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## RESPONSE

### *Griswold, Geduldig, and Hobby Lobby: The Sex Gap Continues*

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In response to Mary Ziegler, *The (Non)-Right to Sex*, 69 U. MIAMI  
L. REV. 631 (2015).

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## I. INTRODUCTION

In her article, *The (Non)-Right to Sex*, Professor Mary Ziegler excavates the fascinating legal history of the “sex gap”—the historical failure to address sexual liberty—in the constitutional canon and offers an important cautionary tale for contemporary advocacy of marriage equality.<sup>1</sup> By surfacing lost efforts to expand sexual liberty, and by linking that liberty to intersectional concerns about class, gender, and racial equality, Professor Ziegler both explains why sexual freedom has received such limited constitutional protection and shows how incrementalist litigation strategies aimed at progressive legal change have inadvertently strengthened the State’s power to delimit sexual expression.<sup>2</sup>

The sex gap identified by Professor Ziegler signifies not only the absence of sexual liberty within Supreme Court jurisprudence, but also the absence of sex equality analysis in cases relating to sexuality and reproduction.<sup>3</sup> This brief comment builds on Professor Ziegler’s article to highlight how the sex gap in the Supreme Court’s foundational equal protection and substantive due process cases limits not only sexual liberty, but also continues to impede sex equality under the law. This comment highlights the sex discrimination aspects of *Griswold v. Connecticut*<sup>4</sup> that the Court ignored and adds *Geduldig v. Aiello*<sup>5</sup> to the list of the Court’s canonical cases that took apart the connections between sexuality, reproduction, and sex equality in constitutional analysis. The Court’s disassociation of sexual liberty, reproductive liberty, and gender equality from one another has impoverished all three interrelated aspects of a woman’s right to equal citizenship.<sup>6</sup>

The story of the “non-right” to sex continues today, particularly for women. Almost fifty years after *Griswold* first recognized a right of marital privacy protecting access to contraception, the Supreme Court subverted contraceptive access in *Burwell v. Hobby Lobby Stores, Inc.*<sup>7</sup> The Court’s conceptual and doctrinal delinking of sexuality, reproduction, and sex equality

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<sup>1</sup> Mary Ziegler, *The (Non)-Right to Sex*, 69 U. MIAMI L. REV. 631 (2015).

<sup>2</sup> *Id.* at 808 (“Strategic incrementalism seemed to be a realistic option for progressives interested in remaking the State’s treatment of sex. Nonetheless, by endorsing the State’s ability to regulate illicit sex, progressive social movements helped to entrench the State’s power to reach intimate relations and to discriminate between them.”).

<sup>3</sup> I use the terms “sex equality” and “gender equality” interchangeably throughout this comment to refer to concerns about women’s rights to equality under the law.

<sup>4</sup> 381 U.S. 479 (1965) (holding that a Connecticut law forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy).

<sup>5</sup> 417 U.S. 484 (1974) (holding that pregnancy discrimination does not constitute sex discrimination under the Equal Protection Clause).

<sup>6</sup> See Deborah Dinner, *Recovering the LaFleur Doctrine*, 22 YALE J.L. & FEMINISM 343, 347–48, 383, 387–94 (2010) (describing early feminist articulation of right to reproductive liberty and right to sex equality as inextricably intertwined rights of citizenship).

<sup>7</sup> 134 S. Ct. 2751 (2014).

paved the way for *Hobby Lobby*, a decision that significantly undermined progress toward the right to equal sexual liberty.<sup>8</sup>

## II. THE (NON)-LINKS BETWEEN SEXUALITY, REPRODUCTION, AND EQUALITY IN THE CONSTITUTIONAL CANON

As Professor Ziegler's article convincingly demonstrates, the constitutional canon relating to sexuality and reproduction—including cases on illegitimacy, contraception, and abortion—not only refused to acknowledge sexual pluralism<sup>9</sup> as a constitutionally protected interest at stake in those cases, but also reinscribed the State's power to define and discipline illicit sex.<sup>10</sup> The sex gap in the Court's jurisprudence not only muted sexual liberty as an animating constitutional concern, but also erased sex discrimination analysis from cases addressing government restrictions on sexual and reproductive liberty, even though those restrictions impacted women much more heavily. The foundational contraception cases—including *Griswold* and *Eisenstadt v. Baird*<sup>11</sup>—illustrate the sex equality gap in the Court's articulation of rights relating to sexuality and reproduction. Moreover, adding *Geduldig v. Aiello* to the spectrum of canonical cases on sexuality and reproduction further explicates how the Court severed sexuality from reproduction—and reproduction from sex equality—in constitutional jurisprudence.

