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Essay

***1089** COMFORTABLY PENUMBRAL

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Introduction

The emergence of a working conservative majority on the Supreme Court during the last five years has produced a number of interesting developments. Two are especially notable. The first is the apparent victory of conservative judges and scholars who stressed the primacy of text and history in constitutional interpretation. [FN1] The second is the subject of this Essay: the ***1090** Court's willingness to supplement text, precedent, and history with inferences derived from related constitutional provisions, the overall structure of the Constitution, and the principles that animated its framing. [FN2]

The 1995-96 and 1996-97 Terms produced several decisions that illustrated the extent to which the "conservative" Rehnquist Court has adopted interpretive methodologies that, ten or twenty years ago, would have been anathema to self-respecting "strict constructionists." In short, conservatives on the Court have embraced what has been termed "penumbral reasoning," [FN3] of the sort employed in Griswold v. Connecticut. [FN4] The "liberal" members of the Court and many commentators, meanwhile, have decried this trend, and are now posturing as defenders of the Constitution against "activist" attempts at its rewriting. [FN5]

We, however, come not to bury penumbral reasoning, but to praise it. This Essay argues that neither conservatives nor liberals should characterize penumbral reasoning as a less legitimate method of constitutional explication than originalism, textualism, strict constructionism, or living constitutionalism. In many ways, penumbral reasoning, conscientiously employed, combines the best characteristics of these methods without suffering the defects that dogmatic adherence to one school of constitutional interpretation often ***1091** entails. To confuse penumbral reasoning with judicial activism is thus a mistake or, more often, politically motivated sloganeering. [FN6]

This Essay revisits the penumbral reasoning model sketched in an earlier article, [FN7] and in particular, the predictions made then about its prospects for future use by the Court. Part I discusses the historical origins of penumbral reasoning. Then, taking examples from the 1995-96 and 1996-97 Terms, Part II demonstrates the extent to which the conservative majority has embraced the approach that conservative commentators, like Robert Bork, had previously derided. [FN8] In particular, Part II addresses four major areas in which the Court has eagerly relied on penumbral reasoning: sovereign immunity, federalism, separation of powers, and the dormant Commerce Clause. Part II also examines the most prominent example of conservative unwillingness to rely on penumbral reasoning: Romer v. Evans. [FN9] In doing so, the Essay evaluates some of the strengths and weaknesses of penumbral reasoning as well as the prospects for the Court's continued use of this methodology.

Part III concludes that although enthusiasm for penumbral reasoning seems somewhat outcome-driven, the method itself is a sound tool for interpreting the Constitution and is sometimes superior to other methods of interpretation, like Borkian originalism. Moreover, penumbral reasoning provides a corrective to the

exceedingly narrow "clause-bound" focus of past Supreme Courts. Additionally, penumbral reasoning can elevate constitutional interpretation above what Professor Charles Black, an eloquent advocate of penumbral reasoning and reasoning from structure, sardonically characterized as "Humpty-Dumpty textual manipulation." [FN10] Now that penumbral reasoning has largely sloughed off its "liberal" connotations, proponents and opponents of its outcomes should focus instead on penumbral reasoning's use, that they can more credibly point out instances of its abuse.

***1092** I. Penumbral Reasoning: Past

Simply put, penumbral reasoning involves "reasoning-by-interpolation," [FN11] drawing logical inferences by looking at relevant parts of the Constitution as a whole and their relationship to one another. In most judges' and scholars' minds, the premier contemporary example of penumbral reasoning is Griswold. [FN12] In Griswold, Justice Douglas looked at various provisions of the Bill of Rights, including those that protect assembly, freedom from self-incrimination, and the right not to have troops quartered in one's home. From his survey, he inferred that there was a common thread throughout that government could not intrude into the privacy of individuals absent fairly compelling circumstances. [FN13]

As Justice Black's dissent made clear, there is nothing explicit about privacy in the text of the Bill of Rights. [FN14] Justice Black's criticisms, however, were the result of his not being able to see the forest for the leaves. Black had a clause-bound vision of liberty in which government power was limited only by those specific clauses that prohibited it from acting. [FN15] Douglas's method, in contrast, was closer to that of the Framers': loath to ascribe to a government unlimited power at the expense of individual liberty. [FN16] Moreover, Douglas's method would have been readily recognizable to those of the Founding Era as well. [FN17]

Griswold, however, is neither the alpha nor the omega of penumbral reasoning. Consider briefly Justice Marshall's opinion in McCulloch v. Maryland, ***1093**[FN18] in many ways the quintessential example of penumbral reasoning. [FN19] The issues in McCulloch echo today in the cases discussed below. [FN20] Marshall, reasoning from the text and structure of the Constitution, and supplementing his citations to specific constitutional provisions with reference to overarching principles that bind--and illuminate-- both text and structure, answered both questions presented: (1) whether Congress had the power to incorporate a bank; and (2) whether the state of Maryland could exercise its concurrent power to tax an instrumentality of the federal government. Though the literal text of the Constitution provided no definitive answer to either question, [FN21] Marshall formulated a persuasive answer based on the whole structure of the Constitution, its text, the interrelatedness of its provisions, and constitutional "first principles." His approach in McCulloch is embodied in his oft-misquoted reminder that "it is a constitution we are expounding." [FN22]

In answering the first question--whether the federal government could charter a bank--Marshall rejected

the characterization of the Necessary and Proper Clause [FN23] as a limitation on the power of Congress. He noted its inclusion in the section of the Constitution that granted power to Congress, and not in a subsequent section that restricted Congress's power. [FN24] Marshall noted that as an additional grant of power, "necessary" could not thus mean "absolutely necessary." [FN25] In addition, he cited for the proposition that the Congress was, within its enumerated powers, supreme, the language of the Supremacy Clause, [FN26] which emphasized both the preeminence of the Constitution ***1094** and announced its authoritativeness as an act of a National People. [FN27] Moreover, the text of the Constitution and the availability of judicial review served to prevent the clause from being construed as an endless grant of power to the Congress. [FN28] After all, Congress could only exercise its discretion in the choice of means by reference to an enumerated power. [FN29] Further, Marshall made it clear that the judiciary would be obligated to act should Congress exercise power ultra vires under the pretext of implied powers, or otherwise overstep the limits of its enumerated powers. [FN30]

Thus, Marshall defended his construction of the Necessary and Proper Clause against charges of potential abuse with reference to the explicit enumeration of Congress's powers "herein granted" and to the Tenth Amendment, [FN31] while holding that it allowed Congress flexibility within the parameters established by the Constitution itself. Marshall further offered examples of how his implied powers doctrine was reasonable in light of the specific ***1095** powers given to Congress, and what authority Congress would by necessity have to have in order to execute those powers in any meaningful sense. [FN32] He wrote that, "[t]he power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means." [FN33]

The second question required even less effort than the first. Though the states clearly possessed the concurrent power to tax, [FN34] they could not use that power to undermine the overarching federal principles embodied in the Constitution. [FN35] Specifically, they could not use the state power to tax a federal instrumentality, lest it be empowered to tax it out of existence. [FN36] To hold otherwise, Marshall believed, would endanger the whole constitutional enterprise. [FN37] Moreover, such a holding would contravene the words of the Supremacy Clause that made explicit the supreme authority of the Constitution. [FN38]

Although there was "no express provision" prohibiting Maryland from taxing the bank, Marshall wrote that "the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds." [FN39] Marshall acknowledged the strength of that argument and held that when the exercise of a concurrent power by a state conflicted with the legitimate goals of the federal government, the Constitution, its provisions, ***1096** and the principles animating its formation commanded that the states not exercise the power. [FN40] In light of Marshall's

logic, it would seem extremely literal to conclude that the absence of a textual provision on point would ever end a constitutional conversation, be it about the power of government, federalism, or the rights of individuals.

As has been duly noted, "advocacy scholarship" probably lies at the heart of conservative approval of McCulloch and excoriation of Griswold, because the methodologies used in both cases are virtually indistinguishable. [FN41] Perhaps general suspicion of penumbral reasoning also proceeds from what Professor Charles Black termed the "modern mode, and indeed the mode of choice in our legal style": textual explication, or less charitably, textual manipulation. [FN42] Nevertheless, penumbral reasoning has always played a consistent, if peripheral, role in the formulation of constitutional doctrine, albeit in many constitutional areas less sexy than "privacy." [FN43]

Moreover, conservatives no less than liberals have found it useful. [FN44] Their embrace of penumbral reasoning is evident in opinions written during the two most recent Supreme Court Terms. Not surprisingly, conservatives' resort to penumbral reasoning in high profile cases involving controversial issues like federalism has drawn fire from other members of the Court [FN45] and Court commentators, proving liberals are no less apt than conservatives to denounce cases based on their outcomes by invoking the "activism" shibboleth. [FN46] In Romer v. Evans, [FN47] however, members of the Court's conservative majority eager to embrace penumbral reasoning in other areas, expressly declined to join fellow conservative Anthony Kennedy in striking down Colorado's Amendment Two. [FN48] The caustic dissent by Justice Scalia--in which he was joined by Chief Justice Rehnquist and Justice Thomas--criticized the ***1097** majority for adopting the interpretive methodology that he later embraced in Printz v. United States. [FN49] Thus, it appears that some members of the Court embrace penumbral reasoning only when it produces outcomes of which they approve. As predicted in a past article, conservative members of the Court sometimes morph from "defenders of principle" into "unprincipled noninterpretivists." [FN50]

II. Penumbral Reasoning: Present

Principled or not, conservatives on the Court have found penumbral reasoning a useful tool to advance several favored causes in the last two Terms. Recent decisions in the areas of federalism and sovereign immunity indicate a majority that has begun to roll back some of the New Deal jurisprudence and is willing to rely extensively on penumbral reasoning to do so. Moreover, though not yet a majority view, Justices Scalia and Thomas recently have championed a theory of the dormant Commerce Clause that, if ever able to command a majority of the Court, could rewrite vast portions of constitutional law. It, too, relies largely on penumbral reasoning, as does the Court's entire body of "negative" Commerce Clause doctrine.

