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Personhood and the Contraceptive Right

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NOTES

Personhood and the Contraceptive Right

Since the United States Supreme Court effectively legalized abortion on demand in Roe v. Wade\(^1\) opponents of that decision have been actively trying to overturn Roe by way of a constitutional amendment.\(^2\) Twenty-four proposals to restrict abortion have been introduced in the Ninety-seventh Congress.\(^3\) Although these amendments vary in their wording,\(^4\)

\(^1\) 410 U.S. 113 (1973).
\(^2\) Sixteen months of Senate hearings on proposed constitutional amendments relating to abortion were held; however, these ended on September 17, 1975 with no action having been taken. S. Rep. No. 126, 94th Cong., 2d Sess. 13-14 (1977); see Cohodas, 'Pro-life' Interest Groups Try a New Tactic in Effort to Crack Down on Abortion, 39 Cong. Q. Weekly Rep. 383, 385 (1981). For a discussion of the early proposed amendments, see Destro, Abortion and the Constitution, 63 Calif. L. Rev. 1250, 1319-25 (1975); Rice, Overruling Roe v. Wade, 15 B.C. Indus. & Com. L. Rev. 307, 321-41 (1973).
\(^3\) The following bills and resolutions were introduced in the first session of the 97th Congress, 1981: H.R. 392; H.R. Res. 13, 27, 32, 39, 50, 62, 92, 99, 104, 106, 122, 125, 127, 133, 198, 249, 372, 380; S.J. Res. 17, 18, 19, 110, 137.
\(^4\) Most of the proposed amendments fall into two categories: those which extend constitutional protection to the unborn ('personhood' amendments) and those which merely give the states or Congress or both the power to legislate in that area ('legislative authorization' amendments). Most amendments are of the personhood type; only two (S.J. Res. 110 and H.R. Res. 372) are of the legislative authorization type.

Four amendments illustrate the typical wordings of all the amendments that were introduced in the 97th Congress, first session. S.J. Res. 17 has the most popular wording, and also has been introduced as S.J. Res. 18, and as H.R. Res. 27, 62, 99, 122, 125, and 133; it also was introduced, with only minor changes, as H.R. Res. 39, 92, and 127. For the text of S.J. Res. 17, see note 5 infra. S.J. Res. 19 has been introduced in the House as H.R. Res. 13, 32, 50, 104, and 106, and as H.R. 392. For the text of S.J. Res. 19, see note 6 infra. The third, a combination of S.J. Res. 17 and S.J. Res. 19, was introduced as S.J. Res. 137 and H.R.R. Res. 380. Its goal was to achieve a "unity" language acceptable to all "pro-lifers." See National Right to Life News, Oct. 13, 1981, at 1, col. 1. This language combines the personhood aspect of S.J. Res. 17 and the fertilization language of S.J. Res. 19:

Section 1: The right to life is the paramount and most fundamental right of a person.

Section 2: With respect to the right to life guaranteed to persons by the fifth and fourteenth articles of amendments to the Constitution, the word "person" applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every state of their biological development including fertilization.

Section 3: No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law allowing justification to be shown for only those medical procedures required to prevent the death of either the pregnant woman or her unborn offspring, as long as such law requires every reasonable effort be made to preserve the life of each.

Section 4: Congress and the several States shall have power to enforce this article by appropriate legislation.

many of them define the word "person" as used in the fourteenth amendment as including the unborn child either "at every stage of their biological development" or "from the moment of fertilization." In addition, legislation has been introduced which defines human life as existing from conception and declares that the word "person" as used in the fourteenth amendment "shall include all human life as defined herein."

The fourth type of wording is different from the first three and is intended to return the power to legislate with respect to abortion back to the states and Congress: "A right to an abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: Provided, That a law of a State which is more restrictive than a law of Congress shall govern." S.J. Res. 110, 97th Cong., 1st Sess. (1981); H.R.J. Res. 372, 97th Cong., 1st Sess. (1981). This type of amendment would not itself confer any rights on the unborn child; however, a conflict might still arise concerning the contraceptive right if a state or Congress equated the destruction of a fertilized ovum with abortion and passed a law prohibiting contraceptives which acted on the fertilized ovum.

5 This is the wording of the most frequently proposed and sponsored amendment:

Section 1. With respect to the right to life, the word "person," as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

Section 2. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.


6 This is the wording of Senator Helms' amendment: "The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health, or condition of dependency." S.J. Res. 19, 97th Cong., 1st Sess. (1981). Although personhood is not specifically mentioned in the amendment, it was the intention of the sponsor that the unborn be protected as a fourteenth amendment person from the time of fertilization. Senator Helms did not want other laws which are imposed on United States citizens (e.g., census, registration, passports, and taxation laws) to be imposed on the unborn, but wanted only the right to life to become a constitutional right. See 127 CONG. REC. S574-75 (daily ed. Jan. 22, 1981) (statement of Senator Helms).

7 This is wording from the so-called "Human Life Bill," which passed out of the Senate Judiciary Committee's Separation of Powers Subcommittee on July 9, 1981. See Cohodas, Anti-Abortion Bill Advances in Senate Panel, 39 CONG. Q. WEEKLY REP. 1253 (1981). The bill provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:

Chapter 101

Section 1. The Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception.

The Congress further finds that the fourteenth amendment to the Constitution of the United States was intended to protect all human beings.

Upon the basis of these findings, and in the exercise of the powers of Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States,
Although the intent of these proposals is to prohibit, or at least restrict, the "abortion right," it has been argued that conferring personhood on the unborn child may also outlaw some contraceptives. Because contraceptives in some cases act not to prevent fertilization but rather to destroy the fertilized ovum, this could be tantamount to the killing of a person.

The Congress hereby declares that for the purposes of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose "person" shall include all human life as defined herein.

Section 2. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions, or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions.

Section 3. If any provision of this Act or the application thereof to any person or circumstances is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.


The "abortion right" referred to in this note is the fundamental privacy right of a woman to make the decision to obtain an abortion as encompassed by the fundamental right of privacy. See Roe v. Wade, 410 U.S. 113 (1973). There are no restrictions on this right in the first trimester, and only restrictions to protect the safety of the mother may be allowed in the second trimester. Id. at 163. An abortion may be prohibited in the third trimester, but may be prohibited even then if maternal health is implicated. Id. at 163-64. Maternal health has been defined in Doe v. Bolton, 410 U.S. 179 (1973), so as to include age and physical, emotional, psychological, and familial characteristics as relevant factors. Id. at 192. The right also attaches to minor children; thus, parents may not exercise an absolute veto over their child's decision to abort. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

Despite the language in Roe that prior to the end of the first trimester no restriction or regulation, even for the mother's health, was constitutionally permissible, there were dicta in the last paragraphs of Roe which indicated that a law permitting only doctors to perform abortions would not be unconstitutional. Roe v. Wade, 410 U.S. at 165-66. This was confirmed in Connecticut v. Menillo, 423 U.S. 9, 10-11 (1975). Furthermore, in Danforth the Court held that a requirement of written informed consent prior to any abortion was constitutional. Planned Parenthood v. Danforth, 428 U.S. at 67. Therefore, obviously, some minor restrictions are allowed on the abortion right in the first trimester. The constitutional issue seems to be whether these types of restrictions "unduly burden" the right. See L. Wardle, The Abortion Privacy Doctrine 103-11 (1981).

Cohodas, supra note 2, at 387; see 4 Abortion: Hearings on S.J. Res. 6, 10, 11 & 91 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 237 (1977) [statement of Harriet F. Pilpel, Senior Partner, Greenbaum, Wolff & Ernst, N.Y.] [hereinafter cited as 1977 Abortion Hearings].

See notes 59, 66-68, 74, 82-84 & accompanying text infra.
However, a law prohibiting the sale or distribution of such contraceptives, passed under the authority of a constitutional amendment conferring personhood on the fertilized ovum, would infringe the "contraceptive right,‖ and currently such a restriction is valid only if there exists a compelling state interest. This note examines the effect of personhood conferred at such an early stage on the contraceptive right. It argues that because of the importance given the contraceptive right, and the fact that the opposing state interest would be in an undeterminable probability of the loss of a person (the fertilized ovum), the typical balancing done by the United States Supreme Court would not allow the prohibition of any currently marketable contraceptives. This note then proposes a better balancing scheme which allows the life of the fertilized ovum to be considered a fundamental right. Under this analysis, which balances the conflicting fundamental rights involved, the contraceptive right may be infringed, but only to the extent reasonable alternative forms of contraception are available. Because such alternatives do not presently exist, this note concludes that even the latter, more accommodating, balancing technique would not allow the prohibition of any contemporary contraceptive methods.

