INSTITUTIONAL ARRANGEMENTS AND INDIVIDUAL RIGHTS: A COMMENT ON PROFESSOR TRIBE'S CRITIQUE OF THE MODERN COURT'S TREATMENT OF CONSTITUTIONAL LIBERTY

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Professor Coenen analyzes Professor Tribe's contention that the present day Supreme Court's constitutional work is marked by an unjustified two-track approach. Professor Tribe has built this claim on an elaborate assessment of Saenz v. Roe*, in which the Court—to the surprise of many prognosticators—invalidated a state statute that imposed temporary limitations on welfare benefits for new residents. He contends that the Court employed the open-stanced constitutional methodology of "structural inference" in deciding* Saenz *only because that case involved institutional arrangements. According to Professor Tribe, the modern Court has carefully (and unjustifiably) confined its use of structural inference to institutional-arrangement cases; in the field of individual liberty it has eschewed this nontextual, nontradition-based style of reasoning ever since its 1973 ruling in* Roe v. Wade.

Coenen begins his response to Professor Tribe's comment by noting that it provides a powerful call for the protection of individual liberties. Coenen also agrees that the structural-inference model has driven recent Supreme Court decisions that curtailed congressional authority under the banner of implied federalism limitations. Coenen, however, raises three major questions about Tribe's portrayal of the modern Court's work and its methodological and doctrinal implications.

First, Coenen asks whether Professor Tribe's dualistic portrayal of the modern Court's work represents an oversimplification. Exam-

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ining a variety of modern rulings, Coenen concludes that the two-track depiction both overstates the Court's willingness to use the structural methodology in cases like Saenz *and understates its willingness to use that methodology in true "fundamental rights" cases.*

Next, Professor Coenen notes that the Court's holding in Saenz*, which invalidated a seemingly quite plausible state law, appears inconsistent at first blush with the Rehnquist Court's strong pro-states-rights stance. Coenen argues, however, that* Saenz *is best understood within a larger view of why state autonomy has value. State autonomy, he says, is merely a means to other ends, and the benefits from diverse state communities exist only when interstate mobility is unimpeded.*

Lastly, although Professor Coenen endorses the view that structural inference should be employed in more orthodox cases involving claimed infringements of rights, he expresses concern about Professor Tribe's suggestion that courts should safeguard individual autonomy because it is connected up with institutional arrangements. More specifically, Coenen worries that this way of thinking about rights might ultimately narrow—rather than broaden—the Court's use of structural inference. Coenen suggests that courts should not apply structural inference in individual-liberty cases on the theory that those cases have institutional dimensions. Rather, courts should use the methodology of structural inference in individual-liberty cases because individual liberties are important in and of themselves.

In this essay, I reflect on Laurence Tribe's recent treatment of *Saenz v. Roe*[1] and what it says about the current Supreme Court's use of reasoning by "structural inference" in constitutional decision making.[2] In *Saenz*, the Court drew upon a variety of constitutional sources, including the Fourteenth Amendment's long-dormant Privileges or Immunities Clause, to invalidate a California law that barred most new state residents from receiving full welfare benefits for one year. Professor Tribe argues that *Saenz* reveals a Court that is acting "paradoxically" in recognizing and applying fundamental rights.[3] In his view, this paradox exists because the Court in *Saenz* recognized a broad right to move from state to state by using the analytic "method . . . of structural inference"[4]—a methodology that looks to the Constitution's "patterns and premises, layout and logic, assumptions and animating principles."[5] In striking contrast, he says, the Court has eschewed this open-stanced structural mode of Constitution-reading in no less significant civil liberties cases, such as

1. 526 U.S. 489 (1999).

2. Lawrence H. Tribe, Comment, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

3. *Id.* at 158.

4. *Id.* at 138.

5. *Id.* at 110 n.3.

Bowers v. Hardwick.[6] According to Professor Tribe, the Court in *Bowers* (but not in *Saenz*) was prepared to consult only "specific text or tradition."[7]

Professor Tribe says this analytic dichotomy reflects two themes in the current Court's work. First, the Court stands ready to reason from structural inference to discover principles that concern the relationships among governmental institutions (relationships that, he says, necessarily include the right to move from state to state at issue in *Saenz*).[8] Second, the current Court has retreated from the use of structural reasoning to identify "rights...of personal self-government"[9] (including, most prominently, the proposed right of sexual intimacy put forward in the *Bowers* case).[10] Professor Tribe goes on to argue that it makes no sense to use structural reasoning to develop personal rights connected with the operations of government institutions—that is, to promote what I shall call "institutionaliberty"—while not wielding the same tool to identify the sort of personal rights involved in *Bowers*—that is, to promote what I shall call "individualiberty."

In this essay, I reflect on Professor Tribe's provocative Comment. Although my reactions to the Comment are complex, my core assessment is that it is deeply powerful. In particular the Comment makes two overarching appeals that, for me, carry great force. First, it calls on the Supreme Court to protect individual liberty in an energetic way. Second, it invites scholars to consider whether an unjustified dualism marks the Court's recent treatment of institutional-arrangements and individual-rights cases. I strongly endorse each of these key aspects of Professor Tribe's Comment. I also accept (and thus shall say no more about) specific components of his line of argument. Thus I take it as a starting point that the Court employs "a certain methodological approach" fairly described as "structural inference" in some constitutional cases.[11] Along with Professor Tribe, I recognize that the Court might well choose to use this methodology in one set of cases but not in another, and have no doubt that the Court could decide to distinguish between institutionaliberty and individualiberty cases in regard to its willingness to take this

6. 478 U.S. 186 (1986) (upholding Georgia law that criminalized homosexual sodomy).

7. Tribe, *supra* note 2, at 158.

8. *See id.* at 112.

9. *Id.*

10. *See id.* In his description of these cases, Professor Tribe points to "such personal rights as privacy, personal autonomy over intimate choices, treatment as an equal, and, for that matter, *intra*-state mobility." *Id.* at 162.

11. Of course, courts may approach structural reasoning in different ways. *See* Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1638–39 (2000) (arguing that Justice Kennedy's broader structural arguments in *Alden*, which focused largely on "historical understanding of the Constitution's structure," differ from the structural reasoning associated with Charles Black, which pays greater heed to "present-day imperatives"). *But cf. id.* at 1649 (noting that "there will be times" that the distinction between Justice Kennedy's and Professor Black's styles of structuralism is "not nearly so clear").

analytic approach.[12] Finally, while I raise questions about Professor Tribe's suggestion that *Saenz* involved a full-bore exercise of reasoning from structural inference, I accept his conclusion that this methodology has driven a recent spate of Supreme Court decisions that recognize implied federalism-based limits on congressional authority.

This paper, however, does not focus on my areas of all-out agreement with Professor Tribe. Rather, it pursues the dialogue he has initiated by identifying three points of concern. First, I raise questions about Professor Tribe's descriptive thesis—that is, his suggestion that the current Court approaches its work with a marked inclination to apply structural reasoning to claims of institutionaliberty but a marked disinclination to use that same approach in evaluating claims of individualiberty. I believe that this descriptive account oversimplifies the Court's outlook. It also may lead advocates who appear before the Court—and even the Justices themselves—to underestimate the Court's past and present willingness to use structural reasoning to protect individual rights.

Second, I pursue a basic question about *Saenz* that draws only limited attention from Professor Tribe. How, in that case, could a Court deeply committed to the values of state autonomy strike down a state law that reflected such a plausible form of local experimentation that even the national Congress had given it an enthusiastic stamp of approval? Although the answer to this question is not simple, one of its components is that the Court's seemingly anti-state-autonomy ruling in *Saenz* comports on close inspection with the Court's own pro-state-autonomy stance. The reason why is that the protection of state autonomy is not an end in itself, but rather a means to achieving broader goals. Those goals include—perhaps most saliently—the creation of diverse communities of opportunity in which individuals may pursue fulfillment in self-suited settings within the broader boundaries of our nation. To be able to benefit from diverse loci of communitarian opportunity, however, the American citizen must have the utmost liberty to move from state to state. For these reasons, even though the state-law-invalidating holding of *Saenz* superficially conflicts with the cause of state autonomy, it comports on close inspection with the deep reasons for safeguarding state autonomy in the first instance.

Finally, while endorsing Professor Tribe's basic contention that the Court should not exclude claims of individualiberty from the structural-inference methodology, I express reservations about significant portions of the rhetoric he offers on behalf of his liberty-supportive position. My concern is that this rhetoric suggests that the Court should protect individual rights—or at least some categories of individual rights—largely because they are intertwined with institutional arrangements. In my view, such an argument is problematic because it invites courts to use the

12. *See* Tribe, *supra* note 2, at 138.

structural methodology in a set of cases that is defined too narrowly. The better argument for fully extending structural reasoning to individualiberty claims rests on the powerful freestanding importance of individual rights, including rights to separate one's self from governmental and nongovernmental institutions. My argument along these lines emanates from wellsprings of constitutional text, constitutional history and constitutional precedent. Quite aptly, however, the argument for unimpeded application of structural inference in individualiberty cases also rests in meaningful measure on structural inference itself.

I. A RECAPITULATION OF THE TRIBE THESIS

Elegant in form and rich in content, Professor Tribe's eighty-eight page Comment resists a quick synopsis. Even so, the very subtlety of the work invites a recapitulation of its most essential features, and my own responsive comments make some form of summary indispensable. I therefore begin by offering this brief overview.

A. The Key Components of the Tribe Comment

Professor Tribe's Comment concerns the Court's decision in *Saenz* and its prospects for propelling "a fuller life" for both the Privileges or Immunities Clause and structural rights-identification by the modern Court.[13] Although his observations range with characteristic sophistication across an expansive field, the piece embodies two main theses, one descriptive and one normative in nature.[14] The descriptive thesis posits that, although the Court has been broadly receptive to engaging in structural reasoning in institutionaliberty cases, it has steered away from use of this methodology in the individualiberty field.[15] The normative thesis holds that the resulting double standard in the Court's use of structural reasoning is unjustifiable and even paradoxical.[16]

B. The Descriptive Thesis: A Two-Track Conception of Structural Inference in Elaborating Constitutional Rights

Professor Tribe begins his treatment of *Saenz* by saying it is "best understood as shedding new light on old fault lines . . . in the doctrinal and theoretical landscape" of constitutional law.[17] More particularly, he finds *Saenz* of interest because of what it teaches us about when the

13. *Id.* at 182.

14. *See id.* at 158.

15. The distinction he sees lies in the Court's willingness to extrapolate rights that seem "more closely related to the body or mind of the individual" than those related "to the organization of the body politic." *Id.* at 137.

16. *See id.* at 158; *see also supra* text accompanying note 3.

17. Tribe, *supra* note 2, at 110.

Court will use the energetic interpretive technique of reasoning from "structural inference."[18] He initiates this inquiry by contrasting the Court's decision in *Saenz* with that decision's doctrinal predecessor, *Shapiro v. Thompson*.[19]

Saenz concerned a California law that limited welfare payments to the level of benefits afforded by the applicant's prior state of residence if that applicant had not lived in California for a year. This law differed in two respects from a similar set of year-long-waiting-period laws struck down thirty years earlier in *Shapiro*. First, the laws at issue in *Shapiro* denied welfare benefits to new residents altogether, while the law in *Saenz* simply held down the amount of awarded benefits to the level of benefits available to the applicant prior to relocation.[20] Second, the law in *Saenz*—in contrast to the laws in *Shapiro*—had been clearly authorized by congressional action.[21] For these reasons, it was open to the Court in *Saenz*, if it wished to do so, to leave in place both its longstanding decision in *Shapiro* and the recently enacted California statute.

According to Professor Tribe, however, these factual distinctions were the least of the worries of the plaintiffs in *Saenz*. Their most pressing problem was that *Shapiro* had come to the Court in a judicial era of constitutional activism on behalf of the poor.[22] This activist stance was reflected in *Shapiro* itself when the Court majority pointedly relied on the potential denial of "food, shelter, and other necessities of life" in finding an equal protection violation.[23] According to Professor Tribe, however, in the last three decades the Court had moved markedly away from an equal-protection jurisprudence driven by compassion for the indigent,[24] which made the attack on the law in *Saenz* far less likely to succeed than the earlier attack on the laws in *Shapiro*. Yet, it turned out that the Court had an even easier time finding a constitutional violation this time around.[25] One question Professor Tribe poses is: Why?

18. *Id.*

19. 394 U.S. 618 (1969).

20. *Compare id.* at 622 n.2 (quoting CONN. GEN. STAT. § 17-2d (Supp. 1965)), *with* Saenz v. Roe, 526 U.S. 489, 493 n.1 (1999) (quoting CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1999)).

21. *See* Tribe, *supra* note 2, at 127. Notably, an unambiguous congressional authorization negated any need for the grant of a "waiver" by the Secretary of Health and Human Services for this waiting period requirement to take effect. *See Saenz*, 526 U.S. at 493.

22. *See* Tribe, *supra* note 2, at 116. The Court in *Shapiro*, according to Professor Tribe, "was quite obviously driven by its concern for the plight of the poor as demonstrated by a string of 'egalitarian philosophy' cases." *Id.* at 115–17; *see also id.* at 121 n.53. Professor Tribe notes that he has some special knowledge of *Shapiro* because he was a law clerk at the Court while the case was under consideration. *Id.* at 115 n.26.

23. *Shapiro*, 394 U.S. at 661.

24. *See* Tribe, *supra* note 2, at 117–19.

25. *See id. Shapiro* was a six-to-three decision, while *Saenz* was decided by a vote of seven to two. Based in part on his experiences as a clerk, Professor Tribe recounts the difficulties *Shapiro* presented for various Justices then on the Court. *Id.*; *see also id.* at 120 ("The ease with which the Saenz Court reached its decision is rendered even more puzzling by the fact that *Shapiro* had not been followed by a powerful line of doctrinal elaboration.").

