BOOK REVIEW

On Reading the Constitution, LAURENCE H. TRIBE & MICHAEL DORF, Harvard University Press, Cambridge, Massachusetts and London, England, 1991, pp. 144.

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" 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' "[1] Cobbled together from past lectures and articles, this slim volume seeks in large measure to demonstrate that the mode of constitutional analysis associated with Harvard Professor Laurence Tribe[2] is not simply Humpty Dumpty harnessed to the current liberal agenda. Moreover, the authors have also embarked upon a critique of original intent jurisprudence, which they upbraid for attempting to mask the "value-laden" choices inherent in constitutional adjudication.[3] Indeed, this work appears to be something of an unsystematic rejoinder to former federal judge Robert Bork who in *The Tempting of America*[4] had rather unkind things to say about Professor Tribe and his *oeuvre*.[5] Furthermore, this extended essay also sounds the alarm over provocative footnotes by Justice Scalia in his *Michael H. v. Gerald*[6]

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* Partner, DeMaria, Ellis, Hunt, Salsberg & Friedman, Newark, N.J. A.B., Harvard College, 1969; J.D., Harvard Law School, 1972.

1 LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 186 (Signet ed. 1960).

2 Well known to both constitutional scholars and regular viewers of the *McNeill-Lehrer News Hour*, Professor Tribe may be justly recognized as a member of the Harvard Law School faculty who owes his current celebrity to his ideas rather than his clients.

3 LAURENCE H. TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION 80 (1991).

4 Anthony K. Modafferi, III, *Robert H. Bork's The Tempting of America: The Political Seduction of the Law*, 20 SETON HALL L. REV. 667 (1990)(reviewing ROBERT BORK, THE TEMPTING OF AMERICA (1990)).

5 Judge Bork observed in his survey of "The Theorists of Liberal Constitutional Revisionism:"

> Laurence Tribe's constitutional theory is difficult to describe, for it is protean and takes whatever form is necessary at the moment to reach a desired result. This characteristic, noted by many other commentators, would ordinarily disqualify him for serious consideration as a constitutional theorist.

BORK, *supra* note 4, at 199.

6 491 U.S. 110 (1989). The incendiary footnotes in Justice Scalia's opinion are numbers 4 and 6. TRIBE, *supra* note 3, at 96, 106.

opinion that are assertedly "tailor-made"[7] for use in overruling *Roe v. Wade*[8] and would "severely curtail the Supreme Court's role in protecting individual liberties."[9] The authors also argue repeatedly that the Supreme Court reached the wrong result in *Bowers v. Hardwick*[10] largely because the majority opinion failed to apply a generalized right "in the direction of intimate personal association" that Professor Tribe had apparently advocated in his role as counsel for the losing side.[11]

While Professors Tribe and Dorf whisk the reader through a variety of constitutional issues, stopping along the way to seek guidance from literature and mathematics, their attempts to craft a mode of constitutional analysis that will sustain *Roe*, while rejecting *Hardwick*, must be adjudged a failure. The authors' failure is attributable to their silent partnership with Humpty Dumpty and his methods. Nevertheless, this present statement of Professor Tribe's constitutional views for lawyers and interested lay readers alike merits our attention, if only because the changing winds of political fortune may bestow upon Professor Tribe the honor that he worked so hard to deny Robert Bork.[12]

Although the authors begin their work by designating the jurisprudence of original intent as "How Not to Read the Constitution," they grudgingly admit the need for interpretive guidelines in constitutional analysis:

> The authority of the Constitution, its claim to obedience and force that we permit it to exercise in our law and over our lives, would lose all legitimacy if it really were only a mirror for the readers' ideas and ideals. Just as the original intent of the Framers—even if it could be captured in the laboratory, and carefully inspected under a microscope—will not yield a satisfactory determinate interpretation of the Constitution, so too at the other end of the spectrum we must also reject as completely unsatisfactory the idea of an empty or malleable Constitution.[13]

Thus, the authors would personally favor a constitutional right

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7 TRIBE, *supra* note 3, at 107.

8 410 U.S. 113 (1973).

9 TRIBE, *supra* note 3, at 104.

10 478 U.S. 186 (1986). *Bowers* upheld Georgia's criminal prohibition against homosexual sodomy. *Id.*

11 TRIBE, *supra* note 3, at 117.

12 *See* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 127-30 (1989)(describing Professor Tribe's role in the campaign against Judge Bork's nomination to the Supreme Court).

