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Book Review (reviewing Neal Devins, Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate (1996))

Tom Ginsburg

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SHAPING CONSTITUTIONAL VALUES by Neal Devins. Baltimore: Johns Hopkins University Press, 1996. Pp. xiv, 193. $47.50 cloth, $14.95 paper.

Reviewed by Tom Ginsburg

Who is the ultimate interpreter of the Constitution? Most Americans believe it is the Supreme Court, a belief often encouraged by the Court itself. In *Shaping Constitutional Values*, Neal Devins reminds us of an essential but sometimes overlooked point: constitutional interpretation is an interactive, ongoing political process, in which the Supreme Court plays an important but not definitive role. Ultimately, there is no final voice telling us what the Constitution says.

In Devins's account, a Supreme Court decision is not the end of the process but rather one chapter in a continuing story. Although the Court can and does say that it is the authoritative voice, other governmental actors react to judicial interpretations. The executive branch must implement laws, Congress and state legislatures can pass new laws defying or pushing the boundaries of judicial interpretation of the laws, and all can do so from independent constitutional positions. As Devins says, "Congress, the White House, governmental agencies, and the states all play critical, interdependent roles in interpreting Supreme Court decisions and the Constitution itself" (p. 23). The Court's interpretation is, in turn, shaped by the constitutional views of other actors. If a court acts in a manner too out of step with the dominant views of the polity, a judicial decision can provoke constitutional amendments, massive social movements, and the ire of other political actors. These social pressures may be difficult for judges to resist. Like a conversation, this process of interaction produces new interpretations, compromises, and positions that are different from those any one body might start out with and reflects new values shaped by the process itself.

While debunking the myth of judicial finality, Devins also distinguishes his account from those of social scientists who see courts as a "hollow hope," incapable of effecting social change.[1] The judiciary is neither supreme nor ineffectual, and an analysis of judicial power requires detailed attention to the specifics of constitutional interpretation in particular policy areas.

1. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE (1991).

Devins illustrates his broad contentions with just such a detailed examination by looking at the role of the courts and other governmental actors in the abortion controversy over the last three decades. After the Supreme Court's controversial decision in *Roe v. Wade*,[2] the elected branches at both the state and federal levels continually presented the Court with legislation that pushed the limits of the Roe holding. Mass social movements were formed on both sides of the issue, and abortion became one of the dominant issues in American politics. The Court's latest statement, *Planned Parenthood v. Casey*,[3] rejected the *Roe* trimester framework while upholding the constitutionality of abortion. In doing so, the Court found a middle ground that in large part resolved a seemingly intractable national controversy (pp. 5-6).

Devins's study uses the controversy not only to cast new light on the well-trodden abortion story but also to illustrate a general argument about American political institutions. This is a readable, short (162 pages of text) contribution to a growing body of scholarship emphasizing the dynamic and interactive nature of the judicial process.[4] While its core point is not original, the application of the evidence from the abortion case is a new and important contribution.

I
HISTORY

After Chapter One outlines the argument, Chapter Two is a cogent recounting of the history of judicial review in America that lends support to Devins's thesis that courts are not the final voice. Devins notes that although the Court asserted its own finality in *Cooper v. Aaron*,[5] where the Court announced it was the "supreme expositor of the Constitution" (p. 21), numerous Justices before and after this decision have understood the Court's interdependent position with other branches (p. 22).

John Marshall, for example, asserted the power of judicial review in *Marbury v. Madison*,[6] but did so in a way that showed political sensitivity to other branches. By finding for the Jeffersonians while asserting (Federalist) judicial power to review legislation, Marshall accomplished a

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

3. 505 U.S. 833 (1992).

4. *See, e.g.*, WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994); STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM (1996); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988); Walter Murphy, *Constitutions, Constitutionalism and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 3 (D. Greenberg et al. eds., 1993); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763 (1993).

5. 358 U.S. 1 (1958).

6. 5 U.S. (1 Cranch) 137 (1803).

tremendous political feat and perhaps saved the judiciary from emasculation (pp. 11-13). But Devins asserts that Marshall never intended his statement that courts "say what the law is"[7] to mean that other branches could not interpret the Constitution (p. 13). Rather, he was trying to expand the power of his own branch in a dynamic political environment (p. 12).

