

THE MEANING OF “LIFE”: THE MORNING-AFTER-PILL, THE QUESTION OF WHEN LIFE BEGINS, AND JUDICIAL REVIEW

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We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.¹

With the recent appointments of two Supreme Court justices widely viewed as “pro-life,” the moral, political, and legal debate over questions of the proper scope of constitutional limitations on abortion have rarely, if ever, been stronger.² Indeed, South Dakota’s legislature has recently considered passing a statute specifically aimed at challenging *Roe v. Wade*, banning nearly all forms of abortion.³ Some have speculated that under the new makeup of the Supreme Court, *Roe* may eventually be overturned and the constitutional right to abortion eviscerated. For the time being, however, this Article will assume that federal courts will continue to interpret and apply abortion law in its current form.

The question of when life begins remains central to the question of the abortion limitations. As quoted above, the Court in *Roe* purported to avoid answering this question in holding that the Constitution forbids States from prohibiting all abortions.⁴ To this point, the Court has been able to avoid dealing directly with this question. Even in declaring a State interest in protecting potential life “[e]ven in the earliest stages of

¹ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

² See Russell Shorto, *Contra-Contraception*, N.Y. TIMES § 6 (May 5, 2006).

³ See *id.*

⁴ *Roe*, 410 U.S. at 159.

pregnancy,” the Court in *Planned Parenthood v. Casey*,⁵ steered clear of any discussion of when pregnancy begins. Legal scholars from numerous camps of thought on judicial review would undoubtedly hail this as proper restraint from intrusion into the most moral of questions.

New State efforts to apply abortion restrictions to the emergency contraceptive known as the morning-after-pill,⁶ however, threaten to make the Court’s deference short-lived. According to its advertisements, the morning-after-pill provides women with the ability to prevent a pregnancy, defined as implantation in the uterus, within 3 days of having unprotected sex.⁷ Because the morning-after-pill operates in a way similar to pre-intercourse contraceptives such as birth control pills and patches, but after sex and potentially after fertilization, there have been arguments made both that the morning-after-pill is, as advertised, a contraceptive and also that it is abortion.⁸ Some States have begun efforts to apply its abortion regulations, such as parental notification statutes, to the morning after pill.⁹

This Article argues that such restrictions will likely lead to constitutional challenges in which the court may be forced to decide between abortion law and contraception law, a decision this Article argues is inextricably linked to a determination as to when life begins. This is so primarily because distinctions in the reasoning behind the Supreme Court’s contraception and abortion decisions suggest both that States have a

⁵ 505 U.S. 833, 872 (1992).

⁶ The morning-after-pill is a drug most commonly distributed under the brand name Plan B that is marketed as a contraceptive effective up to 3 days after unprotected sexual intercourse.

⁷ How PlanB Works, available at <http://www.go2planb.com/ForConsumers/AboutPlanB/HowItWorks.aspx>. It is important to note that, at this point, this Article is not adopting any definition of pregnancy, but rather discussing simply the marketed function of the morning-after-pill.

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greater authority to regulate abortion and that the legal difference between the two hinges on the existence or non-existence of potential life.

The prospect of judges answering the question of when potential life begins immediately draws cries about the inadequacies of judicial review in resolving such moral questions. This Article argues that judges should indeed engage actively in addressing the moral questions posed by restrictions on the morning-after-pill. The Article draws in large part upon Christopher Eisgruber's premise that judges are democratic representatives of the American people and are well situated to decide moral questions on the basis of moral reasoning.¹⁰

Indeed, judicial oversight is particularly appropriate because, when properly viewed, limitations on the morning-after-pill will not beg the question, but rather reflect the government's answer to it. That is, applying general abortion regulations to the morning-after-pill, for example by enforcing a legislative determination that human life begins at the moment of fertilization, constitutes government imposition of its opinion as to when life begins. As such, these restrictions will often raise significant questions about State governments' authority to so impose their moral positions, questions that even the staunchest opponents of active judicial review acknowledge are appropriate for judicial consideration.¹¹ As discussed below, both structural considerations of federalism and enumeration of powers, and the invalidity of State imposition of belief dictate that State governments do not have this power.

Because courts will still have to choose between abortion and contraception doctrine, the lack of any imposing State opinion does not remove the moral question. To

¹⁰ See generally, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 92 (2001).

¹¹ See, e.g. Hamdi v. Rumsfeld, 543 U.S. 507, 578 (Thomas, J., dissenting).

the contrary, this scenario hoists the question of when life begins directly onto the courts. This Article contends that even in such situations judges properly can, and must, decide constitutional challenges to the morning-after-pill.

This argument has the potential to raise majoritarian concerns about judges supplanting the will of a State's people. These concerns are well intentioned, but they can be alleviated through proper jurisprudence. Judges should take care not to simply import their own moral views in making this determination. Instead, courts must, as best they can, adopt and apply a constitutional definition of abortion that is consistent with the American people's beliefs regarding when pregnancy or potential life begins and how personal beliefs about this subject should impact reproductive rights. This complex set of beliefs should guide a court's choice as to whether to consider the morning-after-pill contraception or abortion for constitutional purposes. Finally, the Article argues that in light of the American people's beliefs regarding the effect their personal moral beliefs should have on personal freedoms, judges attempting to determine the point at which the Constitution recognizes the existence of potential life should adopt a presumption of invalidity for any definition that would impair individual personal freedoms. This presumption, however, should be rebuttable on a finding that a supermajority of the public believes that the existence of potential life at a particular point enjoys such widespread acceptance that it should affect the legal rights of even those who do not so believe.

Part I establishes the possibility that State application of abortion restrictions to the morning-after-pill will result in the need for a court to decide whether the morning-after-pill is contraception or abortion. Part II first argues that State governments do not

have the authority to impose their views regarding when life begins on the people in their States. Second, Part II argues for the propriety of judicial review as a mechanism for deciding whether to lump the morning-after-pill in with abortion or with contraception for constitutional purposes. Specifically, Part II argues that courts should adopt the rebuttable presumption described briefly above in order to honor the will of the American people themselves.

I. State Application of Parental Consent Statutes to the Morning-after-pill Has the Potential to Force Courts Into Deciding When Life Begins

As of the writing of this Article, the constitutional quandaries raised by State limitations on access to the morning-after-pill are hypothetical. The lawyers and scholars at this point are battling for the most part over whether States may properly require pharmacists to supply the morning-after-pill.¹² This Part predicts, however, that budding State efforts to limit access to the morning-after-pill will inevitably result in constitutional challenges. Further, this Part will show that courts face a significant dilemma in hearing such challenges. There is at the very least a significant possibility that courts addressing these challenges could legitimately find the limits on access constitutional if they considered the morning-after-pill abortion, but unconstitutional if they considered the morning-after-pill contraception. Finally, this Part contends that because the morning-after-pill falls in between that which is universally thought of as abortion and that which is universally believed to be pure contraception, courts will find

¹² See, e.g., Marry K. Collins, *Consciousness Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 ANNALS HEALTH L. 37 (2006); Kelsey C. Brodsho, *Patient Expectations and Access to Prescription Medication Are Threatened by Pharmacist Conscience Clauses*, 7 MINN. J.L. SCI. & TECH. 327 (2005); Tony J. Kriesel, *Pharmacists and the "Morning-After-Pill": Creating Room for Conscience Behind the Counter*, 7 MINN. J.L. SCI. & TECH. 337 (2005); Comment, Cristina Arana Lumpkin, *Does a Pharmacist Have the Right to Refuse to Fill a Prescription for Birth Control?*, 60 U. MIAMI L. REV. 105 (2005).

themselves in a position where it may be necessary to identify the point at which life begins.

a. The Morning-after-pill Allows Women to Prevent Ovulation, Fertilization, or Implantation

In order to understand why much of the State action that this Article argues will create constitutional questions affects the morning-after-pill, and indeed to understand much of the discussion that follows, we must understand how the morning-after-pill functions. This Article will not delve too deeply into the medical complexities that account of the morning-after-pill's effectiveness.¹³ Rather, it provides only the most basic overview of the way the drug functions.

The operative agent in the morning-after-pill is levonorgestrel.¹⁴ Advertisements for the drug state that it potentially serves three functions.¹⁵ The pill operates "mainly by stopping the release of an egg from the ovary, and may also prevent the fertilization of an egg."¹⁶ Additionally, the drug "may also work by preventing it from attaching to the uterus (womb)."¹⁷ This latter process, commonly known as implantation, occurs after fertilization has already occurred.¹⁸

Conclusive scientific evidence remains unavailable as to exactly how the morning-after-pill operates in any given case, due to the difficulty in determining exactly

¹³ For a detailed scientific analysis of the morning-after-pill's operation, see Horacio B. Croxatto et al., *Mechanism of action of hormonal preparations used for emergency contraception: a review of the literature*, 63 *CONTRACEPTION* 111, 112 (2001) and Roberto Rivera et al., *The mechanism of action of hormonal contraceptives and intrauterine contraceptive devices*, 181 *AM. J. OBSTETRICS & GYNECOLOGY* 1263 (1999).