13 TRIBE, *supra* note 3, at 14.

to "decent housing" as well as a ceiling on the amount of money parents can leave their children, but "having read and reread the document as it exists, and having thought hard about it, we both agree that it is quite impossible to read *our* Constitution as including either of these two provisions."[14] Moreover, while recognizing the limits of historical interpretation in constitutional analysis, the authors also urge that "it is indefensible to ignore [history]."[15] Applicable to any mode of analysis, the authors warn prospective judges against the two fallacious interpretive devices of "dis-integration" and "hyper-integration."[16]

Having identified some wrong ways to read the Constitution, the authors then seek to discern proper methods of constitutional interpretation by analyzing those provisions that create what have been called "unenumerated rights,"[17] with principal reliance upon the Ninth Amendment,[18] the Privileges and Immunities Clause of the Fourteenth Amendment[19] and the Due Process Clause of that same amendment.[20]

The authors undertake their analysis largely in the context of an extended hypothetical involving how these provisions might be applied to an obnoxious local legislation.[21] The limiting principle that

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14 *Id.* (emphasis in original).

15 *Id.* at 18. Similar protestations by Professor Tribe have been received with abundant skepticism. *See, e.g.*, BORK, *supra* note 4, at 200 (commenting that "these claims are shown by the rest of [Tribe's] book to be patently untrue").

16 TRIBE, *supra* note 3, at 19-30. The authors define "dis-integration" as "approaching the Constitution in ways that ignore the salient fact that its parts are linked into a whole—that it is a Constitution, and not merely an unconnected bunch of separate clauses and provisions with separate histories." *Id.* at 20. "Hyper-integration" presents a converse set of problems: "[A]pproaching the Constitution in ways that ignore the no less important fact that the whole contains distinct parts—parts that were added at . . . separated points in American history . . . parts that reflect distinct, and often radically incompatible premises." *Id.*

17 TRIBE, *supra* note 3, at 31-64 ("Structuring Constitutional Conversations").

18 The Ninth Amendment provides: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The authors apparently do not claim that the Ninth Amendment creates substantive rights. Rather, they state that it is "the only rule of interpretation explicitly in the Constitution." TRIBE, *supra* note 3, at 54.

19 The Privileges and Immunities Clause of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. The authors concede, however, that the Privileges and Immunities Clause has been a virtual "dead letter" since the *Slaughterhouse Cases*. TRIBE, *supra* note 3, at 52-53.

20 The Due Process Clause of the Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

21 The imagined enactment is one that would require all families to eat together once a month. TRIBE, *supra* note 3, at 45. Naturally, for theorists like Tribe, consti-

they propose in this analysis is to "seek unenumerated rights by drawing on other parts of the text, coupled with history."[22] The authors urge that this limiting principle would ostensibly make their approach something other than "Humpty Dumpty enumerates the unenumerated." Building upon the views of Norman Redlich,[23] the authors then summarize their position: "If we look at the First, Third and Fourth Amendments, they suggest a tacit postulate with a textual root—namely, that the consensual intimacies in the home are presumptively protected as a privilege of United States citizens."[24]

Unfortunately, according to the authors, the Supreme Court failed to carry over the level of generality implicit in such prior decisions as *Griswold v. Connecticut*[25] and *Roe*, into *Bowers*. In *Bowers*, and later in *Michael H.*, the court failed to apprehend the right at issue with the appropriate level of generality.[26] Instead, the court evaluated the right by reference to the historical tradition most specifically associated with the exact conduct at issue, homosexual sodomy in *Bowers*, and claims by natural fathers asserting rights to children conceived in adulterous liaisons in *Michael H.* The proper test for generality, the authors argue, was "whether the asserted level of generality provides an appropriate reference to the newly asserted rights."[27] Furthermore, the authors elaborate on this point as follows:

> [I]f one is willing to generalize much at all, the Constitution's text—in the First Amendment's protection of peaceful assembly and in the special solicitude for the home in the Third Amendment and the Fourth Amendment—points toward generalizing in the direction of intimate personal association in the privacy of the home, rather than generalizing in the direction of, let us say, freedom of *choice* in matters of procreation.

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tutional metal always seems to expand more easily when fired by the heat of some egregious local legislation that no "right thinking" person would permit. *See, e.g.*, BORK, *supra* note 4, at 234 (observing that "[t]he actual Constitution does not forbid every ghastly hypothetical law, and once you begin to invent doctrine that does, you will create an unconfinable judicial power").

