Eisenstadt v. Baird (1972) - Justice Brennan - 6/1.

The *Eisenstadt* Court
Douglas..Brennan..Stewart..White..Marshall..Burger (Chief)...Blackmun...Powell...Rehnquist

Out: Harlan...Goldberg...Warren...Clark...Black.
In: Marshall...Burger...Blackmun...Powell...Rehnquist.

Majority (6): Douglas, Brennan, Stewart, White, Marshall, Blackmun.
Minority (1): Burger.
[Powell & Rehnquist took no part.]

Issue: After delivering a lecture on overpopulation and contraception, the lecturer invited members of the audience to come to the stage and to help themselves to contraceptive articles, and he personally handed a package of contraceptive foam to a young woman. He was convicted for violating a Massachusetts statute which made it a crime to sell, lend, or give away any contraceptive drug or instrument, **except that physicians could prescribe them for married persons to prevent pregnancy**, **unmarried persons could not get them from anyone to prevent pregnancy** and **married or unmarried persons could get them from anyone to prevent spread of disease**. Is the statute Constitutional?

Held: The Massachusetts statute could not be upheld as a deterrent to fornication, or as a health measure, or as simply a prohibition on contraception, and the statute, by providing dissimilar treatment for married and unmarried persons who were similarly situated, violated the equal protection clause of the Fourteenth Amendment. Conviction reversed.

Reasoning: Justice Brennan...The goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as the true legislative aims of §21 and §21A. The statute, viewed as a prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.

"The Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different

classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded **married and unmarried persons**...We conclude that no such ground exists.

Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*[1], the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest. But we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.

First. Conceding that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as "evils...of different dimensions and proportions, requiring different remedies," we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of this law. "The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception." Like Connecticut's laws in *Griswold*, these laws do not at all regulate the distribution of contraceptives when they are to be used to prevent, not pregnancy, but the spread of disease. Nor, in making contraceptives available to married persons without regard to their intended use, does Massachusetts attempt to deter married persons from engaging in illicit sexual relations with unmarried persons. Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.

Second. If health were the rationale of §21A, the statute would be both discriminatory and overbroad. “If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons." The Court of Appeals added: "If the prohibition on distribution to unmarried persons...is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality." Furthermore, not all contraceptives are potentially dangerous. As a result, if the Massachusetts statute were a health measure, it would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married.

Third. If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? "To say that

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[1]Case 9A-AP-1 on this website.

contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of **sensible legislation**; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state."

Who is the Court to say this is the "very mirror image of sensible legislation"? To hold that it violates fundamental human rights is one thing, but to judge its wisdom is quite another. As far as I know, the people of Massachusetts did not elect the Supreme Court Justices.

We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike. If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an **association of two individuals each with a separate intellectual and emotional makeup**. **If 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**.

Again, regardless of one's philosophy, words have meaning — sometimes "groundwork laying" in their use. Is this the precursor to a debate on homosexual "rights"? Gay marriage? What are the limits of "fundamental" rights?

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. **We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, these statutes violate the Equal Protection Clause.**

CONCURRENCE: Justice Douglas...Baird addressed an audience of students and faculty at Boston University on the subject of birth control and overpopulation. At the close of the address Baird invited members of the audience to come to the stage and help themselves to the contraceptive articles. He was then arrested and indicted for giving one such device away.

Had Baird not "given away" a sample of one of the devices whose use he advocated, there could be no question about the protection afforded him by the First Amendment. A State may not "contract the spectrum of available knowledge." *Griswold v. Connecticut. Pierce v. Society of Sisters.*

However noxious Baird's ideas might have been to the authorities, the freedom to learn about them, fully to comprehend their scope and portent, and to weigh them against the tenets of the "conventional wisdom," may not be abridged.

First Amendment rights are not limited to verbal expression. The right to petition often involves the right to walk. The right of assembly may mean pushing or jostling. Picketing involves physical activity as well as a display of a sign. A sit-in can be a quiet, dignified protest that has First Amendment protection even though no speech is involved. **Putting contraceptives on display is certainly an aid to speech and discussion. Handing an article under discussion to a member of the audience is a technique known to all teachers and is commonly used.** A handout may be on such a scale as to smack of a vendor's marketing scheme. But passing one article to an audience is merely a projection of the visual aid and should be a permissible adjunct of free speech. Baird was not making a prescription nor purporting to give medical advice. Handing out the article was not even a suggestion that the lady use it. At most it suggested that she become familiar with the product line.

Justice Douglas is prone to moments of brilliance as well as moments of inexplicable folly. Really, does anyone see any sense in his 1st Amendment argument? Would he really permit a physics professor, after explaining the mechanism of a suitcase nuclear bomb, to give one away to a student and defend the giving on "freedom of speech" grounds?

CONCURRENCE: Justice White/Blackmun...In *Griswold* we reversed criminal convictions for advising married persons with respect to the use of contraceptives. As there applied, the Connecticut law, which forbade using contraceptives or giving advice on the subject, unduly invaded a zone of marital privacy protected by the Bill of Rights. The Connecticut law did not regulate the manufacture or sale of such products and we expressly left open any question concerning the permissible scope of such legislation.

