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ARTICLE

ABORTION AND THE PIED PIPER OF COMPROMISE

ANNETTE E. CLARK*

In this Article, Professor Clark offers a detailed analysis of the controversy among legal scholars which has long surrounded the issue of legal regulation of abortion. Professor Clark begins by focusing on a recent book by Professor Laurence Tribe, Abortion: The Clash of Absolutes. *She argues that although Tribe claims to seek a compromise solution to the abortion problem, he fails in this pursuit both because he does not truly search for compromise and because he is unwilling to explore intermediate moral or legal positions that are not acceptable to either the pro-choice or pro-life movements. In contrast, Professor Clark proposes a search for intermediate positions which, she argues, better reflect the views of the many people who believe that women have a strong interest in retaining decisional capacity over their reproductive lives and that human life possesses an intrinsic and inherent value to society that increases as pregnancy advances. Professor Clark concludes that a recognition of intermediate positions on abortion would assist the Supreme Court in defining legitimate state interests in the regulation of abortion.*

INTRODUCTION

In 1989, the United States Supreme Court issued its decision in *Webster v. Reproductive Health Services*.[1] In the eyes of many, the five-to-four decision upholding Missouri's abortion regulations heralded the end of the sixteen-year era of federal constitutional protection of abortion rights that had begun with *Roe v. Wade*.[2] As a noted constitutional scholar stated, "[I]f constitutional law is as constitutional law does, then after *Webster*, *Roe* is not what it once was."[3]

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[1] 492 U.S. 490 (1989) (plurality opinion). The Missouri abortion statute at issue included a preamble declaring that the life of each human being begins at conception, required fetal viability testing for women twenty or more weeks pregnant, and prohibited use of public employees and facilities to perform or assist abortions not necessary to save the woman's life. See id. at 501.

[2] 410 U.S. 113, 154 (1973) (finding fundamental right to abortion within constitutional right of privacy encompassed by fourteenth amendment due process clause). Under *Roe*, regulations limiting this fundamental right are subject to strict scrutiny and must be narrowly drawn to serve a compelling state interest. Id. at 155.

[3] Laurence H. Tribe, Abortion: The Clash of Absolutes 24 (1990); see also Planned Parenthood v. Casey, 947 F.2d 682, 694-98 (3d Cir. 1991) (noting that after *Webster* strict scrutiny standard of *Roe* no longer commanded allegiance of a majority of Justices and had been replaced with Justice O'Connor's undue burden standard), aff'd, 112 S. Ct. 2791 (1992).

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In the three years following *Webster* the makeup of the Supreme Court changed dramatically. If *Webster* fired the warning shot, then surely the appointments of Justices Souter and Thomas to replace the retiring Justices Brennan and Marshall sounded *Roe*'s death knell.[4] *Planned Parenthood v. Casey*,[5] argued before the Supreme Court during the 1992 term, was to be the test case. Popular wisdom suggested that in the very likely event that either Justice Souter or Thomas joined the Rehnquist contingent in seeking to limit constitutional oversight in the arena of state abortion regulation,[6] *Roe v. Wade* was as good as dead.[7]

However, on June 29, 1992, the Supreme Court did the unexpected. In *Casey*, the Court reaffirmed women's constitutional right to abortion under *Roe* while simultaneously upholding significant regulation of

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[4] The appointments of Justice Souter and Justice Thomas created much uncertainty as to the Court's stance on abortion rights. If either Justice Souter or Justice Thomas were to agree with the reasoning of either Justice Scalia or Justice Rehnquist in *Webster*, a majority of the Court would favor severely limiting or explicitly overruling *Roe v. Wade*. See note 6 infra.

[5] 112 S. Ct. 2791 (1992). Planned Parenthood brought a facial challenge to the constitutionality of five provisions of Pennsylvania's abortion statute. The five challenged provisions were: (1) 18 Pa. Cons. Stat. Ann. § 3203 (1990) (statutory definition of "medical emergency"); (2) id. § 3205(a) (informed consent, 24-hour waiting period, and mandatory content-based counseling requirements); (3) id. § 3206 (single-parent consent requirement for minors, with judicial bypass option); (4) id. § 3209 (spousal notification requirement); and (5) id. §§ 3207(b), 3214(a), (f) (reporting requirements imposed on facilities which provide abortion services). The Court of Appeals for the Third Circuit had upheld as constitutional all but the spousal notice requirement. See *Casey*, 947 F.2d at 719.

[6] In *Webster*, Chief Justice Rehnquist, in an opinion joined by Justices Kennedy and White, referred to the right to an abortion as a liberty interest rather than a fundamental right. See Webster v. Reproductive Health Servs., 492 U.S. 490, 520 (1989) (plurality). This plurality rejected the *Roe* trimester framework and upheld the viability testing requirement by subjecting it to rational basis review rather than strict scrutiny. See id. Justice Scalia went even further, arguing that the Court should expressly overrule *Roe*. See id. at 532 (Scalia, J., concurring in part and concurring in the judgment). Justice O'Connor found that because the viability testing requirement neither imposed an undue burden on a woman's abortion decision nor conflicted with prior decisions, it was constitutional. See id. at 530 (O'Connor, J., concurring in part and concurring in the judgment).

[7] The pro-choice side was gearing up for defeat and an end to the era of constitutional protection of abortion rights. In oral argument before the Supreme Court, Kathryn Kolbert, lead counsel for Planned Parenthood, argued that upholding any of the restrictions on abortion would be the equivalent of overturning *Roe*. See Linda Greenhouse, Court Gets Stark Arguments on Abortion, N.Y. Times, Apr. 23, 1992, at A1 [hereinafter Greenhouse, Stark Arguments]. By taking an all-or-nothing approach, Ms. Kolbert reaffirmed the pro-choice position that there was no middle ground worth fighting for in the Constitution. See Linda Greenhouse, Abortion Rights Strategy: All or Nothing, N.Y. Times, Apr. 24, 1992, at A1 [hereinafter Greenhouse, Abortion Rights Strategy]. The pro-choice plan was to use a defeat in the Supreme Court as a rallying cry for action at the polls in the upcoming national and state elections in order to protect abortion rights. The abortion rights legal staff of the American Civil Liberties Union (ACLU) was so certain of defeat at the hands of the Court that it severed its ties from the ACLU and formed the Center for Reproductive Law and Policy. The stated reason for the split was that the abortion rights staff desired to shift its orientation from litigation to legislation and public opinion. See David Margolick, Seeking Strength in Independence, Abortion-Rights Unit Quits A.C.L.U., N.Y. Times, May 21, 1992, at A20.

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women's ability to exercise that right.[8] This "constitutional compromise" was the result of a centrist voting bloc formed by Justices O'Connor, Kennedy, and Souter.[9] In Parts I through III of their joint

[8] *Casey*, 112 S. Ct. at 2804, 2822-26. The holding in *Casey* was the result of shifting coalitions reflected in five opinions. A five-to-four majority (Justices O'Connor, Kennedy, Souter, Blackmun, and Stevens) voted to reaffirm the "essential holding" of *Roe*, see note 10 infra, and to strike down the spousal notification provision. See *Casey*, 112 S. Ct. at 2826-31 (O'Connor, J., Kennedy, J., Souter, J.) (joint opinion). A seven-to-two majority (Justices O'Connor, Kennedy, Souter, Rehnquist, White, Scalia, and Thomas) voted to uphold all but the spousal notice requirement of the Pennsylvania statute. See id. at 2822-26, 2832-33 (joint opinion); id. at 2867-73 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

Justices O'Connor, Kennedy, and Souter utilized an "undue burden" standard, see note 13 and accompanying text infra, while Justices Rehnquist, White, Scalia, and Thomas took the position that the Court should have upheld the Pennsylvania statute in its entirety by overruling *Roe* and adopting the approach of the *Webster* plurality. See *id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); see also note 6 supra. Justices Blackmun and Stevens would have invalidated all of the challenged provisions as violations of women's fundamental right to choose to terminate a pregnancy prior to viability. See Casey, 112 S. Ct. at 2838-43 (Stevens, J., concurring in part and dissenting in part); id. at 2845-53 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[9] Justice O'Connor surprised no one when she adopted the undue burden test (albeit it in a somewhat modified form) that she had been singly advancing for a number of years in either dissenting or concurring opinions. See, e.g., Hodgson v. Minnesota, 497 U.S. 417, 458-59 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part); *Webster*, 492 U.S. at 530 (O'Connor, J., concurring in part and concurring in the judgment); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting). Justice Souter's position was less clear but not unexpected. See, e.g., Ruth Marcus, At the Court, The Revolution That Wasn't, Wash. Post, June 28, 1992, at A1, A6 (explaining that Souter's pattern of voting with O'Connor caused conservatives to predict that he would join her in seeking middle ground on abortion rights question).

The real surprise was Justice Kennedy. In the *Webster* decision, he had joined the plurality in viewing the right to terminate a pregnancy as a liberty interest rather than a fundamental right. See *Webster*, 492 U.S. at 520. Justice Kennedy was expected to continue to adhere to this position in *Casey*. But see Linda Greenhouse, Changed Path for Court?, N.Y. Times, June 26, 1992, at A1, A12 (suggesting that effective control of Court had passed to moderately conservative trio of O'Connor, Kennedy, and Souter, who as a group took generally cautious approach to deciding cases, showed hesitancy in overturning precedents, and exhibited distaste for aggressive arguments); Greenhouse, Stark Arguments, supra note 7, at B11 (quoting an exchange between Kathryn Kolbert and Justice Kennedy in which Kennedy said, "Well, if you are going to argue that *Roe* can survive only in its most rigid formulation . . . . I am suggesting to you that that is not the only logical possibility in this case."); Greenhouse, Abortion Rights Strategy, supra note 7, at A1 (describing Justice Kennedy as "eager to find some middle ground" during oral argument on *Casey*). Several theories have already been advanced for Justice Kennedy's move to the center of the Rehnquist Court. Those who have watched the evolution over the tenure of the moderate coalition suggest that the Administration's overly aggressive advocacy in combination with personality conflicts and animosity between the Justices now in the center and those on the right have caused Kennedy's shift to the center. See Linda Greenhouse, A Telling Court Opinion, N.Y. Times, July 1, 1992, at A1 [hereinafter Greenhouse, Telling Opinion]. Friends and colleagues, however, suggest that Kennedy's conservative bent has always been one of character rather than ideology and that his recent opinions simply reflect his respect for stability and predictability in the law. See Terence Moran,

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opinion, which Justices Blackmun and Stevens joined, the Court announced the continuing viability of what it termed "*Roe*'s essential holding."[10] Yet in the next section, the joint opinion abandoned the trimester framework[11] and *Roe*'s articulation of the right to choose as a fundamental right.[12] In its place, Justices O'Connor, Kennedy, and Souter substituted an undue burden test: "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."[13] Utilizing this undue burden standard, the Court struck down the spousal notice requirement but upheld mandatory content-based counseling, a twenty-four-hour waiting period, a parental consent requirement for minors, and mandatory record-keeping by the abortion provider.[14]

Immediately following the release of the opinion, representatives of both the pro-choice and pro-life movements labeled *Casey* a defeat for their respective positions. Patricia Ireland, president of the National Or-

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Breaking Ranks With the Right, The Recorder, July 6, 1992, at 1.

[10] *Casey*, 112 S. Ct. at 2804. The Court articulated *Roe*'s "essential holding" as consisting of three parts:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id. The joint opinion's reaffirmation of *Roe* received high praise from Justice Blackmun, who called it "an act of personal courage and constitutional principle." Id. at 2844 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). But see notes 255-61 and accompanying text infra.

[11] See *Casey*, 112 S. Ct. at 2818.

[12] See id. at 2817 (discussing with disapproval Supreme Court cases subsequent to *Roe* which "decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest").

[13] Id. at 2819. The joint opinion states that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Id.

[14] Id. at 2791, 2822-23. In doing so, the Court upheld provisions virtually identical to ones which the Supreme Court in prior decisions had struck down as unconstitutional. See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759-65 (1986) (striking down statute requiring that physician or counselor present woman with materials describing medical assistance available for childbirth and father's responsibility for child support); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 442-51 (1983) (invalidating 24-hour waiting period and requirement that a physician inform woman seeking an abortion of development of fetus, date of possible viability, physical and emotional complications of abortion, and availability of agencies to provide adoption and childbirth assistance). The Court in *Casey* overruled these prior cases to the extent that they were "inconsistent with *Roe*'s acknowledgement of an important interest in potential life." *Casey*, 112 S. Ct. at 2823.

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ganization for Women, claimed that "*Roe* is dead, despite the flimsy stay of execution today from the Court."[15] In contrast, Wanda Franz, president of the National Right to Life Committee, expressed disappointment over the Court's language reaffirming *Roe* and called the decision "a loss for unborn children and a victory for pro-abortion forces."[16]

While much of what was being said was political rhetoric designed to marshal public support for one position or the other,[17] both pro-choice and pro-life advocates have good reason to be dismayed by *Casey*. The Court's explicit reaffirmation of *Roe* and the ambiguities inherent in the undue burden standard likely will make it more difficult for the pro-choice side to convince the uncommitted public that abortion rights continue to be threatened. In addition, the decision gives states the power to discourage abortions and to regulate them in a manner that will make them more expensive and more difficult for women to obtain, a result that is anathema to the pro-choice movement.[18]

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[15] Robin Toner, Ruling Eases a Worry for Bush, But Just Wait, His Critics Warn, N.Y. Times, June 30, 1992, at A1, A15; see also Robert O. Suro, Outside Court, Rival Rallies and Heavy Politicking, N.Y. Times, June 30, 1992, at A15 (" 'American women no longer have the fundamental right to make decisions about their own lives.' " (quoting Judith L. Lichtman, president of Women's Legal Defense Fund)); Toner, supra, at A15 (" 'Don't be fooled by the Court's smoke screen. What the Court did today is devastating for women. George Bush's Court has left Roe v. Wade an empty shell that is one Justice Thomas away from being destroyed.' " (quoting Kate Michelman, president of the National Abortion Rights Action League)); A warning to New Yorkers from Planned Parenthood of New York City: Don't be fooled. Roe v. Wade is dead (full-page paid advertisement), N.Y. Times, July 1, 1992, at A7.

[16] Suro, supra note 15, at A15; see also Tamar Lewin, Long Battles Over Abortion Are Seen, N.Y. Times, June 30, 1992, at A18 (" 'We've been fighting to overturn Roe v. Wade for 20 years, and if necessary we'll fight for 20 more, but for now, we've lost.' " (quoting Burke Balch, state legislative director of the National Right to Life Committee)); Toner, supra note 15, at A15 (" 'Three Reagan-Bush appointees stabbed the pro-life movement in the back.' " (quoting Randall Terry, a leader of the pro-life group Operation Rescue)).

[17] As noted by Mark Mellman, a Democratic poll-taker, the vast majority of the American people will not read *Casey*. See Toner, supra note 15, at A15. Thus, it is in the best interests of both the pro-life and pro-choice groups to present the opinion to the public in a way that will best serve their objectives. The objective of pro-choice organizations has long been to use the anticipated "defeat" in *Casey* to galvanize public support for pro-choice candidates running for political office, see Linda Greenhouse, Both Sides on Abortion Argument Look Past Court to Political Battle, N.Y. Times, Apr. 20, 1992, at A1, B11, and for the Freedom of Choice Act, a congressional bill which if enacted would prohibit most state restrictions on abortion. To this effect, abortion rights groups immediately mounted a nationwide campaign to persuade the public that the Court's decision in *Casey* threatened a woman's right to choose an abortion. The National Organization for Women sent out two million letters to members urging them to "fight back in this emergency." See Stuart Elliott, Fervid Appeals on Abortion Follow High Court Decision, N.Y. Times, July 7, 1992, at D18. Planned Parenthood Federation of America placed advertisements in The New York Times and The Washington Post declaring that states now have the power to "harass, humiliate and endanger a woman seeking a safe, legal abortion." Id. The media response by pro-life advocates has been less evident, perhaps because the Court's reaffirmation of *Roe* was unexpected and caught them by surprise.

[18] While the joint opinion went much further than expected in reaffirming the "central holding" of *Roe*, it also opened the door for regulations which may as a practical matter

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Casey is no less a problem for the other side. The Court's reaffirmation of at least some of the tenets of *Roe* was a stunning defeat for the pro-life movement. By refusing to adopt the deferential rational basis standard of review for analyzing abortion statutes, the Court ensured that the Constitution will continue to stand as protection against some attempts at state regulation of abortion. For example, the language of the opinion suggests that outright prohibitions of abortion prior to viability are unconstitutional: "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[19]

What will be the ultimate result of the Court's decision in *Casey*? Both pro-life and pro-choice advocates will assuredly respond to the perceived failings of the decision, and the avenues of attack are legion. The 1992 presidential election was but one battleground among many.[20]

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prevent women from having abortions. Costs will likely increase in states requiring that informed consent counseling be done by a physician. The 24-hour waiting period also may burden poor women in rural areas for whom an overnight stay in a city is impossible. Much will depend upon subsequent rulings as to the boundaries of the "undue burden" standard. See notes 13-14 and accompanying text supra.

[19] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2821 (1992) (joint opinion). This quotation and similar language in *Casey* have already been used to strike down all or portions of two restrictive abortion statutes. The Fifth Circuit used the undue burden analysis of *Casey* to hold unconstitutional the entire Louisiana abortion statute, which criminalized the performance of abortions except in very limited circumstances—where the life of the woman was at stake or where the pregnancy was the result of rape or incest that the victim had reported to law enforcement officials. See Sojourner T. v. Edwards, 974 F.2d 27, 30-31 (5th Cir. 1992), cert. denied, 113 S. Ct. 1414 (1993).

Utah had enacted a statute with restrictions similar to those of the Louisiana statute, but the Utah law placed additional restrictions on abortions occurring after 20 weeks of gestational age. See Utah Code Ann. § 76-7-302(3) (1991). Following the Supreme Court's decision in *Casey*, a federal district court judge struck down the sections of the statute criminalizing performance of abortions in the first 20 weeks of pregnancy but upheld the sections prohibiting performance of most abortions after 20 weeks. See Jane L. v. Bangerter, 809 F. Supp. 865, 870-73 (D. Utah 1992). The court reasoned that Utah's statutory ban on non-therapeutic abortions before fetal viability conflicted with the portion of *Casey* reaffirming *Roe*'s central holding. See id. at 870. The court upheld the statutory restrictions on abortion after 20 weeks against a facial challenge because it read *Casey* as allowing states to prohibit non-therapeutic abortions after the fetus has reached viability. See id. at 872-73.

The Supreme Court declined an opportunity to consider the constitutionality of Guam's restrictive abortion law. The Court, voting six to three, denied certiorari in a Ninth Circuit case that found unconstitutional a Guam statute outlawing virtually all abortions. See Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366 (9th Cir. 1992), cert. denied, 113 S. Ct. 633 (1992). While the Ninth Circuit decision preceded *Casey* and was thus decided under prior precedent, the result likely would have been the same under *Casey*. See Linda Greenhouse, High Court Spurns Guam Bid to Revive Curbs on Abortion, N.Y. Times, Dec. 1, 1992, at A22 (opining that "there was no way the Court could have resurrected the Guam law in the absence of a fundamental change of heart by a member of the *Casey* decision's majority").

[20] Both pro-life and pro-choice advocates considered the 1992 presidential election to be

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State legislative elections,[21] the arena of public opinion,[22] national[23] and

essential to their respective causes because the next president would undoubtedly appoint at least one Justice to the Supreme Court during his term in office. If the next Justice appointed were to take the view that the right to choose to terminate a pregnancy is not to be found in the Constitution, or that it is a liberty interest entitled to little protection, then the fragile coalition in *Casey* would be to no avail.

Justice Blackmun, the author of the majority opinion in *Roe v. Wade* and one of the five Justices who voted in *Casey* to reaffirm *Roe*, was expected to be the next Justice to retire. See *Casey*, 112 S. Ct. at 2854-55 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("I am 83 years old. I cannot remain on this Court forever . . . ."). Surprisingly, Justice White, an abortion conservative, was the first Justice to announce his retirement. See Linda Greenhouse, White Announces He'll Step Down From High Court, N.Y. Times, Mar. 20, 1993, at A1. With the appointment of Ruth Bader Ginsburg as his replacement, President Clinton has likely guaranteed the continued existence of a constitutional right to abortion. For Justice Ginsburg's views on abortion and *Roe*, see Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. Rev. 1185, 1198-1209 (1992); see also Neil A. Lewis, Ginsburg Affirms Right of a Woman to Have Abortion, N.Y. Times, July 22, 1993, at A1.

President Clinton will also play a key role in the abortion context through the appointment of judges to the federal district court and appellate court benches. The judges in the lower courts, if selected on the basis of ideology, can have a marked effect on issues such as abortion. A 1990 study financed by the National Science Foundation and the Brookings Institute highlights the importance of the lower federal judiciary in this context. It revealed that from 1981 to 1987, judges appointed by Reagan upheld abortion restrictions in approximately 77% of their abortion cases, while Carter appointees upheld restrictions in approximately 12% of their cases. See Neil A. Lewis, Selection of Conservative Judges Insures a President's Legacy, N.Y. Times, July 1, 1992, at A13. The Clinton Administration has indicated that it might name some judges to the lower federal courts who oppose abortion rights in order to "demonstrate evenhandedness" and an end to the "abortion litmus test" first used by Reagan. Neil A. Lewis, Clinton is Considering Judgeships for Opponents of Abortion Rights, N.Y. Times, Sept. 18, 1993, at A1. But see Neil A. Lewis, Unmaking the G.O.P. Legacy, N.Y. Times, Aug. 23, 1993, at A10 (suggesting that Administration's use of a centrist-liberal profile for judicial selection will result in only abortion rights supporters being named to federal bench). Finally, and perhaps most importantly, the President wields the power either to sign or to veto congressional legislation such as the Freedom of Choice Act. See note 23 infra.

