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Essays

New Historical Insights on the Curious Case of *Baird v. Eisenstadt*

Roy Lucas*

From the shadowy, puritanical Victorian days of 1879, until March 22, 1972, the Commonwealth of Massachusetts periodically enforced an archaic law that initially defined its sweeping crime as follows:

> Whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away . . . any drug, medicine, instrument or article whatever for the prevention of conception . . . or advertises same, or writes, prints, or causes to be written

* Roy Lucas died on November 3, 2003, before the editorial process for this essay had been completed. The essay, in edited form, is published with the permission of Mr. Lucas's sister, Mary E. Lucas. The *Law Review* thanks Ms. Lucas for her assistance.

Prior to his death, Roy Lucas was an independent research scholar in Washington, D.C., involved since 2000 in researching the private papers of Supreme Court Justices in the National Archives and the Manuscript Division of the Library of Congress. He wrote the first article making a constitutional right of privacy argument for abortion while a senior at New York University School of Law in 1966-67. See Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. Rev. 730 (1968). While attending New York University School of Law, Lucas was a member of the Law Review and Order of the Coif, was a Root-Tilden Scholar, and was a Rotary Foundation Fellow in the United Kingdom in 1965-66. Most notably, Lucas wrote parts of two briefs for Roe in *Roe v. Wade*, 410 U.S. 113 (1973) and one brief for Doe in *Doe v. Bolton*, 410 U.S. 179 (1973), and argued several cases before the United States Supreme Court, including *Baird v. Bellotti (I)*, 428 U.S. 132 (1976).
or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years ....\textsuperscript{1}

Thus, it was criminal in the Commonwealth to sell, give away, loan, or show contraceptives such as condoms, IUDs, birth control pills, and perhaps even rhythm charts. Any transmission of information or means of contraception could come under the prohibition of the law. A user could be a felon as well, or an accessory,\textsuperscript{2} or perhaps a conspirator,\textsuperscript{3} depending upon the creativity of the prosecutor.

Any such transmission of contraceptive means or information was initially a crime, whether done by a physician, druggist, or professional teacher-lecturer.\textsuperscript{4} The same was true regardless of whether the recipient was married, and irrespective of health or even life concerns which necessitated such use. The 1879 Massachusetts birth control ban, like that of the same year in Connecticut, was total, and has a place of shame in legal history not unlike a scarlet letter.\textsuperscript{5}

Law students since the 1940s have studied the path of the Massachusetts mini-Comstock law from its inception in 1879,\textsuperscript{6} the


\textsuperscript{2} Mass. Gen. Laws ch. 274, § 2 (2000) provides, "Whoever aids in the commission of a felony, or is accessory thereto before the fact by counseling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon." Id.

\textsuperscript{3} Conspiracy to commit a felony is only a misdemeanor. See Commonwealth v. McKnight, 289 Mass. 530 (1935). Nevertheless, the multiplication of counts in a large enterprise can yield significant time. Section 2 defines accessory so broadly as to devour much of the conspiracy misdemeanor altogether. See § 2; Commonwealth v. Stasuin, 349 Mass. 38 (1965).

\textsuperscript{4} The Massachusetts courts initially interpreted the statute quite literally. See, e.g., Commonwealth v. Gardner, 15 N.E.2d 222 (Mass. 1938) (enforcing the Massachusetts statute against physician and director of clinic in Salem). Two years later, the same court, in an embarrassed turnabout, allowed registered pharmacists to sell contraceptives for the prevention of disease. Commonwealth v. Corbett, 29 N.E.2d 151, 153-54 (Mass. 1940).

\textsuperscript{5} See generally Nathaniel Hawthorne, The Scarlet Letter (Harper & Brothers, 1950) (1866).

\textsuperscript{6} See discussion of Anthony Comstock and "his law," infra note 20.

Today we can enrich these important historical studies with newly available manuscript papers from the Library of Congress and the National Archives. These papers reveal the United States Supreme Court’s previously secret processes of deciding cases defining American constitutional rights. They open up some

7. See Gardner, 15 N.E.2d at 222 (upholding Massachusetts birth control ban), *appeal dismissed*, 305 U.S. 559 (1938) (per curiam).

8. 381 U.S. 479 (1965).

9. In 1966, post-*Griswold*, Massachusetts amended section 21 to create a similar crime with regard to means and materials “intended to be used for self-abuse,” as well as informational material on abortion. *Mass. Gen. Laws* ch. 272, § 21. The origin and enforcement of the “self abuse” clause is shrouded in mystery. In addition, the legislature created section 21A to carve out exemptions for registered physicians, pharmacists, and some few others providing contraception services and information to *married* persons who have prescriptions. *Mass. Gen. Laws* ch. 272, § 21A (2000). The *unmarried* class had no such access or exemption. *Id.*


12. The ever-quoted phrase from *Baird* is: “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.” 405 U.S. at 453. The “bear or beget” terminology was not suggested as such in argument, the briefs of the parties, or by amici curiae. It may have been derived from the expression “to bear or not to bear” written back in 1966, and published in the text accompanying footnote 125 of the law review article by Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. Rev. 730, 761 (1968). The “beget” term is a biblical translation removed from the text of the Dead Sea Scrolls.

13. The Library of Congress (LOC) and National Archives (NA) in Washington, D.C., have extensive manuscript and Supreme Court document holdings, in several different locations, with treasures in abundance. The Supreme Court itself has a fine law library, but does not match the LOC or NA for in-depth research on historical manuscripts. Very often, the private notes reveal explanatory thoughts and viewpoints that a Justice would never have articulated in public including: the deciding of issues not briefed or argued, criticizing counsel or a lower court, relying on material not in evidence, showing lack of knowledge of the record or legal issues in a case, exposing serious bias, and bargaining (“accommodating”) for votes to obtain a majority, or switching viewpoints, even within a single case.
of the reality behind the stately printed "opinions of the Court," which often are clerk-written, after-the-fact rationalizations, drafted to reinforce the conclusions of our nine highest, secluded, and secretive, black-robe-clad lawyer-judges.\textsuperscript{14} Research into these papers is jurisprudential archaeology in the tradition of \textit{The Brethren},\textsuperscript{15} \textit{Liberty and Sexuality},\textsuperscript{16} and \textit{Closed Chambers},\textsuperscript{17} tenfold.

\textsuperscript{14} Each Justice, of course, has a different learning and decisional process. In every case, however, the practice is to vote in "Conference" the Thursday or Friday after argument, \textit{then} to assign, write, and circulate proposed opinions. Occasionally, the briefs, records, and supporting materials are simply not studied by the Justice, or are even regarded with disdain. Lack of depth in understanding background, facts, and issues is not uncommon. For example, in \textit{Roe}, Justice Blackmun cited the outdated lay book \textit{Abortion} (1966), by writer-activist Lawrence Lader, instead of any number of scholarly treatments on the shelves and in the briefs that had current material relevant to the \textit{Roe/Doe} cases. \textit{Roe}, 410 U.S. at 130 n.9, 132 n.17, 133 n.21, 136 n.26, 139 n.33, 150 n.44, 161 nn.57–58. This was akin to citing \textit{The New York Post} instead of the \textit{Journal of the American Medical Association}.

\textsuperscript{15} \textbf{BOB WOODWARD} \& \textbf{SCOTT ARMSTRONG}, \textit{The Brethren} (Avon Books 1981) (1979). This is one of the earlier modern-era books by non-lawyer journalists that utilizes conversations with Justices, law clerks, and others unknown, to tell important and interesting inside stories.

\textsuperscript{16} \textbf{DAVID J. GARROW}, \textit{Liberty and Sexuality} (MacMillan 1998) (1994). Garrow is almost encyclopedically thorough in his setting out of historical private papers, interviews with law clerks, and private information from Justices, parties to litigation, counsel, families, friends, and foes. Any critical analysis in \textit{Liberty and Sexuality} is only diminished slightly by Garrow's chronological twenty-year distance from the events and lack of training as a lawyer, much less as a strategic federal appellate litigator. Three years of law school and 3000 hours per year working at litigation make a Grand Canyon chasm of difference in one's analysis of matters, as does a special and deep involvement in the subject matter. Litigators tend to notice significant strategic material that is under the radar of political scientists, historians, and other mortals who have never studied evidence or federal appellate practice, or so much as scanned the federal judicial code. Justice Scalia made a particularly insightful observation on this point: "The first year of law school makes an enormous impact upon the mind . . . a sort of intellectual rebirth, the acquisition of a whole new mode of perceiving and thinking." \textit{Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws}, in \textit{A Matter Of Interpretation} 3 (Amy Gutman ed., 1997). (Note: Garrow was suspended from his post at Emory in October 2002 after having been arrested on charges of criminal battery upon a female university employee. See \textit{Arielle Kass, Professor suspended after alleged assault: Garrow faces criminal charges; civil suit expected}, \textit{The Emory Wheel}, Oct. 25, 2002, www.emorywheel.com/vnews/display.v/ART/2002/10/25/3db8b9b5d2e62. This may or may not affect his authority as a scholar. In the present article, however, Garrow's infer-
Before these last several years, scholars, lawyers, and students had only the usual, published opinions of the court, copies of briefs, joint appendices, and occasional law review articles to discern the Justices' decision-making processes. Those are often mere surface imagery materials, frequently no more than camouflage. The case method deals with after-the-fact rationalizations, not the numerous, often subtle and extra-judicial persuasion factors that go into a vote on a case. In this respect, much of our legal education has been fundamentally flawed from the very outset. Law clerks, not Justices, draft most opinions today, and have done so since the time of Chief Justice Earl Warren. Yet students examine Supreme Court opinions as if each word came from the Justices with specific intent.

This Essay sets out and explains intriguing new documentary material in the context of the rise and fall of the Massachusetts birth control law, and the landmark Equal Protection case we know as Eisenstadt v. Baird, or vice-versa. Chief Justice Burger himself mixed up the names and parties in a private diatribe he wrote against Sheriff Eisenstadt, intending to attack Mr. Baird. As an incentive to continue carefully, you may expect to find that:

- Chief Justice Burger voted strongly against Baird initially. Finding himself alone, he hinted he would switch and thus be able to assign the opinion away from Justices Douglas or Brennan.
- Justices Douglas and Brennan countered by suggesting that Brennan write a simple per curiam instead of a full opinion, and thereby dispose of the case quickly as if it were unimportant. Burger agreed because he had determined never to assign important opinions to the Warren Court "liberals," especially not Douglas, Marshall, or Brennan.

ences and omissions with regard to Liberty and Sexuality were known and examined on the merits many months before the arrest.)


19. See Appendix. Chief Justice Burger was alone in his diatribe and dissent, and appeared not to have a full grasp of the broader issues in the case, as shown in the Conference Notes and his undated handwritten memo set out at the end of this Essay.
Justice Brennan promptly produced a full sixteen page right of privacy opinion instead. He circulated it the morning of the *Roe v. Wade* oral arguments, perhaps expecting to influence the outcome and reasoning, even to secure the *Roe* opinion assignment for himself.

