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A HIDDEN HISTORY OF AFFIRMATIVE OBLIGATION

Patrick O. Gudridge*

I. INTRODUCTION

This contribution to the Symposium was supposed to be titled “The Age of Aquarius?”¹ In 1977 Laurence Tribe and Frank Michelman published articles arguing to the same conclusion: Initial impressions notwithstanding, the United States Supreme Court decision in *National League of Cities v. Usery*² is best understood as recognizing and protecting—however implicitly or obliquely—constitutional obligations requiring states to assure their residents certain minimum services.³ Prominent initial reactions to these articles were not entirely positive—putting it mildly.⁴ It seemed bizarre then—it may still seem bizarre now—to suggest that the *National League of Cities* majority opinion, the work of Justice William Rehnquist, pointed toward a jurisprudence of affirmative obligation, however much Tribe and Michelman wished for that jurisprudence to prevail. “Mystic crystal revelation, and the mind’s true liberation”⁵—it was (it might have been said) all too 1960s, already out of date.

The reactions of the critics, though, seemed to me to suggest another reading. *National League of Cities* was (at the time) the last in a blizzard of opinions Justice Rehnquist had generated, especially since 1974—opinions (it is easier to see now) that challenged and reordered then-standard assumptions, both formal and substantive, about the content of constitutional law, the organizing structure of federal law generally, and reader expectations regarding judicial opinion-writing. Rehnquist—that Rehnquist, anyway—somehow seized the devices of critical legal studies in utero.⁶ It would not be surprising if Tribe and Michelman meant to write against Justice Rehnquist. Explaining the interestingly different approaches the two took was supposed to be the ultimate aim

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1. The 5th Dimension, *The Age of Aquarius* (Buddha Records 1969) (CD).

2. 426 U.S. 833 (1976), *overruled*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

3. Frank I. Michelman, *States’ Rights and States’ Roles. Permutations of “Sovereignty”* in *National League of Cities v. Usery*, 86 Yale L.J. 1165, 1174 (1977); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065, 1076 (1977).

4. See *infra* nn. 13–24 and accompanying text.

5. The 5th Dimension, *supra* n. 1, at *Aquarius/Let the Sun Shine In*.

6. Interestingly, most of the essays and memorials published on the occasion of William Rehnquist’s death did not make much of his work in this period, choosing to emphasize, for both criticism and praise, his later, seemingly “moderate” work as Chief Justice.

of this exercise.

The present intrudes, however: The Supreme Court's 2007 decision in *Massachusetts v. Environmental Protection Agency*,⁷ I realized, returns us—almost—to the 1977 universe of Rehnquist, Tribe, and Michelman. The majority opinion that Justice Stevens wrote in the *Massachusetts* case includes a considerable discussion of why Massachusetts had standing to challenge the failure of the EPA to regulate greenhouse gases—in particular, the concerns state officials took to be pertinent.⁸ But for present purposes, what matters most is the emphasis that Stevens gave to a century-old opinion written by Justice Holmes—*Georgia v. Tennessee Copper Co.*⁹ Chief Justice Roberts, dissenting, dismissed *Tennessee Copper* as essentially an irrelevant curiosity.¹⁰ It turns out, though, that the Holmes opinion is one of a line of cases—moving forward through the twentieth century, and backwards past the Civil War. This line includes—not marginally—*In re Debs*,¹¹ a large decision indeed. Across the range of cases, we glimpse what turns out to be a constitutional account of the origins of affirmative obligation. We may well wonder whether the *National League of Cities* articles that Professor Tribe and Michelman wrote caught something important after all.

The effort here acquires, almost by accident, a considerably larger ambition.¹²

II. THE CRITICAL REACTION

The Tribe and Michelman efforts, themselves, do not become a focus of this discussion until it has proceeded fairly far. Two backdrops need to be set up. The first is a brief exploration of the reactions of the critics.

It was not as though the *National League of Cities* articles went unread. Mark Tushnet thought that the Supreme Court's own effort was “fundamentally incoherent,” but he also concluded that Professor Tribe's reading was “a less coherent rendering”¹³ of what Tushnet thought that the Court meant to accomplish itself—to protect “the ability of states to stand as guardians against overreaching by the national government.”¹⁴ Then-professor Ruth Bader Ginsburg, reviewing the first edition of *American Constitutional Law*,¹⁵ judged the *National League of Cities* gloss, as Tribe restated it there, to be “extravagant . . . Occam's razor is not prominent in the analysis.”¹⁶ The late David Currie described the Michelman and Tribe gloss as “fanciful to the extent it is not facetious; it transforms a decision designed as a shield for state autonomy into a

7. 127 S. Ct. 1438 (2007).

8. *See id.* at 1452–58.

9. 206 U.S. 230 (1907); *see Mass.*, 127 S. Ct. at 1454–55.

10. *See id.* at 1465 (Roberts, C.J., Scalia, Thomas & Alito, JJ., dissenting).

11. 158 U.S. 564 (1895).

12. I do not mean to claim that Justice Rehnquist, were he aware of the *Tennessee Copper* line, would have understood these decisions as underpinning his own analysis. The twenty-first century, so far at least, is not the Age of Aquarius.

13. Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 *Stan. L. Rev.* 623, 636 n. 50 (1984).

14. *Id.* at 636.

15. Laurence Tribe, *American Constitutional Law* (Foundation Press 1978).

16. Ruth Bader Ginsburg, *Book Review*, 92 *Harv. L. Rev.* 340, 344 (1978). She liked the book as a whole: “A work of spectacular originality, sometimes elusive and uniformly provocative.” *Id.* at 340.

sword for its destruction.”¹⁷ Writing more recently, Richard Epstein agreed, adding a pejorative “legal alchemy.”¹⁸

In his widely-noticed *The Case Against Brilliance*,¹⁹ Daniel Farber used the Tribe and Michelman articles as a central illustration of what follows—and what “should be abandoned”—given “the current academic bias in favor of brilliant, ‘paradigm shifting’ work.”²⁰ Farber’s provocative comments warrant careful reading:

The most famous example is the attempt . . . by two brilliant professors, to show that Justice Rehnquist’s opinion in *National League of Cities* . . . really established a constitutional right to welfare. . . .

Of course, this interpretation was so dazzlingly brilliant just because it was painfully obvious that Justice Rehnquist had no such thing in mind. . . . [T]here is something inherently suspect about an interpretation so clever that it never would have occurred to the speaker or the audience. If Paul Pedestrian asks someone to pass the salt, one might argue that he “really” must mean, “pass a healthful and taste-enhancing condiment”—a description that does not apply to salt, if current medical theories are correct. So, in some sense, what Paul “really” means is “pass the pepper.” In the same sense, what Justice Rehnquist “really” meant was to establish a constitutional right to welfare—which is, as the professors explained, what he would have meant if he had been as clever as they were. But he wasn’t that clever, so it wasn’t what he meant after all.²¹

Professor Farber revisited his essay a year later, this time exploring at further length possible interpretations of the Tribe/Michelman thesis.²² He concluded: “The flaw . . . is not just that it won’t persuade Rehnquist, but that it shouldn’t. . . . Even the best logical argument will not persuade him that the ‘sun rises in the west,’ because his belief to the contrary is strongly rooted in his experience.”²³ Farber proceeded, drawing on Kuhn, Quine, and company, to make what he called “The Case for Common Sense.”²⁴

Was William Rehnquist “Paul Pedestrian”?²⁵ “[J]udges are not as clever as the scholars,” Professor Farber wrote, noting as well: “With unusual candor, a Minnesota trial judge recently acknowledged that ‘[I]f IQ tests were used in grading judges, I wouldn’t be a judge.’”²⁶ Was Justice Rehnquist just some sort of judicial peasant, guided by “his experience” not to believe that “the sun rises in the west?”²⁷

Justice Rehnquist? Daniel Farber could not have meant to make these equations.

17. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864, 878 n. 79 (1986).

18. Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O’Connor: Is Half a Loaf Enough?* 58 Stan. L. Rev. 1793, 1806 n. 56 (2006). Professor Epstein also criticized Justice Rehnquist’s opinion. *Id.* at 1805–07.

19. Daniel A. Farber, *The Case against Brilliance*, 70 Minn. L. Rev. 917 (1986).

20. *Id.* (quoting Thomas Kuhn, *The Structure of Scientific Revolutions* 10 (2d ed., U. Chicago Press 1970).

21. *Id.* at 926–27.

22. See Daniel A. Farber, *Brilliance Revisited*, 72 Minn. L. Rev. 367, 369–75 (1987). He writes in response to Pierre Schlag, *The Brilliant, the Curious, and the Wrong*, 39 Stan. L. Rev. 917 (1987).

23. Farber, *supra* n. 22, at 374.

24. *Id.* at 375; see *id.* at 375–81.

