Abortion, Absolutism, and Compromise


Stephen L. Carter†

I

Back around the turn of the century, the head of the United States Patent Office suggested that the time might have come to close his bureau down. His reason was simple: there would be no more useful patents, because all the inventions had been made.

The literature on abortion is like that too: one longs for something new, an idea that will shake things up, but as each new article or book comes out, one is left with the dreadful and yet unavoidable sense that everything has been said. Not only that, but most of it was said ten years ago. Whatever arguments for free choice Justice Blackmun might have omitted in his comprehensive but unsatisfying majority opinion in Roe v. Wade1 have long since been filled in, and the basic pro-life argument, that the fetus should be protected for its real or potential personhood, is restated in lots of clever ways but is still only restated. As eyes glaze over, it often has seemed during the past two decades that only the names of the authors who offer the arguments have changed.

* Tyler Professor of Constitutional Law, Harvard Law School
† William Nelson Cromwell Professor of Law, Yale University.
If the scholarship on abortion has changed little, the politics of abortion have changed much. As a constitutional precedent, *Roe* stands out as a political failure. This judgment has nothing to do with the constitutional argumentation that undergirds the decision, still less to do with the correct answer to the moral question that abortion starkly poses; rather, it reflects the simple and remarkable reality that as *Roe* approaches the end of its second decade as law of the land, there are tens of millions of Americans who are quite unembarrassed about disagreeing quite openly with the decision, and it is still possible (and, for some politicians, even sensible) to run against it. Take a watershed decision with which *Roe* is often compared: *Brown v. Board of Education.* As controversial as *Brown* was in its time, within a good deal less than twenty years it was no longer politically respectable to run a campaign that argued explicitly that the decision should be overturned. One might resort to all sorts of code words, of course, and one might counsel the most outrageous forms of legal circumvention, but two decades after *Brown* one could not build a political career on the proposition that racial integration was wrong, and, certainly, no President could have been elected on a platform expressly calling for its reversal. But today, 18 years after *Roe,* there are districts in nearly every state where an explicit anti-abortion platform is not only useful, but actually required, and, for presidential candidates, running and winning on anti-abortion platforms has recently been the rule, not the exception.

But that is only one part of the political reality, the part that marks the Supreme Court's decision in *Roe* as a failure. There is another reality that marks the idea underlying *Roe,* the vision of reproduction as personal choice, as a clear, if still fragile, political success. After running comfortably and risklessly against *Roe* for years, hundreds or perhaps thousands of pro-life politicians—mostly, but not exclusively, drawn from the ranks of conservative Republicans—suddenly find themselves in the unexpected and, as it turns out, often unwanted position of being able to do something about it. This is because the Supreme Court, in *Webster v. Reproductive Health Services,* dumped much of the abortion question back where the pro-life movement had always said that it should be: in the laps of the states. The immediate result was that pro-choice forces discovered that their fears and rhetoric were equally unfounded: most Americans didn't want their governments to exercise the restrictive authority against which pro-choice forces had always warned. As for the pro-life forces,

---

3. Nothing in this argument turns on whether voters are deeply influenced by the candidate's stance on abortion; for example, many pro-choice voters no doubt supported Presidents Reagan and Bush, both of whom ran pro-life campaigns. The point, rather, is simply that it is politically respectable to run a campaign that calls for the reversal of *Roe.*
they found that the public that voted for them was less ready than they supposed to turn political slogans into political action.\footnote{In this review, I use the words "pro-choice" and "pro-life" because these are the names that the movements have in recent years most frequently applied to themselves. I recognize that the pro-life movement says that the pro-choice movement should be labeled "pro-abortion" or even "pro-death," and that the pro-choice movement says that the pro-life movement should be labeled "anti-abortion" or even "anti-woman," but absent the risk of a total collapse of the language, I am willing to let movements choose their own labels.}

Less ready is not the same as unready, however, and many states (Louisiana recently to the fore) have seen movements to place very restrictive abortion laws on the books. As with any other practice that the state is allowed to regulate, the content of the "right" to decide whether to end a pregnancy now varies from one state to the next. Pro-choice forces point to this as a problem, but at least it accords with the old argument that federalism allows the states to serve as laboratories in which social policies can be tested on a small scale before being adopted in the large. Whatever one's view of Roe, however, the result that a pregnant woman might face markedly different laws in different states is plainly offensive to the idea that the right to decide whether to end a pregnancy is a right of constitutional dimension.

Still, by returning many aspects of abortion regulation to the legislatures, Webster might be envisioned as a vehicle for enhancing the possibility that new laws might move through deadlocked legislatures. But as every student of legislative process knows, the heavier burden is on those wishing to change the status quo, not those wishing to preserve it; concomitantly, it is naive to suggest that a refusal to enact a new statute or change an old one represents the will of the people. Quite apart from any question of the distribution and intensity of preferences, it is the pro-life forces, seeking to change the law, who face the more difficult legislative task, because the pro-choice forces, except in those states where there are serious legislative threats to gains in reproductive freedom, have little incentive to compromise.\footnote{For an argument that pro-choice forces shouldn't compromise, see Dellinger, Should We Compromise on Abortion?, THE AMERICAN PROSPECT, Summer 1990.}

Besides, many of the battle-lines may have hardened rather than softened in the wake of Webster, because now that so much of the fight is in the state legislatures, the angry, polemical street demonstrations on both sides of the issue make a good deal more sense than they did when the matter was entirely before the courts: political pressure is what legislators are supposed to notice. And although pro-life forces prevail in some states, pro-choice forces in others, there is no sense in which one can say that the two sides are holding a dialogue. Because they can see no common ground, then, there is a political void to match the void in scholarship.