**THE RIGHT OF PRIVACY AND ACCESS TO CONTRACEPTIVES**

The right of privacy first enunciated in *Griswold v. Connecticut* pro-
tected the use of contraceptives by married couples. The Court found that the marriage relationship lies within "the zone of privacy created by several fundamental constitutional guarantees," and that a law which forbids the use of contraceptives "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms." The Court left open the question of whether a law regulating the manufacture or distribution of contraceptives would also invade the zone of privacy.

Seven years after Griswold, a statute banning the distribution of non-prescription contraceptives was invalidated in Eisenstadt v. Baird. Because the law applied only to unmarried persons, the Court was able to sidestep the question left open in Griswold: whether the zone of privacy was invaded by the mere regulation of distribution. Instead it struck down the law on equal protection grounds, holding that the law did not have a rational connection to its purpose, the prevention of premarital sex. However, there was dictum to the effect that the decision to use contraceptives adheres to the individual, whether married or single. This dictum was a significant step beyond the protection of the marriage relationship at the heart of the decision in Griswold. Furthermore, Justice White's concurring opinion suggested that this type of restriction on the distribution of nonprescription contraceptives infringed the constitutional right to privacy.

16 Id. at 485.
17 Griswold was a plurality opinion with five Justices concurring in three opinions and two dissenting. Despite differences in the modes of constitutional interpretation, seven Justices agreed that sufficiently special interest were involved to require a stricter review—some "fundamental values" deserved special protection. See G. Gunther, Cases and Materials on Constitutional Law 589-90 (10th ed. 1980).
18 The Court found various "zones of privacy" in the "penumbras" of the first, third, fourth, fifth and ninth amendments, and cited previous cases in which the zones had been implicitly alluded to. Griswold v. Connecticut, 381 U.S. at 484-85. The court found the right of privacy inherent in the marriage relationship to be older than even the Bill of Rights. Id. at 486.
19 Id. at 485 (citing NAACP v. Alabama, 377 U.S. 288, 307 (1964)); cf. id. at 493 (Goldberg, J., concurring) (the ninth amendment alone would protect such fundamental rights as this from infringement); cf. id. at 500 (Harlan, J., concurring) (this law violates the due process clause of the fourteenth amendment, and thus resort to the Bill of Rights is not necessary).
20 Id. at 485 (plurality opinion).
22 Id. at 449; see G. Gunther, supra note 17, at 587-88 & n.3; J. Nowak, R. Rotunda & J. Young, Constitutional Law 627-28 (1978).
23 "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. at 453 (emphasis in original).
24 The plurality opinion in Griswold was concerned with the direct invasion upon the marital association itself which would be necessitated by enforcing a law that forbade the use of contraceptives. Griswold v. Connecticut, 381 U.S. at 485. The dicta in Eisenstadt extended the right of privacy and made it "universal in a way that repudiated the legally privileged status of marriage." J. Noonan, A Private Choice 21 (1979).
Finally, in *Carey v. Population Services International*, the Court invalidated several restrictions on the distribution and advertising of non-prescription contraceptives. The Court specifically considered a person’s right of access to contraceptives when striking down that part of the statute that allowed only pharmacists to sell nonprescription contraceptives to adults. The Court found that the protected right that had developed over the preceding line of cases was “the decision whether to bear or beget a child,” and that “restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions.”

Moreover, the Court found that a law that burdens a person’s right to decide to prevent conception by “substantially limiting access to the means of effectuating that decision . . . may be justified only by a ‘compelling state interest’ . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake.” The Court further stated that although there is no independent fundamental right of access to contraceptives, such access is essential to the exercise of the fundamental right of decisionmaking in matters of childbearing. However, since a compelling interest is needed to impinge validly on this right of access as well as to impinge validly on the fundamental right itself, the proposed distinction in practical terms vanishes.

The Court recognized that a state’s interest in safeguarding health, maintaining medical standards, or protecting potential life may be compelling. However, in *Carey* only nonhazardous contraceptives were involved, and the Court interpreted *Roe* as support for the proposition that potential life is not a consideration in the regulation of contraceptives. The implication of *Carey*, then, is that hazardous contraceptives

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29 Id. at 687 (quoting Eisenstadt v. Baird, 405 U.S. at 453) (emphasis added). A few years earlier the Court had found that the right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Roe v. Wade*, 410 U.S. 113, 153 (1973). This was approvingly cited by the Court in *Carey* in support of the statement that “the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”*Carey v. Population Servs. Int’l*, 431 U.S. at 687 (emphasis added).
31 Id. at 688 (quoting *Roe v. Wade*, 410 U.S. at 155).
32 Id.
33 Id. at 686. Again the Court approvingly cited *Roe v. Wade*, 410 U.S. at 154. In *Roe* the Court found no compelling interest of any kind in the first trimester; a compelling interest in the mother’s health at the end of the first trimester; and a compelling interest in potential life at viability, subject to total defeasance by an overriding compelling interest in the health of the mother after viability. *Id.* at 163-64.
34 Carey v. Population Servs. Int’l, 431 U.S. at 690:
   With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside of the mother’s womb.
can be regulated to safeguard maternal health and maintain medical standards, and that states may regulate with respect to potential life only when that interest becomes compelling.\footnote{State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother. Id. (quoting Roe v. Wade, 410 U.S. at 163-64).}

Although the contraceptive cases deal mainly with nonprescription devices,\footnote{Even though Roe foreclosed consideration of the fertilized ovum as a legitimate reason to restrict contraceptives, if personhood would be conferred on the previable fetus (which includes the human fertilized ovum) Roe would be overturned as far as its treatment of previable life as undeserving of the "compelling interest" status. See Carey v. Population Servs. Int'l, 431 U.S. at 682; Eisenstadt v. Baird, 405 U.S. at 440, 462-63; cf. Griswold v. Connecticut, 381 U.S. at 479-80 (although opinion did not indicate what types of contraceptives were involved, right to use contraceptives, as opposed to the right of access, was at issue).} the right of access contained in the development of the contraceptive right can be extended to include prescription contraceptives such as the "pill" and intrauterine devices (IUD). Prescriptions for drugs and devices may be required in order to safeguard health,\footnote{Eisenstadt v. Baird, 405 U.S. at 463 (White, J., concurring).} and this purpose was recognized in Carey as a compelling state interest.\footnote{Carey v. Population Servs. Int'l, 431 U.S. at 686.} Therefore, prescription contraceptives should be subject to the same right of access as nonprescription ones,\footnote{"Read in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State. Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions." Id. at 687.} except to the extent of the state's compelling interest in safeguarding health. The difference is simply that no such compelling state interest exists for nonprescription drugs.\footnote{Id. at 690. See generally Doe v. Bolton, 410 U.S. 179, 192 (1973) (health defined as all factors relevant to well-being of patient). See Colautti v. Franklin, 439 U.S. 379, 400-01 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 79 (1976); Roe v. Wade, 410 U.S. at 165-66. The abortion cases and contraception cases are very closely entwined because both deal with the fundamental privacy right to decide whether to bear or beget children. The Court sees both abortion and contraception as necessary means to effectuate that same decision. Carey v. Population Servs. Int'l, 431 U.S. at 687. Both rights are not absolute, but it is necessary that a woman's right of access not be limited by anything less than a compelling interest so that she can exercise the fundamental right to decide whether or not to have children. Roe v. Wade, 410 U.S. at 155.} Furthermore, when a doctor prescribes a contraceptive, he is treating the "health" of his patient as defined by the Supreme Court.\footnote{See generally Doe v. Bolton, 410 U.S. 179, 192 (1973) (health defined as all factors relevant to well-being of patient).} In analogous abortion decisions, the Court has stated that broad discretion must be allowed the doctor in treating the health of his patient, and thus states cannot arbitrarily limit the tools available to do so.\footnote{Carey v. Population Servs. Int'l, 431 U.S. at 687.}

In summary, the contraceptive right is actually the right to use and have access to contraceptives, which can only be limited by a compelling...
state interest. Although access to contraceptives is not itself an absolute right, an unburdened access is required in order to allow an individual to exercise the fundamental right to decide whether or not to have children.

