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Griswold v. Connecticut: The Start of the Revolution

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Amid discussions of whether the FDA should approve a so-called Viagra for women, which creates a desire for sex (rather than simply facilitating it), it is hard to imagine a world in which it was a crime for a married couple to use birth control. But that indeed was the law that sparked a lawsuit and led to the Supreme Court's landmark ruling in *Griswold v. Connecticut*, fifty years ago this week.

On June 7, 1965, the Supreme Court found a surprising thing: a constitutional right of married couples to access and use contraception. It didn't literally find those words in the Constitution—of course they don't appear—but it found, in the "penumbras and emanations" of several amendments, a right to privacy that was broad enough to encompass this particular right.

The legacy of a Supreme Court ruling is often clear and immediate. When the Supreme Court struck down Virginia's ban on interracial marriage in the 1967 case of *Loving v. Virginia*, it ended an era rather than began one. (For my ruminations on the cultural and legal legacies of *Loving*, read **here (http://writ.news.findlaw.com/grossman/20070530.html)** and **here (http://writ.news.findlaw.com/grossman/20070612.html)**.) But *Griswold v. Connecticut* can fairly claim a different role in history, as the launch pad for some of the most important and well-known cases on constitutional rights. In those cases lie some of

our most significant constitutional rights, as well as some of our most significant social controversies—abortion and same-sex marriage, to take just the most obvious examples.

Griswold v. Connecticut: The Ruling and Its Progeny

The Connecticut law challenged in *Griswold* made it a crime for any person to use "any drug, medicinal article or instrument for the purpose of preventing conception" or for any person to assist or abet another person's use of contraception. To stage a challenge to the law, a doctor and an executive at Planned Parenthood opened a clinic in New Haven, through which they gave "information, instruction, and medical advice to 'married persons' as to the means of preventing conception." They then "examined the wife and prescribed the best contraceptive device or material for her use." The doctor and clinic director were arrested and convicted under these statutes, the constitutionality of which they challenged.

The question for the Supreme Court, then, was whether the state of Connecticut could criminalize the distribution and use of contraception by married couples. In a blissfully short majority opinion (at least by today's long-winded judicial standards), Justice William O. Douglas described the many different provisions of the Constitution that supported a more general right to privacy—the right against unreasonable search and seizure, the right to freely associate, the right to raise children without interference from the government, for example. The statute in this case, Justice Douglas wrote, "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." And in criminalizing not only the sale of contraceptives, but their *use*, Connecticut sought to achieve its goals—restricting sex to reproductive purposes—with "a maximum destructive impact upon that relationship." Would Connecticut have the police "search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" Surely, he concluded, the "very idea is repulsive to the notions of privacy surrounding the marriage relationship." And keeping the police out of those sacred precincts was one function of "a right of privacy older than the Bill of Rights."

In 1972, the Court continued what would be a long and profound path when it extended the right to use contraceptives to single people. The Massachusetts law challenged in *Eisenstadt v. Baird* criminalized only the distribution of contraceptives to unmarried persons. But the Supreme Court wrote, in an opinion by Justice William J. Brennan, that the right of privacy was a right of individuals, married or not. The decision whether to have a baby was to remain free of "unwarranted governmental intrusion." So was the decision, the Court would hold the following year in 1973, whether to terminate a pregnancy, at least in the earlier months. The controversies over this ruling and abortion rights in general have had a life of their own, especially piqued in recent years as states

intentionally pass laws that infringe on the rights articulated in *Roe* and later cases, in the hopes of staging a new challenge to those cases. (To see just one of many possible examples of this trend, see **here (https://verdict.justia.com/2013/04/02/whats-the-matter-with-north-dakota-and-arkansas)** .)

For all the controversy about abortion, though, the right to use contraception established in *Griswold* is sacrosanct. Before the recent controversy over contraceptive coverage under the Affordable Care Act, it was hard to find people, regardless of their place on the political spectrum, who would admit to believing that the government should be able to block access to contraception. To illustrate this point, Judge Robert Bork's open opposition to the *Griswold* ruling cost him a seat on the Supreme Court in 1987.

Griswold and Gay Rights

Although *Griswold* and many of the rulings it supported involved sex—there's no need for abortion or contraception without it—the Court had shied away from any frank discussion of that nature. The decisions were couched primarily in terms of decision-making and the zone of privacy that surrounded certain types of decisions about intimate and family life. The reach of *Griswold* was tested in 1986, in *Bowers v. Hardwick*, in which two men challenged convictions under a law that criminalized same-sex sexual behavior. In a decision that seemed to signal an end to the expansion of the right to privacy, the Court upheld the law. The Due Process Clause, it reasoned, protected only those rights that were fundamental—"implicit in the concept of ordered liberty"—a standard that sodomy could not survive.

The Supreme Court then reversed itself seventeen years later, in *Lawrence v. Texas*. There, it struck down an almost identical law, holding that *Bowers* was wrong and had been wrong when decided. The key to that decision was not what the Court did or did not do in *Bowers*, but the sea change in social attitudes about homosexuality and the development of gay rights at the state and local levels. A shift in composition of the Court combined with a shift in public opinion combined to produce the opposite result.