The answer, according to Professor Tribe, is that the Court that confronted *Saenz* both had created, and was caught up in, a "new generation" of constitutional ideas.[26] Most notably, he says, the current Court has little interest in an open-ended judicial pursuit of an ill-defined egalitarianism. It was for this reason, he opines, that the Court in *Saenz* did not rely on the Equal Protection Clause, which had driven its decision in *Shapiro*. Instead it relied on the Citizenship and Privileges or Immunities Clauses of the Fourteenth Amendment.[27] The Court's movement away from an energetic brand of equal-protection reasoning, Professor Tribe suggests, comported with the Court's recent retreat from a rights-generative employment of so-called substantive due process—a movement that he says is particularly well-illustrated by the modern Court's rejection of the personal-autonomy claim presented in *Bowers v. Hardwick*.[28] Professor Tribe hastens to add (and we now come to his central descriptive point):

> [I]t was not the *method* of inferring constitutional principles and rights from the overall structure and sense of the document without clear guidance from the text with which the Court had grown disenchanted by the late 1970s. It was simply that a majority of the Court had come to doubt the *application* of that method—a method that connects the dots and extrapolates broad themes rather than relying almost exclusively on the text and on long settled traditions—to identify personal rights against government, at least where those rights seemed more closely related to the body or mind of the individual than to the organization of the body politic.[29]

In Professor Tribe's eyes, the Court employed precisely this sort of connect-the-dots "structural" reasoning in *Saenz* even though neither the Citizenship Clause nor the Privileges or Immunities Clause "speaks in terms of travel, interstate mobility or anything of the sort."[30] The Court did so, however, in keeping with a distinctly modern synthesis under which "[s]tructural inference in the derivation of individual rights was suspect,"[31] but no similar judicial hesitation attached to "employing such inference to articulate the architecture of [our governmental] system and to extrapolate the rights, whether of states or, derivatively, of individuals, that flow from that architecture."[32]

To support his assertion that structural logic enjoys a special vitality in the government-architecture field, Professor Tribe offers the ever-

26. *Id.* at 135.
27. *See id.* at 126.
28. 478 U.S. 186 (1986).
29. *See* Tribe, *supra* note 2, at 137 (internal citations omitted).
30. *Id.* at 154; *see also id.* (reiterating that *Saenz* "reflected the Court's vision of governmental design . . . and not primarily . . . constitutional text . . . despite the majority's ostensible reliance on the language of several clauses"); *id.* at 135 (noting *Saenz* was "based more on constitutional design than on constitutional text").
31. *Id.* at 138.
32. *Id.*; *see also id.* at 110 n.3.

growing collection of cases in which the Court has invalidated national legislation in the name of state autonomy: among them, *National League of Cities v. Usery*,[33] *New York v. United States*,[34] *Printz v. United States*,[35] *Seminole Tribe v. Florida*,[36] and *Alden v. Maine*.[37]

All of these cases involve the nature of institutional arrangements in a pure sense, for in each of them the challenger of the federal law was either a state or a state representative who was asserting claims of state freedom from federal controls. Professor Tribe submits, however, that by the 1990s the Court had revealed a willingness to use structural reasoning not only in unalloyed institutional-arrangement cases, but also to vindicate claims of individual liberty connected with governmental relationships.

The most prominent exemplification of this tendency, according to Professor Tribe, came in *Zobel v. Williams*,[38] which concerned a law that calibrated oil-royalty payments, made by Alaska to all its residents, according to the duration of state residence of any particular distributee. In a clutter of opinions, seven Justices came together to invalidate a law that provided in essence: "The longer you've been here, the more you get." To be sure, as Professor Tribe notes, *Zobel* involved issues distinguishable from the issues presented in *Saenz*.[39] Nonetheless, he says that *Zobel* foreshadowed the result in *Saenz* because it broadly reflected the Court's willingness to use "structural inference" to vindicate individual rights that spring from "how the federal system matches people with territorially-based state jurisdictions."[40] Put another way, *Saenz*—like *Zobel* but unlike *Bowers*—concerned the "institutional building blocks of government," rather than personal control over the individual body or mind.[41] Structural reasoning was the order of the day in *Saenz* because "the particular right [it] recognized fits within . . . the grand-architecture of federal-state relations that the Court has been mapping out for the past two decades . . . ."[42]

33. 426 U.S. 833, 852 (1976) (holding that the Commerce Clause did not authorize Congress to interfere with "states' freedom to structure integral operations in areas of traditional governmental functions"), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

34. 505 U.S. 144, 188 (1992) (holding that Congress cannot commandeer state legislative processes).

35. 521 U.S. 898, 935 (1997) (holding that Congress cannot commandeer state executive processes).

36. 517 U.S. 44, 76 (1996) (holding that Article I, Section 8 powers do not authorize Congress to abrogate states' Eleventh Amendment immunity).

37. 527 U.S. 706, 759–60 (1999) (holding that the state immunity reflected in the Eleventh Amendment extends to state court, as well as federal court, proceedings). *See generally* Tribe, *supra* note 2, at 138 (commenting that the Court's *Alden* and *College Savings Bank* cases "relied alternately on the Tenth and Eleventh Amendments but never on the actual text of either").

38. 457 U.S. 55 (1982).

39. *See* Tribe, *supra* note 2, at 143–44.

40. *Id.* at 143.

41. *Id.*

42. *Id.* at 157.

Having come this far, it is worth capturing Professor Tribe's thoughts on structural inference in a more structured way. Professor Tribe depicts the modern Court as dividing up the world of constitutional decision making (or at least much of it) across two great axes of characterization. First, the Court sees the subject matter of its cases as involving either "institutional design" or "individual rights."[43] Second, the Court's decisions employ one of two forms of constitutional reasoning. There is structural reasoning—which has a proudly open-stanced, richly exploratory quality—and there is what I will call non-structural reasoning—which cleaves close to constitutional text or long-established and narrowly defined traditions.[44] Because the Court's work may be divided along these two axes, the categories that occupy Professor Tribe's attention may be captured in a four-quadrant picture:

By way of illustration, we might place in Quadrant A decisions that have used a close textual analysis to invalidate government action that impairs important features of the architecture (or "structures,"[45] "arrangements,"[46] "institutions,"[47] or "building blocks"[48]) of government—for example, the legislative-veto case, *INS v. Chadha*.[49] A similarly text/tradition-based protection of individual rights might be exemplified

43. *Id.* at 168.
44. *See id.* at 164.
45. *Id.* at 154.
46. *Id.* at 181.
47. *Id.* at 157.
48. *Id.* at 143.
49. 462 U.S. 919, 959 (1983) (invalidating one-house legislative veto of executive branch decisions based primarily on text-driven arguments).

in Quadrant B by a paradigmatic First Amendment prior-restraint case—say *Near v. Minnesota*.[50] And so we might fine-tune our chart in the following way:

This quick elaboration of Quadrants A and B brings us to Professor Tribe's key area of initial focus: Quadrant C. He emphasizes that the Court places in this quadrant two ostensibly separate sets of cases: (1) cases that involve institutional arrangements per se (for example, *New York* or *Alden*)[51] and (2) cases that involve the extrapolation of individual rights from those institutional arrangements—that is, institutionaliberty cases like *Zobel* and *Saenz*.[52] Both sets of cases belong in Quadrant C because, in each of them, the Court has revealed a commitment to structural reasoning in the cause of defining institutional relationships.

50. 283 U.S. 697, 702 (1931) (striking down a statute that authorized prior restraints against publication of a "malicious, scandalous and defamatory newspaper, magazine or periodical").

51. *See supra* notes 34, 37 and accompanying text.

52. *See supra* notes 30, 38–42 and accompanying text.

Thus, we might refine our chart in this way:

This brings us to Quadrant D and, more particularly, to the relationship of that quadrant, which covers claims of individualiberty, to Subquadrant C2, which covers claims of institutionaliberty. Professor Tribe argues in the end that it makes no sense to fence out Quadrant D cases from the style of structural inference freely used in Quadrant C, and particularly in the institutionaliberty cases that make up Subquadrant C2. On his way to reaching this conclusion, however, Professor Tribe makes a fascinating attempt to refine Quadrant D based on a close examination of *Romer v. Evans*.[53]

The Court's 1986 decision in *Bowers*, according to Professor Tribe, involved a quintessential demand on the Court to use structural inference in the service of individualiberty.[54] Consistent with Professor Tribe's descriptive thesis, the Court took a narrow view of its role with regard to recognizing nontextual/nontraditional rights by rejecting an attack on a state statute that outlawed the most intimate forms of wholly consensual sexual conduct engaged in within the home.[55] *Romer* brought the subject of gay rights back to the Court by presenting the question whether a state constitution could bar the state and all of its subunits from prohibiting discrimination against homosexuals.[56]

53. 517 U.S. 620 (1996).

54. *See* Tribe, *supra* note 2, at 172–73.

55. *See id.* at 172.

56. In *Romer*, a Colorado state constitutional amendment adopted in a 1992 statewide referendum was challenged. *Romer*, 517 U.S. at 623. The amendment forbade the state and all of its agencies and political subdivisions from enacting, adopting, or enforcing "any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships" would

Many observers predicted that the Court would uphold the state constitutional provision in *Romer* by reasoning that, if the state may go so far as to outlaw homosexual conduct altogether, it may also deny to homosexuals the "special rights" provided by antidiscrimination laws.[57] A majority of the Court, however, took a different pathway through the case, concluding that the law in *Romer* violated foundational principles of equal protection.

In an effort to explain the differing results in *Bowers* and *Romer*, Professor Tribe returns to his basic assertion that the Court is distinctively open to structural reasoning in institutionaliberty cases. One way of thinking about *Romer*, he observes, is to see that it bears a subtle relation to *Zobel* and *Saenz*.[58] According to Professor Tribe, *Romer* did not involve any claim of "a right to engage in sexual intimacies."[59] In addition, *Romer* did not involve—at least in its most significant dimension—a claimed denial of equal protection based on a weighing of private rights and public interests pursuant to the now familiar multitiered means/ends balancing methodology.[60]

Rather, *Romer* recognized and vindicated premises that are, to quote Professor Tribe, "presupposed by . . . the method traditionally employed in equal protection analysis"[61]—namely, as the Court itself stated, "the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[62] Thus, while *Romer* "smells . . . of personal autonomy" (like *Bowers*)[63] and obviously did not involve "inferring instrumental rights from geographic arrangements of power" (like *Saenz*),[64] it did at a deep level involve institutional configurations—namely, the principle that, within our complex and interlocking system of governmental structures, no class of citizens may be "removed from the organizational chart all together."[65]

entitle persons to "have or claim any minority status, quota preferences, protected status or claim of discrimination." *See id.* at 624.

57. *See id.* at 626; *see also id.* at 636 (Scalia, J., dissenting).

58. *See* Tribe, *supra* note 2, at 172–79.

59. *Id.* at 178. *See generally* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 628–35 (13th ed. 1997) (discussing rational-relation, intermediate, and strict scrutiny under the Equal Protection Clause).

60. *See* Tribe, *supra* note 2, at 175.

61. *Id.*

62. *Romer*, 517 U.S. at 633.

63. Tribe, *supra* note 2, at 179.

64. *Id.* at 181.

65. *Id.* at 173.

With these similarities and distinctions in mind, it is now possible to "fill in" Quadrant D.

For Professor Tribe, *Romer* reveals the closeness of categories C2 and D1. He thus depicts these two zones as embodying "a third space" in which "the modern Court manifests a willingness to reason from constitutional structure" when "rights of equal citizenship are at stake . . . ."[66] Of no less importance is his suggestion that the measure of willingness to enter this third space marks a major philosophical divide between Justices O'Connor and Kennedy, on the one hand, and Justice Scalia, on the other. After all, Justices O'Connor and Kennedy were with the majorities in both *Romer* and *Saenz*, while Justice Scalia—even though he was with the majority in *Saenz*—vigorously dissented in *Romer*.[67]

Justices O'Connor and Kennedy, Professor Tribe suggests, recognized the subtle, institution-based connections that tied together *Zobel*, *Romer*, and *Saenz*; in contrast, Justice Scalia's tendency is to eschew structural reasoning whenever, as in *Romer*, the constitutional claim "*seems to be* about personal autonomy."[68] For Justice Scalia, then, "the *Saenz* decision seemed easy," but only "because inferring instrumental rights from geographic arrangements of power is easy to depict, however misleadingly, as a process of astute but passive observation or 'map-reading.'"[69] As signaled by *Romer*, Justices O'Connor and Kennedy have

66. *Id.* Professor Tribe notes that in *Romer* the claimed rights "defied easy classification along the personal-institutional continuum."

67. *See id.* at 176.

68. *Id.* at 181.

69. *Id.*

been able to move beyond strictly limiting structural inference to "geographic arrangements of power" cases, though they have ventured no further than the "third space" cases represented by *Romer*.[70] Chief Justice Rehnquist and Justice Thomas have taken the most parsimonious view of all the Justices with regard to using structural reasoning to vindicate individual rights: they dissented even in *Saenz*.[71] The nub of Professor Tribe's descriptive thesis is that a majority of the present-day Court has shown a marked unwillingness to employ structural reasoning in those true individualiberty cases located in Subquadrant D2.

C. The Normative Thesis: A One-Track Theory of Institutional Arrangements and Individual Liberty

Professor Tribe perceives in the modern Court's decisions a "baffling inconsistency."[72] As he explains:

> The Court allows rights that help fill out the constitutional landscape to be derived by structural inference from the borders and lines of authority that map that landscape. However, it paradoxically proceeds as though rights that are valued in themselves as constitutive elements of the human personality . . . may not be similarly derived; rather these individual rights must be located, if at all, only in specific text or tradition.[73]

The great crusade of Professor Tribe's Comment is to debunk this constitutional "double-standard."[74]

Professor Tribe's attack embraces both a negative and a positive component. The negative argument entails tearing down proposed distinctions between institutional-arrangement and personal-liberty cases that might justify a two-track approach to structural reasoning.[75] For example, Professor Tribe notes the argument that individualiberty and institutional-arrangement cases might be distinguishable on the ground that individual rights are more susceptible to textual enumeration than the "infinitely varied patterns" of institutional relationships.[76] This distinction fails, according to Professor Tribe, because "much of what is true (and nearly all of what's interesting) about personal rights cannot be enumerated in a mere list . . . ."[77]

Of greater significance than Professor Tribe's effort to cut down possible distinctions is his effort to derive from the Court's acceptance of structural reasoning in institutional-arrangements cases affirmative ar-

70. *Id.*
71. *See id.*
72. *Id.* at 158.
73. *Id.*
74. *Id.*
75. *See id.* at 161–64.
76. *Id.* at 165–66 (emphasis omitted).
77. *Id.* at 166.

guments for the use of structural reasoning in individualiberty cases. Professor Tribe's efforts along these lines—which he weaves through a discussion cast only in distinction-debunking negative terms—begins with the observation that the Court's institutional-arrangements jurisprudence is closely allied by its deeper purposes to the law of individualiberty.[78] This is so, he says, because the underlying goal of dividing up power among our government's structural units of authority is, at least largely, to protect liberty.[79] In effect, Professor Tribe asks how a Court eager to use structural reasoning to protect liberty *indirectly* can throw out the window the same structural techniques when called on to protect liberty *directly*.[80]

The more important feature of Professor Tribe's affirmative argument involves drawing individualiberty claims into the rhetoric of institutional arrangements. Although this argument is marked by nuance, it seems at bottom to have a syllogistic cast. Thus: (1) if the Court is ready to apply structural reasoning in institutional-arrangements cases (and we already have seen that it is) and (2) if individualiberty cases are themselves fairly characterized as involving institutional arrangements, then (3) the Court must logically extend structural reasoning to individualiberty cases.

The controversial step in the syllogism lies in its minor premise (step #2), and that is where Professor Tribe does his heaviest lifting. He declares that our "constitutional order" is built around more than a national government, state governments, and the various official subunits and agencies of each.[81] It also embraces, Professor Tribe says, another host of "governing components—individuals, families and private associations as diverse as business corporations, political parties, and religious bodies and congregations—that are in their own ways no less integral to the constitutional structure than are the federal, state, and local governments."[82] Stated differently, our public institutions reflect only "the crudest organizational features of the Constitution."[83] Private actors—including individuals—constitute "indispensable decision-making units," and their relationships to government are thus no less "structural in character" than the relationships among public entities themselves.[84]

Professor Tribe also likens individuals to states. States, he says, "enjoy a unique role as repositories of popular sovereignty, according to

78. *See id.* at 161–62.

79. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (noting that division of powers "between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (remarking "the Constitution diffuses power the better to secure liberty").

80. *See* Tribe, *supra* note 2, at 161–62.

81. *Id.* at 162.

