Ponnuru's post on The Corner today complains that I "sidestep[ed] the issue of scholarly misconduct." My post had nothing to do with the substance of Ponnuru's National Review piece – rather, I said that I thought that the whole enterprise was silly. There was an indirect substantive critique, however. The unstated upshot of my view was that the entire subject was so trivial that, essentially by definition, it couldn't amount to scholarly misconduct.

But Ponnuru's vituperative post in response to mine inspired me to take a deeper look at the allegations, which I've now done. He called me "slippery and dishonest" and accused me avoiding the actual issue. I couldn't possibly care less what he thinks of me, but those claims inevitably – and seemingly intentionally – were going to invite scrutiny of the substance of what he had written. So I got a copy of the relevant sections of Tribe's briefs in *Richmond Newspapers*, which are available here: http://goldsteinhowe.com/blog/files/RNBriefs.pdf, and Tribe's *Green Bag* article, which is available here: http://goldsteinhowe.com/blog/files/GreenBagPDF.pdf. (Disclosure: I got the *Green Bag* article by calling Tribe's office and asking someone on his staff to fax or e-mail it to me because I don't have a copy and couldn't find it on-line. I've still not spoken to Tribe about this; he holds the copyright on the piece, but I figure this is fair use.)

In the paragraphs that follow, I lay out Ponnuru's claim and why I think it's quite wrong. I also think this whole endeavor will reinforce my original sense that this is entirely silly. Tribe is perfectly capable of defending himself, and some posts have indicated that he intends to do so, but Ponnuru has drawn my interest. So – and I ask your indulgence because I've just written this on the fly without editing it or having anyone else review it for style – here we go . . . .

Ponnuru's position is that Tribe "committed precisely the offense that he identified as 'the cardinal sin for any scholar'" – namely, he "present[ed] 'fantasy' as 'fact.'" The misrepresentation is said to occur in the *Green Bag* piece, which is where I start.

For completeness, I'm going to quote in full each reference by Tribe to his use of the Ninth Amendment in the *Green Bag* piece. Tribe introduces the Ninth Amendment as follows:

> [T]he First Amendment didn't completely suffice [in *Richmond Newspapers*] – unless one treated it as a very broad structural guarantee of access to information in an open society, a guarantee not enumerated anywhere in the Bill of Rights, but one reinforced by the Ninth Amendment's mandate that the Constitution's "enumeration . . . of certain rights, shall not be construed to deny or disparage others retained by the people."

Note how Tribe frames his view in the case: that the Ninth Amendment reinforces the First Amendment, as opposed to serving as a stand-alone source of constitutional authority. But note as well that, for all of Ponnuru's quotes of Tribe, he omits the one that actually sets out the substance of his argument.

Here are the next two paragraphs:

> But the Ninth Amendment, I learned as I briefed *Richmond Newspapers* and as I found myself being lobbied hard by the pillars of the media bar, was barely to be mentioned in polite society, much less was it ready for prime time.
>
> Who was I, an utter novice at Supreme Court advocacy, to buck the conventional wisdom on something so basic? Well, I was a lawyer who'd taken a case because he believed in it, who'd been teaching and would teach generations more of law students about the kinds of questions the case raised, who'd gone on record a couple of years earlier in a treatise, *American Constitutional Law* (1st ed. Foundation Press, N.Y. 1978) (now in its third edition as of 2000), on most of the issues the case touched, and who cared a lot more about keeping faith with what he'd feel bound to write and teach in years to come, and with how he thought the Court should be approached, than with what the Pooh-Bahs of the establishment thought of him. That's who I was. And am. So the Ninth Amendment argument stayed in. And, I'm happy to report, in the end it hit its target.

So Tribe has said that the Ninth Amendment argument "stayed in" the case, despite strong urging from media lawyers.

Tribe next mentions his use of the Ninth Amendment after describing the death of his father:

> In none of the thirty or so Supreme Court cases that I've argued since *Richmond Newspapers* have I passed the days leading up to oral argument in anything like the unfocused, disoriented frame of mind in which I felt those days and nights slip by. In retrospect, I imagine I must have concentrated somehow on the details of the case, the themes I wanted to stress, the major problems I saw in the position I thought the Court should take. I know that urgent phone calls imploring me, above all else, to forget that "crazy Ninth Amendment argument," didn't even scratch the surface of what I was feeling. Literally all I recall about writing the reply brief – which ended (I've just reread it) with a call upon the Court to vindicate "a tradition … demonstrably central to the public awareness and institutional accountability that define our form of government" – is that I refused to use that brief as a vehicle for backing away from the Ninth Amendment, whose affirmation of rights unwritten and unseen I think I was almost beginning to identify, in some then still unconscious way, with the mystery of why I'd fortunately agreed to call my father the night before his anniversary; of why I'd felt the knock of doom before our phone had rung; and, above all, of what I'd seen streaking across the predawn sky out of the airplane window.

