 (1977).

Under the doctrine of desuetude, which generally has not been adopted in the United States,<sup>188</sup> "courts may abrogate statutes that have fallen into disuse."<sup>189</sup> Generally speaking, "the doctrine of desuetude refers to judicial abrogation of a statute that has not been enforced for a long period of time, no longer reflects the goals and values of the community, and is thus widely ignored."<sup>190</sup>

Judge Guido Calabresi and Cass Sunstein have applied desuetude to constitutional questions. Judge Calabresi has articulated a version of desuetude that is specifically calibrated to statutes that raise serious constitutional questions. In Judge Calabresi's view,

[w]hen legislation comes close to violating fundamental substantive constitutional rights . . . courts have asserted the right to strike down statutes and, before ruling on the ultimate validity of that legislation, to demand a present and positive acknowledgment of the values that the legislators wish to further through the legislation in issue.<sup>191</sup>

According to Calabresi,

when a law is neither plainly unconstitutional . . . nor plainly constitutional, the courts ought not to decide the ultimate validity of that law without current and clearly expressed statements, by the people or by their elected officials, of the state interests involved . . . . [A]bsent such statements, the courts have frequently struck down such laws, while leaving open the possibility of reconsideration if appropriate statements were subsequently made.<sup>192</sup>

On Calabresi's "constitutional remand"<sup>193</sup> view, nonenforcement may be a sufficient, although not a necessary, condition for rejection of a statute under the rubric of desuetude.<sup>194</sup> Similarly, Cass Sunstein advocates that courts should invalidate constitutionally suspect statutes on grounds of desuetude. Professor Sunstein considers desuetude to be "a form of procedural rather than substantive due process; the basic concerns are that

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<sup>188</sup> See, e.g., Mark Peter Henriques, Note, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1068 (1990).

<sup>189</sup> Corey R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449, 449.

<sup>190</sup> Henriques, *supra* note 188, at 1069.

<sup>191</sup> *Quill v. Vacco*, 80 F.3d 716, 735 (2d Cir. 1996) (Calabresi, J., concurring in the result), *rev'd*, 521 U.S. 793 (1997).

<sup>192</sup> *Id.* at 738.

<sup>193</sup> *Id.* at 742.

<sup>194</sup> See also Henriques, *supra* note 188, at 1068 ("commentators disagree as to whether desuetude implies some affirmative policy of nonenforcement").



there has been no focused legislative deliberation about the particular matter at hand and that rule of law principles are being violated in the enforcement process."<sup>195</sup> Specifically, he argues that courts should hold

that laws that lack real enforcement and that appear (for that reason) no longer to reflect current political convictions cannot be used against private citizens with respect to [certain] decisions . . . . A Court could so conclude without resolving the question whether a recent democratic judgment, supported by more than episodic or discriminating enforcement efforts, would be constitutional.<sup>196</sup>

Desuetude as procedural due process has been suggested as a basis for the Court's decision in *Griswold*. Indeed, this seems to have been the straw for which Judge Robert Bork grasped in an effort to save his Supreme Court nomination from the fallout of his continued excoriation of the constitutional reasoning of *Griswold*.<sup>197</sup> Bruce Fein also advances desuetude as a basis for *Griswold*.<sup>198</sup> Sunstein<sup>199</sup> similarly contends that "the key privacy cases [in the Supreme Court] . . . are best seen not as flat declarations that the state interest was inadequate to justify the state's intrusion, but more narrowly as democracy-forcing outcomes, designed

<sup>195</sup> Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1157 (1997).

<sup>196</sup> Cass R. Sunstein, *The Supreme Court 1995 Term, Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 95 (1996).

<sup>197</sup> See William Safire, *The Penumbra of Desuetude*, N.Y. TIMES, Oct. 4, 1987, § 6 (Magazine), at 16, 18 (quoting Bork as stating, with respect to the statute invalidated in *Griswold*, "I think you'd have a great argument of no fair warning, or sometimes what lawyers call . . . *desuetude*, meaning it's just so out of date it's gone into limbo."). The Senate confirmation hearings on Bork's nomination concluded on September 30, 1987, and the Senate Judiciary Committee did not issue its negative vote until October 6. See MICHAEL PERTSCHUK & WENDY SCHAEZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* 297-98 (1989). A few years later, Bork wrote:

It is quite arguable that [refusal to repeal unenforced laws] is an improper use of law, most particularly of criminal law, that statutes should not be on the books if no one intends to enforce them. It has been suggested that if anyone tried to enforce a law that had moldered in disuse for many years, the statute should be declared void by reason of desuetude or that the defendant should go free because the law had not provided fair warning.

ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 96 (1990). In this book, Bork does not view nonenforcement to have been the situation in *Griswold*, which he instead sees as a contrived prosecution. See *id.*

<sup>198</sup> See Fein, *supra* note 158, at 556.

<sup>199</sup> Sunstein builds on, without wholly embracing, Alexander Bickel's analysis of *Tileston v. Ullman*, 318 U.S. 44 (1943), and *Poe v. Ullman*, 367 U.S. 497 (1961). See Sunstein, *supra* note 195, at 1147 & n.117 (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 148-56 (2d ed. 1986)); Sunstein, *supra* note 196, at 8 n.8 (noting points of commonality and difference with Bickel's approach).

to overcome problems of discrimination and desuetude.”<sup>200</sup> According to Sunstein, the principle of desuetude “provides the strongest support for *Griswold* itself.”<sup>201</sup>

From “suggest[ions]” of the existence of “problems in the system of democratic deliberation that contributed to the outcomes,”<sup>202</sup> Sunstein concludes, apparently as a matter of historical description, that, in *Griswold* and the privacy cases, “the Court did not announce a broad right to sexual autonomy. It said more narrowly that any intrusion on that right must be direct, nondiscriminatory, and supported by actual public judgments, rather than indirect, discriminatory, and reflecting no actual judgment from the democratic public.”<sup>203</sup> According to Sunstein, in *Griswold*:

[T]he ban on the use of contraceptives within marriage was not a simple invasion of privacy; it involved a statute enacted long ago, not plausibly representing the considered judgments of the relevant electorate, and enforced only in a selective and discriminatory manner. In this sense, the ban presented a case of desuetude.<sup>204</sup>

However, the Court’s opinions in cases like *Griswold*, *Eisenstadt*, and *Roe* did not explicitly state that they were predicated upon the invalidated statutes’ desuetude.<sup>205</sup> Certainly, in *Poe v. Ullman*,<sup>206</sup> which had held that the matter was not justiciable, the Court viewed Connecticut’s ban on contraceptive use as a dead letter. Yet, *Griswold* made no suggestion that current majoritarian sentiment might suffice constitutionally to revive the statute invalidated there. The Court did not say that it was taking a procedural due process desuetude approach in *Griswold*, nor is it even a logical consequence of the Court’s reasoning.<sup>207</sup> It is wrong to read *Gris-*

<sup>200</sup> SUNSTEIN, *supra* note 3, at 77.

<sup>201</sup> *Id.* at 112. Sunstein claims that the Court’s privacy cases, in addition to *Griswold*, “did not vindicate a broad right to control one’s body. They suggested more narrowly that if a state is going to regulate sexual activity, it must do so directly and not through the indirect, at best modestly effective means of making pregnancy the price of that activity.” *Id.* at 100–01 (emphasis added).

<sup>202</sup> *Id.* at 101.

<sup>203</sup> *Id.* (emphasis added).

<sup>204</sup> Sunstein, *supra* note 195, at 1147–48 (footnote omitted).

<sup>205</sup> Sunstein acknowledges that “in *Griswold* the Court embarked on the task of taking large-scale positions on matters of political morality by speaking of the constitutional ‘right of privacy.’” Sunstein, *supra* note 196, at 95.

With respect to *Roe*, Sunstein suggests, perhaps reconstructively, that it “is best understood as largely a case about sex equality,” yet he also claims, falsely if it is meant to describe the Court’s opinion, that *Roe* “depended centrally on the fact that restrictions on the right to abort are a form of discrimination against women and closely associated with traditional and no longer legitimate ideas about women’s appropriate role.” SUNSTEIN, *supra* note 3, at 114 (emphasis added). One searches in vain in the *Roe* opinions for discussion of these considerations.

<sup>206</sup> 367 U.S. 497 (1961).

<sup>207</sup> While not wholly inconsistent with what the Court did say in *Griswold*, the proce-

would as actually resting on desuetude and to conclude that "these cases were more minimalist than they appear."<sup>208</sup>

Perhaps claims such as Sunstein's should be understood not as historically descriptive statements about the Court's rationale in *Griswold* or other cases. Rather, they might be understood either as interpretations of what the Court did in *Griswold* or as reconstructive justifications of the Court's reasoning or actions. Sunstein admits that judicial invalidation of statutes for desuetude "does not have explicit support" in Supreme Court precedent.<sup>209</sup> He nonetheless insists—and makes out a fair case—that, in general, the doctrine of desuetude "makes a good deal of constitutional sense."<sup>210</sup> Indeed, elsewhere Sunstein clearly states that "the outcomes in the early privacy cases could be seen as more minimalist than they were written, for they raised questions of procedural due process, involving as they did laws that were practically unenforced and unenforceable."<sup>211</sup> Sunstein contends that the principle of desuetude "provides a simpler and more compelling basis for *Griswold*, and Justice White's opinion in *Griswold* can be understood to point to concerns of this sort."<sup>212</sup>

However, desuetude does not provide a "more compelling basis for *Griswold*." Sunstein concedes the potentially sweeping breadth of his favored desuetude approach and the "obvious slippery slope problem. Many statutes now in operation were enacted long ago, when facts and values were different; are all such statutes unconstitutional?"<sup>213</sup> He also acknowledges that invalidating statutes for desuetude "puts courts in the business of setting the legislative agenda."<sup>214</sup> Whatever the balance of the merits of the desuetude approach in the abstract, these line-drawing and separation-of-powers problems suggest that the wholesale revision of *Griswold* necessary to embrace the desuetude view should be rejected.

Yet another reason that *Griswold* should not be reconceived as a procedural due process desuetude decision is *Griswold*'s factual context. The legislative ban on contraceptive use at issue in *Griswold* should not be understood as a mere relic of Comstockery, a law moldering in dusty oblivion since shortly after its initial enactment in 1879. As Mary Dudziak has established,

Connecticut law was enforced against the personnel of birth control clinics for aiding and abetting the use of contraceptives. Enforcement of the statute against those working in clinics kept

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dural due process approach lacks roots in the text of the decision.

<sup>208</sup> SUNSTEIN, *supra* note 3, at 115.

<sup>209</sup> Sunstein, *supra* note 195, at 1157.

<sup>210</sup> *Id.*

<sup>211</sup> SUNSTEIN, *supra* note 3, at 100 (internal cross-reference omitted).

<sup>212</sup> *Id.* at 110 (emphasis added).

<sup>213</sup> See Sunstein, *supra* note 195, at 1159.

<sup>214</sup> *Id.*

birth control clinics closed in Connecticut for twenty-five years. The lack of birth control clinics may not have greatly affected middle-class and wealthy people who could afford private medical care, since doctors would often break the laws. The lack of clinics primarily harmed lower-income women who needed the free or low-cost services birth control clinics provided. . . . [T]he effect of the Connecticut restrictions was that "while birth control services were generally available, the poor, dependent on free medical services, were effectively denied assistance."<sup>215</sup>

Hence, if desuetude requires nonenforcement as a precondition for invalidation, Connecticut's contraception ban would not have been invalidated on that ground. There was little problem of notice, a concern Bork and others have articulated as underlying the doctrine of desuetude.<sup>216</sup> Connecticut had obtained state supreme court rulings upholding the statute's constitutionality in 1940<sup>217</sup> and 1942.<sup>218</sup>

Moreover, to the extent that enforcement is important as a reflection of presumed public sentiment, *Griswold* was an unattractive candidate for invoking desuetude. Granted, Connecticut's ban on contraceptive use was enforced only against birth control clinics (and vending machine operators). However, "the state's real interest [in the initial 1939 prosecution of a birth control clinic and attendant 1940 appeal] was . . . in closing down the clinic and in establishing the constitutionality of the statute as enforced against medical personnel."<sup>219</sup> Thus, when Estelle Griswold and Lee Buxton were prosecuted for distributing contraceptives and advice on their use, and their clinic shut down after only ten days in operation, this was not an aberrant decision by a rogue prosecutor, but precisely the sort of action contemplated by the state law enforcement hierarchy. Connecticut's Attorney General was an elected officer, and, thus, the *Griswold* litigation arguably did enjoy the imprimatur of "the people['s] . . . elected official," as specified in Calabresi's formulation of the desuetude doctrine,<sup>220</sup> as well as the sanction of the state's highest court.<sup>221</sup>

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<sup>215</sup> Dudziak, *supra* note 134, at 917-18 (footnote omitted) (quoting C. THOMAS DIENES, LAW, POLITICS, AND BIRTH CONTROL 116 (1972)).

<sup>216</sup> See, e.g., Fein, *supra* note 158, at 556; Safire, *supra* note 197 (quoting Bork).

<sup>217</sup> *State v. Nelson*, 11 A.2d 856, 862 (Conn. 1940).

<sup>218</sup> *Tileston v. Ullman*, 26 A.2d 582, 588 (Conn. 1942).

<sup>219</sup> Dudziak, *supra* note 134, at 923-24.

<sup>220</sup> See *supra* text accompanying notes 191-193.

<sup>221</sup> Moreover, Sunstein says that "if the legislature has recently considered the problem and failed to do anything new, the doctrine of desuetude probably does not apply." SUNSTEIN, *supra* note 3, at 112. Yet, this is precisely what had happened in Connecticut. Repeal effort after repeal effort met with failure in the state legislature. Ordinarily, according to Sunstein's view, this would preclude a court from invalidating the statute for desuetude.

Sunstein's case for the desuetude of Connecticut's ban on contraception seems, then, to rest on a political process argument with which he supplements his old law arguments.

For all of the foregoing reasons, *Griswold v. Connecticut* and the other sexual freedom cases should not be understood as procedural due process rulings predicated upon desuetude. Some other account of those cases is necessary if the "right to sex" interpretation is to have a viable competitor.

### C. Fourth Amendment and "Governmental Snooping"

Another view of the sexual freedom cases, which treats them as grounded in Fourth Amendment concerns, interprets the Court's early contraception decisions, or at least *Griswold v. Connecticut*, as "case[s] about governmental snooping."<sup>222</sup> Michael Sandel, for example, suggests that, in *Poe v. Ullman*, Justices Douglas and Harlan (whose dissents prefigured the Court's ruling in *Griswold*) thought that Connecticut's ban on the use of contraceptives violated "the right to be free of the surveillance that enforcement would require."<sup>223</sup> Certainly, there is language in the dissenting opinions to support this interpretation.<sup>224</sup>

However, Professor Sandel goes further, arguing that, in *Griswold*, "[t]he violation of privacy consisted in the intrusion required to enforce the law, not in the restriction on the freedom to use contraceptives."<sup>225</sup> Solicitor General Charles Fried, on behalf of the Reagan administration, also suggested this view, arguing that *Roe* could (and should) be over-

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Specifically, he argues that "a well-organized religious minority, invoking a purely religious argument, was able to block a repeal that was very generally favored of a law that was never directly enforced through the criminal law." *Id.* at 275 n.24. Sunstein says that this circumstance distinguishes the facts of *Griswold* from other situations where "religious groups can block change for religious reasons . . ." *Id.* Normally, where this occurs, such groups may "participate in democratic processes" without "justifying a more aggressive judicial role" that might invalidate a statute for desuetude. *See id.* It is unclear how people, let alone courts, are to make the necessary distinctions, in a principled fashion, about the reasons for which some group opposes legislative change ("purely religious" or "religious") or about degrees of political efficacy ("participat[ion]" vs. "block[ing]").

Even if one could make such principled distinctions, this would still not have clearly justified a desuetude ruling from the U.S. Supreme Court, for a repeal effort finally seemed poised on the brink of success when the legislature decided to wait for the outcome of review in the Court. *See* DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 235 (1994). Although this last repeal measure was introduced after the U.S. Supreme Court announced that it would review *Griswold*, *see id.* at 229, 235, highly placed Catholic figures in Connecticut issued very important repeal-supporting statements prior to that announcement, *see id.* at 228-29.

