*Review Essay*

# On Politics, Constitutional Interpretation, and Abortion Rights Jurisprudence

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Neal Devins, *Shaping Constitutional Values*. Baltimore: Johns Hopkins Press, 1996. x + 193 pp. $45 cloth; $14.95 paper.

Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution*. Cambridge: Harvard University Press, 1996. 404 pp. $35.00 cloth.

Eileen McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent*. New York: Oxford University Press, 1996. viii + 280 pp. $49.95 cloth; $24.95 paper.

Reaching as far back as *Marbury v. Madison* (1803) for authority, the U.S. Supreme Court rendered a most remarkable decision last term in *City of Boerne v. Flores* (1997). Declaring therein that, "When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say *what the law is*" (*Boerne* 1997:2172; emphasis added), the Court invalidated the Religious Freedom Restoration Act of 1993. While the dissenters were occupied largely with the question of the "correctness" of the *Smith* (*Employment Division, Oregon Dep't of Human Resources v. Smith* 1990) decision which Congress, through RFRA, sought to overturn, the larger significance of *Boerne* is that it declared the judiciary's virtual hegemony over constitutional interpretation.[1] Despite the Court's at-

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[1] It might be argued that the dissenters in *Boerne* were willing or anxious *only* to reconsider the correctness of *Smith*'s limited protections for religious freedom. The implication was that if *Smith* were to be reinforced by the high Court, then they too were unlikely to recognize the power of Congress to legislate broader protections for the rights guaranteed by the Fourteenth Amendment than had been recognized by the Court's majority. O'Connor averred, "Indeed, if I agreed with the Court's standard in *Smith*, I would

Law & Society Review, Volume 31, Number 4 (1997)

tempt to distinguish previous congressional legislation which, like RFRA, had expanded the protection of constitutional rights under the power granted in section 5 of the Fourteenth Amendment but which, unlike RFRA, had not been voided by the high Court, the consequences of the Court's decision may be far-reaching. Supreme Court decisions on constitutional rights, generally assumed to form a floor for individual liberty, and "expandable" by Congress, appear after *Boerne* also to define the ceiling. Declaring that Congress is no longer able to "define" rights but only to utilize "preventive" or "remedial" legislation to "protect" Fourteenth Amendment rights (*the substance of which is defined by the high Court)* (*Boerne* 1997:2169–72; emphasis added), the Court signaled a dramatic shift in formal governmental power as previously understood. Most immediately jeopardized by this decision is, perhaps, the myth,[2] long shared by many pro-choice activists, that *some day* (when both the Congress and the President are simultaneously receptive) a Freedom of Choice Act would be enacted and abortion rights rendered more secure than as defined by the Supreme Court in *Webster* (1989) and *Casey* (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 1992).[3]

The full consequences of the *Boerne* decision may take some years to unfold, and will, no doubt, be informed by scholarly analysis offering varying interpretations of the decision and creative advice as to its subsequent application. But just as significant for the scholarly community are the critical questions the decision raises for the perceptions and arguments already in print with respect to substantive civil liberties, judicial process, and separation of powers/checks and balances. *Boerne* raises some especially interesting challenges for the three books reviewed herein, which are all focused on the processes of defining civil liberties as well as on abortion as a subject of public policy.

The recent works of Ronald Dworkin, Eileen McDonagh, and Neal Devins constitute an interesting progression with respect to their approaches to individual liberty. Ronald Dworkin provides an eloquent exposition of *moral reasoning* in constitutional adjudication. While Eileen McDonagh does not entirely share the *substance* of Dworkin's constitutional philosophy, she engages in the *moral reasoning* enterprise which Dworkin attaches to the process

join the opinion" (*Boerne* 1997:2176). Breyer and Souter were less committed on this question but also offered no support for Congress's authority under § 5.

[2] I here use the term "myth" in the sense that Sorel did in describing the general strike, a unifying cultural belief and organizing strategic goal to be realized at some *indeterminate* time in the future.

[3] The unsuccessful Freedom of Choice Act of 1991 (FOCA), which would have codified *Roe v. Wade* (1973) as federal statutory law, arguably lost its momentum due to the Court's decision not to entirely overrule *Roe* in *Casey* (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 1992) and the election of Republican majorities in both houses of Congress.

of constitutional interpretation. In contrast with the decidedly normative theoretical orientation of the other two, Neal Devins suggests that a full understanding of constitutional law necessitates an empirical analysis of the roles of the *elected branches* of government, rather than just that of the federal judiciary. Tied together as well by the fact that all three authors address the contemporary debates in abortion law, these scholars each suggest a different way of thinking about this apparently intractable public policy issue dubbed by Laurence Tribe (1990) as "The Clash of Absolutes." They do so from their individual, but overlapping, multiple disciplinary identities in political science, philosophy, feminist studies, and law. When read together, these books invite us to reconsider anew what the debate over abortion tells us about the sociolegal culture in the United States and the role(s) of the judiciary in American society.

## Dworkin's Jurisprudence

In his compendium of previously published essays, nearly all of which had appeared in the popular but erudite *New York Review of Books*, Professor Dworkin covers a wide swath of constitutional theorizing and addresses not only abortion but also several other contemporary controversial subjects with a single nearly unifying theme: the *moral reading* of the Constitution. He does as well offer a subsidiary political message; the Reagan and Bush presidencies have threatened American constitutional values. Organized into three substantive sections dealing loosely with "Life, Death and Race," "Speech, Conscience, and Sex," and "Judges," Dworkin presents his views on the appropriate constitutional status and understanding of abortion, of the right to die, of free speech (including libel, pornography, and the gag rule on abortion), and of academic freedom. The volume also includes (in "Judges") an analysis of the Bork and Thomas confirmation hearings as partisan politicization not only of the confirmation process itself but also more broadly of the Court as an institution. In the same section he also offers a scathing critique of *The Tempting of America,* Bork's (1990) own postmortem on the Senate's rejection of his nomination to the high Court. The last essay in the book, "Learned Hand," is a very personal remembrance of this prominent jurist for whom Dworkin clerked at an early age. The irony perhaps of his ending with what is unabashedly a tribute to Hand is that the latter was fundamentally skeptical about the ability of the courts to resolve the moral questions that Dworkin so clearly and optimistically entrusts to them.

It is, I think, fair to say that Dworkin's volume demonstrates some of the structural problems associated with compendia of a decade of one's writings. Because the parts were not written to be within an integrated larger work, these enterprises may appear

fragmentary or repetitive as to central themes. Consequently, in Dworkin's case, while his introductory essay constructs a sufficiently sized conceptual tent for the *themes* of the essays that suggests a rationale for the volume, the essays themselves tend to be somewhat redundant. Second, given the venue of their first publication, several of the essays are review essays which, with the passage of time since publication, have lost some of their moment. Here I refer specifically to his essays on Renata Adler's study of the *Sharon* and *Westmoreland* libel cases (Adler 1986, reviewed by Dworkin in 1987) and Anthony Lewis's analysis of *New York Times v. Sullivan* (Lewis 1991, reviewed by Dworkin in 1992). Provocative books, interesting reviews, but the "shelf life" of books tends to exceed that of reviews. Finally, a problem associated with the book's genre is that Dworkin has included his half of dialogues with Judge Richard Posner and Professor Catharine MacKinnon. For those who have not read or do not recall either Posner's contributions to their debate or MacKinnon's response to Dworkin's review of *Only Words* (MacKinnon 1993), it is much like "one hand clapping."

