

PENUMBRAL REASONING ON THE RIGHT

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Recent years have seen considerable criticism and hostility regarding efforts of both courts and commentators to derive constitutional rights from sources other than explicit constitutional language.¹ Nearly all of that criticism has emanated from those generally characterized as “right wing” or “conservative,” and it concerns cases in which the outcome is generally regarded as “left wing” or “liberal.”

One might imagine that the unidirectional nature of this criticism stems from a similar tendency in the way the Constitution is interpreted, with the left relying more on extratextual sources of authority and loose interpretations of constitutional language, and the right rejecting these methods in favor of strict reliance on explicit textual language and original understanding. Interestingly, however, this turns out not to be the case. Upon even a cursory examination, it becomes apparent that judges and scholars on the right have been as willing as those on the left to rely on reasoning and authority that are not explicit in the language of the Constitution to reach ends consistent with their desires. Nevertheless, uses of what I call “penumbral reasoning” to obtain “right wing” results have not generated the kind of criticism from advocates of “strict

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¹ One of the leading critics is Judge Robert Bork. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 187-221 (1990) (criticizing “theorists of liberal constitutional revisionism”); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) (“Where constitutional materials do not clearly specify [a] value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.”). But see Glenn H. Reynolds, *Sex, Lies, and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1086-91 (1990) (criticizing Judge Bork’s view of *Griswold* as inconsistent with the original understanding of the Framers).

construction" and "original intent" theory that has appeared when the results have been otherwise.

I. PENUMBRA REASONING

What do I mean by "penumbral reasoning?" As its name suggests, I use the term to describe the sort of reasoning-by-interpolation performed by Justice Douglas in *Griswold v. Connecticut*.² *Griswold* involved a challenge to a Connecticut statute forbidding the distribution and use of contraceptives. In terms worthy of Judge Bork, Justice Douglas disclaimed any intent on the part of the Court to "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."³ Here, however, he said that the statute in question operated on an "intimate relation of husband and wife," necessitating further inquiry.⁴

Justice Douglas next looked to the text of the Bill of Rights, saying that:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters* [268 U.S. 510 (1925)], the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska* [262 U.S. 390 (1923)], the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin v. Struthers*, 319 U.S. 141, 143 [(1943)]) and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman v. Updegraff*, 344 U.S. 183, 195 [(1952)])—indeed, the freedom of the entire university community. *Sweezy v. New Hampshire*, 354 U.S. 234, 249-250, 261-263 [(1957)]; *Barenblatt v. United States*, 360 U.S. 109, 112 [(1959)]; *Baggett v.*

² 381 U.S. 479 (1965).

³ *Id.* at 482.

⁴ *Id.*

Bullitt, 377 U.S. 360, 369 [(1964)]. Without those peripheral rights the specific rights would be less secure.⁵

Having noted that the Court in the past had found specific rights whose existence depended on more general statements in the Bill of Rights, Justice Douglas went on to review specific provisions in the Bill of Rights that seemed to protect people in situations similar to that of married couples in Connecticut (that is, individuals in their homes who are not menacing others). He noted that the First Amendment protected association,⁶ that the Third Amendment protected citizens from having soldiers quartered (without consent) in their homes in time of peace,⁷ that the Fourth Amendment explicitly affirmed the right of individuals to be secure in their persons, homes, papers, and effects from unreasonable searches and seizures,⁸ that the Fifth Amendment, through its Self-Incrimination Clause, "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment,"⁹ and finally noted the Ninth Amendment's explicit provision that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁰

Drawing on all of this, Justice Douglas concluded that the various provisions described above permitted an inference that there existed a right of privacy sufficient to overturn the Connecticut statute.¹¹ Justice Douglas described this right as being formed by the overlap of "penumbras" from enumerated rights and supported by "emanations" from them.¹² He also asked: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"¹³ And further, he resolved that "[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."¹⁴

Justice Douglas's method seems to boil down to looking at a number of constitutional provisions that address related, but not

⁵ *Id.* at 482-83.

⁶ *See id.* at 484.

⁷ *See id.*

⁸ *See id.*

⁹ *Id.*

¹⁰ *Id.* (quoting U.S. CONST. amend. IX).