25. Farber, *supra* n. 19, at 927.

26. *Id.* at 929; *id.* at 929 n. 51 (quoting Jim Klobuchar, 4 Minneapolis Star & Tribune 1B (Oct. 10, 1985)).

27. Farber, *supra* n. 22, at 374.

He had to have known that they were and are—to put it mildly—wildly wrong.²⁸ Perhaps Farber would have been prepared, in some other setting, to criticize Rehnquist or other judicial “brilliant” on similar terms.²⁹ For the moment, he wanted to focus on academic manifestations. Or perhaps Professor Farber understood that if Justice Rehnquist’s work—including *National League of Cities*—were acknowledged to be original, challenging, and plainly threatening to at least some conceptions of the substance of constitutional law, Professors Tribe and Michelman might be plausibly understood as attempting to meet the challenge and blunt the threat. If so, their own originalities might appear to be less off-putting, recognizably responses (whether or not successful), neither “facetious”³⁰ nor “clever.”³¹

III. WHAT JUSTICE REHNQUIST DID

In the two years or so preceding *National League of Cities*, Justice Rehnquist wrote a sequence of opinions that, as they accumulated, revealed a distinctive, dramatic (for many, disturbing) approach to constitutional adjudication.

A. *Description of Nonconstitutional Law Displaces Constitutional Analysis Per Se*

Arnett v. Kennedy—Justice Rehnquist’s plurality opinion in that case—was and remains the epitome.³² The opinion has become a casebook staple, we all know, this sentence always quoted: “[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.”³³ The sentence states a conclusion, it might appear, about the content of constitutional law—about whether the usual requirements of procedural due process hold if legislation-defining entitlements, invoked in individual instances, also specify the hearing procedures to be followed. It is possible to think—indeed, the Supreme Court would within a few years commit itself to thinking³⁴—that the question is one which is chiefly resolved through

28. Professor Farber himself has written brilliantly. (I mean this in the old-fashioned sense, as a genuine compliment.) In his book *Lincoln’s Constitution*, Farber explores constitutional issues that arose in the course of the Civil War from within a perspective that appears to treat as contemporaries not only Lincoln, his colleagues, and his immediate predecessors and successors, but also the so-called Framers (Washington, Jefferson, Madison, Hamilton, etc.), and present day Justices, judicial opinions, and constitutional doctrine. As a result, the reader is put in a distinctive, initially disconcerting original position, not only able to judge Lincoln as we would judge him by our lights, but to use Lincoln and his arguments as a baseline for assessing the acts and arguments of our own contemporaries. If we sympathize with Lincoln, Farber’s reader inevitably wonders, why not similarly sympathize with . . . ? See generally Daniel Farber, *Lincoln’s Constitution* (U Chicago Press 2003).

29. For well-known, formidable criticism of Justice Rehnquist around the time of *National League of Cities*, see David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293 (1976). Paul Carrington has sharply criticized brilliant—in his terms “heroic”—judging. See Paul D. Carrington, *Stewards of Democracy: Law as a Public Profession* (Westview Press 1999). For discussion of the difficulty of Professor Carrington’s use of Thomas Cooley as the paradigmatic anti-hero, see Patrick O. Gudridge, *Carrington, Cooley, Kennedy, Klare*, 22 Cardozo L. Rev. 837, 837–48 (2001).

30. Currie, *supra* n. 17, at 878 n. 79.

31. Farber, *supra* n. 19, at 929.

32. 416 U.S. 134 (1974).

33. *Id.* at 153–54.

34. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

reference to constitutional concerns as such. But Rehnquist's particular approach, it is clear, treats the question as not itself a question of due process of law, as instead extrinsic, an at the threshold regulation of the relevance of due process, to be explored and resolved entirely through properly conscientious reading of legislative enactments.³⁵

Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. . . . [W]e do not believe that a statutory enactment . . . may be parsed as discretely as appellee urges. Congress was obviously intent on according a measure of statutory job security to governmental employees which they had not previously enjoyed, but was likewise intent on excluding more elaborate procedural requirements which it felt would make the operation of the new scheme unnecessarily burdensome in practice. Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.³⁶

Is it really the case that the applicability of the constitutional right of due process of law turns on an essentially extraconstitutional inquiry? Justice Rehnquist is convinced, at least, that the proper analytical bias gives precedence to congressional understandings:

To conclude otherwise would require us to hold that although Congress chose to enact what was essentially a legislative compromise, and with unmistakable clarity granted governmental employees security against being dismissed without "cause," but refused to accord them a full adversary hearing for the determination of "cause," it was constitutionally disabled from making such a choice. . . . Neither the language of the Due Process Clause of the Fifth Amendment nor our cases construing it require any such hobbling restrictions on legislative authority in this area.³⁷

This much is clear: Over and over, within this period at least, Justice Rehnquist, in the course of working through nominally constitutional questions, presented as decisive non-constitutional legal documents, practices and institutions—on their own terms, carefully considered. In *Paul v. Davis*,³⁸ Kentucky's decision to cast its legal protection of individual reputation in the form of tort liability rules rather than direct recognition of a property interest ultimately determined the outcome of the due process inquiry.³⁹

35 *Id.* at 560–61 (Rehnquist, J., dissenting).

36 *Arnett*, 416 U.S. at 152.

37 *Id.* at 154.

38 424 U.S. 693 (1976).

39 *Id.* at 693–710.

But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of

Jackson v. Metropolitan Edison Co., for example, depicted constitutional analysis of “state action” as not much more than a collection of catch phrases; instead, described closely the Pennsylvania procedure within which the electric company disclosed the termination practices alleged to be inconsistent with due process of law; and taking the state procedure on its own terms, found no regulatory “*imprimatur*,” and therefore no state action.⁴⁰ *Sosna v. Iowa* upheld a durational residency requirement limiting the ability of newly arrived residents to obtain divorces.⁴¹ Familiar constitutional law starting points like the right to travel and the fundamental interest of individuals in obtaining divorces were briefly noted but set to the side.⁴² State legal strategy and “settled principles of Iowa practice and pleading” were conclusive.⁴³

Sosna is one of quite a few opinions in which Justice Rehnquist explained the irrelevance of constitutional concerns through a careful, appreciative description of non-constitutional choices, objectives, and institutional settings. *Parker v. Levy* stressed the “long recognized” status of the military as “a specialized society separate from civilian

respondent’s status as theretofore recognized under the State’s laws. For these reasons we hold that the interest in reputation asserted in this case is neither “liberty” nor “property” guaranteed against state deprivation without due process of law.

Id. at 711–12.

40. 419 U.S. 345, 357 (1974).

[I]t is less than clear under state law that Metropolitan was even required to file this provision as part of its tariff or that the Commission would have had the power to disapprove it. The District Court observed that the sole connection of the Commission with this regulation was Metropolitan’s simple notice filing with the Commission and the lack of any Commission action to prohibit it.

Id. at 355 (footnotes omitted).

At most, the Commission’s failure to overturn . . . amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent’s exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so “state action” for purposes of the Fourteenth Amendment.

Id. at 357 (footnote omitted).

41. 419 U.S. 393 (1975).

42. *Id.* at 405–06.

43. *Id.* at 407–08 n. 20.

Where a divorce decree is entered after a finding of domicile in *ex parte* proceedings, this Court has held that the finding of domicile is not binding upon another State and may be disregarded in the face of “cogent evidence” to the contrary. For that reason, the State asked to enter such a decree is entitled to insist that the putative divorce petitioner satisfy something more than the bare minimum of constitutional requirements before a divorce may be granted. The State’s decision to exact a one-year residency requirement as a matter of policy is therefore buttressed by a quite permissible inference that this requirement not only effectuates state substantive policy but likewise provides a greater safeguard against successful collateral attack than would a requirement of bona fide residence alone. This is precisely the sort of determination that a State in the exercise of its domestic relations jurisdiction is entitled to make.

Id. at 407–09 (citations omitted);

Our Brother MARSHALL argues in dissent that the Iowa durational residency requirement “sweeps too broadly” since it is not limited to *ex parte* proceedings and could be narrowed by a waiver provision. But Iowa’s durational residency requirement cannot be tailored in this manner without disrupting settled principles of Iowa practice and pleading. Iowa’s rules governing special appearances make it impossible for the state court to know, either at the time a petition for divorce is filed or when a motion to dismiss for want of jurisdiction is filed, whether or not a respondent will appear and participate in the divorce proceedings.