Sunstein offers that "if there is good evidence that a state government has actively and intensely considered an issue, . . . it seems strained to say that the due process clause requires actual reenactment" to avert a ruling of desuetude. SUNSTEIN, *supra* note 3, at 113. Yet, this was precisely the situation in *Griswold*. Sunstein's appeal to blocking by a "well-organized religious minority" is unpersuasive.

<sup>222</sup> Ely, *supra* note 30, at 930.

<sup>223</sup> MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 95 (1996).

<sup>224</sup> *See id.* (quoting Douglas's dissent); *id.* at 96 (quoting Harlan's dissent).

<sup>225</sup> *Id.* at 96.

ruled without overruling *Griswold*.<sup>226</sup> Under this Fourth Amendment reading, *Griswold* held "that some acts are so intimate and personal that they could be discovered (and thus regulated) by the government only through means offensive to the principles underlying the fourth amendment, and that those acts therefore fall within a zone of privacy."<sup>227</sup> Under this interpretation, *Griswold* said nothing essential about a constitutional right of access to contraceptives, let alone a right to sex; rather, it was merely a case about means, about governmental searches that are unreasonable within the meaning of the Fourth Amendment.

If the obnoxiousness of the searches were limited to marital bedrooms, then a *Post*-type statute, preventing an unmarried woman and man from having oral sex, would not fall afoul of the rights established by the sexual freedom cases on this Fourth Amendment view. In contrast, if the marital character of the boudoir were not a necessary component of the offensiveness of governmental bed checks, then unmarried persons should also be constitutionally shielded from laws forbidding oral and anal sex. Indeed, their enforcement would generally require intrusion comparable to that at issue in *Griswold*.

This Fourth Amendment interpretation is not without support in *Griswold*, as Professor Ely forcefully argues.<sup>228</sup> Except for the paean to marriage in its final paragraph, the last sentences of Justice Douglas's opinion for the Court are: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>229</sup> The persuasiveness of this explanation of the right recognized in *Griswold* suffers, however, in two respects: later judicial elaboration of the right<sup>230</sup> and closer inspection of the factual context of *Griswold*.

The Supreme Court's subsequent contraceptive decisions in *Eisenstadt* and *Carey* demonstrate the inadequacy of the Fourth Amendment interpretation. In contrast to *Griswold*, the Court's opinion in *Eisenstadt* did not suggest that the intrusive governmental searching required to enforce the state law rendered the law unconstitutional. Nor could it, for the

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<sup>226</sup> See Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 94 (1989):

Squinting at *Griswold*, the United States noted a reference there to the possibility of "police searches of marital bedrooms for the telltale signs of the use of contraceptives," and suggested that *Griswold* could be read as a narrow fourth amendment search and seizure case. This reading would reduce the case to a largely inconsequential decision.

(footnote omitted).

<sup>227</sup> *Schneider*, *supra* note 108, at 272.

<sup>228</sup> See Ely, *supra* note 30, at 930.

<sup>229</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

<sup>230</sup> See *infra* text accompanying notes 231-232.

law struck down in *Eisenstadt* restricted distribution of contraceptives, not their use. The state did not need to search any bedrooms, marital or otherwise, to enforce such a law.<sup>231</sup> The Fourth Amendment interpretation of *Griswold*<sup>232</sup> is decidedly less attractive after *Eisenstadt*, as Sandel properly recognizes: "More than freedom from surveillance or disclosure of intimate affairs, the right to privacy would now protect the freedom to engage in certain activities without governmental restriction."<sup>233</sup> So too, *Carey* makes clear that one should not adopt the Fourth Amendment interpretation of the contraceptive cases. A ban on distribution requires no unseemly governmental searches of private places. Any doubt about the adequacy of Fourth Amendment secrecy or seclusion values as a foundation for the sexual freedom cases is dispelled when one considers *Roe v. Wade*: abortions are most commonly performed with the aid of medical personnel at hospitals or clinics, hardly the sort of locales that are conventionally thought shielded from the government's gaze.

Moreover, the Fourth Amendment interpretation fails to justify the decision in *Griswold*. The State of Connecticut was enforcing its laws only against birth control clinics, largely public spaces akin to the sorts of facilities that perform abortions. The Court in *Griswold* granted the clinic directors standing to argue that the State's ban on contraceptive use violated the constitutional rights of married couples.<sup>234</sup> If those rights were, contrary to the Fourth Amendment approach, considered substantive rights to use contraceptive devices, then state restrictions on clinic distribution of contraceptives arguably could infringe on those rights. However, if the only constitutional failing of Connecticut's ban were the intrusiveness of searches necessary to enforce it against *principals* (the married couples that used contraceptives), rather than any substantive impermissibility of restrictions on actual use, then state efforts to stem the supply of contraceptives by prosecuting clinics for aiding and abetting use would not have infringed upon the Fourth Amendment rights of married couples. If that were the case, there would have been no need for the Court to grant standing to the clinic operators to assert married couples' rights: enforcement against distribution in no way made intrusive searches of marital bedrooms more likely and, if anything, might have increased the likelihood that married couples would be safe from such searches because of reduced state concern about contraceptive use as a result of a reduced supply of contraceptives.

Since the Fourth Amendment view of the sexual freedom cases fails to account for *Griswold* or the later sexual freedom decisions, those that

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<sup>231</sup> Cf. *Schneider*, *supra* note 108, at 273 ("as the Court has expanded the right of privacy it has decreasingly relied on (to the point of ignoring) emanations of the fourth amendment").

<sup>232</sup> See *supra* text accompanying notes 222–229.

<sup>233</sup> SANDEL, *supra* note 223, at 97.

<sup>234</sup> See *supra* text accompanying note 45.

resist the "right to sex" reading of those precedents must offer an alternative interpretation. The following section discusses one such effort, based on a socially conservative reading of the sexual freedom cases as protecting the family unit, traditionally conceived in nuclear heterosexual terms.<sup>235</sup>

### *D. Social Conservatism and "Traditional Family Values"*

Writing some two decades ago, John Hart Ely observed that much of the Supreme Court's right to privacy jurisprudence

has offered little assistance to one's understanding of what it is that makes [sex-marriage-childbearing-child-rearing] a unit. Instead, it has generally contented itself with lengthy and undifferentiated string cites . . . or equally unhelpful explanations that this guarantee of personal privacy "has some extension" to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.<sup>236</sup>

Although this inarticulation remains nearly as salient today as it was two decades ago, some scholars adopt what I term a traditional family values view of the sexual freedom cases, contending that the cases are really about the protection of traditional families and marriages, not sex.<sup>237</sup>

On this view, the sexual freedom cases do not really protect sexual freedom, and *Post* probably would have been decided differently. A statute that prohibits a man and a woman from engaging in anal or oral sex together does not readily appear to weaken the bonds of marriage, adoption, or kinship; instead, it limits people's sexual expression. To the extent that sexual expression is recognized as a valuable or important way that people express affection for each other, the "traditional family values" interpretation would, at most, invalidate a *Post*-type law insofar as married couples are concerned. As for the unmarried person, the "tradi-

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<sup>235</sup> In reality, one of the most prominent commentators extends his view of traditional family to include groups linked via marriage, adoption, or kinship, and not merely mixed-sex spouses and their born or adopted children. See *infra* Part III.D.

<sup>236</sup> John Hart Ely, *The Supreme Court, 1977 Term, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 11 n.40 (1978). The altered text comes from *id.* at 11. Similarly, Thomas Grey has observed that the decisions in *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and *Prince v. Massachusetts*, 321 U.S. 158 (1944), "were isolated decisions and dicta, never grouped into a common category before *Griswold*." Grey, *supra* note 127, at 83.

<sup>237</sup> See Hafen, *supra* note 13, at 523 (characterizing Supreme Court precedents as embodying "a tradition of preference for family values"); cf. SANDEL, *supra* note 223, at 93 ("[a] right to be free of governmental interference in matters of marriage, for example, can be defended not only in the name of individual choice but also in the name of the intrinsic value or social importance of the practice it protects").



tional family values" approach does not "prize her sexual relations independent of childbearing issues."<sup>238</sup>

Of course, the Constitution "does not contain the word family. It makes no mention of marriage, parenting, procreation, contraception or abortion."<sup>239</sup> Yet, this has not precluded the "traditional family values" interpretive camp from concluding that "the contraception and abortion cases . . . are, like the general run of the Court's decisions in this area, dedicated to the cause of social stability through the reinforcement of traditional institutions and have nothing to do with the sexual liberation of the individual."<sup>240</sup> Bruce Hafen joins Thomas Grey in maintaining that the sexual freedom cases in actuality "are 'simply family planning cases' . . . ."<sup>241</sup> Hafen agrees with Grey that these decisions "represent two standard conservative views: that social stability is threatened by excessive population growth; and that family stability is threatened by unwanted pregnancies, with their accompanying fragile marriages, single-parent families, irresponsible youthful parents, and abandoned or neglected children."<sup>242</sup> Thus, Hafen answers Ely's charge:<sup>243</sup> "The conceptual 'unit' that binds these family-related decisions is the notion of a permanent, relational interest. Only interests relating to marriage and kinship comprise such a conceptual unit."<sup>244</sup>

Claims like these are often proffered as descriptive (or predictive) of Supreme Court precedent. For example, Hafen writes of the "Court's *attitude*" toward "sexual freedom" or "sex outside marriage."<sup>245</sup> Grey argues that

the Court *has consistently protected* traditional familial institutions, bonds and authority against the centrifugal forces of an anomic modern society. Where less traditional values have been directly protected, conspicuously in the cases involving contraception and abortion, the decisions reflect not any Millian glorification of diverse individuality, but the stability-centered

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<sup>238</sup> Hafen, *supra* note 13, at 537.

<sup>239</sup> Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 299 (1993). See also LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 49 (1991) (moving quickly past the concession that "there is not a word in the Constitution about family or family life").

<sup>240</sup> Grey, *supra* note 127, at 88.

<sup>241</sup> Hafen, *supra* note 13, at 533 (quoting Grey, *supra* note 127, at 88).

<sup>242</sup> Grey, *supra* note 127, at 88 (quoted in Hafen, *supra* note 13, at 533).

<sup>243</sup> See *supra* text accompanying note 236.

<sup>244</sup> Hafen, *supra* note 13, at 535 n.348. Cf. Ann MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L.Q. 487, 510 (1991) ("unmarried persons have no constitutionally protected positive right to procreate").

<sup>245</sup> Hafen, *supra* note 13, at 528 (emphasis added).

concerns of moderate conservative family and population policy.<sup>246</sup>

Similarly, Hafen insists that the primary issue with respect to the sexual freedom cases "is whether they *are based* on definitions of privacy or liberty broad enough to include sexual relations—as distinguished from decisions to prevent or terminate pregnancies—outside marriage."<sup>247</sup> Their prognostications of these cases are often distinctly descriptive: "[I]t seems clear," writes Grey, "that traditional restrictions [on the right to marry] such as those prohibiting incestuous and polygamous marriage will not be placed in doubt, however little secular or utilitarian justification they may have."<sup>248</sup> According to Hafen, "the massive weight of the Court's other family-related decisions [besides abortion and contraception cases] indicates no necessary implication that the Court will protect unmarried sexual privacy or the relational interest between unmarried persons."<sup>249</sup>

This "traditional family values" view certainly fits *Griswold* with its rhapsodic praises of the institution of marriage. It also might be a plausible approach to *Skinner v. Oklahoma*,<sup>250</sup> which, despite the lack of discussion of the marital status of the man that the Court saved from castration, did, with the announcement that "[m]arriage and procreation are fundamental to the very existence and survival of the race,"<sup>251</sup> first inject the notion of reproductive autonomy into Supreme Court precedent. As Laurence Tribe and Michael Dorf argue, however, "the approach Grey describes is not something that deserves to be called constitutional interpretation," however accurate it may be as a description of Supreme Court psychology.<sup>252</sup>

Moreover, once the Court moved past *Griswold* to decisions such as *Eisenstadt v. Baird*<sup>253</sup> or *Roe v. Wade*,<sup>254</sup> its case law is not plausibly understood as protecting rights necessarily based in marriage. *Eisenstadt* insisted that the constitutional rights of unmarried persons were necessarily the same as those of married persons.<sup>255</sup> In *Eisenstadt*, the Court rejected marriage or traditional family as the ultimate ground of constitutional right in *Griswold*, placing emphasis instead on the individual in a fashion that Janet Dolgin argues was quite radical.<sup>256</sup> The Court retained

<sup>246</sup> Grey, *supra* note 127, at 90 (emphasis added).

<sup>247</sup> Hafen, *supra* note 13, at 528 (emphasis added).

<sup>248</sup> Grey, *supra* note 127, at 85.

<sup>249</sup> Hafen, *supra* note 13, at 528.

<sup>250</sup> 316 U.S. 535 (1942).

<sup>251</sup> *Id.* at 528 (emphasis added) (quoting *Skinner*, 316 U.S. at 541).

<sup>252</sup> TRIBE & DORF, *supra* note 239, at 59.

<sup>253</sup> 405 U.S. 438 (1972).

<sup>254</sup> 410 U.S. 113 (1973).

<sup>255</sup> See *supra* notes 48–57 and accompanying text.

<sup>256</sup> See Dolgin, *supra* note 54, at 1537–56. Unfortunately, as sources of potential wisdom about constitutional meaning go, the Court's opinion in *Eisenstadt* is sadly skimpy.

this emphasis on individuals, regardless of marital status, in *Carey v. Population Services International, Inc.*<sup>257</sup> Similarly, *Roe v. Wade* protected the right to choose an abortion for all women, married or, like Jane Roe herself, unmarried.<sup>258</sup>

Hafen tries to save what I am terming the "traditional family values" approach by bracketing marriage and repairing instead to the notion of kinship. He offers that

*Griswold* [may be placed] in the chronological middle of an established substantive due process tradition [stretching from *Meyer v. Nebraska*<sup>259</sup> and *Pierce v. Society of Sisters*<sup>260</sup> to *Moore v. City of East Cleveland*<sup>261</sup>] based on the liberty interest inherent in marriage and kinship, rather than [at] . . . the beginning of a stirring new privacy philosophy laden with first amendment overtones.<sup>262</sup>

Although he does not offer a precise definition of what he means by kinship, Hafen contends that "the fifty or so Supreme Court decisions that now touch on family interests effectively define a 'family' as persons related by blood, marriage, or adoption."<sup>263</sup> Most importantly, Hafen insists that "[t]he Court's contraception and abortion cases do not depart from the touchstones of marriage and kinship as the criteria for determining the relational and sexual interests protected by the Constitution, even though the cases include single, unmarried persons."<sup>264</sup>

Hafen argues that, because decisions about contraception and abortion "affect the earliest possible creation of kinship," cases like *Eisenstadt* and *Roe* "can also be seen as arising from kinship interests."<sup>265</sup> He then invokes what he perceives as "the overtones of relational—as distin-

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*Cf. id.* at 521 (more bluntly describing the decision as "badly reasoned"). Indeed, on the key point about the primacy of the individual, the opinion's entire analysis appears to be the two sentences first quoted *supra* note 54 in the initial description of *Eisenstadt*, consisting of the observation that married couples, like all associations, are composed of individuals; and of the assertion that, to be meaningful, the constitutional right of privacy must protect both unmarried and married individuals' "free[dom] from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453.

<sup>257</sup> 431 U.S. 678 (1977).

<sup>258</sup> 410 U.S. 113 (1973).

<sup>259</sup> 262 U.S. 390 (1923).

<sup>260</sup> 268 U.S. 510 (1925).

<sup>261</sup> 431 U.S. 494 (1977).

<sup>262</sup> Hafen, *supra* note 13, at 523.

<sup>263</sup> *Id.* at 491–92. Hafen seems to have some naturalistic notion of the force of "kinship" (which seems to mean a blood or legally recognized quasi-permanent relationship) quite apart from the dictates of positive law, as reflected, for example, in his invocation of "persons bound together by the bonds of kinship." *Id.* at 511.