[21] Pro-life groups have in the past enjoyed great success in their efforts to elect pro-life individuals to state legislatures. Pro-choice groups have vowed to target incumbent pro-life legislators and replace them with pro-choice candidates. For a useful survey of the political maneuvering on both sides of the issue, see L. Tribe, supra note 3, at 139-96.

[22] See notes 15-17 supra.

[23] The Freedom of Choice Act, S. 25, 103d Cong., 1st Sess. (1993), is an example of a national legislative approach to abortion. The purpose of the Act is to "establish, as a statutory matter, limitations upon the power of states to restrict the freedom of a woman to terminate a pregnancy in order to achieve the same limitations as provided, as a constitutional matter, under . . . Roe v. Wade and applied in subsequent cases from 1973 to 1988." Id. § 2(b). The Act would effectively prohibit most abortion restrictions including the informed consent, content-based counseling, and waiting period requirements upheld in *Casey*. See id. § 3(a)(1).

The fate of the bill hangs in the balance. Supporters of the Freedom of Choice Act have been forced to contend with not only abortion opponents but also abortion rights advocates who claim that the bill does not go far enough to protect the rights of women. See Robin Toner, Middle Ground on Abortion Shifting to Terra Incognita, N.Y. Times, July 15, 1993, at A1, A16; Robin Toner, Success Spoils Unity of Abortion Rights Groups, N.Y. Times, Apr. 20, 1993, at A18. At issue are provisions that would let stand state laws that ban public financing

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state[24] legislative processes, and federal courts, including the Supreme Court,[25] will be the next targets of activists on both sides of the abortion

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of abortion and state laws that require parental involvement in cases of minors seeking abortions. See id.; see also S. 25 §§ 3(b)(2), (3). Even if these disputes among abortion rights supporters are resolved, additional hurdles would be presented in the form of floor amendments designed to allow some of the restrictions, such as waiting periods, that the bill seeks to bar. See Robin Toner, Abortion-Choice Bill Renewed, So Is a Battle, N.Y. Times, Mar. 25, 1993, at A21.

In a recent development, even supporters of the Freedom of Choice Act are giving up hope that the bill will be passed this year. See Adam Clymer, Abortion-Rights Measure Gives Way to Other Priorities in Congress, N.Y. Times, Sept. 16, 1993, at A1, A18. The loss of momentum is attributed both to internal divisions among the bill's supporters as well as a shift in priorities to other federal legislation. See id. One of the most contested issues—whether to continue the ban on federal financing of abortions for poor women (the Hyde Amendment)—was decided for another year when the Senate voted to continue the ban, albeit in a slightly watered down form. See David E. Rosenbaum, Clinton's Health Plan; Defying President, Senate Votes to Keep Medicaid Abortion Limit, N.Y. Times, Sept. 29, 1993, at A19.

However, abortion rights supporters successfully spearheaded passage of federal legislation that provides federal employees with health insurance policies that cover abortion. See Adam Clymer, Federal Employees Given Coverage for Abortions, N.Y. Times, Aug. 4, 1993, at A17. The focus is now expected to shift to President Clinton's proposal for national health care reform, which includes abortion coverage as part of the standard health benefits package. See Rosenbaum, supra, at A19.

[24] Both sides agree that the decision in *Casey* will lead to a new round of state laws designed to create procedural obstacles to abortion. See Lewin, supra note 16, at A8. A number of states will undoubtedly seek to pass laws similar to the Pennsylvania statute at issue in *Casey*. Others may test the limits of the undue burden standard by passing regulations which fall short of prohibition but go beyond waiting periods and informed consent. According to Janet Benshoof, president of the Center for Reproductive Law and Policy, the states most likely to pass such legislation are Idaho, Illinois, Louisiana, Mississippi, North Dakota, Ohio, South Dakota, and Wyoming. See id. Still others will legislate to preserve abortion rights as they stood prior to *Webster* and *Casey*. The State of Washington, for example, amended its abortion statute through an initiative process in November 1991 to protect against the possibility that the Court might overturn or weaken *Roe*. See Wash. Rev. Code § 9.02.100 (1992) (declaring that women have fundamental right of privacy that extends to right to refuse or choose an abortion).

[25] According to Kathryn Kolbert of the Center for Reproductive Law and Policy, "The only thing this [*Casey*] means is full employment for lawyers." Lewin, supra note 16, at A18. Litigation over the constitutionality of new state abortion restrictions is inevitable. Because of the change in the applicable legal standard, see notes 11-14 and accompanying text supra, pro-choice advocates anticipate having to relitigate virtually every restriction that previously has been struck down under *Roe*. See Tamar Lewin, Clinics Eager to Learn Impact of Abortion Ruling, N.Y. Times, July 1, 1992, at A12 (citing Janet Benshoof, president of the Center for Reproductive Law and Policy).

Conversely, what remains of Pennsylvania's statute may not withstand subsequent constitutional challenges. For example, the Court in upholding the 24-hour waiting period noted that "*on the record before us*, and in the context of this facial challenge," the waiting period did not constitute an undue burden. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2826 (1992) (joint opinion) (emphasis added). Justice Blackmun stated, "I am pleased that the joint opinion has not ruled out the possibility that these regulations may be shown to impose an unconstitutional burden. The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it." Id. at 2845 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Pro-choice advocates in Pennsylvania are presently gathering facts in order to make the required undue burden showing. See Lewin,

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debate. A noted social scientist who has extensively studied the evolution of the pro-life and pro-choice movements in this country once stated, "Indeed, the sound and fury of these last few years may have been the tail-end of the storm."[26] That was 1984. The storm still rages.[27]

Legal academics choosing to enter the abortion fray have tended to respond in one of two ways. The first and by far the most common response has been to defend from a legal and jurisprudential standpoint either the pro-choice or pro-life position. The other, less common response has been to search for a compromise on the abortion question. It is this latter search for compromise which provides the impetus for this Article.

Compromise implies mutual agreement through mutual concessions. The idea of compromise is an inviting one, particularly given the current legal emphasis on alternative dispute resolution processes that produce resolution through negotiation and bilateral assent. It is even more inviting in the abortion context because those who advocate compromise hold out the promise of an end to the divisiveness engendered by the current abortion debate. One needs merely to look for a position somewhere between those of the pro-life and pro-choice movements—an intermediate position that both sides would agree is acceptable.

Laurence Tribe, one of the leading constitutional law scholars of our time, proposes to lead the way in this search for compromise in his book, *Abortion: The Clash of Absolutes*.[28] The Supreme Court's decision in *Webster* was the catalyst for Tribe's book, as it provided an opportunity to examine the bitter abortion debate with an eye to moving beyond the

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supra note 16, at A18. On remand, a federal district court judge granted plaintiffs' motion to reopen the record so that they could introduce this additional evidence to satisfy the burden of proof required by the newly formulated "undue burden" standard. See Planned Parenthood v. Casey, 822 F. Supp. 227, 229-30 (E.D. Pa. 1993).

In an attempt to prevent the evidentiary hearing from taking place, lawyers for the Commonwealth of Pennsylvania have since sought a writ of mandamus from the Third Circuit Court of Appeals. See Joseph A. Slobodzian, The 3d Circuit Hears *Casey* Again, Nat'l L.J., Sept. 27, 1993, at 11. At the hearing on the writ, the issue appeared to be the construction given to the instructions that issued from both the Supreme Court and the Third Circuit upon remand of *Casey*. See id. The appellate court has not yet issued a decision but has taken the case under advisement. See id.

[26] Kristin Luker, Abortion and the Politics of Motherhood 245 (1984).

[27] The pro-life movement sprang to life following *Roe* and has been extremely active ever since. In contrast, during the post-*Roe* period, the pro-choice movement was relatively quiescent. It perceived abortion rights as being protected by the Constitution and thus found no reason to rally its constituents. It has been only recently, as the Court has indicated a willingness to reconsider *Roe*, that the pro-choice forces have begun to organize effectively. Now, both sides are confronted by what they perceive to be a defeat in *Casey*. See notes 15-17 and accompanying text supra. Thus, for the first time, this country may experience the sound and fury of the simultaneous mobilization of massive forces on both sides.

[28] See generally L. Tribe, supra note 3.

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"clash of absolutes." Given the *Casey* decision and the consequent political reaction to it, Tribe's objective to search for ways to move past the conflict surrounding abortion would seem to be more timely today than ever before.

This Article therefore begins with a detailed review of *Abortion: The Clash of Absolutes*. In Part I, I argue that Tribe fails in his pursuit of compromise, first because he does not truly search for it, and second because there simply is no intermediate position on abortion that will be acceptable to both the public pro-choice and pro-life movements. By framing the inquiry in terms of compromise between two "warring factions," scholars such as Tribe erroneously assume that their inquiry is complete once they fail to find a compromise acceptable to both sides. What is lost is the opportunity to explore the existence of intermediate positions on abortion that are not reflected in the current debate. Laurence Tribe's book is symptomatic of legal scholarship's failure in general to acknowledge and explore intermediate positions on abortion. Part II of this Article attempts to remedy this omission by using Professor Tribe's book as a springboard for exploring alternative ways of thinking about abortion, including an analysis of the Supreme Court's most recent foray into the abortion debate in *Casey*.

I

LEGAL SCHOLARSHIP'S FAILED PROMISE OF COMPROMISE: LAURENCE TRIBE'S *ABORTION: THE CLASH OF ABSOLUTES*

Laurence Tribe begins his book by asserting that his goal is not to " 'prove' to anyone the correctness of any particular position in the abortion debate."[29] Rather, he proposes to "challenge[] the inevitability of permanent conflict . . . and [try] to lay the groundwork for moving on,"[30] to "[give] voice to the human reality on each side of the 'versus,' keeping both the woman and the fetus in focus at the same time,"[31] and endeavor to "discover areas in which the two sides can find common ground."[32] To assist him in reaching these laudable goals, Tribe appropriately enlists the aid of his audience. He appears to want active readers who will question and reexamine along with him the moral and philosophical, as well as the legal, bases for various beliefs about abortion.

Persons searching for insight or compromise are understandably drawn to Laurence Tribe's pursuit. Whom better to journey with through the abortion rights landscape than the renowned Tyler Professor of Con-

[29] Id. at 8.
[30] Id. at 7.
[31] Id. at 6.
[32] Id. at 7.

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stitutional Law from Harvard Law School? The potential benefits—a deeper understanding of the abortion controversy, mutual respect for all involved in the debate, a way around the clash between life and liberty, perhaps the location of a workable compromise position—are powerful and alluring possibilities.

What Tribe asks for in return, however, is no small matter. Tribe seeks readers willing to reexamine their own positions for weaknesses and hidden agendas and to hold their deeply held beliefs up to the harsh light of rationality. At the same time, he asks readers to recognize the strengths of the opposing side's views and to explore why others believe as they do.[33] Tribe invites vulnerability and sensitivity—two attributes not often apparent in the debate over abortion rights, at least in public. In the final analysis, though, what Laurence Tribe seeks as he beckons with promises of understanding and mutual respect is his readers' trust.

Prior to making this commitment, his readers might wish to know more about Laurence Tribe's interest in and position on abortion rights. Members of the legal academy or the legal profession in general cannot help but be familiar with Laurence Tribe and his writings. His *American Constitutional Law*[34] is considered by many to be the leading treatise on the subject of constitutional law. Legal professionals are also likely to know of Tribe's appellate advocacy, including his championing of the constitutional right to privacy.[35] But Laurence Tribe did not write *Abortion: The Clash of Absolutes* exclusively or even primarily for an academic or legal audience. It is, appropriately, given his objectives, aimed at ordinary citizens who are frustrated by the political maelstrom that the abortion controversy has become.[36] Thus Tribe's readers might reasonably ask for information concerning his legal background and involvement in the abortion debate.

Surprisingly, enlightenment is not to be found within the covers of his book, whether one looks to the acknowledgment, the text, the

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[33] See id. at 8-9.

[34] Laurence H. Tribe, American Constitutional Law (2d ed. 1988).

[35] For example, Tribe represented Michael Hardwick before the Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986), where Tribe argued that two men engaging in consensual sexual conduct in their home were entitled to constitutional protection under the right of privacy. See L. Tribe, supra note 34, at 1422. In the section of his treatise where Tribe discusses this case, he informs his readers that he argued for Hardwick. See id. See notes 37-47 and accompanying text infra for a comparable situation in which he does not so inform his readers.

[36] His general appeal to all who have ever participated in the abortion debate or struggled with it personally, see L. Tribe, supra note 3, at 3-9, and his "civics lesson" approach to the legal system, see, e.g., id. at 77-112, make apparent that his target audience is not legal academics. Compare his approach here with his more theoretical and abstract analysis of the same material in his treatise, *American Constitutional Law*, which is intended for use by law students and constitutional law scholars. See L. Tribe, supra note 34, at 1337-62.

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endnotes, or even the book jacket.[37] This omission is curious, for Tribe has not been a disinterested observer of the abortion debate in this country. Prior to publishing *Abortion: The Clash of Absolutes*, he had staked out an avowedly pro-choice position within the legal community.[38] In *American Constitutional Law*, he argues long and eloquently the case for a constitutional right to privacy broad enough to include a woman's right to choose to terminate her pregnancy without government interference.[39] In 1985, in the case of *Thornburgh v. American College of Obstetricians & Gynecologists*, he was counsel of record for an amicus brief filed on behalf of certain members of Congress in support of abortion rights and *Roe v. Wade*.[40] In 1989, Tribe, along with numerous other law professors, submitted an amicus brief in *Webster v. Reproductive Health Services* in support of a woman's constitutional right to choose an abortion.[41] He cites to this brief to show his readers that "many lawyers and law professors throughout the country believe the Supreme Court's decision in [*Roe*] was entirely correct as a legal matter."[42] Curiously, he does not inform his readers that he was a signatory to the amicus brief.[43]

Perhaps Tribe considers his own previously formed beliefs about abortion irrelevant to the inquiry he undertakes. If so, he is mistaken, as his general approach to the book and his stated objectives show. If Tribe expects his readers to reexamine their beliefs, then fairness demands that Tribe reexamine his own values and beliefs and share this search with his audience.[44] How can Tribe's readers participate in this exercise with him

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[37] Curious readers must resort to the Acknowledgement section or the book jacket to discover *anything* about the author. They could infer that he is a professor at Harvard Law School from the fact that Tribe thanks his law students for their assistance. See L. Tribe, supra note 3, at xv-xvi. The book jacket supplies additional information about his prior publications and appellate advocacy before the Supreme Court. However, no mention is made of Tribe's particular interest in or prior position on the question of abortion rights.

[38] In labeling Tribe's position as pro-choice, my intent is not to suggest that Tribe necessarily represents all views on the pro-choice continuum, but rather that his ceaseless defense of a woman's constitutional right to abortion places him on the pro-choice end of the abortion beliefs continuum.

[39] See L. Tribe, supra note 34, at 1337-62. This second edition of his treatise was published in 1988, one year prior to the publication of *Abortion: The Clash of Absolutes*.

[40] See Brief Amicus Curiae of Senator Bob Packwood (R-Ore.), Representative Don Edwards (D-Cal.), and Certain Other Members of the Congress of the United States in Support of Appellees, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (No. 84-495; No. 84-1379), available in LEXIS, Genfed Library, Briefs file.

[41] See Brief for a Group of American Law Professors as Amicus Curiae In Support of Appellees at app., Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605), available in LEXIS, Genfed Library, Briefs file.

[42] L. Tribe, supra note 3, at 82.

[43] See id.; see also id. at 250 n.7.

[44] Tribe repeatedly uses the pronouns "we" and "us" in Chapter 1. See, e.g., id. at 8 ("*[W]e* may come to see new ways to understand the issue.") (emphasis added); id. ("If each of *us* reexamines the complex issues that make up the question of abortion, *we* may yet find more

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if they are not given his starting point?

This is not to say that Tribe's readership has a right to expect that he will be neutral on the subject of abortion.[45] But they do have the right to expect that he disclose any information that would help his readers assess whether he keeps his promise to explore all angles of the abortion question.[46] Laurence Tribe's failure to disclose openly his starting position is a breach of trust with his readers, whether they be pro-choice, pro-life, or something in-between.[47]

A. Tribe on Abortion: An Overview

The ways in which authors choose to provide order and structure to their words and ideas as they create books say much about how they themselves view the subject of their writing. Tribe's promises early on engender expectations that this book will range far and wide to cover new ground in the abortion debate. A brief survey of the chapter titles elicits some hope that he will deliver on his promises.[48] But in one key

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common ground than *we* currently imagine.") (emphasis added).

[45] That Tribe believes that a woman's right to choose is a fundamental right protected by the Constitution, see L. Tribe, supra note 34, at 1337-62, does not disqualify him from examining the abortion question and searching for ways around the "clash of absolutes." In fact, his knowledge of and participation in the debate make him eminently suited to the inquiry he undertakes, provided he does not mislead his readers into believing that he begins his analysis from an uncommitted position.

[46] This is particularly important because Tribe has pledged that he does not seek to prove the correctness of any particular position. See text accompanying notes 29-32 supra.

[47] Tribe's decision to present (at least implicitly) his stance as neutral is particularly hard to square with his own words on the subject of neutrality. In the preface to the second edition of his constitutional law treatise, he stated:

> It should be plain by now that I do not shrink from offering forthright opinions in this book. For me, the morality of responsible scholarship points not at all to the classic formula of supposedly value-free detachment and allegedly unbiased description. Instead such morality points to an avowal of the substantive beliefs and commitments that necessarily inform any account of constitutional arguments and conclusions. . . . Because such views are openly presented, and because I believe the contrary views are fairly considered, the decision to forego an illusory neutrality can enhance the value of the book to all readers, who whether they agree, dissent, or wonder at any given point will know more of the values that may have influenced a particular judgment, which at bottom can never stand solely on a neutral base.

L. Tribe, supra note 34, at viii-ix.

[48] The chapters are:

Chapter 1: Approaching Abortion Anew
Chapter 2: From *Roe* to *Webster*
Chapter 3: Two Centuries of Abortion in America
Chapter 4: Locating Abortion on the World Map
Chapter 5: Finding Abortion Rights in the Constitution
Chapter 6: The Equation's Other Side: Does It Matter Whether the Fetus Is a Person?
Chapter 7: The Politics of Abortion: From a New Right to the "New Right"
Chapter 8: The Politics of Abortion: The Pro-Life Advocates in Power

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sentence in the first chapter, Tribe dims such hopes and foreshadows for his readers the narrow content of the remainder of the book. He writes, "Inevitably then, this is a book about constitutional law."[49]

His conclusion is counterintuitive, given his pledge to explore the moral, philosophical, medical, and legal bases for abortion beliefs with an eye to finding a way around the clash of absolutes.[50] The readers understand the Supreme Court's decisions from *Roe* to *Webster* to be the catalyst for the book, not its beginning, middle, and end. A review of the Supreme Court's approach to abortion, even one as forceful and persuasive as the one Laurence Tribe ultimately presents in subsequent chapters, simply cannot meet the objectives he lays out at the start. It is a necessary and useful part of this book, but as background or a stepping stone rather than the focal point of his work.[51]

Whether Tribe's readers approve of his approach, they should at least be thankful that he explicitly states his focus on constitutional law, because it will assist them in making sense of the remainder of the book. Professor Tribe begins by introducing the Supreme Court opinions from *Roe* to *Webster*.[52] In the next two chapters, he proceeds to examine the history of women and abortion in the United States and other nations' approaches to this issue.[53] Such historical and comparative analyses are useful, according to Tribe, because values and beliefs about abortion are social constructs—points on a temporal and spatial continuum.[54] He observes, for example, that Americans have not always viewed the woman's right to liberty and the fetus's right to life as unalterably opposed.[55]

Chapter 9: In Search of Compromise

Chapter 10: Beyond the Clash of Absolutes.

L. Tribe, supra note 3, at ix-xiii.

[49] Id. at 7.

[50] See id. at 8-9.

[51] Tribe's decision to frame his book around constitutional law would be justified if he proposed to give his readers some new way of looking at the Constitution and the question of abortion rights, perhaps foreshadowing the Supreme Court's decision in *Casey*. But he does not propose a constitutional "solution" that differs substantially from the one created by Justice Blackmun in *Roe*. See note 104 and accompanying text infra.

[52] Unfortunately, the writing is uneven and the chronology is difficult to follow. Although he begins with an explanation of the *Roe* decision, Tribe exhibits a disconcerting tendency to interrupt his explication with wandering descriptions of the various Justices which travel back and forward in time. For example, in the space of one paragraph, readers learn that Justice Blackmun authored the Court's opinion in *Roe*, had been a court of appeals judge, was earlier general counsel for the Mayo Clinic, has always been regarded as "an extraordinarily kind man," is "more judicious than political," turned 82 in 1990, and has become a member of the liberal wing of the Court. See L. Tribe, supra note 3, at 11. From there, readers are returned to an analysis of *Roe*'s trimester framework, interrupted at points by mini-biographies of Justices Rehnquist, White, and Powell. See id. at 11-13.

[53] See id. at 27-76.

[54] See id. at 27.

[55] See id. Tribe supports his view of history with citations to the works of both historians

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Thus, history and comparative analysis may offer insights into different ways of thinking about abortion.

One would expect this to be a key point in a book devoted to a search for alternative, less absolute ways to view the question of abortion rights. But Tribe squanders his opportunity by using these chapters merely as a means to a predetermined end.[56] His approach eschews true narrative, merely summarizing superficially the conclusions of others.[57]

The derivative nature of these chapters results in illustrations that seem strangely sterile and detached when compared with the works of scholars who have researched these topics independently.[58] It is perhaps not surprising that Tribe does not match the scholarly achievements of historians, social scientists, and law professors who have spent years researching and writing entire books on the history and comparative aspects of abortion. Tribe could rightly argue that such complexity and depth would be inappropriate given his intended audience.

