

*GRISWOLD v. CONNECTICUT*: 50 YEARS OF UNINTENDED  
CONSEQUENCES

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Women's rights changed markedly in the fifty years since *Griswold v. Connecticut*,<sup>1</sup> and this author believes the *Griswold* decision and its progeny weakened our body politic, and women's rights, as a whole. This Article reviews *Griswold* and its effects through two particular lenses. The first lens focuses on federalism, exploring the negative effects of *Griswold* on the body politic where it weakened many aspects of our national experiment, a balance of power between two coexistent sovereigns, the state government and the federal government. The second lens spotlights women's health as measured by health outcomes and economic incentives, arguing that political strong arming by the judiciary, an abuse of the police power, inhibits the political feedback required for legislatures to make informed decisions in the women's health sphere.

I. HISTORICAL CONTEXT: FOUR "WAVES"

Women's rights in the United States generally divides into "waves," or periods, of activity or focus.<sup>2</sup> The first wave centered on suffrage and access to the franchise.<sup>3</sup> That wave pushed through the 1920s and obtained the ratification of the Nineteenth Amendment that granted female suffrage.<sup>4</sup> The second wave (1920s–1990s), in which *Griswold* arose, addressed what is termed "*de facto*" inequalities, such as sexual and reproductive rights.<sup>5</sup> These inequalities were considered limitations to female workplace advancement due to childbirth and traditional domesticity, which had been largely a female role.<sup>6</sup> The development of women's study programs and scholarship in women's fields began to rise,<sup>7</sup>

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<sup>1</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>2</sup> See Martha Rampton, *Four Waves of Feminism*, PAC. UNIV. OR. (Oct. 25, 2015), <http://www.pacificu.edu/about-us/news-events/four-waves-feminism>.

<sup>3</sup> *Id.*

<sup>4</sup> *The Women's Rights Movement, 1848–1920*, U.S. H. OF REP.: HISTORY, ART & ARCHIVES, <http://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/No-Lady/Womens-Rights/> (last visited Sept. 10, 2016).

<sup>5</sup> *A Look Back: The Second Wave of Feminism*, RADICAL NOTION (June 1, 2015), <http://www.theradicalnotion.com/look-back-second-wave-feminism/>.

<sup>6</sup> See Rampton, *supra* note 2.

<sup>7</sup> Katherine D. Kalagher, *The Development and Impact of Women's Studies In American Higher Education*, GOODWIN COLL. 7, 8 (2014), [http://digitalcommons.goodwin.edu/cgi/viewcontent.cgi?article=1008&context=gen\\_fac\\_pubs](http://digitalcommons.goodwin.edu/cgi/viewcontent.cgi?article=1008&context=gen_fac_pubs).

and during this time the terms sex and gender were differentiated; the former as a biological fact, and the latter as a social construct.<sup>8</sup>

Wave three began in the mid-1990s as a reaction to the rejection of modernity by the second wave.<sup>9</sup> In it, women functioned in a power role, exploiting their sexuality by proudly wearing the plunging necklines that the first two waves would consider as symbols of male oppression.<sup>10</sup> In addition, the third wave developed and embraced the concept of universal womanhood and brought in non-western ideologies of womanhood.<sup>11</sup> It grew and concentrated primarily in academic halls and focused a great deal on theory.<sup>12</sup>

The current, or “fourth” wave extends the battle of women for equality to all marginalized people groups, viewing the third wave as too limiting in its exclusive focus on women.<sup>13</sup> This wave, as with all previous waves, does not perceive itself as a separate movement from its predecessors; rather, each group functions as a Hegelian dialectical synthesis, reacting to society’s antithesis against it, producing a new, blended approach to women’s rights.<sup>14</sup> For the purposes of this Article, the first wave—and the suffrage movement in particular—offers an excellent backdrop against which to measure *Griswold* and its effects.

## II. THE FIRST WAVE: “REMEMBER THE LADIES”

The first wave is of an old pedigree, arising among leading colonial women even before the birth of our nation.<sup>15</sup> One well-known exchange took place between Abigail Adams and John Adams in what is called the “Remember the Ladies” letter of March 31, 1776:

I long to hear that you have declared an independency—and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticular care and attention is not paid to the Laidies we are

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<sup>8</sup> Rampton, *supra* note 2.