- Justice Stewart insisted that Brennan remove from the *Baird* draft opinion a paragraph condemning discrimination against the poor.
- Justice Blackmun declined to join the Brennan privacy opinion in *Baird*. Instead, he acquiesced in a concurring opinion by Justice White which used a different approach.

**THE 1879 MASSACHUSETTS LAW**

At the behest of legendary neo-puritan Anthony Comstock, Massachusetts passed the law in question in 1879. Comstock was the well-known fundamentalist enthusiast who marshaled the Comstock Act of 1873 through Congress, which banned the importation or transportation in interstate commerce of matter pertaining to abortion or contraception. He orchestrated the arrest of over 3000 individuals, and was instrumental in the passage of mini-Comstock laws in a number of states.

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The driving force... was Anthony Comstock, who in his diary referred to the 1873 Act as 'his law.' Comstock was a prominent antivice crusader who believed that 'anything remotely touching upon sex was... obscene.' The original prohibition was recodified and reenacted on a number of occasions, but its thrust remained the same—'to prevent the mails from being used to corrupt the public morals.' (citations omitted).

*Id.* at 71 n.19.


22. The Connecticut statute struck down in *Griswold, supra*, is also from 1879, a prolific year for Mr. Comstock. The literature on other mini-Comstock laws, birth control, morality, and Comstockery as a way of life is substantial. *See generally* MARY WARE DENNETT, BIRTH CONTROL LAWS (1926) (includes
Massachusetts placed the statute in its lengthy Chapter 272, "Crimes Against Chastity, Morality, Decency, and Good Order." The chapter has some 100 separate, often extraordinary offenses, and a preoccupation with regulating anything and everything sexual. As surely as the sun rises in the east, fornication has been a dastardly crime throughout New England since the landing at Plymouth Rock. Self-abuse is not a permissible privilege either. Contraception, of course, allows several certain sins to be free from detection, and came under statutory condemnation in 1879.

**CHALLENGES TO THE AFORESAID LAW**

Often in the 1900s, birth control supporters beseeched the Massachusetts legislature to change the 1879 law—always in vain. Lobbyists for the tax-exempt Catholic Church just as often suggested that they change nothing, or civilization might come to an end, at least in New England. *Liberty and Sexuality*, the very lengthy book by David Garrow, tells most of that story quite well and in exquisite factual detail. I will not retrace that ground, except to notice significant new insights. I will attempt to remain focused instead on strategy, policy, and the consequences of various courses of action in the litigation process. I will suggest that with an alternative strategy, Bill Baird would likely have obtained a similarly favorable ruling much sooner and not done hard time in the Charles Street jail over this Comstockian law. However, the alternative course had a dangerous eighty-five-year-old pitfall of

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23. The first English criminal laws against fornication in the colonies were likely those in 1612 from Lord De La Warr and the Jamestown Virginia Council: the code "Lawes Divine, Morall and Martial." Premarital sexual experimentation was not uncommon in the Puritan world, according to the historical record, but was punished whenever accusations were made. See www.mayflowerfamilies.com/colonial_life/morality_and_sex.htm, (listing a number of convictions and punishments for premarital sex).

24. MASS. GEN. LAWS ch. 272, § 21.


26. Garrow, supra note 16.
its own, namely, the failing, but still influential, Justice Hugo Black.\footnote{27}

A QUICK FAST FORWARD

One can quite adequately summarize the litigation history of the 1879 Massachusetts law in the Supreme Court within a few paragraphs. Thereafter, the new subchapters of this important story may be told, without undue proliferation of citations and footnotes, and endless deadly explanations of standing, \textit{jus tertii}, ripeness, privacy, penumbras, emanations, instruments, and the like.

The initial Massachusetts foray to the U.S. Supreme Court began with the appeal of \textit{Commonwealth v. Gardner}.\footnote{28} \textit{Gardner} originated as an undercover investigation and enthusiastic prosecution of a physician and the director of North Shore Mothers' Health Office in Salem, which provided contraceptives, primarily to married women.\footnote{29} After this prosecution, and similar undercover operations in Brookline and Boston, every such clinic in the Commonwealth closed.

In \textit{Gardner}, the Commonwealth high court unanimously upheld the convictions and rejected the plea to interpret that statute to exempt physicians prescribing for the health, safety, and well being of married patients. That court declined to make any exceptions whatsoever, and expressly rejected the approaches of the New York federal and state courts, including the wisdom of Learned and Augustus Hand.\footnote{30} The Massachusetts Supreme Judi-

\footnote{27. I am neither the first nor the last to suggest that Justice Black perhaps should have left the Court when he started developing a mean streak around 1965. By then he was 79. \textit{See generally} DAVID N. ATKINSON, \textit{LEAVING THE BENCH} 143 (1999); David J. Garrow, \textit{Mental Decrepitude on the US Supreme Court}, 67 U. CHI. L. REV. 995, 1050 (2000). The guardians of the Bill of Rights and penumbras should always have their wits about them, or the citizenry will suffer. Justices do have comfortable life pensions, but tend to hold on to the reins of power, even after they cannot be trusted with the car keys.}

\footnote{28. 15 N.E.2d 222 (Mass. 1938).}

\footnote{29. In earlier times, the arrestees might have been tried for witchcraft, but Salem had progressed to a different felony for vocal "uppity" women who defied the governing males.}

cial Court identified the legislative purpose as preventing "sexual immorality." By common misunderstanding in Massachusetts, that meant any non-procreative and probably non-missionary sex, and in fact, perhaps any pleasurable form of sexual activity at all.

Dr. Gardner and the other defendants filed four separate appeals to the U.S. Supreme Court on August 11, 1938. The late Robert G. Dodge of Boston was lead counsel. The Commonwealth of Massachusetts did not even file an opposition brief. None is in the "Records and Briefs" for this case at the Library of Congress. The actual federal constitutional questions presented are not clearly set out by the wordy Mr. Dodge, who was a "prominent" Boston lawyer, meaning corporate and well-connected, but not necessarily a skilled federal appellate litigator. The Statement as to Jurisdiction for Dr. Carolyn T. Gardner, by today's standards, reads like a repeatedly redundant general narrative written by a state court litigator, who might have had difficulty finding a federal courthouse without a map and satellite guidance. There was simply no clear identification of any federal constitutional "Question Presented," or a plausible federal question raised. At most, Mr. Dodge sets out his wording of this offer of proof: "It is sound and generally accepted medical practice to prescribe contraceptives to protect life or health. Such practice has the backing of the American Medical Association . . . ."

Counselor Dodge did identify his reliance generally upon the Due Process Clause of the Fourteenth Amendment, but said nothing of the Equal Protection Clause, which was to be by far the strongest argument with Justice Black and company on the Court. Equal protection of fundamental human rights became the winning argument in Eisenstadt v. Baird, but 34 years would first intervene.

Dodge did not explain what the American Medical Association and "accepted medical practice" had to do with the Fourteenth

32. Today and then, all could be combined into a single Jurisdictional Statement to minimize redundancy, printing costs, court filing fees, and legal fees. See Sup. Ct. R. 12(4).
33. The entry in Gardner v. Massachusetts, 305 U.S. 559, 559 (1938) (per curiam), shows no appearance whatsoever for Commonwealth counsel.
34. Appellant's Statement as to Jurisdiction at 10, Gardner, 305 U.S. 559 (No. 264) (on file with Roger Williams University Law Review).
35. 405 U.S. 438 (1972).
Amendment. Certainly the Constitution is not synonymous with evolving standards of acceptable medical practice, whatever that means. He might have said that this factor tends to show the absence of a Commonwealth public health interest, but he did not. The lengthy discussion of state court procedure, timing, record keeping, and the like seem endlessly immaterial and may suggest he was being paid by the word, or had nothing substantial to argue concerning the federal Constitution.36

The U.S. Supreme Court, without even requesting a response, summarily and unanimously rejected the appeals on the second Monday in October, the 10th, 1938. The per curiam memorandum upheld the Massachusetts anti-birth control law on the merits. The Court cited four earlier decisions deemed dispositive, as follows: “The appeals herein are dismissed for the want of a substantial federal question. Powell v. Pennsylvania, 127 U.S. 678, 685 [1888]; Jacobson v. Massachusetts, 197 U.S. 11, 26-27 [1905]; Graves v. Minnesota, 272 U.S. 425, 428 [1926]; Lambert v. Yellowley, 272 U.S. 581, 596 (1926).”37 Gardner thus became a unanimous decision by the U.S. Supreme Court on the substance and merits, upholding the Massachusetts mini-Comstock’s total prohibition on contraceptives, even as applied to a physician’s ability to prescribe contraceptives to patients for their health and well-being, or to protect them from the serious hazards of childbirth, including maternal mortality.

Gardner is not a technical or procedural dismissal, as shown by the authorities it cited and the references to explanatory pages

36. Garrow inexplicably praises Dodge’s legal work in Liberty and Sexuality. Garrow, supra note 16, at 54. Katharine Hepburn, mother of the late actress, and Connecticut birth control activist, dissented. She suggested in jest she “might shoot” Dodge, but for the wrong reasons. Id. at 55. With hindsight, one sees the Dodge firm today simply as Boston “prestige” lawyers, who lacked vision and analytical litigation skills in dealing with this cutting edge federal constitutional material and practice. No matter how you view the Gardner matter, Dodge made a woefully inadequate presentation of the constitutional case. He did not develop the case law on constitutional rights and he did not present any “Brandeis brief” kind of evidence on the birth control problem, the ongoing work of the clinic and physicians, or the dire human circumstances of a sample of patients. These inadequacies have not been uncommon in the course of similar litigation. Both Ms. Sarah Weddington, arguing for Roe in Roe v. Wade, and Ms. Margie Pitts Hames, arguing for Doe in Doe v. Bolton, put on no medical evidence whatever at trial, called no witnesses, and had minimal federal litigation experience.

37. Gardner, 305 U.S. at 559.
within those decisions. The disposition of *Gardner* was the highest degree of utter and total rejection that the Court could bestow on the Birth Control League of Massachusetts (BCLM), an early version of Planned Parenthood.

At the time, the Supreme Court consisted of Chief Justice Charles Evan Hughes, and Justices McReynolds, Brandeis, Butler, Stone, Roberts, Black and Reed. Not one voiced a dissent. The result was the equivalent of finishing the Boston Marathon after dark, the next day, and being cited for loitering during the race. The Court, in *Gardner*, was quite evidently sending a very strong message that a state’s power over health and morals allowed it to ban outright all sale and prescription of contraceptives, even by physicians for the most serious of life and health reasons. Abortion would have been even less favored.

