How Conflict Entrenched the Right to Privacy

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We are about to mark the fiftieth anniversary of *Griswold v. Connecticut*, a 1965 case in which the Supreme Court struck down a Connecticut law that criminalized the use of contraception, in the process giving birth to the modern right to privacy. From *Griswold*’s understanding of “liberty” grew the right to make decisions about abortion, and the right to engage in same-sex sex, without coercion by the criminal law. How has our understanding of the Constitution’s protection for “liberty” come to include sex and marriage, whether sex in marriage, or same-sex marriage?

In what follows, I will consider debates over the right to contraception and its progeny at three points in history: in the 1960s when the Court first decided the *Griswold* case; in 1980s “culture war” struggles over *Griswold* during the Reagan era; and in current conflicts over the right to privacy—in the recently decided *Hobby Lobby* case and in continuing struggles over same-sex couples’ right to marry. The story illustrates how the making of constitutional meaning occurs all around us, not only in formal processes of constitution-making or in acts of constitutional interpretation by the Court, but also in day-to-day debates among ordinary Americans. Importantly, *Griswold*’s story shows how deeply the Constitution’s meaning is shaped by conflict as well as by consent. *Griswold*’s story demonstrates how conflict over the right to privacy—one of the most fiercely contested rights in the modern constitutional canon—has helped to entrench the right to privacy, to make it endure, and to imbue it with evolving meaning.

1. **Griswold Born**

Neither contraception nor abortion was banned at the nation’s founding. It was after the Civil War that the federal government enacted the 1873 Comstock...
Act, which criminalized contraception and abortion together as obscenity.\(^3\) Anthony Comstock and his supporters judged “obscene” contraception, abortion, and other practices that would free sex from the purpose of procreation in marriage. Many states enacted versions of the Comstock statute, including Connecticut in 1879.\(^4\)

The Victorian understanding of sexuality and family life that supported bans on contraception began to erode by the early decades of the twentieth century. In World War I, the federal government authorized the use of condoms to protect military men from the threat of venereal disease.\(^5\) Growing numbers of newly enfranchised women joined or supported a movement for birth control.\(^6\) Government officials began to read federal and state bans on contraception as containing implicit exceptions for protecting health.\(^7\) By mid-century, social scientists were informing the public about the wide variation in heterosexual and homosexual practice, changing popular understandings of “normal” sex in the process.\(^8\)

If evolving sexual mores and the efforts of the birth control movement were essential pre-conditions to Griswold, so, too, was a transatlantic debate among elites about the role of the criminal law in enforcing sexual morals. In 1955, U.S. law professor Herbert Wechsler led a prominent “model penal code” commission in drafting a report that for the first time omitted sodomy, stating that “[n]o harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities.”\(^9\) In 1957, Eng-


5. TONE, supra note 3, at 106-07.


8. See, e.g., ALFRED KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); ALFRED KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, HUMAN SEXUAL RESPONSE (1966).

land’s Wolfenden Commission made headlines by proposing to repeal criminal bans on sodomy as infringing on sexual relations that were properly “private.”

In the ensuing debate over the Commission’s report, Lord Patrick Devlin defended the use of the criminal law to enforce public morals, while H.L.A. Hart countered by emphasizing the importance of protecting a sphere of liberty, of individual privacy, from the reach of the criminal law. This debate about whether and when it was appropriate to criminalize sex would soon spread from public policy and political philosophy to constitutional law.

In 1961, a case challenging Connecticut’s law prohibiting contraception reached the Supreme Court in *Poe v. Ullman.* However, at Justice Frankfurter’s urging, a sharply divided Court refused to decide it for want of a prosecution. In a lengthy dissent, Justice Harlan countered that a threat of prosecution made the case ripe for decision. Even as Justice Harlan seemed to side with Devlin in affirming the state’s authority to regulate sexual morals—including "laws forbidding adultery, fornication and homosexual practices"—Justice Harlan urged that “the most substantial claim which these married persons press is their right to enjoy the privacy of their marital relations free of the enquiry of the criminal law.”

