

# The Burger Court Opinion Writing Database

*Eisenstadt v. Baird*

405 U.S. 438 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

November 23, 1971

Re: No. 70-17 - Eisenstadt v. Baird

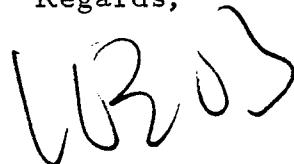
Dear Bill:

The above case was in a state of confusion as to grounds for reversal. On referring back to my Conference notes I have internal inconsistency in the sense I marked it "WOD will assign" but I failed to so act.

My vote is a questionable reverse with a note "could affirm - depends on how written".

Discussion with Bill Brennan confirms that no court emerged for any basis of decision, and I concur in your idea of a p. c. disposition followed by such opinions as may develop.

Regards,



Mr. Justice Douglas

cc: Mr. Justice Brennan

70-17 Wm. Douglas Oct 71

③  
CHAMBERS OF  
Supreme Court of the United States  
Washington, D. C. 20543

December 28, 1971

CHAMBERS OF  
THE CHIEF JUSTICE

No. 70-17 -- Eisenstadt v. Baird

Dear Bill:

I am still finding it very difficult to spell out standing for this "busybody" and will either dissent on that and other grounds or join a compatible dissent from Byron, whose latest recording on my books is to reverse.

Regards,

WB

Mr. Justice Brennan

Copies to the Conference

To: Mr. Justice Douglas,  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: MAR 10 1972

**Recirculated:**

No. 70-17 -- Eisenstadt v. Baird

MR. CHIEF JUSTICE BURGER, dissenting.

The judgment of the Supreme Judicial Court of Massachusetts in sustaining appellee's conviction for dispensing medicinal material without a license seems eminently correct to me and I would not disturb it. It is undisputed that appellee is not a physician or pharmacist and was prohibited under Massachusetts law from dispensing contraceptives to anyone, regardless of marital status. To my mind the validity of this restriction on dispensing medicinal substances is the only issue before the Court; appellee has no standing to challenge that part of the statute restricting the persons to whom contraceptives are available. There is no need to labor this point, however, for everyone seems to agree that if Massachusetts has validly required, as a health measure, that all contraceptives be dispensed by a physician or pursuant to a physician's prescription, then the statutory distinction based on marital status has no bearing on this case. United States v. Raines, 362 U.S. 12, 21 (1960).

C7

*stylistic changes  
throughout*

1st DRAFT

To: Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

No. 70-17

Circulated: MAR 21

Thomas E. Eisenstadt, Sheriff  
of Suffolk County, Massa-  
chusetts, Appellant,  
v.  
William R. Baird.

On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

Recirculated:

[March 22, 1972]

MR. CHIEF JUSTICE BURGER, dissenting.

The judgment of the Supreme Judicial Court of Massachusetts in sustaining appellee's conviction for dispensing medicinal material without a license seems eminently correct to me and I would not disturb it. It is undisputed that appellee is not a physician or pharmacist and was prohibited under Massachusetts law from dispensing contraceptives to anyone, regardless of marital status. To my mind the validity of this restriction on dispensing medicinal substances is the only issue before the Court, and appellee has no standing to challenge that part of the statute restricting the persons to whom contraceptives are available. There is no need to labor this point, however, for everyone seems to agree that if Massachusetts has validly required, as a health measure, that all contraceptives be dispensed by a physician or pursuant to a physician's prescription, then the statutory distinction based on marital status has no bearing on this case. *United States v. Raines*, 362 U. S. 12, 21 (1960).

The opinion of the Court today brushes aside appellee's status as an unlicensed layman by concluding that the Massachusetts legislature was not really concerned with the protection of health when it passed this statute. MR. JUSTICE WHITE acknowledges the statutory concern with the protection of health, but finds the restriction on dis-

November 23, 1971

Dear Chief:

I have your note in No. 70 - 17,  
Eisenstadt v. Baird.

I have talked to Bill Brennan and he has agreed to prepare a p.c. in the type involved in Redrup, where the various grounds for reversal are stated. That is done with the view of accommodating all different points of view, and the likelihood will be that several will file separate concurring opinions.

