

2014

Morning-After Decisions: Legal Mobilization Against Emergency Contraception in Chile

Fernando Muñoz León
Universidad Austral de Chile

Follow this and additional works at: <https://repository.law.umich.edu/mjgl>



Part of the [Civil Law Commons](#), [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [Food and Drug Law Commons](#), [Law and Gender Commons](#), and the [Natural Law Commons](#)

Recommended Citation

Fernando M. León, *Morning-After Decisions: Legal Mobilization Against Emergency Contraception in Chile*, 21 MICH. J. GENDER & L. 123 (2014).

Available at: <https://repository.law.umich.edu/mjgl/vol21/iss1/3>

<https://doi.org/10.36641/mjgl.21.1.morning-after>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender & Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MORNING-AFTER DECISIONS: LEGAL
MOBILIZATION AGAINST EMERGENCY
CONTRACEPTION IN CHILE

*Fernando Muñoz León**

ABSTRACT

In Chile, the Criminal Code bans all forms of abortion. Furthermore, the Constitution—drafted and enacted by the Military Junta led by General Augusto Pinochet—was inspired by a conservative version of Catholic natural law championed by prominent Chilean constitutional law scholars. This Article traces the emergence, development, and ultimately the defeat of a persistent legal mobilization driven by natural law-inspired litigants, politicians, and scholars against levonorgestrel-based emergency contraception, also known as the morning-after pill. In their decade-long efforts at legal mobilization, these natural law litigants used every tool of the Chilean legal system to challenge the legality and the constitutionality of the morning-after pill. This case of legal mobilization demonstrates both the strengths and the weaknesses of conservative political and religious networks in Latin America, and it demonstrates both the potential and limitations of litigation-led policymaking in civil law countries.

ABSTRACT • 123

INTRODUCTION: NATURAL LAW CONSTITUTIONALISM IN
CHILE • 124

I. A PROSOPOGRAPHY OF NATURAL LAW
LITIGANTS • 133
Juan Enrique Jara • 135
Jorge Reyes • 136

* Doctor of the Science of Law, Yale Law School. Assistant Professor, Universidad Austral de Chile. This Article began as part of my doctoral dissertation, titled “Autonomy and Responsiveness: The Discursive Mediation between Law and Society.” I thank Robert C. Post, my supervisor, for his invaluable guidance in this endeavor; and Reva B. Siegel, for some timely conversations from which this particular part of the project greatly benefited. I have presented parts of it in workshops at Yale Law School and Universidad de Chile; I would like to thank the participants in these discussions, as well as other friends from whose insights this work has benefitted, particularly Paula Ahumada, Diego Arguelhes, Or Bassok, and Jaclyn Neo. I also thank the editors of the *Michigan Journal of Gender & Law* for their generous help in improving the clarity of this Article. The responsibility for the views presented here, of course, is mine alone.

	<i>José Antonio Kast</i>	• 138
II.	THE BEGINNING: ANTI-CONTRACEPTION LITIGATION BEFORE ORDINARY COURTS	• 139
III.	ANTI-PILL PYRRHIC VICTORIES AT THE CONSTITUTIONAL TRIBUNAL	• 147
IV.	THE LEGISLATIVE COMEBACK OF THE PILL	• 157
	CONCLUSION: ANSWERING A FEW QUESTIONS	• 172

INTRODUCTION: NATURAL LAW CONSTITUTIONALISM IN CHILE

Does natural law play any role in contemporary legal systems? What is the destiny of reproductive rights in Catholic societies? Are courts viable outlets for channeling political conflicts in so-called civil law countries? And can judges have the last word on any issue when there is no *stare decisis*? This Article addresses these questions by studying the legal struggles surrounding emergency contraception in Chile. As a result of the complete ban on abortion,¹ the legality of the so-called morning-after pill became a hot-button issue for almost an entire decade. Between 2001 and 2010, a group of litigants and politicians led a legal mobilization against emergency contraception.² Over the course of a decade, the conservative crusade against

-
1. The 1874 Criminal Code, which is still in force, punishes both women and physicians for willful abortions. CÓDIGO PENAL [CÓD. PEN.] arts. 342–345 (Chile). Between 1931 and 1989, however, therapeutic abortion was sanctioned by the Public Health Code, which only required “the informed opinion of two surgeons.” CÓDIGO SANITARIO [CÓD. SANIT.] art. 119 (Chile). The Military Junta amended this law through Statute N° 18.826, of September 15, 1989, whose only article established that “[n]o action will be performed whose aim is to cause an abortion.” Law No. 18.826, Septiembre 15, 1989, DIARIO OFICIAL [D.O.] (Chile). In addition to that, the 1855 Civil Code decrees in its Article 75 that “[t]he law protects the life of those about to be born,” enabling a judge, “on [his] own motion or at the request of anyone, [to] take all the measures that he deems necessary to protect the existence of the unborn, when he thinks that it is endangered in any form.” CÓDIGO CIVIL [CÓD. CIV.] art. 75 (Chile). Finally, the 1980 Constitution, also enacted by the Military Junta, guarantees “[t]he right to life and to the physical and psychological integrity of persons,” adding that “[t]he law protects the life of those about to be born.” CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19(1). Throughout the Article, all translations of texts originally in Spanish are provided by the author.
 2. By “legal mobilization,” I mean a sustained deployment of legal strategies and other complementary actions in the public sphere against or in favor of a certain policy. The concept is close to those of “adversarial legalism” and “cause lawyering.” Kagan has defined adversarial legalism as “policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation.” ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001). The difference of

emergency contraception used *recursos de protección* (constitutional rights injunctions), *nulidades de derecho público* (public law annulments), *requerimientos de inconstitucionalidad* (concrete constitutional review), and even the threat of consumer-law lawsuits in their attempts to get rid of the morning-after pill. And yet, despite using practically every tool that the Chilean legal system provided for challenging the legality and the constitutionality of the morning-after pill, and despite being successful in most of their lawsuits, these crusaders ultimately failed to achieve their objective. Public opposition to the 2008 Constitutional Tribunal's ban on the pill, including the first-ever massive protest in Chile against a judicial ruling, created the political conditions for the enactment of a statute declaring the legality of this drug and guaranteeing access to it, putting an end to this decade-long struggle.

In the study of law and politics, there is always a danger of focusing too much on the pronouncements of courts, and therefore neglecting the surrounding context that accounts for the "judicialization" of politics and its resulting "juristocracy."³ This risk becomes much more pronounced when trying to understand judicial engagement in policy making within civil law countries which, at least in theory, rely on legislation rather than case law for the development of the legal system. In civil law countries, where the division of labor between legislatures and courts makes "adversarial legalism" and "cause lawyering" much more difficult, there are fewer examples of this kind of committed legal mobilization; as a result, the phenomenon remains much less studied in this context.⁴ Lastly, while constitu-

legal mobilization, as I use it here in contrast to adversarial legalism, is that the former does not necessarily entail the existence of a settled (if controversial) practice of policy making constructed around litigation, which is precisely what Kagan describes. Sarat and Scheingold characterize cause lawyering as an activity that is "frequently directed at altering some aspect of the social, economic, and political status quo." Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3, 4 (Austin Sarat & Stuart Scheingold eds., 1998). Unlike cause lawyering so defined, legal mobilization does not necessarily represent a rebellious contestation of the status quo; in this case, in fact, the conservative lawyers who waged legal war against emergency contraception were not only deeply tied to the Chilean structures of power and prestige, but also they were opposing the introduction of a new technique—the morning-after pill—in the Chilean public health system.

3. *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* (Rachel Sieder, Line Schjolden & Alan Angell eds., 2005); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).
4. See Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES*, *supra* note 2, at 31, 35, available at http://www.law.yale.edu/documents/pdf/Intellectual_Life/

tional analysts commonly pay copious attention to the supply-side of conservative legal action, particularly in the form of “originalist” constitutional rulings, the study of the demand-side of conservative legal action seems much less visible in the literature.⁵

In this Introduction, I give basic information about Chilean legal culture and its natural law thread. In Part I, I flesh out the natural law element of Chilean legal culture by analyzing the stories of the leaders of the legal mobilization against the morning-after pill. In Parts II and III, I follow their litigation’s trajectory up through the hierarchy of the Judiciary,⁶ culminating in decisions by the special body entrusted with the adjudication of constitutional disputes among the branches of government, the Constitutional Tribunal.⁷ In Part IV, I illuminate the legislative response to the Tribunal’s

The_Causes_of_Cause_Lawyer.pdf (“The organization of the state and of legal regimes also affects how cause lawyering can be expressed. For example, civil law systems allow fewer litigated challenges to rules.”).

5. Notable exceptions are STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (Ira Katznelson et al. ser. eds., 2008), and Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009). However, I am reluctant to use Teles’ concept of a “conservative legal movement” to describe the Chilean case. The phenomenon studied by Teles typically has permanent organizations and personnel that, while retaining institutional and personal connections to political parties, are dedicated full-time to legal advocacy work. In other words, the “conservative legal movement” is an institutionalized phenomenon, relatively autonomous from the groups acting in the electoral and legislative domains. Instead, we have seen that in Chile the anti-pill litigants are not only actively involved in politics, but also occasionally appear to use their advocacy as a way to gain power within the Right. None of them is devoted to legal advocacy in a full-time capacity. Their networks are not primarily, much less exclusively, oriented towards legal advocacy. Legal advocacy has been just one tool among many to promote their agenda. My choice of the term “mobilization,” which suggests an occasional event, instead of “movement,” which indicates the existence of an organization, seeks to manifest this difference.
6. In Chile, the structure of the Judiciary is similar to the structure of federal courts in the United States: it includes courts of first instance, courts of appeals, and a Supreme Court. The latter, however, lacks competence in disputes between the Presidency and Congress regarding their constitutional powers, which are entrusted to a Constitutional Court. For more on the Constitutional Court, see note 7.
7. C.P. ch. 7 (Chile) (establishing the Constitutional Tribunal). Chile follows what Tushnet calls the “German model” of constitutional adjudication, centered on a specialized constitutional court. As Tushnet puts it, “Hans Kelsen, the jurisprude and constitutional scholar who designed and then served on the first Austrian constitutional court, argued that a specialized constitutional court would better understand the political component of constitutional law than would judges who dealt with ordinary (and in Kelsen’s view, largely nonpolitical) law.” MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 18 n.4 (2008).

anti-pill rulings. Part IV concludes with a discussion of the relevance of this case for understanding the future of reproductive rights in Chile and Latin America in general.

Chilean legal culture and its transformations provide helpful context for understanding the two main jurisprudential strands that we will find among the decisions adjudicating morning-after pill trials. They can be succinctly described as a legalistic self-restraint on the one hand, and a value-laden constitutional activism on the other. These two approaches have roots in different interpretive attitudes, which have distinct origins within Chilean legal history.

Lisa Hilbink has observed that, in the 1830s, the founding elite of Chile sought to permanently exclude judges from policy making through institutional and ideological mechanisms.⁸ Their clearest legacy is in Chile's Civil Code, which asserts that only the legislature can explain or interpret the law in a generally binding way and that judicial rulings have no value as precedent.⁹ Under these circumstances it is not surprising that political and social struggles have been historically channeled through the legislative process.¹⁰ Predictably, Chilean internal legal culture¹¹ has been traditionally characterized as "legalistic" and "positivistic." These adjectives suggest that its legal professionals tend to analyze and interpret the law in a textualist and formalist way, that its judges are self-restrained and deferential towards the political process, and that the overall legal culture is averse to innovative interpretations of the law.¹² In sum, the historical structure and culture of the Chilean legal system make legal mobilization a rare occurrence in Chile.¹³

8. LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE 37 (Chris Arup et al. ser. eds., 2007).

9. CÓD. CIV. art. 3 (Chile).

10. See Julio Faúndez, *Chilean Constitutionalism Before Allende: Legality Without Courts*, 29 BULL. LATIN AM. RES. 34 (2010).

11. Friedman distinguishes between external legal culture, "the legal culture of the general population," and internal legal culture, "the legal culture of those members of society who perform specialized legal tasks." LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 223 (1975).

12. See generally Edmundo Fuenzalida Faivovich, *Law and Legal Culture in Chile, 1974–1999*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 108 (Lawrence Friedman & Rogelio Pérez-Perdomo eds., 2003); JULIO FAÚNDEZ, *DEMOCRATIZATION, DEVELOPMENT, AND LEGALITY: CHILE, 1831–1973* (James Dunkerley ser. ed., 2007); HILBINK, *supra* note 8, at 166–76.

13. Before anti-pill litigation, the most significant example of legal mobilization was the use of courts to challenge human rights violations under Pinochet. In the last two decades, a few moral and sociopolitical struggles have been the objects of attempts at legal mobilization. They include the effort by conservatives to use courts to uphold

The 1980 Constitution, enacted by the Military Junta led by General Augusto Pinochet,¹⁴ transformed Chile's legal culture to serve the political agenda of the Junta and its civil allies. They created new constitutional remedies for the protection of rights considered valuable by Catholics (life) and neoliberals (property and economic freedom). The new Constitution reinforced these protections. It granted individuals the right to seek injunctions to enforce certain constitutional rights, and gave jurisdiction to grant these injunctions to the Appellate and Supreme Courts.¹⁵ It also created a strong Constitutional Tribunal entrusted with the constitutional review of legislation.¹⁶ But the Constitution reflected the neoliberal agenda through its unbalanced protection of constitutional rights; it reserved injunctions for the protection of property rights and economic freedoms, excluding from its scope socio-economic rights such as the right to healthcare and to social security and the right of workers to strike.¹⁷ The Constitutional Tribunal, meanwhile, was entrusted with reviewing whether new legislation conformed to the substantive and procedural constraints the Junta wrote into the Constitution—a mandate that the Court has almost always followed. As a consequence, the 1980 Constitution forced the courts to confront and resolve issues that previously were left to the political process. And yet, the history of fundamental rights under the 1980 Constitution has been sum-

the ban over the film *The Last Temptation of the Christ* in the nineties and the contestation by progressives of a ruling by the Supreme Court that deprived a lesbian mother of tuition for her daughters. These two cases resulted in rulings by the Inter-American Court of Human Rights. See *Olmedo-Bustos v. Chile* ("The Last Temptation of Christ" Case), Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001); *Atala Riffo & Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012). Because of its decade-long efforts, its proponents' persistence in using all available judicial procedures, and its capacity to influence the political and legislative agenda, the conservative crusade against emergency contraception stands out as the most important example of Chilean legal mobilization.

14. General Augusto Pinochet came to power after a coup on September 11, 1973 ousted President Salvador Allende, a Socialist who sought to redistribute property and wealth through the expropriation of land and the nationalization of industry. See, e.g., TANYA HARMER, ALLENDE'S CHILE AND THE INTER-AMERICAN COLD WAR 21–22, 85–86, 90, 237–47 (2011). For an explanation of the enactment of the Constitution by the Military Junta, see ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 167 (2002).
15. C.P. art. 20 (Chile).
16. C.P. ch. 7 (Chile).
17. Domingo Lovera, *Derechos sociales en la Constitución del 80 (y de 1989 y de 2005)*, in EN NOMBRE DEL PUEBLO: DEBATE SOBRE EL CAMBIO CONSTITUCIONAL EN CHILE 217, 223–25 (Claudio Fuentes ed., 2010).

marized as the ‘rights revolution that never was.’¹⁸ In a way, as I explain in greater detail below, it could be said that the new Constitution furthered some “legalistic” aspects of Chilean legal culture but lessened its “positivistic” aspects insofar as “positivism” meant value relativism.¹⁹

Consistent with other aspects of Chile’s internal legal culture, the 1980 Constitution was preceded and shaped by a revived natural law discourse rooted in a conservative version of Catholic doctrines.²⁰ Natural law has served important ideological functions for the Chilean Right. Relying on natural law ideology, a group of conservative lawyers was able not only to radically transform the Chilean legal order during the Pinochet dictatorship (1973–1990), but also has been able to maintain its hegemony over constitutional norms, even after losing power in 1990 at the hands of the center-left *Concertación* government.²¹ Indeed, natural law-inspired lawyers became an important part of the ideological and intellectual support of the Junta; the other part was represented by the, perhaps more famous, “Chicago Boys” economists.²²

The lawyers allied with the Military Junta employed natural law arguments to both support and steer the political and legal transformations sought by the Junta. First and foremost, natural law discourse provided a

18. Javier A. Couso, *The Judicialization of Chilean Politics: The Rights Revolution that Never Was*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA*, *supra* note 3, at 105.

19. See *infra* text accompanying notes 34–35.

20. See, e.g., JAVIER COUSO ET AL., *CONSTITUTIONAL LAW IN CHILE* 174 (Roger Blanpain ed., Wolters Kluwer L. & Bus. 2011) (“Regarding the notion of rights behind the 1980 Charter, most Chilean scholars agree on its Christian-natural-law-oriented doctrine.”).

21. During the period under study, there were two major coalitions in Chile: the Center-Left *Concertación de Partidos por la Democracia* (Concert of Parties for Democracy), principally formed by the Christian Democrat Party, the Socialist Party, the Party for Democracy, and the smaller Radical Party; and the Right’s coalition *Alianza por Chile* (Alliance for Chile; the coalition has had various names over the years), which included the National Renewal Party and the Democratic Independent Union. John M. Carey, *Parties, Coalitions, and the Chilean Congress in the 1990s*, in *LEGISLATIVE POLITICS IN LATIN AMERICA* 222, 224–25 (Scott Morgenstern & Benito Nacif eds., 2002).

22. See JUAN GABRIEL VALDÉS, *PINOCHET’S ECONOMISTS: THE CHICAGO SCHOOL IN CHILE* 16–21 (Crawford D. Goodwin ser. ed., 1995). In fact, these two groups joined forces during the dictatorship due to their concurrent concerns and strategies, succeeding in steering it towards a minimal-state program—an outcome that differed radically from what happened in most military dictatorships in Latin America. This alliance between lawyers and economists, which took form between 1973 and 1977, was the basis for the foundation of the politically authoritarian, socially conservative, and economically neoliberal *Unión Demócrata Independiente* (UDI) party in 1983, which will be so prominent in this story. See MARCELO POLLACK, *THE NEW RIGHT IN CHILE, 1973–97* 65–66, 88–89 (1999).

justification for the 1973 coup that ousted President Salvador Allende by endorsing the right to legitimate rebellion.²³ Later, the Catholic concept of subsidiarity, referring to the restraint that the State has to keep vis-à-vis civil society, offered a code name for privatization, deregulation, and the retreat of the State in the provision of education, healthcare, and social security.²⁴ And while lacking in positive liberties, the Constitution strengthened negative liberties such as economic freedom, property rights, and freedom of teaching. These innovations were wrapped in rhetoric of inalienable natural rights that existed prior to and were superior to the State. As the Constitution put it, “[t]he exercise of sovereignty recognizes as a limitation the respect for the essential rights originating from human nature.”²⁵ Furthermore, the 1980 Constitution included for the first time in Chilean constitutional history an explicit mention of the right to life.²⁶ This was consistent with the official Catholic position proclaimed in Paul VI’s *Of Human Life*,²⁷ but a paradoxical innovation coming from a murderous dictatorship.