22 TRIBE, *supra* note 3, at 60. That Professor Tribe at least appears to speak the language of original intent may suggest how far scholars such as Judge Bork and others have succeeded in moving the terms of constitutional debate. Unfortunately, Professor Tribe's adoption of the originalist vocabulary is largely camouflage.

23 Norman Redlich, *Are There Certain Rights Retained by the People?*, 37 N.Y.U. L. REV. 787, 810-12 (1962).

24 TRIBE, *supra* note 3, at 60.

25 381 U.S. 479 (1965).

26 TRIBE, *supra* note 3, at 97-117.

27 *Id.* at 111.

> It is for this reason that *Hardwick* seems to us so egregiously wrong; that *Roe* seems a closer and more difficult case.[28]

Despite these efforts, the authors do not appear to have solved their Humpty Dumpty problem. In the first place, their assault upon original intent jurisprudence, so lucidly and elegantly expounded by Judge Bork in *The Tempting of America*, amounts to little more than an intellectual Pickett's charge—a brief lodgement here, a small penetration there, but, in all, a failure.[29] At one level, the authors appear to understand original intent as simply an arrogant attempt to decide cases according to how the framers might have ruled if confronted with the issue. This caricature of original intent highlights the familiar truth that the framers' unenacted intentions are not law.[30] Yet, this misapprehends Judge Bork's position:

> In short, all that a Judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge[sic] must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows. It does not follow without difficulty, and two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results, but that in no way distinguishes that task from the difficulties of applying any other legal writing.
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> This version of original understanding certainly does not mean that judges will invariably decide cases the way the men of the ratifying conventions would if they could be resurrected to sit as courts. Indeed, the various ratifying conventions would surely have split within themselves and with one another in the application of the principles they adopted to particular fact situations. That tells us nothing other than that the ratifiers were like other legislators. Any modern congressional majority would divide over particular applications of a statute

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28 *Id.* at 117.

29 JAMES M. MCPHERSON, THE BATTLE CRY OF FREEDOM 662 (1988).

30 TRIBE, *supra* note 3, at 10-12, 80, 106. Professor Tribe's treatment of Judge Bork's views should perhaps give us pause as we survey intellectual controversies from vanished eras where only one side has come down to us. *See, e.g.*, ROBERT L. WILKEN, THE CHRISTIANS AS THE ROMANS SAW THEM (1984)(attempting to recreate the views of the pagan critics of Christianity from the surviving Christian works written to refute these critics).

> its members had just enacted. That does not destroy the value of seeking the best understanding of the principle enacted in the case either of the statute or of the Constitution.
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> We must not expect too much of the search for original understanding in any legal context. The result of the search is never perfection; it is simply the best we can do; and the best we can do must be regarded as good enough—or we must abandon the enterprise of law and, most especially, that of judicial review. Many cases will be decided as the lawgivers would have decided them, and, at the very least, judges will confine themselves to the principles the lawgivers intended. The precise congruence of individual decisions with what the ratifiers intended can never be known, but it can be estimated whether, across a body of decision, judges have in general indicated the principle given into their hands. If they accomplish that, they have accomplished something of great value.[31]

In their misunderstanding of original intent, the authors also seem to have difficulty with the first step in the jurisprudence of original intent, namely the text itself. For example, they take Judge Posner to task for apparently attempting "to read in the Constitution as it exists a sweeping ban on race-specific affirmative action, even though the text says absolutely nothing, and, so far as we can determine, the history does not support, requiring government to be color-blind when it seeks to eradicate historic discrimination."[32] Yet the authors' apparent belief that the Constitution is silent on eliminating racial discrimination by discriminating on the basis of race overlooks the plain language of the Equal Protection Clause.[33] Judge Bork explains the function of the Equal Protection Clause: "the Judge should state the principle at the level of generality that the text and historical evidence warrant. The equal protection clause was adopted in order to protect the freed slaves, but its language, being general applies to all persons."[34]

In this same vein, the authors further misapprehend Judge Bork's position on original intent by arguing that "it would require

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[31] BORK, *supra* note 4, at 162-63.

[32] TRIBE, *supra* note 3, at 16.