¹¹ *See id.* at 485.

¹² *Id.* at 484-85.

¹³ *Id.* at 484.

¹⁴ *Id.* at 486.

completely on-point, subjects and extracting a common idea—expressed in those provisions in different, but overlapping ways—that can be applied to the topic at hand. In *Griswold*, this common idea was an uneasiness about the degree to which a government, even (or perhaps especially) one organized according to majoritarian principles, can intrude upon the lives and intimate relations of individuals without exceeding the authority delegated to it by the people. This idea, which Justice Douglas characterized as a right of privacy implicit in the logic and structure of the Bill of Rights, led to the conclusion that the statute in question must be found unconstitutional as too great an intrusion on that right.¹⁵

Now this seems to me, and to some others,¹⁶ to be a perfectly legitimate mode of textual interpretation; surprisingly, however, Justice Douglas's reasoning in *Griswold* has never received a very enthusiastic reception.¹⁷ Conservatives have denounced it as thoroughly unprincipled,¹⁸ and even many liberals have seemed to be far more comfortable with *Griswold's* outcome than with Justice Douglas's methodology.¹⁹ But, as I will show, penumbral reason-

¹⁵ See *id.* at 485. When the issue is seen in this light—as a question of how much power governments may legitimately possess over the lives of individuals within a system of delegated powers—Justice Douglas's statement that the right to privacy predates the Bill of Rights makes perfect sense. The Bill of Rights, in this view, is illustrative of the limits to governmental power, rather than being the source of those limits.

¹⁶ See, e.g., Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 CONST. COMMENTARY 75, 75-80 (1991) (describing the methodology employed by Justice Douglas in *Griswold* as straightforward textualism).

¹⁷ Perhaps this is because of Justice Douglas's use of nonlawyerly sounding terms such as "emanations" and, of course, "penumbra"—although such terms in fact have a pedigree that extends well before Justice Douglas's opinion in *Griswold*. See Henry T. Greely, *A Footnote to "Penumbra" in Griswold v. Connecticut*, 6 CONST. COMMENTARY 251, 252 (1989); Burr Henly, *"Penumbra": The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 83 (1987). As Henly points out, the term "penumbra" had been used by such well known authorities as Oliver Wendell Holmes, Benjamin Cardozo, Felix Frankfurter, and Learned Hand, as well as Justice Douglas himself and Professor H.L.A. Hart, before the *Griswold* opinion came down. See *id.* at 83-92. Karl Llewellyn, a scholarly contemporary of Justice Douglas, also used the term in *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 26 (1934). Yet commentators persist in acting as if the term first appeared in *Griswold*. See Henly, *supra*, at 83. At any rate, Justice Douglas's mode of reasoning should hardly be discredited merely on grounds that he used funny-sounding words.

¹⁸ See, e.g., BORK, *supra* note 1, at 99 (asserting that "the nature of [the reasoning *Griswold* created], its lack of rationale or structure, ensured that it could not be confined").

¹⁹ See, e.g., John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929 & n.69 (1973) (agreeing that the Court is obligated "to seek out the sorts of evils the Framers meant to combat and to move against their twentieth

ing is more common than is generally realized and is used regularly by judges generally regarded as conservative. Yet when that happens, no one complains, or at least, no one accuses them of being unprincipled penumbralists.

II. STANDING

The doctrine of standing is one product of penumbral reasoning. The text of Article III of the Constitution says nothing about standing, but merely states:

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, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.²⁰

From this straightforward language it has been determined that because Article III describes all instances to which the federal judicial power extends, only those parties who possess "standing" may invoke that power. Essentially, the question is whether a "party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."²¹ In making this determination, the court looks not so much at the issues in question as at the party who is bringing them.²²

In essence, to demonstrate standing a party must show that she has suffered some injury in fact, that the injury was caused by the challenged action, and that a favorable decision of the court will redress the injury.²³ I will not go into the complex, and often

century counterparts," but stating that the *Griswold* opinion is "vague and open-ended"); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 292-94 (1973) (finding that the statute at issue in *Griswold* was "an arguably unconstitutional condition on the privileges that flow from a state-supported institution," but concluding that to reach that result, "[p]enumbras were not necessary, zones of privacy an unfortunate invention, and reliance on the Fourth Amendment a mistake").

