

Contraception as a Sex Equality Right

Neil S. Siegel & Reva B. Siegel

“Not only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in society. Are women to have the opportunity to participate in full partnership with men in the nation’s social, political, and economic life?”

– Ruth Bader Ginsburg, 1978¹

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”

– *Planned Parenthood v. Casey*, 1992²

Challenges to federal law requiring insurance coverage of contraception are occurring on the eve of the fiftieth anniversary of the U.S. Supreme Court’s decision in *Griswold v. Connecticut*.³ It is a good time to reflect on the values served by protecting women’s access to contraception.

In 1965, the Court ruled in *Griswold* that a law criminalizing the use of contraception violated the privacy of the marriage relationship. *Griswold* offered women the most significant constitutional protection since the Nineteenth Amendment gave women the right to vote,⁴ constitutional protection as important as the cases prohibiting sex discrimination that the Court would decide in the next decade⁵—perhaps even more so. *Griswold* is conventionally understood to have secured liberty for women. But, we argue, the right to contraception also secures *equality* for women, as Ruth Bader Ginsburg saw clearly in the

1. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN’S RTS. L. REP. 143, 143-44 (1978).

2. 505 U.S. 833, 856 (1992).

3. 381 U.S. 479 (1965).

4. U.S. CONST. amend. XIX; see also *infra* note 30 and accompanying text (quoting the ACLU’s invocation of the Nineteenth Amendment in *Griswold*).

5. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

1970s and as the Court eventually would explain in *Planned Parenthood v. Casey*. Because *Griswold* was decided before the sex equality claims and cases of the 1970s, the *Griswold* Court did not expressly appeal to equality values in explaining the importance of constitutionally protected liberty—as, for example, the *Casey* Court did.⁶ Yet as some contemporaries appreciated, in protecting decisions concerning the timing of childbearing, the *Griswold* Court was protecting the foundations of equal opportunity for women, given the organization of work and family roles in American society.

Today, those who appreciate contraception's singular importance to women call recent attacks on contraception a "war on women."⁷ Yet even now, it may not be immediately clear that the right to contraception is a sex-equality right. Both men and women use contraception, even if the forms of contraception that they use are sex-differentiated. The Connecticut statute banning contraception applied to both sexes.

Analyzing the right to contraception in historical context helps to clarify the ways in which the right to contraception secures equality, as well as liberty, for women. As *Griswold* turns fifty, we return to the historical record to demonstrate that the ban on contraception struck down in that case was enforced in ways that reflected and reinforced traditional gender roles. Even though the law was written to apply to both sexes, the state applied the law to men and women differently. In recovering this history, we show how the regulation of contraception is tied to double standards in sex and parenting. Recognizing these deep and enduring differences in gender roles demonstrates why denying women control over the timing of childbearing denies them equal citizenship. With these concerns in view, it becomes clear why judicial decisions and laws securing access to effective and affordable contraception vindicate both equality and liberty values.⁸

I. CONTRACEPTION, SEX, AND MOTHERHOOD IN THE CENTURY AFTER THE CIVIL WAR

Contraception was first banned under federal and state law not in the Founding era, but in the decade after the Civil War. The 1873 Comstock Act

6. For a discussion of how the *Casey* Court protected equality values under substantive due process, see Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 1960 (2013), <http://www.uclalawreview.org/?p=4186> [<http://perma.cc/6XYM-Y2J8>].

7. See, e.g., *War on Women*, ACLU: BLOG RTS., <https://www.aclu.org/blog/tag/war-women> [<https://perma.cc/5Y2T-B2QW>].

8. For related observations about abortion rights, see Siegel & Siegel, *supra* note 6.

was premised on the view that it was obscene to separate sex and procreation.⁹ Soon after, many states passed laws modeled on the Comstock Act criminalizing contraception and abortion.¹⁰