<sup>9</sup> *See id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See* Letter from Abigail Adams to John Adams (Mar. 31, 1776), in 1 ADAMS FAMILY CORRESPONDENCE 369, 370 (L.H. Butterfield et al. eds., 1963). The signing of the Declaration of Independence on July 4, 1776 “gave birth to [the] American nation.” Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 737 (2001).

determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation. That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute, but such of you as wish to be happy willingly give up the harsh title of Master for the more tender and endearing one of Friend. Why then, not put it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity. Men of Sense in all Ages abhor those customs which treat us only as the vassals of your Sex. Regard us then as Beings placed by providence under your protection and in imitation of the Supreme Being make use of that power only for our happiness.<sup>16</sup>

Adams reply, is less than hopeful.

In fact, his reply is discouraging. On April 14th John Adams responded:

As to your extraordinary Code of Laws, I cannot but laugh. We have been told that our Struggle has loosened the bands of Government every where. That Children and Apprentices were disobedient -- that schools and Colledges were grown turbulent - - that Indians slighted their Guardians and Negroes grew insolent to their Masters. But your Letter was the first Intimation that another Tribe more numerous and powerfull than all the rest were grown discontented. -- This is rather too coarse a Compliment but you are so saucy, I wont blot it out.

Depend upon it, We know better than to repeal our Masculine systems. Altho they are in full Force, you know they are little more than Theory. We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice you know We are the subjects. We have only the Name of Masters, and rather than give up this, which would compleatly subject Us to the Despotism of the Peticoat, I hope General Washington, and all our brave Heroes would fight. I am sure every good Politician would plot, as long as he would against Despotism, Empire, Monarchy, Aristocracy, Oligarchy, or Ochlocracy. -- A fine Story indeed. I begin to think the Ministry as deep as they are wicked. After stirring up Tories, Landjobbers, Trimmers, Bigots, Canadians, Indians, Negroes, Hanoverians, Hessians, Russians, Irish Roman Catholicks,

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<sup>16</sup> Letter from Abigail Adams to John Adams, *supra* note 15.

Scotch Renegadoes, at last they have stimulated the to demand new Priviledges and threaten to rebell.<sup>17</sup>

In this exchange one can see the tension with this political inequality. Abigail wants equality in substance and not just in name only, and John really does not want to give up any power. That is irreconcilable, I submit. Thus, even at the beginning, there were signs that the freedom espoused in the Declaration of Independence would be in the name of men only. And this attitude was not just limited to private letters and personal sentiments; rather, it found itself expressed in policy. For example, in 1777, women lost the right to vote in New York.<sup>18</sup> Massachusetts followed in 1780, and New Hampshire in 1784.<sup>19</sup> In 1787, when the U.S. Constitution put voter “qualifications in the hands of the states,” all states revoked women’s suffrage except New Jersey, which followed suit in 1807.<sup>20</sup>

Reaction against this prohibition of political participation reached a critical mass in 1848.<sup>21</sup> Elizabeth Cady Stanton, the daughter of a New York Supreme Court Justice, planned the world’s first Women’s Rights Convention, held in July of 1848 in Seneca Falls, New York.<sup>22</sup> This functioned as a pressure relief valve, of sorts, and a response to the narrowing of rights that had thus far happened.<sup>23</sup> Women, galvanized by Stanton’s leadership, commenced making their case from state to state in the legislative arena.<sup>24</sup> While the years around and including the Civil War and World War I put women’s suffrage on hold, the persuasive power of the movement was undeniable.<sup>25</sup> The table below identifies when states opened the franchise to women.

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<sup>17</sup> Letter from John Adams to Abigail Adams (Apr. 15, 1776), in 1 ADAMS FAMILY CORRESPONDENCE 381, 382-83 (L.H. Butterfield et al. eds., 1963).

<sup>18</sup> *The Woman Suffrage Timeline*, LIZ LIBRARY, <http://www.thelizlibrary.org/suffrage/> (last visited Nov. 3, 2016).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Elizabeth Cady Stanton*, HISTORY NET, <http://www.historynet.com/elizabeth-cady-stanton> (last visited Nov. 3, 2016).

<sup>23</sup> *The Woman Suffrage Timeline*, *supra* note 18.

