

**BURWELL v. HOBBY LOBBY STORES, INC.: PRIVACY,
EQUAL FREEDOM, AND ECONOMIC JUSTICE**

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ABSTRACT

In this investigation we argue that the *Burwell v. Hobby Lobby Stores, Inc.*, 2014 decision by the US Supreme Court - in which for profit businesses can deny birth control coverage in company health insurance plans on the basis of religious beliefs of company ownership - should instead be adjudicated within the context of “privacy” based on the legal precedents of *Griswold v. Connecticut*, 1965 and *Eisenstadt v. Baird*, 1972. Birth control should be a integral part of health care coverage irrespective of the company ownership’s religious beliefs. Consequently, the *Hobby Lobby decision* was wrongfully adjudicated under the Religious Freedom and Restoration Act of 1993 (RFRA) and should be rescinded. We further argue that, privacy rights also imply that birth control, understood as women’s reproductive rights is directly related to women’s economic well-being as free, self-determining, and autonomous persons capable of deciding their own reproductive choices. This is specifically the case for women, one of the most impoverished groups in the United States and global community, in preventing unwanted pregnancies and incurring greater economic hardship. Accordingly, if individuals have the legally established right to “privacy” to be “let alone,” that is, “freedom for” government noninterference (*Griswold* and *Eisenstadt*) then it can also be argued that individuals have a fundamental right to resources, or “freedom from” deprivation and those fundamental assets to maintain a minimal level of dignified human existence and self-determination. In academic literature this is known as “equal freedom.” Personal freedom upholding privacy rights to be “let alone” must necessarily lay claim to resources to be a free and autonomous person if these resources cannot

be allocated, so that persons can be let alone and “free form” government dependence in the first place. This would necessarily include reproductive rights and the regulation of one’s own reproductive capacities and the economic support for this right. The point of investigation for understanding how privacy is related to “freedom from” deprivation is also a “freedom for” economic justice and reproductive rights. *Burwell v. Hobby Lobby Stores, Inc.* must be rethought in terms of personal privacy and economic support for birth control and reproductive rights. Thus the religious exemption decision in *Hobby Lobby* is nothing more than a red herring argument and should be dismissed as a rationale for denying birth control coverage under the Affordable Care Act, 2010.

Keywords: religious exemption, legal precedent, discrimination, freedom from, freedom for, economic justice.

INTRODUCTION

Under the Patient Protection Affordable Care Act of 2010 (ACA), for-profit businesses, companies, and corporations are required to provide full contraceptive health care coverage for their employees. Objecting to this mandate were numerous business owners who, on religious grounds, filed lawsuits against the federal government forcing them to provide contraception to employees. The Obama Administration then sought clarification from the Supreme Court of the United States (SCOTUS) as to whether or not for-profit corporations can claim a religious exemption to the contraceptive mandate. At the time, Solicitor General Donald Verrilli characterized this issue as one of “exceptional importance” in need of a precise legal remedy (*Burwell v. Hobby Lobby Stores, Inc.*, 2014).¹

The ACA coverage includes the “morning after pill,” and other forms of contraception, which some religious leaders allege to be abortifacients. If forced to comply with this form of birth control, some business owners argue that their First Amendment rights, understood as religious freedom of expression, are violated. Some of these employers have had success suing in court, specifically under the “freedom of

expression” clause in the First Amendment which, constitutionally provides a legal exemption. Thus the plaintiffs claim that their First Amendment rights combined with the Religious Freedom and Restoration Act of 1993 (RFRA), a law intended to strengthen religious liberty, supports a business owner’s right to refuse providing contraceptive coverage (*Religious Freedom and Restoration Act of 1993*).²

One of the plaintiffs challenging the ACA mandate was the Green family Hobby Lobby Stores, Inc., an Oklahoma based business located throughout the United States. On June 30, 2014, in *Burwell v. Hobby Lobby Stores, Inc.*, the SCOTUS ruled in favor of Hobby Lobby.³ What the case brought to light was two significant legal issues addressing, whether or not, a for-profit corporation as a “person” can be: (1) protected under religious freedom laws; and (2) categorized as a religious entity entitled to freedom of expression rights. Hobby Lobby argued that because their company possesses legal “personhood” as a for-profit family business, their religious beliefs which are in opposition to artificial contraception and abortion, deserve protection under the “free expression” clause of the First Amendment. Moreover, Hobby Lobby maintained that the government was taking the position that private individuals apparently lose their religious freedom when they run a for-profit business or corporation. This, of course, was flatly denied by government attorneys who argued that the issue is one of a private company hiding behind the mask of religious freedom in order to discriminate

An appeals court in a separate ruling sided with an Ohio business owner, Francis and Philip Gilardi owners of Freshway Foods and Freshway Logistics of Sidney, Ohio. In challenging the birth control mandate under the ACA, *Francis A. Gilardi, et al., v. United States Department of Health and Human Services*, 2013, the Gilardis claimed that the mandate providing artificial contraception and the morning after pill to employees would compel them to violate their Roman Catholic religious beliefs. Writing for the majority, Judge Janice Rogers Brown wrote that the birth control mandate “trammels” the First Amendment right to the “free exercise” of religion which is at the heart of fundamental constitutional liberties in RFRA 1993. Brown reasoned that the Gilardis were being pushed into a Hobson’s

choice where “they can abide by the sacred tenets of their faith, pay a penalty of over \$14 million and cripple the companies they have spent a lifetime building, or they can become complicit in a grave moral wrong” (Brown, 2013, p. 20).

In reaction to the SCOTUS decision in *Burwell* and *Gilardi*, the Obama Administration argued that it is “unprecedented” for a court of law to extend religious exemptions to corporations. No court has ever accepted a claim under RFRA guidelines in which for-profit businesses and employers are exempt from employment regulations. As such the Obama Administration argued that legal cases involving corporate employers are separate issues from lawsuits involving religiously affiliated schools and hospitals and should be treated accordingly.

THE LEGAL ARGUMENTS

The Obama Administration argued that the contraception mandate, as it relates to for-profit corporations, “seeks to ensure that women and families, not their bosses or corporate CEOs, can make personal health decisions based on their needs and their budgets.”⁴ Moreover, women’s rights advocates such as Planned Parenthood argued that mandatory birth control benefits are vital to women’s freedom and economic well-being since an unwanted pregnancy can economically devastate a woman and her family. On the other hand, defenders of religious rights argued that family-run businesses are only acting on their owner’s religious convictions, and should not be “unduly burdened” in their free religious expression (Garnett, 2014).⁵

In a 1990 opinion by Justice Antonin Scalia, the Supreme Court rejected the argument that, while the First Amendment protects the free exercise of religion, it does not give religious believers a right to ignore laws that apply to everyone, specifically in the case of two Native Americans who were fired for using peyote. In disagreeing with this decision Congress argued that Native Americans should be exempt from being denied access to the “legal” use of peyote in their religious celebrations. Consequently RFRA was passed asserting that government will not burden an individual’s exercise of religion, except if there is a compelling interest.

