

FROM MY COLD DEAD HANDS:<sup>1</sup> *WILLIAMS V. PRYOR* AND  
THE CONSTITUTIONALITY OF ALABAMA'S  
ANTI-VIBRATOR LAW

In 1998, the Alabama Legislature amended state laws in order to address a presumably pressing concern. Alabama legislators, worried about the proliferation of vibrators and other marital aids, accordingly amended Alabama's obscenity laws to criminalize the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value."<sup>2</sup> In the case of *Williams v. Pryor*,<sup>3</sup> vendors and users of vibrators and other marital aids sued in federal court pursuant to 42 U.S.C. § 1983, challenging the constitutionality of the statute.<sup>4</sup> The Northern District of Alabama held that the statute was unconstitutional under the lenient rational basis standard, rejecting plaintiffs' assertions that vibrators are a fundamental right, and thus subject to strict scrutiny.<sup>5</sup> In a January 2001 opinion, the Eleventh Circuit reversed the lower court on grounds that the statute survives rational basis review, but remanded for reconsideration by the district court of the as-applied challenges, which implicate "important" interests in sexual privacy.<sup>6</sup>

This Comment analyzes the case of *Williams v. Pryor* and addresses the constitutionality of Alabama's anti-vibrator statute. Part I will discuss the *Williams v. Pryor* opinions to date. Part II examines the status of the law in other states. Part III examines whether the privacy right under the contraception and abortion cases should extend to cover the

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1. The phrase "from my cold dead hands" is generally associated with gun rights supporters and was recently quoted by Charlton Heston in his capacity as a spokesman for the National Rifle Association. See, e.g., Charlton Heston, Address at the National Rifle Association Annual Meeting (May 20, 2000), available at <http://164.109.174.105/transcripts/hestonam.asp> (last visited Feb. 23, 2002).

2. ALA. CODE § 13A-12-200.2 (2000). First time violators are subject to a fine of up to \$10,000 and "may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year." *Id.*

3. 41 F. Supp. 2d 1257 (N.D. Ala. 1999).

4. *Pryor*, 41 F. Supp. 2d at 1260.

5. *Id.* at 1293.

6. *Williams v. Pryor*, 240 F.3d 944, 949, 955-56 (11th Cir. 2001) (withdrawing and substituting an October 12, 2000 opinion).

use and distribution of vibrators as a fundamental right. Part IV examines whether the statute should be rejected even under the rational basis standard. Part V examines whether the statute should be declared unconstitutional on equal protection grounds.

## I. *WILLIAMS V. PRYOR*

### A. *The District Court's Opinion*

There were two groups of plaintiffs in this case: vendors of sexual devices (vendor plaintiffs) and users of such devices (user plaintiffs).<sup>7</sup> One of the vendor plaintiffs was Sherri Williams, a principal shareholder of Pleasures, an Alabama corporation with two retail sexual novelty stores in North Alabama.<sup>8</sup> Parties stipulated at trial as to the customer use of Pleasures' products:

Many use these products to avoid the possibility of sexually transmitted diseases; while others use the products to better stimulate intimate relationships with partners; there are those who use the products to achieve sexual satisfaction not otherwise available to them; and some use these products for temporary or long-term sexual satisfaction when a partner is not otherwise available. Many of "Pleasures'" customers have even been referred to the store by therapists treating them for sexual dysfunction or marital problems.<sup>9</sup>

The other vendor plaintiff was B.J. Bailey, owner of Saucy Lady, Inc., an Alabama corporation that sells sexual devices and novelties to women through "Tupperware-style" parties.<sup>10</sup> The majority of Ms. Bailey's customers are either anorgasmic or have difficulty achieving orgasm through sexual intercourse.<sup>11</sup> The products have helped her customers become orgasmic and have improved their marital and sexual relations.<sup>12</sup> The user plaintiffs, consisting of four women, each contended that she "uses sexual devices either, or for therapeutic purposes related to sexual dysfunction, or as an alternative to sexual intercourse."<sup>13</sup> Two of the user plaintiffs were married and used vibrators as part of their marital relations, and the other two women were single and

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7. *Williams*, 41 F. Supp. 2d at 1260.

8. *Id.*

9. *Id.* at 1262-63.

10. *Id.* at 1260.

11. *Id.* at 1263.

12. *Williams*, 41 F. Supp. 2d at 1263-64.

13. *Id.* at 1260.

used vibrators to reach orgasm.<sup>14</sup>

In *Williams*, the plaintiff vibrator vendors and users argued that the anti-vibrator statute infringed upon their fundamental right to privacy guaranteed by the United States Constitution.<sup>15</sup> Alternatively, the plaintiffs argued that the statute does not pass rational basis scrutiny.<sup>16</sup>

The anti-vibrator statute is currently not being enforced due to an agreement between the parties,<sup>17</sup> but enforcement would make it a crime to sell or distribute “any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.”<sup>18</sup> In order to obtain marital aids under the vibrator ban, users will have to purchase them in another state and bring them across state lines.<sup>19</sup> Alabama laws do not prosecute masturbation or other stimulation of the genitals, even when performed with a sexual aid.<sup>20</sup> Rather, it is the sale, not the use, of such devices that is proscribed.<sup>21</sup>

The plaintiffs claimed enforcement of the anti-vibrator statute would “impose an undue burden on their ‘fundamental rights of privacy and personal autonomy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution.’”<sup>22</sup> Plaintiffs asserted that “their right of privacy and personal autonomy constitutes a ‘liberty interest’ protected by the Due Process Clause of the Fourteenth Amendment.”<sup>23</sup> The district court framed the issue as whether the constitutionally protected “right to privacy” protects an individual’s liberty to use the proscribed sexual devices when engaging in private, lawful sexual activity.<sup>24</sup> The threshold issue was whether the statute burdened a fundamental right, because if it did, the statute would be subject to strict judicial scrutiny.<sup>25</sup>

The district court determined that the Fourteenth Amendment did not cover the plaintiffs’ requested extension of the privacy right that the Supreme Court has recognized as fundamental.<sup>26</sup> In reaching this conclusion, the court first focused on the use of the proscribed devices, rather than their distribution, because “if the *use* of such devices is a fundamental liberty interest as plaintiffs contend, then the legislature’s

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14. *Id.* at 1264-65.