¹⁴ What is Plan B?, available at <http://www.go2planb.com/ForConsumers/AboutPlanB/WhatisPlanB.aspx>.

¹⁵ See How Plan B Works, <http://www.go2planb.com/ForConsumers/AboutPlanB/HowItWorks.aspx>

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ BARRY R. FURROW, ET AL, *BIOETHICS: HEALTH CARE LAW AND ETHICS* 85 (2004, 5th ed.).

when a woman ovulates¹⁹ and of determining whether pregnancy failure in the post-ovulation period was due to want of fertilization or inability to implant.²⁰ “With few exceptions, the fact that an entity or a process is altered by the treatment does not necessarily mean that it explains how pregnancy is prevented in real life situations.”²¹ Some evidence does suggest that the effect that the morning-after-pill will have depends somewhat on the amount of time that has elapsed between intercourse and administration of the drug and may also depend on the time of ovulation.²² At least one study has shown that “effects [of the morning-after-pill] that prevent ovulation or fertilization are likely to be the main mechanism of action of emergency contraceptive pills.”²³ This presumption was drawn from the fact that the pill’s efficacy diminishes the longer a woman waits to take it after intercourse.²⁴ Other studies, however, lend more credence to the prospect that the morning-after-pill does have a post-fertilization effect,²⁵ and nearly all studies show that the morning-after-pill creates physical conditions inhospitable for implantation.²⁶

Based upon the foregoing discussion, any legal analysis of limitation to access of the morning-after-pill must presume that, in at least some cases, the morning-after-pill causes a failure of fertilized eggs to implant in a woman’s uterus. The significance of this presumption, if not clear already, will quickly become evident.

¹⁹ See Croxatto et al., *supra* note 11, at 118.

²⁰ See Kevin T. McMahon, *Why Fear Ovulation Testing?*, 28 ETHICS & MEDICS 3, 3 (June 2003).

²¹ Croxatto et al., *supra* note 11, at 118.

²² See Croxatto et al., *supra* note 11, at 118; Rivera et al., *supra* note 11, at 1265–66.

²³ Rivera et al., *supra* note 11, at 1266. *But see* McMahon, *supra* note 18, at 3 (citing another study suggesting that pregnancy rates in women who took emergency contraceptives were “consistent with a post-fertilization effect”).

²⁴ See Rivera et al., *supra* note 11, at 1266.

²⁵ See McMahon, *supra* note 18, at 3; Croxatto et al., *supra* note 11, at 118; Rivera et al., *supra* note 11, at 1265–66.

²⁶ See generally McMahon, *supra* note 18, at 3; Croxatto et al., *supra* note 11, at 118; Rivera et al., *supra* note 11, at 1265–66.

b. Ovulation, Fertilization, Implantation, and Beliefs About When Human Life Begins

The medical definition of pregnancy, as set forth by the American Conference of Obstetrics and Gynecologists (“ACOG”), is the time between implantation and live birth or other termination.²⁷ Were we all to accept this definition wholesale, this Article would indeed be a relatively simple undertaking. There is no debate that an abortion should be defined as anything other than the termination of a pregnancy. If there were likewise no dispute as to the fact that pregnancy begins at implantation, there would be no reason for courts to find otherwise.

In fact, however, there are numerous other stages in human development that certain individuals believe should be considered to starting point of “the human individual.”²⁸ Perhaps the most common answer to the question of when people believe human life begins would be fertilization.²⁹ If this were true, a drug that prevents post-fertilization development could reasonably be considered an abortifacient. Indeed, many believe this to be the case.³⁰

There are also those who believe that because genetic uniqueness is bestowed upon an oocyte (an egg) just before ovulation, the human individual begins at that point, even before fertilization.³¹ Such a belief may call into question whether even drugs or devices that prevent fertilization are properly named contraceptives. Others believe that a fetus does not become an individual until electrical brain activity begins, which takes

²⁷ AMERICAN CONFERENCE OF OBSTETRICS AND GYNECOLOGISTS, ACOG TERMINOLOGY BULLETIN 1–2 (1965).

²⁸ *See generally* C.R. AUSTIN, HUMAN EMBRYOS: THE DEBATE ON ASSISTED REPRODUCTION 22–31 (1989). Austin argues that because the eggs and sperm are clearly alive prior to fertilization, we are actually looking to when human individuality begins. *Id.*

²⁹ *See id.* at 22.

³⁰ *See, e.g.,* McMahon, *supra* note 18, at 3–4.

³¹ *See* AUSTIN, *supra* note 26.

place around twelve weeks after fertilization.³² Those who accept this view may thus consider the vast majority of abortions performed in the United States more akin to contraception. While this Article focuses primarily on the interval between fertilization and implantation it is important to note the widely divergent views in this area.

c. Some State Governments Have Begun to Consider the Morning-after-pill to be Abortion or Adopt Restrictions Similar to Those on Abortion

Social conservative politicians in several State governments have either attempted to apply parental consent abortion statutes to limit distribution of the morning-after-pill to minors or taken steps to create such statutes tailored specifically for the morning-after-pill. Massachusetts Governor Mitt Romney vetoed legislation designed to expand access to the morning-after-pill due to concerns about the lack of any parental notification requirement.³³ Governor Romney felt that the statute, which included no age limitation on access to the morning-after-pill, would alter Massachusetts parental consent laws for abortion.³⁴ Thus, Governor Romney assumed that the parental consent regulation for abortion in general already limited minors' access to the morning-after-pill.

Other States actually have statutes on their books that may implicitly direct State executives to treat the morning-after-pill as abortion.³⁵ Missouri's legislature has made official findings that "[t]he life of each human being begins at conception."³⁶ In Wisconsin, "'Abortion' means the use of an instrument, medicine, drug or other substance or device with intent to terminate the pregnancy of a woman known to be

³² *See id.*

³³ Mitt Romney, *Why I Vetoed Contraception Bill*, BOSTON GLOBE A17 (July 26, 2005); Scott S. Greenberger, *Lawmakers Override Governor's Contraception Veto*, Boston Globe B4 (September 16, 2005). The Massachusetts Legislature overrode the Governor's veto. *Id.*

³⁴ *Id.*

³⁵ *See, e.g.*, MO. STAT. ANN. § 1.205(1) (Vernon's 2006).

³⁶ *Id.*

pregnant or for whom there is reason to believe that she may be pregnant.”³⁷ Either of these statutes arguably allows, and potentially even requires, State officials to enforce the States’ preexisting limitations on access to abortions against those seeking access to the morning-after-pill. Justice Stevens suggested as much, stating that the Missouri legislature’s finding that life begins at conception, defined “as ‘the fertilization of the ovum of a female by a sperm of a male . . . implies regulation . . . of common forms of contraception such as . . . the morning-after-pill.”³⁸

Still other States are getting even more specific. The New Hampshire Legislature, for instance, is considering a bill that would require parental notification prior to a pharmacist dispensing the drug.³⁹

As discussed more thoroughly below, specifically tailored legislation is different in important ways from government action that makes the morning-after-pill an abortifacient under State law. On the surface, at least, the State is not regulating the pill out of a belief that it constitutes abortion. As we will see below, however, this difference does not likely go much deeper than the surface. Nearly every State has some sort of parental consent or notification statute on the books that would limit young women’s access to abortions.⁴⁰ No State has a law that requires all minors to engage their parents in order to receive contraceptives.⁴¹ As such, it seems far from clear that the motivations related to abortion beliefs failed to influence legislation specifically tailored to the morning-after-pill.

³⁷ WISC. STAT. ANN. § 253.10(2)(a) (West 2006) (emphasis added).

³⁸ *Webster v. Reproductive Health Services*, 492 U.S. 561, 563 (1989) (Stevens, J., concurring in part and dissenting in part).

³⁹ Marc Kaufman, *Plan B Contraceptive Battles Embroil States*, WASH. POST (Bus. Sec.) (Feb. 27, 2006).

⁴⁰ See Guttmacher Institute,

⁴¹ Rachael K. Jones & Heather Boonstra, *Confidential Reproductive Health Services for Minors: The Potential Impact of Mandated Parental Involvement for Contraception*, available at <http://www.guttmacher.org/pubs/journals/3618204.pdf>.

d. Courts Hearing Constitutional Challenges to Such Actions May Have to Decide Whether to Apply Abortion or Contraception Law, a Decision Implicating the Question of When Life Begins

Without question, the State actions described above will result in constitutional challenges brought by reproductive rights groups on behalf of women denied access to the morning-after-pill. This Part argues that applying or imposing restrictions such as parental notification or consent requirements to the morning-after-pill may be unconstitutional under contraception doctrine, but constitutional under abortion doctrine. Thus courts cannot necessarily avoid addressing the issue of when life begins in some way.

i. The Effect of When Life Begins on State Authority to Regulate Abortion and Contraception

Implicit in the reasoning of both the Supreme Court and lower federal courts ruling on abortion and contraception cases is an understanding both that the line that divides abortion and contraception is when life begins and that States have a greater authority to regulate abortion.