The greater problem lies in what he does, or rather, what he does not do with the historical and comparative data he relates. His readers have been led to expect that he will use this information as a way to explore alternatives to the clash of absolutes. But, when Tribe finally completes his summary and begins to integrate history and cross-cultural

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and social scientists. See, e.g., K. Luker, supra note 26; James C. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900 (1978). The gist of Tribe's observation is that abortions early in pregnancy were common in the United States until restrictive abortion laws were passed in the mid-nineteenth century, see L. Tribe, supra note 3, at 28-34, and that it was not until the late nineteenth century that the Roman Catholic Church took the position that the fetus was a person, thus equating abortion with homicide, see id. at 31-32.

[56] For a discussion of the "end" that Tribe is seeking, see text accompanying notes 91-132 infra.

[57] In a footnote, Tribe informs his readers that his point of departure for much of the chapter is an amicus brief entitled "Brief of 281 American Historians as Amici Curiae Supporting Appellees in Webster v. Reproductive Health Services." L. Tribe, supra note 3, at 244 n.1. At least one commentator has criticized Tribe for treating a pro-choice brief as scholarship. See Michael W. McConnell, How Not To Promote Serious Deliberation About Abortion, 58 U. Chi. L. Rev. 1181, 1183 n.4 (1991) (book review). To the extent that the amicus brief accurately represents the scholarly work of the historian signatories, the criticism seems unfounded. But see id. (referring to a controversy over whether historian James C. Mohr's scholarship was accurately represented in the brief). The crucial issue is whether, to the extent that there are disagreements among scholars, Tribe presents an even-handed view of the history of abortion in America. To this end, McConnell further criticizes Tribe for failing to refer to any of a number of scholarly works that take a different view of the history of women and abortion in the United States. See id. This criticism is more to the point. For further development of the thesis that Tribe assumes the position of an advocate while posing as a mediator or conciliator of the dispute, see Part I.B infra.

[58] For example, when Kristin Luker explores the historical role of the medical profession in shaping societal responses to abortion, the story resonates with complexity and nuance. See K. Luker, supra note 26, at 11-39. In contrast, although Tribe tells his readers that the medical profession's motivations were complex, his description of them fails to convey that complexity. See L. Tribe, supra note 3, at 30-31.

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comparisons into his thesis, his readers are told nothing of the possibilities of compromise or common ground. Instead, Tribe advances the position that *Roe* was necessary to protect abortion rights and then closes the chapter by using the history of the abortion reform and repeal movements to "prove" his point.[59]

In a parallel manner, he concludes the chapter on comparative law by rejecting the Western European approaches to abortion as unwise and unworkable.[60] And through it all, he throws in without explanation cryptic comments about "lurk[ing] social and cultural forces,"[61] "deeply

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[59] Between 1967 and 1973, 19 states amended their restrictive abortion laws. See Mary Ann Glendon, Abortion and Divorce in Western Law 48 (1987). Many of these reforms were modeled after the American Law Institute's Model Penal Code, which permitted abortions in such circumstances as rape, incest, serious physical or mental defect of the fetus, or grave impairment of the physical or mental health of the mother. See L. Tribe, supra note 3, at 42. In addition, Alaska, Hawaii, New York, and Washington went further and repealed their criminal abortion statutes as to abortions performed in early pregnancy. See M. Glendon, supra, at 49. Professor Mary Ann Glendon, a colleague of Tribe's at Harvard, uses these facts to argue that the Supreme Court's decision in *Roe* interrupted a wave of state abortion reform that ultimately would have protected women's right to choose to terminate a pregnancy. See id. at 48-49. Thus, she sees *Roe* as unnecessary and counterproductive. Cf. Ginsburg, supra note 20, at 1205-09 (making similar argument about *Roe*'s interference with a trend of legislative abortion reform). Tribe disagrees, finding the trend toward reform in the 1960s and 1970s to be both weak and piecemeal. See L. Tribe, supra note 3, at 49-51.

Professors Tribe and Glendon disagree on an even more fundamental level. Tribe would argue that even if the movement toward legislative reform were strong, judicial resolution of the abortion issue is mandated by our form of constitutional government. In his view, fundamental rights may not be submitted to a vote or made to depend upon the political process. See L. Tribe, supra note 34, at 1351. In contrast, Glendon would rely upon the democratic political process to produce compromise legislation on abortion, such as statutes that permit early abortions but restrict later ones. See M. Glendon, supra, at 47, 49. But see note 19 supra (discussing highly restrictive state abortion laws actually passed by states in the wake of *Webster*).

[60] See L. Tribe, supra note 3, at 73-75. Glendon, in her study of abortion law in Western Europe, develops her thesis that compromise positions on abortion are best achieved through the democratic legislative process. See M. Glendon, supra note 59, at 10-39. While the Western European countries are arrayed on a continuum from very strict to quite lenient abortion statutes, the middle range reflects, in Glendon's view, the majority sentiment that early abortions should be allowed but that abortion should always be treated as a serious matter. See id. at 49. She criticizes the rights-based system of American constitutional jurisprudence which tends (at least prior to *Casey*) to result in clear winners and losers in the abortion battle. See id. at 49-50.

Tribe rejects the European model on a number of grounds. First, in his view, statutes that value fetal life in principle but not in practice denigrate the rule of law and erode the public's confidence in the legal system. See L. Tribe, supra note 3, at 73-74. Second, the United States is uniquely a rights-centered culture that values personal autonomy over government decisionmaking. See id. at 74. Third, the poor and the politically disempowered are unlikely to be protected by the legislative process. See id. at 75. Fourth, consistent reforms could not be achieved legislatively in the United States, which is more politically and culturally heterogeneous than Western Europe. See id.

[61] L. Tribe, supra note 3, at 76.

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held, sometimes hidden, views about the needs of society,"[62] and "rationalizations for policies that serve nonabortion-related interests."[63]

Tribe is finally in his element at the point that he throws off his detachment and gives a stirring defense of *Roe*. The writing no longer has a derivative feel because this is his world. At the center of the book and of Tribe's world view is the Constitution, and central to the Constitution according to Tribe is the fourteenth amendment and the right to privacy. Thus, he constructs piece by piece a seemingly impenetrable wall around *Roe*.[64]

He organizes his analysis around objections that have been made to *Roe*, beginning with what he labels as the "simplest argument" against the decision, that the issue of abortion should be returned to the legislative arena.[65] This is a "simple argument" only because Tribe mischaracterizes it. The discussion that ensues is a defense of the judiciary's power to interpret the Constitution and act in a countermajoritarian manner by striking down unconstitutional legislation.[66] When opponents claim that *Roe* is antidemocratic, however, they do not question the Supreme Court's holding in *Marbury v. Madison*[67] that the judiciary has the power to interpret the Constitution. They argue instead that the Court erred in its interpretation of the Constitution when it found therein a fundamental right to choose an abortion.[68]

Tribe confronts this objection again after an historical examination of the *Lochner*[69] era and whether the fourteenth amendment due process clause provides substantive as well as procedural protections.[70] He recognizes that the question of whether *Roe* was correctly decided is a multipart question. First, assuming "liberty" in the due process clause[71] does protect substantive rights, does it protect unenumerated rights?[72] If so, does it include protections for the right to privacy?[73] If so, does the right to privacy include a woman's right to choose to terminate a preg-

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62 Id. at 53.

63 Id. at 52. For a discussion of the meaning of these cryptic quotations see text accompanying notes 131-35 infra.

64 See L. Tribe, supra note 3, at 77-112. For an additional critique of Tribe's constitutional analysis, see Part I.B infra.

65 L. Tribe, supra note 3, at 80.

66 See id. at 80-81.

67 5 U.S. (1 Cranch) 137, 177-79 (1803).

68 See note 81 infra.

69 Lochner v. New York, 198 U.S. 45 (1905).

70 See L. Tribe, supra note 3, at 83-86.

71 "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

72 See L. Tribe, supra note 3, at 88-90.

73 See id. at 92-101.

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nancy?[74] If so, is that right fundamental?[75] And if so, does the trimester framework correctly balance the woman's and the State's interests in the abortion context?[76]

Out of all of these questions, Tribe devotes much of his time and energy to the first question, attacking the relatively extreme position of Judge Robert Bork,[77] who believes that the fourteenth amendment due process clause incorporates only the substantive rights specifically enumerated in the Bill of Rights.[78] By playing off Judge Bork's position, Tribe is able to illustrate with a "parade of horribles" what the world might look like if constitutional protection extended only to enumerated rights. He warns of abuses of government power that could lead to the banning of birth control,[79] or in the opposite direction, eugenics and government-mandated abortions or sterilizations to control population growth.[80]

Tribe's criticism of Judge Bork's position is well-taken. But his lengthy refutation of Judge Bork is at the expense of the other perhaps more critical questions, particularly whether the right to privacy includes the right to choose an abortion. By attacking an extreme argument, Tribe draws his readers' attention away from more moderate positions.

One such position is reflected in the criticism most frequently leveled against *Roe*.[81] This view holds not that the Constitution provides no protection for privacy rights at all but rather that the Court in *Roe* worked an unwarranted extension of the privacy right cases, particularly *Griswold v. Connecticut*[82] and *Eisenstadt v. Baird*.[83] Tribe does not ade-

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74 See id. at 101-04.

75 See id. at 90-104.

76 See id. at 109-10.

77 See id. at 82-92.

78 See Robert H. Bork, The Tempting of America 31-32 (1990); cf. Rochin v. California, 342 U.S. 165, 174-77 (1952) (Black, J., concurring) (maintaining that due process clause of fourteenth amendment incorporates only specific guarantees of Bill of Rights); Adamson v. California, 332 U.S. 46, 90-92 (1947) (Black, J., dissenting) (same).

79 See L. Tribe, supra note 3, at 95.

80 See id. at 111-12.

81 See, e.g., Webster v. Reproductive Health Servs., 492 U.S. 490, 520 (1989) (Rehnquist, C.J.) (plurality opinion) (distinguishing *Roe* from *Griswold* and arguing that right to choose abortion is a liberty interest rather than a fundamental right); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting) (stating that woman's decision whether to terminate pregnancy is a liberty interest "different in kind from the [decisions] that the Court has protected under the rubric of personal or family privacy and autonomy"); Roe v. Wade, 410 U.S. 113, 174-77 (1973) (Rehnquist, J., dissenting) (opining that right to choose abortion is not a fundamental right protected by fourteenth amendment due process clause).

82 381 U.S. 479 (1965). In *Griswold*, the Court struck down a portion of a Connecticut statute prohibiting the use of contraceptives by married couples. Id. at 481-86. In discussing the right to privacy, the Court stated, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is

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quately address this argument but merely declares, "What is really protected as a fundamental right in the contraception cases is the right to engage in sexual intercourse without having a child."[84] Because he construes the holdings of *Griswold* and *Eisenstadt* in this broad fashion, he has no difficulty arguing that *Roe* was a logical extension of those cases. However, he evades the critical issue: did those cases stand for a narrower definition of the privacy right, and, if so, was Justice Blackmun's reliance in *Roe* on that line of cases inappropriate?[85] Answers to these questions are crucial because they determine whether *Roe*'s fall would necessarily herald the demise of the other, less controversial right-to-privacy cases.[86]

After Tribe completes his defense of *Roe* by considering the extent to which the fetus might have no protection under the Constitution—it should by now come as no surprise to the readers to discover that fetuses are entitled to very little constitutional protection[87]—he offers an exhaustive but almost purely descriptive picture of the modern politics of abortion.[88] Tribe's primary point seems to be that while some politicians were elected in the past almost entirely on the basis of their pro-life stance, they now stand to lose entirely on that basis.[89] What this contrib-

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repulsive to the notions of privacy surrounding the marriage relationship." Id. at 485-86. Some commentators have argued that the holding of *Griswold* was concerned with governmental intrusion into the privacy of the home and marital bedroom rather than a broader right to reproductive freedom and decisional privacy. See, e.g., John H. Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920, 930 (1973).

[83] 405 U.S. 438 (1972). In *Eisenstadt*, the Court struck down on equal protection grounds a Massachusetts statute permitting married people, but not unmarried people, to have access to contraceptives. Id. at 454-55. The Court stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.

[84] L. Tribe, supra note 3, at 94.

[85] See, for example, John Hart Ely's famous article, supra note 82, at 931, criticizing the Court for failing to articulate its rationale for relying on the contraceptive cases, particularly *Griswold*, for the privacy right upheld in *Roe*.

[86] Tribe does quote Professor Charles Fried who argued for the United States as amicus curiae in *Webster* that the contraceptive cases could stand even if the Court overturned *Roe*. See L. Tribe, supra note 3, at 95. However, Tribe dismisses Fried without explaining on what theory Fried had premised his argument or the basis for Tribe's disagreement. See id. Tribe notes that of the four Justices who would apparently vote to overrule *Roe*, none has expressed disagreement with *Griswold*. See id. at 94. Tribe again fails to explore why these Justices might find the contraceptive cases distinguishable from *Roe*.

[87] Tribe first asks the question whether the fetus is a person for purposes of the Constitution and takes an inappropriately brief look at religion, science, and the Constitution for an answer. See id. at 115-25. He then argues that even if the fetus is a person, the woman's liberty interest would still prevail under the equal protection clause and common law autonomy values. See id. at 129-35; notes 114-17 and accompanying text infra.

[88] See L. Tribe, supra note 3, at 139-96.

[89] See id. at 161-96 (summarizing political maneuvering within pro-choice and pro-life camps).

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utes to the search for compromise is anyone's guess.

B. *Reading Between the Lines*

Tribe began this book by presenting himself in the role of a mediator.[90] He ostensibly sought to facilitate communication and understanding while assisting society in a search for a solution to the abortion conundrum. In return he asked that his readers undertake to examine the abortion issue with open minds. But, first subtly and then not so subtly, Tribe shifts to the role of a pro-choice advocate, demanding an even higher price from his readers.[91] It is not enough that they approach the debate with sensitivity and a desire to learn—they must also agree with his legal conclusions.[92] This seems a very high price to pay, particularly since persuasion was not a part of the original bargain.

In order to observe Tribe's shift in roles, one need simply read each chapter with an eye to how it advances Tribe's constitutional argument. Chapter Two, *From Roe to Webster*,[93] is a brief summary of Supreme Court abortion precedents, which sets the parameters of his constitutional analysis. Chapter Three, *Two Centuries of Abortion in America*,[94] is a description of how inevitable and necessary the decision in *Roe* was from an historical perspective. Chapter Four, *Locating Abortion on the World Map*,[95] explains how much superior the Supreme Court's solution in *Roe* was to any other nation's. Chapter Five, *Finding Abortion Rights in the Constitution*,[96] and Chapter Six, *The Equation's Other Side: Does It Matter Whether the Fetus Is a Person?*,[97] explain and justify *Roe* and its progeny. Chapter Seven, *The Politics of Abortion: From a New Right*

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[90] See Jean Braucher, Tribal Conflict Over Abortion, 25 Ga. L. Rev. 595, 608 (1991) (book review). A mediator is a neutral third party who assists people in resolving disputes by helping them reach solutions satisfactory to both sides. Because the mediator works with and for both sides, trust is an essential element of the mediation process. See Stephen B. Goldberg et al., Dispute Resolution 91-123 (1985) (describing role of mediator in dispute resolution).

[91] In sharp contrast to the role of a mediator, an advocate represents and speaks for only one side in a dispute. The advocate's primary duty is to advance the interests of the client and prevail over the opposition. Again, in labeling Tribe a pro-choice advocate, this author's intent is not to suggest that Tribe necessarily represents all views on the pro-choice continuum, but rather that his arguments place him on the pro-choice end of the abortion continuum.

[92] See L. Tribe, supra note 3, at 128-29. ("But it is vital, morally vital, to see the force of the argument that an amendment to our Constitution would be required to [endow the fetus with the status of person] . . . . Of course, the Supreme Court of the United States might disagree; it might continue its retreat from *Roe v. Wade* . . . . But such a decision by the Supreme Court would be indefensible . . . .").

[93] Id. at 10-26.

[94] Id. at 27-51.

[95] Id. at 52-76.

[96] Id. at 77-112.

[97] Id. at 113-38.

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to the "New Right,"[98] and Chapter Eight, *The Politics of Abortion: The Pro-Life Advocates in Power*, show how dangerous it is to allow people who disagree with *Roe* to wield political power. Chapter Nine, *In Search of Compromise*,[99] explains that the only acceptable compromise is *Roe*. And Chapter Ten, *Beyond the Clash of Absolutes*,[100] reveals that those who disagree with *Roe* are morally suspect. It is no wonder that by the time his readers finish they feel pressed to agree with his position. This is not an investigatory book; it is an unrelentingly argumentative brief.

Moreover, it is a brief written by an astute lawyer well-versed in the art of advocacy and persuasive writing. The strategies and tactics he uses are so numerous that only a few of them will be discussed here.[101] First, Tribe does not begin explicitly with his constitutional argument. In a tactic frequently used by lawyers to lull the opposition, he leads up to his position slowly but inexorably, so that by the time his conclusions come, they appear to be not only logical but inevitable as well. The placement of the chapters on the Constitution in the middle of the book is no accident. Everything that comes before leads to his defense of *Roe*, and everything that follows harkens back to it.

Second, Tribe's stance throughout is consistent with the principle that a good attorney never makes the case for the other side.[102] His frame of reference for every story he tells, every issue he discusses, and every concern he raises is the woman's.[103] The power of this type of discourse is that it tells a cohesive and coherent story, but it does so at the expense of complexity, nuance, and principled contrary arguments.

Third, Tribe characterizes the Supreme Court's decision in *Roe v. Wade* as a compromise.[104] This is an ingenious and effective rhetorical

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98 Id. at 139-60.

99 Id. at 197-228.

100 Id. at 229-42.

101 Written advocacy takes many forms, and has both substantive and procedural components. If one had the time and inclination, one might dissect this book and find evidence of Tribe's advocacy position on the basis of book title, word choice, sentence structure and order, paragraph structure and organization, heading and subheading choices, chapter titles and organization, style, tone, choice of subject matter, form of narrative, and point of reference.

102 See McConnell, supra note 57, at 1183 (noting that Tribe's endnotes cite over 30 scholarly books and articles authored by abortion rights proponents but only four anti-abortion scholarly works).

103 This is not to say that Tribe avoids all mention of the interests of the fetus. But when interests other than the woman's are discussed, they are quickly neutralized by a refutation or an argument pushed to its logical extreme. See, e.g., L. Tribe, supra note 3, at 120-25 (analyzing ramifications of fetus as constitutional person, which include State being compelled to treat all abortion as murder, mandatory criminal punishment of woman, no exception if life of woman were in danger, reversal of Court's contraception decisions, constitutional protection for frozen embryos under a "best interests of the embryo standard," mandatory medical treatment for fetus despite pregnant woman's objection, etc.).

104 Id. at 78 ("For all the talk of possible future compromises, it must not be forgotten that

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move because it recasts the Supreme Court's holding in *Roe* as a possible solution to the very problem Tribe sets out to solve. Such advocacy through the skillful use of rhetoric is a powerful weapon in any context but even more so when practiced on a trusting and unsuspecting audience.

Although the Supreme Court in *Planned Parenthood v. Casey* recently found a basis in the Constitution for compromise that differs from *Roe*,[105] Tribe evidently did not see the possibility of a different framework for constitutional compromise. While Tribe could not have been expected to predict the change in Court personnel or the emergence of a moderate coalition, Justice O'Connor has been openly advocating a different middle position in constitutional abortion jurisprudence for a number of years.[106] Yet in his book, Tribe states merely that Justice O'Connor has "displayed a distinctive view of the meaning of *Roe*" in arguing that "a regulation imposed on an otherwise lawful abortion is unconstitutional if it imposes what she describes as an 'undue burden' on a woman's abortion decision."[107] He never discusses her position in the

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Roe itself represented a compromise."); see also id. at 197 ("[I]t seems fruitful to explore the grounds for a political compromise other than the one reached in *Roe* itself, a compromise that has seemed unsatisfactory to many."); see also Frances Olsen, Unraveling Compromise, 103 Harv. L. Rev. 105, 107 (1989) (describing *Roe* as a compromise because it legalized abortions but still allowed states to control women's bodies and limit some of their procreative choices). But see Braucher, supra note 90, at 596 (asserting that limiting legal abortions only after fetal viability is a pro-choice position rather than a compromise).

Tribe is technically correct when he suggests that *Roe* falls somewhere between a holding that a woman has an absolute right to control her body and a holding that the State's interest in the fetus always prevails over a woman's interests. However, the holding in *Roe* that the woman's right to choose is fundamental, see Roe v. Wade, 410 U.S. 113, 153 (1973), together with the creation of the corresponding trimester framework, see id. at 162-65, left the State powerless as a practical matter to effectuate its interest in potential life in any meaningful way prior to viability. *Roe* did represent a true compromise in that it affirmed the power of the states to regulate abortion to protect the woman's health and to prohibit abortions after fetal viability. See id. at 63. While relevant to a discussion of government's power to regulate abortion in general, the maternal health aspect of that compromise is irrelevant to the debate over the rights of the pregnant woman vis-à-vis the fetus.

Further, Tribe's characterization of *Roe* as a compromise seems particularly surprising given his rejection, see L. Tribe, supra note 3, at 75, of Mary Ann Glendon's view that laws which incorporate language recognizing the value of fetal life serve both useful interpretive (reflecting people's conduct and beliefs) and constitutive (likely to affect people's conduct and beliefs) functions. See M. Glendon, supra note 59, at 58-62. Tribe responds that "[t]o anesthetize through rhetoric those who wish to protect fetal life . . . is a far cry from genuinely protecting fetal life or its value. Merely to affirm in law a sense of responsibility to new life is a far cry from actually treating that life with respect." L. Tribe, supra note 3, at 75. Yet Tribe is guilty of just such anesthetization when he uses rhetoric to persuade his readers that *Roe* represents a satisfactory compromise.

