BOOK REVIEW

Abortion: The Clash of Absolutes, LAURENCE H. TRIBE, W.W. Norton & Co., New York, New York, and London, England, 1990, pp. 270.

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There are many clashing absolutes in our national abortion debate. There are conflicting constitutional absolutes. There are differing moral and religious absolutes. There are warring absolutes of a personal, social, economic and political nature, to say nothing of ever-evolving medical absolutes.

Professor Laurence H. Tribe, the Harvard constitutional scholar, analyzes and assesses these various absolutes in his penetrating study, *Abortion: The Clash of Absolutes*. This is not a legal treatise, though lawyers can profit by reading it. Basically, the book is addressed to the general public. While Tribe is not at his best in writing for popular consumption, this book does manage to convey the intractable nature of the competing values advanced by the hordes of combatants in the abortion war. At the same time, Tribe demonstrates the transient nature of these clashing absolutes. Absolutes, he notes, "themselves may be contingent; they arise out of particular social contexts, problems, and concerns that change as society changes."[1]

The element of change indeed marks virtually every aspect of the abortion debate. The current abortion debate, pitting the right of the fetus to live versus the right of a woman to determine her own reproductive destiny, reflects a variety of fairly recent changes in social and demographic forces, as well as advances in medical technology and understanding. These societal changes in turn, have led to counterpart changes in constitutional and legal theories.

And yet, despite the evolving and changeable nature of these absolutes, Tribe suggests that there is a basic underlying theme in terms of women's traditional sex roles and traditional sexual

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[1] L. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 27 (1990).

morality. This theme has not changed with time, though it is often muted in the voicing of contemporary absolutes. Tribe's search for this theme begins by tracing the 200-year history of abortion in America, as well as the story of abortion in foreign lands. He notes that in the 18th and 19th centuries our society was predominantly rural and family-oriented. It valued children not as persons entitled to life or liberty but as sources of economic strength; and it was totally unconcerned with any so-called rights of the unborn fetus.

Traditionally, women played a subordinate yet essential role in perpetuating the farm economy. It was their moral duty to marry and bear children who would one day till the soil. As Justice Bradley put it in 1873, "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[2]

Abortions in those times were sought primarily by single women, unfaithful to their noble offices, to conceal illicit sexual behavior, "behavior so harshly condemned at times that society's rebuke must have been a terrible thing for women to endure."[3] Add to this societal condemnation the fact that 19th century abortion methods were medically crude and dangerous, one widespread method being to administer poisons to the pregnant woman. Mortality from surgical abortions was also extremely high. And yet, as Tribe reports, "by the middle of the nineteenth century there was, by some estimates, one induced abortion for every four live births."[4]

The harsh anti-abortion statutes enacted during the 19th century are seen by Tribe as largely the result of the medical profession's effort to professionalize the practice of medicine and to halt the competition from the apothecaries and ill-trained doctors who engaged in crude abortion services. There were no widespread moral or religious crusades against abortion. While Catholicism traditionally forbade all abortions, it took no part in the public and legislative debates in this era. The Catholic opposition to abortion was based solely on its interference with the

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[2] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring). This statement of Justice Bradley led Justice Brennan, 100 years later, to label it "an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage," an attitude that became "firmly rooted in our national consciousness" during the 19th century. Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

[3] L. TRIBE, *supra* note 1, at 29.

[4] *Id.*

procreative purpose of sexual activity. Neither the Church nor other anti-abortion groups had yet constructed a dogma that a fetus becomes a person at or soon after conception and that early abortion is murder.[5]

The 20th century, however, has witnessed a vast sea-change in the components of the abortion debate, as well as an increase in the number and the hardness of the absolutes at the heart of those components. America has become more urban than rural, and is becoming more service-oriented than industrialized. There have been vast increases in population, accompanied by the polarization of economic and ethnic classes and the augmentation of crime and drug sub-cultures. Superimposed on these demographic changes have been at least four other developments: (1) increased freedom and opportunities for women, reflecting a rejection of the stereotyped notion that women have no role in society other than as wives and mothers; (2) a massive change in public attitude toward, and tolerance of, sexual activity outside the traditional marital relationship; (3) increased sexual activity by many teenagers; and (4) significant advances in medical techniques of contraception and abortion that make it easier and safer to prevent conception or to terminate pregnancy.