In the wake of the *Poe* decision, doctors, lawyers, and professors of Yale University worked with Estelle Griswold of the local Planned Parenthood clinic and with lawyers of the national birth control movement and the American Civil Liberties Union to set up a test case challenging Connecticut’s ban on contraception. In 1965, the Supreme Court declared Connecticut's ban on contraception unconstitutional in *Griswold v. Connecticut.* While lawyers of

12. See H.L.A. Hart, *Law, Liberty, and Morality* 14-15 (1963) (stating that The Wolfenden Report’s recommendation that the law against homosexual practices between consenting adults in private should be relaxed was based on the principle that “[t]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business” and noting that the American Law Institute had recommended “that all consensual relations between adults in private . . . be excluded from the scope of the criminal law”).
16. Id. at 536 (emphasis added).
18. 381 U.S. 479 (1965).
the period had begun to articulate new frameworks—focusing on privacy between consenting adults and even sex equality—the Court’s decision followed Justice Harlan’s lead and emphasized the privacy of the marriage relationship. Justices Stewart and Black strenuously dissented. Because the right to privacy lacked a sufficient basis in the Constitution, they argued, the Court had usurped the democratic prerogatives of the people of Connecticut.

II. GRISWOLD ENTRENCHED

The Griswold opinion became deeply entrenched in our constitutional tradition, first by judicial elaboration in Supreme Court decisions and then, just as importantly, by political conflict over those decisions.

Over the ensuing decades, pushed by growing movements debating the decriminalization of abortion and the decriminalization of same-sex sex, the Supreme Court progressively expanded Griswold’s reach, first extending the right to contraception to unmarried persons in the 1972 case of Eisenstadt v. Baird and then declaring in the 1973 case of Roe v. Wade that the “right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

As we know, controversy escalated around these decisions. Architects of the New Right appealed to conflicts over race, sex, and other “social issues” of the 1970s to attract traditional Democratic voters to the ranks of the Republican

19. Id. at 485-86. Catherine Roraback, who brought several cases against the Connecticut law, including Griswold, has pointed out that briefs written before the Supreme Court appeal in Poe did not invoke privacy but instead focused on rights to life, liberty, health, and to marital relationships free of government intrusion (without mention of privacy). See Catherine G. Roraback, Griswold v. Connecticut: A Brief Case History, 16 OHIO N.U. L. REV. 395, 399-400 (1989). For alternative frameworks, see Thomas I. Emerson, Nine Justices in Search of a Doctrine, 64 MICH. L. REV. 219 (1965) (detailing five grounds on which the Court could have decided Griswold); supra notes 9-12 and accompanying text (discussing claims about privacy between consenting adults); see also Siegel & Siegel, supra note 7, at 355-56 (discussing sex equality claims in the ACLU’s amicus brief in Griswold).

20. Griswold, 381 U.S. at 511-13 (Black, J., dissenting); id. at 530-31 (Stewart, J., dissenting).

21. For an account of the movements debating decriminalization of abortion preceding Eisenstadt, see, for example, Garrow, supra note 17, at 407-24; Linda Greenhouse & Reva B. Siegel, Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court’s Ruling (2d ed. 2012). For a description of the movements debating decriminalization of same-sex sex, see for example, John D’Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970 (1983); Marc Stein, Rethinking the Gay and Lesbian Movement (2012).


This strategy helped elect Ronald Reagan President in 1980 on a campaign platform promising to appoint “judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”

Once in office, President Reagan set out to nominate judges who would roll back liberal judicial decisions, elevating William Rehnquist to Chief Justice and appointing Sandra Day O’Connor and Antonin Scalia to the Supreme Court. With these appointments, the Court voted 5-4 in *Bowers v. Hardwick* to limit privacy doctrine and to uphold a state law criminalizing sodomy. *Bowers* signaled that Roe’s future was at risk.

The fate of the constitutional right to privacy was decisively shaped by President Reagan’s nomination of Judge Robert Bork to the Supreme Court in 1987. Judge Bork was prominent as a critic of civil rights law and as an originalist who believed that the equal protection sex discrimination cases of the Burger Court were contrary to the intent of the Fourteenth Amendment’s Framers. At the time of his appointment, Judge Bork was famous for his early criticism of *Griswold* as an “unprincipled” usurpation of democratic authority unauthorized by the Constitution’s text—a critique he reiterated as a judge on the D.C. Circuit in an opinion with then-Judge Scalia upholding the Navy’s discharge of a gay service member as consistent with equal protection and due process.