105 See discussion in notes 5-14 and accompanying text supra.

106 See notes 9, 13 and accompanying text supra.

107 L. Tribe, supra note 3, at 23.

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later constitutional law chapters.[108] This is not the type of in-depth analysis called for in a book ostensibly devoted to a search for alternative positions.[109]

In a different vein, Professor Jean Braucher criticizes Tribe for expressing doubts about the morality of abortion.[110] She terms this Tribe's willingness to "compromise on rationale but not on result."[111] Her stated concern is that by giving credence to the notion that abortion is of questionable morality, he gives too much ammunition to abortion opponents.[112]

While Tribe may actually harbor doubts about the morality of abortion, a different explanation is equally plausible.[113] He may simply be using the standard advocacy technique of conceding a point that costs little, at least in his view, in order to give the appearance of reasonableness and flexibility. From Tribe's perspective, as long as his readers are willing to accept the constitutional argument, then a woman's right will be protected regardless of anyone's views about the morality of abortion. Thus, throwing in a few phrases about the doubtful morality of abortion costs little compared to the benefits of appearing to compromise on the question.

Tribe makes a secondary argument that even if the fetus were a "person" under the fourteenth amendment, the law would still support abortion rights based on principles of autonomy and equal protection.[114] Professor Braucher argues that his use of this "even if" argument further

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108 Tribe does mention O'Connor and the undue burden standard again in Chapter 9 in the context of predicting an outcome in a parental consent case, but he does not examine the standard in any detail. See id. at 202.

109 See text accompanying notes 29-32 supra.

110 See Braucher, supra note 90, at 610 (criticizing Tribe's view that *Roe*'s "ultimate moral rightness" is "less clear" than its constitutional defensibility).

111 Id. at 608.

112 See id. at 596.

113 The theory that Tribe's statements present true internal ambivalence is undercut by his suggestion in later chapters that much of what underlies opposition to abortion is traditional sexual morality and a desire to control women. See L. Tribe, supra note 3, at 234; see also text accompanying notes 133-36 infra. This suggests strong skepticism on his part regarding the existence of any principled moral opposition to abortion. In addition, one would expect *ab initio* that individuals harboring moral doubts about abortion would be willing to affirm the value of fetal life in principle even if not in legal practice. Yet Tribe's response to Glendon's view of the value of such life-affirming legal rhetoric is to label it hypocritical. See id. at 73-74; see also note 104 supra.

114 See L. Tribe, supra note 3, at 129-35. He uses a hypothetical developed by Judith Jarvis Thomson, in which the reader is asked to imagine waking up and finding herself attached to a famous violinist who has kidney failure and needs the use of the reader's circulatory system for several months in order to survive. See Judith Jarvis Thomson, A Defense of Abortion, 1 J. Phil. & Pub. Aff. 47, 48-49 (1971). Analogizing this situation to pregnancy, Tribe agrees with Thomson that even if the fetus is a person, the law would not compel the woman to remain attached to the fetus. See L. Tribe, supra note 3, at 130.

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illustrates Tribe's doubts over the morality of abortion.[115] She believes the argument "indicates that Tribe's legal rationale is constructed on the assumption that the fetus is a legal person."[116] However, Braucher ignores some key language in Tribe's analysis. Tribe begins, "*If we were to assume for the sake of discussion* that fetuses are separate persons, would it necessarily follow . . . ?"[117] Tribe has not conceded that the fetus is a person; he has simply assumed it for the sake of argument. Thus the more likely explanation for Tribe's use of the "even if" argument is one based on advocacy. Tribe is attempting to refute a pro-life argument by hypothetically adopting the fetus-as-a-person position and "proving" that the result must still be constitutional protection for a woman's right to choose.

Tribe's advocacy role is most apparent when he finally begins the search for compromise promised from the beginning.[118] Tribe clearly has a dilemma. How can he convince readers that his constitutional answer is the only acceptable one when he has specifically promised to explore compromise? The last thing that an advocate wants to do is give an audience additional options from which to choose. Tribe therefore first narrows the search for acceptable compromise by describing for his readers a world in which only two positions are permissible. Those two positions are reflected in the "absolutes" of Tribe's book's title: a belief in either (1) the woman's right to liberty or (2) the fetus's right to life.[119] Having effectively narrowed the choices to two, he then rejects various compromises as being incompatible with one position or the other. He has obviously predestined the failure of his search for compromise by giving absolute veto power to each side. What pro-choice or pro-life group would select a compromise given the hypothetical choice between it and their original position? The end result is that the readers are presented with Tribe's conclusion (also his starting premise) that there really are only two possible positions. And, of course, the pro-life and pro-choice positions are not created equal in Tribe's world.

Thus, Tribe dismisses consent requirements, notification provisions, waiting periods, limits on the reasons for which abortion will be allowed, restrictions on abortion funding, and earlier cut-off dates on the basis that they are either "cruel compromises" or "not compromises at all."[120] This dismissal raises two questions. First, how is "compromise" defined if *Roe* is a compromise and these types of statutes are not? Second, what

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115 Braucher, supra note 90, at 610.

116 Id. (footnote omitted).

117 L. Tribe, supra note 3, at 129 (emphasis added).

118 See id. at 197-228.

119 See id. at 1.

120 Id. at 208.

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is the referent for labeling these "cruel compromises"? Tribe's unrelenting focus on the woman and her liberty interest—his world view, if you will—prevents him from exploring seriously any possible compromises other than *Roe*.[121]

In his search for compromise, Tribe turns next to RU-486, an abortifacient drug unavailable in the United States but marketed in France.[122] His lengthy discussion of the drug suffers from the fact that Tribe allows the pro-life position to veto it: "[T]hose who oppose abortion from the moment of conception may well oppose it just as vehemently when it is performed with a simple pill."[123] He then commences a thought experiment, inviting readers to contemplate the development of an artificial womb.[124] What begins as an interesting examination of the theoretical difficulties of premising a woman's constitutional right to choose on notions of bodily autonomy—a concept whose relevance vanishes if the fetus and the woman can be physically separated—becomes just another attack on the pro-life position through the suggestion that some individuals who oppose abortion do so on the basis that "women represent cheap 'baby machines.' "[125]

Once Tribe has dispensed with possible compromises, he leaves his readers with the same two choices: fetal life or female liberty. He has earlier made it clear that the choice of liberty is the only legally defensible one. All that remains is for Tribe to make it clear that that same choice is morally required as well. Tribe accomplishes this by alluding to "truths" to be revealed about the values and beliefs that underlie the clash of absolutes, particularly those on the pro-life side of the equation:

> Yet if we recognize the nature of our beliefs, we may ultimately be better able to discern the social agendas implicit in the positions taken on each side of the abortion question.[126]
>
> Second, we shall see in some cases that moral tales societies tell themselves about abortion, the stories they incorporate in ethical or legal norms, are designed to serve apparently unrelated needs that societies feel. . . . While the views most of us hold about abortion, whether pro-life or pro-choice or a mix of both, are not *obvious* rationalizations for

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121 See text accompanying notes 164-67 infra.

122 See L. Tribe, supra note 3, at 215-20.

123 Id. at 215. For a discussion of RU-486, see notes 183-203 and accompanying text infra.

124 See L. Tribe, supra note 3, at 220-27. Interestingly, what Tribe proposed as a thought experiment may one day become reality. A Philadelphia obstetrician has recently patented an artificial uterus that is designed to suspend a prematurely born second trimester fetus in a liquid environment until its lungs mature sufficiently for survival outside the womb. See Sabra Chartrand, Patents; For Premature Babies Born in the Second Trimester, Hope of Survival in an Artificial Uterus, N.Y. Times, July 19, 1993, at D2.

125 L. Tribe, supra note 3, at 225-27.

126 Id. at 27.

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> policies that serve nonabortion-related interests, our views about what is the right way for American society to treat abortion may well reflect deeply held, sometimes hidden, views about the needs of society.[127]
>
> It seems certain that beneath the abortion debate in America, too, there lurk social and cultural forces of which we are at best dimly aware.[128]
>
> The primary argument in support of such a state prerogative [to treat fertilized ova as bearers of competing rights] is that from the very moment of conception the fetus is a person and is therefore a bearer of human rights. We will look later at some inconsistencies that make it seem unlikely that such a belief really does underlie the views of most people who want to restrict or prohibit abortions.[129]
>
> To the extent that a person is willing to do just about anything to stop abortion *except* prevent pregnancy, much is revealed about that person's *true* values and his or her reasons for opposing abortion, as we will see later in this chapter.[130]

Tribe scatters these hints of what is to come throughout the book. But he saves his frontal attack, his "exposure" of the pro-life movement, for the chapter entitled, ironically, *Beyond the Clash of Absolutes*.[131] There, he makes good his "threat" by exposing the "truth" behind opposition to abortion.[132]

His errors in logic are most easily understood if one starts from

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127 Id. at 52-53.

128 Id. at 76.

129 Id. at 115.

130 Id. at 213.

131 See id. at 229-42.

132 Tribe has no corresponding "truth" to offer about the pro-choice position. If the goal is to look for internal tensions in the abortion debate, Tribe might have examined the fascinating discourse that has taken place among feminist legal theorists. Catherine McKinnon, for example, rejects the doctrine of privacy rights because it assumes erroneously that non-interference by the State translates into autonomy and equality for women. See Catherine McKinnon, Feminism Unmodified 99-101 (1987). Andrea Dworkin details a position held by some antiabortionists that is based not on concern for the fetus but rather for the woman, in which abortion is viewed as increasing men's sexual access to women without reducing the fundamentally exploitive nature of the sexual relationship. See Andrea Dworkin, Right-Wing Women 102-103 (1983). Jean Braucher criticizes the use of Judith Jarvis Thomson's hypothetical, see note 114 supra, as a model for abortion rights because it represents an individualistic morality not consistent with the relational moral reasoning that underlies many women's abortion decisions. See Braucher, supra note 90, at 617-18. Sidney Callahan, a self-avowed pro-life feminist, uses this same relational theory to argue that "women can never achieve the fulfillment of feminist goals in a society permissive toward abortion." Sidney Callahan, Abortion and the Sexual Agenda, Commonweal, Apr. 25, 1986, at 232, reprinted in The Ethics of Abortion 131 (Robert M. Baird & Stuart E. Rosenbaum eds., 1989). She argues that abortion is inconsistent with feminism's basic demand for justice, see id. at 132-34, and that women's quest for social equality is inextricably linked to fetal rights, see id. at 136-42. Other feminist critiques use the principle of equality to justify abortion rights. For a summary of equal protection analysis as applied to abortion rights for women, see Olsen, supra note 104, at 117-21.

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Tribe's beliefs and works backwards. Tribe strongly believes that the pro-life position is premised in part on a "reflexive willingness" to enforce traditional sex roles upon women and to perpetuate traditional sexual morality.[133] He seems to think that he can prove this to be the case by showing that pro-life individuals do not really believe that the fetus is a person. To do this, he looks to a Harris opinion poll revealing that a majority of the people questioned who opposed abortion for an unmarried teenager seeking it because her " 'future life might be seriously affected' " supported abortion in cases of rape or incest.[134] From this, he concludes that antiabortion sentiment cannot be rooted entirely in the belief that abortion is the killing of an innocent person.[135] Then, from these and similar statistics, Tribe reasons that pro-life views about abortion must be based on something other than this belief. That something, he argues, is the desire to enforce traditional sex roles upon women.[136]

Tribe commits his first error by assuming that belief in traditional gender roles and in the fetus-as-person are mutually exclusive positions. Nothing could be further from the truth. Professor Kristin Luker has persuasively shown that pro-life activists have "an internally coherent and mutually shared view of the world," where women are thought to be intrinsically different from men and are valued in their roles as wives and mothers.[137] As part of this belief system, they view personhood as a " 'natural,' inborn, and inherited right rather than a social, contingent, and assigned right."[138] Thus, the notion of a fetus-as-person is a natural and logical extension of the pro-life value system. If belief in traditional gender roles and the fetus-as-person are not mutually exclusive beliefs

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133 See L. Tribe, supra note 3, at 237.

134 Id. at 231-32 (quoting Harris Poll, Jan. 29, 1989, at 2). The 1989 Harris Poll showed that 40% of the American public would oppose abortion in the case of a pregnant unmarried teenager " 'whose future life might be affected,' " while only 17% would oppose abortion in the case where pregnancy was the result of rape or incest. Id. From these figures Tribe calculates that almost 60% of those individuals who oppose abortion for the unmarried teenager support abortion in cases of rape or incest. Id. at 232.

135 See id.

136 See id. at 237-38.

137 K. Luker, supra note 26, at 159. Luker summarizes the pro-life world view as one where women are thought to be nurturing, caring, and self-sacrificing by nature—attributes which define their roles as wives and mothers. See id. at 159-61. She suggests that abortion violates the pro-life value system in three ways:

> First, [abortion] is intrinsically wrong because it takes a human life and what makes women special is their ability to nourish life. Second, it is wrong because by giving women control over their fertility, it breaks up an intricate set of social relationships between men and women that has traditionally surrounded (and in the ideal case protected) women and children. Third and finally, abortion is wrong because it fosters and supports a world view that deemphasizes (and therefore downgrades) the traditional roles of men and women.

Id. at 161-62 (emphasis omitted).

138 Id. at 157.

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but in fact are mutually inclusive, then Tribe simply cannot prove the former by negating the latter.

Tribe commits a second error when he fails to differentiate committed pro-life activists from the larger group of citizens who are neither actively pro-life nor pro-choice.[139] The pro-life position commands a relatively small percentage of supporters in the United States.[140] Thus, when Tribe points to an opinion poll showing that almost sixty percent of those who oppose abortion for the unmarried teenager would support abortion in cases of rape or incest,[141] he cannot properly draw the conclusion that pro-life activists do not really believe the fetus is a person.[142] Of those who oppose abortion for the unmarried teenager, more than forty percent also oppose abortion in the case of rape or incest. It is likely that committed, pro-life individuals are represented in the latter group, which has taken a position entirely consistent with the belief that the fetus is a person.[143]

The polls do suggest that a significant proportion of people in the United States would oppose abortion under certain circumstances but would support it under others.[144] Here, Tribe can properly conclude

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139 See notes 144-47 and accompanying text infra.

140 See note 177 infra.

141 See notes 134-35 and accompanying text supra.

142 While Tribe does not explicitly state this conclusion in this form, his frequent, fluid shifting between pro-life individuals and pro-life activists indicates that he considers these two groups interchangeable—fungible, if you will.

143 Tribe may be referring to the seeming inconsistency in the pro-life movement's willingness to propose and support restrictive abortion legislation that allows exceptions for cases of rape and incest. However, their willingness to accept a compromise position in order to lend it political viability does not call into question their beliefs as to the personhood of the fetus; this choice is merely an example of a preference for the lesser of two evils. The greater evil in their view would be legislation or Supreme Court jurisprudence that accords fetal life little or no protection. See M. Glendon, supra note 59, at 46.

Tribe himself provides a perfect example of this phenomenon. When the *Casey* decision came down, he commented, "This opinion makes sense and puts the right to abortion on a firmer jurisprudential foundation than ever before." Greenhouse, Telling Opinion, supra note 9, at A12. When confronted with comments by pro-choice individuals who found the decision appalling, Tribe responded, "What some of them may forget is how much worse things could have been and how much worse many of us had reason to suspect they would have been if Justices Souter and Kennedy had not joined Justice O'Connor to form a solid centrist plurality in this court." Abortion Ruling Satisfies None (National Public Radio broadcast, June 30, 1992), available in LEXIS, Nexis Library, Omni file. Tribe's support for a decision that markedly changes the standard of review and allows greater regulation of abortion does not call into question his belief that a woman's right to choose is a fundamental right. Tribe expresses support for *Casey* only because it is the lesser of two evils. For him the greater evil would have been an explicit rejection of *Roe* and the adoption of rational basis review of abortion regulations. Tribe revealed the relative nature of his support for *Casey* by later stating, "[T]he floor that the Court [in *Casey*] built under *Roe* was full of holes . . . . Only passage of the Freedom of Choice Act can remove them and restore the freedom women enjoyed before *Casey* . . . ." Laurence H. Tribe, Write Roe Into Law, N.Y. Times, July 27, 1992, at A17.

144 See L. Tribe, supra note 3, at 231-33 (citing polls which generally show less public toler-

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that this group does not seem to view abortion as the equivalent of murder. But Tribe commits a third error when he argues that what underlies this group's seemingly contradictory views about abortion is their desire to enforce traditional sexual morality and gender roles upon women.[145] These people are likely neither committed pro-life nor pro-choice activists, and yet Tribe, relying on Kristin Luker's study, seemingly attributes to them a world view that Luker ascribed to pro-life activists alone.[146] She did not study nor did she draw any conclusions about the beliefs of the majority of the people who occupy the middle of the abortion continuum.[147] Tribe seems to assume that belief in "traditional" gender roles and belief in fetal personhood exhaust the plausible reasons for opposition to abortion. This position is untenable, overlooking as it does the value many people attach to fetal life independent of any belief that the fetus is a person.[148]

The most ironic aspect of Tribe's faulty reasoning is that he did not need to prove his initial premise at all. The pro-life movement does not hide the fact that it views and values women differently from men nor that those beliefs include a traditional view of sex and morality. It is part and parcel of their world view, as is the belief that life, including fetal life, is sacred.[149] Given that, what could Tribe accomplish by implying that everyone who does not agree with him is sexist, unenlightened, and hypocritical? His dismissive methods do not lead to compromise or common ground, nor do they lead him to a solution that "maintain[s] respect for the deepest values on both sides of the equation."[150] Rather, his answer to the clash of absolutes is to insist that others adopt his world view. He concludes his book in a way that suggests he has accomplished everything he promised to do:

> So it is that a close look at the clash of absolutes may in the end reveal a sliver of light in a world of shadow. For if, in a moment of honesty with ourselves, we recognize—on either side of the question—that what is at stake is not really the absolute in whose name the battle has been fought, then we may get beyond our once intractable dispute about the question of abortion.[151]

Did Laurence Tribe recognize the misleading nature of this elaborate constitutional apologia when he crafted it? How could he not have?

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ance of abortions for reasons such as economic or personal hardship than for rape or incest).

145 See id. at 233-38.

146 See id. at 237-38.

147 See K. Luker, supra note 26, at 249-50 (explaining that she chose abortion activists as focus of her study because they tend to shape public debate).

148 See note 178 and accompanying text infra.

149 See L. Tribe, supra note 3, at 159-75.

150 Id. at 3.

151 Id. at 242.

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A skilled appellate advocate such as Tribe must surely recognize advocacy when he sees it, particularly when the persuasive writing is his own.

One way to assess Tribe's motives is to survey how other commentators have perceived his role. Jean Braucher states that "[i]t is hard to believe that Tribe really thinks he is offering a compromise."[152] She labels him a pro-choice advocate, but she criticizes him more for having presented a poor defense of the pro-choice position than for having adopted an advocacy role in the first place.[153] Robert Drinan does not speak directly to Tribe's role but describes the book as "Professor Tribe's calm and comprehensive story of abortion and the law."[154] Anita Allen states that Tribe writes "[w]ith an eye toward rehabilitating the right to choose,"[155] and she praises him for his "judicious defense of the liberal pro-choice perspective."[156] She does not remark on the contradiction between Tribe's stated goals[157] and his "judicious feminism." Stephen Carter refers to Tribe's "almost ringingly pro-choice"[158] rhetoric and notes the "tendency of the pro-choice perspective to dominate a book that strives to be even-handed."[159] His assumption is that Tribe intended to be unbiased but failed.

In one of the more interesting critiques, Isabel Marcus relates her own history with the abortion debate and then finds fault with Tribe's failure to do the same.[160] She remarks that "Tribe's volume is written in a voice which removes him from the fray. Law school colleagues will recognize its classic tenor instantly."[161] She does not, however, note that his use of such a voice masks his very real presence in the fray.

Michael McConnell goes much further than the others in attributing a motive. He concludes in his book review that Tribe was likely "indulg-

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152 Braucher, supra note 90, at 619.

153 See id. at 596. In Braucher's view, Tribe does not make a sustained argument. Id. at 602. She criticizes him for stereotyping the arguments of both sides but most of her critique is reserved for his failure to place the pro-choice position in its social context with a view of women as moral agents who choose abortions for moral reasons. Id. passim.

154 Robert F. Drinan, Abortion and the Law: A Problem Without A Solution?, 89 Mich. L. Rev. 1390, 1394 (1991) (book review).

155 Anita L. Allen, Tribe's Judicious Feminism, 44 Stan. L. Rev. 179, 183 (1991) (book review).

156 Id. at 179.

157 See text accompanying notes 29-32 supra.

158 Stephen L. Carter, Abortion, Absolutism, and Compromise, 100 Yale L.J. 2747, 2750 (1991) (book review).

159 Id. at 2751. Carter's concern over the biased nature of this book appears to be mitigated by his view that the clash *is* one of absolutes and that dialogue likely will not resolve it. See id. at 2765.

160 See Isabel Marcus, Many Realities, Many Words: Abortion and the Struggle over Meaning, 69 Tex. L. Rev. 1259, 1262 (1991) (book review) (questioning Tribe's motives for not revealing his "abortion location" to the reader but stopping short of drawing any conclusions).