²⁰ U.S. CONST. art III, § 2.

²¹ *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

²² See *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

²³ For a summary of these requirements, see LAURENCE H. TRIBE, *AMERICAN*

contradictory, details of how this doctrine is implemented,²⁴ because I want to ask another question: Where does it come from? That is, what does the mention in Article III of “cases” and “controversies” have to do with the requirements of injury in fact, causality, and redressability that courts have imposed in order to limit access to federal judicial power?

As a textualist or a practitioner of “original understanding” jurisprudence, one might imagine that the way to proceed would be to determine the meaning of “case” and “controversy” as those terms were understood by the Framers. Or, as Judge Bork, the leading contemporary advocate of originalist strict construction, explains: “All that counts is how the words used in the Constitution would have been understood at the time.”²⁵ This approach might lead to some interesting questions: What did the Framers mean by a “case” or a “controversy”? How were those words understood at the time? Could a “controversy” be something different from a “case”—say, an abstract disagreement about the law, leading to a request for an advisory opinion? Or do the terms really mean the same thing? And, if so, why did the Framers use different words? As it turns out, however, the inquiry into the meaning of Article III has nothing to do with these sorts of questions; for although the standing requirement is often said to stem from the “case or controversy” language of Article III, the question of where the standing requirement comes from turns out to be addressed in very different terms.

The answer, in fact, seems to be a penumbral one. As Judge Bork himself puts it:

All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in

CONSTITUTIONAL LAW § 3-14, at 107-08 (2d ed. 1988).

²⁴ For writings on the doctrine, see generally Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 298 (1979) (explaining that “[t]he standing doctrine holds that one may not assert the rights of other persons”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-28 (1988) (describing the origins of modern standing law); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 659 (1984) (“One could perhaps be forgiven for confusing standing’s agenda with that of the New Right.”).

²⁵ BORK, *supra* note 1, at 144; see also Raoul Berger, *Judicial Review: Counter-criticism in Tranquility*, 69 NW. U. L. REV. 390, 393-97 (1974) (arguing that in determining the Framers’ intent, it is best to look to the plain words of the Constitution, since inquiry into the Framers’ true beliefs “is a task for psycho-analysis” (quoting RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* 71 (1969))).

part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.²⁶

Or, if I read Judge Bork correctly, the courts decided upon the need for standing and related doctrines by looking at the overall structure of the Constitution—in which powers of one sort were given to the political branches, and in which powers of another sort were given to the judiciary—and by extracting from that structure an idea expressed nowhere in the document's words: the idea that access to courts should be limited to concrete disputes. As Justice O'Connor wrote in *Allen v. Wright*²⁷

[T]he "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society."²⁸

Justice O'Connor further acknowledged that this is where related questions, such as causation, come from:

These questions and any others relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and as a necessity," and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process."²⁹

Well, the notion that federal courts may exercise power "only in the last resort" and "as a necessity" does not appear anywhere in *my* copy of Article III. It is as absent as the words "birth control" from the Bill of Rights. In fact, the language about how the judicial power "shall" extend to "all Cases, in Law and Equity"³⁰ seems to me to make the "last resort" approach rather dubious.

²⁶ *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring).

²⁷ 468 U.S. 737 (1984).

²⁸ *Id.* at 750 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

²⁹ *Id.* at 752 (citations omitted) (quoting *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1892), and *Flast v. Cohen*, 392 U.S. 83, 97 (1968), respectively).

³⁰ U.S. CONST. art. III, § 2.

But no matter—although its application and scope may be (and are) subject to much dispute, the doctrine of standing is regarded as hard-headed constitutional law. But it does not come from the text at all, or from the popularly described version of the original understanding in which we are merely concerned about the meaning of words at the time of the Framing. In fact, it cuts somewhat against the text, and makes sense *only* if Article III is interpreted in light of a much larger idea concerning the proper role of courts in a democratic society, an idea that does not appear in the text of the Constitution but is somehow extracted from various structural characteristics of the document.