15. *Id.* at 1260.

16. *Id.*

17. *Williams*, 41 F. Supp. 2d at 1260.

18. ALA. CODE § 13A-12-200.2 (2000).

19. *Williams*, 41 F. Supp. 2d at 1265.

20. *Id.*

21. *Id.* It is also noteworthy that Alabama laws do not outlaw sale of ribbed or tickler condoms and virility drugs, such as Viagra. *Id.*

22. *Id.* at 1274 (quoting the Plaintiffs’ corrected memorandum).

23. *Williams*, 41 F. Supp. 2d at 1274.

24. *Id.* at 1275.

25. *See id.* at 1274.

26. *Id.* at 1281-83.

ban on *distribution* compels strict judicial scrutiny."<sup>27</sup> The court based this assertion on two Supreme Court cases which it said "elucidate[s] the fact that any significance of the distinction between prohibitions of commercial use versus private use depends on the protection the Constitution affords the target material or conduct."<sup>28</sup> The district court said, however, that the United States Supreme Court has not yet decided whether lawful private sexual conduct is a fundamental right.<sup>29</sup> And, the district court was reluctant to make the extension required in order to cover sexual devices due to the Supreme Court's narrow readings of the cases that recognize liberty interests as fundamental.<sup>30</sup>

The district court then surprisingly held that the statute failed rational basis review.<sup>31</sup> Alabama's purported interests in passing the anti-vibrator statute were "to protect children from exposure to obscenity, prevent assaults on the sensibilities of unwilling adults by the purveyor[s] of obscene material, and suppress the proliferation of 'adult-only video stores,' 'adult bookstores,' 'adult movie houses,' and 'adult-only entertainment.'"<sup>32</sup> The *Williams* court additionally found that, after considering the pleadings, motions, briefs, oral arguments, etc., the state's interest could also have been:

- (1) the belief that 'the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships is an evil, an obscenity . . . detrimental to the health and morality of the state;' or (2) the desire to ban commerce in all 'obscene' material.<sup>33</sup>

The court then found that the state's interests were legitimate, but

27. *Id.* at 1281 (emphasis added).

28. *Williams*, 41 F. Supp. 2d at 1281 n.30. The two cases are *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding access to birth control is essential to exercise of constitutionally protected right of decision in matters of childrearing). The *Paris Adult Theatre I* Court stated that:

If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle."

*Paris Adult Theater I*, 413 U.S. at 66.

29. *Williams*, 41 F. Supp. 2d at 1281. The *Williams* court cited *Carey v. Population Services International*, where the United States Supreme Court said it "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating private consensual sexual behavior among adults, . . . and we do not purport to answer that question now." *Id.* (quoting 431 U.S. 678, 688 n.5 (1977)). *But see Carey*, 431 U.S. at 718 n.2 (Rehnquist, J., dissenting) ("While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established.")

30. *See Williams*, 41 F. Supp. 2d at 1284.

31. *Id.* at 1293.

32. 1998 Ala. Acts 98-467.

33. *Williams*, 41 F. Supp. 2d at 1286 (quoting the Brief of the Alabama Attorney General).

that the statute was not rationally related to the legitimate state interests.<sup>34</sup> Specifically, the court said that countless measures short of an absolute ban on the distribution of the proscribed devices would accomplish the state's goals in banning public displays of obscene materials, because the "Tupperware style" parties are not public in any fashion, and the Pleasures store's public displays could be modified to accommodate the state's objective.<sup>35</sup> The court cited *Romer v. Evans*,<sup>36</sup> where the United States Supreme Court said an amendment to a state constitution failed rational basis review under the Equal Protection Clause because the breadth of the Amendment was too far removed from the state's purported justifications.<sup>37</sup>

The district court also said that the statute was not rationally related to Alabama's interest in banning "the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships," because "such a ban inevitably interferes with sexual stimulation and auto-eroticism which is related to marriage, procreation, and familial relationships."<sup>38</sup> The court said that proscription of the sexual devices "inherently interferes with both the conduct the State sought to interfere with or discourage ('sexual stimulation and auto-eroticism, for its own sake'), and that which it did not ('sexual stimulation and auto-eroticism . . . unrelated to marriage, procreation or familial relationships')."<sup>39</sup> The court found it significant that the FDA recognizes sexual devices as useful for the treatment of sexual dysfunction,<sup>40</sup> and that other courts and legislatures have recognized the therapeutic value of sexual devices.<sup>41</sup>

### B. *The Eleventh Circuit's Opinion*

The Eleventh Circuit responded in *Williams v. Pryor*<sup>42</sup> by reversing the district court because the statute passed rational basis review and

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34. *Id.* at 1286-88.

35. *Id.* at 1288.

36. 517 U.S. 620 (1996). The district court in *Williams* also cited *Turner v. Safley*, 482 U.S. 78, 91 (1987). The court in *Turner* found that one of the asserted penological interests of the state "[did] not satisfy the reasonable relationship standard, but rather constitute[d] an exaggerated response to [its] . . . concerns". *Turner*, 482 U.S. at 91. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (holding a zoning ordinance unconstitutional where the Court found no "rational basis for believing that the [home subject to the ordinance] would pose any special threat to the city's legitimate interests").

37. *Romer*, 517 U.S. at 635.

38. *Williams*, 41 F. Supp. 2d at 1288-89.

39. *Id.* at 1289 n.40 (emphasis omitted).

40. See 21 C.F.R. §§ 884.5490, .5960 (1984).

41. See *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 370 (Colo. 1985); *State v. Hughes*, 792 P.2d 1023, 1031-32 (Kan. 1990).