<sup>264</sup> *Id.* at 533.

<sup>265</sup> *Id.* at 534.

guished from individual—interests in the family privacy cases” in order to criticize views that “see the cases totally as reflections of individual privacy.”<sup>266</sup>

Hafen’s argument lacks force. Of course, the contraception and abortion cases are, in one sense, about kinship, insofar as one’s failure to contracept or to abort can lead to the creation of a new life to which one is related. Obviously, an individual’s interest in avoiding such a relationship is part of what is protected by the rights recognized in the sexual freedom cases. Those that view these decisions as protecting a right to sex do not typically deny this. However, it is unclear what view Hafen is attributing to unnamed persons that “see the cases *totally* as reflections of individual privacy.”<sup>267</sup> My best guess is that Hafen is attempting to emphasize the “social interests”<sup>268</sup> at stake. I suspect that Hafen seeks to valorize societal interests in fostering those parent/child relationships most likely to prove durable due to their being desired by at least one of the adults involved. Such an interest, however, is compatible with the “right to sex” view of the sexual freedom cases. The bearers of individual rights might (and, I would hazard a guess, frequently do) value not only consensual sexual interactions with others, but also the ability to make choices about the circumstances under which they would create a new kinship relationship. Decisions about the latter are often part and parcel of decisions about the former. The “right to sex” scholars do not read control over the creation of kinship relationships out of their interpretation of the sexual freedom cases. Consequently, Hafen does not offer persuasive reasons to prefer his view that those decisions are solely about control over those to whom one will be immediately genetically related.

Aside from the serious question of whether the normalizing “traditional family values” approach to the sexual freedom cases offers a normatively attractive understanding of these constitutional decisions, this view appears to contradict significant portions of Supreme Court jurisprudence. Hafen confesses that “[t]he abortion and contraception cases come closer than do the Court’s other cases to departing from the traditional blood-marriage-adoption criteria [for fundamental rights]”; admits that “[i]t is not [his] purpose to defend the results of the abortion and contraception cases”; and concedes, albeit with considerable understatement, that they “may not seriously further the purposes of giving extraordinary legal preference to the family.”<sup>269</sup> Indeed, they do not.<sup>270</sup> Yet, that

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<sup>266</sup> *Id.*

<sup>267</sup> *Id.* (emphasis added).

<sup>268</sup> The title of his article is, after all, *The Constitutional Status of Marriage, Kinship, And Sexual Privacy—Balancing the Individual and Social Interests*.

<sup>269</sup> Hafen, *supra* note 13, at 527, 535.

<sup>270</sup> Cf. West, *supra* note 105, at 1325 (arguing that the sexual autonomy protected in *Griswold* and *Eisenstadt* “constitutes a severe departure from—not a logical outgrowth of—the familial decisional autonomy at stake in the earlier, pre-contraception cases”).

should cause one to conclude that superelevating "the family" is not the point of the rights recognized in those decisions. Hafen's much more modest goal is "only" to show that these decisions did "not protect[ ] sexual privacy for the unmarried" and did "not disturb[ ] the preferred legal status given to formal marriage and kinship."<sup>271</sup> While he may not have failed on the second prong of his project, it is not clear that anything of significant consequence would follow. As for the first, he has not succeeded, for he has not come to grips with the abstinence gap argument of the "right to sex" view.

Hafen tries to address the abstinence gap. He criticizes the Court's decisions in *Eisenstadt* and *Carey* for extending protection to "unmarried persons and promiscuous teenagers."<sup>272</sup> He recognizes precisely the option addressed by the "right to sex" view: "If some single person is so concerned about not entering into a child-parent relationship, let her abstain from sexual relations . . . ."<sup>273</sup> Yet, rather than conclude with the "right to sex" proponents that these decisions must protect more than they expressly state, Hafen apparently concludes that these decisions are wrong and that preventing undesired teen pregnancies and the transmission of sexually transmitted diseases is simply an "issue of social policy," not a matter of "constitutional right."<sup>274</sup> This approach, then, is best viewed not as an interpretation but as a repudiation of the sexual freedom cases, and anyone genuinely interested in exploring the generative potential of these decisions would be well advised not to cling to the "traditional family values" interpretation.

### *E. Independent Citizens and Transcendental Antitotalitarianism*

Jed Rubenfeld has advanced a powerful and well-received alternative interpretation of the Supreme Court's sexual freedom and other privacy cases.<sup>275</sup> Under his view, "[t]he distinguishing feature of the laws struck

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<sup>271</sup> Hafen, *supra* note 13, at 535.

<sup>272</sup> *Id.* at 537. Hafen does not specify why he focuses on "promiscuous" youth, rather than, say, entertaining the possibility of monogamous, sexually active, youthful couples.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> See, e.g., Megan E. Farrell, Baehr v. Lewin: *Questionable Reasoning; Sound Judgment*, 11 J. CONTEMP. HEALTH L. & POL'Y 589, 613-14 (1995) (relying on Rubenfeld to argue that right to marry is fundamental, even as between two people of same sex); Stephen J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861, 872 (1991) (noting, with reservations, that "Rubenfeld's efforts take us well along the way of providing a more satisfactory understanding of privacy than does *Griswold*"); Tom Stacy, *Death, Privacy, and the Free Exercise of Religion*, 77 CORNELL L. REV. 490, 555 (1992) (discussing "Jed Rubenfeld's brilliant article on constitutional privacy"); Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141 (1997) (taking Rubenfeldian approach to military exclusion of lesbian persons). But see, e.g., Thomas, *supra* note 32, at 1499 (confining himself to addressing "the most marked flaws in the interpretive model[ ] defended in . . . 'The Right of Privacy'").

down . . . has been their profound capacity to direct and to occupy individuals' lives through their affirmative consequences. This affirmative power in the law, lying just below its interdictive surface, must be privacy's focal point."<sup>276</sup> Under Professor Rubenfeld's reading of the Court's jurisprudence, the underlying principle of the decisions "is the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state."<sup>277</sup> This transcendental principle of constitutional law stems from dictates of our form of constitutional democracy, which demands that government be limited by accountability to the people:

The very possibility of accountability to a people presupposes that the bodies and minds of the citizenry are not to be too totally conditioned by the state that the citizenry is meant to be governing. If they were, self-government, although it might continue to exist in form, would in fact be wholly illusory."<sup>278</sup>

Under this view of the right recognized in the sexual freedom cases, a *Post*-type statute forbidding a woman and a man from having oral or anal sex might or might not be adjudged impermissible. The outcome would depend on whether being restricted to the statutorily permitted options of masturbation and peno-vaginal intercourse is too total of an influence directing a person's life. It is not clear what Rubenfeld's view of that issue would be. While he does imply that *Hardwick* was wrongly decided,<sup>279</sup> in disregard of his antitotalitarianism principle,<sup>280</sup> he does so on the ground that "the prohibition [against homosexual sex] . . . forcibly directs individuals into the pathways of reproductive sexuality, rather than the socially 'unproductive' realm of homosexuality."<sup>281</sup> Since Rubenfeld completely fails to address the possibility that many gay and lesbian people might rather masturbate than "switch" and, thus, that, in practice, sodomy laws would not determine the "network of social institutions and relations that will occupy their lives to a substantial degree,"<sup>282</sup> it is unclear what his theory would say with respect to a *Post*-type law. This question need not be resolved, however, because Rubenfeld's transcen-

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<sup>276</sup> Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740 (1989).

<sup>277</sup> *Id.* at 784.

<sup>278</sup> *Id.* at 805.

<sup>279</sup> See *id.* at 801 ("emphasiz[ing] that conceiving of the right to privacy as protecting homosexuality for the reasons just discussed is not at all to convert the right to privacy into a general protection of 'sexual intimacy,'""); *id.* at 802 (concluding that laws like that at issue in *Hardwick* "may properly be called 'totalitarian,' and the right to privacy exists to protect against them").

<sup>280</sup> See *id.* at 799 ("it is the one case with which [his] new principle for privacy conflicts").

<sup>281</sup> *Id.* at 800.

<sup>282</sup> *Id.*

dent antitotalitarianism does not provide a good account of the sexual freedom cases, so the question of its treatment of mixed-sex sodomy is somewhat moot.

To Rubenfeld, the Supreme Court decisions striking down laws restricting access to contraceptives and abortion, like most of the Court's privacy doctrine, implemented his antitotalitarianism principle. He treats these cases as dealing with "child-bearing"<sup>283</sup> and argues that these laws' "productive or affirmative consequences," like the results of antimiscegenation and compulsory government education laws,

involve the forcing of lives into well-defined and highly confined institutional layers. At the simplest, most quotidian level, such laws tend to *take over* the lives of the persons involved: they occupy and preoccupy. They affirmatively and very substantially shape a person's life; they direct a life's development along a particular avenue. These laws do not simply proscribe one act or remove one liberty; they inform the totality of a person's life.<sup>284</sup>

This is true of the sexual freedom cases, Rubenfeld contends, because restrictive abortion and contraception laws "produce motherhood: they take diverse women with every variety of career, life-plan, and so on, and make mothers of them all."<sup>285</sup>

Rubenfeld rejects the response to this thesis "that anti-abortion or anti-contraception laws do not force women to bear children because women can simply refrain from having sex."<sup>286</sup> Why? "To begin with, it is no answer to the pregnant woman seeking an abortion."<sup>287</sup> For her, sex is a done deal, and the issue is whether legislative majorities may use the power of law to prevent her from obtaining an abortion. Shifting the temporal focus thus changes the availability of alternatives to childbearing. So, focusing on those persons most affected by a law's restrictions (as the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* instructed),<sup>288</sup> Rubenfeld may well succeed in his analysis of *Roe* in antitotalitarian terms.<sup>289</sup> To this extent, his analysis seems correct and certainly valuable, and it is consistent with the approaches advanced in Part V.B of this Article.

Anticontraception laws, however, stand on decidedly different footing, where Rubenfeld's argument that they produce motherhood fails. As

<sup>283</sup> *Id.* at 783.

<sup>284</sup> *Id.* at 784.

<sup>285</sup> *Id.* at 788. *See also id.* at 791 (explicating *Griswold* along similar lines).

<sup>286</sup> *Id.* at 784.

<sup>287</sup> *Id.*

<sup>288</sup> 505 U.S. 833, 894 (1992) ("Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.").

<sup>289</sup> *See* Rubenfeld, *supra* note 276, at 788–91.

Justice Stevens argued, concurring in *Carey v. Population Services International, Inc.*, "[t]he options available to the already pregnant minor are fundamentally different from those available to nonpregnant minors. The former must bear a child unless she aborts; but persons in the latter category can . . . avoid childbearing by abstention."<sup>290</sup> Similarly, in his dissenting opinion in *Carey*, then Justice Rehnquist distinguished antiabortion laws from anticontraception laws. With the latter, a "legislature has not chosen to deny to a pregnant woman, after the fait accompli of pregnancy, the one remedy which would enable her to terminate an unwanted pregnancy. It has instead sought to deter the conduct which will produce such faits accomplis."<sup>291</sup> Hence, a person imminently faced with the decision whether to comply with an anticontraceptive law, unlike a woman imminently faced with the decision whether to comply with an antiabortion law, is offered a choice of either the risk of pregnancy occurring or abstinence from heterosexual intercourse.

Rubinfeld, thus, goes astray when he argues to the contrary that "[t]he practical consequence of obeying laws against contraception . . . is that people become pregnant . . . ."<sup>292</sup> Rubinfeld ignores the alternative of abstinence from peno-vaginal copulation, which many other scholars have found persuasive,<sup>293</sup> primarily because he focuses on what he wishes to argue are the productive consequences of legal inhibitions. He argues quite convincingly that "[a]nti-abortion laws produce motherhood . . . ."<sup>294</sup> However, perhaps because he is trying to redescribe the bulk of the Court's privacy precedents, he does not rest with *Roe*, maintaining as well that "*Griswold* is explicable along the same lines."<sup>295</sup> His argument trades on a largely social (not purely legal) "normative regimen of sexual relations leading from chastity straight to marriage," as well as the fact that, in 1965, abortion was generally prohibited. Therefore, he claims, "the ban on contraception was equivalent in its positive aspect to enforced child-bearing."<sup>296</sup>

Yet, this does not fully explain why Connecticut's anticontraception law was not equivalent to either enforced childbearing or abstinence from peno-vaginal copulation. Even on the counterfactual assumption that the prohibition of abortion meant that abortions would not be performed, why does Rubinfeld fail to acknowledge abstention from peno-vaginal (or perhaps all) sexual activity as a possible result of anticontraception

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<sup>290</sup> 431 U.S. 678, 713 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added).

<sup>291</sup> *Id.* at 718-19 (Rehnquist, J., dissenting).

<sup>292</sup> Rubinfeld, *supra* note 276, at 784.

<sup>293</sup> See *supra* Part II.B.

<sup>294</sup> Rubinfeld, *supra* note 276, at 788. For elaboration of this claim, see *id.* at 788-91.

<sup>295</sup> *Id.* at 791.

<sup>296</sup> *Id.*



laws? One part of the answer to this puzzle seems to be methodological, and one part seems descriptive.

In applying his antitotalitarian reconception of the Supreme Court's constitutional right of privacy to sodomy laws, Rubenfeld's approach simply assumes that such laws are obeyed;<sup>297</sup> thus, he analyzes "the real effects that *conformity with the law* produces at the level of everyday lives and social practices."<sup>298</sup> He makes this methodological move on the ground that "[a]ll laws . . . are disobeyed."<sup>299</sup> Although he is not explicit about it, presumably this is an objection to analyzing various laws constitutionally for "their propensity to lead to disobedience"<sup>300</sup> because it would not usefully differentiate among laws, with the result being that either all laws or no laws are unconstitutional.<sup>301</sup> It seems, however, that laws would vary in the amount of disobedience that they prompt (depending, in part, on the importance to people of engaging in whatever activity a given law restricts) and in the objectionability of the consequences of disobedience or "doing the proscribed thing under the conditions of illicitness"<sup>302</sup> (such as back-alley abortions<sup>303</sup>).

Even setting aside this criticism of Rubenfeld's obedience-to-law methodology, it remains subject to charges of incoherence or inconsistent application in light of his descriptive claims. His analysis may be criticized as incoherent to the extent that a given law, in reality, does meet with disobedience. In such a case, the notion of "the real effects that conformity with the law produces"<sup>304</sup> makes less than complete sense.

Moreover, his methodology may also be criticized as inconsistently applied when it comes to sex. Rubenfeld rejects the position that antia-bortion and anticontraception laws might be seen to produce abstinence from peno-vaginal intercourse, concluding instead that such laws produce pregnancy because "they operate on drives and desires too strong or too subtle for most to resist."<sup>305</sup>

The problem with this analysis is that anticontraceptive and antia-bortion laws were not the only legal regulations of sexuality in place in 1965. At that time, "all but ten states prohibited fornication."<sup>306</sup> In par-

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<sup>297</sup> See *id.* at 799–800.

<sup>298</sup> *Id.* at 783 (emphasis added).

<sup>299</sup> *Id.* at 800 n.221.

<sup>300</sup> *Id.*

<sup>301</sup> Cf. *Griswold*, 381 U.S. 479, 518 n.11 (1965) (Black, J., dissenting) ("But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.") (quoting *Adkins v. Children's Hosp.*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting)).

<sup>302</sup> Rubenfeld, *supra* note 276, at 800 n.221.

<sup>303</sup> See *id.*

<sup>304</sup> *Id.* at 783.

<sup>305</sup> *Id.* at 784.

<sup>306</sup> Stratton, *supra* note 111, at 769–70 (citing *SEXUAL BEHAVIOR AND THE LAW* 10 (Ralph Slovenko ed., 1965)).

ticular, Connecticut had a criminal fornication law.<sup>307</sup> Given this, Rubenfeld's methodological assumption of obedience to law, in conjunction with his reasonable focus on the set of legal restrictions in place, ought to result in the conclusion that the effect of obeying anticontraception laws for unmarried persons is abstinence, not pregnancy leading to motherhood. Conversely, if the irresistible power of sexual desire were enough to lead a person to violate a fornication law, it would not be clear why the desire to avoid pregnancy, disease, or both would not also suffice to precipitate violations of anticontraception laws and, thus, would not produce motherhood. So, even if *Griswold* were originally explicable on antitotalitarian grounds,<sup>308</sup> after its explicit extension to protection of unmarried persons by *Eisenstadt* and *Carey*, the contraception decisions are not explicable on that basis.