Like the federal law, Connecticut's ban on contraception drew no formal distinctions by sex; rather, it prohibited "[a]ny person" from "us[ing] any drug, medicinal article or instrument for the purpose of preventing conception."¹¹ Even so, contemporaries understood the judgments about nonprocreative sex in the federal and state laws through Victorian mores concerned with differences in the physical and social relations of reproduction.¹² The Comstock Act, for example, was enacted a year after Justice Bradley explained that "[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."¹³ Doctors reasoned that women who enjoyed sex while endeavoring to avoid its natural procreative consequences engaged in "physiological sin"—and predicted that they would suffer health harms as a result.¹⁴ Press coverage of the Comstock Act focused on women who were prosecuted for defying the ban.¹⁵

The new bans on contraception applied to all at a time when men and women were held to gender-differentiated double standards in matters of sex and parenting. Men were entitled to breach prevailing sexual norms in ways

-
9. Comstock Act ch. 258, 17 Stat. 598, 599 (1873) (repealed 1909) (prohibiting any person from selling or distributing in U.S. mail articles used "for the prevention of conception, or for causing unlawful abortion" or sending information concerning these practices as "obscene"). On the federal law, see ANDREA TONE, *DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA* 13-24 (2002). On abortion law in the nineteenth century, see JAMES MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* (1979).
 10. Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 AM. Q. 3, 4 (1966) (observing that "anti-contraceptive laws were passed in 24 states as part of obscenity statutes, and obscenity laws in 22 other states came to be used as anti-contraceptive laws because of federal statutes and interpretation" and citing MARY WARE DENNETT, *BIRTH CONTROL LAWS* 11-14 (1926)); see also C. THOMAS DIENES, *LAW POLITICS, AND BIRTH CONTROL* 42-47 (1972) (discussing state laws restricting contraception).
 11. See *Griswold v. Connecticut*, 381 U.S. 471, 480 (1965) (quoting CONN. GEN. STAT. § 53-32 (1958)).
 12. One of those contemporaries was Anthony Comstock, architect of the Comstock Act. For a description of his views on women's social roles and sexuality, see JANET BRODIE, *CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA* 272-74 (1994).
 13. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).
 14. See Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 292-96 (1992) (tracing usage of "physiological sin" and quoting doctors on sins and health harms of preventing pregnancy).
 15. See Ana C. Garner, *Wicked or Warranted?*, JOURNALISM STUD., Jan. 2, 2014, at 6-9, <http://dx.doi.org/10.1080/1461670X.2013.870390> [<http://perma.cc/N85X-SKEJ>].

that women were not, and women were expected to assume parenting responsibilities in ways that men were not.¹⁶

By the twentieth century, Connecticut and many other jurisdictions relaxed enforcement of Comstock laws in ways that reflected these role-based judgments about men and women. During World War I, the U.S. military concluded that providing condoms to men significantly lowered the rates of sexually transmitted diseases and authorized the use of condoms for preventing disease.¹⁷ Following the federal government's lead, the Massachusetts high court crafted an exception to the state's ban on contraception permitting use of condoms to prevent the spread of venereal disease.¹⁸ The court recognized an implied exception to the ban that would protect men's health, even though two years earlier the court had reasoned that the ban was absolute and prohibited the sale of contraceptives to married women on a physician's prescription to preserve their lives or health.¹⁹ The court granted a health exception to men—even when their lives were not threatened by venereal disease²⁰—after having refused a health exception for women even when their lives were threatened by pregnancy.²¹

16. For example, for centuries, the law expected women, not men, to assume care and financial responsibility for children born out of wedlock. See Serena Mayeri, *Marital Supremacy and the Constitution of the Non-Marital Family*, 103 CALIF. L. REV. (forthcoming 2015); Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1682-89 (2000). Gender-role differences in sex and parenting of this kind are commonplace. See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 817-18 (2007).

17. TONE, *supra* note 9, at 106-07.

18. *Commonwealth v. Corbett*, 307 Mass. 7, 8 (1940).

19. *Commonwealth v. Gardner*, 300 Mass. 372 (1938). In *Corbett*, the court allowed a health exception for men over a dissent pointing out that the court had recently insisted that the ban was absolute in the course of denying a health exception for women. See *Corbett*, 307 Mass. at 16 (Donahue, J., dissenting) (citing *Gardner*, 300 Mass. 372).