<sup>24</sup> *See id.*

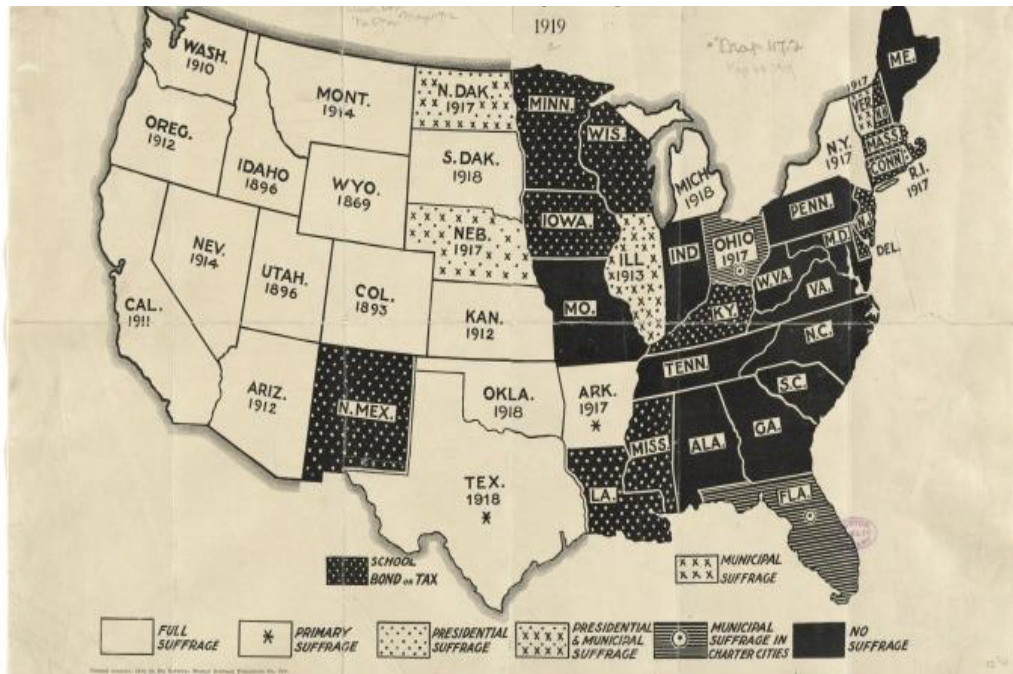
<sup>25</sup> *See id.*

Table 1<sup>26</sup>

Year	Franchise to Women
1869	Wyoming
1870	Dakota (1 vote loss)
1875	Michigan and Minnesota (school elections only)
1880	New York (school)
1882	Congressional committees give favorable report
1887	Utah loses right, Kansas (municipal), Rhode Island (loss)
1893	Colorado
1896	Utah returns right to vote; Idaho
1910	Washington
1911	California
1912	Arizona, Kansas, Alaska, Illinois (municipal and federal, but not state), Oregon
1914	Nevada, Montana
1917	Arkansas (primaries only), Indiana, Nebraska, North Dakota, Rhode Island, New York (full), Michigan (presidential)
1918	Oklahoma, Michigan, South Dakota
1919	Michigan, South Dakota
1920	Nineteenth Amendment ratified; Supreme Court of the United States denies challenge to amendment process

<sup>26</sup> DOANE ROBINSON, *HISTORY OF SOUTH DAKOTA* 597 (1904) (1872–Dakota); *National Suffrage Timeline*, ROCHESTER REG'L LIBRARY COUNCIL, <https://rrlc.org/winningthevote/timelines/national-suffrage-timeline/> (last visited Nov. 3, 2016) (1818–NY; 1887–RI; 1912–AK; 1919–MI); Bill Corbett, *Suffrage Amendment*, OKLA. HISTORICAL SOC'Y, <http://www.okhistory.org/publications/enc/entry.php?entry=SU002> (last visited Nov. 3, 2016) (1918–OK); *Woman Suffrage: History and Time Line*, SOC. WELFARE HIST. PROJECT, <http://socialwelfare.library.vcu.edu/woman-suffrage/woman-suffrage-history/> (last visited Nov. 3, 2016) (1880–NY); National Woman Suffrage Publishing Co., *Victory Map*, BOS. PUB. LIBRARY, <http://maps.bpl.org/id/15285> (last visited Oct. 19, 2016) (originally published in 1918) (1896–ID; 1910–WA; 1911–CA; 1912–AZ, KS, OR; 1914–NV, MO; 1913–IL; 1917–AR, NE, RI, NY; 1918–OK, MI, SD); *The Woman Suffrage Timeline*, *supra* note 18 (1869–WY; 1870–UT; 1887–UT); *1922 Supreme Court defends women's voting rights*, HIST., <http://www.history.com/this-day-in-history/supreme-court-defends-womens-voting-rights> (last visited Nov. 10, 2016) (Nineteenth Amendment ratified; Supreme Court of the United States denies challenge to amendment process).