These natural law-inspired arguments were elaborated, deployed in public discourse, and translated into legislation by a group of lawyers who had graduated from the Pontifical Catholic University of Chile. Many of these lawyers worked in governmental departments during the dictatorship and later became politicians, mainly in the Independent Democratic Union (*Unión Demócrata Independiente*, UDI) party.²⁸ Jaime Guzmán was the most prominent among them. Guzmán founded the conservative student movement *Gremialismo* at the Pontifical Catholic University in 1967 and later became a professor of constitutional law there.²⁹ He was an outspoken leader of the opposition to President Salvador Allende from the moment of

23. Junta Militar de Gobierno - Chile, Bando N° 5, § 12 (11 septiembre 1973), *available at* http://www.archivochile.com/Dictadura_militar/doc_jm_gob_pino8/DMdocjm0023.pdf (“The arguments invoked here are, in light of the classical doctrine that characterizes our historical thinking, enough to justify our intervention to depose the illegitimate and immoral government, unrepresentative of the national soul, in order to avoid the greater evils that the current void of authority could produce.”).

24. Mario Sznajder, *Globalization and Limited Democracy through the Mirror of History in Chile*, in *GLOBALITY AND MULTIPLE MODERNITIES: COMPARATIVE NORTH AMERICAN AND LATIN AMERICAN PERSPECTIVES 183, 192–93* (Luis Roniger & Carlos H. Waisman eds., 2002).

25. C.P. art. 5 (Chile).

26. *See infra* Part I.

27. ENCYCLICAL LETTER OF POPE PAUL VI “HUMANAE VITAE”: THE RIGHT ORDERING OF THE PROCREATION OF CHILDREN (Rev. Alan C. Clark & Rev. Geoffrey Crawford trans., 1968) (Holy See).

28. POLLACK, *supra* note 22, at 116.

29. POLLACK, *supra* note 22, 31–36, 116.

his election in 1970. After a coup lead by General Augusto Pinochet overthrew President Allende, Guzmán became a political and constitutional advisor to the Military Junta. After founding the UDI with his longtime followers in 1983, he became a Senator in the first democratic elections of 1989.³⁰ In 1991, Guzmán was assassinated by a terrorist organization.

Guzmán did not simply create the *Gremialismo* as a political organization to oppose the radicalization of campus politics in the late 60s; rather, he endowed it with a doctrine based on an individualistic reinterpretation of Catholic social thought that would have a broad social impact.³¹ That doctrine later infused the 1980 Constitution and still remains the political platform of UDI.³² Guzmán believed that from the primacy of the individual and the subsidiarity of the state derived, as a logical consequence, “the right to private property and the free initiative in the economic field (generally known as ‘free enterprise’) that correctly understood are not only economically efficient formulae, but also *faithful expressions of human nature* and safeguards of freedom.”³³

Once the 1980 Constitution was in place, constitutional law professors who subscribed to its natural law inspiration began arguing that it represented a departure from previous constitutional documents. They claimed that while old positivistic constitutionalism was minimalist and deferential towards legislation, the new natural law constitutionalism was robust and value-ridden. Furthermore, whereas old constitutionalism regarded its open clauses as political programs to be implemented by the political branches of government, the new natural law constitutionalism regarded its principles as having a legally binding status, to be interpreted and implemented by courts. For example, José L. Cea, a professor at the Pontifical Catholic University of Chile and a member of the Constitutional Tribunal at the time it handed down two decisions about the pill, has argued that the system of

30. POLLACK, *supra* note 22, 89, 187.

31. Cristi has characterized Guzmán’s doctrine, based on what he deems a misled reading of John XXIII’s encyclicals, as offering a “radicalized version of the thomistic theory of relational entities” that allows Guzmán to “reorient the principle of subsidiarity towards the minimalization of state action and to sustain an individualistic interpretation of property rights.” RENATO CRISTI, *EL PENSAMIENTO POLÍTICO DE JAIME GUZMÁN: UNA BIOGRAFÍA INTELECTUAL* 26 (2011).

32. *Doctrina y Principios*, UNIÓN DEMÓCRATA INDEPENDIENTE, <http://www.udi.cl/web-site/contenido.php?S=7&SC=6&C=6> (1991) (Chile) (last visited Feb. 4, 2014) (“The Independent Democratic Union believes in the principle of subsidiarity as the basis of a free society. The respect of personal freedom and the autonomy of intermediate social bodies demand that neither the State nor any other social group encroaches or absorbs the specific domain of the smaller entities or the freedom of individuals.”).

33. Arturo Fontaine Talavera, *El miedo y otros escritos. El pensamiento de Jaime Guzmán E.*, 42 ESTUDIOS PÚBLICOS 251, 256–57 (1991) (emphasis added) (Chile).

values that shapes the Constitution enacted in 1980 “is a corrective to the excesses of formalist positivism and of all-embracing state voluntarism.”³⁴ To his mind, these pejorative qualities were expressed paradigmatically in the legal instrumentalism of the Allende administration, which tried “to manipulate or instrumentalize bourgeois laws, ignoring the values that infuse it with legitimacy in order to keep only its neutral, formalistic wrapper.”³⁵

Several *leitmotifs* and labels have been used by academics working within this school to describe the distinctiveness of this new constitutionalism: the “comprehensive Constitution”³⁶—the Constitution contains answers to all problems; the “axiological interpretation of the Constitution”³⁷—the Constitution is loaded with determined values that have to guide the judge; the “normative force” of the Constitution³⁸—the Constitution has the binding force and the determinacy of any statute;³⁹ and, most famously the “constitutionalization” of the legal system⁴⁰—all the rest of the legal system must be interpreted in light of constitutional principles and values.⁴¹ To the outside observer, these points might seem to evoke Ronald Dworkin’s interpretivism, but they are in fact much closer to Justice Antonin Scalia’s view that the Constitution of the United States is “an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.”⁴² This embrace of originalism, to be sure, is a smart move for the proponents of natural law constitutionalism who shore up their own views against any change by asserting that the 1980

34. José Luis Cea Egaña, *La interpretación axiológica de la Constitución*, in UNIVERSIDAD DE CHILE & UNIVERSIDAD ADOLFO IBÁÑEZ, INTERPRETACIÓN, INTEGRACIÓN Y RAZONAMIENTO JURÍDICOS 89, 95 (1992) (Chile) [hereinafter Cea Egaña, *La interpretación axiológica de la Constitución*].

35. JOSÉ LUIS CEA EGAÑA, I DERECHO CONSTITUCIONAL CHILENO 44 (2002).

36. José Luis Cea Egaña, *La Constitución plena*, 11 VIGILIA 46, 48 (1979) (Chile).

37. Cea Egaña, *La interpretación axiológica de la Constitución*, *supra* note 34.

38. Luz Bulnes Aldunate, *La Fuerza Normativa de la Constitución*, 25 REVISTA CHILENA DE DERECHO 137, 137 (1998); Miguel Angel Fernández González, *La Fuerza Normativa de la Constitución*, 63 REVISTA DE DERECHO PÚBLICO 77, 77 (2001) (Chile).

39. These authors ignore the longstanding indeterminacy debate among legal theorists.

40. José Luis Cea Engaña, *La constitucionalización del Derecho*, 59 REVISTA DE DERECHO PÚBLICO 11 (1996) (Chile).

41. Pablo Ruiz-Tagle, an outspoken critic of this approach, prefers to use the more descriptive label of “pontifical doctrine,” as “besides responding to the influence of papal encyclicals, it is based at the institution of higher education that bears this name,” i.e., the Pontifical Catholic University of Chile. RENATO CRISTI & PABLO RUIZ-TAGLE, LA REPÚBLICA EN CHILE: TEORÍA Y PRÁCTICA DEL CONSTITUCIONALISMO REPUBLICANO 133 (2006).

42. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

Constitution, which was written by some of them, has a stable and fixed meaning that lies beyond the realm of political contestation.

Natural law constitutionalism is of great importance to anti-emergency contraception litigation. Its natural law inspiration is evident and often self-proclaimed; for example, Ángela Vivanco, a professor at the Catholic University and currently Dean of the Saint Thomas Aquinas Law school, declared that “the Constitution of 1980 subscribes to a natural law understanding of the law, since the construction of this chapter [on the bases of the institutional order], and the history of its establishment, indicate that the Constitution includes elements contained in human nature and preexisting to the State.”⁴³ The intersection between Catholicism, anti-abortion scholarship, and anti-pill legal mobilization is particularly clear. For example, Figueroa, when reviewing the works of Catholic constitutional law professors who have written about the right to life, observes that most of them “tend to mention God, Christian ethics, or forthrightly Catholic morals” when they explore the constitutional concept of personhood and the foundations of the right to life.⁴⁴ Still, the professors’ professional identity and their capacity to translate their religious positions into juridical arguments turn them into the kind of Catholic advocates who Lemaitre describes as arguing from “reason alone.” In other words, “the lay faithful, often occupying public offices or other positions of influence” appeal “to constitutional and human rights law in courts and legislatures” in order to defend the agenda of the Catholic Church,⁴⁵ a strategy that replaces the clergy’s invocation of scripture, religious authority, or revelation.

I. A PROSOPOGRAPHY OF NATURAL LAW LITIGANTS⁴⁶

In order to fully understand the religious, professional, and political networks behind the anti-pill legal mobilization, this Part will explore the profiles of the litigants who led this attack on emergency contraception.

43. ÁNGELA VIVANCO, 2 CURSO DE DERECHO CONSTITUCIONAL. ASPECTOS DOGMÁTICOS DE LA CARTA FUNDAMENTAL DE 1980 33 (2006).

44. Rodolfo Figueroa García-Huidobro, *Concepto de persona, titularidad del derecho a la vida y aborto*, 20 REVISTA DE DERECHO (VALDIVIA) 95, 100 n.27 (2007) (Chile). His list of law professors who have written on the right to life from a Catholic natural law perspective includes Catholic University professors José L. Cea, Enrique Evans, Arturo Fermandois, Jorge Precht, José P. Silva, Eduardo Soto, José J. Ugarte, Ángela Vivanco, Patricio Zapata, University of Los Andes professor Hernán Corral, and University Gabriela Mistral professor Jorge Varela.

45. Symposium, Julieta Lemaitre, *By reason alone: Catholicism, constitutions, and sex in the Americas*, 10 INT’L J. CONST. L. 493, 494 (2012).

46. Prosopography is, according to the Oxford Dictionary, “a description of a person’s appearance, personality, career, etc., or a collection of such descriptions.” Originating in the work of classical historians, social scientists use these descriptions

Between 2001 and 2010 important Chilean political and social actors, including members of both major political coalitions and influential religious leaders, challenged the lawfulness of emergency contraception, arguing that its effects were abortifacient and thus contrary to the absolute prohibition of abortion by Chilean legislation. As a result, a sustained anti-pill legal mobilization threatened, with varying degrees of success, the attempt to provide this medicine widely and freely. Courts were the main fora for this opposition. Support of the policy came mainly from the Executive: first, by issuing decrees authorizing distribution of the pill by the public health system, and then launching the legislative process that ultimately begat a statute guaranteeing the supply of the pill.⁴⁷ As we will see, President Ricardo Lagos (2000–2006) stood against the legal challenges to the administrative authorization of the pill by the Institute of Public Health. Likewise, President Michelle Bachelet not only served as Minister of Health during the first half of the Lagos administration and as President (2006–2010) when the anti-pill opposition moved to confront the Ministry of Health before the Constitutional Tribunal, but also sent a bill to Congress to secure the legality of the pill even after the Tribunal had declared it unconstitutional.

to provide context to their studies in the form of personal life stories that they consider representative of larger social trends. See Lawrence Stone, *Prosopography*, 100 DÆDALUS 46 (1971).

47. This calls for a brief explanation of the way that the Chilean constitutional system handles the creation of norms. There are two normative instruments: decrees issued by the President using his *potestad reglamentaria* (regulatory powers) and legislation. The interaction between these two forms is a complex matter. The President has two forms of regulatory powers: executive regulatory powers, which implement or enforce legislation; and autonomous regulatory powers, which regulate things that are not reserved for statutory regulation. Simultaneously, there are certain matters whose regulation falls within the scope of legislation, and thus that exclude the deployment of autonomous regulatory powers: this is the principle of *reserva legal* (statutory reservation). The 1980 Constitution, mindful of the possibility that Pinochet or his heir might one day rule with an elected Congress, sought to increase the area of the President's autonomous regulatory powers; but since the beginning of the democratic governments in 1990, all the relevant institutions—the Executive, Congress, and the Constitutional Tribunal—have decreased the scope of autonomous regulatory powers, increasing the space of statutory reservation. This does not mean, however, that the power of the Executive has suffered a net loss. The President can always use his executive regulatory powers, and he has an ample power to present bills to Congress; in fact, there are vast areas of legislation that can only begin with a Presidential law proposal, in what is known as the President's *iniciativa exclusiva* (exclusionary initiative). What these adaptations of constitutional practice under civilian rule meant was that the President would bring most issues to discussion in Congress, creating the consensual politics that were so characteristic of the Chilean transition to democracy. See Peter M. Siavelis, *Exaggerated Presidentialism and Moderate Presidents: Executive-Legislative Relations in Chile*, in LEGISLATIVE POLITICS IN LATIN AMERICA 79 (Scott Morgenstern & Benito Nacif eds. 2002).

In so doing, she managed to solve the issue in a way favorable to reproductive rights.

A decade of legal battles would not have been possible without the small group of organizers and leaders who gave direction and strategy to the anti-pill mobilization, both inside and outside the courts. Their profiles evidence the extensive political and religious connections of the anti-pill legal mobilization, constituting an important part of the context of the cases. In a brief exercise of prosopography, I will look at three individuals who stood out for their contribution in grassroots organization, litigation, and congressional leadership, respectively: Juan Enrique Jara, Jorge Reyes, and José Antonio Kast.

Juan Enrique Jara

In 2001, while still a law student at the University of Los Andes,⁴⁸ Juan Enrique Jara brought one of the first lawsuits against the morning-after pill.⁴⁹ In 2006, *Revista El Sábado*, a weekly magazine published by the conservative newspaper *El Mercurio*,⁵⁰ ranked Jara as one of the 100 “notable young leaders” of that year introducing him with these words:

He brings together young people of conservative leanings to demonstrate against divorce, the morning-after pill, and euthanasia. He sued four laboratories that produce the pill, and got a pill produced by two laboratories taken off the market. Now, he is trying to promote legislation about cloning. Five years ago, when he was still a law student at the University of Los Andes,

48. The University of Los Andes is a nonprofit private institution of higher education established in 1989 by members of the Opus Dei, a Catholic movement founded in 1928 by the Spaniard José María Escriba. The University of Los Andes has more private donations than any other Chilean university, a fact that reveals the ascendancy of the Opus Dei among the Chilean entrepreneurial class. The intellectual, moral, and religious leadership of the Opus Dei, and consequently of the University of Los Andes, stands consistently on the conservative side on any public discussion in Chile. For an account of the cultural, financial, and political power of the Opus Dei in Chile, see MARÍA O. MÓNCKEBERG, *EL IMPERIO DEL OPUS DEI EN CHILE* (2003).

49. Corte de Apelaciones [C. Apel.] [court of appeals], 28 mayo 2001, “Philippi Izquierdo c. Instituto de Salud Pública,” Rol de la causa: 850–2001 (Chile).

50. *El Mercurio* is by any account the most influential newspaper of Chile. For an account of its influential role in Chilean history, which includes the collaboration of its owner, Agustín Edwards, with the C.I.A. during the presidency of the socialist Salvador Allende and the newspaper’s silence about human rights violations during the dictatorship, see PAULETTE DOUGNAC ET AL., *EL DIARIO DE AUGUSTÍN: CINCO ESTUDIOS DE CASOS SOBRE El Mercurio y los derechos humanos (1973–1990)* (Claudia Lagos, 2009) (Chile).

Jara formed the *Front for Choice (for Life and Family)*, a group that has gone out to the streets to protest and that, in 2003, gathered 2,500 people in front of the Presidential Palace, La Moneda, to protest divorce legislation.”⁵¹

Jara ran unsuccessfully for Congress twice: in 2001, as a candidate of the UDI, he obtained 3.42% of the vote in the 26th District; and in 2009, as a candidate of the shortly-lived Christian Humanist Movement, he obtained 4.83% in the 9th District.⁵² During his last campaign, in an interview with the progressive biweekly magazine, *The Clinic*, Jara declared, “I will do my best to approve pro-life legislation,” because “abortion is a nightmare for women” who “cannot forget that they have murdered a child, something so brutal that whenever they see a drain they begin to vomit.”⁵³

Jorge Reyes

Attorney Jorge Reyes, another important protagonist of the anti-pill legal movement, said that he was inspired to study law at the age of fifteen when he conducted an interview with Jaime Guzmán.⁵⁴ After becoming a lawyer, he worked for fourteen years as a legal advisor to UDI congressman Carlos Bombal.⁵⁵

Reyes was also actively involved in another high-profile case confronting traditional morality with a civil liberties claim: the litigation surrounding the ban on the film *The Last Temptation of Christ*. On January 20, 1997, Reyes and other lawyers brought a request for a constitutional rights injunction in the Court of Appeals of Santiago against the November 11, 1996 decision by the Chilean Film Rating Board that had allowed the exhibition of the film, which had been prohibited in the country since its release

51. *Abogado Juan Enrique Jara*, RED DE LÍDERES (3 julio 2013, 10:19 PM), <http://www.redlideres.cl/1813/article-73054.html> (Chile).

