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Erwin Chemerinsky

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IN DEFENSE OF *ROE* AND PROFESSOR TRIBE

Erwin Chemerinsky*

I. INTRODUCTION

I first met Professor Tribe when he judged me in a college debate round at the National Debate Tournament in Annapolis, Maryland in 1973. Over the last 35 years, he has been my constitutional law professor, my mentor, and my friend. He is my role model in what I aspire to be as an academic, a lawyer, and an activist. It is truly a privilege and pleasure to write this article in his honor.

In the same year I met Professor Tribe, he wrote the prestigious Foreword to the Harvard Law Review.¹ To be sure, he had a momentous Term of the Supreme Court to write about and focused on two cases of lasting significance: *Roe v. Wade*² and *San Antonio Independent School District v. Rodriguez*.³ Besides the obvious significance of these cases, it should be noted that *Roe* was the last time the Court recognized a new fundamental right. In *Cruzan v. Director, Missouri Department of Health*,⁴ the Court recognized a right to refuse medical treatment, and in *Lawrence v. Texas*,⁵ the Court recognized a right for consenting adults to engage in private homosexual activity. But pointedly, in neither case did the Court use strict scrutiny or expressly say that there was a fundamental right.

I believe that *Roe* and *Rodriguez* have a great deal to do with the subsequent failure of the Court to recognize other fundamental rights. The enormous controversy over *Roe* unfortunately has made suspect (or worse) the recognition of rights not mentioned in the text of the Constitution. Also, once the Court in *Rodriguez* said that education is not a fundamental right, it is difficult to imagine that many things will rise to that status.

In discussions of *Roe*, it is frequently said that even liberals believe that Justice Blackmun's majority opinion was poorly written and reasoned.⁶ I strongly disagree with

* Alston & Bird Professor of Law and Political Science, Duke University.

1. Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973).

2. 410 U.S. 113 (1973).

3. 411 U.S. 1 (1973) (rejecting a constitutional challenge to inequities in school funding and concluding that poverty is not a suspect classification and that education is not a fundamental right).

4. 497 U.S. 261 (1990).

5. 539 U.S. 558 (2003).

6. See e.g. Jan Crawford Greenberg, *Supreme Conflict: The Inside Story of the Struggle for Control of the Supreme Court* (Penguin Press 2007).

this characterization and conclusion. In this article, I make two points. First, Justice Blackmun's opinion essentially got it right and what is missing is provided by Professor Tribe's 1973 Foreword. Second, Professor Tribe's suggestion, near the end of his article, that there should be a "personal question" doctrine is very desirable and still unfortunately missing from constitutional law.

II. WHY JUSTICE BLACKMUN GOT IT RIGHT IN *ROE*

A. *The Issues in Roe*

The Court in *Roe* faced three questions. First, is there a right to privacy protected by the Constitution even though it is not mentioned in the document's text? Second, if so, is the right infringed by a prohibition of abortion? Third, if so, does the state have a sufficient justification for upholding laws prohibiting abortion?

1. Is there a right to privacy protected by the Constitution?

This really is the place where opponents of *Roe* have focused their attack, arguing that there is no such right because it is not mentioned in the Constitution and was not intended by its drafters. The most famous critique of the decision was written by Professor John Hart Ely and he declared: "It is, nevertheless, a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."⁷ Ely's objection was that abortion and privacy are not mentioned in the Constitution and therefore no such rights exist. This, of course, is the criticism that originalists have launched at *Roe* since it was decided.

The problem with this argument is that it fails to acknowledge that it is urging a radical change in constitutional law. Before *Roe*, the Court had expressly recognized a right to privacy, especially over matters of reproduction, even though there is no mention of this in the text of the Constitution. In *Griswold v. Connecticut*,⁸ the Court expressly recognized a constitutional right to privacy and declared unconstitutional a state law prohibiting the sale, distribution, or use of contraceptives. In *Eisenstadt v. Baird*, the Court declared: "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 bear or beget a child."⁹

In fact, long before *Roe*, the Court safeguarded many aspects of autonomy as fundamental rights even though they are not mentioned in the text of the Constitution. For example, the Court has expressly held that certain aspects of family autonomy are fundamental rights and that government interference will be allowed only if strict

7. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973) (emphasis in original).