It is no wonder, then, that the "Application" section of his article<sup>309</sup> fails to discuss *Eisenstadt* and *Carey*. Rubenfeld could conclude that these two cases were wrongly decided or that they are supported by something other than the right of privacy as he conceives it, although he does not do so. However, if he tried either of those moves, then the "fit" of his antitotalitarian interpretation of the right of privacy with the Court's "actual decisions"<sup>310</sup> in the sexual freedom cases would be seriously diminished. He would no longer be able to argue that *Bowers v. Hardwick* "is the one case with which [his] new principle for privacy conflicts."<sup>311</sup>

Nor would Rubenfeld's antitotalitarianism well explain *Stanley v. Georgia*, which he fails to cite anywhere in his article although Richard Mohr relies on it in his precedential argument for the right to sex.<sup>312</sup> As discussed earlier,<sup>313</sup> the Supreme Court severely cabined the reach of *Stanley v. Georgia*, effectively holding that, while one may have a right to possess obscenity, that right is protected, as Justice Black charged in one dissent, "only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room."<sup>314</sup> It would be a feeble restraint on totalitarianism that would allow a person to possess ob-

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<sup>307</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) (citing CONN. GEN. STAT. §§ 53-218, 53-219 (1958)).

<sup>308</sup> There are numerous problems with this position. For example, it overlooks the option of giving a child up for adoption (perhaps not often done by married couples). Moreover, it presumes the normative unjustifiability of a government's insisting on abstinence from peno-vaginal intercourse (for, if it were justifiable, then motherhood should be seen as the product of married persons' unreasonable decisions not to so abstain).

<sup>309</sup> See Rubenfeld, *supra* note 276, at 788.

<sup>310</sup> *Id.* at 788.

<sup>311</sup> *Id.* at 799.

<sup>312</sup> See *supra* text accompanying notes 142-143.

<sup>313</sup> See discussion *supra* notes 142-143 and accompanying text.

<sup>314</sup> *United States v. Thirty-Seven Photographs* and *United States v. Reidel*, 402 U.S. 363, 382 (1971) (Black, J., dissenting).

scene material only in the home but would not protect getting such non-conforming material into the home to begin with.<sup>315</sup>

Due partly to its overbroad ambition, of the sort against which Section I.B cautions, Rubinfeld's approach fails to deliver. His antitotalitarian principle quite possibly cannot account for *Griswold*, and it certainly fails to explain the conclusions in *Eisenstadt* and *Carey*.<sup>316</sup> Because the next two Parts of this Article show that there are more plausible views, Rubinfeld's approach should not be embraced as the best understanding of the sexual freedom cases.

#### IV. Toward a Better Understanding

In various ways, the putative interpretations of the sexual freedom cases analyzed in Part III fails to provide a persuasive explanation of, or justification for, the Supreme Court's contraception and abortion cases. The three alternative interpretations considered below are somewhat more successful. Section A considers an approach that grounds the sexual freedom cases in principles of gender equality. Section B looks at the view that the cases reflect constitutional principles protecting persons' bodily integrity. Finally, Section C examines an explanation of the cases as based upon principles of, intuitively enough, reproductive autonomy.

The gender equality approach, however well it explains and justifies the outcomes of the Supreme Court's sexual freedom cases by reference to an overarching constitutional value, lacks deep roots in the opinions of these decisions and would necessitate appreciable revision of constitutional doctrine.<sup>317</sup> The shared primary weakness of the other two inter-

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<sup>315</sup> In addition, it is dubious that the right protected in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), was "perfectly consistent with an anti-totalitarian conception of the right to privacy." Rubinfeld, *supra* note 276, at 792 (emphasis added). *Moore* "struck down a law that limited occupancy of dwellings to members of an immediate family." *Id.* Rubinfeld sees that decision as antitotalitarian because "[l]aws regulating who may and may not live in the home according to a single, narrow conception plainly have the effect of shaping diverse individuals and cultures into a particular mold." *Id.* Yet, three years earlier, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), another case that Rubinfeld does not cite, the Court upheld a law prohibiting more than two persons not related by "blood, adoption, or marriage" from "living and cooking together as a single housekeeping unit." *Id.* at 2. This law, too, "dictat[ed] the environment in which lives would be lived and children would be raised"—to use Rubinfeld's characterization of the affirmative consequences of the law struck down in *Moore*. Rubinfeld, *supra* note 276, at 792. While one might try to distinguish the two cases based on the range of options precluded by the different statutes, it is not readily apparent that the natures of the standardization wrought by each differ sufficiently to be constitutionally significant. Indeed, the plurality opinion in *Moore* distinguished *Belle Terre* on the ground that the statute sustained there "promoted 'family needs' and 'family values,'" whereas the East Cleveland ordinance "regulat[ed] the occupancy of its housing by slicing deeply into the family itself," *Moore*, 431 U.S. at 498—hardly an antistandardization stance.

<sup>316</sup> See also *supra* note 315 and accompanying text (suggesting other cases for which Rubinfeld's view does not account).

<sup>317</sup> I include this interpretation here because of my sense that its compelling principles

pretations of the sexual freedom cases lies in the incompleteness of their arguments, which fail to provide a sound response to the precedential argument for a right to sex relying on the possibility of abstinence from peno-vaginal copulation. Accordingly, after this Part examines these three interpretations and suggests why they might be worth attempting to salvage, Part V will explore possible ways of bridging the peno-vaginal abstinence gap in their arguments. Some of these attempts to bridge the gap will highlight the interpretive possibilities of treating the Supreme Court's contraception decisions separately from its abortion decisions rather than lumping them all together as reflecting a unitary constitutional right.

### A. *Maternal Burdens and Gender Equality*

A gender equality approach to the Supreme Court's sexual freedom cases is somewhat more promising than those previously discussed in this Article, which variously suffer from some combination of logical problems, normative difficulties, and the failure to fit the facts of the cases. A number of scholars have suggested that the Court's decisions in this area are best justified as protection of gender equality and repudiation of gender subordination. Nevertheless, although equality is a vital constitutional value and this approach fits the holdings of the sexual freedom cases reasonably well, this section shows that the gender equality account has only limited support in the expressed rationales of those decisions and, more importantly, would require significant doctrinal reform. Thus, despite its considerable merit as a normatively attractive interpretation of the Constitution, the gender equality interpretation is deficient as an account of existing constitutional law.

A gender equality approach would not speak in any simple way to a law prohibiting mixed-sex couples from engaging in oral or anal sex, like that invalidated in *Post*. Doctrinally, judges would likely view such a law as classifying not on the basis of sex but on the basis of body parts.<sup>318</sup>

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provide such strong justification as to overcome even significant elements on the dimension of fit and because of my belief that its reconstructive project is worth pursuing. In addition, the gender equality approach is consistent with all of the sexual freedom cases, save perhaps the abortion funding cases, even though it rejects other Supreme Court precedents. It should nonetheless be borne in mind that the gender equality approach is best seen as a project in process, not a simple interpretation of current constitutional law.

<sup>318</sup> This consequence would probably follow from the Court's much criticized general refusal to treat pregnancy discrimination as sex/gender discrimination for constitutional purposes. *See, e.g.,* *Geduldig v. Aiello*, 417 U.S. 484 (1974). *But see* *Cleveland Bd. of Educ. v. LaFleur* 414 U.S. 632 (1974) (finding a multimonth mandatory pregnancy leave arbitrary and thus in violation of due process). Given the close—although not perfect, *see, e.g.,* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999)—correlations between persons with a penis and males and between persons with a vagina and females, and the even tighter correlations between pregnant persons and females, a careful analysis should see that anti-

One would need to consider more directly, then, whether laws forbidding anal or oral sex violate some norm of gender equality that the Constitution should be understood to embody. Although sodomy laws leave acts of manual stimulation free from interdiction, they might be seen as channeling approved sexual expression into peno-vaginal intercourse. The most likely rationale for such deployment of the criminal law would be a view about the morality of sex tied closely to reproduction (if rationalized at all and not proffered merely as a "bare" assertion of immorality).<sup>319</sup> It would then take a complicated argument about the interplay of reproduction and gender to show how this law would violate constitutional gender equality norms. Such an argument could be constructed—perhaps one would emphasize the increased risks of conception, pregnancy, childbirth, and attendant constraints on women's social positions imposed on sexually active women by such a law. These kinds of claims might not be considered suitable for judicial adoption, but, even if they were not, conscientious legislators and prosecutors would remain obliged to consider seriously their merit.<sup>320</sup> What then is the gender equality view of the sexual freedom cases?

The importance of reproductive autonomy, not for its own sake but because of its necessity for equality of status between men and women, forms the core of the gender equality interpretation of the Supreme Court's sexual freedom cases. Stephen Carter, for example, suggests that "[o]ne can . . . argue, . . . in equality terms, that reproductive freedom is required to avoid the subordination of women."<sup>321</sup> More emphatically and apparently brooking no disagreement, Catharine MacKinnon insists that "*the real constitutional issue raised by criminal abortion statutes like that in Roe is sex equality and that it should be recognized as such.*"<sup>322</sup> To like effect, Kenneth Karst argues that "[t]he *Griswold* and *Roe* decisions are most satisfactorily defended as effectuating the principle of equal citizenship."<sup>323</sup> In Professor Karst's opinion, "any sensible view of the sub-

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sodomy laws turn upon sex. See Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988). A facially gender-neutral law, however, would be defined in terms of sex organs and mouths and/or anuses; "penis" or "vagina" would only appear in a (perhaps) nonstatutorily explicit definition of "sex organs." Moreover, the formal analogy between anti-same-sex sodomy laws and antimiscegenation laws would not work here, for no one, male or female, is allowed to have oral or anal sex with a woman, or with a man, under the type of statute at issue.

<sup>319</sup> See generally Cicchino, *supra* note 121.

<sup>320</sup> Whether, ultimately, this line of argument should be taken to establish the constitutional validity of the decision in *Post* is a question beyond the scope of this Article, which focuses more upon the meaning of the Supreme Court's sexual freedom cases than on their application to particular sexual regulations.

<sup>321</sup> Stephen L. Carter, *Abortion, Absolutism, and Compromise*, 100 YALE L.J. 2747, 2754 (1991) (book review).

<sup>322</sup> Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1319 n.163 (1991) (emphasis added).

<sup>323</sup> KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 53 (1993) (footnote omitted).

ject must recognize the centrality of controls over sexual behavior and maternity as determinants of women's place in society and in the public life of their communities—in short, of women's status as equal citizens."<sup>324</sup>

Similarly, Erin Daly argues that "[r]estrictive abortion laws that unequally burden women's, but not men's, capacity to define their own lives should be invalidated as violating the equality principle."<sup>325</sup> For Cass Sunstein,

[i]n its fullest form, the argument from equality is supported by four different points: (1) prohibiting abortion is a form of *prima facie* or *de jure* sex discrimination; (2) it is impermissibly selective [in compelling parentage]; (3) it results from constitutionally unacceptable stereotypes [of different roles for men and women]; and (4) it fails sufficiently to protect fetal lives [since history shows that nearly as many abortions occurred in the U.S. when abortion was illegal].<sup>326</sup>

Proponents of the gender equality interpretation typically concede that there is little express foundation for their view of the sexual freedom cases in the reasoning of Supreme Court opinions. Thus, for example, Paula Abrams writes: "Equal Protection analysis under the Fourteenth

<sup>324</sup> *Id.* at 180. For Karst, "[t]he focus of equal citizenship here is not a right of access to contraceptives, or a right to an abortion, but a right to take responsibility for choosing one's own future." Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under The Fourteenth Amendment*, 91 HARV. L. REV. 1, 58 (1977).

<sup>325</sup> Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 117 (1995).

<sup>326</sup> Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1, 32 (1992), quoted in Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419, 437 (1995).

In other equal protection arguments, Donald Regan has emphasized "the physical and psychological burdens of pregnancy and childbirth." Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1573 (1979). Placing some, but less, emphasis on gender, *see id.* at 1631–34. Regan further argues that, by imposing greater burdens on women than U.S. jurisdictions' legal systems impose on other potential samaritans that are not obligated to save lives, antiabortion laws deny women equal protection of the laws, *see id.* at 1635, and that this argument is "the best justification of the result in *Roe*." *Id.* at 1646. Technically, Regan claims it was the best justification of which he knew at the time that he wrote his article in 1979. *Id.* Updating and modifying Regan's argument, Eileen McDonagh argues that antiabortion laws, which involve the state in perpetuating a fetus's intrusion into a woman's body, unconstitutionally deny women equal protection of the laws "as long as the state extends to others protections from intrusions by private parties." EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* 11–12 (1996). *See also id.* at 132 (contending that the equal protection issue is "whether the state protects pregnant women as victims of private injuries committed by the fetus as state-protected human life to the same degree that the state protects others who are victims of private injury caused by human life"). Because gender seems rather incidental to Regan's and McDonagh's arguments, I have treated Regan and McDonagh as bodily integrity theorists. *See infra* Part IV.B.

Amendment, applicable to legal classifications based on gender, has not been applied to reproductive regulation, in part because the Court has insisted that the Equal Protection Clause is implicated only where men and women are 'similarly situated.'<sup>327</sup> According to Professor Abrams, "[t]he Supreme Court, while recognizing economic and status disadvantages imposed upon women historically, has yet to acknowledge that the tradition of female procreative destiny is the source of gender discrimination."<sup>328</sup>

Little express precedential basis for the gender equality interpretation does not, however, mean no basis at all. Reva Siegel reads the Court's opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*<sup>329</sup> as suggesting that abortion restrictions "implicate[ ] constitutional values of equality as well as privacy."<sup>330</sup> While "federal courts have virtually never applied gender-based equality doctrine to reproductive freedom cases," Ruth Colker suggests that "[i]n *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Blackmun furnishes the first mention of gender-based equality theory in a Supreme Court reproductive freedom case[.]"<sup>331</sup> Moreover, contends Paula Abrams, "*Casey* represents a significant emergence of the equality issues underlying reproductive rights cases. The joint opinion of Justices O'Connor, Souter, and Kennedy repeatedly recognizes the vestiges of gender stereotyping which so completely infuse reproductive issues."<sup>332</sup> Similarly, Justice Ginsburg argues that the authors of *Casey* "added an important strand to the Court's opinions on abortion—they acknowledged the intimate connection between a woman's 'ability to control [her] reproductive li[fe]' and her 'ability . . . to participate equally in the economic and social life of the Nation.'"<sup>333</sup>

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<sup>327</sup> Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 455 (1995).

<sup>328</sup> *Id.* at 485.

<sup>329</sup> 476 U.S. 747 (1986).

<sup>330</sup> Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 263 (1992). She quotes the Court:

The Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as men . . . . A woman's right to make [the abortion] choice freely is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

*Id.* at 263 n.4 (quoting *Thornburgh*, 476 U.S. at 772 (citations omitted)).

<sup>331</sup> Ruth Colker, *Equality Theory and Reproductive Freedom*, 3 TEX. J. WOMEN & L. 99, 100 (1994) (footnote omitted). "Although Blackmun does note that equal protection issues are raised by provisions like those at issue in *Casey*, he then proceeds in the rest of his opinion to argue that *Roe* and the right of privacy protect a woman's choice to obtain an abortion." *Id.* at 108 n.43 (citing *Planned Parenthood v. Casey*, 505 U.S. 883, 928–40 (1992) (Blackmun, J., concurring in part and dissenting in part)).

<sup>332</sup> Abrams, *supra* note 327, at 488–89.

<sup>333</sup> Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199

Recognizing, then, that the gender equality view finds little support in the reasoning of the Court's decisions in the sexual freedom cases, many commentators insist that this approach nonetheless provides the best justification for the Court's actions invalidating various laws. That is, these scholars take an expressly reconstructive approach to the sexual freedom cases.