In our contemporary post-industrial society, a pluralistic society in which all these demographic, attitudinal and medicinal changes have occurred almost simultaneously, the absolutes which mark the abortion debate have changed and become more sophisticated. But despite the higher level of the modern clash of absolutes, Tribe finds that underlying the present war against abortion is the same anti-feminist feeling that motivated societal condemnation of abortion in the 19th century. That underlying feeling, in Tribe's words, is a reflexive willingness on the part of pro-life proponents "to enforce traditional sex roles upon women and to impose upon them an unequal and harsh sexual morality."[6]

If Tribe's perception is correct, much of the current abortion

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[5] Tribe writes:

> But the traditional Catholic position on abortion — similar to that taken by Aristotle and by some rabbinic scholars in the Jewish tradition — was that a fetus was not a human being until the time of 'animation.' Under Catholic doctrine, a male fetus became animated — that is, infused with a soul — at forty days after conception. A female fetus was believed to become animated at a gestational age of eighty days.

Id. at 31.

[6] *Id.* at 237. Tribe also writes that the aversion to abortion rights, especially on

debate reflects, at least subliminally, differing views about woman's traditional role as wife and mother, as well as her developing role as an equal participant in the economic and public world. The expressed concerns of the pro-life groups about the life and the rights of the fetus then become a subterfuge for rejecting the modern woman's assertion of right to control the use of her own body and her own reproductive destiny. These groups, even while mouthing deep concerns about "family values" and the immorality of killing the unborn, would in effect reinstate the 19th century notion that the proper role of women is to stay in the kitchen and the bedroom. Let them endure the "punishment" of pregnancy and childbirth for having engaged in consensual sex. Let them be satisfied with their ordained function of feeding, breeding and perpetuating the human race.[7]

This role-of-woman thread runs through both the pro-choice and the pro-life parts of the abortion fabric. Both groups treat the abortion problem virtually as a sub-set of their views of the proper role of women in contemporary society. Tribe describes the pro-choice forces as representing, rather disproportionately, "various privileged elites, the 'upper echelons' of American society: scientists, intellectuals both inside and outside universities and other academic institutions, high-earning corporate executives, other highly educated men and women, the working press, much of the publishing industry, and all those 'pointy-headed' types whom George Wallace loved to hate . . . [who] are more likely to live along the nation's coastline (with a gap in the Southeast) than in the heartland or in the South."[8] And those are the forces most likely to be pro-feminist and to

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the part of those who generally welcome the energetic uses of new technologies such as nuclear reactors or computers,

> would seem to reflect a deeply held *sexual* morality, in which pregnancy and childbirth are seen as punishment that women in particular must endure for engaging in consensual sex. The fact that opposition to abortion rights may in large part be about sexual morality is reflected, too, in the attitude . . . of those who oppose abortion and seem willing to do almost anything to stop it — *except* take the effective pregnancy-reducing step of providing birth control education and better contraceptives.

Id. at 234 (emphasis in original). This position, Tribe suggests, is one "in which sexual morality is primary, with any claim of a fetus's right to life taking a very distant backseat." *Id.*

7 *Id.* at 237 (citing K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984)).

8 L. TRIBE, *supra* note 1, at 238.

advocate the privacy right of women to make their own sexual and natal choices.

On the other side, Tribe views the pro-life movement as drawing "disproportionately from the remaining groups, those 'distanced from elite culture by their membership in relatively recent immigrant groups and in lower-status religious groups.' "[9] These are the groups most likely to expound the values of family life, to support government regulation of sexual demeanor, and to oppose the economic and social liberation of women. These pro-lifers are said to be "quick to denounce those who favor choice as morally blind" and rarely claim to be especially tolerant of diversity, to be distinctively broad-minded, to be uniquely open to competing moral perspectives."[10]

But, in Tribe's view, the pro-choicers fare little better when it comes to broad-mindedness. They often show contempt for what they view as "the prejudiced, superstitious, backward views of pro-life groups," and view pro-life women in particular as "benighted victims of social conditioning that prevents their views from authentically reflecting their own genuine needs and deepest beliefs."[11]

Tribe concedes that each side can and does project deeply held personal and moral commitments.[12] Given the strength of these commitments, however, his proposed solution may appear somewhat naive and unreal, at least in the short run. For both sides, he suggests, "a greater measure of humility seems in order."[13] That is, we should each treat the voices of our opponents as being no less worthy or meaningful than our own. Presumably, out of the welter of this "respectful" clash of absolutes, will emerge the truth, the accommodations, and the compromises that are necessary to resolve issues in a democracy, wherein "voting and persuasion are all we have."[14]

In a recent observation, Professor Tribe supplements his proposal to settle the tragic public clash of absolutes by asking each side to be more tolerant and respectful of opposing views.