161 Id. at 1262-63.

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ing in political calculation."[162] *Abortion: The Clash of Absolutes* is, in McConnell's view, Tribe's response to the threat of politically viable solutions to the abortion dilemma other than Tribe's own.[163] McConnell's hypothesis has much to recommend it. It would certainly explain Tribe's failure to disclose his prior association with the pro-choice position, the brief-like nature of his book, his almost exclusive reliance on pro-choice scholarship, and his search for hidden agendas in the pro-life position coupled with an almost unquestioning acceptance of pro-choice arguments. But this hypothesis is also immensely disturbing. The use of politics in the guise of professorial mediation on an issue as profoundly troubling as abortion, particularly when aimed at an audience least likely to recognize the intent to persuade, surely does nothing to enhance the integrity of the academy.

Without undercutting the strength of Professor McConnell's hypothesis, I would like to advance an alternative explanation that is at least slightly less disturbing. It arises from the groundbreaking work of Kristin Luker, who through interviews explores the values, beliefs, and lives of activists in the pro-life and pro-choice movements in California.[164] She states, "In the course of our interviews, it became apparent that each side of the abortion debate has an internally coherent and mutually shared view of the world that is tacit, never fully articulated, and, most importantly, completely at odds with the world view held by their opponents."[165] Tribe clearly accepts Luker's conclusions—he even uses them to challenge pro-life readers to recognize that their view of the world is what is largely behind their opposition to abortion.[166] But Tribe never—at least within the confines of his book—applies Luker's conclusions to himself. It is perhaps his world view, so strongly tied to his beliefs about the Constitution, which prevents him from even beginning to understand or write about those who believe differently, or to contemplate an outcome other than the one he advocates. Thus, the misleading nature of his book is perhaps the result of his failure to engage in self-discovery rather than an intentional attempt to lead his readers astray.[167]

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[162] McConnell, supra note 57, at 1200.

[163] Id. at 1200-02.

[164] See generally K. Luker, supra note 26.

[165] Id. at 159.

[166] See text accompanying notes 126-35 supra.

[167] Of course, this explanation does not relieve Tribe of his duty to represent accurately himself and his efforts, nor does it relieve his editor and publisher of their duty to ensure the same.

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II

DIFFERENT STORIES, DIFFERENT VISIONS

A. The Clash of Absolutes Reconsidered

A reviewer critical of Professor Tribe's efforts obviously has a mental picture of the book that should or might have been written. That vision necessarily depends upon the reviewer's own sense of what is needed to bring understanding or resolution to the abortion debate, which is of course dependent upon the reviewer's own values.[168] I acknowledge the value-laden nature of such a vision and the fact that it is much easier to imagine a book than to write one. But as someone who subscribes to neither the pro-choice nor the pro-life positions, I cannot help visualizing the book that might have been.[169]

What made *Abortion: The Clash of Absolutes* so intriguing from the outset is that it promised to do something more than revisit the all-too-familiar arguments advanced for public consumption by the pro-life and pro-choice movements. While Tribe might reasonably have taken a more in-depth, less superficial look at the underlying theories behind the pro-life and pro-choice positions, this too has been done before.[170] The real novelty in this book lay in its promise to explore the moral and legal bases for *other* positions.

What form might such an examination have taken? Professor Tribe might have organized his book's inquiry around four basic propositions. First, for certain individuals the clash between life and liberty presented by abortion *is* one of absolutes. These individuals' unwillingness to compromise their values for the sake of finding a middle ground should be neither surprising nor particularly troubling. For them, compromise,

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168 Thus, Jean Braucher finds the book especially disappointing because Tribe "missed the opportunity to present a clear explanation to an audience receptive to the pro-choice side of the abortion controversy in its social context." Braucher, supra note 90, at 607. Conversely, Michael McConnell criticizes Tribe for missing the opportunity as a pro-choice scholar to "present the pro-life position fairly." McConnell, supra note 57, at 1182.

169 Tribe appeared to invite individuals such as myself, whose beliefs locate them somewhere in-between those of pro-choice and pro-life activists, to enter into the abortion discourse. See L. Tribe, supra note 3, at 8-9. How disappointing to be left standing outside once more. In stating that my beliefs do not fall within either the publicly stated pro-life or pro-choice positions, it is necessary that I define my working definitions for those positions. While the pro-choice and pro-life positions are complex, each of them has a central core. For the pro-choice movement, that core is that the decision whether to terminate a pregnancy is the woman's (at least until viability), whether that conclusion be premised on notions of autonomy, liberty, privacy, sexual equality, relational feminism, or something else. For the pro-life movement, the core belief is that the fetus is a person with the same moral and legal claim to life that each of us has.

170 See generally, e.g., Abortion: Understanding Differences (Sidney Callahan & Daniel Callahan eds., 1984); K. Luker, supra note 26; The Ethics of Abortion (Robert M. Baird & Stuart E. Rosenbaum eds., 1989); Catherine Whitney, Whose Life? (1991).

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which here would protect an absolute value only partially, is by definition defeat. Second, if the goal is to discover alternatives in a moral sense, the search must sweep more broadly than the stereotyped absolutist positions of life and liberty. It must look beyond the political positions presented to the media or the legal responses represented in statutes and litigation, which reflect imprecisely, if at all, the range of views and beliefs about abortion. Third, the discovery of moral positions that operate somewhere between the pro-life and pro-choice positions does not answer the question of whether it is desirable or even possible to translate those positions into positive law. Even if we conclude upon reflection that transforming them into law is either impossible or undesirable, however, the simple acknowledgment of the beliefs and the people who hold them may have value. Fourth, the translation of an alternate moral position into a political or legal "compromise" need not be and is not likely to be acceptable to either of the sides in the abortion debate.

Some would claim that a search for alternatives is destined to fail because there are no intermediate positions to be found. Frequently what is meant by such claims is that there are no intermediate *legal* positions.[171] Whether that proposition is true remains to be seen, but for now its consideration is premature. The focus of the search initially should be on alternative moral, rather than legal positions.[172]

An educated guess based simply on the number of possible variables suggests that such intermediate positions must exist. One could construct separate moral continua based on beliefs about the nature of women's roles in society; the relative moral weight to be given to the fetus, which could vary depending on the developmental stage of the fetus; the acceptability of various reasons advanced for the abortion; the proper roles of the individual and the State in decisionmaking; or the appropriate province of the medical profession in the abortion arena. A graph incorporating all of the possible variables would necessarily be multidimensional, with an infinite number of points in space representing slightly different moral positions. How is it then, that the graph one might construct after incorporating the positions on abortion advanced in the media or even in scholarly works is basically one with two widely separated points and nothing in between?

The simplest answer is that those who wish to advance either the

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171 See Braucher, supra note 90, at 595-96 (claiming no middle ground exists on legality of abortion because question of whether pregnant woman may legally abort fetus requires simple "yes" or "no" answer).

172 The problem with beginning with possible legal positions is that it limits the search unnecessarily. For example, Tribe works backwards from *Roe* to examine the possible moral positions on abortion. But because he focuses on constitutional law, his search leads him to only two positions, those of "life" and "liberty." See L. Tribe, supra note 3, at 228.

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pro-life or the pro-choice position politically have little incentive to explore other possibilities or to validate the beliefs of anyone who chooses not to join their crusades. The very deliberate choice of war rhetoric[173] perfectly embodies the message that this is a war with battles to be fought, skirmishes to be won or lost, an enemy to be defeated, and lives at stake. When winning is the goal of two opponents, advocates of a third view are at best a distraction and at worst a threat. Thus, left to their own devices, the two most vocal combatants will narrow the choice of options to two. Particularly in the realm of politics, where the battle cry "you're either for us, or you're against us" rules the day, individuals are continually called upon to choose between two positions, neither of which may accurately represent their beliefs.[174]

This narrowing of the debate in order to enhance the possibility of victory is understandable in the political realm because it makes good strategic sense. But why does this same narrowness exist generally in legal scholarship?[175] The paucity of scholarly treatment of intermediate moral views on abortion is particularly difficult to understand given the evidence that such views do exist in this country.[176] While opinion polls on abortion are notoriously subject to manipulation by the framing of the questions, they consistently reveal that a significant proportion of the population supports abortion rights, but in a more restricted sense than pro-choice groups advocate.[177] The actual numbers are less important

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[173] *Abortion: The Clash of Absolutes*, for example, is replete with war imagery, including its title. Tribe speaks of "no-win battle[s]," L. Tribe, supra note 3, at 6, "right-to-life forces," id. at 17, "pro-choice forces," id. at 173, "preparing for war," id. at 143, "battles in [the] war of attrition," id. at 144, "assault on *Roe*," id. at 145, "successful counterattack," id. at 157, "enemies of life," id. at 161, "antiabortion movement's offensive," id. at 172, and "political war over abortion," id. at 192, to name just a few.

[174] See text accompanying notes 118-25 supra for a discussion of the use of this tactic in Tribe's book.

[175] See Carter, supra note 158, at 2749 (referring to absence of scholarship taking middle ground on abortion); Ronald Dworkin, Unenumerated Rights: Whether and How *Roe* Should be Overruled, 59 U. Chi. L. Rev. 381, 398 (1992) (noting that legal and academic discussion surrounding abortion assumes that argument is one of whether fetus is a person).

[176] Tribe acknowledges that most people believe that "a fetus occupies some middle ground between sperm and ova, on the one hand, and a newborn infant, on the other." L. Tribe, supra note 3, at 224. He even admits that "[t]here is something deeply misleading about discussing the abortion debate solely in terms of a clash between pro-life 'groups' and pro-choice 'groups,' as though each of us could properly be labeled as belonging to one camp or the other." Id. at 229. Nevertheless, if the discussion in *Abortion: The Clash of Absolutes* is misleading, who is to blame but the author? Tribe neglects further exploration of alternative views of abortion because he concludes that *Roe* is consistent with those beliefs. Thus, he defends *Roe* as "a decision that sees abortion much the way that most Americans see it," id. at 138, and describes that decision as "rest[ing] on a vision that seems compatible, in broad outline, with the views of most Americans about abortion," id. at 136. However, public opinion polls suggest otherwise. See note 177 infra.

[177] After an extensive survey of abortion poll data, Kristin Luker concluded that "neither the pro-life nor the pro-choice movement has ever been 'representative' of how most Ameri-

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than the fact that support exists for positions that are by definition neither pro-life nor pro-choice. Why has there been so little exploration, particularly in the legal literature, of the moral underpinnings of these positions?

In many ways, academia is simply another battlefield on which adversaries fight for control. The world of legal scholarship is certainly contiguous with the political arena. Thus, the same tactics and strategies evident in the public debate over abortion rights, including the desire of the participants to limit the number and nature of the opponents, can be expected to appear in the academic literature as well. This explanation is not entirely satisfactory, however. While the intent to persuade might be the same in both arenas, academicians presumably start with a different premise—one that dictates that a particular position has been adequately defended only when other possibilities have been explored and rejected in a reasoned manner. Thus, even if much of the scholarship is intended to explain, justify, or advocate a pro-choice or pro-life position, this does not excuse its failure to confront the moral middle.

Pro-choice advocates might point to moral pluralism as the answer to the question. The pro-choice movement clearly accommodates a wide range of beliefs about abortion. Even women who believe abortion is immoral, and who would never choose to terminate a pregnancy themselves, can fall within the pro-choice position as long as they also believe that every woman is entitled, as a legal and moral matter, to decide for herself. Thus, the picture of the two sides in the debate, represented initially by a graph with only two widely separated points, may be an inac-

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cans feel about abortion." K. Luker, supra note 26, at 224. According to Luker, with some variation based on "the [particular] poll, the year it was taken, and the wording used, somewhere between 20 and 40 percent of the American public are deeply committed to either the pro-life or the pro-choice position." Id. at 227. She concludes that between 50% and 80% of the American public generally approve of abortion but do not subscribe to either of the opposing views. See id.

Luker's data were derived from polls taken prior to the mid-1980s. While a greater percentage of people now subscribe to the pro-choice position as compared to the pro-life position, a substantial percentage of the population continues to stake out a middle ground. For example, Mary Ann Glendon, summarizing public opinion polls taken during the years before and after *Roe*, states that a majority of the American population has consistently opposed both unrestricted access to abortion and total prohibition. See M. Glendon, supra note 59, at 41; see also E.J. Dionne, Jr., Poll Finds Ambivalence on Abortion Persists in U.S., N.Y. Times, Aug. 3, 1989, at A18 (noting that New York Times/CBS News Poll suggests that "the critical center in American public opinion would like to see abortion available, but harder to get"); Donald Lambro, Court-Backed Abortion Curbs Have Solid Backing in Surveys, Wash. Times, July 1, 1992, at A8 (citing June 1992 Gallup Poll wherein 48% of respondents said abortion should be legal under certain circumstances, 34% said it should be legal under any circumstances, and 13% said it should be illegal in all cases); More Favor Placing No Restrictions on Abortion, Star Trib., Jan. 22, 1992, at 11A (reporting that January 1992 Gallup Poll found 53% of respondents saying abortion should be legal under certain circumstances, 31% favoring access to abortion under all circumstances, and 14% favoring outright ban on abortion).

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curate representation. It might be redrawn so that the pro-choice position occupies every point on the abortion-belief continuum save for the single one occupied by the pro-life position. To the extent that the moral middle ground falls under the broad umbrella provided by the pro-choice position, perhaps it need not be independently discussed or examined.

This explanation is not entirely satisfactory either. While the pro-choice position is pluralistic, there is at least one moral variable that it does not accommodate. If a person believes that there are potential limits to a woman's choice, she is not invited to seek shelter under the pro-choice umbrella. Pluralistic pro-choice morality simply does not encompass the beliefs of those who would support abortion rights in a more restricted sense. Thus, pluralism alone cannot completely explain the void in scholarship.

The casual dismissal of intermediate moral positions may have more to do with intellectual elitism than anything else. Because a refusal to join the ranks can be risky when one is in the middle of a war zone, few people in the public or academic eye are willing to admit holding fast to a middle moral ground in the abortion conflict. Therefore, the only real source of information on beliefs other than those held by vocal pro-life or pro-choice proponents is the public opinion polls. But opinion polls are easily dismissed as being biased, invalid, or indeterminate. And the people who answer the questions are easily labeled as confused, ambivalent, or uninformed. Thus, some may conclude that there is no value in exploring the beliefs of such people.

Scholars truly searching for other ways of thinking about abortion would not make such a mistake. They would ask why such individuals believe what they do. Furthermore, these scholars would anticipate that the answers would be of infinite variety. Some people would know little about abortion and care even less. Some would know what they believe but be unable to articulate why. And, if these scholars looked hard enough, they would find a group of people who cared enough about the issue to refuse to adopt either a pro-life or a pro-choice stand. Such people, including women like myself, would tell how tired they are of having a war that they do not choose to join fought on their behalf and in their name. They would tell of hurtful cries of "traitor" from either side. They would report pro-choice or pro-life claims that too much is at stake for their dissident voices to be heard. In addition, if asked, they might articulate in an intelligent and informed manner ways of thinking about abortion that are different from the scholars'. Not necessarily better, but different.

The moral middle in the abortion debate is not a single position but rather represents a range of views. Generally, people who fall in this

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range believe both that women have a strong interest in retaining decisional capacity over their reproductive lives, including the decision whether to terminate a pregnancy, and that human life possesses an intrinsic and inherent value to society, a value that increases as gestational age advances.[178] The absolute nature of life and liberty so essential to the pro-life and pro-choice camps is simply not accepted by this silenced middle as part of their moral calculus. Abortion is a morally significant act above and beyond the moral significance that the individual woman might attach to it because abortion has the potential to offend a collective belief in the value of human life. Whether it does or not may depend upon a complex series of circumstances, among which are the timing of and reasons for the abortion.

While it is beyond the scope of this Article to survey all possible variations on the theme, focusing on at least one subset of the larger moral middle is useful. One possible subset consists of individuals who believe that the timing of the abortion is the most important factor in determining its moral status.[179] The importance of timing follows from a balancing of the woman's always present interest in decisional autonomy with society's graduated valuation of human life in utero, a value which

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[178] Ronald Dworkin, in one of the few essays to consider possible bases for intermediate moral and legal positions on abortion, describes the view held by most Americans as a conviction "that abortion is always morally problematic, . . . but . . . sometimes justified." Dworkin, supra note 175, at 405. Dworkin explores the moral bases for this position and delineates three possibilities: (1) the fetus, as a moral person, has a claim to life; (2) the fetus, though not a person, has interests of its own; and (3) human life has intrinsic value to society, separate and distinct from whatever moral claim the fetus might have. See id. at 405-07. He concludes that the *complex* position that most people share can only be explained on the third basis, a belief in the intrinsic value of human life. See id. at 406. He states:

> [The American community] is divided, however, not into two bitterly opposed groups—one of which affirms and the other of which denies that a fetus is a person—but in a much more complex way, because judgments about whether abortion dishonors or respects the intrinsic value of life in different circumstances involve a large variety of separate issues.

Id. See also Ronald Dworkin, Life's Dominion 68-101 (1993) (expanding upon this thesis).

Dworkin advances the state of the legal literature immeasurably both by undertaking this analysis and by unmasking the misleading nature of the moral debate that has taken place over abortion. If one assumes mistakenly that the basis for most intermediate positions on abortion is a belief that the fetus is a person with interests of its own that somehow surpass a woman's interests, then it is relatively easy to attack that position by pointing out inconsistencies between people's beliefs and their answers to questions in opinion polls.

Tribe's mastery of this technique is evidenced in his attack on the position that abortion should be allowed only in cases of rape or incest. See text accompanying notes 133-35 supra. Once he implausibly assumes that most people who support the exception believe that the fetus is a person, he can point out the inconsistency inherent in their support of the exception and then conclude that they must really want to punish women for having sex. See id.

[179] Because this analysis has been simplified by the choice to examine only this one alternative view of abortion, the discussion is meant to be illustrative rather than exhaustive.

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increases as embryonic or fetal development advances.[180]

One possible result of this balancing is a belief that abortion early in pregnancy is a morally acceptable choice regardless of the woman's reason for wishing to terminate the pregnancy.[181] This would follow if the woman's moral claim to choose an abortion early in pregnancy outweighs the societal value of embryonic, as opposed to more fully developed human life. As the pregnancy progresses, the moral acceptability of abortion might wane in those circumstances where the woman could reasonably have made the decision to terminate the pregnancy earlier but did not. One could imagine a presumption against the acceptability of abortion beyond, say, the fourth month of pregnancy, but with the understanding that either later developments, such as diagnosis of a fetal defect by amniocentesis, or particularly traumatic circumstances such as pregnancy resulting from rape or incest, might prevent a woman from having had a reasonable opportunity to exercise her choice earlier in the pregnancy.

Professor Tribe posits that people's willingness to make exceptions for women who become pregnant as a result of nonconsensual sex is merely the flip side of their desire to punish women who become pregnant after engaging in consensual sex.[182] While this is no doubt true for some, other possibilities exist. For those people who believe that a woman's moral claim to choose does not always outweigh society's interest in valuing human life, pregnancy as a result of nonconsensual sex may be viewed as tipping the moral balance in favor of the woman. The relative values assigned to the interests, while undoubtedly subject to dispute, do not necessarily arise from a general desire to punish sexually active women. People who support abortion restrictions might value a woman's moral claim as highly as a pro-choice activist but differ in their view of the strength of society's interest in valuing human life.

The simple recognition of such a moral resting place could have profound effects on the way in which abortion is discussed. Consider, for

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[180] Dworkin terms it an almost universal conviction that abortion becomes more morally problematic as a fetus develops because the insult to the sanctity of human life is greater when the life ended is further advanced. See Dworkin, supra note 175, at 429-30; see also Nancy K. Rhoden, Trimesters and Technology: Revamping *Roe v. Wade*, 95 Yale L.J. 639, 672 (1986) (acknowledging "that because developmental status [of the fetus] is relevant, late abortion is more morally problematic than earlier abortion").

[181] The choice of the phrase "early in pregnancy" is intentional. For purposes of the following discussion, it is irrelevant whether people believe that the point at which the woman's interest in free choice might be outweighed by a societal interest in valuing human life is eight weeks, twelve weeks, or after the first trimester. Undoubtedly the middle includes people who would draw the line at those points and every point in between. What is important is that there are individuals who believe that abortion is neither always wrong nor always right should a woman choose it.

[182] See L. Tribe, supra note 3, at 234.

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example, the debate which has taken place over the abortifacient drug RU-486.[183] Laurence Tribe's explanation reflects the current parameters of the discussion:

> In a sense, of course, neither RU-486 nor any other abortifacient pill really solves, or even circumvents, the problem of abortion. *Although the fact that these abortifacients can be effective at an earlier stage of*

[183] RU-486, whose chemical name is "mifepristone," is an oral drug classified as an "antiprogestin" because it blocks the actions of the steroid hormone progesterone. Progesterone has a number of functions, all crucial to maintaining a pregnancy. Progesterone causes the uterine wall to thicken in preparation for implantation of the early embryo or blastocyst. Once the blastocyst attaches itself to the uterine wall, the ovary secretes additional progesterone which signals the brain to suppress the next ovulation. As the embryo develops, the placenta begins to secrete progesterone, which acts to calm uterine contractions and prevent the embryo from being expelled from the uterus. See Etienne-Emile Baulieu & Mort Rosenblum, The Abortion Pill: RU-486, A Woman's Choice 13 (1990). RU-486, by blocking progesterone, causes a breakdown of the embryo's bond to the uterine wall and results in uterine bleeding and contractions that flush the embryo out. See id. at 17; Judson Gooding & Roger Williams, RU 486: The Fuss, the Fears and the Facts, Am. Health, Dec. 1991, at 65, 66; Philip J. Hilts, How Abortion Pill Works, N.Y. Times, July 24, 1992, at A7 (nat'l ed.). The woman receives an injection of the hormone prostaglandin two days after taking RU-486 to increase the strength of the uterine contractions and assist the expulsion process. See Gooding & Williams, supra, at 66; Hilts, supra, at A7. The French government has recently approved an oral form of the prostaglandin for use with RU-486 in some women, thus making the procedure simpler and perhaps more private. See Remi Peyron et al., Early Termination of Pregnancy With Mifepristone (RU 486) and the Orally Active Prostaglandin Misoprostal, 328 New Eng. J. Med. 1509, 1512 (1993).