8. 381 U.S. 479 (1965) (declaring unconstitutional a state law prohibiting sale, distribution, or use of contraceptives).

9. 405 U.S. 438, 453 (1972) (invalidating a state law that made it a crime to distribute contraceptives to unmarried individuals).

scrutiny is met. These liberties include the right to marry,¹⁰ the right to custody of one's children,¹¹ the right to keep a family together,¹² and the right to control the upbringing of one's children.¹³ Unless the Court intended to overrule all of these decisions, it was clear at the time of *Roe* that the Constitution is interpreted as protecting basic aspects of personal autonomy as fundamental rights even though they are not mentioned in the text of the document. Put another way, the Court never has adopted the originalist position of justices like Scalia and Thomas that the Constitution's meaning is limited to its original meaning. In fact, rejecting privacy as a right because it is not in the text of the Constitution would mean repudiating other rights not mentioned, such as freedom of association or even due process as a limit on personal jurisdiction.

Of course, opponents of *Roe* could argue that all of these decisions were wrong and that there should be no protection of privacy or other non-textual rights. But this would be a radical change in the law. Professor Cass Sunstein has explained: "[The rejection of privacy rights] is a fully plausible reading of the Constitution. But it would wreak havoc with established law. It would eliminate constitutional protections where the nation has come to rely on them—by, for example, allowing states to ban use of contraceptives by married couples."¹⁴

My point here is not to write a defense of the Constitution's protection of privacy.¹⁵ Rather, it is to suggest that Justice Blackmun's invocation of privacy was consistent with precedent and adequately justified in *Roe*.

In the introduction to his Foreword, Professor Tribe states that his goal is to give "substantive due process a more respectable place in American constitutional law than it has [occupied] since 1937."¹⁶ Even for a scholar of Professor Tribe's incredible talents, this was an impossible quest. Those who reject constitutional protection of privacy are not going to be persuaded by anything Professor Tribe, or anyone else, has to say. But at the very least it is important to recognize that opponents of privacy rights are urging a radical change in the law and that Justice Blackmun's finding a right to privacy in the Constitution was based on decades of precedents.

2. Do laws that prohibit abortion infringe a woman's right to privacy?

Interestingly, no one, not even the fiercest critics of abortion rights, dispute this. Opponents of *Roe* attack whether there is a right to privacy and/or claim that the state had a sufficient interest in prohibiting abortion. But understandably, there is no

10. See e.g. *Loving v. Va.*, 388 U.S. 1 (1967) (speaking of a fundamental right to marriage).

11. See e.g. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) ("[A] natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." (internal quotation marks omitted)); *Stanley v. Ill.*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.'").

12. See e.g. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (declaring it unconstitutional for a zoning ordinance to keep a grandmother from living with her two grandsons who were first cousins).

13. See e.g. *Pierce v. Socy. of Sisters*, 268 U.S. 510 (1925); *Meyer v. Neb.*, 262 U.S. 390 (1923).

14. Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* 81–82 (Basic Bks. 2005).

15. For an excellent defense of this, see Jeb Rubinfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989).

16. Tribe, *supra* n. 1, at 2.

disagreement that a prohibition of abortion interferes with a woman's right to autonomy.

Obviously, prohibiting abortion interferes with a woman's ability to control her reproductive autonomy and to decide for herself, in the words of *Eisenstadt v. Baird*, whether to "bear or beget a child."¹⁷ Also, no one can deny that forcing a woman to continue a pregnancy against her will is an enormous intrusion on her control over her body. Justice Blackmun expressed this forcefully:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.¹⁸

3. Do states have a compelling interest in protecting fetal life?

Once it is decided that there is a fundamental right to privacy and that laws prohibiting abortion infringe it, then the question is whether laws prohibiting abortions meet strict scrutiny. The key question is whether the government has a compelling interest in protecting the fetus from the moment of conception.

Justice Blackmun says that the state has a compelling interest in prohibiting abortion only at the point of viability, the time at which the fetus can survive outside the womb. He wrote: "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."¹⁹

Professor Tribe is justifiably critical of the lack of adequate defense for this conclusion. He writes: "The Court says even less to justify its crucial conclusion that the state's interest in potential life does not become 'compelling' until viability. One reads the Court's [conclusion] several times before becoming convinced that nothing has inadvertently been omitted."²⁰ Moreover, the choice of viability as the point where there is a compelling government interest seems at odds with Justice Blackmun's earlier declaration: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's

17. 405 U.S. at 453.