Id. at 407 n. 207 (citations omitted).

society,”⁴⁴ as undercutting enforcement of ordinary free speech protections: “The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”⁴⁵ *American Radio Assn. v. Mobile Steamship Assn.* showed a similar disinterest in close free speech analysis and accorded a similar respect to the policies and interests underlying a state court injunction prohibiting union “Buy American” picketing of foreign freight ships.⁴⁶ Description of the structure of the North Carolina court system was a sufficient counter to due process and equal protection objections to the failure to appoint counsel for indigents at issue in *Ross v. Moffit*.⁴⁷

B. *The Appearance of Multiplicity Overwhelms Canonical Emphasis*

Justice Rehnquist acknowledged “the tendency of all rights [is] ‘to declare themselves absolute to their logical extreme,’”⁴⁸ but he also held that the elaborating logic of rights themselves, their own account of their “importance” and therefore pertinence, “does not, by itself, determine [their] scope.”⁴⁹ Within his accounts, specification of the limits on constitutional rights—“scope”⁵⁰—was an external matter, the work of non-constitutional bodies of law fixing constitutional law’s applicability. This structure was simply one illustration of a recurring tendency apparent in Rehnquist’s work in this period. He was, Justice Ginsburg might say, a determined anti-Occamist (like Professor Tribe?⁵¹). Justice Rehnquist’s opinions routinely conceived of legal questions as implicating several distinct constitutional or statutory or judicial domains, notably proceeding without conveying any sense of canonical emphases, treating various regimes as in principle equally significant.⁵²

In *Richardson v. Ramirez*,⁵³ this preference for multiplication was deployed within constitutional law. Justice Rehnquist held that the question of state exclusion of felons from voting was not, as it might be ordinarily thought, a question implicating the Equal Protection Clause of section one of the Fourteenth Amendment, but rather a matter governed by section two, separately applicable, to be construed independently of usual

44. 417 U.S. 733, 743 (1974); see *Middendorf v. Henry*, 425 U.S. 25, 37 (1976) (distinguishing “civilian community” and “military community” for Sixth Amendment purposes).

45. *Parker*, 417 U.S. at 758; see also *Kelley v. Johnson*, 425 U.S. 238, 248 (1976) (discussing regulation of police personal appearance).

46. 419 U.S. 215, 229–30 (1974).

47. 417 U.S. 600 (1974); see also *U.S. v. MacCollom*, 426 U.S. 317, 327 (1976) (plurality) (stating the constitutionality of statutory delegation to district court judges of indigents’ rights to transcripts in habeas proceedings turns on “essentially practical judgment on questions” that courts of appeals confront more often than the Supreme Court and thus the Supreme Court should defer to the views of the courts of appeals regarding constitutionality).

48. *Ross*, 417 U.S. at 611–12 (quoting *Hudson Co. Water Co. v. McCarter*, 209 U.S. 249, 355 (1980)).

49. *Mich. v. Tucker*, 417 U.S. 433, 439 (1974).

50. *Id.*

51. See *supra* n. 16 and accompanying text.

52. Justice Rehnquist was hardly unique in recognizing that legal analysis could proceed by treating “law” as an aggregate of more or less separated regimes. See Patrick O. Gudridge, *The Persistence of Classical Style*, 131 U. Pa. L. Rev. 663, 686–98 (1983) (“proliferation of legal media”). But he put this recognition to work, it appears, with unusual enthusiasm.

53. 418 U.S. 24 (1974).

equal protection preoccupations.⁵⁴ More often, however, the tendency to multiply is evidenced in opinions in which seemingly threshold questions of jurisdiction or procedure, or other seemingly peripheral complexities, are explored with pronounced enthusiasm and depth, as matters no less significant than the so-called “merits” of the particular cases; indeed in some cases without regard to whether the threshold questions block reaching the “merits” or not.⁵⁵ *Rizzo v. Goode*, of course, shows off Rehnquist’s multiplicity at its most churrigueresque.⁵⁶ Analysis proceeds through three main stages, each verging on definitive resolution, but nonetheless overlaid by the next. A constitutional discussion of justiciability, suggesting that no individual plaintiffs could show a sufficiently real risk of suffering further acts of police brutality, concludes abruptly with recitation of the fact of class action certification and a supposition that the justiciability issue recedes, leading to a discussion of requirements of the section 1983 cause of action, seemingly not met, itself superseded by a final discussion of remedial considerations pointing towards abstention.⁵⁷ It is clear that plaintiffs lose, in a sense two or almost three times over, but no single, settled conclusion emerges.

C. National League of Cities as *Hodgepodge*

National League of Cities, it appears, was not *Rizzo*. Justice Rehnquist worked within only one body of law—constitutional law as ordinarily conceived. *National League of Cities* was not like *Arnett* and company either. Rehnquist addressed and sought to define, it appears, affirmative constitutional protections (of state sovereignty, in this instance), rather than set limits. Not exactly: Mark Tushnet’s characterization of the *National League of Cities* opinion as “fundamentally incoherent”⁵⁸ begged important questions (for example, whether and why “coherence” is a pertinent criterion for judging Supreme Court majority opinions generally⁵⁹), but it also underscored as important what every reader of the opinion notices.

National League of Cities is a hodgepodge. It incorporates examples of exercises of state sovereignty, but no efforts to extract any but the most general common elements; a long list of government projects that might be (or already had been) made more costly, and that potentially might be (or already were) constrained by extension of federal wage and hour requirements—again, without any real attempt to articulate criteria for testing significance; and another list of “typical” state or local programs to some degree taken over, at least with respect to decisions regarding employment structure, by the federal

54. See *id.* at 54–55; see also *Intl. Tel. & Telegraph Corp. v. Loc. 134*, 419 U.S. 428 (1975) (usual APA understandings of “adjudication” and separation of functions gives way to more specialized understandings implicit in NLRA provisions addressing jurisdictional disputes of the sort at issue).

55. Several 1975 opinions are illustrative. See e.g. *Weinberger v. Salfti*, 422 U.S. 749 (1975); *U.S. v. Peltier*, 422 U.S. 531 (1975); *Intercounty Const. Corp. v. Walter*, 422 U.S. 1 (1975); *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Train v. Nat. Resources Def Council*, 421 U.S. 60 (1975); *Reid v. INS*, 420 U.S. 619 (1975).

56. 423 U.S. 362 (1976).

57. *Id.* at 371–80.

58. Tushnet, *supra* n. 13, at 636 n. 50.

59. I proceed here—as in the rest of this section—supposing that Justice Rehnquist had enough control over the content of his opinions to permit me to treat the work as his own. This is not necessarily the case, of course, given that nine Justices ordinarily participate in deciding the cases that the Supreme Court hears.

rules; again unaccompanied by serious attempt at analytical resolution.⁶⁰ The opinion also includes quite a few asides—even while it repeatedly insists on the importance of state sovereignty—suggesting limits to the decision’s reach. A way was left open for excepting congressional acts enforcing the Fourteenth Amendment.⁶¹ (Justice Rehnquist himself would write *Fitzpatrick v. Bitzer*, seizing this opportunity only four days later.⁶²) States and localities might be able to waive constitutional protection as a condition for receiving federal funds.⁶³ The long-time attempt to distinguish “governmental” and “proprietary” undertakings of state and local governments remained available as a way to identify another proper zone for federal wage and hour regulation.⁶⁴ Rehnquist also reserved the question of what impact *National League of Cities* would have on congressional exercises of the war power.⁶⁵

Perhaps *National League of Cities* internalizes (or only partially represses) Justice Rehnquist’s predilection for conceiving of law as an aggregation of separate and distinct domains, each setting limiting conditions on the others, no settled ordering emerging. In this period at least, Rehnquist’s work is paradoxically of a piece. There is no “there” there: all parts, no wholes. The cases become versions of Gertrude Stein’s Oakland.⁶⁶

D. Altogether Jerrybuilt Arrangements

It is as though Justice Rehnquist seized and jammed inside each other the internal and external perspectives that H.L.A. Hart distinguished in *The Concept of Law*.⁶⁷ Component parts of the overall legal regime figure as limits on the applicability of other parts, in terms extrinsic to the limited domains, interacting contingently and unpredictably, as perceived internally, within the terms of any particular part. This distinctive structure, glimpsed in the Rehnquist opinions written around the time of *National League of Cities*, would surely have counted as “brilliant” as Daniel Farber understood the term. We might wonder, perhaps following Farber’s prompting, what we ought to make of Rehnquist’s structure. No single domain—for example, the constitutional law of individual rights—can claim precedence, or (within its own perspective) more than unpredictably intermittent pertinence. The commitments of every body of law, like those of the federal statute considered in *Arnett*, are qualified or gapped. There are, it appears, only underenforced norms within every legal domain—an altogether jerrybuilt arrangement.⁶⁸

Perhaps not: If the relevant perspective is that of a judge altogether removed from

60. See *Natl. League of Cities*, 426 U.S. at 843–46, 846–47, 848–51. The recurring themes in the Rehnquist opinions that I have pointed out, and the distinctiveness of those themes (something I have treated as self-evident), together suggest that Justice Rehnquist was likely responsible for much of what we find in the opinions published in his name.

61. *Id.* at 852 n. 17.

62. 427 U.S. 445 (1976).