52. SERVICIO ELECTORAL DEL REPÚBLICA DE CHILE, *Votación por Lista/Pacto País: Diputados 2001*, ELECCIÓN DE DIPUTADOS 2001, http://historico.servel.cl/SitioHistorico/index2001_dipu.htm (last visited Feb. 5, 2014); SERVICIO ELECTORAL DEL REPÚBLICA DE CHILE, *Votación por Lista/Pacto País: Diputados 2009*, ELECCIÓN DE DIPUTADOS 2009, http://historico.servel.cl/SitioHistorico/index2009_dipu.htm (last visited Feb. 5, 2014).

53. *Juan Enrique Jara, del Movimiento Humanista Cristiano: “Me la jugaré por una legislación pro vida,”* THE CLINIC ONLINE (30 agosto 2009), <http://www.theclinic.cl/2009/08/30/juan-enrique-jara-del-movimiento-humanista-cristiano-me-la-jugare-por-una-legislacion-pro-vida> (Chile).

54. Claudia Urzúa & Sebastián Vasquez, *La historia del abogado que tras ocho años logró sacar la “pildora” del sistema público*, LA TERCERA, 27 abril 2008, available at http://www.jesus.cl/iglesia/paso_iglesia/recortes/recorte.php?id=8714 (Chile).

55. *Id.*

during the last days of the Pinochet dictatorship.⁵⁶ To satisfy the requirements of standing posed by the Chilean Constitution, which demands that constitutional rights injunctions be presented by individuals “on their own, or through a third party,”⁵⁷ Reyes and his associates presented this lawsuit “on behalf of Jesus Christ, the Catholic Church, and themselves.”⁵⁸ They won this case both at the Court of Appeals of Santiago and the Supreme Court, but a group of liberal lawyers challenged this outcome in *Olmedo Bustos et. al v. Chile*, heard by the Inter-American Court of Human Rights.⁵⁹ On April 30, 1999, Reyes petitioned the Inter-American Court to be heard as *amicus curiae*, but the Court rejected his petition for procedural reasons.⁶⁰

In 2001, Reyes became involved in the first lawsuit against emergency contraception in Chile on behalf of the NGO Worldwide Organization of Mothers (*Organización Mundial de Madres*).⁶¹ Since then, he has become a highly visible figure, acting as a spokesperson for conservative causes not only through lawsuits but also on talk shows.⁶² Reyes, according to reporters, “speaks of ‘we’ when he refers to the self-described ‘pro-life’ movement, of which he is the visible face since the end of the last decade.”⁶³ He staunchly defends the role that litigation has played for the pro-life movement. For example, Reyes remarks that being called an “extremist” annoys him, as “we have used peaceful means, we have used the courts and have always shown our faces.”⁶⁴ As he puts it, “there is nothing more peaceful and respectful of the other [than courts], where one makes claims, is heard, provides evidence and submits oneself to the decision of a superior.”⁶⁵

56. *Olmedo-Bustos v. Chile* (“The Last Temptation of Christ” Case), Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 60 (Feb. 5, 2001).

57. C.P. art. 20 (Chile).

58. *Olmedo-Bustos*, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 60.

59. *Olmedo-Bustos*, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 60.

60. Ultimately, the Court condemned the state of Chile for censorship. *Olmedo-Bustos*, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 103 (finding that “the State must amend its domestic law, within a reasonable period, in order to eliminate prior censorship to allow exhibition of the film ‘The Last Temptation of Christ.’”).

61. Carolina Valenzuela, *Corte Suprema emite fallo que revoca la comercialización de la “pildora del día después”*, EL MERCURIO ONLINE (30 agosto 2001, 12:23 PM), <http://www.emol.com/noticias/nacional/2001/08/30/64575/corte-suprema-emite-fallo-que-revoca-la-comercializacion-de-la-pildora-del-dia-despues.html> (Chile).

62. Urzúa & Vasquez, *supra* note 54.

63. *Id.*

64. *Id.*

65. *Id.*

José Antonio Kast

Between 2001 and 2005, the Chilean anti-pill movement channeled its force through constitutional and administrative-law remedies, the resolution of which fell to courts of first instance, courts of appeals, and the Supreme Court. But after exhausting the possibilities offered by ordinary courts, in 2006 the litigants brought the conflict under the jurisdiction of the Constitutional Tribunal.⁶⁶ With that, the right to initiate actions passed to Congress, whose members possess sole constitutional authority to request the Constitutional Tribunal use its powers of abstract constitutional review.⁶⁷ Specifically, the power to continue the litigation passed to José Antonio Kast, a UDI member of the Chamber of Deputies. Kast personally gathered the necessary signatures of his fellow congressmen to request the intervention of the Constitutional Tribunal,⁶⁸ and devised the legal strategy of the case together with Reyes.⁶⁹ Kast is a devout Catholic, who believes that Catholics “have the obligation to take part [in politics], as witnesses of the Truth.”⁷⁰ On March 11, 2010, which marked the inauguration of the first administration of the Right after two decades of Center-Left presidencies, Kast declared that the new government had “a great mission, which involves not only the reconstruction of much of our country [after the 2010 earthquake], but also the cultural and ethical reconstruction of our people.”⁷¹

66. The Constitutional Tribunal is separate from ordinary courts, which are composed of courts of first instance, courts of appeals, and the Supreme Court. The Constitutional Tribunal only deals with the interpretation of the Constitution; if a constitutional issue is raised in an ordinary court, either the litigants or the court can present a referral to the Tribunal. The only constitutional matter reserved to ordinary courts is the cognizance of constitutional rights injunctions by courts of appeals, which can be appealed to the Supreme Court. See COUSO ET AL., *supra* note 20, at 118.

67. The distinction between *a priori* or abstract review and *a posteriori* or concrete review hinges on “whether the constitutionality of a law or administrative action is determined before or after it takes effect,” and, therefore, “whether a declaration of unconstitutionality can be made in the absence of an actual case or controversy.” Ran Hirschl, *The Judicialization of Politics*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 119, 130 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008).

68. *TC acoge requerimiento de la Alianza contra pildora del día después*, EL MERCURIO ONLINE (19 octubre 2006, 2:00 PM), <http://www.emol.com/noticias/nacional/2006/10/19/233366/tc-acoge-requerimiento-de-la-alianza-contra-pildora-del-dia-despues.html> (Chile).

69. *Id.*

70. *Seminario Iglesia y Política en Chile*, CATHOLIC.NET, <http://www.es.catholic.net/empresarioscatolicos/464/997/articulo.php?id=44741> (last visited Feb. 5, 2014).

71. José Antonio Kast, *Los costos del estilo de “gobierno ciudadano”*, LA TERCERA BLOG (13 marzo 2010), http://blog.latercera.com/blog/jakast/entry/los_costos_del_estilo_de (Chile).

Kast has forged a strong alliance with the bishop of his district, Juan Ignacio González Errázuriz, a member of the Opus Dei. Before the last mayoral election, González “wrote a four page document telling his congregation how to vote”⁷²—an important intervention in a district where 63.3% of the population are practicing Catholics—declaring that “no one should support any candidate who supports the distribution of the morning-after pill”⁷³ or “encourages or defends homosexual or lesbian marriages, physical or chemical contraception or who would like to equate marriage with domestic partnerships.”⁷⁴ His involvement in the “pro-life” mobilization catapulted Kast to a position of leadership among the most conservative section of the UDI. When he decided to run for its chairmanship in 2008, he forced the first competitive election within the party since Guzmán founded it in 1983.⁷⁵

The religious aspect of the anti-pill movement emerges in various other anecdotes. In the oral arguments held for a constitutional rights injunction filed in 2001 by natural law litigants, a group of fourteen-year-old students from religious high schools packed the courtroom and prayed a Hail Mary “as a way to give strength to the attorneys opposing the pill, who were the first ones to intervene in the hearing.”⁷⁶ But, as we will see, they were not the only ones capable of mobilizing people around judicial processes in this series of events: pro-pill protests also flooded the streets as anti-pill victories progressed.

II. THE BEGINNING: ANTI-CONTRACEPTION LITIGATION BEFORE ORDINARY COURTS

This decade-long struggle began in the early days of the twenty-first century when the Chilean Institute of Public Health (*Instituto de Salud Pública*, ISP) announced that it would consider approving a levonorgestrel-based emergency contraception pill.⁷⁷ The announcement stirred immediate

72. Torres Verónica, *El mundo que José Antonio Kast no quiere ver: San Bernardo, la tierra santa*, THE CLINIC ONLINE (7 agosto 2009), <http://www.theclinic.cl/2009/08/07/el-mundo-que-jose-antonio-kast-no-quiere-ver-san-bernardo-la-tierra-santa/> (Chile).

73. *Id.*

74. *Id.*

75. At that time, and in a display of bad taste, his supporters started calling him “the white Obama,” leading some to ridicule him by christening him “Ku Klux Kast.” See, e.g., makerscorp, *NTN, AMOR AL PODER 4*, YOUTUBE (Oct. 21, 2009), <http://www.youtube.com/watch?v=qMeM6bQ6xwc>.

76. CLAUDIA DIDES CASTILLO, *VOCES EN EMERGENCIA: EL DISCURSO CONSERVADOR Y LA PÍLDORA DEL DÍA DESPUÉS* 75 (2006) (Chile).

77. *Buscan evitar uso de “píldora del día después”*, EL MERCURIO ONLINE (13 febrero 2001, 12:16 PM), <http://www.emol.com/noticias/nacional/2001/02/13/46045/buscan-evitar-uso-de-pildora-del-dia-despues.html> (Chile)

opposition by the Catholic Church and quick partisan alignment on the issue.⁷⁸ In March 2001, the ISP released a report holding that the so-called “morning-after” pill did not cause abortions, attempting to clear the way for its approval.⁷⁹ The Church and conservative groups, however, had a different opinion. The Chilean Episcopal Conference criticized the decision, arguing that “it acts against a being that certainly has received the invaluable gift of life.”⁸⁰ A group of conservative lawyers responded by filing a constitutional rights injunction against the ISP in order to stop its distribution.⁸¹ The congressional candidates of the UDI signed a document expressing their decision to oppose the pill⁸² and called their peers from the center-left Christian Democratic Party (*Partido Demócrata Cristiano*, PDC) to join them in the fight.⁸³ On the other side, President Lagos and Minister of Health Michelle Bachelet both expressed their commitment to support the pill.⁸⁴ In the center-left, the Party for Democracy (*Partido Por la Democracia*, PPD) expressed its support for the decision, arguing that the

78. *Iglesia Católica rechazó venta de la “píldora del día después”*, EL MERCURIO ONLINE (20 marzo 2001, 12:49 PM), <http://www.emol.com/noticias/nacional/detalle/detal-lenoticias.asp?idnoticia=49539> (Chile). For a compilation of the Catholic Church’s pronouncements and interventions on the issue, see *Documentos de la Conferencia Episcopal de Chile*, IGLESIA.CL, <http://www.iglesia.cl/especiales/porlavida/> (last visited Feb. 5, 2014).

79. *Informe del ISP estima que píldora del día después no es abortiva*, EL MERCURIO ONLINE (16 marzo 2001, 3:51 PM), <http://www.emol.com/noticias/nacional/2001/03/16/49252/informe-del-isp-estima-que-pildora-del-dia-despues-no-es-abortiva.html> (Chile).

80. *Iglesia Católica rechazó venta de la “píldora del día después,” supra* note 78.

81. *Buscan evitar uso de “píldora del día después,” supra* note 77.

82. *Candidatos a disputados UDI firman compromiso contra el aborto*, EL MERCURIO ONLINE (16 marzo 2001, 1:46 PM), <http://www.emol.com/noticias/nacional/2001/03/16/49235/candidatos-a-disputados-udi-firman-compromiso-contra-el-aborto.html> (Chile).

83. *UDI llama a DC a protestar juntos contra “píldora del día después”*, EL MERCURIO ONLINE (5 marzo 2001, 11:44 AM), <http://www.emol.com/noticias/nacional/2001/03/05/47906/udi-llama-a-dc-a-protestar-juntos-contra-pildora-del-dia-despues.html> (Chile).

84. *Lagos Llamó a no Temer Debate Sobre “Píldora del Día Después”*, EL MERCURIO ONLINE (7 marzo 2001, 11:00 AM), <http://www.emol.com/noticias/nacional/2001/03/07/48146/lagos-llamo-a-no-temer-debate-sobre-pildora-del-dia-despues.html> (Chile); *Ministra Bachelet se Refirió a la Polémica “Píldora del Día Después”*, EL MERCURIO ONLINE (1 marzo 2001, 8:08 PM), <http://www.emol.com/noticias/nacional/2001/03/01/47641/ministra-bachelet-se-refirio-a-la-polemica-pildora-del-dia-despues.html> (Chile).

drug “is not an abortive pill and constitutes an advancement of medical science.”⁸⁵

On February 13, 2001, six organizations filed a request for a constitutional rights injunction before the Court of Appeals of Santiago against the ISP and the Minister of Health “in their own name and on behalf of those about to be born in Chile, of their mothers and parents, and especially of any woman, potentially a victim” to defend “their right to life, which they consider threatened by the arbitrary and illegal act of the health authorities, which accepted a request for marketing authorization and issued a permit for the commercialization of the drug Postinal.”⁸⁶ Oral arguments were heard on May 14, and on May 28, the Court of Appeals dismissed the injunction request for lack of standing, declaring that the unborn, as a group seeking relief, were “indefinite and lacked the indispensable discreteness that the law requires to request the constitutional rights injunction in question.”⁸⁷ The Court added:

The doctrinal discussion put forward in this request and its supporting briefs, together with the scientific and technical studies that grounded the decision of the ISP, which the complainants challenge, lie beyond the scope of constitutional rights injunctions, as it would demand full use of the rules of evidence, which would include diverse and complex means of proof, proceedings that are not compatible with the objective [of the constitutional rights injunction] of affording a quick and efficient remedy to protect an eventual affected party.⁸⁸

A dissent was filed by Judge María Antonia Morales, who invoked what would become the theme of anti-pill adjudication in the decade to come: the idea that the Constitution “recognizes as the first and most fundamental of all the rights that it guarantees, the right to life, and imposes on the law the duty to protect the life of those about to be born in all phases of its development from the moment of conception.”⁸⁹ The Court of Appeals’ dismissal of the injunction request through formalistic standing require-

85. *PPD respalda uso de la pildora del “día después”*, EL MERCURIO ONLINE (3 marzo 2001, 6:23 PM), <http://www.emol.com/noticias/nacional/2001/03/03/47815/ppd-respalda-uso-de-la-pildora-del-dia-despues.html> (Chile).

86. Corte de Apelaciones [C. Apel.][court of appeals], 28 mayo 2001, “Philippi Izquierdo c. Instituto de Salud Pública,” Rol de la causa: 850–2001, slip op. at § 1 (Chile).

87. C. Apel., 28 mayo 2001, “Philippi Izquierdo,” slip op. at § 9.

88. C. Apel., 28 mayo 2001, “Philippi Izquierdo,” slip op. at § 11.

89. C. Apel., 28 mayo 2001, “Philippi Izquierdo,” slip op. at § 11 (Morales, J., dissenting).

ments harkens back to the restrictive constitutional review characteristic of Chilean courts prior to the 1980 Constitution's entry into force.⁹⁰

The plaintiffs filed an appeal to the Supreme Court on June 1, 2001, which was decided on August 30, 2001.⁹¹ The Supreme Court reversed, declaring that standing to request a constitutional rights injunction “only requires the existence of concrete beings that may be affected by the action that is being denounced as arbitrary or illegal, even if it is unknown where they are or if there is uncertainty about their name or any other individualizing characteristics.”⁹² With respect to the substance of the injunction, the Supreme Court ruled in favor of the plaintiffs, declaring that since the injunction request claimed that “the drug . . . could, in one of its results, affect the fertilized egg, that is an embryo with all of its genetic load, preventing it from gaining implantation in the uterus and thus causing an abortion.”⁹³ The Court stated, “what needs to be resolved is at what point can or ought we recognize legitimately and legally the existence of a human being.”⁹⁴ The decision concluded that “those about to be born, whatever their stage of prenatal development—since the constitutional norm does not make distinctions—have a right to life.”⁹⁵ This line of reasoning and conceptual framework would characterize later decisions by the Constitutional Tribunal that declared presidential decrees supporting emergency contraception unconstitutional. The Supreme Court, as we have seen, shared the perspective of the natural law litigants, presenting the issue exclusively as a right-to-life problem. These terms naturally invoke an anti-pill solution and neglect the interests of pregnant women and of public health authorities. The major achievement of the anti-pill movement was its success in framing the issue in this way.⁹⁶

90. Through this Constitution, as I have observed, the Junta enhanced constitutional adjudication in order to protect private property and economic freedoms. Before its enactment, both the Supreme Court and the short-lived Constitutional Tribunal used their powers with considerable self-restraint. See HILBINK, *supra* note 8; FAÚNDEZ, *supra* note 12, at 201.

91. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 30 agosto 2001, “Philippi Izquierdo c. Instituto de Salud Pública,” Rol de la causa: 2186–2001 (Chile).

92. C.S.J., 30 agosto 2001, “Philippi Izquierdo,” slip op. at § 8.

93. C.S.J., 30 agosto 2001, “Philippi Izquierdo,” slip op. at § 13.

94. C.S.J., 30 agosto 2001, “Philippi Izquierdo,” slip op. at § 14.

95. C.S.J., 30 agosto 2001, “Philippi Izquierdo,” slip op. at § 17.

96. Two Justices filed a dissent arguing, as the majority had asserted in the first instance ruling, that the nature of the constitutional rights injunction renders it unfit “to introduce oneself in the study and resolution of questions that entail scientific knowledge, matters that belong to a full trial with ample opportunities to argue, respond, debate, substantiate, and provide evidence, for all the parties.” C.S.J., 30 agosto 2001, “Philippi Izquierdo,” slip op. at § 2 (Kokisch & Yurac, JJ., dissenting).

After the Supreme Court ruling, the ISP made a singular move: it authorized a different company to distribute a different morning-after pill, Postinor 2, also based on levonorgestrel.⁹⁷ This reaction inaugurated a pattern that would characterize the behavior of the Administration in this matter. I describe the ISP's response as one of "legal resistance," that is, of persisting in a certain policy commitment in the face of judicial opposition by means of devising new legal strategies to pursue them. The plaintiffs of the original case, however, considered the ISP decision an act of disobedience to the Supreme Court ruling, and petitioned the Court to enforce its previous decision against this new drug.⁹⁸ The Supreme Court instructed the Court of Appeals to respond to the petition, which it did on October 10, 2001.⁹⁹ In its ruling, the Court of Appeals wrote that the Supreme Court "annulled a distinct and single administrative act, e.g., Resolution N° 2141 of March 21, 2001, of the ISP, but it did not prohibit, in general and absolute terms, the circulation and commercialization of pharmaceuticals containing the drug Levonorgestrel, 0.75 mg."¹⁰⁰ The legal consequence of interpreting the Supreme Court decision this way was clear because the Civil Code establishes that in the Chilean legal system each judicial decision is binding only for the case in which it had actually been pronounced.¹⁰¹ Thus, the Court of Appeals was able to conclude that the previous decision "sanctions a concrete act, and therefore this Court is unable to give it an extensive effect."¹⁰² Once again, the Court of Appeals expressed a restrained and formalistic understanding of constitutional adjudication that contrasts with a more expansive constitutionalism rooted in natural law values.