The far-from-fatal structural problems aside, Dworkin's essays draw us back to first-order questions about constitutional rights and the justification for judicial review in defining their meaning and limits. Most sections of the book suggest a "rules of engagement" for constitutional interpretation which counters the majoritarian argument against judicial review and rejects the *methodology* of the contemporary "originalists." In the process of developing his *moral reading* thesis, and tying in with his disgust with the Reagan-Bush devaluation of the judiciary, Dworkin evinces little patience with those intent on eradicating what they disparagingly call "judicial activism."[4] Despite his frequent disagreements with the constitutional judgments of the U.S. Supreme Court, Dworkin nevertheless sees no evidence that there is a better alternative than the judiciary to perform this interpretive function (pp. 34–35). Dworkin observes that the weakness inherent in offering majoritarianism as an argument against judicial protections of civil liberties is that majoritarianism is itself built on the principles of liberty, equality, and community in 18th-century political thought. Rather than undermining democracy, judicial review in the preservation of civil liberties can best ensure the conditions that make majoritarian democracy possible (pp. 19, 25).[5]

[4] The decision of the high Court in *Boerne* in June 1997 may provide new support for Dworkin in his battle with the ideological right over judicial activism, as there have been few more "activist" decisions than *Boerne*. Counting the Chief Justice (whom Reagan elevated to that status) in support of the majority position expanding judicial authority at the expense of elected congressional representatives were four of the six Reagan-Bush appointments to the high Court.

[5] Interesting in Dworkin's critique of majoritarianism is his observation that *Buckley v. Valeo* (1976), a decision he has for years fought to overturn, is premised on

In confronting the "originalist" indictment of "judicial activism," Dworkin asserts that with respect to the often vague language of the Constitution, the Framers "meant to use abstract words in their normal abstract sense" (p. 76). It is this understanding of the Framer's *values*, rather than the "originalists'" search for their "other intentions" that should guide the interpretive enterprise (p. 10). Dworkin's refusal to cede ownership of the Framers' intentions to the sociolegal right (including, but not limited to, Edwin Meese, Richard Posner, Robert Bork, or Antonin Scalia) sends a powerful political message; it is analogous to the refusal of political progressives to surrender ownership of the American flag to contemporary conservatives. Dworkin's broad reading of the Framers' intentions serves his theoretical concerns; as importantly, it reclaims for him and other liberal thinkers rightful access to communal American icons.

The moral reading which constrains judicial review involves identifying "general principles" that are consistent with the structural design of the Constitution as an organic whole and also are consistent with the dominant lines of past constitutional interpretation by other judges in other cases (pp. 8–10).[6] In some instances, identifying the *moral principle* to guide the interpretation of constitutional rights is to Dworkin nearly self-evident: *freedom of speech* rests on the moral principle that "it is wrong for government to censor or control what individual citizens say or publish" (p. 2) and *equal protection of the laws* signals that "government must treat everyone as of equal status and with equal concern" (p. 10), the latter proposition reminiscent of Kenneth Karst's well-reasoned *Law's Promise, Law's Expression* (1993).

Throughout Dworkin's analyses of controversial questions is the observation that to preserve moral responsibility the range of constitutional freedom must be sufficient not only to ensure self-determination of an autonomous individual but also to hold free citizens accountable for their actions as independent moral agents. It is primarily this proposition, and not the functional or instrumental value of civil rights and liberties, that justifies their protection in our society.[7] With respect to free speech, he com-

majoritarian democracy. I find this curious, as the argument is easily sustained that *Buckley* undermines one of Dworkin's own principles of majoritarianism, to wit, that each citizen is of equal value and concern to the U.S. government. Even aside from Dworkin's premises for majoritarianism, *Buckley* supports the proposition that the freedom to influence the electoral process via the mobilization of exceptional wealth cannot be curtailed in the name of more fairly assessing the "majority" will.

[6] This rather strong commitment to the weight of precedent is tempered by the related proposition that judges may "in good faith" recognize some earlier lines of decisionmaking to have been "mistakes" if they are found to be in conflict with even more fundamental principles embedded in the Constitution's structure and history (p. 103).

[7] It should be noted that Dworkin's discussion of the instrumental approach to civil liberties addresses only the democratic argument, to wit, that in order to know "who" the majority is and to allow for the majority to change, freedom of speech is necessary. Other

ments that in a "liberal society committed to individual moral responsibility any censorship on the grounds of content is inconsistent with that commitment" (p. 205). He similarly supports the right of a woman to terminate a pregnancy on the basis of *inter alia* a right to personal physical integrity, "so crucial to the development of personality and sense of moral responsibility" (p. 51).

The philosophical imperative that Dworkin outlines in *Freedom's Law* (as summarized above) is stated with his trademark paradoxical combination of erudition and simplicity, but it is not without significant limitations when operationalized. Perceiving moral responsibility as the foundation for, rather than, arguably, a consequence of, a liberal society that ensures a broad range of freedoms poses some daunting difficulties for Dworkin when he seeks to resolve concrete sociolegal disputes. As the critiques (which follow) of his views on academic freedom and reproductive choice suggest, exceptionally individualized bases for rights, grounded in personal moral autonomy, do not easily admit of either limitation or the integration with other collective social values.

## Censorship and the Academy

Several of Dworkin's essays address censorship, but probably the most controversial and, to my mind, the most vulnerable is entitled, "Why Academic Freedom?" To overcome the limitation that the First Amendment applies only to governmentally run institutions, Dworkin identifies "ethical individualism" as the "inspiration" for political liberalism that undergirds a free society (p. 250) and, therefore, argues against censorship in the academy. The special need of academics to enjoy the freedom to state the truth as they see it within their professional milieu is likened to, and deemed to surpass, that of physicians who have a special moral duty to tell their patients what is believed to be in their best interests to hear. "Professors . . . have an even more general and uncompromising responsibility . . . an undiluted responsibility to the truth" (pp. 250–51).