So Tribe has said that in writing his reply brief he rejected calls to back away from the Ninth Amendment. That means, necessarily, that the Ninth Amendment argument must have been made in the opening brief, something that he confirms in the next quote.

Tribe's final reference to the Ninth Amendment refers back:

> Reflecting now on my resolute commitment to arguing the case in Ninth Amendment terms – and thus in terms of the Constitution's "tacit postulates," which my opening brief had reminded then-Justice Rehnquist and Chief Justice Burger that they had only recently

> described as no less "engrained in the fabric of the document [than] its express provisions," *Nevada v. Hall*, 440 U.S. 410, 433 *(*1979) (dissenting opinion) – I think my grief may have permitted me to see a bit more clearly through the fog of superficial arguments and objections and may have steeled me against the kinds of eleventh-hour distractions and importunings that co-counsel, meaning to be helpful, are prone to inject as a Supreme Court argument nears.

So Tribe has said that he was committed to the Ninth Amendment argument in his opening brief despite the urging of other lawyers.

In the entire piece, those are all the references by Tribe to his reliance on the Ninth Amendment. Ponnuru's piece gives a quite different impression. Ponnuru says that "Tribe's essay casts himself as a kind of hero for breathing life into the amendment" and (sticking with that theme) "a forgotten hero of the Ninth Amendment." Judge for yourself. I don't see it, which reinforces my sense that even if Ponnuru had a substantive point (which he doesn't), he's just trying to blow it miles out of reasonable proportion.

Ponnuru now ostensibly turns to substance. He says that "the record in front of the Supreme Court does not corroborate important parts of Tribe's story. He didn't argue his case in Ninth Amendment terms. Other parties in the case did, but not Tribe."

Ponnuru sets this argument up by misstating what Tribe said. Ponnuru introduces the Ninth Amendment issue into his piece with this paragraph:

> Tribe argued [*Richmond Newspapers*] just two weeks after his father died. That fact, his essay explains, emboldened him to do something daring: to invoke the Ninth Amendment to the Constitution.

As described above, that is doubly inaccurate. First, Tribe never said that his father inspired that argument. To the contrary, he said that the reason the Ninth Amendment argument stayed in was that "I was a lawyer who'd taken a case because he believed in it, who'd been teaching and would teach generations more of law students about the kinds of questions the case raised," etc., etc.

Second, Tribe did not adopt the Ninth Amendment argument upon his father's death. To the contrary, he made quite clear that the argument was in his opening brief, then refused to abandon it in the reply. Tribe wrote the reply brief after his father's death, which means that the opening brief was written months beforehand.

That misstatement by Ponnuru has real consequences. Any reader who has made it thus far into Ponnuru's piece is paying attention to the events as Ponnuru claims Tribe represented them unfolding. So the reader is looking for proof that Tribe raised the Ninth Amendment argument after his father's death in the reply and the oral argument. Ponnuru then point his readers to the missing argument that Tribe never claimed was there.

So now we come to the blow-by-blow of Ponnuru's analysis. In order, he contends . . . .

First, "[t]he Ninth Amendment did not appear in the [jurisdictional] statement Tribe filed asking the Supreme Court to review the case." Tribe never said otherwise – he said it was in the opening brief. But Ponnuru implies that Tribe representing something about the jurisdictional statement; otherwise, why is Ponnuru mentioning it?

Second, Ponnuru contends that Tribe only made passing references to the Ninth Amendment in the opening brief. He contends:

> Tribe's brief on the merits of the case did refer to the Ninth Amendment – but the references hardly justify the billing Tribe gave them two decades later. Tribe opened and closed a seven-page section of his 72-page brief with references to the amendment. But in between he mostly discussed Fourteenth Amendment precedents. There was no discussion of the history of the Ninth Amendment – nothing about how James Madison viewed it, nothing about the Court's prior treatment of it. The previous case in which the Ninth Amendment had figured most prominently was *Griswold* v. *Connecticut* (1965), in which the Court had struck down a law against contraception. Tribe didn't mention it. The Ninth Amendment was a mere rhetorical flourish in this brief. The State of Virginia felt no need to include any Ninth Amendment analysis in its own brief, since there was nothing much to respond to.