One need not look further than the Supreme Court's benchmark contraception and abortion cases in order to find evidence of courts' treatment of contraception as prior to the origins of new human life and abortion as after. In *Griswold v. Connecticut*,⁴² neither the Court's majority and concurring opinions nor its dissents refer to any interests beyond those of the individuals denied the right to contraceptive services.⁴³ *Roe*, and *Casey*, on the other hand, are replete with references to a State's interest in preserving "potential life."⁴⁴ Indeed, Justice Blackmun's lengthy opinion in *Roe* expressly distinguishes

⁴² 381 U.S. 479 (1965).

⁴³ See generally *id.*

⁴⁴ See *Roe v. Wade*, 410 U.S. 113, 162–64; *Planned Parenthood v. Casey*, 505 U.S. 833, 872 (1992).

abortion from contraception, extending principles from *Griswold*, yet distinguishing it on the basis that a “pregnant woman cannot be isolated in her privacy” due to the existence of potential life.⁴⁵ The *Casey* Court went even further, placing an import on the State’s interest in protecting potential life great enough to balance, to a limited extent, against a woman’s fundamental right to choose whether to have an abortion. Without a finding that potential life existed at the time of an abortion, but not at the time of contraception, it is difficult to see why *Roe* was in any way a dramatic extension of *Griswold*, much less to explain why the public abortion debate remains so rich despite the relatively minimal clamor over the legality of contraception.

Because abortion involves potential life and States have a legitimate interest in protecting that potential life, and because potential life and the corresponding State interest are not present in contraceptive choices, States have greater authority to regulate abortion decisions than contraception decisions. Courts do often conflate the constitutional standards with which to adjudicate State limitations on contraception with those used to evaluate abortion limitations.⁴⁶ Even in doing so, however, courts acknowledge a distinction between the two standards; either implicitly or explicitly, courts scrutinize limitations on rights to use and access to contraception to a greater degree than they do abortion rights.⁴⁷ Justice Brennan expressed this distinction clearly, stating that “[t]he State’s interests in protection of the mental and physical health of the

⁴⁵ See *Roe*, 160–64.

⁴⁶ See, e.g., *Planned Parenthood Assn. of Utah v. Matheson*, 582 F.Supp. 1001, 1007–09 (1983) (applying reasoning and holdings of various abortion decisions to a constitutional challenge to Utah law restricting State funds for contraception).

⁴⁷ See, e.g., *id.* at 1009 n.9 (reserving expressly the question as to whether a hypothetical parental consent statute that included some maturity evaluation process would pass constitutional muster despite earlier acknowledgment of abortion cases in which the Supreme Court found that such bypass procedures made otherwise unconstitutional parental consent statutes constitutional); *Parents United for Better Schools v. School Dist. of Philadelphia Bd. of Educ.*, 978 F.Supp. 197, 209 (1997) (stating that “States have even less interest in regulating minors’ access to contraception than in regulating minors’ access to abortion”).

pregnant minor, and in protection of potential life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive.”⁴⁸

ii. The Morning-after-pill Potentially Could Be Constitutionally Limited to Minors if Considered Abortion but Not if Considered Contraception

Given the disparity in State authority over abortion and contraception decisions, there is a strong possibility that certain restrictions can be constitutionally applied to abortion decisions but not to contraceptive choices. For example, in the context of abortion, “the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of State assistance if the mother chooses to raise the child herself.”⁴⁹ The *Casey* Court held that this allowance justifies requirements that minors involve their parents in abortion decisions and that women wait twenty-four hours before having the procedure.⁵⁰

It is certainly possible that a court may find that morning-after-pill cases are distinguishable, given the wait might actually prove prohibitive in many cases due to the short window during which the drug is effective. Without question, some judges presented with the question would find that even if considered abortion, parental notification with judicial bypass or a twenty-four hour waiting period constitute an undue burden, and are therefore unconstitutional restraints. Such a holding has merit from the perspective of judicial restraint, as these courts would avoid the moral question at the heart of this Article.

⁴⁸ *Carey v. Population Services International*, 431 U.S. 678, 694 (1977).

⁴⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992).

⁵⁰ *See id.*

The problem with holding that the parental involvement statutes and waiting periods constitute an undue burden on teens is that such a holding necessarily rests on highly tenuous logic, given the Supreme Court's current abortion jurisprudence. Especially in the case of parental notification and judicial bypass, Supreme Court cases holding these restraints on abortion are constitutional are based on the premise that, as a class, minors are less mature than adults, and hence less capable of making reasoned decisions.⁵¹ As such, the state has an interest in seeing that a mature adult can advise the minor in the decision-making process, or at least that the minor can be judged responsible enough to make the decision on her own. If one holds that a young woman need not be subject to such restrictions because of the time constraints involved in the morning-after pill, the holding necessarily rests on the premise that some right to choose the means of abortion outweigh any considerations of mature decision-making. The Supreme Court has yet to recognize any such right.

Indeed, such a right would stand in direct conflict with the Court's current doctrine. If it is a child's maturity to make the decision without assistance that is at issue, it does not seem to follow that a right to choose one method of abortion over another should be given greater weight than the recognized state interest. There are two potential ways that one might reason otherwise. This first is that concerns over safety and invasiveness of particular methods must be taken into account in assessing whether it is constitutional to place certain limitations on minors seeking abortions. A woman's health has certainly been recognized as a critical factor in abortion doctrine. Common early abortion methods, however, have become increasingly safe, such that concerns over safety are minimal. Invasiveness of alternative procedures may be a more substantial

⁵¹ See *Hodgson v. Minnesota*, 497 U.S. 417, 458–59 (O'Connor, J. concurring).

argument. Nonetheless, this again requires the creation of previously unrecognized abortion rights. Thus, while it remains possible that a right to choose the means of your abortion should be a fundamental right, protected against a states interest in educated decision-making, judges cannot, at this point, comfortably rely on such a right to answer the question presented in this Article.

Further, attacks on the constitutionality of particular methods of abortion runs afoul by failing to respect the current judicial understanding of abortion. The Supreme Court has made clear that where potential life is at issue, the state has an interest in protecting that potential life. As is discussed more thoroughly below, the Court's emphasis on potential life as creating a state interest balanced against a woman's unfettered right to choose whether to terminate her pregnancy means that a finding that a particular procedure is abortion has a special significance. If the morning-after-pill is held to be abortion, the state may balance the potential life involved against a woman's rights, and thus justify a number of restrictions on her access to the procedure.

It is far from clear, however, that a State may constitutionally place the same restrictions on access to contraception. Indeed, at least one federal court has specifically acknowledged the possibility that the same kind of parental consent and notification laws, explicitly sanctioned by the Supreme Court in the context of abortion, may be unconstitutional as to contraception.⁵²

Moreover, Supreme Court doctrine currently requires very distinct formulas for analyzing abortion and contraception regulations. Pre-viability abortion regulations are analyzed under the "undue burden" standard articulated in *Casey*.⁵³ There, the Court

⁵² See *Matheson*, 582 F.Supp. at 1009 n.9.

⁵³ 505 U.S. at 869–79.

made clear that it was disavowing a strict scrutiny standard for such regulations. To the contrary, the Court's benchmark contraception decision uses the strongest of language in asserting that regulations touching contraceptive choices must meet strict scrutiny, serving a compelling State interest.⁵⁴ *Casey* explicitly changed this standard in abortion cases, but the Court has not done so in the context of contraception. The result of these differing standards is that parental consent, informed consent, and waiting period laws, struck down only if they act as a substantial obstacle to a woman's abortion decision, may have a harder time withstanding judicial scrutiny when applied to contraception decisions.

In sum, there is a likelihood that regulations such as those currently being considered to limit access to the morning-after-pill, while constitutional under abortion law, are unconstitutional under contraception doctrine. Affirmatively proving this point would be an article unto itself. This Part has simply attempted to show that such a conclusion is a very real possibility.

In the context of our larger discussion, the possibility that parental notification statutes and the like would be unconstitutional in the contraception context but not in the abortion context means that the constitutionality of limitations on access to the morning-after-pill may hinge on whether courts consider it to be abortion or contraception. Likewise, the fact that the divide between contraception and abortion has been drawn at the beginning of pregnancy and the corresponding beginning of potential human life means that in order to decide whether the morning-after-pill is abortion or contraception

⁵⁴ *Carey v. Population Services International*, 431 U.S. 678, 686 (1977) (stating "'Compelling' is of course the key word; 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").

courts must decide whether it acts before or after the start of pregnancy. Courts cannot do so without deciding when pregnancy, when life, begins.

Courts' inclination will likely be to avoid this last question. They may be inclined instead to adopt some sort of continuum approach, treating the morning-after-pill as a step in-between abortion and contraception thus entitled to a mid-level protection against government intrusion. The nature of the distinction that this Part has discussed, however, sets abortion and contraception on either end of a miraculously bright line that allows for no in-between. Thus, if you accept the distinction drawn, and if there is a practical distinction in the treatment of statutes regulating abortion from those regulating contraception, the morning-after-pill must find a place on one side of that line or the other. The question then becomes how judges should decide which side the morning-after-pill belongs on.