Against the history of judicial interpretation, Devins traces elected branch interpretation of the Constitution from the early days of the Republic. The Alien and Sedition Acts of 1798, for example, were declared by Jefferson in 1801 to be "a constitutional 'nullity'" (p. 13). Congress followed suit forty years later when it declared the Acts "unconstitutional, null and void" (p. 13). It took the Court over 150 years to finally strike the Alien and Sedition Acts, in *New York Times Co. v. Sullivan*,[8] where it noted that the "court of history" had already invalidated the Acts (p. 13).

Another early example of executive branch interpretation is Andrew Jackson's veto of legislation rechartering the Bank of the United States, despite the Court's approval of the chartering in *McCulloch v. Maryland*.[9] Jackson believed the bank unconstitutional and knew that the Court could not implement a contrary decision without the cooperation of other branches. Jackson is reputed to have said in another context, "John Marshall has made his decision, let him enforce it" (p. 14).

Aware of the potential damage to the court's prestige from challenging elected branch action, John Marshall never held a congressional act unconstitutional after *Marbury*. It was not until 1856, in *Dred Scott v. Sandford*,[10] that the Court again challenged the legislature, this time when it voided the Missouri Compromise on the ground that the right to own slaves was "distinctly and expressly affirmed in the Constitution" (p. 14). But far from settling the question of slavery as the Justices had hoped, the decision provoked further controversy, leading ultimately to the Civil War. Abraham Lincoln called for the decision's reversal and said that judicial supremacy was both absent from the Constitution and unwise because "if the policy of the government . . . is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers" (p. 15). Lincoln's argument for democracy contrasted with that of his opponent in the Senate race, Stephen Douglas, who argued for the finality of judicial pronouncements and thus the finality of *Dred Scott*.

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7. *Id.* at 177.
8. 376 U.S. 254 (1964).
9. 17 U.S. (4 Wheat.) 316 (1819).
10. 60 U.S. 393 (1856).

Elected branches do not always acquiesce to unpopular judicial decisions. For example, New Deal forces successfully sought to overcome resistance by the Lochner Court[11] and its substantive due process jurisprudence (pp. 17-18). Similarly, popular dissatisfaction with the Warren Court's countermajoritarian role led to over sixty bills in Congress to limit the jurisdiction of the federal courts (pp. 18-19), a process repeated in the late 1970s with the Burger Court.

The lessons of this constitutional history are clear. Where the Court has sought to "decide and settle a controversy which has so long and seriously agitated the country," as Justice Catron said to James Buchanan about *Dred Scott* (p. 10), it has usually failed to do so. Where the Court has listened to the public and the political branches, it has found more success. This does not mean the Court simply reflects majority political views; rather, it is involved in a dialogue where it can play a constructive role (p. 5).

Nevertheless, the myth of judicial finality has deep power. Despite evidence that the Court has never been the final interpreter of the Constitution, the myth persists that the Court can resolve national problems by serving as an authoritative and final voice. This myth remains important to the institutional legitimacy of the judiciary, and we react when politicians seek to deny it. Witness Edwin Meese's castigation in 1986 for arguing that Supreme Court decisions were not "binding on all persons and parts of government henceforth and forevermore" (p. 10).

II
INSTITUTIONS

After looking at the history of judicial review, Devins turns to the limitations on judicial power and the constitutional role of other branches in Chapter Three, "Constitutional Iuterpretation by Elected Government." The chapter begins by identifying constraints and limits on judicial power as the final expositor of the law. For example, jurisdictional hurdles such as Article III's case-or-controversy requirement and the political question doctrine insulate whole classes of disputes from judicial resolution, even though the disputes can and often do have constitutional implications. As a result, where the Court is unable (or unwilling) to act, elected government must interpret the Constitution on its own (p. 24).

"Political" branch interpretation is also apparent in the appointment and confirmation process, which exposes the judicial philosophies of the President and the Senate. Devins notes that the rejection rate of

11. *See* Lochner v. New York, 198 U.S. 45 (1905).

Supreme Court nominees in the Senate is nearly twenty percent, higher than for any other post requiring Senate confirmation (p. 27). This process has a profound influence on the Court's composition and thereby its decisions, and as such is deeply troubling to the image of courts as apolitical, neutral interpreters. As Potter Stewart said in 1974, "[a] basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the government" (p. 27). Devins responds that Justice Stewart's remark is "ill-informed" (p. 27); politics is everywhere and can't be avoided.