THE CONTRACEPTIVE FUNCTION AND A SURVEY OF METHODS

In order to understand the conflict that would arise with the contraceptive right if personhood were to be conferred on the fertilized ovum, it is necessary to examine the effects of various contraceptive methods on the reproductive cycle. There are three events in the reproductive cycle which may be affected by a contraceptive. Initially, ovulation is the release of an ovum from the ovary; fertilization can then occur within several days after ovulation if the ovum becomes impregnated by a sperm; finally, implantation occurs several days after fertilization when the fertilized ovum, now called a blastocyst, attaches to the wall of the uterus. It is only after implantation that the pregnancy can be detected.

It should be noted that in the natural course of the reproductive cycle the odds are against a fertilized ovum developing much past the implantation stage. A percentage of fertilized ova never implant, and of those that do the incidence of an early natural abortion has been estimated to

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43 Contraception has been defined as preventing the ovum from being fertilized either by preventing sperm from reaching the ovum or by suppressing ovulation itself. See Dorland's Illustrated Medical Dictionary 348, 355, 1250 (25th ed. 1974) (definition of "contraception," "conception" and "pregnancy"). Recently, contraception has been redefined by medical convention to encompass any method that prevents biological events which would otherwise result in the conception of a pregnancy, and thus includes methods which either prevent implantation or cause the early demise of the implanted blastocyst. See J. Madden, supra note 14, at 3. Since it would be logical to assume that the Court would accept the current medical definition of contraception, those methods which also act to destroy the fertilized ovum would be classed as contraceptives and protected by the contraceptive right. The Court acknowledged this view in Roe by recognizing studies and articles which "indicate that conception is a 'process' over time." Roe v. Wade, 410 U.S. at 161. The Court also implied that this definition of conception may be more acceptable because of the action of the morning after pill and the menstrual extraction technique. Id.

44 J. Madden, supra note 14, at 2. The author explains:

Ovulation is the process whereby an ovum is matured and released from the ovary... The ovum is retrieved by the oviduct. Within the oviduct, the ovum is nourished until fertilization by a sperm occurs. The... [fertilized ovum] is detained in the oviduct for two to three days apparently to allow for further maturation; the early pregnancy is then conducted to the uterine cavity. Now the human blastocyst (consisting of approximately one hundred cells) floats freely in the uterine cavity for nearly four days before beginning to implant in the uterine lining (endometrium)... The implanting blastocyst produces and secretes into the maternal blood stream a hormonal signal (human chorionic gonadotropin or hCG) that notifies the mother's body that a pregnancy has occurred... hCG can be detected in the pregnant woman's blood eight days after ovulation. The detection of hCG in a woman's blood or urine is the basis for all pregnancy tests.

Id.
be approximately forty-two percent. Moreover, it is probable that environmental influences such as tobacco smoking and moderate alcohol intake also lead to an increased incidence of early natural abortion. Therefore, when considering a law that would ban certain contraceptives because of their effect on the fertilized ovum, it must be remembered that there is already a large loss of this early life in nature. The following survey of contraceptives compares the different contraceptive methods with respect to their mode of action, effectiveness, and safety.

**Barrier Methods**

Barrier devices, which include the condom, diaphragm, and cervical cap, prevent the sperm from reaching the upper female genital tract, thus preventing fertilization of the ovum. The failure rates for these methods fluctuate greatly depending on the motivation of the patients. Estimates of the failure rates for these methods range from six to eighteen percent for the condom and from seven to fifteen percent for the diaphragm.

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45 Id. at 1-2.
46 Id.
47 This survey is not intended to be an exhaustive study of contraception, but rather is intended to highlight the different modes of action of various groups of contraceptives, along with other major differences and similarities.
48 The effectiveness of a contraceptive can be indicated by its "failure rate," which estimates the chance of becoming pregnant while using a particular method. One early method for calculating the failure rate was Pearl's Index, in which the number of total accidental pregnancies was divided by the total number of months of contraceptive exposure and multiplied by 1,200 to generate a figure expressed as the number of pregnancies per 100 years of contraceptive exposure. See D. HAWKINS & M. ELDER, HUMAN FERTILITY CONTROL 177-78 (1979). The resulting figure was generally biased, being too high for short term studies and too low for long term studies. Id. Therefore, a new "life table method" was developed which generates a failure rate expressed as the number of women out of 100 who will become pregnant in a given period (usually a year). Id.; Berger & Jackson, The Effectiveness of Over-the-Counter Vaginal Contraceptives, in THE SAFETY OF FERTILITY CONTROL 159, 160-62 (L. Keith ed. 1980).

When possible, the figures in this note represent the percent chance of pregnancy in the first year (the life table method). However, figures from Pearl's Index are expressed in the same manner because they approximate the percentages in the life table method if the study is of moderate length. See Menken, Trussell, Ford & Pratt, Experience With Contraceptive Methods in Developed Countries, in CONTRACEPTION: SCIENCE, TECHNOLOGY AND APPLICATION 42-44 (Nat'l Research Council eds. 1979) [article hereinafter cited as Menken]; text hereinafter cited as CONTRACEPTION]; Shelton & Taylor, The Pearl Pregnancy Index Reexamined, 139 AM. J. OBSTET. GYNECOL. 592, 594-96 (1981).

49 D. HAWKINS & M. ELDER, supra note 48, at 133. About 15 percent of U.S. birth control users (contraceptors) use the condom, while about 4 percent use the diaphragm. C. GARCIA & D. ROSENFELD, HUMAN FERTILITY 73-74 (1977).


51 See D. HAWKINS & M. ELDER, supra note 48, at 141; Barrier Methods, supra note 50, at 91; Pamphlet, supra note 50.
The most significant advantage of barrier methods is that they are relatively free from side effects.52

Spermicides

Spermicides come in the form of foams, jellies, and creams, and act not only to block passage of the sperm, but also to incapacitate the sperm before it can reach the ovum.53 When used alone, the failure rate for spermicides is about fifteen percent depending on user motivation.54 This rate may be substantially lower when spermicides are used in combination with barrier devices, but it is generally recognized that the failure rate of spermicide users is much higher than that of pill users.55 Overall, there have been no reports of mortality or serious side effects from usage.56 However, a recent study indicates that spermicides may sometimes cause birth defects and late miscarriages.57

Oral Contraceptives

The “pill” generally refers to the combination type oral contraceptive that contains both synthetic estrogen and progestogen.58 It can act to prevent pregnancy in several ways: by inhibiting ovulation, preventing fer-

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52 C. Garcia & D. Rosenfeld, supra note 49, at 74; D. Hawkins & M. Elder, supra note 48, at 136, 141.
54 Barrier Methods, supra note 50, at 78; cf. D. Hawkins & M. Elder, supra note 48, at 148 (failure rate of five to seven per 100 women-years); Sciarra, Weighing the Benefits and Risks of Contraceptive Methods, in THE SAFETY OF FERTILITY CONTROL 343, 347 (L. Keith ed. 1980) (failure rate of 20 per 100 women-years).
55 See C. Garcia & D. Rosenfeld, supra note 49, at 73; D. Hawkins & M. Elder, supra note 48, at 148-49.
56 See C. Garcia & D. Rosenfeld, supra note 49, at 73; D. Hawkins & M. Elder, supra note 48, at 148; Barrier Methods, supra note 50, at 96.
57 There is a possibility that spermicides may occasionally only damage, rather than block or incapacitate, some of the sperm, thus allowing fertilization in this defective state. The spermicide may also damage the ovum itself. Seligmann, Warning on Spermicides, NEWSWEEK, Apr. 13, 1981, at 84. But see Barrier Methods, supra note 50, at 100.
58 It has been estimated that about 22 percent of all married women in the United States between 15 and 44 years of age use the pill. Menken, supra note 48, at 28. These pills contain from 20 micrograms to 150 micrograms of an estrogen in combination with from 0.3 milligram to 25 milligrams of a progestogen. C. Garcia & D. Rosenfeld, supra note 49, at 79. The trend in the United States is toward using pills with lower estrogen content. Pills with 50 micrograms of estrogen constituted over 50 percent of the market in 1977 as compared with less than 10 percent in 1967. Formulation with less than 50 micrograms of estrogen accounted for about 18 percent of the market in 1977. The use of 100-microgram and 80-microgram formulations had dropped to 25 percent of the market in 1977, down from 43.6 percent in 1973. Oral Contraceptives, POPULATION REPORTS, series A, Jan. 1979, at 196 [hereinafter cited as Oral Contraceptives].
The contraceptive pill has been widely used as a form of birth control, featuring the principal mode of action as to suppress ovulation; however, it appears that at lower dosages the other modes of action are necessary to prevent pregnancy. The primary advantage of the pill is its effectiveness, for its estimated failure rate is about two percent. The major disadvantage of the pill is its connection with increased user risk of thromboembolic complications, cerebrovascular disease, cardiovascular disease, and circulatory system diseases, all of which lead to an increased death rate among users, although it has been found that a lower dosage will decrease the incidence of some of these side effects. However, women with certain medical conditions, such as hypertension, renal disease, or cardiovascular disease, should never use the pill because of the increased mortality rate associated with these conditions.