The U.S. Tenth Circuit Court of Appeals in Denver argued a different position, stating that since corporations had free speech rights in politics, they should also have similar rights to religious freedom and expression. The U.S. Seventh Circuit Court of Appeals in Chicago adopted this same view. On the other hand, in July of 2013, the Third Circuit Court of Appeals in Philadelphia took the opposite view in ruling against *Conestoga Wood Specialties Corp.*, run by a Mennonite family who also sought a religious exemption based on freedom of speech and expression. Solicitor General Donald Verrilli Jr. representing the Obama Administration argued that the legal implications of the Tenth and Seventh Circuit Court decisions, granting free expression exemptions to for-profit corporations, could potentially open the door to an assortment of new religious freedom claims. Verrilli further argued that such a ruling would set a dangerous precedent if the Supreme Court were to allow corporate owners to cite religious views as a basis for ignoring or avoiding federal laws governing the workplace. Employers would be more than justified in making arguments in the name of religious liberty claims, specifically from owners of corporations who object to laws mandating, not just contraception, but “equal treatment” issues in hiring and/or firing based on race, ethnicity, gender, sexual orientation and identity, religion, and political affiliation.

Others, such as the American Civil Liberties Union (ACLU) have argued that a broad ruling could theoretically open the door for a Christian business owner to refuse service to gays and lesbians, or a Muslim-owned business to turn away women deemed “immodestly” dressed. For example, a New Mexico photographer, who objected to taking photos of a same-sex wedding and an Oregon business owner’s objection in preparing a cake for a same-sex wedding, was challenged in court as being “illegal” and was dismissed. The point is moot, however, since same sex marriage is now legal in the U.S., yet examples continue to surface. ACLU attorneys nevertheless argue that further legal clarification is needed and if not understood in terms of discrimination in the name of religion, the SCOTUS will be revisiting this issue indefinitely (ACLU, 2016; The Wall Street Journal, 2015).

Writing the dissent to *Hobby Lobby*, Justice Ruth Bader Ginsburg noted that there should be no controversy over the interpretation of the RFRA law and that the entire case turns on RFRA which clearly states that government shall not burden any individual's religious practices without a strongly convincing reason otherwise. She further argued that RFRA was not intended to exempt for-profit corporations from complying with laws governing the workplace, but rather to exempt Native Americans from criminal prosecution for using peyote (an illegal drug) in their religious ceremonies. Ginsburg, on the same grounds, also rejected the argument that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) which Congress passed to broaden RFRA guidelines, did not apply as well. The "broad reach" argument that Hobby Lobby lawyers used as a legal loophole to argue against mandated contraception did not pass the "strict scrutiny" test in constitutional law.

Charities and religious nonprofits, in contrast to proprietary institutions, were given permission by the Obama Administration to opt out of providing contraceptive coverage to their employees. But this was allowed only under the proviso that those employees who object to contraceptive coverage give formal notice to the government of their particular objection based on their religious beliefs. That notification would then result in insurers providing contraceptive coverage to female workers, directly. Nevertheless, Catholic bishops joined by numerous nonprofits argued that the "accommodation" still put a "substantial burden" on their personal religious freedom. They argued that even with the notification to government they would still be acting against the tenants of their faith and therefore complicit in what they view as "sin."

In response to this Justices Ginsburg, Kagen, and Sotomayor, argued that it was very difficult to accept the position of Catholic Charities and nonprofits refusal to even notify the government they would not provide contraceptive coverage to their employees precisely because they "object to objecting." Justice Sotomayor further argued that war-time conscientious objectors must inform the government of their religious objection to compulsory military service and that this exemption is *not* considered objectionable to religious

organizations as an “unnecessary burden.” In fact, according to the dissenting Justices nearly all the U.S. appeals courts, with the exception of the 8th Circuit Court, had sided with the Obama Administration arguing that any required notification was in no way evidence of a substantial and undue burden.

The SCOTUS then ruled unanimously on May 16, 2016, after the death of Justice Antonin Scalia, that female workers may receive “cost-free contraceptive coverage” without infringing on the religious rights of the church-based employers. As such, the eight justices argued that there was no need to rule at the moment on broader legal issues, including whether the so-called contraceptive mandate violated the charities’ religious liberties or whether government has a compelling interest in requiring contraceptive coverage for female employees. But what has made the case all the more complex is the recent ruling by United States District Court Judge Sean F. Fox of Detroit. Based on the *Hobby Lobby* decision, Fox ruled on August 8, 2016, that a local funeral home has the legal right to fire an employee for their transgender identification, since this identification violates the employer’s religious beliefs. This legal complexity is still being adjudicated at the present time and is being challenged through various forms of appeals in lower courts.

Critique

It is important to note the difference between for-profit and non-profit organizations. For example, for-profit commercial corporations have no legal status, under U.S. tax codes, identifying themselves as religious institutions. The nature of a for-profit enterprise is that of financial profitability. As such, a non-profit, 501©3, is identified differently under U.S. tax law. Thus the Catholic Church for example as a non-profit charitable organization is entirely different, legally, from a corporate entity such as Microsoft. This is because the Catholic Church is concerned with private religious matters, while the corporations deal with profit maximization. Financial institutions and for-profit corporations according to federal law must provide the full range of health care coverage including contraception. Religious

groups are exempt. But now with the *Hobby Lobby* decision the religious views of the ownership of for-profit corporations allow those businesses to not only withdraw contraceptive support, but also allow these same businesses to discriminate. This was based on the majority opinion of Justice Samuel Alito who argued that the religious exemption clause outlined in RFRA and RLUIPA, allowing Native Americans to use peyote in religious ceremonies, should be applied similarly in *Hobby Lobby*. We argue that this is a misapplication of legal principles. In no way can the exemption from prosecution in the use of peyote in religious ceremonies be applied to an exemption in providing health care coverage.