As to the four cases cited, *Powell* upheld 8–1 a dairy-protectionist statute that criminalized the sale of oleomargarine, an insulting fifty year-old precedent to throw at Mr. Dodge, and a laughable outcome as seen from a 2003 perspective in light of “I Can’t Believe It’s Not Butter!.” *Jacobson* sensibly upheld a compulsory vaccination-against-smallpox law, 7–2, using an urgent public health need rationale. (Smallpox, however, received two votes, and contraceptives, none!) *Graves* unanimously upheld a state dentistry requirement of a diploma as a prerequisite for taking the licensure exam. *Yellowley* upheld 5–4 the 1926 Prohibition Act provision that a physician could prescribe only one pint of liquor for medicinal purposes within any ten day period, a practice that the American Medical Association said was without any “scientific basis,” as even Chivas Regal cured nothing and was an acquired taste.

The inadequacy of the Court’s knowledge of the subject matter was appalling, and the citation to the pre-science oleomargarine case of 1888 was embarrassing. The *Gardner* outcome was regressive, even in 1938. The Court was in the midst of a larger dispute over its power to strike down state and federal legislation.

38. 127 U.S. 678 (1888).
40. 272 U.S. 425 (1926).
41. 272 U.S. 581 (1926).
42. Id. at 590-91.
generally, but that was no excuse for inadequate performance on an issue of such magnitude as human birth control laws and public health. The Court, however, may not have wanted to enter the altogether new (to the Court) arena of birth control with powerful and vocal forces on both sides, not the least of which was the Roman Catholic Church. The Justices, at their advanced ages, also might not have identified with the problem of sexual urgency that creates an unwanted infant year after year. Viagra was not even a twinkle in the eyes of Pfizer at the time. The need for Chivas during Prohibition, by contrast, brought in four votes. Chivas 4, condoms and diaphragms 0. Even smallpox received two votes. What could the Justices have been thinking?

*Tileston v. Ullman* next visited the marble halls of Franklin Delano Roosevelt’s newly reconstituted Supreme Court. Dr. Tileston, with no patient plaintiffs, challenged the Connecticut mini-Comstock law in state court, with his “prominent” Connecticut lawyers. In an unsigned per curiam opinion, however, a unanimous Supreme Court dismissed the case, saying that Dr. Tileston had neglected to spell out in his complaint that his rights, not just those of his patients, were being injured by the 1879 Connecticut law. The claims had been added in the subsequent binding stipulation just a few pages over in the record. The Supreme Court disregarded those. The Justices thought the case contrived.

The New York lawyering on appeal in *Tileston* was also less than outstanding. The dismissive, two-page per curiam *Tileston* opinion alone makes that clear. Counsel altogether failed to utilize a powerful 1942 Equal Protection precedent that might have carried the day, *Skinner v. Oklahoma*. The utility of *Skinner* is clear from the fact that the Justices often cited it years later in the *Griswold-Baird-Roe* series.

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44. 318 U.S. 44 (1943) (per curiam).
45. *Id.* at 45.
46. 316 U.S. 535 (1942).
Massachusetts's reformers launched no serious judicial challenges to speak of in the 1940s and 50s. The Connecticut Planned Parenthood committees could not agree on a litigation strategy for another fifteen years, until May 1958. Then they filed a new challenge, Poe v. Ullman, again in state and not federal court, with patients as co-plaintiffs. The U.S. Supreme Court once more ultimately dismissed the eventual appeal by a single vote, finding 5-4 that the Connecticut law was not seriously being used to prosecute those plaintiffs; ergo there was no case or controversy.

A surprising swing vote was Justice Brennan. Poe is one of those opinions that law students routinely eviscerate in Constitutional Law 101 as poorly reasoned, insensitive, abdicatory, and worse than cheap white wine with rare, aged Chateaubriand. Planned Parenthood responded this time at more than a glacial pace, and helped arrange for a Yale physician and Planned Parenthood director to be criminally prosecuted and fined a small sum, so that the law could perhaps be heard on the merits.

In June 1965, the Supreme Court in Griswold v. Connecticut found 7-2 that the law was unconstitutional and violated a marital right of privacy, but the rambling opinion by Justice Douglas diminished his credibility. The Ninth Amendment treatment by Justice Goldberg, however, became a jurisprudential landmark for that neglected article of the Constitution.

Griswold's right of marital privacy in 1965 was better than never or none. However, the Court could have done the same in

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48. The addition of plaintiffs Poe and others was designed to meet the technicalities expressed eighteen years earlier in Tileston, so that the Court might move on to other technicalities. Eighteen years is perhaps the American record for the time required for lawyers to amend a complaint, to add and rearrange a few words and sentences. There were, however, mitigating circumstances, perhaps. Large numbers of vocal individuals and committees insisted on being consulted. If anyone in the process had expertise and experience in affirmative federal court litigation, he or she remained well hidden.


50. Prosecution of physicians had not been an easy option in Massachusetts because the crime was a felony there with potential serious prison time, and consequences for a physician's license.

51. 381 U.S. 479 (1965).
1938 or 1943, or found an implicit constitutional right to protect one's life and health, or concluded that the Massachusetts and Connecticut statutes violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{52} During those intervening years, there might have been great progress in the realms of population and family planning. If, in 1938 or 1943, five Justices had so much as comprehended the world population and human birth control problems, been sensitive to the health interests of women, faced the substance of the cases, and found the embarrassing mini-Comstock laws to be unconstitutional, then legal scholars and law students might have respected the Court more highly, instead of considering \textit{Gardner, Tileston} and \textit{Poe} to be relics of insensitivity to modern American life and constitutional development. The retrogressive trilogy of \textit{Gardner, Tileston}, and \textit{Poe} unnecessarily blocked world progress in many areas for twenty years and more.

\section*{The Rights to Privacy, Life, and Health}

Constitutional scholars debated the notion of a constitutional right of privacy well before \textit{Griswold, Baird, Roe}, and \textit{Doe}.\textsuperscript{53} The 1992 case, \textit{Planned Parenthood v. Casey},\textsuperscript{54} supplanted the focus on privacy with the Fourteenth Amendment "liberty" concept. Yet even \textit{Casey} is poised precariously, existing as the law of the land only as long as it can enlist a majority, which may be for months, years, or decades.\textsuperscript{55} Life, death, and viewpoints on the Court are


\textsuperscript{53} Innumerable privacy-related articles and books are cited throughout the 1998 paperback edition of \textit{Liberty and Sexuality}, a veritable academic treatise on privacy. \textit{Garrow, supra} note 16.


\textsuperscript{55} \textit{Casey} was a fragmented split decision with a three-Justice plurality that could hold, or not, or be altered, after a series of unpredictable new appointments. Historically, Republican presidents have appointed a number of conservatives who put on the robes and became at least partial humanitarians: Earl Warren, William Brennan, Potter Stewart, Harry Blackmun, Lewis Powell, David Souter, and Anthony Kennedy come to mind. Garrow boldly states: "\textit{Casey} resolved the basic constitutional question of abortion for all time. The Court has made crystal clear that after \textit{Casey}, there is simply no
no more reliable than those who occupy the seats, and for however long. Four Justices—Warren, Fortas, Harlan, and Black—left the Court in close proximity in 1969-1970.

While Roe is one of the landmark cases of the 20th century, it is also often and heavily criticized. Detractors point to the unenumerated nature of the privacy right, the badly handled oral arguments on both sides, the disputed decision to reargue, and the legislative nature of the opinion, just to mention a few. Justice Blackmun himself, presenter of the opinion of the Court, was most dissatisfied with much of the process. As The Brethren noted, "Blackmun's tone was hostile throughout. Overall, he had found the quality of oral argument in these cases poor. The abortion issue deserved a better presentation." A poorly argued case may be considered weak precedent.

The right to health care without discrimination or undue government interference is an additional constitutional framework that might have been more solid than privacy. A right to improve one's health without undue government interference is textually closer to the Fourteenth Amendment than privacy or personal autonomy. The Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Health and good health care are a going back." Garrow, Abortion Before and After Roe v. Wade: An Historical Perspective, 62 ALB. L. REV. 833, 845 (1999). That is sadly and absolutely incorrect in history, practice, and reality. The only barrier to overruling Roe is two raw votes. If you replace Justice Stevens, then Justice O'Connor and/or Kennedy with Scalia and Thomas followers, then Roe and Doe will become overruled history. Then, chaos theory comes into play state by state. Congress might attempt to impose various national restrictions on travel for abortion and circumstances of the procedure. There is absolutely no binding force that compels a new Justice to vote a particular way as to Roe. Nominees to the Court routinely spin their views on possible issues that might come before them. Nothing binds them to future votes, except their own inclinations and reasoning.


57. "Privacy" brings to mind secrecy and the "hiding" of contraband or criminal behavior, whereas "health" is a positive goal to extend the quality of life. "Life" is textually protected in the Fourteenth Amendment, with "health" as a component in any analysis. Poor health may shorten life substantially.
fundamental necessity for a normal-to-better "life," and a quality lifespan.

I personally briefed this "right to health care" issue in *United States v. Vuitch*,\(^58\) in my American College of Obstetricians and Gynecologists (ACOG) Brief in *Doe v. Bolton*, in the brief for Jane Roe in *Roe v. Wade*, and in several lower federal and state court cases.\(^59\) These all were before the briefing and argument of *Eisenstadt v. Baird*. The *Roe* section on "health" argued as follows:

A. The Right to Seek and Receive Medical Care for the Protection of Health and Well-Being is a Fundamental Personal Liberty Recognized by Decisions of This Court and by International and National Understanding.

The personal right to care for and protect one's health in the manner one deems best has been honored by legislatures, except as to measures necessary to check widespread disease and except for the intrusion of restrictive contraception, abortion and sterilization laws.

Although this court has not expressly delineated a right to seek health care, the importance of such care has been recognized and the existence of such a right suggested. In *United States v. Vuitch*, this Court reaffirmed society's expectation that patients receive "such treatment as is necessary to preserve their health." In this Court's invalidation of Connecticut's proscription against contraception, Justice White noted that statute's intrusion upon "access to medical assistance... in respect to proper methods of birth control."

Finally, policy statements of national, and international organizations indicate a pervasive recognition of the right to seek health care. For example,


the right to seek health care. For example, the Constitution of
the World Health Organization provides: "The enjoyment of
the highest attainable standard of health is one of the fundamen-
tal rights of every human being without distinction of race, reli-
gion, political belief, economic or social condition."

Congress, in passing the Comprehensive Health Planning
Act of 1966, took a similar position: "[T]he fulfillment of our na-
tional purpose depends on promoting and assuring the highest
level of health attainable for every person, in an environment
which contributes positively to healthful individual and
family living... (footnotes and citations omitted)."

The point was not stressed in oral argument.