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9 *Id.*

10 *Id.* at 239.

11 *Id.*

12 *Id.* at 6, 27.

13 *Id.* at 240.

14 *Id.* Tribe presumably relies upon the First Amendment principle that in an uninhibited marketplace of abortion ideas the truth will ultimately prevail, to the end that government may be responsive to the will of the people. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369 (1931).

Admitting that a continuation of the loud battle between pro-choice and pro-life forces promises no common ground, even in a democracy, Tribe now emphasizes that the "only genuine solution is to build a world in which contraception and child care are improved to the point where every child conceived is a child that is welcome."[15] Building upon a notion initially presented in the book, Tribe urges that both sides focus their efforts on sex education, birth control, parental leave, infant health, and child care. Presumably, in this best of all worlds, providing such a welcome wagon for the unborn will cause the rancor instilled by the abortion debate to recede if not disappear. But will it? Will the controversy about a woman's decision to abort her pregnancy be dissipated by the increased availability of prenatal and postnatal child care? Can every child conceived by rape or incest, or by negligent promiscuity by those unfit or unprepared to be parents, or by those suffering from some dread inheritable disease, be transformed into a child who is welcome?

Perhaps a more pragmatic solution to the abortion dilemma is found in Tribe's discussion of new and more effective methods of birth control and prevention. As he notes, medical science is in the process of developing: (1) safer and less awkward forms of contraception, (2) new and more effective abortion pills, such as the French pill RU-486, and (3) an artificial womb or placenta, either freestanding or implanted in a human host.[16] If these developments do not solve the abortion debate, at least they will significantly reshape the controversy.

None of the solutions offered by Tribe address, let alone resolve, the basic tensions created by the efforts to free women from their 19th century shackles. No amount of humility, no increase in prenatal or postnatal child care, no advent of the abortion pill, is likely to wipe away those tensions. Nor can the national or state legislatures, largely composed of males, be expected to provide a quick or final answer to the problem of the proper sexual role of females in the 20th and 21st centuries. The pregnant woman and her fetus have become pawns in the much larger struggle for the sexual, social, and economic emancipation of women.

This basic argument over the proper role of women in our society has also affected the ensuing constitutional debates

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15 N.Y. Times, Jul. 2, 1990, at A15, col. 5 (Op-Ed article authored by Prof. Tribe entitled *A Nation Held Hostage*).

16 L. TRIBE, *supra* note 1, at 213-23.

before the Supreme Court concerning abortion. The pro-choice argument before the Court, that a woman has a fundamental privacy right of choice between bearing or not bearing a child is, but an integral part of the contention that she should have the opportunity to free herself from the stereotyped notion that she is duty-bound to do no more than "fulfill the noble and benign offices of wife and mother." On the other hand, the pro-life argument that the state can force her to choose motherhood, since otherwise the fetus would be deprived of potential life, is to restate and advance the age-old notion that, once impregnated, a woman must lend her body to the developing fetus and thus fulfill her "noble and benign offices."

Professor Tribe summarizes the Court's abortion decisions from *Roe v. Wade*[17] to *Webster v. Reproductive Health Services*,[18] with emphasis, of course, on *Roe*. The Court's ruling in *Roe* is viewed by Tribe as essentially a compromise between the two absolutist views that: (1) a woman has an absolute right to decide whether to terminate a pregnancy, at whatever time, in whatever way, and for whatever reason she alone chooses, a position as to which the Court said "we do not agree,"[19] and (2) the unborn fetus is a "person" within the meaning of the Fourteenth Amendment and therefore has an absolute right to life from the moment of conception. In rejecting the latter argument, the Court expressly held that the word "person," as used in the Fourteenth Amendment, "does not include the unborn."[20] As to the contention

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17 410 U.S. 113 (1973).

18 109 S.Ct. 3040 (1989). The book was published early in 1990, prior to the two latest abortion rulings of the Court: Hodgson v. Minnesota, 110 S.Ct. 2926 (1990), and Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990), both rendered on June 25, 1990. Tribe's observation in The New York Times, *supra* note 15, comments on these two rulings, and in that sense is an addendum to the book.

19 *Roe*, 410 U.S. at 153.