42. 240 F.3d 944 (11th Cir. 2001).

remanded for reconsideration of the plaintiff's privacy issues.<sup>43</sup> First, the court discussed the highly deferential rational basis standard, quoting *FCC v. Beach Communications*,<sup>44</sup> where the United States Supreme Court said that, under rational basis scrutiny, "[a] statute is constitutional . . . so long as 'there is any reasonably conceivable state of facts, that could provide a rational basis' for the statute."<sup>45</sup> The court said the statute rationally serves the State of Alabama's legitimate interest in public morality.<sup>46</sup> "The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny."<sup>47</sup> The court found the criminal proscription of the sexual devices a rational means for abolishing commerce in the devices, which is a rational means for making, obtaining and using the devices more difficult.<sup>48</sup> Thus, the court found that the statute was constitutional because it was rationally related to at least one legitimate state interest.<sup>49</sup>

The Eleventh Circuit also said the district court's reliance on *Romer v. Evans*,<sup>50</sup> *Turner v. Safley*,<sup>51</sup> and *City of Cleburne v. Cleburne Living Center*<sup>52</sup> was misplaced when it concluded that the statute was not rationally related to the state's interest.<sup>53</sup> The court found each of those cases fatally distinguishable from the facts of *Williams*.<sup>54</sup> According to the Eleventh Circuit, *Turner* applies only to prisoners, and not to "the constitutional protection accorded by ordinary rational basis scrutiny to citizens in free society."<sup>55</sup> *Romer* does not apply because *Romer* only applies where there is no legitimate state interest in passing the statute, which is not the case at bar.<sup>56</sup> And finally, *City of Cleburne* only applies to Equal Protection challenges, which *Williams* did not assert.<sup>57</sup> Therefore, the court relied on the more usual deferential standard to hold that the statute passes rational basis review.

The Eleventh Circuit then, however, remanded the case back to the

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43. *Williams*, 240 F.3d at 956.

44. 508 U.S. 307 (1993).

45. *Williams*, 240 F.3d at 948 (quoting *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993)) (emphasis omitted).

46. *Id.* at 949.

47. *Id.* (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991)).

48. *Id.* at 949-50.

49. *Id.* at 950.

50. 517 U.S. 620 (1996).

51. 482 U.S. 78 (1987).

52. 473 U.S. 432 (1985).

53. *Williams*, 240 F.3d at 950.

54. *Id.* at 950-52.

55. *Id.* at 950.

56. *Id.* at 951.

57. *Id.*

district court on the fundamental right issue.<sup>58</sup> The court agreed with the district court that the statute was facially constitutional, because the statute has possible constitutional applications.<sup>59</sup> But, the court then remanded for reconsideration of the “as-applied fundamental rights challenges raised by the plaintiffs.”<sup>60</sup> The court said the statute, as applied to the four individual user plaintiffs, implicates “important interests in sexual privacy.”<sup>61</sup>

The jury is still out, therefore, as to the fate of Alabama’s anti-vibrator law. Does the Eleventh Circuit’s remand hint at a possible victory for vibrator rights advocates under the as-applied challenge? We will have to wait and see. Part II examines the state of the law in other states, however, in an effort to predict the future.

## II. STATE OF THE LAW: OTHER STATES

Seven states other than Alabama have enacted laws banning the sale, distribution, or promotion of sexual devices: Colorado, Georgia, Kansas, Louisiana, Mississippi, Texas, and Virginia.<sup>62</sup> The state Supreme Courts in Colorado,<sup>63</sup> Kansas,<sup>64</sup> and Louisiana<sup>65</sup> have rejected the anti-vibrator statutes as unconstitutional. Courts in Texas and Georgia have upheld the anti-vibrator statutes.<sup>66</sup>

In *People v. Seven Thirty-Five East Colfax, Inc.*,<sup>67</sup> the Colorado Supreme Court struck down an obscenity statute similar to the Alabama statute.<sup>68</sup> The Colorado court found that the privacy right protected by

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58. *Williams*, 240 F.3d at 955.

59. *Id.* The court said that for a facial challenge to be successful, opponents to a statute “must establish that no set of circumstances exists under which the Act would be valid.” *Id.* at 953 (quoting *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999)). Because application of the statute to those who would sell such devices to minors would not violate any fundamental right, the statute is facially constitutional. *Williams*, 240 F.3d at 954-55.

60. *Id.* at 955.

61. *Williams*, 240 F.3d at 955. Among other cases, the *Williams* court cited two noteworthy Supreme Court cases. *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Griswold* as holding that the “Constitution protects a fundamental right to marital privacy”)).

62. See COLO. REV. STAT. ANN. §§ 18-7-101-102 (1999); GA. CODE ANN. § 16-12-80 (1999); KAN. ST. ANN. § 21-4301 (1994); LA. REV. STAT. ANN. § 14:1206.1 (2002); MISS. CODE ANN. § 97-29-105 (rev. 2000); TEX. PENAL CODE ANN. §§ 43.21, 43.23 (1994); VA. CODE ANN. § 18.2-373 (2000). See also *Williams*, 41 F. Supp. 2d at 1279 (discussing the seven states).

63. See *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).

64. See *State v. Hughes*, 792 P.2d 1023 (Kan. 1990).

65. See *State v. Brennan*, 772 So. 2d 64 (La. 2000).

66. See *Regalado v. State*, 872 S.W.2d 7 (Tex. App. 1994); *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985); *Sewell v. State*, 233 S.E.2d 187 (Ga. 1977).

67. 697 P.2d 348 (Colo. 1985).

68. *Colfax*, 697 P.2d at 370. The Colorado statute proscribed promoting or possessing any

*Roe v. Wade*,<sup>69</sup> *Paris Adult Theatre I v. Slaton*,<sup>70</sup> and *Stanley v. Georgia*,<sup>71</sup> among others, extends to protect the "right of privacy of those seeking to make legitimate medical or therapeutic use of [the proscribed] devices."<sup>72</sup> The Colorado statute differed from Alabama's in that it labeled all proscribed devices as "obscene," and the court left open the question whether sexual devices could be constitutionally defined and regulated.<sup>73</sup> However, the court said that any such legislation "must be compatible with the right of a person to engage in sexual activities to the extent that right is encompassed within the constitutional right of privacy."<sup>74</sup> The court ultimately held that the state's interest in prohibiting the sexual devices was not "sufficiently compelling to justify the infringement on the privacy right of those seeking to use them in legitimate ways."<sup>75</sup> Thus the court subjected the statute to strict scrutiny, and found that the statute failed because the state's interests were not compelling enough.

