



## *Griswold, Eisenstadt, and Carey: Constitutional Protection for the Right to Contraception*

The Constitution’s protection for personal liberty in matters of reproductive decision-making and family relationships traces back to several key decisions establishing and affirming the right to contraception: *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Carey v. Population Services International*, 431 U.S. 678 (1977). These cases identify a sphere of personal liberty protected by the Due Process Clause of the Fourteenth Amendment that is shielded from government intrusion. The rights recognized in these cases encompass important constitutional values including dignity, equality, autonomy, and bodily integrity. As the Court put it, if this right of personal liberty “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.” *Eisenstadt*, 405 U.S. at 453.

In 1965, in *Griswold*, the Supreme Court held that that a law criminalizing the use of contraception by married couples violated the Constitution’s substantive due process guarantee. 381 U.S. 479. In recognizing the right to contraception, the Court identified a zone of marital privacy that the state could not invade. *Id.* at 482–83. Because the anti-contraceptive law significantly interfered with the marital relationship without sufficient justification—or, as the Court put it, sought to “achieve[] [its] goals by means having a maximum destructive impact upon that relationship,” *id.* at 485—the Court found it unconstitutional.

Seven years later, *Eisenstadt* extended *Griswold*’s holding to unmarried people. *Eisenstadt*, 405 U.S. 438. The law at issue prohibited unmarried people from obtaining contraceptives to prevent pregnancy, but permitted married couples to do so. *Eisenstadt* described the right recognized in *Griswold* as an individual right and not dependent on the *marital* relationship. *Id.* at 453. The Court explained that “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.” *Id.* It then held that “the State could not, consistently with the Equal Protection Clause, outlaw distribution [of contraceptives] to unmarried but not married persons” and struck down the law. *Id.* at 454.

Then, in *Carey*, the Court addressed a restriction, rather than a ban, on contraceptives and recognized the essential point that without access, a constitutional right is a hollow guarantee. *Carey* held unconstitutional a state regulation limiting distribution of nonprescription contraceptives to licensed pharmacists and prohibiting distribution of contraceptives to individuals under age 16. 431 U.S. 678. Recognizing that “the Constitution protects individual decisions in matters of childbearing from

unjustified intrusion of the State,” *id.* at 687, as a fundamental right, the Court analyzed the regulation under the highest level of constitutional scrutiny. This required the state to demonstrate that the regulation serves a compelling state interest. *Id.* 689-91. “‘Compelling’ is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.” *Id.* at 686.

While the restriction limiting the distribution of nonprescription contraceptives to licensed pharmacists “[was] not as great as that under a total ban on distribution,” it made contraceptives less accessible; diminished price competition; and reduced the ability to select a contraceptive privately. *Id.* at 689. As a result, the regulation “clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so.” *Id.* In other words, the right to contraception is meaningless without access.

While the burdens on access were well-established, the Court found no countervailing compelling interests. The Court dismissed any notion that limiting the distribution of contraceptives to licensed pharmacists advanced any interest in protecting health, because contraceptives were not hazardous. *Id.* at 690. The Court further recognized that the regulation of contraceptives implicates no interest in protecting potential life. *Id.*

The right to contraception guarantees the right to make life-determinative choices about family and childrearing without government intrusion. The cases recognizing this right not only guarantee the right to reproductive autonomy as a fundamental right, they affirm key principles of constitutional law essential to reproductive freedom and family decision-making. Any nominee to the Supreme Court must recognize these precedents and the important constitutional values they reflect.