20 *Id.* at 158. Ronald Dworkin has written:

> Even though a fetus is not a constitutional person, it is nevertheless an entity of considerable moral and emotional significance in our culture, and a state may recognize and try to protect that significance in ways that fall short of any substantial abridgment of a woman's constitutional right over the use of her own body. . . . A state's concern for the moral significance of a fetus increases as pregnancy advances, and it is particularly intense after viability when the fetus has assumed a postnatal baby's form. This is a matter of resemblance. People's instinctive respect for life is unlikely to be lessened significantly if they come to regard the abortion of a just-fertilized ovum as permissible, any more than it is lessened when they accept contraception. But the assault on instinctive values is likely to be almost devastating when a nearly full-term baby is aborted as when a week-old child is killed.

that life begins at conception, the Court found that since those trained in medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary is not in a position to speculate as to the answer, at least not at this point in the development of human knowledge.[21]

The compromise reached by *Roe* is that a woman's fundamental privacy right to terminate or not terminate her pregnancy is to be balanced against the government's compelling interest in protecting both the woman's health and the life of the viable fetus. To implement that compromise, the Court constructed its now-famous trimester system, whereby the woman's right of choice predominates mainly during the first trimester, which ends roughly at the point of fetal viability. During the second and third trimesters, the interest of the government becomes increasingly compelling in terms of protecting the life of the viable fetus. Only a dire threat to the mother's life or health, which is also a governmental concern, can outbalance the governmental concern for the fetus. Thus the Court neatly transferred the so-called fetal right to life to the protective arms of government, which is able to assert and protect the viable fetus' right within the trimester balancing schema.

Tribe is at his constitutional best in defending *Roe* against its detractors. In the chapter entitled "Finding Abortion Rights in the Constitution," Tribe portrays *Roe* as part of the judicial development of a Constitution that in critical parts is open-ended and designed for ages to come, to be interpreted and applied in order to meet exigencies which the Framers could not possibly have foreseen.[22] This understanding of the Constitution, with particular reference to the open-ended "liberty" guarantee of the Fourteenth Amendment, enables Tribe to train a withering constitutional fire on the likes of the Bork-Rehnquist-Scalia school of neoconstructionism, much admired by the anti-abortion forces.

Only a few of the Borkian targets hit by Tribe need be mentioned here. The first and the "simplest" argument against *Roe*, writes Tribe, is that judicial resolution of abortion rights is undemocratic, that abortion rights should be returned to Congress and to state and local legislators to make legislative decisions in a

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Dworkin, *Taking Rights Seriously in the Abortion Case*, Ration Juris. Vol. 3, No. 1, 68, 77 (March 1990) (reprinted from New York Review of Books). *See also* Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 Yale L. J. 639 (1986).

21 *Roe*, 410 U.S. at 159.

22 *See* L. TRIBE, *supra* note 1, at 106-07.

democratic way.[23] Such was the position taken by Chief Justice Rehnquist's plurality opinion in *Webster*,[24] a position articulated even more expressly in Justice Scalia's concurring remark in that case that abortion is a field over which the Court "has little proper business since the answers to most of the cruel questions posed are political and not juridical."[25] To which Tribe responds that the very nature of judicial review of the constitutionality of state and federal statutes is undemocratic, and was so meant to be by the Framers.[26] And he cites Justice Jackson's statement for the Court in *Barnette* that the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of political majorities and officials and to establish them as legal principles to be applied by the courts."[27]

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[23] *Id.* at 80-81.

[24] 109 S.Ct. at 3058, stating that the decision sustaining Missouri's restrictions on abortion "hold[s] true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Id.* The Chief Justice sought to deny the dissenters' view that the *Webster* decision was "an invitation to enact abortion regulation reminiscent of the dark ages." *Id.* But the efforts of anti-abortion forces to secure enactment of just such regulations in various states, following the *Webster* ruling, make that denial shallow indeed.

[25] 109 S.Ct. at 3064. Justice Scalia reiterated this position in his concurring opinion in the recent abortion case, Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972, 2984 (1990), stating that leaving the abortion matter to the political processes "is not only legally correct, it is pragmatically so." *Id.* He added that the Court "should end its disruptive intrusion into this [political] field as soon as possible." *Id.*

[26] Professor Tribe correctly notes that "the Constitution provides for unelected judges, appointed by the President and confirmed by the Senate, who serve for life and whose salary cannot be diminished, precisely to prevent them from making decisions based on the popular will, however formally and democratically expressed." L. TRIBE, *supra* note 1, at 81 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). Tribe further notes that however "undemocratic" a judicial invalidation of a statute enacted by a simple majority through the legislative process may be, the Supreme Court's prime obligation to obey and enforce the Constitution justifies such invalidation, a proposition that is "a cornerstone of our system of government." *Id.* And the fact that the Court may have acted in such an "undemocratic" fashion in the *Roe* case does not make that decision a usurpation of power, or destroy the basic democratic roots of the Constitution. *Id.* The only legitimate question, says Tribe, is whether *Roe* can find support in the Constitution. *Id.* at 82.