Dr. Etienne-Emile Baulieu, the French researcher, physician, and inventor of RU-486, prefers to label the drug a "contragestive" rather than an abortion pill. E. Baulieu & M. Rosenblum, supra, at 18. According to Dr. Baulieu, contraceptives prevent fertilization, abortion excises a fetus, and contragestives fall somewhere in the middle, countering gestation before the blastocyst implants or interrupting pregnancy in its earliest stages following implantation. See id. at 18; id. at 28 (chart showing overlapping categories of contraception, contragestion, and abortion). However, the scientific community generally recognizes only the categories of "contraceptives" and "abortifacients." Contraceptives are those agents that either prevent fertilization or prevent implantation of a fertilized egg. See David A. Grimes & Rebecca J. Cook, Mifepristone (RU 486)—An Abortifacient to Prevent Abortion?, 327 New Eng. J. Med. 1088, 1089 (1992). Implicit in this classification is a view that pregnancy begins not with fertilization but when implantation is complete. See id. It follows that "abortifacients" are those agents that act after implantation, thus terminating, rather than preventing, pregnancy. See id. Whether RU-486 is classified as a contraceptive or an abortifacient would depend upon whether it is used prior to or following implantation. See Anna Glasier et al., Mifepristone (RU 486) Compared with High-Dose Estrogen and Progesterone for Emergency Postcoital Contraception, 327 New Eng. J. Med. 1041, 1043-44 (1992).

RU-486 is currently available in France, Britain, and Sweden. See Barry Newman, Among Those Wary of Abortion Pill is Maker's Parent Firm, Wall St. J., Feb. 22, 1993, at A1. In France, its use is highly supervised. The woman must make four mandatory visits to a government-licensed clinic: at the initial visit, she decides whether she wants to use RU-486; at the second visit, following a one week mandatory waiting period, she takes the three 200-milligram RU-486 pills; two days later, she returns to receive a dose of prostaglandin; the final visit one week later involves a check-up to ensure that the treatment has resulted in an abortion. See Gooding & Williams, supra, at 66, 68; Hilts, supra, at A7. If the administration of RU-486 has not been effective, the woman then undergoes a surgical abortion. See E. Baulieu & M. Rosenblum, supra, at 18.

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> *pregnancy . . . may make them less objectionable to some . . .*, those who oppose abortion from the moment of conception may well oppose it just as vehemently when it is performed with a simple pill. Indeed, some opponents of letting women choose for themselves whether or not to end a pregnancy find upsetting the way in which they believe a drug like RU-486 might both conceal from the woman the reality of what she is destroying and withhold from the public its current methods of exerting control over that choice.[184]

Tribe mentions the fact that RU-486 is effective only early in pregnancy and then immediately proceeds to discuss the drug in terms dictated by the pro-choice and pro-life movements.[185] Confining the moral

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[184] L. Tribe, supra note 3, at 215 (emphasis added).

[185] See id. at 214-15. Tribe does examine health and safety aspects of RU-486, but through a bipolarized lens that focuses on pro-life opposition to and pro-choice support of the drug. See id. at 215-20. RU-486 is championed by the pro-choice movement as being safe, effective, and cheaper than a surgical abortion. Only one death has been recorded so far after more than 100,000 abortions, and that death was caused by the prostaglandin rather than RU-486. See Hilts, supra note 183, at A7.

In addition to the safety and efficacy of the abortion pill, RU-486 has the potential of privatizing the abortion in a way not possible with a surgical abortion. An abortion with RU-486 requires a prescription and visits to a doctor's office, see supra note 183, but not that a woman go to an abortion clinic or hospital, which have become frequent targets of the pro-life movement's efforts. Thus, the pro-choice movement hopes, and the pro-life movement fears, that RU-486 would make abortions easier to obtain in the United States. See Philip J. Hilts, Abortion Pills Are Confiscated by U.S. Agents, N.Y. Times, July 2, 1992, at A12 ("[A]dvocates of abortion rights say RU-486 would give women a simple, private method of ending pregnancies.").

RU-486 is not available here because its manufacturer, Roussel Uclaf, and its German parent company, Hoechst, have so far refused to seek Food and Drug Administration (FDA) approval to sell the drug in the United States. See Gooding & Williams, supra note 183, at 69; Tamar Lewin, After Furor, Americans Are No Closer to Having Abortion Pill, N.Y. Times, July 24, 1992, at D16 [hereinafter Lewin, After Furor]. The manufacturer has declared that it will not attempt to market the pill in countries such as the United States, where pro-life groups are likely to mount significant protests. See id. But in a recent surprising development, Roussel Uclaf, responding to increasing pressure from the Clinton Administration and abortion rights groups, agreed to license RU-486 to the Population Council, a not-for-profit research organization based in the United States. See Warren E. Leary, Maker of Abortion Pill Reaches Licensing Pact With U.S. Group, N.Y. Times, Apr. 21, 1993, at A18. The Population Council hopes to find a U.S. manufacturer and sponsor an application to the FDA for approval to market RU-486. See id. Several small drug companies have expressed interest in manufacturing and marketing the drug, but it is expected that FDA approval will take at least two years. See Elyse Tanouye & Rose Gutfeld, U.S. Firms Mull Entering Fray of Abortion Pill, Wall St. J., Apr. 26, 1993, at B1, B4. Further, Roussel Uclaf now appears reluctant to sign a licensing agreement with the Population Council. See Tamar Lewin, Plans to Put Abortion Pill in U.S. Stall, N.Y. Times, Oct. 13, 1993, at A17 [hereinafter Lewin, Plans Stall].

In the meantime, RU-486 is on the FDA's "import alert" list, which allows Customs officials to seize the drug if a person attempts to bring it into this country for personal use. See Lewin, After Furor, supra, at D16. However, the election of President Clinton has already resulted in an important change in the Administration's position. On January 22, 1993, Clinton signed a memorandum calling for a review of the FDA's ban on the importation of RU-486 for personal use. See Robin Toner, Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush, N.Y. Times, Jan. 23, 1993, at 1.

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analysis of RU-486 to whether or for what reasons it appeals to two groups of individuals narrows the focus unnecessarily. When RU-486 is viewed in a more expansive moral context, there are additional arguments to be made in its favor.

For example, the subset of individuals for whom the timing of abortion is crucial to the moral calculus should welcome RU-486 because it provides women with a safe, effective alternative to surgical abortion that must be used, if at all, in the first seven or eight weeks of pregnancy.[186] Thus, it may reduce the number of later abortions, ones which this group finds objectionable. Further, the RU-486 pill can theoretically be utilized any time after conception.[187] With the early pregnancy tests available today, a woman could potentially take RU-486 to terminate her pregnancy within a few weeks of conception. In contrast, surgical abortion by dilation and evacuation is often delayed until at least the eighth week of pregnancy because of the risk that embryonic tissue will be missed if the procedure is performed earlier.[188] So, unlike women desiring surgical abortion, women who wish to take advantage of the abortifacient properties of RU-486 must by necessity make and carry out the decision by the eighth week of pregnancy and may choose to do so shortly after conception. Thus, to those in the moral middle who believe that early abortions are preferable to later ones, RU-486 has much to recommend it.[189] It follows that the alternative of abortion through the use of RU-486 serves the interests of more than just pro-choice proponents.[190]

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[186] See E. Baulieu & M. Rosenblum, supra note 183, at 28; Gooding & Williams, supra note 183, at 66-67.

[187] E. Baulieu & M. Rosenblum, supra note 183, at 27-28. In fact, a recent clinical study has shown RU-486 to be effective in preventing implantation when used as an emergency postcoital agent, that is, as a "morning-after" pill. See Glasier et al., supra note 183, at 1043-44; Gina Kolata, New Use Is Found for Abortion Pill, N.Y. Times, Oct. 8, 1992, at A1. In this context, RU-486 is acting after conception but prior to uterine implantation of the fertilized egg; thus it is arguably preventing a pregnancy rather than terminating one. See Grimes & Cook, supra note 183, at 1089. But see Ron P. Hamel & M. Therese Lysaught, Mifepristone (RU 486)—An Abortifacient to Prevent Abortion?, 328 New Eng. J. Med. 354, 354 (1993) (letter to editor) (arguing that since many people believe that pregnancy begins at conception, study authors' use of language of contraception to describe action of drug that prevents implantation is manipulative and misleading).

[188] See E. Baulieu & M. Rosenblum, supra note 183, at 27.

[189] Nancy Rhoden, in a discussion of the way in which new technologies might affect the constitutional protection of abortion rights, suggested that the courts have an obligation to read the Constitution as protecting a woman's privacy rights for a "substantial portion of pregnancy." Rhoden, supra note 180, at 683. She went on to acknowledge that the lower limit of what is a "substantial portion of pregnancy" might drop if there were a safe, inexpensive, and effective first trimester abortifacient that could be purchased over the counter and ingested. See id. at 684. Thus, the availability of RU-486 could potentially affect the constitutional analysis as well.

[190] The argument that RU-486 would appeal to more than just pro-choice individuals is

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This same conclusion is borne out in a related context. One of the reasons the pro-choice movement values RU-486 is its potential to provide a more private abortion that is safe and physically less intrusive than a surgical one.[191] The pro-life movement opposes the use of RU-486 for the very same reasons—because it makes abortions "easy."[192]

In structuring their arguments, both sides neglect to consider the ways in which abortion by pill may be physically and emotionally more demanding of women than surgical abortion. A surgical abortion is a procedure carried out on the woman by someone else. The most common method of dilation and evacuation requires that the woman lay supine with her legs apart and her feet in stirrups. In most cases, she has been given medication to blunt the pain and to help her relax. She is usually unable to observe the procedure, blocked by both the physician and a sheet.[193] This separation and lack of control may be intensely alienating, but it may also be protective in that immediate responsibility for the abortion is shared.[194]

In contrast, the woman who chooses RU-486 effectively performs the abortion herself. The autonomy that the pro-choice group extols may be a double-edged sword for the woman who takes the pills and the prostaglandin, and who then leaves the physician's office to wait and watch for the embryonic or fetal tissue to pass.[195] One woman who has experienced both methods described abortion with RU-486 as "an intensely solitary act."[196] She preferred RU-486 over the surgical abortion because it invested her with greater responsibility, but abortion by pill also made her "determined to do everything to avoid ever having to have

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supported by a 1988 Harris poll in which 59% of those surveyed said they were in favor of an abortion pill being made available in this country, while 33% were opposed. See Gooding & Williams, supra note 183, at 68; see also note 177 supra (citing opinion polls that reveal that majority of Americans occupy a position somewhere between those of pro-life and pro-choice positions).

191 See note 185 and accompanying text supra.

192 See Lewin, Plans Stall, supra note 185, at A17 (noting that anti-abortion groups have called RU-486 "a tragedy for women and children and a drug that, by its convenience, would encourage more abortions").

193 See Marge Berer, "Inducing a Miscarriage": Women-Centered Perspectives on RU-486/Prostaglandin as an Early Abortion Method, 20 Law, Med. & Health Care 199, 201-04 (1992).

194 Compare the pro-life argument that it is abortion by pill that will conceal from the woman the reality of her decision. See text accompanying note 184 supra.

195 Once the woman takes RU-486 the decision to abort is irrevocable. But the time from when she takes the pills to when the abortion is completed is two to three days. The potential emotional and psychological burden of this wait should not be underestimated.

196 Gooding & Williams, supra note 183, at 67. Researchers have found that some women who have had both surgical and RU-486 abortions prefer the surgical abortion over the "depressingly solitary process of taking the pill." Id.

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an abortion again."[197] Viewed in this light, individuals whose views on abortion are less than absolute may prefer that women have an option that allows them to take a more active role in the abortion than is possible with a surgical procedure.[198]

The potential utility of exploring alternative moral views on abortion does not end with a discussion of RU-486. One of the difficulties with the pro-life position that personhood begins at conception is that it asks society to distinguish on moral and physiological grounds between those agents that act as contraceptives and those that act as abortifacients.[199] The line between these categories is not always clear. As Tribe points out, some commonly used methods of "birth control," such as the IUD and at times the birth control pill, act not by preventing conception but by preventing implantation of the fertilized egg.[200] These "birth control" methods, depending upon the definitions used, may thus be classified as contraceptives, early acting abortifacients, or even as contragestives.[201] RU-486, presently classified as a contragestive or abortifacient drug,[202] has some properties that may eventually result in its use as a contraceptive.[203]

The more difficult it is to draw fine physiologic lines between contra-

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197 Id. Despite the risk that abortion by pill may be more physically and psychologically demanding for some women, pro-choice activists assuredly will continue to champion RU-486. They seek not to make it the only method of abortion available but rather an option for those women who would choose it. See note 185 and accompanying text supra. Likewise, the pro-life side will undoubtedly continue to oppose RU-486 because of their concern that any benefits arising from the greater demands it places on women would be more than offset by the increased privacy afforded to a woman's decision and the abortion itself. See note 194 and accompanying text supra.

198 Opinion polls suggest that a significant proportion of the public is concerned that some abortion decisions might be casually made and too easily carried out. See K. Luker, supra note 26, at 227 (concluding from opinion polls that majority of Americans approve of abortion in general, but disapprove of "casual" abortions); Dionne, supra note 177, at A18 (citing New York Times/CBS news poll in which 46% of respondents agreed with statement: " 'Abortion should be available for those who really want it, but it should not be easy to get.' "). At first glance, the availability of RU-486 would seem likely to heighten this concern. But if the discourse on RU-486 were expanded beyond its present state, it might help persuade those who believe otherwise that abortion through use of a pill is an emotionally and physically demanding process that women would not undertake lightly.

199 See note 183 supra.

200 L. Tribe, supra note 3, at 95; see also Webster v. Reproductive Health Servs., 492 U.S. 490, 563 n.7 (1989) (Stevens, J., concurring in part and dissenting in part) (listing IUD, "morning-after pill," low-level "combined" estrogen pills, and RU-486 as methods that act to disrupt pregnancy rather than prevent fertilization of egg by sperm).

201 As discussed previously, see note 183 supra, the inventor of RU-486 uses the term "contragestive" to refer to those agents that act after conception but before implantation. In contrast, the scientific community generally includes such agents in the category of contraceptives, while pro-life groups would presumably classify such agents as abortifacients. See id.

202 See note 183 supra.

203 See E. Baulieu & M. Rosenblum, supra note 183, at 18.

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ceptives and abortifacients, the more difficult it is to treat them as morally distinguishable. This problem is less troubling, however, for those who believe that society's valuation of human life is relatively low early in pregnancy. Contraceptives, methods such as the IUD, abortion pills, or timely surgical abortions are all morally acceptable choices for such women.

This is not to suggest that one should support a particular moral view simply because it makes the abortion debate less intractable. But neither should an alternative view be discounted or ignored precisely because it does eliminate some of the problems posed by the clash of absolutes. Any alternative view advanced in good faith is worthy of society's respect, which is exhibited first through acknowledgment that such beliefs exist and second through exploration of the moral and legal implications of those beliefs.

The discussion to this point has deliberately centered on the ways in which even one alternative view might enrich the debate over the morality of abortion. However, to acknowledge and explore intermediate moral positions does not answer whether those positions can or should be translated into law. Scholars truly committed to exploring the dimensions of the abortion dilemma would not ignore this facet of the problem any more than they would ignore the existence of alternative moral views.[204]

Why would those who support abortion rights in a more limited sense want to see their position become law? Pro-choice and pro-life individuals are engaged in a virtual war to ensure either that the law continues to reflect their beliefs or that the law is changed to reflect their beliefs. Individuals who support neither position have an equally legitimate interest in advancing their views in the legal as well as the moral setting. The more difficult question is whether they ought bow to the pro-choice position that as a legal matter the decision whether to abort is

[204] Mary Ann Glendon in her book *Abortion and Divorce in Western Law* conducts a comparative analysis of abortion laws in Western Europe and concludes that moderate statutory restrictions on abortion present a viable compromise position that this country might do well to consider. See M. Glendon, supra note 59, at 40-58. Professor Glendon's book has been roundly criticized on a number of different grounds. See, e.g., Marie Ashe, Conversation and Abortion, 82 Nw. U. L. Rev. 387, 400 (1988) (book review) (criticizing Glendon for not engaging in feminist discourse on abortion that speaks of "female experience in a voice that is identifiably female"); Martha L. Fineman, Contexts and Comparison, 55 U. Chi. L. Rev. 1431 (1988) (book review) (criticizing Glendon for conveying less than full story by failing to give cultural context to her comparative analysis); Leslie Pickering Francis, Virtue and the American Family, 102 Harv. L. Rev. 469 (1988) (book review) (detailing inaccuracies in Glendon's description of French abortion law and arguing that Glendon's retreat from rights analysis risks loss of framework for respecting individuals). While much of the criticism of Glendon's comparative method and corresponding conclusions is valid, it does not lead to the conclusion that alternative legal positions are either nonexistent or per se unworkable.

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one to be made by the individual woman based on her values, beliefs, and life experiences.

Not even the strongest pro-choice advocates would argue that a woman's individual decision has no effect on the community in which that decision is made. Some would argue that each time a woman exercises her moral and legal right to decide whether to terminate a pregnancy the community is enriched by her empowerment.[205] Individuals who support more restricted abortion rights would agree, up to a point. However, they might argue that in some circumstances, whether related to timing or a woman's reasons for seeking an abortion, the individual and collective value in allowing the woman to exercise the right to choose is outweighed by the collective harm done to society's valuation of human life.

It follows that individuals in the moral middle who would seek to translate their belief in more limited abortion rights into law must have a view of the proper role of the State in promoting the value of human life.[206] In an eloquent and well-reasoned essay on whether *Roe* should be overruled,[207] Ronald Dworkin describes two possibilities for society's role. The first he terms "responsibility"—the State might seek to ensure that its citizens recognize and consider the fundamental moral significance of abortion.[208] The second he terms "conformity"—the State might seek to ensure, by coercion if necessary, that its citizens act in ways that the majority decides best evidence respect for the intrinsic value of life.[209] Dworkin finds these two societal goals of responsibility and conformity to be mutually exclusive and antagonistic. He reasons that if the aim of the State is responsibility, each citizen must be left free to decide as she thinks right.[210] If the aim is conformity, then each citizen must be denied that decision.[211] But Dworkin fails to consider a third possibility raised in the context of abortion: because pregnancy

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205 See, e.g., Braucher, supra note 90, at 617-18 & n.132 (referring to works of Carol Gilligan and Robin West to support proposition that many women's abortion decisions are grounded in feelings of social responsibility).

206 The word "State" is intended by this author to be synonymous with society. The pro-choice movement has waged a campaign to transform words such as "state" and "government" into something other than a society with a role in the woman's decisionmaking process. See, e.g., E.J. Dionne, Jr., Abortion Rights Backers Adopt Tactics of Politics, N.Y. Times, July 21, 1989, at A6 (describing pro-choice efforts to take advantage of anti-government mood of Reagan era by framing issue to present government as villain in abortion rights battle). Such rhetoric does a disservice to those who believe society does have a role to play in the abortion debate.

207 See generally Dworkin, supra note 175.

208 Id. at 408.

209 Id.

210 See id.

211 See id. Dworkin argues that given these two possibilities, a society that values human life is best served if the State aims at responsibility rather than coercion. See id. at 408-15.

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does not occupy a single point in time, a state could adopt a goal of responsibility early in pregnancy and one of conformity at a later point.

Professor Dworkin describes *Roe* as upholding a fundamental right against conformity.[212] In point of fact, *Roe* explicitly incorporated the principle that the State may demand conformity from its citizens.[213] It just set the point at which a state may do so at viability rather than some point earlier in the pregnancy.[214] Further, it is clear after *Planned Parenthood v. Casey* that a state may legitimately adopt different goals at different stages of pregnancy. Under *Casey*, a state may now pass regulations, such as waiting periods and informed consent,[215] designed to encourage women to make responsible decisions, at the same time that, under *Roe*, it may require conformity by prohibiting abortions after viability. The notion of sequential governmental goals of responsibility followed by conformity over the course of a pregnancy is consistent with the belief that society's interest in the abortion decision increases as the pregnancy advances.

Assuming for the moment that the State has a legitimate role to play in the abortion decision, determining the form the legal expression of that role might take is difficult. The problem is at least in part one of context. The pro-life movement has advanced some of the possible legal options as steps in the battle to criminalize abortion, taking advantage of the fact that many regulations have the effect of preventing at least some women from having abortions.[216] Laurence Tribe, in his examination of possible legal "compromises," examines these regulations only in that light; he cannot get past his view that they are advanced by the pro-life movement for wholly illegitimate reasons.[217] Would some of those same options be more acceptable if the motivation for advancing them were different?

Consider, for example, one legal option that might appeal to the group of individuals who believe that the morality of an abortion varies according to the stage of pregnancy.[218] A statute might allow a fixed

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212 See id. at 410.

213 See Roe v. Wade, 410 U.S. 113, 163-64 (1973) (holding that State may proscribe abortion after viability).

214 See id.

215 See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2822-25 (1992) (joint opinion); note 14 and accompanying text supra.

216 See L. Tribe, supra note 3, at 177-78.

217 Thus, Tribe rails against mandatory waiting periods because they are forms of propaganda intended to suggest that women make abortion decisions rashly. See L. Tribe, supra note 3, at 204. He criticizes restrictions based on the reasons women seek abortions because "those who draft such legislation are simply trying to exploit the widespread opposition to certain uses of abortion as a back-door path to their goal of outlawing abortion altogether." Id. at 205.