Devins goes on to describe how elected government "interprets" the Constitution, focusing in turn on Congress, the executive, and state governments. Members of Congress, for example, assess the constitutionality of bills before enactment, can bring suits in the Court, and can threaten to pass constitutional amendments. The positions taken in all these activities can influence the Court. For example, Congress approved the Equal Rights Amendment (which ultimately failed to be ratified by the States) in part because of the Court's failure to invalidate gender-based decision making in the 1960s (p. 32). The ERA led to Court decisions closer to the amendment's principles in the 1970s (p. 32). Another example is in the religion area. Congress was dissatisfied with the Court's failure to adequately protect religious liberty in *Employment Division of Oregon v. Smith*,[12] in which the Court held that generally applicable laws that adversely affect but are not directed at religious activity are not unconstitutional. In response, Congress enacted the 1993 Religious Freedom Restoration Act,[13] which explicitly rejected *Smith* and specified that government must always have a compelling justification for burdening religious exercise, even in laws of general application (p. 32).

The executive branch interprets the Constitution in the course of implementing the laws, a much more pervasive activity than the occasional instance of judicial review (p. 33). As David Strauss put it, "[w]henever a federal law enforcement officer decides whether there is probable cause for an arrest, the executive branch has interpreted the Fourth Amendment; whenever federal employees are disciplined for statements they made, the executive branch has interpreted the First Amendment" (p. 33). Similarly, briefs filed by the Solicitor General, the Attorney General, and administrative agencies before the Court include executive branch interpretation of the Constitution.

States also interpret the Federal Constitution. The most infamous instance of such interpretation was the resistance of Southern states to

12. 494 U.S. 872 (1990).

13. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

Brown v. Board of Education.[14] Despite the Supreme Court's pronouncement that segregation was illegal, within three years after *Brown*, "136 laws designed to preserve segregation had been enacted" (p. 38). Furthermore, the States interpret the Federal Constitution in the course of interpreting their own constitutions (pp. 75-76).

The constitutional views of the elected branches constrain the Court's interpretation. The Southern resistance to *Brown* provides a good example. In what is now a familiar story, State resistance to judicially mandated desegregation was overcome by the federal Civil Rights Act of 1964, in which Congress and the executive branch were allied with the Court against the states. But the Court went further than the political branches in ordering a busing remedy in *Swann v. Charlotte-Mecklenburg County Board of Education*,[15] prompting congressional and executive branch opposition that eventually prevailed. The Court needed the help of the other branches to implement its decisions; "after two decades of [political branches'] attacking mandatory reassignments (and appointing Supreme Court justices) the Court has ceded to elected-branch desires and returned much of school desegregation to the control of state and local government" (p. 45). In this story, the Court's interpretation that the Constitution requires busing went too far and provoked counterpressures that eventually moderated the Court.

In Chapter Four, Devins describes more examples of "constitutional dialogues." One story of constitutional give-and-take is about the federal minimum wage, in which decades of deference on Commerce Clause cases were punctuated when the Court struck down the federal minimum wage for state employees in *National League of Cities v. Usery*[16] (pp. 45-48); the Court later rejected *Usery* in *Garcia v. San Antonio Metro Transit Authority*.[17] Another case study is the interaction between state regulators and fundamentalist Christian educators, in which the educators prevailed by appealing to their elected officials rather than to the courts (pp. 51-55). A third "dialogue" concerns the use of the legislative veto, rejected by the Court in *INS v. Chadha*.[18] *Chadha* has been followed by over three hundred federal laws with legislative vetoes as well as by a number of informal arrangements whereby congressional committees were able to accomplish similar goals with administrative agencies despite the fact that these informal arrangements may not have legal force (p. 50). As Louis Fisher has noted, the post-*Chadha* arrangement is "more convoluted, cumbersome, and covert

14. 347 U.S. 483 (1954).
15. 402 U.S. 1 (1971).
16. 426 U.S. 833 (1976).
17. 469 U.S. 528 (1985).
18. 462 U.S. 919 (1983).

than before. Finding the Court's doctrine incompatible with effective government, the elected branches have searched for techniques that revive the understanding in place before 1982" (p. 51). This is an instance where the Court's final pronouncement was ignored by elected government without significant penalty.