One caveat: in examining the following cases for evidence of penumbral reasoning, overt or covert, we imply neither that resort to penumbral reasoning made the Court's holding inevitable, nor that a Court's

particular opinion was a "good" application of penumbral reasoning. Nor do we suggest that we agree with all of the Court's decisions. These important considerations necessarily invite debate. This Essay, however, seeks only to provide a necessary foundation for that debate: recognition that the Court presently and properly engages in penumbral reasoning when it decides issues of constitutional law.

A. Sovereign Immunity

One of the more remarkable changes in the last two Terms has been the emergence of a strong reaffirmation of sovereign immunity principles that extend far beyond the strict text of the Eleventh Amendment. [FN51] In two recent cases, Chief Justice Rehnquist's earlier dissents [FN52] became the basis for a new ***1098** majority view. In Seminole Tribe v. Florida, [FN53] the Court, per Chief Justice Rehnquist, struck down a congressional statute that waived states' sovereign immunity under congressional authority to regulate "commerce with the Indian Tribes." [FN54] Rehnquist wrote:

> Although the text of the [Eleventh Amendment] would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." That presupposition, first observed over a century ago in [Hans v. Louisiana, 134 U.S. 1 (1890)], has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." . . . For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." [FN55]

Seminole Tribe overruled an earlier case, Pennsylvania v. Union Gas Co., [FN56] in which the plurality opinion authorized Congress to abrogate state sovereignty on the strength of the Interstate Commerce Clause. [FN57] Chief Justice Rehnquist wrote that the "plurality's rationale . . . deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in [Hans v. Louisiana]." [FN58] Union Gas had ignored not only that part of the Eleventh Amendment that, to Rehnquist, seemed "clear enough" that "state sovereign immunity limited the federal courts' jurisdiction under Article III," but also that part of the Court's jurisprudence that is neither clear nor present in the text of the Amendment. [FN59] "[O]ur decisions since Hans had been equally clear that the Eleventh Amendment reflects 'the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III.'" [FN60]

Moreover, the Rehnquist opinion quoted approvingly an earlier opinion written by Chief Justice Charles Evans Hughes clearly stating that the principles in Hans and the Court's Eleventh Amendment jurisprudence went beyond the mere text of the Amendment: [FN61]

> ***1099** Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III,

> or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a "surrender of this immunity in the plan of the convention." [FN62] The Chief Justice further bolstered the Court's sovereign immunity analysis with an appeal to extra-constitutional sources of authority such as the law of nations: "[Hans] found its roots not solely in the common law of England, but in the much more fundamental 'jurisprudence in all civilized nations.'" [FN63]

Lest anyone miss the point, the Court, in its most recent Term, reaffirmed its sovereign immunity jurisprudence summarized in Seminole Tribe. Writing for the majority in Idaho v. Coeur d'Alene, [FN64] Justice Kennedy admitted that a literal reading of the text of the Eleventh Amendment "could suggest that [[[it], like the grant of Article III, § 2 jurisdiction, is cast in terms of reach or competence, so the federal courts are altogether disqualified from hearing certain suits brought against a State." [FN65] However, he continued:

> This interpretation . . . has been neither our tradition, nor the accepted construction of the Amendment's text. Rather, a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it. The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction.
>
> The Court's recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment. To respect the broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and ***1100** exemplifying, we have extended a State's protection from suit to suits brought by the State's own citizens. [FN66]

Needless to say, there are many critics of the Court's sovereign immunity jurisprudence. Even if the Framers intended to keep some form of it in place, [FN67] it is certainly not apparent from either the Constitution or the text of the Eleventh Amendment, which speaks only to the ability of federal courts to hear suits in which a non-resident sues a state. [FN68] Moreover, as critics like Akhil Reed Amar point out, the concept of sovereign immunity is at odds with a system like ours, where the people, not an individual or even the government itself, are sovereign. [FN69] The goal here, however, is not to evaluate the substance of the Court's decisions--as many of commentators have already done [FN70]--but to illustrate the method the Court uses to reach those decisions: ***1101** penumbral reasoning.

B. Federalism

During the last two Terms, the Court has also actively policed the boundaries of power between the state

and federal governments. Specifically, the Court has worked to reinvigorate "Our Federalism" and to limit the degree of power that the federal government may constitutionally exercise over the states. The Court has accomplished this in part through the application of its sovereign immunity jurisprudence, [FN71] but also by limiting the scope of congressional power exercised under color of the Commerce Clause. [FN72] Finally, the Court has policed these boundaries through the application of penumbral reasoning. Its use guaranteed neither a "nationalist" nor a "states' rights" outcome: in one case the states benefited; in the other, the federal government was the beneficiary.

In U.S. Term Limits, Inc. v. Thornton, [FN73] the Court struck down an Arkansas referendum that imposed term limits on its officials elected to serve in Congress. Justice Stevens's majority opinion, as well as Justice Kennedy's concurrence in which Kennedy responded to Justice Thomas's provocative dissent, relied, among other things, on an interpretation of the Constitution that drew its authority from a constitutive act of a national people. [FN74] In contrast, the dissent characterized the Constitution's ratification as an act of a people in their capacity as citizens of sovereign states delegating authority from those states to the federal government. [FN75] In addition, the majority's opinion appealed to "basic principles of our democratic system": [FN76] the right to stand for office and the right of the people to elect who they wish to represent them. [FN77]

The majority explicitly rejected the argument that, absent a specific textual prohibition, states were free to add additional qualifications to the age, citizenship, and residency requirements present in the Constitution [FN78] because ***1102** such power was "reserved" to states and their citizens under the Tenth Amendment. [FN79] The Court stated:

> Petitioner's Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only "reserve" that which existed before. As Justice Story recognized, "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed." [FN80] Simply put, because the structure of the federal government was entirely new, and because there was no Congress of the sort created by the Constitution prior to its ratification, the states had no preexisting power regarding its representatives' qualifications to reserve.

Bolstering this historical analysis was the penumbral interplay among the sections of the Constitution that established the national government and provided for federal elections:

> For example, Art. I, § 5, cl. 1 provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." The text of the Constitution thus gives the representatives of all the people the final say in judging the qualifications of the representatives of any one State. . . .
>
> Two other sections of the Constitution further support our view of the Framer's vision. First, . . . the Constitution provides that the salaries of representatives should "be ascertained by Law, and paid out of the Treasury of the United States," Art I., § 6, rather than by individual States. . . . Second, the

> provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States . . . . This duty parallels the duty under Article II that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." Art. II, § 1, cl. 2. [FN81]

Taken together, the Court argued, the Constitution's text and structure-- informed by constitutional first principles regarding the nature of the Founding itself--refuted the dissent's assertion that the states could add ***1103** qualifications for its citizens seeking federal office, despite textual silence. [FN82] "In sum," it concluded, "the available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution . . . reveal the Framers' intent that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution." [FN83] It was the sort of inference drawn from the various textual provisions implementing the federal structure that would have made Professor Black--and John Marshall-- proud. [FN84]

Penumbral reasoning played an important role in Thornton, despite its rejection by the dissent. [FN85] It was even more successful in Printz v. United States [FN86]--in many ways the most penumbral decision of the last two Terms. Not surprisingly, critics of the Court conservatives have reserved their most intense criticism for Printz. In the most telling example, before reading his dissent from the bench, Justice John Paul Stevens "remarked spontaneously that Justice Scalia's opinion for the Court reminded him of Justice Douglas's opinion in the Griswold contraceptives case of 1965, which extrapolated a ***1104** right to privacy from the Constitution's 'penumbras' and 'emanations.'" [FN87]

Printz arose from the 1993 amendments to the Gun Control Act of 1968, [FN88] popularly known as the "Brady Bill." [FN89] Prior to the establishment of a nationwide network capable of performing an instant background check of persons wishing to purchase handguns, provisions of the Brady Bill required the chief law enforcement officer ("CLEO") in all states to perform these background checks to ascertain if the prospective purchaser had a criminal record, history of mental illness, or some other disqualifying factor that would prevent that person from purchasing a handgun. [FN90] In short, "the Brady Act purport [ed] to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." [FN91]

The Court, in an opinion by Justice Scalia, held that the statute unconstitutionally impressed state CLEOs into federal service, but admitted at the outset that "there is no constitutional text speaking to this precise question . . . ." [FN92] In finding this provision of the Brady Bill unconstitutional, the Court consulted "historical understanding and practice, . . . the structure of the Constitution, and . . . the jurisprudence of this Court." [FN93] For our purposes, we shall examine the Court's reliance on constitutional structure and the resulting penumbral inferences.

