

Jill Lepore, "To Have and to Hold: Reproduction, marriage, and the Constitution," *The New Yorker*, May 25, 2015.

### **A Note about Sources**

*N.B. For readers who'd like to read more, or who are undertaking their own research, here is a select bibliography of my sources for this piece. As with all the bibliographies for New Yorker essays that I post on my Harvard faculty website, this brief discussion mentions a good number of works consulted but it's neither an exhaustive inventory of my sources nor a survey of the scholarship in a given field. Instead, I've listed works I found most useful or especially provocative. I have generally only included manuscripts, journal and magazine articles, and books; I haven't listed interviews here at all; I've generally not included things like newspapers, advertisements, patents, legislation, and policy statements; and I've left out citations from specialized bodies of literature in fields like medicine and law. A last caveat: these brief bibliographies are all frozen in time: I do not update them, and they therefore don't include anything written on these subjects after the date on which my essay was published.*

My special thanks to Louise Trubek and Jessica Trubek for speaking with me and to Louise and Dave Trubek for sending me legal documents relating to their case, along with an unpublished 2015 essay of Louise Trubek's. And thanks to the Schlesinger Library at Radcliffe for Estelle Griswold's 1976 oral history.

This essay, which considers a five-decades-long chain of cases linking *Griswold v. CT* (1965) to *Obergefell v. Hodges* (2015), draws on material in a variety of fields, including political history, constitutional law, and political theory, too rich and wide to do justice to here. My essay concerns privacy and equality arguments in reproductive rights, gay rights, and same-sex marriage cases. The debate about the relationship between and relative force of privacy and equality arguments in such cases is a longstanding one, and has been revisited many times over the years. Moreover, the underlying historical, political, and legal issues are much larger than any literature review confined to such cases would suggest: privacy arguments have been made about many things other than reproduction, equality arguments about many things other than marriage. This bibliography, then, touches only on a small part of the relevant scholarship.

For the pre-history of *Griswold*, see Mary L. Dudziak, "Just Say No: Birth Control in the Connecticut Supreme Court Before *Griswold v. Connecticut*," *Iowa Law Review* 75 (1990): 915-939. Historical studies of *Griswold* and *Roe* include John W. Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right to Privacy* (Lawrence, KS: University of Kansas Press, 2005) and David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Berkeley, CA: University of California Press, 1994, 1998). On the history of marriage, see Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000). On the history of the same-sex marriage movement, see Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-*

*Sex Marriage* (New York: Oxford University Press, 2013). For an influential discussion of marriage, reproduction, and political theory, see Carole Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988).

The legal scholarship and case commentary on reproductive rights, gay rights, and same-sex marriage is vast. Each significant court ruling generates yet another stack of law-review articles. Some of the most influential and provocative discussions of privacy and equality arguments are (here in chronological order): Catharine A. MacKinnon, "Privacy v. Equality: Beyond *Roe v. Wade* (1983)," in *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University press, 1987), 93-102; Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review* 63 (1984-1985): 375-386; Martha Minow, "We, the Family: Constitutional Rights and American Families," *Journal of American History* 74 (1987): 959-983; Cass R. Sunstein, "Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection," *University of Chicago Law Review* 55 (1988): 1161-1179; Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1996): 2117-2207; Elizabeth M. Schneider, "The Synergy of Equality and Privacy in Women's Rights," *University of Chicago Legal Forum* 137 (2002): 137-154; Reva B. Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115 (2002): 969-970; Richard A. Epstein, "Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights," *University of Chicago Legal Forum* 137 (2002): 73-; Catherine A. MacKinnon, "The Road Not Taken: Sex Equality in *Lawrence v. Texas*," *Ohio State Law Journal* 65 (2004): 1081-1094; Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA," *California Law Review* 94 (2006): 1323-1419; Reva B. Siegel, "Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression," *Emory Law Journal* 56 (2007): 815-842; Neil S. Siegel and Reva B. Siegel, "Compelling Interests and Contraception," *Connecticut Law Review* 47 (forthcoming, 2015): 1-15.

The most illuminating commentary occasioned by the fiftieth anniversary of *Griswold* is a forum in the *Yale Law Journal* which consists of adaptations of papers delivered at the Association of American Law Schools's 2015 Annual Meeting in Washington, D.C. See especially Melissa Murray, "Overlooking Equality on the Road to *Griswold*," *Yale Law Journal Forum*, March 2, 2015, an important reflection on the as-yet-unstudied significance of *Trubek v. Ullman* (1961). I was a participant in a panel discussion of *Griswold* at Yale Law School in March 2015 and greatly benefited from analyses presented by Jack Balkin, William Eskridge, Linda Greenhouse, and Reva B. Siegel. Commentary on *Obergefell* is, undoubtedly, forthcoming.