II. Judges Should Decide Whether to Apply Abortion or Contraception Law to the Morning-after-pill in Light of Their Role as Representatives of the People

This Part argues that Courts should decide whether to consider the morning-after-pill abortion or contraception by adopting an approach to judicial review commensurate with Christopher Eisgruber's theory that judges should act as representatives of the American people in deciding cases.⁵⁵ Eisgruber has freely admitted that his work does not offer "constitutional judges any sort of 'cookbook' to get them through hard cases," and has in fact argued that a general jurisprudential technique demanding "such 'specificity is impossible or undesirable.'"⁵⁶ To the contrary, this Article's very purpose is to provide a cookbook of sorts for judges presented with the constitutional challenges to limitations on

⁵⁵ See generally EISGRUBER, *supra* note 8.

⁵⁶ Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. REV. 115, 179 (2002).

access to the morning-after-pill. This should not be confused, however, with an attempt to set out a jurisprudential technique of general applicability. Rather than adopting Eisgruber's theory only to reject one of its central premises,

this Article proposes methodology that aims to be both limited to the set of facts we have discussed and true to a judge's role as a representative of the American people. The Article does not offer a definitive answer to this question, but simply presents an analytical framework for judges to use and some factors they might consider.

The Article argues that constitutional courts must attempt to determine the American people's beliefs as to the question of whether the morning-after-pill should be treated as contraception or as abortion for constitutional purposes. This Part first argues that State governments have no authority to adopt views as to when life begins and then impose those views on the people within the State. It explains that federalism and institutional considerations dictate against allowing State legislators and executives to define the federal Constitution. Further, States lack authority in this area because it is a matter purely of belief, and a State may not justify its laws based on belief alone.

Second, this Part presents a framework through which judges can attempt to derive the American people's view as to whether courts should consider the morning-after-pill abortion or contraception. This inquiry great complexity, for it involves a probe, not only of the people's views on the question of when life begins, but also, and more importantly on the effect that the American people believe that their individual views should have on the legal rights of others. This Part argues that, for the most part, Americans believe that their moral opinions should not affect the personal freedoms of others. Nonetheless, Americans do have a tipping point at which they a

belief is shared widely enough and felt strongly enough that Americans believe the belief should impact legal rights.

As such, the Article proposes that judges adopt a framework that treats any constitutional interpretation as to the beginning of life presumptively improper if it would adversely affect individuals' personal freedoms. While this is a sweeping presumption, it is consistent with the American people's feelings about the effect their moral beliefs should have on the legal treatment of their peers, at least as applied to the context of reproductive decisions. Further, the Article proposes that the presumption may be rebutted on a finding that a supermajority of the American people believe both in the moral premise and in the premise that it should have legal force. This allows judges to honor the exceptional circumstances in which Americans feel there is such a consensus regarding an issue of great import that moral beliefs may play a role in defining the law even at the cost of personal freedoms. This super-majoritarian concept is reconcilable with constitutional structure, Supreme Court precedent on reproductive rights under substantive due process, and the thinking at the heart of our criminal law.

Because evidence of the American people's beliefs as to each of these questions will not always be readily available, judges will often have to exercise moral reasoning in attempt to derive them. The people, however, also have a desire to see "moral issues" decided on the basis of moral reasons that have some popular appeal."⁵⁷ As such, this Article echoes Eisgruber's call for judges to exercise their own reasoning in deciding what effect the views of the majority of Americans should have on the legal rights of their peers.

⁵⁷ EISGRUBER, *supra* note 8 at 57.

The piece of the proposed analytic framework that calls on judges to undertake an independent analysis immediately draws concerns regarding substitution of judicial morality for that of the people. Considered as a whole, however, the analysis set forth below lessens the need for this concern by recommending independent judicial reasoning be used in light of critical empirical analysis of the American people’s views, rather than as a lone mechanism of decision-making. A judge’s role requires not only deriving the will of the majority of Americans (even through reasoned analysis of the people’s beliefs that transcends simple counting of hands at the polling place), but also undertaking a reasoned analysis to ensure that the effect the majority’s beliefs have on specific issues are consistent with their principles. Courts, for example, should protect against violation of individual rights, even through majority decision-making. Ronald Dworkin has expressed that “[r]ights . . . are best understood as trumps over some background justification for political decisions that States a goal for the community as a whole.”⁵⁸ This Article suggests that rights are, in fact, broader goals for the community in themselves, goals that often supercede the community’s issue-specific goals. As such, courts deciding whether to consider the morning-after-pill abortion or contraception must evaluate the American people’s view as to when life begins, and then assess the people’s views as to how rights and other considerations should effect the governmental application of their issue-specific beliefs.

a. State Government Authority to Impose Its Opinion as to When Life Begins

All of the contexts in which States limit access to the morning-after-pill seem to involve the application of a State government’s opinion as to when life begins. Certainly

⁵⁸ RONALD M. DWORIN, *A MATTER OF PRINCIPLE* 359 (1985).

this is true of affirmative declarations by State legislatures that life begins at conception and State actions applying existing abortion laws to the morning-after-pill. The point may also be applicable to State legislative action specifically attacking access to the morning-after-pill. As indicated above, no State has a law that requires all minors to engage their parents in order to receive contraceptives.⁵⁹ Legislative beliefs that life begins at conception thus seem the likely reason for placing such restrictions on access to the morning-after-pill.⁶⁰ Foremost, if one accepts the possibility set forth above—that the regulations States are placing on the morning-after-pill are constitutional under abortion law and may be unconstitutional under contraception law and that there is no in-between—States may be in a position that they can defend their restrictions on access to the morning-after-pill only by asserting that the drug causes abortion, that it terminates existing potential human life.

It is quite likely that a number of women seeking access to the morning-after-pill will not share this view. The question, then, is what level of deference, if any, should constitutional courts give to a State's determination that the morning-after-pill is abortion in the face of challenges brought by those that believe otherwise? This Part argues that the determination should receive no deference.

At first blush this position might seem somewhat extreme. Should State governments not have the first crack at adopting definitional standards of law? States are allowed to legislate definitions of death in the context of murder statutes, organ donations, estates, torts etc, why not allow them to define life? On closer examination,

⁵⁹ Rachael K. Jones & Heather Boonstra, *Confidential Reproductive Health Services for Minors: The Potential Impact of Mandated Parental Involvement for Contraception*, available at <http://www.guttmacher.org/pubs/journals/3618204.pdf>.

⁶⁰ See Romney, *supra* note 31, at A17; Greenberger, *supra* note 31, at B4.

however, it becomes clear that States have no business defining the morning-after-pill either as contraceptive or abortifacient because the definitional question presents a combination of constitutional interpretation and religious belief, neither of which fall within the proscriptive powers of the States.

Belief is a key word here. There is no scientific proof, nor can there likely ever be any such proof, of when human life begins, when one is ensouled, for those who believe in a human soul. All that exists is a series of individual and collective beliefs about when (and if) this happens. Yet, as *Roe* and *Casey* make clear, the constitutional considerations involved in reviewing a particular method of preventing live birth depend greatly on whether the practice takes place before or after the beginning of pregnancy—whether there is potential life to consider.⁶¹

At issue, then, is not an individual State's definition of pregnancy or when life begins, but rather the constitutional definition. The question to answer, therefore, is not necessarily whether life begins at conception or implantation, but rather at which of these points (or at what other point) the Constitution should recognize the existence of potential life. And all we have to go on is belief.

In this context, a picture of why States may not take the first bite at the definitional apple begins to emerge. It could not reasonably be said that a State's definition of condom use as abortion would receive any deference from a federal court today. Nor would a definition of pregnancy that commences twelve weeks after implantation, such that the vast majority of procedures now commonly considered abortion would be defined as contraception. But why?

⁶¹ See *Roe v. Wade*, 410 U.S. 113, 162–64; *Planned Parenthood v. Casey*, 505 U.S. 833, 872 (1992).

There are two primary reasons. First, because the situation involves interpretation of the federal Constitution, federalism and enumeration of powers make this question one for the federal judiciary, not the State legislature and executive. Second, the State imposition of a religious belief on the people within, having the practical effect of limiting individual rights, offends substantive due process principals.

i. State Authority over Constitutional Interpretation

Once we understand that the pivotal question presented by challenges to restrictions on access to the morning-after-pill, unlike the majority of challenges to State regulations on those within its jurisdiction, is one of federal constitutional meaning, it is clear that federalism principles foreclose States from speaking with authority on the subject. As Justice Story expressed just thirty years after the Constitution’s ratification: “It is manifest that the constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted.”⁶² The American people gave the new federal government the authority and ability to make and interpret its own laws, which would be binding on the States, despite the considerable retention of States’ sovereignty within their jurisdictions. As such, federalism requires that federal courts have final say over determinations of federal law.⁶³ This allows for a necessary uniformity in federal law throughout the States.⁶⁴ Nowhere is such uniformity so important as in treatment of interpretive questions such as when the Constitution should first recognize potential life.