In *State v. Hughes*,<sup>76</sup> the Kansas Supreme Court rejected a state statute<sup>77</sup> as unduly burdensome to the fundamental right to privacy. Relying on the Colorado *Colfax* opinion,<sup>78</sup> the court held the statute was unconstitutional because it "impinges without justification on the sphere of constitutionally protected privacy which encompasses therapy for medical and psychological disorders."<sup>79</sup> The Kansas statute, like the Colorado statute, labeled the sexual devices obscene per se, and the Kansas court said the legislature "may not declare a device obscene merely because it relates to human sexual activity."<sup>80</sup> The court found it disturbing that the statute would prevent doctors and psychologists from providing the proscribed devices to patients for therapy purposes, and

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"obscene device," defined as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs." COLO. REV. STAT. ANN. § 18-7-101(3) (1999).

69. 410 U.S. 133, 152 (1973).

70. 413 U.S. 49, 65 (1973) (protecting the privacy right of "the personal intimacies of the home").

71. 394 U.S. 557, 564 (1969) (calling "fundamental" the "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy").

72. *Colfax*, 697 P.2d at 370. The Colorado Supreme Court, as well as the Northern District of Alabama in *Williams*, found significant that the FDA recognizes "powered vaginal muscle stimulators and genital vibrators" for therapeutic use. *See id.*; *see also Williams v. Pryor*, 44 F. Supp. 2d 1257, 1266 (N.D. Ala. 1999).

73. *Colfax*, 697 P.2d at 370.

74. *Id.*

75. *Id.* at 370.

76. 792 P.2d 1023, 1031 (Kan. 1990).

77. KAN. STAT. ANN. § 21-4301 (2000). The provision at issue proscribed the sale, distribution, etc. of "obscene" devices, defined as "a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs." *Id.*

78. *Colfax*, 697 P.2d at 348.

79. *Hughes*, 792 P.2d at 1031.

80. *Id.*

said that the statute therefore "impermissibly infringes on the constitutional right to privacy in one's home and in one's doctor's or therapist's office."<sup>81</sup> The Kansas court carefully limited its holding to the sale, distribution, and use of the sexual devices for "medical and psychological therapy."<sup>82</sup>

In *State v. Brennan*,<sup>83</sup> the Louisiana State Supreme Court declared unconstitutional a state obscenity statute aimed at the sale of vibrators and other similar devices.<sup>84</sup> Brennan was arrested for selling vibrators and sentenced to five years probation and fined \$3,000.<sup>85</sup> Like the district court in *Williams*, the Louisiana high court rejected the defendant's assertion that the proscription infringed on a fundamental right, but the court found that the statute failed rational basis review.<sup>86</sup> The court accepted the state's interests as a legitimate attempt to promote morals and public order.<sup>87</sup> However, given the well-documented therapeutic uses of vibrators and other proscribed sexual devices, the court said that banning all such devices without any review of their prurience or medical use is not rationally related to state's interest in waging "war on obscenity."<sup>88</sup>

Appeals courts in Texas, in upholding similar obscenity statutes, have rejected the *Colfax* and *Hughes* holdings.<sup>89</sup> In *Regalado v. State*<sup>90</sup> an appeals court said that the Supreme Court has never recognized a fundamental right to sexual privacy, and thus the right to privacy does not extend to the use or distribution of "obscene" devices.<sup>91</sup> A criminal appeals court reached the same holding in *Yorko v. State*,<sup>92</sup> but a strong dissent recognized the fundamental right:

An unwritten but necessary premise in both abortion and contraception cases is that the constitutional personal right of pri-

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81. *Id.* at 1032.

82. *Id.*

83. 772 So. 2d 64 (2000).

84. *Brenan*, 772 So. 2d at 76. The statute proscribed "obscene devices," defined as a "device, including an artificial penis or artificial vagina, which is designed or marketed as useful primarily for the stimulation of human genital organs." LA. REV. STAT. ANN. § 14.106.1 (2000).

85. *Brenan*, 772 So. 2d at 66.

86. *Id.* at 72, 76. In fact, the *Brenan* court cited the *Williams* district court decision several times. *See id.* at 66, 72, 75.

87. *Id.* at 73.

88. *Id.* at 76.

89. *See, e.g., Regalado v. State*, 872 S.W.2d 7 (Tex. App. 1994); *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985).

90. 872 S.W.2d 7 (Tex. App. 1994).

91. *Regalado*, 872 S.W.2d at 9. The statute at issue defined "obscene device" as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs." TEX. PENAL CODE ANN. § 43.21(a)(7) (1994).

92. 690 S.W.2d 260, 265 (Tex. Crim. App. 1985).

vacy in such matters of personal liberty encompasses the threshold decision of whether to engage in sexual activity at all. When the first decision is to indulge in one of "the most intimate of human activities and relationships,"<sup>93</sup> naturally involving "the stimulation of human genital organs," whether to use contraceptives in order to prevent conception or, as the majority phrases it, "to implement the decision not to beget a child" is a secondary decision. That the Constitution provides the freedom to make the second decision necessarily means that the right to make the first one is protected. "If the right of privacy means anything, it is the right of the individual, *married or single*, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>94</sup> If such decisions are "among the most private and sensitive," the right of the individual . . . to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to engage in private consensual sexual activity in the first instances must be practically invulnerable. The majority need not look for Supreme Court decisions to find "any fundamental right to use . . . devices" that are said to be obscene. It is sufficient that there is a constitutional right to personal privacy broad enough to encompass a person's decision to engage in private consensual sexual activity in any manner or means not proscribed by law.<sup>95</sup>

In *Red Bluff Drive-In, Inc. v. Vance*,<sup>96</sup> the Fifth Circuit Court of Appeals also upheld the Texas obscenity statute, finding it acceptable because it was patterned on a Georgia obscenity statute.<sup>97</sup> In *Sewell v. State*,<sup>98</sup> a man was charged with violating Georgia's obscenity statute for selling an artificial vagina to an undercover police officer.<sup>99</sup> The man challenged his conviction, but the Georgia Supreme Court rejected his vagueness and overbreadth arguments and found no constitutional problem with the Georgia Legislature's prohibition on the sale of such devices.<sup>100</sup> The United States Supreme Court dismissed Sewell's appeal for want of a substantial federal question.<sup>101</sup> The Fifth Circuit said that, because the Georgia statute was constitutional, the identical Texas stat-

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93. *Carey v. Population Servs. Int'l*, 431 U.S. 684, 685 (1977)

94. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1974).