Professor Ziegler carefully elucidates how canonical cases on “illegitimacy, contraception, and abortion—matters centrally involving sex—made the issue all but invisible.”<sup>12</sup> In *Griswold v. Connecticut*, the Supreme Court struck down Connecticut's criminal ban on the use of contraception by married couples, focusing primarily on a traditional right of marital privacy.<sup>13</sup> *Griswold* not only obscured the underlying issue of sexual liberty by focusing solely on the rights of married couples, but also refused to acknowledge how laws limiting access to contraception enforced traditional gender roles and gendered double standards in sexuality. In particular, the law at issue in *Griswold* (and other similar laws) granted exceptions to protect men's health—e.g., permitting the use of contraception to protect against venereal disease (condoms)—but denied women access to the most effective forms of

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<sup>8</sup> See Ziegler, *supra* note 1, at 645 (explaining advocates' theory of equal sexual liberty, which included the “insight that state control of sexuality implicated not only intimate behavior but also the equal treatment of women and racial minorities”).

<sup>9</sup> *Id.* at 806, 808.

<sup>10</sup> See *supra* note 2 and accompanying text.

<sup>11</sup> 405 U.S. 438 (1972).

<sup>12</sup> Ziegler, *supra* note 1, at 649.

<sup>13</sup> 381 U.S. 479, 485–86 (1965) (emphasizing that the contraceptive ban interferes with “the sacred precincts of marital bedrooms” and “is repulsive to the notions of privacy surrounding the marriage relationship,” a “right of privacy older than the Bill of Rights”).

contraception to protect their health (diaphragms or the pill) and avoid dangerous pregnancies.<sup>14</sup> Therefore, by granting men access to contraception over which they have control, the law “[gave] men more control than women in separating sex and childbearing” and reinforced gendered double standards in sex and parenting.<sup>15</sup> Given the gendered realities of childbearing and child rearing, laws restricting access to contraception clearly raise equality concerns for women.<sup>16</sup> *Griswold* failed to address the links between sexual freedom, reproductive freedom, and sex equality in both the private and public spheres for women, even though advocates had already set forth the intellectual foundations for such a conceptualization at the time.<sup>17</sup>

In *Eisenstadt v. Baird*, the Court extended *Griswold*’s right of marital privacy to include single persons, but once again failed to even mention the sex equality implications of the battles over contraception. The Court held that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>18</sup> As Professor Ziegler explains, the Court’s rhetoric occluded the sexual liberty interests at stake in decriminalizing access to contraception, emphasizing only the burdensome consequences of reproduction.<sup>19</sup> The Court again refused to acknowledge the sex discrimination inherent in a statute that prohibited contraceptives when used to prevent conception but not to prevent the spread of disease. Instead, the Court merely noted that the statute’s inconsistencies

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<sup>14</sup> See Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. F. 349, 352–54, 355 (2015), available at [http://www.yalelawjournal.org/pdf/Siegel-SiegelPDF\\_pnrriadk3.pdf](http://www.yalelawjournal.org/pdf/Siegel-SiegelPDF_pnrriadk3.pdf) (“[In Massachusetts, the state] granted a health exception to men [by crafting an exception to the state’s ban on contraceptives for condoms]—even when [men’s] lives were not threatened by venereal disease—after having refused a health exception for women even when their lives were threatened by pregnancy.”).

<sup>15</sup> *Id.* at 355.