63. See *Natl. League of Cities*, 426 U.S. at 852 n. 17.

64. See *id.* at 854–55 n. 18.

65. See *id.*

66. See Jon Winokur, *The Traveling Curmudgeon* 49 (Sasquatch Books 2003) (Stein’s view of Oakland).

67. H.L.A. Hart, *The Concept of Law* (Oxford U. Press 1961).

68. See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1213–20 (1978).

within the point of view of any particular domain—the judge *ex ante*. If this judge identifies, in each case, the pertinent body of law, on the basis of some overarching criterion external to each and all of the aggregated parts, the structure as a whole might be “coherent” even if each part were irregularly gapped. In a lecture delivered at the University of Miami in 1978, Justice Rehnquist stated what might be taken to be a methodological premise (and, of course, a notable substantive bias)—*the priority of authority*:

[J]ust as surely as we must strive to maintain a maximum amount of individual liberty, we must realize that authority, too, has its claim in a constitutional republic such as ours. Indeed, the very idea of law is ultimately based on the authority of the state to enforce that law, as events throughout our Nation’s history have on more than one occasion demonstrated. Authority in this sense of the word is . . . the indispensable condition of all government, including self-government.⁶⁹

Assuming that “we” addresses, in the first instance, the Justices of the United States Supreme Court, something like an adjudicative algorithm emerges. In each case the “claim” of authority—the plausibility of the grounds of its exercise, the good faith of its exercise—point to whichever of the contingently overlapping bodies of law affords the most apt terms for articulating the “claim.” This “authoritarianism,”⁷⁰ however, is neither naïve nor inevitably apologetic. The process of sorting alternate legal orders, of testing terms as evocative (or not) of plausibility or good faith, induces a measure of judicious skepticism, touching both terms and claims. Claims of authority that do not fit readily within available terms lose credibility. Justice Rehnquist’s “authoritarianism” is therefore to some degree self-limiting, within the aggregative legal order he depicts; appropriate to a legal order—although some may worry only barely so—that includes constitutional law among its parts.

IV. WHAT PROFESSORS MICHELMAN AND TRIBE DID

Of course, an opposite starting point is also evident, since 1971 or so already well named by John Rawls—“*the priority of liberty*.”⁷¹ There is thus nothing surprising in supposing that in 1977 Professors Michelman and Tribe were, at some level, drawn to the *National League of Cities* opinion precisely because it was an opinion preoccupied with “state sovereignty,”⁷² an especially apt occasion for attempting to counter the “authoritarianism” already evident in the Rehnquist corpus, even if not yet fully articulated—to show-off especially dramatically (Farber was not wrong in perceiving an element of political theater) the equal applicability of the opposed perspective. What is interesting, all the same, is the difference in the approaches that Michelman and Tribe took.

69. William H. Rehnquist, *The Adversary Society*, 33 U. Miami L. Rev. 1, 17 (1978).

70. *Id.*

71. John Rawls, *A Theory of Justice* 243–51 (Harvard U. Press 1971).

72. “State sovereignty” is referenced twenty-six times in the opinion. 426 U.S. at 842, 843, 845, 848, 849, 852, 855, 858, 860–62, 864–66, 868–69, 871–73, 877.

A. *Frank Michelman Embraced Nancy Reagan*

Just say no: Remarkably, Professor Michelman never acknowledged Justice Rehnquist to be the author of the *National League of Cities* majority opinion—indeed, “Rehnquist” showed up only four times, in other connections, all in footnotes.⁷³ Michelman most often attributed *National League of Cities* to “the Justices” or “the Court.”⁷⁴ But Justice Brennan appeared at least six times in main text,⁷⁵ including the very first sentence: “A share of the blame for what follows belongs to Mr. Justice Brennan, whose twenty years of distinguished labor on behalf of our constitutional system—on behalf, I should say, of the men, women, and children whose rights and concerns that system serves.”⁷⁶ Michelman, it should be apparent, insisted on continuity, presented “our constitutional system” as persisting unchanged. He supposed, therefore, that the parts of that system were relatively well-defined and capable of disciplined expansion. This obviously conservative methodological bias, understandably, led to close examination of the “state sovereignty” notions evoked in *National League of Cities*, in order to determine whether these notions possessed the required attributes.

The casual face of Justice Rehnquist’s opinion—the absence of any real effort to treat “state sovereignty” in terms suggestive of precise criteria—was plainly unsatisfactory within Professor Michelman’s perspective.⁷⁷ There was nonetheless, Michelman thought, real substance implicit in *National League of Cities*: “[T]he Court . . . was using ‘sovereignty’ to stand—rather unexpectedly—for nothing more nor less than the state’s role of providing for the interests of its citizens in receiving important social services.”⁷⁸ The question then became how to describe the “special constitutional place” of this notion of state sovereignty “in a way that would make [*National League of Cities*] respectable if not incontrovertibly right.”⁷⁹ Provision of these services “might be construed as a political expression of society’s commitment to the *principle* that individuals ought to be provided with some level of services without having to pay specially for them.”⁸⁰ This principle, Michelman supposed, could be fit within constitutional law in only one way (this is the point at which his methodological conservatism bit hard): “Only constitutional recognition of an interest as a ‘right’ can provide such a basis.”⁸¹ This “reconstruction” of *National League of Cities* was—he acknowledged—“a very big surprise.”⁸²

It also carried a strong implication:

[T]he social service role is treated as a part of the legal conception of what it means to be a

73. See Michelman, *supra* n. 3, at 1174 n. 36, 1176 n. 39, 1186 n. 68.

74. See *e.g. id.* at 1166, 1180.

75. See *id.* at 1165, 1166, 1184, 1192, 1193.

76. *Id.* at 1165. The Michelman article appears in a symposium honoring Justice Brennan—this may explain some of the citations, but it also underscores the anomaly.

77. See *id.* at 1167–73.

78. See Michelman, *supra* n. 3, at 1172.

79. *Id.* at 1173.

80. *Id.* at 1179.

81. *Id.* at 1176 (emphasis omitted).

82. *Id.* at 1180.

state within the . . . system established by the Constitution. Since it is that same Constitution that enjoins those same states from depriving persons of "life, liberty, or property" unreasonably and from denying persons "the equal protection of the laws," how . . . can the states not be "acting" insofar as they fail to perform that same service-providing role that they, in order to prevail in [*National League of Cities*] must claim as a part of their character as "states." Whatever choice the state makes regarding its arrangements . . . is a choice it makes as a state and for which it is, therefore, accountable under Fourteenth Amendment standards of reasonableness, fairness, good faith (or whatever), and nondiscrimination.⁸³

Must courts themselves be able to define constitutionally basic services? Fourteenth Amendment "standards" did not require that judges take up this task:

The general idea . . . is that judicial incapacity, without legislative assistance, to give concrete content or effect to certain inchoate rights does not imply judicial incapacity to seize upon political actions that are visibly responsive to those inchoate rights, and thereafter to regulate institutional frameworks with a view to protecting the claims that grow out of political actions.⁸⁴

National League of Cities might serve not only as "a shield" for state and local governments subjected to burdensome congressional regulation, but also as "Excalibur" for plaintiffs seeking to enforce a right to hitherto free social services that state or local governments might try to cease providing.⁸⁵

B. *Laurence Tribe Embraced William Rehnquist*

Professor Tribe has no trouble associating *National League of Cities* with Justice Rehnquist, at the very point that Tribe identified his own point of departure: "The language of *National League of Cities* is indeed quite consistent with a protected state role premised on individual rights. In fact, Justice Rehnquist seems sometimes to lay the foundations for precisely such a theory."⁸⁶ Tribe, though, did not concentrate his attention on Rehnquist's opinion in the way that Michelman did—his is not so much an internal critique, rather (he writes) an attempt to pull out one thread of thinking, an "unraveling" (his title is dead-on) that reveals the thread to be one also found in "an established fabric of doctrine and theory."⁸⁷ *National League of Cities* is quickly grouped,⁸⁸ inter alia, with *Shapiro v. Thompson*,⁸⁹ *Goldberg v. Kelly*,⁹⁰ *San Antonio Independent School District v. Rodriguez*,⁹¹ and *West Coast Hotel Co. v. Parrish*,⁹²—all "interstitial doctrinal sources of protection," starting points for invalidating congressional

83. See Michelman, *supra* n. 3, at 1185 (footnote omitted) (emphasis in original).

84. *Id.* at 1191.

85. *Id.* at 1185. This is, of course, the image that provoked David Currie's riposte. See Currie, *supra* n. 17, at 878 n. 79.

86. Tribe, *supra* n. 3, at 1075.

87. *Id.* at 1078.

88. See *id.* at 1078–90.

89. 394 U.S. 618 (1969).

90. 397 U.S. 254 (1970).

91. 411 U.S. 1 (1973).