The first part of this paragraph is just misleading. The second part of it just represents Ponnuru's view that he knows better than Tribe how to argue a constitutional law case in the Supreme Court. If you believe that, then by nature you're going to believe inconsolably that Ponnuru is right about all of this and Tribe is wrong. (Tribe did win the case, incidentally.)

What, you might wonder if you've made the miscalculation of reading this far, was the "seven-page section" of the brief? It was entirely devoted to the Ninth Amendment – not merely a section with opening and closing "references." (As noted, you can open the pdf of the brief above and read along.) It was entitled, "Even if Not Otherwise Enumerated, the Right is Implicit in Ordered Liberty and Is Among the Rights or Privileges 'Retained by the People.'" That is, of course, a quote from the Ninth Amendment. The discussion at the beginning and end explain that this section is going to demonstrate that the appellants are pursuing a valid unenumerated right. All that comes in between goes to that point. For people who've actually written briefs, that seems to me to be an inescapable conclusion. To say as Ponnuru does that the Ninth Amendment was a mere rhetorical flourish is just inexplicably wrong. There are pages and pages of rhetoric that have the single, obvious purpose of establishing that the plaintiffs are protected by the Ninth Amendment.

In reading the section of Tribe's brief, for example, I find it illustrative that Ponnuru highlights that Tribe doesn't again return to the phrase Ninth Amendment – it is after all the name of the section of the brief, so Tribe's reader knows what is going on – but Ponnuru omits Tribe's repeated, clear invocations of the fact that his theme is that the right need not be located anywhere else in the Bill of Rights. He draws comparisons to the "unenumerated right to vote in state elections" and the "unenumerated right to proof beyond a reasonable doubt," and he

explains that there was "no need 'to ascribe the source of this right . . . to a particular constitutional provision.'" But you don't get any of that from Ponnuru's piece. And here you don't have to take my word for it or Ponnuru's; read the pdf.

Third, Ponnuru indicates that Tribe's statements about his reply brief "not backing away" from the Ninth Amendment and that "he was under great pressure to do so" are inaccurate because – on Ponnuru's premise – "there wasn't much to back away from, so it's hard to see why anyone would have thus importuned him." That premise is false for the reasons I just described, so Ponnuru's suggestion that Tribe is just lying about what other lawyers urged him to do, is built on a falsehood.

Ponnuru also says that "Tribe's reply brief contained only one stray reference to the earlier brief's comments about it." But as Ponnuru quotes but refuses to acknowledge otherwise, Tribe said he refused to "back away" from the Ninth Amendment in the reply, nothing more. Ponnuru is suggesting that Tribe actually represented that he made some argument in the reply brief. In fact, Tribe claimed that other people wanted him to disavow that argument, and he didn't. That seems entirely accurate. As for the amount of space devoted to the Ninth Amendment, for litigators, it's not a remarkable proposition at all to deal at length with the arguments your opponent makes. Tribe did raise and preserve the Ninth Amendment in the reply. He never claimed anything else. Tribe also did, of course, argue at length the First Amendment in response to the state's argument – and as I said, Tribe's *Green Bag* piece explains that he used the Ninth Amendment to reinforce the First. But, as noted, Ponnuru omits that part of Tribe's essay.

Having discussed the briefs, Ponnuru says that "[w]hen he argued the case in front of the Supreme Court, Tribe didn't mention the Ninth Amendment even once." Not only did Tribe not contend to the contrary (never having asserted that he raised the issue at oral argument), but Ponnuru's statement is misleading by omission. Ponnuru's readers would never know that Tribe's essay had a lengthy – *more than two page* – section discussing the oral argument itself in substantial detail in which Tribe never *once* said that he had raised the Ninth Amendment at oral argument. If Tribe were actually contending that he discussed the Ninth Amendment at oral argument, he would have said so in that section. But Ponnuru raises the non-existent claim and shoots it down, creating the impression that Tribe suggested to the contrary.

Relatedly, Ponnuru states that Tribe didn't raise the Ninth Amendment when asked at oral argument:

> Fifteen minutes into it, a justice asked Tribe "just what provision of the Constitution [the Virginia statute] violates as applied in this case." Tribe replied, "I think that it violates the Sixth Amendment, and the First, and the Fourteenth."