20. Allowing condom use to prevent venereal disease may also protect women's health. But it protects against only some of the health risks that intercourse and pregnancy pose for women, unlike the more comprehensive health protection that condoms afford men. The gender asymmetry of the protection afforded men and women is more pronounced as one considers the facts explored below: judges were willing to read into the statute a health exception providing men contraception without any showing that contraception would be used for health-related purposes, while judges refused to allow women with health needs access to contraception, even on a doctor's prescription, instead advising women—unlike men—to practice sexual abstinence.

21. The notion that women were equally situated to men because they, too, could purchase condoms seems to us formalist in the extreme. The suggestion assumes that women were as free as men to purchase condoms in drug stores, and further assumes that women could persuade men to use condoms as easily as women could use contraception themselves. Both assumptions strain credulity. In this Essay we analyze laws with attention to the social norms and arrangements that guide their enforcement.

II. *GRISWOLD* AND DISPARATE TREATMENT

Gendered assumptions about sex and parenting also shaped enforcement of Connecticut's ban on contraception, giving rise to sex equality concerns of several kinds in *Griswold*.

By the mid-twentieth century, it was widely understood that one could buy contraceptives in drug stores in Connecticut. The state deemed the threat of venereal disease sufficiently compelling to make a health exception to its law banning contraception. This exception allowed pharmacies to sell condoms under the auspices of “disease prevention” as well as certain products for “feminine hygiene” that might have contraceptive properties.²² Yet like Massachusetts, the Connecticut Supreme Court rejected a health exception to the ban that would allow doctors to prescribe contraception for women physically unable to tolerate pregnancy or childbirth.²³ The court advised women with a medical need for contraception that they should simply abstain from sex,²⁴ but did

The popular television series *Downton Abbey* has recently reminisced about the norms that inhibited respectable women from purchasing contraception. In Season Five, Episode 2, Lady Mary sends her maid Anna on a clandestine mission to a drug store to purchase contraception. See Louis Bayard, “*Downton Abbey*” Recap: *If You Show Me Your Piero Della Francesca . . .*, N.Y. TIMES: ARTSBEAT (Jan. 11, 2015), <http://artsbeat.blogs.nytimes.com/2015/01/11/downton-abbey-recap-if-you-show-me-your-della-francesca> [<http://perma.cc/U7HQ-DDPE>] (“Sex and its unintended consequences were everywhere to be seen this week—most suspensefully in the visit by Anna (Joanne Froggatt) to the local chemist, where, just to procure a single contraceptive package, she has to flash her wedding ring, plead ill health and endure the slut-shaming questions of some 1920s drugstore employee version of Phyllis Schlafly, who suggests she try abstinence instead. Anna can’t admit, of course, that she’s loading up her boss Lady Mary for a Liverpool sexfest, but the whole experience has her inching toward Margaret Sanger.”).

22. Connecticut seemed to follow the Massachusetts Supreme Court’s interpretation of its similarly restrictive statute. See *Tileston v. Ullman*, 129 Conn. 84, 91 (1942) (citing *Corbett*, 307 Mass. at 8, with apparent approval); see also Brief for Appellants, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496), 1965 WL 115611, at *9-10 (explaining the connection between judicial interpretation of Connecticut and Massachusetts statutes). Many sources indicate that Connecticut’s ban was not enforced against contraceptives sold under the auspices of disease prevention or feminine hygiene. See *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring); *id.* at 506 (White, J., concurring in judgment); Motion for Leave to File a Brief and Appendices as Amicus Curiae for Planned Parenthood Federation of America, Inc., *Griswold*, 381 U.S. 479 (1965) (No. 496), 1965 WL 115612, at *17-18; Mary Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 IOWA L. REV. 915, 926-27 (1989).
23. *State v. Nelson*, 126 Conn. 412, 417 (1940) (“Any intention on the part of the Legislature to allow [a health] exception . . . is negated not only by the absolute language used originally and preserved ever since but also, signally, by its repeated and recent refusals to inject an exception.”); *Tileston*, 129 Conn. 84 (affirming *Nelson*); *Buxton v. Ullman*, 147 Conn. 48 (1959) (affirming *Nelson* and *Tileston*).
24. *Tileston*, 129 Conn. at 92 (“The state claims that there is another method, positive and certain in result. It is abstention from intercourse in the broadest sense—that is, absolute ab-

not advise men to protect themselves from the risk of venereal disease in this fashion. Instead, the state allowed men to buy condoms on demand in the state's drug stores, while making no effort to ensure that men (particularly married men) actually were using condoms to prevent disease, as opposed to conception.²⁵