It is interesting to note that so many earlier states were on the western portion of the United States. Why is this? Many states needed women to counter the high male-female ratio, and the opportunity to vote was believed to be an incentive for eligible women to move west.<sup>27</sup> “According to the National Constitution Center, by 1919 there were 15 states in which women had full voting rights, and only two of them were east of the Mississippi River.”<sup>28</sup> The map below further clarifies the divergence:



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This first wave women’s movement thus completed its primary goal of acquiring women’s suffrage by using the power of persuasion in state legislatures.<sup>30</sup> This process demonstrated the majoritarianism characteristic of our political system, whereby the persuasive minority,

<sup>27</sup> See Christopher Klein, *The State Where Women Voted Long Before the 19<sup>th</sup> Amendment*, HIST. (Aug. 26, 2015), <http://www.history.com/news/the-state-where-women-voted-long-before-the-19th-amendment>.

<sup>28</sup> *Id.* (supporting author’s belief that the harsh conditions of life out west stripped away a lot of prejudice, revealing the intrinsic rights of women that deserved the franchise as free citizens).

<sup>29</sup> National Woman Suffrage Publishing Co., *supra* note 26.

<sup>30</sup> See Rampton, *supra* note 2.

through the power of reason and logic, convinces the majority to further a right of the political minority via the legislative branch of government.

This mechanism contrasts starkly with the second and later waves. *Griswold*, decided in 1965, arose in the second wave, a milieu where the courts were viewed as the part of the body politic imbued with protecting minority rights under the U.S. Constitution.<sup>31</sup> This protective view appears to be a later development, as the U.S. Supreme Court failed to protect minority rights in both *Dred Scott v. Sanford* (1857),<sup>32</sup> leading to the Civil War,<sup>33</sup> and *Plessy v. Ferguson* (1896), upholding educational segregation based on ethnicity.<sup>34</sup>

### III. GRISWOLD HARMED FEDERALISM, WITH MULTIPLE NEGATIVE EXTERNALITIES

The U.S. Constitution plainly lists enumerated powers of the federal government.<sup>35</sup> The Tenth Amendment, ratified on December 15, 1791,<sup>36</sup> reserves to the states or the people those powers not expressly delegated to the federal government.<sup>37</sup> This setup, or division of powers, is called federalism.<sup>38</sup>

From the outset, and quite plainly, nothing dealing with contraception appears in the Constitution's text.<sup>39</sup> Thus, under the Tenth Amendment, it would be reserved to the state.<sup>40</sup> By the assumption of this state police power to govern health by the federal Supreme Court, *Griswold* threw a wrench into the delicate federal/state balance, leaving a path of negative externalities in its wake.

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<sup>31</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965).

<sup>32</sup> *Scott v. Sandford*, 60 U.S. 393, 403, 404–05 (1857).

<sup>33</sup> Gregory J. Wallace, *Dred Scott Decision: The Lawsuit That Started The Civil War*, CIVIL WAR TIMES, Mar.–Apr. 2006, at 46, 50–51.

<sup>34</sup> *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896), *overruled* by *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (supporting the “minority rights” mission of the Court that began the mid-20th century).

<sup>35</sup> H.R. DOC. NO. 110–50, at 13 n. 12 (2007).

<sup>36</sup> U.S. CONST. art. I, § 8.

<sup>37</sup> U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>38</sup> Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 917 (1984–85).

<sup>39</sup> Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV., 2269, 2270 (2001).

<sup>40</sup> See WEX LAW DICTIONARY, online at [https://www.law.cornell.edu/wex/police\\_powers](https://www.law.cornell.edu/wex/police_powers). “Police powers” reserved to the states include laws “protecting the welfare, safety, and health of the public.” *Id.*

### A. *GRISWOLD* LED TO INCREASED LITIGATION COSTS

*Griswold* incredibly increased the costs of litigating women's health issues, solely in the arena of abortion. By way of example, the author attended oral arguments and authored an amicus brief in the recent case of *Whole Woman's Health v. Hellerstedt*.<sup>41</sup> The case arose out of the passage by the Texas Legislature of abortion facility regulations that require such facilities to meet the standards of an ambulatory surgical center,<sup>42</sup> ostensibly in the wake of the Kermit Gosnell scandal.<sup>43</sup> It is realistic that the entire course of a case like *Hellerstedt* can easily cost over one million dollars.<sup>44</sup>

Both parties in *Hellerstedt* argued from a position that their "camp" was the protector of women's health rights; the plaintiffs argued that they were protecting access to abortion rights,<sup>45</sup> and the defendants argued they were protecting the right of women to safe health care.<sup>46</sup> Regardless of the posture of the parties, the unintended consequence of *Griswold* is plain. Each major decision regarding women's health in the context of abortion must be taken to the U.S. Supreme Court for resolution.<sup>47</sup> This fact, without question, is an economic loss, a financial battlefield casualty—a negative externality—that would be incredibly mitigated were the Supreme Court to have restrained its hand in *Griswold* and left such decisions where the Constitution identifies they should occur: the states.

