

## How Conflict Entrenched the Right to Privacy

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We are about to mark the fiftieth anniversary of *Griswold v. Connecticut*,<sup>1</sup> 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<sup>2</sup> 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.

### I. *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

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1. 381 U.S. 479 (1965).

2. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Act, which criminalized contraception and abortion together as obscenity.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> Growing numbers of newly enfranchised women joined or supported a movement for birth control.<sup>6</sup> Government officials began to read federal and state bans on contraception as containing implicit exceptions for protecting health.<sup>7</sup> 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.<sup>8</sup>

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.”<sup>9</sup> In 1957, Eng-

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3. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, 17 Stat. 598 (1873). On the passage of the federal Comstock 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).
  4. For more on the passage of the Connecticut Comstock law, entitled “An Act to Amend an Act concerning Offenses against Decency, Morality, and Humanity,” see Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 AM. Q. 3 (1966). See also C. THOMAS DIENES, *LAW POLITICS, AND BIRTH CONTROL* 46-47 (1972); and JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT TO PRIVACY* 7-8 (2005).
  5. TONE, *supra* note 3, at 106-07.
  6. LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: THE HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 171-210 (2004).
  7. 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> [<http://perma.cc/ZV72-CLRS>].
  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).
  9. MODEL PENAL CODE § 207.5 cmt. at 277-78 (Proposed Official Draft 1955).

land's Wolfenden Commission made headlines by proposing to repeal criminal bans on sodomy as infringing on sexual relations that were properly "private."<sup>10</sup> In the ensuing debate over the Commission's report, Lord Patrick Devlin defended the use of the criminal law to enforce public morals,<sup>11</sup> 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.<sup>12</sup> 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*.<sup>13</sup> However, at Justice Frankfurter's urging, a sharply divided Court refused to decide it for want of a prosecution.<sup>14</sup> 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"<sup>15</sup>—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*."<sup>16</sup>

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.<sup>17</sup> In 1965, the Supreme Court declared Connecticut's ban on contraception unconstitutional in *Griswold v. Connecticut*.<sup>18</sup> While lawyers of

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10. THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (1963).

11. PATRICK DEVLIN, ENFORCEMENT OF MORALS (1959).

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").

13. 367 U.S. 497 (1961).

14. *Id.* at 501-02, 508; Ryan C. Williams, *The Paths to Griswold*, 89 NOTRE DAME L. REV. 2155, 2163-65 (2014).

15. *Poe*, 367 U.S. at 546 (Harlan, J., dissenting).

16. *Id.* at 536 (emphasis added).

17. See DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 196-229 (1994); LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 93-119 (2013); Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 IOWA L. REV. 915, 936-38 (1990).

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.<sup>19</sup> 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.<sup>20</sup>

## 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,<sup>21</sup> 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*<sup>22</sup> 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.”<sup>23</sup>

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

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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).

22. 405 U.S. 438, 453 (1972).

23. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

Party.<sup>24</sup> 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.”<sup>25</sup>

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.<sup>26</sup> With these appointments, the Court voted 5-4 in *Bowers v. Hardwick* to limit privacy doctrine and to uphold a state law criminalizing sodomy.<sup>27</sup> *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<sup>28</sup> 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.<sup>29</sup> 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<sup>30</sup> – 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.<sup>31</sup>

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.<sup>32</sup> 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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24. See Linda Greenhouse & Reva B. Siegel, Feature, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2052-59 (2011).

25. *Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT (2015), <http://www.presidency.ucsb.edu/ws/?pid=25844> [<http://perma.cc/J4B2-4569>].

26. DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 133-55 (1999).

27. 478 U.S. 186 (1986).

28. See, e.g., Robert Bork, *Civil Rights – A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 22; Robert H. Bork, *The Unpersuasive Bakke Decision*, WALL ST. J., July 21, 1978, at 8.

29. See *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 159-61 (1987) [hereinafter *Bork Hearings*]; ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 241 (2007).