The plaintiffs then moved to a new venue. They filed a petition before a court of first instance to invalidate the administrative acts of the ISP on the basis of their public law nullity.¹⁰³ On June 30, 2004, Judge Silvia Papa declared null the ISP's authorization based on constitutional and other legal arguments.¹⁰⁴ For an administrative act to be valid, she argued, the act needs

97. "Postinor 2" es la nueva pildora del día después, EL MERCURIO ONLINE (29 agosto 2001, 9:44 PM), <http://www.emol.com/noticias/nacional/2001/08/29/64531/postinor-2-es-la-nueva-pildora-del-dia-despues.html> (Chile).

98. Corte de Apelaciones [C. Apel.][court of appeals], 10 octubre 2001, "Philippi Izquierdo c. Instituto de Salud Pública," Rol de la causa: 850-2001, slip op. at § 1 (Chile).

99. C. Apel., 10 octubre 2001, "Philippi Izquierdo," slip op. at § 6.

100. C. Apel., 10 octubre 2001, "Philippi Izquierdo," slip op. at § 2.

101. Cód. Civ. art. 3 (Chile).

102. C. Apel., 10 octubre 2001, "Philippi Izquierdo," slip op. at § 7.

103. The Constitution establishes that actions by public bodies that do not satisfy constitutional requirements are void, allowing individuals affected by those actions to file a petition to declare that nullity. C.P. art. 7 (Chile).

104. Juzgados Civiles (J. Civ.) (civil courts), 30 junio 2004, "Centro Juvenil AGES c. Instituto de Salud Pública," Rol de la causa: 5839-2002 (Chile).

to have a determinate end or goal consistent with Article 1 of the Constitution, which proclaims that “[t]he State is at the service of the human person, and its goal is to promote the common good.”¹⁰⁵ Based on Articles 75 and 76 of the Civil Code, the Judge concluded that “the protection that the Judge must give [to the unborn] begins at the moment of conception, and the second of these Articles does not establish a calculation or amount of time that needs to be deducted, nor does it mention the moment of implantation of the fertilized egg.”¹⁰⁶ The legislature, she argued, “protects the embryo of an individual of the human species before his birth, establishing a special juridical status, prohibiting the performance of therapeutic abortions in the Health Code and punishing abortion in our Criminal Code.”¹⁰⁷ In consequence, she wrote, “there has been a misuse of power when the institution has pursued a goal other than the one chosen by the legislator, that is to protect the life of the unborn without making arbitrary distinctions about whether the embryo is implanted or not.”¹⁰⁸ In an interview with the newspaper *La Segunda*, Judge Papa emphasized that Article 75 of the Civil Code, which instructs judges to take all the measures that they deem necessary to protect the life of the unborn, guided her decision. Furthermore, she added that she relied on “[the ample] evidence provided by researchers and physicians of different persuasions,” together with “legal opinions and medical expert testimonies.”¹⁰⁹

The decision of first instance was appealed, and the Court of Appeals of Santiago, once more, asserted the legality of emergency contraception on procedural grounds.¹¹⁰ The lower court had dismissed the ISP’s demurrer

105. C.P. art. 1 (Chile).

106. J. Civ., 30 junio 2004, “Centro Juvenil AGES,” slip op. at § 42.

107. J. Civ., 30 junio 2004, “Centro Juvenil AGES,” slip op. at § 44.

108. J. Civ., 30 junio 2004, “Centro Juvenil AGES,” slip op. at § 51.

109. Verónica Cerda F., *Jueza Papa, la que falló en contra de la píldora: “No soy pechoña”*, LA SEGUNDA (1 julio 2004), available at http://www.jesus.cl/iglesia/paso_iglesia/recortes/recorte.php?id=2983 (Chile).

110. Corte de Apelaciones [C. Apel.][courts of appeals], 10 diciembre 2004, “Centro Juvenil AGES c. Instituto de Salud Pública,” Rol de la causa: 4200–2003 (Chile). The truly remarkable thing about the jurisprudential consistency of the Court of Appeals of Santiago in this matter is that each decision was issued by a different panel of judges. The May 28, 2001 decision dismissing the constitutional rights injunction was taken by judges Rubén Ballesteros, Amanda Valdovinos, and the dissenting María Antonia Morales. Corte de Apelaciones [C. Apel.] [courts of appeals], 28 mayo 2001, “Phillippi Izquierdo c. Instituto de Salud Pública,” Rol de la causa: 850–2001 (Chile). The October 10, 2001 decision declining to extend the Supreme Court ruling to the new morning-after pill approved by the Institute of Public Health was taken by judge María Antonia Morales, joined by judges pro tempore María Cristina Navajas and Ángel Cruchaga. Corte de Apelaciones [C. Apel.] [courts of appeals], 10 octubre 2001, “Phillippi Izquierdo c. Instituto de Salud Pública,” Rol de la causa: 850–2001 (Chile). This decision is particularly striking as María Anto-

asserting that the plaintiffs lacked standing to represent indeterminate women and the unborn, a decision that the Court of Appeals overturned by declaring that “in a State of Law like ours, where the principle of legality rules first and foremost, the initiation of the process of adjudication—particularly in civil matters—is highly regulated.”¹¹¹ For the Court of Appeals, this meant that “to file an action in these kinds of issues it is necessary to prove a present, legitimate, and reasonable interest on the part of those who initiate the action in question, interest that must be understood as an injury to the person or the group that sues or on whose name one is suing.”¹¹² Thus, “neither the importance, object, or scope of the complaint, nor even the justice of the demand, can alter or replace the aforementioned requirement.”¹¹³ The Court ruled that it was “forced to conclude that, in effect, the plaintiffs lacked the necessary standing to sue.”¹¹⁴ Moreover, the Court declared that it “cannot resolve the dispute presented in this case” because judges can act “only on the basis of certainties, and are barred from recognizing rights or duties deriving from scientific hypotheses currently under discussion.”¹¹⁵

The Supreme Court put an end to this phase of the anti-pill litigation by ruling on November 28, 2005, on a cassation application filed by the plaintiffs against the Court of Appeals decision.¹¹⁶ The Supreme Court

nia Morales, who joined the Supreme Court as its first female member ever, only a couple of weeks earlier, had previously voted against the pill. *Histórico juramento de mujeres en Corte Suprema*, EL MERCURIO ONLINE (5 noviembre 2001, 9:20 AM), <http://www.emol.com/noticias/nacional/2001/11/05/70397/historico-juramento-de-mujeres-en-corte-suprema.html> (Chile). María Cristina Navajas was the Dean of the Catholic University Law School. Decanos, FACULTAD DE DERECHO, PONTIFICA UNIVERSIDAD CATOLICA DE CHILE, <http://derecho.uc.cl/Historia/decanos.html> (last visited March 13, 2014). In my opinion, her membership in this academic community made unlikely her vote in favor of a restrained application to the anti-pill Supreme Court ruling. The December 10, 2004 decision overturning the public law nullity of the ISP authorization was authored by judges Hugo Dolmetsch Urra and Dobra Lusic Nadal, together with judge pro tempore Paulina Veloso Valenzuela. Corte de Apelaciones [C. Apel.] [courts of appeals], 10 diciembre 2004, “Centro Juvenil AGES c. Instituto de Salud Pública,” Rol de la causa: 4200–2003 (Chile). This consistency is remarkable as common lore has it that different panels, or *salas*, of Chilean courts never judge alike.

111. C. Apel., 10 diciembre 2004, “Centro Juvenil AGES,” slip op. at § 8.
112. C. Apel., 10 diciembre 2004, “Centro Juvenil AGES,” slip op. at § 8.
113. C. Apel., 10 diciembre 2004, “Centro Juvenil AGES,” slip op. at § 8.
114. C. Apel., 10 diciembre 2004, “Centro Juvenil AGES,” slip op. at § 8.
115. C. Apel., 10 diciembre 2004, “Centro Juvenil AGES,” slip op. at § 16.
116. Cassation is the final review of judicial decisions by the highest court in a civil law system. It was created in France in the nineteenth century. While plaintiffs have a right to be heard by a court of appeals, they do not have a right to have their cassation application heard by the highest court. But, unlike certiorari jurisdiction, cassation is not, strictly speaking, discretionary. Cassation must be requested when

sided with the plaintiffs on the standing issue, but added that “this does not necessarily mean that their demand must succeed.”¹¹⁷ In fact, the Supreme Court agreed with the Court of Appeals and concluded that “it has not been substantiated in this procedure that the drug in question causes abortions nor that its use can cause, with certainty, a threat to the life of the unborn.”¹¹⁸ The Court found that the Institute of Public Health was authorized to issue the administrative act at stake.¹¹⁹

Defeated in ordinary courts, the anti-pill litigants shifted to new legal strategies. In January 2006, Centro Juvenil Ages, the organization created by Juan Enrique Jara for the purpose of challenging the legality of the pill,¹²⁰ presented a civil liability lawsuit against Grünenthal, the main pharmaceutical company importing the pill.¹²¹ Shortly thereafter, the company withdrew its product Postinor-2 from the market and resigned its license.¹²² Then, in September 2006, the importer of TACE, the other brand of the pill, also retired its product from the shelves.¹²³ Despite the fact that the latest Supreme Court ruling declared the pill legal,¹²⁴ ACONOR, another

the applicant argues successfully that the court of first instance or the court of appeals have based their decision on an error of law. Through a cassation appeal, the Supreme Court can “quash judicial decisions based either on a mistaken interpretation of the law or on a failure to observe the rules of procedure,” a power that is “strictly regulated: decisions had to be reasoned and could only be exercised against a limited number of Court of Appeals’ judgments.” FAÚNDEZ, *supra* note 12, at 136.

117. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 28 noviembre 2005, “Centro Juvenil AGES c. Instituto de Salud Pública,” Rol de la causa: 1039–2005, slip op. at § 22 (Chile).

118. C.S.J., 28 noviembre 2005, “Centro Juvenil AGES,” slip op. at § 34.

119. C.S.J., 28 noviembre 2005, “Centro Juvenil AGES,” slip op. at § 34. For a critique of the Supreme Court opinion regarding its understanding of the legal status of the unborn, see Antonio Bascuñán, *Después de la Píldora*, 2 ANUARIO DE DERECHOS HUMANOS 235 (2006) (Chile).

120. Lorena Letelier & Ana María Morales, *Nuevo fallo prohíbe venta de la “píldora del día después,”* CATHOLIC.NET (1 julio 2004), <http://es.catholic.net/imprimir/index.phtml?ts=22&ca=285&te=706&id=18349> (last visited Mar. 20, 2014). As the source puts it:

Because of the public debate caused by the first lawsuit against the drug, the lawyers opted this time for maintaining a low profile. In consequence, Jorge Reyes stopped being the claimant and left Centro Juvenil Ages, chaired by Juan Enrique Jara, law student at the University of Los Andes, as the sponsor of the request.

Id.

121. Lidia Casas Becerra, *La saga de la anticoncepción: de emergencia en Chile: avances y desafíos*, 2 DOCUMENTOS ELECTRÓNICOS PROGRAMA GÉNERO Y EQUIDAD 5 (2008) (Chile).

122. *Id.*

123. *Id.* at 6.

124. C.S.J., 28 noviembre 2005, “Centro Juvenil AGES,” slip op.

consumer association created by Juan Enrique Jara,¹²⁵ sent letters to drugstores informing them that selling the pill was illegal.¹²⁶

These strategies caused a shortage of the pill, which the government sought to solve in several ways. As one method, the government fined some drugstores that had no emergency contraception in their inventory. As another method, the government instructed the public health system, composed of state and municipal hospitals, to provide women with the pill. In addition the Ministry of Health issued an administrative order, Exempt Resolution N° 584,¹²⁷ enacting a code of standards and practices in reproductive matters for the health sector: the National Norms on the Regulation of Fertility (NNRF).¹²⁸ This action, however, gave the anti-pill advocates a new legal and political target: the exempt resolution issued by the Ministry of Health. This move had important jurisdictional and political consequences because it allowed the anti-pill movement to shift from the ordinary jurisdiction of Courts of Appeals and the Supreme Court to the institution designed to adjudicate conflicts regarding the powers of each branch of government: the Constitutional Tribunal.¹²⁹

III. ANTI-PILL PYRRHIC VICTORIES AT THE CONSTITUTIONAL TRIBUNAL

Moving to the Constitutional Tribunal gave the anti-pill movement more stable terrain on which to advance. Many of the members of the Tribunal were constitutional law professors at Catholic law schools and there-

125. Casas observes that Juan Jara, president of Centro Juvenil Ages, was at the same time vice-president of ACONOR. Casas Becerra, *supra* note 121, at 8.

126. CENTRO DE DERECHOS HUMANOS UNIVERSIDAD DIEGO PORTALES, INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2008 343 (2009).

127. Ministerio de Salud, APRUEBA NORMAS NACIONALES SOBRE REGULACIÓN DE LA FERTILIDAD, RESOLUCIÓN EXENTA N° 584, Sept. 1, 2006 (Chile). In Chilean administrative law, an exempt resolution (*resolución exenta*) is an administrative act that is not reviewed preemptively by the General Comptroller. Numerically, most administrative acts are exempt from this preemptive review. See FAÚNDEZ, *supra* note 12, at 117.

128. GOBIERNO DE CHILE, MINISTERIO DE SALUD, NORMAS NACIONALES SOBRE LA REGULACIÓN DE LA FERTILIDAD (2006).

129. Pablo Zalaquett, mayor of La Florida, made a prior but unsuccessful attempt to challenge the NNRF through a constitutional rights injunction, claiming that it was illegal and that it violated the right of parents to educate their children on sex matters. See Corte de Apelaciones [C. Apel.] [court of appeals], 10 noviembre 2006, “Corporación Municipal de Educación y Salud de la Florida c. Ministerio de Salud,” Rol de la causa: 4693–2006 (Chile). On appeal, the Supreme Court refrained from ruling because in the meantime the Constitutional Tribunal had declared Exempt Resolution N° 584 unconstitutional. See Corte Suprema de Justicia [C.S.J.] [Supreme Court], 25 enero 2007, “Corporación Municipal de Educación y Salud de la Florida con Ministerio de Salud,” Rol de la causa: 6237–2006 (Chile).

fore likely to be supporters of natural law constitutionalism.¹³⁰ The Tribunal was more prone to the substantive forms of constitutional reasoning that favored the anti-pill movement over the procedural formalism that had protected emergency contraception. This favorable scenario secured two momentous rulings for the anti-pill crusade.¹³¹ Nevertheless, as we will see in the next Part, the two anti-pill victories in this venue were not the last word on emergency contraception in the Chilean legal system; indeed, they were not even the last word from the Constitutional Tribunal.¹³²

On September 30, 2006, thirty-one lower house congressmen of the National Renewal (*Renovación Nacional*, RN) and UDI parties¹³³ petitioned the Tribunal to declare Exempt Resolution N° 584 unconstitutional.¹³⁴ The anti-pill Congressional front advanced two main arguments. First, they objected to the Ministry of Health's use of an exempt resolution—a lower form of regulatory power¹³⁵—arguing that this normative instrument had been chosen to avoid its reviewability by administrative courts; even though “the most radically significant individual rights that our Constitution recognizes are at stake.”¹³⁶ Second, and relatedly, the congressmen claimed that Resolution N° 584's authorization of the morning-after pill violated the

130. Members of the Constitutional Tribunal that taught at Catholic law schools and that, in my opinion, subscribe to a Catholic natural law understanding of constitutional law include three of its recent Presidents: José L. Cea (2005–2007), Raúl Bertelsen (2011–2013), and Marisol Peña (2013–2015). See *Integración Histórica*, TRIBUNAL CONSTITUCIONAL CHILE, <http://www.tribunalconstitucional.cl/wp/tribunal/integracion-historica> (last visited Feb. 5, 2014).

131. Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 11 enero 2007, “Requerimiento de inconstitucionalidad de la Resolución Exenta N° 584 del Ministerio de Salud,” Rol de la causa: 591–2006, slip op. at § 33 (Chile); Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 18 abril 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” Rol de la causa: 740–2007, slip op. at § 40 (Chile).

132. *Infra* Part III.

133. While the elements that formed the UDI and still constitute its leadership were the followers of Jaime Guzmán and the Chicago Boys, RN also boasts continuity with the National Party (1967–1973) and through it, with the traditional parties of the Chilean elite, the Conservative and Liberal Parties. For an in-depth study of the historical background, ideological outlook, and electoral successes of these parties, see POLLACK, *supra* note 22, and VERÓNICA VALDIVIA, *NACIONALES Y GREMIALISTAS: EL “PARTO” DE LA NUEVA DERECHA POLÍTICA CHILENA 1964–1973* (2008).

134. Only congressmen can petition the Constitutional Tribunal to perform an abstract constitutional review of executive acts. Private parties can only request a concrete constitutional review, to be performed in the context of a pending case before another court. See *supra* notes 47, 67.