Any rationale can be used to disregard certain laws or even actively discriminate against any one person or group based on a religious exemption. What results is a distorted application of the First Amendment in order to discriminate against others. Thus the RFRA and RLUIPA laws used in support *Hobby Lobby* become nothing more than a “red herring” argument to violate the already established laws against discrimination. Freedom of speech and expression as legal scholar Cass Sunstein argues, is meant for deliberative democratic discourse within what, Oliver Wendall Holmes famously described, the “marketplace of ideas” (Sunstein, 1993; 1996). What can be concluded about the *Hobby Lobby* decision is that: (1) the nature of free speech and free expression under the First Amendment has been broadened to the point where discrimination against others can be justified arbitrarily on the basis of religious beliefs; (2) the broadening of the First Amendment freedom of speech right has led to legal ambiguities where for-profit corporations are equated with persons specifically now with religious rights; and (3) the misidentification and conflation of speech and expression has led to the violation of constitutional rights to privacy, specifically in health care matters.

LIBERAL LEGAL SCHOLARSHIP

The legal scholarship of Louis Brandeis is significant in this critique. A liberal legal conceptual framework is essential in order to assess how health care (contraception) and for-profit

corporations have been mistakenly identified as “persons” with constitutional rights to free speech and expression. While it may be the case that Hobby Lobby, its attorneys, and the SCOTUS are misidentifying a legal grievance as a First Amendment free speech and expression issue, we argue that the *Hobby Lobby* case is better addressed as one of an individual’s right to privacy, specifically when it comes to birth control and reproductive rights.

Brandeis and Privacy

In an article published in the *Harvard Law Review*, December, 15, 1890, "The Right to Privacy," Supreme Court Justice to be, Louis Brandeis, identified and defined modern notions of privacy rights. The central thesis of this article argued that implicit in the Constitution is a concept based on “a right to be left alone” (privacy). As such the right to “privacy” has developed into a Constitutional liberty based on notions of individual and personal autonomy established and protected by the Fourth Amendment. The First, Fourth, and Fifteenth Amendments also establish and provide protection of privacy, although in almost all cases this right is narrowly defined.

At the time Brandeis and his coauthor Samuel Warren, were reacting to, among other issues, "snapshot photography," which was making its way into journalism allowing newspapers to publish photographs and statements of individuals without obtaining their permission. Brandeis argued that individual privacy was being violated by the newspapers and that this violation weakened the "moral standards of society." In effect, Brandeis identified a new legal concept which has been consistently upheld through legal challenges and has thus endured the test of time. Based on laws of defamation, literary property, and eavesdropping, Brandeis argued that the major idea at the core of the argument for “privacy” was a legal interest in maintaining the right to personal integrity, specifically "the right to be let alone." This “right” he argued, ought to be secured except for a compelling reason to maintain public welfare. Brandeis recognized that such an invasion of privacy demanded legal protection which otherwise leaves individuals vulnerable to

“invasion” of their privacy. Thus “The Right to Privacy,” according to legal scholar Roscoe Pound, was one of the most important legal formulations derived from the Constitution and accomplished “nothing less than adding a chapter to our law.”⁶

Decades later, in his widely cited dissenting opinion in *Olmstead v. United States*, 1928, Brandeis based his decision on much of what he developed in his 1890 *Harvard Law Review* article, “The Right to Privacy.”⁷ But in his dissent in *Olmstead*, Brandeis now intensified the focus on privacy whereby he argued that personal privacy is more intrinsically related to Constitutional Law, even going so far as to claim that government itself can be identified as a “privacy invader.” At issue in *Olmstead* was the use of wiretap technology to gather evidence which Brandeis referred to as “dirty business.” He further argued that privacy more than implies that the individual be “let alone” by government and that this legal right is fundamental to the Fourth Amendment which is intended to counter unreasonable search and seizure. Though this formulation was based on Brandeis’s dissenting opinion, the other dissenting justices - Frank Murphy and Felix Frankfurter - clearly referred to the Fourth Amendment as the “protection” from government and the implied right to personal privacy (Steiker, 2009).

While this dissenting view did not prevail legally at the time, decades later the argumentation was later revived by the Warren Court. The issue of privacy surfaced once more with the growth of surveillance technology during the 1950s and 1960s. In writing the majority opinion for the Warren Court, Justice Potter Stewart argued that individual privacy was a greater priority than government’s arbitrary rationale for invading this same privacy. *Olmstead* was overturned by the Warren Court and Brandeis’s privacy formulation was utilized in major court decisions. However Brandeis’s “privacy” formulation has met with some resistance, specifically in legal cases related to “abortion rights” and the “right to die” controversies.⁸

BIRTH CONTROL AND PRIVACY RIGHTS

The notion of privacy as it relates to contraception is derived from *Griswold v. Connecticut*, 1965 and *Eisenstadt v. Baird*, 1972. As Brandeis has argued, legal privacy involves an individual's right to be "let alone," and therefore make personal decisions without coercion from others or government. Using Brandeis's privacy arguments in the *Griswold* and *Eisenstadt* decisions, the SCOTUS recognized the right of individual privacy but undue interference from government intrusion is less clear. Though some states have an explicit right to privacy built into their constitutions, no explicit provision exists at the federal level which clearly, and explicitly, declares a right to privacy in the U.S. Constitution. Thus, a literalist interpretation of the Constitution tends to argue that no general prohibition exists in any absolute sense which would limit a government at various levels from intrusions of privacy upon citizens (Steiker, 2009; Peltason, 1991; Wing, 1995; Feldstein, 1988; Hogue, 1980; Glancy, 1979).

Griswold v. Connecticut (1965) was the landmark case that explicitly recognized for the first time a constitutional right to privacy. The Planned Parenthood League of Connecticut in 1961 opened a center in New Haven for the distribution of information on birth control. After a nine day period, the executive director of Planned Parenthood (Estelle Griswold) and the medical director of the clinic were arrested while counseling a married couple about the use of contraception, which was a crime to use at that time. Both Griswold and the medical director were tried and convicted for aiding and abetting a crime. Through the state court system they appealed. Subsequent appeals to this decision failed and the case was eventually heard by the SCOTUS (Helsher 1994; Johnson 2005).

When *Griswold* was brought before the SCOTUS, the Court itself was divided regarding its rationale in favor of *Griswold*. In a 7-2 decision, the Court reversed the criminal convictions of Griswold and asserted that the Connecticut law as applied was unconstitutional. Justice William Douglas cited a list of constitutional rights that had been recognized and protected by the Court, despite the fact that they had not been literally written

into the provisions of the Constitution. Justice Douglas reasoned from these precedents that, “the foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanation from those guarantees that give life and substance... Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen” (*Griswold v. Connecticut*, 381 U.S. 479, 1965).