The vulnerability of the essay is not necessarily due to the "professional hubris and cheerleading" to which Dworkin admits at the end of the piece (p. 260). The problem I perceive is that the absence of a social context for the foundations or application of academic freedom renders his theory unable to resolve clashes over its limits and impels Dworkin to offer compromises to tie up

instrumental justifications for freedom of speech such as the enhancement of human relationships, the generation and sharing of culture, indeed even as a critical feature of the nonpolitical marketplace of ideas, are not featured in his discussion of instrumentalism. One need not eschew Dworkin's constitutive approach to civil liberties to also value empirical or normative instrumental understandings of the functions/purposes of liberty within society.

the loose ends. More specifically, Dworkin's excessively individualized and didactic view of freedom of speech, which underlies academic freedom, speaks less effectively to the context of education (and to professional practices) in contemporary American society than it might have in the past. His reference to the physician's moral duty (to tell the patient what *he* or *she* believes "is in the patient's best interest to hear"; p. 251) is emblematic of his view of free speech as a hierarchical construct largely devoid of an expectation of dialogue and of the right of the hearer to hear. Contrary to Dworkin's view, the physician's perceived ethical duty, as well as standards of medical malpractice, requires the provision of accurate information to the patient. Dworkin's view is reminiscent of a time when a physician was deemed to be in unilateral control not only of information sharing but also of decisions on treatment modalities, a time when physicians made paternalistic choices about what to tell patients, especially terminally ill patients. The right of the patient to hear and to know is in Dworkin's approach at best derivative of the right of the physician to speak, rather than a justification for the physician's rights.[8]

With respect to the professor in society, Dworkin focuses predominantly on his or her role as scholar and not as professor.[9] The professorial obligation, one might argue, is to engage students in the educational process, a responsibility that often tries the pedagogic skills of many of us! Within the structured purposes of the university, it is, thus, arguably, the students' right to hear and to learn that justifies freedom of speech for the faculty in the classroom, rather than deriving from it. This understanding similarly suggests that faculty are reasonably expected to create an educational environment that is inclusionary of the institution's students across lines of race, gender, religion, or social class. While Dworkin does not deny that one should be welcoming, in addressing the ferment on college campuses and the antiharassment speech codes that have been developed in recent years, he suggests that the forces supportive of equality constitute an "emotional mismatch" for academic freedom in the abstract

[8] See note 7. Being an exponent of the constitutive approaches to civil liberties, Dworkin gives little attention to the "social good" argument for a physician's or a professor's freedom of speech. The value to the community of ensuring mutually trusting relationships in the delivery of health care, education, or myriad other kinds of services involving an inequality of relevant expertise would seem to provide firmer ground for the protection of the learned professions than individualized moral responsibility.

[9] It is interesting to note that the AAUP statement on academic freedom, adopted in 1941, makes clear that the protection is intended to further "the common good" and not either "the interests of the individual teacher or the institution as a whole." It states further that "the teacher is entitled to full freedom in research and publication of results, subject to the adequate performance of his other academic duties" (Power 1997:A52). While the statement may be primarily intended to ensure that faculty members not shirk duties other than research, it simultaneously does acknowledge that there are academic responsibilities that are not subsumed under a rubric of "academic freedom" per se.

(p. 245). He suggests further that they have been joined by the emerging power in universities of the "anti-truth squads, . . . relativists, subjectivists, neo-pragmatists, and post-modernists" who do not believe in objective truth and, therefore, allegedly have little interest in academic freedom (p. 246). Even a sympathetic reader of Dworkin's perceptions about intellectual movements in the academy might, nevertheless, suggest that those he condemns as "anti-truth squads," uninterested in academic freedom, may in the main simply differ with him in their understanding of academic freedom. These schools of thought posit the existence of many truths as well as the significance of personal and group experience in shaping reality. Their growth within universities is, understandably, disquieting to many traditionalists like Dworkin, as they do raise serious challenges to the way the academy conceptualizes the time-honored "search for the truth" and its professed commitment to an open exchange of ideas and knowledge.

Perhaps the greatest unmet challenge in his analysis of academic freedom is Dworkin's attempt to find a resolution to disputes involving harassment. He suggests that he does not object to those speech codes which prohibit that which is reasonably viewed as humiliating treatment. A line that even the faculty may not cross in exercising academic freedom is to engage in "deliberate insults . . . whose principle motive is to cause injury or distress or some other kind of harm" (p. 255). Because motives are often mixed, he advises that institutions should tread especially lightly in "censoring" such speech, but Dworkin does suggest that swastikas and *Playboy* centerfolds could be banned from professors' office walls as could professors calling black students "boy" or "girl" (pp. 255–56). Arguing that these are themselves "insults," says Dworkin, institutions could legitimately tell such faculty "to express their opinions in other ways" (ibid.). The problem is that this advice appears to be simply a compromise position, a position probably born of his admirable concern for civility but problematic nevertheless. Would the professor be prohibited from calling a student "boy" or "girl" if the faculty member was also African American and this was a teasing form of bond and understood as such by the student. Similarly, one must question whether displaying a *Playboy* centerfold is unprotected speech in the office of an art professor where it is accompanied by a wide range of nude paintings and photography over the ages . . . or in the office of a women's studies' professor documenting the exploitation of women in such magazines. The weakness I see here, as in several of Dworkin's analyses of communication, is that he declines to incorporate context and the nature of the message heard; his focus is exclusively on the speaker and the channel of communication is one way.

Dworkin's conceptualization of academic freedom also does not effectively deal with the problem of professorial inexperience with organized challenges to their views, challenges that Dworkin seems to suggest are equivalent to censorship. A case cited by Dworkin as undermining academic freedom involved a protest by students against the pedagogy of a professor they viewed as racially exclusionary. It is, no doubt, unsettling to our profession, which has long enjoyed the comfort of hegemony over the learning process, to face organized student protests including, for example, the picketing of a classroom. But is it censorship? From the standpoint of the students who believe that they have been treated dismissively, protest constitutes a dialogue; to Dworkin such behavior is an assault on the moral responsibility of the professor to speak the truth as he or she knows it (p. 245), a responsibility that involves our collective defense against "disintegrating into a culture of intellectual conformity" (p. 248).

## Dworkin on Abortion

Abhorrence of conformity, as well as the imperatives of individual moral autonomy and moral responsibility, so determinative of Dworkin's views on academic freedom, also infuse his approach to reproductive freedom. His several essays on reproductive rights, written over a three-year period, are at first supportive of a broad reading of *Roe* but ultimately adopt an undue burden standard for governmental regulation of abortion. There is inconsistency in these writings, not only over time but also with regard to his respect for the moral autonomy and moral responsibility of the individual, at first the foundation for his views and ultimately modified to incorporate support for a concept of the moral community. Dworkin acknowledges neither a change of mind nor the oddity of his later thesis vis-à-vis the general argument of his work. One is thus left to speculate on the explanation for his seemingly dramatically changed position as well as the significance of his unique treatment of abortion.

To Dworkin's credit, he acknowledges several constitutional foundations for reproductive choice, in an inchoate manner acknowledging that constitutional law must be able to govern a complex and perhaps chaotic society where numerous rights may be simultaneously affected by public policy.[10] Tying abortion philosophically to his penchant for the individuality of the free citizen, and looking remarkably like the justification for academic freedom, he asserts, "The fundamental right *Roe* upheld is

[10] In his rejoinder to Judge Posner, who has dubbed abortion "the wandering Jew of constitutional law," Dworkin observes that redundancy in constitutional law is not a vice (p. 110).

the right against conformity" (p. 97).[11] He also rests the right to terminate a pregnancy on the First and Fourteenth Amendments privacy right to decide personal and ethical issues in marriage and procreation (à la the *Griswold* (1965) line of cases (p. 50, arguing that contraception and abortion overlap), the right to moral and physical integrity under the First Amendment (p. 51), and the freedom of religion as also protected in the First Amendment (p. 100). He has also observed that a ban on abortion may "insult the dignity of a pregnant woman" (p. 104).