Laurence Tribe seeks to fill both voids with Abortion: The Clash of Absolutes,\footnote{L. Tribe, Abortion: The Clash of Absolutes (1990) [hereinafter cited by page number only].} an ambitious but ultimately unsatisfying effort to explain (and justify)
the constitutional theory of reproductive freedom. The book, plainly written
with a lay audience in mind, is a readable and provocative treatment of the
problem, as one has come to expect from the prolific Tribe. I think that anyone
seriously interested in the subject of abortion will benefit from reading this
book, but I fear that the reader (especially the reader whose predispositions are
pro-life rather than pro-choice) will likely come away frustrated, convinced (as
Tribe’s title suggests) that there is no room for compromise.

Still, Tribe tries to find one; indeed, the book is motivated by the idea that
there is a set of shared interests between the competing forces. According to
Tribe, “[o]ur national institutions are braced for a seemingly endless clash of absolutes.”8 Tribe tells us, however, that his goal is to build a bridge between
the pro-life and pro-choice forces, to supply the common ground that is now
missing. Few issues are as morally searing as abortion, so teasing out compro-
mise is an important and laudable goal; the only difficulty with the way Tribe
does it, as I shall show, that in seeking to construct his bridge, he gradually
allows the pro-choice arguments to dominate his narrative, so that by the end
of the book, when the rhetoric becomes almost ringingly pro-choice, the
adamantly pro-life readers to whom he is so plainly reaching out will surely
wonder why anyone would imagine that the bridge is worth crossing. So even
if Tribe is right that there are absolutes clashing here, he is wrong to suppose
that he has found a way of softening their conflict.

II

Tribe promises as early as the first chapter to “challenge[] the inevitability
of permanent conflict” and “lay the groundwork for moving on.”9 But before
he can get to his proposed solutions to this seemingly intractable disagreement,
there is, he explains, a bit of underbrush to be cleared away. So he spends a
chapter explaining the Supreme Court’s abortion jurisprudence,10 another on
the history of abortion in America,11 and a third on, as he puts it, “Locating
Abortion on the World Map.”12 (This comparative chapter is one of the most
useful in the book, a neat counterpoint to the easy assumption of many Ameri-
cans that both the problems that we face and the solutions that we propose are
somehow sui generis.) These background chapters are intended to provide a
context for the rest of the book and also, particularly the chapter on the Su-
preme Court, to guide lay readers who might be unfamiliar with the relevant
legal terrain, and each is a very interesting catalogue in its own right.

10. Pp. 10-26. Much of the chapter is devoted to a discussion of Court personnel and their stances on
the abortion issue, but the book was published before Justice Brennan retired and was replaced by Justice
Souter.
12. Pp. 52-76.
Even in these early background chapters, however, one sees evidence of the phenomenon that I suggested before, the tendency of the pro-choice perspective to dominate a book that strives to be even-handed. A single striking example will suffice to make the point. In rejecting Mary Ann Glendon’s argument that the United States should follow the example of European countries and use the teaching authority of law to celebrate life by urging women not to have abortions (for instance through mandatory counseling) but nevertheless allowing them the ultimate choice,\textsuperscript{3} Tribe tells us that these laws would not work in American society because they provide only unenforceable norms of behavior rather than enforceable rules:

Law, of course, can be as important for the message it sends as for the rules it promulgates. Society may benefit from the incorporation in its laws of normative statements of principle. Yet the codification of a truly empty promise, one whose vision is belied by the people’s day-to-day experience, one that is utterly at variance with the substance of the law in which it is contained, can take an unacceptably high toll on confidence in the rule of law and in the integrity of the legal system as a whole. The French solution, within an Anglo-American legal system that has long insisted that law be composed of enforceable norms, seems to teach mostly hypocrisy.\textsuperscript{4}

As far as it goes, the argument is certainly true: it is possible to design legislative schemes that change nothing but appear to change much. But this cannot be a serious objection to requiring counseling and other means of persuasion. Surely Tribe does not mean to suggest that when pro-life forces argue that the state should discourage abortions, they are asking the impossible, and they must therefore be prevented from succeeding for their own sake, lest they lose respect for law. The stronger argument, one assumes, is that government persuasion should be prohibited because it intimidates pregnant women and interferes with their choice, not because it doesn’t work!\textsuperscript{5}

Still, it must be said that the argument against importing the various European experiments is only a very small point and not one of Tribe’s principal themes. In these introductory chapters, his only aim is to establish a series of starting points: abortion is largely back with the legislatures, the problem has been around for centuries, and it is a problem everywhere in the world. This is the ideal time, he seems to think, to search for a resolution that rests on the

\textsuperscript{13} M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).
\textsuperscript{14} Pp. 73-74.
\textsuperscript{15} The Supreme Court has rejected some efforts at requiring counseling. See City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). As a constitutional matter, however, the claim that the state cannot seek to influence the choice of the pregnant woman is much weakened by the abortion funding cases, Maher v. Roe, 432 U.S. 464 (1977), and Harris v. McRae, 448 U.S. 297 (1980), and, more recently, by Rust v. Sullivan, 111 S. Ct. 1759 (1991). For a forceful statement of the argument that the funding decisions are flatly inconsistent with Roe, see Perry, \textit{Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae}, 32 STAN. L. REV. 1113, 1126 (1980).
commonalities between the two sides rather than their differences. I can scarcely fault Tribe for arguing that the time to act, if there is action to be taken, is now. I am confident, however, that despite the fierceness of our moral battle, future generations, whatever their judgment on the right answer, will shake their heads disdainfully when they reflect on our struggle over the abortion question. They will laugh not because they will not believe in grappling seriously with difficult dilemmas, but because the time will come when a consensus exists that is far stronger than the weak and shifting survey results that one sees today.