THE FEDERAL COURT ALTERNATIVES IN MASSACHUSETTS

Why did Bill Baird not start in the first place in federal
court, with judges protected from religious and political
pressure by life tenure? Federal civil test cases to protect
constitutional rights under the Bill of Rights were nothing
novel when Bill Baird was arrested in 1967. They went
back to the post-Civil War era and the federal civil
such § 1983 cases are commonplace. Highly suc-
cessful early examples had been Truax v. Raich, Pierce v. Society of
Sisters, Terrace v. Thompson, and West Virginia Board of
Education v. Barnette. Such affirmative federal cases were
staples in the legal strategy of the Jehovah's Witnesses and the
NAACP, but not Planned Parenthood. The Witnesses had
the skilled counsel of one Hayden Covington, a quite
talented New York federal litigator who traversed the nation
protecting the

60. Brief for Appellants, Roe (No. 70-18).
61. 239 U.S. 33 (1915).
63. 263 U.S. 197 (1923).
64. 319 U.S. 624 (1943).
Witnesses' right to distribute pamphlets promoting their fundamentalist beliefs.  

A favorable federal district judge might have heard a Massachusetts birth control case alone, if Baird had filed a classic declaratory judgment action. Or the district judge might have requested that the chief judge of the circuit convene a three-judge federal court, if the Massachusetts birth control law had been challenged and an injunction sought under 28 U.S.C. § 1343(3). The U.S. Court of Appeals for the First Circuit included at the time Chief Judge Bailey Aldrich, Frank Coffin, and Edward McEntee. Aldrich, a Harvard classmate of both Blackmun and Brennan, was a liberal intellectual. He was the federal judge who ultimately freed Baird on bail. Aldrich wrote a strong 1971 opinion in Baird's favor. Success in federal court without being jailed was frankly a highly probable outcome, if only legal talent had been available.

I discussed this with Bill Baird in 2001. He had been of the viewpoint in 1967 that public opinion about birth control would sway the Massachusetts state courts favorably. Before the arrest, he had not mapped out a defense or litigation plan with any legal counsel. He thought that the American Civil Liberties Union (ACLU) would defend him well and successfully, but he had not discussed that with the ACLU. However, considering the extensive planning of Planned Parenthood's legal counsel, and the uniformly horrendous outcomes that followed such planning (Gardner, Tileston, and Poe, as well as Sturgis), there simply may

65. West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), for instance, was a straightforward three-judge federal court constitutional case, directly appealed as a matter of right to the Supreme Court, developed strategically almost twenty-five years before the Baird arrest.

66. The respectable federal Second Circuit in New York to the immediate south had extensive experience in contraceptive legal issues, having decided United States v. One Package, 86 F.2d 737 (2d Cir. 1936) (Augustus Hand, J.) and Youngs Rubber Co. v. C.I. Lee & Co., 45 F.2d 103 (2d Cir. 1935) (Swan, J.). One Package sanctioned "the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients." Id. at 739. The Massachusetts law was anything but intelligent and conscientious. It punished both physician and patient in a highly discriminatory way, and on top of that, it was a felony.

have been a vacuum of federal civil liberties litigation legal talent in Boston as to the potential legal questions involved in this kind of case. Perhaps the confrontational style of Baird perturbed the usual straight-laced Boston civil liberties bar, if there was one. In any event, Baird fortuitously wound up with landmark decisions in 1971 and 1972 with no early legal strategy and a last minute switch of counsel in the Supreme Court. Credit for those creative decisions goes primarily to Baird who set up the opportunity, Judge Aldrich who wrote the First Circuit opinion, and Justice Brennan who wrote and engineered the almost unanimous Supreme Court opinion in \textit{Eisenstadt v. Baird}, just in time for the \textit{Abortion Cases of 1973}.\footnote{Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton 410 U.S. 179 (1973).}

\textbf{IF \textit{BAIRD V. MASSACHUSETTS} HAD BEEN LITIGATED DIFFERENTLY IN 1967}

A Boston federal three-judge court route would probably have produced the same or a very similar favorable outcome in Massachusetts at or about the end of 1967, or beginning of 1968, since Baird had been active in April 1967. Baird could have joined students or a student group as co-plaintiffs making First Amendment, privacy, and Equal Protection claims. The result would not necessarily have been the same for a 1968 appeal to the Supreme Court as in 1967, however, because the Court composition was markedly different.

Strong-willed and stubborn Justice Hugo Black at age 82 in 1968 would have been the most formidable obstacle for Baird’s counsel to overcome. Black may have brought with him the vote of malleable patrician Potter Stewart. This had been the case with the \textit{Griswold} decision in June 1965, where only Black and Stewart dissented. Chief Justice Earl Warren was on the Court until June 1969, so Warren Burger was no factor at all. The Chief and Justice Harlan may or may not have favored the Baird claims in 1968.\footnote{Justice Harlan had written an important separate opinion in \textit{Poe v. Ullman}, 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting), and agreed with the outcome in \textit{Griswold v. Connecticut}, 381 U.S. 479, 499-502 (1965) (Harlan, J., concurring), but those cases were about married couples using contraceptives. Justice Harlan himself in \textit{Poe} stated: The laws regarding marriage which provide both when the sexual}
Justice Thurgood Marshall, who had replaced Justice Tom Clark, was a likely favorable humane visionary vote in 1968. Justice Abe Fortas remained on the Court until May of 1969, and was both a strong privacy advocate and the author of *Epperson v. Arkansas*, which settled the case or controversy problems left over by *Poe v. Ullman*. *Epperson* was precedent for suing without having to be arrested.

The most probable vote stacked up as 7–2 in Bill Baird’s favor in 1968, or 6–3 if the appeal went over into 1969 when Warren Burger would have arrived on the scene as Chief Justice. The Boston Vice & Morals Squad attending his lecture however, had different plans for Bill Baird. They arrested and cuffed him as a prospective felon, and took him into the Massachusetts criminal law and court system.

**BAIRD IN THE MASSACHUSETTS COMMONWEALTH COURTS**

The 1967 charges against Baird were twofold: (1) “unlawfully giving away a certain medicine and article for the prevention of conception” and (2) “unlawfully exhibiting certain articles for the prevention of conception.” The Boston trial judge found Baird guilty on all counts, and reported the case to the Supreme Judicial Court, which set argument for December 2, 1968.

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powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. 367 U.S. at 546. Hence, in 1968, the claims of unmarried persons might or might not have come within the constitutional protection Justice Harlan had to offer. See Tinsley E. Yarbrough, John Marshall Harlan 313-314 (1992). But see Lawrence v. Texas, 539 U.S. __, 123 S. Ct. 2472 (2003) (striking down a Texas statute outlawing sexual relations between unmarried, same-sex persons).


71. 393 U.S. 97 (1968).


73. Id. at 575.
The opinion of the aging conservative court in *Commonwealth v. Baird* is not altogether an unsympathetic one. The court understood that the incident was planned and occurred during "a lecture to students in an auditorium of an educational institution." The court understood that the incident was planned and occurred during "a lecture to students in an auditorium of an educational institution." Baird had been invited to address "a group of approximately 2,000 students in Hayden Auditorium at Boston University on April 6, 1967." The one hour lecture was described as informative and comprehensive. At the end, Bill Baird invited the students to help themselves to various non-prescription, over-the-counter contraceptive samples, namely Emko foam, which he brought along to illustrate the lecture. He did not encourage or advocate, much less incite any student to take samples and use them. He did not do anything that might be construed as practicing medicine or pharmacy.

Seven police officers and detectives came up to the stage. One arrested Baird. The officers did not even have the initiative to take the identities, age, or marital status of any of the student witnesses. From a prosecutorial standpoint, the officers and detectives did little to develop any kind of case at that time or later. They simply loitered, ogling coeds. They then took Baird in for processing as a felonious perpetrator against the morals and order of the Commonwealth.

The Boston University incident exacerbated relations between Baird and the local Planned Parenthood and ACLU. Those organizations, however, had made little progress in the 94 years since the enactment of the mini-Comstock law in 1873. Together, all they had achieved was to lose a unanimous U.S. Supreme Court decision. Both in Massachusetts and Connecticut, the Planned Parenthood organizations had considered birth control reform their private domain, although they could achieve little reform. Their committee-planned lawsuits went down in flames, even though they used "prominent" lawyers. The ACLU was relatively new to the fields of birth control and abortion, and primarily

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74. Id.
75. Id.
76. Id.
seemed to issue policy statements and hold endless committee meetings rather than planning creative federal or state court litigation. Baird's vocal pro-active work rattled the cages of these more conservative groups. He was actually doing something, and it looked like it might work. His being male, too, may have ignited the fires of reverse sexism among the emerging feminists. Planned Parenthood and the ACLU distanced themselves from Baird. They variously criticized or ignored Baird, then filed briefs on his side in the higher courts, wrote papers about his case, and cited the decisions in his case in their briefs and articles. Perhaps Baird was simply taking a viable course in the tradition of Martin Luther King, Jr., or even Galileo.

Meanwhile, the Massachusetts high court ruled for Baird on the charge of "exhibiting" contraceptives. The court stated, "The display of those articles was essential to a graphic representation of his subject."

On the charge of giving away the over-the-counter Emko, the Massachusetts court ruled this "added nothing to the understanding of the lecture, and was not an exercise of a right guaranteed under the First Amendment." The Massachusetts justices must have been living in an era before the handout of package inserts, articles, samples, and other teaching materials. On this point the court was arguably wrong. Baird's handouts were not that different from giving out the labels or package inserts of the articles, because Baird did nothing to encourage or incite use. Looking at a can of sample foam is a very far cry from using it. The seven loitering police produced no evidence at all that any person even thought about using a sample, as opposed to studying the contents or seeking a physician's advice. They do make good paperweights! The Massachusetts court, however, upheld the distribution charge

78. Coincidentally at the time, April 1967, as a senior at NYU Law School one month from graduation, I had completed and published a note that involved a comprehensive study of American birth control and abortion laws. This included extensive study of Planned Parenthood and ACLU policies and activities. The article discussed affirmative preemptive declaratory federal litigation. Lucas, supra note 12.


80. Id. at 578.

81. Id.
in part because Baird was not a pharmacist or physician, and because the foam, in its view, was a contraceptive only. \textsuperscript{82} Baird was at risk of up to five years in prison for his lecture sample.

The court further suggested that Baird should have tested the law by bringing a declaratory judgment proceeding. \textsuperscript{83} The "open challenge" and "public attention" bothered the court. Perhaps, however, the court was annoyed at being the instrument of possible ridicule for upholding such an irrational statute. That was not Baird's fault. Criticism of courts and judges is a legitimate form of free expression that contributes to public understanding.

**THE UNTIMELY APPEAL OF BAIRD V. MASSACHUSETTS**

Baird next attempted to appeal to the U.S. Supreme Court by filing a typewritten in forma pauperis petition for writ of certiorari. The Court formally denied certiorari on January 12, 1970, with only Justice Douglas dissenting. \textsuperscript{84} This refusal to hear was unexpected. Baird was a very important case involving the application of Griswold to unmarried persons in the context of a non-physician giving an informative lecture.