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

19. *Id.* at 163.

20. Tribe, *supra* n. 1, at 4.

knowledge, is not in a position to speculate as to the answer.”²¹

It is here, though, that Professor Tribe’s Foreword provides what is missing in Justice Blackmun’s opinion. Professor Tribe clearly frames the issue as being about *who* should decide whether the fetus is a human person: Each woman or the state legislature. Professor Tribe explains:

The Court was not, after all, choosing simply between the alternatives of abortion and continued pregnancy. It was instead choosing among alternative allocations of decisionmaking authority, for the issue it faced was whether the woman and her doctor, rather than an agency of government, should have the authority to make the abortion decision at various stages of pregnancy.²²

Professor Tribe then goes on to explain why it was not appropriate for the Court to allow the government to choose conception as the place where human personhood begins and therefore to prohibit all abortion. First, there was then, and is now, no consensus as to when human life begins. As Professor Tribe explains:

But the reality is that the “general agreement” posited above simply does not exist. Some regard the fetus as merely another part of the woman’s body until quite late in pregnancy or even until birth; others believe the fetus must be regarded as a helpless human child from the time of its conception. These differences of view are endemic to the historical situation in which the abortion controversy arose.²³

The choice of conception as the point at which human life begins thus was based not on consensus or science, but religious views. Professor Tribe wrote: “And, at least at this point in the history of industrialized Western civilization, that decision in turn entails not an inference or demonstration from generally shared premises, whether factual or moral, but a statement of religious faith upon which people will invariably differ widely.”²⁴ Professor Tribe argues that unless there is a secular basis for finding that life begins at conception, there cannot be a compelling government interest.

Professor Tribe then goes on to attempt to refute the state’s claim that its interest in prohibiting abortion is in protecting *potential life*. Professor Tribe says that this, too, depends on a religious based value choice:

To accept the “potential life” interest as compelling in this context, therefore, would be to say that the values supposedly served by a more “detached” determination of the pros and cons of creating an additional future life overcome those implicit in the constitutional condemnation of church-state entanglement. But allowing this incremental gain in disinterestedness to outweigh the religion clauses of the first amendment would be difficult to reconcile with their central place in our scheme of government.²⁵

I am not sure why, though, the state could not offer a secular argument that there is at least potential human life at the point of conception and that the state therefore has a compelling interest in prohibiting abortion from that point. The problem with this

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

22. Tribe, *supra* n. 1, at 11 (emphasis omitted).

23. *Id.* at 19.

24. *Id.* at 21.

25. *Id.* at 26.

argument is that it has no stopping point. The argument is that absent abortion there is a significant likelihood that a human person will be born. But actually, the statistics are surprising in terms of how uncertain it is whether there will be a birth if there is not an abortion. About 15 to 20 percent of known pregnancies end in miscarriage and studies have found that 30 to 50 percent of fertilized eggs are lost before a woman finds out she is pregnant.²⁶ In other words, there is a reasonable chance—but no more than that—that there will be a baby but for an abortion.

But the same, of course, can be said about contraception. There is the potential for life every time a couple has sex without contraception: But for contraception there is a reasonable chance that there will be a baby. “When trying to conceive, a couple with no fertility problem has about a 30 percent chance of getting pregnant each month.”²⁷

Thus the potential life argument justifies a ban on contraception as much as it does a ban on abortion. This, of course, is the position of the Catholic Church. But then the power of Professor Tribe’s argument becomes even more apparent: There is not a non-religious basis for the prohibition of contraception and abortion.