Dworkin's preliminary analysis of reproductive choice involves an eloquent defense of freedom as a multifaceted phenomenon and a meticulously crafted critique of the Reagan-Bush arguments in support of prohibition and/or regulation of abortion. Rejecting the proposition that a fetus has constitutional personhood (as the Court had as well in *Roe),* he proceeds to suggest that the state has, therefore, no justification for banning abortion.[12] In a rather critical assessment of the Court's decision in *Webster* in 1989, Dworkin argues that "any regulation that significantly increases the risk that a woman will be denied a fair opportunity to control her own reproductive life, *as mandatory waiting periods or a requirement of parental consent might do,* is in my view inconsistent with the best interpretation of what the Constitution requires" (p. 67; emphasis added).

Three years after his article on *Webster,* in an essay entitled, "*Roe* Was Saved," Dworkin writes supportively of the Court's decision in *Casey,* a decision that is largely dedicated to ensuring the appearance of adherence to constitutional precedent while it continued the process of gutting reproductive rights that was begun in *Webster.* Dworkin comments that the Court "reaffirmed and strengthened the reasoning behind . . . *Roe*" (p. 117), a proposition that is at best befuddling. Prominent among the provisions of Pennsylvania law upheld by the Court was a mandatory 24-hour waiting period after an in-person dissuasive lecture on abortion, policies Dworkin had earlier seen as constitutionally problematic. While Dworkin expresses some disappointment over the Court's failure to explore whether the state might not have met its goals through somewhat less restrictive alternative means (p. 123), this is rather a quibble on Dworkin's part and

[11] "Enforced conformity" as an evil in a liberal society is a repeated theme in Dworkin's essays, whether it results from a failure to seek truth and knowledge in the academy or from the imposition of "canonical interpretations" regarding the value of human life in the criminal law (p. 104). Perhaps it is a quibble, but I do not see a "right against conformity" as especially germane to the right to terminate a pregnancy, either as a normative or an empirical observation. I am hard-pressed to understand why challenging "conformity rises to the top of his list of rights at risk in abortion regulation when other rights at risk include bodily integrity, religious freedom, and full socioeconomic equality of women (the last a value not identified by Dworkin in this work as supporting abortion rights).

[12] See discussion below criticizing the importance Dworkin attaches to this proposition.

not a substantial criticism of the judicial resolution of *Casey*. Especially remarkable, given the premises of Dworkin's support of abortion rights, is his particular endorsement of the Court's statement in *Casey* that, "even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage (a pregnant woman) to know that there are philosophical and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy" (pp. 121–22, quoting Justice O'Connor's opinion for the plurality). That Dworkin's changed view of abortion was not a result of *Casey* per se is apparent from an essay written a few months before the *Casey* decision, wherein he argued that the state should be able to prohibit women from intentionally waiting until late in pregnancy to abort because this behavior suggests "indifferen[ce] to the moral and social meaning of their act" and "insults the sanctity of human life" (p. 114). One wonders why the moral responsibility and right against conformity entrusted by Dworkin to free citizens, indeed, even foundational to his earlier, stronger support of reproductive choice as well as myriad other civil liberties, may be subordinated to the collective power to inform a woman that she is viewed as immoral. Under the terms of *Casey,* applauded by Dworkin, obstacles to abortion designed to influence a pregnant woman's morality have been legitimated as state power from even the earliest days of a pregnancy. He posits, in 1992, perhaps by way of explaining his (unacknowledged) new line of thinking on the subject, that abortion challenges the intersection of "religious and personal freedom . . . [and] government[al] responsibility for guarding the public moral space in which all must live" (p. 95). But "public moral space" exists in domains well beyond and aside from abortion; nevertheless, governmental "guarding" of these appears not to influence Dworkin's thinking on other, equally ethically controversial subjects, most especially pornography.[13]

While it is not entirely clear how one ought to understand Dworkin's transition on abortion, several possibilities come to mind. First, in early 1992, he may have been writing a plea to the high Court that *Roe* not be entirely overruled in its upcoming resolution of *Casey;* thus he might have been willing to accept a more limited protection for abortion rights that saved the minimal holding of *Roe* (1973). Similarly, subsequent to the *Casey* ruling, he may have been very pleased that most of the Court's opin-

[13] His strong defense of pornography as protected free speech, in other essays in *Freedom's Law*, is notably *not* tempered by discussions of alternatives to censorship that would send the message of society's moral aversion to this material. He rejects the MacKinnon-(Andrea) Dworkin civil ordinance approach and does not consider, for example, the alternative he admires when applied to libel—a judicial declaratory judgment (without financial penalty) stating that the material defamed (p. 212). Indeed, there does not appear to be any civil liberty, save abortion, on which Dworkin affords to the state the power to "guard . . . public moral space" by placing material obstacles in the path of its exercise.

ion is dedicated to injecting certitude into constitutional law and resisting the opportunity to jettison a recognized right. O'Connor's plurality opinion resonates with Dworkin's view of tradition in interpreting fundamental rights. Also possible is that for reasons known only to him, Dworkin has developed reservations about his earlier and stronger support for abortion rights but simply fails to acknowledge the conflict between these writings. A less likely explanation for Dworkin's modified position on reproductive rights suggests that perhaps he, like Devins, but in distinct contrast with McDonagh (discussed below), believed that the *Casey* "compromise" might resolve the "clash of absolutes" and move abortion off the political agenda, thereby reducing what Dworkin and others have viewed as distortive "single-issue" politics (p. 70).[14]

## Contrasting McDonagh's Approach to Abortion Jurisprudence

In contrast with Dworkin's multiple constitutional foundations for reproductive choice, Eileen McDonagh sustains a single provocative argument for abortion rights in *Breaking the Abortion Deadlock: From Choice to Consent.* The departure from the conventional dialogue on reproductive *choice* (in which Dworkin and scores of other normative scholars have been involved) is apparent in the title of McDonagh's book. In contrast with those concerned with a woman's right to *choose* whether or not to terminate a pregnancy, McDonagh essentially makes the case that it is the *continuation of pregnancy* and not abortion that requires explanation. She, therefore, posits that to remain pregnant a woman must consent to the use of her body by a fetus. She argues that an unwanted pregnancy is much like a rape or a kidnapping, an invasion and extended overwhelming control over a woman's body which, under the right to self-defense, she is entitled to repel.[15] And because this uninvited bodily invasion is akin to an illegal physical assault, a woman is also entitled to the assistance of the state in resisting the fetus, including, but not limited to, financial support for medically indigent women who seek to abort (pp. 69–78). Her thesis, which is certain to generate much debate, not

[14] This is distinctly less likely as an explanation for Dworkin's changed views, in that he comments that *Casey*, in fact, did not appear to resolve the political controversy surrounding abortion and suggested, instead, that the next appointment to the Supreme Court would be crucial. The divisions within the Court on *Casey*, thus, added significance to abortion in the presidential election in 1992 (p. 129).