Justice Douglas also argued along these lines with respect to the Third Amendment (prohibition against the quartering of soldiers); the Fourth Amendment (unreasonable searches and seizures); the Fifth Amendment (self-incrimination); and the Ninth Amendment (certain rights and privileges shall not be denied – unenumerated rights). In the Fourth and Fifth Amendments, Justice Douglas further clarifies that these amendments were aimed at protecting against all government invasions “of the sanctity of a man’s home and the privacies of life,” and that they constitute a “right to privacy, no less important than any other right carefully and particularly reserved to the people” (*Griswold v. Connecticut*, 381 U.S. 479, 1965). As a result, many controversies exist over such rights as “privacy and repose.” Thus, such cases signify that the right of privacy, especially in the case of contraceptive choice, is a legitimate right.

It is important to note that at this point, some ethicists and legal theorists find it important to clarify the distinction between “privacy” and “autonomy” in *Griswold v. Connecticut*. The legal issue of distinguishing between privacy and autonomy presents potential difficulties as it has surfaced in legal literature. Hyman Gross states that the issue manifests itself when the repeated use of the term ‘right to be left alone’ becomes synonymous with the ‘right to privacy.’ Gross argues that the SCOTUS conflated the two concepts in *Griswold v. Connecticut*, and the ensuing intellectual foundation for privacy is based on a semantical error. In this unique case legislative prohibition regarding contraceptives was understood to violate the right to privacy, specifically as it affected married couples. According to Gross the Court’s play on words, in which the word ‘privacy’ was

manipulated, is really an issue regarding autonomy and not privacy (Gross, 1967; 1971).

Gross further argues that in *Griswold* the SCOTUS should have focused on the proper boundaries for the exercise of legislative power regarding the rights to autonomous persons as citizens. The *Griswold* opinion not only failed to take up that question in a forthright manner, but rather promoted confusion about privacy in the law by unsettling the intellectual focus which had already been developed in torts and constitutional law. Nevertheless, regardless of its origin, the effect confused two different substantive meanings – privacy and autonomy – which welcomes clarification because of the *equivocation* on the two terms (Carney and Scheer, 1974: 47, 67). This ambiguity can be understood, for example, when it is clarified that an offense to privacy may be an offense to autonomy, but not every restraint on autonomy is a compromise of privacy.

Douglas's opinion in *Griswold* was insightful, however, in keeping with judicial traditions, Douglas would allow for state wide discretion under its police powers to regulate most economic and social activities, especially those that relate to public health. In fact, the opinion recognizes the inherent power of the state to regulate contraceptives in their use and production. The importance of the opinion lies in Douglas's recognition that the exercise of state power would affect an important, constitutionally recognized individual right or "fundamental interest." Consequently, an otherwise valid exercise of state power cannot be achieved by means of having a "maximum destructive impact" upon such an individual interest, nor may it "sweep unnecessarily broadly." In other words, the court believed that when such an important private interest was at stake, the courts must abandon their traditionally deferential role to the states and take a much more active role in reviewing the wisdom and validity of legislation which invades this privacy.

Courts and legal experts tend to agree that this more active role of courts is appropriate where sufficiently important individual interests are at stake. The controversy and ambiguity in *Griswold*, however, is over clarifying the circumstance under which direction is appropriate. In that regard, the most unusual aspect of Douglas's opinion was that it created, or at least

recognized for the first time, a new constitutionally protected interest, and a new area of judicial involvement in legislative matters. Furthermore, Douglas implied that other constitutional rights might be found in relation to the issue of privacy within the Constitution. Still, Douglas defined one application of this right and gave only an outline of its nature. The majority opinion speaks generally of “zones of privacy” and specifically of one of these zones: sexual activity between married people. Despite this, the *Griswold* case did not hold that the state could not invade this zone of privacy in any way and neither did it clarify whether other activities by other people would fall within this important yet unclear category.

PRIVACY AND UNMARRIED PEOPLE

The *Griswold* case had an impact felt nationwide. Numerous states legislatures, including Massachusetts, amended their statutes to conform to the apparent dictates of the opinion. Under the “Crimes against Chastity, Morality, Decency and Good Order,” Massachusetts criminal statutes had forbid the use of any contraceptive devices. Then after *Griswold*, the Massachusetts statute was amended by the state legislature to make an exception for contraceptives given to a married individual with a prescription by a physician or pharmacist. In effect, contraceptives were to be treated as prescription drugs available only to married people (Eastland, 1995; Lockhart, 1997).

An initial reading of *Griswold* after its decision might have led to the conclusion that the Massachusetts law as amended might still be valid. Justice Douglas’s assessment left a clear impression that sexual conduct within marriage was a private matter and protected by the Constitution. Nonetheless, there was the implication in the decision that the state could regulate contraception in some capacity, inclusive of married couples. This inference, however reasonable, soon became invalidated in *Eisenstadt v. Baird* (Kalman and Garrow, 1994). William Baird’s name had been associated with a number of social causes, and in the late 1960’s he was known in Massachusetts for his crusades to free birth control from the strict legal restraints

imposed in that state. He openly violated these laws and eventually forced his own prosecution in order to challenge their constitutionality.

In May 1967, Baird gave a lecture on birth control at Boston University. His presentation includes exhibits and displays of contraceptive devices. After his address he invited members of the audience to help themselves to available samples. Baird was approached by an unmarried woman, to whom he personally handed a can of vaginal foam. At that moment, the local sheriff Thomas Eisenstadt had been in the audience and subsequently arrested Baird. He was charged with both exhibiting contraceptives and giving contraceptives to an unmarried person in violation of the Massachusetts statute. Baird was tried and convicted, to which he appealed through the state court system. The Massachusetts Supreme Court reversed the conviction for exhibiting contraceptives as a violation of Baird's right to free speech guaranteed by the First Amendment of the United States Constitution. However, the state court upheld his conviction. Baird then filed a writ of habeas corpus in federal court (Lockhart, 1997; Loewy, 2003; Tushnet 2008). His appeal was dismissed in both the federal district, and the federal circuit court of appeals. Baird then appealed to the Supreme Court.

In writing for the majority, Justice Brennan argued that Baird's claim essentially challenged the constitutionality of the Massachusetts statute under the equal protection clause of the Constitution. Justice Brennan, examining the statute according to the principles of equal protection, held that "the question for determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried people under Massachusetts General Laws" (*Eisenstadt v. Baird*, p. 448). Brennan further surmised that if the purpose of the statute was directed at deterring premarital sex, as the state argued, then those who engage in premarital sex could potentially be punished with pregnancy.