Baird was indicted for giving away contraceptive foam. The State did not purport to charge Baird for distributing to an unmarried person. No proof was offered as to the marital status of the recipient. The gravamen of the offense charged was that Baird had no license and therefore no authority to distribute to anyone.

I assume that a State's interest in the health of its citizens empowers it to restrict to medical channels the distribution of products whose use should be accompanied by medical advice. I also do not doubt that various contraceptive medicines and articles are properly available only on prescription, and I therefore have no difficulty with the Massachusetts court's characterization of the statute at issue here as expressing "a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences." **Had Baird distributed a supply of the so-called "pill," I would sustain his conviction under this statute**. Requiring a prescription to obtain potentially dangerous contraceptive material may place a substantial burden upon the right recognized in *Griswold*, but that burden is justified by a strong state

interest and does not, as did the statute at issue in *Griswold*, sweep unnecessarily broadly or seek "to achieve its goals by means having a maximum destructive impact upon" a protected relationship.

Baird, however, was found guilty of giving away vaginal foam. Inquiry into the validity of this conviction does not come to an end merely because some contraceptives are harmful and their distribution may be restricted. Our general reluctance to question a State's judgment on matters of public health must give way where, as here, the restriction at issue burdens the constitutional rights of married persons to use contraceptives. In these circumstances we may not accept on faith the State's classification of a particular contraceptive as dangerous to health. Due regard for protecting constitutional rights requires that the record contain evidence that a restriction on distribution of vaginal foam is essential to achieve the statutory purpose, or the relevant facts concerning the product must be such as to fall within the range of judicial notice.

Neither requirement is met here. Nothing in the record even suggests that the distribution of vaginal foam should be accompanied by medical advice in order to protect the user's health. Nor does the opinion of the Massachusetts court or the State's brief filed here marshal facts demonstrating that the hazards of using vaginal foam are common knowledge or so incontrovertible that they may be noticed judicially. On the contrary, the State acknowledges that Emko is a product widely available without prescription.

That Baird could not be convicted for distributing Emko to a married person disposes of this case. Assuming, *arguendo*, that the result would be otherwise had the recipient been unmarried, nothing has been placed in the record to indicate her marital status. The State has maintained that marital status is irrelevant because an unlicensed person cannot legally dispense vaginal foam either to married or unmarried persons. This approach is plainly erroneous and requires the reversal of Baird's conviction; for on the facts of this case, it deprives us of knowing whether Baird was in fact convicted for making a constitutionally protected distribution of Emko to a married person.

...**Because this case can be disposed of on the basis of settled constitutional doctrine, I perceive no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried**.

DISSENT: Justice Burger...It is undisputed that appellee is not a physician or pharmacist and was prohibited under Massachusetts law from dispensing contraceptives to anyone, regardless of marital status. To my mind the validity of this restriction on dispensing medicinal substances is the only issue before the Court...Everyone seems to agree that if Massachusetts has validly required, as a health measure, that all contraceptives be dispensed by a physician or pursuant to a physician's prescription, then the statutory distinction based on marital status has no bearing on this case.

The opinion of the Court today brushes aside appellee's status as an unlicensed layman by concluding that the Massachusetts Legislature was not really concerned with the protection of health when it passed this statute. Douglas' concurring opinion does not directly challenge the power of Massachusetts to prohibit laymen from dispensing contraceptives, but considers that appellee rather

than dispensing the substance was resorting to a "time-honored teaching technique" by utilizing a "visual aid" as an adjunct to his protected speech. I am puzzled by this third characterization of the case...These opinions seriously invade the constitutional prerogatives of the States and regrettably hark back to the heyday of substantive due process.

In affirming appellee's conviction, the highest tribunal in Massachusetts held that the statutory requirement that contraceptives be dispensed only through medical channels served the legitimate interest of the State in protecting the health of its citizens. The Court today blithely hurdles this authoritative state pronouncement and concludes that the statute has no such purpose. Three basic arguments are advanced: First, since the distribution of contraceptives was prohibited as a moral matter in Massachusetts prior to 1966, it is impossible to believe that the legislature was concerned with health when it lifted the complete ban but insisted on medical supervision. I fail to see why the historical predominance of an unacceptable legislative purpose makes incredible the emergence of a new and valid one. See ***McGowan v. Maryland***.

Remember *McGowan*? This was the Sunday Blue Laws case where the constitutionality of criminalizing "working on Sunday" was put to the test. The laws were upheld. The Court magically turned the "original Christian basis" for these laws into justification for a "secular day off." In the "Religion Summary" I said: "Personally, I feel Justice Douglas got *McGowan* right in dissent...Is this a case where the Court just could not 'undo' what had been the 'long standing tradition'?" So...whether Justice Burger believes *McGowan's* result was intellectually honest or not, here he is saying, "Look at *McGowan* — we have used this argument before — why not now?"