92. 300 U.S. 379 (1937).

action threatening “the deprivation of subsistence rights.”⁹³

These juxtapositions are surprising (“I make no claim in this Article to be describing what the Justices actually intended.”⁹⁴). But surprises come not just because *National League of Cities* appears to be the “odd opinion out.” It is not: We may well wonder—given its result—why *Rodriguez* belongs in this group. Every case, it turns out, is one that Professor Tribe reads differently, in ways that depart from usual emphases, that reveal “threads” in these opinions too that are not immediately apparent. It is a tour de force. The obviousness of the virtuosity, however, raises the question of its point: If the grouping requires this much work, why is it persuasive? (Farber, Farber, Farber.) Earlier in the article, in a footnote discussing *Hughes v. Alexandria Scrap Corp.*,⁹⁵ Tribe resorts to a different metaphor:

I mean to say nothing about the conscious purposes of the Justices in making the distinctions they have; at the same time, I find it difficult to believe that either coincidence alone, or even a determined desire on my part to pour the cases into a certain mold, could satisfyingly account for the quite remarkable way in which otherwise perplexing and unconnected lines may be seen as linked in a single diagram. Although any such supposition is necessarily speculative, the almost magnetic force that seems to bring the lines into a coherent pattern could well be an underlying structure of beliefs about human rights and their importance—a structure that might unite judges and commentators of obviously different political and ideological leanings, if not at the level of doctrine then at least at the level of doctrinal boundaries and distinctions.⁹⁶

This is the voice, we recognize, of the author of *American Constitutional Law*, writing right around the moment of its publication, knowing nothing (or not much) of what the reaction to that treatise would be, but conscious perhaps that some readers at least might find it “extravagant” (to use Justice Ginsburg’s word, if not her own judgment⁹⁷). Surprising connections—and Professor Tribe’s remarkable ability to make them seem somehow “underlying”⁹⁸—would (we know now) be one principal reason for the treatise’s triumph. We also know, though, that the “underlying”⁹⁹ conjunctions would often work, would often persuade, even if the reader also acknowledged that the particular “coherent pattern”¹⁰⁰ was not the only possible one. Tribe showed the Supreme Court’s readings of constitutional law to be super-saturated. Within the cases in the aggregate there are always cues pointing to arrangements and arguments with claims to serious attention that differ, sometimes substantially, from other cues, arrangements, and arguments—and maybe not just one or two others. There is (the canonist might think) too much “there” there.

Professor Tribe, thus, agreed with Justice Rehnquist and disagreed with Professor Michelman. The individual opinion—*National League of Cities*, say—is not “[a]nalyzed

93. Tribe, *supra* n. 3, at 1089; *id.* at 1090.

94. *Id.* at 1078.

95. 426 U.S. 794 (1976); see Tribe, *supra* n. 3, at 1072–74 n. 34.

96. Tribe, *supra* n. 3, at 1073–74 n. 34.

97. See Ginsburg, *supra* n. 16, at 344.

98. Tribe, *supra* n. 3, at 1065.

99. *Id.*

100. *Id.* at 1072–74 n. 34.

to the bottom,” its meaning a matter of “plumbing the depths.”¹⁰¹ It is, rather, a surface thing, an accumulation of glimpses. Rehnquist opinions contingently advertised the seeming randomness of the legal propositions accumulated and treated as decisive (a second randomness). These opinions advertise the fragility of the idea of principle—of the notion that constitutional law or any other body of law could claim some persisting deep structure. But for Tribe—here he turned away from Rehnquist and (partly) toward Michelman—the opinion itself may be merely an accumulation of phrases and references, but it is also therefore directional (or multi-directional), pointing towards possible conjunctions possibly suggesting “underlying”¹⁰² orders. Professor Tribe, we can see, directly challenged Justice Rehnquist:

I make no claims about what the Justices intended or “really had in mind.” I haven’t a clue what that might have been, but I doubt that the conclusion of this Article was it. I will be arguing about the logic, not the motives, of the Court’s action. And I will be arguing about that logic with a purpose of my own: to enlist that logic—while remaining faithful to its premises—in the search, perhaps delayed but not defeated, for a just constitutional order.¹⁰³

Every case that might appear to be a demonstration of the arbitrary, never-certain pertinence of constitutional law is also, potentially, a pointer to resources within constitutional law that reveal persuasive conjunctions and arguments (even if never definitively so), therefore reasserting the pertinence of constitutional law, now footed in the aggregate of cases, free of the inadequacy of individual opinions.

V. THEN NOW

If we take into account the larger collection of opinions that Justice Rehnquist was assembling in the period, the efforts of Professors Tribe and Michelman fit well within an on-going clash of obvious and unusual importance. It was, we might think, an extraordinary moment—“brilliance” was probably not “normal,” but it was also probably a not-surprising side effect (as it were) of the hard work that the moment appears to have invited.

Isn’t this just ancient history? Maybe not: An important recent Supreme Court decision that puts in play a century-old opinion written by Justice Holmes points to a new (also old) context within which the Tribe and Michelman efforts ultimately acquire added constitutional resonance—indeed, real textual footing. Seeing this, I should warn at the outset, requires an extended exposition.

A. Tennessee Copper *in* 2007

In *Massachusetts v. Environmental Protection Agency*, decided last April, the United States Supreme Court, although dividing 5-4, ruled that the EPA possessed authority under the Clean Air Act to regulate emissions of carbon dioxide and other

101. Michelman, *supra* n. 3, at 1194.

102. Tribe, *supra* n. 3, at 1065.

103. *Id.* at 1066.

greenhouse gases¹⁰⁴ and that the refusal of the EPA, as of the time of the Court's decision, to undertake such regulation was founded in no reason that the Clean Air Act marked as pertinent, and was therefore arbitrary and capricious.¹⁰⁵ These are obviously both important rulings.¹⁰⁶ But the majority opinion written by Justice Stevens devoted about as much attention to the threshold question of whether Massachusetts, as a State, had standing to challenge the EPA failure to act.¹⁰⁷ Chief Justice Roberts considered—at substantial length—only the standing question.¹⁰⁸

The State of Massachusetts held title to property bordering the Atlantic Ocean that faced possible endangerment by rising waters that could result from global warming.¹⁰⁹ The potential danger might be offset, to some currently undeterminable extent, if the EPA pursued a regulatory course sufficiently more aggressive than its present, relatively laid back approach.¹¹⁰ Chief Justice Roberts contended that a private property owner could not claim standing in these circumstances.¹¹¹ Both prospective injury and the ability of the EPA to prevent or reduce injury turned on too much speculation.¹¹² Justice Stevens, however, thought that the interests of states were different in kind from those of private property owners, and that the risks posed to the State's own property were simply illustrative of considerations that Massachusetts itself could choose to decide were presently relevant, and (having so decided) invoke as a basis for proceeding in federal court.¹¹³

Stevens quoted Justice Holmes, writing for the Supreme Court one hundred years earlier in *Tennessee Copper*:

This is a suit by a State for an injury to it in its capacity of *quasi-sovereign*. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.¹¹⁴

Massachusetts, the majority opinion concluded, “is entitled to special solicitude in our standing analysis.”¹¹⁵ The State's determination that it needed to act “to preserve its sovereign authority today” was sufficiently “well-founded” to establish standing.¹¹⁶ The affidavits that Massachusetts included with the complaint it filed in federal district court showed that “the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts,” that “[t]he risk of catastrophic harm, though remote, is nevertheless real,” and that the “risk would be reduced to some extent” if the

104. 127 S. Ct. 1438, 1462.

105. *Id.* at 1463.

106. *See e.g. id.* at 1446, 1458 (discussing the dangers associated with global warming).

107. *Id.* at 1452–58.

108. *Id.* at 1463–71 (Roberts, C.J., Scalia, Thomas & Alito, JJ., dissenting).

109. 127 S. Ct. at 1456.

110. *See id.* at 1458.

111. *See id.* at 1465 (Roberts, C.J., Scalia, Thomas & Alito, JJ., dissenting).

112. *See id.* at 1470.

113. *Id.* at 1454–55.

114. 127 S. Ct. at 1454 (quoting 206 U.S. at 237).

115. *Id.* at 1455.

116. *Id.* at 1454.