<sup>16</sup> *Id.*; see also Melissa Murray, *Overlooking Equality on the Road to Griswold*, 124 YALE L.J. F. 324 (2015), available at [http://www.yalelawjournal.org/pdf/MurrayPDF\\_yjfnw4ya.pdf](http://www.yalelawjournal.org/pdf/MurrayPDF_yjfnw4ya.pdf) (comparing the sex equality arguments for access to contraception articulated in *Trubek v. Ullman*, 367 U.S. 907 (1961), and *Poe v. Ullman*, 367 U.S. 497 (1961), both pre-*Griswold* cases).

<sup>17</sup> See, e.g., Siegel & Siegel, *supra* note 14, at 355–56 (noting that the American Civil Liberties Union’s amicus brief in *Griswold* argued that “Connecticut’s ban on contraception violated equal protection” by denying women, not men, “effective means of contraception [that could enhance] the opportunities of women who wish to work”) (citing Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae at 15–16, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496)); Murray, *supra* note 16, at 325–29 (discussing the sex equality arguments in *Trubek*’s complaint as proving that “decision-making about contraception and family planning permitted wives to forego marriage’s gendered expectations in order to pursue their own ambitions in and outside of the home. In so doing, birth control could not only liberate women to pursue their own ambitions, it could completely reorder the meaning and structure of marriage”).

<sup>18</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 455 (1972).

<sup>19</sup> Ziegler, *supra* note 1, at 668–69, 673.

indicated only that it was not narrowly tailored to meet the state's aim of deterring premarital sex.<sup>20</sup> Although feminist advocates filed briefs emphasizing the relationship between sexual liberty, fertility control, and sex discrimination, and articulated a theory of equal sexual liberty touching on both equal protection and substantive due process, *Eisenstadt* ignored the intertwined nature of claims to sexual freedom, reproductive freedom, and women's right to equal treatment.<sup>21</sup>

Two years after *Eisenstadt*, in *Geduldig v. Aiello*, the Court utterly severed the relationship between women's reproductive liberty and sex equality. *Geduldig* infamously held that pregnancy discrimination is not sex discrimination under the Equal Protection Clause.<sup>22</sup> *Geduldig* upheld a California disability insurance program that denied benefits for pregnancy-related disabilities, while granting benefits for other "voluntary disabilities such as cosmetic surgery . . . [and] disabilities unique to sex or race such as prostatectomies . . ." <sup>23</sup> The Court rejected the plaintiffs' argument that the statute discriminated on the basis of sex, declaring: "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons."<sup>24</sup> *Geduldig's* rhetoric and reasoning proclaimed that gender was not even at issue in the case, ignoring the long history of women's subordination based on their capacity for pregnancy<sup>25</sup> and making no mention of the lower court's finding that pregnancy exclusions from employment benefits both rely on and reinforce sex-role stereotypes about women.<sup>26</sup> The Court's exceedingly narrow definition of sex discrimination both ignored the obvious—that only women become pregnant—and elided the profound social and economic effects of pregnancy on women.<sup>27</sup>

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<sup>20</sup> *Eisenstadt*, 405 U.S. at 449. The *Eisenstadt* Court relied on the Equal Protection Clause in striking down the Massachusetts criminal ban on contraceptive use by unmarried persons, identifying the equal protection violation not as sex discrimination but as discrimination between married and unmarried individuals. *Id.* at 454–55.

<sup>21</sup> See Ziegler, *supra* note 1, at 647 & n.87–90.

<sup>22</sup> See *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974).

<sup>23</sup> See *id.* at 499–500 (Brennan, J., dissenting).

<sup>24</sup> *Id.* at 496 n.20 ("There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class . . .").

<sup>25</sup> See generally KATE MILLETT, *SEXUAL POLITICS* (1970).

<sup>26</sup> See *Aiello v. Hansen*, 359 F. Supp. 792, 799 (N.D. Cal. 1973), *rev'd sub nom.* *Geduldig v. Aiello*, 417 U.S. 484 (1974) ("[T]he apparently solicitous attitude that pregnant women are in a 'delicate condition' has the effect that they often cannot earn an income or obtain the usual social welfare benefits for the unemployed. The only way to assure that this irrational result is not simply the product of mistaken stereotypical beliefs is to require, as the equal protection clause does, that each pregnant woman be considered individually.").

