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## Court Declares a Right to Contraceptives for Unmarried Individuals

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In 1965, in the landmark case of *Griswold v. Connecticut*, the U.S. Supreme Court, for the first time in our nation's history, invoked the right to privacy for the purpose of upholding the right of married couples to access contraceptives. *Griswold* was hailed by women, who had been fighting for the right to use contraceptives for well over a century. It granted women control over their own reproductive organs and provided married couples with the liberty to decide whether to procreate, plan families and make decisions associated with parenthood.

*Griswold v. Connecticut*, rendered at the height of America's sexual revolution, recently prompted a curious reader of this column to ask about the establishment of the constitutional right of unmarried couples' access to contraceptives. The answer to her delightful question is to be found in the Court's landmark ruling in *Eisenstadt v. Baird* in 1972—seven years after *Griswold*.

*Eisenstadt v. Baird*, in a 6-1 decision written by Justice William Brennan, extended the protection of the right of privacy to unmarried individuals by overturning a Massachusetts law that permitted only physicians to prescribe means of birth control and then only to married couples.

The protagonist in this story was a young man, William Baird, who had made something of a short career out of protesting—and violating—similar state laws. In

the spring of 1965, Baird violated a New York law by handing out contraceptives in a Long Island community. A few months later, he protested the Catholic Church's opposition to birth control on the steps of New York's St. Patrick's Cathedral. He was subsequently arrested in New Jersey for publicly displaying contraceptives in violation of a state law.

On April 6, 1967, Baird, by now a veteran protester, delivered a lecture in Boston about overpopulation and contraception. Following his remarks, Baird displayed various contraceptives and personally handed to a woman a jar of vaginal foam. Police officers arrested Baird and he was convicted on two counts: exhibiting contraceptives and disseminating contraceptives to an unmarried person. The high court of Massachusetts dismissed the first count on grounds that it violated Baird's First Amendment right of free speech but upheld the second conviction. Contending that the law under which he was convicted was unconstitutional, Baird appealed to federal district court, which dismissed his action. However, the federal appellate court set aside the dismissal and the sheriff of Suffolk County, Eisenstadt, appealed the decision to the U.S. Supreme Court.

Justice Brennan's opinion for the Court struck down the Massachusetts law, vindicating Baird's right to distribute contraceptives. Brennan built upon the Court's ruling in Griswold that upheld a married couple's right to contraceptives and declared that the Massachusetts law violated the Equal Protection Clause of the 14th Amendment. Brennan rejected the state's rationale for banning contraceptive use among the unmarried—detering premarital sex—as an unreasonable justification. The statute failed the rational basis test. The logical effect of a law prohibiting the sale or gift of contraceptives to unmarried women, he explained, was to “prescribe pregnancy and the birth of an unwanted child as punishment for fornication.”

While the Court struck down the Massachusetts law as a violation of the Equal Protection Clause, Justice Brennan expanded the right to privacy as set forth in *Griswold*. "It is true," Justice Brennan wrote, "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 with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of an *individual*, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

Justice Brennan's declaration that the right to privacy is an individual right carved a path for subsequent assertions of privacy rights in various areas of the law, including the identification by the Court in *Roe v. Wade* of abortion rights.

Of immediate importance, of course, was the fact that the right of married couples to access contraceptives required, under the principle of equal protection, an equal right of access for unmarried individuals. There was no rational basis for distinguishing between two classes of people, married and unmarried. In subsequent years, the logic of this reasoning proved compelling in protecting other intimate activities and associations, including, for example, same-sex marriage.

The right to privacy, an unenumerated right, was described by commentators shortly after *Griswold* was delivered, as a "fixed star in our constitutional firmament." This star, however, might not be as "fixed" as most citizens hope it to be. The right to contraceptives, to the extent that it is grounded in the right to privacy, is under threat. No less a figure

than Justice Clarence Thomas has questioned the constitutional status of unenumerated liberties, including the right to privacy.

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