⁶² *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 346–47 (1816).

⁶³ *See id.* at 347 (stating that “reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction); *see also* 16B CHARLES ALAN WRIGHT ET. AL, *FEDERAL PRACTICE AND PROCEDURE* § 4006 (2d ed. 2005).

⁶⁴ *See Hunter's Lessee*, 1 Wheat. (14 U.S.); WRIGHT, *supra* note 63, at § 4006.

It is certainly true that State *courts* play some role in constitutional jurisprudence. The Constitution makes this much clear through the Supremacy Clause.⁶⁵ Indeed, nothing in this Article should be construed to argue that State courts may not have a go at the constitutional question involved in challenges on restrictions to the morning-after-pill. Indeed, while the federal judiciary and ultimately the Supreme Court will have the final word, many of these challenges may originate in State courts. This Article intends to lay down principles to be used by both federal and State courts. The argument here is simply that State legislatures and executives should not be awarded any deference in what is purely a question of interpretive definition.

To find otherwise would be to allow States in a sense to legislatively create “potential life,” the protection of which the Supreme Court in *Roe* and its progeny has held can be weighed in drafting abortion regulations. Ronald Dworkin has painted a colorful picture of what would be possible were States to have the constitutional authority to add persons to the constitutional order; one in which newspapers become extinct as a result of protecting the due process rights of trees and corporations could vote elect one of their own as a United States Senator for the State of Delaware.⁶⁶ This would be possible because “the suggestion that the Constitution allows States to bestow personhood on fetuses assumes . . . that a State can curtail constitutional rights by adding new persons to the constitutional population, to the list of those whose constitutional rights are competitive with one another.”⁶⁷ These absurdities illustrate

⁶⁵ See U.S. CONST., art. VI, cl. 2 (stating that federal law is “the supreme Law of the Land; and the Judges in every State shall be bound thereby”).

⁶⁶ See RONALD DWORKIN, *LIFE’S DOMINION* 113–14 (1993).

⁶⁷ *Id.* at 113.

further the problems with allowing States to justify limitations on access to the morning-after-pill based on the States' determinations as to when life begins.

The conclusion that State legislatures and executives are entitled no deference does not offend respect for the States as sovereigns. Not even Congress has the interpretive power to legislate constitutional meaning.⁶⁸ While Congress does receive some deference from the courts in matters on which the Supreme Court has not yet ruled,⁶⁹ this makes sense in light of its nationwide authority, which alleviates the uniformity concerns mentioned above.⁷⁰

The preceding discussion provides at least two partial answers to the question of why the issues presented by challenges to limitations on access to the morning-afterpill are distinguishable from a hypothetical review of State statutes defining death in the context of murder statutes. First, the definition at issue in the latter context involves interpretation of *state* law, not federal. As such, federalism concerns regarding interpretation of the federal Constitution are not present. Second, and consequently, the interest in universality of the definition is insubstantial. It should be noted, however, that even in this context, States themselves have felt compelled to achieve universality. This is why most States have adopted the Uniform Determination of Death Act.⁷¹

ii. State Authority and Belief

The second problem for State legislatures and executives is tied to the concept of belief. Given that only belief can presently answer the question of when potential life first exists, only belief can possibly justify any State's declared definition of when pregnancy

⁶⁸ *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (holding that Congress “has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation”)

⁶⁹ *See id.*

⁷⁰ *See* text accompanying note 63.

⁷¹ *See* FURROW, *supra* note 16 at 215.

or potential life begins. As such, current Supreme Court substantive due process doctrine would never allow such a belief to significantly impair the individual liberties of American people.

While questions of belief seem to touch freedom of religion more than any other individual right, the Supreme Court has made clear that the right to develop one's own beliefs is encompassed within the liberty rights protected by the Due Process Clause of the Fourteenth Amendment,⁷² limiting States' authority to resolve questions of belief.⁷³ The Court's reasoning in *Casey* illustrates this well. There, the Court found that the "conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other," did not apply when the State, in so adopting, intruded upon protected liberties.⁷⁴ In words prophetically applicable to our current discussion, the Court Stated: "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."⁷⁵

Casey does not stand alone in protecting personal belief from State intrusion. The Court had previously declared that "a State may not adopt one theory of when life begins to justify its regulation of abortion."⁷⁶ Further, *Lawrence v. Texas*,⁷⁷ stands for the proposition that States may not enforce a belief that homosexual sodomy is immoral.⁷⁸

⁷² U.S. CONST. Am. XIV § 1; *see also* *Planned Parenthood v. Casey*, 505 U.S. 833, 850–51 (1992).

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⁷⁴ *Casey*, 505 U.S. at 851.

⁷⁵ *Casey*, 505 U.S. at 851.

⁷⁶ *Akron v. Akron Ctr. For Reproductive Health, Inc.*, 462 U.S. 416, 444 (1983).

⁷⁷ 539 U.S. 558 (2003).

⁷⁸ *See id.* at 571, 578.

This line of cases stands firmly for the premise that States have no authority to legislate belief.

The Supreme Court has stated that *Roe* “implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.”⁷⁹ Such a value judgment, however, does not amount to State imposition of its beliefs, but rather State declaration of its beliefs. The Court has been clear that due process forbids States from reaching the imposition stage. As one scholar puts it: “Obviously, the question of the precise moment of ensoulment (assuming that there is such a thing) is none of Caesar’s concern.”⁸⁰

Certainly, the First Amendment may also present obstacles for State determinations regarding the morning-after-pill.⁸¹ The question of how to define pregnancy has the potential to touch both the Free Exercise and Establishment Clauses of the First Amendment.⁸² This Article focuses, however, on substantive due process, and, as such, full discussion of the First Amendment’s effects on analysis of the question before us is beyond the scope of the present discussion.

iii. State Assertion of Public Health Concerns

The State interest often asserted for restrictions on the morning-after-pill, of course, will be more paternalistic than philosophical. The FDA has already latched onto a dearth of research as to the morning-after-pill’s effects on women under age sixteen to

⁷⁹ *Maier v. Roe*, 432 U.S. 464, 474 (1977).

⁸⁰ Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159, 180–81 (2003).

⁸¹ *See id.* (implying that a State determination of when life begins would violate the Establishment Clause of the First Amendment).

⁸² U.S. CONST. Am. I.

justify attempts to limiting over-the-counter access to the drug.⁸³ Protecting the health of its citizens is certainly a legitimate State interest.⁸⁴ Courts have a responsibility, however, to ensure that a State assertion that it is acting to protect citizens cannot serve as smokescreen to justify an otherwise improper moral imposition on those citizens.⁸⁵

Nothing suggests that State concerns over the effects on the morning-after-pill are anything more than smokescreen. There has, indeed, been widespread speculation that the FDA's use of the public health justification is disingenuous, masking political pressures from those who have moral problems with the morning-after-pill.⁸⁶ The morning-after-pill does cause stomach pain, nausea, and vomiting in some women.⁸⁷ It is not reasonable, however, to think that FDA is withholding wider access to the morning-after-pill on the threat of a stomachache. After extensive research, the morning-after-pill, contrary to RU-486, has not produced any serious side effects at any age level.⁸⁸ Thus, basing limits on access on the rationale that effects on teens are uncertain seems unreasonable at best and insincere at worst.

b. Deciding Between Contraception and Abortion Law Requires Courts to Derive the American People's Moral Opinion as to Whether the Constitution Treats the Morning-after-pill as Abortion or Contraception

Having answered the question of whether State governments have the authority to impose their view about life's commencement in the negative, constitutional judges facing challenges to access limitations are not yet out of the woods. These judges must still decide whether to apply contraception or abortion law. As such, they must decide

⁸³ Gardiner Harris, *Drugs, Politics, and the F.D.A.*, N.Y. TIMES 11 (Aug. 25, 2005). The FDA subsequently approved over-the-counter access to the drug for those over the age of eighteen.

⁸⁴ See *Jacobson v. Massachusetts*, 197 U.S. 11, 24–29 (1905).

⁸⁵ See Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1238 (2004).

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whether the Constitution should recognize the existence of human life at the time of conception.

The discussion above provides a structural answer to why judges may appropriately answer this question. The matter involves constitutional interpretation, the province of the courts. The second concern discussed above, that the government may not impose its beliefs on the people, makes it less clear that courts are entitled to decide this question. Would judges themselves not be imposing their own beliefs on the people (and not just the people of one State, but the American people as a whole) were they to answer the question one way or another?

This Part seeks first to alleviate this fear, as well as the corresponding concern that one or several judges may displace the will of the majority. Second, it seeks to provide for constitutional judges a blueprint for how to analyze the question of when the Constitution first recognizes the existence of potential life.

i. Judicial Imposition of Belief and Majoritarian Concerns

The concern that judges will simply replace a State's belief about when potential human life begins with their own in adopting a constitutional definition of pregnancy is a valid one. "[A]bsent an authoritative source of bonos mores, judges necessarily bring to bear their own moral positions any time they review the legal sufficiency of a morals-based rationale."⁸⁹ Fortunately, however, judges do have such an authoritative source: the American people.