The Court also identified the irony of a contraceptive law that proposed to regulate premarital sex but apparently did not discourage extramarital sex. In fact contraceptives could be legally distributed in Massachusetts as long as they were used for

the prevention of disease but not when they were used to prevent conception. Furthermore, the Court also reasoned that if the purpose of the Massachusetts statute was to regulate dangerous health-related devices, then the statute would be based on the false assumption that all contraceptive devices can be dangerous. The statute would therefore be unnecessarily broad and discriminatory.

Finally, the Court pointed out that in Massachusetts at the time, fornication was only a misdemeanor punishable by a \$30 fine or ninety days in jail while the possession of contraception was a felony. The Court argued that this legal disparity was unfairly disproportionate. Consequently, whether the state had the right to prohibit the use of contraceptives by unmarried people as immoral was an issue the Court declined to address. Because of this the Court supported the right to privacy stating that "... for the unmarried and married alike ... 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" (*Eisenstadt v. Baird*, p. 453).

Brennan and Privacy

The equal protection analysis invoked by Justice Brennan in the *Eisenstadt* case, was to some degree contradictory. Justice Brennan claimed that state legislation was really being tested in this case, and that the rational basis for such a law was in question. As a result, the Court's decision established three very important principles. First, is the belief that the "fundamental interest" to privacy protected by the federal Constitution, however defined at the very least includes the use of contraceptives by married and unmarried persons. Second, it demonstrates that the Court is willing to examine the legislative discretion of the state closely and with some suspicion when the right to privacy is affected. Underlying this is the rationale that state discretion is accepted if it actually serves a valid purpose and does so with a minimal impact on individual privacy. Third, the legal ambiguity that exists between "privacy" and "autonomy" still remains.

Over time the Court has generally attempted to make principled legal decisions and has with some success managed to avoid overtly political decisions. For the most part, the justices have traditionally valued and supported the principle of stare decisis, the division of powers, and other elements that are critical to their role when interpreting the US Constitution. Nevertheless, the Constitution is ultimately no more, and no less, than what the majority of nine individuals chosen it to be at any given time. If they disagree with a lower court's decision, they have the power to limit, overturn, or rescind previous rulings on privacy. This is why it is increasingly difficult to analyze and explain the evolution of the constitutional right to privacy rooted in *Griswold and Eisenstadt* because of the changing nature of the SCOTUS. It is also increasingly difficult to predict the future of the right to privacy since the legal grounding of this issue is not clearly defined by the Supreme Court. The otherwise cavalier assumption that the Constitution guarantees a right to privacy needs more legal analysis and constitutional justification if the right to privacy is to be truly guaranteed and protected.

It would be far too optimistic to assume that the right to privacy is guaranteed based on prior Supreme Court decisions. There is a great deal that should be considered unsettling about these cases in relation to the right to privacy. These cases still confirm important principles and illustrate important lessons concerning the law and the legal system that are ultimately as important as any assessment of the current constitutional status of privacy. In *Griswold* and *Eisenstadt*, it appears that the constitutional status of the right to privacy has significant foundation based on court adjudications at the federal level. Yet the right to privacy at local levels of government is nevertheless a matter of interpretation for local courts, even though some legal precedents have been established by the Supreme Court. This is because the courts have not been precise in their definition and application of privacy rights. The task of public policy will be to address this issue through proper legal discretion in light of what may happen at the local levels of government. More adjudication may take place at the local levels with respect to health care privacy rights, even though

federal law has precedent over state and local government as in *Griswold v. Connecticut* and *Eisenstadt v. Baird*.

PRIVACY AND EQUAL FREEDOM

One of the most fundamental rights protected by constitutional democracies is freedom. It is central to any notion of justice (Isbister, 2001). To not be free is to be under the control of another and is understood to be a form injustice and even exploitation. In fact, the struggles for justice over the past 250 years in the United States have almost entirely focused on the issue of freedom. Today freedom in current political discourse has tended to emphasize a form of noninterference in the lives of people known as libertarianism (Nozick, 1974; Machen, 1998). For libertarians freedom is the preeminent social virtue defining justice. Thus “liberal” notions of justice according to libertarian thought, which can also be inclusive of conservatives, anarchists, and left-libertarian, involves the absolute right to individual freedom. Government is understood as counterproductive and even intrusive in the lives of people. In *Capitalism and Freedom*, Milton Friedman states, “As liberals, we take freedom of the individual ... as our ultimate goal in judging social arrangements” (1962, p. 12). Not only do Friedman and other libertarian-minded thinkers regard freedom as the preeminent social virtue, that is, being superior to equality, they also view freedom as being counter to equality and vice versa. To champion equality is to simultaneously undermine freedom since equality implies taking away assets that individuals have freely acquired. Nevertheless, this underlying notion of freedom is related to the legal notion of freedom “to be let alone,” as Supreme Court Louis Brandeis has argued.⁹

There is, however, another notion of freedom with respect to political and legal scholarship that defines freedom within the context of equality. John Locke and other theorists argue that the ideal state of freedom is equal freedom (Locke, [1690] 1947; Alperovitz, 2013; 2008; Isbister, 2001; Sen, 1999; Adler, 1987; Rawls, 1971). As John Rawls describes it, “each person is to have an equal right to the most extensive basic liberty

compatible with a similar liberty for others” (1971, p. 60). That is to say, to be less than equally free is to be in some respects unfree, while at the same time in order to remedy lack of freedom, freedom requires some form of relative egalitarian outcome in order to avoid human depravation.

Typically in discussions on “equal freedom,” the distinction between “freedom-from” and “freedom-for” is addressed (Nielsen, 1985; Peffer, 1990). *Freedoms-for* are freedoms to do as one wishes outlined in the First, Fourth, and Fifteenth Amendments. These also guarantee the freedom to worship, public and written speech, assembly, and right to petition government for redress of grievances. The Fourth Amendment guarantees the right to hold property and be protected against unreasonable searches and seizures and government intrusion. The Fifteenth Amendment guarantees the right of citizenship and voting. This is generally what is understood as freedoms-for. However, *freedoms-from* are different, and while not mentioned in the US Constitution they can nevertheless be derived from the concept of freedom, specifically not from government intrusion, but rather government support. Accordingly freedom-from such afflictions as hunger, poverty, illiteracy, sickness, homelessness, and lack of reproductive self-determination (birth control) are such examples.