The "minipill" is a daily oral contraceptive which contains a small quantity of progestogen only, rather than a combination of progestogen and estrogen. While the possible modes of action are the same as those of the regular pill, the primary mode of action is to prevent implantation.

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1 C. Garcia & D. Rosenfeld, supra note 49, at 79-80; see Moghissi, The Effect of Steroidal Contraceptives on the Reproductive System, in Human Reproduction 559, 568-81 (E. Hafez & T. Evans eds. 1973). But see D. Hawkins & M. Elder, supra note 48, at 52 (pills of low hormone dosage seem to have no effect on sperm penetration).

2 D. Hawkins & M. Elder, supra note 48, at 52-53; J. Madden, supra note 14, at 4-5.

3 D. Hawkins & M. Elder, supra note 48, at 53; J. Madden, supra note 14, at 5.

4 Menken, supra note 48, at 32; Pamphlet, supra note 50; cf. C. Garcia & D. Rosenfeld, supra note 49, at 65 (estimates the failure rate by Pearl Index to be from four to seven failures per 100 women-years).

5 See D. Hawkins & M. Elder, supra note 48, at 69-75; Connell, Thromboembolic Phenomena and Oral Contraceptives, in The Safety of Fertility Control 68, 69-72 (L. Keith ed. 1980); Oral Contraceptives, supra note 58, at 133, 146. But cf. C. Garcia & D. Rosenfeld, supra note 49, at 81-82, 85-87 (many reported side effects could be related to other factors, and relative risk of pill is actually very low); Ory, The Health Effects of Fertility Control, in Contraception, supra note 48, at 110, 115-17. (incidence of four diseases is reduced by use of pill: benign breast lumps; ovarian cysts; iron deficiency anemia; and rheumatoid arthritis).

6 Risks are magnified by cigarette smoking and by the duration of use. See, Connell, supra, at 70-72; Oral Contraceptives, supra note 58, at 133.

7 J. Madden, supra note 14, at 4-5. See Connell, supra note 63, at 70. Estrogen seems to be the culprit in causing many of these side effects. See D. Hawkins & M. Elder, supra note 48, at 75; Connell, supra note 63, at 70; Kent & Nissen, Metabolic Effects of Oral Contraceptives, in The Safety of Fertility Control 57, 59 (L. Keith ed. 1980). Therefore, "clinical prudence dictates maintaining patients on the lowest dosage oral contraceptive tolerated." Kent & Nissen, supra, at 61.

8 See C. Garcia & D. Rosenfeld, supra note 49, at 96; D. Hawkins & M. Elder, supra note 48, at 69-75; Kent & Nissen, supra note 64, at 62.

9 C. Garcia & D. Rosenfeld, supra note 49, at 98. Its present usage is very low. See J. Madden, supra note 14, at 5.

10 C. Garcia & D. Rosenfeld, supra note 49, at 98; Moghissi, Newer Approaches to Steroidal Contraceptives, in Human Reproduction 447, 456-57 (E. Hafez & T. Evans eds. 1973) [hereinafter cited as Moghissi, Newer Approaches]; see J. Madden, supra note 14, at 5.

11 See D. Hawkins & M. Elder, supra note 48, at 98. The minipill inhibits ovulation in only 15 percent to 40 percent of cycles. J. Madden, supra note 14, at 5; see C. Garcia & D. Rosenfeld, supra note 49, at 98; Moghissi, Newer Approaches, supra note 67, at 448.
The minipill’s estimated failure rate, ranging from 4.1 percent to 5.8 percent, is higher than the pill’s, but is similar to the IUD’s. The minipill compares unfavorably to the pill because an omission of a single minipill can result in conception, whereas an omission of a single regular pill probably will not. The major advantage of the minipill is that it is devoid of most of the side effects commonly attributed to the pill, however, a high percentage of users experience abnormal bleeding and a lack of cycle control.

The “morning after pill” contains high doses of estrogen and is given over several days after intercourse, usually in emergency situations. This high estrogen dose probably acts to prevent fertilization or implantation. It does not interfere with ovulation, nor does it cause the abortion of an implanted blastocyst. The failure rate ranges from zero to 2.4 percent, with effectiveness depending upon administration within twenty-four to seventy-two hours after exposure to unprotected intercourse. Side effects such as nausea, vomiting, headaches, dizziness, and menstrual disturbances occur in over half of the patients. The Federal Drug Administration considers use of the morning after pill to be limited to emergencies, and warns against use as a routine contraceptive. The large dose of estrogen may also cause congenital abnormalities if pregnancy continues.

Intrauterine Devices

Intrauterine devices are polyethylene devices of different configurations, sometimes containing a medicational coating, which are inserted into the uterus by a physician. The IUD can remain inserted for long
periods of time without being replaced. It has been suggested that the IUD may prevent fertilization or destroy the fertilized ovum by stimulating a foreign body reaction. It may also prevent implantation or cause the abortion of a recently implanted blastocyst. Its primary mode of action seems to be the prevention of implantation. While the IUD's failure rate is six percent or less, there are associated health risks. About two in every 1,000 users require hospitalization for a condition caused by IUD use, compared to only one in 1,000 oral contraceptive users. The death rate of IUD users, approximately one to ten deaths per million users per year, is also comparable to that of oral contraceptive users. Women who have a history of pelvic infection, abnormal pap smears, hypermenorrhea, dysmenorrhea, or uterine abnormalities should not use the IUD.

Experimental Contraceptives

Depo Provera is a relatively new contraceptive being used in certain

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at 5. It is estimated that there are approximately two million users in the United States. I.U.D. Debate, TIME, May 26, 1980, at 60. Use of the IUD among married women in the United States in 1976 was estimated at six percent. Menken, supra note 48, at 30.

81 Newton, IUD Update, FAMILY HEALTH, May 1981, at 56.

82 It is possible that in response to a foreign body reaction white blood cells and macrophages may consume the sperm or the fertilized ovum. See D. Hawkins & M. Elder, supra note 48, at 166-67; Moyer & Shaw, Intrauterine Devices, in HUMAN REPRODUCTION 310 (E. Hafez & T. Evans eds. 1973); J. Madden, supra note 14, at 7.

83 D. Hawkins & M. Elder, supra note 48, at 169-70; see Moyer & Shaw, supra note 82, at 310; J. Madden, supra note 14, at 7.

84 I.U.D. Debate, supra note 80, at 57; see J. Madden, supra note 14, at 7. There is no evidence that the IUD interferes with ovulation. C. Garcia & D. Rosenfeld, supra note 49, at 102; J. Madden, supra note 14, at 7. It is also questionable whether the IUD consistently prevents sperm from reaching the site of fertilization. See D. Hawkins & M. Elder, supra note 48, at 166; J. Madden, supra note 14, at 7.

85 See Menken, supra note 48, at 32; Tyrer, The Benefits and Risks of Intrauterine Devices, in THE SAFETY OF FERTILITY CONTROL 117, 120-21 (L. Keith ed. 1980); J. Madden, supra note 14, at 6.

86 Tyrer, supra note 85, at 118. IUD users seem to be two to seven times more susceptible to pelvic infections (which can cause sterility) than nonusers. Ory, supra note 63, at 117; see D. Hawkins & M. Elder, supra note 48, at 222-23; Tyrer, supra note 85, at 120. Users have about six times the risk of an ectopic pregnancy. Ory, supra note 63, at 117; see C. Garcia & D. Rosenfeld, supra note 49, at 104; D. Hawkins & M. Elder, supra note 48, at 226-27; cf. Tyrer, supra note 85, at 121 (copper containing IUD has significantly lower ectopic pregnancy rate than inert IUD). Users tend to be 25 to 75 times more susceptible to septic spontaneous abortion than nonusers. Ory, supra note 63, at 117; see Tyrer, supra note 85, at 121; J. Madden, supra note 14, at 6.

