This is a sample of the instructor resources for *The Law and the Public's Health, Seventh Edition* by Kenneth Wing and Benjamin Gilbert. This sample contains the instructor notes for Chapter 3.

The complete instructor resources consist of 40 pages of instructor's notes. If you adopt this text you will be given access to complete materials. To obtain access, e-mail your request to hap1@ache.org and include the following information in your message:

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3

Government Power and the Right to Privacy

This is likely to be your students' favorite chapter, and that's the problem. The material is so sexy—both figuratively and literally—that it is easy to get lost in the excitement and forget the objectives of the class and the reasons for teaching this material. We recommend that you devote two three-hour classes to these materials.

The most important objective here is to identify the nature and origins of the right to privacy, the prototypical example of what courts traditionally have called a "fundamental interest," and to describe how the courts balance "fundamental interests" against those constitutionally valid interests that a state may attempt to serve under its police powers. Once again, it is a matter of defining the relevant concepts and principles and, at the same time, defining the division of authority between the branches of government. Of particular interest here is the concept of judicial "close scrutiny," the active and special protection of certain individual rights that essentially requires the state to seek judicial approval of both the validity of its objectives and the means by which they are sought. The "undue burden" analysis first presented in the *Casey* case, of course, has thrown a whole new wrinkle into the analysis—one which certainly has reworked the rhetoric of "close scrutiny" in abortion cases and may have changed its application in other cases as well. At the same time, the privacy cases, while illustrating these crucial constitutional principles, apply those principles in the context of some of the most controversial issues of our times: attempts by states to regulate contraceptives, abortions, sexual conduct, and other personal activities. Defining the discretion of the government to regulate or prohibit abortions, for better or for worse, has become one of the most important legal and political issues of our times; you could hardly *not* teach these cases even if they were not such good illustrations.

But the fact of the matter is that there is no better example of how law can evolve and change than the constitutional right to privacy. Essentially created in one context in 1965, extended to some, but not all, similar situations in the next two decades, it has been modified or, at least, re-worded in the last several privacy-related decisions. This makes for exciting reading and controversial discussion. And it illustrates—indeed, exaggerates—some very important legal and constitutional issues.

In class, we typically describe the *Griswold* and *Eisenstadt* cases in story fashion, as we do in the text, and quote heavily from both opinions. This reminds the students, as well as the person teaching them, of two things: (1) that, in the not-too-distant past, the state's power to regulate private matters was much broader, and such legislation, as was involved in the two cases, was the status quo in most jurisdictions; (2) while both these decisions "closely scrutinize" the legislation, neither does so in the "close scrutiny" rhetoric. While it will be necessary to learn that rhetoric, it is better first to learn what it means conceptually, whatever terms are used to talk about it later. Among other things, this will help you make some sense of *Casey*. You may note that the quoted excerpt from *Griswold* also draws the connection between these cases and the "close scrutiny" in cases involving First Amendment and other important

interests. You may want to make (brief) reference to these examples as well and review some other explicit and implied "fundamental interests."

The *Griswold* and *Eisenstadt* opinions also may become far more important as *Roe v. Wade* becomes less important as a seminal case and *Griswold* and *Eisenstadt* become the primary definitions of the right to privacy.

The discussions of *Roe*, and to a lesser extent, *Doe*, are still important. We have included a portion of *Roe* in edited form in the supplement. Whatever format you use to present or discuss this material, the point is to use these cases to identify "close scrutiny" analysis, how the courts articulate the "close scrutiny" issues, and, above all, what it really means to "closely scrutinize" a statute. We usually describe *Roe v. Wade* in lecture form, walk through the analysis in *Doe v. Bolton*, and then present the students with one or more of the statutes that were involved in the later cases and let them in discussion, or in writing if there is time, try to "closely scrutinize" various abortion conditions and limitations. We think the best example of the depth to which the Court may scrutinize and the fine lines it must draw under classic "close scrutiny" analysis involves the parental consent issue. The Court recognizes that there is a "compelling interest" that may be served; nonetheless, the Court weighs that interest against the impact on the "fundamental interest" in privacy and concludes in some cases that the state's parental consent requirements survive "close scrutiny" but, with slightly different statutes, that the legislation is unconstitutional.

As set out in the text, there are two sets of post-*Roe*, pre-*Casey* abortion decisions. There are those cases in which the Court steadfastly insisted on "close scrutiny" of virtually any abortion restriction, and there are those in which the dissenting justices gradually eroded the majority's hold on the Court. The first set of cases is still important because they involved some of the issues eventually reargued in *Casey*. Reviewing these cases is the best way to identify what *Casey* really changed. The second set of cases allows you to identify the positions of the various dissenters and isolate the pre-*Casey* politics. You will want to teach them but also avoid being bogged down in their specific facts and holdings.

Bowers v. Hardwick was, at one time, the watershed case for the right to privacy, although it has been since overruled. But it too retains some vitality, if only as a stark demonstration of how deferential the courts will be in situations in which they find no "fundamental interest" and apply only a "rationality" standard. It is also hard to appreciate how important the *Lawrence* decision was without understanding what *Bowers* said and why. We recommend that you teach *Cruzan* following *Bowers* and before *Casey*. Alternatively, you can teach all of the abortion cases, then *Bowers* and *Lawrence,* and finally the right to die cases.

Your choice may be affected by how you interpret *Cruzan*. We think *Cruzan* is just another application of the "rationality" standard, a reading of the case that is not shared by some of our colleagues and, in fact, the Court in subsequent cases—especially *Glucksberg*—"pretends" that *Cruzan* did, in fact, treat Cruzan's interests as a "protected liberty."