135. See *supra* note 43.

136. DEDUCEN REQUERIMIENTO DE INCONSTITUCIONALIDAD CONTRA DECRETO SUPREMO (SIC) QUE SEÑALAN 3 (30 septiembre 2006) (Chile).

right to life of the fetus, a right they traced back to the writings of Roman jurists.¹³⁷

In its January 11, 2007 decision, the Tribunal embraced the anti-pill plaintiffs' more positivistic arguments. The Tribunal declared that because of the matters that Exempt Resolution N° 584 regulated—matters which the majority left unidentified, but that the dissenters identified as fundamental rights¹³⁸—Exempt Resolution N° 584 was actually a decree, a form of regulatory power of higher rank and therefore greater reviewability. Moreover, since it lacked the signature of the President, the Tribunal declared it unconstitutional.¹³⁹ Thus, “having declared that Exempt Resolution No. 584 has a formal flaw that entails its formal unconstitutionality, this Court shall refrain from ruling on other possible unconstitutional flaws presented in the petition.”¹⁴⁰ The three dissenting judges argued that administrative resolutions do not become supreme decrees if they regulate constitutional rights and that the Constitutional Tribunal lacked jurisdiction to review the constitutionality of resolutions.¹⁴¹

The Executive's reaction to this ruling followed the pattern of legal resistance. As if following the Tribunal's suggestion,¹⁴² on January 26, 2007 President Michelle Bachelet signed Supreme Decree No. 48,¹⁴³ enacting the same National Norms on the Regulation of Fertility that Exempt Resolution No. 584 intended to enact. Supreme Decree No. 48 gave new and adequate legal support to the governmental policies on the matter, including the power to distribute the pill through the public health system. In response, the anti-pill congressional bloc filed a new petition before the Constitu-

137. DEDUCEN REQUERIMIENTO DE INCONSTITUCIONALIDAD CONTRA DECRETO SUPREMO (SIC) QUE SEÑALAN 3 (30 septiembre 2006) (Chile).

138. Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 11 enero 2007, “Requerimiento de inconstitucionalidad de la Resolución Exenta N° 584 del Ministerio de Salud,” Rol de la causa: 591–2006, slip op. at § 33 (Chile).

139. T.C., 11 enero 2007, “Requerimiento de inconstitucionalidad de la Resolución Exenta N° 584 del Ministerio de Salud,” slip op. at § 33.

140. T.C., 11 enero 2007, “Requerimiento de inconstitucionalidad de la Resolución Exenta N° 584 del Ministerio de Salud,” slip op. at § 61 (second ruling).

141. T.C., 11 enero 2007, “Requerimiento de inconstitucionalidad de la Resolución Exenta N° 584 del Ministerio de Salud,” slip dissenting op., at ¶ 6 (Colombo, Vodanovic, Correa & Fernández, JJ., dissenting).

142. *Bachelet firmará Decreto Supremo para restituir la entrega de la píldora*, EL MERCURIO ONLINE (12 enero 2007, 2:26 PM), <http://www.emol.com/noticias/nacional/2007/01/12/242028/bachelet-firmara-decreto-supremo-para-restituir-la-entrega-de-la-pildora.html> (Chile).

143. MINISTERIO DE SALUD, APRUEBA TEXTO QUE ESTABLECE LAS NORMAS NACIONALES SOBRE REGULACIÓN DE LA FERTILIDAD, DECRETO N° 48 (26 enero 2007) (Chile). The Supreme Decree was reviewed and approved by the General Comptroller on February 2, 2007.

tional Tribunal requesting constitutional review of Supreme Decree No. 48.¹⁴⁴ The congressmen argued that the Decree, an administrative act restricting the right to life of the embryo, exceeded the President's authority.¹⁴⁵ They argued that, under the Chilean Constitution, only properly enacted legislation could regulate the legal status of the embryo.¹⁴⁶ The President argued that her constitutional duty was to implement public policies for everyone, regardless of their moral convictions. This responsibility entailed making emergency contraceptives available while respecting the personal beliefs and values of everyone.¹⁴⁷

A ruling by the Tribunal declaring the pill unconstitutional was officially announced on April 4, 2008, well before the text was ready for its public release—an unprecedented practice for this court.¹⁴⁸ On April 18, the Tribunal released the 276-page opinion.¹⁴⁹ In its decision, the majority adopted a more substantive focus than it had in the Exempt Resolution No. 584 decision.¹⁵⁰ For the majority, the core of the dispute was whether the text of the National Norms on the Regulation of Fertility clashed with various constitutional clauses, particularly with the right to life established in Article 19 N° 1.¹⁵¹ Nevertheless, the decision also had a procedural or formalistic dimension that limited its impact on existing contraceptive methods. The Tribunal declared that the public health system's distribution of

144. DEDUCEN REQUERIMIENTO DE INCONSTITUCIONALIDAD CONTRA DECRETO SUPREMO QUE SEÑALAN (3 marzo 2007) (Chile) (petition to Constitutional Tribunal filed by Lower House Congressmen).

145. *Id.* at 33.

146. *Id.* at 33.

147. MICHELLE BACHELET JERIA, PRESIDENTA DE LA REPÚBLICA ET AL., FORMULA OBSERVACIONES A REQUERIMIENTO 92 (10 abril 2007) (Chile).

148. *Oficial: Tribunal Constitucional prohíbe entrega de la píldora del día después*, EL MERCURIO ONLINE (4 abril 2008, 2:10 PM), <http://www.emol.com/noticias/nacional/2008/04/04/299210/oficial-tribunal-constitucional-prohibe-entrega-de-la-pildora-del-dia-despues.html> (Chile).

149. *TC notifica fallo sobre "píldora del día después" que prohíbe su distribución en sistema público*, EL MERCURIO ONLINE (18 abril 2008, 9:17 PM), <http://www.emol.com/noticias/nacional/2008/04/18/301022/tc-notifica-fallo-sobre-pildora-del-dia-despues-que-prohibe-su-distribucion-en-sistema-publico.html> (Chile). To my knowledge, at the moment of its release it was the longest opinion of the Tribunal in its history.

150. Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 11 enero 2007, "Requerimiento de inconstitucionalidad de la Resolución Exenta N° 584 del Ministerio de Salud," Rol de la causa: 591-2006 (Chile).

151. Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 18 abril 2008, "Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud," Rol de la causa: 740-2007, slip op. at § 40 (Chile).

the pill was unconstitutional on the substantive grounds that this form of contraception can affect the constitutionally protected right to life of the fetus. However, it refrained from banning other mechanisms, such as intrauterine devices, that can produce similar abortifacient effects. The procedural reason for this restrained conclusion, in the face of the substantial similarity between emergency contraception and intrauterine devices, was that the petition was directed only against the Supreme Decree that ordered the public health system to distribute the pill.¹⁵² One can only wonder whether this conclusion was a deliberate attempt on the part of the majority to minimize the impact of this ruling on well-established reproductive health practices.¹⁵³

With respect to the morning-after pill, the opinion concluded that there was a “lack of consensus between the specialists” resulting in a “lack of certainty about one of the possible consequences of the emergency contraception, i.e., whether it prevents the implantation of a human being.”¹⁵⁴ Nonetheless, the Tribunal considered that “the equivalence that could exist, in a first analysis, between the divergent positions of the specialists that had provided evidence to this case” was undermined by the fact that “one of these positions leads to an unconstitutional result while the other does not.”¹⁵⁵ Effectively, the Tribunal employed precautionary reasoning in the face of what it characterized as the scientific uncertainty of the effects of levonorgestrel.¹⁵⁶

It is important to note that the main justificatory shortcoming of this decision was its inability to identify the other constitutional interests at play in this case. On the one hand, the Administration has an interest in having an efficient public health policy; on the other, women have an interest in exercising their reproductive autonomy and to count on adequate means for doing so. The Tribunal did not discuss these interests in its opinion, despite the fact that the Ministry of Health and organizations of pill users had

152. T.C., 18 abril 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” slip op. at § 12 (second ruling).

153. Intrauterine devices have been given to Chilean women by the public health system since the early 1960s. In fact, a Chilean physician, Jaime Zipper, created the copper IUD in the early 1970s.

154. T.C., 18 abril 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” slip op. at § 36.

155. T.C., 18 abril 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” slip op. at § 64.

156. For a critique of the standards of proofs employed by the Tribunal in this respect, see Daniela Accatino Stagliotti, *Una Duda Nada Razonable*, 21 REVISTA DE DERECHO (VALDIVIA) 160 (2007) (Chile).

articulated them.¹⁵⁷ Both detractors and sympathizers criticized the Tribunal's decision for failing to discuss these aspects.¹⁵⁸ For Vivanco, a professor at the Pontifical Catholic University and a supporter of the ruling,¹⁵⁹ it was a deficit that could have been easily fixed without altering the outcome by balancing the rights to life and reproductive autonomy.¹⁶⁰ But from the perspective of reproductive rights, the written opinion not only failed to deliver discursive recognition to women and their needs but also failed to substantively protect their interests. After all, women protesting the decision sported banners saying, "Take your rosaries off our ovaries!"—not "Write a balancing test into your opinions!"¹⁶¹

In order to uncover the power networks at play in this decision, I want to focus on two secondary aspects of the written opinion: its cursory dismissal of Justices Enrique Navarro and Raúl Bertelsens' recusals and its characterization of Chilean constitutional scholarship as fundamentally "pro-life." This analysis will illustrate the professional power structures reflected in this decision.

The Tribunal dealt with the recusal of Justices Enrique Navarro and Raúl Bertelsen before discussing the substance of the main legal issue. This decision directly impacted the Tribunal's composition and thus arguably influenced the outcome of the dispute. In 2003 both Navarro and Bertelsen signed an amicus brief entitled *The right to life as an entitlement: Some considerations concerning the marketing of the drug levonorgestrel 0.75*, which argued that emergency contraception was unconstitutional. The brief was

157. T.C., 18 abril 2008, "Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud," slip op. at VI.2, X.2, Title II ("Personas que han hecho presentaciones en contra del requerimiento") § 1.

158. See Andrés Bordalí Salamanca & Yanira Zúñiga Añazco, *Análisis del fallo del Tribunal Constitucional sobre la píldora del día después*, 5 ANUARIO DE DERECHOS HUMANOS 173, 177 (2009) (Chile) (remarking that "a transversal characteristic of the decision is its failure to consider women as holders of rights"); see also Ángela Vivanco Martínez, *La Píldora del Día Después: Sentencia de Tribunal Constitucional de 11 de enero de 2007*, 35 REVISTA CHILENA DE DERECHO 543, 567 (2008) (noticing the absence in the opinion of a consideration "of whether the option for the precautionary protection of human life amounted to the impairment of other rights involved").

159. Vivanco Martínez, *supra* note 158, at 543.

160. Vivanco Martínez, *supra* note 158, at 569 (arguing that the Tribunal did not "prefer a right over other rights, but rather . . . it has been decided that the essence of sexual and reproductive rights, of the exercise of autonomy and freedom of conscience, do not reach, in their magnitude, the [intensity of the] possible harm to the life of a third party, [the fetus,] in its condition of person and holder of rights").

161. *Veinte detenidos deja manifestación por eventual prohibición de la píldora*, EL MERCURIO ONLINE (3 abril 2008, 2:51 PM), <http://www.emol.com/noticias/nacional/2008/04/03/299047/veinte-detenidos-deja-manifestacion-por-eventual-prohibicion-de-la-pildora.html> (including a picture of a large ensign with the shape of an ovary).

filed in support of the request for annulling the pill's authorization.¹⁶² The amicus was highly partisan, describing the distribution of the pill as “an assault on the Constitution.”¹⁶³ Thus, a group of congressmen supporting emergency contraception argued that the two Justices must recuse themselves for having previously issued an opinion on the matter that had come under their cognizance.¹⁶⁴ While Justice Navarro chose to recuse himself,¹⁶⁵ Justice Bertelsen declared that his participation in the amicus did not pro-

162. Acompaña Informe en Derecho: a modo puramente ilustrativo y testimonial at 6 and 10, Juzgados Civiles (J. Civ.) (civil courts), 30 junio 2004, “Centro Juvenil AGES c. Instituto de Salud Pública,” Rol de la causa: 5839-2002 (Chile) (brief by Alejandro Romero on behalf of *Centro Juvenil AGES*); Informe en Derecho: El Derecho a la Vida y su Titularidad. Algunas Consideraciones a Propósito de la Comercialización de la Droga Levonorgestrel 0.75, , Juzgados Civiles (J. Civ.) (civil courts), 30 junio 2004, “Centro Juvenil AGES c. Instituto de Salud Pública,” Rol de la causa: 5839–2002 (Chile) (brief by Alejandro Silva Bascuñán, et. al. as Amici Curiae on behalf of *Salud Pública*).

163. Brief by Alejandro Silva Bascuñán, et. al. as Amici Curiae for Salud Pública, *supra* note 162. Interestingly, the amicus bound together not only professors widely recognized as right-leaning, but also prominent Christian Democrats, bridging two sections of the political spectrum—the Catholic Center and the Catholic Right—that had been separated since the Military Regime. The conservative camp included Raúl Bertelsen, whose tenure in the Constitutional Tribunal we will soon discuss; Eduardo Soto, who has written extensively in praise of the 1980 Constitution and in criticism of redistributionist policies; Sergio Carrasco, author of a laudatory biography of conservative President Jorge Alessandri; and Arturo Fermandois, UDI member, and appointee as Ambassador to the United States by President Sebastián Piñera in 2010. The PDC group included Alejandro Silva, founding member of the PDC; Francisco Cumplido, Minister of Justice of President Patricio Aylwin; and Patricio Zapata, who worked in the same administration for various members of the Cabinet. It should be noted that Alejandro Silva formed part of the Commission for the Study of a New Constitution between 1973 and 1977, a body appointed by the Military Junta to draft a new constitutional text. At that time he advocated, together with Jaime Guzmán, for a wording of the right to life clause that would have completely banned therapeutic abortion, which was legal in Chile at the time. *See* Comisión de Estudios de la Nueva Constitución, 90th Session, November 25, 1974 (Chile).

164. T.C., April 18, 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” slip op., at X.2. § 4; *see also* Jorge Contesse Singh, *Implicancias y Recusaciones: el caso del Tribunal Constitucional. Informe en derecho sobre la inhabilidad constitucional para conocer de un caso en el que se ha vertido opinión pública con anterioridad*, 2 REVISTA IUS ET PRAXIS 391, 391 (2013) (Chile) (brief presented in support of the congressmen’s recusal petition).

165. A source has suggested to me, off the record, that Navarro might have recused himself due to the fact that, having been appointed to the Tribunal by the Supreme Court, he did not want to alienate anyone in that organ in this highly sensitive matter. Having been appointed by the Right in Congress, Bertelsen would not have felt constrained in the same way. Private interview with an anonymous source (Nov. 2010).

vide enough ground for his recusal,¹⁶⁶ thus taking part in the hearings, an action that earned him strong criticism from feminist movements and progressive politicians.¹⁶⁷

As in the case of our earlier biographical sketches, Justice Bertelsen's profile demonstrates the links between different networks of influence and power, in this case between religious and academic groups. On June 9, 1977, during Augusto Pinochet's dictatorship, Justice Bertelsen became a member of the Commission for the Study of a New Constitution, the advisory legal team appointed by the Military Junta to draft what later became the 1980 Constitution.¹⁶⁸ He also chaired the legislative committee established by the Junta in 1983 that prepared its organic constitutional laws.¹⁶⁹ As a member of the Opus Dei, Bertelsen's academic life has taken place almost exclusively in Catholic institutions. At the Catholic University of Valparaiso he obtained his bachelor of laws, taught as a professor, and served as President from 1983 to 1985.¹⁷⁰ He received his doctorate from the Opus Dei University of Navarra, Spain, and he served as President of the Opus Dei University of Los Andes, Chile between 1988 and 2000, where he remains a professor to date.¹⁷¹

Bertelsen's arrival on the Constitutional Tribunal signifies his connection with the political front. His seat on the Tribunal was part of a political bargain in the Senate that simultaneously placed one Justice of the Right and one of the Center-Left coalition.¹⁷² A group of academics questioned his appointment arguing that "[b]esides technical skills, people in whose hands the Republic puts the defense of the Constitution must have demon-

166. Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 18 abril 2008, "Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud," Rol de la causa: 740-2007, slip op. at § X (Chile).

167. *TC: Miembros rechazaron inhabilitar a Bertelsen en fallo sobre píldora*, EL MERCURIO ONLINE (8 abril 2008, 2:00 PM), <http://www.emol.com/noticias/nacional/2008/04/08/299672/tc-miembros-rechazaron-inhabilitar-a-bertelsen-en-fallo-sobre-pildora.html> (Chile).

168. *Presidente, Raúl Bertelsen Repetto*, TRIBUNAL CONSTITUCIONAL DE CHILE, <http://www.tribunalconstitucional.cl/index.php/integraciones/view/3> (last visited Feb. 5, 2014).

169. *Id.*

170. *Id.*

171. *Id.* For more information on the Universities of Navarra and Los Andes, see *supra* note 48.

172. *Senado aprueba a abogados Bertelsen y Vodanovic para Tribunal Constitucional*, EL MERCURIO ONLINE (8 noviembre 2005, 6:20 PM), <http://www.emol.com/noticias/nacional/2005/11/08/201007/senado-aprueba-a-abogados-bertelsen-y-vodanovic-para-tribunal-constitucional.html> (Chile).

strated their loyalty to the [democratic] principles that inspire it.”¹⁷³ Bertelsen’s participation “in drafting the 1980 Constitution and in the formulation of the legislation enacted between 1983 and 1989 in order to preserve the institutions of the military regime,”¹⁷⁴ in their opinion, contradicted that democratic commitment. However, their criticism only managed to stir up support for Bertelsen from other academics.¹⁷⁵ Ultimately, on August 9, 2011, the other Justices elected Bertelsen President of the Constitutional Tribunal. In earlier ballot rounds he had tied twice with socialist Francisco Fernández.¹⁷⁶

Bertelsen’s religious and academic affiliations reflect the hegemony of natural law constitutionalism in the Chilean legal system. The Constitutional Tribunal further reinforced natural law constitutionalism by endorsing the pro-life framework as the correct way of interpreting the Constitution, as opposed to other possible juristic readings of the same text. In fact, the Court declared, “a majority of Chilean constitutional scholars, unlike professors from other legal fields, believe that the constitutional protection of the person begins at the moment of conception.”¹⁷⁷ This was an explicit reference to the debate held in 2004 at the influential think tank Centro de Estudios Públicos between constitutional law professor Arturo Fernandois and criminal law professor Antonio Bascuñán.¹⁷⁸

-
173. Open letter from Professor Fernando Atria et al., (Nov. 18, 2005) (on file with author).
174. Open letter from Professor Fernando Atria et al., *supra* note 173. . The newspaper *El Mercurio* described the letter as a “liberal assault on the Constitutional Tribunal.” *Arremetida Liberal en el TC*, *EL MERCURIO*, 20 noviembre 2005, at A2 (Chile). For an analysis of the whole conflict, see Fernando Muñoz León, *Not Only ‘Who Decides’: The Rhetoric of Conflicts over Judicial Appointments*, 14 *GERMAN L. J.* 1195 (2013).
175. See, e.g., Hugo Herrera, *Nombramiento de Bertelsen II*, *EL MERCURIO*, 24 noviembre 2005, at A2 (Chile); Juan Terrazas, *Nombramiento de Bertelsen*, *EL MERCURIO*, 23 noviembre 2005 (Chile); Patricio Zapata, *Nombramiento de Raúl Bertelsen*, *EL MERCURIO*, 25 noviembre 2005 (Chile); Francisco Zúñiga, Enrique Navarro, Eugenio Evans & Arturo Fernandois, *Respaldo a Bertelsen*, *EL MERCURIO*, 27 noviembre 2005, at A2 (Chile).
176. *Presidente electo del TC: Fallos son argumentados y públicos, no políticos*, *EL MERCURIO*, 10 agosto 2011 (Chile).
177. Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 18 abril 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” Rol de la causa: 740-2007, slip op. at § 49 (Chile).
178. The presentations of the professors were later published in the journal edited by Centro de Estudios Públicos. See Arturo Fernandois, *La píldora del día después: aspectos normativos*, 95 *ESTUDIOS PÚBLICOS* 91 (2004) (Chile); Antonio Bascuñán Rodríguez, *La píldora del día después ante la jurisprudencia*, 95 *ESTUDIOS PÚBLICOS* 43 (2004) (Chile).