How is this different from *Griswold*? Not very. Of course, Judge Bork and Justice O'Connor might respond that I have misunderstood them. They might say that their discussion is not directed at uncovering the meaning of "cases" or "controversies," but rather at discovering the place of judicial review in a system of separated powers. That, however, is exactly my point. I do not mean to knock separation of powers, which is obviously an important concept, but it too is one that is nowhere mentioned in the Constitution. Rather, it is derived from the Constitution's allocation of powers and from our knowledge of the Framers' overall goal of setting up a well-structured government.

But, once again, the same thing can be said about the right of privacy. Like separation of powers, the right of privacy is not specifically mentioned in the Constitution, though it can be derived from the Bill of Rights' protection of individual liberty combined with what we know about the Framers' overall goals in setting up a free society in which individuals' rights to liberty (and, dare I say it, the pursuit of happiness) would be recognized and in which the powers of government would be properly limited. One might believe that Justice Douglas got it wrong, and that Justice O'Connor and Judge Bork have it right, but the methodology seems the same. And it is Justice Douglas's methodology—not the result in *Griswold*—on which most critics focus.³¹ That methodology is more widespread than critics admit, as some further examples will illustrate.

³¹ Judge Bork himself suggested in his confirmation hearings that he might be able to find a constitutional hook with which he could save the result in *Griswold*, which certainly seems to mean that methodology is the problem. See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings*

III. SOVEREIGN IMMUNITY

States are immune from suit without their consent under the Eleventh Amendment. Well, sort of. The actual language of the Eleventh Amendment provides only that: "The Judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."³²

Despite its apparently plain language, however, the Eleventh Amendment has been construed to do far more than simply forbid federal jurisdiction over suits "in law and equity" against a state by noncitizens. Among other things, the Supreme Court has held that the Eleventh Amendment bars suits under the Constitution of the United States (as opposed to "law and equity"), even when the suit is by a citizen of the state itself, as opposed to a noncitizen.³³

My point here is not to summarize the Supreme Court's many departures from the plain text of the Eleventh Amendment, or the counterintuitive (and confused) results that these departures have produced.³⁴ Instead, I wish simply to note that the process involves a sort of penumbral reasoning: notwithstanding that there is nothing in the Eleventh Amendment to bar suits not in law or equity or suits brought by a state's own citizens from the federal courts, the Supreme Court has consistently found that such suits are barred by general doctrines of federalism and state sovereignty that are inherent in the constitutional plan, though not present anywhere in the constitutional text.

Perhaps the best exposition of this approach is found in then Justice Rehnquist's dissent in *Nevada v. Hall*.³⁵ The question in that case was whether the Eleventh Amendment barred suits against

Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 115, 118 (1987) (testimony of Judge Robert Bork). Judge Bork refrains from any such suggestions in his recent book, in which he refers to *Griswold* not only as an "intellectual catastrophe," see BORK, *supra* note 1, at 234 (a view which could, I suppose, stem from his opinion of Judge Douglas's methodology), but also as a symptom of "the rampant individualism of the modern era," which asserts that "all individuals are entitled, as a matter of constitutional right, to engage in any form of sexual activity." *Id.* at 122. This latter criticism seems more result-oriented.

³² U.S. CONST. amend. XI.

³³ See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890) (asserting that a contrary holding would produce anomalous results).

³⁴ For a good summary of these, see TRIBE, *supra* note 23, at 173-95.

³⁵ 440 U.S. 410 (1979).

a state in the courts of another state.³⁶ The majority, finding no way to extend the Eleventh Amendment's language concerning "the Judicial power of the United States" to cover the judicial power of a state, held that the Eleventh Amendment provided no bar.³⁷ Justice Rehnquist dissented, opening his opinion with a complaint about the majority's "literalism" and a ringing endorsement of penumbral reasoning:

Any document—particularly a constitution—is built on certain postulates or assumptions; it draws on shared experience and common understanding. On a certain level, that observation is obvious. Concepts such as "State" and "Bill of Attainder" are not defined in the Constitution and demand external referents. But on a more subtle plane, when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning. . . . The Court's literalism, therefore, cannot be dispositive here, and we must examine further the understanding of the Framers and the consequent doctrinal evolution of concepts of state sovereignty.³⁸