III

Today’s debate over abortion, like so many arguments over what might seem facially to be moral questions, is governed by an imposed consensus: the right to choose whether to end a pregnancy is fundamental because the Supreme Court has said it is, and, one supposes, it will cease to be fundamental in the constitutional sense if a future Supreme Court changes its mind. This, I think, is what was really at stake in the battle over Robert Bork’s nomination to the Supreme Court (a battle that Tribe, unlike some other opponents, fought with considerable integrity, and continues to fight in this book). The Block Bork Coalition, to be sure, comprised an impressive range of civil rights and civil liberties organizations, but Justices whose views the groups opposed were confirmed in the past, even though some of them might have harbored constitutional visions equally objectionable to the Coalition. Most of the gains that the Coalition described as threatened were not, because no other Justice shared the views of, say, the public accommodations section of the Civil Rights Act of 1964 that Bork was said to hold. The only significant issue on which it could be argued in a serious way that a Justice Bork would probably “tip the balance” was abortion, for Bork would be joining a Court on which it was widely suspected that there were already four votes to overturn Roe.

Tribe, very much recognizing that Roe even now hangs in the balance, therefore sets about shoring up its constitutional foundations. The immediate difficulty that he faces is that the opponents of abortion have successfully reduced their legal position to what is almost an applause line: the right to end a pregnancy is not mentioned in the Constitution; it is a right invented by the courts.

This particular argument against Roe is simplistic in its misunderstanding not of constitutional theory but of judicial process, and few sophisticated

16. For Tribe’s continuing effort to justify the result in the Bork brouhaha, see pp. 18-19. For my commentary on instances in which Bork’s other opponents went a bit overboard, see Carter, Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice, 69 TEX. L. REV. 759 (1991). For a general statement of Tribe’s strong view (one that I dispute) that the Senate has the right and even the duty to consider the judicial philosophy of nominees to the Supreme Court, see L. TRIBE, GOD SAVE THIS HONORABLE COURT (1985). I reject this position in Carter, The Confirmation Mess, 101 HARV. L. REV. 1185 (1988).
Abortion and Absolutism

constitutional scholars take it seriously as it stands. Because he is writing for a lay audience, however, Tribe, who is a very sophisticated scholar, does take the time to treat it seriously, although it must be said that he has little trouble in refuting it. Still, the argument that he presents in response lacks a crucial step. Tribe first explains how it is that the courts use the due process clause to protect some rights that do not appear in the Constitution in so many words.\textsuperscript{17} He runs into difficulty, however, when he seeks to link the result in \emph{Roe} to the Court's established jurisprudence on the right of privacy—the same difficulty, to be sure, that confronted Justice Blackmun in the majority opinion in \emph{Roe}.

John Hart Ely, mere months after \emph{Roe} was decided, was out with a rather fierce article contending that the trouble with the decision was not that it was bad constitutional law, but that it was not constitutional law and gave “almost no sense of an obligation to try to be.”\textsuperscript{18} Although he does not cite the Ely essay itself, Tribe chooses this as the essential form of argument that he must refute; \emph{Roe}, he wants to show, not only \emph{is} constitutional law but is \emph{good} constitutional law. But it is here that Tribe, like so many pro-choice scholars who choose to defend \emph{Roe} as it stands rather than on some other ground, begins to run into more serious difficulty. Perhaps the transformation of privacy in the way that the Court has traditionally meant it to privacy in the sense that is needed to encompass the decision whether to end a pregnancy is not as easy as it might appear.

\emph{Roe v. Wade}, Tribe insists, is the logical outgrowth of the Court's privacy decisions. In order to make this work, however, he must first put the right spin on the privacy jurisprudence. Thus, for example, \emph{Griswold v. Connecticut},\textsuperscript{19} in which the Court for the first time restricted the authority of the state to prohibit contraceptive use (at least by married couples) becomes a case about protection of “the right to engage in sexual intercourse without having a child.”\textsuperscript{20} Tribe does not quote \emph{Griswold} itself for this proposition, nor could he, since no such notion is discussed in the case. One may make what one likes of the majority opinion in \emph{Griswold}, but what concerned the Court was the fact that the law could be enforced only by sexual legitimacy police invading “the sacred precincts of marital bedrooms.”\textsuperscript{21} \emph{Griswold} was a case about privacy in the strictest sense: when one is on one's own and away from public scrutiny, the government mustn't snoop, least of all when one is engaged in sex. \emph{Griswold} is about the sexual act, not about the result of that act, and certainly not about medical procedures, a realm in which the state had not theretofore been thought forbidden to regulate. The logical corollary of \emph{Griswold} is not

\begin{footnotes}
\item[17.] Pp. 77-92.
\item[19.] 381 U.S. 479 (1965).
\item[20.] P. 94.
\item[21.] 381 U.S. at 485.
\end{footnotes}
reproductive freedom of choice for pregnant women, but complete sexual freedom of choice for consenting adults; which is another way of saying that as long as Griswold is the law of the land, it is difficult to defend the result in Bowers v. Hardwick.  