<sup>27</sup> See generally Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. 415 (2011).

Although Congress rejected *Geduldig*'s notoriously obtuse declaration that pregnancy exclusions differentiate not between women and men but between "pregnant women and nonpregnant persons,"<sup>28</sup> the decision has never been explicitly overruled by the Court.<sup>29</sup> *Geduldig*'s impact on the law has been widespread and lasting, diminishing the law's understanding of sex equality, reproductive liberty, and the relationship between the two. *Geduldig*'s parsimonious logic reverberates through judicial decisions governing women's access to abortion care, contraception, and protection from discrimination. For example, the Supreme Court implicitly relied on *Geduldig*'s reasoning in holding that the federal government did not violate constitutional equality or reproductive liberty principles by denying Medicaid funding for poor women's abortion care—even when it was for medically necessary abortions.<sup>30</sup> Lower courts have also parroted *Geduldig*'s logic in holding that employer's who exclude contraceptive coverage from employee prescription benefit plans do not violate Title VII's prohibition against sex discrimination or the Pregnancy Discrimination Act.<sup>31</sup>

In sum, the Court's canonical cases relating to sexuality and reproduction not only left intact the State's power to limit sexual liberty, but also reinforced asymmetrical burdens of reproduction and inequalities along lines of gender, race, and class.<sup>32</sup>

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<sup>28</sup> *Geduldig*, 417 U.S. at 496 n.20. Congress overturned the Court's attempt to import *Geduldig*'s logic into Title VII employment discrimination law by enacting the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e); see also *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1363 (2015) (noting that Congress rejected the Court's application of rational basis scrutiny in *Geduldig* to pregnancy discrimination by enacting the PDA).

<sup>29</sup> In 2003, in *Nevada Department of Human Resources v. Hibbs*, the Court for the first time held that legal regulation of pregnant women based on sex-role stereotypes may violate the Equal Protection Clause, but it did not explicitly overrule *Geduldig*. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); see also Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1882–97 (2006) (discussing the implications of *Hibbs* for future interpretations of *Geduldig*).

<sup>30</sup> See, e.g., *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). In contrast to the U.S. Supreme Court, some state courts have concluded that denying coverage to women for medically necessary abortions while providing coverage for all of men's medical needs constitutes sex discrimination. See, e.g., *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 850–57 (N.M. 1998) (holding that "classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under [New Mexico's] Equal Rights Amendment," and that the funding ban "undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women").

<sup>31</sup> See, e.g., *In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936 (8th Cir. 2007). The Eighth Circuit does not cite *Geduldig* in its decision, but implicitly relies on the same logic. See *id.* at 944–45 (holding that denial of contraceptive coverage is not sex discrimination, even though the lower court found that the plan discriminated against women by providing fuller coverage for preventive care for men, including coverage of medications for male-pattern baldness).

<sup>32</sup> See Cary Franklin, *Griswold and the Public Dimension of the Right to Privacy*, 124 YALE L.J. F. 332 (2015), available at [http://www.yalelawjournal.org/pdf/FranklinPDF\\_xotfi3j7.pdf](http://www.yalelawjournal.org/pdf/FranklinPDF_xotfi3j7.pdf)

## III. HOBBY LOBBY'S SEX GAP

The conceptual and doctrinal limits of *Griswold* and its progeny became strikingly apparent in the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*<sup>33</sup> In *Hobby Lobby*, five Justices concluded that the Religious Freedom Restoration Act ("RFRA")<sup>34</sup> prohibits the federal government from requiring that employers who provide health insurance benefits to employees include comprehensive contraceptive coverage as part of their health insurance plans.<sup>35</sup>