95. *Yorko*, 690 S.W.2d at 268 (Clinton, J., dissenting).

96. 648 F.2d 1020 (5th Cir. 1981).

97. *Red Bluff*, 648 F.2d at 1027. The Georgia statute was GA. CODE ANN. § 26-2101(c) (1999).

98. 233 S.E.2d 187 (Ga. 1977).

99. *Sewell*, 233 S.E.2d at 188.

100. *Id.*

101. *Id.*

ute must be also.<sup>102</sup> The Fifth Circuit did say that the Texas statute might be overbroad, because there are no exceptions for marital, medical, or other legitimate uses of the devices,<sup>103</sup> but the court abstained from answering the question on federalism concerns.<sup>104</sup>

The states are thus divided on the question of the constitutionality of anti-vibrator statutes, with Kansas, Colorado, and Louisiana rejecting such statutes, and Georgia and Texas upholding them. It is clear that where courts subject these statutes to strict scrutiny, they are likely to fall. Therefore, if a party can successfully argue a fundamental right to a vibrator, she is more likely to keep hers.

### III. FUNDAMENTAL RIGHT TO A VIBRATOR?

The Due Process Clause of the Fourteenth Amendment protects individual liberty against overly restrictive governmental interference.<sup>105</sup> The standard of scrutiny a legislative act faces when challenged on due process claims depends upon whether the statute burdens a fundamental right.<sup>106</sup> If legislation interferes with the exercise of a fundamental right, then that legislation is subject to strict judicial scrutiny.<sup>107</sup> Under strict scrutiny analysis, the court asks whether the challenged governmental action is justified by a compelling state interest, and whether the statute at issue is narrowly tailored to achieve that compelling state interest through the least restrictive means possible.<sup>108</sup>

The Supreme Court has recognized as fundamental the rights "to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion."<sup>109</sup> The Court has never addressed the issue here—whether the right to privacy covers access to sexual devices—but the plaintiffs in *Williams v. Taylor* argued that "the right of privacy is broad enough to encompass matters of sexual intimacy."<sup>110</sup> The district court summarized the plaintiff's argument as follows:

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

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102. *Red Bluff*, 648 F.2d at 1028.

103. *Id.* at 1030.

104. *Id.* at 1036. As late as 2000, the Texas statute was still being enforced. *See Webber v. State*, 21 S.W.3d 726 (Tex. App. 2000).

105. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

106. *Glucksberg*, 521 U.S. at 721.

107. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973).

108. *Roe*, 410 U.S. at 155.

109. *Glucksberg*, 521 U.S. at 720 (citations omitted).

110. *Williams v. Pryor*, 41 F. Supp. 2d 1257, 1277 (N.D. Ala.1999).

tivity in the first instance. Or, as plaintiffs phrase it: "That the Constitution provides the freedom to make the second decision necessarily means that the right to make the first one is protected." Indeed, one could factually assert that the "decision whether to bear or beget a child," *Eisenstadt* [v. Baird], necessarily presupposes the right of two consenting, heterosexual partners to engage in the act of sexual intercourse.<sup>111</sup>

The *Williams* plaintiffs thus apparently contend that (1) the contraceptive/abortion cases support a fundamental Constitutional right to private sexual activity, and (2) this constitutionally protected private sexual activity includes a right to have local access to vibrators. Courts must accept both arguments in order to find that the right to a vibrator is a fundamental right, and both arguments have some obstacles.

First, there is some question as to whether the contraceptive/abortion cases actually do stand for a Constitutional right to private sexual activity. According to Richard Posner, "[i]n a series of decisions between 1965 and 1977, the Supreme Court created a constitutional right of sexual or reproductive autonomy, which it called privacy."<sup>112</sup> The so-called "sexual freedom cases" are *Griswold v. Connecticut*,<sup>113</sup> in which the Supreme Court invalidated a state law prohibiting the use and distribution of contraceptives; *Eisenstadt v. Baird*,<sup>114</sup> which extended the *Griswold* holding to unmarried women; *Carey v. Population Services International*,<sup>115</sup> which invalidated a state law ban on anyone other than licensed pharmacists from distributing even non-medical contraceptives to persons under the age of sixteen; and *Roe v. Wade*,<sup>116</sup> which recognized a constitutional right of women to choose to have an abortion.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>117</sup> the Court upheld *Roe*'s right to choose abortion, offering an explanation of the right's constitutional foundation:<sup>118</sup> "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."<sup>119</sup> "[T]he Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood," and more broadly, the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships,

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111. *Williams*, 41 F. Supp. 2d at 1277 (internal citations omitted).

112. RICHARD A. POSNER, *SEX AND REASON* 324 (1992).

113. 381 U.S. 479 (1965).

114. 405 U.S. 438 (1972).

115. 431 U.S. 678 (1977).

116. 410 U.S. 113 (1973).

117. 505 U.S. 833 (1992).

118. *Casey*, 505 U.S. at 846.

119. *Id.* at 847.

child rearing, and education.”<sup>120</sup> The Court reasoned that choices about abortion share “critical” features with the choices constitutionally protected by the decisions in *Griswold*, *Eisenstadt*, and *Carey*.<sup>121</sup> These cases all “involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.”<sup>122</sup> While “reasonable people will have differences of opinion about these matters[,]” such beliefs “are intimate views with infinite variations, and their deep, personal character underlay [the Court’s] decisions in *Griswold*, *Eisenstadt*, and *Carey*.”<sup>123</sup> According to *Casey*, “[i]t was this dimension of personal liberty that *Roe* sought to protect.”<sup>124</sup> *Casey* went on to say that:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize “the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Our precedents “have respected the private realm of family life which the state cannot enter.” These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>125</sup>

Many constitutional scholars believe that the Supreme Court’s decisions in the contraception and abortion cases are predicated upon a right to engage in sexual activities for purposes other than reproduction.<sup>126</sup> According to this “right to sex” view, these decisions “establish a constitutional right to sexual autonomy.”<sup>127</sup> According to one proponent of a constitutional right to sex, “[t]he principle that holds these cases together is that privacy affords one the right to guide one’s sex life by

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120. *Id.* at 849, 851.