W. O. D.

The Chief Justice

70-17- Wm Dwyer Oct 71

*C*  
*44*

To: The Chief Justice  
~~Mr. Justice Black~~  
~~Mr. Justice Marshall~~  
~~Mr. Justice Brennan~~  
~~Mr. Justice Stewart~~  
~~Mr. Justice Harlan~~  
~~Mr. Justice Douglas~~  
~~Mr. Justice White~~  
~~Mr. Justice Powell~~  
~~Mr. Justice Rehnquist~~

5th DRAFT

SUPREME COURT OF THE UNITED STATES *For Douglas, J.*

\_\_\_\_\_  
No. 70-17  
\_\_\_\_\_

Circulated: 12-13

Recirculated: \_\_\_\_\_

Thomas E. Eisenstadt, Sheriff  
of Suffolk County, Massachusetts, Appellant,  
*v.*  
William R. Baird. } On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[December —, 1971]

MR. JUSTICE DOUGLAS, concurring.

This to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth.

I assume that Massachusetts would have the power—absent federal pre-emption—to require that if contraceptives are sold, they be sold by someone licensed for that purpose. But under no stretch of the law as presently stated could Massachusetts require a license from those who desire to lecture on planned parenthood, contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege.

As to license taxes on First Amendment rights we said in *Murdock v. Pennsylvania*, 319 U. S. 105, 115:

"A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

We held in *Thomas v. Collins*, 323 U. S. 516, that a

*By — [initials]*  
*p/*

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

6th DRAFT

SUPREME COURT OF THE UNITED STATES

*From: Douglas, J.*

*Circulated:*

No. 70-17

*Recirculated: 1-5*

Thomas E. Eisenstadt, Sheriff  
of Suffolk County, Massa-  
chusetts, Appellant.  
*v.*  
William R. Baird.

On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[December —, 1971]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth.

I assume *arguendo* that Massachusetts would have the power—absent federal pre-emption—to require that if contraceptives are sold, they be sold by someone licensed for that purpose. But under no stretch of the law as presently stated could Massachusetts require a license from those who desire to lecture on planned parenthood, contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege.

As to license taxes on First Amendment rights we said in *Murdock v. Pennsylvania*, 319 U. S. 105, 115:

“A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.”

We held in *Thomas v. Collins*, 323 U. S. 516, that a

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Pickman  
Mr. Justice Powell  
Mr. Justice Marshall

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-17

Circulated:

Recirculated: 3-17

Thomas S. Eisenstadt, Sheriff  
of Suffolk County, Massa-  
chusetts, Appellant,  
v.  
William R. Baird.

On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[March 22, 1972]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth. *Stromberg v. California*, 283 U. S. 359.

Under no stretch of the law as presently stated could Massachusetts require a license for those who desire to lecture on planned parenthood, contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege. As to license taxes on First Amendment rights we said in *Murdock v. Pennsylvania*, 319 U. S. 105, 115:

"A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

We held in *Thomas v. Collins*, 323 U. S. 516, that a

To: *[Handwritten signatures and initials are present here]*

8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-17

Thomas S. Eisenstadt, Sheriff  
of Suffolk County, Massa-  
chusetts, Appellant,  
*v.*  
William R. Baird. } On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[March 22, 1972]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth. *Stromberg v. California*, 283 U. S. 359.

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We held in *Thomas v. Collins*, 323 U. S. 516, that a

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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice O'Connor

9th DRAFT

From: Douglas, J.

No. 70-17

Circulated:

Thomas S. Eisenstadt, Sheriff  
of Suffolk County, Massa-  
chusetts, Appellant,  
*v.*  
William R. Baird.

Recirculated: 2-21  
On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[March 22, 1972]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth. *Stromberg v. California*, 283 U. S. 359.

Under no stretch of the law as presently stated could Massachusetts require a license for those who desire to lecture on planned parenthood, contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege. As to license taxes on First Amendment rights we said in *Murdock v. Pennsylvania*, 319 U. S. 105, 115:

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We held in *Thomas v. Collins*, 323 U. S. 516, that a

B  
1  
J, 5, 6

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Justice Rehnquist

## SUPREME COURT OF THE UNITED STATES

No. 70-17

Thomas S. Eisenstadt, Sheriff  
of Suffolk County, Massa- } On Appeal from the  
chusetts, Appellant, } United States Court  
v. } of Appeals for the  
William R. Baird. } First Circuit.

3/21/72

[March 22, 1972]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth. *Stromberg v. California*, 283 U. S. 359.

Under no stretch of the law as presently stated could Massachusetts require a license for those who desire to lecture on planned parenthood, contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege. As to license taxes on First Amendment rights we said in *Murdock v. Pennsylvania*, 319 U. S. 105, 115:

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We held in *Thomas v. Collins*, 323 U. S. 516, that a

8/5

SUPREME COURT OF THE UNITED STATES

No. 70-17

From: Douglas

Circulated:

On Appeal from the  
United States Court of Appeals for the  
First Circuit.