*Hobby Lobby* addressed a number of questions about RFRA's meaning and application, including whether RFRA applied to for-profit corporations.<sup>36</sup> Under the Constitution, neutral laws of general applicability do not violate the Free Exercise Clause, even if they substantially burden an individual's religious exercise.<sup>37</sup> However, by enacting RFRA, Congress provided protection beyond what the Supreme Court's Free Exercise Clause jurisprudence requires, at least as it applies to federal statutes.<sup>38</sup> RFRA mandates that the federal government grant exemptions from neutral laws of general applicability to individuals (and now closely-held corporations, under *Hobby Lobby*) who assert that the law substantially burdens their sincere religious beliefs, unless the government can show that the law serves a compelling interest and is narrowly tailored to that interest.<sup>39</sup>

In *Hobby Lobby*, the Supreme Court considered whether regulations adopted by the federal government for implementing the Patient Protection and Affordable Care Act<sup>40</sup> violated RFRA—in particular, regulations requiring that employers provide health insurance coverage for all Food and Drug

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(situating *Griswold* within the Warren Court's poverty cases and discussing class dimensions of battles over access to contraception).

<sup>33</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>34</sup> Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb-1).

<sup>35</sup> See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759–60.

<sup>36</sup> See *id.* at 2767 ("The first question that we must address is whether [RFRA] applies to regulations that govern the activities of for-profit corporations . . ."); see also *id.* at 2768–69 (finding that RFRA applies to a "person's exercise of religion," and that a for-profit corporation is a person within the meaning of RFRA) (internal quotation marks omitted).

<sup>37</sup> See *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . .'").

<sup>38</sup> See 42 U.S.C. § 2000bb-1. *But see* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (finding RFRA unconstitutional as applied to the states).

<sup>39</sup> 42 U.S.C. § 2000bb-1(a) to (b).

<sup>40</sup> Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, and 42 U.S.C.).

Administration (“FDA”) approved contraceptives.<sup>41</sup> Five justices concluded that RFRA applied to for-profit corporations, that requiring contraceptive coverage substantially burdened the sincerely held religious beliefs of Hobby Lobby Stores, and that the government failed to establish that its regulations were narrowly tailored.<sup>42</sup> The majority opinion avoided the question whether comprehensive insurance coverage for contraceptives serves a compelling government interest in protecting public health and ensuring women’s equality.<sup>43</sup> In each step of its analysis, the Court ignored how allowing religious exemptions to contraceptive coverage effaced women’s decisionmaking, minimized the burdens of denying full insurance coverage for women, and cast aside concerns about sex discrimination by permitting employers to provide women lesser benefits for their preventive health care needs than men.<sup>44</sup>

Thus, similarly to *Geduldig*, the *Hobby Lobby* decision erased sex equality from its analysis of denials of employee benefits related to gender-specific health care. *Hobby Lobby* also scrupulously avoided any mention of sexual liberty, although the contraception issue brings the question of women’s right to equal sexual liberty to the fore even more explicitly than questions about abortion rights.<sup>45</sup> Although the Court asserted that women’s need for contraceptive coverage could be addressed through a more narrowly tailored remedy—namely by the government providing contraceptive coverage as it would for non-profit religious entities—*Hobby Lobby* failed to address the dignitary harms caused by legally sanctioning objections to women’s use of birth control.<sup>46</sup> By sheltering

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<sup>41</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2754 (2014).

<sup>42</sup> *See id.* at 2775, 2780. Justice Alito wrote the majority opinion and was joined by four male Justices (Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas). The Court’s three female Justices, Justices Ginsburg, Kagan, and Sotomayor, along with Justice Breyer, dissented. *See id.* at 2787 (Ginsburg, J., dissenting).

<sup>43</sup> However, Justice Ginsburg’s dissent and Justice Kennedy’s concurrence acknowledged that the mandate does serve compelling government interests. *See* Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 *CONN. L. REV.* 1025, 1028 (2015) (“[In *Hobby Lobby*,] five Justices concluded that the government has compelling interests in ensuring women (and men) access to affordable contraception.”) (citing *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2785–86, 2805).

<sup>44</sup> Elizabeth Sepper, *Gendering Corporate Conscience*, 38 *HARV. J.L. & GENDER* 193, 202–12 (2015) (criticizing *Hobby Lobby* for treating “gender as irrelevant” throughout its analysis).