Sylvia Law, for example, argues that "[s]ex-based equality *could have* provided a stronger basis for the decision in *Eisenstadt*."<sup>334</sup> Because "only women are confronted with the choice of obtaining an abortion or enduring the physical burdens of pregnancy," government imposes a sex-based burden upon women when it "denies access to contraception."<sup>335</sup> This reasoning clearly embraces *Griswold* and *Carey* as well: the sex-differential burden is in no way reduced by the presence of a marriage relationship or chronological minority status. The argument does, however, take for granted that anticontraceptive and antiabortion laws do impose constitutionally significant burdens on women. While it may be that the Constitution is implicated by sex discrimination even as to constitutionally trivial matters,<sup>336</sup> if this is not the case, then the gender equality approach would still have a gap. It would fail to explain why, if the sexual freedom cases do not protect a right to engage in nonprocreative sex, the ability to avoid sex-differential consequences of anticontraception or antiabortion laws by abstaining from peno-vaginal copulation does not shift responsibility for incurring those consequences to those that choose to have such potentially reproductive sex. This peno-vaginal abstinence gap in the gender equality argument would then be shared by the interpretations of the sexual freedom cases addressed in Sections B and C of this part.

Aside from the abstinence gap issue, the gender equality approach to the sexual freedom cases does provide a rather sensible justification for results in those cases, although it may well require changes in existing equal protection doctrine before a court could accept it.<sup>337</sup> Perhaps most

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(1992) (citing *Planned Parenthood*, 505 U.S. at 856).

The dearth of judicial equality analysis in the sexual freedom cases should not be laid entirely at judicial feet. As Sylvia Law has remarked, "the constitutionality of government restrictions on the right [to obtain abortions] was not presented to the courts as a clear issue of sex equality." Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 973 (1984). See also MacKinnon, *supra* note 322, at 1288 n.34. Similarly, Catharine MacKinnon notes that, in "the early feminist legal view," abortion restrictions "were not considered legal issues of sex inequality at all, not in the doctrinal sense." *Id.* at 1287-88.

<sup>334</sup> Law, *supra* note 333, at 977-78 (emphasis added).

<sup>335</sup> *Id.* at 978.

<sup>336</sup> Cf., e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 735 (1982) (Powell, J., dissenting) (criticizing majority for, and characterizing majority as, extending constitutional solicitude to male nursing applicant that suffered merely the inconvenience of not being able to attend the nursing program closest to his home).

<sup>337</sup> See also Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 22 n.37 (1993) (citing articles



notably, it may require abandonment of the discriminatory purpose requirement applicable to laws which do not facially employ a suspect or quasi-suspect classification,<sup>338</sup> which contraception laws do not. Anti-abortion laws might be thought to classify on the basis of sex, although this conclusion also might require rejection of the Supreme Court's much-criticized conclusion in *Geduldig v. Aiello* that classifications on the basis of pregnancy are not sex-based.<sup>339</sup> The discriminatory purpose requirement holds that facially neutral laws are not subject to heightened judicial scrutiny unless government "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>340</sup>

In addition to the necessary significant reworking of current doctrine, the gender equality approach does not account well for the abortion funding cases,<sup>341</sup> which proponents of this approach tend to regard as mistaken for that reason.<sup>342</sup> The Supreme Court's decision in *Bowers v. Hardwick*, upholding Georgia's sodomy law,<sup>343</sup> has been criticized as violating gender equality norms as well.<sup>344</sup> Given the vast weight of academic commentary critical of *Hardwick*, however, this may actually be a point in favor of the avowedly reconstructive gender equality interpretation.

In assessing the gender equality interpretation of the sexual freedom cases, one ought not to demand grand theory, a complete reconciliation of all Supreme Court privacy cases, for its partisans do not pretend to offer a description of all extant privacy precedents. Rather than treating the Court as having gotten everything right, the gender equality approach justifies the decisions in the sexual freedom cases and provides a basis (or yet another basis) on which to criticize *Hardwick*.<sup>345</sup> For anyone that believes that the expressed rationales of past Supreme Court decisions may properly be ignored or reconceived, the gender equality interpretation is worth keeping, since one important feature of this approach is its reliance on an almost indisputable constitutional value: gender equality.<sup>346</sup> Catharine MacKinnon properly argues that:

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providing "critiques of the equal protection argument").

<sup>338</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229, 242-45 (1976); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272-74 (1979).

<sup>339</sup> 417 U.S. 484, 497 (1974).

<sup>340</sup> *Feeney*, 442 U.S. at 279.

<sup>341</sup> See *supra* notes 69-75 and accompanying text.

<sup>342</sup> See, e.g., MacKinnon, *supra* note 322, at 1320.

<sup>343</sup> See *supra* text accompanying notes 120-123.

<sup>344</sup> See generally Koppelman, *supra* note 318; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187.

<sup>345</sup> Gender equality has been seen as consistent with constitutional protection for pornography by anticensorship feminists, so *Stanley v. Georgia*, 394 U.S. 557 (1969), should not be fatal to this approach.

<sup>346</sup> But cf. *United States v. Virginia*, 518 U.S. 515, 574-75 (1996) (Scalia, J., dissenting) (suggesting that he would jettison heightened scrutiny for gender discriminatory laws

in the discussion of whether the Constitution deserves fidelity, equality is not just . . . an artifact or a convenient example. Equality keeps coming up . . . [because] equality makes the Constitution legitimate, so its treatment is central to answering the question of why we should be loyal to it. Equality comes up in the fidelity discussion precisely because, to the degree the Constitution is not equal, it is not legitimate, hence not deserving of adherence, so it becomes unacceptable merely to interpret it . . . . The Constitution became more legitimate the day it guaranteed equal protection of the laws. It will become more legitimate the day it delivers on this promise.<sup>347</sup>

It may well be, therefore, that the gender equality approach to the Supreme Court's sexual freedom cases offers an attractive way of understanding those decisions' basis in the Constitution. Given, however, that this justification was not relied upon or even articulated in any of the sexual freedom cases,<sup>348</sup> and, more importantly, that it would require a refashioning of significant aspects of current constitutional gender equality doctrine, this approach is far more satisfying as a revision of constitutional law as it stands to this date than it is as an interpretation of actual existing precedents.

### *B. Eighth Amendment and Bodily Integrity*

One alternative interpretation of the sexual freedom cases that arguably fares better on the dimension of fit than the gender equality approach puts emphasis not on the postbirth consequences of childbearing, as the transcendent antitotalitarian approach does,<sup>349</sup> but rather on the burdens of pregnancy and childbirth themselves. Some scholars treat those physically invasive burdens, when backed by government sanction, as violating individual women's bodily integrity and, therefore, constitutional principles related to the Eighth Amendment's ban on governmentally imposed suffering. This view of the sexual freedom cases would not condemn a *Post*-type statute prohibiting a woman and a man from having anal or oral sex,<sup>350</sup> for one could comply with such a law with no resulting bodily intrusions. The bodily integrity approach arguably makes

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before he would subject them to strict scrutiny).

<sup>347</sup> Catharine A. MacKinnon, "*Freedom from Unreal Loyalties*": On Fidelity in Constitutional Interpretation, 65 *FORDHAM L. REV.* 1773, 1778-79 (1997).

<sup>348</sup> Arguably, post-*Roe v. Wade* abortion decisions may refer to the gender equality justification to a slight degree.

<sup>349</sup> See *supra* Part III.E.

<sup>350</sup> This is true unless, perhaps, it were thought impermissibly to increase risks of burdens or invasions of pregnancy by channeling sexuality into potentially reproductive outlets.

more sense of the Court's case law than do the accounts considered in Part III of this Article. Yet, it too has difficulties.

The bodily integrity approach gives privileged consideration to the physical invasions that persons would have suffered under the laws struck down in many of the sexual freedom cases. For example, Ann MacLean Massie has characterized bodily integrity as "one of the chief values particularly identified for protection in the contraception and abortion cases."<sup>351</sup> Comparably, Rhadika Rao, while recognizing ambiguity<sup>352</sup> in the Court's decision in *Skinner v. Oklahoma*,<sup>353</sup> suggests that its outcome "may simply rest upon the constitutional right to [what she terms] privacy of person, which prohibits state intrusions upon bodily integrity."<sup>354</sup> By necessitating unwanted intrusions into people's bodies, the laws that the Court has invalidated arguably run afoul of constitutionally derived values of bodily integrity. Interestingly enough, this view is capable of harmonizing a great deal of the Court's case law, although certainly not perfectly.

The result in *Skinner v. Oklahoma*,<sup>355</sup> the earliest forerunner of the constitutional sexual freedom cases,<sup>356</sup> is largely explicable along these lines. In *Skinner*, the Supreme Court held unconstitutional a state law authorizing sterilization for those convicted of three felonies of moral turpitude, excluding "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses."<sup>357</sup> The statutory punishment, sterilization, would clearly have interfered with Jack Skinner's bodily integrity, and the nature of the stakes—destruction of "the right to have offspring"—demanded careful review by the judiciary.<sup>358</sup> The Court judged procreation, or procreative capacity, to be a constitutionally important interest ("one of the basic civil rights of man") of both individual and societal importance and necessitating stricter than normal scrutiny, in part due to the irrevocability of sterilization.<sup>359</sup>

Bodily integrity also accords with the Supreme Court's explanation for the difference between *Cruzan v. Director, Missouri Department of Health*,<sup>360</sup> where the Court presumed a constitutionally protected liberty

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<sup>351</sup> Anne MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135, 159 (1995).

<sup>352</sup> See Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1484 (1995).

<sup>353</sup> 316 U.S. 535 (1942).

<sup>354</sup> Rao, *supra* note 352, at 1484–85.

<sup>355</sup> 316 U.S. 535 (1942).

<sup>356</sup> *Skinner* was, however, preceded by *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), both of which dealt with minors' education.

<sup>357</sup> *Skinner*, 316 U.S. at 537 (internal quotation marks omitted).

<sup>358</sup> *Id.* at 536.

<sup>359</sup> See *id.* at 541.

<sup>360</sup> 497 U.S. 261 (1990) (assuming constitutional right of competent persons to refuse

interest in refusing nutrition and hydration as a refusal of unwanted bodily intrusions, and *Washington v. Glucksberg*,<sup>361</sup> where the Court refused to hold that the Constitution protects a fundamental right allowing a person to seek a physician's aid in ending her or his life, when the aid would require an affirmative intrusion.<sup>362</sup> Moreover, arguments in a number of the concurring opinions in *Glucksberg* suggested that there may be a constitutional right to adequate pain relief that would preclude a state from insisting that breakdowns in one's bodily functioning go unrelieved.<sup>363</sup> *Bowers v. Hardwick* would not fall within the scope of a constitutional principle against nonconsensual physical invasions because the law there prohibited bodily intrusion and, thus, could be complied with without any intrusions at all, so it too is consistent with this approach.<sup>364</sup>

The case for the bodily integrity approach is only slightly less straightforward with respect to the abortion cases. If one brackets equal protection concerns, the abortion funding cases<sup>365</sup> seem consistent with the bodily integrity view. Using Eileen McDonagh's conceptualization of the issue, if the state denies funding for an abortion, then arguably the state is not intruding on the woman's body but is instead merely refusing to take affirmative steps to allow her to alleviate the intrusion by the fetus.<sup>366</sup> Affirmative restrictions on abortion, such as the criminal laws in-

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lifesaving hydration and nutrition but upholding state law requiring clear and convincing evidence for court to order such).

<sup>361</sup> 521 U.S. 702 (1997).

<sup>362</sup> See *supra* text accompanying notes 115–118.

<sup>363</sup> See Seth F. Kreimer, *The Second Time as Tragedy: The Assisted Suicide Cases and the Heritage of Roe v. Wade*, 24 HASTINGS CONST. L.Q. 863, 888–900 (1997) (discussing this possibility).

<sup>364</sup> On the other hand, the right that the Court recognized in *Stanley v. Georgia*, 394 U.S. 557 (1969), see *supra* text accompanying notes 142–143, did not involve resisting any governmentally compelled invasions of bodily integrity, so another basis would have to be offered for that decision. One might be found in its reliance on First Amendment values, as the Court subsequently emphasized in *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (characterizing *Stanley* as “firmly grounded in the First Amendment” and disparaging Michael Hardwick’s claim as ostensibly lacking such a textual basis). Of course, this rationale is not thoroughly satisfying, for *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), had rejected the argument that the First Amendment contained penumbral protection extending to obscenity, distinguishing *Stanley* as turning on “the privacy of the home.” See *id.* at 66 & n.13 (“The protection afforded by [*Stanley*] is restricted to a place, the home. In contrast, the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship.”). In addition, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), decisions protecting certain educational choices, were not physical invasion cases either. *Pierce* and *Meyer* would have to be reconceived as First Amendment cases—which Douglas did for the Court in *Griswold*. See *supra* note 47 and accompanying text. All this would still leave unexplained the invalidation of extensive mandatory maternal leave policies in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), where the Court said that the unconstitutional policies “impermissibl[y] burden[ed] a protected area of ‘freedom of personal choice in matters of marriage and family life.’” Massie, *supra* note 351, at 151 (quoting *LaFleur*, 414 U.S. at 639).

<sup>365</sup> See *supra* notes 69–75 and accompanying text.

<sup>366</sup> See, e.g., McDONAGH, *supra* note 326, at 6 (“the key issue in abortion [is] a

validated in *Roe v. Wade*,<sup>367</sup> also cohere with the bodily integrity view of the sexual freedom cases, for they enlist the coercive force of the law on behalf of fetuses, insisting that pregnant women allow the fetus's continued and undesired invasion of the woman's body. As Professors McDonagh and Donald Regan<sup>368</sup> (among others) emphasize, pregnancy and childbirth impose serious physical burdens on women.<sup>369</sup>

The contraception cases, however, are trickier to reconcile with the bodily integrity view. If anticontraception laws are seen as significantly increasing the risk that women will become pregnant, then a state that adopts them is using its coercive power to impose risks of serious bodily intrusions, arguably interfering with women's rights to refuse to consent to such intrusions and, thus, is violating their right to bodily integrity. The question, however, is whether anticontraceptive laws *should* be seen as significantly increasing the risks of pregnancy. Whether causation is ever simply descriptive, for constitutional purposes, this is not simply a factual question, but rather involves normative choices about responsibility in law.

If a fertile man and a fertile woman in a jurisdiction with an anti-contraception law choose to engage in peno-vaginal intercourse without contraception, the woman obviously faces greater risk of the burdens of pregnancy and either abortion or childbirth than she would have had they engaged in contracepted intercourse. However, she also faces greater risk than if they had abstained from such intercourse altogether. Should responsibility for the risk that she actually faces be attributed primarily or solely to the law against contraception, or should responsibility be attributed to the couple's choice to engage in intercourse? Both the law and the choice are but-for causes of the increased risk. Whether a constitutionally significant share of the responsibility should be allocated to the state's anticontraceptive law probably depends on the propriety of a state's insistence on abstinence from peno-vaginal intercourse in this context.

Because, by hypothesis, the bodily integrity interpretation would supplant or displace the "right to sex" account of the sexual freedom cases, people would have no right to engage in peno-vaginal copulation for purposes other than reproduction.<sup>370</sup> At least in the abstract, governmental insistence on abstinence by those not seeking to procreate would be thoroughly proper (assuming some minimally legitimate governmental interest in this kind of sexual regulation). As between two potential

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woman's right to the assistance of the state to stop the fetus as a private party from intruding on her bodily integrity and liberty without consent").

<sup>367</sup> 410 U.S. 113 (1973).

<sup>368</sup> See Regan, *supra* note 326.

<sup>369</sup> See, e.g., *id.* at 1579–83; McDONAGH, *supra* note 326, at 28–29, 33, 69–73, 77.