The mystery remained hidden in the private papers of the Justices until recently. A note from a law clerk to Justice Douglas in the later Eisenstadt v. Baird manuscript files states: "Last term the case was one day nonjurisdictionally out of time and deadlisted, you voting to grant." \textsuperscript{85} This suggests that counsel for Baird

\textsuperscript{82} Id. at 579.

\textsuperscript{83} Following the Baird decision, a group of Boston Planned Parenthood-approved ob/gyn physicians took the court up on its seeming invitation to contest the remaining law in a declaratory judgment proceeding. By an even stronger vote and opinion, the Massachusetts high court rebuffed them as well in Sturgis v. Attorney General, 260 N.E.2d 687 (Mass. 1970).


\textsuperscript{85} Clerk's memorandum to Justice William O. Douglas regarding Eisenstadt v. Baird, (No. 70-17) (Dec. 30, 1970) (copy on file with the Roger Williams University Law Review, original on file with Justice William O. Douglas Collection, Manuscript Division, Library of Congress, Madison Building, Washington, D.C.). Chief Justice Burger, who was hostile to Baird for unknown reasons, had "deadlisted" the Baird case. "Deadlisting" means no discussion as a possible petition for certiorari to grant and hear, no discussion at all, unless specifically requested by a Justice. Burger did not need to do this. As Chief, he could list the case for discussion, and for a vote on whether to be heard. To remove a case for discussion requires initiative from
filed the petition for certiorari one day late, but the Court might still have discretion to hear it, if four Justices wanted to do so. None but Douglas did.

The issue of timing is straightforward. The Massachusetts Supreme Judicial Court decision was May 1, 1969. Thirty days remained in May, thirty in June, and thirty in July. The petition for certiorari was thus due in 90 days, namely on or before July 30, 1969. It was filed on July 31, one day late, and was not resurrected. While the petition was sent by special delivery, a time stamp shows that it arrived late. The United States Postal Service failed Baird, and the Justices refused to remedy the delay.

So, on January 12, 1970, the Supreme Court sent the Baird case back to Boston. The Charles Street jail waited. No one informed Bill Baird of the background of this denial and error until I showed him the Douglas note in November 2001 from the National Archives. No one seems to have noticed the reason for the Supreme Court’s initial denial of certiorari for all of these thirty-three years, not even Garrow. The lesson is to file only printed petitions for certiorari, and to be careful to do so several days ahead of time, at the latest. Do not count on special delivery. It may have been special, but it was late!

THE ENCOUNTER WITH JUDGE ANTHONY JULIAN

Baird had been sentenced to three months jail time following the affirmance of his conviction. His time was up when the Supreme Court declined to hear his untimely petition for review. Baird’s only hope for release or liberty was to seek a federal writ of habeas corpus declaring the conviction unconstitutional. He filed such a petition in Boston federal court. He drew at random from six possibilities the elderly, very Catholic district judge Anthony Julian, who denied bail. On March 20, 1970, Judge Julian upheld the conviction and the constitutionality of the Massachusetts law, in a fairly lengthy opinion that followed the Supreme Judicial Court of Massachusetts. Julian completely rejected

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other Justices. Only Douglas wanted to grant review, and he was lukewarm. Unlike several other Justices, Douglas operated in a world of his own and did not lobby his colleagues to hear cases.

Baird's First Amendment free expression claims, as did all judges hearing the case aside from Justice William O. Douglas. In truth, Douglas just may have been more nearly correct than any of the others. The strength of Baird's free speech argument comes from the educational lecture after which Baird offered the Emko foam for people to read the label and take or return. There was no encouragement or incitement to use. The recipient could simply read the label, go to a physician, or go to a movie, and use the can as a paperweight or memento.

The judicial opinions in the course of this litigation do not show that Baird submitted any package inserts, medical articles, testimony from medical expert witnesses, or FDA material about the safety of Emko foam. Those materials may have helped him in the court of appeals and the Supreme Court, as icing on the cake. Some of those materials were available by walking into a drugstore. Judge Julian used this deficiency of evidence as one of many grounds for ruling against Baird. And so it was that Bill Baird took up temporary residence in the notorious Charles Street Jail, while his unpaid counsel scrambled to appeal and seek his release in the interim.

RESCUE BY THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

The Baird federal appeal was promptly set before Chief Judge Bailey Aldrich and Circuit Judges Coffin of Maine and McEntee of Boston. They ordered that Baird be released on bail, although he had already settled in and become familiar with the insects and small rodents of the Charles Street detention facility.

The United States Court of Appeals for the First Circuit heard Baird v. Eisenstadt on June 4, 1970 and efficiently decided the case in a four-page opinion released July 6, 1970. The rocket

88. Id. at 955.
89. Id. at 954 n.4.
90. Baird v. Eisenstadt, 429 F.2d 1398, 1399 (1st Cir. 1970). This decision became a very useful precedent for both its lucid articulation of privacy rights and post-conviction bail in controversial habeas corpus cases. It has saved many a reformer from unnecessary incarceration pending appeal. Later in 1970 I used this case to prevent the detention of one Dr. Milan Vuitch who was unjustly sought on illegal abortion charges in Maryland. See Vuitch v. Hardy, 473 F.2d 1370 (4th Cir. 1973) (per curiam).
91. 429 F.2d 1398 (1st Cir. 1970).
pace from the Supreme Court refusal-to-hear on January 12, 1970 to a full court of appeals decision July 6, 1970 is nothing short of amazing.

Initially, Judge Aldrich rejected out of hand the First Amendment arguments of Baird for "symbolic speech" because acts beyond speech were involved. That analysis was too abbreviated and dismissively conclusory, but the court moved on to rule in Baird's favor.

Aldrich next identified the reasons Massachusetts proffered for the law against giving away contraceptives: "health and morals." The Commonwealth asserted that contraceptives had to be carefully controlled and access limited because of health issues. Further, Massachusetts insisted that it could criminalize transfers of contraceptives altogether to unmarried persons, and that it had the power "to enact statutes regulating the private sexual lives of single persons." The court of appeals found the Commonwealth position "arbitrary and discriminatory" because of "the statute's total exclusion of the unmarried, and because of its palpable overbreadth with respect to the married."

Additionally, the court held specifically that Baird had standing to sue although he was neither a physician nor a pharmacist. Standing followed from the mere circumstance of Baird being criminally prosecuted. The Massachusetts high court itself had recognized standing by suggesting that Baird might instead have brought a declaratory judgment proceeding.

The Commonwealth of Massachusetts promptly appealed the court of appeals' judgment to the Supreme Court. It timely filed its papers as No. 70-17, Eisenstadt v. Baird. In sequence, this was just before Roe v. Wade, which became No. 70-18, which I had personally filed in the Supreme Court, probably the same day.

92. Id. at 1399.
93. Id. at 1400.
94. Id. (quoting Griswold v. Connecticut, 381 U.S. 479, 498 (1965)).
95. Id.
96. This conclusion followed for the time being only because Judge Aldrich said so.
98. I had been asked to and had solely prepared the Jurisdictional Statement in Roe. The Texas counsel had never before handled a federal case and did not know where to appeal. I personally walked this one to the clerk's
Baird v. Eisenstadt had been appealed later in the day, or the following day, after Roe, it might have been held over for the decisions in the earlier relevant privacy cases, and may not have been argued at all! Instead, by synchronism, Baird became a very forceful supporting precedent for Roe, Doe, and a host of privacy/Equal Protection cases in the decades since.

The Supreme Court, of course, agreed to hear the appeal in Baird v. Eisenstadt, and set November 17, 1971 for oral argument. The Court later set December 13, 1971, for oral argument of Roe v. Wade, No. 70-18, and Doe v. Bolton, No. 70-40. Notably, the only female lawyer on the Baird appeal was a Massachusetts assistant attorney general, supporting the mini-Comstock law. All too often the demons against equal female rights are, yes, female; they may be the designated foes, or misdirected allies mounting dangerous friendly fire.

Although Bill Baird and the Planned Parenthood-ACLU leadership would never be affectionate friends, both Planned Parenthood and the ACLU filed friend of the court briefs on behalf of the important issues in his case.

Bill Baird determined late in the process to have former Democratic U.S. Senator Joseph Tydings of Maryland present the oral argument, as opposed to Joseph Balliro or Chester Paris of Boston. The latter two had been representing him for no compensation throughout most of the preceding four-plus years. Baird had been persuaded that Tydings had special expertise, from his work as a Senator, on family planning and population issues, so Tydings would argue, and he would do well.

office at the Supreme Court in Washington, D.C., to minimize any problems or possible errors, and to meet the Clerk and his colleagues.

99. Whenever an earlier case involves similar subject matter, the Court often holds all later cases without argument until the first is decided. While Roe and Doe were pending, the Court held on the docket a considerable number of appeals related to abortion and privacy, from all over the United States. These are scattered in the U.S. Reports following Doe v. Bolton, 410 U.S. 179 (1973).

100. Paris had successfully argued in the U.S. Court of Appeals, although Judge Aldrich always had a totally independent mind of his own in deciding cases, regardless of input from mere mortal counsel. Aldrich considered himself an eminent Harvard intellectual, scholar, civil libertarian, and judge, with whom I basically agree, most of the time.
ARGUMENT: NOVEMBER 17 AND 18, 1971

I was in Washington, D.C. for this argument and spent several hours the day before and morning of the Baird hearing conducting some final research, probably on the last-minute preemption question raised by Tydings in the supplemental brief.101 While I would not be participating in the argument of Baird, Roe, or Doe, I was handling a number of federal and state cases nationwide that could be assisted or totally lost depending upon the Baird/Roe/Doe arguments and outcomes. The Baird appeal was a winning case and future precedent, barring some unpredictable catastrophic occurrence. Roe and Doe were less predictable and not in the best of hands for oral argument.102 A disaster in Roe/Doe, moreover, could leak back into Baird v. Eisenstadt since the arguments both concerned privacy, and were less than one month apart.103

Joseph Nolan opened at 2:26 p.m. with oral argument for the Commonwealth of Massachusetts.104 Nolan admitted at the outset to Chief Justice Burger that “the record does not indicate nor did the Commonwealth... introduce evidence tending to show that

101. The Tydings Supplemental Brief at __, Eisenstadt v. Baird, 405 U.S. 438 (1972), (70-17), (available in the Library of Congress Law Library). (Editor’s note: Due to the author’s death, this source could not be located and verified prior to publication). Tydings essentially argued that the Family Planning Services and Population Research Act of 1970, 42 U.S.C. §§ 300(a)-(c), 3505(a)-(c) (1994), and other federal family planning laws, preempted the Massachusetts law. Federal law supported the provision of contraceptives for all Americans, regardless of marital status. That was a sound argument in light of precedent, and could not have been raised below because the federal statutes were new.