Put another way, in deciding when the state has a compelling interest in prohibiting abortion, the Court had three realistic choices: conception, viability, or birth. Conception is problematic because it requires the Court accepting that the state can decide that human life begins at conception when there is no consensus as to this and no apparent non-religious justification for it. The question Professor Tribe poses is why we should allow the state to make the judgment that human life begins at conception rather than leave this to each woman. By contrast, Professor Tribe argues that viability is an appropriate place for the Court to draw the line. He wrote:

Viability thus marks a point after which a secular state could properly conclude that permitting abortion would be tantamount to permitting murder, not because of some illusion that this biologically arbitrary point signals “any morally significant change in the developing human,” and certainly not because of any (necessarily religious) notion that the fetus is intrinsically a human being from that technology-dependent point forward, but rather on the secular and quite practical ground that a state wishing to prevent the killing of infants simply has no way to distinguish the deliberate destruction of the latter from what is involved in postviability abortions.²⁸

Indeed, almost two decades after *Roe*, in *Planned Parenthood v. Casey*, the joint opinion of Justices O’Connor, Kennedy, and Souter explained why viability is the appropriate point for finding a compelling state interest in prohibiting abortion. Their explanation was similar to that offered by Professor Tribe immediately after *Roe* was decided. They wrote:

[T]he concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent 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. Consistent with other constitutional norms,

26. See Babycenter, *Understanding Miscarriage*, http://www.babycenter.com/0_understanding-miscarriage_252.bc (last updated Dec. 2005).

27. Dr. Spock, *What is Infertility?* <http://www.drspock.com/article/0,1510,6262,00.html> (Aug. 30, 2001).

28. Tribe, *supra* n. 1, at 27–28 (internal citations omitted).

legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.²⁹

In other words, on each of the three key questions faced in *Roe*, Justice Blackmun's opinion is defensible. Professor Tribe rightly criticizes the opinion for not adequately defending viability as the point at which there is a compelling government interest. But here, Professor Tribe offers an explanation, one similar to that ultimately adopted by the Court.

B. Was There a Better Way to Write the Opinion in Roe?

Some have suggested that it would have been preferable for Justice Blackmun to have written the majority opinion in *Roe* in terms of equal protection rather than due process. Ruth Bader Ginsburg suggested this in an article written before she became a Supreme Court Justice.³⁰ There, of course, is no doubt that laws prohibiting abortion affect women in a vastly different way than they affect men. But on reflection, a shift to equal protection would not have been a better way to write *Roe*.

Most important, using equal protection would not have avoided the need for the Court to decide whether the state has an adequate interest in protecting fetal life from the moment of viability. As explained above, this was the crucial and most difficult issue faced by the Court in *Roe*. Equal protection analysis would not have avoided this.

In fact, it must be remembered that the Supreme Court at the time of *Roe* had not yet used more than rational basis review for gender discrimination. It was not until three years after *Roe*, in *Craig v. Boren*,³¹ that the Court approved intermediate scrutiny for sex-based discrimination. In other words, had the Court used equal protection based on gender for analyzing abortion, only rational basis review would have been applied in 1973, and even later, only intermediate scrutiny would have been applied. By relying on privacy, the Court applied strict scrutiny. But even if somehow the Court had used strict scrutiny for gender discrimination in *Roe*, still the Court would have had to face and answer the question of whether the government has a compelling interest in prohibiting abortions. Nothing would have been gained by shifting from due process to equal protection in this regard.

Additionally, there would have been doctrinal problems with using equal protection. Laws that prohibit abortion have a disproportionate impact on women, and

29. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 870 (1992) (internal citations omitted).

30. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 365 (1985).

31. 429 U.S. 190 (1976).

especially poor women. But disproportionate impact is not enough for an equal protection violation.³² And just a year after *Roe*, the Supreme Court later held that discrimination based on pregnancy is not gender discrimination.³³ Poverty has never been found to be a suspect classification so the disproportionate effect on poor women would not realistically have been a basis for the Court's opinion.

Of course, opponents of abortion rights suggest that the Court could have written a better opinion in *Roe* by declaring that the entire issue of abortion is left to the political process. It is what John Hart Ely argued after *Roe* and it is what Justice Scalia long has advocated. He concluded his dissent in *Casey* by declaring: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."³⁴

But as explained above, the Court could have defended this conclusion only in three possible ways: By concluding that there are no privacy rights protected by the Constitution; or that prohibitions of abortion do not infringe privacy; or that the state has a compelling interest in prohibiting abortions from the moment of conception. On each, Justice Blackmun and Professor Tribe make a persuasive argument in support of abortion rights and why it should be for each woman, and not the government, to decide the moral status of the fetus.