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<sup>41</sup> See, e.g., Brief for Texas Center for Defense of Life as Amicus Curiae and Then There Were None In Support of Respondents, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274) [hereinafter Brief for Texas Center for Defense of Life].

<sup>42</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

<sup>43</sup> *HB2: Protecting Texas Women*, THE ATTY GEN. OF TEX., <https://www.texasattorneygeneral.gov/hb2/texas-women> (last visited Sept. 10, 2016) (noting that Kermit Gosnell, an abortion doctor, was sentenced to serve three life sentences in prison for killing an abortion patient and three babies at his Philadelphia abortion clinic).

<sup>44</sup> Adriene Hill, *How Much Does a Big Supreme Court Case Like Gay Marriage Cost?*, MARKETPLACE (Mar. 25, 2013) <http://www.marketplace.org/2013/03/25/economy/how-much-does-big-supreme-court-case-gay-marriage-cost>.

<sup>45</sup> Brief for Petitioner at 3, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274).

<sup>46</sup> Brief for Respondent at 16, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274).

<sup>47</sup> See *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RESEARCH CTR. (Jan. 16, 2013), <http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/>.



Consider the typical state legislative process. First, a concerned constituent identifies a need. Second, that person, through contact with a state legislator, proposes a bill, which then is drafted. Third, the bill goes to committee, and if successfully passed to the whole body, then repeats that process in the other house of nearly all bicameral legislatures. Lastly, upon passage by both bodies, the governor will then sign the bill into law. The average costs spent on this process, for example in Wyoming, is \$453 to \$39,795.<sup>48</sup>

Contrast this with the million-plus dollar judicial pitched battle over Texas' HB2, where hundreds of highly-paid attorneys, functioning both as counsel for the litigants or amicus counsel, spend thousands of billable hours from the trial court, through the intermediate courts of appeal, and finally on to the U.S. Supreme Court.<sup>49</sup> Certainly, even adding in dollars spent by lobbyists, the costs of the judicial route dwarf by several orders of magnitude the costs of the legislative route.<sup>50</sup> Yet this distortion, and unintended consequence of the Supreme Court intruding in the police power of the state, via *Griswold* and its progeny, is the legacy of abortion policy in the United States.

#### B. *GRISWOLD* LED TO POLICY FREEZE AND INCREASED RANCOR

Rather than fifty unique micro-laboratories of liberty, the Supreme Court's intervention with *Griswold* has bottlenecked the legislative process in each state regarding abortion and contraception and contributed to the acrimony surrounding these issues. Texas' House Bill 2, the basis of the *Hellerstedt* case, was passed in July 2013.<sup>51</sup> Three years later, the Court struck down the law.<sup>52</sup> This bottlenecking unquestionably delayed the feedback time for evaluating any effects of the law and prevented state actors from crafting legislative "tweaks" and adjustments from their constituencies.

Health care policy suffered as a result; the legal battle prevented policy makers from enacting any incremental shifts. This is true because

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<sup>48</sup> Michelle Dynes, *The Cost of a Bill*, WYO.NEWS.COM (Jan. 9, 2011), [http://www.wyomingnews.com/news/the-cost-of-a-bill/article\\_08ba2400-eccc-58ce-a397-449fc735daff.html](http://www.wyomingnews.com/news/the-cost-of-a-bill/article_08ba2400-eccc-58ce-a397-449fc735daff.html).

<sup>49</sup> See Alexa Ura and Lauren Flannery, *Abortion Legal Fight Cost Texas More Than \$1 Million*, THE TEXAS TRIBUNE (June 29, 2016), <https://www.texastribune.org/2016/06/29/abortion-legal-fight-cost-texas-more-1-million/>; see also Hill, *supra* note 31; Robert Barnes, *A Priceless Win at the Supreme Court? No, it has a Price*, WASHINGTON POST (July 25, 2011), [https://www.washingtonpost.com/politics/a-priceless-win-at-the-supreme-court-no-it-has-a-price/2011/07/25/gIQAvOsPZI\\_story.html](https://www.washingtonpost.com/politics/a-priceless-win-at-the-supreme-court-no-it-has-a-price/2011/07/25/gIQAvOsPZI_story.html).

<sup>50</sup> Compare Dynes, *supra* note 48 (noting the average cost of the legislative process in Wyoming as ranging from \$453 to \$39,795); with Hill, *supra* note 44 (noting the average cost of a Supreme Court case is in the millions).

