

Bruce Ackerman - The Possibility of Interpretation (Griswold updated)

In the "*Possibility of Interpretation*", Bruce Ackerman investigates the Brown and Griswold cases, rejecting the hypothesis that they represented examples of constitutional politics (i.e. that the Justices intended to impose their own moral vision while lacking a legitimate interpretative approach to the text of the Constitution) and advancing the argument that the two cases stand as a "continuation of the project of synthetic interpretation begun in the aftermath of the Civil War in the Slaughterhouse Cases and redirected in New Deal opinions like *Carolene Products*". (p. 132).

Reasons for rejecting the political interpretation:

- The decisions did not come at a time where there was substantial popular mobilization for change; on the contrary, the period when the decisions were enacted was characterized by moderate political engagement: "after a generation of extraordinary involvement in public life, precipitated by economic crisis and world war, the American people were returning to more normal levels of political engagement". (p. 134)
- The *post hoc* popular support to end segregation does not imply the decision was political:
 1. Alexander Bickel's efficacy argument: the court lacks the capacity to ensure eventual public consent.
 2. Inconsistency with the principles of dualist democracy: "not the special province of judges to lead the People onward and upward to new and higher values. This is the task of citizens [...]". (p. 139).

Reasoning in support for the interpretative character of the opinions:

- The enduring popular support for an activist government throughout the New Deal era constitutes a third stage of constitutional law-making:
 1. Unlike the Founding and the Reconstruction, this change is implicit. However, since the Founding and the Reconstruction were procedurally irregular in their own right, the legitimacy of each of these periods of constitutional reform is to be found in popular support and mobilization (the method of interpretation here is popular constitutionalism).
 2. If before the New Deal the paradigmatic reading of the constitution limited congressional power and protected liberty of contract, after 1937 the government is awarded substantial powers to regulate. This is because government comes to be recognized as an "active contributor to the process by which groups made their 'choices' in American society". (p147).
- Given the new role of the government in society, public schools gain a new status, as a legitimate instrument for the state to shape societal "choices", including those regarding the meaning of social segregation. Thus, according to Ackerman, "within the new activist order, the schoolchild's sense of racial inferiority has become a public responsibility, not a private choice". (p. 150).

GRISWOLD

Griswold is portrayed as a representative of the modern prophetic approach of the Supreme Court

The Warren court can be seen to go against Brown, by recognizing a constitutional right to privacy, while Brown safeguarded an expansive role for the state in fighting racial discrimination. Ackerman argues Brown and Griswold are complementary not contradictory. In Griswold the Court attempts a synthesis of "the Founding's principle of individual freedom and the New Deal's affirmation of activist government." (p. 152). Ackerman's thesis: "Griswold is best understood as a critical stage in this process of Brown-like detachment from the abandoned premises of the middle republic." (p. 152).

Fundamental difference from Brown: there is no equivalent of Plessy in regards to birth control; the court had not approached this issue during the middle republic. The Connecticut statute could have still been repealed by the Supreme Court before the New Deal era. But it is likely that the arguments would have emphasized Lochner's affirmation of freedom of contract. In 1965, Griswold's lawyers argued for a distinction between matters of economic regulation and "rights of fundamental individual and personal character".

This is also the line followed by Justice Douglas in his opinion. While emphasizing the special role of marriage in society, Douglas rejects the interpretation of the Bill of Rights as a disjoint set of rules. Rather, he seeks to defend the Founding values that informed those rules. Ackerman argues this is a "brilliant interpretative proposal" (p. 159), because it allows for a meaningful way of preserving the Founding's affirmation of liberty in the context of the activist welfare state. (but isn't this a value judgment rather than a valid argument for constitutional interpretation?).

Ackerman argues the two dissenters in Griswold favor "almost plenary power" for the welfare state, in all areas of life. Thus, they solve the synthesis challenge presented by the New Deal in a completely different way from Douglas. The concurring opinions, on the other hand, avoid tackling the synthesis dilemma seriously, and are limited to "more open-ended kinds of inquiry in which the Court roams broadly to elaborate the substance of constitutional value". (p. 157).