82. *Id.*

83. *Id.*

84. *Id.*

which they partake of sovereign authority . . . ."[85] In the same vein, "and perhaps most importantly, . . . notions of self-government, including freedom from external domination, extend not only to the separate *states* . . . but also to their *citizens*."[86] Thus, being a citizen (like being a state) entails a broad "capacity and opportunity to govern oneself."[87] Professor Tribe offers this rhetoric of state-resembling self-governing individuals in the Introduction to his Comment and describes "what follows" as developing "a number of implications of these core citizenship principles."[88]

Finally, Professor Tribe aligns cases of individualiberty like *Bowers* with cases of institutionaliberty, like *Zobel* and *Saenz*. He says, in so many words, that entering into a set of personal relationships or embracing a set of personal values is not fundamentally different from moving into a new state. Thus, "'voting with one's feet' to select the legal system by which one wishes to be governed" is but one of many "special cases" of "binding oneself, through a self-defining and enduring commitment to a community of individuals and a system of values."[89] It follows that:

> However different it might at first appear substantively, choosing a marital partner with whom to share one's life is ultimately just another illustration of self-binding self-definition and hence of personal self-government, as is choosing whether to care for a child, deciding whether to have one's own biological baby, or making any of several other constitutive choices through which all of us construct our identities and, in every meaningful sense, govern ourselves as individuals.[90]

For these reasons and others, Professor Tribe asserts that the "rights securing provisions" of the Constitution "themselves define organizational features and institutional aspects of the constitutional order."[91] And, if this is so, "digging beneath text and tradition" with the tools of structural inference becomes "no less essential" in individualiberty cases than in institutionaliberty cases, such as *Saenz*.[92]

In sum, Professor Tribe's normative position is that the Court should embrace unflinching use of structural reasoning—preferably under the banner of the Privileges or Immunities Clause, rather than "substantive due process"[93]—to safeguard rights of "personal self-government."[94] In developing this thesis, Professor Tribe wraps claims of individualiberty in the linguistic garb of institutional arrangements.

85. *Id.* at 111.
86. *Id.*
87. *Id.* at 112.
88. *Id.*
89. *Id.* at 186–87.
90. *Id.* at 187–88.
91. *Id.* at 161–62.
92. *Id.* at 162.
93. *Id.* at 192.
94. *Id.* at 112, 187.

Given his descriptive thesis, this use of institutions-oriented rhetoric should come as no surprise. What better argument could a passionate (and practical) patron of liberty offer to a Court he sees as "far more comfortable protecting rights that it can describe in architectural terms"?[95]

II. A RESPONSE TO PROFESSOR TRIBE

Building on *Saenz*, Professor Tribe offers a big-picture appraisal of the work of the current Court. His treatment is innovative and ambitious. He plants a seed that may grow into a newly energized Privileges or Immunities Clause,[96] an expanded use of structural inference in individualiberty cases, or (if he reaps a harvest) both.

Precisely because Professor Tribe's work holds the potential of reshaping constitutional theory and doctrine in significant ways, it merits a thoughtful testing. Criticism of his Comment is sure to come from advocates of judicial restraint critical of *Saenz* in particular, of structural reasoning in general, and of Professor Tribe's ardent call for an expanded judicial role in protecting individual liberty. In contrast, my own reactions come from a perspective that is sympathetic to Professor Tribe's plea for judicial attentiveness to claims of personal autonomy. Indeed, it is my own gravitation toward Professor Tribe's embrace of rights-oriented structural reasoning that leads me to raise three significant questions about the route of his argument.

First, I question Professor Tribe's depiction of the Court as an institution that is, in an across-the-board way, committed to claims of institutionaliberty but mistrustful of claims of individualiberty. This portrayal, it seems to me, is both too crude and too pessimistic about the modern Court's willingness to use structural reasoning in the service of individual rights. Second, I note that Professor Tribe does not address in detail an important question raised by *Saenz*: how could a Court that has hitched its wagon to state autonomy invalidate a state enactment that reflected such a reasonable and measured form of federalistic experimentation that Congress had broadly endorsed it? Answering this question is not an easy task. One important part of the answer, however, may be that *Saenz* runs with, rather than against, the underlying purposes of federalism by broadly facilitating citizen options to enjoy the region-based diversity of opportunities our federal system is meant to engender. Finally, I raise concerns about one major element of Professor Tribe's plea for

95. *Id.* at 198; *see also id.* at 140 ("[I]n the current era, claims of individual rights are most likely to have power and ultimately to prevail if they can be convincingly expressed through the language, and clearly understood through the logic, of such concretely architectural features of the Constitution as the separation of powers or the federal system . . . .").

96. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 80 n.* (2000) (Thomas, J., concurring) ("This case does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause.").

structural reasoning in individualiberty cases. In particular, I worry that an attempt to advocate personal rights with a rhetoric of institutional arrangements is not likely to advance the great purpose of safeguarding human liberty. Instead, I express concern that, from a liberty-oriented perspective, such an approach may do more harm than good.

I hasten to add that, in making these points, I do not conceive of them as challenges, counterarguments, or critiques. What Professor Tribe has done in his *Saenz*-inspired Comment is to invite a dialogue about what are, and should be, the deep presuppositions at work in the collective mind of the Court. I offer the remainder of this paper in the spirit of taking up that invitation in a way that is both constructive and fairly attentive to the genuine range and depth of Professor Tribe's intriguing analysis.

A. Of Institutionaliberty, Individualiberty, and the Use of Structural Reasoning

At the heart of Professor Tribe's treatment of *Saenz* is his assertion that it helps reveal an "inconsistency"[97] and "double standard"[98] in the Court's use of reasoning from structural inference. The modern Court, he says, stands ready to "tease out" rights that "partake simultaneously of personal self-government *and* of the system of definitions and relationships that describe the form of state and federal self-government."[99] The same Court, however, proceeds with the "unarticulated assumption" that reasoning by way of structural inference is "too undisciplined and indeterminate" when the recognition of purely personal liberties is at stake.[100] Because this depiction of the Court's outlook sets the stage for all of Professor Tribe's later musings, a logical starting point is to ask whether that depiction is descriptively accurate. My own sense is that, like many "grand theories," it suffers from the vice of oversimplification.

To begin with, Professor Tribe distills his descriptive thesis from only a small body of cases. He rightly acknowledges, for example, that the lion's share of the Court's interstate-movement rulings have rested on the sturdy linguistic foundation of the Article IV Privileges and Immunities Clause.[101] For this reason, *Zobel* and *Saenz* essentially stand

97. Tribe, *supra* note 2, at 158.

98. *Id.*

99. *Id.* at 112; *see also id.* at 135 ("As of the 1990s, the Court had not completely given up on the notion of teasing new freedoms or liberties, often called 'fundamental rights,' out of the seemingly procedural commands of the Fifth and Fourteenth Amendment Due Process Clauses, but it had come close.").

100. *Id.* at 112; *see also id.* at 137 (noting that "the Court by the late 1970s had clearly signaled a deep reluctance to push the frontiers of personal liberty in new directions").

101. *See id.* at 128–29; *id.* at 141 (noting that the main body of cases that protect individual rights in the service of institutional arrangements rests on the Article IV Privileges and Immunities Clause, and thus "have a strong grounding in the text of Article IV itself"); *id.* at 141–42 (commenting that *Doe v. Bolton*, decided on the very same day as *Roe v. Wade*, was based on the Article IV Privileges and Immunities Clause). Moreover, the Court has not always vindicated institution-related claims of

alone as Professor Tribe's evidence that nontextual efforts to construct institution-connected rights have met with special favor in the Court. The Court's treatment of these cases, however, was not, it seems to me, nearly as nontextual as Professor Tribe's synthesis might suggest. Thus, in *Saenz* the Court unambiguously declared that the "right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State . . . is *plainly identified* in the *opening words* of the Fourteenth Amendment."[102] The Court found especially informative the text of the Citizenship Clause: "All persons born or naturalized in the United States . . . *are citizens . . . of the State wherein they reside*."[103] This language, the Court observed, was suggestive of "the citizen's right to be treated equally in her new State of residence."[104] In particular, "[t]hat Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence."[105] And, "[j]ust as it would violate the Constitution to deny these new arrivals state citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were still citizens of other states."[106] To be sure, the Fourteenth Amendment does not declare on its face that "newly arriving residents shall receive a full measure of welfare benefits." But the Court's extrapolation of that principle from the actual text of the Citizenship Clause was—let us say—intelligible and direct.

The *Saenz* majority also emphasized that, even while the *Slaughter-House Cases*' majority was stifling the libertarian potential of the Fourteenth Amendment's Privileges or Immunities Clause, it was simultaneously acknowledging that one of few privileges actually conferred by the Clause was the right to "become a citizen of any State of the Union by a *bona fide* residence therein, *with the same rights as other citizens of that State*."[107] The rendering of this interpretation of the Fourteenth Amendment only four years after its ratification supplements the textual argument with a strong historical argument in support of the result in *Saenz*.[108] In short, the reasoning of *Saenz* seems a far cry from that of

undeterred travel even in these text-based cases. *See, e.g.*, Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 387–88 (1978) (reading a "fundamental interest" limitation into the Article IV clause in rejecting claimed right of out-of-staters to hunt elk on equal terms with state residents).

102. 526 U.S. 489, 502–03 (1999) (emphasis added).

103. *Id.* at 503 (quoting U.S. CONST. amend. XIV, § 1) (emphasis added).

104. *Id.* at 505.

105. *Id.* at 506 (quoting Zobel v. Williams, 457 U.S. 55, 59 (1982) (Brennan, J., concurring)).

106. *Id.* at 507 n.20 (quoting William Cohen, *Discrimination Against New State Citizens: An Update*, 11 CONST. COMMENT. 73, 79 (1994)). A similar thought was expressed by Justice Brennan in his *Zobel* concurrence when he noted that the Citizenship Clause "does not provide for, and does not allow for, degrees of citizenship based on length of residence." *Zobel*, 457 U.S. at 69.

107. *Saenz*, 526 U.S. at 503 (quoting the *Slaughter-House Cases*, 83 U.S. 36, 80 (1872)) (second emphasis added). The Court also noted that Justice Bradley, in his dissenting opinion, "used even stronger language to make the same point." *Id.*

108. *See infra* note 241.

Griswold v. Connecticut[109] or *Roe v. Wade*.[110] Invoking *Saenz* to reveal a broad post-*Roe* commitment to nontextual exegesis on behalf of claims of institutionaliberty thus is open to serious question.

The greater problem with Professor Tribe's descriptive thesis, however, appears on the other side of the ledger. Thus, even assuming we should characterize *Saenz* as using logic no less structural than appears in classic substantive due process decisions (or if, more modestly, we accept the more plausible, if not undeniable, assertion that the Court's recent Tenth and Eleventh Amendment decisions have a *Roe*-like structural dimension[111]), there are reasons to question Professor Tribe's overarching portrayal of the modern Court as vigorously averse to using structural reasoning in individualiberty cases. To begin with, as Professor Tribe concedes, the present-day Court has not refused to use the Due Process Clauses to protect substantive rights,[112] despite continuing expressions of discontent by high-profile critics of so-called substantive due process.[113] No less important, he recognizes that the vitality of substantive due process was given a significant boost when Justices O'Connor and Kennedy distanced themselves from Justice Scalia's tightfisted brand of rights recognition that looks solely to text and traditions characterized in the narrowest possible terms.[114] Likewise, when they reaffirmed the "core of *Roe*" in *Planned Parenthood v. Casey*,[115] Justices O'Connor, Kennedy, and Souter did more than uphold the essential features of the most controversial individualiberty decision of the modern era; they also openly embraced the underlying style of substantive-due-process extrapolation that stretches back to *Meyer v. Nebraska*[116] through *Griswold v. Connecticut*[117] and *Roe v. Wade*[118] to *Moore v. City of East Cleveland*.[119]

109. 381 U.S. 479 (1965) (striking down statute that made use of contraceptives by married persons illegal as an unconstitutional invasion of privacy).

110. 410 U.S. 113, 154 (1973) (holding that the right to privacy encompasses the decision of a woman to have an abortion).

111. *See* Young, *supra* note 11, at 1602 (stating that one would expect "the new federalism cases to be dominated . . . by textualism and originalism, the two interpretive methods associated most commonly with conservativism," but adding that "Alden disappoints any such expectation").

112. *See* Tribe, *supra* note 2, at 136 n.125 (noting, for example, that in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), six Justices, including the Chief Justice and Justices O'Conner and Kennedy, "reaffirmed in dictum the vitality of substantive due process").

113. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 36–39 (1990).

114. *See* Tribe, *supra* note 2, at 180. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (noting that historical tradition, viewed narrowly, was a foundational element in past "due process" cases), *with id.* at 132 (O'Conner, J., concurring) (questioning this view of the role of tradition-based analysis in prior due process decisions). Professor Tribe himself has vigorously challenged this most-specific-level-of-tradition-based reasoning. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 971–99 (1991).

115. 505 U.S. 833, 853 (1992).

116. 262 U.S. 390, 399, 402 (1923) (holding that the concept of liberty embodied in the Fourteenth Amendment prevented a law barring the teaching of foreign languages to school children).

117. 381 U.S. 479, 485 (1965) (holding that a statute barring the use of contraceptives violates martial privacy as protected by the Constitution).

Other modern cases confirm the present-day Court's openness to the substantive due-process methodology. In *Eastern Enterprises v. Apfel*,[120] for example, Justice Kennedy joined four other Justices to reaffirm that the Due Process Clause blocks—as substantively unacceptable—unfairly retroactive disruptions of settled expectations. In *Turner v. Safley*,[121] a unanimous Court read the Due Process Clause to guarantee an incarcerated felon a substantive right to marry. In the distinctively modern crucible of the right-to-die and assisted-suicide cases, a Court majority consistently has expressed an openness to evaluating overreaching state regulations under the rubric of substantive due process.[122] In a recent case, even Chief Justice Rehnquist and Justice Thomas decided to go with the flow, drawing on a supposedly nontextual right to raise one's children to block legislative efforts to afford broad visitation rights to grandparents and others.[123] And a majority of the Court took its *Roe*/*Casey* jurisprudence to yet a more controversial level by invalidating a so-called partial-birth-abortion statute in *Steinberg v. Carhart*.[124]

The modern Court also has maintained a willingness to craft antistatist principles in extrapolating the commands of equal protection. For

118. 410 U.S. 113, 153 (1973) (holding that the right to privacy, based on the Fourteenth Amendments concept of liberty, encompasses a woman's decision to have an abortion).

119. 431 U.S. 494, 499 (1977) (plurality opinion) (invalidating a zoning ordinance that limited the number of extended family members that could live together). Professor Tribe describes *Moore*—a case decided at a time when Justices Brennan, Marshall, Stewart, Blackmun, Powell, and Stevens still roamed the Court—as "one of the last cases to protect . . . individual rights through a method that relied more on overall pattern and underlying principle than on strictly textual chapter and verse." Tribe, *supra* note 2, at 137. What may be most interesting about *Moore*, however, is how later Justices came to perceive and use it. Notably, *Moore* itself was a four-to-one-to-four decision in which the critical fifth vote came from the then recently appointed Justice Stevens, who declined to apply strict scrutiny, albeit while supporting invalidation of the family-restricting zoning scheme. In the wake of *Moore*, however, the Court has treated the plurality's substantive-due-process heightened-scrutiny approach as setting forth the governing principle of the case. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) (citing *Moore* for the proposition that family relationships are afforded heightened constitutional protection).