[15] She makes clear that the conditions under which one became pregnant are irrelevant to her argument. There is a tendency in the literature and debate on abortion to assume that unless a woman is raped, pregnancy is a volitional, and voluntary, act. McDonagh suggests the following analogy: sex is to rape as a wanted pregnancy is to an unwanted one. This applies to pregnancy the well-established distinction in culture and law about sex; when it is consensual it is a positive experience and when it isn't, it is rape.

to mention acrimony,[16] is unswerving in its unsentimental portrayal of pregnancy and its demand for the empowerment of women to control the use of their bodies. Throughout the book, McDonagh catalogues and explores not only the justifications for her understanding of pregnancy and abortion but as well cites the numerous advantages that inhere in her approach to abortion as a legal subject.

McDonagh's thesis represents an interesting tributary in reproductive jurisprudence. She is not the first to view pregnancy as a bodily invasion; indeed, as she acknowledges, a number of years ago Judith Thomson (1971:56–58) likened an involuntary pregnancy to being "shanghaied," a term one would be unlikely to use today but which effectively made this point. Various aspects of the thesis developed by McDonagh have also, in nascent form, been foundational arguments utilized by other scholars over the past decade. Robin West, in a seminal article in 1988, observed that in a woman-centered legal system unwanted pregnancy would be defined as the harm of "invasion" (pp. 59–61). Argued by others was that the absence of legal obligation to provide bodily material to already-born persons (including one's children) is, *a fortiori,* dispositive of fetal claims to maternal gestation (Gallagher 1987:17–31; Binion 1989:37–38; Neff 1991: 349–52). In a related approach, several scholars have applied to pregnancy and abortion the bodily integrity principles that are protected under the Constitution's ban on slavery. In denying that the state can obligate a woman to carry a pregnancy to term, Koppelman observed that "the thirteenth amendment . . . draws no distinction between the powers of a man's back and arms and those of a woman's uterus" (1990:488; see also Cooper-Davis 1993). All these previous discussions shared McDonagh's main thrust, to wit, that an equitable analysis of *unwanted* pregnancy would treat it as akin to bodily invasion and exploitation. To my knowledge, however, McDonagh is the first to fully flesh out the legal foundations and consequences for the self-defense approach to abortion and to painstakingly anticipate and address expected criticisms. Her book is likely to become a state-of-the-art treatise for legal scholars debating abortion as well as a manual for pro-choice litigators.

McDonagh's self-defense approach to abortion immediately gets beyond the question that occupies most traditional reproductive rights scholars and, thus, fundamentally alters the terms of the constitutional debate. Dworkin's approach to abortion, like that of dozens of other prominent constitutional lawyers, is to determine as a first-order question whether the fetus is a per-

[16] A rather protracted electronic discussion of her book among Law & Courts Section scholars in Political Science (most of whom disclosed that they had not read the book) suggests that it will prove very controversial. The controversial quality will probably be as ideological as it is legalistic.

son.[17] He takes a limited pro-choice position *because* he has concluded that the fetus is not a "constitutional person" (p. 47). In his jurisprudence, if the fetus were a person, then, barring threats to a woman's health, the state would be empowered to protect the fetus from abortion because the fundamental principle of democracy is that the state show "equal concern" for each person (p. 48). McDonagh, for the sake of argument, indeed, to break the deadlock, concedes personhood to the fetus in order to focus on what the fertilized ovum *does*, not what the fertilized ovum *is* (p. 5). This, she repeatedly reminds the reader, is the critical issue in pregnancy. In support of this point, McDonagh provides a rather comprehensive description of the physical consequences of pregnancy, both "normal" as well as "pathological." In describing pregnancy in medical terms and suggesting how overwhelming the consequences of gestation for women's health, McDonagh not only invites a demystification of the abortion debate, she challenges our collective myths about gender roles. In a society in which self-defense is a male expectation and self-sacrifice a female virtue (p. 19), in which access to women's bodies has been a male prerogative (pp. 155–62) and a fetal right (p. 22), where pregnancy is often seen as a "gift from god" (p. 30), McDonagh recognizes that she has an uphill climb to have *unwanted* pregnancy seen as a civil and criminal wrong against a pregnant woman. She, therefore, repeatedly prods her readers to try to step back from and question the gendered cultural norms that underlie and frame the abortion debate.

In differing from Dworkin on the issue of fetal personhood and the consequences of this determination, McDonagh frames the debate as a woman-centered discussion. In her view, a woman's right to self-defense against a fetus is the same as her right to repel *anyone's* invasion of her bodily integrity. Dworkin has left little room for abortion rights for otherwise healthy women *if* a fetus is deemed to be a constitutional person. As noted above, he reaches this conclusion on the basis of his "equal concern" principle of democracy and the Equal Protection Clause of the Constitution. Treating fetal personhood as largely *dispositive* of the abortion question, Dworkin ignores the case law in support of bodily autonomy generally, as well as decisions denying to relatives a right to the potentially life-saving bodily materials of their kin (see, e.g., *Rochin v. California* 1952; *McFall v. Shimp* 1978; *In re George* 1982; *Winston v. Lee* 1985; *In re A.C.* 1990; *Curran v. Bosze*

[17] That this question has been deemed to be so fundamental is, as I have argued elsewhere, reflective of the male experience in reproduction. Whereas women experience three biological stages in the process of reproduction—insemination, gestation, and childbirth—men are physically involved only in insemination. For men to be equal in their biological parenting with women, the personhood of the fetus must begin at the stage in which men are also physically involved in the progenitive process. This would be at insemination/fertilization. See Binion 1997:67-68.

1990).[18] Given my assumption that Dworkin would support these precedents, it is unclear why he does not view these principles as applicable to unwanted pregnancies if the fetus were deemed to be a constitutional person. That pregnant women's rights are thus effectively rendered derivative of those of fetuses and that Dworkin is perhaps personally ambivalent about abortion[19] also clearly distinguishes his and McDonagh's views on the subject. The contrast is repeated in their respective discussions of the restrictions that the state may place on abortion and the power of the state to discourage this "choice." McDonagh is unwavering in her rejection of all the restrictions on consent that states have imposed since the Supreme Court's decision in *Roe* (1973); Dworkin demonstrates a curious ambivalence. Whereas McDonagh remains opposed to, *inter alia,* government-mandated dissuasive lectures, waiting periods, and state record-keeping requirements, as well as governmental refusals to fund abortion, as noted above, Dworkin condemned the Court's decision in *Webster*[20] and three years later endorsed the Court's stance in *Casey* (1992).[21]

## Critiquing the Self-Defense Thesis

If the foregoing suggests that, in contrast with my criticisms of Dworkin's approach, I am uncritically supportive of McDonagh's thesis, let me suggest the problems I see associated with her thesis. Given that McDonagh is herself a feminist theorist, I focus on the criticism that would probably come from those perspectives most inclined to support women's rights. While her book presents a strong defense of women's physical autonomy, bridges the gap between constitutional and common law, provides a strong foundation for an Equal Protection analysis of self-defense law, and most significantly, perhaps, obligates the state to provide financial support for abortion, these accomplishments are not without cost.

