ON *GRISWOLD* AND WOMEN'S EQUALITY

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Thank you to Ernie Walton and the Center for Global Justice, Human Rights, and the Rule of Law for inviting me to participate in today's Symposium. I divide my comments today into three parts. First, I'll discuss how the Supreme Court has come to view the nature of the individual rights that first received Constitutional protection in *Griswold v. Connecticut.*[1] Then, I'll turn to the effect of *Griswold* and its progeny on women's social and economic equality in the U.S. And finally, I'll offer some thoughts on the future and challenges that continue to face women who seek equal opportunities to define for themselves how their lives should go.

I. *GRISWOLD V. CONNECTICUT* (AND PROGENY)

In *Griswold,* the Supreme Court held that a state law criminalizing the use of contraception violated married couples' privacy rights.[2] The decision promised that couples would be free from state intrusion into the bedroom.[3] Seven years later, in *Eisenstadt v. Baird,* the Court extended the same protection to unmarried couples.[4]

The Court in *Griswold* found the right to privacy implicit in the various provisions of the Bill of Rights.[5] Justice Goldberg's concurrence, moreover, pointed to the Ninth Amendment's assurance that the enumeration of certain rights should not be construed to deny the existence of others.[6] In other words, the Framers understood the impossibility of cataloging all individual rights entitled to Constitutional protection (one of the reasons given by Alexander Hamilton for excluding from the Constitution altogether a Bill of Rights).[7] The Ninth Amendment clarifies that the list of rights spelled out in the Bill of Rights is not an exhaustive one.[8]

Nonetheless, Constitutional originalists have long criticized the

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1 Griswold v. Connecticut, 381 U.S. 479 (1965).

2 *Id.* at 485.

3 *See id.* at 485–86.

4 Eisenstadt v. Baird, 405 U.S. 438, 443, 454–55 (1972).

5 *Griswold*, 381 U.S. at 484–85.

6 *Id.* at 486–87 (Goldberg, J., concurring).

7 *Id.* at 486–89, 489 n.4.

8 *Id.* at 492.

approach taken by the *Griswold* Court.[9] And I think the Court has responded by better explaining the nature of the privacy right in its later decisions. *Eisenstadt v. Baird* more explicitly grounded the right to privacy in the Fourteenth Amendment as part of the liberty guaranteed by that provision.[10] In *Lawrence v. Texas*, where the Court held in 2003 that criminalizing gay sex was not within the Constitutional power of the states,[11] Justice Kennedy wrote for the Court that "[l]iberty … presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct…. [L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[12]

Justice Kennedy also takes a jab at strict interpretationists. In surmising why the Framers did not explicitly include the right to adult consensual intimate conduct (including same-sex conduct), he writes in *Lawrence,* "[h]ad those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might *have* been more specific. They did not presume to have this insight."[13] The document that establishes the foundational principles of the nation's government and rights of individuals within it is not a statute or administrative regulation; it's a Constitution.

Griswold and its progeny thus establish that we individuals have a Constitutionally-protected liberty interest in private intimate conduct.[14] Pure moral disapproval of conduct is not a sufficient reason for the state to prohibit conduct. For example, the Court held that the Texas statute criminalizing gay sex "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[15]

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[9] *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7–9 (1971) (arguing that *Griswold* "is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it"); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1597–98 (2004) ("The *Griswold-Roe-Lawrence* line of cases has no apparent basis in the text or original meaning of the Due Process Clauses, and the Justices have never tried to show that there is one."). *Cf.* Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 742–43 (2010) (suggesting that progressives should answer these criticisms by reclassifying privacy rights as liberty rights).

[10] *See* Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 197–98 (arguing that *Eisenstadt* "unmasks *Griswold* as based on the idea of sexual liberty rather than privacy" because the law challenged in *Eisenstadt* restricted the distribution rather than the use of contraceptives).

[11] Lawrence v. Texas, 539 U.S. 558, 567, 578–79 (2003).

[12] *Id.* at 562, 572 (emphasis added).

[13] *Id.* at 578–79 (emphasis added).

[14] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003); Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[15] *Lawrence*, 539 U.S. at 578.