120. 524 U.S. 498, 539–50 (1998) (Kennedy, J., concurring) (reasoning that the Due Process Clause's protection against retroactive lawmaking, rather than the Takings Clause of the Fifth Amendment, supported invalidation of the Coal Industry Retirement Benefit Act).

121. 482 U.S. 78 (1987).

122. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279–80 (1990) (endorsing substantive due process scrutiny of state regulations for ending hydration and nutrition of incompetent individuals); Washington v. Glucksberg, 521 U.S. 702, 735 n.24 (1997) (noting that its holding leaves open the possibility that "a more particularized challenge" to an assisted suicide law could succeed in the future); *see also* GUNTHER & SULLIVAN, *supra* note 59, at 77 (noting that only four Justices joined the *Glucksberg* opinion "without qualification" and that separate opinions joined by five Justices in *Glucksberg* may mean that substantive due process requires state endorsement of "the doctrine of 'double effect'—*i.e.*, the view that action undertaken with the primary intent of stopping pain is permissible even if accompanied by the knowledge that it may cause death.").

123. *See* Troxel v. Granville, 530 U.S. 57 (2000). In *Troxel* the Court noted it was "not within the province of the state to make significant decisions concerning the custody of children merely because it could make 'a better' decision." *Id.* at 63 (quoting *In re* Custody of Smith, 969 P.2d 21, 31 (Wash. 1998)). The Court reasoned that "[i]n light of . . . extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." *Id.* at 66.

124. 530 U.S. 914, 946 (2000).

example, as Professor Tribe rightly recognizes, the modern Court has not wholly shut down the egalitarian wellsprings that fed the Court's ruling in *Shapiro*. As recently as 1996, a six-Justice majority built on the structural Warren Court bedrocks of *Griffin v. Illinois*[125] and *Boddie v. Connecticut*[126] to hold that a hybridized due-process/equal-protection right requires states to pay filing fees for indigent appellants in parental-termination proceedings.[127] In the field of voting rights, the modern Court has reaffirmed the quasi-textual protections against vote denial and vote dilution first crafted by the Warren Court,[128] while also embracing an additional principle that bars states from depriving citizens of the right to cast ballots in a race-neutral electoral process absent compelling justification.[129] In *Romer*, as well as in *Cleburne v. Cleburne Living Center, Inc.*,[130] the Court showed no small measure of "creative fire" in taking the reach of equal protection beyond the region of suspect and quasi-suspect classifications.[131] Additionally, in *Adarand Constructors, Inc. v. Pena*,[132] the Court extended the so-called "equal protection component of the Fifth Amendment's Due Process Clause" in a way many would view as highly counter-textual.[133]

125. 351 U.S. 12 (1956) (finding that an Illinois law preventing indigents from seeking review because of their inability to pay for court transcripts violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

126. 401 U.S. 371 (1971) (holding that the Due Process Clause of the Fourteenth Amendment prevented Connecticut from requiring payment of court costs and costs for service of process where it effectively prevented indigents from obtaining a divorce).

127. *See* M.L.B. v. S.L.J., 519 U.S. 102 (1996); *see also* Little v. Streater, 452 U.S. 1 (1981). Professor Tribe has read *Little* and *M.L.B.* as based on the Court's "special solicitude for rights related to marriage, parenting or reproduction." Tribe, *supra* note 2, at 118. Thus, he says, they "are not exceptions to the general trend of dramatically reduced constitutional protection for the poor." *See id. But cf.* Bearden v. Georgia, 461 U.S. 660, 665, 668, 674 (1983) (permitting revocation of probation for nonpayment of fines only if there are no "bona fide efforts" to pay or "alternative punishment is not adequate," and noting that "[d]ue process and equal protection principles converge" in these cases involving indigence). Even assuming Professor Tribe is correct, however, the cases reinforce and expand the vitality of structural analysis of "family rights" under the substantive due process rubric.

128. *See, e.g.*, Karcher v. Dagget, 462 U.S. 725, 744 (1983) (holding that an apportionment plan producing a minor population deviation was the product of a good faith effort to achieve population equality); Brown v. Thompson, 462 U.S. 835, 846–48 (1983) (acknowledging constitutional protection against vote dilution but holding that particular statute at issue did not violate constitutional guarantees); *see also* Bush v. Gore, 531 U.S. 98, 105–06 (2000) (reaffirming and relying on Warren Court's early one-person-one-vote decisions).

129. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 907–08 (1996) (holding that North Carolina's redistricting plan that attempted to achieve a majority black voting district violated the Fourteenth Amendment).

130. 473 U.S. 432, 448 (1985) (applying "rational basis" review to strike down a zoning ordinance that required a permit for homes for mentally retarded individuals).

131. Tribe, *supra* note 2, at 181; *see also* Plyler v. Doe, 457 U.S. 202, 212–14 (1982) (invalidating Texas law denying free public education to the children of illegal aliens).

132. 515 U.S. 200 (1995).

133. *Id.* at 204. A key element of the Court's reasoning in *Adarand* was that the equal protection "component" of the Fifth Amendment must be read to parallel precisely the Court's reading of the Equal Protection Clause of the Fourteenth Amendment. If the concept of due process embodied all of what is Fourteenth Amendment equal protection, however, one wonders why that amendment itself contains *both* a Due Process *and* an Equal Protection Clause. Put another way, the *Adarand* decision seems to render the Fourteenth Amendment's Equal Protection Clause mere surplusage, or something

Any evaluation of Professor Tribe's effort to portray the current Court as distinctively inhospitable to structural reasoning in individualiberty cases must also address the perennial problem of identifying analytical baselines. If we say that the current Court is unreceptive to structural reasoning in the cause of individual liberty, what do we mean? How do we measure unreceptiveness? What is our frame of reference, our point of comparison, our starting place for argument? What is, in short, the baseline from which we are making an ultimately comparative judgment?

Professor Tribe's proposed point of comparison is the Warren Court and its immediate successor, the early Burger Court, which he says still operated under the sway of the Warren Court's structural tendencies.[134] As we have seen, however, the present-day Court has not abandoned the willingness of prior Courts to use either substantive due process or reverse incorporation; indeed, in some ways, the modern Court has reached beyond the willingness of Earl Warren himself to employ these purportedly structural rubrics.[135]

In suggesting that the post-70s Court has brought a guarded stance to cases of individualiberty, Professor Tribe relies most pointedly on *Bowers v. Hardwick*.[136] It is true, of course, that the five-Justice majority in that case advocated caution in invoking the Due Process Clause to recognize rights with "little or no cognizable roots in the language or design of the Constitution."[137] But so—it is important to recall—did even the great champions of a fundamental-rights approach to due process on

very close to it. Such a result, it might well be said, offends traditional text-driven canons of construction and thus must be highly structural in nature.

134. *See* Tribe, *supra* note 2, at 189.

135. *See supra* note 133 (discussing the *Adarand* case). Professor Tribe says:

> The Court's warning in *Moore* [about charges of judicial overreaching] suggests that it had in mind, even though it did not articulate, a distinction between employing such inference outside the context of defining the institutional building blocks of our governmental system, and employing such inference to articulate the architecture of that system and to extrapolate the rights, whether of states or, derivatively, of individuals, that flow from that architecture.

Tribe, *supra* note 2, at 137–38. One might respond that Professor Tribe, in making this comment, seems prepared to read from between the lines a great deal about what the Court in *Moore* had in mind. Particularly open to question is his suggestion that this fundamental "distinction" in the Court's thinking is "reflected" in *National League of Cities v. Usery*, a decision that like *Moore* was decided by a five-four vote (with the fifth vote offered in an equivocal opinion). *See id.* at 138. After all, *National League of Cities* was followed by a string of cases in which the Court declined to extend or apply its structural principle and was not long afterwards flatly overruled. *See* Garcia v. San Antonio Metro. Mass Transit Auth., 469 U.S. 528, 530 (1985). In short, a more than plausible reading of *Moore* and *National League of Cities* is that the Court was showing, in both contexts, a willingness to reason from structural inference, as well as reservations about using that methodology too freely. *See* Tribe, *supra* note 2, at 138.

136. 478 U.S. 186 (1986); *see also* Reno v. Flores, 507 U.S. 292, 302 (1993) (reiterating that the Court must use the "utmost care" in deciding cases involving claims of substantive due process); Collins v. Harker Heights, 503 U.S. 115, 125 (1992) ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.").

137. *Bowers*, 478 U.S. at 194.

the Warren Court.[138] It might be argued that actions speak louder than words, so that the actual liberty-frustrating ruling in *Bowers* provides the best evidence of a significantly shifted judicial climate. There is strong reason to believe, however, that Warren Court—as well as the post-Warren Court that decided *Roe*—would also have rejected Hardwick's constitutional claim, perhaps with little difficulty.[139]

The point of all of this is clear enough. It is unclear that the present-day Court has taken a long march away from structural Constitution-reading in developing protections of individual rights. It is important to recognize in this regard that the substantive due process field presents us with only a limited set of cases. Moreover, in a variety of those cases—including some of the most widely watched and highly controversial cases of recent years—a majority of the Court has weighed in on the side of protecting individual liberty.[140] In the equal protection context, cases like *Shaw v. Reno*[141] and *Adarand Constructors, Inc. v. Pena*,[142] have involved the Court in devising new constitutional protections built (at least in part) on the structural methodology.[143] To be sure, these decisions have been subject to criticism, particularly by persons on the left. The leveling of such criticism, however, does not diminish the fact that these decisions have roots in an openness to structural reasoning that distills rights from deep constitutional premises.

Why does it matter whether we view the spirit of the modern Court as more complex and structurally minded than Professor Tribe's starkly dualistic portrayal of its work suggests? The main reason is this: When Laurence Tribe talks, people listen. In particular Professor Tribe's remarkable track record of advocacy before the Court is likely to induce other advocates to pay heed to his views and to his counsel. It is true

138. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 501–02 & n.* (1965) (Harlan, J., concurring) (applying "fundamental rights" approach to invalidate Connecticut birth control restriction while "heartily agree[ing] that judicial 'self restraint' is an indispensable ingredient of sound constitutional adjudication"); Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (emphasizing that, in employing the substantive-due-process approach, "we exercise limited and sharply restrained judgment"); Rochin v. California, 342 U.S. 165, 168 (1952) (Frankfurter, J.) (invoking Due Process Clause to exclude evidence secured by forcible stomach pumping; nonetheless cautioning that "'we must . . . exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes'" (quoting Malinski v. New York, 324 U.S. 401, 418 (1945))); Adamson v. California, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring) (advocating an "alert deference" and condemning use of "merely personal judgment" in judicial recognition of fundamental rights).

139. *See* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975) (summarily affirming constitutionality of Virginia law prohibiting sodomy); *see also* Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) ("The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.").

140. *See supra* notes 123–24 and accompanying text (discussing grandparent visitation and partial birth abortion cases).

141. 509 U.S. 630 (1993).

142. 515 U.S. 200 (1995).

143. *See also* Bush v. Gore, 531 U.S. 98 (2000) (recognizing new principle restricting variations in ballot-assessment methodologies in statewide manual recount).

that Professor Tribe disclaims "doing anything as crude as advising advocates to dress constitutional wolves of personal rights in the sheep's clothing of state sovereignty."[144] But who cares? If advocates accept Professor Tribe's dualistic vision of the mind set of the Court, they most certainly will frame arguments that take account of that vision. Arguments that cater to a judicial outlook that does not exist, however, are not likely to do much good in cases that concern the proper contours of constitutional liberty. Faulty premises may also affect the Court itself. It does no service to the Justices, or to the cause of liberty, to say "it is Justice Scalia's orientation toward structural inference that seems to have galvanized a majority on the current Court."[145] The world is far more nuanced than that—as Professor Tribe's own discussion of *Casey*, *Romer*, and *Michael H. v. Gerald D.*[146] powerfully reveals.[147] There is, in short, no benefit in telling the Court that its track record is distinctively inhospitable to using structural reasoning to protect claims of autonomy over one's body and mind. One problem is that precedent-conscious members of the Court (even if in small measure) may believe such an account and act accordingly.

Stepping away from Professor Tribe's descriptive thesis draws us back to the basic question that drives his entire Comment: How *do* we explain the Court's decision in *Saenz*? If the taproot of *Saenz* does not lie in the soil of a dualistic approach to structural reasoning, what forces do account for the result in that case? We already have touched on the textual sources of that decision.[148] We turn now to more subtle currents of thought that may have swept along the Court's response to the case.

B. The Hardest Question Raised by Saenz

I have proposed the idea in the immediately preceding section that no monumental difference marks the current Court's willingness to use structural reasoning in individualiberty and institutionaliberty cases. But if that is so, we are left to ask: What great theme does mark the current Court's work? One answer to this question seems no less right than it seems obvious. The dominant theme concerns judicial protection of state autonomy against incursions of national power.[149] Within the past decade, the Court has boldly ended a sixty-year period of judicial acceptance of uninhibited congressional action by invalidating a string of national laws said to impinge unduly on state sovereignty.[150] The Court

144. Tribe, *supra* note 2, at 140.
145. *Id.* at 159.
146. 491 U.S. 110 (1989).
147. *See* Tribe, *supra* note 2, at 172–82.
148. *See supra* notes 102–06 and accompanying text.
149. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 664 (1999) (Stevens, J., dissenting) (describing "this Court" as "the champion of States' rights").
150. *See supra* notes 33–37 and accompanying text.

likewise has taken federalism-driven approaches in statutory interpretation,[151] vindicated a variety of state claims in the criminal-justice field,[152] and demonstrated a particular zeal to protect the states' authority to control the use of their own funds.[153]

Against this backdrop, the Court's decision in *Saenz* might seem out of step. To be sure, as we have just seen, the current Court remains quite willing to invoke constitutional safeguards of personal interests to strike down many forms of state laws.[154] It is noteworthy, however, that *Saenz* did not fall into those categories of cases—most notably, cases that entail interference with private property,[155] freedom of expression,[156] affirmative action[157] or discrimination in regulating or taxing interstate commerce[158]—in which the modern Court has shown its most activist streaks.

151. *See, e.g.*, Jones v. United States, 529 U.S. 848, 850 (2000) (relying on *United States v. Bass*, 404 U.S. 336, 349–50 (1971), to read a statute criminalizing the destruction of "property used in interstate or foreign commerce" not to include the firebombing of an owner-occupied private residence); Vt. Agency of Natural Res. v. United States, 529 U.S. 765, 787–88 (2000) (interpreting the term "person" in the federal False Claims Act not to include states for the purpose of qui tam liability); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (holding that Congress, in passing the Rehabilitation Act, did not abrogate the States' Eleventh Amendment immunity from suit).

152. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 316 (1989) (holding that prisoners may not use a new rule of criminal procedure to secure habeas corpus relief if their convictions became final before recognition of the rule).

153. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 752 (1999) ("A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts.").

154. *See generally* Robert F. Nagel, *The High (and Mighty) Court,* WALL ST. J., June 30, 2000, at A14 (asserting that "judicial activism is alive and well," and reflected in an "extraordinary record of stubborn, even pugnacious, activism over the past 30 years").

155. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384, 395–96 (1994) (holding the conditioning of a building permit on dedication of land to the city for a bicycle path was an uncompensated taking in violation of the Fifth Amendment); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1020 (1992) (reasoning that application of a South Carolina permit law that operated to deprive owners of almost all economic value of their land was a taking under the Fifth Amendment unless the prohibited use was a common-law nuisance); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42 (1987) (holding that the grant of a public easement across beachfront private property, as a condition of securing a permit to build a house, was a Fifth Amendment taking).

156. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (holding that a state law that required the Boy Scouts to retain an openly gay adult member infringed on the organization's right to freedom of expressive association); Reno v. ACLU, 521 U.S. 844, 874 (1997) (holding that sections of the Communications Decency Act aimed at regulating patently offensive communication on the Internet placed an unacceptable burden on protected speech).

157. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235–36 (1995) (holding that strict scrutiny was applicable to race-based affirmative action programs adopted by federal, state, and local governments alike); Shaw v. Reno, 509 U.S. 630 (1993) (applying strict scrutiny in holding that North Carolina's race-conscious redistricting plan stated a claim under the Equal Protection Clause of the Fourteenth Amendment); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (holding strict scrutiny applicable even to allegedly "benign" racial classifications).

158. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (holding that Maine's tax exemption for charitable institutions that predominately offered services to Maine residents violated the dormant Commerce Clause); Fulton Corp. v. Faulkner, 516 U.S. 325, 333–34 (1996) (determining that a North Carolina intangibles tax that favored corporations with more extensive connections with the state discriminated against interstate commerce in violation of the dormant Commerce Clause).

Even more important, the law challenged in *Saenz* bore earmarks both of moderation and of federalistic experimentation. Unlike the more draconian measure struck down in *Shapiro*, the state law challenged in *Saenz* did not shut out new residents from receiving all state welfare benefits; it merely limited benefits to the (potentially generous) level that had been available in the claimant's prior state of residence.[159] Nor did this measure lack a justification that might appeal even to "bleeding heart liberals." In *Shapiro*, no less an egalitarian than Chief Justice Warren noted, in a dissenting opinion joined by Justice Black, that invalidating laws like California's might well worsen, rather than ameliorate, the plight of poor.[160] In particular, he shared "the apprehensions of many States that an increase in benefits without minimal residence requirements would result in an inability to provide an adequate welfare system."[161] Invalidating waiting requirements, he added, logically cut against "encourag[ing] the States to assume greater welfare responsibilities"[162] and complicated state efforts to "concentrate . . . resources upon new and increased programs of rehabilitation."[163] Particularly in light of these crosscutting concerns about the real-world consequences of waiting periods on welfare benefit programs, worries about stifling salutary state-by-state experimentation were at a high ebb in cases like *Shapiro* and *Saenz*.[164]

The argument for validating California's moderated waiting-period rule in *Saenz* also gained strength from the supportive intervention of Congress. Having examined the national welfare system, Congress passed legislation that specifically authorized the very rule at issue in that

159. *See* Saenz v. Roe, 526 U.S. 489, 493 (1999). Notably, California offered the sixth highest welfare benefits level in the country. *Id.* at 492–93 (noting that California's welfare program "is one of the most generous" in the nation, offering a family of two benefits of $456 per month compared to Arizona's $275 per month); *see also id.* at 496 n.6 (noting further the relative attractiveness of California benefit levels).

160. *See* Shapiro v. Thompson, 394 U.S. 618, 650–51 (1969) (Warren, C.J., dissenting). Indeed, Chief Justice Warren—a vigorous champion of "the downtrodden and dispossessed"—worried "that welfare levels might be lowered nationwide" unless migration-discouraging waiting periods were upheld. *See* Tribe, *supra* note 2, at 114.

161. *Shapiro*, 394 U.S. at 651 (Warren, C.J., dissenting).

162. *Id*.

163. *Id.* In *Saenz*, the Solicitor General argued that the Court, at a minimum, should respect Congress's considered judgment that "the fear that [states] will attract large numbers of recipients from bordering States" would engender "a 'race to the bottom' in setting . . . benefit levels." *Saenz*, 526 U.S. at 509, 510 n.24.

164. *See Shapiro*, 394 U.S. at 654. Justice Harlan emphasized this point in his separate *Shapiro* dissent:

> [O]f longer-range importance, the field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments.

Id. at 674–75; *see also Saenz*, 526 U.S. at 509 (suggesting that the current federal welfare program "gives the States broader discretion" and that the resulting pattern of "significant differences among the States [thus] may provide new incentives for welfare recipients to change their residences").

case.[165] *Saenz* thus did not present a garden-variety contest between competing state and national interests. It presented a case in which the argument for judicial deference was at its zenith, because the considered judgment of all political branches—both state and federal—was arrayed against court action.[166] Against this backdrop, the federalism-driven argument for upholding the California law at issue in *Saenz* was (to say the least) quite strong. Yet if this is so, the result in *Saenz* raises a head-scratching riddle: How could a Court deeply committed to the values of "states' rights" strike down a federalistic experiment so reasonable that even the national Congress had given it an enthusiastic stamp of approval?

One possible answer has already been suggested. It may be that the Court, even if otherwise sympathetic to California's position, found itself driven to reject it because of strong contrary signals in the Constitution's text.[167] Another possible answer is that a Court that is generally federalism-oriented can be nationalism-oriented in particular fields. In fact, the modern Court has demonstrated nationalist tendencies in a variety of cases. For example, the Court—albeit by the narrowest of margins—struck a blow for nationalism when it held that states cannot lay down qualifications for national officeholders, including in the form of term limits.[168] The Court, by an even larger majority, has persisted in applying the so-called dormant Commerce Clause to protect long-recognized (but arguably nontextual) interests in preserving a borderless national marketplace.[169] And the modern Court has followed the lead of its predecessors in endorsing an active judicial role in blocking state action that intrudes on the foreign-policy-making powers of the national government.[170]

These precedents suggest that one way of reconciling the result in *Saenz* with the modern Court's profederalism tendencies is to see it as yet another example of the Court's attentiveness to nationalism values in discrete contexts where those values have particularly great weight.[171] In

165. *See Saenz*, 526 U.S. at 495.

166. As the Court observed in *Prudential Insurance Co. v. Benjamin*:

> Clear and gross must be the evil which would nullify . . . an exertion [of state and federal authorities acting in concert], one which could arise only by exceeding beyond cavil some explicit and compelling limitation imposed by a constitutional provision or provisions designed and intended to outlaw the action taken entirely from our constitutional framework.

328 U.S. 408, 436 (1946); *see also Shapiro*, 394 U.S. at 675 (Harlan, J., dissenting) ("A . . . presumption of constitutionality attaches to state statutes, particularly when, as here, a State has acted upon a specific authorization from Congress" (citing Powell v. Pennsylvania, 127 U.S. 678, 684–85 (1888))).

167. *See* Tribe, *supra* note 2, at 128–29.

168. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (five-to-four decision).

169. *See supra* note 158 and accompanying text.

170. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000) (rejecting state law that barred its agencies from doing business with Burma because the "clear mandate and invocation of national power belie[d] any suggestion that Congress intended the President's effective voice to be obscured by state or local action").

171. A nationalist stance was suggested by Justice Stevens's decision to close his opinion with Justice Cardozo's famous tocsin that "in the long run prosperity and salvation are in union and not divi-

short, *Saenz* may be seen as reflecting the conception that states—although loci of autonomy and strength—must operate within a national community whose citizenry is closely tied together by, among other things, unimpeded opportunities for interstate movement.[172]

Saenz, however, also might be seen as a case about vindicating, rather than subordinating, the values of a vibrant federal system. The proper starting point for developing this line of thought is to recognize that protecting state autonomy is "not just an end" in itself.[173] Rather, the maintenance of a strong federal system is a means to achieving broader goals. Those goals include the facilitation of participatory democracy on a local level, the modeling of programs for possible emulation by other governmental units, and the maintenance of a counterweight to the undue concentration of power in the hands of national-government decision makers.[174] At the core of the purposes of federalism, however, lies another powerful desideratum: the value of permitting regional diversity to flourish.[175] The idea is that state autonomy gives rise to a range of places in which individuals can pursue happiness in settings distinctively suited to their own wants. By facilitating the emergence of a myriad of self-constructed local communities—those communities being states and the smaller geographic subunits within states—federalism fosters opportunities for individual self-realization. The backpacker may find solace in Washington State, the gun owner in Montana, the gambler in Nevada, the art lover in New York, and so forth. At least in theory, federalism thus holds the potential to generate the greatest good for the greatest number as differing sets of individuals establish differing communities distinctively responsive to their own outlooks and aspirations.

Against this backdrop, the ruling in *Saenz* may be seen to comport, rather than to conflict, with the values of federalism. After all, for American citizens to "cash in" on the benefits of a rich diversity of com-

sion." Saenz v. Roe, 526 U.S. 489, 511 (1999) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935)); *see also* Attorney General v. Soto-Lopez, 476 U.S. 898, 902 (1986) (noting "the unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many states into a single Nation").

172. *See* Tribe, *supra* note 2, at 126–30.

173. New York v. United States, 505 U.S. 144, 181 (1992).

174. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (remarking that the "Framers crafted the federal system of Government so that the people's rights would be secured by the division of power"); *New York*, 505 U.S. at 181 (observing that "federalism secures to citizens the liberties that derive from diffusion of sovereign power"); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (noting the "federalist structure of joint sovereigns preserves to the people numerous advantages"; "it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for mobile citizenry"); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (explaining that "[t]he 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'" (quoting Garcia v. San Antonio Metro. Mass Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting))).

175. *See Gregory*, 501 U.S. at 458 (noting that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society").

munities, those citizens must possess the utmost freedom to move from state to state. A necessary corollary to the right of federalistic experimentation is the power to vote with one's feet—to "vote down" one community of values by leaving it behind and to "vote up" another community by joining in its membership. From this perspective, the state-law-invalidating ruling in *Saenz* ran counter to the values of federalism only in a superficial sense. By broadly safeguarding opportunities for interstate movement, *Saenz* powerfully vindicated the deeper purposes of federalism.[176]

Or did it? The argument against viewing the result in *Saenz* as a corollary of the feet-voting facet of federalism emanates from the particular features of the law at issue in the case. As we have seen, that law did not wholly block newly arriving residents in California from receiving welfare benefits; rather the law merely held down the level of benefits to the quantum of benefits receivable in the state from which the claimant had come.[177] This feature of the law (so the argument goes) negates any claim that the holding in *Saenz* was necessary to safeguard the right to vote with one's feet.[178] If the move to California from any other state was going to result in no lessening of welfare benefits (so the argument continues), how can it be that California imposed an obstacle to exercising the right to move?[179]

Answering this question is not easy work, but at least three separate points may support the view that the law in *Saenz* offended an appropriately expansive commitment to making interstate movement hassle-free. First, the uneven treatment of new and not-so-new residents might itself provide a disincentive to unimpeded interstate mobility. People do not like being treated as second-class citizens. While the California law did not generate unequal treatment of new residents vis-à-vis their treatment

176. *See* Tribe, *supra* note 2, at 156 (reasoning that "[p]eople vote with their feet on a lasting basis in deciding which state to call home").

177. *See Saenz*, 526 U.S. at 493.

178. *But see* Mark Strasser, *The Privileges of National Citizenship: On* Saenz, *Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553, 569 (2000) (asserting without elaboration that the California "statute penalized the . . . individual's right to migrate to a new state").

179. Curiously, while Professor Tribe describes *Saenz* as a logical outgrowth of *Zobel*, his own characterization of the principle of *Zobel* leaves an opening for arguing the two cases are fundamentally distinguishable on this very ground. Thus, the constitutional difficulty in *Zobel* arose (at least in part) because Alaska citizens were not "free to leave a state without suffering a distinct economic disadvantage for not having stayed longer." Tribe, *supra* note 2, at 147. This problem was not present in *Saenz* precisely because California guaranteed the newly arriving citizen nothing less than that person would have received in the prior state of residence. To be sure, Professor Tribe says that *Zobel* stands for more: namely, that in switching state citizenship, "the benefit of making that switch must be that the person doing so acquires upon arrival all those things that [the new state] makes available to its citizens and only to them—not something less." *Id.* at 148. But *Zobel* does not compel this result, nor does Professor Tribe really explain why this result "necessarily" follows from the Court's multi-opinion analysis in that case. *Id.* In short, his effort to reason from *Zobel* to *Saenz* faces an unacknowledged difficulty: the rule challenged in the former case, but not the latter, raised a distinctive threat to free mobility by forcing the exiting citizen to sacrifice built-up, state-granted, further-buildable seniority rights. Thus the former case, but not the latter, imposed a very clear disincentive to interstate movement.

in the states from which they came, it did create uneven treatment of new residents vis-à-vis all other residents of their recently chosen domicile.[180] For this reason, even the "soft" discrimination worked by the California statute might have discouraged some interstate migration. To be sure, this disincentive to movement to California might have been relatively small. But the aggregation of small measures of deterrence across all jurisdictions might well produce, in overall effect, a significant inhibition on free interstate mobility.[181]

A second point is that the California scheme created the potential for frictions and resentments incompatible with both an uninhibited system of cross-state migration and a thriving psychological sense of citizenship in a unified nation. In particular, any one state's adoption of a waiting period—even of the more moderate variety involved in *Saenz*—might well induce the retaliatory adoption of similar waiting periods by other states. Such a state-dividing wave of retaliatory action hardly comports with the notion that our nation, for purposes of interstate migration, is and should be without internal borders.[182]

There is a final reason to say that forcing relocating citizens "to begin anew in their new domicile . . . as 'junior varsity' citizens"[183] violates an appropriately unbending anti-citizen-seniority-system principle. The reason is that such a principle is neat and clean. Application of a bright-line requirement of undifferentiated treatment of new and not-so-new state citizens avoids inquiries into complex questions like whether a particular style or combination of benefits in one state equals in effect what would have been available in another.[184] A rigid principle of undifferen-

180. This is especially true if one considers the logical consequences of adopting this "nonpenalty" point of view. A "migratee" state apparently could impose an income tax on the amount the migrator otherwise would have paid in her state of exit even if the migrator state did not ordinarily impose any income tax at all. *See id.* at 150 n.193. After all, if a state can withhold a financial benefit in the form of a monetary grant, can it not similarly withhold a financial benefit in the form of non-taxation?

181. In addition, the California system carried with it the danger of unhappy surprise. Newly arriving California citizen *A*—who understandably anticipated equal treatment with her next door neighbor, citizen *B*, who from all appearances was identically situated—might well be displeased to learn that things are not as they seem. Resulting instabilities and dangers of distress—particularly when multiplied across all states and all state programs—again might create untoward incentives for American citizens to stay put rather than to migrate.

182. These same desiderata of maintaining a nation without internal borders and preventing retaliation among the states drive the Court's dormant Commerce Clause decisions. *See, e.g.*, Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 578 (1997) (emphasizing that a central purpose of the dormant Commerce Clause is to prevent retaliatory action among states); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 414 (1994) (Souter, J., dissenting) (noting that "[l]aws that hoard for local businesses the right to serve local markets or develop local resources work to isolate States from each another and to incite retaliation, since no State would stand by while another advanced the economic interests of its own business classes at the expense of its neighbors"); Dennis v. Higgins, 498 U.S. 439, 453 (1991) (Kennedy, J., dissenting) (discussing Framers' intent that the Commerce Clause would guard against retaliation).

183. *See* Tribe, *supra* note 2, at 147.