While the consent argument does move the abortion debate beyond fetal personhood, it does so by (questionably) conceding

[18] It might also be noted that Dworkin's approach to constitutional law—that it should reflect long-standing values—suggests that he would look at abortion in a context larger than the personhood debate and consider the line of cases on the common law of bodily integrity and autonomy. It might also be suggested that his passionate (though moderately reasoned) defense of the right to die, posited on the lack of value of an "insensate" life (pp. 140-41), would also have applicability to fetal life prior to the third trimester of gestation when the nervous system develops.

[19] I note that he regularly refers to a pregnant woman as a "mother," perhaps suggesting that he does not see "pregnant woman" as a separable status (Dworkin, pp. 65, 114, 115).

[20] He castigated the state of Missouri for trying to make abortion unavailable and for punishing those residents seeking abortions for having the law on their side (pp. 57-59).

[21] See discussion above, pp. 853–56.

the point. Does a two-month-old fetus, barely the size of the top of a thumb, with only buds from which organs may later develop, reasonably qualify as a "person"? Does the fact that even without elective abortion a majority of fertilized eggs will never make it to birth, either because they do not implant or naturally are miscarried, undermine the soundness of assuming a fetus to be a "person"? Even though her concession appears to be a device to bring into stark relief the legitimacy of the self-defense argument, *even if* the fetus has personhood status, the *a fortiori* argument from the physical invasion cases would seem to serve the same purpose without such a grand and, I would argue, insupportable concession, a concession that serves to reinforce the "baby killer" epithet hurled at women who terminate pregnancies. True, McDonagh advises throughout the book that the relevant issue is what the fetus *does*, not what it *is;* nevertheless, her apparent concession on the "personhood question" is troubling.

Also troubling from the perspective of feminist thought is the concern that McDonagh has constructed an intensely adversarial relationship between woman and fetus. This not only adopts what is sometimes dubbed "the male model" of social structure but as well separates the woman from the fetus in a manner potentially problematic for women's reproductive rights. Some years ago, Neff, writing in the *Yale Journal of Law and Feminism*, argued for the bodily integrity approach to abortion (1991). Although she shared McDonagh's view of pregnancy as an entirely physical phenomenon, in contrast with McDonagh she catalogued the advantages of seeing the pregnant woman and fetus as an indivisible whole. Not only would this approach preclude anti-choice forces from treating the fetus as having separate interests that the state could acknowledge and protect *against the pregnant woman*,[22] but it also would obviate the need to decide whether a fetus is a person with respect to *all* aspects of the law (Neff 1991:passim). Neff's unitary, nonadversarial approach has a further value in feminist thought; it would deny to the state control over "aborted" fetuses. She noted that abortion involves "the choice not to be a mother," and not just freedom from pregnancy (p. 335). She further observed that the possibility of artificial wombs only serves "to complicate the burden of parenthood" (ibid.). A legal argument on abortion rights should be prepared for the possibility of artificial gestation. Although in 1997 this may sound like *Brave New World* or *The Handmaid's Tale*, recall that very recently (prior to the birth of Dolly) it was believed that the cloning of adult mammals was well-nigh impossible.

[22] It should be noted that pro-choice scholars have also been known to see the fetus as being in an adversarial relationship with a pregnant woman seeking an abortion. Tribe (1985:342) refers to the role of the law in "moderat[ing] the clash" between woman and fetus.

McDonagh's argument would suggest that provided women are not deprived of the right to defend themselves from unwanted fetuses, the state would be free to take custody of those aborted. Indeed, she posits that the method of abortion (especially late term) could be regulated to preserve fetal viability (p. 80). While it could be argued that a fetal protection policy of this kind would unduly pressure some women to continue gestation, rather than cede control over their biological offspring to others, the ability to free oneself from the physical rigors of pregnancy is all that McDonagh's approach provides.

## Moving beyond the Courts—The Devins Thesis

The approaches to abortion as a constitutional right taken by Dworkin and McDonagh are methodologically similar but fundamentally at odds as to their premises and their recommendations for public policy. They are, however, in agreement that it is the judiciary to whom they are speaking. In one of the latest in a series of books analyzing the politics of abortion, Neal Devins renews attention to the roles of the elected branches in the formulation and shaping of the policies governing the legality of abortion and the regulations governing its availability. The main thrust of the book is that properly understood, the constitutional contours of public policy in general, and of abortion rights in particular, result from a dialogue among the courts, the legislature, and the executive, and he criticizes those who continue to look to only the judiciary as the source of constitutional law. Although the model may be applicable as well to the constitutional law of each of the 50 states (and the author does inventory the abortion-related legislative activity within the states surrounding landmark federal constitutional rulings), the main focus of the work is on the federal arena and the relative roles of judges, the president, and Congress in shaping constitutional policy. In contrast with Dworkin whose normative prose on the same subject is aimed at excoriating the politicization of constitutional decisionmaking, Devins is interested in a more self-consciously empirical analysis. Devins's work is but one of a number of books attempting to, *inter alia*, isolate the roles of the various actors in the abortion battles of the past generation and the consequences of the decisions made. (See, e.g., Rosenberg 1991; Burgess 1992; Craig & O'Brien 1993; Jelen 1995; O'Connor 1996.) Targeted in Devins's analysis are the observations about the role of the Court in policy that have been offered by Ruth Bader Ginsburg, Gerald Rosenberg, even Robert Dahl, who have suggested, respectively, that legislatures should have been afforded greater input on the abortion issue, that the Court has had little impact on abortion, and that the Court's constitutional decisions eventually follow those of the dominant lawmaking majorities. Devins believes that

the relationships among the branches and between the divisions of government in the processes of giving meaning to the Constitution are more complex and more dynamic than these and most other analysts have observed (pp. 3–6). To some extent Devins's critique is legitimate, but it should also be noted that the observations he offers in his book are indicative of a more general facet of American public policy: that political institutions and the individuals within them attempt to maximize their input and their power. That the interpretation of the Constitution is, therefore, not always and in all respects entirely under the sole control of the judiciary, not only because of the Constitution's formal "checks and balances" and "separation of powers," but also because of the political realities of American society, should surprise no one. Nevertheless, and with some reservations on his thesis noted below, I would conclude that Devins has done a very competent job of presenting a useful panoramic view of abortion rights policy over the past three decades, interweaving constitutional and political dimensions. It is the kind of work that should inform even sophisticated students and generate valuable classroom discussion.

Devins places the constitutional debate on abortion within the context of a long tradition of interbranch conflict within the federal government. From Jefferson's opposition to judicial review (p. 13), to FDR and the Court-packing plan (p. 18), to congressional attempts to limit the jurisdiction of courts (p. 21), the tension between the judiciary and the elected branches has been apparent throughout American history.[23] Ironically, Devins uses these examples of unsuccessful activity in a chapter that ends with the observation that "judicial supremacy" is a "myth" (p. 22). Nevertheless, he argues, despite their failures to employ head-on attacks on the Court's power, the elected branches have influenced the substance of constitutional interpretation in numerous ways and on numerous subjects. But his own examples suggest, nevertheless, that the judiciary, especially the U.S. Supreme Court, may, in fact, be in the constitutional "cat bird seat" most of the time, a proposition constitutionally reinforced by the Court itself in *Boerne*.