From the Constitution's structure, Scalia argued, one could discern "essential postulates" [FN94] that included a system of dual sovereignty consisting of both a federal system of discrete and enumerated powers [FN95] and a larger area of "[r]esidual state sovereignty." [FN96] The Court first observed that "[t]his separation of the two spheres is one of the Constitution's structural protections of liberty." [FN97] Scalia reasoned that the federalist system constructed by the Framers would suffer "if [the federal government] were able to impress into its service--and at no cost to itself-- the police officers of the 50 States," because the federal government would be able to increase its own power at the expense of the states. [FN98] Second, Scalia argued, the scheme in Printz transgressed another "essential postulate": the separation of power between ***1105** the three branches of the federal government. [FN99] He argued that the "Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control . . . ." [FN100] The Brady Bill thus potentially undermined the "vigor and accountability" of the executive branch. [FN101]

Finally, Scalia defended his method of arriving at the Court's decision, and took the dissenters to task for

> falsely presum[ing] that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions . . . and not only those, like the Tenth Amendment, that speak to the point explicitly. It is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications. [FN102]

Justice Stevens, the author of the majority opinion in Thornton that had relied in part upon a textual "basic principles of our democratic system" to strike down Arkansas' term limits law, [FN103] found the majority's arguments simply unpersuasive. In his dissent, Justice Stevens termed Scalia's argument "remarkably weak," resting as it did on a "'principle of state sovereignty' mentioned nowhere in the constitutional text." [FN104] Stevens wrote that there is "not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I." [FN105]

The dissent then took issue with the substance of Justice Scalia's penumbral inferences. First, in response to Scalia's invocation of enumerated powers, Stevens criticized the majority for not deferring sufficiently to Congress's interpretation of its implicit power in passing the Brady Bill. [FN106] Second, objecting to Scalia's citation of INS v. Chadha [FN107] in support of the nontextual "structural protection" provided by the separation of powers, Stevens wrote that unlike this case, Chadha

> ***1106** rested on the Constitution's express bicameralism and presentment requirements, . . . not on judicial inferences drawn from a silent text and a historical record that surely favors the congressional

understanding. Indeed, the majority's opinion consists almost entirely of arguments against the substantial evidence weighing in opposition to its view; the Court's ruling is strikingly lacking in affirmative support. Absent even a modicum of textual foundation for its judicially crafted constitutional rule, there should be a presumption that if the Framers had actually intended such a rule, at least one of them would have mentioned it. [FN108] Finally, he argued that the Framers' intent to preserve state sovereignty did not answer the question posed in Printz: whether Congress may require state employees to perform federal statutory obligations. [FN109]

It is difficult to square Justice Stevens's dissent with his majority opinion in Thornton, [FN110] except on grounds that the outcome in the latter was more acceptable to him than that in Printz. Stevens's dissent provides evidence for this conclusion. He argued that, taken to extremes, the majority's refashioned boundaries of "Our Federalism" "would undermine most of our post-New Deal Commerce Clause jurisprudence." [FN111] Yet precisely the mode of reasoning Stevens rejects in Printz, he adopts in a recent opinion on the dormant Commerce Clause. [FN112]

C. Separation of Powers

The Court relied at least in part on penumbral reasoning this Term in deciding Boerne v. Flores. [FN113] At issue was whether Congress, through its power to enforce the provisions of the Fourteenth Amendment through "appropriate legislation," [FN114] could pass the Religious Freedom Restoration Act of 1993 ("RFRA"). [FN115] Among other things, RFRA had the practical effect of overruling an earlier Supreme Court decision. [FN116] The Court struck down RFRA, in part relying on the principles it regarded as implicit in the ***1107** separation of powers doctrine. [FN117]

Justice Kennedy began the analytical portion of the opinion by quoting Marbury v. Madison: "The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" [FN118] Justice Kennedy's reliance on Marbury is certainly no coincidence. In fact, the reasoning of Boerne tracked that of Chief Justice Marshall.

In Marbury, before Chief Justice Marshall analyzed the question whether the Court had the power to nullify a law of Congress adjudged to be unconstitutional, he wrote that though the question was itself "deeply interesting," it was "not of an intricacy proportioned to its interest." [FN119] He proceeded to deduce from the right of the people to establish a supreme authority, [FN120] the power to separate and limit power in a written constitution, and the inability of the established branches to act outside the limits of that document. [FN121] "It is a proposition too plain to be contested," Marshall wrote, "that the constitution controls any legislative act repugnant to it" and that a legislature may not "alter the constitution by an ordinary act." [FN122] He then concluded that it was the judiciary's duty to resolve any alleged

conflicts between the legislature and the Constitution. [FN123] To hold otherwise, or to say that the judiciary must defer to Congress, "would subvert the very foundation of all written constitutions." [FN124] Moreover, "[i]t would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits." [FN125]

Like Marshall, Justice Kennedy quickly apprehended the consequences of a literal interpretation of Section 5, [FN126] which arguably could be interpreted to grant Congress the authority to determine by normal legislation the substantive content of the Fourteenth Amendment--a position the Court nearly ***1108** adopted in the 1960s. [FN127] Kennedy wrote:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and like other acts, . . . alterable when the legislature shall please to alter it." Marbury v. Madison, 1 Cranch, at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power . . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V. [FN128]

Such a holding would diminish the Court's power, and would subvert the ideal of a written constitution. In addition, as Kennedy noted, such a broad reading of Section 5 would provide a back door for Congress to amend the Constitution outside the Article V process. Kennedy's logic was sound--even the dissenters agreed with his analysis of Congress's Section 5 power--but the text does not specifically command it. Kennedy's conclusions rely on the very nature of a written constitution and the separation of powers doctrine inferred from other provisions and suggested by the Constitution's structure. These principles are implicit, not explicit. They are, in fact, penumbral.

D. Dormant Commerce Clause

A final example from this Term in which members of the Court endorsed penumbral reasoning arose in a case involving the "dormant Commerce Clause." [FN129] Though the Commerce Clause is an express grant of power to ***1109** Congress, [FN130] the Court long has recognized an implied limitation on the power of the states to regulate commerce. [FN131] In various decisions throughout the years, the Court has linked much of its dormant Commerce Clause jurisprudence to its assertion that one of the animating principles of the Constitution is economic union, which would be frustrated if states could enact discriminatory or protectionist legislation aimed at out-of-state commerce. [FN132] The dormant Commerce Clause, however, has proved amenable to expansion beyond the antidiscrimination principle. This Term, the Court reaffirmed this penumbral graybeard, and even expanded it somewhat in Camps Newfound/Owatonna, Inc. v. Town of Harrison. [FN133]

Maine passed a statute creating a property tax exemption for "'benevolent and charitable institutions incorporated' in the State." [FN134] Organizations that are "in fact conducted or operated principally for the benefit of persons who are not residents of Maine," however, enjoy only a limited version of the property tax exemption "and then only if the weekly charge for services provided does not exceed $30 per person." [FN135]

The petitioner, which operated a camp whose campers came primarily from out of state, applied for a refund of property taxes, was told that it did not qualify for the exemption, and sued, challenging that the exemption violated***1110** the dormant Commerce Clause. [FN136] The town lost in the trial court, but the trial court's decision was reversed by the Supreme Judicial Court of Maine on the grounds that the exemption was really a "tax expenditure" and that the "exemption for charitable institutions [was] the equivalent of a purchase of their services." [FN137] The United States Supreme Court reversed the Maine high court, and struck down the exemption on the grounds that it offended the dormant Commerce Clause. [FN138]

Justice Stevens rejected attempts to characterize Maine's exemption as "an expenditure of government money designed to lessen its social service burden and to foster the societal benefits provided by charitable organizations," [FN139] and that its discrimination in favor of Maine residents was permissible as either a "legitimate discriminatory subsidy" [FN140] or as "a governmental 'purchase' of charitable services falling within the narrow exception to the dormant Commerce Clause for States in their role as 'market participants' . . . ." [FN141]

The Court gave short shrift to both the subsidy and the market participant arguments the town made. First, it refused to regard a tax exemption as the equivalent of an outright cash subsidy: "Although tax exemptions and subsidies serve similar ends, they differ in important and relevant respects, and our cases have recognized these distinctions." [FN142] The argument that the tax was permissible because the state was a "market participant" was dismissed by the Court. [FN143] Stevens and the majority proceeded to expand the dormant ***1111** Commerce Clause doctrine, holding that all discriminatory tax exemptions violated the dormant Commerce Clause--whether or not such exemptions were limited to not-for-profits.

At the beginning of the Court's opinion, Stevens offered an interesting defense of the dormant Commerce Clause doctrine. Citing Justice Johnson's concurring opinion in Gibbons v. Ogden, [FN144] Steven wrote:

> During the first years of our history as an independent confederation, the National Government lacked the power to regulate commerce among the States. Because each State was free to adopt measures fostering its own interests without regard to possible prejudice to nonresidents, . . . a "conflict of commercial regulations, destructive to the harmony of the States" ensued. . . . "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial

intercourse among the States free from all invidious and partial restraints."