121. *Id.* at 853.

122. *Id.*

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

124. *Id.*

125. *Id.* at 851 (citations omitted).

126. See David B. Cruz, “The Sexual Freedom Cases”? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 316 (2000).

127. *Id.* at 317-18.

one's own lights."<sup>128</sup>

There is much debate, however, whether the contraception/abortion cases actually do support an individual's right to sex. The Supreme Court in *Washington v. Glucksberg*<sup>129</sup> said that the quoted passage from *Casey* simply "described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment."<sup>130</sup> *Glucksberg* held that not all "important, intimate, and personal decisions" are specially protected under the Due Process Clause.<sup>131</sup> Additionally, the right to sex view seems to be at odds with the Court's decision in *Bowers v. Hardwick*<sup>132</sup> that there is no fundamental right to homosexual sodomy.

However, some scholars argue that the "sexual freedom" cases reflect a constitutional right to sex because if "the choice to engage in non-procreative sexual activity were not constitutionally protected, . . . then laws burdening that choice would not be subjected to any special constitutional protection and should be judicially upheld if they survive rational basis review."<sup>133</sup> According to Lawrence Tribe and others, anti-contraceptive laws may be obeyed with minimal risk of pregnancy by abstinence from peno-vaginal intercourse; thus such laws do not really deprive people of procreative control.<sup>134</sup> Under this so-called "abstinence argument" for a Constitutional "right to sex," if a state has a legitimate interest in deterring people from engaging in sex, anti-contraceptive laws should be upheld because individual inconveniences from denial of peno-vaginal physical intimacy would not be constitutionally significant.<sup>135</sup> Therefore, because the anti-contraceptive laws were struck down, the Constitution must be protecting a right to sex.<sup>136</sup> This reasoning led one scholar to conclude that "the only true principle behind *Griswold* and *Eisenstadt* [is] the principle that married and single people have a constitutionally protected right to engage in affection-

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128. Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 80 (1986).

129. 521 U.S. 702 (1997) (holding that the Constitution does not protect a fundamental right to physician-assisted suicide).

130. *Id.* at 727.

131. *Id.*

132. 478 U.S. 186 (1986).

133. Cruz, *supra* note 126, at 323.

134. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21, at 1423 (2d ed. 1988) ("[T]he right to control the size of one's family can be vindicated, without any resort to contraceptives, by simply refraining from sexual intercourse—'just saying 'No.'" No law of any of the states involved in [the sexual freedom cases] prohibited celibacy or abstinence as methods of avoiding childbirth.").

135. Cruz, *supra* note 126, at 324.

136. *Id.*

ate non-reproductive sex."<sup>137</sup>

The "abstinence gap argument" may seem to be inconsistent with *Bowers v. Hardwick*, but for several considerations. First, its proponents generally proffer that *Hardwick* was wrongly decided, so that inconsistency with *Hardwick* "might be seen as a count against *Hardwick* rather than against the 'right to sex' interpretation."<sup>138</sup> And second, the *Hardwick* Court framed the issue narrowly as whether there was a constitutional right to engage in particular sex activities, not whether there was a constitutional right to sex.<sup>139</sup> Finally, the Court's 1996 decision in *Romer v. Evans*<sup>140</sup> may indicate that *Hardwick* is on its way to being overturned. *Romer* held that an amendment to Colorado's state constitution precluding any level of government from adopting policies against sexual orientation discrimination was an unconstitutional violation of the Equal Protection Clause.<sup>141</sup> Some scholars have concluded that *Romer* is inconsistent with *Hardwick*, "and as a result not much is left of *Hardwick*."<sup>142</sup>

Therefore, under a "right to sex" view, the contraception and abortion cases support a fundamental constitutional right to sex. Even assuming this view is correct, however, that does not assure that there is a fundamental right to a vibrator. The district court in *Williams* said that, to resolve the fundamental right issues, the "court must focus on the use of the proscribed devices, rather than their *distribution* because, if the use of such devices is a fundamental liberty interest . . . then the legislature's ban on distribution compels strict judicial scrutiny."<sup>143</sup> Therefore even though the Alabama statute proscribes the distribution, not the use, of vibrators, if the use is a fundamental right, then the distribution would be also.

In *Glucksberg*, the most recent Supreme Court case in which an argument for recognition of a new fundamental right was presented, the Supreme Court said that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that 'neither liberty nor justice would

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137. Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 *FORDHAM L. REV.* 1313, 1325 (1997).

138. Cruz, *supra* note 126, at 326.

139. *Bowers v. Hardwick*, 478 U.S. 186 (1986). "The Constitution might include a more broadly formulated right while not including a more narrowly formulated one if the abstract specification names a constitutionally protected value while the more concrete specification does not." Cruz, *supra* note 126, at 326.

140. 517 U.S. 620 (1996).

141. *Romer*, 517 U.S. at 623.

142. Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 *U. COLO. L. REV.* 373, 374 (1997). Similarly, some judges have predicted that "[o]f course, *Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*." Nabozny v. Podlesny, 92 F.3d 446, 458 n.12 (7th Cir. 1996).

143. *Williams v. Pryor*, 41 F. Supp. 2d 1257, 1280 (N.D. Ala. 1999).

exist if [the right] were sacrificed.’”<sup>144</sup> Applying these criteria, the district court in *Williams* refused to find a fundamental right to a vibrator.<sup>145</sup> The Eleventh Circuit remanded the case back to the district court stating as follows:

The court analyzed neither whether our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons nor whether contemporary practice bolsters or undermines any such history. The record is bare of evidence on these important questions. Absent the kind of careful consideration the Supreme Court performed in *Glucksberg*, we are unwilling to decide the as-applied fundamental rights analysis and accordingly remand those claims to the district court.<sup>146</sup>

The Eleventh Circuit thus remanded the case for a *Glucksberg*-type fundamental rights analysis.