In cataloging the ways in which the elected branches influence constitutional interpretation, Devins immediately turns to the process of judicial selection and confirmation. Therein lies perhaps the single most important input to the high Court from the "majoritarian" political system. The power to decide who shall be on the federal courts, and especially on the U.S. Supreme Court, should not be underestimated. At the same

[23] It must be noted, of course, that until the passage of the Seventeenth Amendment, U.S. Senators were not popularly elected. Thus, one could argue that prior to 1914, the U.S. Senate was not unlike the federal judiciary, chosen by those who had been elected.

time, perhaps paradoxically, this reality undercuts Devins's larger thesis, in that the importance of the appointment/confirmation powers is but a reflection of the exceptional power of the judiciary in the United States to shape the meaning of the Constitution. The power of the president to nominate and, with the advice and consent of the Senate, to appoint jurists speaks to the power of both branches to affect, indeed sometimes effect, constitutional judgments, but it is judgments later to be made by the judicial branch. Indeed, I believe that the conclusion is easily reached that, contrary to Devins's larger argument for understanding abortion rights policy which involves assessing the policymaking activities of the elected branches, changes in Supreme Court membership "explain" the shift in abortion law beginning in 1989. The Supreme Court had, from the earliest cases on the subject after *Roe*, created room for the elected branches (federal and state) to limit financial support for abortion and to require parental involvement for minors (subject only to the existence of a judicial bypass option). All other pre-viability restrictions on choice challenged prior to *Webster* had been rejected. The very same types of previously voided restrictions enacted by the elected branches were thereafter permitted[24] under relaxed standards of review.[25] Thus, especially when dealing with highly controversial and divisive constitutional questions, the process of judicial selection requires exceptional attention, an observation echoed in Dworkin's work by way of *his* highly critical view of Presidents Reagan and Bush for using the selection process to further a conservative political agenda (Dworkin, chs. 6, 12–15).

While the appointment process is clearly the critical, albeit indirect, point of senatorial input into constitutional decisionmaking, I might take issue with Devins's account of the (contemporary) significance of the formal powers of the Senate. It is true that the rejection of Supreme Court nominees (27 of a base of 148) far outpaces those of nominees for other positions (in contrast, only 9 cabinet nominations have ever been voted down in the Senate), and this would suggest that the Senate has exercised greater authority in relation to the president in this arena. But that is only part of the story of senatorial influence. Two other nuancing factors need to be considered with respect to the data on the confirmation process. First is that the great mass of rejections of Supreme Court nominations occurred in the 19th century (25%). The 20th century has seen but 8% rejected, and none was rejected between 1930 and 1969. Whether the 4 defeats

[24] With the exception of the requirement that a married woman obtain consent from her husband or notify him prior to obtaining an abortion. This continues to be rejected by the high Court, but is the only challenged practice that has been defined as constituting an "undue burden."

[25] The *Webster* decision, as well as the "undue burden" standard employed by the plurality in *Casey*, permits a wide range of controls on the practice of medicine that had previously been deemed violative of the constitutional right to privacy.

in the past 28 years (Fortas,[26] Haynesworth, Carswell, and Bork) signal a revival of a more activist Senate posture is yet to be determined. On the other hand, one must always remain mindful of the senators' activism in other modes, including but not limited to, informal presidential advising that routinely occurs prior to the formal selection of nominees, forcing the withdrawals of problematic nominations, such as that of Douglas Ginsburg during the Reagan administration, and, as has been alleged recently, foot-dragging on judicial appointments by the Senate's Committee on the Judiciary. Thus, it is probably not inaccurate to see the Senate as at least potentially powerful in the selection process, recognizing that the political burden is on those who would formally defeat a president's choice, especially at the Supreme Court level. The Thomas confirmation as well as the carefully orchestrated rejection of Bork both provide, I believe, testimony to the burden proposition.

Devins's book is especially useful in courses dealing with judicial process or law and politics because he does a nice job of reviewing (with appropriate examples) the myriad ways in which other policymakers beyond the courts are able to participate (even when not exercising decisive power) in the making of constitutional law and maintain, in effect, a democratic legitimacy for judicial review. Members of Congress on occasion bring suits raising constitutional questions about separation of powers,[27] and in cases before the Court, Congress can file briefs. Although the authority has recently been seriously restricted, if not eliminated, by the high Court, through legislative mechanisms Congress and the president have on occasion undone what they perceived as constitutional mistakes by the Court through legislation expanding constitutional rights.[28] Although the executive obviously shares in the legislative activity of the Congress, it also has significant other mechanisms for influencing constitutional law: through agency rules, through litigation strategies before the federal courts, and through amici briefs to the Court which the solicitor general has a standing invitation to file. Utilizing very brief summaries of the elected branches' activities in several policy areas involving landmark constitutional rulings—school desegregation, minimum wage, legislative veto, and parochial edu-

[26] I include Fortas among the "defeats" in the U.S. Senate (rather than a withdrawal) because it was a failed vote on cloture that led to the withdrawal of his nomination to become Chief Justice and, ultimately as well, to his resignation from the Court.

[27] This, of course, can be a political hot potato for the judiciary. See, e.g., *Goldwater v. Carter* (1979), as well as the more recent decision in *Raines v. Byrd* (1997), denying to senators standing to challenge the presidential line-item veto.

[28] See, e.g., *Goldman v. Weinberger* (1979) and *Zurcher v. Daily Stanford* (1986), which were followed by congressional statutes broadening rights under the First Amendment (PL 100-180, and Privacy Protection Act of 1980, respectively). The most recent statement by the Supreme Court (in *Boerne*) of *its* ultimate authority in interpreting the Constitution would probably lead Devins to revise his argument in the second edition of his book.

cation—Devins concludes: "Constitutional decision-making is a fluid, ongoing enterprise involving all three federal branches and the states. The courts help to define but do not control constitutional interpretation" (p. 55). It is not entirely clear to me that, aside from the rarely used constitutional amendment process, there is a lack of "judicial control" of constitutional interpretation. His research speaks more effectively to both the efforts of the "elected branches" to influence the judiciary (as distinguished from seizing "control") and the ability of other branches to interpret Court decisions and thereby affect the application of constitutional law.

What seems to be missing in Devins's book is an overall theoretical framework for assessing and explaining the relative roles of the three branches of the federal government and of the states in the process of giving meaning to the U.S. Constitution. His work presents a large body of information and analyzes the data very competently, but it does not offer theoretical insights that social scientists have come to expect in studies of this type. For models of this enterprise I refer to two now classic studies: Goldman and Jahnige, *The Federal Courts as a Political System* (1985), which analyzed the courts as part of an Eastonian system with all its attendant political aspects (and intersection with the "elected branches") of input, feedback, and conversion; and Johnson and Canon, *Judicial Politics: Implementation and Impact* (1984), which looked at the major actors in the process of interpreting, implementing, and consuming judicial decisions. Possibly because of the employment of appropriate theoretical frameworks, such works are more fully able to capture what has come to be known as law in action. I believe that that may have been Devins's greater aim. Given that there is little question in contemporary American society that (barring a constitutional amendment) the Supreme Court is the final word on what the Constitution *means*, what needs to be explained is why that is only a *formal* truth. Why is it that several years after the Court's ruling in *Abington v. Schempp* (1963) a majority of school districts in the country were still conducting prayers (and perhaps still are)? Given that the *formal* Constitution has provided little defense for Dr. Jack Kevorkian's actions in assisting suicides,[29] why do juries repeatedly refuse to convict (and probably will continue to do so)? Why do the institutional capacities of the judiciary to effect its decisions vary so significantly with the issue, the politics and the actors involved?