184. *Cf.* Saenz v. Roe, 526 U.S. 489, 497 (1999) (noting district court's finding that eligibility for food stamps at increased levels "partially offset the disparity between the benefits for new and old residents").

tiated treatment also reflects considerations of fairness. The bad news is that when I migrate from State *Y* to State *Z*, I immediately sacrifice all benefits State *Y* can limit (albeit equally) to its own citizens. The good news is that I simultaneously acquire all benefits that State *Z* can limit (again albeit equally) to its own citizens. There is justice in such a world (or, to be more precise, in such a nation), and there is an elegant sense of symmetry too.[185]

Viewing *Saenz* in federalism-friendly feet-voting terms carries with it one consequence of particular relevance to Professor Tribe's Comment: it cuts against any suggestion that a paradox marks the differing outcomes in *Saenz* and *Bowers*.[186] The reason why is straightforward. If a central purpose of facilitating free interstate mobility is to permit picking and choosing among diverse locales, it follows that those locales must have much discretion to make themselves diverse. From this perspective, just as surely as American citizens must have freedom to change their states of residence, states must have freedom to embrace distinctive forms of community-defining values, norms, and laws. And, at least from a strongly state-centered point of view, community self-definition logically should entail broad local discretion in handling such social issues as those that involve nonmarital intimacy.

This is not to say that the ruling in *Bowers* was the right one; indeed, my own view tracks the liberty-oriented outlook of the apparent five-Justice majority that came together at too late an hour to vindicate Mr. Hardwick's actual claim.[187] The point instead is that, from the standpoint of the serious-minded proponent of a vibrant federal system, no paradox marks *Saenz* and *Bowers* even if those decisions reflect some fundamental difference in the Court's willingness to use structural reasoning. As we have seen, however, it is a reach to say such a fundamental difference exists. Put another way, it is an oversimplification to depict *Bowers* as representative of a stark analytic divide that has shunted individualiberty cases into the outer darkness with regard to the use of structural inference.[188] To say these things, however, merely pushes us to the question that is at the heart of Professor Tribe's inquiry: Would it make

185. Rejection of the *Saenz* dissenters' requirement of only supplying benefits equivalent to what was available in the former state of residence carries with it another advantage that derives from the value of simplicity. It avoids the crazy-quilt result of permitting states to apply fifty different sets of rules to the broad group of disfavored new-arriving residents. *See* Tribe, *supra* note 2, at 150 n.194 (noting that California rule not only discriminates against new residents but also invites application of "'a variety of rules within that class'" (quoting *Saenz*, 526 U.S. at 505)); *cf. Saenz,* 526 U.S. at 505 (remarking that California's scheme not only disadvantages new residents vis-à-vis long-term California citizens but that it also disadvantages them vis-à-vis "new arrivals who last resided in another country").

186. *See* Tribe, *supra* note 2, at 157.

187. *See* Linda Greenhouse, *Washington Talk; When Second Thoughts in Case Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at A14 (recounting Justice Powell's comments to the effect that he might have made a mistake in not applying the constitutional right of privacy to invalidate the law at issue in *Bowers*).

188. *See supra* notes 112–43 and accompanying text.

sense for the Court now to devise a two-track jurisprudence that broadly protects values of federalism, but not values of individualiberty, through use of the structural methodology?

C. The Dangers of Tying Individual Liberty to the Rhetoric of Institutional Arrangements

Professor Tribe's Comment centers around his normative thesis—a thesis that calls on courts to use structural reasoning no less stingily in individualiberty than institutionaliberty cases.[189] In addition, Professor Tribe seeks to push forward his normative thesis by tying claims of individualiberty to the rhetoric of institutional arrangements.[190] This way of thinking and talking about individual rights has its merits and its place, for some rights—consistent with power-dispersing propensities of the Framers—do involve fostering nongovernmental focal points of authority.[191] The joint operation of the nonestablishment and free-exercise principles of the First Amendment, for example, facilitates the emergence of aggregations of collective religious power designedly separated from government.[192] Civil and criminal juries composed of ordinary community members likewise operate as a sort of fourth-branch counterweight to oppression by organized government departments.[193] Even the institution of private property permits the emergence of meaningful centers of power apart from the state.[194] In addition, some direct protections of liberty—particularly protections connected up with speaking and voting—have institution-constituting dimensions of a very basic nature.[195] When we speak about and vote for political candidates, after all, we are in a very real sense *being* the self-governing state.[196] From these propositions, however, it is a long stretch to say that individual persons themselves are "components" of our institutional structures or that individuals, like states, are entitled to a broad domain of "self-government."[197]

189. *See supra* notes 3–5, 16, 75–80 and accompanying text.

190. *See supra* notes 78–95 and accompanying text.

191. As noted in AKHIL REED AMAR, THE BILL OF RIGHTS xii (1998):

> A close look at the Bill [of Rights] reveals . . . [the] protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate. The genius of the Bill was not to downplay organizational structure but to deploy it, not to impede popular majorities but to empower them.

192. *See id.* at 33–34.

193. *See id.* at 94–96 (discussing the purpose of juries as reserving a role to citizens in the function of government).

194. *See* CASS SUNSTEIN, THE PARTIAL CONSTITUTION 136 (1993) ("The commitment to citizenship requires that people have a large degree of security and independence from the state. The original constitutional protection of private property was justified in large part on this ground.").

195. *See* Dan T. Coenen, Essay, *Of Pitcairn's Island and American Constitutional Theory,* 38 WM. & MARY L. REV. 649, 672 (1997) (describing "the definition . . . of the national electorate" as the "most basic . . . governmental structure").

196. Professor Tribe, among many others, has noted "the place of [freedom of speech] in maintaining a meaningful system of representative government in which an informed electorate determines its own fate." Tribe, *supra* note 2, at 169 n.282.

197. *See id.* at 112, 187.

For this reason, the assertion that the Court should afford individuals autonomy because individuals are institution-like seems destined to have limited persuasive effect.[198]

There is a deeper difficulty with any plea for judicial attention to claims of individualiberty based on the relation such claims have to institutional structures. The problem is that, even if the argument sometimes does persuade, it may push courts toward requiring the advocates of individual liberty to link their claims to collections of persons fairly characterized as institutions. Claims of parental control within the traditional "institution" of the nuclear family, for example, might fare well under this rhetorical regime. But advocates should not count on courts to treat every aggregation of individuals as a constitutionally cognizable institution.[199] And once courts start dividing human aggregations into "institutional" and "noninstitutional" categories, we may expect the more unorthodox, nontraditional aggregations to not fare well.[200] Homosexual couples, for example, might do quite poorly under a rhetoric of liberty that gives a special place to "institutions" precisely because, as a historical matter, this form of relationship has clashed with prevailing conceptions of a more familiar and long-celebrated institution—namely, the traditional nuclear family.

Many other claims of right also may suffer under an institutions-connected rhetoric of constitutional liberty. For example, it is hard to see how the right to refuse treatment prescribed by medical professionals,[201] the right to "loaf,"[202] or the right to keep secret personal information[203] connects up with any kind of participation in a recognized institu-

198. Moreover, the underlying endorsement of institutions-celebrating rhetoric that this approach entails seems likely to boomerang on advocates of personal liberty if in fact the modern Court already sees itself as more activist in institutional-arrangements, than individual-liberty, cases. *See supra* notes 14, 26–42 and accompanying text.

199. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 8–9 (1974) (rejecting nonfamily members' claim of right to occupy a home together despite prohibition imposed by local zoning law).

200. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 315 (1993) (rejecting substantive due process claim of allegedly deportable children to be released to persons other than parents). It is interesting that, in giving examples of the "constitutive choices" through which we govern ourselves as individuals, Professor Tribe identifies, along with marriage, "whether to care for a child" and "whether to have one's own biological baby." *See* Tribe, *supra* note 2, at 187. It may be telling that these choices concern whether to associate with other human beings in traditional age-old relationships.

201. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 723 (1997) (recognizing a right to refuse medical treatment); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990) (recognizing a constitutional right to refuse hydration and nutrition).

202. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (noting that the problem with prohibiting these types of activities is that they are "historically part of the amenities of life as we know them"; nonetheless the Court noted that: "They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity."); *see also* Tribe, *supra* note 2, at 190 (noting that the Court in *Morales* was not "prepared to proclaim a fundamental right . . . to loaf"). *But cf. id.* at 190–91 (commenting that decisions about "what public places one will stand around . . . is close to the essence of what it means to be a self-governing person").

203. *See* Whalen v. Roe, 429 U.S. 589, 599 (1977) (recognizing a constitutional privacy interest in keeping certain sensitive information free of widespread disclosure).

tion. In the same fashion, rights to shape one's appearance,[204] to travel from place to place,[205] or to go out at night[206] may not link up readily with an institution-centered rhetoric of rights. The Court's recent Fourth Amendment decision in *Illinois v. Wardlow*,[207] for example, leaves open at least a small crack to argue that there is a substantive-due-process-based "right to run" from government authorities, at least in extraordinary cases.[208] Again, however, it seems hard to fit such a claim of liberty into a mode of argument that focuses on and applauds institutional arrangements.

Indeed, all forms of choice that involve opting out of relationships seem distinctly nonanalogous to the right to move into a different state. Put another way, a rhetoric that celebrates alignments with "institutions" seems incompatible with protecting nonconformists who aspire to isolate themselves from common forms of social connections. If there is any "nontextual" constitutional liberty, however, it is the "right to privacy."[209] And a right to privacy must protect, if anything at all, certain personal decisions to separate one's self from others.

Similar problems extend to claims of liberty more firmly grounded in the constitutional text. For reasons already noted, it is certainly true that tying individual rights to institutional arrangements supports a broad right to free political speech.[210] The reality, however, is that this self-government-promoting conception of the free-speech right is not significantly controversial.[211] What is more controversial is the notion that free speech rights should flourish in substantial measure due to the value of individual autonomy.[212] An autonomy-based conception of the First Amendment, however, seems hard to square with an institutions-driven conception of personal rights. Thus, rights to engage in nonpolitical ex-

204. *See* Quinn v. Muscare, 425 U.S. 560, 562 (1976) (identifying the same sort of potential liberty interest, but upholding a facial hair regulation for firemen under the rational-relationship standard); Kelley v. Johnson, 425 U.S. 238, 244 (1976) (assuming that there exists a liberty interest in choosing one's own hair style, but upholding hair standards for police officers under rational-relationship test).

205. *See, e.g.*, Hurtado v. California, 110 U.S. 516, 537 (1884) (suggesting that a person's basic liberties include rights to go "from place to place as he chooses" or not "to go to a place contrary to his inclination").

206. *See* Bykofsky v. Borough of Middletown, 429 U.S. 964, 964 (1976) (Marshall, J., dissenting from denial of certiorari) ("The freedom to leave one's house and move about at will is 'of the very essence of a scheme of ordered liberty.'" (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).

207. 528 U.S. 119, 125 (2000).

208. *See id*. at 128 n.1 (Stevens, J., concurring in part and dissenting in part) (noting that the Court has "expressly identified this 'right to remove from one place to another according to inclination' as 'an attribute of personal liberty' protected by the Constitution" (quoting City of Chicago v. Morales, 527 U.S. 41, 53 (1999))).

209. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

210. *See* Tribe, *supra* note 2, at 160. *See generally id.* at 169 & n.282.

211. *See, e.g.*, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–28 (1971) (arguing that the First Amendment, by design, protects political speech, for the purpose of facilitating democratic self-government).

212. *See, e.g.*, United States v. Playboy Entm't Group Inc., 529 U.S. 803, 817 (2000) (suggesting that speech is protected in part because "[i]t is through speech that our personalities are formed and expressed").

pression—the rights to dance,[213] to dress,[214] to paint,[215] to make music[216]—may suffer in a world that steers talk about rights into the language of institutional arrangements.

Professor Tribe might respond to these expressions of concern by saying that it misconceives his argument. He might say, in particular, that his rhetoric does not so much involve conceiving of individuals as parts of institutions (though I believe much of his rhetoric does point this way) as it involves treating the individual's choice of a state as little different from other self-governing choices about how one lives one's life—choices about whether, for example, to dress unconventionally, to make music, or to loaf.[217] But there are many disconnections in this it's-all-just-like-migrating-to-another-state analogy. To name a few:

(1) States are textually recognized, indispensable features of our constitutional system, and the right to move freely among them may thus be viewed as a logical outgrowth of having a system of separate states.

(2) The right to migrate (as we have already seen) may well have a distinctive claim to judicial recognition based on the text of the Fourteenth Amendment's Citizenship Clause. That clause, after all, specifi-

213. *See, e.g.*, Erie v. Pap's A.M., 529 U.S. 277, 285 (2000) (recognizing nude dancing for entertainment as expression "entitled to some quantum of protection under the First Amendment"); Barnes v. Glen Theater Inc., 501 U.S. 560 (1991) (plurality opinion) (same).

214. *See, e.g.*, Tinker v. Des Moines, 393 U.S. 503, 514 (1969) (upholding students' right to wear black arm bands in protest of the Vietnam War under the First Amendment); Scott v. Meyers, 191 F.3d 82, 86 (2d Cir. 1999) (holding that a transit authority's rule barring buttons or badges on uniforms was overbroad and infringed on employees' First Amendment right of free expression).

215. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, Inc., 515 U.S. 557, 569 (1995) (commenting that the "painting of Jackson Pollack" was protected by the First Amendment); Kaplan v. California, 413 U.S. 115, 119–20 (1973) (remarking that, "[a]s with pictures, films, paintings, drawings and engravings, both oral utterances and the printed word have First Amendment protection").

216. *See, e.g.*, *Hurley*, 515 U.S. at 569 (noting examples of art, including the music of Arnold Shoenberg, which is "unquestionably shielded" expression); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (stating that "[m]usic as a form of expression and communication is protected under the First Amendment").

217. There is much room to argue, of course, about what the right of "equal citizenship" recognized in *Saenz* entails. For example, perhaps this right implies that a state cannot make homosexual conduct a crime because such a law denies equal citizenship to homosexuals. It might also be argued that some laws—including sodomy laws—unduly discourage interstate travel and migration into states that enact them, thus undermining, among other things, "the economic progress of our nation." Zobel v. Williams, 457 U.S. 57, 68 (1982) (Brennan, J., concurring). Put another way, the Fourteenth Amendment's Citizenship Clause may envision a basic floor of liberties afforded to each citizen lest too many citizens be discouraged from moving. There are, however, serious weaknesses in this argument. After all, the sense of the Citizenship Clause is—to the extent it treats state citizenship—not that all citizens in each state equally share a core of federally defined rights. Rather, the sense of the clause is that each citizen gets a special set of rights—that is, those rights associated with being a citizen of a particular state—that flow from the choice to "reside" in that state. In addition, it would seem unwise to conceive the right of privacy as a mere prophylaxis designed to ensure free interstate movement. If the Court is going to protect sexual liberty, for example, the Court should protect it because sexual liberty is foundationally important. Protecting human rights on the theory that they conduce to free travel invites crabbed interpretations and basic misconceptions about why such rights are important.

cally checks government power with regard to an individual's choice to "reside" in one state rather than another.[218]

(3) Affording individuals the ability to move from state to state involves something more than permitting persons to choose a "system of values."[219] It also (for example) provides a potent means of peacefully checking and responding to abuses by local government power. In this sense, the right to move is closely allied to core voting and speech rights.[220]

(4) Unlike the exercise of many would-be rights, migrating to a new state intrinsically involves a political act—namely, the act of choosing a new political community. Permitting me to choose with whom I will engage in group self-governance may be seen as very different from blocking the very self-governing group I have chosen to join from adjudging certain forms of nonpolitical conduct I engage in to be legally out of bounds.