87 D. Hawkins & M. Elder, supra note 48, at 229; J. Madden, supra note 14, at 6. But cf. Ory, supra note 63, at 114 (IUD mortality rate much lower than that of pill users). A type of IUD, the Dalkon Shield, was taken off the market after four patients who became pregnant with the device in place died from sepsis. D. Hawkins & M. Elder, supra note 48, at 182.

88 Tyrer, supra note 85, at 117-18.
parts of the world, but is not presently available in the United States. It is an intramuscular injection of a long acting progesterone which need only be administered at intervals of from three to six months. Its possible actions include suppressing ovulation, preventing implantation, and preventing fertilization by inhibiting sperm penetration of the cervical mucus. It has been suggested that the drug primarily inhibits ovulation. Foreign studies indicate a failure rate of less than one percent; however, side effects include irregular bleeding, amenorrhea after discontinuation, and possible infertility. Long-term effects on organs have not been determined.

The prostaglandin pill is a new experimental oral contraceptive which has to be taken only once a month. It prevents pregnancy either by preventing implantation or by causing an early abortion of the implanted blastocyst depending on the time during the menstrual cycle at which the drug is given. Preliminary studies on animals have shown no side effects, and the failure rate is estimated to be zero.

In summary, all presently available contraceptive methods except barrier methods and spermicides probably destroy the fertilized ovum in some instances. This probably occurs more frequently with the minipill, the morning after pill, and the IUD than with the pill. The primary mode of action of the morning after pill is probably to prevent implantation, which destroys the fertilized ovum. Of the two future contraceptives, the prostaglandin pill acts to destroy a fertilized ovum, and Depo Provera primarily acts to suppress ovulation in a manner similar to the pill.

While barrier methods and spermicides are the safest contraceptives, they also have the highest failure rates. The “pill” has the lowest failure rate but has a sizeable health risk and certain persons should not use this method. As alternatives to the pill, the minipill and IUD have two to three times the failure rate and their own peculiar health risks. Depo

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10 C. Garcia & D. Rosenfeld, supra note 49, at 98; see Ellinas, supra note 89, at 104.
91 C. Garcia & D. Rosenfeld, supra note 49, at 98.
92 Ellinas, supra note 89, at 104.
93 Id. at 106.
95 C. Garcia & D. Rosenfeld, supra note 49, at 99.
96 The synthetic chemical used in this pill is one of many substances in the family of prostaglandins. Jeffery, Birth Control News, Harper's Bazaar, Aug. 1978, at 24. It should not be confused with other types of prostaglandins, which are presently used for second trimester abortions, and are also licensed for other medical uses. Id. See C. Garcia & D. Rosenfeld, supra note 49, at 148-49 (prostaglandin compounds used for abortions).
97 Jeffery, supra note 96, at 24.
98 Id. at 24, 146; see Segal, Methods of Fertility Regulation in Clinical Trial, in Contraception, supra note 48, at 138.
99 Jeffery, supra note 96, at 146; see J. Madden, supra note 14, at 8.
100 See Jeffery, supra note 96, at 24, 146.
Provera has a lower failure rate but health risks similar to the IUD, while the prostaglandin pill has shown relatively no side effects and a failure rate of zero.

**BALANCING A LIFE PROBABILITY**

A problem presented by defining a fertilized ovum to be a person is that contraceptives which allow ovulation and fertilization but prevent implantation would result in the killing of such a person. However, laws prohibiting the sale and distribution of such contraceptives would infringe upon the fundamental right to decide whether to bear or beget a child. This conflict necessitates a reconciliation of several interests: first, the right of privacy as it encompasses the contraceptive right must be balanced against the state’s interest in the life of a fourteenth amendment person; and second, the contraceptive right and the right to life of a fertilized ovum, as a person, must both be accommodated.

There are two balancing techniques the Court has used when faced with competing interests which may be applied in this situation. The first technique, the “judicial balance,” determines whether the infringed right or the opposing state interest should prevail. The second technique recognizes the existence of two fundamental rights and tries to “accommodate” each.

**The Judicial Balance**

The first technique, which has been used for substantive due process review, looks at the purported state interest to determine if it is sufficiently important to validly burden a fundamental right. In practical

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102 The substantive guarantee of due process has generally required that laws bear a rational relationship to a legitimate state goal, see J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 22, at 404; however, in United States v. Carolene Prods., 304 U.S. 144 (1938), Justice Stone intimated that a closer scrutiny should be made of laws restricting constitutional rights, restricting the political process, or prejudicing discrete and insular minorities. Id. at 152-53 n.4. Stricter scrutiny was soon applied to laws which infringed particular rights contained in the Bill of Rights that the Court determined were fundamental and therefore applicable to the states by means of incorporation into the fourteenth amendment. The tests for being considered fundamental in this incorporation process ranged from a right so fundamental as to be "implicit in the concept of ordered liberty," or "so rooted in the traditions and conscience of our people as to be as fundamental," Palko v. Connecticut, 302 U.S. 319, 325 (1937), to a right "fundamental to the American scheme of justice," Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968). Today, most of the provisions of the Bill of Rights have been incorporated into the fourteenth amendment, thus becoming "fundamental" and therefore protected by a stricter form of review. See J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 22, at 414-16.

Currently, fundamental rights can only be limited if there is a “compelling state interest.” Roe v. Wade, 410 U.S. at 155. The most recent step in substantive due process analysis
terms this is a judicial balance of competing interests; however, because one interest is armed with the shield of "fundamental rights" language, the state interest carries a heavy burden of justification.\textsuperscript{103}

This type of balancing technique is prevalent in cases concerning the privacy right.\textsuperscript{104} The Court in \textit{Carey} recognized that a compelling state

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\textsuperscript{103} One theory behind this type of balancing suggests that the Court is making a decision as to whom to allocate decisionmaking power with respect to the right in question. Professor Tribe provided the best explanation of this theory when he drew from an earlier classic article on role allocation, Fried, \textit{Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test}, 76 HARV. L. REV. 755 (1963), and applied it to the detailed balancing done by the Court in \textit{Roe}. See Tribe, \textit{The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law}, 87 HARV. L. REV. 1 (1973).

In role allocation, "the due process clause is violated whenever the state either assumes a role the Constitution entrusts to another, or fails to assume a role the Constitution imposes upon it." \textit{Id.} at 15. Tribe felt that the decision to obtain an abortion was the type of choice which ought to be left to the individual, without government intervention. \textit{Id.} at 32.

It is interesting to note that although Tribe argued that \textit{Roe} is acceptable constitutional law when based on this type of role allocation, he felt the actual Court balancing in \textit{Roe} was not of this nature. \textit{Id.} at 50-52.

Another theory suggests that the Court allocates the decisionmaking role to itself when dealing with issues involving personal liberties and then ascertains the weights of competing moral principles in the light of conventional morality.

An extensive analysis of this theory behind "judicial balancing" can be found in Wellington, \textit{Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication}, 83 YALE L.J. 221 (1973). In discussing the seeming double standard of review between economic regulation cases and personal liberty cases, Professor Wellington distinguished them not on that basis but rather as distinguishing between "policies" and "principles." \textit{Id.} at 222-29, 284-85, 302-04.

Wellington felt that when a principle is involved in a dispute, the Court should ascertain the weight of the principle in "conventional morality" and convert the moral principle into a legal one by connecting it with the body of constitutional law. \textit{Id.} at 284. Thus, in \textit{Roe} the Court had to determine the weights of both the state's claim of protecting potential human life (a principle) and the woman's interest in her liberty (a principle)—the weight to be determined with respect to conventional morality. \textit{Id.} at 302-03.

Interestingly, the subjectivity of this type of balancing becomes evident when Wellington concluded that his concept of conventional morality agreed only partly with the Model Penal Code (in 1973), and that both the Model Penal Code and the Supreme Court went beyond the bounds of conventional morality as he appraised it. \textit{Id.} at 310-11.

Under either theory, the Court decides whether the competing state interest outweighs the fundamental right it infringes. It either directly determines (from its perception of conventional morality) the appropriate weight to be given each interest, or the Court allocates the decision to one of the parties involved, in effect determining the weight of the competing interests.