These three short studies illustrate Devins's contention that constitutional interpretation is best understood as a process of dialogue among institutions. They serve to set the stage for the second half of *Shaping Constitutional Values*, a detailed study of the abortion controversy.

III

FROM ROE TO CASEY: THE ABORTION CONTROVERSY

Roe v. Wade[19] is usually understood as an instance of aggressive judicial activism in which the Supreme Court articulated new norms before the "political" branches were ready to do so. Depending on the side of the controversy on which one stands, this activism was either heroic or sinful, though even pro-choice jurists such as Justice Ginsburg have criticized *Roe* as "heavy-handed judicial intervention" that "ventured too far in the change it ordered" (p. 3). By studying legislative reaction to *Roe*, Devins traces the ongoing refinement of the basic *Roe* position until its partial rejection in *Planned Parenthood v. Casey* [20] in 1992.

Devins begins by recounting the context and facts of *Roe* (p. 56). Illegal in many states for much of American history, abortion gradually became more tolerated in this century. Spurred by the American Medical Association, abortion was liberalized in criminal law, notably in the Model Penal Code reform of 1962, which allowed abortion in cases of danger to the mother's health, birth defects, and rape or incest (p. 58). This was followed in whole or part by fourteen states; four others had completely decriminalized abortion by 1973 (p. 59). This liberalization led to a rapid increase in the number of abortions and, in reaction, the birth of the modern pro-life movement. The controversy gained prominence and soon wound its way into the courts.

The Supreme Court became the center of this growing controversy in *Roe* when it struck down a Texas law that allowed abortions only to save the life of the mother and held that a woman's substantive due process right to privacy outweighed state interests in maternal health and fetal protection (p. 56). *Roe* was supposed to resolve the abortion controversy by giving constitutional sanction to first-trimester abortion, allowing reasonable state regulation during the second trimester, and

19. 410 U.S. 113 (1973).
20. 505 U.S. 833 (1992).

permitting the prohibition of third-trimester abortions (p. 2). Justice Blackmun's trimester test—criticized by Justice Stewart as "inflexibly 'legislative'" (p. 2)—was an example of judicial policy making at its best or worst. Like the *Dred Scott* Court, Blackmun had put on the cloak of judicial finality; he set out to "resolve the issue by constitutional measurement, free of emotion and of predilection" (p. 2).

Although *Roe* invalidated 46 state laws (p. 5), it did nothing to resolve the abortion issue. The young pro-life movement now had a focal point and fought back against *Roe* at the state level. In the year following *Roe,* 260 bills to restrict abortion rights were introduced in state legislatures. Of these, 31 passed (p. 60). By 1989, 306 state abortion measures restricting funding or imposing some kinds of consent requirements had been enacted at the state level (pp. 60-61). These statutes kept a steady stream of abortion cases before the Court, but most of the new restrictions on abortion were struck down (p. 64).[21] Other states acquiesced or supported *Roe* (p. 61).[22]

Congress also played a role, mainly in battles over federal funding for abortion. In 1976, Representative Henry Hyde of Illinois handwrote a last-minute amendment to the appropriations bill for the Department of Health, Education, and Welfare preventing federal funds from paying for abortions (p. 80). Annual debates over the Hyde amendment followed and kept the issue at the forefront of American politics. Policy was contentious but not always consistent. For example, a rape and incest exception to the Hyde amendment was added in 1977, dropped in 1981 and restored in 1993 (pp. 80-81). Congress also proposed constitutional amendments and "human life legislation" to overturn *Roe* (pp. 86-87).

With the ascension of Ronald Reagan to the White House, abortion became a litmus-test issue in judicial appointments. A Democrat-controlled Congress kept it at the forefront of confirmation hearings, and Republican appointees Kennedy, Souter and Thomas all acknowledged the constitutional right to privacy (p. 92).

Nevertheless, after several years of Reagan-Bush appointments to the Supreme Court, there was growing anticipation of a judicial repudiation of *Roe.* This culminated in the Court's 1989 decision in *Webster v. Reproductive Health Services,*[23] in which the Court upheld a Missouri statute that mandated second-trimester fetal viability testing and, more important, declared in its preamble that "the life of each

21. *See, e.g.,* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

22. States that did not pass restrictive laws between 1973-78 included Alaska, Arizona, California, Colorado, Hawaii, Iowa, Maryland, New Hampshire, New York, North Carolina, Oregon, Rhode Island, Texas, Washington, West Virginia, Wisconisin, and Wyoming. *See* Devins, p. 61.