Today we understand "privacy" to be an essential aspect of "liberty," the essence of which is "[l]iberty . . . from unwarranted government[al] intrusion[]."[16]

II. THE IMPACT OF *GRISWOLD*

Griswold meant that women were guaranteed the liberty to control when and whether to bear children—in other words, it promised procreative liberty for women.[17] There was no mention by the *Griswold* majority of the equality guarantee of the Fourteenth Amendment (it wasn't until 1971 that the Court would read the Equal Protection Clause of the Fourteenth Amendment to provide meaningful protection from discrimination based on sex).[18] *Griswold,* however, has had a tremendous effect on women's equality gains in social and economic life.[19]

The economy where a single wage-earner could earn enough to support a family is past—in fact, it was a short-lived historical aberration.[20] That means that families need women to earn wages and participate in the workplace.[21] And once in it, the ability to plan childbearing has meant that women have the opportunity to participate, not as second-class citizens, but instead on equal terms.[22]

Research has found that access to birth control "before age 21 has been . . . the most influential factor in enabling women" enrolled in college to remain in and graduate from college.[23] Women can time childbearing so as to complete studies and obtain the education required to survive, compete, and succeed in today's information/technology/service-driven economy.[24] Studies have attributed "one-third of the wage gains women have made since the 1960s . . . [to their] access to oral contraceptives."[25]

Guaranteeing to women the ability to control the timing of childbearing has thus had effects that have reached far beyond the specific

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16 *Id.* at 562.

17 *See* Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. FORUM 349, 349–50 (2015).

18 *See id.*; *see also* Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Reed v. Reed, 404 U.S. 71, 76-77 (1971).

19 *See* NAT. WOMEN'S L. CTR., *50 Years After the Griswold vs. Connecticut Decision* (June 2015), https://nwlc.org/wp-content/uploads/2015/08/griswold_anniversary_6.2.155.pdf.

20 *See* STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 155–56 (1992).

21 *See id.*

22 *See* PLANNED PARENTHOOD, BIRTH CONTROL HAS EXPANDED OPPORTUNITY FOR WOMEN, PLANNED PARENTHOOD (June 2015), https://www.plannedparenthood.org/files/1614/3275/8659/BC_factsheet_may2015_updated_1.pdf.

23 *Id.*

24 *See id.*

25 *Id.*

realm of family planning and reproductive rights. As Justice Ruth Bader Ginsburg recently observed, "[t]he 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."[26]

III. CURRENT AND FUTURE LANDSCAPE

At the same time, women have not yet achieved full equality in the workplace.[27] The wage gap is smallest in the lowest-paying jobs—so women cashiers earn about ten cents to the dollar less than men in those same jobs.[28] But the wage gap increases significantly when we compare men and women in the higher paying jobs. Women lawyers, for example, earn about 79 cents to the dollar (or about 21 cents less than men lawyers).[29] Part of that difference can be attributed to women taking time out of the labor force when they have children.[30] But nearly 40 percent of that difference is unaccounted for.[31]

Women continue to face challenges to their ability to access reproduction-related health care.[32] In *Burwell v. Hobby Lobby, Stores, Inc.*, for example, employers who objected on religious grounds to certain forms of contraception challenged federal regulations mandating that employers provide group health insurance with coverage for contraceptives (known as the "contraceptive mandate").[33]

In a 5-4 decision, the Supreme Court construed the Religious Freedom Restoration Act of 1993 (RFRA) to require the Federal Government to provide exemptions to corporations like Hobby

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[26] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787-88 (2014) (Ginsburg, J. dissenting) (quoting *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 856 (1992).

[27] MICHELLE KELSO ET AL., GENDER EQUALITY IN EMPLOYMENT: POLICIES AND PRACTICES IN SWITZERLAND AND THE U.S. 6 (2012), https://www2.gwu.edu/~igis/assets/docs/report-gender-equality-switzerland-2012.pdf.

[28] BUREAU OF LABOR STATISTICS, REP. 1051, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2013, at 16 tbl.2 (2014), http://www.bls.gov/opub/reports/womens-earnings/archive/highlights-of-womens-earnings-in-2013.pdf.

[29] *Id.* at 4, 12.