\textsuperscript{104} The privacy cases implicitly apply such a technique:

\[ \text{[The same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely. Both types of regulation "may be justified only by a compelling state interest ... and ... must be narrowly drawn to express only the legitimate state interests at stake."} \]

interest which would allow a limitation on the access to contraceptives may exist. However, the Court decided that the state's interest in protecting maternal health was outweighed by the necessity of access to contraceptives because the suspect law dealt only with nonhazardous contraceptives. The Court also found that the state's interest in protecting potential life was not "implicated" in the state regulation of contraceptives. The Court based this conclusion on the finding in Roe that the state has no compelling interest in a previable fetus. This implies that the Court recognized that regardless of any potential harm to the fertilized ovum, there was not a sufficient interest in this stage of fetal life to infringe upon the contraceptive right.

Roe itself is a prime example of the judicial balance technique. The Roe Court allocated the decisionmaking power to different parties at different stages of fetal gestation. After the first trimester the state's interest in maternal health "outweighed" the decision to abort, but only to the extent of licensing the physician or clinic to ensure a "safe" abortion for the mother. Before that point, no state interest outweighed the abortion right, and only after viability did the state's interest in protecting fetal life become sufficiently compelling to outweigh the decision to abort. However, the Court did a secondary balancing and held that in the third trimester a compelling interest in fetal life did not outweigh the state's interest in preserving maternal health. For obvious reasons this type of balancing has come under severe criticism for its judicial subjectivity. However, the judicial balance technique is likely to be applied to the con-

106 Id. at 690.
107 Id.
108 Id. (quoting Roe v. Wade, 410 U.S. at 163-64). See note 34 & accompanying text supra. The Court in Roe found that the state's interest in the fetus does not become compelling until viability. At that point the fetus "presumably has the capability of meaningful life, outside the mother's womb" and the protection of such fetal life has "both logical and biological justifications." Roe v. Wade, 410 U.S. at 163.
109 If the state has no compelling interest in fetal life before viability, it could have no compelling interest in the fertilized ovum.
110 See notes 102-109 & accompanying text supra.
111 Roe v. Wade, 410 U.S. at 163. The Court held that the state cannot use its interest in maternal health to prohibit abortions in the first trimester because the Court found as a fact that abortion in the first trimester is safer for the woman than giving birth. Moreover, because the Court found that prenatal life must be "meaningful" before the state has an interest in protecting it, no state law prohibiting abortions in the first trimester could be based on the state's interest in protecting unborn life. Id. For a discussion of the abortion right, see note 8 supra.
113 Roe v. Wade, 410 U.S. at 163.
flict between the personhood amendments and the contraceptive right, as the question is analogous to that presented in *Roe*.

Initially, the effect on the contraceptive right of conferring personhood on the fertilized ovum would depend on the effect of fetal personhood on the right to abort. Specifically, the question that would be presented is whether the viable-previable distinction would continue, or whether fetal personhood would give the state a compelling interest which would completely outweigh the right to abort. If fetal personhood would make no difference to the previous balancing done in *Roe*, then by default, no adjustment need be made to the Court’s reasoning in *Carey*; and therefore, no restriction on the sale or distribution of any contraceptive could be maintained based on a state’s interest in protecting the life of a prenatal person. The dicta in *Roe*, however, stated that if such personhood were established, “the fetus’ right to life would then be guaranteed specifically by the Fourteenth Amendment.” This would bestow a compelling interest in the life of the fetus and consequently the fertilized ovum, and the balancing easily sidestepped in *Carey* would have to be done.

However, the fundamental right to decide whether to bear children would be balanced not against the state’s compelling interest in a person in being, but rather against the state’s interest in a statistical probability that a fertilized ovum may be in existence. The dissimilarity of this balancing, as opposed to balancing the state’s interest in the life of a viable or previable fetus against a woman’s abortion right, is that in the latter instance a person could be shown to be in existence, while in the former positive proof of pregnancy (and therefore of the existence of a person) could be obtained only after implantation. Therefore, what would be balanced against the contraceptive right is less than in the abortion of a viable or even previable fetus. Thus, the fundamental right of a woman to decide whether to bear a child would be balanced against the mere probability that use of the banned contraceptive would result in the death of a “person,” a somewhat weaker interest than the state’s interest in a viable or previable fetus. Even though the state’s interest in the fer-

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117 The dicta in *Roe* stated that if personhood was established the case supporting the right to abortion would collapse. *Id.* Since the appellants argued for an absolute abortion right, they necessarily controverted the appellee’s contention that a compelling interest existed in prenatal life from and after conception because of fourteenth amendment personhood. *Id.* The collapse of appellants’ case then, would indicate the existence of a compelling interest in the life of a fourteenth amendment person. This is further bolstered by the Court’s admission that it would not have interpreted a law at issue in United States v. Vuitch, 402 U.S. 62 (1971), as favorable to abortion if the result were to be the death of a fourteenth amendment person. *Roe v. Wade*, 410 U.S. at 159. *But see 1977 Abortion Hearings*, supra note 9, at 351 (statement of Laurence H. Tribe).
118 See text accompanying notes 107-09 supra.
119 See text accompanying note 102 supra.
120 See notes 14 & 44 supra.
tilized ovum may be compelling, the interest in only the possibility of existence may not be compelling.\textsuperscript{121} Thus, this balancing technique would necessitate an evaluation of the different contraceptives' effects on the fertilized ovum.

A contraceptive whose only mode of action is to destroy the fertilized ovum is most closely analogous to the first trimester abortion which could be outlawed if the dicta in \textit{Roe} were followed.\textsuperscript{122} Using judicial balance, the Court might find that the state interest in this example would be sufficiently compelling to allow the prohibition or regulation of such a contraceptive. However, more dubious balancing would be involved with contraceptives that have varied modes of action, only one of which has a destructive effect on the fertilized ovum, because the destructive mode of action takes effect only a varying percentage of the time, depending on the contraceptive and the individual.\textsuperscript{123}

A law burdening a fundamental right must be narrowly drawn to express only the legitimate state interest at stake.\textsuperscript{124} However, it is impossible to predict with certainty, for a given individual, what the destructive effect of a certain contraceptive on a fertilized ovum will be.\textsuperscript{125} Thus, if the state were to regulate a contraceptive which acted on the fertilized ovum a specified average percentage of the time, it could be effectively argued that the contraceptive's destructive effect on a given individual could be much lower, and thus that the individual's access to the contraceptive would be limited by a law that reached overbroadly.

Because the medical data are sparse with respect to the percentage of time a given contraceptive interferes with the life of the fertilized

\textsuperscript{121} An interesting consideration is that a certain percentage of fertilized ova do not implant for various natural reasons. See J. Madden, supra note 14, at 1-2. No hard data are available as to the exact percentage, but certainly a contraceptive whose anti-implantant mode of action occurs less frequently than nature's cannot be considered hazardous to the fertilized ovum.

\textsuperscript{122} See notes 116-17 & accompanying text supra. The only use of such a contraceptive would be to destroy a fertilized ovum if one were in existence. This would be similar to performing an abortion every month whether the woman was pregnant or not.

\textsuperscript{123} See note 104 supra. Also, the more contraceptives to which access is restricted by law the greater the infringement on the "contraceptive right" which makes it more likely such a law would be overbroad.

\textsuperscript{124} See notes 59, 67, 74, 83 & accompanying text supra. Percentages which indicate statistical averages mean that for a given individual the estimated effect could vary up or down from that average. H. Larsen, Introduction to Probability Theory and Statistical Inference 80-90 (1969). This is best understood by looking at the results of a typical study in which a combined estrogen-progesterone morning after pill was tested. Out of eleven patients on the drug, ovulation was prevented in three, while it was assumed that a different mode of action was responsible for preventing pregnancy in the other eight. While the second mode of action probably had an anti-implantation effect, it was speculated that it might have possibly disrupted proper gamete transport, thus preventing fertilization. See Ling, Robichaud, Zayid, Wrixon & McLeod, Mode of Action of DL-Norgestrel and Ethinylestradiol Combination in Postcoital Contraception, 32 Fertility & Sterility 297, 301-02 (1979).
ovum, it would seem that the judicial balance technique might easily invalidate a law prohibiting the distribution of contraceptives with a quantitatively unknown destructive effect on the fertilized ovum. The Court could conclude that the law bears no logical relation to the compelling interest because of its arbitrariness, and is thus overbroad in that it would infringe unnecessarily and arbitrarily on many individuals' fundamentally protected contraceptive right.  

**Accommodation Balancing**

Judicial balancing may be unsatisfactory because it does not adequately reflect the significance of bestowing personhood upon a fertilized ovum. Instead, the right to life of such a person could be considered a fundamental right. Although the "right to life" has not been explicitly declared a fundamental right within the modern due process structure of the fourteenth amendment, it is arguably the most fundamental of all rights.