The conflict between these two conceptions of freedom was, and perhaps still is, one of the major political conflicts of the twentieth and twenty-first centuries. Libertarians, and for the most part elites, emphasize freedoms-for and egalitarians and radicals generally emphasize freedoms-from (Nielson, 2003; Peffer, 1994). Many egalitarians on the other hand, understand freedoms-for as counterproductive to the real freedoms that allow individuals and communities to obtain basic human needs. In prioritizing freedoms-for, as egalitarians argue, “power” is disproportionately distributed to elites in society which then undermines the basic needs of persons (Sopel and Jacobs, 2005; Parenti, 1978). While the conflict between the two concepts of freedom is real with respect to applied public policy, it would be erroneous to conclude that freedom-from and freedom-for are mutually exclusive. In fact, it could be argued to the contrary, that the two freedoms complement each other in what is

understood as “equal freedom” (Locke, [1690] 1947; Alperovitz, 2013; 2008; Isbister, 2001; Sen, 1999; Adler, 1987; Rawls, 1971; Nielson, 2003; Peffer, 1994).

An example of freedom-for can best be understood in John Stuart Mill’s classic understanding of freedom *On Liberty* when he states, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (1859, p. 13). Based on this understanding the state is restricted to a large degree from involvement in people’s lives and would only be permitted to enforce laws prohibiting harmful acts such as murder, robbery, assault, shouting “fire” in a crowded theatre, and similar injurious actions. However another dimension to freedom that Mill does not address, is the notion of freedom which guards against human deprivation. Understood as freedom-from, the concept involves removing barriers for individuals to freely obtain strategic human resources and basic human needs. Philippe Van Parijs states, “real freedom is not only a matter of having the right to do what one might want to do, but also a matter of having the means for doing it” (1995, p. 4). This position argues that freedom is to be proactive in removing obstacles in society when there is a lack of access to critical resources for people.

Clearly the optimum state of freedom, “equal freedom,” (both freedom-for and freedom-from) is difficult to apply in practice, specifically in public policy (Dahl, 1961; Lowi, 1979; Lukes, 2005; Dahl and Lindblom, 1991; Kristol, 1972; Bork, 1995). Nevertheless, it can safely be assumed that access to wealth and resources are essential in assisting people in obtaining basic human needs. Other things being equal, it follows that the goal of equal freedom according to Rawls and other egalitarians such as Nielsen and Peffer is to prioritize equal freedom over “equal opportunity” since arguably equal opportunity facilitates unequal outcomes which potentially threatens equal opportunity over the long run, and therefore threatens justice itself (Isbister 2001).

ECONOMIC JUSTICE

Equal freedom thus attempts to mitigate inequalities, advance economic justice and reproductive rights. Thus freedom to be “let alone” or *freedom-for*, guards against government intrusion, while on the other hand freedom to be “let alone” or *freedom-from*, secures basic human needs and resources inclusive of birth control. Freedom-from implies a proactive policy, either through government or non-governmental organizations (NGOs), or a guaranteed national income.¹¹

It is important to note that freedom and equality are not to be equated in a strict manner. Nonetheless, the argument put forth here is that freedom can only reach its fullest expression in cooperation with equality (Isbister, 2001). In this sense the ideal state of freedom is equal freedom, specifically “for” and “from, to be “let alone” in terms of privacy in order to “make claims upon” those resources that secure the basic needs of individuals and communities. To be “let alone” and live in “privacy” as Brandeis has argued implies freedom not only for government noninterference but also “let alone” as Locke would argue to live in “privacy” and be free from state dependence on fundamental human needs. Some theorists argue that this constitutes a fundamental human right in the form of “property rights.”¹²

In this investigation we have argued that the *Burwell v. Hobby Lobby Stores, Inc.*, 2014 decision, in which for profit businesses are allowed to deny birth control coverage in company health insurance plans on the basis of religious beliefs should best be decided within the context of “privacy” based on the legal precedents of *Griswold v. Connecticut*, 1965 and *Eisenstadt v. Baird*, 1972. Moreover, privacy rights also imply that birth control, understood as women’s reproductive rights is also related to women’s economic well-being by preventing unwanted pregnancies and economic hardship.

Accordingly, if individuals have the legally established right to “privacy” to be “let alone,” that is, “freedom for” government noninterference then it can also be argued that individuals have a fundamental right to resources, or “freedom from” deprivation and those fundamental assets to maintain a minimal level of dignified human existence and self-determination. This would

necessarily include reproductive rights and the regulation of women's reproductive capacities and the economic support for this right. Thus *Burwell v. Hobby Lobby Stores, Inc.* must be rethought in terms of personal privacy and economic support for birth control and reproductive rights. The religious exemption argument is thus a red herring and should be dismissed as a rationale for denying birth control coverage in the ACA.

ECONOMIC IMPACT OF CONTRACEPTION

President Barack Obama announced on January 20, 2102 that under the ACA employers were required to include no-cost preventive services, including contraception, in their health care plans. Churches and houses of worship were exempt from the birth control requirement, but religiously affiliated employers such as hospitals, universities, and charities, were not. The president's announcement triggered a storm of protest, ranging from the U.S. Conference of Catholic Bishops to prominent Catholic liberals. Some critics accused President Obama of "waging a war on religion" and the basic tenets of religious liberty. Three weeks after the announcement, the president issued a revised regulation that included an accommodation for religiously affiliated employers. Under the new rule these employers would not be required to include contraceptive coverage in their health plans. Instead, their employees would get no-cost coverage directly from the insurance provider.

The new rule satisfied most critics but not all of them. Many conservative members of Congress, leaders on the religious right, and others increased their demands. They now argued that no employer, religiously affiliated or not, should have to include contraception—or any other health service they found morally objectionable—in their health plans. As conservatives demanded religious liberty for bosses, women's groups and others stood up for the religious liberty of employees who needed contraception to follow their conscience and live responsible lives. This liberty is rightly understood constitutionally as the "right to privacy." Broader economic issues such as jobs and what the lack of access to contraception implied were sidetracked for arguments about reproduction, religion, and women's sexuality in general.

When specific economic issues related to contraception did break through, however, they tended to focus on the cost of contraception, and the fact that millions of women struggle to pay for it. While contraception's price tag is certainly an issue, missing from the debate was the broader picture connecting family planning with women's economic circumstances.

Then on February 10, 2012, President Barack Obama announced the revamp of his contraception policy requiring religious institutions to fully pay for birth control in the new Obamacare legislation. The decision to have a child, or not, implies an expense that significantly impacts a family and their finances for an indefinite period of time. In addition to general costs to support a child, other related expenses can include health insurance, maternity or paternity leave, whether paid or unpaid, costs related to training and education. Time off from work if the child is sick, child care cost, transportation expenses, and most basic of all: can a woman afford the contraception she needs in order to plan her family. Women cannot responsibly plan their families or their careers without access to affordable contraception. And related to this is affordable housing, health care, and a living wage salary are also key to their economic security and family stability.