The second argument rejects a health purpose because, "if there is need to have a physician prescribe...contraceptives, that need is as great for unmarried persons as for married persons." This argument confuses the validity of the restriction on distributors with the validity of the further restriction on distributees, a part of the statute not properly before the Court. Assuming the legislature too broadly restricted the class of persons who could obtain contraceptives, it hardly follows that it saw no need to protect the health of all persons to whom they are made available. Third, the Court sees no health purpose underlying the restriction on distributors because other state and federal laws regulate the distribution of harmful drugs. I know of no rule that all enactments relating to a particular purpose must be neatly consolidated in one package in the statute books for, if so, the United States Code will not pass muster. I am unable to draw any inference as to legislative purpose from the fact that the restriction on dispensing contraceptives was not codified with other statutory provisions regulating the distribution of medicinal substances. And the existence of nonconflicting, nonpre-emptive federal laws is simply without significance in judging the validity or purpose of a state law on the same subject matter.

It is possible, of course, that some members of the Massachusetts Legislature desired contraceptives to be dispensed only through medical channels in order to minimize their use, rather than to protect the health of their users, but I do not think it is the proper function of this

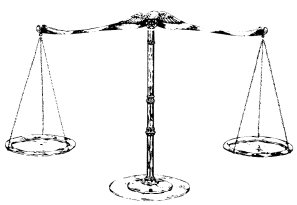
Court to dismiss as dubious a state court's explication of a state statute absent over-whelming and irrefutable reasons for doing so.

Justice White, while acknowledging a valid legislative purpose of protecting health, concludes that the State lacks power to regulate the distribution of the contraceptive involved in this case as a means of protecting health. The opinion grants that appellee's conviction would be valid if he had given away a potentially harmful substance, but rejects the State's placing this particular contraceptive in that category. So far as I am aware, this Court has never before challenged the police power of a State to protect the public from the risks of possibly spurious and deleterious substances sold within its borders. Moreover, a statutory classification is not invalid "simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

But since the Massachusetts statute seeks to protect health by regulating contraceptives, the opinion invokes *Griswold* and puts the statutory classification to an unprecedented test: either the record must contain evidence supporting the classification or the health hazards of the particular contraceptive must be judicially noticeable. This is indeed a novel constitutional doctrine and not surprisingly no authority is cited for it.

Since the potential harmfulness of this particular medicinal substance has never been placed in issue in the state or federal courts, the State can hardly be faulted for its failure to build a record on this point. And it totally mystifies me why, in the absence of some evidence in the record, the factual underpinnings of the statutory classification must be "incontrovertible" or a matter of "common knowledge."

Even if it were conclusively established once and for all that the product dispensed by appellee is not actually or potentially dangerous in the somatic sense, I would still be unable to agree that the restriction on dispensing it falls outside the State's power to regulate in the area of health. The choice of a means of birth control, although a highly personal matter, is also a health matter in a very real sense, and I see nothing arbitrary in a requirement of medical supervision. It is generally acknowledged that contraceptives vary in degree of effectiveness and potential harmfulness. There may be compelling health reasons for certain women to choose the most effective means of birth control available, no matter how harmless the less effective alternatives. Others might be advised not to use a highly effective means of contraception because of their peculiar susceptibility to an adverse side effect. Moreover, there may be information known to the medical profession that a particular brand of contraceptive is to be preferred or avoided, or that it has not been adequately tested. Nonetheless, the concurring opinion would hold, as a constitutional matter, that a State must allow someone without medical training the same power to distribute this medicinal substance as is enjoyed by a physician.



It is revealing, I think, that those portions of the majority and concurring opinions rejecting the statutory limitation on distributors

rely on no particular provision of the Constitution. I see nothing in the Fourteenth Amendment or any other part of the Constitution that even vaguely suggests that these medicinal forms of contraceptives must be available in the open market. **I do not challenge *Griswold,* despite its tenuous moorings to the text of the Constitution, but I cannot view it as controlling authority for this case**. The Court was there confronted with a statute flatly prohibiting the use of contraceptives, not one regulating their distribution. I simply cannot believe that the limitation on the class of lawful distributors has significantly impaired the right to use contraceptives in Massachusetts. **By relying on *Griswold* in the present context, the Court has passed beyond the penumbras of the specific guarantees into the uncircumscribed area of PERSONAL PREDILECTIONS.**

I find it easy to judge the Court based upon its analysis of the written word; i.e., "the legislation at hand." I would urge us all, however, never to forget that "legislation" is more than that. It is the end product of sometimes long and difficult debate based upon testimony of expert witnesses. It is the "collective judgment of a majority of elected representatives of a state or the Congress or local governmental bodies." This democracy conjures up phrases like "separation of powers" and "checks and balances" and "federalism." When a majority of the Supreme Court strikes down legislation, they are either justifiably telling elected lawmakers that, wise or not, their work exceeds the limits of the Constitution "or" they are themselves abusing the awesome power only they hold. *"We, the People"* must stay educated because whether the Court gets it right or wrong, "We" have the ultimate power to amend the Constitution. That is not easily done, but we cannot even begin to use our Constitution as intended by the Framers if we do not stay informed.