102. The number of knowledgeable observers critical of the inadequacy of the oral arguments in Roe/Doe is substantial, including the Chief Justice and Justice Blackmun. See supra notes 36, 68 and accompanying text. No Justice has suggested that he was helped in any way by the oral presentations. Justice Powell’s biography does not even devote a line to the oral arguments in the lengthy chapter concerning abortion. See JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR: A BIOGRAPHY 332-70 (Fordham 2001) (1994). Blackmun’s law clerk, Ed Lazarus, personally described the arguments as “notably unenlightening.” LAZARUS, supra note 17, at 349. Similarly, Garrow enumerates other published remarks mentioning the arguments as “not well argued,” “less than stellar,” and “more like a lobbyist.” GARROW, supra note 16, at 897 n.71.

103. Baird was November 17 and 18. Roe/Doe were December 13, 1971.

[the person taking the Emko foam] was unmarried.\textsuperscript{105} In truth, the Commonwealth did not even prove that she was a she, nor her identity, nor her intent in looking at the can of Emko foam, nor what, if anything, was said when, or even if, the can passed hands. Perhaps she thought it would make a good paperweight or a simple souvenir. So much for charging Baird with giving away a contraceptive to an unmarried person. The Court would decide the issue anyhow.

Nolan quickly objected to Baird's standing to challenge the law that had jailed him.\textsuperscript{106} Justices Brennan and White both came back with the observation that surely Baird must have standing to challenge the very law that put him away. That was the basis for standing in the court of appeals decision. Even the Massachusetts courts had not denied Baird standing.

One Justice raised the interesting hypothetical whether the Commonwealth could make it a crime for a non-physician to hand "wheat germ" to a person.\textsuperscript{107} The suggestion here was that the Commonwealth had some responsibility to show that the banned substance was harmful. Nolan sidestepped, observing that some contraceptives have dangerous side effects. He made no such claim as to Emko foam, and the Commonwealth had presented no evidence whatsoever to that effect. Since Emko foam was available over the counter and was non-prescriptive according to the FDA, the Commonwealth was in trouble on this point.

Nolan knew he was being battered, and moved on to argue that the Court should not act as a "super legislature" and should not decide these policy issues.\textsuperscript{108} He thought the legislature alone held that power, and could support the statute as a morals law as well. Then Nolan blurted out that "it's also against the natural law."\textsuperscript{109} Whose "natural law," and where is it codified, the Court might have asked, but Nolan was finished.

Chief Justice Burger appeared to be the sole tentative supporter for Nolan, and at the end suggested that the "strongest point" for the Commonwealth was that the law could "protect peo-

\textsuperscript{105} Id. at 4.
\textsuperscript{106} Id. at 8.
\textsuperscript{107} Id. at 11. The transcript does not always identify the questioner, directly or indirectly.
\textsuperscript{108} Id. at 16.
\textsuperscript{109} Id.
people from harmful substances at the hands of non-physicians." Nolan sat down. Burger was only one vote. No other Justice seemed to be leaning toward the Commonwealth.

Senator Joseph Tydings then began his argument for affirmance of Baird's victory by referring to "the dissenting opinion in the Massachusetts Supreme Judicial Court." However, there were two such opinions. Tydings was caught not knowing that, or to which he might prefer to focus his attention. Both were well written.

Tydings might have started out more strongly by attacking the irrational features of the law, and the nonsense that there was any public health reason to require Emko foam to be dispensed as if it were a prescription drug. (He did that well, but much later in the argument, which continued the following day.) Emko was an over-the-counter product. Anyone could buy it and pass it on to anyone else, except in Massachusetts.

So, Tydings shifted over to standing, which he might have bypassed entirely as well-covered in the brief. He noted that the Commonwealth courts had accorded standing to Baird, and that a person in jail under a law surely ought to have standing to challenge it. No Justice reacted, as the issue had been exhausted favorably fifteen minutes earlier.

Then Tydings turned to his pet federal preemption argument, which urged that three separate acts of Congress on family planning clinics and population together preempted the field, hence Massachusetts could not enforce a restriction contrary to the federal clinic program. He should have underscored that federal clinic workers were at risk of going to jail if they adhered to the

110. Id. at 21.
111. Id. at 22.
112. Justices Whittemore and Cutter had filed a dissenting opinion together, favoring Baird. Commonwealth v. Baird, 247 N.E.2d 574, 580-81 (Mass. 1969). They were prepared to find the "giving away" provision of § 21 unconstitutionally vague. Id. at 580. They also found no further existing rational basis on which to sustain the statute. Id. at 581. Justice Spiegel had filed a dissenting opinion in favor of Baird. He too found the law arbitrary and capricious. Id. at 582.
114. Id. at 23.
115. Id. at 23-24.
letter and purpose of the federal family planning programs in Massachusetts.

Justice Brennan interrupted, curious as to why he did not yet have a copy of Tyding's supplemental brief on federal preemption.\textsuperscript{116} That late brief had been filed only two weeks before. The point had not been considered or ruled on in the lower courts, and the Commonwealth had not even replied to the brief. Justice White was also interested in the preemption argument, but Tydings had to concede that the federal acts did not specifically address the question of non-physician provision of non-prescriptive contraceptives.\textsuperscript{117} He did observe astutely that "you just can't possibly afford to have a doctor in every clinic."\textsuperscript{118}

Tydings next moved on to the "right to health" argument, stating: "The right to make a decision to protect one's life, or to protect one's health is a fundamental personal constitutional right, within the penumbra certainly of the Fourth and Fifth Amendments and the Ninth Amendment . . . ."\textsuperscript{119} No Justice challenged him.

Tydings moved further to "show some of the absurdities and contradictions which put it [the law] clearly beyond any justification, either as a health statute or a moral statute."\textsuperscript{120} Justice Brennan inserted: "I take it that that's the ground the Court of Appeals took?"\textsuperscript{121} Such was indeed the case.\textsuperscript{122}

The Justices were basically listening to and not interrupting Tydings. Again he noted that in the case of a woman who could not afford a doctor's office visit to obtain a prescription for a contraceptive, the statute "cuts off any opportunity for her to protect her own health."\textsuperscript{123}

The Court adjourned for Wednesday, and returned at 10 a.m. the next day. Tydings continued. He started with the poignant example of the fact that a new bride could not obtain contraceptives in Massachusetts until after the wedding ceremony, so "she

\textsuperscript{116} \textit{Id.} at 24.
\textsuperscript{117} \textit{Id.} at 26.
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.} at 27.
\textsuperscript{120} \textit{Id.} at 28.
\textsuperscript{121} \textit{Id.} at 29.
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
dashes from the church to the gynecologist to the drugstore and back to the wedding reception.”124 Justice Stewart inquired whether adultery was a crime in Massachusetts and, if so, what the penalty might be. Tydings did not know.125 The final opinion of the Court made no reference to that sub-issue.

Tydings summed up concisely and did not even use up all of his time. He described the law as “an outdated anachronism from a Comstockian statute back in the 1870’s, which has no business being on the statute books today.”126 He identified the core of his constitutional argument as “the dignity and the personality of the individual . . . the very right to life and health.”127 Then he poked both feet in his mouth, continuing, “not only of the individual mother herself but to the possible unborn child that she may have or she may have some day.”128 Somehow Tydings, in the pressure of the Court environment, became totally mixed up. He should have argued that contraception now protects a woman’s health for the future, when and if she wants a child or further children.

POST-ARGUMENT ACTIVITY IN THE SUPREME COURT

An amusing incident happened after all of the arguments were done the second day. The Justices were leaving the courtroom through the curtains behind them. A large, plump, ruddy-faced man from the audience stood up, huffed and puffed, and advanced toward the bench and Chief Justice Burger. He did not shout, but said twice in a loud voice “I want to address the Court!” There was silence in the chamber. If anything, the Justices who

124. *Id.* at 33.
125. *Id.* at 34. Today, this information is available quickly from the Internet. Chapter 272 § 14, Adultery, provides:

A married person who has sexual intercourse with a person not his spouse or an unmarried person who has sexual intercourse with a married person shall be guilty of adultery and shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two years or by a fine of not more than five hundred dollars.


127. *Id.* at 39-40.
128. *Id.* at 40.
even looked back appeared bemused. They knew what was coming. Instantaneously, a dozen burly U.S. Marshals converged upon the man. They lifted him horizontally into the air, and quickly transported him from the courtroom toward the public hallway. A bone crackled in there somewhere. I watched all of this from scarcely ten feet away, amazed. The tight security and metal detectors ruled out any concern for weapons. The huge detail of U.S. Marshals eliminated any serious issue of physical threats. Neither I nor Bill Baird ever learned the identity or purpose of the red-faced mystery man, though it seems likely that he was someone who hoped to persuade the Court to preserve Massachusetts' ban on birth control. In this field it is grand to see opponents behave like idiots.

The Douglas, Marshall, and Brennan manuscript papers in the Library of Congress archives tell us what next occurred with *Eisenstadt v. Baird*. The Conference discussion on the case followed on the morning of Friday, November 19, 1971. Chief Justice Burger opened the *Baird* case discussion indicating his intention to reverse the first circuit and uphold the Massachusetts statute. He summarized his view stating: "this is like cigarettes – a vendor's license is needed." As we shall see, there is no evidence anywhere that Burger had studied the briefs, the record, or any of the lower court opinions. The other Justices simply ignored him in such situations.

Next, the most senior Justice, William O. Douglas, voted for Baird. He found the case to be a straightforward First Amendment matter and Baird's handing out of a can of Emko foam to view was a legitimate part and extension of the educational lec-

129. A recent book edited by Del Dickson includes and paraphrases these as well. See *The Supreme Court in Conference* 803-04 (1940-1985) (Del Dickson ed., 2001). The original documents may be viewed under tightly controlled circumstances in the Library of Congress, Manuscript Division. In order to do so, one registers, secures any necessary extra permissions, then studies the registries of documents in a Justice's collection, sends for those container boxes and files of interest, and reviews them in a designated space under many watchful eyes and cameras. I carefully studied the Douglas notes on the conference, as well as some by Justice Brennan.


131. *Id.*
Potter Stewart found the statute to be "completely irrational." He supported Justice Brennan (who shortly would be writing the plurality opinion for the Court) and his view that "this is in the penumbra of Griswold." Justice White initially stated that he was inclined to rule against Baird and reverse, because Baird was not a doctor as the statute required. As to the belated argument by Senator Tydings that federal law might preempt the Massachusetts restrictions, White thought there "might be something to [it]." White eventually wrote a concurring opinion favoring Baird, joined by Justice Harry A. Blackmun who soon was to be writing the opinions in the Abortion Cases of 1973.

The unwillingness of Blackmun to support Brennan on privacy at this point, and even later, is enigmatic. Blackmun's physician-oriented focus may have been the cause, or the fact that Brennan and Douglas represented the old Earl Warren Court. Nonetheless, the Blackmun vote for Baird in concurrence with Justice White was an important one, and a deliberate break with Chief Justice Burger.