III. A PERSONAL QUESTION DOCTRINE

At the end of his Foreword, Professor Tribe offers the idea that the Court should develop a "personal question doctrine." He writes: "[T]he conclusions thus far reached might be expressed as a 'personal question' doctrine—a doctrine embodying the concept that some types of choices ought to be remanded, on principle, to private decisionmakers unchecked by substantive governmental control."³⁵ Professor Tribe does not develop this further in the Foreword. Nor has it been developed in other of his writings or by others.³⁶

Thirty-five years after *Roe*, this seems a promising approach that unfortunately has been ignored. The central idea is that the Constitution leaves some matters to the individual, not to the state to decide. To put it in the language of Professor Tribe's Foreword, in allocating decision-making, some choices should be for individuals and not for the government.

Recognizing a personal question doctrine would have significant benefits. It would have been very helpful in the abortion context in explaining why it was for the woman to decide whether to have an abortion or a child and not for the state to try and use its enormous powers to influence that choice. In cases subsequent to *Roe*, the Court spoke of the government's valid interest in encouraging childbirth over abortion. In holding that the government can refuse funding for abortions, even when it pays for

32. See e.g. *Personnel Adminstr. of Mass. v. Feeney*, 442 U.S. 256 (1979).

33. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

34. 505 U.S. at 1002 (Scalia, J., dissenting).

35. Tribe, *supra* n. 1, at 32.

36. A Westlaw search for the "personal question doctrine" yields only three instances where that phrase has been used in law review articles, Professor Tribe's and two articles citing to him.

childbirth, the Court declared: “The State unquestionably has a ‘strong and legitimate interest in encouraging normal childbirth,’ an interest honored over the centuries.”³⁷ Similarly, in upholding a 24 hour waiting period for abortions, the Court said “[t]o promote the State’s profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”³⁸

But if abortion is a personal choice under Professor Tribe’s personal choice doctrine, then efforts by the state to pressure a woman against having an abortion—whether by financial pressure or via waiting periods—would be unconstitutional. The personal choice doctrine would leave it to each woman, to decide on whatever basis she deems appropriate, whether to have an abortion.

A personal choice doctrine would have provided a clear basis for finding that adults have a fundamental right to engage in private, consensual same-sex sexual activity. This approach might have avoided the decision in *Bowers v. Hardwick*³⁹ and would have provided a basis for the Court finding a fundamental right in *Lawrence v. Texas*.⁴⁰

Similarly, a personal question doctrine would have provided a foundation for the Court holding that there is a fundamental right to refuse medical care⁴¹ and a right to assisted death.⁴² A personal question doctrine would provide a basis for explaining why it should be for each person, and especially terminally ill individuals, to decide whether to die.

Obviously, the contours of a personal question doctrine would need to be developed over time. What aspects of personhood are so important that they should be deemed to be protected under the personal question doctrine? What justifications are sufficient to allow the government to interfere with choices protected by it? Although Professor Tribe does not provide answers, by creating the personal question doctrine he has asked the right question and focused attention where it should be in this area: What choices are so fundamental to personhood that they should be left to the individual and not the government?

IV. CONCLUSION

The Supreme Court has changed dramatically in the 35 years since Professor Tribe wrote the Harvard Foreword. In 1973, there was one very conservative Justice: William Rehnquist, and *Roe* was a 7–2 decision. Today, there are four very conservative Justices: Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

Professor Tribe obviously could not have known when he wrote in 1973 that the

37. *Maher v. Roe*, 432 U.S. 464, 478 (1977) (internal citations omitted).

38. *Casey*, 505 U.S. at 878.

39. 478 U.S. 186 (1986) (upholding state law prohibiting oral-genital or anal-genital contacts).

40. 539 U.S. 559 (2003) (invalidating Texas law prohibiting homosexual activity).

41. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990) (finding that competent adults have the right to refuse medical care).

42. *Wash. v. Glucksberg*, 521 U.S. 702 (1997).

Supreme Court would become profoundly more conservative and that he would spend his career writing and litigating before a Court generally hostile to his views of constitutional law. Scholars, though, write not just for the immediate audience, but also for a longer term when there might be more sympathetic ears. Professor Tribe's Harvard Foreword, like so much of his scholarship, withstands the test of time because it addresses an immediate issue and decision, but does so in an insightful way that offers clarity for an on-going controversy 35 years after it was written.