In the published version of that debate, Fernandois, a professor at Catholic University and a member of the UDI, tried to secure a privileged position for pro-life interpretations of the Constitution. He declared that he would speak from a position that he had labeled “real constitutionalism,” for which the Constitution “is a juridical norm properly speaking, endowed with all of its attributes: binding and coercive, requiring or permitting certain state conducts, and whose consequences can be unraveled objectively through a system of interpretation.”¹⁷⁹ He claimed that in contrast to this approach stood the school of “hypothetical constitutionalism,” for which “the Constitution is a mere parameter, flexible and mutable, that serves as a simple reference to the exercise of state power.”¹⁸⁰ This latter form of reasoning, Fernandois claimed, “is not, thus, constitutional law, but rather political science, or in some cases political philosophy. These are respectable and prestigious areas of knowledge that nurture the law and influence it, but that are essentially different from it in the sense that I have pointed out.”¹⁸¹ In sum, for Fernandois his own knowledge was real and binding, while that of his opponents was hypothetical and not binding. And so, Fernandois announced his interpretation of Article 19 N° 1 of the Constitution.¹⁸² He contended that “the strong language used in this Article is clearly structured towards the protection of those ‘about to be born.’”¹⁸³ For Fernandois, this meant that in Chilean constitutional law, there existed “a strong protective principle”¹⁸⁴ in favor of the fetus.¹⁸⁵

Bascuñán offered an alternative interpretation of Article 19 N° 1. For him, “the specific context of the regulation expresses an unequivocal distinction between persons and the unborn.”¹⁸⁶ While persons held “a public subjective right, the right to life, effective even against legislation,”¹⁸⁷ the “life of the unborn, rather, is an object of protection commended to the legislator.”¹⁸⁸ Any other reading, argued Bascuñán, would render the second line of Article 19 N° 1 either irrelevant or arbitrary.¹⁸⁹ It should be noted that, by distinguishing between a right and an object of protection, Bascuñán

179. Fernandois, *supra* note 178, at 92.

180. *Id.*

181. *Id.* at 93.

182. C.P. art. 19 (Chile) (“The Constitution guarantees to all persons: The right to life and to the physical and psychological integrity of persons. The law protects the life of those about to be born.”).

183. Fernandois, *supra* note 178, at 102.

184. *Id.*

185. *Id.*

186. Bascuñán Rodríguez, *supra* note 178, at 54

187. *Id.*

188. *Id.*

189. *Id.*

creates a space for the judicial balancing of the competing interests at stake; that space remains closed if one refuses to see any internal distinction within Article 19 N° 1. This distinction, he maintained, “is supported by parts of criminal law scholarship”¹⁹⁰ and has “a solid foundation in the history of the establishment of the constitutional text.”¹⁹¹ In sum, for Bascuñán, Article 19 N° 1 “makes of the life of the unborn an object of protection, without assigning the unborn a right to life.”¹⁹²

Bascuñán’s argument reveals the existence of alternative readings of Article 19 N° 1 within Chilean legal academia. The Tribunal’s intervention, however, excluded that interpretation by declaring the primacy of what “constitutional scholarship has held” over “what professors from other legal fields believe,”¹⁹³ thus reaffirming the hegemony of natural law constitutionalism.

IV. THE LEGISLATIVE COMEBACK OF THE PILL

The impact of the Tribunal’s decision was constrained by formalistic considerations, specifically by the fact that it targeted a specific document, Supreme Decree No. 48.¹⁹⁴ The Tribunal itself noted the limited impact of the ruling when it stated that intrauterine devices were not affected.¹⁹⁵ The restrained decision undermined public faith in the Tribunal, as it also implied that the pill could still be bought from private vendors and was therefore still available for those who could afford it. For example, President Bachelet, while observing that the pill still could be bought at drugstores, chastised the decision as a “hard blow to women that use the public health services” and a “step back in terms of equality.”¹⁹⁶ Additionally, many critics

190. *Id.* at 62. Bascuñán discusses the following criminal law treatises: ALFREDO ETCHERRY, *DERECHO PENAL* (1998) (Chile); MARIO GARRIDO, *DERECHO PENAL, PARTE ESPECIAL* (1999) (Chile); and SERGIO POLITOFF, FRANCISCO GRISOLÍA & JUAN BUSTOS, *DERECHO PENAL CHILENO, PARTE ESPECIAL* (1993) Chile. *Id.* at 62, 79, 81.

191. *Id.* at 62.

192. *Id.* at 64.

193. Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 18 abril 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” Rol de la causa: 740–2007, slip op. at 243–44 (Chile).

194. T.C., 18 abril 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” slip op. at 1.

195. T.C., 18 abril 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” slip op. at 82–83.

196. *Bachelet: Fallo del TC es “un retroceso en términos de equidad”*, EL MERCURIO ONLINE (19 abril 2008, 4:36 PM), <http://www.emol.com/noticias/nacional/2008/04/19/301089/bachelet-fallo-del-tc-es-un-retroceso-en-terminos-de-equidad.html>.

thought the Tribunal's decision was an imposition of Catholic values.¹⁹⁷ Furthermore, once released, the written opinion—fraught with non-sequiturs, fallacies, and gaps in argumentation—complicated the Tribunal's position even further. As one commentator put it, the Tribunal “displays considerable argumentative deficiencies, considering that only one out of the six points that structure the essence of its reasoning is acceptable.”¹⁹⁸

Due to these and other perceptions, Case N° 740 arguably stands as the most controversial ruling of the Chilean Constitutional Tribunal since its reestablishment in 1980. No other decision by this court has stirred so much public discord and opposition. The decision outraged supporters of emergency contraception among civil society and the political elite. For days, hundreds protested the decision at the doors of the Tribunal. On April 22, 2008, over 20,000 people gathered in protest.¹⁹⁹ Moreover, wide sections of society were willing to resist the decision. A poll conducted in the region of Concepción found that 64.2% of the population believed that the ruling by the Tribunal should not be obeyed.²⁰⁰ Members of Congress were called on to resist the decision and to enact a constitutional amendment guaranteeing the distribution of the pill.²⁰¹

-
197. See, e.g., Carlos Moffat, *La Píldora del Día Después (Pero la intolerancia es de siempre)*, DE LA REPÚBLICA BLOG (4 abril 2008), <http://blog.delarepublica.cl/2008/04/04/la-pildora-del-dia-despues-pero-la-intolerancia-es-de-siempre/> (Chile) (declaring that the decision “represents the vision of the most intolerant, ignorant, and conservative among us,” and asserting that the Justices and their allies “attack also the worst off, creating a new instance of that inequality that their ideas have familiarized us with.”).
198. Rodolfo Figueroa, *Comentario relativo a la sentencia del Tribunal Constitucional referida a la píldora del día después del año 2008*, 1 ANUARIO DE DERECHO PÚBLICO 144, 161 (2010) (Chile).
199. *Convocan a marcha contra fallo del TC sobre la “píldora”*, EL MERCURIO ONLINE (13 abril 2008, 7:41 PM), <http://www.emol.com/noticias/nacional/2008/04/13/300297/convocan-a-marcha-contr-fallo-del-tc-sobre-la-pildora.html> (Chile); *Fallo del Tribunal Constitucional: Más de 20.000 personas protestan en Chile por la prohibición de distribuir la píldora postcoital*, EL MUNDO (23 abril 2008, 1:14 PM), <http://www.elmundo.es/elmundosalud/2008/04/23/mujer/1208948973.html>. To my knowledge, this was the first time in Chilean history that a ruling by a court had been the object of a massive protest.
200. *Encuesta Píldora del Día Después*, CENTRO DE ESTUDIOS CORBIOBIO (abril 2008), http://www.corbiobio.cl/_cec/encuestas/encuesta-21-04-2008-210408041413.pdf (Chile).
201. See, e.g., *Diputada Mun-oz: Concertación buscará anular fallo por píldora del día después*, EL MERCURIO ONLINE (10 abril 2008, 9:53 AM), <http://www.emol.com/noticias/nacional/2008/04/10/299885/diputada-munoz-concertacion-buscar-a-anular-fallo-por-pildora-del-dia-despues.html> (Chile) [hereinafter *Concertación buscará anular*]; *Ministras se movilizan contra fallo que prohíbe la “píldora del día después”*, EL MERCURIO ONLINE (6 abril 2008, 5:26 PM), <http://www.emol.com/noticias/nacional/2008/04/06/299417/ministras-se-movilizan-contr-fallo-que-prohibe-la>

Not everyone criticized the Tribunal. Later that year, at the annual September 18th mass, which commemorates the Independence of Chile, Archbishop Francisco Javier Errázuriz praised God for the work of the Constitutional Tribunal and the General Comptroller.²⁰² Errázuriz celebrated them by saying “they work conscientiously, thinking of the common good of Chile, not fearing the displeasure that their rulings or opinions may cause, only submitting themselves to the Constitution and our legal order.”²⁰³ Two Catholic University constitutional law professors—one from the PDC, one from the UDI—criticized demonstrators and politicians who had protested the Tribunal’s decision before the written opinion was released. They argued that it was necessary to hear the arguments that the Tribunal had to offer before agreeing or disagreeing with it.²⁰⁴

President Bachelet spearheaded the institutional reaction against the Tribunal’s decision. Bachelet expressed her belief that the decision inflicted “a deep wound to building a more just and equitable society, and to giving more opportunities,” and that it “affects the poorest women of our country.”²⁰⁵ Karla Rubilar, a RN congresswoman, expressed her dissent from the majority of her peers in the Right by declaring that she would appeal the decision before international organizations.²⁰⁶ This option was also considered by the Minister Secretary General of the Presidency, José Antonio Viera-Gallo, together with three alternatives: establishing the legality of emergency contraception through a bill, which would mean engaging in a new act of legal resistance; appealing the Tribunal’s decision to the same body, a non-existent procedure; or proposing a constitutional amendment to declare the distribution of the pill constitutional.²⁰⁷

pildora-del-dia-despues.html (Chile); *PPD junta firmas para apoyar entrega de la “pildora del día después”*, EL MERCURIO ONLINE (5 abril 2008, 1:46 PM), <http://www.emol.com/noticias/nacional/2008/04/05/299306/ppd-junta-firmas-para-apoyar-entrega-de-la-pildora-del-dia-despues.html> (Chile).

202. The Office of the General Comptroller (Contraloría General de la República) is an autonomous body that performs a legality review of the regulatory powers of the Executive and of municipalities. See C.P. ch. IX (Chile).
203. F. Torrealba et al., *Arzobispo destaca rol de la Contraloría y del Tribunal Constitucional*, EL MERCURIO, 18 septiembre 2008, at C4 (Chile).
204. Arturo Fermandois & Patricio Zapata, *Tribunal Constitucional*, EL MERCURIO, 13 abril 2008, at A2 (Chile).
205. Bernardita Marino, *La Presidenta dijo “lamentar profundamente” fallo del TC*, EL MERCURIO, 6 abril 2008, at C9 (Chile).
206. R. Olivares, C. Carvajal & V. Zúñiga, *Polémica transversal por eventual fallo del TC sobre la pildora del día después*, EL MERCURIO, 4 abril 2008, available at <http://recortes.iglesia.cl/recorte.php?id=8572> (Chile).
207. *Gobierno analiza tres vías para reponer la polémica pildora*, EL MERCURIO, 8 abril 2008, available at <http://recortes.iglesia.cl/recorte.php?id=8577> (Chile).

Soon, a less costly strategy was adopted. As we have seen, the procedural constraints of the Tribunal's decision left drug-store sales of the pill untouched, which the Ministry of Health used to justify the acquisition of large quantities of the pill.²⁰⁸ Therefore, the Government only had to find a new channel to supply the pill to poor women. The Ministry of Health decided that the solution was to have the pill distributed by municipal public health departments.²⁰⁹ In fact, the chair of the Chilean Association of Municipalities declared that it was still legal for them to distribute the pill.²¹⁰

A major problem with this method of distribution, however, was that conservatives who actively opposed the morning-after pill headed many municipalities.²¹¹ The question then became whether mayors could oppose the distribution of the pill in their municipalities.²¹² The Chilean Association of Municipalities requested the General Comptroller, who is endowed with the authority to interpret the laws applicable to public institutions, to rule on whether the Constitutional Tribunal's decision was applicable to them.²¹³ Anti-pill litigants seized the opportunity to advocate for an expansive interpretation of the ruling.²¹⁴ The Comptroller's response came out on June 16,

208. *Ministra de Salud Justifica nueva adquisición de dosis de la píldora*, EL MERCURIO ONLINE (8 septiembre 2008, 12:38 PM), <http://www.emol.com/noticias/nacional/2008/09/08/320983/ministra-de-salud-justifica-nueva-adquisicion-de-dosis-de-la-pildora.html> (Chile).

209. Still, this measure was unsatisfactory as it relied on the discretion of the mayors heading each municipality. Unsurprisingly, only 50.5% of the municipalities of the country reported supplying it. See Claudia Dides C., M. Cristina Benavente R. & Isabel Sáez A., *Entrega de la Píldora Anticonceptiva de Emergencia en el Sistema de Salud Municipal de Chile: Estado de Situación 2010*, FACULTAD LATINOAMERICANA DE CIENCIAS SOCIALES [FLACSO] & CONSORCIO LATINOAMERICANO DE CONCEPCIÓN DE EMERGENCIA [CLAE] 8 (2010) (Chile).

210. *Presidente de la Asociación de Municipios: Tenemos "autonomía" para entregar 'la píldora'*, EL MERCURIO ONLINE (21 abril 2008, 6:02 PM), <http://www.emol.com/noticias/nacional/2008/04/21/301225/presidente-de-la-asociacion-de-municipios-tenemos-autonomia-para-entregar-la-pildora.html> (Chile).

211. María Teresa Solinas, *Con posturas divididas los alcaldes de la Alianza enfrentan la entrega de la píldora*, EL MERCURIO ONLINE (30 enero 2007, 2:24 PM), <http://www.emol.com/noticias/nacional/2007/01/30/244154/con-posturas-divididas-los-alcaldes-de-la-alianza-enfrentan-la-entrega-de-la-pildora.html> (Chile).

212. Each municipality is headed by a mayor elected by its inhabitants. C.P. art. 118 (Chile).

213. *Asociación de Municipalidades respaldará entrega de "Píldora del Día Después"*, EL MERCURIO ONLINE (17 julio 2008, 6:49 PM), <http://www.emol.com/noticias/nacional/2008/07/17/313507/asociacion-de-municipalidades-respaldara-entrega-de-pildora-del-dia-despues.html> (Chile).

214. This included a petition by anti-pill activist Jorge Reyes and a brief presented by 37 law professors, headed by the Christian Democrats Alejandro Silva Bascuñán and Francisco Cumplido Cereceda and the conservative Eduardo Soto Kloss.

2009; it declared that it was “evident” that the Tribunal’s decision was “binding for all the organisms, institutions, and civil servants that form part of the Care Network of the National System of Health Services.”²¹⁵ Therefore, in the Comptroller’s interpretation, municipalities fell under the scope of the Tribunal’s decision. It should be noted that Ramiro Mendoza, the General Comptroller, had also signed the anti-pill amicus brief presented in 2003 at the public law nullity trial, just like Constitutional Tribunal Justices Bertelsen and Navarro.²¹⁶

This ruling marked a watershed event. It extinguished any possibility of distributing the pill through administrative action. Effectively, the Comptroller had decided that the Constitutional Tribunal’s decision made it illegal for any state institution, and even for any private party, to distribute the pill.²¹⁷ On June 30, 2009, only two weeks after the Comptroller’s decision, and after new pro-pill protests,²¹⁸ President Michelle Bachelet submitted a bill to Congress for immediate review.²¹⁹ The proposed legislation declared that the public health system would make available all contraceptive methods, including emergency contraception, to any person.²²⁰

Arguably, to override a decision by the Constitutional Tribunal, backed by the General Comptroller, the President should have presented a constitutional amendment rather than a law proposal. But no one argued so. Instead, by mid-July the proposed law was approved by the Lower House, with the support of sixteen congressmen of the Right—eleven from RN and five from UDI. By the end of October the Senate approved it, with

215. *Dictamen N° 31356*, CONTRALORÍA GENERAL DE LA REPÚBLICA (16 junio 2009), <http://www.contraloria.cl/appinf/LegisJuri%5Cjurisprudencia.nsf/0/1A188BE92FF4475C842575D9006117F5?OpenDocument&consulta=p%EDIdora&vista=1&desde=1&dpp=10&Highlight=2,p%EDIdora&Seq=2-1> (Chile).

216. *Supra* note 163, at 9.

217. Cristian Farías & Paola Aveggio, *Contraloría prohíbe a municipios entregar la “pildora del día después”*, LA TERCERA (18 junio 2009, 4:30 PM), <http://www.latercera.com/noticia/nacional/2009/06/680-143575-9-contraloria-prohibe-a-municipios-entregar-pildora-del-dia-despues.shtml> (Chile). The Comptroller, should be noted, has no power over private parties.

218. Cristian Farías & Paola Aveggio, *Protestan en Contraloría tras dictamen que impide distribuir “pildora del día después”*, LA TERCERA (22 junio 2009, 3:42 PM), <http://www.latercera.com/noticia/nacional/2009/06/680-145703-9-protestan-en-contraloria-tras-dictamen-que-impide-distribuir-pildora-del-dia.shtml> (Chile).