Perhaps Roe can be modeled in this traditional sense of privacy, too, as long as one does not find that the interjection of a physician (which states may constitutionally require) makes things different. But this has never been the strongest principle available to justify the result. Surely the pro-choice advocate can better defend Roe on the model of equality, writing privacy out of the case altogether and challenging abortion restrictions as sex discrimination. (Tribe acknowledges this possibility and seems to find it compelling, but he spends only a page on it, which is quite a sensible choice, given his principal mission of exegesis rather than invention of new arguments.) One can go further and argue, again in equality terms, that reproductive freedom is required to avoid the subordination of women. My point here is not to determine whether these arguments are convincing or not, but simply to propose that they are more compelling than the privacy rationale on which Roe currently rests. The one thing that cannot be done is to argue that Roe follows from Griswold in some a fortiori sense.

It is possible, however, to work matters the other way around, to reinvent abortion as being about sex rather than reinventing the privacy cases as being about reproduction. In fact, by thinking of the abortion debate as an argument about sex, Catharine MacKinnon has developed an intriguing explanation for polling data suggesting that men often are more supportive than women of broad abortion rights. MacKinnon, who readily admits that for many well-meaning people, men and women alike, abortion poses a difficult dilemma, focuses on the other side of the matter: not why some surveys show fewer women than men supporting broad abortion rights, but why the surveys show more men than women supporting them, a subtle and important inversion. Mackinnon wants to know why, in a world characterized by patriarchy, so many men would be in favor of something that seems to provide women with additional freedom. The reason, MacKinnon suggests, is that when men dominate, abortion is not a freedom. Men, she says, support reproductive “freedom” for their own benefit: the widespread availability of abortion, she argues,


23. For provocative efforts to defend abortion on equality and other grounds apart from privacy, see, for example, C. MacKINNON, Privacy v. Equality: Beyond Roe v. Wade, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93 (1987); Regan, Rewriting Roe v. Wade, 77 MICH L. REV. 1569 (1979); Thomson, A Defense of Abortion, 1 PHIL. & PUB. AFFAIRS 47 (1971).


translates into a widespread heterosexual availability of women. If an unexpected pregnancy can be ended in an instant, there is still less reason (there was never much, she seems to say) for men to be responsible, or even kind, in their selection of sexual partners.

I think that MacKinnon, too, might be oversimplifying a complex psychology, but her view has a certain appeal. She articulates what is often unspoken in the abortion debate. We may frame the debate as being about privacy, or about control of one’s reproductive processes, or about equality, or about much else besides; but for MacKinnon, the argument is really about sex. The smaller the number of legal roadblocks to abortion, the fewer the practical barriers to heterosexual intercourse.

When one moves MacKinnon’s analysis onto the constitutional plane, however, one has to wonder which way it cuts. After all, if the widespread availability of abortion makes it harder rather than easier for women to withstand the predatory conduct of men, then Roe is about sexual privacy only in a special sense: it is about the privacy of men who are being oppressive rather than the privacy of women who are being oppressed. This is, it seems, another of those intriguing areas (the prohibition of exploitative pornography is another) in which the feminist left meets the traditionalist right, for many women in the pro-life movement have very strong views about the proper conditions for sex, and when they counsel women to avoid sex outside of marriage, they are expressing well-known concerns that men who have no fears about fatherhood will “take advantage” of women whom they no longer have any reason to respect. This language is all very old-fashioned and it harks back to a world that was more oppressive of women than this one, but there is still an intriguing point, one that dovetails with MacKinnon’s analysis: a principal consequence of abortion rights is that they make sex harder for women to avoid, which in a patriarchal society potentially degrades women by increasing the likelihood of sexual exploitation. One may accept this argument or reject it; my reason for mentioning it is simply to suggest that the coin of privacy has more than one side.

IV

There is a second and more troubling difficulty with Tribe’s constitutional discussion, one with eerie but clear echoes of the battle to keep Robert Bork off the Supreme Court. I suppose one might refer to it as the Myth of the Disinterested Expert, and Tribe exemplifies it in this startling passage:

What may surprise some, given the certitude with which Judge Bork and a number of others pronounce that Roe v. Wade was constitutionally illegitimate, is how many lawyers and law professors throughout the country believe the Supreme Court’s decision in that case was entirely correct as a legal matter. For example, a friend of the court brief was
filed in the Webster case "on behalf of 885 American law professors . . . who believe that the right of a woman to choose whether or not to bear a child, as delineated . . . in Roe v. Wade, is an essential component of constitutional liberty and privacy commanding reaffirmation by [the Supreme] Court." Similarly, the American Bar Association in February 1990 approved a resolution expressing the ABA's recognition that "the fundamental rights of privacy and equality guaranteed by the United States Constitution" encompass "the decision to terminate [a] pregnancy."

Now, of course, nearly a thousand law professors and the nation's leading organization of lawyers could certainly be wrong on a matter of law. But how plausible is it that all of them would fail to recognize as blatant a legal blunder as some say the Court made in Roe?2

What is one to make of this? Does Tribe seriously suggest that the nation's law professors are so apolitical that they would prefer identifying a "blatant . . . legal blunder" to making a political point? Maybe he is right, and I would like to think so, but there has been nothing in recent history, or past history either, to suggest that he is; law professors have to work as hard as anybody else to separate their personal moral convictions from their conclusions on what the Constitution requires or permits or forbids, and nowadays this separation is thought by many to be impossible or wrong. As to the ABA, it has recently repealed the controversial 1990 resolution of which Tribe makes so much. Maybe "the nation's leading organization of lawyers" has changed its mind about the law: does this imply that the rest of us should too? One might respond, of course, that only politics led to the repealer, and one would undoubtedly be right; but if the ABA is so susceptible to political pressure to find other than the "correct" legal answer, then why assume that the initial pro-choice resolution amounts to anything other than politics? In fact, why give special weight to the organization's views at all?