<sup>51</sup> Ura & Flannery, *supra* note 49.

<sup>52</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

most, if not all, political decisions exist in a self-policing atmosphere of “action/reaction,”<sup>53</sup> where feedback regarding new statutes and policies comes back to the legislators over time, and course “corrections,” so to state, to those policies are implemented based on the feedback.<sup>54</sup> The feedback loop on contraception and abortion law has been destroyed, as fifty separate states’ worth of legislatures experience policy gridlock while they attempt to divine and parse the full meaning of each Supreme Court decision on women’s contraception case law in order to craft statutes able to survive a federal legal challenge. This makes abortion and contraception policy and laws a political “hot-potato,” allowing situations like the *Gosnell* to exist unaddressed while the legislative and executive political arms are frozen, impotent, unable, or simply unwilling to adjust policy.

Post-*Griswold*, there is only one laboratory for contraception policy: The Supreme Court of the United States. And while the author automatically assumes the nine justices on the Supreme Court would each assert an abiding personal humility, their oligarchical actions destroy the fifty states’ individual, contemporaneous, experiments in liberty. It prohibits “voting with your feet,” a treasured aspect of our state polity. *Griswold* destroys political diversity, making us a homogenous whole rather than a nation of diverse state atmospheres, each with its own individual bent toward health policy.<sup>55</sup>

It has also increased the rancor associated with abortion. Rather than approaching political opponents reasonably, believing that reasonable people can disagree on political issues, the legal opponents have become the enemy. By way of example, during the legislative hearings leading to the passage of Texas’ House Bill 2, opponents of the bill were chanting and yelling “Hail Satan” to offend the supporters of the bill.<sup>56</sup>

### C. A *GRISWOLD* APPROACH SUBSIDIZES BAD MEDICINE

By enacting judicial control over contraception policy, the Court in essence “subsidizes” the supply market for contraception because many

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<sup>53</sup> See Dragan Golubovic, *An Enabling Framework for citizen Participation in Public Policy: An Outline of Some of the Major Issues Involved*, 12 INT’L J. NOT-FOR-PROFIT L. 38, 38–39 (2010).

<sup>54</sup> See *id.*

<sup>55</sup> Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONT. PROB., 147, 150 (1992).

<sup>56</sup> See Jason Howerton, *Watch: Abortion Supporters Chant ‘Hail Satan!’ While Pro-Life Activists Sing ‘Amazing Grace’ Outside Texas Capitol*, THE BLAZE (July 2, 2013), <http://www.theblaze.com/stories/2013/07/02/watch-abortion-supporters-chant-hail-satan-while-pro-life-activists-sing-amazing-grace-outside-texas-capitol/>. Purely historically speaking, the author cannot recall any benevolent act proceeding from Satan, whether portrayed as a grotesque spiritual ghoul or a cute red cartoonish character.

substandard providers remain in the market, isolated from market feedback, to the detriment of women.<sup>57</sup> By permitting rational forces to operate in the abortion market, the converse is true: women's health is improved, and the chances for another *Gosnell* are reduced.<sup>58</sup> Even the arguments against Texas's House Bill 2 by Whole Women's Health (WWH), the plaintiff, were about the cost of WWH providing contraception (via abortion) as a private business rather than an obstacle to contraception.<sup>59</sup>

In fact, though Planned Parenthood Federation of America operates in Texas as competitor of WWH, it was not a plaintiff and *never sued* over House Bill 2.<sup>60</sup> It could afford to provide care for women at facilities that qualified under the ambulatory surgical center guidelines, while WWH could not.<sup>61</sup> That is the subsidy difference. It is a marketplace battle disguised as a women's health argument. WWH president Amy Hagstrom-Miller acknowledged as much when she complained to the *Wall Street Journal* about the business impact of House Bill 2; she "competes with Planned Parenthood for abortion patients—and finds it deeply frustrating" to provide better facilities for her women clients.<sup>62</sup> But the need for better facilities is not a novel idea. The *Gosnell* grand jury—which included abortion supporters—fully believed that women should get the best possible facilities when they engage in contraception by abortion.<sup>63</sup>

Moreover, economists studying the issue have concluded the issue is more market related.<sup>64</sup> The bookends of this debate, involving either (1) striking down nearly all state laws by federal intervention or (2) leaving

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<sup>57</sup> Texas Center for Defense of Life, *supra* note 41, at 15–16.

<sup>58</sup> *Id.* at 10.