EPA were to undertake more aggressive regulation of emissions of greenhouse gas.¹¹⁷ Massachusetts could therefore claim standing.¹¹⁸

Chief Justice Roberts insisted that there was good reason why Massachusetts itself “never cited *Tennessee Copper* . . . before this Court or the D.C. Circuit,” why “not one of the legion of *amici* . . . ever cited the case,” and “why not one of the three judges writing below ever cited the case either.”¹¹⁹ *Tennessee Copper* addressed the question of entitlement to equitable relief, holding only that the distinctive interests of a state provided a basis for an injunction in circumstances in which private property owners would be relegated to damages actions.¹²⁰ “The case had nothing to do with Article III standing.”¹²¹ Article III does not “somehow implicitly treat[] public and private litigants differently.”¹²²

Taken in isolation, several of the propositions that the Roberts dissent asserts are easy to criticize. Article III, section 2, forthrightly announces that the “judicial Power shall extend to all Cases, in Law and Equity.”¹²³ There are other requirements, of course, but the “Cases” and “Controversies” condition,¹²⁴ it is usually thought, is ordinarily met given equity jurisdiction (which precisely describes who can seek what when.) “Standing” was first of all an equity notion itself.¹²⁵ Article III, moreover, plainly does too “implicitly treat[] public and private litigants differently.”¹²⁶ *Chisholm v. Georgia*¹²⁷ was wrong, most of us learned in law school. (Who taught the Chief Justice constitutional law?) If it were not already clear, Chief Justice Rehnquist confirmed conventional wisdom when he declared *Hans v. Louisiana*¹²⁸ to be constitutional law,¹²⁹ and not just a decision about equity jurisdiction (as the *Hans* opinion itself seemed to suggest¹³⁰). Article III, even without the help of the Eleventh Amendment, marks states as different, extending the “original Jurisdiction” of the Supreme Court to “all Cases . . . in which a State shall be Party”¹³¹—but not, conspicuously, to cases initiated by private parties. *Tennessee Copper* was one such original case,¹³² and Justice Holmes was plainly concerned in part with mapping how equity jurisdiction changed because the State of Georgia had brought the injunctive

117. *Id.* at 1458.

118. *Id.*

119. 127 S. Ct. at 1466 (Roberts, C.J., Scalia, Thomas & Alito, JJ., dissenting).

120. *See id.* at 1465 (referencing *Tenn. Copper*, 206 U.S. at 236–38).

121. *Id.*

122. *Id.*

123. U.S. Const. art. III, § 2.

124. *Id.*

125. *See* Henry R. Hart & Herbert Wechsler, *The Federal Courts and the Federal System* 170 (Foundation Press 1953); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *Stan. L. Rev.* 1371, 1417–57 (1988); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?* 102 *Mich. L. Rev.* 689 (2004).

126. 127 S. Ct. at 1465 (Roberts, C.J., Scalia, Thomas & Alito, JJ., dissenting).

127. 2 U.S. 419 (1793).

128. 134 U.S. 1 (1890).

129. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54 (1996).

130. *See Hans*, 134 U.S. at 9–10 (Harlan, J., concurring).

131. U.S. Const. art. III, § 2.

132. 206 U.S. at 236.

action.¹³³ But he began his discussion by describing the distinctive “capacity” in which Georgia sued¹³⁴—what we might take to be the “standing” part of his opinion—with the remedial details following as corollaries (not as independently given.)

Chief Justice Roberts, though, was also right to wonder. Justice Harlan had written a concurring opinion in *Tennessee Copper* on all fours with Roberts’s own thinking:

When the Constitution gave this court original jurisdiction in cases “in which a State shall be a party,” it was not intended, I think, to authorize the court to apply . . . any principle or rule of equity that would not be applied, under the same facts, in suits wholly between private parties. . . . Georgia is entitled to the relief sought, not because it is a State, but because it is a *party* which has established its right to such relief by proof. The opinion [of Justice Holmes], if I do not mistake its scope, proceeds largely upon the ground that this court . . . owes some special duty to Georgia as a state . . . while under the same facts, it would not owe any such duty to the plaintiff, if an individual.¹³⁵

Was Holmes wrong? Why rest the important *Massachusetts* decision on an opinion, ignored in the course of litigation, announced one hundred years ago, but also one hundred twenty years after the drafting of the Constitution?

Holmes wrote after the fashion of an idiosyncratic genius. “[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word.”¹³⁶ Georgia is alone and godlike, standing apart from its citizens, deciding the fate of mountains and air—Wagnerian constitutional law! The *Tennessee Copper* opinion itself, though, turns out not to stand alone. It was neither the Supreme Court’s “last word” nor its first.

B. After Tennessee Copper

Hopkins Federal Savings & Loan Assn. v. Cleary, decided in 1936, concerned a suit brought by Wisconsin banking officials challenging the constitutionality of a federal statute authorizing state-chartered, state-regulated savings banks, upon a majority vote of shareholders, to convert their institutions to federally-chartered savings associations subject to federal regulation.¹³⁷ The Supreme Court’s unanimous opinion, written by Justice Cardozo, held that the congressional legislation was inconsistent with the Tenth Amendment, in the process addressing the question of state standing (citing *Tennessee Copper* twice):

As against the protest of the state, asserting its public policy or the prohibition of a statute, no assent by shareholders, however general or explicit, will be permitted to prevail. It is of no moment in such conditions that the interest of the state in repelling the encroachment is other than pecuniary. At least there is “a matter of grave public concern in which the state, as the representative of the public has an interest apart from that of the individuals affected.” In its capacity of quasi-sovereign, the state repulses an assault upon the quasi-public institutions that are the product and embodiment of its statutes and its policy. . . .

133. See *id.* at 237.

134. *Id.*

135. *Id.* at 239–40 (Harlan, J., concurring).

136. *Id.* at 237 (majority).

137. 296 U.S. 315 (1935).

In the creation of corporations of this quasi-public order and in keeping them thereafter within the limits of their charters, the state is *parens patriae*, acting in a spirit of benevolence for the welfare of its citizens. Shareholders and creditors have assumed a relation to the business in the belief that the assets will be protected by all the power of the government against use for other ends than those stated in the charter. . . . True, most of the shareholders . . . assented to the change. Even so, an important minority were not represented at the meetings, and their approval is not shown. Creditors other than shareholders have not been heard from at all. To these non-vocal classes the *parens* owes a duty.¹³⁸

Georgia v. Pennsylvania Railroad Co.,¹³⁹ a truly extraordinary antitrust action, invoked the original jurisdiction of the Supreme Court, alleging an elaborate price-fixing conspiracy on the part of some twenty railroad companies that “in purpose and effect give manufacturers, sellers and other shippers in the North an advantage over manufacturers, shippers and others in Georgia.”¹⁴⁰ The result of the conspiracy, the complaint charged, was “to deny . . . many of Georgia’s products equal access . . . to the national market,” “to limit . . . the Georgia economy to staple agricultural products,” “to frustrate and counteract the measures taken by the State to . . . promote the general progress and welfare of its people,” and “to hold the Georgia economy in a state of arrested development.”¹⁴¹ Writing for five Justices, Justice Douglas concluded that Georgia was suing to vindicate its own interests—and not “in reality for the benefit of particular individuals.”¹⁴²

Georgia sues as a proprietor to redress wrongs suffered by it as the owner of a railroad and as the owner and operator of various public institutions. . . . But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae*, are those arising from an alleged . . . price-fixing scheme, it is said, [that] has injured the economy of Georgia.¹⁴³

Tennessee Copper (and predecessors I will discuss shortly) established that the interest in the state economy was interest enough.¹⁴⁴

Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. . . . They may arrest the development of a State or put it at a decided disadvantage in competitive markets.¹⁴⁵

Chief Justice Stone, asserting the position of the dissenters, did not deny the possibility of a *parens patriae* interest—only its relevance.

The federal government is *parens patriae* with respect of the cause of action here alleged, and not the State. The federal government alone stands in such relationship to the citizens

138. *Id.* at 339–41 (citations omitted).

139. 324 U.S. 439 (1945).

140. *Id.* at 444.

141. *Id.*

142. *Id.* at 446.

143. *Id.* at 447.

144. *See Pa. R.R. Co.*, 324 U.S. at 447–49.

145. *Id.* at 450 (note “stream of commerce” echoes); *cf. Debs*, 158 U.S. 564, 591.

and inhabitants of the United States, as to permit the bringing of suit in their behalf, to protect them from the violation of federal laws relating to interstate commerce.¹⁴⁶

Some forty years later, Justice White self-consciously synthesized *Tennessee Copper* and *Pennsylvania Railroad Co.* in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*¹⁴⁷:

[T]he State must articulate an interest apart from the interests of particular private parties [A] State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.

[T]he State has an interest in . . . ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system.¹⁴⁸

And finally, *Nebraska v. Wyoming* concluded that federal failures to enforce federal law governing water contracts fell within the compass of state interests justifying *parens patriae* actions of the *Tennessee Copper* sort, thus allowing a state to sue the United States itself (in this instance in order to assure successful operation of a consent decree).¹⁴⁹

Wyoming argues only that the cumulative effect of the United States's failure to adhere to the law governing the contracts undermines the operation of the decree . . . and thereby states a claim arising under the decree itself, one by which it seeks to vindicate its "quasi-sovereign" interests which are "independent of and behind the titles of its citizens, in all the earth and air within its domain."¹⁵⁰

C. Before Tennessee Copper

The older sequence of cases begins—or may be taken to begin—with *United States v. Hughes*, decided in 1850.¹⁵¹ Evidently, the United States sold the same land twice and the United States Attorney brought an action to undo the second transaction.¹⁵² Counsel for Hughes, the second purchaser, argued that "the United States have no interest in this suit, but interpose only as an act of grace, officiating only in the office of prerogative."¹⁵³

The United States in selling land, and in all matters of contract, does not assert its sovereignty, but acts as a citizen. Constitutional governments cannot pronounce their own deeds void for any cause.