218 See notes 178-90 and accompanying text supra. Again, the examination of one legal

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period, perhaps through the fourth month of pregnancy, within which women could obtain legal abortions. After that point, whether a woman could obtain a legal abortion might depend on whether her reasons for seeking the abortion fell within a "list" of acceptable reasons.[219] The list might include reasons such as pregnancy due to rape or incest, the diagnosis of a fetal defect later in the pregnancy, and danger to the woman's life if the pregnancy is not terminated. Each of these reasons arguably reflects a circumstance in which a woman would not have had a reasonable opportunity to exercise her right to choose earlier in the pregnancy, either because the reason did not become apparent until later in pregnancy or, as in the case of rape or incest, because the resulting pregnancy is particularly difficult with which to come to terms. The statute might also contain a cut-off point after which abortion would be prohibited unless the woman's life were in danger.

Tribe considers a similar proposal[220] and concludes that while it has more to commend it than other "compromises," it is not a viable option because it is incompatible with both the pro-life and pro-choice positions.[221] Once again, he might have expanded his analysis to consider whether and how such a statute would advance the interests of those who subscribe to a different view of abortion.

This hypothetical statute is designed to advance each of the interests recognized by the group of people who believe the timing of abortion is critical. It recognizes the moral weight of a woman's claim to make the decision by giving her an arguably reasonable period of time in which to exercise that decision without societal interference. It makes exceptions for some circumstances in which a woman would not have had a reasonable opportunity to exercise her right to choose within the fixed period. It also effectuates this group's belief that society has a strong interest in recognizing and validating the value of human life as the pregnancy advances.

Of course, a statute that appears to effectuate interests in the abstract may not do so in practice. More than half of the abortions performed in the United States occur in the first eight weeks of pregnancy

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option among many simplifies the analysis and is meant to be illustrative rather than exhaustive.

219 Using Dworkin's terminology, the State's goal in the first four months of pregnancy would be one of responsibility, while its goal after that would be one of conformity, with exceptions for situations where requiring conformity would be unduly harsh. See text accompanying notes 207-11 supra.

220 The proposal Tribe considers is more rigid in that it would allow abortions for a brief fixed period but then would ban all abortions past that period unless the woman's life were in danger. L. Tribe, supra note 3, at 208.

221 See id.

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and more than ninety percent are performed in the first thirteen weeks.[222] Assuming that of the less than ten percent that are now performed in the second trimester[223] many would fall within the list of statutory reasons, this statute would not decrease significantly the number of legal abortions when compared with the number that occur presently.[224] Pro-choice advocates might point to these statistics to argue that the statute unnecessarily denigrates a woman's right to choose with no corresponding benefit. That argument assumes, however, that the purpose of the statute is to reduce the total number of abortions. On the contrary, this statute is directed at the permissible timing of abortions, not their absolute number. Even if no one has an abortion in the twentieth week of pregnancy, a law that would allow a woman an absolute right to choose to do so may be unacceptable to some individuals in the moral middle. A statute that allows women to choose abortion at virtually the same rate they do presently (although perhaps earlier during their pregnancies), and yet at the same time allows society to make a strong statement about the value of human life as pregnancy advances, is perhaps a good middle ground. Its unacceptability to either the pro-choice or the pro-life movement is not particularly relevant for purposes of the analysis of legal alternatives.

However, a more in-depth look at how such a statute would work in practice suggests it might not be entirely successful in effectuating the interests it was designed to advance. One of the most difficult issues arises when one tries to formulate a list of acceptable reasons for abortion after four months.[225] The ostensible reason for making exceptions past the fixed period is that under some circumstances four months may not be a reasonable period of time for a woman to make and carry out her decision. If that is the rationale, what does one do with a situation in which the woman initially decided to continue with her pregnancy but then experienced a significant change in life circumstances after the fixed period? Imagine, for example, that she lost her job or that her spouse or partner left her. A statute that did not take these circumstances into account would perhaps be unduly harsh because this woman's situation

222 See Hilts, supra note 183, at A7. Ninety-nine percent of the abortions performed in the United States take place in the first 20 weeks (approximately in the first half of pregnancy). Olsen, supra note 104, at 135 & n.116.

223 See Dworkin, supra note 175, at 431 & n.74.

224 In addition, the choice of a four-month (approximately 16 weeks) fixed period for allowing abortions for any reason would actually fall within the early second trimester, thus including some second trimester abortions within the fixed period.

225 In addition to formulating the list, one must also consider what will be required of the woman in order to "prove" that she is legitimately advancing one of the reasons on the list. One can imagine particular difficulties in requiring a woman who is a victim of rape or incest to "prove" her pregnancy is actually a result of such a crime.

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is not significantly different from the situation where a woman learns of a fetal defect through amniocentesis at eighteen weeks.

One response might be that the woman who decides to continue a pregnancy must do so with the understanding that her circumstances might change later. But this would give the woman an incentive to abort for fear that if she does not do so and her circumstances change, she has given up her window of opportunity. A response that would cause women to choose abortions they would not otherwise have had is surely unacceptable for the majority of people who view abortion as potentially morally problematic.

A further concern is raised by statistics that show that one of the groups most likely to seek later abortions consists of young teenagers.[226] Individuals who seek later abortions are often poor and uneducated as well as young.[227] These factors all translate into decreased access to health care. Without access to health care, a woman of whatever age will have difficulties exercising her right to choose early in pregnancy, thus suggesting another possible exception.[228] Yet, if one defines the exceptions broadly so that virtually any change in life circumstances or difficulty in obtaining an abortion would suffice, the "exceptions" would cease to have meaning. At that point the pro-choice advocates would be justified in claiming that the statute restricts women's rights while doing nothing to advance society's interest in valuing human life.[229]

The most vocal opposition to a statute that restricted abortion rights in the second trimester may be expected to come from those who have chosen to make abortion rights the primary battleground over women's rights.[230] Even if the statute resulted in little or no reduction in the number of abortions, they would argue that abortion restrictions stand as a symbol of the devaluation of women in general and their reproductive rights in particular. The argument can be summarized as follows: moral

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226 See Rhoden, supra note 180, at 683 & n.209. Young teenagers are prone to seek later abortions because they may have irregular menstrual periods that make it more difficult to detect pregnancy, they are more likely to deny the pregnancy until it is too far advanced to ignore, and they may be fearful of telling their parents. See id.

227 See id. at 683 & n.210.

228 Tribe criticizes statutory "solutions" that call upon the young, the uneducated, minorities, and the poor to bear the burden of statutory abortion restrictions. L. Tribe, supra note 3, at 208. When statutes such as restrictions on funding are passed as part of a pro-life agenda, the discriminatory burdens can at least be explained on the basis that the pro-life movement is attempting to reduce the number of abortions and is utilizing the only methods found constitutional under *Roe*. In the context of developing a statutory scheme designed to promote earlier abortions, however, it is more difficult to justify burdens that will fall most heavily on those least able to bear them and least represented in the political process.

229 Some of these problems are mitigated by the fact that the vast majority of abortions occur in the first trimester where, under this hypothetical statute, the reasons for the abortion would be irrelevant.

230 See Braucher, supra note 90, at 621. See generally Olsen, supra note 104.

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views about abortion other than those consistent with pro-choice morality are the result of women's subordination, legal restrictions on abortion are an expression of those moral views, and thus abortion restrictions both arise from and perpetuate women's subordination.[231]

How does one go about refuting such an argument, particularly if one is inclined to accept the underlying premise that much of women's existence can best be explained by a theory of male domination? Perhaps the only adequate response is to assume the validity of the claim but then ask an additional question: in a world where women were truly equal with men, would *Roe* be the only possible outcome? If the answer is "yes," then those in the women's movement who claim that too much is at stake even to discuss other views are correct. But if the answer is even potentially "no," then the inquiry is a valid and a necessary one.

The question still remains whether intermediate legal positions on abortion are constitutional. Until recently, American constitutional law has had relatively little to offer those who do not count themselves among the believers on either side. Because the pro-life and pro-choice positions have dominated the legal as well as the moral landscape, the constitutional arguments have centered around two choices. The loudest claims have been either that *Roe* must stand in its entirety or that it must fall in its entirety. Neither choice is particularly appealing to supporters of abortion rights in a more limited sense.

The pro-life side would see *Roe* overturned on any of a number of grounds.[232] The purpose here is not to revisit such well-trodden ground but to discuss how a person in the moral middle might react to each of the legal arguments against *Roe*. Since many in the moral middle do not believe that the fetus is a person,[233] they are unlikely to be persuaded by a pro-life argument that begins with that belief and then interprets the Constitution in light of it. The legal position more persuasive to this group first acknowledges that the fourteenth amendment protects fundamental privacy rights but then posits that the right to choose falls outside this core. Under this theory, states would be allowed more latitude to regulate abortion than was possible under *Roe*, a result perhaps more acceptable than *Roe* to people who inhabit the moral middle.

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231 See Braucher, supra note 90, at 616; Olsen, supra note 104, at 126-31.

232 Tribe summarizes the arguments in the constitutional law chapter of *Abortion: The Clash of Absolutes*. See L. Tribe, supra note 3, at 77-112. One line of reasoning suggests that the fetus is a person entitled to protection under the fourteenth amendment of the Constitution. See id. at 113-29. Another suggests that the fourteenth amendment incorporates only those substantive rights specifically enumerated in the Bill of Rights, which of course does not include the right to privacy. See id. at 82-92. A third argument is that the right to choose an abortion does not fall within the core of fundamental rights protected by the right to privacy. See id. at 92-104.

233 See note 178 supra.

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Two aspects of this argument should give the moral middle pause. The first is mentioned by Tribe in his defense of the pro-choice position. If the right to choose is not a fundamental right, then the State could conceivably under its police powers regulate reproductive decisions to the point of mandating abortion to effectuate a public interest in population control. Such an event, while unlikely, would be possible if a state could freely intrude upon a pregnant woman's body to effectuate a legitimate state interest.[234] This result would run directly counter to the belief that society has an interest in *protecting* human life.

But the more critical problem posed by the argument that privacy rights do not encompass the abortion decision is that it does not adequately reflect the belief that the woman has a strong moral claim to make the decision herself. To label the woman's interest as non-protected or a mere liberty interest such that the State can regulate it virtually at will denigrates the woman's moral claim in a way that should be unacceptable to this group.[235]

The position of pro-choice activists who support *Roe* may better appeal to believers in limited abortion rights. Justice Blackmun's articulation in *Roe* of the interests implicated by the question of abortion rights seems to be consonant with the beliefs of the moral middle. The Court's recognition of a woman's fundamental right to choose to terminate a pregnancy,[236] which grew out of the right to use contraceptives,[237] and has since come to stand for the broad right to procreational autonomy,[238] is one that rings true with people who recognize the strength of a

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234 See L. Tribe, supra note 3, at 111-12. A state might be prohibited from taking this action even if the right to choose were not a privacy right protected by the Constitution. Individuals have a fundamental right to be free of state-sponsored bodily invasion apart from any privacy interest. See, e.g., Winston v. Lee, 470 U.S. 753 (1985) (holding state-ordered surgical removal of bullet lodged in suspect's shoulder to be unconstitutional). But see Buck v. Bell, 274 U.S. 200 (1927) (upholding forced sterilization); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding ordinance requiring compulsory vaccinations).

235 Professor Glendon suggests that intermediate legal positions on abortion could be best achieved through the democratic process. See M. Glendon, supra note 59, at 40. She criticizes rights-based constitutional jurisprudence because it creates clear winners and losers and does not allow for compromise. See id. Those who reject the pro-choice and pro-life positions may find little comfort in Glendon's position. Because American constitutional jurisprudence *is* rights-based, the only way to allow the states sufficient latitude to negotiate the kind of legal compromise Glendon advocates is to conclude that the Constitution provides little or no protection for a woman's right to choose. This would offend those who believe that a woman's claim to make the decision is a strong one. In addition, to advocate unconstrained state-by-state regulation is to accept that a state could legitimately ban virtually all abortions, again an unacceptable result.

236 See Roe v. Wade, 410 U.S. 113, 153 (1973).

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

238 See Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to

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woman's moral claim to decisionmaking. The Court's conclusion that the State has an important and legitimate interest in "protecting the potentiality of human life"[239] also seems consonant with beliefs about the intrinsic value of human life. Of course, the Constitution is not intended to be read as a primer on majority sentiment. The question the Constitution must answer is how those interests are to be balanced. Once the Court in *Roe* identified the woman's right to choose as fundamental, traditional fundamental rights analysis dictated that the Court strictly scrutinize any state regulation infringing on that right.[240] The trimester framework was simply the Court's shorthand way of expressing the result of the strict scrutiny standard. Under the trimester framework, any abortion regulation prior to viability that was designed to effectuate the State's interest in protecting human life was an unconstitutional infringement of the woman's fundamental right to choose.[241] For those who would advocate intermediate legal positions, *Roe* and its trimester framework presented much the same obstacle that had confronted the pro-life forces since 1973.

B. Roe *Reconsidered*

On June 29, 1992, the Supreme Court in *Planned Parenthood v. Casey*[242] partially overcame the obstacle that *Roe* had erected almost twenty years earlier. To update Laurence Tribe's statement, "[I]f constitutional law is as constitutional law does, then after [*Casey*], *Roe* is not what it once was."[243] One might be tempted to conclude that because

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bear or beget a child.").

The Supreme Court in *Planned Parenthood v. Casey*, actually strengthened the jurisprudential ties between the contraception cases and *Roe*. The joint opinion stated:

> It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International*, afford constitutional protection. . . . They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. . . . The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

112 S. Ct. 2791, 2807-08 (1992) (joint opinion).

239 *Roe*, 410 U.S. at 162.

240 See id. at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' " (citing Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963))). Further, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Id. (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940)).

241 See id. at 163-64.

242 112 S. Ct. 2791 (1992).

243 L. Tribe, supra note 3, at 24.

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both sides in the abortion debate view *Casey* as a defeat,[244] the decision must necessarily be a "victory" for those who subscribe to alternative moral and legal views of abortion.

Certainly the media suggested as much. At the same time that the newspapers regaled the public with the cries of disapproval from the pro-life and pro-choice movements, they contained statements describing the decision as "a ruling in touch with many people—and out of touch with activists"[245] and " 'perfectly reflect[ing] the consensus opinion of mainstream America.' "[246] Such statements reflect general public approval of the result reached in *Casey*. But for those who hold fast to an intermediate position on abortion, the fact that the Court upheld all but one of the challenged regulations is less important than the Court's reasoning. The question for those in the middle has always been whether one could make constitutional sense out of common sense. The true measure of *Casey* depends on the extent to which the Justices both articulate a clearly identifiable normative vision of abortion and incorporate that vision into a sustainable mode of constitutional analysis.

The joint opinion is most effective in its explication of why, as a matter of constitutional principle and pragmatism, the Constitution protects the woman's right to choose to terminate a pregnancy. The opinion goes beyond mere statement of abstract legal principles to give voice to the human reality of women's lives and their reproductive decisions. Justices O'Connor, Kennedy, and Souter speak of women as individuals and members of the community,[247] rational actors confronting the reality of unplanned and possibly unwanted pregnancies,[248] participants in the workplace and the home,[249] and individuals historically subject to outside pressures to define themselves consistent with societal or individual views of women's roles.[250] The joint opinion acknowledges the profound and life-changing nature of the decision whether to terminate a pregnancy and communicates a vision of women as responsible moral actors who have a right to define their "own concept of existence, of

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244 See notes 15-16 and accompanying text supra.

245 Mimi Hall, Activists Aside, Justices' Ruling Pleases Many, USA Today, July 1, 1992, at 3A. In a USA Today/CNN/Gallup poll conducted within a few hours after the *Casey* decision came down, greater than 70% of the respondents supported each of the challenged Pennsylvania restrictions when asked about them separately. Id. When asked a more general question, 48% favored abortions with restrictions, 34% favored abortion without restrictions, and 13% said abortion should be illegal. Id.

246 E.J. Dionne, Jr., Justices' Abortion Ruling Mirrors Public Opinion, Wash. Post, July 1, 1992, at A4 (quoting Republican pollster who has worked for both abortion-rights groups and candidates who oppose abortion).

247 See *Casey*, 112 S. Ct. at 2807 (joint opinion).

248 See id. at 2807-09.

249 See id. at 2809.

250 See id. at 2807.

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meaning, of the universe, and of the mystery of human life."[251]

The Court need not leap far from its location of the woman and her decision to its legal conclusion that the abortion decision is one of those intimate and personal choices central to the liberty protected by the fourteenth amendment.[252] The strength of this portion of the Court's decision lies less in the fact that it upheld *Roe* than in its explicit discussion of a normative view of women and the abortion decision that drives the constitutional analysis.

The fact that the Justices openly interpret the Constitution in the context of beliefs about women's roles and the importance of the abortion decision leaves them open to various forms of criticism.[253] It is perhaps the value-dependent nature of their inquiry that led the trio of Justices to buttress their reading of the Constitution with two additional arguments.[254] Ultimately, however, the Court's reliance on the principles of stare decisis and institutional integrity weakens rather than strengthens the opinion.

Had the Court upheld *Roe* in its entirety, its reliance on stare decisis could be understood as merely an additional basis for its decision. Indeed, the joint opinion's discussion of stare decisis,[255] following as it does the analysis of the liberty clause of the fourteenth amendment, makes the Court appear to be in the process of upholding *Roe* in its entirety.[256] But

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251 Id.

252 See id. The Court further justifies its conclusion by analogizing the abortion decision to the decision to use contraception. See id. The Court indicates that it has no doubt about the correctness of cases such as *Griswold* and *Eisenstadt* and thus concludes that the abortion decision is similarly entitled to constitutional protection. See id. at 2807-08.

253 Chief Justice Rehnquist argues that the *Roe* Court reached too far when it analogized the right to abortion to the rights involved in earlier privacy cases such as *Loving v. Virginia* and *Griswold*. See id. at 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The Chief Justice does not make a sustained argument, offering little analysis to differentiate *Roe*, which he would overturn, from the other privacy rights cases, which he would allow to stand.

Justice Scalia's criticism is much more direct. He holds the joint opinion out as the perfect example of illegitimate judicial legislation. See id. at 2875-76 (Scalia, J., concurring in the judgment in part and dissenting in part). Because the three Justices are very explicit about the normative vision underlying their decision, Scalia is able to accuse them of making value judgments in the guise of constitutional interpretation. Justice Scalia subscribes to an "interpretivist" view of the Constitution, whereby judges are limited to only those norms stated or clearly implied in the Constitution and to the normative intent of the framers. See Anita L. Allen, Autonomy's Magic Wand: Abortion and Constitutional Interpretation, 72 B.U. L. Rev. 683, 695 (1992). If one accepts Justice Scalia's view of the Constitution, his criticism is convincing. On the other hand, those who believe that the process of constitutional interpretation by its very nature requires judges to make value judgments must appreciate the joint authors' willingness to do so explicitly. Cf. David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 750 (1987) (arguing for duty on part of judges to be candid).

254 See *Casey*, 112 S. Ct. at 2808-16 (joint opinion).

255 See id. at 2808-16.

256 See id. at 2804-08.

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the joint opinion repudiates *Roe*'s trimester framework and strict scrutiny standard with only a nodding glance to the doctrine of stare decisis.[257] The Court manages this sleight of hand by abstracting the trimester framework from the remainder of *Roe* and declaring, "[W]e do not consider [the trimester framework] to be part of the essential holding of *Roe*."[258] The only support offered for this stunning conclusion is a citation to statements made by the Chief Justice and Justice O'Connor in *Webster*.[259] Those statements at best offer support for the proposition that Rehnquist and O'Connor have previously criticized the trimester framework. They do not even begin to support the proposition that the trimester framework was anything less than essential to *Roe*. The Court nevertheless uses this questionable proposition in combination with its view of stare decisis to justify adherence to the parts of *Roe* it labels "central"[260] at the same time that it freely jettisons the equally central tenets of strict scrutiny and the trimester framework.[261] This selective and result-oriented application of stare decisis tarnishes both the doctrine and the credibility of the joint opinion authors.

The Court's reliance on institutional integrity is equally problematic. The Justices single out *Roe v. Wade* as one of a very few watershed cases in which the Court has been called upon to resolve an intensely divisive national controversy.[262] The Court concludes that decisions in such cases have a dimension that the resolution of other cases does not carry and, as a result, require greater precedential force to counter the inevitable efforts to overturn them and thwart their implementation.[263] Any other rule would threaten the legitimacy of the judiciary and thus its power.[264]

Chief Justice Rehnquist appropriately criticizes the Court's analysis by pointing out that a decision to adhere to prior precedent, while it may be seen as a refusal to favor those who oppose the prior decision, might just as easily be seen as favoring those who support the prior decision.[265]

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257 See id. at 2791, 2817-21.

258 Id. at 2818.

259 See id. In his plurality opinion in *Webster*, Chief Justice Rehnquist describes the trimester framework as unsound and unworkable. See Webster v. Reproductive Health Servs., 492 U.S. 490, 518 (1989) (Rehnquist, C.J.). Justice O'Connor describes the trimester framework as "problematic." Id. at 529 (O'Connor, J., concurring in part and concurring in the judgment).

260 See, e.g., *Casey*, 112 S. Ct. at 2817 (joint opinion); see also note 10 supra.

261 See *Casey*, 112 S. Ct. at 2817-21.

262 See id. at 2815. The Court recognizes two other cases that have implicated similar concerns: Brown v. Board of Educ., 347 U.S. 483 (1954), and Lochner v. New York, 198 U.S. 45 (1905). See *Casey*, 112 S. Ct. at 2812-13.