It is possible that Devins's argument would have had benefited, perhaps paradoxically, if he had broadened the scope of his subject. Whereas he addressed only the elected branches as

[29] Indeed, in *Vacco v. Quill* (1997) and *Washington v. Glucksberg* (1997) the Supreme Court rejected the claim that the Constitution provides a right to assisted suicide for terminally ill, suffering patients.

rivals of the courts in the power to interpret the Constitution, perhaps he would have made a more effective argument about the limited power of the courts to control the function if he had taken a law in action approach and assessed the unofficial and nonsanctioned actions that influence the process. In the former category I would place, for example, public opinion and community behavioral norms, from which the extralegal phenomenon of jury nullification stems. Arguably, this process is potentially more effective as a protection for (popularly recognized) constitutional rights than is any action of the elected branches. In the latter category of governmental but nonsanctioned practices is most prominently the behavior and ethos of law enforcement,[30] which has been primarily responsible for limiting the protections afforded individuals who come in contact with the criminal law. When in the 1960s the Warren Court issued broad statements of rights under the Fourth, Fifth, and Sixth Amendments, law enforcement pushed the boundaries and with greater conservatism on the Court won support for retrogression in civil liberties law. That Congress and the state legislatures engaged in the identical process of "boundary-pushing" on abortion rights protection under the Constitution is represented as elected branch power in Devins; the similarly critical role of nonjudicial agents in determining the scope of Bill of Rights protections for suspects and defendants cannot be accounted for in Devins's thesis. While this is not a fatal flaw, it does suggest that his approach does not fully develop the thesis he puts forth regarding the forces of "constitutional interpretation" that limit the hegemony of the courts over this function. With the Court's decisions in recent years limiting Congress's power over the states, implicitly limiting the congressional role in giving meaning to the Constitution, and *Boerne* which explicitly exerts such limits, the balance that Devins addresses has significantly tipped toward the judiciary. Limitations on the judiciary may, thus, be more fruitfully sought outside the traditional paradigms of power.

## Concluding Comments

In contrast with Devins's thesis and elaborate supporting documentation, Dworkin and McDonagh evince a very different understanding of the framework within which constitutional issues are resolved, where control over constitutional decisionmaking actually lies, and where accountability resides. Neither Dworkin nor McDonagh ignores that as a matter of pragmatic reality, there is a substantial role played by the elected branches and the

[30] While one could subsume law enforcement under the rubric of the "elected branches" in that they are within the executive authority of the state, this would seem to be a significant stretch and beyond the conceptualization of democratically "elected branches" suggested by the author's work.

political community in affecting the exercise of constitutional rights. And neither expresses any particular discomfort with a positive role for elected officials in protecting rights. Where they would sound a caution to Devins's approach is over the legitimacy of political actors interfering with constitutional rights that have been recognized by the judiciary. Indeed, in contrast with Devins's apparent belief that it is a good thing in a democracy for this responsibility to be shared, Dworkin asserts that the question may be open as to which branch is most capable of providing the proper reading of the Constitution, but that all things considered, including our traditions as he understands them, this function belongs to the judiciary, the position that the Court itself has more recently expressed. "The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are. . . . American constitutional practice shows that our judges have final interpretive authority" (Dworkin, pp. 34–35). Dworkin's view reflects on his conceptualization of democracy that does not rest on the primacy of majoritarianism, as is implicit in Devins's work, but rather on an understanding of democracy as a commitment to the equal status of each member of the political community. While Dworkin neither ignores nor disparages the role of the other branches of the federal government and the states in the policymaking process, it is clear that he views the constitutionalizing of an issue, such as abortion or libel, as tantamount to assigning the ultimate decisionmaking on the subject to the judiciary. While several prominent scholars and judges (e.g., Professor Robert Burt, Justice Ruth Bader Ginsburg, and Judge Abner Mikva) have, in recent years, argued that the Court should have left room for the states' legislatures to mold abortion policy, Dworkin avers that the judicial resolution of *Roe* "may have produced a better understanding of the complexity of the moral issues than politics alone would have provided" (p. 31). In Devins's view, the Congress, the president, and the states have all (legitimately) had their due roles in the dialogue that has emerged since *Roe* in 1973.

Despite very different intellectual starting points and very different scholarly agendas in their respective books, interestingly, fundamental agreement between Devins and Dworkin emerges with respect to support for the Court's decision in *Casey* in 1992, and distinguishes both from McDonagh who roundly condemns undue burden jurisprudence as limiting a pregnant woman's right to self-defense. Dworkin and Devins applaud the decision but, not surprisingly, in different ways and for different reasons. Dworkin appreciates the Court's preservation of *Roe*, as well as its support for the moral context and significance of the abortion decision. Devins, alternatively, is pleased that the undue burden standard adopted by the plurality effectively legitimates a role for

the state legislatures in public policy on abortion rights. He comments, "The Clinton administration, recognizing *Casey's* popularity, became less strident and more reactive in advancing its pro-choice agenda" (p. 137). He endorses what he believes was "the middle ground" sought by the Court in *Casey* (p. 147) as good politics, but does not explore what this doctrine means in practice or how "middling" it really is. For example, he takes no note of the fact that with the exception of husband's notification, Justice O'Connor, the architect of the "undue burden" standard, had never found any restrictions on abortion to be unconstitutional. Devins also does not document whether *Casey*'s consequences are widely understood and endorsed by the general public or by those for whom abortion is a salient political issue. It would appear that contrary to Devins's assessment of *Casey* as seizing the popular majoritarian middle ground on abortion, the decision has done nothing to lower the heat on abortion. Despite the *Casey* "compromise," violence against clinics continues and protracted congressional attempts to criminalize "intact dilation and extraction" procedures (so-called partial birth abortion) suggests abortion policy may be as contentious as ever. The problem with seeing *Casey* as a "political" solution is that this view underestimates the extent to which pro-life forces find *Casey* insufficient and pro-choice forces find it unprotective. Perhaps what one learns from these various approaches to, and studies of, abortion is that, contrary to the position of many political scientists who see the *courts* as institutionally incapable of effective policymaking, *politics* in the form of electoral and legislatively driven decisionmaking may also be institutionally incapable of resolving some of society's most divisive disputes. Despite all the recent literature offering doctrinal resolutions for abortion law[31] and numerous social science studies of the nonjudicial politics of abortion,[32] as a society we may still be far from what Karen O'Connor has called "neutral ground." And with the Court's decision in *Boerne*, it is distinctly possible that the resolutions will rest entirely with the judiciary.

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[31] This includes more than 200 law review articles focused on abortion that have been published since the Court's decision in *Casey* in 1992.

[32] More than two dozen such books have been published in the past decade.

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