Judges should view their charge in answering constitutional questions involving moral dilemmas as finding the American people's opinion as to the best way to resolve the complex web of questions involved. In the context of our discussion, this means that

⁸⁹ Goldberg, *supra* note 82, at 1288.

judges must determine not only the American people's beliefs as to the question of when life begins, but also the people's beliefs as to what effect the people would want their beliefs as to when life begins to have on the judicial process. "Constructing the American people's conception of justice is not the same thing as expressing one's own conception of justice or as expressing the best conception of justice, whatever that may mean."⁹⁰ As long as judges remain true to their charge, there is no reason to fear their rulings as impositions of belief on the people, for the beliefs being imposed are those of the people.

While judges drawing upon a set of mores beyond their own may seem implausible, judges at the highest level already do so. *Casey* is a wonderful example of judges doing just that.⁹¹ The Court in *Casey* reaffirmed the "essential holding" of *Roe*, that women have the right to choose to have an abortion before viability of a fetus.⁹² Yet the Opinion of the Court, written by Justices O'Connor, Kennedy, and Souter, states expressly: "Some of us as individuals find abortion offensive to our most basic principles of morality."⁹³ The Justices nonetheless believed that a higher morality than their own had to control their analysis.⁹⁴

It is noteworthy here that, as discussed in more detail below, the beliefs that should be judicially implemented are not simply those about when life begins, but also about how this first set of beliefs should effect[?] the legal rights of the people.⁹⁵ Thus, courts impose not even the American people's beliefs regarding when life begins, but rather attempt to provide the contextual application of the people's concept of justice.

⁹⁰ EISGRUBER, *supra* note 8 at 126.

⁹¹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992).

⁹² See *id.* at 846.

⁹³ *Id.* at 850.

⁹⁴ See *id.*

⁹⁵ See *infra*, text accompanying notes 112–19.

Most simply put, this Article argues that judges should interpret the Constitution as would the American people.

The majoritarian concerns that some will continue to have with this Article's propositions have been dealt with adeptly by Eisgruber, who reveals these concerns as a misunderstanding of the nature of democracy.⁹⁶ While neither he, nor much less I, will ever convince all of those who maintain a contrary view of democracy, it is worthwhile to discuss how the conception of democracy assumed in this Article answers traditional majoritarian concerns regarding active judicial review on questions such as the constitutional definition of pregnancy.

Properly viewed, "judicial review is, among other things, a device for regulating federalism. It is an institution through which the national government supervises State and local institutions."⁹⁷ This supervision is necessary precisely because democracy constitutes something more than deriving the will of the majority.⁹⁸ It charges government with the duty to represent all of the people.⁹⁹ "The democratic character of moral decision-making . . . turns on the character of the government's reasons, not on the sheer size of the constituency for those reasons."¹⁰⁰ Judges (federal in particular), because of the ties to mainstream politics required to ascend to the bench, and because of the nature of judicial office once they do get there, including insulation from those same politics and the obligation to issue public, reasoned opinions, are well-suited to ensure the highest character of the reasons for the government's moral decision-making.¹⁰¹

⁹⁶ EISGRUBER, *supra* note 8

⁹⁷ *Id.* at 92.

⁹⁸ Eisgruber, *supra* note 53, at 121 (arguing that "democracy is government by the whole people, and a majority is by definition only a fraction of the people").

⁹⁹ *Id.*

¹⁰⁰ Eisgruber, *supra* note 53, at 123.

¹⁰¹ EISGRUBER, *supra* note 8 at 71.

Moreover, simple majoritarian decision-making is ill-suited for complex moral policy questions. Indeed, perhaps the most significant problem with pure majoritarianism in the context of moral decision-making is that the majority often fails to use sound moral reasoning in reaching its decisions, rather succumbing to self-interest. Certainly this can be seen to the extent we equate the legislative process with expression of majoritarian views. Imagine that the question of when the Constitution should first recognize the existence of potential life was put squarely before Congress for an up-or-down vote. Realistically, the vast majority of Senators and Congressmen would base their decision not on any reasoned moral analysis, but rather on polling data and how pro-life or pro-choice those polls tell them they should appear to their constituents.¹⁰²

Self-interest does not have to be so tangible.¹⁰³ Self-interest includes interests in avoiding exposure to offensive conduct.¹⁰⁴ It is for this reason that rationales underlying government regulation of certain aspects of sexual behavior create unique constitutional concerns.¹⁰⁵ “Comingl[ing] intense pleasures, dark power relationships, and mysteries of human creation. . . . rivets attention and frustrates understanding.”¹⁰⁶ As a result,

First, judges have life tenure and good jobs; hence they are insulated from the pull of interests that might distort the judgment of other decision-makers. Second, judges’ votes often have a decisive impact, hence judges have an incentive to take personal responsibility for their choices. Third, judges must give a public account their reasoning; hence they put their reputation for fairness on the line whenever they issue a decision. Fourth, judges are appointed on the basis of their political views and political connections; hence their views of justice are unlikely to be radically at odds with the American mainstream

Id.

¹⁰² See generally Comment, Jason M. Horst, *Imaginary Intent: The California Supreme Court’s Search for a Legislative Intent that Does Not Exist*, 39 U.S.F. L. REV. 1045, 1063–67 (2005) (discussing the self-interest involved in the legislative process in California).

¹⁰³ Eisgruber, *supra* note 53 at 134 (stating that “[s]elf-interest is not reducible to material or economic self-interest”).

¹⁰⁴ *Id.* at 134.

¹⁰⁵ EISGRUBER, *supra* note 8 at 159.

¹⁰⁶ EISGRUBER, *supra* note 8 at 158–59.

individuals tend to define themselves by condemning the sexual practices of others.¹⁰⁷ As such, Eisgruber has suggested that judges must take care to ensure that State regulations do not “condition fundamental benefits of citizenship . . . upon whether a person conforms to the State’s judgments about how to pursue sexual pleasure in a way that is proper rather than debasing.”¹⁰⁸ Ronald Dworkin has referred to this right as the right to moral independence, and framed it more precisely:

People have the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong.¹⁰⁹

Applied specifically to our present discussion, this concept requires judges to scrutinize State limitations on access to the morning-after-pill in order to ensure that such limitations are not based upon an animus toward unplanned, unprotected sexual intercourse. While enforcing such animus would be constitutionally prohibited, it seems at first illogical that this bias actually drives State limitations on the morning-after-pill. No less than the morning-after-pill—and indeed to an arguably far greater degree—birth control pills and patches facilitate the same sexual practices. Why then, should the pill and patch be so easily obtained and the morning-after-pill require parental involvement? There seems to be a strong possibility that, despite the insignificance of the morning-after-pill’s effect on unplanned unprotected sex, the variation exists due to the majority’s inclination to view themselves[?] as sexually responsible. Because the morning-after-pill “is employed after intercourse. . . . it may have particular appeal to the occasional sex

¹⁰⁷ EISGRUBER, *supra* note 8 at 159.

¹⁰⁸ EISGRUBER, *supra* note 8 at 160.

¹⁰⁹ RONALD DWORKIN, *A MATTER OF PRINCIPLE*, 353 (1985).

consumer for use as an alternative to pre-intercourse regimens.”¹¹⁰ Women who have unplanned, unprotected sex who have prepared for that eventuality by using continual hormonal birth control methods may be widely viewed as responsible, especially by comparison. Those women themselves make up at least one quarter of all women in the United States.¹¹¹ In fact, more than ninety percent of all women in America use some form of birth control.¹¹²

Thus, upon further reflection, there is actually significant risk that government action restricting access to the morning-after-pill, in actuality, manifests a majority’s attempt to define itself by condemning actions it views as sexually irresponsible. It seems quite unlikely, however, that the American people, even a majority of them, would believe such a rationale would be legitimate to justify the way the law treats women who seek access to the drug.

Certainly, the Supreme Court has not endowed morality-based legislation with its imprimatur simply because it was created through the majoritarian process. Rather, the Court’s reasoning in *Lawrence* backs a counter-majoritarian view of constitutional democracy. For the majority, Justice Kennedy asserted that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹¹³ Justice Stevens has echoed this sentiment, stating that “the individual’s freedom to choose his own creed is

¹¹⁰ June Mary Zekan Makdisi, *Genetically Correct: The Political Use of Reproductive Terminology*, 32 PEPP. L. REV. 1, 20 (2004).

¹¹¹ Allen Guttmacher Institute, *Get in the Know: Prevention and Contraception*, available at <http://www.guttmacher.org/in-the-know/prevention.html>.

¹¹² *See id.* (stating that nine in ten women use some contraceptive method including natural).

