

KEY IDEAS

Explicitly guaranteed rights: rights that are explicitly written into the Constitution (e.g. right to due process explicitly written in the Fourteenth Amendment).

Penumbral rights: rights that are derived by implication from rights that are explicitly guaranteed by the Constitution (e.g. right for married couples to use contraceptives derived by implication from other explicitly guaranteed rights).

Purposivism: an approach to interpreting the Constitution that emphasizes the broad purpose of rights guaranteed in the Constitution, using the text, precedent, and relevant moral and political principles to discern that purpose.

Originalism: an approach to interpreting the Constitution that emphasizes either (a) how the legislation or statute was understood by reasonable people when it was ratified, or (b) how the writers of the constitution intended it.

DISCUSSION QUESTIONS

1. What justification does Douglas provide in *Griswold* for moving from the rights explicitly guaranteed by Amendments 1, 3, 4, 5, and 9 to a penumbral right to privacy? Do you find Douglas' purposivism convincing in this case?
 - 1st Amendment: Freedom of speech, press, assembly
 - 3rd Amendment: No forced quartering of soldiers during peacetime
 - 4th Amendment: No unreasonable searches and seizures
 - 5th Amendment: No forced self-incrimination
 - 9th Amendment: Enumerated rights don't preclude others being retained by the people.
2. Catherine MacKinnon (1989) offers a feminist critique of privacy by pointing out that appeals to privacy of the home have been used to defend the exemption of marital rape from sexual assault laws, and to discourage state interference with domestic violence and child abuse. MacKinnon does not reject the importance of privacy entirely, but maintains that it can and has been used as a shield for abuse. How do you think a purposivist should respond?
3. Purposivism is deployed as a defense of a right to privacy, and originalism (seems to) be deployed as a critique of a right to privacy. However, both purposivists and originalists are very concerned with protecting citizens' liberties. Which approach do you prefer?