263 See *Casey*, 112 S. Ct. at 2815.

264 See id.

265 See id. at 2865 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

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Once the Court bases its decision even partially on its concern over appearances, what is initially just a possible appearance of impropriety becomes reality.[266] Any decision by the Supreme Court that gives effect to public opinion, whether that opinion is arrayed for or against an earlier decision, threatens the legitimacy of the Court.[267]

The joint opinion's reliance on institutional integrity is problematic in another sense. The Court implicitly assumes there are only two sides to the controversy and constructs its view of institutional integrity within that framework. In doing so, the Court fails to recognize the many individuals who have joined neither the pro-life nor pro-choice causes but nevertheless have an interest in the outcome. If the actions of the vocal advocacy groups in the abortion controversy are permitted to influence the Court, then those who on principle have refused to join the war over abortion lose no matter which side "wins." What was once mere political powerlessness becomes constitutional powerlessness as well. If envisioning the Court held captive by the warring factions is disturbing, how much more troubling it is to hear the Court vow to remain captive "lest in the end a price be paid for nothing."[268]

While the Court's reliance on stare decisis and institutional integrity undercuts the strength of its privacy rights analysis, on balance the joint opinion does a credible job of justifying its conclusion that the Constitution provides protection for a woman's decision whether to terminate a pregnancy.[269] However, if the true measure of *Casey* depends on the joint authors' success in articulating a normative vision of abortion and sustainable constitutional analysis, then their treatment of the other side of the balance is equally important. The authors of the joint opinion do reach a "constitutional compromise" on the abortion question, but their result is not premised on the view that the woman's constitutional right is weaker than first articulated in *Roe*.[270] The difference between *Casey* and *Roe* resides in the joint authors' views of the strength of the State's interest in human life.[271] *Casey* is thus a response to anyone who has ever questioned *Roe*'s holding, not because the Court there got it all wrong but because the Court got it only half right.

The linchpin of the analysis in *Casey* is the conclusion that the State

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266 See id.

267 See id.

268 Id. at 2815.

269 See id. at 2804.

270 The Court states, "Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty." Id. at 2810-11.

271 See id. at 2817. The joint opinion in *Casey* suggests that the weight to be given the State's interest in potential life, not the strength of the woman's interest, was the difficult question faced in *Roe*. See id.

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has a "substantial . . . interest in potential life throughout pregnancy."[272] According to the joint authors, abortion decisions following *Roe* gave too little acknowledgement and effect to the State's interest in potential life.[273] Justices O'Connor, Kennedy, and Souter identify the trimester framework as the causative factor in the Court's eventual undervaluation of the State's interest.[274] They argue that because the trimester framework treats all government intrusion prior to viability as unwarranted, it prevents the State from effectuating its substantial interest in potential life.[275] The authors of the joint opinion thus abandon the trimester framework and substitute an undue burden standard in its place.[276]

The joint opinion centers on the trimester framework as the culprit. But given that the trimester framework was merely the *Roe* Court's shorthand application of strict scrutiny analysis,[277] the effect of *Casey* is to replace strict scrutiny with an undue burden standard. The unstated but unavoidable conclusion is that the woman's constitutional right to choose is now something less than a fundamental right, such that state regulation is subject to less than strict scrutiny.[278]

One might expect that before the Court would so fundamentally de-

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272 Id. at 2820.

273 See id. at 2817-20. The joint opinion argues that *Roe* recognized the strength of the State's interest. See id. at 2817. But this attempt to harmonize *Casey* and *Roe* is unpersuasive. If decisions subsequent to *Roe* undervalued the strength of the State's interests, they did so on the basis of *Roe*'s clear holding that the woman's right to choose was a fundamental right while the State's interest prior to viability was less than compelling. Roe v. Wade, 410 U.S. 113, 163 (1973); see also text accompanying note 241 supra.

274 See *Casey*, 112 S. Ct. at 2820 (joint opinion).

275 See id.

276 Id. After *Casey*, a state may regulate abortion prior to viability to effectuate its interest in potential life as long as the regulation does not place a substantial burden in the path of the woman seeking an abortion. Id.

277 See text accompanying notes 240-41 supra.

278 By adopting the undue burden standard, which entails something less than strict scrutiny analysis, the joint opinion abandoned at least implicitly *Roe*'s holding that the right to terminate a pregnancy is a fundamental right. See *Roe*, 410 U.S. at 163. The joint opinion uses the word "fundamental" only twice, in neither case describing the nature of a woman's right to choose to terminate a pregnancy. See *Casey*, 112 S. Ct. at 2804 (referring to "fundamental constitutional questions resolved by *Roe*" and quoting previous Supreme Court case that referred to "fundamental rights"). In describing the proper analysis under the undue burden standard, the Court uses language more consistent with rational basis review. See, e.g., id. at 2820 ("[A] statute which, while furthering the interest in potential life or some other *valid state interest*, has the effect of placing a substantial obstacle in the path of the woman's choice cannot be considered a *permissible means* of serving its *legitimate ends*.") (emphasis added); id. at 2821 ("[A] state measure designed to persuade her to choose childbirth over abortion will be upheld if *reasonably related* to that goal.") (emphasis added). Contrast this with Part II of Justice Blackmun's opinion, in which he asserts repeatedly that the fundamental right of privacy encompasses a woman's right to an abortion without government interference and that state abortion statutes must be subjected to strict scrutiny analysis. See id. at 2845-50 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

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part from traditional due process analysis,[279] it would have a firm grasp of the state interest that led it to do so. But the *Casey* opinion contains many conclusions with little analysis. The Court's failure to identify the nature or strength of the State's interest is most evident in its choice of terminology. The interest is variously labeled an interest in "the life of the fetus that may become a child,"[280] "the potentiality of human life,"[281] "potential life,"[282] "life of the unborn,"[283] "prenatal life,"[284] "fetal life,"[285] and "potential life within the woman."[286] Similarly, the strength of the State's interest is variously assessed as "profound,"[287] "substantial,"[288] "substantial . . . throughout pregnancy,"[289] "important,"[290] and " 'important and legitimate.' "[291] Beyond such labels, the only defining characteristics of the State's interest are implicit: the interest is something more than that articulated in *Roe* (which was defined as something less than compelling) and something less than that which would allow the State to take the decision from the woman. Even the latter conclusion is theoretically questionable given the Court's reliance on stare decisis to avoid revisiting the question whether the State's interest might be strong enough to support an abortion ban prior to viability.[292]

The joint authors' seeming inability or unwillingness to define meaningfully the state interest in human life is not unique to *Casey*. The seeds of the problem were first planted in *Roe*. By applying the strict scrutiny standard, which raised a presumption against any state regulation of the woman's right to choose, Justice Blackmun was able to erect the trimester framework without fully defining the origin, nature, or extent of the State's interests in the fetus or "potential life."[293] For purposes of strict scrutiny, it was sufficient for the Court to conclude that whatever the

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279 See note 240 and accompanying text supra. But see Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 462 (1983) (O'Connor, J., dissenting) (stating that use of undue burden standard was not novel in Court's fundamental rights jurisprudence, nor was its prior use restricted to abortion context).

280 *Casey*, 112 S. Ct. at 2804 (joint opinion).

281 Id. at 2821.

282 Id. at 2817.

283 Id. at 2816.

284 Id. at 2818.

285 Id.

286 Id. at 2820.

287 Id. at 2821.

288 Id. at 2820.

289 Id.

290 Id. at 2823.

291 Id. at 2817 (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

292 See text accompanying note 315 infra.

293 See *Roe*, 410 U.S. at 159-64 (concluding that State has legitimate interest in protecting potentiality of human life but that such interest does not become compelling until viability).

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nature and extent of the State's interest, it was too weak to justify any restriction before viability on a woman's right to choose but strong enough to justify a state prohibition on abortion after viability.[294] With that framework in place, subsequent application of the strict scrutiny standard required only that the Court locate the point in pregnancy at which the regulation operated in order to determine its constitutionality.

While the strict scrutiny standard was workable without a clear delineation of the State's interest in human life prior to viability, the undue burden standard emphatically is not. The standard has no meaning in the abstract, nor can it be given meaning (despite the joint opinion's efforts[295]) by counting the number of abortions a particular regulation might prevent. The adoption of the undue burden standard is a direct result of the Court's newfound willingness to recognize a greater state interest in human life. The standard is thus derived from and must be defined by the State's interest.[296] Until the Court explores the nature and extent of the State's interest in human life, it will be unable to apply the undue burden standard in anything other than a conclusory fashion.[297]

This problem that confronts the authors of the joint opinion today was presaged by Ronald Dworkin in an essay that preceded *Casey*. Dworkin wrote: "[T]he most difficult constitutional issue in the abortion controversy is whether states can legitimately claim a detached interest in protecting the intrinsic value, or sanctity, of human life."[298] Justice

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294 See id. at 163-64.

295 See *Casey*, 112 S. Ct. at 2822-31 (joint opinion).

296 As evidence of the necessary relationship between the State's interest and the application of the undue burden standard, compare Justice O'Connor's prior formulation of the standard with the present one. In Akron v. Akron Ctr. for Reprod. Health, Inc., Justice O'Connor termed the State's interest in the protection of potential human life "compelling." 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting). In her view, the corresponding undue burden standard was violated only if a statute imposed "absolute obstacles or severe limitations on the abortion decision." Id. at 464. In *Casey*, the State's interest is described as "substantial" or "important" rather than compelling, and the corresponding undue burden standard is violated by obstacles that are merely "substantial" rather than absolute or severe. *Casey*, 112 S. Ct. at 2820 (joint opinion).

297 Justice Scalia's description of the way in which the joint opinion applies the undue burden standard seems accurate. He states:

> [T]he approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a "substantial obstacle" or an "undue burden."

Casey, 112 S. Ct. at 2880 (Scalia, J., concurring in the judgment in part and dissenting in part).

298 Dworkin, supra note 175, at 407. The Supreme Court has faced this question before in the context of the right to terminate medical treatment. See Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990). The Court there allowed Missouri to assert an unqualified interest in the preservation and protection of human life that was then weighed against the constitutionally protected liberty interests of the individual. See id. at 282. In *Casey*, the joint opinion cites *Cruzan* to support the proposition that "a State's interest in the protection of life

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Stevens highlights the problem in *Casey* by noting that "[t]he fact that the State's interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman's interest in personal liberty."[299] Justice Stevens goes on to argue that the State cannot claim an *in loco parentis* interest because the fetus is not a person.[300] He identifies the state interest as an "indirect" one grounded in humanitarian and pragmatic concerns.[301] He suggests that because many citizens believe that abortion reflects an unacceptable disrespect for potential life, the State has a legitimate interest in minimizing such offense.[302]

Dworkin proposes a similar analysis. He describes two possible interests a state might have in protecting human life. He terms the first interest a "derivative" one because it derives from individual rights and interests.[303] In the abortion context, a state would advance its derivative interest if it protected human life on either the basis that the fetus is a person or the basis that the fetus, while not a person, has interests of its own.[304] Dworkin labels the second state interest a "detached" one because it arises not from any rights of the fetus but rather from society's interest in protecting human life as an intrinsic good in and of itself.[305] Dworkin's "detached" interest is thus equivalent to Justice Stevens's description of the State's "indirect" interest in potential life.[306]

Returning to the joint opinion with this analytic framework in mind, it is possible to draw some conclusions and raise additional questions about the state interests recognized by the three Justices. For example, their decision to reaffirm *Roe* by allowing states to restrict or ban abortion after fetal viability is arguably based on a recognition of the State's derivative interest in protecting the fetus.[307] The Court appears to be attributing interests to the fetus itself when it states that "the indepen-

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falls short of justifying any plenary override of individual liberty claims." *Casey*, 112 S. Ct. at 2810 (joint opinion).

299 *Casey*, 112 S. Ct. at 2839 (Stevens, J., concurring in part and dissenting in part).

300 See id. at 2840.

301 Id.

302 See id. Justice Stevens, in balancing the State's indirect interest against the woman's constitutional liberty interest, concludes that the State may not attempt to persuade a woman to choose childbirth over abortion. See id. His analysis would, however, allow the State to fund childbirth, create alternatives to abortion, and promote the virtues of family. See id. at 2840-41.

303 Dworkin, supra note 175, at 396.

304 See id. at 397.

305 Id.

306 The use of the terms "indirect" and "detached" is problematic in that it tends to minimize the State's interest. Such terminology presupposes that the appropriate referent point for the interest is the fetus or potential life. If instead society were the referent, then the state interest is surely direct and anything but detached.

307 Using Dworkin's terminology, the State's interest would arise from the fetus that, though not a person, does have interests of its own that the State may protect.

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dent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."[308] Similarly, the opinion refers to state intervention after viability as being "on behalf of the developing child."[309]

The joint authors also appear to recognize a detached or indirect state interest in human life.[310] They refer to abortion as an act fraught with consequences for others including society,[311] and they would uphold regulations that—without placing an undue burden on the woman—allow the State to "express profound respect for the life of the unborn"[312] or inform the woman of the "philosophic and social arguments" that support the continuation of the pregnancy.[313] In fact, it is the recognition of the strength of this state interest that leads them to replace strict scrutiny with an undue burden analysis and uphold the statutory waiting period and informed consent requirements.[314]

In the course of their discussion of the State's interest in potential life, the Justices make an intriguing statement:

> We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability . . . . [T]he immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.[315]

Although the Justices' analysis is obscured by this reliance on stare decisis, they seem to suggest that were the issue before them as an original matter, they would consider whether the State's detached interest in potential life might be sufficient to justify an earlier ban on abortion. This suggests that the Justices recognize a derivative state interest, which operates at least at viability, and a detached state interest, which operates prior to viability to allow some forms of regulation and which, but for stare decisis, might justify a ban on abortion prior to viability.

What might be the relationship between the State's derivative and

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308 Planned Parenthood v. Casey, 112 S. Ct. 2791, 2817 (1992) (joint opinion).

309 Id.

310 It is not always clear whether the opinion is recognizing a detached or a derivative state interest. The use of the term "potential life" would imply a detached interest because potential life likely has no interests of its own. See, e.g., id. at 2821. But the opinion sometimes refers to the State's interest in "fetal life" prior to viability, see, e.g., id. at 2820, which could either be based on a general societal valuation of human life—a detached interest—or on protection of the fetus's own interests—a derivative interest.

311 Id. at 2807.

312 Id. at 2821.

313 Id. at 2818.

314 See notes 269-74 and accompanying text supra.

315 *Casey*, 112 S. Ct. at 2817 (joint opinion).

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detached interests? There are several possibilities, none of which the opinion clearly embraces. Perhaps the State's detached interest in potential life merges into or becomes its derivative interest at fetal viability. Alternatively, the two interests might be separate and distinct, but the derivative interest does not arise until viability, while the detached interest is present throughout pregnancy. It might be that the two interests are both present throughout pregnancy but the detached interest stays constant while the derivative interest grows, or perhaps the derivative interest stays constant while the detached interest grows. Or the interests might both be present and increasing throughout pregnancy. Which, if any, of these possibilities is an accurate representation of the State's legitimate interests would determine the types and timing of abortion restrictions allowed under the undue burden standard.

What are the consequences of the joint opinion's failure to delineate more fully the nature and extent of the State's interests and their relationship to one another? At present, the undue burden standard appears arbitrary because there is no reasoned basis for the results the joint opinion would ascribe to it. The questions the opinion leaves unanswered are numerous: What is the nature of the State's interests such that the Court is willing to identify a new level of constitutional right that is neither fundamental nor subject to rational state regulation?[316] Why is the undue burden standard the proper standard? How does it lead to the conclusion that the State may throw obstacles in the way of a woman's choice as long as it stops just short of taking the choice from her? What separates a "substantial" obstacle from an "insubstantial" one? Why is a state precluded from advancing its interest in human life by prohibiting abortion at some point prior to viability?

The joint opinion is thus left open to valid criticism from either direction. Justice Scalia argues that the nature of the undue burden inquiry is standardless.[317] It is but a short step from this criticism to his conclusion that the standard is nothing more than legislation based on political values in the guise of constitutional law.[318] Similarly, Chief Justice Rehnquist labels the undue burden standard "an unjustified constitutional compromise"[319] that was "created largely out of whole cloth"[320]

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316 But compare scrutiny of this right to intermediate scrutiny of gender classifications under the equal protection clause. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

317 See *Casey*, 112 S. Ct. at 2875-76 (Scalia, J., concurring in the judgment in part and dissenting in part).

318 See id. at 2875.

319 Id. at 2855-56 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

320 Id. at 2866.

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and "not built to last."[321] Justice Stevens and Blackmun moderate their criticism of the undue burden standard since it is far preferable in their view to the rationality review standard advocated by Rehnquist. Had they wanted to be less forgiving, they might have criticized the authors of the joint opinion for straying from traditional due process analysis into the uncharted waters of the undue burden.[322] Unless and until Justices O'Connor, Kennedy, and Souter undertake the admittedly difficult task of defining the nature and extent of the State's interests in the abortion decision, they will have failed to translate their normative vision of abortion into a sustainable mode of constitutional analysis.[323]

CONCLUSION

In the end, one is struck by the complexity of the task that confronted the centrist coalition in *Planned Parenthood v. Casey*. It cannot have been easy for the authors to merge their three personal visions into one while confronting the strictures of traditional due process analysis, the doctrine of stare decisis, and the political maelstrom that surrounds the issue of abortion. Perhaps it is not surprising then that the picture the joint authors create is blurred and incomplete.

Their task was certainly made more difficult by the fact that the abortion discourse for too long has been narrowed by those who have no interest in intermediate positions. Justice Stevens makes it clear that the "detached" or "indirect" interest of the State arises directly from societal

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321 Id.

322 Justice Blackmun does argue that the *Roe* trimester framework was far more administrable and far less manipulable than the undue burden standard. See id. at 2848 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

323 The Supreme Court has already passed on one opportunity to explore further the dimensions of the undue burden standard. In Barnes v. Moore, the Fifth Circuit upheld against a facial challenge a Mississippi abortion statute with a 24-hour waiting period requirement similar to that of Pennsylvania's. 970 F.2d 12 (5th Cir. 1992), cert. denied, 113 S. Ct. 656 (1992). The court in *Barnes* reasoned that because the Supreme Court in *Casey* upheld "substantially identical" abortion regulations, the plaintiffs could not meet the undue burden standard through a facial challenge. Id. at 15. Rather, the plaintiffs will be forced to mount an "as applied" challenge to the Mississippi statute. See Linda Greenhouse, Justices Decline to Hear Mississippi Abortion Case, N.Y. Times, Dec. 8, 1992, at A22.

Similarly, a federal district court recently upheld against a facial challenge a North Dakota abortion statute that included an informed consent provision and a 24-hour waiting period requirement. See Fargo Women's Health Org. v. Sinner, 819 F. Supp. 862, 865 (D.N.D. 1993). The court concluded that since *Casey* upheld nearly identical provisions, the plaintiffs could not prevail in a facial challenge of the North Dakota statute. Id. at 864-65. The court subsequently denied a motion for a stay of the judgment and an injunction pending appeal, see Fargo Women's Health Org. v. Schafer, 819 F. Supp. 865, 866 (D.N.D. 1993), aff'd, 113 S. Ct. 1668 (1993) (mem.). Justice O'Connor, in a concurring opinion in the affirmance, emphasized that while denial of the stay was appropriate, the district court's refusal in the principal case to examine the record for an undue burden was inconsistent with *Casey*. See 113 S. Ct. at 1669 (O'Connor, J., concurring).

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concern over abortion.[324] While there are undoubtedly some societal beliefs about abortion that the State may not legitimately act upon, one cannot even begin to make that kind of distinction without first identifying and acknowledging the various beliefs.

Abortion discourses, such as found in the academic literature and books like Laurence Tribe's, that exclude views not encompassed by the pro-life or pro-choice positions thus deny individuals the ability to participate in the formulation of the State's interests at the same time that they hinder the Supreme Court in defining what are legitimate state interests. The cost of an abortion discourse that either ignores or misinterprets the beliefs of many Americans is thus immense. The cost is multiplied because this same discourse has dictated the terms under which the constitutional debate has taken place as well.

It is too early to determine whether the joint opinion in *Casey* marks the beginning of a new era of constitutional abortion jurisprudence or merely an historical curiosity. Even if the undue burden standard never commands a majority of the Court, it will stand as a reminder to all that the abortion issue is not a two-sided coin. The significance of *Roe v. Wade* has in the past extended far beyond its legal holding. In the hands of pro-choice academics and activists, *Roe* stood not only for the unconstitutionality of abortion restrictions but also the immorality of those who would claim that *Roe* went too far. The fact that three Supreme Court Justices saw fit to explore other ways of viewing the moral and legal questions posed by abortion is profoundly important to those of us who have waged an internal struggle to reconcile our beliefs with the public pro-life and pro-choice positions.

Despite the joint authors' optimism that the *Casey* decision will bring an end to the war over abortion rights, the war will continue.[325] It is in this context that Laurence Tribe has in the end offered something of value. At the very beginning of his book, Tribe asks his readers to question and reexamine with him the moral, philosophical, and legal bases of abortion and to approach the inquiry with vulnerability and sensitivity. He concludes his final chapter with a plea for tolerance, humility, and respect for those involved in the debate.[326] Even though *Abortion: The Clash of Absolutes* failed to lead the way in this endeavor, Tribe's readers should carry on the effort after they turn the final page. And just as the search for additional insights into the abortion rights question requires an expanded view, so too should Tribe's call for understanding and respect be extended to people who have up until now been valued only as

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[324] See *Casey*, 112 S. Ct. at 2840 (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[325] See notes 20-27 and accompanying text supra.

[326] See L. Tribe, supra note 3, at 240.

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votes to be captured or ground to be won.[327] Ultimately, there is hope for those whose views have yet to be heard because women, perhaps better than anyone, understand the devastating effects of exclusion.

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[327] See K. Luker, supra note 26, at 228 ("[T]he future of the debate will belong to the side that most effectively captures the middle ground of opinion."); Braucher, supra note 90, at 596 ("[T]he only way to wage the battle for the center is to mobilize the committed and to persuade people who are wavering or uncommitted to one's side.").

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