219. Mensaje de S.E. la Presidenta de la República con el que inicia un proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad, Mensaje N° 667–357 (Junio 30, 2009) (Chile) (bill sent to Congress).

220. *Id.*

four votes from National Renewal and two from the Democratic Independent Union.²²¹

What explains the urgency with which this bill was presented? What accounts for its ultimate success? The answer to these questions seems to lie in the approaching presidential election, which by June 2009, was marching along at full speed. Christian Democrat Eduardo Frei—presidential candidate of the PDC, the PPD, and the Socialist Party—had expressed his support for emergency contraception, and so had the other progressive candidates Marco Enríquez and Jorge Arrate.²²² Frei in particular used the pill as an electoral argument against RN candidate Sebastián Piñera, to whom he eventually lost the race.²²³ Most anti-pill litigants, congressmen, and law professors were members of UDI, which supported the candidacy of Piñera.²²⁴ But Piñera was trying to win the moderate vote in order to secure his candidacy, and could not be perceived as part of a conservative reaction—an image usually projected by UDI activists opposing emergency contraception.²²⁵ As a news report observed, “despite the cost of dividing the *Alianza* [the coalition between RN and UDI], Piñera’s polls show that an immense majority believes that the pill should be made available.”²²⁶

My interpretation of the record is that the dynamics of the presidential competition strengthened the legislative viability of Bachelet’s bill, both in-

-
221. *Con cinco votos UDI, Cámara aprueba proyecto sobre la “pildora”*, EL MERCURIO ONLINE (15 julio 2009, 2:47 PM), <http://www.emol.com/noticias/nacional/2009/07/15/367315/con-cinco-votos-udi-camara-aprueba-proyecto-sobre-la-pildora.html> (Chile).
222. Both Enríquez and Arrate had been members of the Socialist Party until 2009 when they resigned in order to run for the Presidency. Enríquez ran as an independent, while Arrate became a member of the Communist Party to run as its candidate. *See PC valoró inscripción de Arrate en el partido*, COOPERATIVA.CL (13 julio 2009, 2:30 PM), http://www.cooperativa.cl/pc-valor-inscripcion-de-arrate-en-el-partido/prontus_not/2009-07-13/143143.html (Chile).
223. *Frei acusa a la Alianza de “inconsecuencia inaceptable” en el caso de la “pildora”*, EL MERCURIO ONLINE (4 julio 2009, 11:05 AM), <http://www.emol.com/noticias/nacional/2009/07/04/365682/frei-acusa-a-la-alianza-de-inconsecuencia-inaceptable-en-el-caso-de-la-pildora.html> (Chile).
224. *See supra* Part II, note 151. It is interesting to observe that the PDC politicians and law professors that were opposed to the pill did not become a liability in this regard for Frei.
225. *See* Daniela Salinas, *Mesa UDI frena documento valórico para no empañar proclamación de Piñera*, LA TERCERA (21 agosto 2009, 7:55 AM), <http://www.latercera.com/noticia/politica/2009/08/674-171689-9-mesa-udi-frena-documento-valorico-para-no-empañar-proclamacion-de-pinera.shtml> (Chile) (explaining that the UDI refrained from publicizing a political manifesto where it criticized emergency contraceptives in order not to harm Piñera’s candidacy).
226. *See, e.g.*, Pilar Molina Armas, *La ofensiva del Gobierno con la pildora*, EL MERCURIO, 28 junio 2009, at C6 (Chile).

spiring the bill's progressive supporters in an effort to differentiate themselves from the Right *and* emboldening the more centrist, secular, or even pragmatist congressmen of RN and UDI to vote in favor of the pill. For example, Piñera declared that the Comptroller's expansive anti-pill ruling was "absurd" since "it has not been proven that [the pill] is abortive, this is a decision that each person needs to make conscientiously and freely."²²⁷ Piñera stated that it was "unacceptable that the pill is still sold in drugstores to the wealthy, and is denied to the needy at the health services offices."²²⁸ In the presidential debate he would go on to say:

[that he would] always defend the value of life, especially of the children about to be born because of their defenselessness and innocence, but the pill is not abortive and that is my opinion, and as long as I think that way the pill will be available not only in drugstores but also offered freely in public health services offices.²²⁹

Frei criticized Piñera for supporting the pill while most of the congressmen in his coalition voted against Bachelet's bill.²³⁰ While that was in fact true, some RN and even a few UDI congressmen voted to approve the bill. In the words of UDI congressman Juan Lobos, "if [the Government] does not come as a bulldozer in search of petty electoral gains and they protect paternal authority, this time there will be quorum in the *Alianza* for approving the project."²³¹

This support was secured through dialogue with the Piñera campaign; thus the bill sent by President Bachelet to Congress was previously checked with María Luisa Brahm, Piñera's senior policy advisor.²³² The press reported her declaration that "through legislative amendments they would try

227. Fernando Jiménez, *Piñera califica como absurdo fallo sobre "píldora del día después"*, EL MERCURIO ONLINE (20 junio 2009, 12:39 PM), <http://www.emol.com/noticias/nacional/2009/06/20/363743/pinera-califica-como-absurdo-fallo-sobre-pildora-del-dia-despues.html> (Chile).

228. *Id.*

229. F. Torrealba & P. Yévenes, *Candidatos marcaron sus posturas valóricas en segundo debate presidencial*, EL MERCURIO, 10 octubre 2009, at C4 (Chile).

230. *Frei acusa a la Alianza de "inconsecuencia inaceptable" en el caso de la "píldora"*, EL MERCURIO ONLINE (4 julio 2009, 11:05 AM), <http://www.emol.com/noticias/nacional/2009/07/04/365682/frei-acusa-a-la-alianza-de-inconsecuencia-inaceptable-en-el-caso-de-la-pildora.html> (Chile).

231. Molina Armas, *supra* note 226.

232. *See Maria Luisa Brahm*, PODEROPEDIA (27 marzo 2013), http://www.poderopedia.org/personas/Maria_Luisa_Brahm (Chile).

to provide information to parents or guardians in the case of minors.”²³³ For Brahm, substantively respecting parental authority over children was the price that the bill had to pay in order to be approved. In this regard, the UDI’s attempt to guarantee the right of parents to be informed about their children’s use of emergency contraception had been unsuccessful. Two legislative amendments establishing that right, one presented by congressmen María Angélica Cristi and Patricio Melero and another presented by Senator Juan Antonio Coloma, had been rejected successively in the Chamber of Deputies and the Senate.²³⁴ But a new amendment, proposed by RN Senator Antonio Horvath, reflected the primacy assigned by Brahm to parental authority, and did so in a way that was also attractive to Center-Left congressmen. It established that “educational institutions recognized by the State shall include in their High School curriculum a sexual education program which, according to their principles and values, shall comprise contents that foster a responsible sexuality and informs in a complete manner about the various existing and authorized contraceptive methods.”²³⁵ Senators Guido Girardi (PPD), Mariano Ruiz-Esquide (PDC), and Carlos Ominami (PS) proposed a similarly drafted amendment, and the idea to combine both proposals emerged.²³⁶ Ultimately, the law as approved by Congress established that the sexual education in schools would be taught “in accordance with the educational project, convictions and beliefs that each educational institution teaches and adopts together with their board of parents.”²³⁷

In a way, this outcome was highly paradoxical, as it represented a shift in the Right’s position on compulsory sexual education in schools.²³⁸ Still,

233. Brief by Alejandro Silva Bascuñán, et. al. as Amici Curiae for Salud Pública, *supra* note 162. Lobos, in fact, later on would be one of the five UDI congressmen who voted in favor of the bill.

234. The two proposed legislative amendments were identical. They declared, “these guidelines can be handed to minors only with the consent of any of their parents or their legal tutor, expressed previous knowledge of their content.” HISTORIA DE LA LEY No. 20418, Enero 28, 2010, Fija Normas sobre Información, Orientación y Prestaciones en materia de regulación de la Fertilidad 69, 302 DIARIO OFICIAL [D.O.] (Chile) [hereinafter HISTORIA DE LA LEY No. 20.418].

235. *Id.* at 302.

236. *Id.*

237. Law No. 20418, Enero 18, 2010, Fija Normas sobre Información, Orientación y Prestaciones en materia de regulación de la Fertilidad, art. 1, para. 4 DIARIO OFICIAL [D.O.] (Chile), available at <http://www.leychile.cl/Navegar?idLey=20418&idVersion=2010-01-28>.

238. In 1996, the Church and the Right parties energetically protested the Government’s implementation of a sexual education program in schools known as Days of Conversation about Affects and Sexuality (JOCAS, for its initials in Spanish). As a news report puts it, “the story of State sexual education is short, and the JOCAS is, to be sure, its most remembered milestone.” Marcela Escobar Q., *Cómo se enseña sexo en los*

the law let schools decide what kind of sexual education it would teach, a solution that appealed to Catholic principles of freedom of teaching and parental authority. We will soon see how important this aspect was for the conservative members of the Constitutional Tribunal.

One reaction to the idea of amending the bill to include a reference to sexual education in schools is particularly noteworthy. Then Minister Secretary General of the Presidency José Antonio Viera-Gallo, who was present at the session where the idea first emerged, observed that the bill as it stood did not contemplate “matters related to education” and therefore the proposed amendment was a “norm that exceeds the scope of the bill.”²³⁹ This would be problematic in light of Article 69 of the Constitution, which bans the introduction of amendments that have no “direct connection with the central or fundamental ideas of the bill.”²⁴⁰ Furthermore, as Viera-Gallo observed, establishing a curricular mandate for schools could “imply its preemptive review by the Constitutional Tribunal,”²⁴¹ resulting in its delay and—perhaps Viera-Gallo might have thought—even in the declaration that the whole bill was unconstitutional.

In spite of this word of caution, the members of the Senate’s Committee on Health unanimously approved the inclusion of this amendment.²⁴² But, as Viera-Gallo had foreseen, the inclusion of educational matters in the bill meant that once it had been approved by both Houses it had to be sent to the Constitutional Tribunal for a preemptive review, giving this body a

colegios: A diez años de la polémica de las Jocas, EL SÁBADO, 29 abril 2006 (Chile). The Ministry of Education began the JOCAS program in 1993, but the program became an issue of public contestation only in 1996 when *El Mercurio* published a sensationalist story entitled “The New Sexual Education of the State” that described, among other things, performances by students simulating sexual intercourse and posters depicting young men masturbating in an explosion of semen. A picture of two school students holding condoms accompanied the news story. It was soon discovered that the photographer had given the condoms to the girls for the picture—the JOCAS did not provide students with them. In any case the propagandistic effect was achieved; the very day of the publication, the ultraconservative bishop Jorge Medina attacked the Minister of Education, with the RN and UDI chairmen joining in his criticism. See Pilar Molina, *La Nueva Educación Sexual del Estado*, EL MERCURIO, 8 septiembre 1996, at D1 (Chile); CLAUDIA LAGOS LIRA, ABORTO EN CHILE: EL DEBER DE PARIR 72 (2001).

239. HISTORIA DE LA LEY No. 20.418, *supra* note 234, at 312.

240. C.P. art. 66 (Chile).

241. SENADO DE CHILE, SEGUNDO INFORME DE LA COMISIÓN DE SALUD RECAÍDO EN EL PROYECTO DE LEY, EN SEGUNDO TRÁMITE CONSTITUCIONAL, SOBRE INFORMACIÓN, ORIENTACIÓN Y PRESTACIONES EN MATERIA DE REGULACIÓN DE LA FERTILIDAD (2009).

242. INFORMACIÓN, ORIENTACIÓN Y PRESTACIONES EN MATERIA DE REGULACIÓN DE LA FERTILIDAD: SENADO DE CHILE: DISCUSIÓN PARTICULAR APROBADO CON MODIFICACIONES Legislatura 357a, Sesión 76a (Diciembre 16, 2009).

third opportunity to make its voice heard on this issue. Once the legislative process was completed, the President of the Lower House and UDI member, Rodrigo Álvarez, announced that he would send the bill to the Constitutional Tribunal for its preemptive review of constitutionality.²⁴³ Article 93 of the Constitution entrusts the Tribunal with reviewing “prior to their promulgation” the constitutionality of organic constitutional laws—a category of laws that requires a supermajoritarian quorum of four sevenths for approval, and that includes not only the regulation of education but also of various other matters such as political parties, states of exception, the Military Forces, and the Central Bank.²⁴⁴

All along the enemies of the pill had considered challenging the bill before the Constitutional Tribunal.²⁴⁵ José Antonio Kast had announced that if the Executive submitted a bill on the issue for legislative discussion, he would “gather the thirty signatures [of congressmen] that are needed to go to the Constitutional Tribunal.”²⁴⁶ Jorge Sabag, a PDC congressman and a member of the Opus Dei, declared in an interview that he was “willing to resort to the Constitutional Tribunal to enforce the Rule of Law.”²⁴⁷ During the legislative process, UDI congressmen Patricio Melero and Marcelo Forni, along with UDI Senator Jorge Arancibia, also articulated their intention to challenge the bill before the Constitutional Tribunal.²⁴⁸ But ultimately, as President of the Lower House Rodrigo Álvarez explained via Twitter, “no one objected [to] this: neither in the floor of the Senate, nor in

243. *Proyecto de píldora del día después será revisado por el Tribunal Constitucional*, EL MERCURIO ONLINE (6 enero 2010, 6:08 PM), <http://www.emol.com/noticias/nacional/2010/01/06/392620/proyecto-de-pildora-del-dia-despues-sera-revisado-por-el-tribunal-constitucional.html> (Chile).

244. C.P. art. 93, at 1 (Chile). This category, unprecedented in Chilean constitutional history, was created by the 1980 Constitution. The Military Junta, as it lacked any significant internal divisions on policy issues, had no problems putting in place legislation regulating these matters. Once the democratic forces came to government in 1990, the supermajoritarian quorum and the preemptive review by the Constitutional Tribunal sheltered the policy decisions that the Junta enshrined in the laws from meaningful change.

245. Constitutional review of bills prior to their enactment is mandatory for organic constitutional laws. C.P. art. 93 N° 1 (Chile). Both organic constitutional laws and ordinary statutes, however, can also be reviewed prior to their enactment when there is a “question of constitutionality”—i.e., when a group of congressmen challenges the constitutionality before the Tribunal. C.P. art. 93 N° 3 (Chile).

246. Muñoz, *supra* note 201.

247. Nelly Yáñez N., *Diputado Jorge Sabag se autodefine como “el último de los mohicanos” en la DC: “Voy a recurrir al TC si la Cámara aprueba la píldora”*, EL MERCURIO, 12 julio 2009, at D6 (Chile).

248. HISTORIA DE LA LEY No. 20.418, *supra* note 234, at 74, 124, 232.

the floor of the Lower House”; it was “the Constitution that commands us to send it to the Court.”²⁴⁹

Why did none of the congressmen who had announced that they would complain before the Court about the unconstitutionality of the pill—Melero, Arancibia, Kast (UDI), Sabag (PDC)—make good on their promises? Why did Álvarez make that announcement so quickly and publicly through his Twitter account? The timing of these events seems important. The legislative process was completed on January 6, 2010, and the bill was sent for its preemptive constitutional review the next day.²⁵⁰ Very shortly thereafter, on January 17, the presidential runoff between Sebastián Piñera (RN) and Eduardo Frei (PDC) was held. It is very likely that both candidates made strong efforts to silence any action that could be used against them. If a Christian Democrat like Sabag had done anything, progressive critics of the Frei candidacy could have spoken against him in the second round election. Certainly if congressmen in the Right had actively objected to the bill’s constitutionality before the Tribunal it would have damaged the moderate image that Piñera needed so much in order to be elected. The way events unfolded suggests this political dynamic was at play. A clear example is found in the case of Álvarez, who, as President of the Chamber of Deputies, announced to the press that the bill would be sent to the Constitutional Tribunal.²⁵¹ Soon PPD congressmen claimed that, once again, the UDI had called in the Tribunal.²⁵² Álvarez even felt compelled to rebuke the criticisms made by PPD congressman Felipe Harboe, telling him through Twitter that “the pill project goes to the Court because it includes an organic constitutional norm, not on a whim of mine.”²⁵³ Both Frei²⁵⁴ and President Bachelet²⁵⁵ called on congressmen to approve the bill.

249. *Proyecto sobre píldora del día después va al TC tras su aprobación*, EL MERCURIO, 1 enero 2010, at C2 (Chile). Rodrigo Álvarez, nonetheless, voted against the bill.

250. *Id.*

251. *Id.*

252. *Tribunal Constitucional volverá a revisar proyecto de la “píldora”*, COOPERATIVA.CL (6 enero 2010, 2:36 PM), <http://www.cooperativa.cl/noticias/pais/salud/pildora-del-dia-despues/tribunal-constitucional-volvera-a-revisar-proyecto-de-la-pildora/2010-01-06/144117.html> (Chile).

253. Rodrigo Alvarez, TWITTER (6 enero 2010, 10:04 AM UTC), https://twitter.com/#!/RodrigoAlvarez_/status/7448494839.

254. *Frei emplaza a la oposición a “no boicotear” proyecto sobre la píldora*, EL MERCURIO ONLINE (28 octubre 2009, 5:40 PM), <http://www.emol.com/noticias/nacional/2009/10/28/382237/frei-emplaza-a-la-oposicion-a-no-boicotear-proyecto-sobre-la-pildora.html> (Chile).

255. *Bachelet pide apoyar distribución gratuita de píldora del día después*, EL MERCURIO ONLINE (28 octubre 2009, 1:04 PM), <http://www.emol.com/noticias/nacional/2009/10/28/382188/bachelet-pide-apoyar-distribucion-gratuita-de-pildora-del-dia-despues.html> (Chile).

The bill was sent to the Tribunal on January 7, 2010. Its ruling was issued shortly after, on January 14, in eight short paragraphs.²⁵⁶ The decision was formalistic and self-restrained. The Tribunal declared that the Horvath amendment “regulates matters characteristic of organic constitutional laws”;²⁵⁷ that “the norm of the bill reviewed by this Court was approved in both Chambers of the National Congress by the majorities required by the second paragraph of Article 66 of the Constitution, and that, in this regard, no question of constitutionality has been raised”;²⁵⁸ and that it “does not comprise norms that conflict with the Constitution.”²⁵⁹ In sum, the Tribunal concluded that the law was constitutional.