23. 492 U.S. 490 (1989).

human being begins at conception" (p. 65). The Court suggested that *Roe*'s framework was unworkable; the pro-life forces smelled victory, and pro-choice activists feared a new flurry of state regulation. But there were few new bills that followed *Webster*, in part because of the awakening of the "pro-choice 'sleeping giant'" (p. 68). Just as *Roe* had galvanized a young pro-life movement, pro-choice organizations received much new funding and political clout in the wake of *Webster* (p. 68). State legislatures were faced with a situation in which new legislation would alienate the sleeping giant.

One state did act, however. In 1989, Pennsylvania passed a law banning most abortions at public hospitals, prohibiting all abortions after the 24th week of pregnancy, requiring spousal notification and waiting periods, and outlawing abortion for sex selection (p. 73). The law was immediately challenged and came before the Court in 1992. In one of the most anticipated Supreme Court decisions in recent memory, the Court announced in *Planned Parenthood v. Casey* that it reaffirmed the "central holding of *Roe*" while at the same time rejecting the trimester framework and overruling any decisions "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy" (p. 74). In the part of the opinion authored by Justices O'Connor, Kennedy, and Souter, the Court showed sensitivity to public opinion while denying it was doing so, leading conservatives to claim that "the Court is driven more by public opinion than by constitutional principle" (p. 74).

Devins tells this story crisply, emphasizing the roles of the executive branch, Congress, and the states in his narrative. In his view, *Casey* is the grand middle ground between two seemingly irreconcilable positions. Its success can be seen in the hiatus in legislation after the decision, although it may only be temporary: "[C]onstitutional decisionmaking," Devins writes, "is a never-ending process. The abortion dispute is testament to the fact that constitutional decisionmaking is part and parcel of an ongoing political process" (p. 149).

The executive branch has been much less ambivalent than the legislature in articulating positions about *Roe*, especially in its involvement in rulemaking on funding issues, upheld in 1991 in *Rust v. Sullivan*.[24] Congress has been active in proposing constitutional amendments as well as in sponsoring pro-choice initiatives such as the Freedom of Choice Act,[25] intended to nullify *Webster* by statute. But congressional efforts on both sides have been unsuccessful and have lost momentum, Devins asserts, because of the middle ground articulated by the *Casey* Court (p. 90).

24. 500 U.S. 173 (1991).
25. S. Rep. No. 102-321 (1992).

The legislature serves as an arena where Court decisions are challenged, but pro-Court legislation is rarely promoted. "When the Court ardently supports abortion rights, pro-choice interests are less vocal and pro-life interests in Congress are more likely to get their way. . . . In contrast, when *Roe* appeared ready to be overruled, it seemed likely that Congress would enact some form of freedom-of-choice legislation" (p. 95).

IV
A CONSTRUCTIVE VOICE?

In Devins's view, the Court's role in the abortion controversy has been constructive. It placed the issue on the national agenda with *Roe* and then helped the country steer through the controversy that erupted. Two decades and several decisions later, the Court articulated a middle ground in *Casey* that has helped to resolve the controversy. The most rigid part of the *Roe* framework has fallen, but the constitutionality of some abortions is assured, and the judiciary and public opinion are now in line (p. 74).

Devins is correct that *Casey* has indeed led to some quieting of the abortion issue. He characterizes post-*Roe* controversy as core and post-*Casey* controversy as peripheral. But it would be a mistake to assert that *Casey* resolved the issue completely. Although Devins asserts that "*Webster* and *Casey* have placed a virtual hold on state lawmaking" (p. 148), he also notes that after *Casey* there were roughly 300 abortion related measures per year introduced in state legislatures, one-third of which improved access to abortion (p. 74). Devins also concludes that after *Casey*, "abortion disputes continue but they focus on ancillary concerns such as funding, clinic access, and health care" (p. 5). This may or may not be the case. Recent legislation on "partial-birth" abortions and constitutional cases on free speech and clinic access mean that the Court and government are as embroiled in abortion as ever. Indeed, "too mnch should not be read into the relative quiet of post-*Casey* state abortion politics" (p. 77).