That is simply a flat misquotation. The audio is available at this link: http://www.oyez.com/oyez/resource/case/328/resources. In fact, Tribe doesn't end the sentence with "the Fourteenth." He says, "I think that it violates the Sixth Amendment, and the First, and the Fourteenth, *and I*" (emphasis mine) and then the Justice *cuts him off* and asks another series of questions. This is a troubling misrepresentation because Ponnuru apparently is listening to the

same on-line audio I am, so he knows that Tribe gets cut off but tells the reader through the punctuation the contrary. (Ponnuru says twice that he's using "[a]n audio transcript" but that seemingly can't be right because he later refers to the particular Justice asking the questions.) I can't say for sure that Tribe was going to say "and I think the Ninth," but the constitutional provisions discussed by Tribe's brief were the First, Sixth, Fourteenth, and Ninth Amendments, so it seems entirely possible. In all events, Ponnuru's readers take away the mistaken impression that Tribe laid out his theories and consciously omitted this one.

Incidentally, by listening to the audio – and if you do, reconsider your morbid fascination with this silly issue – you'll hear that, with the exception of this one ten-second or so exchange, the Justices were not particularly interested at the oral argument in the nicety of the particular constitutional provision that underlay the plaintiff's claim. So when Ponnuru says, "[w]hen he argued the case in front of the Supreme Court, Tribe didn't mention the Ninth Amendment even once," the reader is left with the misimpression that the relevant constitutional provision was actually the subject of substantial discussion. As I said, otherwise, why would Ponnuru raise it?

Ponnuru also contends that an "exchange with Chief Justice Burger did not go as Tribe lays it out." Tribe says in his essay, referring to the exchange as it appears in "the transcript":

> Chief Justice Burger kept me at the podium. He wanted to probe the sources of other rights (he had quite a litany to ask about) that, as I'd urged was true of the right to observe trials, might be rooted more in constitutional tradition and structure than in explicit constitutional text.

He continues:

> Needless to say, I was only too happy to oblige. Our back-and-forth must have gone on for a couple of minutes, with the red light on all the while (one lesson you learn arguing at the Court is to take those lights *very* seriously, but not quite as seriously as you take the Chief Justice), until the Chief finally asked – referring to my submission that only a closure order narrowly tailored to a compelling need could overcome the right I was asking the Court to declare – whether we "could prevail by applying a different standard than compelling need." "We could prevail by applying *any* standard other than no need at all," I replied. When the Chief said, "That's right," his words must have been music to my ears. And when I said, "Thank you," I'm sure I meant it. I sat down.

Ponnuru says it "did not go" that way, but actually happened this way:

> Burger asked Tribe, "What provision of the Constitution did the Court draw on to make a presumption of innocence part of our fabric?" Tribe answered that the presumption is implicit in the Constitution because it is central to the legitimacy of the justice system. Burger then asked whether there were any "hints" that this view "was the tradition in 1787 and '89 and '90 and '91." Tribe said that there were. That was the whole exchange. Burger asked about no "litany" of rights. (Tribe's *Green Bag* essay attributes some other comments to Burger, but judging from the audio transcript he appears to be mistaken about who said what.) The idea that Burger was asking for "help" appears to be the

> professor's self-serving fantasy. Based on my analysis of the public record, so does the related contention that Tribe is responsible for the Ninth Amendment comments in Burger's opinion.

This claim by Ponnuru is principally misdirection. He creates the impression that Tribe is just making things up – that, for example, that Tribe didn't get kept up there for several additional minutes and that the Chief didn't say "That's right" in response to Tribe's final answer. In fact, those things happened. Listen to the audio from the 1 hour mark – when the hour-long argument by definition ends formally (give or take a few seconds for the change between arguing counsel) – to the 1:03:55 mark when Tribe ends. That's how you'll know that Tribe was kept up there as he said. In the middle you will hear a bunch of questions from the Chief and then the final "that's right" remark – it may be from the Chief, but maybe not, I can't quite tell. But it gets said. Ponnuru's contention that "the whole exchange" was two questions by the Chief is just not true.

The remaining misdirection here comes from the fact that Tribe is avowedly using *the transcript* (which didn't have the Justices' names on it until this Term) while Ponnuru indicates he's looking at the same thing as Tribe but in fact seems to be using the on-line audio that lets you hear the names and know that the voices have changed and someone new is talking. So Ponnuru is correct insofar as he merely means that at one point the Chief stops asking questions for a bit because someone else interjects – it's Stevens I'm pretty sure. Tribe can't know that fact from the transcript unless he remembers each person who asked him each question a quarter century later. Ponnuru himself recognizes that Tribe is mistaken about various quotes, but omits that this is seemingly the source of the confusion about the whole exchange. Ponnuru also makes the point that Burger "asked about no 'litany' of rights." I leave it to you to decide whether Burger's questions amount to a litany – he asks about the presumption of innocence and tradition and Tribe discusses due process under the *Winship* case. Personally, I do think it's fair to say that the Chief was looking for help, although I wouldn't call it a litany. Principally, I know for a fact that I wouldn't consider the use of the word litany worthy of discussion in an article.