Thomas S. Eisenstadt, Sheriff  
of Suffolk County, Massachusetts, Appellant,  
v.  
William R. Baird.

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

3/22/72

[March 22, 1972]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth. *Stromberg v. California*, 283 U. S. 359.

Under no stretch of the law as presently stated could Massachusetts require a license for those who desire to lecture on planned parenthood, contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege. As to license taxes on First Amendment rights we said in *Murdock v. Pennsylvania*, 319 U. S. 105, 115:

"A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

We held in *Thomas v. Collins*, 323 U. S. 516, that a

5

*Please leave me*

Mr. Justice Black  
Mr. Justice Clark  
Mr. Justice Harlan  
Mr. Justice Stewart  
Mr. Justice White  
✓Mr. Justice Marshall  
Mr. Justice Blackmun

From: Brennan, J.

1st DRAFT

Circulated: 12-13-71

## SUPREME COURT OF THE UNITED STATES

No. 70-17

Thomas E. Eisenstadt, Sheriff  
of Suffolk County, Massachusetts, Appellant,  
v.  
William R. Baird. } On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[December —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws c. 272, § 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, secondly, for giving a young lady a package of Emko vaginal foam at the close of his address.<sup>1</sup> The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. *Commonwealth v. Baird*, 355 Mass. 746, 247 N. E. 2d (1969). Baird subsequently filed a petition for a federal writ of habeas corpus, which the District Court dismissed. 310 F. Supp. 951 (1970). On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action with directions to grant the writ discharging the petitioner.

<sup>1</sup> The Court of Appeals described the recipient of the foam as "an unmarried adult woman." 429 F. 2d, at —. However, there is no evidence in the record as to her marital status.

8/14, & more charges  
throughout

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

From: Brennan, J

**SUPREME COURT OF THE UNITED STATES**

No. 70-17

circulated: 12/23/71

Thomas E. Eisenstadt, Sheriff  
of Suffolk County, Massachusetts, Appellant,  
v.  
William R. Baird.

On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[January —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws c. 272, § 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, secondly, for giving a young woman a package of Einko vaginal foam at the close of his address.<sup>1</sup> The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. *Commonwealth v. Baird*, 355 Mass. 746, 247 N. E. 2d 574 (1969). Baird subsequently filed a petition for a Federal writ of habeas corpus, which the District Court dismissed. 310 F. Supp. 951 (1970). On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action

<sup>1</sup> The Court of Appeals below described the recipient of the foam as "an unmarried adult woman." 429 F. 2d 1398, 1399 (1970). However, there is no evidence in the record as to her marital status.

See Pages 4-6, 12-13 of 15  
Also minor changes throughout

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

You have fixed it.

3rd DRAFT

From: Brennan, J.

**SUPREME COURT OF THE UNITED STATES**

Circulated: \_\_\_\_\_

Recirculated: 12-29-71

No. 70-17

Thomas E. Eisenstadt, Sheriff  
of Suffolk County, Massachusetts, Appellant,  
v.  
William R. Baird.

On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[January —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws c. 272, § 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address.<sup>1</sup> The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. *Commonwealth v. Baird*, 355 Mass. 746, 247 N. E. 2d 574 (1969). Baird subsequently filed a petition for a Federal writ of habeas corpus, which the District Court dismissed. 310 F. Supp. 951 (1970). On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action

<sup>1</sup> The Court of Appeals below described the recipient of the foam as "an unmarried adult woman." 429 F. 2d 1398, 1399 (1970). However, there is no evidence in the record as to her marital status.

*B* *NY*  
*You joined on 2/13/69*  
*STYLISTIC CHANGES THROUGHOUT.*  
*SEE PAGES:*

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
*Mr. Justice Marshall*  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

6th DRAFT

**SUPREME COURT OF THE UNITED STATES**

From: Brennan, J.

\_\_\_\_\_  
No. 70-17  
\_\_\_\_\_

Circulated: \_\_\_\_\_

Recirculated: 3/16

Thomas E. Eisenstadt, Sheriff  
of Suffolk County, Massa-  
chusetts, Appellant,  
*v.*  
William R. Baird.