<sup>370</sup> I adopt this qualification because I assume that, even if the Supreme Court's sexual freedom cases do not establish a right to procreate, the Constitution would be interpreted independently to protect, at the very least, a limited such right claimable by married persons.

causes of a pregnancy (here, an anticontraceptive law and a choice to engage in potentially procreative sex), where one is a *prima facie* constitutionally proper exercise of governmental power and the other a private determination to engage in conduct that the government is trying to deter with its *ex hypothesi* legitimate law, the private choice generally ought be considered the cause in law.<sup>371</sup>

Hence, the fact that peno-vaginal copulation in the absence of contraception is more likely to cause pregnancy than if contraception were used is not enough, by itself, to establish that anticontraception laws significantly burden one's right to bodily integrity.<sup>372</sup> If the bodily integrity interpretation is to provide a successful alternative to the argument from peno-vaginal abstinence exploited by the "right to sex" interpretation, it needs some additional constitutional right or principle that would exclude laws that impose these kinds of risks without enshrining a constitutional right to sex. Part V of this Article explores possibilities of bridging this peno-vaginal abstinence gap.

### C. Responsible Reproduction and Procreative Autonomy

The final interpretation of the Supreme Court's contraception and abortion cases to consider is, in one sense, the most obvious: viewing those decisions as recognizing and protecting a constitutional right to procreative autonomy, to make and act on decisions whether or not to attempt to bring new life into the world. On this view, Richard Posner is half right in characterizing the cases as embodying "a constitutional right of sexual *or* reproductive autonomy."<sup>373</sup> This procreative autonomy approach, unsurprisingly, may best fit existing Supreme Court precedent. Its

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<sup>371</sup> The situation with respect to antiabortion laws is different, for there the question is not simply one of the causation of a pregnancy but, more importantly, a question of the continuation of a pregnancy. Peno-vaginal abstinence and the use of contraceptive devices are both ways of avoiding causation of a pregnancy, so it seems proper to attribute responsibility to the person that chooses the latter when it is legally proscribed. Unlike an abortion, however, peno-vaginal abstinence is not a way of avoiding perpetuation of a pregnancy, so antiabortion laws should be considered responsible for the continued burdens born by women legally unable to get an abortion. See *infra* text accompanying notes 415-419.

<sup>372</sup> Another route to this conclusion might be to hold that governmental actions that merely increase the risk of bodily invasion do not violate the constitutional right of bodily integrity, which could be thought to protect only against actual bodily harm. This avenue might require more theoretical grappling with the disease-preventing functions of some forms of contraception; on the facts of *Griswold*, however, Connecticut law allowed the sale of devices for the prevention of disease transmission, so the law against contraceptive use that the Court held unconstitutional arguably did not even threaten people with sexually transmitted diseases.

<sup>373</sup> POSNER, SEX AND REASON, *supra* note 5, at 324 (emphasis added). Posner was only half right because, although *sexual* and *reproductive* can be synonyms, in common parlance and constitutional commentary, *sexual* more generally refers to something like *erotic*. Compare, e.g., SCHNEIDER, *supra* note 108, at 296-97 (discussing sexual autonomy) with POSNER, SEX AND REASON, *supra* note 5, at 267-72 (discussing reproductive autonomy).

greatest weakness is its vulnerability to the argument from abstinence. This flaw, however, is not fatal, for it may be augmented by a constitutional limitation on the means that government may use to pursue its goals in this area, as suggested in Part V.

The procreative autonomy interpretation of the sexual freedom cases, like the gender equality account, does not speak clearly to a *Post*-type situation in which a law forbids a mixed-sex couple from engaging in oral or anal sex. On the one hand, it is not apparent that many people engage in oral or anal sex intentionally *as* a form of birth control, even if that is their effect.<sup>374</sup> Laws proscribing necessarily nonreproductive sexual activities do not seem best characterized as infringements of individuals' procreative autonomy. On the other hand, it is not readily apparent why oral or anal sex ought not to be viewed as constitutionally equivalent to contracepted peno-vaginal copulation: exclusive oral sex, for example, is an even more effective way of having a sex life while preventing unwanted pregnancy than is exclusive reliance on oral contraceptives during peno-vaginal copulation.

Whether or not the procreative autonomy interpretation of the sexual freedom cases would condemn laws banning oral or anal sex, it is different from the bodily integrity view, although the two could perhaps be combined. The bodily integrity view treats the constitutional gravamen of complaints against contraception and antiabortion laws as lying primarily in the increased risk from such laws of diseases or of the physical burdens of unwanted pregnancies. The procreative autonomy view, by contrast, attaches constitutional significance to the reduction in control over the circumstances under which persons can choose whether or not to bring new life into the world.<sup>375</sup>

The procreative autonomy interpretation of the sexual freedom cases enjoys a good fit with existing Supreme Court precedent. It accounts for the cases' invalidation of contraception and antiabortion laws, which arguably reduced the amount of control that persons had over whether or not to conceive and bear children. It also accounts for *Skinner v. Okla-*

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<sup>374</sup> It is not inconceivable that some mixed-sex couples might engage in oral or anal sex in order to avoid risking pregnancies via peno-vaginal copulation. Certainly this has occurred, as in the scene in the film *Saturday Night Fever*, where one male character seeks oral sex instead of peno-vaginal copulation due to lack of contraceptives. See *SATURDAY NIGHT FEVER* (Paramount Pictures 1977). Oral and anal sex, do, however, appear to be enjoyed by many people for their own sake, not simply as nonreproductive substitutes for other sex acts.

<sup>375</sup> Certainly, the gender equality theorists discussed in Part IV.A, *supra*, treat the sexual freedom cases as being centrally about procreative autonomy, for they believe such control over reproduction necessary for women to stand a chance of equal participation and status in society. So too some scholars of reproductive law and policy, including ones holding such divergent views as Ann MacLean Massie and John Robertson, treat the sexual freedom cases as grounded in reproductive control. See, e.g., Massie, *supra* note 244, at 50; John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 405 (1983).

*homa*,<sup>376</sup> where the Court struck down a law which would have eliminated some individuals' ability to reproduce by authorizing sterilization of certain felons. Moreover, as Lawrence Wu notes, the Supreme Court's language in many of its cases suggests a view of constitutional procreative autonomy broader than negative protection of bodily integrity.<sup>377</sup> *Skinner*, for example, speaks of "the right to have offspring," not . . . "the right to the capacity to have offspring."<sup>378</sup> In *Stanley v. Illinois*,<sup>379</sup> the Court stated that the "rights to conceive and to raise one's children" were "basic civil rights of man."<sup>380</sup> The procreative autonomy approach to the sexual freedom cases treats them as being about what the Court (eventually) said that they were about: constitutional "protect[ion of] individual decisions in matters of childbearing."<sup>381</sup>

The procreative autonomy view is also arguably consistent with *Bowers v. Hardwick*.<sup>382</sup> There, the Court saw the sexual regulation at issue as being unrelated to decisions about whether or not to bring children into the world or how to raise such children, and it denied that the sexual freedom cases actually extended constitutional protection to all sexual activities in which consenting adults engage.<sup>383</sup> The procreative autonomy interpretation could, at a stretch, make a kind of perverse sense of the obscenity decisions, such as *Stanley v. Georgia*,<sup>384</sup> and those cabining *Stanley*'s reach. Pornography in the home (where one may legally masturbate) might plausibly be used as a substitute for engaging in potentially reproductive sex, at least in comparison to pornography in a theater full of strangers (where masturbation would be illegal), which seems less likely to be a proximate substitute for peno-vaginal copulation.

The foregoing is not meant to argue that there can be no disagreeing with the procreative autonomy interpretation. Perhaps the most significant hurdle for the procreative autonomy view to clear is the argument relied on by those that interpret the sexual freedom cases as protecting sexual autonomy. Recall that this argument relied on the availability of abstinence from peno-vaginal copulation as an alternative to risking pregnancy to contend that what the Supreme Court actually protected in its contraception and abortion cases was a right to engage in sexual activities. According to this argument, the sexual freedom cases

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<sup>376</sup> 316 U.S. 535 (1942).

<sup>377</sup> Cf. Law, *supra* note 344, at 225 (arguing that "individual interest in access to contraception and abortion is not simply a matter of avoiding unwanted procreation" and that "[p]eople have a strong affirmative interest in sexual expression and relationships").

<sup>378</sup> Wu, *supra* note 351, at 1480 (footnote omitted) (quoting *Skinner*, 316 U.S. at 536.)

<sup>379</sup> 405 U.S. 645 (1972).

<sup>380</sup> Wu, *supra* note 351, at 1480-81 (quoting *Stanley*, 405 U.S. at 651 (quoting *Skinner*, 316 U.S. at 541) (invalidating a state law that it treated as erecting an irrebuttable presumption of the unfitness of a nonmarital parent)).

<sup>381</sup> *Carey v. Population Serv. Int'l*, 431 U.S. 678, 687 (1977).

<sup>382</sup> 478 U.S. 186 (1986).

<sup>383</sup> See *id.* at 190-91.

<sup>384</sup> 394 U.S. 557 (1969).



are not really about procreative autonomy, for, even in the face of the challenged laws, people could choose not to procreate by abstaining from peno-vaginal intercourse.<sup>385</sup>

This is a powerful objection, one that has not been adequately addressed by procreative autonomy theorists that reject the view that the sexual freedom cases actually protect a right to sex. Abstinence from peno-vaginal copulation is certainly the most effective way to try to ensure that one will not become a parent against one's wishes; virtually all forms of contraception have some positive failure rate. If one has no constitutional right to engage in nonprocreative sex and one retains a fool-proof power not to procreate by abstinence from peno-vaginal copulation, it is difficult to see how an contraception law deprives one of procreative control in violation of a constitutional right to reproductive autonomy.

The objection is difficult, but not impossible. The gap in the reproductive autonomy interpretation of the sexual freedom cases—the argument about peno-vaginal abstinence—essentially mirrors the abstinence gap in the bodily integrity view and, perhaps, the gender equality approach.<sup>386</sup> Although the gap has not yet been satisfactorily bridged by constitutional scholars, there are ways that it might be addressed, and these form the subject of the next Part of the Article.

## V. Bridging the Gap and Cleaving the Canon

Each of the three views of the sexual freedom cases (the bodily integrity interpretation, the reproductive autonomy account, and, perhaps, the gender equality approach) needs some way to bridge the peno-vaginal abstinence gap by demonstrating constitutionally cognizable harms that are occasioned by contraception and antiabortion laws. Such laws might be viewed as subjecting people to risks of diseases or the physical burdens of pregnancy, reducing people's procreative control in constitutionally significant ways, or imposing differential burdens on women. Two types of efforts at making such a showing seem facially plausible: first, constitutional embrace of a notion of powerful sexual "drives,"<sup>387</sup>

<sup>385</sup> See *supra* Part II.

<sup>386</sup> Rubenfeld's transcendent antitotalitarianism approach also suffers from an abstinence gap, since its claim that contraception laws produce motherhood fails because, on Rubenfeld's own methodological assumptions, such laws produce peno-vaginal abstinence. I have excluded his approach from Part IV, however, because of its independent problems accounting for cases such as *Stanley* and *Belle Terre*. See *supra* Part III.E. The allure of Rubenfeld's overarching antitotalitarianism principle would be further diminished if one of the gap-bridging principles discussed in Part V.B, *infra*, were used instead of antitotalitarianism to justify the contraception decisions.

<sup>387</sup> See, e.g., Dan Subotnik, "Sue Me, Sue Me, What Can You Do Me? I Love You" *A Disquisition on Law, Sex, and Talk*, 47 U. FLA. L. REV. 311, 390 (1995) (clearly suggesting that "the sex drive" is "powerful enough to drive us to distraction"); *id.* at 372 (invoking notion of "undifferentiated lust, a drive to unite with the entire population of the opposite

and, second, invocation of an independent restriction on the government's use of limits on contraception or abortion to pursue its goals. Sections A and B of this Part consider such arguments in turn, concluding that the first type does not provide an adequate way of bridging the peno-vaginal abstinence gap, but that the second type does provide a reasonably plausible bridge.

### A. Sex Drives and Irresistible Impulses

The first type of effort to bridge the peno-vaginal abstinence gap might invoke the notion of "intense and unruly 'natural' drives" to suggest "that human passions are too unruly, and reason too weak and under the sway of self-interest"<sup>388</sup> for government to demand reasonably that those that do not wish to risk conception abstain from sex. This view conceives of sexual desire as "a powerful instinctual drive, a 'push,' like the needs for food and drink,"<sup>389</sup> and, crucially, not something that exercises of human rationality can subordinate.<sup>390</sup> The possibility of abstaining from potentially reproductive sex would, thus, not be deemed a feasible option adequate to protect people's bodily integrity or procreative control. Regardless of any restrictions on access to contraceptives or abortions, and regardless of how much people try in good faith to comply with any sexual regulations in place, too many people simply will succumb to temptation, give in to their sex drives, and have intercourse, for abstinence to be a realistic method of birth control and of avoiding the physical burdens of pregnancy.<sup>391</sup> This view would, thus, treat abstinence from peno-vaginal copulation as an unrealistic and, therefore, constitutionally inadequate justification to permit the interference with procreative autonomy wrought by anticontraceptive and antiabortion laws.

An argument constitutionally enshrining this irresistible impulse view of sexual desire should not be accepted as an adequate way to bridge the peno-vaginal abstinence gap in the three accounts of the sexual freedom cases examined in Part IV.<sup>392</sup> True, there may be some hints

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sex") (emphasis added) (internal citation omitted). Subotnik's latter concept is possessed, presumably, by heterosexually identified adolescent men.

<sup>388</sup> Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 295 (1995). Macedo discusses a supposed general need to channel human sexual desire and conduct, rather than focusing on the specific issue of bridging the abstinence gap.

<sup>389</sup> Martha C. Nussbaum, "Only Grey Matter"? Richard Posner's Cost-Benefit Analysis of Sex, 59 U. CHI. L. REV. 1689, 1716 (1992).

<sup>390</sup> Cf. *supra* text accompanying note 305.

<sup>391</sup> See Morris Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROBS. 217, 218 (1960) ("Sexuality simply cannot realistically be confined within present legal bounds").

<sup>392</sup> The quoted phrase is, of course, an allusion to a common formulation of the insanity defense in criminal law. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 376 (1997) (Breyer, J., dissenting) ("the notion of an 'irresistible impulse' often has helped to shape criminal law's insanity defense").

of support for such a position in Supreme Court opinions.<sup>393</sup> This irresistible impulse position may, however, overstate the degree to which people are actually committed to observing an anticontraceptive law and would, in fact, risk unwanted pregnancies rather than disregard anticontraceptive laws or engage in nonprocreative sexual activities.<sup>394</sup> Moreover, the soundness of this drive conception of human sexual desire is open to serious question.<sup>395</sup> Yet, even aside from those concerns, the greatness and mystery of sex as a motivating force need not render it ungovernable.

Rather, as in the case of many sexual regulations, society should regard individuals' sexual activity as greatly susceptible to their own control. The vows of interpersonal celibacy taken by some members of various religious denominations presuppose such a view of human sexual control, even though there are many persons that have, in deeply troubling ways, failed to live up to them. Religiously and otherwise motivated views that persons should not engage in nonmarital sexual activity similarly take self-control as an attainable ideal.

Moreover, feminists have justly considered the contrary assumption—that human sexual desires (males' desires in particular) are so puissant that they must be acted on—as problematic. Martha Chamallas, for example, criticizes the *revocation rule*, which denies the possibility of revoking consent to sex and, thus, the existence of rape, once peno-vaginal copulation is commenced, as further reinforcing “the idea that beyond a certain point in a sexual encounter, men are powerless to

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<sup>393</sup> Consider, for example, the Court's landmark obscenity decision *Roth v. United States*, 354 U.S. 476 (1957), which conceived of sex as “a great and mysterious motive force in human life.” *Id.* at 487. See also *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (rejecting a sex discrimination challenge to Alabama's ban on women prison guard positions requiring continuous close physical proximity to inmates in maximum security institutions because of an “expect[ation] that sex offenders that have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of normal heterosexual environment, would assault women guards because they were women”) (emphasis added).

<sup>394</sup> It seems likely that, pre-*Griswold*, many Connecticut residents made no such efforts to comply with that state's anticontraceptive laws, as condoms were notoriously available for purchase. Consumers were unlikely to take seriously disclaimers that the condoms were sold for prevention of disease only.