To deal with Professor Tribe's argument in this way may be, in a sense, to do him an injustice. His Comment, for example, does not say that there are no differences whatsoever between *Saenz* and cases that involve nonpolitical self-definition like *Bowers*. Moreover, his Comment is far richer and intense in defending a broadened judicial role in the aid of liberty than my snippets and paraphrases can convey. If there is a problem with Professor Tribe's rhetoric, however, it is not that that rhetoric lacks a zeal for protecting liberty. The problem is that its institutions-tied focus may set the table for a synthesis that is not friendly to forms of liberty he seems to favor. In cases that involve such self-definitional matters as sexuality, medical autonomy, or the right to "do absolutely nothing"[221]—as opposed, perhaps, to such matters as getting married or having or raising a child—an institutions-centered rhetoric of personal rights may well open the door for a judicial retreat.[222]

218. It is important to see that, in this way, the regulation at issue in *Saenz* blocked free interstate movement in a way quite different from the law at issue in *Bowers*. It might always be said that a state interference with personal liberty discourages interstate mobility by blocking the movement of persons who prefer not to have their liberty constricted in a particular way—the law in *Bowers*, for example, undoubtedly discouraged the migration of homosexuals to Georgia. The key point, however, is that the sort of law involved in *Saenz* discouraged interstate movement directly because it was triggered only when and because people moved into the state. In contrast, the law in *Bowers* applies to one and all, wholly apart from any decisions to relocate.

219. Tribe, *supra* note 2, at 186–87.

220. *See* HANNAH ARENDT, ON REVOLUTION 24–25 (1963) (asserting that the right to move is one of the most basic rights, essential to participation in public affairs).

221. Aaron J. Mann, *Casenote: A Plurality of the Supreme Court Asserts a Due Process Right to Do Absolutely Nothing in* Chicago v. Morales, 33 CREIGHTON L. REV. 579 (2000).

222. Professor Tribe pauses to "stress that the dichotomy of individual rights vs. community self-government is to some degree a false one, for a community cannot be meaningfully self-governing unless the individuals who constitute it are self-governing as well." *See* Tribe, *supra* note 2, at 185 n.332. Moreover, his conception of self-governing individuals extends beyond insuring that those individuals have "tools and opportunities to share in directing the community's fate" (presumably through strong protections of speech and voting rights). *Id*. It also operates "in the intrinsic and personal sense that each member of such a community must have the capacity and freedom to choose a life di-

This doubting response to Professor Tribe's institutions-driven line of argument for full-scale structural reasoning in individualiberty cases raises yet another question: Is there a better argument for an energetic judicial protection of liberty and, in particular, a line of argument that will carry water with the modern Court? This question, in turn, raises another question: What interpretive tools matter to the present-day Justices? Text surely matters—as it should. And so it seems worthwhile to show that an open-stanced vision of protected liberty can find safe lodging in the Constitution's express terms. Fully elaborating such an argument is beyond the scope of this essay. But the beginning point of such an argument is at hand. After all, the current Court has not balked at the thought that significant substantive protections of individual autonomy inhere in the mandate that no state shall "deprive any person of life, liberty, or property, without due process of law."[223]

Some commentators have derided "substantive due process" as a linguistic non sequitur.[224] But the shorthand slogan "substantive due process" itself appears nowhere in the Fifth or Fourteenth Amendments, and in each of those amendments the word "process" does not stand alone. In fact, a purely literalist look at the Due Process Clauses suggests a variety of bases for saying that those clauses supply to persons whose liberty is in jeopardy more than merely procedural "fair trial" safeguards. Consider the following interpretive stances:

(1) The words "without due process of law" must be read in a holistic way that neither rips the term "process" from its context nor undervalues the notion that "it is a *constitution* that we are expounding."[225] The whole phrase might be paraphrased to mean something like "in the absence of fundamental fairness," "in a manner inconsistent with our deepest norms," or—to paraphrase the Great Charter from which the constitutional language was actually derived—"except in keeping with the Law of the Land." Translated in any such a way, the Due Process

rection and the will and liberty to act in accord with that choice." *Id.* In effect, Professor Tribe thus suggests that a community of people cannot meaningfully govern themselves by way of majority action unless majorities and their representatives respect important apolitical personal rights. Professor Tribe, however, does not really explain why. He offers only—and again rather cryptically—the thought that failing to embrace a principle of judicially enforceable rights to individual self-government would permit "those in . . . power [to control] the sources of available information and the centers of value formation." *Id.* This argument moves close to asserting that we, as individuals, need to be given broad liberty to act so that we, as a society, can determine whether we, as individuals ought to have broad freedom to act. I suspect that, for many judges, such an argument will lack persuasive force.

223. U.S. CONST. amend. XIV, § 1.

224. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (commenting that "'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"); *cf.* Troxel v. Granville, 530 U.S. 5780 (2000) (Thomas, J., concurring in the judgment) (reserving the question whether "our substantive due process cases were wrongly decided").

225. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

Clauses provide linguistic support for substantive, as well as procedural, restrictions on government action that threaten fundamental rights.[226]

(2) Substantive limits inhere in the command that liberty may be taken only by way of the "due process *of law*." On this view, legislative acts should not and do not qualify as "law" if they violate fundamental norms.[227]

(3) The "process of law," as long understood in the Anglo-American common-law tradition, has entailed meaningful context-sensitive development over time.[228] Laws that lack consonance with deep seated norms applied fairly to modern conditions thus do not comport with the "due"—that is, the properly unfolding—"process of law."[229]

(4) Even if "due process of law" is strictly synonymous with "fair procedure," it remains legitimate to test for procedural missteps by assessing the substantive impact and justifiability of laws.[230] Such a prophylactic approach is common in constitutional law;[231] indeed, the Court sometimes describes the ostensibly substantive style of means/ends scru-

226. *See* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320–27 (1999).

227. *See* Tribe, *supra* note 2, at 194 n.355. In *Hurtado v. California*, 110 U.S. 516 (1884), the Court seemed to embrace precisely this interpretation. According to the Court in that case, the Due Process Clause bars "arbitrary exertions of power under the forms of legislation." *Id.* at 536. This is so because: "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, *is not law*, whether manifested as the decree of a personal monarch or of an impersonal multitude." *Id.* (emphasis added). Moreover, "[t]he enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority." *Id.*

228. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 441–44 (2000).

229. *See, e.g.*, Ray v. Blair, 343 U.S. 214, 232–33 (1952) (Jackson, J., dissenting) (noting that "[u]sage may sometimes impart changed content to constitutional generalities, such as 'due process of law'"); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 236 (2d ed. 1986) (suggesting that Justices should "extract 'fundamental presuppositions' . . . from the evolving morality of our tradition").

230. For example, in the law of contracts there exists the doctrine of constructive fraud. Under this doctrine, where a fiduciary relationship exists, the court will assume that a substantively unfair contract was obtained "by trickery, by taking undue advantage of one's position, by non-disclosure of material facts or by other unconscientious means." E. ALLEN FARSNWORTH, CONTRACTS § 4.27, at 305 (3d ed. 1999) (citing J. POMOROY, EQUITY JURISPRUDENCE § 1405a (5th ed. 1941)). In other words, the doctrine looks to substantive unfairness to guard against predictable procedural miscues. This line of thinking is also present in constitutional cases. *See, e.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 41 (1991) (noting that a "verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case").

231. A pragmatic rights-implementing view of the judicial role was surely part of the legal backdrop against which the Fourteenth Amendment was adopted. For example, in *Ex parte Craig*, 6 F. Cas. 710 (C.C.E.D. Pa. 1827) (No. 3,321), the issue was whether the government could seize money held by an alleged counterfeiter. The seizure, Justice Bushrod Washington explained, could not stand in light of the defendant's Sixth Amendment rights to counsel and to secure witnesses. Justice Washington's view of the case was practical and prophylactic: "what would these securities avail the accused," Justice Washington asked, "if a judicial officer . . . of the court may legally deprive him of the means of obtaining his witnesses, and of employing the counsel in whom his confidence is placed; by detaining the money found upon his person, which, in many cases, may be his all?" *Id.* at 711; s*ee also* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1127–28 (2000) (discussing *Ex parte Craig*).

tiny routinely used in both equal protection and substantive due process cases as being employed for the very purpose of flushing out wrongful processes in the making of law.[232]

(5) Due process at least requires that decision makers be impartial.[233] But how can we judge whether lawmakers have been minimally impartial toward those groups they have selectively disadvantaged, except by weighing such matters as statutory impact, statutory justification and the soundness of means/ends relationships? Put another way, fundamental-rights analysis provides a way to judge whether lawmakers have acted with the sort of detached neutrality that due process concededly mandates.[234]

(6) Fairly understood, "due process of law" requires at least that legislative actions be rational or nonarbitrary.[235] Making this determination, however, inescapably entails judicial balancing.[236] And balancing inquiries should, in logic, be stepped up in cases that involve threats to rights of a distinctively fundamental nature.

No less important than these linguistic foundations for fundamental-rights analysis is the fact that, from the beginning, the Supreme Court has read the Due Process Clauses to place substantive limits on govern-

232. *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1824–28 (2001).

233. *See, e.g.*, Ford v. Kentucky, 469 U.S. 984, 987 (1984) (Marshall, J., dissenting from denial of certiorari) (determining that there could be "no question that due process requires state grand juries to be unbiased and impartial"); KPNX Broad. Co. v. Arizona, 459 U.S. 1302, 1306 (1982) (noting that "'[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences'" (quoting Sheppard v. Maxwell, 384 U.S. 333, 362–63 (1966))).

234. Historically, many states during the antebellum era used the concept of due process to condemn "special laws" that gave special benefits or imposed unique burdens on distinctive classes of individuals. "By establishing equal treatment as a constitutional norm, this line of cases curtailed the power of legislatures to enact laws which aided one class of individuals." Ely, *supra* note 226, at 338. Special laws were illegitimate under the maxim that "'no person could be deprived of property but by due process of law'. . . . Thus, if an exercise of legislative authority was not general in application then it failed to satisfy due process." *Id.* (quoting Michael Les Benedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 326 (1985)); *see also* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 640 (1999) (suggesting that legitimacy demands both substantive and procedural "due process of law").

235. *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 127 n.10 (1992) (noting "the Due Process Clause, like its forebear in Magna Carta, . . . was 'intended to secure the individual from the arbitrary . . . powers of government . . . .'"(quoting Hurtado v. California, 110 U.S. 516, 527 (1884))); Daniels v. Williams, 474 U.S. 327, 331 (1986) ("The touchstone of due process is protection of the individual against arbitrary action of government." (quoting Wolff v. McDonell, 418 U.S. 539, 558 (1974))).

236. Illustrative of the point is then-Justice Rehnquist's dissenting opinion in *Roe v. Wade*, 410 U.S. 113, 173 (1973). After noting that the normal standard for review of social and economic legislation is rational-basis review, Justice Rehnquist concluded that the prohibition on abortion would pass that level of scrutiny. *See id.* at 172–73. Justice Rehnquist also acknowledged, however, that an abortion law would be unconstitutional under rational-basis review to the extent it applied when the mother's life is in jeopardy. *See id.* at 173. But why? In the end, Justice Rehnquist concluded that the costs associated with the probability the mother would die outweighed the benefits of the possibility—or perhaps even the near-certainty—that the fetus would be born. *See id.* Such logic, it seems clear enough, involves the balancing of a personal interest in the mother's life against the state's competing interest in protecting fetal life.

ment action.[237] In the *Slaughter-House Cases*[238] the Court did not reject the disgruntled butchers' due process argument on the ground that they had presented only a substantive, rather than a procedural claim—even though the Court could easily have done just that.[239] A short time later, the Court made explicit the implicit message of *The Slaughter-House Cases*—namely, that the Due Process Clauses do impose substantive liberty-protecting restrictions on the powers of government.[240] These authorities are weighty because the modern Court has reaffirmed the distinctive precedential importance of Court decisions that come close in time to the adoption of the relevant constitutional text.[241] Moreover, there is freestanding evidence that the legal community broadly understood the term "due process of law" to have a substantive dimension at the time the Fourteenth Amendment was ratified.[242] In short, precedent and history combine to support the modern Court's use of so-called substantive due process.[243]

To say that "substantive due process" lives, however, is not to address fully the underlying question raised by Professor Tribe: Is there reason to use structural reasoning less vigorously to safeguard individualiberty than to police institutional arrangements? In response to this question, some might say that judicial use of structural reasoning in cases concerning institutional arrangements, but not individualiberty, comports with principles of democratic self-rule.[244] Our Constitution, however, has

237. *See Collins*, 503 U.S. at 127 n.10.

238. 83 U.S. 36 (1872).

239. In the *Slaughter-House Cases*, Louisiana had enacted a law giving a twenty-five-year monopoly to a corporation for the operation of slaughterhouses in New Orleans. Other persons wanted to operate slaughterhouses as well, and they brought an action based on the Privileges or Immunities, Equal Protection, and Due Process Clauses. *Id.* at 43–44. The Supreme Court considered and rejected all of these challenges. *Id.* at 83. If the Court had believed that substantive claims were unavailable under the Due Process Clause, the Court could have said just that. In dismissing the due process claim, however, the Court instead said merely "that under no construction of" the Due Process Clause that the Court "deem[ed] admissible, [could] the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a *deprivation of property*." *Id.* at 81 (emphasis added). The implication is that, if there had been a deprivation of property, a due process claim might well have been available notwithstanding the substantive (rather than procedural) nature of the challenge.

240. *See Hurtado*, 110 U.S. at 536–37 (viewing "partial and arbitrary exertions of power under the forms of legislation" as incompatible with the Due Process Clause).

241. *See* United States v. Morrison, 529 U.S. 598, 622 (2000) ("The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the [then-sitting] Members of the Court . . . [because they] obviously had intimate knowledge and familiarity with the events surrounding [the adoption of the Fourteenth Amendment]."); *see also* Tribe, *supra* note 2, at 194 n.355 (noting that *Hurtado* came "shortly after that amendment's adoption").

242. *See* Ely, *supra* note 226, at 328–35 (discussing how both state and federal courts took the position that "due process" and "by the law of the land" were synonymous). Professor Ely catalogues numerous cases that precede the ratification of the Fourteenth Amendment that identified due process as having a substantive component. *Id.*

243. *See* Tribe, *supra* note 2, at 194 n.354 (advocating substantive reading of the Due Process Clause and citing earlier supportive work).

244. An argument along these lines is suggested by Chief Judge Wilkinson's concurring opinion in *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 889 (4th Cir. 1999) (Wilkinson, C.J., concur-

always surrounded majoritarian authority with elaborate checks and balances. Thus, any argument from self-rule carries with it something of a question-begging quality, and when—as is now the case—the Court's institutional-arrangements decisions channel legislative control from Congress to the states, the majoritarian argument has a rather hollow ring. After all, the Court's actions in all such cases involve frustrating the will of the national majority through the invalidation of acts of Congress.[245]

The latter point reminds us that, in exploring the dualism question raised by Professor Tribe, we must take as our point of reference the Court's recent federalism cases, for it is in this distinctive set of institutional-arrangements cases that the Court has been most open to using the tools of structural inference.[246] Put another way, we must ask whether we can derive from the broad-gauged extrapolation of limiting principles in the service of states' rights the proposition that the Court should be no less open to extrapolating limiting principles in the service of individual liberties. Three sets of reasons—rooted in text, tradition, and structure—suggest that the answer to this inquiry may well be "yes."