My point is not that Tribe is wrong or that these groups are. My point, rather, is that in a book written for the lay public, it is important not to make too much of the positions taken by professional organizations. In particular, it is potentially misleading to suggest that their members are making disinterested, dispassionate judgments about law. Besides, even if they are as distant and objective as Tribe implies, the majority sentiment among "experts" is surely irrelevant. In determining constitutional meaning or learning whether a constitutional mistake has been made, the last thing that it seems sensible to do is count heads, even if they are the heads of smart law professors and smart lawyers. If that is the ideal guide to whether the courts have made a mistake or not, then there is scarcely any need for judges.

26. Pp. 82-83 (ellipsis and brackets in original) (footnotes omitted).
A principal weapon in the pro-life arsenal is exactly what the movement's name implies: the argument that the fetus is a person. This argument has important political consequences, because in a world in which much regulation of abortion has been returned to the legislatures, it will obviously be easier for pro-life forces to enact abortion restrictions if they can convince legislators (and the public) of the personhood of the fetus. The question that Tribe poses, however, is whether fetal personhood possesses any legal significance.  

The first point that should be made is that there is a broad consensus among legal scholars, whether pro-life or pro-choice, that the state lacks the power to define personhood when its definition would interfere with the exercise of the constitutional right to terminate a pregnancy. I am not sure that the matter is quite as clear as this consensus might imply, but the argument is certainly a plausible and straightforward one: if the state cannot prohibit abortion, then it cannot use a subterfuge to reach the same goal.  

Still, this proposition has the practical effect of putting the entire abortion debate off limits; as is so common in American political dialogue, it allows one side to say to the other that there is no need for moral debate because the rights that are at stake are of constitutional dimension. But there is no reason that

27. Tribe’s discussion of the problem of personhood is refreshingly free of any suggestion that the religious motivation of many pro-life advocates rules their positions out of bounds, either as a matter of constitutional law or as a matter of secular liberal dialogue: "[A] question such as this, having an irreducibly moral dimension, cannot properly be kept out of the political realm merely because many religions and organized religious groups inevitably take strong positions on it.” P. 116.  

This is a point worth stressing. Many in the pro-choice movement have evidenced an unfortunate tendency to denigrate religious motivation, as though the fact that the moral positions of many in the pro-life movement are fired by spiritual commitment is itself an index of illegitimacy. Political rhetoric, letters to the editor, even law review articles by scholars who should know better, have all advocated what amounts to a ban on participation in these debates by people whose morality is shaped by religious conviction. Tribe quite poignantly admits that this was once his own view. P. 252 n.3. Even one Justice of the Supreme Court has suggested that the definition of personhood is inherently religious and therefore not the state’s business. See Webster v. Reproductive Health Services, 492 U.S. 490, 571 (1989) (Stevens, J., concurring in part and dissenting in part).  

There is much tragedy in this tendency. The American political tradition is full of religious activism, much of it in the service of expressly liberal ends. There was no demand for the separation of church and state during the civil rights movement, which was sparked by open and explicit calls upon religious belief, and it is an ahistorical fantasy to imagine that the religious aspect was mere window dressing. Moreover, no one seems to consider the problem irreducibly religious when the state defines personhood for other purposes, such as inheritance, murder, or the abolition of slavery.


elevating a moral claim to constitutional status should put an end to public moral conversation.

The task of defining personhood is necessarily of vital importance to the liberal state, for, under liberalism, rights attach to sovereign individuals. Not all persons are treated the same, of course—17-year-olds cannot vote, 18-year-olds can—but distinctions among persons are no longer supposed to be signs of their differing worth. The state determines when a being is a person for the purposes of murder, inheritance, taxes, tort, and much more (including the prohibition on slavery). In fact, the state can scarcely regulate without some understanding, whether explicit or not, of what constitutes a “person.”

The state’s power to define personhood is denied only when one has an *ex ante* preference that a particular thing be defined as something other than a person. Thus, the reason that the state is prohibited from defining the fetus as a person is that allowing the state to do so is seen as complicating the case for making abortion widely available. One cannot find another sensible reason. It cannot be, as Justice Blackmun’s majority opinion in *Roe* suggests, that the reason the state cannot define the fetus as a person is that there has never been societal consensus on its personhood, for there is no principle of law forbidding difficult legislative choices in the absence of consensus; if there were, federally mandated affirmative action, to take only one of many sensitive subjects, would not exist. Nor can the reason be, as some theorists have suggested, that science itself is unable to supply the answer, for were legislation forbidden in the absence of scientific consensus, it would be constitutionally impermissible to fund the Strategic Defense Initiative.

Consequently, the only “reason” that the state is not allowed to define the fetus as a juridical person is that the right to abortion exists. This might seem like a case of the tail wagging the dog, but it reflects a legitimate fear that the case for killing a person is weaker than the case for allowing a woman to choose freely whether to bear a fetus that might become one. For all the argument over personhood, however, it is not clear that it possesses either the political or the constitutional significance that is claimed for it.