We have subsequently endorsed Justice Johnson's appraisal of the central importance of federal control over interstate and foreign commerce and, more narrowly, his conclusion that the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power. [FN145]

Justice Stevens's defense, while not inconsistent with the historic rationale offered in defense of the dormant Commerce Clause doctrine, is also the same sort of penumbral reasoning for which he took Justice Scalia to task in Printz. [FN146] Justice Stevens's arguments that it is not the judiciary's place to enforce the Constitution's structural limitations, like federalism, could be deployed against his argument for a judicial role in policing state regulation of ***1112** commerce. [FN147] After all, implicit in Congress's power to regulate commerce among the states [FN148] is the power to override state laws it finds offensive.

Even Justice Scalia, who dissented in Camps Newfound, [FN149] and who has been a vociferous critic of the Court's dormant Commerce Clause jurisprudence, [FN150] has accepted the doctrine insofar as it prohibits states from facially discriminating against interstate commerce or enacting protectionist legislation designed to benefit local producers at the expense of out-of-state commercial enterprises. [FN151] Thus, although there is some historical evidence to support the Court's dormant Commerce Clause doctrine, [FN152] it is not in the text of the Constitution itself. In fact, an argument can be made that if the Framers intended to deprive the states of the power to regulate commerce, they would have done so explicitly. [FN153] Again, we are not taking the position ***1113** that either Justice Stevens or Justice Scalia is wrong to endorse the dormant Commerce Clause, which has been a part of Court doctrine for over a century. The point is that, once again the use of penumbral reasoning does not determine whether the result will be "liberal" or "conservative."

E. Romer v. Evans: Odd Man Out

While the 1995 and 1996 Terms often provided the unusual spectacle of the Court's conservatives embracing penumbral reasoning, and its liberals rejecting it largely in disputes over congressional power and state sovereignty, one case from the 1995 Term demonstrated that penumbral reasoning still could be employed, as students of Griswold became accustomed, in defense of individual rights. The case is Romer v. Evans. [FN154] Justice Kennedy, author of the majority opinion and most likely the deciding vote in the case, again showed himself willing to rely on structure and penumbral reasoning. In contrast, the more conservative Justice Scalia--joined by Chief Justice Rehnquist and Justice Thomas--ridiculed and disparaged Kennedy's resort to structure apparently because they found the outcome unpalatable. [FN155] Although Kennedy's decision was criticized as lacking citation to case law or legal text and as "conspicuously fail[ing] to articulate a principled justification" for its result, [FN156] it is a clear--and convincing--example of

penumbral reasoning. Viewed from this perspective, Kennedy's approach seems less like unprincipled usurpation and more like an articulation of inferences derived from a close reading of the Constitution and the Fourteenth Amendment.

Romer involved a challenge to the constitutionality of a Colorado amendment, popularly known as "Amendment Two," which forbade any state or local governmental entity from enacting any laws, ordinances, or regulations that prohibited discrimination against homosexuals on the basis of their sexual orientation. In rendering its decision, the Court affirmed the Colorado Supreme Court's grant of injunctive relief, but rejected the ground upon which it had relied: that Amendment Two infringed homosexuals' fundamental right to full participation in the political process. [FN157] Rather, in an ***1114** opinion influenced by an amicus curiae brief written by Laurence Tribe and signed by such constitutional law luminaries as Kathleen Sullivan, Gerald Gunther, and John Hart Ely, [FN158] the Supreme Court adopted the position that Amendment Two was a per se violation of the Equal Protection Clause of the Fourteenth Amendment. [FN159]

Kennedy's reasoning proceeded from the principles of the Fourteenth Amendment with which he began his opinion: "that the Constitution 'neither knows nor tolerates classes among citizens,'" [FN160] and that it is committed to "the law's neutrality where the rights of persons are at stake." [FN161] Justice Kennedy wrote that the Equal Protection Clause supports this principle and directed the Court's invalidation of Amendment Two. [FN162] Though the Court dutifully discussed rational basis review, it departed from this traditional model and instead embraced what has been called "rationality with teeth." The animating spirit of this view was best captured by the late Justice William Brennan who wrote that, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." [FN163]

Although critics were correct in observing that Kennedy's opinion lacked copious citation to precedent and discussion of original understanding, such focus missed the force of the opinion. A close reading of the Court's opinion shows that the majority avoided textual manipulation, and instead employed a structure-driven, common sense reasoning that was so simple that it almost escaped those of us reared on the exhaustive discussion of Court doctrine and the invocation of hydra-headed "balancing" tests that were a hallmark of the Burger Court. Justifying his return to first principles, Kennedy emphasized the unique nature of Amendment Two: "[i]t is not within our constitutional tradition to enact laws of this sort." [FN164] He then articulated the theoretical basis for striking down the Colorado amendment:

> Central both to the idea of the rule of law and to our own Constitution's ***1115** guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. . . . Respect for this principle explains why laws singling out a certain class of citizens

> for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. The guaranty of equal protection of the laws is a pledge of the protection of equal laws. [FN165]

Though Kennedy, like Chief Justice John Marshall, [FN166] eschewed citations that might have obscured the underlying principle, one can, in retrospect, cite constitutional provisions that support the principles on which the Court relied in its opinion. For example, in support of Kennedy's first principle, that "government and each of its parts remain open on impartial terms," [FN167] one need only look as far as Article I's requirement that House of Representatives elections occur every other year, [FN168] and the requirement that states hold elections for federal offices, [FN169] both of which provide individuals with access to the federal government. Recall, as well, the First Amendment's proscription against any congressional enactment "abridging . . . the right of the people . . . to petition the Government for a redress of grievances." [FN170] Further, Article IV's guarantee of a "[r] epublican [f]orm of [g]overnment" [FN171] arguably precludes state governmental policies that impose de jure discriminatory classifications on its citizens. [FN172]

Other provisions of the Constitution support Kennedy's observation that ***1116** "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare." [FN173] A glance at the Constitution reveals unqualified prohibitions against both congressional and state passage of ex post facto laws and bills of attainder. [FN174] Even the Contracts Clause reveals the Framers' concern that state legislatures interested in pleasing their debtor-constituents not single out unpopular creditors for unfair treatment. [FN175] These provisions give substance to the Federalist hope that the government would be of "laws, and not of men." [FN176] Read with these provisions in mind, the majority's principle of legal equality seems to track the Framers' vision. In fact, the Romer decision represented a particularly appropriate use of penumbral reasoning, given the unique nature of Amendment Two. The Colorado referendum highlights one shortcoming of a strict "originalist" or "literalist" interpretation of the Constitution. One will often search a text in vain for answers to questions the Framers never asked themselves. Although laws of the type Colorado attempted to enact would have been unknown to the Framers, the closest analogies to laws extant in the Framers' era were prohibited by the Constitution. [FN177]

Even more remarkable than the majority's embrace of penumbral reasoning, in which even Justice Stevens joined, was Justice Scalia's emphatic rejection of penumbral reasoning, [FN178] especially in light of his decision in Printz. In his Romer dissent, Scalia derided the majority's "heavy reliance upon principles of righteousness rather than judicial holdings," and stated that "[s]ince the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the ***1117** democratic adoption of provisions in state constitutions." [FN179] He characterized as "facially absurd" the

majority's proposition that laws enacted through the democratic process can be unconstitutional, [FN180] and concluded that the "opinion ha[d] no foundation in American constitutional law, and barely pretend[ed] to." [FN181] However, Scalia's overstated, and arguably overheated, [FN182] dissent was no improvement upon the majority opinion that he criticized.

As an example of penumbral reasoning, Romer is not as explicit as was Griswold; but a close reading of Kennedy's opinion clearly reveals that the majority reasoned from overarching constitutional inference. More interesting, in light of the cases from this most recent Term, is how outcome seemed to drive the degree to which the members of the Court embraced penumbral reasoning. Moreover, to the extent those dissenting Justices were dissatisfied with the outcomes generated by penumbral reasoning, they tended to attack the majority's interpretive method, seeking to tar it with the brush of illegitimacy. What should be apparent to those Justices, however, is that when they do so, they foul their own nest, leaving themselves open to charges of intellectual hypocrisy in future cases where penumbral reasoning proves useful, whether to achieve "liberal" results as in Romer or "conservative" results as in Printz. [FN183]

III. Penumbral Reasoning: Future

As more issues involving federalism and separation of powers dominate the Court's agenda, it will have more opportunities to employ penumbral ***1118** reasoning. Perhaps the increase in the Court's use of penumbral reasoning can help remove the taint that seems to have attached to its use since Griswold. Only by moving past the criticisms of penumbral reasoning as an illegitimate interpretive technique, which really mask dissatisfaction with particular outcomes, can its ultimate utility be analyzed. Viewed disinterestedly, penumbral reasoning has several virtues.