The six-justice majority that in 2008 declared the pill unconstitutional splintered on this issue. Cea had already left the Tribunal. Venegas and Colombo subscribed to a strict understanding of the Tribunal’s preemptive review powers without further elaboration. Bertelsen and Peña joined in this restrained approach, but included a natural law justification for their view that the Horvath amendment was indeed constitutional. Only Fernández Baeza voted against the constitutionality of the bill invoking the substantive precedent of 2008.²⁶⁰ This outcome elicits various questions.

First, why did the Tribunal not declare the bill unconstitutional altogether? That was a possible outcome. At least one Justice, Mario Fernán-

256. Tribunal Constitucional [T.C.] [Constitutional Court], 14 enero 2010, “Control de constitucionalidad del proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad,” Rol de la causa: 1588–2010 (Chile).

257. T.C., 14 enero 2010, “Control de constitucionalidad del proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad,” slip op. at § 6. Justices Vodanovic, Navarro, Francisco Fernández and Carmona, however, disagreed with this assertion, inspired by a restrained understanding of the scope of constitutional organic laws. The Tribunal later articulated this perspective in 1992, asserting that constitutional organic laws “have been incorporated to the Constitution restrictively and in a very exceptional way, to regulate certain basic institutions with the purpose of giving stability to the system of governance and to avoid the risk that accidental majorities can change it.” Tribunal Constitucional [T.C.] [Constitutional Court], 30 noviembre 1992, “Requerimiento respecto de la cuestión de constitucionalidad surgida durante la tramitación del proyecto de ley que Modifica la Planta de Personal de la Contraloría General de la República,” Rol de la causa: 160–1996, slip op. at § 9 (Chile).

258. T.C., 14 enero 2010, “Control de constitucionalidad del proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad,” slip op. at § 7.

259. T.C., 14 enero 2010, “Control de constitucionalidad del proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad,” slip op. at § 8.

260. T.C., 14 enero 2010, “Control de constitucionalidad del proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad,” slip op. at § 7.

dez,²⁶¹ pointed out that the newly enacted legislation contradicted the Tribunal's 2008 decision. As he declared in his dissent, the Tribunal's decision in Case No. 740 was based on a substantive assessment of the threat that the pill presented to the embryo's right to life. For Fernández, "the constitutional review that this Tribunal has been called to perform in this case deals with *a matter about which the Tribunal already issued its juridical opinion, in April 2008, and with respect to the subject and form of which there has been no change at all.*"²⁶² Fernández was the only activist voice on this issue; an affiliate to the PDC and a former member of the Lagos cabinet, he had already shown, in 2008, that he did not take into consideration partisan strategy when it came to matters where the Church had strong stances.²⁶³ To the Justices close to the Right,—Venegas, Colombo, Bertelsen, and Peña—things certainly looked different. The 2008 ruling taught them the clear lesson that the pill was tainted with controversy. They might have preferred not to be associated with it again. The timing was also particularly critical. The 2009–2010 presidential elections looked like, and indeed became, the moment when the Right would win the Presidency democratically for the first time in half a century.²⁶⁴ If there was a moment for caution and self-restraint, it was certainly that one. After all, not going beyond its preemptive review mandate would not harm the Tribunal.

Second, why did the Tribunal decline to declare the Horvath amendment unconstitutional on the basis of its lack of "direct connection with the central or fundamental ideas of the bill"? It would seem that the strategic commitments of its members pointed down other paths. They had no incentive to make such a declaration, even with the interests of the Right in

261. Fernández, a PDC appointee, was a staunch Catholic. In 2002 he declared: "I am against divorce, because the Church is against divorce. I have no idea about the theological reasons, I am not a theologian. I believe everything that the Cardinal says. He is my religious authority." Francisco Artaza, *El voto que La Moneda no pudo cambiar*, LA TERCERA REPORTAJES, 8 abril 2008, at 12 (Chile).

262. T.C., 14 enero 2010, "Control de constitucionalidad del proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad," slip op. at § 7 (Fernández, J., dissenting) (emphasis in original).

263. Mario Fernández, a long-time member of the PDC, was appointed by President Ricardo Lagos as his Minister of National Defense and then as his Minister Secretary-General of the Presidency. At the time of the 2008 decision, Fernández was strongly criticized by members of the *Concertación*. "Mario follows closely the precepts of the Church," said some of his fellow party members to *El Mercurio*, which also reported that Fernández attends Mass every day. Víctor Zúñiga, *Fernández justifica su voto contra la distribución de píldora en consultorios*, EL MERCURIO (3 mayo 2008) (Chile).

264. Alexei Barrionuevo, *Right-Wing Businessman Wins Chile's Presidency*, N.Y. TIMES (Jan. 17, 2010), http://www.nytimes.com/2010/01/18/world/americas/18chile.html?_r=0.

mind. Annuling it would have meant leaving the bill as the President had proposed it. Precedent pointed toward approval; the Tribunal often—but not always—interprets its preemptive review powers as limited to merely the review of whether the constitutionally required quorum was satisfied.

Justices Raúl Bertelsen and Marisol Peña nevertheless used the opportunity to imbue the Horvath amendment with natural law overtones. Justice Bertelsen wrote that “the law, although it includes a new mandatory content for high school curriculums, . . . does not require [schools] to develop it in a predetermined direction, but rather allows each educational institution to do so according to its educational ideology, and thus respects the freedom of teaching constitutionally recognized in Article 19, No. 11, of our Basic Law.”²⁶⁵ His words convey a libertarian view of education that, in context, appears to be protective of religious education.²⁶⁶ Justice Peña, for her part, argued that schools “do not enjoy an absolute liberty in that sense; rather, the principles and values, convictions and beliefs that the school in question holds in this matter must respect the constitutional limits that constrain freedom of teaching.”²⁶⁷ For Peña this meant that education must:

[G]ive an objective and responsible account of the current state of the science and technology related to these matters, emphasizing the eventual assault on the right to life—the most basic and fundamental among human rights—that the use of certain contraceptive methods can cause, as expressed in the decision taken by this Court in its Case No. 740.²⁶⁸

265. T.C., 14 enero 2010, “Control de constitucionalidad del proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad,” slip op. at § 4 (Bertelsen, J., concurring).

266. The most important elite schools are run by various religious orders, including the Jesuits, the Opus Dei, the Legionaries of Christ, the Congregation of Holy Cross, and the Society of the Divine Word. See *¿La elite nace o se hace?*, CAPITAL (24 enero 2014), <http://www.capital.cl/poder/la-elite-nace-o-se-hace/> (Chile). With respect to subsidized private education, a study shows that by the year 2001, out of 3094 subsidized schools whose information was available (in a total of 3594), there were 812 schools run directly or indirectly by churches, representing 26.6% of the institutions and 35.6% of the students in the system. See MARCIAL MALDONADO TAPIA, OFICINA REGIONAL DE LA INTERNACIONAL DE LA EDUCACIÓN PARA AMÉRICA LATINA, LA PRIVATIZACIÓN DE LA EDUCACIÓN EN CHILE 55 (2003).

267. T.C., 14 enero 2010, “Control de constitucionalidad del proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad,” slip op. at § 4 (Peña, J., concurring).

268. T.C., 14 enero 2010, “Control de constitucionalidad del proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad,” slip op. at § 4 (Peña, J., concurring).

In other words, Peña believed that freedom of teaching is not so free. Schools must transmit a pro-life understanding of sexual education. Bertelsen and Peña diverge rhetorically in their stance towards freedom—one defends it while the other constrains it—but they converge in the substance of their concerns: the importance of reaffirming a Catholic sexual ethos, whether it need protection from State intervention or enforcement against non-Catholic actors.

On January 18, 2010 Michelle Bachelet signed Law No. 20.418, titled “Rules About Information, Orientation, and Services Related to the Regulation of Fertility”.²⁶⁹ On the day before, the *Concertación* candidate, Eduardo Frei, lost the election against his competitor, and the days of the Center-Left in government came to a halt.²⁷⁰ A few weeks later physician Jaime Mañalich, appointed by Piñera to be his Minister of Health, announced to the press that the distribution of the pill was not in danger.²⁷¹

Consider the question of whether, as Justice Fernández contended, the Presidency and Congress had engaged not only in an act of legal resistance but of frank disobedience.²⁷² Was Justice Fernández right? Was the 2008 ruling binding on the Presidency and Congress in the sense of forestalling a bill legalizing the morning-after pill? It seems that he was not completely right, considering that the Tribunal itself circumscribed its ruling to the President’s Supreme Decree, seemingly to prevent it from affecting other contraceptive methods and effectively leaving the pill’s administrative authorization by the ISP untouched.²⁷³ The Tribunal, as a consequence, did decide that the pill was unconstitutional for substantive reasons but it did not take this judgment to its ultimate consequence, i.e., annulling the IPH

269. Law No. 20418, Enero 18, 2010, Fija Normas sobre Información, Orientación y Prestaciones en materia de regulación de la Fertilidad, DIARIO OFICIAL [D.O.] (Chile), available at <http://www.leychile.cl/Navegar?idLey=20418&idVersion=2010-01-28>. The bill was ready for its enactment on January 14, but Rodrigo Álvarez could not be found that day. *La postergada promulgación de la ley sobre la “pildora”*, EL MOSTRADOR (15 enero 2010), <http://www.elmostrador.cl/pais/2010/01/15/la-postergada-promulgacion-de-la-ley-sobre-la-pildora/> (Chile).

270. Barrionuevo, *supra* note 264.

271. *Futuro Ministro de Salud: Habrá pildora del día después en todos los consultorios*, EL MERCURIO ONLINE (12 febrero 2010, 8:38 PM), <http://www.emol.com/noticias/nacional/2010/02/12/398323/futuro-ministro-de-salud-habra-pildora-del-dia-despues-en-todos-los-consultorios.html> (Chile).

272. T.C., 14 enero 2010, “Control de constitucionalidad del proyecto de ley sobre información, orientación y prestaciones en materia de regulación de la fertilidad,” slip op. at §§ 8–12 (Fernández, J., dissenting).

273. Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 18 abril 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” Rol de la causa: 740–2007, slip op. at § 40 (Chile).

authorization. It was an inaction, however, that was consistent with the separation of powers enshrined in the Chilean Constitution, which does not give the Constitutional Tribunal the authority to declare unconstitutional administrative acts that no one has asked it to review. The Tribunal cannot trigger constitutional review on its own; constitutional review must begin upon request by the appropriate person or office.²⁷⁴ Thus, it was the anti-pill litigants who failed to bring their legal mobilization to its ultimate desired consequence. Kast and the other congressmen who had announced they would request the Tribunal's intervention failed to follow through. In the face of this inaction, Decision N° 740 of the Chilean Constitutional Tribunal can be characterized not only as the most controversial ruling in the court's history, but also as its most ineffective.

The ineffectiveness of that ruling, to be sure, is not necessarily a bad thing. In the context of American constitutional debates, Robert Post and Reva Siegel have argued that “[t]rust in the responsiveness of the constitutional order plays a crucial role in preserving the Constitution’s authority,” a trust whose maintenance “depends upon citizens having meaningful opportunities to persuade each other to adopt alternative constitutional understandings.”²⁷⁵ We can assess the final outcome of the struggles around the legality of the morning-after pill from that perspective. In the end, the Tribunal did not insist on its previous and unpopular decision appears, from this perspective, as an effort to restore trust in the responsiveness of the constitutional order.

CONCLUSION: ANSWERING A FEW QUESTIONS

What accounts for the emergence and success of this instance of legal mobilization? Is this a case comparable to the conservative legal movement described by Teles in the United States? And what seems to be the future of reproductive rights in this part of the world?

First, why did these advocates take to the courts? In the first phase from 2001 to 2008, the pill was backed by administrative action. Throughout this period Socialists who unequivocally supported the distribution of the morning-after pill held the Presidency. However, during that time it was unclear what position the Centrist and Center-Right congressmen of the Christian Democrat and National Renewal parties would take. This ambiguity meant that the opponents of the pill could not know whether they could count on legislative support to ban the pill through legislation. Furthermore, this avenue would have been complicated by the Chilean legisla-

274. C.P. art. 93 (Chile).

275. Robert Post & Reva Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020* 25, at 27 (Jack Balkin & Reva Siegel eds., 2009).

tive process, which gives the President substantial control of the legislative agenda.²⁷⁶ Bills proposed by congressmen that are not sponsored at some point by the Executive are rarely discussed and almost never approved.²⁷⁷ In consequence, in this phase, their safest option was judicial review. By the time that a legislative proposal finally arrived in Congress in the second phase, it was clear that a majority of Chileans were in favor, making it hard for the anti-pill coalition to oppose it.²⁷⁸

Second, why were the anti-pill advocates so successful in the courts? To put it simply, the natural law constitutional text, read through the lenses of the old “positivistic” legal culture, seems to have tilted the legal field in favor of their position. Protecting reproductive autonomy, in the context of a natural law constitutional text, would require forms of purposive reasoning that remain unavailable to Chilean judges. The only option they have is to use formalistic evasions to avoid deciding the issues. Moreover, because judges have been excluded from policymaking through the interdiction of *stare decisis*, they are wary of taking positions that could create new constitutional rights through adjudication.

Finally, what is the future of reproductive rights in Chile? Let us remember that, in its much-criticized decision No. 740, the Constitutional Tribunal never discussed reproductive rights, neither from the perspective of women’s autonomy nor from the perspective of public health. Rather it limited itself to discussing either positivistic worries about hierarchies of norms or natural law concerns regarding the unborn.²⁷⁹ These preferences and omissions spoke loudly about the current state of a historically formalistic legal culture that has only relatively recently been impressed by Catholic natural law. It seems unlikely that a widespread awareness of gender issues would emerge from within this legal culture. To be sure, there are important voices in academia that seek to change this. Feminist and gender legal scholars such as Lidia Casas, Yanira Zúñiga, Verónica Undurraga, and Alejandra Zúñiga have full-time appointments at prestigious universities and regularly publish works that reflect these perspectives. However, so far law school curricula and the opinions of judges, arguably the two most important sources of internal legal culture, do not seem to have taken notice of gender perspectives and concerns.

276. Siavelis, *supra* note 47, at 83–84.

277. *Id.* at 84–89.

278. *See, e.g.*, CORPORACIÓN HUMANAS, V ENCUESTA NACIONAL: PERCEPCIONES DE LAS MUJERES SOBRE SU SITUACIÓN Y CONDICIONES DE VIDA EN CHILE 53 (2008).

279. Tribunal Constitucional (T.C.) (Constitutional Court) (highest court on constitutional matters), 18 abril 2008, “Requerimiento de inconstitucionalidad del Decreto Supremo N° 48 del Ministerio de Salud,” Rol de la causa: 740–2007, slip op. at § 40 (Chile).

It seems that if a change in constitutional culture with respect to reproductive rights is ever to take place, it will have to come from the external legal culture—from the preferences and demands of public opinion and social movements. On this front, there is cause for optimism. An important element in the landscape that needs to be taken into account is the demand—put forward by the 2011 student protests and embraced by Michelle Bachelet as a key element of her new term as President—of enacting a new Constitution. This event, if it takes place, will most likely redraw the foundation of Chilean constitutional law, and replace its natural law and neoliberal influences with declarations of autonomy, equality and social rights.²⁸⁰

Even if there is no new Constitution, cultural transformations might change the contents of legislation with respect to reproductive rights, particularly with regard to abortion. The evolution of public opinion in this respect in the last three decades makes this scenario appear plausible. In 1987, a poll registered 81.8 % disagreement with the following question: “Are you in agreement or in disagreement with the idea of enacting a law authorizing abortion in Chile?”²⁸¹ In 1999, another poll showed that 55% of Chileans surveyed believed that abortion should always be prohibited, 34.7% stated that abortion should be allowed in special cases, and 9.6% asserted that abortion should be freely available to women.²⁸² A 2010 poll concluded that in the case of a rape, only 40.8% believed that abortion should still be prohibited, against 53.4% who believed that in the case of rape abortion should be allowed.²⁸³ The same poll showed that when the pregnancy causes a serious threat to the life of the mother, 40.5% would uphold the ban and 53.1% would overturn it.²⁸⁴ These numbers suggest that Chileans are increasingly making distinctions on this issue; they seem to value the life of the unborn, but when the life or the autonomy of the woman is threatened in a way they deem excessive, they tend to defer to the latter. Also, these

280. Fernando Muñoz León, *The Constituent Power of Student Protests in Chile*, INT’L J. CONST. L. & CONSTITUTIONMAKING.ORG BLOG (Aug. 26, 2013), <http://www.iconnectblog.com/2013/08/the-constituent-power-of-student-protests-in-chile>.

281. *Estudio Social y de Opinión Pública en la población de Santiago, Diciembre 1986 - Enero 1987*, CENTRO DE ESTUDIOS PÚBLICOS 111 (1987), available at http://www.cepchile.cl/dms/archivo_2949_2623/DOCUMENTO_encDic86_1.pdf (Chile).

282. *Estudio Nacional de Opinión Pública, Septiembre-Octubre 1999*, CENTRO DE ESTUDIOS PÚBLICOS 36 (1999), available at http://www.cepchile.cl/1_2906/doc/estudio_nacional_de_opinion_publica_septiembre-octubre_1999.html#.UuGhMRAo7IV (Chile).

283. *Encuesta Nacional UDP 2010: Ciudadanía apoya aborto dependiendo de circunstancias; Opinión pública y aborto en Chile*, UNIVERSIDAD DIEGO PORTALES (2010), available at <http://www.encuesta.udp.cl/wp-content/uploads/2010/12/ICSO-Aborto-2010.pdf> (Chile).

284. *Id.*

numbers suggest that the Chilean attitude toward abortion continues to evolve.²⁸⁵ Such as in the case of the morning-after pill, cultural change seems to be at work—and the passage of time appears to be the strongest ally of progress in the field of reproductive rights in Chile.

The protracted struggle around the morning-after pill ultimately ended with a victory for reproductive rights. Whether this decade of social, political, and legal conflict served to advance the cause of sexual autonomy is still open to debate. While now Chileans have access to this drug, the total ban on abortion was left unchallenged. Has the exposure of reproduction issues for a decade paved the road for confronting this more complex issue? The next decade of reproductive rights struggles will answer this question. ❀

285. Obviously, the question asked in the first poll makes it impossible to know whether Chileans would have made similar distinctions at that time. However, the fact that polls have become more and more subtle on this issue reveals in itself a change in the way that the issue is approached by Chilean society: from blunt rejection to thoughtful consideration.