In *Glucksberg*, the Court held that the Constitution does not protect a fundamental right to physician-assisted suicide.<sup>147</sup> In formulating that holding, the Court discussed the long history of the proscription of suicide and assisting suicide and also the considerable contemporary nationwide legislative action to preserve the suicide laws.<sup>148</sup> The Court concluded that assisted suicide was not a liberty interest “deeply rooted” in the history and traditions of the Nation.<sup>149</sup> Is a right to a vibrator a liberty interest “deeply rooted” in the history and traditions of the Nation? To answer this question, the history of vibrators should be examined.

According to Rachel Maines, a historian and museum archivist, the vibrator emerged as an electromechanical medical instrument for the treatment of “hysteria.”<sup>150</sup> Hysteria, an ailment considered common and chronic in women, was thought to be the consequence of sexual deprivation.<sup>151</sup> From the time of Hippocrates until the 1920s, massaging female patients to orgasm was a staple of medical practice among Western physicians.<sup>152</sup> The vibrator was developed as a more efficient means

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144. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

145. *See Williams*, 41 F. Supp. 2d at 1284.

146. *Williams v. Pryor*, 240 F.3d 944, 955-56 (11th Cir. 2001).

147. *Glucksberg*, 521 U.S. at 728.

148. *Id.* at 710-19.

149. *See id.* at 720-21, 728.

150. RACHEL P. MAINES, THE TECHNOLOGY OF ORGASM: “HYSTERIA,” THE VIBRATOR AND WOMEN’S SEXUAL SATISFACTION 3 (1999).

151. *Id.* at 23. Symptoms of hysteria included fainting, edema, “nervousness, insomnia, sensations of heaviness in the abdomen, muscle spasms, shortness of breath, [and] loss of appetite for food or for sex.” *Id.*

152. *See id.* at 3-4.

of treating the hysterical patients.<sup>153</sup>

Medical treatment of hysteria by massaging women to orgasm does not mean that masturbation was promoted to women—quite the contrary was true. From the eighteenth century until the second half of the twentieth century, physicians, along with theologians and concerned parents, discouraged masturbation.<sup>154</sup> Married women were supposed to achieve orgasm through peno-vaginal sex alone, and were considered “frigid” if they could not have a vaginal orgasm during intercourse.<sup>155</sup> However, studies have shown that more than half of all women, and “possibly more than 70 percent,” do not achieve orgasm through peno-vaginal intercourse alone.<sup>156</sup> Yet most women can masturbate to orgasm in a little over four minutes, suggesting “that many women do not orgasm during intercourse, or do so sporadically, simply because sexual intercourse is an extremely inefficient way to stimulate the clitoris.”<sup>157</sup>

However, women apparently did not take the physicians’ discouragement to heart because after 1900, women began purchasing vibrators for self-treatment at home.<sup>158</sup> Electric lights were introduced in 1876, and the first home appliance to be electrified was the sewing machine in 1889.<sup>159</sup> The sewing machine was followed in the next ten years by the fan, the teakettle, the toaster and the vibrator, which preceded the electric vacuum cleaner by nine years, the electric iron by ten, and the electric frying pan by more than a decade, “possibly reflecting consumer priorities.”<sup>160</sup> A 1908 vibrator advertisement in the *National Home Journal* proclaimed “Gentle, soothing, invigorating and refreshing. Invented by a woman who knows a woman’s needs. All nature pulsates and vibrates with life.”<sup>161</sup>

Vibrators disappeared from public advertising in the 1920s, after they appeared in early stag films as a sexual aid, apparently losing respectability.<sup>162</sup> Then vibrators reemerged in the 1960s as a “frankly

153. *Id.* at 3.

154. MAINES, *supra* note 150, at 56.

155. EDMUND BERGLER & WILLIAM S. KROGER, *KINSEY’S MYTH OF FEMALE SEXUALITY* 48 (1954).

156. MAINES, *supra* note 150, at 5 (citing ALFRED CHARLES KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); SHERE HITE, *THE HITE REPORT ON FEMALE SEXUALITY* (1976)).

157. DONALD SYMONS, *THE EVOLUTION OF HUMAN SEXUALITY* 87 (1979). A 1980 study estimated that ninety-seven percent of males and seventy-eight percent of females practiced some form of masturbation. MAINES, *supra* note 150, at 59.

158. See MAINES, *supra* note 150, at 100.

159. *Id.*

160. *Id.* The earliest known advertisement for a home vibrator was for the “Vibratile,” which appeared in McClure’s in March 1899, offering itself as a cure for “Neuralgia, Headache, [and] Wrinkles.” *Id.* Note that the early vibrators were not phallic-shaped insertable devices, but rather topically-applied vibrators. *Id.*

161. MAINES, *supra* note 150, at 101. “The most perfect woman is she whose blood pulses and oscillates in unison with the natural law of being.” *Id.*

162. *Id.* at 108.

sexual toy,"<sup>163</sup> and have enjoyed popularity ever since. As was discussed in Part I, even the FDA recognizes sexual devices as useful for the treatment of sexual dysfunction.

In this context, can the right to a vibrator be considered "deeply rooted" in the history and traditions of the nation? Certainly this case is unlike *Glucksberg*, where centuries of law criminalized suicide. Unlike sodomy and adultery, masturbation itself has never been criminal in this country. Sales and distribution of vibrators have been criminalized, as discussed here, but these laws are new, controversial, and certainly not akin to the long history of the proscription of suicide at issue in *Glucksberg*. All things considered, the right to a vibrator may indeed be a fundamental right, as the courts in Colorado and Kansas held.<sup>164</sup>

#### IV. IS THERE A RATIONAL BASIS FOR PROSCRIBING VIBRATORS?

If legislation does not burden a fundamental right, then the act faces only minimal scrutiny: the rational basis standard.<sup>165</sup> Under this test, the challenged statute must be rationally related to legitimate government interests.<sup>166</sup> The rational basis standard has been widely criticized as being the equivalent to no review at all,<sup>167</sup> because under the test, courts must uphold a statute "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and that "[w]here there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'"<sup>168</sup>

Because the rational basis standard is so lax, it is surprising that the district court in *Williams*<sup>169</sup> and the Louisiana Supreme Court in *Brenan*<sup>170</sup> found the anti-vibrator statutes failed rational basis review. Both courts noted that the states' interests were a legitimate attempt to promote morals and public order;<sup>171</sup> however, the courts held that banning all such devices without any review of their prurience or medical use is not rationally related to states' interests in battling obscenity.<sup>172</sup> Given the United States Supreme Court's reluctance to review statutes under the rational basis test with any vigor, it is unlikely they would do so here. Thus the district case of *Williams* and Louisiana's *Brenan* are

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163. *Id.*

164. See discussion *supra* Part III.

165. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

166. *Glucksberg*, 521 U.S. at 728.