Congressional activity persists despite *Casey*. "[B]ecause of *Casey*'s reaffirmation of both abortion rights and state regulatory authority," Devins says, "Congress has little incentive to pursue absolutist pro-choice or pro-life measures"(p. 96). But this is a straw man. Congress as a whole has never had an incentive to pursue absolutist policies over such a contentious issue (althongh individual legislators may have had such an incentive); in part that is why Congress was content to let the Court take the lead position in the national debate.

Devins goes beyond making the empirical point that constitutional interpretation is an interactive process to assert that this is normatively

desirable. Devins's take on the abortion controversy is neither a clash of absolutes[26] nor a battle of irreconcilable world views about motherhood,[27] but a "constructive constitutional dialogue" (pp. 4-5) where judicial or legislative decisions on their own would be unsatisfactory. By accepting that controversy is inherent in the issue, the constitutional dialogue approach allows both sides to feel as if they have gained some victories in the struggle for middle ground policies. This is good for the legitimacy of the constitutional order, precisely because no one "wins" (pp. 5-6).

The dialogue metaphor is a good one because it captures some of the unpredictability of constitutional politics. For example, five Reagan-Bush appointees to the Court weren't enough to overturn *Roe*. As the *Casey* decision says, "[s]ome of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision."[28] Clearly, the Justices are constrained by something besides pure politics. But what might that be? Devins leaves the question of judicial motivation unexplored.

Nor does Devins provide an explanation for the persistence of the myth of judicial finality, and this is the only notable omission from his argument. One reason the Court deploys myths of judicial finality and of insulation from politics is because it is ambivalent about alternative bases for its legitimacy. The opinion in *Casey* says that "social and political pressures" must be resisted,[29] at the same time its author admits to being sensitive to such forces.[30] Once one allows that such forces can legitimately affect its decisions, one needs a theory of constraints on the process as well.

One is led to ask whether the lessons Devins seeks to draw from the abortion controversy are applicable to other policy areas. It is possible that because of its usual characterization as an "either/or issue," abortion is "truly extraordinary" (p. 7) and thus especially suited to a judicial role in constitutional dialogues. Elected branches, after all, may be "quite willing to delegate decision-making authority rather than bear the costs of choosing between pro-choice and pro-life interests" (p. 95). This was one of the reasons state legislatures did not welcome *Webster* as an opportunity to test *Roe* (p. 70). Because of the legislative reluctance with regard to this particular issue, the Court, rather than other actors, was the body best suited to find the middle ground. Other policy areas may be less suited to a judicial role: Devins's other case

26. *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).
27. *See* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984).
28. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850 (1992).
29. *Casey*, 505 U.S. at 865.
30. Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82.

studies of "constitutional dialogues," including the *Usery* decision and the legislative veto, seem to illustrate the weakness of the Court in these areas. In the latter case, a Supreme Court decision was simply ignored by Congress without penalty (pp. 50-51). These cases seem more consistent with a "hollow hope" view of judicial power.

Where elected branches all share policy views and wish to resist Court decisions, the Court is powerless to compel them. But where there are no clear answers and elected-branch views vary, the Court can play a greater role in shaping values. Elected-branch reactions to *Roe*, for the most part, were not trying to overturn the decision but instead contented themselves with testing it in areas not directly addressed by the Court, such as waiting periods, parental notification, and consent requirements (p. 5). In this sense abortion was different from *Brown*, where states were more openly defiant, or from the congressional reaction to *Chadha*. The elected branches kept the Court at the center of the abortion dispute.

Devins is asserting a position between two schools of thought, one that sees courts as supreme and another that sees them as ineffectual. As a general argument, his attack on supremacy is more convincing than his attack on ineffectuality. But in the particulars of the abortion case, his attack on ineffectuality is persuasive. By emphasizing the symbolic power of the Court, he shows us that the judiciary has impact not only through its formal decisions but also through its role in shaping values.

Devins's book is an effective argument for a position that may become the new orthodoxy. In the words of Justice Ginsburg, courts "play an interdependent part in our democracy. They do not alone shape legal doctrine but . . . they participate in a dialogue with other organ, of government, and with the people as well" (p. 3). Devins makes the argument persuasively and makes effective use of original sources and quotations. He uses the case study method well, moving back and forth between the abortion story and his larger theory about American political institutions. By using theory to illuminate the abortion controversy, and the abortion controversy to illustrate his theory, Devins makes an important contribution to the political analysis of courts.