<sup>59</sup> Brief for Petitioners *supra* note 45, at 7; see *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2323 (Thomas, J., dissenting) ("Our precedents encourage abortion providers to sue—and our cases then relieve them of any obligation to prove what burdens women actually face. . . . There should be no surer sign that our jurisprudence has gone off the rails than this: After creating a constitutional right to abortion because it 'involve[s] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,' the Court has created special rules that cede its enforcement to others.") (citation omitted).

<sup>60</sup> See Brief for Planned Parenthood Federation of America et al., as Amici Curiae Supporting Respondents, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), at 3.

<sup>61</sup> *Id.* at 3–5; Brief for Petitioners, *supra* note 59, at 7, 17.

<sup>62</sup> Stephanie Simon, *Planned Parenthood Hits Suburbia*, WALL ST. J. (June 23, 2008), <http://www.wsj.com/articles/SB121417762585295459>.

<sup>63</sup> See Investigating Grand Jury XXIII, *Report of the Grand Jury*, CITY OF PHILA. 248–51 (Jan. 14, 2011), <http://www.phila.gov/districtattorney/PDFs/GrandJuryWomensMedical.pdf>.

<sup>64</sup> See Steven H. Aden, *Driving out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion*, 8 UNIV. ST. THOMAS J. LAW & PUB. POL. 1, 32 (2013); Ted Joyce et al., *Abortion Before & After Roe*, 32 J. HEALTH ECON. 804, 815 (2013).

the states to enact regulation, result in a market swing of roughly twelve to twenty-one percent.<sup>65</sup> This small difference, the economic data suggests, is mainly due to shifts in demand, a market force.<sup>66</sup> Thus, economic theory suggests that the Court's injection into this traditional area of state policy is misplaced.

#### IV. *GRISWOLD* LED TO NEGATIVE MATERNAL HEALTH EFFECTS

*Griswold* arose in the post-World War II political liberal individualism that sought to drive a hard wedge between personal responsibility and personal freedom.<sup>67</sup> It urged a consequence-less approach to life, including sex, that exalted pleasure above, not intertwined with, responsibility.<sup>68</sup>

Yet a recent article published by CNN.com wondered why the United States, as one of the most prosperous nations in the world, would have a climbing maternal mortality rate.<sup>69</sup> The author submits that *Griswold* is one expression of the consequence-less approach to life, the effects of which are identified in the CNN article.

First, the article identified obesity as a “‘tremendous piece’ of the problem.”<sup>70</sup> The negative effects upon the body caused by obesity have increased maternal background stress; adding pregnancy to that stress pushes it over the top.<sup>71</sup> And this obesity, as gauged by the clamor across the nation for better nutritional guidelines, can be primarily attributed to choice-based dietary decisions.<sup>72</sup> In an atmosphere where actions are divorced from consequences, such habits will take hold.

Second, the article suggested two other important factors negatively affect maternal health: increased health care costs and a lack of insurance.<sup>73</sup> The break between our choices and the consequences of those

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<sup>65</sup> See Aden, *supra* note 64, at 32; Joyce et al., *supra* note 64, at 805.

<sup>66</sup> See Aden, *supra* note 64, at 25 (citing Marshall H. Medoff, *Price, Restrictions and Abortion Demand*, 28 J. FAM. ECON. ISS. 583, 592–93 2007).

<sup>67</sup> See Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, YALE L. J. FORUM 316, 317-18 (Mar. 2, 2015), <https://www.law.yale.edu/system/files/documents/pdf/Faculty/SiegelPrivacyYLJF.pdf>.

<sup>68</sup> See *id.* at 318.

<sup>69</sup> Kelly Wallace, *Why Is the Maternal Mortality Rate Going Up in the United States?* CNN (Dec. 11, 2015), <http://www.cnn.com/2015/12/01/health/maternal-mortality-rate-u-s-increasing-why/>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (quoting Elise Turner, a nurse midwife and an associate professor of nursing at Belhaven University).

<sup>72</sup> HHS and USDA Release New Dietary Guidelines to Encourage Healthy Eating Patterns to Prevent Chronic Diseases, U.S. DEP'T OF AGRICULTURE, <http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2016/01/0005.xml&printable=true&contentidonly=true>.