It is against public policy, that the land-officers should elect their favorite between two citizens claiming the same land by purchase, and involve the United States as a partisan in

146. *Id.* at 474 (Stone, C.J., Roberts, Frankfurter & Jackson, JJ., dissenting).

147. 458 U.S. 592 (1982).

148. *Id.* at 607–08; *see id.* at 604–06 (discussing *Tenn. Copper* and *Pa. R.R. Co.*).

149. 515 U.S. 1 (1995).

150. *Id.* at 20 (citation omitted) (quoting *Okla. ex rel. Johnson v. Cook*, 304 U.S. 387, 393 (1938) (quoting *Tenn. Copper*, 206 U.S. at 237)).

151. 52 U.S. 552 (1850).

152. *Id.* at 554–56.

153. *Id.* at 561–62.

the strife.¹⁵⁴

The Supreme Court, however, accepted the premise but drew an opposite conclusion.

It is manifest that, if the agents of an individual had been thus imposed on, the conveyance could be set aside because of mistake on part of such agents, and fraud on part of the second purchaser, in order that the first contract could be complied with. Nor can it be conceived why the government should stand on a different footing from any other proprietor.

As the patent to Hughes is a conveyance of the fee, the United States stand divested of the legal title, and therefore cannot fulfill their engagement with Goodbee [the first purchaser] and his alienees, to whom they stand bound for a legal title, until the grant to Hughes is annulled.¹⁵⁵

United States v. San Jacinto Tin Co.,¹⁵⁶ a case factually not too different from *Hughes*, restated the rule:

[S]ince the right of the government . . . to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

[T]his interest or duty of the United States must exist as the foundation of the right of action.¹⁵⁷

Just a few months later, however, Justice Miller—the author of the *San Jacinto Tin* opinion—demonstrated some surprising implications of his earlier formulation. “[O]bligation on the part of the United States”¹⁵⁸ covered a lot. *United States v. American Bell Telephone Co.* was a suit brought to cancel telephone patents issued to Alexander Graham Bell.¹⁵⁹ Bell’s lawyers invoked the *San Jacinto Tin* rule: “This language is construed by counsel . . . to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest.”¹⁶⁰ *No.*

154. *Id.* at 562 (citations omitted).

155. *Id.* at 568.

156. 125 U.S. 273 (1888).

157. *Id.* at 285–86.

158. *Id.* at 286.

159. 128 U.S. 315 (1888).

160. *Id.* at 367.

It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is *its obligation to protect the public* from the monopoly of the patent which was procured by fraud.¹⁶¹

The would-be private action has become a public action.¹⁶²

Seven years later, the full force of Miller's analysis was felt. *In re Debs*—famously and infamously—addressed an injunction sought and obtained by the United States against a union boycott of Pullman sleeping cars included in trains running throughout the Midwest—the boycott was meant to assist a worker strike at the Pullman factory.¹⁶³ The boycott effectively shut down railroad operations in the Midwest, with obvious national consequences. Issuance of the injunction led to contempt imprisonment of Eugene V. Debs and other union leaders.¹⁶⁴ Did “the government” have “such an interest in the subject-matter . . . to appear as party plaintiff in this suit?”¹⁶⁵ “A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill.”¹⁶⁶ But Justice Brewer's opinion declared: “We do not care to place our decision upon this ground alone.”¹⁶⁷ “It is obvious,” given *San Jacinto Tin* and *American Bell*

that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are entrusted to the care of the Nation, and *concerning which the Nation owes the duty to all the citizens of securing to them their common rights*, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce,

161. *Id.* (emphasis added). Justice Miller noted that *Hughes*, was a similar case: “[T]he right of the government to sustain the suit was based upon its legal or moral obligation to give a good title to another party who had a prior and better claim to the land, but whose right was obstructed by the patent issued by the United States.” *Id.* at 368. Earlier in the opinion, Miller had foreshadowed his conclusion:

If such a fraud were practised [sic] upon an individual, he would have a remedy in any court . . . ; but it is said that the government of the United States—the representative of sixty millions of people, acting for them, on their behalf and under their authority—can have no remedy against a fraud which affects them all, and whose influence may be unlimited.

Id. at 357.

162. See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387 (1995).

163. 158 U.S. 564.

164. See Nick Salvatore, *Eugene V. Debs: The Citizen and Socialist (The Working Class in American History)* 131–38 (U. Illinois Press 1983).

165. *Debs*, 158 U.S. at 583.

166. *Id.*

167. *Id.* at 584.

has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction.¹⁶⁸

There are only a few stops on the way between *Debs* and *Tennessee Copper*. *Louisiana v. Texas*, an original matter in the Supreme Court in 1900, involved a yellow fever quarantine—allegedly over-restrictive—that Texas officials enforced against all commercial goods transported from New Orleans.¹⁶⁹ Although Texas ultimately prevailed,¹⁷⁰ Chief Justice Fuller's majority opinion relied directly on *Debs*, quoting from the passage above,¹⁷¹ to establish that Louisiana needed no "special and peculiar injury such as would sustain an action by a private person."¹⁷² "[T]he state . . . presents herself in the attitude of *parens patriae*, trustee, guardian, or representative of all her citizens."¹⁷³ A year later, *Missouri v. Illinois* addressed Missouri's challenge to a plan adopted by the Sanitary District of Chicago to discharge city sewers into the Mississippi River.¹⁷⁴ Quoting *Louisiana* and its quotation of *Debs*,¹⁷⁵ the majority opinion of Justice Shiras treated Missouri's standing as clear: "But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them."¹⁷⁶ The *Missouri* opinion is the only decision Justice Holmes cited as supporting authority in *Tennessee Copper*.¹⁷⁷

VI. THE DUTY TO PROTECT (A MANIFESTO OF SORTS)

The opinion that Justice Holmes wrote in *Tennessee Copper* was one in a long line. Within the sequence, the Supreme Court addressed both original matters and cases on appeal beginning in usual trial courts. The Court's opinions show that something like the reasoning that Holmes deployed shows up in discussions of both equity jurisdiction and justiciability—indeed, not surprisingly, the two categories overlap. Justice Stevens was not "off the wall" in calling attention to *Tennessee Copper* in the *Massachusetts* majority

168. *Id.* at 586 (emphasis added). The duty, Justice Brewer thought, carried over to the judiciary as well. "If ever there was a special exigency, one which demanded that the courts should do all that courts can do, it was disclosed by this bill, and we need not turn to the public history of the day, which only reaffirms with clearest emphasis all its allegations." *Id.* at 592.

169. 176 U.S. 1 (1900).

170. *Id.* at 22–23 (finding the acts of the health officer were not expressly authorized by the Texas governor).

171. *Id.* at 19.

172. *Id.*

173. *Id.* Justice Harlan disagreed. "The case involves no property interest of [Louisiana]. Nor is Louisiana charged with any duty, nor has it any power, to regulate interstate commerce. Congress alone has authority in that respect." *La.*, 176 U.S. at 24 (Harlan, J., concurring).

174. 180 U.S. 208 (1901).

175. *Id.* at 234–38.

176. *Id.* at 241.

177. 206 U.S. at 237. Justice Holmes also noted his own opinion for the Supreme Court in a subsequent stage of the *Missouri* litigation, *Mo. v. Ill.*, 200 U.S. 496 (1906). There, he had proceeded cautiously in evaluating the merits of the claim.

It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fit would be at least premature.

Id. at 521. The main issue concerned the increase in cholera death rates in St. Louis—Holmes thought that the evidence was inconclusive regarding the impact of the sewage infiltration. *See id.* at 522–26.

opinion. Chief Justice Roberts, it seems, was wrong.