Connecticut's crafting of a health exception for men, but not for women, led to a second inequality in the state's enforcement of its ban on contraception. Connecticut enforced the ban so as to allow men easy access to the most effective form of contraception for men (condoms), but to deny women access to the most effective forms of contraception for women (diaphragms or the pill).²⁶ At oral argument in *Griswold*, Justice Brennan repeatedly asked whether the plaintiffs were challenging this pattern of enforcement on equal protection grounds.²⁷ Law professor Thomas Emerson, who with Catherine Roraback represented the plaintiffs, responded that discriminatory enforcement of the statutes was part of the plaintiffs' due process claim.²⁸

stention."); Oral Argument at 45:53, *Poe v. Ullman*, 367 U.S. 497 (1961) (Nos. 60, 61), http://www.oyez.org/cases/1960-1969/1960/1960_60 [<http://perma.cc/9XSB-W72W>] (Harriet Pilpel: "Connecticut has imposed a choice upon the appellant Mrs. Doe either to risk death or renounce all marital relations.").

25. Connecticut did not expressly adopt an exception for disease-preventing contraceptives. See *supra* note 22. Moreover, Connecticut's attorneys refused to concede that the law was not enforced against such devices and claimed that there were arrests in at least two unreported cases. *Poe* Oral Argument, *supra* note 24, at 100:17; Oral Argument at 52:57, *Griswold*, 381 U.S. 479 (1965) (No. 496), http://www.oyez.org/cases/1960-1969/1964/1964_496 [<http://perma.cc/AV9J-LZSE>]. The Supreme Court, however, appeared to accept the wide availability of condoms in *Poe*, 367 U.S. at 502, and *Griswold*, see *supra* note 22. Moreover, commentators and contemporaries report that it was widely known that condoms were widely available. See DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 128 (1994) (describing a law professor and a journalist's attempt to report a drugstore's sale of condoms to the police, who said that "the articles [they] had purchased were legal," and to the local prosecutor, who "was not enthusiastic" about prosecuting the claim and, "per *Corbett*, noted the difference between prophylactic and contraceptive use"); Dudziak, *supra* note 22, at 926-27; Harriet F. Pilpel & Abraham Stone, *The Social and Legal Status of Contraception*, 22 N.C. L. REV. 212, 223-24 (1944) (observing that a health exception allowed drug store sales of condoms virtually without constraint); Catherine G. Roraback, *Griswold v. Connecticut: A Brief Case History*, 16 OHIO N.U. L. REV. 395, 396-97 n.9 (1989).
26. Brief for Appellants, *supra* note 22, at *32 (citing a study finding the average annual pregnancy rate per 100 woman for the following methods: douche—31, rhythm method—24, jelly alone—20, withdrawal—18, condom—14, diaphragm (with or without jelly)—12, Enovid ("the Pill")—1.2); Planned Parenthood Brief, *supra* note 22, at 49b (citing a similar study). Triggering enforcement of Connecticut's ban in *Griswold* was Joan B. Forsberg's use of the anti-ovulation pill, Marie Wilson Tindall's use of a diaphragm, and Rosemary Anne Stevens's use of ortho-gynol vaginal jelly. Transcript of Record at 20-21, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496).
27. Transcript of Oral Argument, at *2, *4, *Griswold*, 381 U.S. 479 (No. 496).
28. *Id.*

By providing health exceptions for men but not for women, and by allowing men but not women access to the most effective forms of contraception, Connecticut enforced its ban so as to give men more control than women in separating sex and childbearing. Connecticut's disparate treatment of men and women was constitutionally significant because it reflected and reinforced traditional gender roles in sex and parenting.