Justice Rehnquist goes on to discuss the question in the context of notions of state sovereignty and its inherent characteristics, of the role of the national courts in a federal system, and of the effect of the majority's decision on relations among the states.³⁹ He then says:

Presumably the Court today dismisses all of this as dicta. Yet these statements—far better than the Court's literalism—comport with the general approach to sovereign-immunity questions evinced in this Court's prior cases. Those cases have consistently recognized that Art. III and the Eleventh Amendment are built on important concepts of sovereignty that do not find expression in the literal terms of those provisions, but which are of constitution-

³⁶ See *id.* at 411.

³⁷ See *id.* at 416-21.

³⁸ *Id.* at 433-34 (Rehnquist, J., dissenting) (footnote omitted).

³⁹ See *id.* at 433-39.

al dimension because their derogation would undermine the logic of the constitutional scheme.⁴⁰

Thus, says Justice Rehnquist, whatever the literal language of the Eleventh Amendment, the overall constitutional structure supports—in fact, demands—that states be immune from suit in the courts of other states.

He may well be right, and certainly his methodology is nothing radical. One case cited by Rehnquist demonstrates that this kind of reasoning has been around for a long time. That case is *Crandall v. Nevada*,⁴¹ an 1868 case involving a Nevada “head tax” on persons exiting the state. As Rehnquist notes:

The essential logic of the opinion is that to admit such power would be to concede to the States the ability to frustrate the exercise of authority delegated to the Federal Government—for example, the power to transport armies and to maintain postal services. There is also the theme that the power to obstruct totally the movements of people is incompatible with the concept of one Nation. The Court admitted that “no express provision of the Constitution” addressed the problem, but it concluded that the constitutional framework demanded that the tax be proscribed lest it sap the logic and vitality of the express provisions.⁴²

Accordingly, a fidelity to the text and design of the Constitution may actually *require* courts to engage in penumbral reasoning in order to be faithful to their interpretive task. Justice Rehnquist supports this view:

I think here the Court should have been sensitive to the constitutional plan and avoided a result that destroys the logic of the Framers’ careful allocation of responsibility among the state and federal judiciaries, and makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity.⁴³

⁴⁰ *Id.* at 439 (Rehnquist, J., dissenting).

⁴¹ 73 U.S. (6 Wall.) 35 (1868).

⁴² *Hall*, 440 U.S. at 441 (Rehnquist, J., dissenting) (citation omitted) (quoting *Crandall*, 73 U.S. (6 Wall.) at 48).

⁴³ *Id.* at 441 (Rehnquist, J., dissenting).

IV. CONCLUSION: SOME REALISM ABOUT TEXTUALISM

This sounds a lot like what might be said about *Griswold*. As Justice Douglas noted, the Framers set up a system in which certain defined powers aimed at creating the general good were allocated to the state and federal governments, while areas of liberty outside these powers were retained by the people. And, although the Bill of Rights does not specifically mention contraception, allowing states to enforce laws that so thoroughly burden individual liberty (and do not further some countervailing public good⁴⁴) would undermine the constitutional plan and destroy the careful allocation of power among the people and the state and federal governments that the Framers created. At least, this is what the application of penumbral reasoning tells us about the situation giving rise to the *Griswold* case, and the application of penumbral reasoning there seems as reasonable as its application in any of the other situations I have described above. After all, if there is a common idea, a "logic" behind the "express provisions" of the Bill of Rights, it certainly would be destroyed by the kind of narrow, literalistic reading of the Bill of Rights urged by "conservative" commentators like Judge Bork. Such a narrow reading would also deny "force and often meaning" to the Bill of Rights' "tacit postulates" of individual freedom from arbitrary state power.⁴⁵ Penumbral reasoning seems to me to be the answer to this problem.