First, penumbral reasoning is perhaps less susceptible to abuse "because it ties the development of new principles to the overall structure and purposes of the Constitution . . . ." [FN184] At the very least, by forcing the Court to place its decisions in the context of the words and structure of the Constitution and to render decisions based on reasonable inferences derived therefrom, penumbral reasoning offers ordinary citizens a better opportunity to participate in a constitutional dialogue than when the Court declares that original intent or stare decisis mandates a particular outcome. Should one, after all, need a Ph.D. in history, or be a professor of constitutional law to evaluate the Court's decisions? We think not, and suggest that penumbral reasoning provides the Court a way to articulate a logical position without clumsy textual manipulation or "law office history." [FN185]

Second, because penumbral reasoning focuses on the text of the Constitution itself, and demands not only a close reading of its provisions and their relationship to one another, but also close attention to the Constitution as an enterprise, it is a useful educative tool, both for professionals and for the public. One of the unfortunate legacies of the Court's Carolene Products approach to the Constitution is that it seems to preclude any other method of interpretation than what John Hart Ely famously termed "clause bound

interpretivism." [FN186] While ostensibly a method of restraining the judiciary and ***1119** minimizing the countermajoritarian difficulty, divorcing specific clauses from the overall structure of the Constitution and requiring them to bear the constitutional weight asked of them by the Warren and Burger Courts made for some unconvincing Supreme Court opinions in the 1960s and 1970s. [FN187] Far from ensuring stability and legitimacy, this approach made constitutional law look like a parlor game--conservative scholars called for a return to "original intent," leftists responded with citations to Foucault, and the Great Interpretive Debate was on. Penumbral reasoning did not even get a fair hearing as the debate polarized around "strict constructionists" and "living Constitutionalists." [FN188]

Yet its constant reemergence in spite of ridicule suggests that penumbral reasoning plays a vital role. Penumbral reasoning can mediate between the need to root constitutional decisions in the text of the Constitution, and the frank realization that the Framers did not--and could not--provide answers to all of our interpretive questions. As when one concentrates too closely on one part of a television screen or on an Impressionist painting, the Constitution, too, can dissolve into incomprehensibility if one fails to take account of the larger picture.

Additionally, by taking such a broad view, penumbral reasoning can help clean up the "inkblot" problem posed by puzzling constitutional provisions, like the Ninth and Tenth Amendments, the Necessary and Proper Clause, and the Equal Protection Clause. Unclear on their own, these provisions make sense when read alongside related provisions. Similarly, penumbral reasoning is often the only way to vindicate principles that "everyone knows" informed the Constitution, but are nowhere mentioned explicitly: judicial review, federalism, separation of powers, and popular sovereignty, to name a few. In so doing, penumbral reasoning holds the promise of reintroducing a coherence and an integrity too long absent from constitutional doctrine. Regular use might allow for the reintroduction of moribund, but important, constitutional doctrines like the nondelegation principle, once thought essential to guarantee liberty through limited government, [FN189] or even the Guarantee Clause, [FN190] which has never done significant constitutional ***1120** work. [FN191]

Conclusion

We do not mean to say that penumbral reasoning is always the answer, or that it always will be used properly or responsibly. Such claims would reveal us to be either naive or poor students of constitutional law. Penumbral reasoning would not be proper in some cases. For example, when the Court interprets an express textual provision, a proper understanding of what the Framers thought it meant is an appropriate initial line of inquiry. Similarly, we recognize that penumbral reasoning can be used inappropriately. The same, however, is true of originalism. Moreover, unlike originalism, poor logic and erroneous inferences resulting from "bad" penumbral reasoning are more apparent than reliance on advocacy scholarship or dubious history might be to the laity.

Finally, and perhaps most importantly, the cases in the last two Terms have demonstrated that there is nothing inherently "liberal" or "conservative" about penumbral reasoning in terms of the results its use produces. The disappearance of such a false dichotomy is an important first step toward its acceptance, given all the hoopla generated by Robert Bork and other 1980's conservative critics of penumbral reasoning and the liberal reaction to recent Supreme Court opinions. We applaud the fact that both sides are apparently becoming more "comfortably penumbral" in their respective approaches to constitutional interpretation. Results aside, inasmuch as penumbral reasoning demands both a close reading of the Constitution's text, and a careful examination of its overall structure, it seems to us to be a conservative mode of constitutional explication, in the best sense of the term. We hope that, as penumbral reasoning becomes a more mainstream interpretive tool, members of the Court and commentators will stop trying to characterize its use as the last refuge of an activist, and instead will begin to address the merits of the holdings such reasoning produces. Constitutional discourse will, we think, be the richer for it.

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[FN1]. The victory for the textualists and originalists is nearly complete, as shown by recent instances of the more "liberal" members of the Court taking the new conservative majority to task for allegedly ignoring text and history in their decisions. See, e.g., Printz v. United States, 117 S. Ct. 2365, 2389 (1997) (Stevens, J., dissenting). Justice Stevens wrote:

> There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.

Id.; see also id. at 2390 (criticizing the majority's response to historical arguments as "weak"). As Jeffrey Rosen notes, "liberals have become the defenders of judicial restraint and conservatives the defenders of judicial activism." Jeffrey Rosen, Nine Votes for Judicial Restraint, N.Y. Times, June 29, 1997, at E15.Moreover, the new post-New Deal generation of legal scholars has embraced text and history to justify results that commentators might characterize as "liberal." See, e.g., Cass R. Sunstein, The Partial Constitution 119 (1993) ("Any system of interpretation that disregards the constitutional text cannot deserve support."); Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457 (1994) (invoking text and history in support of an unenumerated right to "alter or abolish" the Constitution outside of the Article V amending process); see also Brannon P. Denning, Means to Amend: Theories of Constitutional Change, 65 Tenn. L. Rev. 155 (1997). See generally 1 Bruce Ackerman, We the People: Foundations (1991) (relying on history to support his theory of amendatory change through "constitutional moments" instead of through the Article V amendment process). Historian

Laura Kalman has described this as a new trend in "legal liberalism." Laura Kalman, The Strange Career of Legal Liberalism 1 (1996).

[FN2]. See Printz, 117 S. Ct. at 2366 ("Because there is no constitutional text speaking to the precise question... the answer to the... challenge must be sought in historical understanding and practice, in the Constitution's structure, and in this Court's jurisprudence.").

[FN3]. Glenn H. Reynolds, Penumbral Reasoning on the Right, 140 U. Pa. L. Rev. 1333, 1333 (1992).

[FN4]. 381 U.S. 479, 483-86 (1965) (striking down a Connecticut statute forbidding the use of contraceptives because the guarantees in the Bill of Rights have "penumbra[s] where privacy is protected from governmental intrusion" into the marital relationship).

[FN5]. See, e.g., Anthony Lewis, Justices on a Mission, N.Y. Times, June 30, 1997, at A11 (criticizing conservative Supreme Court Justices for becoming "result-oriented" and reaching their intended result without regard to precedent or constitutional doctrine); Jeffrey Rosen, Dual Sovereigns, New Republic, July 28, 1997, at 16, 17 (accusing the Court's conservative Justices of ignoring constitutional text and misconstruing constitutional history, thereby creating "bad constitutional law").

[FN6]. See generally Glenn Harlan Reynolds, Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding, 24 Ga. L. Rev. 1045 (1990) (criticizing Robert Bork's attacks on penumbral reasoning as result-oriented and inconsistent with original understanding).

[FN7]. See Reynolds, supra note 3, at 1334-36.

[FN8]. See, e.g., Robert H. Bork, The Tempting of America: The Political Seduction of the Law 263-65 (1990) (stating that with the "result-first, premises-to-follow form of legal 'reasoning[,]'... [t]here are no rules, only passions"); see also Reynolds, supra note 6, at 1062 (describing Robert Bork's criticism of Griswold).

[FN9]. 116 S. Ct. 1620, 1623 (1996) (striking down Colorado's Amendment Two, which prohibited the passage of legislation or implementation of policies at any level of state or local government granting additional protections to homosexuals).

[FN10]. Charles L. Black, Jr., Structure and Relationship in Constitutional Law 29 (Ox Bow Press 1985) (1969).

[FN11]. Reynolds, supra note 3, at 1334.

[FN12]. See id. at 1334-37. Note that Douglas's use of the term "penumbra" in Griswold was not new--Karl Llewellyn had used the word three decades earlier. See Karl Llewellyn, The Constitution as an Institution, 34 Colum. L. Rev. 1, 26-28 (1934) (describing how the edges of the working Constitution are not sharp but "penumbra-like" and in "constant flux"). For more on this history, see Henry T. Greely, A Footnote to "Penumbra" in Griswold v. Connecticut, 6 Const. Commentary 251 (1989) (inquiring into the history of the word "penumbra" from judicial opinions prior to Griswold); Burr Henly, "Penumbra": The Roots of a Legal Metaphor, 15 Hastings Const. L.Q. 81, 83 (1987) (exploring the penumbra metaphor's origin and significance).

[FN13]. See Griswold, 381 U.S. at 482-84.

[FN14]. See id. at 527 (Black, J., dissenting) ("Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written.").

[FN15]. See, e.g., id. at 510 (Black, J., dissenting) (stating that the government has a right to invade privacy unless it is expressly prohibited by a constitutional provision).

[FN16]. See, e.g., Reynolds, supra note 6, at 1074-81 (arguing that Douglas's analysis in Griswold is consistent with statements of Framers such as James Iredell and Samuel Chase, and later experts on Framing-era thought such as Joseph Story).

[FN17]. See, e.g., Jean Edward Smith, John Marshall: Definer of a Nation 437 (1996) ("Like all of Marshall's great constitutional decisions, the Dartmouth College opinion is uncluttered with citations to cases and precedent. That reflected a deliberate choice rather than ignorance or carelessness.... [A]s he usually did when wrestling with fundamental constitutional questions, Marshall preferred to reason from general principles.").