[33] The Equal Protection Clause provides, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Indeed, as one wit observed at the time, the proper response to a different result in *Regents of University of Cal. v. Bakke*, 438 U.S. 265 (1978), would have been a constitutional amendment reenacting the original Equal Protection Clause with the added language, "This time we mean it."

[34] BORK, *supra* note 4, at 149. Professors Tribe and Dorf note, however, the flaw in Bork's statement.

virtually *no* claim of constitutional right ever be upheld,"[35] citing the example of how Judge Bork might resolve a claim to the violation of speedy trial rights under the Sixth Amendment.[36] Yet their contention that drawing any line in such a decision is no "less subjective than the judgment that the right to have sex without children is part of the 'liberty' protected by the Fourteenth Amendment" is surely nonsense.[37] Under Judge Bork's analysis, a decision would proceed from a constitutional value expressly articulated in the text of that document and informed by available historical materials. Furthermore, that major premise in constitutional adjudication would have been adopted through the democratic process for amending the Constitution, a process that would have given the people's representatives the choice to select or reject this value. By contrast, Professor Tribe's analysis would, like Humpty Dumpty, simply read "liberty" to mean the constitutional right to have sex without children and thus create a new constitutional value not recognized, much less discussed, in the ratification process.

The authors' dissatisfaction with original intent leads them to take strong exception with Judge Bork on the issue of unenumerated rights, which may be seen as perhaps the most basic disagreement between Professor Tribe and Judge Bork. With respect to the Due Process Clause, Professor Tribe does not seriously address much less seek to refute the powerful arguments made by Judge Bork and others[38] that the Due Process Clauses in both the Fifth and Fourteenth Amendments were simply not intended to create substantive rights, despite a history of erroneous judicial interpretation that began with Chief Justice Taney's decision in *Dred Scott v. Sandford*.[39] While the authors also place some stock in the Privilege and Immunities Clause of the Fourteenth Amendment and appear to be on firmer ground in criticizing Judge Bork for apparently wanting to treat this provision as a constitutional dead letter, they undertake no serious analysis of the historical evidence[40] and are content to ob-

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35 TRIBE, *supra* note 3, at 67 (emphasis added).

36 *Id.* More specifically, the authors suggest that if Judge Bork were to rule a three year delay in trying a criminal defendant violated the speedy trial provision of the Sixth Amendment, Judge Bork would be "guilty" of making a subjective determination in interpreting the Constitution. *Id.*

37 *Id.*

38 BORK, *supra* note 4, at 32.

39 60 U.S. (19 How.) 393 (1857)(gratuitously invalidating the Missouri Compromise as an infringement on slaveholders' property rights in their human chattels).

40 That evidence, even broadly read, would not support *Roe* or compel a different result in *Hardwick*. RAOUL BERGER, GOVERNMENT BY JUDICIARY 20-51 (1977). *See* BORK, *supra* note 4, at 180-81.

serve in pedestrian fashion that "protecting your ability to control your own body would have to be on anyone's short list of basic liberties or privileges and immunities in our system of government."[41] In contrast, the impressive historical evidence in *Hardwick* suggests that using your body for homosexual sodomy was not on this list when the Fourteenth Amendment was ratified, and Justice Rehnquist's forceful dissent in *Roe* makes the same point on abortion.

Apart from these provisions, however, the Ninth Amendment appears to be the authors' chosen favorites.[42] Again, the authors simply do not answer the strong case made by Judge Bork and others that the Ninth Amendment was intended to prevent the Constitution from encroaching on rights created by state law, a view that would surely eliminate the Ninth Amendment as a source of federal rights against state legislation.[43] Instead, Tribe and Dorf assert the following claim:

> By contrast, nothing in the Constitution's test remotely forecloses the argument that unconventional sexual behavior is a fundamental right. If we are to take seriously the Ninth Amendment's requirement that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," at a minimum we must consider the possibility that rights which are consistent with the enumerated rights—as a right to choose unconventional sexual behavior is, and as a "right" to engage in theft surely is not—may be required by the Constitution.[44]

Furthermore, the limiting and supporting principles that the authors apparently espouse to keep the Ninth Amendment from becoming a toy for Humpty Dumpty border on the absurd and invite derision, as if the Third Amendment's[45] prohibition against the quartering of troops, which addresses one very specific historical evil, somehow provides a constitutional warrant for homosexual sodomy or abortion. In part, the authors have cited these other provisions of the Constitution as limiting principles in rejoinder to Judge Bork's provocative argument that Professor Tribe's manipulation of "liberty" would be equally conducive to sustaining kleptomania as homosexuality.[46] According to Tribe and Dorf, however,

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41 TRIBE, *supra* note 3, at 61. *See also* Roe v. Wade, 410 U.S. 113, 176-77 (1973).