In fact, penumbral reasoning is almost certainly *more* appropriate in the context of individual rights than anywhere else. After all, neither the Eleventh Amendment nor any other provision of the Constitution instructs courts to be particularly solicitous of sovereign immunity. The Eleventh Amendment on its face provides only that the judicial power of the United States shall not be construed to permit certain kinds of lawsuits against states. Through the use of penumbral reasoning, the Supreme Court has expanded this provision into a general doctrine of state sovereign immunity (though that phrase does not appear in the Eleventh Amendment itself), a doctrine so far-reaching that it does not stop until we reach a situation—suits in the courts of other states—to

⁴⁴ Judge Bork has argued that the public good in this context might be the selfish moralistic desire of some Connecticut citizens to prevent others from using birth control. See BORK, *supra* note 1, at 257-58. As I have suggested elsewhere, such selfish purposes do not constitute a permissible government end within the Framers' conception of our governmental system. See Reynolds, *supra* note 1, at 1069-94.

⁴⁵ See *supra* notes 38-40 and accompanying text.

which the federal judicial power does not apply at all. Even there, "strict constructionist" Rehnquist would have us use penumbral reasoning to extend state sovereign immunity to a situation absolutely outside the language of the amendment in question.

This is making a lot out of a little, textually speaking. Compared to what Chief Justice Rehnquist is willing to do, Justice Douglas was a piker, especially because in the case of individual rights, the Constitution provides a great deal of guidance—from the Preamble's mention of "liberty" as a key aim of the Constitution, to the very existence of the Bill of Rights (there is, after all, no "Bill of Sovereign Immunity"), to, most importantly, the Ninth Amendment, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁴⁶

I believe that we should read the Ninth Amendment, in part, as a command to use penumbral reasoning in the rights area since only by doing so can we avoid "denying or disparaging" rights not explicitly mentioned in the Constitution—just as we must use penumbral reasoning to avoid gutting the idea of sovereign immunity, which probably *is* incorporated in the Eleventh Amendment despite its absence from the text. And if the Court has already been willing to make far-reaching use of penumbral reasoning in areas lacking such explicit constitutional guidance—such as standing and sovereign immunity—then it should certainly be willing to do so in areas where individual rights are concerned.

"But wait!" some readers are no doubt ready to exclaim. "Isn't this a recipe for judicial lawlessness? If we let judges use penumbral reasoning, won't they just make up all kinds of new rights and doctrines that aren't in the Constitution? Isn't that a recipe for judicial tyranny?"

Well, yes and no. On the one hand, they are already doing so, and have been for a while: *Crandall v. Nevada* is no spring chicken as cases go, after all. Nor is *Crandall* the first Supreme Court case to employ penumbral reasoning.⁴⁷ On the other hand, the tech-

⁴⁶ U.S. CONST. amend. IX.

⁴⁷ For example, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall found a federal power to incorporate a national bank. He freely admitted that "among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,'" but went on to note that "we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies." *Id.* at 407. From the existence of these powers, Chief Justice Marshall inferred the need for a bank in

nique of penumbral reasoning, if conscientiously applied, is no more likely to lead to "judicial tyranny" than any other method of reasoning, from original intent to clause-bound textualism. In fact, penumbral reasoning is nothing more than what competent lawyers do in all sorts of settings on a daily basis: a realistic application of textualism. As Bruce Ackerman points out, a competent tax attorney addresses a tax problem not simply by looking for a single relevant section of the Internal Revenue Code, but by looking at the overall scheme: it is only "the worst kind of tax lawyer . . . who zeroes in on 'the applicable' subsection without reflecting on the purposes of the sentences, paragraphs, and larger textual structures in which it is imbedded."⁴⁸ And Ackerman is surely right when he says that "[b]ad tax law makes even worse constitutional law."⁴⁹

With or without penumbral reasoning, judges will have considerable flexibility in how they ply their craft. The variety of implements in the judicial toolbox is already more than enough to allow them to manipulate results—or simply respond to their own deep-rooted predilections—to a colossal degree. Penumbral reasoning, precisely because it ties the development of new principles to the overall structure and purposes of the Constitution, probably is less likely to create truly unwarranted or unacceptable results than many other approaches.