[27] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Professor Tribe might also have added James Madison's remarks to the House of Representatives, in the course of considering the Bill of Rights in 1789, that once an individual right became embedded in the Bill of Rights, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive." 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1031 (1971).

A second basis for objecting to *Roe*, writes Tribe, is that the right to choose to abort a fetus, at any point during pregnancy, appears nowhere in the text of the Constitution or the Fourteenth Amendment thereof.[28] In the words of Robert Bork, "the right to abort, whatever one thinks of it, is not to be found in the Constitution."[29] And not only does the Constitution contain "no right to abortion," Justice Scalia adds, but such a right "is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution — not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins."[30]

Tribe demonstrates that this kind of objection to *Roe* proves too much, is too destructive of the many "liberty" interests which the Court has long recognized as protected by the due process clause of the Fourteenth Amendment. The word "liberty" appears in the Fifth Amendment as a limit on federal power and in the Fourteenth Amendment as a limit on state power. Neither amendment purports to enumerate or articulate specific "liberty" interests, although the Ninth Amendment tells us that any rights that are enumerated in the Bill of Rights "shall not be construed to deny or disparage others retained by the people."[31] Thus, the task for the Court is to discover what nonenumerated but retained "liberty" rights or interests are entitled to protection under the due process umbrellas of the Fifth and Fourteenth Amendments.

These constitutional references to "liberty" provide the means for executing the judicial task of identifying the retained rights of the people. The word "liberty" lends itself only to broad interpretation. It is not self-defining. It is one of those broad constitutional terms, like "due process," "equal protection," and "privileges and immunities," that defy the efforts of

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[28] *See* L. TRIBE, *supra* note 1, at 82-83.

[29] R. BORK, THE TEMPTING OF AMERICA 112 (1989). Bork also writes that *Roe* contains:

> not one line of explanation, not one sentence that qualifies as legal argument . . . no one, however pro-abortion, has ever thought of an argument that even remotely begins to justify *Roe v. Wade* as a constitutional decision. . . . There is no room for argument about the conclusion that the decision was the assumption of illegitimate judicial power and usurpation of the democratic authority of the American people.

Id. at 112, 115-116.

[30] *Akron*, 110 S. Ct. at 2984 (Scalia, J., concurring).

[31] *See* Carrasco and Rodino, *"Unalienable Rights," The Preamble, and the Ninth Amendment: The Spirit of the Constitution*, 20 Seton Hall L. Rev. 498 (1990).

modern legal positivists and narrow constructionists to read into them only that meaning which the words themselves convey or which the original Framers meant to convey. As Justice Cardozo once explained, our Constitution is designed as an instrument filled with "great generalities" that "have a content and a significance that vary from age to age," a Constitution that "states or ought to state not rules for the passing hour, but principles for an expanding future."[32] It is the role and the responsibility of the Supreme Court, as the ultimate guardian of the Bill of Rights, to give such content, meaning and significance to the word "liberty" as will enable that generality to be adapted to situations and crises never foreseen by the original authors of that word.

Nor, as Tribe notes, did those authors ever intend that the fundamental liberties of the people be left in the hands of majoritarian government "save only for those rights specifically mentioned in the Bill of Rights or elsewhere in the document."[33] If there be such a thing as the "original intent" of the Framers, the intent was precisely to avoid the Borkian notion that if a specific right or liberty is not mentioned in the document that right or liberty does not exist in the world of the Constitution and thus is not to be protected by the Supreme Court or other federal courts. Again, witness the Ninth Amendment's reference to rights retained by the people despite the absence of any specific reference in the Constitution to such rights.

Tribe thus frontally assaults the naive notion that, in seeking to discover whether a woman has a "liberty" right to choose to abort a pregnancy, the Court must look primarily to the understanding or intention of the Framers. Did James Madison, speaking in the 18th Century, really intend or contemplate that the word "liberty" encompasses such a choice? In Tribe's view, that kind of constitutional inquiry and analysis is "outlandish."[34] And rightly so. We do not know to this day precisely which Framer inserted the word into the lexicon of the Fifth or Fourteenth Amendments; nor do we know what the intentions of that Framer might have been. Indeed, we do not know and cannot discover at this late date whose intentions are really relevant in this search for the holy grail of "original understanding." Are we to look to the understanding of all or only the articulate Framers of these amendments (many of whom said nothing on the record), or

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32 B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 16 (1921).