The Conference discussion made it clear that by November 19, 1971 Baird had prevailed, at least 5-2, but he would not know it until publication of the decision four months later on March 22, 1972. A memorandum in the Douglas archives dated November 23, 1971, indicates that Justice Brennan had initially agreed to prepare a per curiam opinion, because the views of the Justices had been so diverse. The reality is more complex. Chief Justice Burger, on November 23, stated in a letter to both Douglas and Brennan, "My vote is a questionable reverse with a note 'could affirm – depends on how written.'"

132. Id.
133. Id.
134. Id.
135. Id.
136. Id.
Justice Brennan wasted no time. He was already far ahead of the pack. Brennan was ever the chess grandmaster.

DECEMBER 13, 1971 – BRENNAN DRAFT AND ROE V. WADE ARGUMENT

No brief per curiam draft opinion emerged from the Brennan chambers. Instead, on December 13, 1971, the date of the Roe/Doe oral argument, Justice Brennan circulated a printed sixteen-page draft of a full opinion on the Baird merits. This contained his soon-to-be-famous "bear or beget" language that linked contraception and abortion as part of the overall phenomenon of human reproduction.\(^\text{140}\) The ever-quoted sentence from Baird is: "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."\(^\text{141}\)

This phrase appeared near the end of the Baird draft opinions from December 13, 1971.\(^\text{142}\) No Justice objected to the expression, and all understood the content and purpose. The phrase has since been quoted literally hundreds of times since 1972 in federal\(^\text{143}\) and state\(^\text{144}\) court decisions and scholarly articles from one end of the United States to the other, and not infrequently by the Planned Parenthood critics of Baird who had failed in the same mission for over 90 years before Baird came along.\(^\text{145}\)

The timing and content were a work of superior intellect and strategy and helped rescue the Roe/Doe cases that had been argued in such painfully mediocre fashion by the Texas and Georgia lawyers that very morning. The entire Court now had before it a

\(^{140}\) "Eisenstadt provided the ideal opportunity to build a rhetorical bridge between the right to use contraception and the abortion issue pending in Roe." LAZARUS, supra note 17 at 365.


\(^{142}\) First draft of Supreme Court Opinion at 15, Eisenstadt v. Baird, 405 U.S. 438 (1972) (No. 70-17). (on file with Roger Williams University Law Review. It is also on file at the Library of Congress, Manuscript Division.)

\(^{143}\) The Shepard's citator sets show that Baird has been cited as authority by each and every one of the eleven U.S. Circuits.

\(^{144}\) Shepard's also reveals that Baird has been cited by the highest courts of all 50 States, the District of Columbia, and Puerto Rico.

\(^{145}\) Shepard's also lists over three entire columns of law review articles that have cited the Baird decision.
high-quality privacy and Equal Protection opinion to study before any vote at all on Roe/Doe.

**THE NINE LONELY DRAFT OPINIONS OF JUSTICE DOUGLAS**

Justice Douglas saw the *Baird* case as a matter of free speech, plain and simple. The Douglas archives show some nine drafts of his opinion which he developed and circulated among the other Justices. No other Justice joined Douglas in his persistent First Amendment analysis. The Douglas *Baird* opinion had the virtue of being one of the most articulate ever by any member of the Court on speech-plus. The core of the Douglas position was this: "Baird gave an hour’s lecture on birth control and as an aid to understanding the ideas which he was propagating he handed out one sample of the devices whose use he was endorsing." Since Emko foam is not "dangerous per se," Justice Douglas would have found the First Amendment sufficient to dispose of the case. The most quotable quote from Douglas was: "The teachings of Baird and those of Galileo might be of a different order; but the suppression of either is equally repugnant."

Ironically, those who suppressed and oppressed Galileo and Baird were ideologically one and the same, the Roman Church. The Roman Catholic Church still has not made great gains in accepting human liberty, gender equality, and privacy, preferring authoritarian control instead. However, the Inquisition and barbecuing at the stake are not so popular today as before.

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147. Editor’s note: Due to the author’s death, copies of these drafts could not be located and verified prior to publication.
148. Though I am skeptical of anything Douglas wrote after 1965, his concurring opinion in *Baird*, in my view, is quite persuasive when studied carefully. His earlier *Griswold* opinion, however, may have so tarnished his reputation as a writer of thoughtful well-reasoned material, that most Justices dismissed him by 1972 as a failing eccentric.
150. Id.
151. Id. at 457-58.
PATRICIAN POTTER STEWART AND THE FERTILE POOR

Justice Potter Stewart, the very likeable Yale Republican patrician, did not write a separate opinion in Eisenstadt v. Baird. However, in a letter to Justice Brennan dated December 22, 1971, he offered to concur, but subject to one startling condition:

The paragraph beginning at the bottom of page 13 of your proposed opinion for the Court in this case gives me considerable difficulty. If, as I understand from our telephone conversation, you would be willing to delete that paragraph, I would be glad to join your opinion.\(^\text{152}\)

The paragraph offensive to Stewart appeared on pages 13-14 in the December 13, 1971 circulated printed draft opinion by Justice Brennan. It stated:

This analysis points to an additional invidious discrimination that the Massachusetts statute, viewed as a health measure, effects, and that is the discrimination against the poor. We have already taken judicial notice that Emko vaginal foam is not a prescriptive drug . . . . By authorizing only doctors and druggists on prescription to dispense contraceptives, Massachusetts has, therefore, unjustifiably made it impossible for those who cannot afford the physician's fee to obtain contraceptives, regardless of their health needs. We conclude, accordingly, that if §§ 21 and 21A are regarded as health measures, they deny the unmarried and the poor the equal protection of the laws.\(^\text{153}\)

Justice Stewart would allow Justice Brennan to insert his eloquent privacy dictum, but not this additional insert offered for the poor and unmarried.\(^\text{154}\) In Massachusetts, the poor could be


\(^{153}\) First draft of Supreme Court Opinion at 13-14, Eisenstadt v. Baird, 405 U.S. 438 (1972) (No. 70-17) (citation omitted).

\(^{154}\) There appears to be no reference to this Stewart-Brennan exchange in the Garrow book, Liberty and Sexuality, although the Brennan paragraph could have been highly significant in economic discrimination cases of the future. Stewart's seeming disdain for the poor showed its worst face in his 5–4
forced to save up for a pointless physician's office visit to obtain a prescription for Emko foam, even though such a ritual was required nowhere else in America and not considered remotely necessary by the FDA. Justice Stewart was promoting unnecessary physician office visits, welfare for doctors. The economic discrimination clause, however, was not necessary to the decision, because the privacy argument independently invalidated the law.

Justice Brennan reluctantly deleted the paragraph on the poor by the December 23, 1971 draft. The *Eisenstadt v. Baird* opinion continued to gain supporters among the Justices, although not from Justices Blackmun or White.

**CONCURRING OPINION OF JUSTICE WHITE**

Justice Byron White, who also had written separately in *Griswold v. Connecticut*,\(^{155}\) penned a concise, persuasive concurring opinion with the same favorable result as that recommended by Justice Brennan. Justice Blackmun joined that opinion on February 29, 1972, instead of the privacy-oriented draft by Brennan. White reasoned that:

> 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.\(^{156}\)

The Commonwealth had not exactly put on the trial of the century. They had not bothered to prove *anything* about the Emko foam product or the still unknown person to whom it was or was not handed, not even gender or marital status. Baird too had failed to put on any evidence.

There are lessons to be learned here. In major cases involving statewide laws, parties should plan ahead and consult with skilled experienced counsel who can see the case from the Supreme Court opinion for the Court in *Harris v. McRae*, 448 U.S. 297 (1980), denying Medicaid reimbursement for medically necessary abortions.

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\(^{155}\) *381 U.S. 479 (1965).*

\(^{156}\) *Eisenstadt*, 405 U.S. at 464.
perspective three years hence. Otherwise, they may seem unprepared in the eyes of the all-important decision makers who make the critical difference.

THE DISSENT AND DIATRIBE OF CHIEF JUSTICE BURGER

Warren Earl Burger became the Nixon-appointed Chief Justice in 1969 when his almost-namesake Earl Warren departed after the Abe Fortas debacle. Burger had been a judge on the U.S. Court of Appeals for the District of Columbia from 1956-1969. He was Minnesota trained and had been a member of the Mayo Foundation, attending board meetings and participating in the growth of that respected medical institution. His Minnesota colleague on the Court, Harry Blackmun, had been counsel for the Mayo Clinic from 1950-1959. The two shared a certain respect for medical professionals as a class. Many Supreme Court Justices traveled to the Mayo Clinic for annual checkups, or for needed treatment.

When *Baird* came up, Chief Burger previously had participated in only one major birth control or abortion case, *United States v. Vuitch*. The *Baird* case struck Burger the wrong way. He penned an undated five page handwritten memo of dissent and sent it around to the other six Justices, all of whom ignored it. For a start, the undated handwritten diatribe by Burger totally misunderstood and maliciously insulted Bill Baird personally. Burger called Baird names, such as "officious intermeddler," "common busybody," "quack," "mountebank," and "casual street corner peddler." In fact, Baird had a pre-med background and had been clinical director of Emko. He was and is an advocate of wide access to birth control and abortion for humanitarian reasons.

159. Handwritten memorandum of dissent, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (No. 70-17). The full text of that memo is set out at the end of this article. See Appendix. (Editor's note: Due to the author's death, this source could not be located or verified prior to publication.)
160. *Id.*
The Burger memo appears in the files of the other Justices.\textsuperscript{161} None seems to have responded. Chief Justice Burger, apart from mixing up the names of the parties, appears altogether to have misunderstood the thrust and issues of the case. Burger alone voted to reverse. Nowhere does he show any awareness that Bill Baird was providing the nonprofit public service of informational lectures on birth control, women's rights, population, poverty, and more. The Emko foam, of course, could be bought by almost anyone in the United States without prescription, and was not for sale by Baird. He did not prescribe it or offer it to anyone to be used.

\textbf{CONTINUING NATIONAL IMPACT OF \textit{EISENSTADT V. BAIRD}}

Some Supreme Court decisions affect only the parties to the lawsuit, and thereafter seem to disappear forever. Others, such as \textit{Roe v. Wade}, are cited hundreds of times. \textit{Eisenstadt v. Baird} has been cited many hundreds of times. A basic \texttt{www.FindLaw.com} search shows \textit{Baird} mentioned in over 52 subsequent Supreme Court cases from 1972 through December 2002. According to Shepard's citator, each and every one of the eleven U.S. Court of Appeals Circuits, as well as the Federal Circuit, has cited \textit{Eisenstadt v. Baird} as authority.\textsuperscript{162} Shepard's further reveals that \textit{Baird} has been cited by the highest courts of all 50 States, the District of Columbia, and Puerto Rico, with the last being Mississippi in the year 2000.\textsuperscript{163} Better late than never. Add to that the three columns of law journal articles Shepard's has on \textit{Baird},\textsuperscript{164} and one must acknowledge that the decision is among the most influential in the United States during the entire century by any manner or means of measurement.

