

Griswold v. Connecticut

MR. JUSTICE WHITE, concurring in the judgment.

In my view, this Connecticut law, as applied to married couples, deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment. I therefore concur in the judgment of the Court reversing these convictions under Connecticut's aiding and abetting statute.

It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," *Meyer v. Nebraska*, [262 U. S. 390](#), [262 U. S. 399](#), and "the liberty . . . to direct the upbringing and education of children," *Pierce v. Society of Sisters*, [268 U. S. 510](#), [268 U. S. 534-535](#), and that these are among "the basic civil rights of man." *Skinner v. Oklahoma*, [316 U. S. 535](#), [316 U. S. 541](#). These decisions affirm that there is a "realm of family life which the state cannot enter" without substantial justification. *Prince v. Massachusetts*, [321 U. S. 158](#), [321 U. S. 166](#). Surely the right invoked in this case, to be free of regulation of the intimacies of [Page 381 U. S. 503](#) the marriage relationship, come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.

Kovacs v. Cooper, [336 U. S. 77](#), [336 U. S. 95](#) (opinion of Frankfurter, J.).

The Connecticut anti-contraceptive statute deals rather substantially with this relationship. For it forbids all married persons the right to use birth control devices, regardless of whether their use is dictated by considerations of family planning, *Trubek v. Ullman*, 147 Conn. 633, 165 A.2d 158, health, or indeed even of life itself. *Buxton v. Ullman*, 147 Conn. 48, 156 A.2d 508. The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. *Tileston v. Ullman*, 129 Conn. 84, 26 A.2d 582. And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. *State v. Nelson*, 126 Conn. 412, 11 A.2d 856; *State v. Griswold*, 151 Conn. 544, 200 A.2d 479. In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Yick Wo v. Hopkins*, [118 U. S. 356](#); *Skinner v. Oklahoma*, [316 U. S. 535](#); *Schware v. Board of Bar Examiners*, [353 U. S. 232](#); *McLaughlin v. Florida*, [379 U. S. 184](#), [379 U. S. 192](#).

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demeans the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under [Page 381 U. S. 504](#) the cases of this Court, require "strict scrutiny," *Skinner v. Oklahoma*, [316 U. S. 535](#), [316 U. S. 541](#), and "must be

viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, [364 U. S. 479](#), [364 U. S. 488](#).

"Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

Bates v. Little Rock, [361 U. S. 516](#), [361 U. S. 524](#). See also *McLaughlin v. Florida*, [379 U. S. 184](#). But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. *Zemel v. Rusk*, [381 U. S. 1](#).* Page 381 U. S. 505

As I read the opinions of the Connecticut courts and the argument of Connecticut in this Court, the State claims but one justification for its anti-use statute. Cf. *Allied Stores of Ohio v. Bowers*, [358 U. S. 522](#), [358 U. S. 530](#); *Martin v. Walton*, [368 U. S. 25](#), [368 U. S. 28](#) (DOUGLAS, J., dissenting). There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.

Without taking issue with the premise that the fear of conception operates as a deterrent to such relationships in addition to the criminal proscriptions Connecticut has against such conduct, I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships. See *Schwartz v. Board of Bar Examiners*, [353 U. S. 232](#), [353 U. S. 239](#). Connecticut does not bar the importation or possession of contraceptive devices; they are not considered contraband material under state law, *State v. Certain Contraceptive Materials*, 126 Conn. 428, 11 A.2d 863, and their availability in that State is not seriously disputed. The only way Connecticut seeks to limit or control the availability of such devices is through its general aiding and abetting statute, whose operation in this context has [Page 381 U. S. 506](#) been quite obviously ineffective, and whose most serious use has been against birth control clinics rendering advice to married, rather than unmarried, persons. Cf. *Yick Wo v. Hopkins*, [118 U. S. 356](#). Indeed, after over 80 years of the State's proscription of use, the legality of the sale of such devices to prevent disease has never been expressly passed upon, although it appears that sales have long occurred and have only infrequently been challenged. This "undeviating policy . . . throughout all the long years . . . bespeaks more than prosecutorial paralysis." *Poe v. Ullman*, [367 U. S. 497](#), [367 U. S. 502](#). Moreover, it would appear that the sale of contraceptives to prevent disease is plainly legal under Connecticut law.

In these circumstances, one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations, and thereby contributes to the State's policy against such relationships. Neither the state courts nor the State before the bar of this Court has tendered such an explanation. It is purely fanciful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship, or for some other reason makes such use more unlikely, and thus can be supported by any sort of administrative consideration. Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and, without the ready availability

of such devices for use in the marital relationship, there will be no or less temptation to use them in extramarital ones. This reasoning rests on the premise that married people will comply with the ban in regard to their marital relationship, notwithstanding total nonenforcement in this context and apparent nonenforcibility, but will not comply with criminal statutes prohibiting extramarital affairs and the anti-use statute in respect to illicit sexual relationships, a premise whose validity has not been [Page 381 U. S. 507](#) demonstrated and whose intrinsic validity is not very evident. At most, the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

* Dissenting opinions assert that the liberty guaranteed by the Due Process Clause is limited to a guarantee against unduly vague statutes and against procedural unfairness at trial. Under this view, the Court is without authority to ascertain whether a challenged statute, or its application, has a permissible purpose, and whether the manner of regulation bears a rational or justifying relationship to this purpose. A long line of cases makes very clear that this has not been the view of this Court. *Dent v. West Virginia*, [129 U. S. 114](#); *Jacobson v. Massachusetts*, [197 U. S. 11](#); *Douglas v. Noble*, [261 U. S. 165](#); *Meyer v. Nebraska*, [262 U. S. 390](#); *Pierce v. Society of Sisters*, [268 U. S. 510](#); *Schware v. Board of Bar Examiners*, [353 U. S. 232](#); *Aptheker v. Secretary of State*, [378 U. S. 500](#); *Zemel v. Rusk*, [381 U. S. 1](#).

The traditional due process test was well articulated and applied in *Schware v. Board of Bar Examiners*, *supra*, a case which placed no reliance on the specific guarantees of the Bill of Rights.

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Dent v. West Virginia*, [129 U. S. 114](#). Cf. *Slochower v. Board of Education*, [350 U. S. 551](#); *Wieman v. Updegraff*, [344 U. S. 183](#). And see [60 U. S. 19](#) How. 9, [60 U. S. 13](#). A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas v. Noble*, [261 U. S. 165](#); *Cummings v. Missouri*, 4 Wall. 277, [71 U. S. 319-320](#). Cf. *Nebbia v. New York*, [291 U. S. 502](#). Obviously an applicant could not be excluded merely because he was a Republican, or a Negro, or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

353 U.S. at [353 U. S. 238-239](#). Cf. *Martin v. Walton*, [368 U. S. 25](#), [368 U. S. 26](#) (DOUGLAS, J., dissenting).