33 L. TRIBE, *supra* note 1, at 90.

34 *Id.* at 106.

should we look to the understanding of the members of those state bodies that ratified the amendments (whose debates and intentions were never reported)?[35] More importantly, as Tribe astutely observes, this search for the original understanding of the word "liberty," with particular reference to a woman's liberty to choose to abort, would make that understanding "a rigid talisman" that "would plunge our nation into a deep freeze in which . . . only the very rights anticipated in 1791, when the Bill of Rights was ratified, or in 1868, when the Fourteenth Amendment was adopted, would be protected."[36]

The process of adding new fundamental rights to the flexible and ever-developing concept of "liberty" never ceases from generation to generation. The woman's right of choice respecting abortion, first recognized in 1973 in *Roe*, is an offspring, an "emanation" if you will, of the earlier recognition of the right to use contraceptives to prevent conception.[37] Both the abortion and contraceptive rights are also direct descendants of the unarticulated liberty interest in privacy, which Justice Brandeis defined as "the right to be left alone — the most comprehensive of rights and the right most valued by civilized men."[38] The Court is constantly adding and recognizing new or expanded liberty interests in response to the felt necessities of each generation. In the 1989 Term alone, the Court recognized a state prisoner's "significant liberty interest in avoiding administration of antipsychotic drugs,"[39] and a competent person's "constitutionally protected liberty interest in refusing unwanted medical treatment."[40]

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35 Tribe's assault upon the "original understanding" concept is fully documented in S. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988).

36 L. TRIBE, *supra* note 1, at 107. Tribe also refers to James Madison's well-known objection to the concept of original understanding. Tribe quotes Madison's own words: "[a]s a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character." *Id.*

37 Griswold v. Connecticut, 381 U.S. 479 (1972).

38 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

39 Washington v. Harper, 110 S.Ct. 1028, 1036 (1990). The opinion of the Court, written by Justice Kennedy, was joined by Chief Justice Rehnquist and Justice Scalia, the most adamant opponents of reading into the due process clause unspecified liberty interests.

40 Cruzan v. Director, Missouri Dept. of Health, 110 S.Ct. 2841, 2851 (1990). Chief Justice Rehnquist authored the Court's opinion in this case, finding that this liberty interest "may be inferred from our prior decisions." *Id.* at 2851. Justice Scalia joined the Court's opinion but "would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field" and that the point at which extraordinary medical measures to prolong a "worthless" life

Neither of those liberty interests is mentioned or specified in the Constitution, yet none but Justice Scalia expressed any reservations about giving them constitutional status.

Roe and its progeny have made it clear that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[41] and that a "woman's right to make that choice freely is fundamental."[42] And despite all the political and popular furor created by such rulings, and despite the multi-faceted obstacles that have been placed in the path of the woman who desires to exercise her abortion choice, it could still be said — as of June 25, 1990 — that "*Roe* remains the law of the land."[43]

But with imminent changes in Court personnel and with constant internal and external pressures to undermine and overrule the *Roe* doctrine, the woman's right of choice in abortion matters is in peril. If *Roe* is eventually overruled, it would mark the first time the Court has ever withdrawn a previously recognized fundamental privacy right from the category of "liberty" interests protected by the due process clause. Indeed, if the legal positivists like Justice Scalia have their way in insisting that only those rights specifically mentioned or specifically contemplated are incorporated in the "liberty" guarantee, the entire fundamental rights component of the due process clause could be reduced to rubble, much as *The Slaughter-House Cases*[44] read fundamental rights out of the privileges and immunities clause of the Fourteenth Amendment.

That indeed is the ultimate and the frightening clash of constitutional absolutes, a clash which Professor Tribe does not openly address. But for anyone involved in this growing constitutional debate, including the Justices of the Supreme Court, *Abortion: The Clash of Absolutes* should be required reading. In measured and respectful tones, Tribe has portrayed the disastrous consequences that can ensue if just one of the recognized fundamental rights is thrown to the majoritarian wolves.

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may be withdrawn is "neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory." *Id.* at 2859.

41 *Roe*, 410 U.S. at 153.

42 Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986).

43 Hodgson v. Minnesota, 110 S.Ct. 2926, 2952 (1990) (opinion of Marshall, J., concurring in part and dissenting in part).

44 83 U.S. (16 Wall.) 36 (1873).