[30] *See* Claire Cain Miller & Liz Alderman, *Why U.S. Women Are Leaving Jobs Behind*, N.Y. TIMES (Dec. 12, 2014), http://www.nytimes.com/2014/12/14/upshot/us-employment-women-not-working.html?_r=0.

[31] *See* Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations,* Institute for the Study of Labor, Discussion Paper No. 9656 (Jan. 2016), http://ftp.iza.org/dp9656.pdf; *see also* Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay,* 14 J. ECON. PERSP. 75, 82 (2000).

[32] *See* AM. ASS'N OF UNIV. WOMEN, REPRODUCTIVE RIGHTS: NEW BEGINNINGS, CONTINUED CHALLENGES 1 (2011), http://www.aauw.org/files/2013/02/position-on-reproductive-rights-112.pdf.

[33] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

Lobby. [34] Writing for the majority, Justice Alito found that the contraceptive mandate imposed a substantial burden on the employer corporations' sincerely held religious beliefs.[35] RFRA therefore required the government to show that the mandate was the least restrictive means of furthering a compelling government interest. [36] Even if "the [governmental] interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling," however, the majority held that the contraceptive mandate was not the least restrictive means available to the government to further that interest.[37]

Furthermore, state legislatures continue to pass measures whose effect is to restrict women's access to contraception and abortion. Two days ago, for example, the Supreme Court heard arguments in *Whole Woman's Health v. Hellerstedt*. [38] The case challenges a 2013 Texas law that requires clinics that perform abortions to meet standards imposed on surgical centers and requires that doctors that work there have admitting privileges at nearby hospitals. [39] These requirements, if upheld, would effectively require many clinics to close their doors. [40] The ostensible purpose of these laws (and anti-abortion lawmakers in other states have recently enacted similar measures) is to protect women's health. [41] But clinics that perform procedures that are many times as risky as abortions (including liposuction and colonoscopies) aren't required to meet these heightened standards. [42] Justice Ruth Bader Ginsburg asked Texas Solicitor General Scott Keller how many women would have to travel more than 100 miles to obtain abortion services if the law went into effect.[43] His response was 25 percent, but suggested that many of those women could travel to New Mexico—where it happens, clinics are not required to meet

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[34] *Id.* at 2781.

[35] *Id.* at 2769 (finding for the first time that closely held for-profit corporations could be considered "persons" with protected religious beliefs).

[36] *Id.* at 2758.

[37] *Id.* at 2780. The Court thus reached its decision on statutory grounds and did not address Hobby Lobby's claims under the Free Exercise Clause of the First Amendment. *Id.* at 2785.

[38] The opinion for *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), has since been released. In a 5-4 decision, the Supreme Court held that the requirements constituted an undue burden on women's ability to access previability abortions and thus violated the Constitution. *Id.* at 2309-20.

[39] *Id.* at 2300.

[40] *Id.* at 2304, 2306, 2312.

[41] *See* Transcript of Oral Argument at 37–38, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

[42] *Whole Woman's Health*, 136 S. Ct. at 2315.

[43] Transcript of Oral Argument, *supra* note 41, at 36–37.

the stringent requirements imposed by the Texas law.[44]

Today, virtually all women—regardless of religious background—use contraception in some period over the course of their lives.[45] "Virtually all" means over ninety-nine percent. [46] This widespread use of contraception suggests that while childbearing is an important part of most women's lives, it is also important to (virtually all) women that we be able to determine if and when to bear children. Childbearing is rendered no less meaningful (and is arguably *more* meaningful) when it is intended. Today, however, nearly half of all pregnancies are unintended, and unwanted; and about one-half of all unwanted pregnancies (about a third of all pregnancies) end in abortion.[47] Throwing up all manner of obstacles to women seeking to carry out a decision to end a pregnancy, as Texas has done, does nothing to support women's health. Ensuring meaningful access to contraception and healthcare more broadly, however, not only supports women's health, but also respects women's liberty, equality, and dignity.

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[44] *Id.* at 37–38.

[45] *See* GUTTMACHER INST., CONTRACEPTIVE USE IN THE UNITED STATES: FACT SHEET 1 (2015), https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states.

[46] *Id.*

[47] GUTTMACHER INST., UNINTENDED PREGNANCIES IN THE U.S.: FACT SHEET (2016), https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states.