¹¹³ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

the counterpart of his right to refrain from accepting the creed established by the majority.”¹¹⁴

Lawrence clearly supports the premise that the majority’s condemnation of a group of people, in that case homosexuals, is an unconstitutional justification for a law.¹¹⁵ Here, neither can the majority’s condemnation of those who are irresponsible in their sexuality justify a constitutional definition of pregnancy. Judicial review, carefully reasoning through each of the moral issues involved through the lens of the American people’s beliefs, can ensure States cannot employ such motives.

ii. Answering the Question: Webs of Belief and Super-Majoritarianism

At last we arrive to the beginning. How should constitutional courts attack the question at the heart of challenges to State limitations on access to the morning-after-pill? As is hopefully becoming clear by now, that question is not the question of when life, potential life, or pregnancy begins. The question before these courts is whether the Constitution should recognize the existence of potential life at the time of fertilization.

This Article has argued that judges attacking this question should draw from the American people’s beliefs. To the extent they are even accurately ascertainable, Americans beliefs regarding what Rebecca Brown calls the “First-Order Question,”¹¹⁶ that is their actual beliefs as to when life begins, play only a supporting role in this analysis. This is because the beliefs are only part of a complex web of beliefs held by the people. Americans often hold numerous beliefs that at least potentially conflict. Constitutional judges must, therefore, look to Americans’ First-Order beliefs in the

¹¹⁴ *Webster v. Reproductive Health Services*, 492 U.S. 561, 572 n.17 (1989) (Stevens, J., concurring in part and dissenting in part).

¹¹⁵ *See Lawrence v. Texas*, 539 U.S. 558, 573–80 (2003).

¹¹⁶ *See Rebecca L. Brown, A Government for the People*, 37 U.S.F. L. REV. 5, 17–18 (2002).

context of their other beliefs, rather than in a vacuum. As such, the more important set of beliefs, from the perspective of our constitutional judges, is a “Second-Order” set of beliefs regarding the effect that the First-Order beliefs should have on law and the rights of others.

This Part argues that Americans are generally disinclined to want their First-Order beliefs to affect the legal rights of others and that they believe such an effect is permissible only if a supermajority of the people share the belief. As such, it argues that courts may find that the Constitution recognizes the existence of potential life at the time of fertilization only if a supermajority of the American people believes that it exists at that point.

Indicia of the American people’s beliefs regarding both abortion and homosexuality both lend themselves to the conclusion that Americans generally want their beliefs separated from their laws. *Lawrence* details the fact that, at the time of the decision, only thirteen States expressly outlawed homosexual sodomy, and less than a third of those States actually enforced their laws.¹¹⁷ Given that half of all American adults have an unfavorable view of homosexuals,¹¹⁸ one would think that if Americans believed that their beliefs should always control their laws, the number of States that actively regulated homosexuality would have been higher while such regulation was still considered constitutional. This phenomenon cannot necessarily be explained away by reliance on the concept that homosexuality is an immutable characteristic. As many Americans believe that homosexuals can change their sexual orientation if they wished as

¹¹⁷ See *Lawrence*, 539 U.S. at 573.

¹¹⁸ See The Pew Research Center, *Religious Beliefs Underpin Opposition to Homosexuality: Republicans Unified, Democrats Split on Gay Marriage*, Part 1: Opinion of Homosexuals, available at <http://people-press.org/reports/display.php3?PageID=764> (last visited May 11, 2006).

believe to the contrary.¹¹⁹ More than sixty percent believe that being gay is not preordained at birth.¹²⁰ Yet, even when it was legal to do so[?], the American people overwhelmingly chose not to use the force of the law to propagate their beliefs.[?] There is a distinct divide between belief and the law. It can be so only because the American people want it that way.

Examination of Americans' beliefs about abortion and the law reveal the same phenomenon. The American people have long been of the belief that their personal feelings about abortion should not dictate the rights of other to obtain an abortion. A *Los Angeles Times* poll conducted in 2000 revealed that while more than half of all Americans believed abortion to be murder, less than a quarter supported a constitutional amendment banning the practice.¹²¹ Likewise, a recent poll revealed that seventy-eight percent of Americans believe that abortion should be legal in at least some circumstances.¹²²

Again, all of this supports the premise that Americans prefer their beliefs to be separated from their law when lack of separation would affect individual liberties. As such, judges attempting to derive the American people's beliefs as to questions such as when the Constitution should first recognize the existence of potential life should begin with a presumption that if the finding one way would restrict personal freedoms, the American people would find the decision unsatisfactory. As such, it would be an improper constitutional interpretation.

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ Alissa J. Rubin, *Americans Narrowing Support for Abortion*, L.A. TIMES 1 (June 11, 2000).

¹²² Nancy Benac, Associated Press (March 13, 2006). The poll divided individuals amongst those who believed that abortion should be legal in all cases (19%), those that believed it should be legal in most cases and illegal in some cases (32%), those who believed that it should be illegal in most cases and legal in some cases (27%), those who believed it should be illegal in all cases (16%), and those who did not know (6%).
Id.

Because constitutional recognition of potential life at any one point along the continuum leading to live birth clearly limits personal freedoms at all later points, however, any definition that places the point of recognition anywhere before live birth is presumptively improper.² Can this be right? Clearly, this seems irreconcilable with *Roe* and *Casey*, the death knell for a framework aspiring towards any legitimacy.

Data from the newer abortion poll mentioned above, however, pulls out another string in the web of the American people's Second-Order beliefs. It is this string that ties the proposed framework back together. Three quarters of Americans believed that abortion should be illegal in some contexts.¹²³ Thus, there is a significant consensus that at some point, beliefs of others should trump those of individuals seeking to act in a certain way. Put another way, Americans appear to overwhelmingly think that their individual beliefs should not affect the scope of constitutional rights if that belief does not hold enough popular appeal.

Logically, if there is a place on the continuum between potential life and life where enough people believe sanctity of the latter has been bestowed on a fetus such as to impose that belief on others, there too must be a point on the continuum of non-existence to existence of potential life at which this happens. If this is true, then surely constitutional judges must account for the exceptional situations in which the vast majority of society as a whole believes that the law should not protect certain beliefs. But how can we separate the beliefs that carry with them the right to act on them from those that do not?

This Article argues that constitutional judges, at least in the context of our present discussion, should adopt a super-majoritarian principle such that the presumption against

¹²³ *See id.*

the propriety of a constitutional definition that limits individual rights can be rebutted only on a finding that a supermajority, at least seventy-five percent of the people, shares a belief. Thus, judges should find the Constitution recognizes the existence of potential life at the point of conception only if a supermajority of Americans believes that to be true.

The reflexive response to this premise will likely be hostile. On reflection, however, constitutional structure, case law, and the whole of criminal law each support the idea.

1. Super-Majoritarianism and Constitutional Structure

The first amongst the parade of horrors that may come from opponents of this idea is the exasperated: “Well, then may Christians act so as to give constitutional effect to a declaration that Jesus is the One and only true God?” The simple answer is yes. Clearly they may. The slightly more complex answer is that nothing in the substantive due process analysis I have proposed would prevent it. Currently such a declaration runs afoul of the express language of the First Amendment, but Article V of the Constitution¹²⁴ contains provisions for amending the constitution in the event that three-quarters of each House of Congress or two-thirds of States propose to do so and three-quarters of States ratify the proposed amendment.¹²⁵ As of 2001, seventy-seven percent of Americans self-identified as Christians.¹²⁶ It is far from beyond comprehension that Christians could thus control enough State and federal offices to effect the change if they so desired. The fact that they have not done so despite possessing a supermajority is

¹²⁴ U.S. CONST., art. V cl.

¹²⁵ *See id.*

¹²⁶ THE GRADUATE CENTER OF THE CITY UNIVERSITY OF NEW YORK, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 6 (2001), available at http://www.gc.cuny.edu/faculty/research_studies/aris.pdf (last visited May 11, 2006).

telling. Americans place an even greater premium on the right to define one's own God than they do on the right to legal protection of one's definition of life or life potential.

The broader point here is that the Constitution is in no way offended by allowing a supermajority to define it. Eisgruber argues that these same provisions make clear that the Constitution does not view democracy as majoritarianism.¹²⁷ While this is clearly true, it obviously does not follow that super-majoritarian decision-making offends the super-majoritarian structure of the Constitution. Indeed, nothing in the Constitution could reasonably be said to prevent the return of slavery through recourse to its amendment procedures. What prevents the United States from becoming a Christian theocracy fueled by slave labor is the fact that the American people believe such a society to be unjust.

2. Super-Majoritarianism and Precedent

Additionally, case law regarding reproductive rights under substantive due process can only be explained satisfactorily by super-majoritarian principles. *Roe* and *Casey* both provide significantly different protection from State efforts to restrict a woman's right to choose whether to abort a fetus depending on how far along in the pregnancy she is.¹²⁸ Under *Roe*, a woman had an almost unqualified right to choose to abort a fetus until viability.¹²⁹ Under *Casey*, the qualification on this right is still relatively minor until viability.¹³⁰ At the point of viability, however, something happens that completely eviscerates the woman's right.¹³¹ The *Roe* Court contends that this something is that the fetus "then presumably has the capability of meaningful life outside

¹²⁷ See EISGRUBER, *supra* note 8.

¹²⁸ *Roe v. Wade*, 410 U.S. 113, 163–66 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 869–77 (1992).

¹²⁹ See *Roe*, 410 U.S. at 163.