<sup>73</sup> Wallace, *supra* note 69.

choices can be seen in no clearer sense than our national health care disaster. For years, the insured have been separated from the direct health consequences of their decisions, resulting in the health-conscious person striving to live a healthy lifestyle while the entire time subsidizing the poor decisions of the “health-ignorant.”<sup>74</sup> To be sure, the health-conscious person will live longer,<sup>75</sup> but at a cost that is increasing ever year.<sup>76</sup> Thus, when the low-income woman is pregnant, she waits longer to begin prenatal care due to its expense and suffers from maladies that might have been easily addressed earlier in pregnancy were health care costs less expensive.<sup>77</sup> The higher income woman is also dissuaded, despite her ability to pay, because of the ever-increasing amount that is not covered by co-pays.<sup>78</sup> In addition, the industry shift toward C-section births, which seems more “scheduled” and industry-predictable, though less organic than natural child birth, increases surgical risk.<sup>79</sup>

Third, women are putting off childbirth to older ages.<sup>80</sup> “Because women are delaying childbearing, a larger proportion of them are likely entering pregnancy with a burden of chronic disease conditions,” making childbirth more risky.<sup>81</sup> This connection may be a bit more tenuous; however, it is possible there is an unintended consequence of delaying childbirth via contraception on demand as promoted by *Griswold*. It is not as if there is no way under the sun to not have children. In fact, the natural Billings Ovulation Method was developed in the 1950s, and engages women and men into a more focused approach to women’s health, with effective prevention of pregnancy in all types of urban and rural demographics.<sup>82</sup>

The reality is that women bear all the physical burden associated with pregnancy. With the concomitant increase in male irresponsibility engendered by *Griswold*’s contraception on demand atmosphere, unwanted pregnancies shift to the woman to bear alone, without help, and this would

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<sup>74</sup> See *id.*

<sup>75</sup> Elisabeth Rosenthal, *American Way of Birth, Costliest in the World*, N.Y. TIMES (June 30, 2013), [http://www.nytimes.com/2013/07/01/health/american-way-of-birth-costliest-in-the-world.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/01/health/american-way-of-birth-costliest-in-the-world.html?pagewanted=all&_r=0).

<sup>76</sup> *9 Ways to Live Longer*, HEALTH, [http://www.health.com/health/gallery/0,,2\\_0366671,00.html](http://www.health.com/health/gallery/0,,2_0366671,00.html) (last visited Oct. 17, 2016).

<sup>77</sup> Rosenthal, *supra* note 75.

<sup>78</sup> See *id.*

<sup>79</sup> Wallace, *supra* note 69.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.* (quoting Dr. Michael Brodman of Mount Sinai Health System).

<sup>82</sup> S. Z. Qian et al., *Evaluation of the Effectiveness of a Natural Fertility Regulation Programme in China*, LIFEISSUES, [http://www.lifeissues.net/writers/qia/qia\\_01Nfpchina.html](http://www.lifeissues.net/writers/qia/qia_01Nfpchina.html) (last visited Sept. 11, 2016). That method is so effective that in a Chinese trial of the Billings Ovulation Method (BOM) versus the intra-uterine device (IUD), the BOM pregnancy rate was zero, and the IUD rate was .5% with 992 participating couples. *Id.*

seem logically to lead to a reluctance towards childbearing.<sup>83</sup> Raising children is a team effort and no one wants to engage in a team effort with half a team.

#### V. THE FUTURE OF *GRISWOLD*

In the foreseeable future, it seems inevitable that the Supreme Court will continue to issue national contraceptive policy. Yet the historical record is clear that while *Griswold* was decided in 1965, the United Nations (founded in 1945) never found contraception to be a “human right” until 2012, well into the modern era, long after major, significant advances for women in the United States.<sup>84</sup> The second panel associated with this Women’s Rights Symposium, from which this Article arose, focused almost exclusively on what could be categorized as “first wave” rights, efforts devoted to the franchise and property rights rather than contraception. The contraception focus of *Griswold*, by comparison, seemed irrelevant, akin to theologians narrow-mindedly debating how many angels fit on the head of a pin while the outside world is in need of their love and charity. Perhaps that panel served as a gentle reminder and, if permitted, a rebuke. A reminder in that access to the franchise and property rights truly give women a voice; a rebuke in that the first world can, in its material comfort, lose sight of what is valuable and focus on that which is fleeting. Women’s rights within the political context are about life, liberty, and property. Our national focus should be on this; instead, it has devolved into which camp can gain the attention of one “swing vote” on the U.S. Supreme Court to address policy concerns properly left to the legislature. May we recover the federalism which *Griswold* destroyed and in the process reverse the unintended consequences of that decision.

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<sup>83</sup> See *Birth Control: A Purely Female Responsibility?*, MINN. WOMEN’S CONSORTIUM (Mar. 25, 2011), <http://www.mnwomen.org/birth-control-a-purely-female-responsibility/>.

<sup>84</sup> *Contraceptive Use in the United States: Who Needs Contraceptives?*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states>.