30. See *Bork Hearings*, *supra* note 29, at 115; Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971).

31. *Dronenburg v. Zech*, 741 F.2d 1388, 1396-97 (D.C. Cir. 1984).

32. See BRONNER, *supra* note 29, at 153-57; MICHAEL PERTSCHUK & WENDY SCHAETZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* (1989).

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.”<sup>33</sup> 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.<sup>34</sup>

Ultimately, Reagan nominated and the Senate confirmed Justice Anthony Kennedy.<sup>35</sup> Not only Justice Kennedy, but also subsequent conservative nominees including Chief Justice Roberts and Justice Alito, affirmed *Griswold* during their confirmation hearings.<sup>36</sup> 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*<sup>37</sup> 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.<sup>38</sup> 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.

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

34. BRONNER, *supra* note 29 at 297; Philip Shenon, *The Bork Hearings; Poll Finds Public Opposition to Bork is Growing*, N.Y. TIMES, Sept. 24, 1987, <http://www.nytimes.com/1987/09/24/us/the-bork-hearings-poll-finds-public-opposition-to-bork-is-growing.html> [<http://perma.cc/J3Q6-DJ54>]; *Senate’s Roll Call on the Bork Vote*, N.Y. TIMES, Oct. 24, 1987, <http://www.nytimes.com/1987/10/24/us/senate-s-roll-call-on-the-bork-vote.html> [<http://perma.cc/QZZ8-CWQB>].

35. YALOF, *supra* note 26, at 164-65 (1999); Maureen Hoch, *Justice Anthony Kennedy*, PBS NEWSHOUR (Mar. 9, 2007, 8:14 PM), <http://www.pbs.org/newshour/updates/law-jan-june07-kennedy> [<http://perma.cc/KM6G-DHEZ>].

36. For discussion in the hearings of Justice Kennedy, see 134 Cong. Rec. S498-99 (daily ed. Feb. 1, 1988); for Chief Justice Roberts, see *Hearings Before the S. Comm. on the Judiciary on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the Supreme Court of the United States*, 109th Cong. 207, 351, 372 (2005); for Justice Alito, see *Hearings Before the S. Comm. on the Judiciary on the Nomination of Samuel A. Alito, Jr., to Be an Associate Justice of the Supreme Court of the United States*, 109th Cong. 318, 318 (2006).

37. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

38. See *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

### 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,<sup>39</sup> while others are based on liberty and reason that the Constitution protects the right to marry.<sup>40</sup> These right-to-marry, liberty-based decisions descend from *Griswold*.<sup>41</sup> (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."<sup>42</sup>)

One story we could tell is of ever-expanding constitutional protections for privacy.<sup>43</sup> 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<sup>44</sup> – a theme continued in recent litigation over the Religious Freedom Restoration Act, most prominently in *Hobby Lobby*.<sup>45</sup> 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*).

42. See OFFICE OF LEGAL POLICY, DEP'T OF JUSTICE, *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION* 41-42 (1988).

43. See, e.g., Douglas NeJaime, *Griswold's Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 *YALE L.J. F.* 340 (2015), <http://www.yalelawjournal.org/forum/griswolds-progeny> [<http://perma.cc/79CX-7QWQ>] (showing *Griswold*'s capacity to support access to the assisted reproductive technologies that have become central to same-sex family formation).

44. See, e.g., Ann Gerhart, *Birth Control as an Election Issue? Why?*, *WASH. POST*, Feb. 20, 2012, [http://www.washingtonpost.com/national/health-science/birth-control-as-election-issue-why/2012/02/17/gIQASW6kPR\\_story.html](http://www.washingtonpost.com/national/health-science/birth-control-as-election-issue-why/2012/02/17/gIQASW6kPR_story.html) [<http://perma.cc/VRA8-4YS3>].

45. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). See generally 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>] (examining complicity-based conscience claims concerning sex, reproduction, and marriage advanced by Christians mobilized in cross-denominational organizations and by the Republican Party).

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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