Lawrence v. Texas is not easily described either — whenever or however you teach it, but we are fairly certain we have it right: The Court clearly overturns *Bowers*; it appears to be saying that the interests of the two same-sex individuals is a "protected liberty," and that the Texas statute does not survive the appropriate judicial examination ("undue burden"?), and at least so long as consenting adults are having sex in private, the state has no interest, let alone a compelling one, in regulating that conduct. Said differently, consensual sex between adults appears to be a constitutional right.

Whatever order in which you teach these cases, the section of the chapter analyzing *Casey* should be, of course, the focus of a lengthy class discussion in which you and your students should try to describe what O'Connor and the various justices, concurring and dissenting, said. It makes for some great vote-counting, especially since four of the justices are no longer around. Our students have a hard time distinguishing between a mandatory waiting period, which is constitutional, and a mandatory notification requirement, which is not. To be honest, so do we, or at least we have a hard time doing so in constitutional terms. We also have a hard time explaining the differences between "close scrutiny" and the new "undue burden" standard. Nor can we really discern whether the "undue burden" standard applies in all cases which had previously used "close scrutiny" or only abortion or other privacy cases. (Surely it doesn't replace the "close scrutiny" in First Amendment cases.)

We think it's important to tell the students all this. Gray areas are gray areas, and unclear decisions are just that. You may want to spend a little time speculating about future applications of the "undue burden" standard, but try to make it clear that any such effort is just that—speculation.

One way to help the students work through these cases, and to show then what has been decided and what has been left unanswered, is to allow them to role play as judges.Let the students work through the cases in groups, taking the roles of different justices, and then present them with various statutes ranging from those that were before the courts in these cases to those regulating other kinds of sexual activity to those preventing contraception, and so on. With some classes, it may be better simply to present these cases and their implications in lecture form first, then move on to a role-playing exercise.

Whatever you do, at least once during each term, if not more often, you should summarize those cases

pending in the courts and speculate about what may happen next. The best teaching material may have been a case decided yesterday, or one working its way through the lower courts.

One other important reminder: If by now you have not taught your class to count judges, you should. One or two new faces—or surprise votes—and the story has to be rewritten yet again. Your law library will have bios for the judges and pictures of each. (Our students love pictures of justices!)

It also should be noted that a good portion of the later abortion cases involve abortion *funding* problems (or at least what the Court chooses to analyze as abortion funding problems). It will be hard to explain this until after a review of the Chapter 4 materials. We usually ask our students to withhold discussion of this aspect of these cases until we have read Chapter 4.

If the section on the "right to die" cases is taught separately, two things should be emphasized. First, and more generally, these cases demonstrate how the right to privacy as defined in the abortion cases has affected many other areas of the law; indeed, until *Cruzan* and *Glucksberg,* the "close scrutiny" analysis used in *Roe v. Wade* was the approach used in virtually all of the "right to die" cases. As discussed in the text, *Cruzan* and *Casey* and *Glucksberg/Quill* may have changed all this. You also may want to go back and consider some of the cases in Chapter 2 and ask whether the "close scrutiny," the "rationality" standard, or the undue burden standard is the predominant model for constitutional analysis in public health cases. The implication of that can be startling, but *Cruzan*, *Glucksberg* and the other "right to die" cases are also important in their own right, especially given the professional futures of many of your students.

We should add that the hardest part of teaching all this is what we said at the beginning of these notes: This material gets so sexy that it is hard to focus on what it represents in more general terms. It is important to view *Casey*, *Lawrence*, or *Glucksberg*—or whatever is the next Supreme Court decision relating to privacy—in the large picture and not just in terms of abortion, sexual privacy, or the "right to die." To emphasize this point, we have written the conclusion to the chapter as a summary of what we regard as the relevant civics lessons of this chapter, and relate those lessons to some of the principles from the previous chapters.

Notes on the Supplemental Cases

Many of the cases in the supplement are edited versions of the cases discussed extensively in the text: *Roe v. Wade*, *Bowers v. Hardwick*, *Planned Parenthood v. Casey*, *Glucksberg/Quill,* and *Lawrence v. Texas*. We believe that makes sense for this chapter where the evolution of the right to privacy outlined by these cases is the principle focus. And each of these cases ought to be taken apart and put back together several times, *Casey* in particular.

We have added two truly supplemental cases, and, if you can find time, each can provide an opportunity to further illustrate the right to privacy and its limits.

Seeley is a bit of a "flyer." The facts are more "right to smoke pot" than "right to die." But the Court views it as basically a post-*Casey* (although pre-*Lawrence)* right to privacy case And the majority decision analyzes the case under equal protection principles. But Justice Sanders' dissent is a moving, if unusual, defense of Seeley's "right," albeit one relying on *Lochner*-type substantive due process principles. The *Gonzales* decision is a kind of "flip side" case: While the states clearly are not required to allow people to terminate their lives, a state can just as clearly do so if there is the will to do so. The specific legal issue that got *Gonzales* to the Supreme Court is relatively narrow: The federal statute allowing the FDA to regulate prescription drugs cannot be used to override a state statute that essentially authorizes the use of those drugs for this particular purpose. There is obviously both a constitutional dimension and a political dimension to the underlying controversy, as outlined in note 7.

As we discussed at some length in note 10, the *Terri Schiavo* case is really a series of cases rapped around an on-going political process—fed by the intense media coverage of the case. We don't think there are any earth shaking constitutional principles demonstrated here, but there are some important legal and, in particular, political lessons, as well as just a darn interesting story that everyone ought to hear (accurately) at least once.