[FN18]. 17 U.S. (4 Wheat.) 316 (1819) (holding that Congress has the power to establish a national bank, and the states do not have the power to impede the bank by taxation).

[FN19]. See Reynolds, supra note 3, at 1345 n.47 (concluding that McCulloch is "a rather clear product of penumbral reasoning").

[FN20]. See infra Part II.

[FN21]. See McCulloch, 17 U.S. (4 Wheat.) at 409 (admitting that "[t]he power of creating a corporation... is not expressly conferred on Congress").

[FN22]. Id. at 407.

[FN23]. "Congress shall have Power... [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

[FN24]. See McCulloch, 17 U.S. (4 Wheat.) at 419-20. Compare U.S. Const. art. I, § 8 (enumerating Congress's powers), with U.S. Const. art. I, § 9 (restricting Congress's powers).

[FN25]. McCulloch, 17 U.S. (4 Wheat.) at 414-15 (comparing the phrase "absolutely necessary" in Article 1, Section 10, Clause 2 of the Constitution with "necessary," as stated in the Necessary and Proper Clause, and finding that "the convention understood itself to change materially the meaning of the word 'necessary' by prefixing the word 'absolutely'").

[FN26]. The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, § 2.

[FN27]. See McCulloch, 17 U.S. (4 Wheat.) at 404-06.

[FN28]. See id. at 421 ("We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended.").

[FN29]. See id. Thus, Marshall expressed what amounts to a test for congressional exercise of its "implied" powers:

> [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id.

[FN30]. See id. at 423. Marshall wrote:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the

> constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal... to say that such an act was not the law of the land.

Id.

[FN31]. See id. at 406; see also U.S. Const. amend. X. Marshall noted, however, that any proper interpretation of the Tenth Amendment itself must take into account the other provisions of the Constitution and the facts of its ratification, such as the fact that it was framed by the people of the United States and operated as an obligation on the states through the Supremacy Clause. He wrote that the Tenth Amendment "[left] the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument." McCulloch, 17 U.S. (4 Wheat.) at 406 (emphasis added).

[FN32]. See McCulloch, 17 U.S. (4 Wheat.) at 407-09. Marshall wrote:

> [I]t may with great reason be contended, that a government, entrusted with such ample powers [to tax, to borrow money, to regulate commerce, to declare war, etc.], on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution.

Id. at 408; see also id. at 416-17 (arguing that, for example, the power to regulate the post implies the power to punish crimes like stealing letters).

[FN33]. Id. at 408.

[FN34]. See id. at 425.

[FN35]. See id. (arguing that a state should be restrained "from such other exercise of [its taxing] power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union").

[FN36]. See id. at 426-27.

[FN37]. See id. at 427; see also Smith, supra note 17, at 444-55.

[FN38]. See McCulloch, 17 U.S. (4 Wheat.) at 426 ("[T]he constitution and the laws made in pursuance thereof are supreme; [and] they control the constitution and the laws of the respective States, and cannot be controlled by them."); see also id. at 427 ("It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.").

[FN39]. Id. at 426 (emphasis added). Marshall's characterization of McCulloch's argument is obviously sympathetic.

[FN40]. See id. at 425-26.

[FN41]. See Reynolds, supra note 3, at 1345 n.47 (quoting Bork, supra note 8, at 27). Strangely enough, Judge Robert Bork endorses McCulloch, a rather clear product of penumbral reasoning, as a "magnificent example of reasoning from the text and structure of the Constitution." Bork, supra note 8, at 27. It is hard to understand on what basis Judge Bork distinguishes the methodology of McCulloch, which he regards as exemplary, from that of Griswold, which he execrates. Such are the drawbacks of advocacy scholarship.

[FN42]. Black, supra note 10, at 17.

[FN43]. See Reynolds, supra note 3, at 1337-43 (discussing the role of penumbral reasoning in the areas of standing and sovereign immunity).

[FN44]. See id. at 1333.

[FN45]. See supra note 1 (noting the criticisms Justice Stevens leveled against the majority in Printz v. United States, 117 S. Ct. 2365 (1997)).

[FN46]. See, e.g., Lewis, supra note 5, at A11 (stating that the Justices are "once more inventing doctrines to make the United States less of a nation"); Rosen, supra note 5, at 17 (criticizing the Court for not basing recent cases on text).

[FN47]. 116 S. Ct. 1620 (1997).

[FN48]. See id. at 1629 (Scalia, J., dissenting); see also infra Part II.E (discussing Romer).

[FN49]. 117 S. Ct. 2365 (1997); see infra notes 86-112 and accompanying text (discussing Scalia's Printz opinion).

[FN50]. Reynolds, supra note 3, at 1347.

[FN51]. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

[FN52]. See Reynolds, supra note 3, at 1341-43 (discussing then-Justice Rehnquist's dissent in Nevada v. Hall, 440 U.S. 410 (1979) (holding that a state is not constitutionally immune from suit in other state courts)).

[FN53]. 116 S. Ct. 1114 (1996).

[FN54]. Id. at 1119.

[FN55]. Id. at 1122 (citations omitted).

[FN56]. 491 U.S. 1 (1989).

[FN57]. U.S. Const. art. I, § 8, cl. 3.

[FN58]. Seminole Tribe, 116 S. Ct. at 1127.

[FN59]. Id.

[FN60]. Id. at 1127-28 (quoting Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 97-98 (1984)).

[FN61]. See id. at 1130 ("[W]e long have recognized that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'" (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 326 (1934))); see also Pennhurst, 465 U.S. at 98 ("In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Article III."); Ex parte New York, 256 U.S. 490, 497 (1921) ("[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given....").

[FN62]. Seminole Tribe, 116 S. Ct. at 1129 (quoting Monaco, 292 U.S. at 321, 323 (citations and footnote omitted in original) (emphasis added)).

[FN63]. Id. at 1130 (quoting Hans v. Louisiana, 134 U.S. 1, 17 (1890)).

[FN64]. 117 S. Ct. 2028 (1997).

[FN65]. Id. at 2033.

[FN66]. Id.

[FN67]. See Reynolds, supra note 3, at 1345 (suggesting that sovereign immunity may have been intended to inform the substance of the Eleventh Amendment); see also Carlos Manuel Vasquez, What is Eleventh Amendment Immunity?, 106 Yale L.J. 1683, 1722-26 (1997) (discussing the controversy over the original intent behind both Article III and the Eleventh Amendment).

[FN68]. See U.S. Const. amend. XI.

[FN69]. See Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1456 (1987) ("In fact, the word 'sovereignty' never appears in the Constitution, not even in the Tenth Amendment...." (footnote omitted)); id. at 1466 ("By allowing both federal and state governments to invoke 'sovereign immunity' from liability for constitutional violations, the Court has misinterpreted the Federalist Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth."); id. at 1473 (calling the Court's interpretation of the intent of the Eleventh Amendment "nonsense"); id. at 1475 ("If the Eleventh Amendment was meant to enshrine the general immunity of state 'sovereigns' from private suits in federal court, it was abysmally drafted."); id. at 1476 (noting that the gap between Supreme Court Eleventh Amendment doctrine and the text of the Amendment "suggests the clear error of the Supreme Court's first interpretive premise that the Amendment is in fact concerned with sovereign immunity"). But see David P. Currie, The Constitution in Congress: The Federalist Era 1789-1801, at 197-98 (1997). Currie writes:

> Sovereign immunity is not fashionable today. Nor is it an attractive principle. When government commits wrongs, they ought to be brought to book. When they violate federal rights, or the rights of citizens of other states or nations, they ought to be suable in federal court. But that was not the view of the Third Congress nor of the state legislatures that approved [the Eleventh Amendment].
>
> ....
>
> ... [T]he historical context [of the Amendment] belies any attempt at wishful thinking: As the prompt rejection of all ameliorating alterations shows, Congress was in no mood to permit any federal suit against a state by a citizen of another state or of a foreign country.

Id.

[FN70]. See, e.g., Amar, supra note 69, at 1478-79 (characterizing the Court's decision in Ex Parte Young, 209 U.S. 123 (1908), as a "fiction").

[FN71]. See supra Part II.A.

[FN72]. See generally United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act on the grounds that Congress, in passing the Act, had exceeded its authority under the Commerce Clause).

[FN73]. 514 U.S. 779 (1995).

[FN74]. See id. at 838 (Kennedy, J., concurring) ("In my view, however, it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system.").

[FN75]. See id. at 849 (Thomas, J., dissenting) ("[T]he notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them.").

[FN76]. Id. at 793 (quoting Powell v. McCormack, 395 U.S. 486, 548 (1969)).

[FN77]. See id. at 793-95.

[FN78]. See U.S. Const. art. I, § 2, cl. 2 (stating that a Representative must be twenty-five years old, a seven-year U.S. citizen, and, when elected, an inhabitant of the state represented).

[FN79]. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[FN80]. Thornton, 514 U.S. at 802 (quoting 1 Joseph Story, Commentaries on the Constitution of the United States § 627 (1833)).

[FN81]. Id. at 804-05.

[FN82]. See id. at 845 (Thomas, J., dissenting).

[FN83]. Id. at 827.

[FN84]. See Black, supra note 10, at 11-13 (arguing that inference from structure could limit state interference with the operation of the federal government even absent other explicit textual support).

