

GRISWOLD v. CONNECTICUT (1965)

BACKGROUND

A Connecticut law made it illegal to “use any drug, medicinal article or instrument for the purpose of preventing conception”, and made it illegal to “assist, abet, counsel, cause, hire, or command another to commit any offense”.

Estelle Griswold, Exec. Director of the Planned Parenthood League of CT, and its medical director, C. Lee Buxton, opened a clinic to dispense contraceptives and were arrested, convicted and fined \$100 each under the statute in 1961.

Griswold and Buxton claimed that the CT law violated the right of married people to liberty under the DP Clause of the 14th Amendment.

The Federal Appeals Court upheld the conviction and fine, as did CT’s State Supreme Court (the Supreme Court of Errors). Griswold and Buxton appealed to the U.S. Supreme Court, which heard and decided the case in 1965.

A DIVIDED COURT

In a 7-2 decision, the Court struck down CT’s statute, holding that the DP Clause protects a fundamental right to marital “privacy” that includes the right to obtain and use contraceptives.

Opinion: Douglas (joined by Clark)

Concurring: Goldberg-Warren-Brennan/Harlan/White

Dissenting: Stewart, Black

DOUGLAS’S PROBLEMS

1. The Constitution does not explicitly (in so many words) protect a “right to marital privacy” that includes the right to decide whether or not to procreate.
2. A long tradition of judicial deference to the State’s use of its liberty-infringing police powers to protect public “morals”, including judicial acceptance of legislative proscription of consensual activities related to sex and marriage: incl. homosexual conduct, adultery, fornication, and incest.

DOUGLAS'S OPINION

Douglas did not say anything significant about the second issue. The bulk of his opinion concerns the first, namely where to find the right to marital privacy in the Constitution.

He was silent on the question of what test to apply to determine whether CT's justification for infringing the right was sufficiently persuasive. The concurrences were not.

DOUGLAS'S ARGUMENT

Some of the rights that are explicitly protected in the Bill of Rights "include" other "peripheral" rights that are not explicitly protected, in the sense that "without those peripheral rights the specific rights would be less secure". In this sense, these amendments have "penumbras, formed by emanations...that help give them life and substance".

EXAMPLES

The right to freedom of the press "includes" the right to distribute, receive and read (not just the right to print).

The right to freedom of speech "includes" the right to freedom to think, inquire and teach, as well as the right to freedom of association (not just the right to utter).

DOUGLAS'S ARGUMENT

Similarly, there is a "zone of privacy" created by the 1st, 3rd, 4th, and 5th amendments within which the state is powerless to intrude (in the absence of an overriding justification).

1st Am: Right against the State's forcing me to reveal my friends/associates protects my privacy.

3rd Am: Right against the State's quartering soldiers in my house in time of peace protects my privacy.

4th Am: Right against unreasonable searches protects my privacy.

5th Am: Right against compelled self-incrimination at trial protects my privacy.

The "zone of privacy" protected against government intrusion includes the "marital bedroom".

So, the CT statute banning the use of contraceptives by consenting adults in the “marital bedroom” infringes a right to marital privacy that lies within the penumbras of four separate constitutional amendments.

DOUGLAS AND THE NINTH AMENDMENT

Responding to the worry that the recognition of implicitly protected constitutional rights is unjustified (perhaps on Plain Meaning or Specific Intent grounds), Douglas pointed to the Ninth Amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”.

GOLDBERG’S CONCURRENCE

Largely agreeing with Douglas on the first issue, Goldberg, Warren and Brennan (and also, separately, Harlan) discussed the second issue raised by *Griswold*. They reasoned that the right to marital privacy is fundamental (see *Palko*), and so is subject to Strict Scrutiny.

Purpose of CT law: to discourage promiscuous or illicit sexual relationships, whether premarital (fornication) or extramarital (adultery).

CT’s end may be compelling, but in any event the law sweeps unnecessarily broadly (why not simply make fornication and adultery illegal?) and isn’t even so much as rational as a means to achieving its stated purpose:

What reasons are there to think that a married couple’s access to contraceptives will make one or both spouses more likely to commit adultery? And how does restricting married couples’ access to contraceptives discourage sex outside marriage?

STEWART’S DISSENT

Stewart could “find no such general right to privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court”.

[Think about the Douglas/Stewart debate as an instance of the debate between the Moral Theory theorists and the Plain Meaning theorists of constitutional interpretation.]

So, Stewart concluded that the most that could be said about the CT law was that it was “uncommonly silly”, “unwise”, and “asinine”. But the Constitution does not proscribe the enactment of unwise laws, and the CT law is therefore constitutionally acceptable.