If the life of the fertilized ovum, as a person, is considered to be of fundamental importance, then the appropriate balancing technique should be an accommodation of the competing fundamental values, rather than

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126 See notes 59, 67, 74, 83 & accompanying text supra.
127 A law is overbroad if "[i]t is not closely correlated to the aim of preserving prenatal life." Doe v. Bolton, 410 U.S. 179, 218 (1973) (Douglas, J., concurring); see notes 124-25 & accompanying text supra.
129 The value of life was most intensely scrutinized by the Court when it struck down a capital punishment statute in Furman v. Georgia, 408 U.S. 238 (1972). Although the Court was determining whether or not the death penalty violated the eighth amendment, it, its reasoning is fully applicable to a discussion of life as a fundamental right. Justice Brennan recognized that the United States was a "society that so strongly affirms the sanctity of life . . . that death is the ultimate sanction," id. at 286 (Brennan, J., concurring), and that death forever ends "the right to have rights," id. at 290 (Brennan, J., concurring). Of course, like other fundamental rights, "the right to have rights" is not absolute. The right to life may be infringed (death may be imposed as punishment) as long as aggravating circumstances outweigh mitigating circumstances and a bifurcated trial to allow for sentencing is provided. See Annot., 51 L. Ed. 2d 886, 898-900 (1978) (discussing Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976)). Although these prerequisites guarantee that the imposition of the death penalty is not "cruel or unusual," id., they also act to ensure that life is not deprived unless the state asserts a requisite compelling interest that, on balance, weighs heavier than an individual's right to life.

Several commentators have discussed the fundamental right to life. See R. BERGER, GOVERNMENT BY THE JUDICIARY 20-51 (1977); Destro, supra note 2, at 1326-27; Gorby, supra note 115, at 5-7; Rice, supra note 2, at 313-17. But see 1977 Abortion Hearings, supra note 9, at 224-27 (statement of Harriet F. Pilpel).

an attack on one fundamental value by an interest that must prove itself to be compelling. The closest the Court has come to this type of accommodation balancing in the privacy cases has been in the area of laws requiring parental consent or notification for minors seeking an abortion. Parental authority has risen to the status of a constitutionally protected right, and could arguably be considered fundamental. Thus, while striking down a parental consent law in *Bellotti v. Baird*, the Court recognized that parents have a constitutionally protected right to raise their children. Moreover, to accommodate this right the Court recognized that a state may determine that parental consultation is in the best interest of a minor child, especially with respect to the abortion decision. States may require parental consent, but must also provide an alternate procedure for the minor child to obtain judicial authorization for the abortion if the child can show either that she is sufficiently mature to make the decision herself, or that an abortion is in her best interest. More recently, a law requiring physicians to notify parents of any minor upon whom an abortion is to be performed was held constitutional as an equitable accommodation between the rights of the parents and the children. In these cases the Court has shifted away from determining whether or not there is a compelling interest that may validly infringe a fundamental right, and has tried instead to accommodate parental authority over minor children with the abortion right of minors.

In contrast with the interpretation of the United States Constitution, West Germany’s Constitution (its “Basic Law”) states: “Everyone shall have the right to life and to the inviolability of his person.” Grundgesetz art. 2, § 2. The German courts have interpreted this clause to invalidate a law that decriminalized abortion in the first twelve weeks after conception. However, they still allow abortion in that time period if pregnancy resulted from a criminal assault; abortion for medical and eugenic reasons, or to relieve a woman of a grave hardship, is also allowed. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. Juris. 255, 262-63, 267 (1977). The German courts resolved the problem of balancing life with anti-implantant contraceptives by defining life to exist at the fourteenth day after conception. Id.

See notes 138-45 & accompanying text infra.


*Id.* at 638 (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)). The Court has stated that it has “recognized on numerous occasions that the relationship between parent and child is constitutionally protected.” *Quilllin v. Walcott*, 434 U.S. 246, 255 (1978).

*4* *Bellotti v. Baird*, 443 U.S. at 640-41.

*Id.* at 643-44, 647, 649.


*6* The Court had previously set the limit at which the accommodating parents’ interests could not go beyond by not allowing an absolute veto over the child’s abortion decision. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). Up to that point, however, the Court allows the accommodation of parental rights through consent and notice laws. The
In order to develop a more detailed analysis of accommodation balancing, one must go beyond the privacy cases to recent cases involving the free press-fair trial controversy. The Court in these cases has refused to assign a priority between the first amendment free press and sixth amendment fair trial rights involved, but has rather tried to accommodate the protected rights. Because of the constitutional nature of each of these rights, the Court has not looked for a valid compelling interest, but has instead scrutinized the restriction protecting the fair trial right to make sure it is not unnecessarily infringing the free press right.

Court notes that there is "an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision." Bellotti v. Baird, 443 U.S. at 648. The Court has looked favorably on a Utah statute that enhances the potential for parental consultation concerning the abortion decision, while infringing the abortion right only slightly. H.L. v. Matheson, 450 U.S. at 411 (1981). Highlighting this accommodation of rights is the fact that the Court recognized that a notice requirement may inhibit some minors from seeking abortions, but determined that this does not invalidate the law. Id. at 413.

The cases in this area actually deal with several rights of the press protected by the first amendment. In Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the Court attempted to accommodate the right of the press to be free from prior restraints with the right of the accused to a fair trial. Id. at 559-61. In Gannett Co. v. DePasquale, 443 U.S. 368 (1979), the issue presented was whether the press' right of access to a pretrial judicial hearing must be accommodated by the fair trial right. Id. at 370-71, 391, 393. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the Court recognized a first amendment right of the press to attend criminal trials which must be accommodated with the fair trial right. Id. at 580. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the Court held that the first amendment secured the right of access to criminal trials to the press. Id. at 580. Such a right was found not to be absolute but to give rise to a presumption of an open trial which could be rebutted to protect the fair trial right. Id. at 573, 580-81 & n.18; id. at 600 (Stewart, J., concurring). The Court considered alternatives which would allow accommodation of the free press right, even though these alternatives would "admittedly present difficulties for trial courts." Id. at 581.

Before Richmond Newspapers, Justice Powell recognized the same free press right, which he considered to be equal in constitutional significance to the fair trial right. Gannett Co. v. DePasquale, 443 U.S. at 397, 400 (Powell, J., concurring). He suggested the need for "a more flexible accommodation between First and Sixth Amendment rights ... - an accommodation under which neither defendants' rights [to a fair trial] nor the rights of members of the press and public should be made subordinate." Id. at 400. Justice Blackmun in Gannett thought the free press right could be restricted to protect the fair trial right, but should be accommodated as far as possible by requiring a "substantial probability" that a fair trial would be prejudiced, and that no alternative restrictions exist. Id. at 440-47 (Blackmun, J., dissenting).

When the Court considered the question of whether a restraining order issued to the press to protect an accused's fair trial violated the first amendment, it recognized that the Bill of Rights did not assign priorities between the first and sixth amendments, and therefore the Court should not. Nebraska Press Ass'n v. Stuart, 427 U.S. at 541, 561. However, the Court recognized that such a restraint could be valid if it were shown that otherwise a fair trial would be jeopardized. Id. at 570. The Court held that because a prior restraint is the most serious and least tolerable infringement on first amendment rights, the free press right in this instance should be accommodated if possible. Id. at 561. Justice Powell felt that any conflict between first and sixth amendment rights could be resolved without abrogating one or the other in that alternative measures existed which could "ensure the ... proper accommodation of both First and Sixth Amendment rights." Id. at 611-12 (Powell, J., concurring).
A general accommodation scheme can be constructed from these cases. In order for the regulation to stand, several requirements must be met. First, the fair trial right must be jeopardized by the unrestricted free press right.140 Second, the restriction placed on the free press right must be effective in protecting the fair trial right.141 Third, no alternative may exist that would adequately protect the fair trial right and would be less restrictive of the free press right.142 Fourth, the restriction must be narrowly drawn so as to infringe the free press right only to the extent necessary to protect the fair trial right.143 Obviously, these steps144 valiantly attempt to accommodate the free press right by recognizing that even though such a right is not absolute, its importance requires an examination of the court order to make sure that such an order restricting the press is truly necessary to protect the fair trial right.145

The preceding balancing procedure can be adapted to the conflict between the contraceptive right and a fertilized ovum’s right to life. If a law were enacted that infringed the contraceptive right by prohibiting certain contraceptives in order to prevent the possible destruction of the fertilized ovum, application of the following accommodation scheme could test its validity. First, the life of the fertilized ovum would have to be jeopardized by the use of the prohibited contraceptives. Second, prohibiting those contraceptives would have to be effective in protecting the life of the fertilized ovum. Third, no alternative could exist that would adequately protect the life of the fertilized ovum without prohibiting access to contraceptives. Fourth, the law would have to be narrowly drawn so as to infringe the contraceptive right only to the extent necessary to protect the life of a fertilized ovum.