\textsuperscript{161} This memo is included in the papers of Justice Brennan on file with the Library of Congress and may be viewed with permission of the Brennan estate. The William & Mary Law School in Williamsburg, Virginia, has the Burger papers. However, Justice Burger ordered these sealed until Year 2026, a quarter of a century hence.
\textsuperscript{162} See supra note 143.
\textsuperscript{163} See supra note 144.
\textsuperscript{164} See supra note 145.
NEW HISTORICAL INSIGHTS

THE BAIRD CASE IN INTERNATIONAL LAW

While Baird in 1972 supplanted its timid older cousin Griswold (completely in my view) and took some of the guesswork out of predicting Roe/Doe, it also had an impact internationally in the high courts of other English speaking nations.

A. Canada

The Supreme Court of Canada, in 1988, held the old Canadian abortion law unconstitutional in Morgentaler v. The Queen.165 A paragraph from the opinion of Canadian Justice Wilson cites Eisenstadt v. Baird as analogous and fairly applicable to this Canadian abortion law decision:

[T]he [U.S.] Supreme Court was asked to determine the constitutionality of a Connecticut statute forbidding the use of contraceptives by married couples. In Griswold v. Connecticut, the majority held this statute to be invalid. The judges writing for the majority used various constitutional routes to arrive at this conclusion but the common denominator seems to have been a profound concern over the invasion of the marital home required for the enforcement of the law. Griswold was interpreted by the Supreme Court in the later case of Eisenstadt v. Baird, where the majority stated at p 453:

It is true that in Griswold the right of privacy in question inered 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 make up. 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.

In Eisenstadt the Court struck down a Massachusetts law

that prohibited the distribution of any drug for the purposes of contraception to unmarried persons on the ground that it violated the equal protection clause.\textsuperscript{166}

And thus, the \textit{Morgentaler} case legalized outpatient clinical abortions across Canada, with a little help from Mr. Baird and his case.

\textbf{B. The United Kingdom}

The British courts tend not to cite or rely upon American Supreme Court decisions, whether well-reasoned or not. We are not their ancestors, and they cannot, therefore, engage in precedent following and ancestor worship in the same manner as our own common law judiciary. However, in the field of reproductive health law, the British have far more efficiently faced many of the same issues, including the \textit{Baird} issue of providing contraceptives to unmarried persons, and later to minors.

The leading House of Lords case of \textit{Mrs. Victoria Gillick v. WN&WA Area Health Authority}\textsuperscript{167} is one very American kind of case and bears brief mention as a matter of comparative law analogous to \textit{Eisenstadt v. Baird}.

Mrs. Victoria Gillick, a proper English woman, sued the area health authority to prevent their physicians from providing contraceptives to any of her four young daughters, all under the age of sixteen, and a fifth who was born after suit was filed.\textsuperscript{168} There was no suggestion that any daughter was actually seeking contraceptives, or might do so without consulting Mom. However, Mom was taking no chances that any daughter of hers might have sex without fearing an unwanted pregnancy.

The case meandered its way up to the House of Lords where on October 17, 1985 the Law Lords ruled thusly:

\[\text{[A]}\text{as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice}\]

\textsuperscript{166.} \textit{Id.} at 167-68 (citations omitted).
\textsuperscript{168.} \textit{Id.} at 119.
has sufficient understanding of what is involved to give a consent valid in law.¹⁶⁹

The Law Lords in very short order decided what we Americans would continue to litigate for twelve years from the arrest of Bill Baird on April 6, 1967, through Eisenstadt v. Baird, to Baird v. Bellotti (I),¹⁷⁰ and not even ending altogether in Baird v. Bellotti (II).¹⁷¹ Unmarried minors, even under the age of 16, could obtain contraceptives in Britain if a doctor found them to have “sufficient understanding and intelligence.”¹⁷² There would be no wasteful side court proceedings required of such minors, no vague burdensome “judicial bypass” as our U.S. Supreme Court has required and ordained.¹⁷³ Scottish Law Lord Fraser of Tullybelton¹⁷⁴ observed that “[t]he only practicable course is to entrust the doctor with a discretion to act in accordance with his view of what is best in the interests of the girl who is his patient.”¹⁷⁵ His Lordship found “nothing strange about entrusting them [doctors] with this further responsibility, which they alone are in a position to discharge satisfactorily.”¹⁷⁶

Strangeness consists of entrusting American state court trial judges, instead of physicians, with that task.

C. Republic of Ireland

The independent ninety-five percent Roman Catholic Irish Republic—the southern segment of the Emerald Isle—is a beautiful geographic setting with castles, golf courses, leprechauns, and a written constitution. Ireland has judicial review of parliamentary legislation much the same as the United States, if you just

¹⁶⁹. Id. at 188-89.
¹⁷¹. 443 U.S. 622 (1979) (requiring judicial bypass procedures where parental consent for abortions is otherwise required by law).
¹⁷³. Belotti (II), 443 U.S. at 643.
¹⁷⁴. Tullybelton, Tayside, is in central Perth, Scotland, and has a town website, http://www.geo.ed.ac.uk/scotgaz/towns/towndetails4750.html, which reports that Tullybelton has 0 Attractions, 0 Families, 0 Features, 0 People, and 2 Settlements, but a representative in the British House of Lords. There is a nearby Loch, but it is monsterless at the present time.
¹⁷⁶. Id.
step back a few centuries. It also has an unborn right to life constitutional amendment, enacted to forestall any potential Irish version of *Roe v. Wade*. One can hope the Irish Justices do not learn to use www.FindLaw.com and start quoting from the works of Justice Antonin Scalia.

The Supreme Court of Ireland recognized and implemented a constitutional right to marital privacy in *Mary McGee v. The Attorney General*. Mary McGee was a 29-year-old married mother of four. She lived happily with her fisherman husband in a cozy trailer by the sea. She had had difficult pregnancies before, and another would be seriously life threatening. She was fitted for a diaphragm in Ireland. The jelly, however, was only available from England and had to pass through the watchful eyes of Irish customs men who were intent on seizing any such dangerous contraband. Her contraceptive jelly was seized upon its arrival by an Irish customs special squadron.

The McGee decision referred to American constitutional case law, citing both *Eisenstadt v. Baird* and *Griswold v. Connecticut* amongst the several opinions and recognized an Irish right to privacy. The right recognized was, in effect, the right of privacy of a married woman to import and use contraceptives. Only Chief Justice Fitzgerald dissented.

I well recall receiving an overseas call sometime in 1972 from an Irish solicitor asking the status of American birth control and abortion cases he had read about in the International Herald Tribune. He was Mary McGee's solicitor. I air-mailed him copies of *Griswold, Baird*, and my gray brief for Roe in *Roe v. Wade*. That was before fax or e-mail with attachments, much less www.FindLaw.com.

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178. *Id.* at 318.
179. *Id.* at 314.
180. *Id.* at 303.
181. *Id.* at 314.
182. *Id.* at 305 (distinguishing both *Griswold* and *Eisenstadt*), 313 (explaining nonreliance on both *Griswold* and *Eisenstadt*), 317 (citing *Griswold* with approval), 318 (citing *Griswold* with approval), 322 (citing *Griswold* with approval).
183. *Id.* at 311.
184. *Id.* at 306.
CONCLUSIONS CONCERNING E v. B, NO. 70-17

Private notes circulated within the seven independent Supreme Court chambers labeled this case E v. B, No. 70-17. Under the authorship of Justice William Brennan, it became one of the most powerful right-of-privacy pronouncements ever issued by the Supreme Court, at once a stealth judgment and decision of profound and lasting impact. What started as a lecture at Boston University on a sensitive subject of human rights importance, and a medieval arrest by a boy's club of Irish cops, wound up creating a new law of the land for unmarried persons, and a persuasive, well-written precedent that could be used for the assertion of privacy rights from Maine to California, indeed from Vancouver to Ottawa, and even in misty Dublin.

And so it was that Eisenstadt v. Baird came to pass. The plurality opinion by Justice Brennan remains a masterpiece, more a daVinci than a Van Gogh, with only Chief Justice Burger as a vituperative one-man Puritan-FDA in rabid dissent.

Bill Baird had slain the Massachusetts Jabberwock, until the next one would come along.

APPENDIX

HANDWRITTEN MEMO OF CHIEF JUSTICE BURGER IN NO. 70-17
(undated)\textsuperscript{186}

[Explanations by the author in brackets.]

\textbf{Eisenstadt 70-17}

W E B (dissenting)

I dissent because I fail to understanding [sic] how the Petr [Petitioner] had standing to challenge the statute or if he did why the Mass holding is wrong.

Eisenstadt is what in times past was called an “officious intermeddler” or a “common busybody.” [The Chief Justice has mixed up Mr. Baird and Sheriff Eisenstadt]. The Court’s opinion points out that he was arrested while delivering what he called a “lecture” and while delivering medicinal contraceptive materials to a young woman student. The judgment of the Sup. Jud. Ct. of Mass. in sustaining the conviction for the unlawful act of dispensing the medicinal material without a license seems eminently correct to me and I would not disturb it. Again we need to remind ourselves that we do not sit as a “court of errors” to review state supreme courts. (Cite Harlan, J.).

That we dress our action in the trappings of constitutional adjudication does not alter what we are doing.

A state under its police power licenses and regulates doctors and pharmacists for their respective functions. Petr is neither a doctor nor a pharmacist. We can assume that one need not be a doctor to sell or dispense the material here in question even though it would seem quite clear that to prescribe it is an act of practicing medicine.

Narrowing the focus to a selling or giving of such materials, there are very good reasons why a state has a legitimate interest in not allowing various and sundry quacks and mountebanks to

\textsuperscript{186} Editor’s note: Due to the author’s death, this memo, transcribed by the author, was not provided to the \textit{Roger Williams University Law Review}. Consent to view the document was not received in time for publication.
dispense, whether by sale or gift, medicinal materials. A licensed pharmacist has a large stake in not dispensing a dangerous or deleterious material: he may lose his valuable license and may be subject to suit for injury. The casual street corner peddler — and Eisenstadt is hardly more than this — has little at risk.

Mass in exercise of its undoubted police power has enacted a statute governing dispensing of "any drug, medicine... for the prevention of conception" except by a physician or pharmacist. The State's highest court has construed this statute to forbid the conduct engaged in by Petr as a layman. It is nonsense, of course, to assert as he does, that the First Amend protects his right to prescribe and dispense the medicinal material involved here. Surely this construction of the statute is an adequate state ground to support the conviction and binding on this Court.

That Petr gave the medicinal substance as a gift rather than selling it is irrelevant. Whether this was a "come one" for some other purpose we cannot know on this record, but his conduct is hardly different from the quack "medicine man" of yester year who came with horse and wagon and some crude form of entertainment to attract the crowd and then give "free samples" of some spurious potion. Police power has long since run such monte-bank[s] out of business. We ought to let Mass treat its quacks in the same way.