The Holmes opinion was nonetheless idiosyncratic in an important respect. *Tennessee Copper* treats the interest of the state “in all the earth and air within its domain” as an interest “independent of and behind the titles of its citizens.”¹⁷⁸ The description is purely a description of property rights without any effort to explain or justify their origin. This formulation recurs, we have seen, in *Nebraska*. But in other Supreme Court opinions issued after 1907 there is a second emphasis. The State “owes a duty,”¹⁷⁹ Justice Cardozo writes in *Hopkins*, to “protect[]” the “assets” of “[s]hareholders and creditors”—this is the basis for state standing.¹⁸⁰ The “rights” that Georgia asserts against the Pennsylvania Railroad, Justice Douglas explains, derive from the “injur[y] [to] the economy of Georgia.”¹⁸¹ (Chief Justice Stone does not disagree with the notion that a duty of government to protect and injury to the populace generally (the economy) together confer standing—he just thinks that the federal government is the relevant government.) Justice White frames his standing discussion similarly in *Snapp*.¹⁸² All of this is quite conclusory. This theme is more pronounced in opinions preceding *Tennessee Copper*. *American Bell* emphasized the “obligation to protect the public”¹⁸³ as the underpinning of United States’ involvement in the action. *Debs*, we have also seen, supplies the fullest statement:

[W]henver the wrongs complained of are such as to affect the public at large, . . . and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or to prevent it from taking measures therein to fully discharge those constitutional duties.¹⁸⁴

This “duty” emphasis, we realize, returns us to *National League of Cities* and Professors Michelman and Tribe. Michelman stressed that his reading of Justice Rehnquist’s opinion yielded “intrinsic duties” and rights “to the state’s protection.”¹⁸⁵ Tribe’s formulation reads like the application of *Debs*—in circumstances akin to those in *Nebraska v. Wyoming*—to justify the adversary relationship of the state and federal governments in *National League of Cities*:

[T]he state’s right against the federal government . . . is derivative of the rights of its residents against government. As a result, the state’s only claim must be that . . . when the federal government leaves to states and localities the fulfillment of the government duty, it cannot act so as to undermine the ability of the states and their subdivisions to perform that duty.¹⁸⁶

The seeming pertinence of *Debs* would be nothing more than an ironic curiosity

178. 206 U.S. at 237.

179. 296 U.S. at 341.

180. *Id.* at 340.

181. *Pa. R.R. Co.*, 324 U.S. at 447.

182. *See* 458 U.S. at 600–08.

183. 128 U.S. at 367.

184. 158 U.S. at 586.

185. Michelman, *supra* n. 3, at 1194 (distinguishing *Natl. League of Cities* and *Rizzo*).

186. Tribe, *supra* n. 3, at 1090.

except for the fact that the *Debs* formula is itself so obviously evocative. The reciprocal relationship of allegiance and protection as the defining content of “citizenship” was a recurring theme in Civil War and Reconstruction constitutional argument—famously (at the time) the ground for the declaration of Attorney General Bates (made in advance of the implementation of the Emancipation Proclamation) that “free” African Americans were United States citizens (*Dred Scott*¹⁸⁷ to the contrary notwithstanding).¹⁸⁸ John Mercer Langston—ex-slave, dean of the Howard University law school, drafter of the Civil Rights Act of 1875—stressed “the duty of allegiance on the one part, and the right of protection on the other” as not only the gist of Bates’s thinking, but also as “propositions . . . passed . . . through the 14th amendment, into the Constitution of the United States.”¹⁸⁹ Langston was, of course, precisely correct: The first sentence of section one of the Fourteenth Amendment fixes federal and state citizenship, thus imposing the duty of allegiance, in advance of the second sentence imposing upon states the duty of affording “the equal protection of the laws,” thus affording the right to discharge that duty, a duty that section five of the Amendment also grants Congress the right to enforce. This is—we can see—Professor Tribe’s formulation in *National League of Cities* with the emphases reversed: It was for Langston the “right of protection” afforded Congress in the event of state failures to protect that mattered—and not, as in *National League of Cities*, state efforts to meet their duty to protect in the face of congressional interference or indifference.

This reconstruction reading of the Fourteenth Amendment reinforces the supposition of both Professors Tribe and Michelman that the individual rights *National League of Cities* protects are Fourteenth Amendment rights. The Fourteenth Amendment enacts a duty to protect. The idea of this duty—the fact of its status as bottom-line constitutional obligation—survived the collapse of Reconstruction, notwithstanding the notable attempt at erasure undertaken by Chief Justice Waite in *United States v. Cruikshank*.¹⁹⁰ The *Debs* usage and its later reiteration is evidence. So too, it might be argued, evidence also lies in the stubborn insistence of federal judges reading Chief Justice Rehnquist’s *DeShaney* opinion against the grain¹⁹¹—as inviting searching scrutiny of government responsibility in the face of seeming failures to act.¹⁹² And there is more (too much to permit dismissal of particular manifestations as idiosyncratic): A long history of allegiance/protection usage, evident in Jefferson’s Declaration of Independence,¹⁹³ in Hobbes,¹⁹⁴ in Coke in *Calvin’s Case*¹⁹⁵—a usage,

187. 60 U.S. 393 (1856).

188. 10 Op. Atty. Gen. 382, 413 (1862).

189. John Mercer Langston, *Equality before the Law* (Oberlin, Pratt & Battle 1874) (reprinted in *Great Speeches by African Americans* 49–50 (James Delay ed., Dover 2006)).

190. 92 U.S. 542, 550–52 (1875).

191. *DeShaney v. Winnebago Co. Dept. of Soc. Serv.*, 489 U.S. 189 (1989). For discussion of some of the history of the duty to protect in the context of a critique of *DeShaney*, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991).

192. See e.g. *Breen v. Tex. A&M U.*, 485 F.3d 325, 332–38 (5th Cir. 2007); *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006). The so-called “state created danger” doctrine that these decisions illustrate is often read quite restrictively—but cases resting on this theory continue to present themselves to courts frequently enough, and are taken seriously by federal courts often enough, to suggest that the theory is in some real sense entrenched.

193. Thomas Jefferson, *Notes of Proceedings in the Continental Congress (June 7 to Aug. 1, 1776)*, in *The*

we think now, that is one central component (at least) of the first formulations of what we recognize as modern constitutional law in the humanist retrievals and remodelings of feudalism undertaken by Ulrich Zasius and his contemporaries early in the sixteenth century.¹⁹⁶

Laurence Tribe and Frank Michelman, writing in 1977, were obviously aware that their arguments fell outside the range of ordinary judicial formulas—“doctrine,” we have learned to say.¹⁹⁷ They sought to describe what Professor Tribe would today call “the invisible Constitution,”¹⁹⁸ suppositions that constitutional provisions or—in this instance—judicial conclusions simply cannot separate out.¹⁹⁹ We cannot help but notice, some thirty years later, that Tribe and Michelman wrote in advance of what we might think of as our own era’s appreciation of constitutional texts as distinctive contributions to the “literature of public documents,”²⁰⁰ richly complex in their own internal reverberations,²⁰¹ worded in terms alluding to long chains of provocative claims, commitments, and cross-references. We have also come, with less resistance than in the past, to understand judicial opinions as very much a separate genre, evocative of distinctive preoccupations, a separate politics—William Rehnquist helped us remember this (so too, of course, William Brennan, Charles Evans Hughes, and John Marshall). We are, as one result, no longer as surprised by glimpses of the complicated relationship of constitutional texts and judicial formulations of “constitutional law.”

“Brilliance” (so suspicious for Professor Farber) now seems more like a not unexpected artifact or by-product of this complexity. The Tribe and Michelman reading of *National League of Cities* should strike us as richly textual, well-rooted in a Fourteenth Amendment we no longer read with eyes wide shut—even if we have not yet fully come to grips with its principal implications.²⁰² Justice Rehnquist’s opinion, we also can see now, was one effort among many in his campaign to blow open (or up) what he took to be then-conventional contents of Supreme Court opinions, in advance (we may think) of his own subsequent assertions of new conventions, conceivably superseded themselves as this century progresses.

Papers of Thomas Jefferson vol. 1, 311 (Julian P. Bond et al. eds., Princeton U. Press 1950).

194. See Quentin Skinner, *The Context of Hobbes’s Theory of Political Obligation*, in *Visions of Politics* 264 (Cambridge U. Press 2002).

195. 77 Eng. Rep. 377 (K.B. 1608); see generally Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case*, 9 Yale J.L. & Humanities 73 (1997).

196. See Steven Rowan, *Ulrich Zasius. A Jurist in the German Renaissance, 1461–1535* 99–101 (Vittorio Klostermann 1987); Quentin Skinner, *The Foundations of Modern Political Thought: Volume Two: The Age of Reformation* 127–30 (Cambridge U. Press 1978); Kathleen Davis, *Sovereign Subjects, Feudal Law, and the Writing of History*, 36 J. Medieval & Early Modern Stud. 223, 257 n. 57 (2006).

197. See Charles Fried, *Saying What the Law Is* 1–12 (Harvard U. Press 2004).

198. Laurence H. Tribe, *The Invisible Constitution* (Oxford U. Press 2008) (forthcoming).

199. In *The Invisible Constitution*, Tribe emphasizes the Constitution itself rather than the Supreme Court’s work.

200. See Robert A. Ferguson, *The American Enlightenment, 1750–1820* 124–49 (Harvard U. Press 1997).

201. See e.g. Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999).

202. For a very preliminary sketch how usual judicial formulas might be recast, developed in the context of a discussion of the Schiavo controversy, see Patrick O. Gudridge, *Pangloss*, 61 U. Miami L. Rev. 763, 775–83 (2007).