<sup>395</sup> Martha Nussbaum criticizes this kind of reductionist view of human sexual desire reflected in Richard Posner's book *Sex and Reason*:

Sexual desire, in short, is a complicated phenomenon. *In part* it is indeed a powerful instinctual drive, a “push,” like the needs for food and drink; and insofar as it is such a drive, it may well demand a lower grade satisfaction where a more desired form of satisfaction is not available. But in part it is also a “pull,” displaying a complex intentionality. It seeks some value in its object, and is aroused by the perception of value in an object.

stop.”<sup>396</sup> Jane Aiken also argues “that judicial acceptance of the male sexual impulse as irresistible has harmed women in a variety of contexts.”<sup>397</sup>

It is possible to advance a less contentious inflection of the irresistible impulse position that would not emphasize the supposed natural, inevitable, and overpowering character of human sexual drives. This position would instead rest on a series of judgments about sexual desires, self-control, and judgment that might be brought together under the rubrics of human motivation and fallibility. Heterosexual sexual desires may not be so overpowering that peno-vaginal copulation, even in the face of contraception laws, “is simply inevitable.”<sup>398</sup> Rather, more modestly put, historical experience with sexual regulations tells us that some number of people will ignore legal demands that people eschew peno-vaginal copulation, even when the consequences of such sex are potentially quite serious.

If, however, there is no constitutional right to engage in sex for purposes other than procreation (the assumption driving the search in this Part for a way to bridge the peno-vaginal abstinence gap in the arguments from Part IV), then it seems unlikely that the Constitution would directly deem impermissible a legislature’s decision that contraception laws are worth incurring the toll that they may take when people slip, succumb to temptation, or damn the consequences and engage in peno-vaginal copulation. Regulation of nonprocreative sex, as discussed here, would be subject to rational basis review, which would sustain even rather draconian policy judgments as appropriate uses of legislative discretion.<sup>399</sup> Such judgments may be unwise, perhaps cruel, and unreasonable in a lay sense, but, if not invidiously discriminatory, they are not condemned by our constitutional law.

For the foregoing reasons, neither the irresistible impulse view of sex drives nor the human fallibility argument should be accepted as a constitutionally satisfactory way of bridging the peno-vaginal abstinence gap in the bodily integrity, procreative autonomy, and, perhaps, gender equality interpretations of the sexual freedom cases. Some other type of response is necessary, and the next section addresses a pair of alternative efforts to bridge the gap.

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<sup>396</sup> Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 818 (1988).

<sup>397</sup> *Id.* at 818 n.182 (discussing Jane H. Aiken, *Differentiating Sex from Sex: The Male Irresistible Impulse*, 12 N.Y.U. REV. L. & SOC. CHANGE 357 (1984)).

<sup>398</sup> WEST, *supra* note 105, at 1323 (critiquing many scholars’ apparent belief that “sex is going to happen regardless”). See also ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 147 & n.6 (1996) (making similar point).

<sup>399</sup> See, e.g., *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (upholding, on rational basis review, blanket employment exclusion of methadone users despite safety of certain individual users); cf. *Bennis v. Michigan*, 516 U.S. 442 (1996) (holding, in a five-to-four decision, that the Constitution does not shield innocent owners from civil forfeitures).

*B. Side Constraints and Permissible Means*

Another type of effort to bridge the peno-vaginal abstinence gap is not so dependent on a constitutional theory of irresistible sexual impulses. The "right to sex" view contends that the Supreme Court invalidated contraception and antiabortion laws because they impermissibly threatened sexual liberty, not women's autonomous life patterns or freedom from the physical burdens of pregnancy or procreative control. To reject this view, the gender equality, bodily integrity, and reproductive autonomy theorists must explain why the legislative demands for abstinence were unconstitutional without resort to a right to sexual autonomy. One possibility lies in a doctrinally innovative constitutional limitation on the types of means that government may pursue, disallowing reliance on measures that subject persons to increased risk of physical harms or to the threat of bringing a new human life into the world.

Anticontraception and antiabortion laws, in effect, tell people, "Either don't engage in peno-vaginal copulation, or else bear an increased risk of conceiving or bearing a child." Logic might suggest that, if the disjunctive choice between abstinence and increased risk of conception forced by anticontraceptive and antiabortion laws is unconstitutional, then it must be because imposition of either option, standing alone, must be unconstitutional.<sup>400</sup> Without a substantive right to sex, however, it is difficult to understand how the Constitution should be interpreted to preclude government from commanding people not to engage in peno-vaginal copulation.<sup>401</sup>

In conventional doctrinal terms, and presuming a lack of a right to sex, bridging the peno-vaginal abstinence gap in the theories discussed in Part IV might seem to suggest that requiring people that engage in peno-vaginal copulation to bear increased risks of pregnancy fails rational basis review. This suggestion echoes Judge Posner's plausible argument "that there is no good reason to deter premarital sex, a generally harmless source of pleasure and for some people an important stage of marital search."<sup>402</sup> Suppose, however, that these theorists (quite reasonably) insist that, in light of the relative lack of harms from engaging in contracepted sex as well as the threat posed by uncontracepted sex to one's ability to control whether one will procreate and bear the burdens of pregnancy or abortion, it is impermissible for the state to threaten people with such

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<sup>400</sup> *Cf.* *New York v. United States*, 505 U.S. 144 (1992) (holding that the choice between regulating nuclear waste according to federal standards or taking title to in-state producers' waste was unconstitutional because neither option could be mandated by Congress).

<sup>401</sup> A substantive right to procreate might protect acts of peno-vaginal copulation engaged in for the purpose of conceiving, but seems inadequate to render unconstitutional on its face a law generally forbidding peno-vaginal copulation.

<sup>402</sup> POSNER, *SEX AND REASON*, *supra* note 5 at 330.

harms. This assertion would fail to afford legislatures the degree of deference that the Supreme Court demands under rational basis review according to current case law.<sup>403</sup> The judgment that it would be unreasonable for the government to demand that women bear the risk of pregnancy and its burdens (and to impose on both men and women the risk of contracting diseases or of parenthood) as the price for copulating might well be endorsed by many. Yet, this kind of unreasonableness is the hallmark of substantive due process review as envisioned by Justices Harlan and Souter,<sup>404</sup> not of minimal rational basis review under current constitutional doctrine.

Fortunately for the gender equality, bodily integrity, and reproductive autonomy interpretations, neither covert departure from rational basis review nor conferral of heightened constitutional value on peno-vaginal copulation<sup>405</sup> appears necessary to bridge the peno-vaginal abstinence gap. Instead, one might proffer an addition to conventional constitutional doctrine focusing upon the interaction of the two disjunctive choices coerced by contraception and antiabortion laws. Specifically, one might view the sexual freedom cases as reflecting one of two possible nonconsequential constraints on the means used to pursue governmental aims, however important (or not) those aims may be. One version of such a means constraint would forbid governments to use the threat of increased risk of disease or serious bodily harm as a means of modifying persons' behavior, whether that end is legitimate, important, or even compelling in canonical equal protection vernacular. The other version would prohibit governments from the instrumental use of an increased risk of the creation of new human life as a means.

### *1. Threats of Physical Harms*

The first means-restricting principle would hold that government may not subject its citizens to risks of physical harm as a means of influencing their behavior. The contraception laws invalidated by the Supreme Court arguably furthered their stated governmental aims by subjecting people that engaged in peno-vaginal copulation to increased

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<sup>403</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312 (1993); *FCC v. Beach Communications*, 508 U.S. 307 (1993).

<sup>404</sup> In *Washington v. Glucksberg*, 521 U.S. 702 (1997), Justice Souter concurred in the judgment rejecting the constitutional challenge to the state's ban on physician-assisted suicide, but he would have analyzed the case following the searching "arbitrariness review" of Justice Harlan's *Poe v. Ullman* dissent, see 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), which the joint opinion in *Planned Parenthood v. Casey*, see 505 U.S. 833, 848-49 (1992), invoked. See also *Glucksberg*, 521 U.S. at 752, 756 & n.4, 762-64 (Souter, J., concurring in the judgment). The *Glucksberg* majority opinion, however, rejected this approach as too subjective. See *id.* at 721-22 & n.17.

<sup>405</sup> Again, this leaves to one side the likelihood that there may be a constitutional right to have sex for the purpose of reproduction.

risks of disease and pregnancy's bodily burdens.<sup>406</sup> This way of promoting governmental goals would be proscribed regardless of the importance of the goals served or the necessity of such laws to attaining those goals.<sup>407</sup> This means-restricting principle rules such instrumental uses of bodily harm out of bounds without extending affirmative constitutional protection to any right to engage in peno-vaginal copulation; it instead insists that government cannot instrumentally increase the costs of such copulation.<sup>408</sup>

A constitutional principle restricting governmental use of means that increase the risk of physical harms faced by individuals bears close affinity to the bodily integrity view of the sexual freedom cases.<sup>409</sup> As with that interpretation, this restriction can draw strength from the principle "that the Eighth Amendment will not allow state officials knowingly to impose brutal pain even on those convicted of heinous crimes."<sup>410</sup> A related concept is embodied in *Estelle v. Gamble*<sup>411</sup> and subsequent cases, which have held it a violation of due process for government to be deliberately indifferent to the serious medical needs of prisoners. Nor may government subject people to surgery or stomach pumping to retrieve evidence, the Court has held.<sup>412</sup> Threatening people with debilitating diseases or even the seemingly quotidian pains of pregnancy<sup>413</sup> arguably runs afoul of such principles and might be prevented by a means restriction like that under consideration.

The means restraint against physical harm would have different consequences outside of the arena of contraception and abortion than would the alternate means restriction against human life discussed in Section B.2. For example, if the Constitution forbids the government from using means that increase the risks of physical harms that people face, then general prohibitions on needle exchanges would probably be unconstitutional. What needle exchange bans do (as distinguished from bans on

<sup>406</sup> Justice White's concurrence in *Griswold* maintained that "[t]here [wa]s no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself . . ." 381 U.S. 479, 505 (1965) (White, J., concurring in the judgment). To the extent this is so, *Griswold* need not express a judgment about whether an immorality-of-contraception justification for anticontraception laws is constitutionally permissible. The proposed means constraint thus remains adequate to bridge the peno-vaginal abstinence gap.

<sup>407</sup> Cf. *Carey v. Population Servs. Int'l, Inc.*, 431 U.S. 678, 694 (1977) (plurality opinion) (rejecting proposition "that minors' sexual activity may be deterred by increasing the hazards attendant on it").

<sup>408</sup> See *supra* note 57 and accompanying text.

<sup>409</sup> See *supra* Part IV.B.

<sup>410</sup> Kreimer, *supra* note 363, at 891.

<sup>411</sup> 429 U.S. 97 (1976).

<sup>412</sup> *Winston v. Lee*, 470 U.S. 753 (1985) (surgery); *Rochin v. California*, 342 U.S. 165 (1952) (stomach pumping).

<sup>413</sup> See, e.g., McDONAGH, *supra* note 326, at 28 ("The Court views these burdens of pregnancy, no matter how dramatically depicted, as *normal* as long as they do not threaten a woman's health or life.").

needle giveaways) is attempt to serve government interests in limiting the spread of drug addiction and trafficking in drugs. They do so, however, by means that increase the likelihood of the spread of diseases by needle sharing. Indeed, the threat of harm must be the intended mechanism; otherwise, needle exchange bans would not deter drug use. Thus, at a time when many, if not most, new cases of HIV infection are associated with intravenous drug use, bans on needle exchange seriously increase the risk of life-threatening disease.<sup>414</sup> The restriction against using physical harms as a means would, therefore, invalidate such bans without extending constitutional protection to underlying acts of illegal drug injection.

Although this means restriction against physical harms would account for the contraception cases, it is not clearly successful with the abortion cases, where the governmental aim is not behavior modification but life preservation.<sup>415</sup> To run afoul of the constraint on governmental means that inflict physical harms on persons, antiabortion laws would have to be understood as treating the prohibition of abortion as a means to some independent governmental end, such as the preservation of (fetal) life. Given the state of medical technology, however, this view draws an exceedingly fine distinction: today, abortion is the destruction of fetal life and prohibiting abortion is the preservation of fetal life. Were abortion not to entail killing a fetus, a law forbidding abortion would do more than preserve fetal life and would, thus, arguably involve a choice of governmental means to some end other than life preservation. However, such abortion technology is not of the world that we inhabit, and the gender equality, bodily integrity, and reproductive autonomy theorists would do well to make an additional attempt to cover the case of abortion.

The solution may be simply to deny that there is any peno-vaginal abstinence gap where the Court's abortion decisions are concerned. Recall that, in the context of antiabortion laws, the peno-vaginal abstinence gap in the procreative autonomy interpretation maintained that such laws did not deprive women of reproductive autonomy because the vast majority of women have the option of refraining from peno-vaginal copulation and, thus, would retain control over decisions whether to procreate even without the option of abortion. In the bodily integrity account, the peno-vaginal abstinence gap lies in women's ability (outside of the case

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<sup>414</sup> Editorial, *As a Matter of Fact . . .*, FRONTIERS NEWSMAGAZINE, Sept. 3, 1999, at 12 ("The majority of new HIV infections in the United States are directly or indirectly associated with injection drug use."); *id.* ("Research has shown that needle-exchange programs can reduce new HIV infections by at least one-third and reduce risk behavior by as much as 80 percent.").

<sup>415</sup> I do not deny that many people that favor restrictive abortion laws also favor rigidly defined, traditional gender roles. See, e.g., Siegel, *supra* note 330, at 327-28. I simply doubt that this fact ought be treated in law as the purpose of antiabortion laws, given my admittedly impressionistic sense of the relative urgency with which such persons espouse fetal life saving compared to their advocacy of gendered constraints.



of rape) to avoid the physical burdens of pregnancy and childbirth by abstaining from peno-vaginal copulation.<sup>416</sup> These arguments adopt an *ex ante* view of women's sexual decision making, focusing on how—prior to ever becoming pregnant—a woman might make choices so that she could avoid either the physical burdens of pregnancy and childbearing or a loss of procreative autonomy.

However, as Professor Rubenfeld trenchantly observes, the option of forgoing peno-vaginal copulation “is no answer to the pregnant woman seeking an abortion.”<sup>417</sup> Even people that took care to use contraception could find their copulation leading to an unwanted pregnancy, since contraceptives, like the persons that use them, are not perfect. Hence—particularly if one believes that “it would not be possible to justly administer laws examining whether a woman actually responsibly used birth control”<sup>418</sup> or that “there is no reason to cede to the government the power to invade privacy sufficiently to [make such determinations]”<sup>419</sup>—constitutional protection for persons' bodily integrity or procreative autonomy should be assessed from a postpregnancy perspective. For a woman deciding whether to have an abortion,<sup>420</sup> unlike a woman deciding whether to use contraception, it is too late for abstinence. Accordingly, one could argue that antiabortion laws do significantly curtail women's control over their bodies and their procreative choices.

## 2. Threats of New Persons

An alternative constraint on governmental means that might bridge the peno-vaginal abstinence gap lies in the principle that the cannot use the threat of creating new persons as a means of behavior modification. This principle interdicts not governmental choice of means that increase risks of bodily harms, but use of means that would increase the risks of

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<sup>416</sup> In the gender equality approach, the gap would need to focus on women's ability to avoid the sex-differential burdens of conception and childbirth by peno-vaginal abstinence. While it might be objected that this “option” is discriminatory in that antiabortion laws do not force men to abstain to avoid pregnancy, this response would seem a bit peculiar, first, because men need never eschew peno-vaginal copulation to avoid the burdens (including diminished opportunity for life control) resulting from pregnancy (for men do not become pregnant, at least not now and not ever without major intentional medical intervention) and, second, because, if women are not having peno-vaginal intercourse, then neither are men. At root, the gender equality approach to the sexual freedom cases relies on the sex-differential importance of reproductive control to women's social situation, so it might doctrinally be assimilated into the procreative autonomy interpretation for purposes of assessing the peno-vaginal abstinence gap.

<sup>417</sup> Rubenfeld, *supra* note 276, at 784.

<sup>418</sup> Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051, 1133 (1997).

<sup>419</sup> *Id.* at 1134.