[FN85]. The dissent was the mirror image of the arguments offered by the majority and in Justice Kennedy's concurring opinion. Justice Thomas relied on constitutional silence and on his vision of the Constitution as an act by citizens of states to bring forth a government to support his inference that adding qualifications to those expressed in the Constitution was one power "reserved" to the states or their people in the Tenth Amendment. Justice Thomas wrote that:

> Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply

> silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.

Thornton, 514 U.S. at 845 (Thomas, J., dissenting). He further asserted that, "the people of the States need not point to any affirmative grant of power in the Constitution in order to prescribe qualifications for their representatives in Congress." Id. at 846. Finally, he noted that to prohibit a state from taking action, "we must point to something in the Federal Constitution that deprives the people... of the power to enact such measures." Id. at 850.The different results arrived at by the majority and the dissenters from essentially the same text and structure illustrates the importance of one's assumptions regarding the Constitution itself. The majority--and more explicitly Justice Kennedy--began with the proposition that the "People" of the Constitution's Preamble are a national people, acting through their states, while the dissent viewed the Founding as an act of the states themselves, acting through their citizens. As Justice Kennedy's vote to overturn the portion of the Brady Bill at issue in Printz demonstrates, though, the differing views do not necessarily mean outcomes will be different in all cases.

[FN86]. 117 S. Ct. 2365 (1997).

[FN87]. Rosen, supra note 5, at 17.

[FN88]. 18 U.S.C. §§ 921-930 (1994) (establishing guidelines for the purchase, transport, and licensing of firearms).

[FN89]. See id. § 922.

[FN90]. See Printz, 117 S. Ct. at 2368-69.

[FN91]. Id. at 2369.

[FN92]. Id. at 2370.

[FN93]. Id.

[FN94]. Id. at 2376 (quoting Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).

[FN95]. See id.

[FN96]. Id.

[FN97]. Id. at 2378.

[FN98]. Id.

[FN99]. See id.

[FN100]. Id.

[FN101]. Id.

[FN102]. Id. at 2379 n.13 (emphasis added).

[FN103]. See supra notes 73-87 and accompanying text (discussing Thornton).

[FN104]. Printz, 117 S. Ct. at 2388 n.2 (Stevens, J., dissenting).

[FN105]. Id. at 2389 (Stevens, J., dissenting). Of course, whether that law was a constitutional exercise of that power was, really, the crux of the problem.

[FN106]. See id. at 2387 (Stevens, J., dissenting). This comment is interesting in light of the majority opinion, in which Justice Stevens joined, in Boerne v. Flores, 117 S. Ct. 2157 (1997). See infra notes 113-28 and accompanying text (discussing Boerne).

[FN107]. 462 U.S. 919 (1983) (invalidating the "legislative veto" as contrary to the Framers' intent to house all legislative power in a single procedure designed in accord with the doctrine of separation of powers).

[FN108]. Printz, 117 S. Ct. at 2393-94 (footnote omitted).

[FN109]. See id. at 2394.

[FN110]. Or with his majority opinion in Camps Newfound/Owatonna, Inc. v. Harrison, 117 S. Ct. 1590 (1997). See infra notes 133-48 and accompanying text (discussing Camps Newfound).

[FN111]. Printz, 117 S. Ct. at 2391.

[FN112]. See infra notes 133-48 and accompanying text.

[FN113]. 117 S. Ct. 2157 (1997).

[FN114]. U.S. Const. amend. XIV, § 5.

[FN115]. 42 U.S.C. §§ 2000bb to 2000bb-4 (1995).

[FN116]. See Boerne, 117 S. Ct. at 2160-62 (discussing Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that a facially neutral regulation applied evenhandedly did not violate the Free Exercise Clause of the First Amendment, even when the application of the regulation had the effect of burdening the exercise of religion)).

[FN117]. See id. at 2168.

[FN118]. Id. at 2162 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)). Note that Kennedy does not say that it is found explicitly in the text of the Constitution. A consistent application of the position that one may not draw inferences where the text is silent, as articulated by Justice Thomas in Thornton or by Justice Stevens--who joined Kennedy's Boerne opinion--in his Printz dissent, would dramatically weaken the case for judicial review of congressional acts.

[FN119]. Marbury, 5 U.S. (1 Cranch) at 176.

[FN120]. See id.

[FN121]. See id.

[FN122]. Id. at 177.

[FN123]. See id. at 177-78.

[FN124]. Id. at 178.

[FN125]. Id.

[FN126]. See Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997) (stating that such a literal interpretation would allow Congress to determine that which violates the Constitution).

[FN127]. See Katzenbach v. Morgan, 384 U.S. 641 (1966). Justice Brennan argued that, as a positive grant of power to Congress, Section 5 did not necessitate a prior judicial determination that the object of congressional action was a violation of the Fourteenth Amendment. See id. at 648-49. To hold otherwise, he wrote, "would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." Id.

(citation omitted). For a defense of Justice Brennan's interpretation, see Archibald Cox, The Supreme Court, 1965 Term-- Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 106-07 (1966) (describing Morgan's new form of judicial deference as "soundly rooted in established constitutional principles"). See also Stephen L. Carter, The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions, 53 U. Chi. L. Rev. 819, 821 (1986) (calling the Morgan decision "consonant with the dominant liberal ideal of a dynamic society evolving toward justice"). For a critique of Brennan's position, see Alexander M. Bickel, The Voting Rights Cases, 1966 Sup. Ct. Rev. 79.

[FN128]. Boerne, 117 S. Ct. at 2168.

[FN129]. See Camps Newfound/Owatonna, Inc. v. Harrison, 117 S. Ct. 1590 (1997).

[FN130]. See U.S. Const. art. I, § 8, cl. 3 ("Congress shall have power... [t] o regulate Commerce... among the several States....").

[FN131]. See, e.g., Philadelphia v. New Jersey, 437 U.S. 617, 622-23 (1978) (declaring unconstitutional a New Jersey statute prohibiting importation of waste originating outside state territorial limits). Justice Stewart, writing for the Court, acknowledged the structural origins of the dormant Commerce Clause:

> [Interstate commerce is] open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself.... The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose.

Id. (citation omitted) (emphasis added).

[FN132]. See, e.g., H.P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949) (holding that a state may not promote its own local economic advantages by curtailing the volume of interstate commerce). The Court stated:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id.

[FN133]. 117 S. Ct. 1590 (1997).

[FN134]. Id. at 1594.

[FN135]. Id.; see also id. at 1594 n.2 (quoting the text of the statute, Me. Rev. Stat. Ann., tit. 36, § 652(1)(a) (West Supp. 1996)).

[FN136]. See id. at 1594-95.

[FN137]. Id. at 1595.

[FN138]. See id.

[FN139]. Id. at 1604.

[FN140]. Id.

[FN141]. Id. at 1605 (citations omitted).

[FN142]. Id. The Court rejected the town's attempt, based on the Court's statements in West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994), that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business," West Lynn Creamery, 512 U.S. at 199, and the Court's admission in the same case that it had "never squarely confronted the constitutionality of subsidies," id. at 199 n.15, to argue that the economic realities of an exemption were the same as those of a subsidy. Relying on previous case law, and little else, the Court saw "no reason to depart from [the traditional distinction between subsidies and exemptions]." Camps Newfound, 117 S. Ct. at 1606.

[FN143]. The Court has recognized a limited exception to the dormant Commerce Clause when states undertake to purchase goods or services as a "market participant" as opposed to a "market regulator," the theory being that when a state acts in the marketplace, it may set the terms on which it purchases goods or services like any other economic actor. See, e.g., White v. Massachusetts, 460 U.S. 204 (1983); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Dan T. Coenen, Untangling the Market-Participant Exception to the Dormant Commerce Clause, 88 Mich. L. Rev. 395 (1989).The primary obstacle to Maine's market participant argument was the Court's recent opinion in New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988), in which the Court struck down a discriminatory state tax credit for ethanol. Though recognizing that a tax exemption "had 'the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws,'" Camps Newfound, 117 S. Ct. at 1607 (quoting Limbach, 486 U.S. at 277), the Court concluded that the "'assessment and computation of taxes [is] a primeval governmental activity.'" Id. (quoting Limbach, 486 U.S. at 277). "A tax exemption," Stevens summarized, "is not the sort of direct state involvement in the market that falls within the market-participation doctrine." Id.

[FN144]. 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring). Recall that while Chief Justice Marshall skirted the question whether the Commerce Clause divested all state power over commerce, as argued by Daniel Webster, Justice Johnson embraced Webster's argument. See Charles F. Hobson, The Great Chief Justice: John Marshall and the Rule of Law 143, 146 (1996); Smith, supra note 17, at 480.

[FN145]. Camps Newfound, 117 S. Ct. at 1595-96 (citations omitted).

[FN146]. See Printz, 117 S. Ct. at 2393-95 (Stevens, J., dissenting).

[FN147]. See, e.g., id. at 2395 (Stevens, J., dissenting) ("Recent developments demonstrate that the political safeguards protecting Our Federalism are effective.").

[FN148]. See U.S. Const. art. I, § 8, cl. 3.

[FN149]. See Camps Newfound, 117 S. Ct. at 1608 (Scalia, J., dissenting).