Judge Bork’s nomination was fiercely opposed by the civil rights movement, the feminist movement, those who supported reproductive freedom, and those who supported gay rights. The Senate Judiciary Committee, led by then-Senator Joe Biden, held extensive hearings on Judge Bork’s constitutional jurisprudence. In long-running colloquies, Senator Biden probed Judge Bork’s

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constitutional views with special attention to privacy, asking whether Judge Bork would allow the government to tell “a married couple . . . what they can or cannot do about birth control in their bedroom.” After days of televised hearings, many Senators and commentators pronounced Judge Bork as “outside the mainstream,” polls ran against Judge Bork’s confirmation, and the Senate voted decisively with 42 senators voting in favor of, and 58 voting against, confirming him to the Supreme Court.

Ultimately, Reagan nominated and the Senate confirmed Justice Anthony Kennedy. Not only Justice Kennedy, but also subsequent conservative nominees including Chief Justice Roberts and Justice Alito, affirmed Griswold during their confirmation hearings. In short, the wide-ranging conflict over Judge Bork’s confirmation helped entrench Griswold. After this great conflict, subsequent nominees concluded that Griswold, like Brown, was part of the constitutional canon—accepted as mainstream.

Yet another consequence of the conflict over Judge Bork’s confirmation was a crucial shift in the composition of the Supreme Court. The substitution of Justice Kennedy for Judge Bork matters in numerous areas of law, but perhaps none so prominently as in the Court’s decision in Planned Parenthood v. Casey to limit but uphold Roe and in the decisions in which the Court has narrowly voted to protect the rights of gay people—decisions that Justice Kennedy has repeatedly authored. Had Judge Bork been appointed to the Court instead of Justice Kennedy, these gay rights decisions would surely have been more narrowly crafted, and one or more of the cases would almost certainly have come out the other way.

33. *Bork Hearings*, supra note 29, at 116 (1987); see also *Pertschuk & Schaeztel*, supra note 32, at 144 (discussing privacy as a focus for opponents of Judge Bork’s nomination).


III. GRISWOLD TODAY

The Court’s decision in Griswold remains in contention today, perhaps most visibly in debates over abortion, but also in the debate over same-sex marriage. Some lower court decisions striking down state-law restrictions on same-sex marriage appeal to equal protection, while others are based on liberty and reason that the Constitution protects the right to marry. These right-to-marry, liberty-based decisions descend from Griswold (This is hardly a surprise. In the era of Bork’s confirmation, the Reagan Justice Department warned that without the appointment of originalist judges, privacy could be used to permit “homosexual marriage or adoption of children by homosexuals.”)

One story we could tell is of ever-expanding constitutional protections for privacy. But despite Griswold’s entrenchment over the past fifty years, the law could yet change, and constitutional protections for privacy could contract or disappear. During the campaigns preceding the 2012 election, numerous Republican candidates criticized contraception—a theme continued in recent litigation over the Religious Freedom Restoration Act, most prominently in Hobby Lobby. If a Republican President who believes a great wrong was done to

39. See, e.g., Baskin v. Bogan, 766 F. 3d 648 (7th Cir. 2014).
40. See Kitchen v. Herbert, 755 F. 3d 1193, 1209 (10th Cir. 2014) (“There can be little doubt that the right to marry is a fundamental liberty.”); see also Bostic v. Schaefer, 760 F. 3d 352, 375-77 (4th Cir. 2014) (invoking a fundamental right to marry under both the Due Process and Equal Protection Clauses).
41. The Tenth Circuit also looks to Griswold to rebut the argument that the purpose of marriage is procreation. See Kitchen v. Herbert, 755 F. 3d at 1214 (asserting that the claim that “the right to marry is fundamental because it is linked to procreation is further undermined by the fact that individuals have a fundamental right to choose against reproduction” and citing Griswold).
Judge Bork is elected in 2016, and if that Republican has an opportunity to replace sitting Justices, we may yet see a new Supreme Court that repudiates the right to privacy first recognized in *Griswold*.

Or perhaps conflict over privacy will continue to discipline and entrench *Griswold*, as it did in the era of the Bork hearings. If this transpires, how will privacy contract and how will it expand? Which protections for sexual expression, for reproduction, and for family life might *Griswold* yet grow to guarantee?

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