167. See Cruz, *supra* note 126, at 331.

168. *FCC v. Beach Communications*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) (citations omitted).

169. See *supra* Part I.

170. See *supra* Part II.

171. *State v. Brenan*, 772 So. 2d 64, 73 (La. 2000).

172. *Brenan*, 772 So. 2d at 76.

more likely aberrations, and the best hope for overturning anti-vibrator laws probably lies elsewhere.

#### V. DOES EQUAL PROTECTION PROTECT MY RIGHT TO A VIBRATOR?

Equal Protection may provide the basis for overturning anti-vibrator laws, though there has been little activity in this arena. In *Red Bluff Drive-In v. Vance*,<sup>173</sup> a handicapped plaintiff raised an equal protection claim on behalf of handicapped persons against Texas's prohibition on the sale of sexual devices.<sup>174</sup> The Fifth Circuit said there was not enough evidence in the record to compel them to recognize a constitutional right by handicapped persons to the proscribed sexual devices or to hold that the statute burdened this right.<sup>175</sup> The evidence consisted of an affidavit by a paraplegic who merely claimed a constitutional right to use the devices.<sup>176</sup> The Supreme Court denied plaintiff's petition for writ of certiorari.<sup>177</sup>

The Fifth Circuit seemed to deny the claim based on a lack of evidence: "With nothing more than the naked legal conclusions on the record, we have no evidentiary basis to sustain the plaintiffs' proposed extension of the constitutional guarantee of personal autonomy."<sup>178</sup> Perhaps with more evidence, the court would have found an equal protection problem. However, in the recent Supreme Court case of *Romer v. Evans*<sup>179</sup> the Court held that an amendment to Colorado's state constitution precluding any level of government from adopting policies against sexual orientation discrimination was an unconstitutional violation of the Equal Protection Clause.<sup>180</sup> The Court apparently applied the rational basis test—because homosexuals are not a protected class—and found that the statute did not pass rational basis scrutiny.<sup>181</sup> It is possible, therefore, that the rational basis test under equal protection analysis has some bite.

Failing that, however, the vibrator cause could be advanced as an equal protection gender issue, which could garner it intermediate scrutiny under *Craig v. Boren*.<sup>182</sup> Under intermediate scrutiny, "[t]o with-

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173. 648 F.2d 1020 (5th Cir. 1981).

174. *Vance*, 648 F.2d at 1028. The Texas statute proscribed "obscene device[s]," defined as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs." TEX. PENAL CODE ANN. § 43.21 (West 1994).

175. *Vance*, 648 F.2d at 1028.

176. *Id.*

177. *Theatres West, Inc. v. Holmes*, 455 U.S. 913 (1982).

178. *Vance*, 648 F.2d at 1028.

179. 517 U.S. 620 (1996).

180. *Romer*, 517 U.S. at 623.

181. *See id.* at 631-34.

182. 429 U.S. 190 (1976).

stand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>183</sup> In *Craig*, a male plaintiff successfully challenged an Oklahoma statute, which forbade the sale of "3.2% beer" to males under the age of twenty-one, and to females under the age of eighteen.<sup>184</sup> The Court applied intermediate scrutiny to hold that the statute was an equal protection violation.<sup>185</sup>

Although the statute at issue in *Craig* was facially discriminatory along gender lines, and the anti-vibrator laws are not, an argument could be made that the anti-vibrator laws as applied burden women more than men, because of women's lesser ability to achieve orgasm during peno-vaginal intercourse.<sup>186</sup> This argument would require an extension of the law, however, because Equal Protection has never been applied to even reproductive regulation—much less sexual satisfaction—in part because men and women are not considered to be "similarly situated."<sup>187</sup>

## VI. CONCLUSION

The outcome of vibrator regulation is therefore still up in the air. Perhaps the Supreme court will weigh in on the issue, and perhaps they will leave it to the states to decide. Clearly, the majority of states leave such personal decisions up to the individual—only seven states have even attempted such regulation. States like Alabama, though, where the Legislature just four years ago decided to outlaw the sale of vibrators, should reconsider the policy behind such legislation. In an era where "[f]ear of contracting or spreading AIDS or another sexually transmitted disease is compelling grounds to avoid sexual intercourse,"<sup>188</sup> are vibrators and other such sexual devices really a threat to society? Are they really a problem worth spending taxpayer money and limited law enforcement resources for?

As a concurring justice noted just last year in *Webber v. State*,<sup>189</sup> "I do not understand why Texas law criminalizes the sale of dildos . . . . Even less do I understand why law enforcement officers and prosecutors expend limited resources to prosecute such activity. Because this is the law, I reluctantly concur."<sup>190</sup> The Texas appeals court thus upheld a

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183. *Craig*, 429 U.S. at 197.

184. *Id.* at 192.

185. *Id.* at 197.

186. See discussion *supra* Part III.

187. Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 455 (1995).

188. *Williams*, 41 F. Supp. 2d at 1267.

189. 21 S.W.3d 726 (Tex. App. 2000).

190. *Webber*, 21 S.W.3d at 732 (Smith, J., concurring).

conviction sentencing a video store employee to thirty days in jail and a \$4,000 fine for selling one vibrator to an undercover police officer who claimed to be anorgasmic.<sup>191</sup> Surely, the Constitution can be invoked to protect individuals from such pointless intrusion into their private affairs. Surely.

*Angela Holt*

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191. *Id.*