Nor are judges the only ones who are vulnerable to their own predilections, or to the outright temptation to engage in advocacy for positions they favor. Why has Justice Douglas's use of penumbral reasoning received so much criticism from right-wing scholars? If the primary concern is methodology, then why have not the other uses of penumbral reasoning that I have discussed here encountered the same kind of criticism? Could it be because the results are

order to execute them and explicitly cited the "necessary and proper" clause of Article I, § 8 (a sort of power-granting analogue to the Ninth Amendment) as evidence that such reasoning was proper. *See id.* at 413.

Strangely enough, Judge 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 1, 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.

⁴⁸ Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1426 (1990) (book review); cf. Michael Gerhardt, *Interpreting Bork*, 75 CORNELL L. REV. 1358, 1366-71 (1990) (book review) (noting that Judge Bork seizes on authority that supports his position without regard to larger issues of consistency and constitutional structure).

⁴⁹ Ackerman, *supra* note 47, at 1427.

different?⁵⁰ Scholars and critics, like judges, should be honest and consistent. But, as with judges, there is no real way to force them to be so.⁵¹ We can only hope.

This hope, unfortunately, is unlikely to bear much fruit. For example, Professor Lino Graglia, a leading critic of “activist” judging, is particularly harsh regarding the Supreme Court’s privacy jurisprudence: “The Constitution doesn’t say anything about a right of privacy.”⁵² True enough, but also, as I have indicated above, essentially meaningless. If the Constitution’s failure to mention privacy means, standing alone, that that doctrine is unfounded and that cases recognizing the right should be overturned, then many other doctrines and cases, which Professor Graglia does not criticize, must go too.⁵³ On the other hand, if the statement that the Constitution “doesn’t say anything” about privacy is merely shorthand for saying that no such right should be found, then one may accuse privacy advocates of being wrong, but not (without more) of being unprincipled noninterpreters.

Those commentators who style themselves as “conservative” have for some time managed to have it both ways, but they cannot keep that up much longer. Either they must take strict construction seriously, or they must give up their stand as defenders of principle. My guess, given the recent shifts on the Court, is that they will do the latter.

And that is too bad. I happen to believe that there are good reasons for paying closer attention to the text and to the intent of the Framers than many of my colleagues have in recent years. I believe this not because I think that doing so will constrain judges in the way that some theorists believe,⁵⁴ but rather because I

⁵⁰ See *supra* notes 31 & 47 and accompanying text.

⁵¹ With judges, the most we can do is scrutinize them in the appointment process. See Glenn H. Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577 (1992). With scholars, rightly enough, we have even less influence.

⁵² *MacNeil/Lehrer NewsHour* (PBS television broadcast, June 27, 1991), available in LEXIS, Nexis Library, Macleh File. Graglia is among the small group of scholars identified by Judge Bork as proper practitioners of original understanding. See BORK, *supra* note 1, at 223-24.

⁵³ For, as Justice Rehnquist says, “when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan.” *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting); see *supra* note 38 and accompanying text. The same “plan” notion has been used in *Griswold*, and elsewhere. See, e.g., *Griswold*, 381 U.S. at 482-85.

⁵⁴ See, e.g., Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110, 114 (1991) (noting that “it is unlikely that the Court will ever reach a truly ‘final’ answer

believe that paying attention to the text and to what its drafters were trying to accomplish is what the craft of lawyering is all about. And I think that matters of craft are important for their own sake: witness the work of Justice Harlan in cases like *Griswold*,⁵⁵ or *Moragne v. States Marine Lines*,⁵⁶ where craft was not a limitation, but a source of power and even beauty. Unfortunately, these days at least, craft, like all else, seems likely to be submerged in politics, leaving us all the poorer. The saddest thing about most critics of *Griswold* is that they miss this point entirely, proving that—although they *are* right-wing—they understand nothing of what it means to be conservative.

to very many questions that come before it, though most theories of constitutional interpretation seem grounded in the assumption that such answers exist"); Reynolds, *supra* note 1, at 1108 ("[N]o additional judicial discipline would be imposed by the adoption and honest implementation of 'original understanding' jurisprudence.").

⁵⁵ See *Griswold*, 381 U.S. at 499-502 (Harlan, J., concurring).

⁵⁶ 398 U.S. 375, 408-09 (1970) (holding that an action for wrongful death can be brought under maritime laws).