Opinion surveys consistently show a majority of Americans (actually, a majority of white Americans) opposed to overturning *Roe v. Wade*, but some surveys also show a necessarily overlapping majority believing that the termination of a pregnancy is the equivalent of killing a child. Plainly, this is one area in which a survey is just words: the group that is in both majorities is unlikely truly to believe that ending a pregnancy is like killing a child or it

30. 410 U.S. at 156-57.

would likely oppose *Roe*. What the survey is really detecting, one supposes, is a majority sense that the fetus represents a form of life the destruction of which makes many people uncomfortable. But many of those who are uncomfortable are not so uncomfortable that they want to turn their discomfort into positive law. According to the surveys, they still believe that abortion is sometimes the best way out of a difficult situation and that the choice should be left to the pregnant woman; most Americans, although they might be willing to limit the *grounds* on which an abortion might be sought, are unwilling to take the ultimate decision out of the private sphere. Although the results of surveys on this issue are volatile and widely regarded as suspect, it is at least possible that a politician could survive—cf. Mario Cuomo—while holding simultaneously the views that a fetus is a person and that abortion should remain an unfettered personal choice. So the absolute political significance of personhood may be small.

Nor is it at all clear that fetal personhood possesses the constitutional significance ordinarily claimed for it; indeed, the success of the pro-life movement in holding that personhood is an important constitutional question, while perhaps invited by the structure of the majority opinion in *Roe*, has always been something of a puzzle. Even Tribe seems to be taken in by the peculiar pro-life canard holding that were the fetus deemed a juridical person within the meaning of the Fourteenth Amendment, a state law permitting abortions would violate the Constitution. Says Tribe:

Notice that this is not really an argument in support of a state’s power to go either way on the subject of abortion. For under this argument for fetal rights, if a state legislature permits abortion, it is licensing others to deprive the fetus of life without due process of law and is denying to the fetus the equal protection of the state’s murder laws, in a blatant violation of the Constitution’s ban on all such denials.33

In this, Tribe is simply echoing the majority opinion in *Roe v. Wade*, wherein Justice Blackmun wrote: “If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”34 This notion that the equal protection clause or the due process clause by their own force would prohibit the state from allowing the killing of persons within its jurisdiction forms the basis for the so-called Human Life Bill that was once a central part of the anti-*Roe* strategy; but as a legal principle, it is just as wrong as it can be.

33. P. 115 (emphasis in original).
34. 410 U.S. at 156-57.
Piling irony upon irony, it is Robert Bork, who has heaped such vehement contempt upon *Roe v. Wade*, who pointed out the error in the course of his testimony against the Human Life Bill. (In the frequently ugly campaign to defeat Bork’s nomination to the Supreme Court, some over-eager researcher informed the opponents that Bork had testified in favor of the bill—an error that, like so many other misstatements in our one-liner political world, was accepted and reported without a shred of evidence.)\(^{35}\) In his testimony, Bork pointed out that the Supreme Court indulges in balancing tests all the time, and that once a right of privacy is accepted, there is nothing on the face of the Fourteenth Amendment to indicate why that right must always be trumped by the rights of the fetal person. On the contrary, said Bork, a court could perfectly well accept the fetus as a juridical person and yet deny that the Constitution itself requires the pregnant woman to carry it to term; indeed, he said, we could end up with a “common law of abortion” that would look very much like what the Justices announced in *Roe*.\(^{36}\)

There is another reason, too, that the status of the fetus as juridical person would not by its own force end the constitutional argument over abortion. The fact that you the reader and I the writer are juridical persons does not lead to any conclusions whatsoever about the constitutional status of the state’s criminal law of murder. The fact that we are persons does not mean that some optimal murder statute is constitutionally required, and the degrees of protection (if one considers both degree of punishment and likelihood of its imposition) vary widely from state to state. Nor does the equal protection clause require that all murders be treated the same. Many states punish the killing of peace officers in performance of their duties more severely than other killings; I see nothing in our constitutional doctrine as it now stands to prevent the state from punishing more or less severely the killing of a reader or a writer, for neither involves a suspect classification. So unless one is prepared to make a case for the suspectness of classifications turning on whether the “person” has yet been born, a court might well sustain the state’s decision to punish less severely (or not at all) the killing of a fetus—particularly, as Bork pointed out, when there are competing interests at stake.

VI

There is a further pro-choice argument for the irrelevance of fetal personhood. Even if the fetus is a human person in every relevant respect, conscripting women to carry fetuses of which they would rather be free is said to be a form of slavery. That is not a bad argument, especially when paired

---


Abortion and Absolutism

with the equality concern that, whether the possibility of pregnancy is a biological accident or not, the state makes no similar effort to conscript men to support living things that they would rather not (although males who were Vietnam-era military draftees might have disputed this point). Whether one finally finds that argument persuasive or not, however, I am interested in turning it on its head and pursuing the moderately less familiar but still common pro-life argument that the dehumanizing of the fetus is like the dehumanizing of the slave. Tribe uses a form of this analogy to reject the claim that the value of fetal life is only what people in power make it: “The same thing once was said of slaves,” says Tribe. “[T]he value of black Americans was less than the value of white Americans in the view of people with power.”

True, but too soft. In the view of many people with power, the slaves were a sub-species, not fully human, which justified their masters in holding them in thrall and making all decisions for them. Self-described pro-life feminists (some say this is an oxymoron, but that is a semantical quibble that I would rather not pursue) argue that the situation of the fetus in society is much like the situation of women historically: without power or choice, totally subject to the whim of the owner. The further, and perhaps stronger, analogy to slavery is obvious.

So is the refutation, one might suppose. Whatever our views about the fetus, we know that the woman, and the slave, are fully human. The reason we know is that, for the sake of our argument, we have defined things that way. After all, the slaveholder might say that he should be free to decide whether his slave, his property, is human, for the due process clause guarantees property in terms just as strong as those protecting liberty. Indeed, if not for the trifling matter of the Thirteenth Amendment, the slaveholder might say that if Roe v. Wade is correct, then ipso facto his rights must be protected too.