<sup>45</sup> *See* Linda Greenhouse, *Doesn’t Eat, Doesn’t Pray and Doesn’t Love*, *N.Y. TIMES* (Nov. 27, 2013), <http://www.nytimes.com/2013/11/28/opinion/greenhouse-doesnt-eat-doesnt-pray-and-doesnt-love.html> (“There is something deeper going on in these cases than a dispute over the line that separates a contraceptive from an ‘abortifacient.’ What drives the anger about this regulation is that, as the opponents see it, the government is putting its thumb on the scale in favor of birth control, of sex without consequences.”).

<sup>46</sup> *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2574–78 (2015) (stating that *Hobby Lobby*’s “refusal to furnish insurance covering contraception labels an entire group of employees—women using contraceptives—as sinners”). It also remains questionable whether the Court correctly assumed that *Hobby Lobby*’s religious beliefs could be accommodated with “precisely zero” effect

corporate objections to contraception, the decision “reiterate[d] older messages that mark contraceptive use as illegitimate, while stigmatizing those women who, for professional reasons or out of simple desire, seek to avoid motherhood by using contraception.”<sup>47</sup> In contrast, legislation that supports women’s control over fertility both materially and symbolically legitimates women’s right to sexual liberty and to participate in society as breadwinners, rather than solely as dependent caregivers.<sup>48</sup> As Justice Ginsburg emphasized in her dissent, *Hobby Lobby*’s reasoning obfuscates the deep connections between women’s reproductive liberty and women’s ability “to participate equally in the economic and social life of the Nation.”<sup>49</sup>

#### IV. CONCLUSION

Fifty years after *Griswold*, the legal battles over women’s access to birth control continue. *Griswold*’s refusal to acknowledge the nexus between sexual liberty, reproductive liberty, and sex equality for women continues to cast a long shadow in contemporary legal skirmishes over reproductive rights. Although no longer criminalized, lack of access to the most effective forms of contraception renders the constitutional right to contraception meaningless for many women, and disproportionately impacts the poor and racial minorities.<sup>50</sup> Furthermore, the ongoing political attacks and judicial retrenchment on abortion rights makes access to contraception to prevent an unwanted pregnancy even more critical.<sup>51</sup>

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on female employees and dependents. *See id.* at 2581 (quoting *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2760).

<sup>47</sup> Murray, *supra* note 16, at 330–31; *see also* Kara Loewentheil, *When Free Exercise Is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 444 (2014) (“Because contraception is essential for ensuring women’s social and political equality, health care plans that cover all types of preventative care needed by men but do not cover one of the most basic forms of preventative care needed by women create the implication that women are second-class citizens, that using contraception and avoiding pregnancy is a woman’s personal problem, and that women’s social and political equality are personal problems that are not a matter of national concern.”).

<sup>48</sup> Siegel & Siegel, *supra* note 43, at 1037–38 (“The federal government has a compelling interest in promoting women’s equal citizenship in American society, given women’s exclusion from key sites of citizenship for most of American history . . . accomplished in significant part by requiring that [women] occupy the role of caregivers, not breadwinners.”).

<sup>49</sup> *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

<sup>50</sup> The most effective methods of contraception are also the most expensive, and limiting health insurance coverage of the most effective contraceptives disproportionately burdens poor women and women of color. *See* Loewentheil, *supra* note 47, at 439–41.

<sup>51</sup> *See, e.g.*, *Whole Women’s Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014). *See also* Jenny Kutner, *GOP’s Texas Health Disaster: Millions of Women Left Without Access to Care*, SALON (Oct. 3, 2014), [http://www.salon.com/2014/10/03/gops\\_texas\\_health\\_disaster\\_millions\\_of\\_women\\_left\\_without\\_access\\_to\\_care](http://www.salon.com/2014/10/03/gops_texas_health_disaster_millions_of_women_left_without_access_to_care) (stating that enforcement of the Texas anti-abortion

The sex gap in the constitutional canon has led to glaring gaps in access to sexual and reproductive liberty—and gender equality—still visible today.

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legislation will cause the closure of eighty percent of Texas' abortion clinics, impacting access to abortion and health examinations for millions).