<sup>420</sup> Contrast this decision with a woman's deciding whether, *in the event of conception*, she would seek an abortion.

bringing unwanted new persons into the world. Like the constraint against threats of physical harm, this principle would condemn the anti-contraception laws invalidated in the sexual freedom cases, since such laws are designed in order to increase the chances of creating new life to deter people from engaging in sex. All else being equal, more children are likely to be conceived and born if contraception is forbidden. The principle against life creation as a means would not, however, condemn needle exchange programs, for, although they increase the likelihood that intravenous drug users will contract a disease, they do not make it more likely that they will procreate.

If anticontraception laws would increase birth rates, it is because people would not always refrain from peno-vaginal copulation on those occasions when they do not wish to procreate. How, then, does a ban on person-creating legislative means parry the argument that since people could, if they chose, abstain from potentially reproductive sexual acts, anticontraception laws should not be seen as threatening their reproductive control or ability to avoid the physical burdens of pregnancy? The response is that this principle is a nonconsequential constraint: it deems it wrongful for government to use the threat of bringing a new person into the world as a means of promoting desired behavior, here, the practice of abstinence. Thus, it would not simply be a constitutional right of reproductive autonomy, bodily integrity, or gender equality that justifies the contraception decisions among the sexual freedom cases, but also a limit on governmental power to use the birth of persons as a behavioral deterrent.

While this limitation on life creation as a governmental means would, like the restriction against physical harms, require for its implementation the articulation of new constitutional doctrine, it resonates with the right to procreative autonomy recognized by the sexual freedom decisions considered in Section IV.C. Scattered hints of a constitutional foundation for the restriction appear in various Supreme Court opinions. Justice Goldberg's concurring opinion in *Griswold* quoted *Prince v. Massachusetts* for the proposition that "the *Meyer* and *Pierce* decisions 'have respected the private realm of family life which the state cannot enter.'"<sup>421</sup> Presumably, that respect includes a substantial measure of deference to people's choices about whether or not to have children.<sup>422</sup> More clearly, the controlling opinion in *Planned Parenthood v. Casey* underscored the gravity of decisions to create a new human life:

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<sup>421</sup> *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

<sup>422</sup> *Cf. id.* at 497 (characterizing "totalitarian limitation of family size" as "at complete variance with our constitutional concepts").

*Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* . . . support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.<sup>423</sup>

If person creation is, constitutionally speaking, such a personal matter subject to such widely differing views, then, arguably, it is inappropriate for government to adopt blanket policies attempting to tax people with conceiving and giving birth as a way of deterring certain sexual conduct.

There are important philosophical arguments supporting a prohibition on the use of person creation as a governmental means. To the extent that, in our constitutional order, persons are to be regarded as ends in themselves, worthy of equal dignity and respect,<sup>424</sup> it is demeaning to treat the production of new persons as a means to some governmental end.<sup>425</sup> A right "not to be used simply as a means[ ] is a basic component of any system of rights like ours, grounded in autonomy and aiming to give people the space in which to lead their own lives."<sup>426</sup> Even if a quasi-Kantian objection that government should not treat persons as mere means, but rather should treat them as ends, does not fully establish the

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<sup>423</sup> 505 U.S. 833, 852–53 (1992) (first emphasis added).

<sup>424</sup> Cf. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 342 (1990) (Stevens, J., dissenting) (observing that Supreme Court has "construed the Due Process Clause to preclude physically invasive recoveries of evidence not only because such procedures are 'brutal' but also because they are 'offensive to human dignity'" (quoting *Rochin v. California*, 342 U.S. 165, 174 (1952)); see also *Bowers v. Hardwick*, 486 U.S. 186, 204 (1986) (Blackmun, J., dissenting) ("[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (quoting Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFFAIRS 288–89 (1977))).

<sup>425</sup> I do not address the question of whether a population growth program should be understood as treating the creation of new persons as a means or an end.

<sup>426</sup> Walen, *supra* note 418, at 1065 (citing THOMAS NAGEL, *EQUALITY AND PARTIALITY* 139, 148 (1991)).

constraint considered here,<sup>427</sup> the use of the creation of new persons as a means of modifying behavior may still be constitutionally objectionable in that it inappropriately devalues persons by treating them with insufficient dignity and respect, that is, treating them too instrumentally, if not solely instrumentally.

Like the principle against using physical harms as a means, the life creation restraint principle also would justify only the contraception decisions but not the abortion decisions. With respect to the latter, it does not appear that government is prohibiting abortion as a means to any end other than increasing the likelihood that conceived lives will become persons born into the world. Antiabortion laws, therefore, arguably do not reflect the governmental instrumentalization of persons that this means restriction condemns.<sup>428</sup> This leaves the question of how the abortion decisions might be justified without recourse to a right to nonprocreative sex, and one solution again (as was the case with the physical harm constraint) is to argue that there is no peno-vaginal abstinence gap in the gender equality, bodily integrity, and procreative autonomy accounts of the abortion cases.

### *C. Constitutional Doctrine and Precedential Unity*

The gender equality, bodily integrity, and reproductive autonomy approaches to the sexual freedom cases might bridge the peno-vaginal abstinence gap in the Supreme Court's contraception decisions by recourse to a constitutional principle forbidding government from trying to modify people's behavior by threatening them with bodily harms or the creation of new persons. However, another treatment of the Court's abortion cases is necessary if those accounts are to offer a satisfactory alternative to the "right to sex" interpretation of the sexual freedom cases. This alternative requires a change in perspective. By focusing on a woman's choices at the time that she truly confronts a pregnancy, rather than just the future possibility of being pregnant, it is possible to conclude that there actually is no peno-vaginal abstinence gap with respect to the abortion cases.

Treated in this fashion, any of the gender equality, bodily integrity, and reproductive autonomy views may be supplemented with a means restriction either against physical harms or the creation of human life, and the result is a principled account of the sexual freedom cases that answers the argument about peno-vaginal abstinence. Notably, however,

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<sup>427</sup> There is some debate about whether this Kantian principle applies to institutions and whether it applies to the creation of persons. See Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L.J. 1081, 1141-44, 1163-75 (1996).

<sup>428</sup> Some might object that antiabortion laws may not treat fetuses as a means to some end but do so treat pregnant women.

these side constraints on governmental means are not isomorphic to the usual inquiries of heightened scrutiny: how important are the governmental ends and how well tailored to those ends are the means? In addition, these means restrictions play no role in justifying the Supreme Court's abortion decisions, so the supplemented interpretations rely on different principles to justify the contraception decisions than they use for the abortion decisions. These results may be somewhat unusual, but they are not improper.

Conventional constitutional doctrine in both the substantive due process and the equal protection arenas asks whether challenged governmental actions are sufficiently important and sufficiently well tailored to pass constitutional muster. Thus, laws that significantly burden fundamental rights or that use suspect classifications must serve compelling governmental interests by means narrowly tailored to those interests; laws that use quasi-suspect classifications must serve important governmental ends by means substantially related to those ends; and laws that neither burden fundamental rights nor use suspect or quasi-suspect classifications must be rationally related to legitimate governmental ends.

The means-restricting principles, however, do not fit this pattern. Rather, they would forbid government from enacting laws that use the threat of physical harm or the creation of new persons as a means to get people to modify their behavior, irrespective of how important the behavioral goals are and irrespective of how narrowly tailored such means might be to those goals. The constraints at issue simply deem certain classes of means impermissible.

While this is not the usual form of due process or equal protection doctrine, it is not unprecedented, for in a number of areas the Supreme Court has adopted doctrines that rule classes of means out of bounds. Arguably this is what the Court did in *Palmore v. Sidoti*.<sup>429</sup> In *Palmore*, the Supreme Court held unconstitutional a state trial court decision that it would be in a child's best interests to transfer custody from her mother, a white woman that married a black man following her divorce, to her father, a white man that married a white woman following the divorce, because of the societal prejudice against interracial couples that the trial judge believed the child would face. The Supreme Court unanimously reversed. It did not, however, argue that the trial court was wrong in concluding that the child would suffer psychic harm from others' prejudices if she lived in an interracial household. Nor did it argue that serving the best interests of the child did not constitute a compelling governmental goal. Finally, it did not argue that the custody transfer decision was not a narrowly tailored way of advancing that goal. Rather, the Court held the transfer decision unconstitutional because "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give

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<sup>429</sup> 466 U.S. 429 (1984).

them effect."<sup>430</sup> Such prejudice-enforcing means of furthering a state interest are unconstitutional, regardless of the importance of the goal they serve or how precisely they serve that goal.<sup>431</sup>

As Eugene Volokh details, other areas of constitutional law do not seem to follow the conventional ends/means formulae that they invoke. Professor Volokh demonstrates that, in a number of free speech contexts, governmental restrictions "would pass muster if the strict scrutiny framework were taken seriously, but . . . nonetheless would and should be struck down."<sup>432</sup> He also contends that the Constitution protects churches' choice of clergy from the restraints of antidiscrimination laws thought to survive strict scrutiny, due to an independent, constitutionally derived constraint that is not tantamount to a requirement of importance of governmental end or necessity of governmental means.<sup>433</sup> Thus, there are significant structural analogues in current constitutional doctrine for the means-constraining principles described in this part.

The fact that the potential doctrines explored in Part IV.B treat the contraception and abortion decisions as resting on somewhat different foundations does not necessarily weaken their plausibility. The Supreme Court itself has varied in its treatment of the sexual freedom and other privacy cases, sometimes discussing liberties as unified and other times as distinct from one another. As Michael Dorf observes, "[a]lthough the Supreme Court sometimes eschews expressly characterizing particular unenumerated rights as specific manifestations of a more general right to privacy, in other cases its rhetoric reveals an underlying commitment to certain unifying themes."<sup>434</sup> Arguably, *Bowers v. Hardwick*<sup>435</sup> went too far in the direction of subdividing rights, characterizing privacy precedents on the basis of their narrow factual contexts. The plurality in *Planned Parenthood v. Casey*,<sup>436</sup> adopting Justice Harlan's articulation, said that the liberty protected by the Due Process Clauses "is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on."<sup>437</sup>

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<sup>430</sup> *Id.* at 433.

<sup>431</sup> To my knowledge, Richard Mohr was the first to argue forcefully in print for this reading of *Palmore*. See RICHARD D. MOHR, *GAY IDEAS: OUTING AND OTHER CONTROVERSIES* 56–58 (1992); RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 206–09 (1988). Eugene Volokh also advances this interpretation. See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2447–48 (1996).

<sup>432</sup> Volokh, *supra* note 431, at 2418.

<sup>433</sup> See *id.* at 2449–50.

<sup>434</sup> Dorf, *supra* note 144, at 1228 (footnote omitted).

<sup>435</sup> 479 U.S. 186 (1986).

<sup>436</sup> 505 U.S. 833 (1992).

<sup>437</sup> *Casey*, 505 U.S. 838, 848 (1992) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

*Casey*, however, may have overcompensated, describing precedent at such a high level of generality that its grand unity was unlikely to prove durable, at least for constitutional litigation purposes. Such a broad formulation—a “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”<sup>438</sup>—is likely to prove unhelpful in the long run to litigants seeking relief from governmental restraints because of judicial concerns about slippery slopes or floodgates and because of interpreters’ tendency to draw back from articulations of rights of such grand sweep. An example of this tendency may be seen in *Washington v. Glucksberg*’s awkward recharacterization of the passage from *Casey*.<sup>439</sup> In general, somewhat more modest, localized characterizations of precedent may be in order in constitutional adjudication. This would seem to be one upshot of the *Glucksberg* majority’s emphasis on “a careful description” of the claimed right at issue.<sup>440</sup>

The Court’s assessment of the lesson of *Griswold v. Connecticut*, in light of cases including *Roe v. Wade*, does not provide a sufficiently careful description when it limits constitutional protection of privacy rights to shielding “individual decisions in matters of childbearing from unjustified intrusion by the State.”<sup>441</sup> Either the sexual freedom cases actually protect a right to engage in sex for reasons other than procreation, or there is a peno-vaginal abstinence gap with respect to the contraception decisions. If the latter is the case, then the abortion decisions may protect a woman’s right to make autonomous decisions about matters of childbearing, but the contraceptive cases must rely on a different principle, such as a constitutional limit on the means by which government may pursue its goals, forbidding means that increase the risk of bodily harm or means that rely on the creation of new persons to effectuate desired behavioral change. In short, the sexual freedom cases are either about sexual freedom, or they are about more than just procreative autonomy.

### Conclusion

The “right to sex” account of the Supreme Court’s sexual freedom cases relies on the abstinence gap in those opinions to conclude that, in invalidating the challenged contraception and antiabortion laws, these decisions necessarily protected a constitutional right to engage in sex for purposes other than procreation. This Article has argued that, although many of the competing accounts of these precedents offered by constitutional scholars fail to ground persuasive interpretations, at least some of

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<sup>438</sup> *Id.* at 851.

<sup>439</sup> See *supra* notes 113–114 and accompanying text.

<sup>440</sup> *Glucksberg*, 521 U.S. 702, 712 (1997) (noting descriptively that “we have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest”) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

<sup>441</sup> *Carey v. Population Servs. Int’l, Inc.*, 431 U.S. 678, 687 (1977).

the accounts do offer viable alternatives to the "right to sex" reading, provided that they are supplemented with an appropriate side principle constraining the means that the government may use to pursue its goals.

The upshot of these conclusions is that the "right to sex" account of the sexual freedom cases is mistaken insofar as it purports to be the only logical interpretation of those decisions. This does not mean, however, that this account is an improper reading of those decisions, nor does it even mean that viewing the Court's contraception and abortion cases as protecting a constitutional right to sex is not the best way to understand those precedents. It simply shows that current constitutional law is inadequate to mandate conclusively one best reading of the sexual freedom cases. People that claim otherwise may be asking too much of precedent.

Indeed, much constitutional theorizing may be too backward looking, treating accumulated case law as adequate, by itself, to the task of addressing heretofore unresolved questions of constitutional meaning.<sup>442</sup> As Robin West argues, such a perspective does injustice to the liberty that the Constitution is supposed to protect.<sup>443</sup> Rather than argue that precedent conclusively demonstrates that there is or is not a constitutional right to engage in (certain) sexual activities, scholars need to concentrate more on the normative issues that are relevant to determining whether, giving precedent its due but no more, the Constitution should be understood to protect a right to sex. This does not mean that legal scholars ought not to argue in technically competent ways, but our notions of legally competent constitutional argument must be more explicitly normative and take much more into account than simply past decisions of the United States Supreme Court.

Fortunately, the legal literature contains good normative arguments for understanding the Constitution to protect a right to sex. Scholars, including Sylvia Law,<sup>444</sup> Richard Mohr,<sup>445</sup> David Richards,<sup>446</sup> and Laurence Tribe,<sup>447</sup> have advanced persuasive reasons for interpreting the Constitution in such a fashion. It is important, then, that those that support a constitutional right to sex not overstate their case by contending that the Supreme Court's sexual freedom decisions necessarily entail a right to sex as a matter of logic.<sup>448</sup> As this Article has shown, that position is mis-

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<sup>442</sup> Cf. Robin West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373 (1991) (suggesting that courts may not be an institutionally desirable place to expand the notion of liberty).

<sup>443</sup> See generally *id.*

<sup>444</sup> Law, *supra* note 344.

<sup>445</sup> Mohr, *supra* note 54.

<sup>446</sup> See, e.g., David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979).

<sup>447</sup> TRIBE, *supra* note 133, § 15-2, at 1304-07; *id.* § 15-21, at 1421-31, 1435.

<sup>448</sup> Cf. Frank I. Michelman, *A Brief Anatomy of Adjudicative Rule-Formalism*, 66 U. CHI. L. REV. 934, 934 (1999) ("It is 'formalist' (never a term of endearment, to my ear) . . . to pretend that the decisive legal norms for any pending case are uniquely deducible from



taken. The prominent, repeated advocacy of a poor argument in support of a just result could, I fear, reflect negatively on proper arguments for a constitutional right to sex, tainting them by association with the bad argument. Even if one argues that the Supreme Court has effectively decided a matter in one's favor, such claims should be phrased not in terms of logical derivations that might be shown to be false, but in terms of the best construction of our history and aspirations, judicial precedents, and, ultimately, of course, the Constitution.