On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[January —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws c. 272, § 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address.<sup>1</sup> The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. *Commonwealth v. Baird*, 355 Mass. 746, 247 N. E. 2d 574 (1969). Baird subsequently filed a petition for a Federal writ of habeas corpus, which the District Court dismissed. 310 F. Supp. 951 (1970). On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action

<sup>1</sup> The Court of Appeals below described the recipient of the foam as "an unmarried adult woman." 429 F. 2d 1398, 1399 (1970). However, there is no evidence in the record as to her marital status.

stylistic changes

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-17

Circulated:

Recirculated: 3/21

Thomas S. Eisenstadt, Sheriff  
of Suffolk County, Massa-  
chusetts, Appellant,  
v.  
William R. Baird.

On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[March 22, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the  
Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws c. 272, § 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address.<sup>1</sup> The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. *Commonwealth v. Baird*, 355 Mass. 746, 247 N. E. 2d 574 (1969). Baird subsequently filed a petition for a Federal writ of habeas corpus, which the District Court dismissed. 310 F. Supp. 951 (1970). On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action

<sup>1</sup> The Court of Appeals below described the recipient of the foam as "an unmarried adult woman." 429 F. 2d 1398, 1399 (1970). However, there is no evidence in the record about her marital status.

6  
11  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

December 22, 1971

70-17 - Eisenstadt v. Baird

Dear Bill,

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.

Sincerely yours,

✓  
P. S.

Mr. Justice Brennan

Copies to the Conference

8 /

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
 Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 2-7-72

No. 70-17

Recirculated: \_\_\_\_\_

Thomas E. Eisenstadt, Sheriff  
of Suffolk County, Massachusetts, Appellant,  
v.  
William R. Baird.

On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[February —, 1972]

MR. JUSTICE WHITE, concurring in the result.

In *Griswold v. Connecticut*, 381 U. S. 479 (1965), we reversed criminal convictions for advising married persons with respect to the use of contraceptives. As there applied, the Connecticut law, which forbade using contraceptives or giving advice on the subject, unduly invaded a zone of marital privacy protected by the Bill of Rights. The Connecticut law did not regulate the manufacture or sale of such products and we expressly left open any question concerning the permissible scope of such legislation. 381 U. S., at 485.

Chapter 272, § 21 of the Massachusetts General Laws makes it a criminal offense to distribute, sell or give away any drug, medicine or article for the prevention of conception. Section 21A excepts from this prohibition registered physicians who prescribe for and administer such articles to married persons and registered pharmacists who dispense on medical prescription.<sup>1</sup>

<sup>1</sup> Section 21 provides as follows:

"Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card,

*By [initials] dated 12/13  
p-1*

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
 Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

*From White, J.*

\_\_\_\_\_  
No. 70-17  
\_\_\_\_\_

Circulated: \_\_\_\_\_

Recirculated: 3-2-72

Thomas E. Eisenstadt, Sheriff  
of Suffolk County, Massa-  
chusetts, Appellant,  
v.  
William R. Baird.

On Appeal from the  
United States Court  
of Appeals for the  
First Circuit.

[February —, 1972]

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK-  
MUN joins, concurring in the result.

In *Griswold v. Connecticut*, 381 U. S. 479 (1965), we reversed criminal convictions for advising married persons with respect to the use of contraceptives. As there applied, the Connecticut law, which forbade using contraceptives or giving advice on the subject, unduly invaded a zone of marital privacy protected by the Bill of Rights. The Connecticut law did not regulate the manufacture or sale of such products and we expressly left open any question concerning the permissible scope of such legislation. 381 U. S., at 485.

Chapter 272, § 21 of the Massachusetts General Laws makes it a criminal offense to distribute, sell or give away any drug, medicine or article for the prevention of conception. Section 21A excepts from this prohibition registered physicians who prescribe for and administer such articles to married persons and registered pharmacists who dispense on medical prescription.<sup>1</sup>

<sup>1</sup> Section 21 provides as follows:

"Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 13, 1971

Re: No. 70-17 - Eisenstadt v. Baird

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 29, 1972

Re: No. 70-17 - Eisenstadt v. Baird

Dear Byron:

Subject to any further writing which may yet be forthcoming, please join me in your circulation of February 7.

Sincerely,

*H. A. B.*

Mr. Justice White

cc: The Conference

March 13, 1972

Re: No. 70-17 - Eisenstadt v. Baird

Dear Byron:

I have read with interest the Chief's dissent circulated March 10. I particularly note the material near the center of page 6.

That material reminded me of the case of State v. Red Owl Stores, Inc., 263 Minn. 31, 115 N.W.2d 643, a case with which I had something to do a few years back. It does not go off on constitutional grounds, but it does bear somewhat upon a drug product's movement from one classification to another.

Sincerely,

HA B

Mr. Justice White