¹³⁰ See *Casey*, 505 U.S. at 872–77.

¹³¹ See *Roe*, 410 U.S. at 163; *Casey*, 505 U.S. at 869–77.

the mother's womb,” giving States compelling “logical and biological justifications” for regulations barring abortions at this stage.¹³² The *Casey* decision also relies expressly on this general premise and additionally on the prospect that “it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.”¹³³

Neither rationale set forth by the Court, however, is fully satisfactory. *Roe* rests in part on fact that the Constitution does not recognize fetuses as persons, though it also recognizes a State interest in protecting their potential lives.¹³⁴ Strangely, however, *Roe* gives no effect to the State’s power to protect potential life until the point of viability.¹³⁵ At that point, the State has complete authority to disregard the rights of a person protected by the Constitution’s provisions in order to protect a non-person, protected by no constitutional provision. While this Article will be far from the first to critique *Roe*,¹³⁶ the fact remains that this reasoning seems fishy.

The Court’s decision makes much more sense, however, under the theory that the Court simply believed that by the time a fetus has become viable, the vast majority of society believes that a fetus has been bestowed with personhood and thus undoubtedly deserves protection of its own. By the point of viability, fetuses have kicked with developing legs hundreds of times and are commonly thought to have already developed personalities.¹³⁷ It seems far from unreasonable that for a supermajority of the population,

¹³² *Roe*, 410 U.S. at 163.

¹³³ *Casey*, 505 U.S. at 870.

¹³⁴ *Roe*, 410 U.S. at 157, 162.

¹³⁵ *See id.* at 163–66.

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¹³⁷

terminating a pregnancy at that stage simply offends common sensibilities. It is unlikely that the Court would be blind to this fact.

The reasoning in *Casey* lends itself even more to this theory. While parroting *Roe*'s justification for the viability standard, the *Casey* Court premised its decision upholding *Roe* on the fact that “[a]t the heart of liberty is the right to define one’s own existence, of meaning, of the universe, and of the mystery of human life.”¹³⁸ Adding the addendum “until your fetus reaches viability” to this sweeping liberty makes sense only if there is a new person to consider. If potential life in some form exists prior to viability, why should it not receive as much protection earlier? If we are to accept the Justices’ profession that they were acting out of an “obligation . . . to define liberty for all”¹³⁹ at the expense of at least some of their own moral views, the holding in the case makes most sense if the Justices had believed that the American public, for the most part, believed that a viable fetus was a person, something that the public did not widely believe prior to viability. Certainly, the Court’s unusually equivocal language in its suggestion that a woman has waived her constitutional rights by the point of viability, its only other justification, seems at the very least to be less than heartfelt. Moreover, as discussed, above, States cannot legitimately rely on characterizations of women as irresponsible to justify its regulations.¹⁴⁰

*Carey v. Population Services International*¹⁴¹ also provides precedential support for the premise that super-majoritarian principles are consistent with the Court’s substantive due process decisions with respect to reproductive rights at the other end of

¹³⁸ *Casey*, 505 U.S. at 851.

¹³⁹ *Id.*

¹⁴⁰ See *supra* text accompanying notes 101–11.

¹⁴¹ 431 U.S. 678 (1977).

the spectrum. In *Carey*, the Court held that it was unconstitutional for New York to limit access to contraceptives to those 16-years-old and above by restricting the right to sell non-prescription contraceptives to licensed pharmacists.¹⁴² Likewise, the Court garnered a majority to hold that married individuals between 14 and 16-years-old were constitutionally protected from outright prohibition of access to contraception.¹⁴³ The argument that those under 16 and unmarried could not be constitutionally denied contraception, however, could not command a majority of the Court.¹⁴⁴

These three holdings seem best reconciled with one another in light of the super-majoritarian analysis set forth above. A supermajority of the population would be quite unlikely to believe that any personally held belief regarding the morality of contraception should affect the rights of either consenting adults or married couples from choosing how they want to have sex. On the other hand, a supermajority may well believe that one under the age of 16 and unmarried has not yet reached the point at which the Constitution should first protect that right.

Tying back into the discussion of the morning-after-pill, the *Carey* Court's refusal to recognize a right of unmarried children under the age of 16 to contraception is thus analogous to finding first that a supermajority believes the Constitution should not yet recognize the existence of potential life at the point just before ovulation (a fairly safe bet.)

None of this, of course, means that the Courts in any of these cases consciously adopted and adhered to a super-majoritarian analytical framework like the one proposed in this Article, nor even that the cases would necessarily come out the same had they

¹⁴² *See id.* at 689–90.

¹⁴³ *See id.* at 708–09 (Powell, J., concurring in part and concurring in judgment).

¹⁴⁴ *See id.* at 691–700 (Brennan, J., specially concurring).

expressly done so. This discussion has simply sought to show that the general reasoning of the framework offered is at least as, if not more, plausible a defense for the holdings in these cases as any offered in the cases themselves.

iii. Super-Majoritarianism and a Functioning Society

Finally, a framework in which a presumption that any constitutional definition that infringes on personal freedoms may be rebutted on a finding that a supermajority believes the law should indeed infringe on those freedoms is ever-present, and essential in a functioning society. All of criminal law is based upon the same premise. The reason that we may put criminals in prison, that we can deprive them of numerous freedoms and liberties, is that a supermajority of our society believes that it is permissible to imprison criminals. Even though there may be great disagreement over the types of crimes deserving of such punishment and the appropriate length of prison terms, the underlying premise is accepted to a degree far beyond any of the beliefs discussed above.

The distinction between the legal effect of a belief that the state can imprison criminals and a belief about whether potential life exists at a given point of embryonic development, however, is simply a matter of the degree to which the beliefs are generally held. As such, a belief that potential life exists at some point prior to the first electrical brain activity will almost certainly be so widely held as to unblinkingly justify treating any action to prevent live birth at that point as abortion.¹⁴⁵ Whether it is permissible to treat such actions as abortion at the point of fertilization is a more difficult question purely due to the fact that it is far from clear whether a supermajority of the public believes doing so is permissible.

iv. Derivation and Discretion

¹⁴⁵ Indeed, this would likely be the case even at the point of implantation.

As one would imagine, courts are not in any position to take a head-count of Americans in their attempts to elicit the people's First and Second-Order beliefs and reconcile the two. Likewise, empirical data regarding Americans' beliefs and practices surrounding the moral question itself may be infected by a general lack of knowledge regarding the biology involved.

For example, the birth control pill is the most widely used birth control method in America.¹⁴⁶ Of all women who use contraceptives, over one third use the Birth Control Pill¹⁴⁷ or some other form of hormonal contraceptive methods such as the Patch or an intrauterine device.¹⁴⁸ The public nearly universally views these birth control methods as contraceptives. As it turns out, these methods all operate essentially identically to the morning-after-pill.¹⁴⁹ A court may thus be initially inclined to take this as a solid indication that Americans believe that drugs which function in this way should be treated as contraception. Anything more than a cursory investigation, however, will lead the court to discover that if a young woman does not understand medical terminology such as implantation, there is little opportunity to learn that hormonal measures to prevent pregnancy may operate after an egg has been fertilized. Not surprisingly, nothing on either packaging for the drugs or informational websites account for the possibility that a

¹⁴⁶ Allen Guttmacher Institute, *Get in the Know: Prevention and Contraception*, available at <http://www.guttmacher.org/in-the-know/prevention.html>.

¹⁴⁷ The Birth Control Pill is a daily hormonal supplement taken by women. The Pill is marketed as a contraceptive.

¹⁴⁸ Guttmacher Insitute, *Get in the Know*, *supra* note 140.

¹⁴⁹ Primarily, the Pill and the Patch work to prevent ovulation, but they are not 100 percent effective in doing so. The fail-safes include both preventing the risk of fertilization and preventing implantation, same as the morning-after-pill.

woman may consider terminating embryonic development once fertilization has occurred an abortion.¹⁵⁰

This goes simply to say that Constitutional judges will, therefore, have to exercise their own moral reasoning to a certain degree in attempting to determine whether a supermajority of the American people share a moral and political belief. A full discussion of what evidence they should consider along the way and the relative weight it should bare must be left for another time. As indicated above, however, as long as these judges remain true to their call as representatives of the American people, there is nothing to fear in their exercise of discretion.

CONCLUSION

Challenges to State efforts to restrict women's access to the morning-after-pill have the potential to present the courts with a question they hoped never to have to answer and one that many see as unfit for judicial determination. Nevertheless, when the question is properly viewed as one of federal constitutional interpretation, it becomes clear not only that constitutional courts are not only the most appropriate body of government to answer it, but also that they are quite capable of doing so in a manner consistent with the best understanding of the judicial role. Through adopting a presumption against a definition that infringes on individual liberty, rebuttable on a finding of multiple super-majoritarian beliefs, judges effectively fill their roles as defenders of the rights of all the people. As such, States attempting to get constitutional judges to give constitutional effect to their beliefs that potential life exists at the point of conception have an incredibly high, though not necessarily insurmountable, burden. This is as the American people would want it.

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