Although fueled by the right to privacy established in *Griswold*, *Lawrence* had a life of its own. Its direct impact was to put an end to sodomy laws, wherever they still existed. But its broader effect, due to the Court's explicit and implicit reasoning, was to put an end to most laws regulating consensual sexual acts between adults. The *Lawrence* opinion cast doubt on the ability of states to mandate a moral code, at least when doing so infringed on the rights of individuals to decide whether, when, and how to carry out consensual, non-commercial relationships with other adults. Successful challenges to fornication and cohabitation bans followed, and challenges to other laws, such as those prohibiting polygamy and statutory rape, were a mixed bag. It is too soon to assess *Lawrence*'s full

legacy, but its impact so far is part of *Griswold*'s legacy. The force of both decisions is on display this term, as the Supreme Court considers whether to invalidate remaining state bans on the celebration and recognition of marriages by same-sex couples (details **here (https://verdict.justia.com/2015/01/28/final-showdown)** and **here (https://verdict.justia.com/2015/04/28/interstate-marriage-recognition-when-history-meets-the-supreme-court)**).

Griswold, Contraceptive Access, and Women's Economic Empowerment

The legacy of a landmark ruling like *Griswold v. Connecticut* goes far beyond increasing the accessibility of contraception. *Griswold* was part and parcel of an era that gave women—through legal, social, and technological developments—greater control over reproduction. And that control, in turn, facilitated their greater integration into the labor force—and access to better economic security.

Much of women's struggle for workplace equality arises from their unique reproductive role. As the Supreme Court observed in its 1992 abortion ruling in *Planned Parenthood v. Casey*, 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." In other words, the more women are like men, the better they will fare in the workplace. But as much as the ability to control the timing and number of pregnancies has enhanced women's economic empowerment, the fact that more than eighty percent of women will at some point give birth—often when they are in the workforce—remains an obstacle to equality.

Pregnancy and its bedfellows—infertility, contraception, fetal risk, childbirth, and lactation (not to mention motherhood itself)—have all given rise to conflicts with employers. At the time of *Griswold*, in 1965, there was no legal protection against pregnancy discrimination in the workplace. Title VII was already on the books, but, when first asked in *General Electric Co. v. Gilbert*, the Supreme Court would hold that the statute's ban on sex discrimination by employers did not extend to pregnancy discrimination. And it borrowed that conclusion from an earlier case ruling, *Geduldig v. Aiello*, in which it held that that pregnancy discrimination was not a form of sex discrimination for equal protection purposes.

The Pregnancy Discrimination Act (PDA), enacted by Congress in 1978, changed the landscape considerably. It made clear that discrimination on the basis of pregnancy, childbirth, or related medical conditions is a form of unlawful sex discrimination. Also, in a separate clause, it provided that pregnant workers must be treated the same as workers with comparable "ability or inability to work" from other causes.

The almost four decades since the PDA was enacted have seen litigation over virtually every possible conflict between reproduction and work. At the core, the PDA has been helpful in eliminating the most common types of employment policies that were used to exclude pregnant women from, or minimize their role in, the workforce. And it has been helpful in reducing employers' reliance on bias, paternalism, and stereotyped views about pregnant or fertile women's capacity to work. But lawsuits have also tested a broader range of issues. Courts, for example, have considered whether the exclusion of prescription contraceptives, which are only used by women, from an otherwise comprehensive employment-based health insurance plan is discrimination (discussed **here (http://writ.news.findlaw.com/grossman/20070417.html)**). And whether an employer can fire an employee simply because she is seeking fertility treatment or is lactating (discussed **here (https://verdict.justia.com/2012/02/21/a-federal-judge-thwarts-title-vii-and-the-pregnancy-discrimination-act-by-ruling-bizarrely-that-lactation-is-not-related-to-pregnancy)**), or whether it is discrimination when an employer refuses to accommodate a woman's lactation or fertility treatment (discussed **here (http://writ.news.findlaw.com/grossman/20080819.html)**).

In a variety of contexts, courts have struggled to give effect to the PDA's promise of greater integration of pregnant women into the workplace, while being resistant to claims for accommodation, even when they are routinely granted to other workers. In a recent ruling (discussed **here (https://verdict.justia.com/2015/03/31/forceps-delivery-the-supreme-court-narrowly-saves-the-pregnancy-discrimination-act-in-young-v-ups)** and **here (https://verdict.justia.com/2015/04/20/afterbirth-the-supreme-courts-ruling-in-young-v-ups-leaves-many-questions-unanswered)**), *Young v. United Parcel Service*, the Supreme Court took a step in the right direction, holding that an employer's failure to accommodate pregnancy-related restrictions while routinely accommodating many other comparably restricted workers could raise an inference of discrimination. Pregnancy may continue to impede women's workplace equality, but contraception access, dating back to the time of *Griswold*, has played an important role in leveling the playing field.

Conclusion

The anniversary of a court ruling might not be a gift-giving occasion (although some IUDs are made with gold), but it is an appropriate time to reflect on the ways in which four simple pages can have a profound impact on the way we live.

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