Contraception is an economic issue, not simply because of the cost of contraception, but because family planning allows women to control the timing of when they will decide to have children, as self-determining, autonomous persons. This is intrinsically related to Brandeis' view that as autonomous individuals, matters of intimacy and privacy for individuals are best left to the individual to decide. The withholding of contraception within health care access deprives the person of one of the integral elements of health care access and at the same time could potentially jeopardize the economic well-being of the woman and her family. Access to contraception is not only an issue related to privacy, but also related to economic justice. In fact women now make up half of the nation's workforce while 60% of women are breadwinners for their family, in large part because of greater access to contraception. A recent study showed that birth control played a critical role in reducing the gender pay gap because of the investments it allowed women to

make in their education and careers (WHO/UNFPA, 2009; Ministerial Declaration of the Conference of Ministers of Gender Equity, 2005).

Because family planning enables women to plan their pregnancies, it also leads to healthier mothers and babies. As a result, it reduces costs to individuals and families, to the health care system, and to society. Suffice it to say, a woman's economic circumstances can strongly influence when and how she chooses to have children and therefore when and how she needs to use contraception. For instance, a woman whose job provides no paid family leave might not be able to afford time off from her job to bond with her newborn and to recover from childbirth. The lack of contraception further complicates all of this (Guttmacher Institute, 2008).

ACCESS TO CONTRACEPTIVES AND ECONOMIC JUSTICE IN THE EUROPEAN UNION

Countries belonging to the European Union (EU) are dedicated to the realization of gender equality at every level, whether in public or private life. Critical to the success of this campaign is access to contraceptives. The reproductive sovereignty of women, and subsequently their ability to determine when to have pregnancies – and how many – is vital to their internal capacities for self-determination and full members of their individual societies.

By ensuring access to forms of contraception, the EU recognizes it will not only realize complete inclusion of women in the different spheres of life, but also it will translate into economic and social benefits, not the least of which are healthy, productive, and full lives for women in the EU. The strengthened commitment to gender equality in the EU stems from the Treaty of Amsterdam (which amended the Treaty of the European Union). In addition to this policy, the European Community Treaty (ECT) acknowledges that gender equality requires elevating living standards in quality of life. This obligates the European Community (EC) to abolish inequalities and to

espouse equality between the sexes, especially on behalf of women and reproductive rights.

Concerning access to contraceptives, the Ministers of Gender Equality in EU Member States recognize the right of women to fully enjoy sexual and reproductive health (and rights). They recognize this as fundamental to lasting and fully-fledged progress in gender equality. The European Parliament has weighed in on this, issuing a resolution on women's sexual/reproductive health (and rights), calling for increased access to contraception. In particular, the European Parliament recommends that Member States engender public policy at the national level regarding sexual/reproductive health and rights. In conjunction with "plural civil society organizations," Member States should provide all-encompassing information regarding family planning methods that are safe, responsible, and effective. This will require that states ensure access to every form of high quality contraceptive methods. Finally, states need to ensure that impoverished people also have improved access to reproductive and sexual health services, especially in terms of contraceptives options (WHO/UNFPA, 2009).

EU Member States have, on account of the foregoing goals, a duty to cease discrimination as well as to advocate gender equality and mainstream this equality in their individual state legislation and policy. Ultimately, by providing equal and effective access to contraception, states will guarantee this EU commitment. Access to affordable, quality contraceptives have a direct impact on women's lives. In fact, modern contraception prevents 215,000 thousand pregnancy-related deaths – not to mention 2.7 million infant deaths – each year. This amounts to, in its finality, a savings of 60 million years of healthy human life. Contraceptives empower women and enable them to plan their families while allowing them to avoid the negative impacts on their health that unsafe abortions and unwanted pregnancies cause. On a global scale roughly 25% of pregnancies are unintended; this puts women at risk a potential economic distress. More and more, studies according to the UNFPA show that properly planned pregnancies/births lead to healthier pregnancies/births and reduce maternal mortality rates. There is also a correlation between increases in contraceptives usage and

decreases in abortions. The UNFPA observes that young and poor women especially suffer from the aforementioned rates in mortality and abortion because their access to contraception is limited most.

Contraception also helps prevent maternal morbidity, which can stress families, devastate women, and is frequent and often underreported. There are at least 20 women who suffer long-lasting complications/illnesses/disabilities related to unintended/unwanted pregnancies and childbirths forever woman that dies from pregnancy or childbirth complications. Unsafe abortions are a leading factor in complications that add to maternal morbidity; one in four women are hospitalized (or admitted to hospitals) after experiencing unsafe abortions. Because access to contraceptives is a good strategy to help women escape unwanted pregnancies, involved complications from pregnancy, childbirth, and unsafe abortions. Empower individuals with the ability to choose how many children to have also empowers them to be able to provide proper nutrition, housing, care and education, which impacts families in healthy ways. In decreasing maternal mortality and morbidity, contraception also helps lessen economic and psychological impacts wrought on families by maternal death or chronic illness. The secondary health-related benefits that pass on to children and families is a positive side-effect of contraception, which firstly promotes women's and girl's health.

The impacts of contraceptives and the increases in female autonomy and social well-being is also important for society to progress. Studies demonstrate that contraceptives, in avoiding unintended pregnancies, can elevate women's status and increase their capacity for decision-making within the home. Family planning also boosts female self-esteem and quality of life, educational access, employment opportunities, and income-generation. Contraception use can improve female access to education because unintended or unwanted pregnancies often force women to quit their studies. The inability to fulfill academic potential has an unmistakable impact on the ability of women to perform a complete social, political, and economic role within their communities. This also has a direct link to poverty (Sonfield, Hastedt, Kavanaugh, and Anderson, 2013).

The effects of education are multigenerational. Educated women will more likely have educated children, especially daughters. Furthermore, studies show that improved access to education, coupled with the use of contraceptives, makes women more active in the workforce, thus enhancing their earning power, their economic security and the well-being of their families. By ensuring access to contraception and services for family planning, governments advance human development and economic growth. Family planning is crucial to ensuring health and education benefits for women and their children. It contributes to an increased productivity and economic security at household and societal levels. Preventing unwanted births and reducing maternal and infant mortality and morbidity also reduces burdens on health care systems. Thus subsidizing reproductive health services, including contraceptives, allows governments to ensure health in a strategic fashion and to better, more effectively, allocate state funds and promote social justice (Sunstein, 2006; 1997).