In considering the first step, of the six presently available contraceptives, barrier methods and spermicides do not jeopardize the fertilized ovum and the pill does so only very minimally.146 However, the IUD, the

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140 See Richmond Newspapers v. Virginia, 448 U.S. at 580; Gannett Co. v. DePasquale, 443 U.S. at 401 (Powell, J., concurring); id. at 441 (Blackmun, J., dissenting); Nebraska Press Ass’n v. Stuart, 427 U.S. at 562; id. at 571 (Powell, J., concurring).
141 See Richmond Newspapers v. Virginia, 448 U.S. at 580-81; Gannett Co. v. DePasquale, 443 U.S. at 442 (Blackmun, J., dissenting); Nebraska Press Ass’n v. Stuart, 427 U.S. at 562.
142 See Richmond Newspapers v. Virginia, 448 U.S. at 580-81; Gannett Co. v. DePasquale, 443 U.S. at 400 (Powell, J., concurring); id. at 441-42 (Blackmun, J., dissenting); Nebraska Press Ass’n v. Stuart, 427 U.S. at 592; id. at 571 (Powell, J., concurring); id. at 558, 612 (Brennan, J., concurring).
143 See Gannett Co. v. DePasquale, 443 U.S. at 400 (Powell, J., concurring); id. at 444-45 (Blackmun, J., dissenting).
144 A fifth step, that the press must be given an opportunity to show that either the fair trial right is not in jeopardy or that alternatives exist which do not infringe the free press right, is not applicable in this context. See Gannett Co. v. DePasquale, 443 U.S. at 401 (Powell, J., concurring); id. at 445-46 (Blackmun, J., dissenting); cf. Richmond Newspapers v. Virginia, 448 U.S. at 581 (recognizing right of access of the press).
145 See note 139 supra.
146 See notes 49, 53, 60 & accompanying text supra.
minipill, and the morning after pill may arguably jeopardize life because they act primarily to destroy the fertilized ovum.\textsuperscript{147} Of the future methods, Depo Provera may inhibit ovulation more than half the time,\textsuperscript{148} presenting a borderline case of jeopardizing life. Again, the problem arises as to whether there is a life in existence which can be in jeopardy, because in reality there is only a \textit{probability} that a fertilized ovum is in existence, and only a \textit{probability} that it will be destroyed by a given contraceptive. Therefore, a law restricting access to contraceptives which have various modes of action may violate the first step of this test because of the uncertainty that anything is being jeopardized. However, the experimental prostaglandin pill allows fertilization to occur naturally and then always acts to destroy the fertilized ovum.\textsuperscript{149} Thus, this method could easily be treated as jeopardizing the fertilized ovum.\textsuperscript{150}

As to the second step, if contraceptives whose primary action is to destroy the fertilized ovum were banned, protection would necessarily be effective. The law would not fully protect all fertilized ova, as some loss would occur from other environmental conditions, but that is not a requisite for a valid law. What is essential is that the law is effective. That some ova die by other causes is not a ground to impugn a law which achieves its goal of protecting ova from one prohibited cause.\textsuperscript{151}

Step three involves the main accommodation technique: searching for alternatives which protect both rights.\textsuperscript{152} This step would at least prevent a blanket prohibition of contraceptives, because there would always exist the alternative of prohibiting just those contraceptives having a harmful effect on a fertilized ovum. Measures less restrictive than prohibiting all methods which act primarily on the fertilized ovum may also be possible. Since women with certain medical histories should not take the pill or the minipill, or use an IUD,\textsuperscript{153} the prohibition against these methods could be lifted for these women. However, because this may not be administratively feasible, it would be arguable that there is no alter-

\textsuperscript{147} See notes 67-68, 74-75, 80-82 \& accompanying text \textit{supra}.
\textsuperscript{148} See notes 91-92 \& accompanying text \textit{supra}.
\textsuperscript{149} See note 98 \& accompanying text \textit{supra}.
\textsuperscript{150} Banning this method would be analogous to banning first trimester abortions. \textit{See note 122 \& accompanying text \textit{supra}.}
\textsuperscript{151} On equal protection grounds it may be argued that such a law is underinclusive because it burdens only users of certain contraceptives (those with a high probability of a destructive effect on the fertilized ovum) while not burdening other users whose contraceptives also may act on the fertilized ovum (but with a lesser probability of a destructive effect). However, the Court has not usually subjected underinclusive laws to strict review due to the desire to let the legislature seek to solve social problems "one step at a time." \textit{Williamson v. Lee Optical, 348 U.S. 483, 489 (1955); see J. Nowak, R. Rotunda \& J. Young, \textit{supra} note 22, at 519-22; Tussman \& tenBroek, \textit{The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 348-49 (1949).}
\textsuperscript{152} When considering the free press-fair trial conflict, the Court always sought out alternatives to the restrictive order. \textit{See note 142 \& accompanying text \textit{supra}.}
\textsuperscript{153} See notes 65, 72, 89 \& accompanying text \textit{supra}.
native to banning the minipill, IUD, and morning after pill in order to protect the fertilized ovum. For the same reasons, there may be no alternative to banning the two possible future methods.

The accommodation of one right with the other is also highlighted in the fourth requirement that a restrictive law be narrowly drawn to prevent unreasonable infringement of the contraceptive right. It would seem that as long as there are reasonable substitutes for those methods which primarily act to destroy the fertilized ovum, they could be prohibited. However, the available information shows no clear substitutes. The pill may not be a reasonable substitute for the minipill or the IUD because of its estrogen-caused side effects, and barrier methods may not be a reasonable substitute because of their high failure rate. Therefore, a woman’s fundamental right to decide whether to bear a child is in danger of being irreparably harmed if she is forced to use a less effective method, or if her health may be endangered by requiring her to switch to a less safe method. On the other side of the scale, there may or may not be a fertilized ovum requiring protection. The medical data are too sparse to accurately identify the percentage of the time a particular method acts on the fertilized ovum, and the actual effect of the contraceptive may vary with the individual. Thus, unless there are allowable substitutes, the restriction of certain contraceptives may cause irreparable injury to the contraceptive right without actually protecting a fertilized ovum. Such a restriction would not be narrowly drawn.

CONCLUSION

If personhood were conferred on the fertilized ovum a conflict would arise with the contraceptive right. Initially, this note analyzed the effect of personhood on the abortion right to determine if the Court would allow the state’s interest in the new persons to prohibit abortion in the first trimester. If it would not, then no possible infringement of the contraceptive right could be justified. However, this note found that first trimester abortions could be banned. Therefore, a balancing against the contraceptive right would be forced by a law that limited access to certain contraceptives in order to protect the state’s interest in the fertilized ovum.

154 See note 64 supra.
155 See notes 50-51 & accompanying text supra.
156 A woman’s health itself qualifies as a compelling state interest. According to Roe, if the abortion procedure would be risky for the woman (as it is in the second trimester), or if the fetus endangered her health, the state has an overriding interest in protecting the health of the woman regardless of other competing interests. 410 U.S. at 163-64.
157 See note 120 & accompanying text supra.
158 See notes 59-61, 74-75, 80-82, 91-92, 98 & accompanying text supra.
159 See note 125 & accompanying text supra.
To balance these competing interests, the Court might undertake the judicial balance it has previously used in privacy cases. This note has argued that such a balancing would find the state's interest in only a statistical probability of a person not to be sufficiently compelling to restrict access to any currently used contraceptives. However, the Court might be persuaded to consider the life of the fertilized ovum as a fundamental right and thus use a four-step accommodation balancing technique. Such a technique gives more weight to the life of the fertilized ovum, but even then no currently marketable contraceptives could be prohibited because of the lack of reasonable substitutes, and the uncertainty that a fertilized ovum would be endangered by a given contraceptive. Only when the sole mode of action of a contraceptive is to destroy the fertilized ovum, as with the prostaglandin pill currently being researched, would a law restricting its distribution be valid.

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