

Borks' View of Griswold

Bork on Griswold

J. Douglas (delivering the opinion of the court) interprets many amendments to have textual rights with penumbras of privacy. Bork disagrees on two points:

- i. a general right to privacy is not found anywhere
- ii. defining that right to privacy is not well-defined by Douglas or anyone else

The standard Douglas requires to restrict freedom is "substantive due process," which Bork says is ill-defined. It means that a court must decide in every case what is protected by the right to privacy and what is not to be protected.

Equal Protection has two possible meanings: formal equality, which requires that the government not discriminate. However, isn't the function of the law primarily to discriminate (i.e. between minors and adults)? The courts actually need to pick and choose which criteria may be used for discrimination and which criteria may not be used. Vague references to 'fairness' or 'fundamental' rights are needed to achieve this.

Bork cites Wechsler's opinion on Brown: "If the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant." If the freedom of association is bilateral (includes the freedom to not associate), then "is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail."

Bork argues that argument is not productive for Brown or for Griswold. Instead, some moral code must be applied to reach a sound conclusion. The 14th amendment was designed to enforce black equality against state discrimination. This amendment does not address the issue of private discrimination. Since Griswold turns on the right of the government to discriminate against people who want to use contraception. Since the 14th A. was not written with any concern for reproductive rights, it should not be used to strike down any sort of discrimination simply because that discrimination is taken to violate some idea of fairness.