42 TRIBE, *supra* note 3, at 110-11.

43 BORK, *supra* note 4, at 183-85.

44 TRIBE, *supra* note 3, at 110.

45 The Third Amendment provides: "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

46 BORK, *supra* note 4, at 204. Far from fatuous, as Tribe and Dorf contend,

those provisions that repeatedly deal with property would foreclose such a conclusion, although the ones dealing with life apparently do not foreclose abortion as a fundamental liberty.

Turning from this analysis to Professor Tribe's treatment of *Roe v. Wade*, we should first note that we have come a long way from the authors' adjuration not to ignore history. After all, the Civil War amendments, which provide for *Roe*'s supposed constitutional framework, were the product of a bitter struggle that was hardly over the supposed right to throttle unborn children in the womb. Instead, in a very real sense, the Civil War, certainly after the Emancipation Proclamation, became an armed struggle to overrule *Dred Scott*, which had placed a part of humanity beyond constitutional protection. Yet, like *Dred Scott*, *Roe* also places beyond the constitutional pale what many passionately believe, with good reason, to be part of a humanity equally deserving of protection.

Here the authors point out, with expressed reservation:

> It is quite clear, of course, that the *Framers* of the Fourteenth Amendment did not think of fetuses as persons, entitled to special protection. Indeed, the amendment includes in its definition of "citizens" "[a]ll persons *born* in the United States." But so what? The State can surely take note of the fact that fetuses soon *will* be "citizens," and that some persons *think* of them as already entitled to the protections of personhood so why cannot a state act on that perception, however controversial it may be?[47]

At the simplest level, of course, the citizenship provision of the Fourteenth Amendment overrules *Dred Scott's* specific holding that blacks cannot be citizens and says nothing about who are "persons" under the amendment, a category that includes more than just citizens.[48] Yet they themselves are not persuaded on this point and,

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Judge Bork's example is not refuted by their analysis because the property provisions foreclose state action to take away property and are silent on what some future advocate might argue is the transcendent liberty to assert control over your own body by taking your neighbor's purse. Moreover, the authors' emphasis on controlling your own body and intimacies in the home would seem to give constitutional protection to the transaction involved in the home delivery service provided by modern Polly Adlers.

[47] TRIBE, *supra* note 3, at 61 (emphasis added). In the end, as the authors would probably concede, *Roe* has ended the controversy over abortion about as much as *Dred Scott* resolved the issue of slavery in the territories.

[48] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (positing that aliens are protected as "persons" under Fourteenth Amendment). Indeed, if one wishes to play the authors' game with language, the amendment may be said, at least impliedly, to define "person" broadly enough to include the unborn because, in defining citizen, the drafters limited the definition to persons who were born.

instead, seek to defend *Roe* on equal protection grounds because of the "unique" imposition on women.[49] Indeed, in a work that ostensibly faults the Supreme Court for defining rights too narrowly, they criticize *Roe* for not limiting its holding to the apparent fact that the pregnancy in that case was the product of a gang rape, leaving for "another day the difficult problem of line-drawing among degrees and sources of involuntariness."[50] The essay, however, does not develop the equal protection argument, although Professor Tribe has dealt extensively with abortion in a separate book.[51]

Yet, any argument that would allow consideration of the state interests that *Roe* banned by fiat remains anathema to the authors.[52] Leaving abortion to the states, they argue, would have to be done on the basis of a constitutional analysis that would also give to the states the power to compel abortions, as in the People's Republic of China.[53] While common sense might possibly suggest that the odds are highly unlikely our society will shortly move in step with the PRC, sustaining *Roe v. Wade* is hardly necessary to recognize that compulsory abortions would invoke both the Due Process Clause and the Eighth Amendment.[54] In short, *Roe* is not our last, best hope against modern Maoism.

Related to the authors' analysis of *Roe* is their concern that Justice Scalia's formulation in footnote 6 of the *Michael H.* case would somehow eviscerate all constitutional protections granted by the Due Process Clause by building the state interest into the "liberty" sought to be protected:[55]

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49 TRIBE, *supra* note 3, at 63.