Indeed, because of gender differences in the physical and social relations of reproduction, laws restricting contraception present equality questions for women, even if the restrictions on contraception are evenly enforced against both sexes. Given the organization of education and work, laws restricting contraception deny education and employment opportunities to those who bear and rear children. Litigants expressed this understanding on the path to *Griswold* with increasing clarity. For example, law students at Yale who were represented by Catherine Roraback argued that the state's ban on contraception deprived students of control over the timing of childbearing, which, they asserted, was needed in order to obtain a professional education.²⁹

Reflecting this understanding, the ACLU's amicus brief in *Griswold* argued that Connecticut's ban on contraception violated equal protection:

[T]he right of the individual to engage in any of the common occupations . . . applies to women as well as men. . . . [I]n addition to its economic consequences, the ability to regulate child-bearing has been a

29. Litigants challenging Connecticut's ban emphasized the importance of a woman's control over the timing of birth in order to pursue a profession. This claim was central in a case involving Yale Law students Louise and David Trubek. In the early 1960s, neither the Connecticut Supreme Court nor the United States Supreme Court were prepared to hold that the Fourteenth Amendment protected liberty or equality interests of this kind. See *Trubek v. Ullman*, 147 Conn. 633, 636 (1960), cert. denied, 367 U.S. 907 (1961) (rejecting claims of plaintiffs, two law students, who asserted that "[a] pregnancy at this time would mean a disruption of Mrs. Trubek's professional education"). For similar claims in this era, see Brief for Appellants, *Poe v. Ullman*, 367 U.S. 497 (Nos. 60, 61), 1960 WL 98679, at *35 (observing about a hypothetical couple in graduate school that "[a] pregnancy at this time would disrupt the wife's education" and that the "spacing of their children is essential to the health of the wife"); Brief for Appellants, *Griswold*, supra note 22, at *44. For more on the *Trubek* case, see Melissa Murray, *Overlooking Equality on the Road to Griswold*, 124 YALE L.J. F. 324 (2015), <http://www.yalelawjournal.org/forum/overlooking-equality-on-the-road-to-griswold> [<http://perma.cc/5EGK-7QKA>]; Louise G. Trubek, Op-Ed, *The Unfinished Fight Over Contraception*, N.Y. TIMES, Mar. 1, 2012, <http://www.nytimes.com/2012/03/02/opinion/contraception-war-goes-on.html> [<http://perma.cc/DZS8-BMDN>] (quoting Professor Trubek as recalling that at the time she volunteered as a plaintiff, there were only six women in her law school class and that she volunteered because "I was planning to have a family and a career as a lawyer" and "I believed I should be free to choose the timing of my children's births so I could do both"). Lawyers who brought feminist perspectives to early litigation over contraception (and abortion) included Catherine Roraback and Harriet Pilpel, both of the ACLU. See LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 96, 131 (2013). As noted above, Roraback, one of the early woman graduates of Yale Law School, played a central role in the Connecticut cases.

significant factor in the emancipation of married women. In this respect, effective means of contraception rank equally with the Nineteenth Amendment in enhancing the opportunities of women who wish to work in industry, business, the arts, and the professions. Thus, the equal protection clause protects the class of women who wish to delay or regulate child-bearing effectively.³⁰

Remarkably, the ACLU uttered those words in 1965.

In the decade after *Griswold*, women challenged beliefs about “separate spheres” that restricted women to childrearing and men to breadwinning. In 1970, on the fiftieth anniversary of the ratification of the Nineteenth Amendment, a “second wave” feminist movement organized a national “Strike for Equality” in which it argued that equal citizenship required not only equal suffrage and the ratification of an Equal Rights Amendment, but also laws changing the work and family arrangements in which women bear and rear children.³¹ The Supreme Court responded, reading the Equal Protection Clause for the first time to prohibit sex classifications in laws that impose caregiver and breadwinner roles on women and men.³² Yet then and now, the Court’s sex discrimination cases allow, but do not require, changes in the organization of work that would help women and men to integrate caregiving and breadwinning.³³

Today, no less than at the time of *Griswold*, control over the timing of childbirth is indispensable if those who raise children are to have equal opportunities to participate in the worlds of education, employment, and politics. The right that the Court recognized in *Griswold* helps to secure equality as well as liberty for women. (In fact, in extending the contraception right to unmarried women and men in *Eisenstadt v. Baird*,³⁴ the Court applied the equal pro-

30. Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae at 15-16, *Griswold*, 381 U.S. 479 (No. 496) (internal quotation marks and citations omitted); see also W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 51 (1970). See generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 945 (2002).

31. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1373-76 (2006).

32. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

33. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court ruled that Congress can enforce the Equal Protection Clause by enacting laws that require employers to provide (unpaid) family leave. But the Court often has rejected sex equality claims involving pregnancy in the workplace, see e.g., *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012); *Geduldig v. Aiello*, 417 U.S. 484 (1974), and may again this Term, see *Young v. United Parcel Serv.*, No. 12-1226.

34. 405 U.S. 438 (1972).

tection framework of *Reed v. Reed*,³⁵ perhaps reflecting a dawning recognition that equality values were at stake.) In *Griswold*, as in *Casey* and *Lawrence v. Texas*, the Court protected equality values as an integral part of due process.³⁶

Equality values anchor not only the individual's right to contraception free of government interference, but also the government's authority to help individuals secure access to contraception. The Court's decisions declaring compelling interests in eradicating race and sex discrimination make clear that those compelling interests encompass both core concerns of the community and crucial concerns of the individuals who are the intended beneficiaries of the law's protections.³⁷ The Court's decision in *Burwell v. Hobby Lobby Stores*³⁸ reflects this understanding.³⁹ Writing for the Court, Justice Alito invoked the constitutional right recognized in *Griswold* in the course of discussing the government's compelling interests in providing employees insurance coverage of contraception.⁴⁰ Because women's health, liberty, and equal citizenship stature are at stake in ways that matter to individuals and to the society as a whole, governments have compelling interests in ensuring access to effective and affordable contraception.⁴¹

Neil S. Siegel is David W. Ichel Professor of Law, Duke Law School. Reva B. Siegel is Nicholas deB. Katzenbach Professor of Law, Yale Law School. They thank Allison Day for extraordinary research assistance, and Kate Bartlett, Cary Franklin, Ruth

-
35. 404 U.S. 71, 75-76 (1971); *see also Eisenstadt*, 405 U.S. at 446-47, 447 n.7 (invoking the *Reed* framework).
36. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852, 856, 898 (1992); *Lawrence v. Texas*, 539 U.S. 558, 575, 578 (2003). As noted in the Introduction, *Griswold* was decided before the sex equality claims and cases of the 1970s. Accordingly, the *Griswold* Court did not expressly appeal to equality values in explaining the importance of constitutionally protected liberty—as, for example, the *Casey* and *Lawrence* Courts did. *See Siegel & Siegel, supra* note 8. Yet, as contemporaries understood, in protecting decisions concerning the timing of childbearing, the *Griswold* Court was protecting the foundations of equal opportunity for women, given the organization of work and family roles.
37. For development of this point and discussion of the relevant case law, *see Neil S. Siegel & Reva B. Siegel, Compelling Interests and Contraception*, 47 CONN. L. REV. (forthcoming 2015).
38. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2550 (2014).
39. *See Siegel & Siegel, supra* note 37.
40. *Hobby Lobby*, 134 S. Ct. at 2779-80.
41. Each opinion in *Hobby Lobby* references health or equality as potential or actual compelling interests. *See, e.g., Hobby Lobby*, 134 S. Ct. at 2779-80 (citing *Griswold*); *id.* at 2786-87 (Kennedy, J., concurring); *id.* at 2787-88 (Ginsburg, J., dissenting) (quoting *Casey*); *id.* at 2799. For a discussion of the government's compelling interests in ensuring women access to effective and affordable contraception, *see generally Siegel & Siegel, supra* note 37. *See also Douglas NeJaime & Reva B. Siegel, Feature, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. (forthcoming 2015), <http://ssrn.com/abstract=2560658> [<http://perma.cc/5C9W-5XZC>] (discussing the application of the Religious Freedom Restoration Act in *Hobby Lobby* and other cases involving contraception).

Bader Ginsburg, Serena Mayeri, Melissa Murray, Doug NeJaime, and Ryan Williams for excellent suggestions.

Preferred Citation: Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. F. 349 (2015), <http://www.yalelawjournal.org/forum/contraception-as-a-sex-equality-right>.