As a moral matter, one might draw a distinction between the woman making a choice about something intrinsic to her body and the slaveholder making a choice about something extrinsic to his body. The slaveholder might respond that control of the slave is every bit as vital to his well-being as control of her body is to the woman. The easy rejoinder is that the slaveholder’s control is over another human being, but that simply returns the argument to its beginning: we have not yet explained why the state should be able to override the slaveholder’s claim that what he is enslaving is not human.

A better candidate for distinguishing the cases would note the difference in what the two protesters, the slaveholder and the pregnant woman, are trying to accomplish. Here the conscription argument for reproductive freedom might be brought into play. The slaveholder wants to control what the state seeks to liberate, whereas the woman seeks to rid herself of what the state seeks to force

37. P. 119.
38. See Callahan, The Impact of Religious Beliefs on Attitudes Toward Abortion, in DEFINING HUMAN LIFE 279 (M. Shaw & A. Doudera, eds. 1983).
her to keep; without regard to the humanity of the object, then, one seeks control of what the state wishes to make free, while the other seeks freedom from that which the state wishes to make her control. The distinction, then, turns not at all on the question of who has the right to determine personhood, and much more on the liberal bias toward freedom rather than control; so that even if the fetus and the slave are both human, the result that slavery is prohibited and abortion is allowed is both coherent and consistent.

VII

But that does not make it right. Pro-life forces are not interested in clever scholarly arguments; they are interested in saving the lives of what they insist are human beings. The true climax of Tribe's book arrives in his effort to solve the problem posed by his title, by "explor[ing] the grounds for a political compromise other than the one reached in Roe itself."39 He first runs through a series of what he calls "cruel" compromises: imposing consent requirements, mandating notification (for example, of parents in the case of a minor), dictating waiting periods, allowing abortions only for specified reasons, limiting the use of public funds for abortions, restricting the activities of clinics, and altering Roe's cut-off dates.

Tribe has two principal objections to these "compromises." The first is that they don't work; that is, according to Tribe, "they don't even serve the purpose of decreasing the number of abortions."40 I am not sure that his statistics are convincing, but let us assume that he is right. What is more intriguing is his second, more central objection: the various "compromises," he says, are "cruel"—cruel, he means, to the pregnant women whose privacy rights are implicated:

The overarching problem with all these purported compromises is that they are not compromises at all. Many of the laws put forward to stake out what is supposedly a middle ground in the abortion debate, rather than meaningfully protecting either life or choice, randomly frustrate both and do not move us closer to a society of caring, responsible people.

In the case of any given woman, these laws will either act as an absolute obstacle to abortion or will not stand in the way. . . . [I]t seems obvious that most of these solutions are unsatisfactory in that they promise abortion rights in principle but deny them in practice to those who are least able to bear the burden of motherhood—particularly the young, the uneducated, the rural, and the nonwhite.41

39. P. 197 (emphasis in original).
40. P. 209.
41. Pp. 208-09. For a similar analysis of abortion "compromises," see Dellinger, supra note 6.
But that line of argument, while perhaps sensible as a matter of constitutional theory, is unlikely to appeal to one whose starting premise is not the need to safeguard reproductive autonomy or individual privacy, but the desire to protect fetal life. To the pro-life advocate, the compromises would seem equally cruel, but for a different reason: the cruelty would be to the fetuses, the real or potential humans, whose lives the compromises would snuff out. For just as the pro-choice advocate would note that the compromises still interfere with privacy or autonomy, the pro-life advocate would note that they still allow the destruction of some fetuses.

Unless one begins with a bias, either pro-choice or pro-life, one cannot say which cruelty is the greater. Tribe’s examples really serve as evidence that compromise in the sense of agreement might be impossible; indeed, Tribe’s own pro-choice biases are surely at work in his ultimate decision to reject cruelty to women in favor of cruelty to fetuses. The choice that he makes is moral and principled and might even be the one that most people in our society would prefer, at least as a matter of law (although this is not as clear as one might think); but there is no particular reason that others, whose moral starting points are very different from Tribe’s, should find his argument persuasive.

And that, perhaps, is the difficulty. Tribe’s title tells the story of his book, and of this critique: much of the debate over abortion does represent a clash of absolutes, and not only are they absolutes—they are axioms. Putting to one side the millions of Americans whose views are reflected in opinion surveys, most of whom clearly find this issue a tough one, there are at the core of both the pro-choice and pro-life movements people sufficiently sure of their starting points that conversation with others whose axioms differ is virtually impossible. To speak of dialogue is to talk past both groups. The argument, finally, is about power. The only issue is who wins.

VIII

Still, Tribe has answers, and some of them are quite sensible. He suggests, for example, that cheap and reliable neonatal care and better and more widespread contraceptive technologies would go a long way toward reducing reliance on abortion as a means of dealing with unwanted pregnancies. Abortion is not something that any woman embraces cheerfully; as Adrienne Rich has written, “No free woman, with 100 percent effective, nonharmful birth control readily available, would ‘choose’ abortion.”

But birth control is not all of it. Surely the lodestar of a real solution to the abortion dilemma should be the proposition that a world in which few women desire abortions is better than one in which some women desire them but are unable to attain them. Thus if the pro-life movement wants to reduce the

42. A. Rich, Of Woman Born: Motherhood as Experience and Institution 268-69 (1976).
number of abortions but is unable to enact legislation that will do very much to accomplish this goal, it must offer other incentives for women who choose to carry their pregnancies to term, finding ways to convince others to value life as much as the movement does. One must deal, after all, with the roots of the problem, and abortion is more a symptom than a problem; when women seek abortions, there are reasons that they do. We live in a world where child care is often shoddy or expensive, where jobs are not put on hold for women (or for men) who take time off to care for their children, where the very act of devoting one’s life and skills to one’s children continues to be viewed with suspicion. Absent a considerable network of legal guarantees—that one’s job will be waiting, that child care will not bust one’s budget, and so on—it will continue to be very difficult for many women who might prefer to make another choice to carry their pregnancies to term.