50 *Id.* at 63.

51 LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990). The authors' arguments about evolving constitutional protection for intimate actions at home would seem to offer rather weak support for *Roe* unless the friendly neighborhood abortionist makes house calls. Moreover, even the authors stop short of contending that one's asserted First Amendment right against receiving information extends to being forced to hear a baby's cry, while the Third Amendment prohibition on quartering troops is not invoked.

52 TRIBE, *supra* note 3, at 62-63.

53 TRIBE, *supra* note 3, at 62. Such an inflated argument really says that "only Humpty Dumpty to save us from the Jabberwocky" and appears as a frequent justification for the Humpty Dumpty approach to constitutional interpretations.

54 Certainly a legislative enactment imposing a death sentence upon the innocent unborn child would be a matter of some serious concern even under what Professor Tribe might regard as Judge Bork's too narrow view of the Due Process Clause, and the prohibition against cruel and unusual punishment.

55 This footnote reads as follows:

> We cannot imagine what compels this strange procedure of looking at that which is assertedly the subject of a liberty interest in isolation from its effect upon other people rather like inquiring whether there

> This is so because, unless the state's interest is absurd on its face, when it is suitably incorporated into an asserted liberty it will render that liberty so specific as to seem insupportable, or at least radically disconnected from precedent. The privacy right protected in *Roe* becomes the implausible "right" to destroy a living fetus; the free speech right protected in *New York Times Co. v. Sullivan* becomes the dubious "right" to libel a public official; the right to an exclusionary remedy for Fourteenth Amendment violations protected in *Mapp v. Ohio* becomes the counter intuitive "right" of a criminal to suppress the truth. To state these cases this way is to decide them in government's favor.[56]

Yet again, such hyperbole proves far too much. Both the First and the Fourth Amendments, textually and historically, embody explicit values in free speech and limitations upon search and seizure without a warrant that, under a jurisprudence of original intent, would be enforced. They stand in marked contrast to "liberty" as a substantive value into which prior court majorities have poured both *Lochner*[57] and *Roe*. To recognize that the states may find there is no Fourteenth Amendment "liberty" to harm another, even someone *en ventre sa mere*, will hardly jettison the First or Fourth Amendments.

Finally, the authors take the Court severely to task for failing to sufficiently generalize the constitutional rights at issue in *Hardwick* and *Michael H.*[58] In one sense, this stands in marked contrast to their criticism of *Roe*, for not avoiding "the rush to sweeping, global, across-the-board solutions."[59] At the same time, they would seem to be on firm ground in recognizing the difficulties in using tradition as a limiting factor, especially because this may merely enshrine a tradition of intolerance.[60] Yet, their entire argument underscores the profound difficulties that emerge when the Due Process Clause is used to create substantive rights. As Judge Bork trenchantly observed, commenting on *Michael H.*:

> However one feels about that, the balance between the inter-

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> is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body.

Michael H. v. Gerald D., 491 U.S. 110, 146 n.4 (1989).

56 TRIBE, *supra* note 3, at 107 (citations omitted).

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

58 TRIBE, *supra* note 3, at 95-117.

59 TRIBE, *supra* note 3, at 63.

60 In the words of author Gary Willis, quoted by Judge Bork, "Running men out of town on a rail is at least as much an American tradition as declaring inalienable rights." BORK, *supra* note 4, at 235.

> ests of the natural father and the marital family is surely a moral and prudential issue for the people and not for the unguided discretion of judges.
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> It may be that [Justice] Scalia and [Chief Justice] Rehnquist are trying to come as close as they can to that position by insisting on using the most specific tradition available. But even that assumes an illegitimate power, and the limitations will prove no restriction at all when there is only a general unfocused tradition to be found.[61]

While this work deserves strong criticism, the authors' essay is certainly a useful addition to our continuing constitutional debate. Indeed, both this work and *The Tempting of America* could be profitably assigned as texts for any advanced seminar on constitutional law. Moreover, the true test of any idea, as Justice Holmes has written, is combat. Fate may yet place Laurence Tribe in the Senate arena to defend his constitutional jurisprudence under the new rules of engagement for Supreme Court nominees, rules that he himself did so much to create. If this book is any indication, he will need more than the king's horses and men to sustain many of his views as an acceptable approach to interpreting the Constitution.

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61 BORK, *supra* note 4, at 240.