CONCLUSION

Over two decades ago, Republicans and Democrats constructed a bill designed to provide support for Americans whose religious beliefs conflicted with the laws of this country. This law, RFRA 1993, states that a person may be exempt from laws that “substantially burden” the free exercise of religion. Only in certain cases can the government compel compliance if the law furthers a “compelling government interest” and is the least restrictive means” of furthering that interest. This law was passed in response to a Supreme Court ruling that the First Amendment did not protect two members of a Native American Church who were fired from their employment for using peyote, an illegal hallucinogen in a religious ritual. In signing the bill at the time President Clinton argued that the principle that government should be held to the highest levels of proof prior to interfering with a person’s free exercise of religion. The consensus that Congress came to, however, has fallen apart to the point that some former supporters of the law now believe it should be repealed while others propose amending it to make it

clear that the law cannot be used to discriminate against others. This is particularly puzzling since the support for RFRA passed with a huge majority of support in Congress, 97-3 in the Senate and no recorded dissent in the House.

One factor is the overly broad manner in which the Supreme Court interpreted RFRA in its 2014 *Hobby Lobby* decision. In a 5-4 vote, the justices ruled that a family owned for-profit business was a “person” and under RFRA could use the law to object to including contraceptives for female employees as part of its company health insurance despite the fact that such coverage is mandated under the Affordable Care Act. Justices who dissented from that decision also raised the possibility that RFRA might be used to justify discrimination, despite the insistence of Justice Samuel Alito, author of the majority opinion, that racial discrimination could not be “cloaked” as a justification for religious practice.

The second factor that has undermined RFRA has nothing to do with a Supreme Court decision, but rather, the reaction to one. After the court ruled last year that the Constitution required same-sex couples to be given marriage licenses, legislators in various states sought to enact state versions of RFRA so that merchants with religious objections to gay and lesbian marriage could seek to be excused from providing services to same-sex couples. Specifically this involves a baker in Oregon who believed baking a wedding cake for two men would violate his religious rights. Some progressives who had previously defended protections for religious beliefs developed second thoughts when it seemed possible that religious freedom laws could be used as a legal crow bar against gays and lesbians.

The essential point in this matter is that those who seek to amend RFRA insist that Congress should make it abundantly clear that the law cannot be used to justify discrimination, including discrimination on the basis of sexual orientation or identity. Congress also should rectify the gross legal error the SCOTUS committed in the *Hobby Lobby* case when it ruled that for-profit corporations are “persons” under RFRA. To date, RFRA fails this test and it places in jeopardy the health and economic stability of women since contraceptives can be withheld as benefits from employees who are female. The

problem transcends potential discrimination on the basis of race, gender, gender identity, religion or even politics. It is a problem of economic justice and fairness for women and their reproductive rights.

Acronyms

ACA	Patient Protection and Affordable Care Act (2010)
ACLU	American Civil Liberties Union
AHCA	American Health Care Association
EC	European Community
ECT	European Community Treaty
EU	European Union
NGOs	Non-Governmental Organizations
RFRA	Religious Freedom and Restoration Act (1993)
RLUIPA	Religious Land Use and Institutionalized Persons Act (2000)
SCOTUS	Supreme Court of the United States
UNFPA	United Nations Population Fund
US	United States
USDHH	United States Department of Health and Human Services
WHO	World Health Organization

NOTES

1. The prior lawsuit was filed under *Sebelius v. Hobby Lobby* prior to Secretary Sebelius stepping down as head of the USDHHS.
2. RFRA prohibits the government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability as argued by Justice Samuel Alito in *Burwell v. Hobby Lobby*.

3. Also see *Conestoga Wood Specialties Corp. v. Burwell*, June 30, 2014 for a similar ruling.
4. See Jay Carney, White House Press Secretary, Obama Administration, www.articles.baltimoresun.com, Nov. 26, 2013.
5. This was the position argued for the majority by Justice Samuel Alito.
6. Letter from Roscoe Pound to William Chilton (1916), quoted in A. Mason, *Brandeis: A Free Man's Life*, 70 (1956). See Dorothy J. Glancy, "The Invention of the Right to Privacy," for a counter position to Brandeis's privacy concept.
7. *Olmstead v. United States*, 277 U.S. 438, was a decision of the Supreme Court of the United States, in which the Court reviewed whether the use of wiretapped private telephone conversations, obtained by federal agents without judicial approval and subsequently used as evidence, constituted a violation of the defendant's rights provided by the Fourth and Fifth Amendments. In a 5-4 decision, the Court held that neither the Fourth Amendment nor the Fifth Amendment rights of the defendant were violated. This decision was later overturned by *Katz v. United States* in 1967.
8. In the landmark case of *Roe v. Wade*, 1973, one of the most controversial and politically significant cases in SCOTUS history, the Court wrote that the decision to terminate a pregnancy, or not, is based on this right to privacy. Other legal cases such as those dealing with a state ban on the dissemination of birth control information, and an individual's "body," not just her "personality," as part of her right to privacy, all derive from Brandeis's concept of privacy. Thus Brandeis's formulation of the concept of legal privacy stands as one of the most significant contributions to legal theory.
9. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4(5), December 15, 1890, and Brandeis's dissent in *Olmstead v. United States*, 277 U.S. 438 (1928).

10. See *History of Basic Income*, Basic Income Earth Network (BIEN), www.basicincome.org, October 15, 2016. Political and economic theorists from diverse economic perspectives have called for a guaranteed national income and minimum subsistence level. These include Thomas Moore, Thomas Paine, Robert Theobald, Frances Fox-Piven, Richard Cloward, John Kenneth Galbraith in *The Economists Statement* of 1968 (1200 economists urged a National Guaranteed Income), M. L. King, Daniel Patrick Moynihan, Richard Nixon, F.A. Hayek, Charles Murray, and the Green Economics Institute.
11. See Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” and Brandeis’s dissent in *Olmstead v. United States*, 277 U.S. 438 (1928). Here Brandeis lays out the foundation for “privacy” as one of the cornerstones of freedom rooted in the U.S. Constitution. The privacy argument of course remains a controversial issue since Brandeis’s formulation is derived from a search and seizure case in *Olmstead*. Legal scholars such as Scalia and Bork argue that Brandeis’s privacy formulation is Constitutional overreach.
12. See Adler, *We Hold These Truths*; Alperovitz, *Unjust Deserts*. The point here is not to engage in a semantical discourse on privacy as freedom with respect to being “let alone” but rather as privacy in order to be “let alone” so one can achieve independence and self-determination to be “free from” the state if scarce resources for obtaining basic human needs are not available for access by those experiencing deprivation, relative or absolute in form. Freedom as “privacy” should be doing both and can be understood as noninterference in one’s life and the other as a moral claim on resources through “property rights” in the effort to be a free person ensuring privacy to be let alone and/or independent from the state.

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