And of course, there will always be women whose pregnancies will be “unwanted” for reasons that the government is powerless to alter: rape, incest, accidents, family situations, illnesses, birth defects, and so on. These abortion decisions cannot be reached by a strategy designed to remove the obstacles to childbearing, for these women are not so much facing obstacles as they are choosing for themselves which future life’s vision they most desire. This is, perhaps, the essence of a private choice, for no one can select a life’s vision for someone else. Whether this is a private choice with which the government must interfere in order to protect life is a different matter, and it is one that Tribe, in the last part of his book, seeks to elide by means of a thought experiment involving an artificial womb. Tribe suggests that if we had a safe and reliable means for removing the fetus from the pregnant woman and installing it in an artificial womb where it could be carried to term, the woman would suddenly be situated similarly to the man involved in bringing about the pregnancy: neither would have the fetus within the body.

The troubles with this proposal, even as a thought experiment, are two. First, the pro-choice advocate might object that it is only the woman, not the

43. See E. Aird, Militant Mothering (work-in-progress on file with author).
44. There is an additional, more controversial strategy. If one truly cares about incentives and cannot find negative ones, then one must generate positive ones instead. So it may be that what the pro-life movement should ultimately demand from the government is not prohibition but money, with which women will be paid for carrying pregnancies to term; for one incentive that has always worked is to offer people a reward for the behavior that one prefers. This is in two different senses a regressive solution—surely the women more likely to be attracted by a cash payment for carrying pregnancies to term rather than ending them will be mostly poor and disproportionately women of color, and it raises the specter not of conscription but of an all-volunteer army of human incubators—but the same might be said, albeit indirectly, of proposals, for example, to improve neonatal care and child care. Those are both services that women with sufficient resources can purchase in the market, so when the government provides them or subsidizes them, it is doing indirectly what direct payments do directly.
man, who is forced to undergo this invasive surgical procedure. The state might deem the procedure safe, and so it might be, but the woman’s sovereignty over her own body is still put in question as long as this is the only procedure that she is permitted to choose. Second, as Tribe himself acknowledges, this form of compromise might be said to “violate a woman’s rights to offer her equality only by rendering her womanhood inconsequential and marginalizing her distinctiveness as a woman”—an objection that would also hold, one supposes, were technology developed to allow impregnation of men—and, further, it “would vindicate a woman’s right to be free of the burden of pregnancy but not her right to control the use of her genetic material in the creation of a child.”

And Tribe’s other “humane compromises”—for example, approval of the so-called abortion pill, RU-486—are unlikely to make the pro-life side happy. It is true, as Tribe argues, that were abortion a matter of taking the proper medication rather than undergoing a surgical procedure, the privacy defense that is under so much fire would be more plausible. But the pro-life advocate would see this technological advance less as a compromise than as a surrender: the cheaper and easier the technology of abortion, the pro-life argument necessarily runs, the greater the devaluing of the human life that the fetus represents.

IX

The short of the matter is that, although one side obviously must prevail, compromise seems unlikely. What, then, are we to do? Tribe offers this guide to a solution: “In the end, the answer to both sides is the same: In a democracy, voting and persuasion are all we have.” The implication is that the two sides in this battle should be talking to each other rather than at or past each other, a lovely vision of the role of public moral dialogue in the liberal state.

The trouble is that Tribe has just devoted most of his book to showing us all of the many forces that make conversation difficult or impossible, and even when he has suggested common ground, I have tried to show why it is rarely ground that the pro-life side is likely to find attractive; and the one time that it might be—in his discussion and apparent advocacy of a technology that would allow the pregnant woman to end the pregnancy but not kill the fetus—he might run into trouble from the pro-choice side. I fear that his title got the matter right and the book, for all of its value, has not really resolved it. The clash is still one of absolutes, and there is no particular reason to think that dialogue will resolve it in the near term.

That does not mean that no resolution is possible, however, for in the American constitutional democracy, voting and persuasion are not all we have.

47. Pp. 224-25 (emphasis in original).
48. P. 216.
49. P. 240 (emphasis in original).
We also have the Constitution. Although Tribe is at pains to point out that the Constitution can be amended, amendment has lately proved almost impossible, even for the broadly popular amendment to guarantee equality for women. When a moral battle seems politically intractable, the parties cease to battle each other and fight for control of the legal apparatus instead, arguing before the courts the merits of their moral positions (in legal guise), or, better still, choosing judges on the basis of predictions about the way that they will vote. The reason, I suspect, that Webster came as such a stunning setback to both sides is that neither was well-prepared to cope with a world in which the political institutions would actually have to resolve a moral dilemma instead of letting the Supreme Court do it and taking potshots at the results.

Robert Goldwin, in a little essay on the search for morality in the Constitution, has complained that moral absolutism tends to distort constitutional law. This, of course, is true. But in a world in which moral absolutists, many in number, are not content with the results of political process, there are few alternatives to litigation or civil war. We tried civil war once already, and if hundreds of thousands died, at least the viciously repressive system of chattel slavery was eradicated. In the abortion debate, the most firmly committed activists on both sides seem to think that every bit as much is at stake now as was then, which suggests that until there is some sign of political consensus, it may turn out that in this democracy, litigation and protest are all we have.

50. P. 240.