[FN150]. See, e.g., Tyler Pipe Indus. v. Department of Revenue, 483 U.S. 232, 259-65 (1987) (Scalia, J., dissenting) (stating that the Court's application of the doctrine has "made no sense").

[FN151]. See, e.g., West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring). Scalia would also invalidate, in the interest of stare decisis, state laws that are identical to those the Court found unconstitutional in previous cases. See id.

[FN152]. See, e.g., 2 The Records of the Federal Convention of 1787, at 589 (Max Farrand ed., rev. ed. 1966) (James Madison, responding that if states should attempt to levy duties on imports or exports not "absolutely necessary" to carry out their inspection fees in violation of the Import-Export Clause, then the "jurisdiction of the Supreme Court" would be a "source of redress"); Letter from James Madison to J.C. Cabell (Feb. 13, 1829), reprinted in 2 The Records of the Federal Convention of 1787, at 478 (writing that the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves").

[FN153]. See U.S. Const. art. I, § 10 (listing Congress's powers that are forbidden to states); see also Laurence H. Tribe, American Constitutional Law § 6-2 (2d ed. 1988) ("Occasionally, the Framers' failure to employ explicit words of exclusion has seemed somewhat puzzling."); Federalist No. 32, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In the Federalist No. 32, Hamilton attempts to assuage state fears about the loss of sovereignty affected by the Constitution's adoption. In only three cases, Hamilton maintains, would states "alienate" their sovereignty: (1) where the federal government was granted

exclusive authority in express terms--for example, Congress's exclusive authority over the seat of government; (2) where there is an express grant to Congress and a concomitant explicit proscription of the states' power--for example, Congress's power to lay and collect taxes, imposts and duties and the Import-Export Clause; and (3) where the authority was granted and concurrent exercise of the power "would be absolutely and totally contradictory and repugnant"--for example, Congress's duty to prescribe uniform regulations for immigration and naturalization. See id. at 198-99. One could construe Hamilton's neglect of the Commerce Clause as an admission that concurrent regulation between Congress and the states did exist.

[FN154]. 116 S. Ct. 1620 (1996) (holding that a Colorado amendment prohibiting all legislative, executive, or judicial action designed to protect homosexuals from discrimination violated the U.S. Constitution's Equal Protection Clause).

[FN155]. Of course, penumbral reasoning's fair weather friends are not strictly limited to the Court "conservatives." As has been shown, Justice Stevens is similarly selective in his application of penumbral reasoning, rejecting it when doing so suggests conclusions with which he cannot agree. See supra notes 103-12 and accompanying text.

[FN156]. Stuart Taylor, Jr., Is Judicial Restraint Dead?, Legal Times, July 29, 1996, at S25. Taylor faulted Kennedy's opinion for being "rooted neither in original meaning nor in precedent, and provid[ing] little guidance for future controversies." Id.

[FN157]. See Evans v. Romer, 854 P.2d 1270 (Colo. 1993), aff'd, 116 S. Ct. 1620 (1996).

[FN158]. See United States Supreme Court Amicus Brief, Romer v. Evans, 116 S. Ct. 1620 (1996) (No. 94-1039) (written by Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan as Amici Curiae in Support of Respondents). For an account of Tribe's motivation for filing the brief, see Jeffrey Toobin, Supreme Sacrifice, New Yorker, July 8, 1996, at 43, 44-45.

[FN159]. See Romer, 116 S. Ct. at 1627-29.

[FN160]. Id. at 1623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[FN161]. Id.

[FN162]. See id.

[FN163]. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (finding unconstitutional a

classification in the Food Stamp Act that excluded from participation in food stamp program any household containing unrelated persons).

[FN164]. Romer, 116 S. Ct. at 1628.

[FN165]. Id. (citations omitted) (internal quotation marks omitted).

[FN166]. See supra note 17 (discussing Marshall's lack of citation to cases and precedent in favor of reasoning from general principles).

[FN167]. Romer, 116 S. Ct. at 1628.

[FN168]. See U.S. Const. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States...." (emphasis added)).

[FN169]. See U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof...." (emphasis added)).

[FN170]. U.S. Const. amend. I. This notion that the branches of government should be open to the citizens is echoed in Article III, which declares that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made... under their Authority," as well as other cases specifically enumerated therein. U.S. Const. art. III, § 2, cl. 1 (emphasis added).

[FN171]. U.S. Const. art. IV, § 4.

[FN172]. See generally Hans A. Linde, When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality, 72 Or. L. Rev. 19 (1993) (discussing initiative campaign and ultimate defeat of Oregon's proposed "Measure 9" that was aimed against rights of homosexuals).

[FN173]. Romer v. Evans, 116 S. Ct. 1620, 1628 (1996).

[FN174]. See U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. Const. art. I, § 10, cl. 1 ("No State shall... pass any Bill of Attainder, [or] ex post facto Law...."). Conversely, the Constitution also forbids the passage of laws that single out classes of citizens for more favorable treatment. See U.S. Const. art. I, § 9, cl. 7 ("No Title of Nobility shall be granted by the United States...."); U.S. Const. art. I, § 10, cl. 1 ("No State shall... grant any Title of Nobility.").

[FN175]. See U.S. Const. art. I, § 10, cl. 1 ("No State shall... pass any... Law impairing the Obligation of

Contracts....").

[FN176]. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[FN177]. See Akhil Reed Amar, Attainder and Amendment 2: Romer's Rightness, 95 Mich. L. Rev. 203, 203-04 (1996) ("[T]he sociology and principles underlying the Attainder Clause powerfully illuminate the facts of Romer, the opinions in Romer, and the spirit of the Equal Protection Clause itself."). See generally Daniel Farber & Suzanna Sherry, The Pariah Principle, 13 Const. Commentary 257 (1996) (concluding that, despite contrary assertions, Romer does not significantly expand current law regarding "suspect" classifications).

[FN178]. See Romer, 116 S. Ct. at 1637 (Scalia, J., dissenting) (stating that the Court has "invent[ed] a novel and extravagant constitutional doctrine," and that the Court's opinion "has no foundation in American Constitutional law").

[FN179]. Id. at 1629 (Scalia, J., dissenting). This was essentially the same point made by Justice Stevens in his dissent in Printz:

> Given the fact that Members of Congress are elected by the people of the several States... it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom.

Printz v. United States, 117 S. Ct. 2365, 2394 (1997) (Stevens, J., dissenting).

[FN180]. Romer, 116 S. Ct. at 1634 (Scalia, J., dissenting).

[FN181]. Id. at 1637 (Scalia, J., dissenting). Scalia argued that "[n]o principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here." Id. at 1633 (Scalia, J., dissenting).

[FN182]. See Amar, supra note 177, at 228-29 (noting Justice Scalia's "stinging" dissents in Romer and other cases).

[FN183]. See Stuart Taylor, Jr., The Upside of Judicial Activism, Legal Times, July 7, 1997, at 19 (asserting that Court decisions in the last Term demonstrate the irrelevance of labels like "liberal" and "conservative"). The divisions present in Court doctrine today more closely resemble those present in the early nineteenth century Court between nationalists and "republicans," than they do the "liberals" and "conservatives" of the Warren Court era, or even the New Deal Court. To the extent we need labels, "nationalist" and "neorepublican" are more apt.

[FN184]. Reynolds, supra note 3, at 1346.

[FN185]. On the latter, see generally Polly J. Price, Term Limits on Original Intent?: An Essay on Legal Debate and Historical Understanding, 82 Va. L. Rev. 493 (1996) (arguing that the historical support for the majority's decision in Thornton was not clear). Professor Price concludes her interesting essay with an admonition:

> The majority opinion in Thornton is difficult to reconcile with almost any version of originalism, though it sought refuge there. The majority could have said, explicitly, that if the text of the Constitution provides no answer, and the participants in the ratification debates are silent, then the Court is justified to draw from "democratic principles" to interpret the text.... Stated differently, the outcome reached by the majority in Thornton could be important within our constitutional framework for reasons other than historical accuracy....
>
> ... Ultimately, Thornton instructs us that we must take great care when approaching perplexing historical questions, particularly those with constitutional significance. It cautions our quest for a unanimous, coherent view of our constitutional history. More importantly, it cautions us against asking the question in a way that the Framers would not have understood.

Id. at 533.

[FN186]. See generally John Hart Ely, Democracy and Distrust (1980) (elaborating a "representation-reinforcing" theory of judicial review). Chapter two of Ely's book focuses specifically on this idea.

[FN187]. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954) (interpreting the Fifth Amendment's guarantee of "due process of law" to include an "equal protection component" despite the absence of an equal protection clause similar to that present in the Fourteenth Amendment).

[FN188]. But see Black, supra note 10, at 29; Ely, supra note 186, at 1.

[FN189]. For an interesting book urging courts to utilize the nondelegation doctrine, see generally David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (1993).

[FN190]. U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State... a Republican Form of Government....").

[FN191]. This is true despite Justice O'Connor's praise of the Guarantee Clause in New York v. United States, 505 U.S. 144, 183-85 (1992) (noting that the "limited holding" of Luther v. Borden, 48 U.S. 1 (1849), over the next century, "metamorphosed into the sweeping assertion that '[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts'" (quoting

Colegrove v. Green, 328 U.S. 549, 556 (1946)).