All this might be different if Tribe had said in his essay that he made the Ninth Amendment the centerpiece of his case. That could be claimed overstatement. But scholarly misconduct, as Ponnuru says in his nasty response to my post? Not in a million years. None of that matters, however, because Tribe never said any such thing. Towards the end of the piece Ponnuru eventually acknowledges that Tribe is right to say that "his essay never stated that his briefs or his oral argument had made an extensive Ninth Amendment pitch." That "is true," Ponnuru says, "He didn't say it in those exact words, but very strongly implied it." Again, judge for yourself. So far as I can tell, he did no such thing. Tribe said he (a) made the argument in his opening brief to "reinforce" the First Amendment, and (b) declined to abandon it in his reply, and moreover he (c) never made any claim *at all* regarding the oral argument.

And this returns to my point about how phenomenally silly Ponnuru's piece is for a magazine like the National Review. It tries to make a mountain out of a molehill. For the reasons I've laid out above, it does that inaccurately. But even if it had been accurate, it still would have been an accurate molehill not worthy of a serious publication like the National Review.

Three further notes. (You can't get enough, can you?) First, as I've oft repeated, my initial reaction was that the Ponnuru piece was silly. That was when I assumed – because it was in the National Review – that it was accurate. Now, you can judge for yourself. And if you conclude that Ponnuru piece was unfair and inaccurate, then it seems to me that there is genuinely a larger issue. I just don't think that you make these attacks – which go to a person's reputation and their standing as an ethical individual – without an extraordinarily strong foundation. It seems to me normatively wrong. Some people believe that Tribe is essentially evil and dishonest. I can no more communication with them than I can liberals who believe the same thing about, for example, Ken Starr. But for those of us in the middle, there seems a ground to insist on better conduct.

Second, some comments on the blog take the view that I may not be objective about this because of my relationship to Tribe. I do disagree with that, but disclosed the fact that we regularly work with Tribe so that readers can make that judgment themselves. People should feel free to read my posts on the subject as a Tribe partisan if they like, notwithstanding that I disagree with it. I freely acknowledge that I could be underestimating, without recognizing it, my affinity for Tribe. But I certainly don't think that he – or anyone else, myself included – is above reproach. In these eight or so too-long pages, I've tried to stick strictly to a recitation of the relevant facts.

The remainder of the disclosure in my post didn't relate to Tribe – it was a note about me personally. I'm not a partisan person, as illustrated the positions I've taken on the President's judicial nominees. One person pointed out that I was co-counsel to the Vice President in *Bush* v. *Gore*. That's true; he was my client. More instructive of these purposes, however, is probably what I've said on lots of panels and in lots of interviews about the Court's decision in that case – namely, that I don't think it was a partisan ruling by the majority, but rather an attempt to set straight what they viewed as an out-of-control Florida Supreme Court. In all events, I am very glad to disclose all of this so that readers should evaluate arguments for their substance, accounting for their authors. It's healthy to come to this thinking – as one commentator who disagreed with my original post said – that I'm more liberal than Ponnuru, and he's more conservative than me. If you're concerned about biases, insist on facts rather than rhetoric from everyone involved.

Third, Ponnuru doesn't quite say in his post, but strongly suggests, that he wasn't motivated by a desire to undermine Professor Tribe in any confirmation fight. Other commentators have suggested they think the same thing (without referring to Ponnuru's response in particular), and that this is instead illustrative of a determination of some conservatives to scrutinize the work of certain liberal professors. I can accept that, although the move from one to the other is pretty short. (Query whether the enterprise is advancing their cause, however, in light of the foregoing.) I assume that Ponnuru's biting attack on me personally in response to what seemed to me a very measured post was the consequence of his taking a personal affront. I'm willing to put the name-calling and questions about motives entirely to the side. I think that the merits or demerits of the Ponnuru piece – and my response to it, which obviously can be scrutinized on the merits as well (if I've made an inadvertent slip I'll gladly acknowledge it, but give me credit for the fact that I just sat down at my computer and knocked it out, rather than going through an editorial process and fact-checking) – can be weighed on their own.

Incidentally, I also think that my point about the rhetoric of the confirmation fights being uniquely nasty is correct – it's just not much of a novel insight.

Thanks for reading.