Take first the matter of text. It may be that the Privileges or Immunities, Due Process, and Equal Protection Clauses are linguistically opaque. But at least those clauses are clauses. The Court's federalism decisions, in contrast, have been driven by nontextual "'postulates which limit and control'"[247]—postulates that have trumped exercises of even expressly granted congressional powers[248] and, in the Eleventh Amendment context, rubbed up hard against the text-driven *expressio unius* principle of divining the law giver's intent.[249] The point is not to bad-

ring), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000). In that case, he urged that the Court's structural federalism decisions differ fundamentally from past activist rulings of the Supreme Court, such as *Lochner v. New York*, 198 U.S. 45 (1905), which have come to be condemned by later generations. *See Brzonkala*, 169 F.3d at 890. One key difference, he says, is that the Court's federalism rulings do not cast judges "as substantive adjudicators, but as structural referees." *Id.* at 895. These rulings—unlike *Lochner*—have not "prevented the people from seeking resolutions of their differences through their popularly elected representatives—federal *and* state." *Id.* Thus, the Court's modern federalism decisions do not "remove the subject matter of those cases from political debate altogether"; "[t]his jurisprudence removes no substantive decision from the stage of political debate"; and "[n]o court blocks the path of legislative initiative in any of these substantive areas." *Id.*

245. Consider, for example, the Civil Rights Act of 1964, which reflected the will of a broad national majority notwithstanding strong opposition from the then-segregated South. Reserving powers to the states may sometimes seem wise from a federalist perspective, but often the reason that Congress intervenes with this type of legislation is precisely because states refuse to act on their own to correct problems or injustices notwithstanding extremely powerful national values to the contrary.

246. *See* Tribe, *supra* note 2, at 110. *See generally supra* notes 148–50 and accompanying text.

247. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 68 (1996) (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).

248. Thus, for example, the Court's rulings in *Printz* and *New York v. United States* involved judicial endorsements of non-text-based principles that overrode otherwise permissible exercises of the expressly granted commerce power. *See also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91–92 (2000) (holding that Congress lacks power to abrogate states' Eleventh Amendment immunity under the Commerce Clause); *Seminole Tribe*, 517 U.S. at 72–73 (holding the Indian Commerce Clause did not give Congress the power to abrogate Florida's Eleventh Amendment immunity).

249. *See, e.g.*, Young, *supra* note 11, at 1602 (noting tension between *Alden* and the Eleventh Amendment's text).

mouth the Court's "tacit postulate" federalism decisions.[250] It is to say, however, that a Court open to the structural derivation of federalism restraints from background principles of constitutional law should be, at least presumptively, no less open to the structural derivation of personal-liberty restraints that begin with the express provisions of the Fifth and Fourteenth Amendments.[251]

This text-based a fortiori argument is reinforced by the Ninth and Tenth Amendments. In its structural-inference federalism cases, the Court has drawn support from the Tenth Amendment. As a linguistic matter, however, that Amendment states only a "truism"[252]—namely, that all powers not delegated to Congress "are reserved to the States respectively, or to the people."[253] The Ninth Amendment, in contrast, states more than a truism by establishing that "[t]he enumeration . . . of certain rights" does not "deny or disparage others retained by the people."[254] Some view the Ninth Amendment's directives as so murky as to be meaningless.[255] But if the Ninth Amendment is Delphic in its statement of limiting principles, it is no more Delphic than the Tenth Amendment. The point, again, is not to denigrate fair structural use of the Tenth Amendment in constitutional reasoning; the Tenth Amendment is a part of our Constitution.[256] The point instead is that a Court prepared to build power-constraining state-rights principles on implications suggested by the Tenth Amendment should, in logic, be no less willing to build power-constraining principles on the express rights-recognizing directives of the Fifth, Ninth, and Fourteenth Amendments.[257]

250. Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

251. *See* Tribe, *supra* note 2, at 167–68 (relying on the Fourteenth Amendment's reference to "liberty," "privileges or immunities," and "equal protection" to argue that "unenumerated rights of individuals are in a sense *more* firmly anchored in the text than are most of their institutional counterparts").

252. United States v. Darby, 312 U.S. 100, 124 (1941).

253. U.S. CONST. amend. X.

254. *Id.* amend. IX. Professor Tribe criticizes the particularly narrow reading of the Ninth Amendment that views it as merely countering the "implausible implication" that the enumeration of liberties in the Bill of Rights preempted recognition of further rights under state law. *See* Tribe, *supra* note 2, at 166 n.263. This reading seems particularly strained because—while state-created rights by definition constrict the powers of state government—all understood the Bill of Rights to restrict only the powers of the national government. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); *see also* United States v. Morrison, 529 U.S. 598, 638 n.11 (2000) (Souter, J., dissenting) (noting the remarks of James Wilson that the enumeration of rights is dangerous because it implies the negation of unenumerated rights).

255. *See* Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (noting the "Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people").

256. *See* Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (remarking that "[t]he [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system").

257. This point is not overlooked by Professor Tribe. *See* Tribe, *supra* note 2, at 166 (commenting that the "Ninth Amendment . . . announces the non-list-like character of the system of personal rights

Our national experience confirms what constitutional text suggests—namely, that the Court should be no less hesitant to use structural reasoning in fleshing out personal rights than in fleshing out state authority. The reason why is banal but compelling: American history is steeped in a commitment to individual liberty. That commitment is embedded in the Declaration of Independence.[258] It drove the American Revolution.[259] It was at the heart of the ratification debates[260] and is reflected in the resulting Bill of Rights.[261] The cause of liberty propelled the abolitionist movement and the antistatist reconstruction era adoption of the Civil War Amendments.[262] If these examples seem too general, there is also a more specific constitutional history to consult. So-called substantive due process took root early in the soil of the Fourteenth Amendment.[263] It survived even the shock of the post-*Lochner* retrenchment, maintaining vitality as a vehicle for protecting noneconomic rights.[264] In the closest thing to a modern acid test of its merits, "substantive due process" emerged unscathed from the uniquely open debate on the subject of its legitimacy during the confirmation hearings on the nomination of Robert A. Bork.[265] Put simply, American history is no less the history of liberty (including judicial protection of liberty under the due process rubric) than it is the history of states' rights. Indeed, to lend the vital energies of structural reasoning to the latter cause, but not the former, is to turn the American experience on its head.

even more clearly than the Tenth Amendment announces the non-list-like character of the set of states rights").

258. Thus, Thomas Jefferson expounded in the Declaration of Independence that "all men . . . are endowed, by their Creator, with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

259. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 55 (1969) (noting that "liberty" was the term used most often "by the Revolutionaries").

260. 1 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST: WHAT THE FEDERALISTS WERE FOR 40, 64–70 (Herbert J. Storing ed., 1981). The Anti-Federalists were deeply concerned about the dangers posed to liberty by factionalism, *see id*. at 39–40, and defended the need for a Bill of Rights by citing the risks posed by the emergence of oppressive majorities. *Id.* at 111.

261. *See* THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 592–97 (B. Schwartz ed., 1971). Jefferson advocated a Bill of Rights in order to protect individual liberties, noting his concerns in a letter to James Madison. *Id.* at 607. Two years later, when Madison introduced the Bill of Rights to the House of Representatives, he emphasized that he wished to remove any fears that anyone wished to rob individuals of the liberty for which they had fought so hard. *Id.* at 1024; *see also* St. George Tucker, *Appendix* to 1 WILLIAM BLACKSTONE, COMMENTARIES 307–08 (St. George Tucker ed., 1803) ("every power which concerns the right of the citizen, must be construed strictly, where it may operate to infringe or impair his liberty").

262. Curtis, *supra* note 231, at 1110 (concluding that "the post-Civil War Amendments reflected a growing conviction that security for liberty must be national to be meaningful").

263. *See supra* notes 236–41 and accompanying text.

264. Even the latter Justice Harlan, an ardent promoter of state prerogatives in many contexts, embraced the notion that "certain interests"—namely, "fundamental" substantive interests, including a "freedom from all substantial arbitrary impositions and purposeless restraints"—require "particularly careful scrutiny of the state needs asserted to justify their abridgement." Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (citations omitted).

265. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 65 (1999) ("Bork's nomination failed, and everyone learned the lesson. You had to support a constitutional right to privacy no matter what . . . .").

This argument for (at least) nondiscrimination in structural reasoning does not rest solely on text and tradition. It also rests on structural reasoning itself. To see why we must circle back to the Court's modern federalism precedents and consider all those precedents, most notably *Garcia v. San Antonio Metropolitan Mass Transit Authority*.[266] In *Garcia*, the Court abandoned its earlier recognition of a nontextual exemption of states' "integral operations" from congressional regulation pursuant to the commerce power.[267] In reaching this result, the Court reasoned that judicial restraint was distinctively appropriate in this area because "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress."[268] (Senators, for example, are elected on a state-by-state basis. Representatives are elected from within states out of districts created by state legislatures. And both Senators and Representatives—and the veto-wielding President too—are chosen by voters identified by state-made rules.[269]) This thought, which had been powerfully developed in earlier works by Herbert Wechsler[270] and Jesse Choper,[271] led the Court in *Garcia* to conclude that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[272] The underlying reasoning of *Garcia* thus provides a powerful structural argument against a dualistic approach to structural inference that disfavors individual rights. After all, the simplest logic suggests that the Court should be no less willing to use structural inference in individualiberty cases than in states' rights cases that involve distinctive factors that counsel judicial restraint.

There is, as usual, a problem with this argument. Four of the five Justices who made up the *Garcia* majority no longer sit on the Court.[273] And in case after recent congressional-power case, the *Garcia*-based built-in-checks argument has failed to carry the day.[274] For the modern Court the line of reasoning set forth in *Garcia* has not led to a judicial decision to "abdicate" all responsibility for safeguarding state authority from congressional overreaching.[275]

To say that judicial abdication in protecting state autonomy is unjustified, however, is not to say that the national legislative process does not embody important specialized protections of state autonomy. In fact

266. 469 U.S. 528 (1985).
267. *Id.* at 546–47.
268. *Id.* at 550–51.
269. *See id*. at 565 n.9.
270. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–47 (1954).
271. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176–77 (1980).
272. *Garcia*, 469 U.S. at 552.
273. Of those Justices who were in the majority, only Justice Stevens remains on the Court.
274. *See supra* notes 33–37 and accompanying text.
275. *See Garcia*, 469 U.S. at 581 (O'Conner, J., dissenting).

it does.[276] Moreover, the subject that concerns us in this essay is not judicial abdication. Our inquiry concerns just the opposite—namely, whether the Court should be at least as activist in using structural reasoning in individualiberty cases as it has been in cases that involve institutional arrangements. More particularly, our inquiry focuses on what logical lesson we should draw about the proper use of structural reasoning in institutionaliberty cases from the Court's untempered use of that technique to constrain congressional power in the name of "states' rights."[277] The logical lesson is simple: If structural reasoning is the order of the day in congressional-power/states-rights cases—cases in which built-in institutional checks already provide significant safeguards against government overreaching—then a fortiori it should be the order of the day in individualiberty cases because in those cases no similar built-in safeguards exist.

All of these arguments take us to the same destination ultimately arrived at by Professor Tribe: They support serious use of structural reasoning in the field of individual rights. The point is not, as Professor Tribe wisely emphasizes, that all constitutional claims of personal liberty should be warmly embraced.[278] Rather, the point is that the Court should resist any pull toward developing, either explicitly or implicitly, a doctrinal dualism under which claims of individual liberty are assigned a second-class status in judicial use of the structural methodology. Exactly where this "equal opportunity" view of structural reasoning might take us remains to be seen. To predict particular pathways of decision is not the purpose of this essay. My purpose instead has been to suggest only that the "mood"—the overarching outlook, the deep philosophy, the instincts—of the Court should be no less structurally minded in individualiberty cases than in cases that concern institutional arrangements.[279] When claims of personal liberty arise, the Court should stand at least as ready as it stands in states-rights cases to put to work the powerful tools of reasoning from structural inference.

276. Moreover, opinions joined by a broad cross section of the current Court have, in various ways, called attention to precisely this point. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) (arguing for heightened presumption of nonpreemption when agency, rather than congressional, action is at issue; noting that "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of the states"); Christiensen v. Harris County, 529 U.S. 576, 579 (2000) (noting that "[i]n the months following *Garcia*, Congress acted to mitigate the effects of applying the [Fair Labor Standards Act] to States and their political subdivisions, passing the Fair Labor Standards Amendments of 1985"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 93 (2000) (Stevens, J., dissenting) (emphasizing the existence of "important structural safeguards" that "adequately defend state interests from undue infringement").

277. *See supra* notes 33–37, 244 and accompanying text.

278. *See* Tribe, *supra* note 2, at 172 n.293.

279. *See* Williams v. Taylor, 529 U.S. 362, 386 (2000) (remarking that "[e]ven though we cannot conclude that the phrases establish 'a body of rigid rules,' they do express a 'mood' that the federal judiciary must respect").

III. CONCLUSION

Laurence Tribe has painted a two-part picture of the work of the modern Supreme Court. In institutional-arrangements cases, he says, the Court is eager to reason from structural inference. But in cases that concern individual rights, he asserts, the Court has eschewed this open-stanced methodology. I question whether this dualistic approach in fact marks the modern Court's work and at least whether it does so as starkly as Professor Tribe suggests. Whether or not it does, however, Professor Tribe and I agree that such a dualism has no place in our law.

In arguing that claims of personal liberty should enjoy the blessings of structural inference no less than claims based on institutional arrangements, Professor Tribe relies on the idea that individual rights and institutional arrangements have a close connection. While there is some truth to this notion, I have voiced worries about channeling the plea for judicial protection of individual liberty into a rhetoric—even a rich rhetoric—of institutional arrangements. My major concern is that this way of conceptualizing claims of personal liberty may leave liberty with too little room to roam. Important rights to define one's self—the right to loaf, to shape one's appearance, to express one's sexuality, to make music or art—may have little apparent connection to "institutions" as judges normally think of them. And there are special problems with arguing that such rights merit protection because they involve attempted exercises of personal self-definition in much the same way as does moving from one state to another. This is so in part because voting with one's feet is quintessentially a political act, and protecting the right of interstate migration—unlike protecting the sort of autonomy-centered right involved in cases like *Bowers v. Hardwick*—is distinctively connected with both the constitutional text and the operation of our federal system. The kinship of *Saenz* to *Bowers*, I fear, will not seem nearly as close to the courts as it does to Professor Tribe.

The better case for liberty rests on simpler and sturdier ideas. It is common ground that the modern Court has used structural reasoning aggressively to protect "states' rights" against overreaches by way of congressional legislation. It follows a fortiori—as a matter of constitutional text, constitutional history, and structural logic itself—that the Court should show no less willingness to wield the tool of structural inference in the service of individual rights. In the end, there is no need to build the case for structural recognition of individual rights on a complex rhetoric of institutional arrangements. The cause of liberty is strong enough to stand on its own feet.